

**FEDERAL COURTS**  
**SPRING 2022**  
**PROFESSOR KELLEN FUNK**

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### **Course Description**

This course introduces the structure and operation of the U.S. federal courts. It examines how they work, and also what their work is supposed to be. Federal courts are courts of limited jurisdiction constrained by constitutional law, statutory law, and judicial policymaking. But they are also institutions of tremendous power and authority. That is, they are courts of equitable discretion, simultaneously powerful yet restrained. This course will acquaint you with the structures and doctrines that control what the Constitution calls “the judicial power of the United States.” The course will survey major issues such as the separation of powers and the role of state law and state courts in the federal system, but the primary focus will be on the procedures and remedies involved in federal court claims against government officials at the national, state, and local levels.

### **Course Materials**

The assigned readings are from RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (7th ed. 2015) (hereafter “Hart & Wechsler”). I will occasionally assign other reading, which will be posted on Courseworks.

Note: You are expected to know the holdings of cases discussed in the notes of Hart & Wechsler, but you need *not* read the footnotes (unless, of course, the footnotes are in the court opinions themselves).

### **Supplemental Materials**

ERWIN CHERMERINSKY, FEDERAL JURISDICTION (8th ed. 2020). Some students find this supplement helpful, especially around exam time. I will not assign any readings from this text.

Many of the key cases we will read are discussed by leading scholars in VICKI JACKSON & JUDITH RESNIK, FEDERAL COURTS STORIES (2009). The book is available in the library and I will occasionally draw on it for lecture material. If readings are assigned, electronic copies will be distributed.

## Course Requirements & Policies

The final exam will be a four-hour scheduled exam. It consists of ten short answer and two essay questions, all open book and open notes.

I will call on students at random during all class discussions. If, on a particular day, you cannot prepare for the discussion, please inform the teaching assistants by 8 a.m. the day of class to remove yourself from the on-call list. You do not need to explain or excuse yourself, and there is no set limit for passing. But this is a privilege that should not be abused. If you must be absent from class entirely, please notify the teaching assistants as soon as you can.

A consistent lack of preparation may harm your final grade. So long as you are prepared, class participation will not otherwise affect your grade. The purpose of these policies is to help me gauge your understanding and the effectiveness of my instruction. You should feel free to speak up to express confusion, seek clarification, and give “wrong” answers. Like many graduate-school classes, the success of this course depends heavily on your own preparation of and engagement with the materials, including puzzlement over the thornier problems you find.

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The syllabus will be given out in installments. Rather than listing reading assignments by day, they are simply numbered. You should always prepare the next assignment for class, even if the previous class ended in the middle of an assignment.

Throughout the semester, the teaching assistants will distribute problem sets and host separate sessions to review approaches and answers to the problems.

Laptop computers are permitted only for note-taking and recall when class meets in-person. Seating will be by assignment.

## Course Outline

- I. Congress' Control of the Federal Courts
  - A. Jurisdiction (Stripping & Stuffing)
  - B. The Administrative Edifice
  - C. Non-Article III Courts
- II. Justiciability
  - A. Political Questions
  - B. Ripeness & Mootness
  - C. Advisory Opinions
  - D. Standing
- III. Federal Court Jurisdiction
  - A. Federal Question Jurisdiction
  - B. Diversity Jurisdiction
  - C. Removal Jurisdiction

- D. Appellate & Interlocutory Jurisdiction
- IV. Federal Remedies
  - A. Implied Actions
  - B. Section 1983
  - C. Universal Remedies
  - D. Declaratory Judgments
  - E. Habeas Corpus
- V. State Officers and State Courts in the Federal System
  - A. Sovereign Immunity
  - B. Official Immunity
  - C. Abstention
  - D. Federal Law in State Courts
  - E. Independent & Adequate State Grounds

## Part I: Congressional Control

### Background Reading

Hart & Wechsler 1-20 (Introductory Note on Article III)

At some point before the start of the course you should acquaint yourself with the historical material opening the casebook. The main takeaway is that the drafting of Article III was relatively uncontroversial—except for the (fairly significant!) detail of whether any federal courts besides the Supreme Court should exist.

### Assignment 1 (prepare for January 18, 2022)

Akhil Amar, *Law Story*, 102 HARV. L. REV. 688 (1989) (on Courseworks)

Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (on Courseworks)

Hart & Wechsler ci-cii (U.S. CONST. art. III.)

Federal Courts is the rare course in which the canonical text is not a statute, restatement, or code but rather the casebook itself. Professor Amar's review will help orient us. The late Professor Cover may help disorient us. Either way, you should read and re-read Article III carefully.

- Amar disagrees sharply with Hart and Wechsler's views that state courts are just as competent to apply federal law. With whom are you initially inclined to agree, and why?
- Amar notes that Hart and Wechsler (and the rest of the Legal Process School) were unprepared for *Brown v. Board of Education*, which ultimately enjoined local municipalities from operating segregated schools. How does Amar's version of Legal Process square with *Brown*?
- Cover gives us a number of reasons to doubt the coherence of the Legal Process approach. What are they? Do you find them compelling, or overblown?
- What, as a student on the first day of class, do you think federal courts are good for?

A. *Jurisdiction (Stripping & Stuffing)***Assignment 2**

- Hart & Wechsler 59–72, 267–72 (*Marbury* and Notes)
- Hart & Wechsler 272–75 (*Louisiana, Wyandotte*, and Notes)
- Hart & Wechsler 275–79 (Jurisdiction Based on State Party Status) *skim\**
- Hart & Wechsler 286–92 (Notes on Original Writs)

We start with *Marbury* not because it famously made judicial review part of “the judicial power,” but because of the restraints it imposed on the federal courts, on the Executive, and incidentally on Congress. We will then survey the rest of the terrain on the Supreme Court’s original jurisdiction, which Congress apparently cannot take away or add to, but the Court can decline to exercise.

- What is mandamus? What are its rules? Can you see why mandamus must be sought from James Madison personally (as opposed to suing the office of the Secretary of State, or President Jefferson, or some underling paper pusher)?
- It may help to look at the original statutes conferring jurisdiction in [Sections 13 & 14 of the Judiciary Act of 1789](#). Could *Marbury* have brought his case clearly within the Court’s jurisdiction any way other than seeking an original writ of mandamus?
- Is Chief Justice Marshall’s reading of Section 13 persuasive? Does Article III really forbid expanding the Court’s original jurisdiction, for all time? Could the Court have declined jurisdiction without striking down Section 13?
- Does Justice White’s dissent in *Louisiana v. Mississippi* convince you? Should we care if the Court declines to hear the relatively few cases that would ever fall into its exclusive original jurisdiction? (Note that the Court [so declined](#) one of the legal challenges to the 2020 election results.)
- According to the Court, when are habeas and mandamus petitions “appellate in nature” and therefore fileable on the Court’s original docket? Does this rule make sense?

**Assignment 3**

- Hart & Wechsler 295–322 (Notes, *Sheldon, McCardle*, and Notes)

From Congress’ attempt to expand the Supreme Court’s jurisdiction (at least as Marshall saw it), we turn to Congress’ efforts to “strip” the federal courts of jurisdiction. For almost the first hundred years of the Constitution, Congress did not even vest original federal question jurisdiction in the inferior federal courts. *Sheldon* takes up a broad swath of diversity jurisdiction that was likewise withheld from the lower courts. *McCardle* raises questions about what happens when Congress withdraws the powers it had once granted.

- What is the strongest textual basis in Article III for Congress’ power to strip jurisdiction a) from the Supreme Court, b) from all federal courts, c) related to specific kinds of actions or subjects (say, labor injunctions, or reproductive rights cases)?

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\* When directed to skim Hart & Wechsler, you will not be responsible for knowing the doctrine or the holdings of the cases discussed. The aim is just to appreciate the confounding complexity of an area of doctrine.

- What are the “few specified instances” referenced in *Sheldon* where the “disposal of the judicial power [does not] belong[] to Congress”?
- Should congressional motive matter when assessing the constitutionality of legislation purporting to strip federal courts of jurisdiction over certain claims? If so, how should courts go about assessing motive?
- Do congressional efforts to withdraw *all* federal court jurisdiction over certain claims raise different constitutional issues than congressional withdrawal of Supreme Court *appellate* jurisdiction? Are the constitutional arguments against withdrawal of all federal court jurisdiction stronger or weaker?
- What does Hart’s *Dialogue* mean about “read[ing] the *McCardle* case for all it might be worth”?

#### Assignment 4

*Wayman v. Southard*, 23 U.S. 1 (1825) excerpts *or* description in Funk, “Handmaid of Justice” (on Courseworks) *skim*  
Hart & Wechsler 326–35 (Notes and *Battaglia*)  
*United States v. Klein*, 80 U.S. 128 (1871) (on Courseworks)  
Hart & Wechsler 323–25 (Note on *Klein*)  
Note on *Bank Markazi & Patchak* (on Courseworks)

Congress’ power to determine the rules used in federal courts—either of procedure or of substance—appears textually unlimited in the Constitution. We will consider how Congress has exercised that power over time, and the occasions when the Supreme Court has objected to that deployment of power.

- Does *Wayman v. Southard* identify procedural rulemaking power as original or appellate jurisdiction, or something else? Insofar as Congress delegates rulemaking to the Supreme Court, is *Wayman* at odds with *Marbury*?
- What is the problem in *Klein*? If Congress’s powers 1) to strip jurisdiction, 2) to define rules of procedure and evidence, and 3) to dictate rules of decision were all plenary, must the offending statute stand? Which if any of these powers does the Court find to be limited?
- Is your articulation of *Klein*’s holding able to explain the division between the majority and dissent?
- What is the difference between *Klein* and *Battaglia*?
- Is it sensible to have different rules depending on whether Congress aims at a) retracting jurisdiction while cases are pending, b) dictating the outcomes in pending cases, or c) constraining the authority of the federal courts to order certain remedies?

B. *The Administrative Edifice*

#### Assignment 5

Hart & Wechsler 20–33, 41–47 (Note on the Federal Judicial System) *skim*  
*Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (on Courseworks)

*United States v. Torres-Jaime*, 821 F.3d 577, 586–88 (5th Cir. 2016) (Costa, J., dissenting) (on Courseworks)

We will survey how the federal courts have used their delegated powers to erect a (relatively) massive administrative apparatus in the twentieth century. Despite this nationwide apparatus and the aim for “horizontal uniformity” in procedure under the Federal Rules, there are a wide variety of divergent practices between the federal courts. We will explore one of those divergences by looking at how circuit courts control the use and authority of “unpublished” decisions.

- You are not required to, but for this session you may want to read the [Final Report](#) of the Presidential Commission on the Supreme Court. In any event, what do you want to do about “court packing”? Does the Supreme Court need to be de-politicized, and if so, what’s the best way to go about that?
- What do you make of the Judicial Conference’s argument that the federal bench must be kept (relatively) small to preserve its elite status? From whence does federal prestige arise – i.e., why do you want to clerk there?
- Why make opinions – the products of these prestigious elites – unpublished? Is anything really unpublished in the digital age?
- The learned author of the *Hart* opinion [resigned in disgrace](#) rather than face an ethics inquiry over allegations of sexual harassment. What can the federal courts system do administratively about these situations? (For what they can do legally, see *Bivens*, *infra*.)

### C. *Non-Article III Courts*

#### Assignment 6

Hart & Wechsler 345–63 (*Crowell* and Notes)

Hart & Wechsler 390–94 (Note on Magistrate Judges)

We finish our overview of Congress’ power by considering “Article I” courts such as the federal bankruptcy bench and judicial magistrates. We want to keep in mind, but will reserve for now, the other big branch of “non-Article III” courts, the state courts. We begin with a case often considered foundational for the modern American administrative bureaucracy, *Crowell v. Benson*. As you read it, think about what is at stake in Congress’s order to the courts to defer to Crowell’s decision.

- Why is the case “*Crowell v. Benson*” instead of “*Benson v. Knudson*” (i.e., do you understand the procedural posture)?
- What is *Crowell*’s definition of a public right? Why isn’t this a public rights case?
- All of the *Crowell* justices agree that the case is better resolved by Crowell, an employment commissioner, rather than the federal court for the Southern District of Alabama. Do you agree? What do the justices disagree about?
- Why is employment a “jurisdictional fact” but not drunkenness? Doesn’t a finding against Knudson on either ground make him ineligible to recover compensation?
- Is Justice Brandeis correct that Article III puts *no* constraints on the delegation of judicial power? Does the Fifth Amendment provide enough protection?

- Some decisions by federal magistrates are appealed to the district court, and some to the circuit court. Is there a principled reason for the distinction?

### Assignment 7

Hart & Wechsler 34–41 (Note on the Federal Judicial System cont'd)

Hart & Wechsler 364–90 (*Stern* and Notes)

Note on *Oil States Energy* and *Wellness International* (on Courseworks)

- What is the meaning and role of public rights in the *Schor* and *Stern* analyses?
- In what ways does *Stern* limit party waiver of Article III “protections”? Do those restrictions make sense in the context of *state* courts applying federal law?
- If public rights cases turn on a balancing test, which factor seems to weigh the heaviest for the Court? For you?
- Which institution seems more “independent”: bankruptcy judges under the pre-*Northern Pipeline* act, bankruptcy judges today, or Crowell’s worker’s compensation commission?
- Does *Wellness International*’s inquiry into whether Congress is seeking to “humble” the judiciary run afoul of *McCardle*’s rejection of purposive tests? Have any of the laws considered in this class so far seemed to have that impermissible design?

## Part II: Justiciability

### A. Political Questions

### Assignment 8

Hart & Wechsler 237–57 (*Nixon*, *Zivotofsky*, and Notes)

Excerpts from and Notes on *Rucho v. Common Cause* 26–39 (on Courseworks)

So Congress, as we’ve seen, has erected a somewhat sprawling system of Article III and Article I courts, and has vested judicial power across these courts. In thinking about jurisdiction-stripping and *Klein* problems, we were mostly asking what is essential (the *sine qua non*) of judicial power that cannot be taken away from Article III courts. Now we approach a similar set of problems from the other direction: what kinds of claims are essentially nonreviewable by courts *because* they are courts? What lies beyond the bounds of judicial competence?

- Which prong of the political question doctrine seems to do the most work in these cases: textual commitment or judicially manageable standards? What is the source of the latter prong? Is it a legitimate reason for the courts to refuse jurisdiction?
- What is the difference between 1) finding a challenge raises a political question, and 2) deciding simply to defer to the government’s chosen course of action? (Can a *plaintiff* ever win a case on either ground?)
- Is *Nixon* best understood as a political question decision, or a decision on the merits? What about Justice Souter’s concurrence?

- Is any question in *Rucho* more difficult to manage than our common tests for “due process” or “strict scrutiny”? Even if partisan gerrymandering turns out to be judicially manageable, are there good reasons for the federal courts to stay out of this arena?

B. *Ripeness & Mootness*

**Assignment 9**

Hart & Wechsler 195–208 (*DeFunis* and Notes)

Hart & Wechsler 217–37 (*Abbott Labs*, *O’Shea*, and Notes)

MARTHA MILLS, LAWYER, ACTIVIST, JUDGE 305–12, 315–19 (2015) (on Courseworks)

Ideally, it would seem, courts decide *live* controversies. But it takes time to decide controversies, time in which parties might suffer irreparable harm pending adjudication, or time in which the controversy might dissipate before the court can properly weigh in. In these readings, we’ll consider the outer boundaries of “live” controversies. To what extent can justiciable claims anticipate harms not-yet-suffered or seek judgment on controversies that have in some sense already ended?

- How much of mootness doctrine is based on Article III and how much on prudential concerns? If Article III, what explains the Court’s willingness to entertain claims that are capable of repetition yet evading review?
- What mootness difficulties might arise in a lawsuit against a misdemeanor bail system in which defendants plead to time served and are released after three days in detention? Can you see ways around those difficulties?
- What is the rule derived from reading *Abbott Labs* and *Toilet Goods* together? What is the source of the rule? Would a prudential rule of ripeness be legitimate?
- Can you imagine a remedy for *O’Shea* short of a “federal audit” of all charging and bail decisions in the challenged jurisdiction? Could the plaintiffs have challenged the validity of an actual law, and if they did, would that have helped?
- Does the setting of *O’Shea* change your view of the case? At the time it was decided, municipalities were generally immune from suit in federal court. Should the availability of municipal liability alter the meaning of *O’Shea* today?

C. *Advisory Opinions*

D. *Standing*

**Assignment 10**

Hart & Wechsler 50–58 (Note on Advisory Opinions)

Hart & Wechsler 73–76 (The Function of Adjudication)

*Holland v. Rosen*, 895 F.3d 272 (3d Cir. 2018) (excerpts on Courseworks)

Hart & Wechsler 103–24 (*Allen* and Notes 1–5)

Few doctrines have determined the modern shape of federal court power like the doctrine(s) of standing. Consider over the next three set of readings whether you prefer to see the federal courts confined to resolving the precise dispute before them or whether you imagine a larger role for the courts to pass judgment on important and timely national concerns. For instance, think about



the recent so-called “Travel Ban” cases. Do we care *who* brings those claims so long as the courts have a chance to evaluate the constitutionality of a President’s order? Or might the identity of the claimant have some ultimate effect on the kinds of remedies the courts can order?

- Why are advisory opinions considered constitutionally problematic? ~~Is *Holland v. Rosen* an advisory opinion? Does it bother you?~~
- What is the basis for the view that judgments cannot be subject to executive or legislative revision? How far does a prohibition on executive or legislative revision extend?
- What are the core components of standing that, in the Court’s view, “derive directly from the Constitution”? Do you see that in the constitutional text? What sort of legal pedigree, if any, should be required to support standing doctrine?
- Should courts be able to reject standing on prudential grounds (i.e., grounds not directly supported by a statute or the Constitution)?

### Assignment 11

Hart & Wechsler 132–51 (*Lujan* and Notes)

Note on *Spokeo* and *TransUnion* (on Courseworks)

*Juliana v. United States*, No. 18-36082 (9th Cir. 2020) (on Courseworks)

Note on *Gill* (on Courseworks)

Standing is distinct from both jurisdiction and causes of action, but all three can depend on one another in peculiar ways. As you read *Lujan*, consider whether Congress’s power over standing is as broad as its power over jurisdiction and the definition of rights. As you read the recent Ninth Circuit case on standing to bring a climate change litigation, consider whether standing is the proper doctrine to address the court’s concerns.

- What are the apparent limits on Congress’s power to confer standing after *Lujan*? Given Congress’s broad powers over jurisdiction and causes of action, should there be any limits to congressional control over standing?
- How can a court tell from the outset of a litigation whether the alleged harm is ultimately redressable? Does the “judicially manageable standards” prong of the political question doctrine offer any help here?
- What are the apparent limits on Congress’s power to recognize new causes of action after *TransUnion*? Does it seem like Congress could amend the FCRA in a way that would entitle Ramirez to recovery under the majority’s test?
- Is the problem in *Juliana* the same as in *Allen v. Wright* — courts can redress official *overreach* but not *abdication*? Does our standing test have to be reformulated to redress government inaction?

### Assignment 12

Hart & Wechsler 130–32 (Note (3) on legislative standing)

Note on *AIRC* (on Courseworks)

*Committee on the Judiciary v. McGahn* (D.C. Cir. 2020) (on Courseworks)

Hart & Wechsler 279–86 (State and *Parens Patriae* Standing)

- Complaint for Declaratory and Injunctive Relief, *California v. Trump* (N.D. Cal. Feb. 18, 2019) (on Courseworks), *skim complaint but read 43-53*
- Motion for Leave to File Complaint, *Texas v. Pennsylvania* (U.S. S.Ct. Dec. 7, 2020) (on Courseworks), *skim motion but read 11-22*
- Ann Woolhandler & Michael G. Collins, *Reining-in State Standing*, 94 N.D. L. REV. 2015 (2019); F. Andrew Hessick, *Quasi-Sovereign Standing*, 94 N.D. L. REV. 1927 (2019) (excerpts on Courseworks), *skim for the flavor of the debate*

Modern standing doctrine arose to address the difficult question of which private parties were the proper ones to sue over government action (or inaction). Now we will reverse the inquiry and consider what issues arise when governments seek to sue. We will consider the distinct but related problems of legislative standing and state standing to challenge federal or inter-branch actions.

- What are the characteristics of a generalized grievance? Won't legislators or states suing in their representative capacity always be asserting generalized grievances?
- Is the House Judiciary Committee running to the federal courts because it otherwise lacks the votes to enforce its subpoena through congressional action? How, if at all, should the courts take that into consideration in their standing analysis?
- What is New Jersey's interest (and injury) in the proposed border wall? Do you think that suffices? If it does, can there be any limit to state standing to challenge federal actions?
- Who is the best plaintiff to challenge the executive's alleged entrenchment on the House's appropriation's power? How should the law of standing take account of a better-positioned litigant?
- Texas did not join the complaint against the border wall. Should it be able to intervene on the executive's behalf? Does its motion in the election fraud case raise any colorable argument for standing?
- Does robust state standing seem to move us fully into the "law declaration model" of federal court adjudication? Do you prefer the law declaration model here? Does it depend on which party controls the Executive?

### Part III: Federal Court Jurisdiction

- A. *Federal Question Jurisdiction*
- B. *Diversity Jurisdiction*

#### Assignment 13

- Hart & Wechsler 779-806 (*Osborn, Lincoln Mills, and Notes*)
- Hart & Wechsler 825-37 (*Grable and Notes*)
- Hart & Wechsler 410-11 (Note on *Tidewater*)
- 28 U.S.C. §§ 1331, 1332, 1367

We now have some sense of what federal courts ought to be doing, what they ought not to be doing, and, perhaps, what they're generally good at. Let's start suing people! To do that, we have

to invoke the federal court's jurisdiction. There are a number of ways to do that (don't forget about admiralty—it's in the Constitution too), but the two main heads of federal jurisdiction involve questions arising under federal law, and diversity jurisdiction. We will focus on the former in this course.

- Why does “arising under” mean different things in Article III and § 1331?
- What is *Osborn*'s constitutional test for arising under jurisdiction? Do you see *Lincoln Mills* and *Verlinden* as straightforward applications of *Osborn* or problematic extensions? Could Congress bring all state litigation into the federal courts with a barebones federal statute?
- What is protective jurisdiction? Does it represent a plausible and preferable justification for the results in these cases?
- What is the *Tidewater* problem? (Hint: Think back to the *Klein* problem.)

C. *Removal Jurisdiction*

D. *Appellate & Interlocutory Jurisdiction*

### Assignment 14

Hart & Wechsler 423–26 (*Davis* and Notes)

*International Energy Ventures Management v. United Energy Group* (5th Cir. 2016) (excerpts on Courseworks)

*Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994) (on Courseworks)

28 U.S.C. §§ 1291, 1292(a)–(b), 1441(a)–(b), 1442, 1443, 1446(a)–(b), 1447

Our next set of jurisdictional statutes operate to divest one court of jurisdiction in favor of another. In removal, a state court's jurisdiction ceases in favor of federal district court litigation. On appeal—whether final or interlocutory—the district court's jurisdiction vanishes while the circuit court takes over. In general, both sets of statutes operate to protect adjudication in the district courts. Is that as it should be? Why overrule a plaintiff's choice to proceed in state court on federal claims?

- Do you agree that *Davis* doesn't abridge state sovereignty? Could Congress by statute allow removal in every criminal case that involves a federal-law defense (Fourth Amendment, Fifth Amendment, etc.)? Is that what § 1443 essentially does?
- Consider the rules that 1) removal jurisdiction is determined entirely upon the removed complaint, and 2) once a federal court obtains jurisdiction it does not relinquish it because of a subsequent change in party status. Do these rules create a difficulty for applying federal pleading standards as the Fifth Circuit does in *Int'l Energy Ventures*?
- What are the unwritten grounds for interlocutory appeals? Why should there be unwritten grounds at all when Congress knows how to write exceptions into the statute?
- What is the “safety valve” that Justice Souter says should quiet our “dismay” about the rule in *Digital Equipment*? Are you sufficiently undismayed?

## Part IV: Federal Remedies

### A. *Implied Actions*

#### Assignment 15

Hart & Wechsler 762–77 (*Bivens* and Notes)

*Hernandez v. Mesa*, No. 17-1678 (Feb. 25, 2020) (on Courseworks) *skim*

Hart & Wechsler 723–47 (*Cannon*, *Sandoval*, and Notes) *skim Cannon*

Most of the material that follows arises under the federal question side of the courts' jurisdiction. Now that we seemingly have so many federal statutory and constitutional rights, how do the courts go about vindicating them? First we consider when and whether Congress has to explicitly allow for private actions. Is the text of the Constitution or the existence of a statutory regime alone enough to empower courts to remedy their violation?

- Should Congress's creation of a cause of action against state officers in § 1983 give us any guidance on the propriety of inferring causes of action against federal officers under *Bivens*?
- What is the government's defense in *Bivens*? How would the government's proposal differ from a decision to recognize a constitutional cause of action?
- What do you think the world of officer suits looked like before *Bivens*? Would that be the world we return to if the concurring *Hernandez* justices succeed in overturning *Bivens*?
- When it comes to implied actions, does it matter whether the default rule favors or abhors implication, so long as there *is* a default rule?

### B. *Section 1983*

#### Assignment 16

42 U.S.C. § 1983

Hart & Wechsler 986–1009 (*Monroe*, *Monell* and Notes)

*Harris v. City of Austin*, Civil No. 15-956, 2016 WL 1070863 (W.D. Tex., Mar. 16, 2016).

*Woods v. City of Michigan City, Ind.*, 940 F.2d 275 (7th Cir. 1991)

Whether or not you're optimistic about the trend in implied actions, since 1871 the leading vehicle for litigating constitutional rights has been Congress' statutory authorization of private suits against *state* actors in a provision now codified at 42 U.S.C. § 1983. Every word of the statute is important. We'll begin by focusing on *person* and *color of . . . law*. How far do those terms reach?

- What is the effect of *Monell's* rejection of respondeat superior liability under § 1983? Does its acceptance of suits based on municipal policy or custom provide a realistic basis for municipal liability? Would different indemnification rules for officers affect your answer?
- Does the *Harris v. City of Austin* decision seem right under *Monell*? If the next county over sets policy through a board of judges, should the result come out differently?
- Why does it seem so important to parse the local vs. state actor distinction? How does *Woods* end? Is there any other way it could have ended, given the finding that the judges were state actors?

C. *Universal Remedies***Assignment 17**

Hart & Wechsler 184–95 (Facial Challenges and Overbreadth)

Hart & Wechsler 168–74 (*Yazoo* and Notes)

Note on *Whole Women’s Health* (on Courseworks)

*Trump v. Hawaii*, No. 17-965 (S.Ct. 2018) (Thomas, J., concurring) (on Courseworks)

*Louisiana v. Becerra*, 20 F.4th 260 (5th Cir. 2021) (slip op. on Courseworks)

Whether facing challenges based on statutory causes of action or direct actions under the Constitution, federal courts are increasingly facing pressure to limit the scope of their relief. In some ways, this pressure dates back to the early days of the republic, in the form of “facial” challenges to unconstitutional statutes. Facial challenges continue to bedevil the courts, as do the rising problems of administering so-called nationwide injunctions.

- What assumptions underlie the Court’s rejection of the challenge in *Yazoo*?
- Can you discern a consistent logic in the Court’s recent jurisprudence on facial challenges?
- What is the difference between 1) challenging a municipal bail schedule as facially unconstitutional, or 2) bringing an as-applied challenge through a class action on behalf of all criminal defendants in a municipality against the imposition of bail prescheduled by the charge?
- Does Justice Thomas persuade you that national injunctions are “historically dubious”? Does the historical pedigree of a remedy matter to you?
- Is the problem with national injunctions that they permit end runs around other procedural rules, like class aggregation, preclusion, and facial challenges? If so, can these problems be solved procedurally without barring the injunction outright?
- If national/universal injunctions are permissible, do you think it is also permissible for Congress to strip the courts of the power to award them? What about channeling them all through the D.C. district and appellate courts?

D. *Declaratory Judgments***Assignment 18** (prepare for March 31, 2022)

28 U.S.C. §§ 2201–2202

Hart & Wechsler 837–49 (Declaratory Judgment Act, *Skelly Oil*, and Notes)

*Pulliam v. Allen*, 466 U.S. 522 (1984) (on Courseworks)

42 U.S.C. § 1988

In 1934, the same year the Supreme Court was authorized to draft the Federal Rules of Civil Procedure, Congress created a new remedy for the federal courts: declaratory relief. Look closely at § 2201: What does it apparently mean for “a case of actual controversy” to be “within [a court’s] jurisdiction”? What does it mean for declaratory relief to be available “whether or not further relief is or could be sought”? We’ll consider how the Supreme Court has limited the reach of the Declaratory Judgment Act before returning again to § 1983, the last lines of which were amended by Congress in 1996 in response to the *Pulliam* decision. Read *Pulliam* carefully—in what ways

has the 1996 amendment overruled it? In light of *Skelly Oil* and the statutory amendment, does it seem possible to sue Texas judges to restrain them from hearing bounty claims under SB 8?

- What is the purported federal question in *Skelly Oil*? Why isn't there any way to get § 1331 jurisdiction?
- Given *Skelly Oil*'s federal jurisdiction requirements, is it okay for federal courts to decline jurisdiction over declaratory actions?
- If judges are not immune to injunctive relief, how does the *Pulliam* Court explain the scarcity of injunctions against judges historically? How does it justify present-day injunctions against judges?
- It is universally understood that Congress intended to overrule *Pulliam* in the Federal Courts Improvement Act of 1996. Does the text of § 1983 and § 1988 as amended seem at odds with that intention?
- What do you think § 1983 means by declaratory relief being "unavailable"?

E. *Habeas Corpus*

**Assignment 19** (lecture only)

28 U.S.C. §§ 2241, 2251

*The Procedural Aspects of "The Airport Cases,"* JOSH BLACKMAN'S BLOG, Jan. 29, 2017

*Arana v. Barr*, 451 F.Supp.3d 271 (S.D.N.Y. 2020) (on Courseworks)

28 U.S.C. §§ 2254–2255

Hart & Wechsler 1193–98 (Introductory Notes on Habeas (1)–(6))

Hart & Wechsler 1323–35 (*Daniels, Noia, and Wainwright*)

We will briefly consider one of the more significant (and complicated) federal court remedies: habeas corpus. Given the many restrictions on habeas, we especially want to ask again: what are federal courts good for in this domain? Is there any reason to think they are better (or worse) equipped to remedy federal abuses (as in the Airport Cases) than state abuses (as in the coerced confessions of *Fay v. Noia*)? Should courts be more solicitous of executive (or "regulatory") detention cases over postconviction review? Are you surprised that emergency filings in the Airport Cases and the covid detention case resulted in remedial orders? Do you see how the courts got there despite AEDPA?

**Assignment 20 (Friday Session)**

28 U.S.C. § 1738

Hart & Wechsler 1377–1404 (*McCurry, Heck, and Notes*)

This isn't an advanced civil procedure course, so we will not linger over detailed questions of preclusion. But in many ways, federal remedies directed against decision making process by state courts (or by federal agencies) are just one giant preclusion problem. To what extent should the virtue of finality ever be a bar to federal remedies? The other major question these cases present – and why we consider them here – is how federal remedies are supposed to interact. Are habeas and § 1983 remedies interchangeable? Should they be?

- The *McCurry* majority argues the legislative history of § 1983 is inconclusive on the question of full faith and credit of state judgments in federal courts. How does the dissent respond? Does the history seem inconclusive?
- The *McCurry* dissent suggests litigants should take a procedural default in order to preserve their choice of forum in a § 1983 action. Is that the same argument as the “sandbagging” critique in *Sykes*? Do you evaluate it differently in this context?
- What is the rule announced in *Preiser*? How far does *Preiser* extend? How far should it extend? Since habeas can be pursued as a class action, should systemic bail challenges be brought under habeas review? What difference would that make?
- Without *Heck*, is the *Preiser* rule too easy to subvert? How does *Heck* address the apparent end-run around *Preiser*?
- What would be the best justification if a district court ordered release from pretrial detention under § 1983? A) *Preiser* should not apply pretrial; B) *Preiser* should not bar a systemic class action; C) *Preiser* is prudential, not jurisdictional; (D) *Preiser* is satisfied if the court could “recharacterize” the case as habeas and reach the same relief.

## V. State Officers and State Courts in the Federal System

### A. Sovereign Immunity

#### Assignment 21

Hart & Wechsler 908–22 (*Hans* and Notes)

Hart & Wechsler 940–67 (*Seminole Tribe* and Notes)

*PennEast Pipeline v. New Jersey*, 141 S.Ct. 2244 (2021) (excerpts on Courseworks) *skim*

For the remainder of our time we will consider the special solicitude federal courts bear towards state law, state courts, and state officers (and the deference states owe to federal law in turn). We begin with state sovereign immunity, a peculiar doctrine that arises from but is not explicitly required by the Eleventh Amendment. *Seminole Tribe* explores sovereign immunity and helps us remember at the outset that there is a whole world of alternative legalities out there that are neither state nor federal jurisdictions. Should native tribes be treated more like states or foreign sovereigns in the federal courts?

- Should the sovereign immunity of the United States be meaningfully different from state sovereign immunity?
- What is Eleventh Amendment immunity and what does it have to do with the Eleventh Amendment?
- What is the scope of Eleventh Amendment immunity after *Seminole Tribe*? Do you see a lurking *Klein* problem here?
- How was *PennEast*, a private oil and gas company, able to pierce New Jersey’s sovereign immunity? How does this theory differ in practice from Congress’s abrogation power?

### B. Official Immunity

**Assignment 22**

Hart & Wechsler 922–38 (*Ex Parte Young*, *Pennhurst*, and Notes)  
 Hart & Wechsler 1038–60 (Notes on Official Immunity)

Sovereign immunity is a pretty stern bar against damages, but easily avoided by a transparent fiction when it comes to prospective relief. Since that fiction relies on suing state officers rather than the state itself, officer immunity becomes the real game in federal litigation. Numerous commentators (and justices) are ready to scale back officer immunity. Should they?

- Why is *Young* proceeding “ex parte”? Do you understand the procedural posture for how this case arrived so expeditiously at the Supreme Court?
- What is the cause of action and how is there federal court jurisdiction in the suit underlying *Young*?
- Is *Young* a fiction? How does *Pennhurst* support the fictional reading of *Young*?
- Why should public officers have immunity, when other individuals (e.g., corporate executives, public interest groups outside the government) suffer “undue interference with their duties” and “potentially disabling threats of liability”?
- How far should legislative immunity extend? To Congress alone? To state legislatures? To local legislatures? If the latter, do we run into a problem in applying *Monell*?

C. *Abstention***Assignment 23**

28 U.S.C. § 2283  
 Hart & Wechsler 1073–78 (*Mitchum*)  
 Hart & Wechsler 1090–93 (Notes on Tax Injunction Act)  
 Hart & Wechsler 1101–27 (*Pullman*, *Burford*, *Thibodaux*, and Notes)

The Court is fond of saying that “jurisdiction existing, a federal court’s obligation to hear and decide a case is virtually unflagging.” Section 1983’s causes of action mean that jurisdiction to hear claims that state officers and state courts are violating federal law almost always exists. Nevertheless the Court has tried to account for the traditional limitations of federal equity to award extraordinary relief by “abstaining” from hearing claims squarely within its jurisdiction in certain classes of cases. In this and the next assignment we investigate those classifications and the broader consequences of withholding federal court relief.

- What are the purposes of the Anti-Injunction Act? What is the difference between a federal court enjoining a state court from doing something (generally barred by the Act) and a federal court enjoining a state executive official from doing something (generally permitted)?
- Are you persuaded by *Mitchum*’s conclusion that § 1983 expressly authorizes federal courts to enjoin state court proceedings? Look back at *McCurry* (and its author!) – why does the logic and the historical reasoning seem so different?
- Did the Texas Railroad Commission violate the Constitution? Should the Court’s analysis be different if the answer is clearly “yes”?



- What should a federal court do if the state-law question is easy? Will a federal court always know what is an “easy” question under state law? Do you think *Pullman* presented a hard question of state law?
- Should federal courts have the power to run toward or away from particular types of questions, depending on those questions’ perceived difficulty?
- Note that Justice Frankfurter writes an opinion in *Pullman, Southern Railway, Burford, Thibodaux, and Mashuda*. Can you discern the through-lines of his abstention jurisprudence?

### Assignment 24

Hart & Wechsler 1127–39 (*Younger* and Note (1))

*Wallace v. Kern*, 520 F.2d 520 (2d Cir. 1975)

Hart & Wechsler 1165–70 (Notes (1)–(2) on Extensions of *Younger*)

Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2327–51 (2018) *skim the rest*

Monica Bell, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1 (2018)

Traditionally, a court of equity restrained *civil*, not *criminal* proceedings. After *Ex parte Young* recognized the power of federal courts to restrain enforcement actions of a state attorney general, is there any way to abide by this traditional limitation? The Court’s attempt to do so is encapsulated in the *Younger* line of abstention cases. Professor Smith and Bell’s exchange is worth reading in full, but if time is short, focus on the assigned pages.

- Why is only Harris a proper plaintiff? Why not Dan, Hirsch, and Broslawsky?
- What does Our Federalism have to do with the First Amendment, and shouldn’t federal courts stop state prosecutions that are unconstitutional?
- Why doesn’t *Younger* rely on the Anti-Injunction Act?
- Does it make sense to conclude that Our Federalism generally bars federal courts from enjoining state criminal proceedings but permits Congress to provide for the removal of state law criminal prosecutions from state to federal court?
- What, if anything, does *Sprint* suggest about the current status of *Younger* and *Burford* abstention? Can *Wallace* remain good law?
- Whom do you favor in the Smith-Bell exchange? Is it worth working within the *Younger* doctrine or must the game be played at a higher socio-cultural level?

D. *Federal Law in State Courts*

### Assignment 25

Hart & Wechsler 412–22 (*Tafflin*, and Note on *Tafflin* and Congressional Exclusion)

Hart & Wechsler 437–49 (*Testa* and Note on Obligation of State Courts, including *Haywood*)

Hart & Wechsler 449–54, 457–60 (*Dice* & Note on Substance and Procedure in the Enforcement of Federal Rights of Action in State Courts (1)–(3), (7)–(8))

The Constitution mandates the supremacy of federal law, but what all counts as “law”? Federal policies? Federal procedures? Are there domains in which state courts can treat federal law like it treats any other foreign source of law? Should there be?

- Why is the question whether Congress has divested the state courts of jurisdiction instead of whether Congress has granted jurisdiction to those courts?
- Hart’s view is that “[t]he general rule . . . is that federal law takes the state courts as it finds them.” Does that seem right in light of these cases? Does Congress have the power to regulate the procedures used by state courts in adjudicating state law claims?
- What is the relationship between *Dice* and *Testa*? Does it follow from the fact that state courts must hear federal claims, absent a valid excuse, that Congress can impose particular procedures on state courts in doing so?

E. *Independent & Adequate State Grounds*

**Assignment 26** (prepare for April 21, 2022)

Hart & Wechsler 490–509 (*Fox*, Notes, and *Michigan v. Long*)

The first edition of Hart & Wechsler declared that “Federal law is generally interstitial in its nature. . . . Congress acts, in short, against the background of the total *corpus juris* of the states in much the same way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.” Does it seem to you that federal law is still interstitial today? Should federal courts, whether in postconviction habeas review or the Supreme Court’s review of state decisions, seek to preserve that sense of interstitial interference in state adjudications?

- What are the state law and federal questions in *Fox*? What makes the state supreme court’s state law holding adequate to support the judgment?
- What rule does *Long* establish about Supreme Court review of state court decisions? How hard do you think it would be to subvert the rule?
- What’s the judgment in *Long*? Can you think of another way to dispose of the case?
- Given declaratory judgments, the possible scope of federal jurisdiction, and federal court tools of agenda control, why not issue opinions despite the presence of independent state grounds?
- How should federal courts judge “adequacy” of state grounds? Or, to put it another way, what are federal courts good for?