

LATE NIGHT CONFESSIONS IN THE HART AND WECHSLER HOTEL

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perhaps it is time to throw the book aside, as having had its day, and start again on something new.

– Doris Lessing¹

I. INSIDE AND OUT

Chief Justice Rehnquist visited my law school last year to deliver a lecture entitled “The Future of Federal Courts.”² The University Theater filled: overdressed alumni in the front rows, respectful students in the balcony, camouflaged professors here and there. I sat in the middle and hunched over a folded-up sheet of legal paper. I scribbled notes and hoped for some insight into the tangled mass of problems I had made my life’s work. Would the Chief Justice perhaps explain the Court’s new habeas corpus jurisprudence? I wanted a little accounting for *Butler v. McKellar*,³ in which he had *994 denied federal court relief to a man who faced the death penalty after a conviction based on a confession that the Court’s own case law would, without question, exclude.

The Chief told some jokes, elaborated on his ties to Wisconsin, and discoursed at length about the *workload* of the courts. The issues were neutral, administrative, managerial, structural.

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¹ Doris Lessing, Introduction to *THE GOLDEN NOTEBOOK* at xxii (Bantam, 1973).

² William H. Rehnquist, speech printed as *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS.L.REV. 1.

³ 494 U.S. 407 (1990). This case, along with its predecessor, *Teague v. Lane*, 489 U.S. 288 (1989), has provoked the greatest outpouring of criticism from federal courts scholars that I can remember. See Ann Althouse, *Saying What Rights Are In and Out of Context*, 1991 WIS.L.REV. 929; James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM.L.REV. 1997 (1992); Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV.L. REV. 1733 (1991); Kathleen Patchel, *The New Habeas*, 42 HASTINGS L. J. 941 (1991); Robert Weisberg, *Future Trends in Criminal Procedure: A Great Writ While It Lasted*, 81 J. CRIM. L. 9 (1990); Marc M. Arkin, *The Prisoner’s Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C.L.REV. 371 (1991); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL.L. REV. 2331 (1993); Patrick E. Higginbotham, *Notes on Teague*, 66 S. CAL.L. REV. 2433 (1993); Susan Bandes, *Taking Justice to Its Logical Extreme: A Comment on Teague v. Lane*, 66 S. CAL.L.REV. 2453 (1993); Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797 (1992); Ann Woolhandler, *Demodeling Habeas*, 45 STAN.L. REV. 575 (1993).

“Did he say anything provocative?” asked a colleague who had missed the speech.

“He never got any more provocative than to say he’s against diversity.”

My friend was shocked. “He’s against *diversity*!!??”

“Diversity *jurisdiction*,” I said, realizing she was not a proceduralist.

Outside the theater, a group of protesters chanted and banged, trying to disrupt the speech. They happened to be pro-choice activists, but they represented all the many persons who have found themselves, over the years, aggrieved by the Court’s rulings. They had no way of knowing that, inside, the Chief’s speech was taking a pristinely procedural track, devoid of any substance capable of sparking protest. The speech continued calmly, the audience continued to listen, and only the noise of the protesters intruded on our privileged space.

Mounted on the ceiling of the theater is a long acoustical panel, with lighting fixtures and decorative strips that seem to form a human face, a strange character who overlooks whatever proceedings take place below. I imagined the ceiling face as the collective spirit of those who had suffered under the force of jurisdictional doctrine, which seemed so harmless in the hands of our honored speaker, who had himself devised much of the pristine procedure that caused and masked suffering.⁴ The speech continued on the procedural channel, *995 with the protest noise mere static drifting in from the substantive channel. The face kept its solemn vigil. I still scrawled my notes, though I knew I would not receive the accounting I wanted. The members of the audience seemed to enjoy a strong sense of their status as insiders. They were in the tasteful theater, in the legal profession, listening to the highest ranking member of that profession, looking forward to shaking hands with him at the reception that would follow at the Edgewater Hotel.

After the Chief Justice finished his speech, the audience filed out and reassembled in a second cavernous room. The reception room was neatly arrayed: white-clothed tables, set with scores of water and wine glasses and white napkins origami’d into absurd peaks. At one end of the room stood a dais, where the fêted Chief soon would bask in adulation. In the lobby, the crowd of buzzing receptioners grew. Rumor had it that the Chief’s car had arrived in the underground parking garage; soon the lobby elevator would open and he would begin to circulate through the gracious crowd.

I did not witness the ensuing celebration: I had impulsively slipped outside and into the twilight. It felt good to leave.

⁴ See, for example, *Butler*, 494 U.S. 407 (defining a “new rule” of constitutional law very broadly, thus removing a large number of important cases from federal habeas review); *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (restricting standing doctrine in a context that prevented any review of trial proceedings in a death penalty case); *Edelman v. Jordan*, 415 U.S. 651 (1974) (finding Eleventh Amendment immunity in suits for retrospective relief against state officials for constitutional violations). See also *DeShaney v. Winnebago County Dep’t of Social Serv.*, 489 U.S. 189 (1989) (narrowing the meaning of due process and denying recovery against state actors who failed to rescue a child from his abusive father). For a decision written by Chief Justice Rehnquist that restricts access to federal courts but may reflect genuine recognition of human suffering, see *Moore v. Sims*, 442 U.S. 415 (1979) (expanding abstention doctrine and excluding broad constitutional attack on a state statute designed to protect children from abusive parents), discussed in the text accompanying notes 77-79.

II. THE BUILDING PROJECT

I once wrote a law review article about the Eleventh Amendment⁵ (haven't we all?). In my quest to explain/unveil/analyze/critique Supreme Court doctrine, I wrestled with the notion of a legal fiction, as legal fictions figure quite large in this area of law.⁶ I ran across the old Lon Fuller article, *Legal Fictions*.⁷ Fuller, a legal process scholar aligned with Hart and Wechsler, the authors of our central text,⁸ conceptualized *996 legal fictions as scaffolding around a building under construction.⁹ Judges have begun the enterprise of building a new legal structure, but they lack the language and the worked-out logic needed to write a final, well-reasoned version of the doctrine they sense they need. So they sketch out a temporary version, to be replaced as experience produces a new conceptualization of the law: the building within the scaffolding. Eventually the building will stand and the scaffolding will be torn down and discarded.

Straining to understand *Ex Parte Young*, I saw no signs of any coming coherent doctrine. I saw a doctrine once presented as cogent reasoning now openly called a legal fiction.¹⁰ It was Lon Fuller's scaffolding all right. But the scaffolding had no building. Nothing was even under construction. Indeed, the whole enterprise of constructing a building had long been abandoned. *Young* was only a legal fiction – take it or leave it – just one more ugly landmark in the field I had chosen to study: not a nice, admirable finished building, but a gangly, old scaffolding, wobbly and patched in a few quite noticable places, lacking the dignity to collapse.

We know the ugly landmarks: *McCardle*¹¹ and *Klein*,¹² *Younger*¹³ and *Mitchum*,¹⁴ *Stone v. Powell*¹⁵ and *Wainwright v. Sykes*,¹⁶ *Teague*¹⁷ and *Butler*,¹⁸ *Edelman*,¹⁹ *Pennhurst*,²⁰ and *Union Gas*,²¹ *Los Angeles v. Lyons*.²² And centrally located in this

⁵ Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L. J. 1123 (1989).

⁶ In *Ex Parte Young*, 209 U.S. 123 (1908), the Court allowed suit against the Attorney General of Minnesota to enjoin the enforcement of an unconstitutional statute. Even though the injunction worked to prevent the state from enforcing the statute and even though there was no reason to sue the Attorney General other than to have this effect, the Court stated that the Attorney General somehow ceased to be the state – and thus could not claim Eleventh Amendment immunity – when he sought to enforce an unconstitutional statute. Moreover, the Attorney General must be viewed simultaneously as the state (for the Fourteenth Amendment to apply) and not the state (for the Eleventh Amendment not to apply).

⁷ 25 ILL.L.REV. 363, 513, 877 (1930, 1931) (published in 3 parts).

⁸ Henry M. Hart, Jr. and Herbert Wechsler, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (Foundation, 1st ed. 1953).

⁹ Fuller, 25 ILL.L.REV. at 525 (cited in note 7).

¹⁰ See, for example, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

¹¹ *Ex Parte McCardle*, 74 U.S. 506 (1868) (characterizing congressional power over Supreme Court jurisdiction as complete, regardless of motive).

¹² *United States v. Klein*, 80 U.S. 128 (1871) (rejecting congressional power over Supreme Court jurisdiction when used as a "means to an end").

¹³ *Younger v. Harris*, 401 U.S. 37 (1971) (creating an abstention doctrine deferring to state court capacity to resolve federal law challenges to a state statute).

¹⁴ *Mitchum v. Foster*, 407 U.S. 225 (1972) (straining statutory interpretation to make it possible to enjoin state courts from enforcing state statutes challenged under federal law, rather than allowing the state court to determine the federal question).

¹⁵ 428 U.S. 465 (1976) (denying federal habeas review of Fourth Amendment exclusionary rule claims in most cases).

¹⁶ 433 U.S. 72 (1977) (allowing state-law procedural defaults to bar federal habeas review in most cases).

¹⁷ 489 U.S. 288 (barring assertion of "new rules" of constitutional law at the habeas stage, with rare exceptions).

¹⁸ 494 U.S. 407 (articulating a broad conception of "new rule" in applying the doctrine announced in *Teague*).

¹⁹ 415 U.S. 651 (denying the applicability of *Ex Parte Young* to requests for retrospective relief against state officials).

²⁰ 465 U.S. 89 (denying the applicability of *Ex Parte Young* to claims based on state law).

woeful territory, the *997 absurd structure of *Marbury*,²³ which we gaze upon for inspiration at the start of our annual trek through the ruins. Oh yes, we can ridicule and criticize. We become righteously indignant: who among us has not pointed out the dead bodies at the foundations of some of the more dangerous structures? But we dutifully make the trek year after year.

Over time you develop a means of presenting the strange, unfolding story of the Eleventh Amendment (or standing or abstention or habeas corpus or whatever you're doing today). You get it to hang together for the students. You write your article about it, adding your little spin, your new perspective, your new piece of historical evidence, your perception of an incoherence or a coherence that nobody else has perceived quite that way before. Your colleagues ask what you're writing about, you name the doctrine, and they pronounce it, inevitably, "arcane." You feel more and more marginalized. You're beginning to feel almost perverse with your concentration on threshold doctrines, forever concerned only with *getting into* court – permanently confined to the antechamber, forever denied *substance*. Sustenance! It's a watery diet indeed.

Quite a few years ago a prominent District of Columbia Circuit judge visited my law school: he was going to give a talk about a case he had just worked on concerning a subtle point of political question doctrine. He questioned the assembled group about their interest in federal courts doctrine and appeared astounded that I, a mere assistant professor at the time, was the only one there who worked the Federal Courts territory. Why, this is the truly fascinating material! This is where the most powerful legal minds can find the most profound intellectual rewards! This is the very pinnacle of elite scholarship! Had we not heard? Indeed, this is what I thought at the time: to be a Federal Courts professor was to enjoy special status within the academy.

Perhaps at some law schools, professors with high aspirations and high opinions of themselves line up for the chance to teach Federal Courts, but at my law school nobody else has given a hoot about teaching Federal Courts for nearly ten years. The faculty willingly granted me the course upon my arrival, as if to say, "Good! You *998 take it! We don't want any of that nonsense!" A judge who had taught law at a prestigious East Coast school once said to me, "How did you get them to let you to teach Federal Courts?" If she only knew! A colleague of mine, professing no interest whatsoever in what I had fancied a highly desirable field of study, scoffed: "I knew when I was a *student* that Federal Courts was the ultimate law school mind game!" When I took a year's leave, the school hired a federal magistrate to cover the course.

²¹ *Pennsylvania v. Union Gas Co.*, 109 U.S. 2273 (1989) (addressing the question of the scope of Congress's power to abrogate Eleventh Amendment immunity).

²² 461 U.S. 95 (1983) (examining standing restrictions disabling federal courts from addressing the problem of fatal police chokeholds).

²³ In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court both asserts the power (by announcing the power of judicial review and the power to mandamus the President) and disclaims it (by finding no jurisdiction and conceding that there are some "political" questions left to the discretion of the President); the Court identifies a fundamental duty to provide a remedy whenever a right is violated, yet sends *Marbury* away without a remedy even though it finds his right violated; the Court addresses the merits of the case first and then determines that it has no jurisdiction.

The elite pinnacle seems more and more like a cramped outpost. Instead of the intellectual leaders of our generation – like Henry Hart and Herbert Wechsler – we seem like the few surviving adherents to the cult they founded. Here we are at our annual ritual. The legal edifice where we once felt so privileged has become stultifying. We may envy our substance-driven colleagues. We may envy the pro-choice noisemakers outside. They are out *in* the world and we are inside *out* of the world. We have built for ourselves structures of reason and doctrine and spend our lives inside these structures. Of course, we know the buildings have flaws; indeed, we make it our work to search for the flaws, point them out, and propose repairs, renovations, remodelings, and new additions. But we remain dedicated to the ongoing building project and sense that to abandon it would be to abandon scholarship.

I confess a certain degree of affection for our structures and frameworks. I would scarcely confine my thoughts here today in a structure of metaphorical language if I didn't find structures compelling. In fact, as I write, the structure of my words holds my attention far more powerfully than any ideas I mean to express. Though I have rankled when non-Federal Courts colleagues have wisecracked that this is a course for people who like to do crossword puzzles, I must admit that our doctrinal and ideological manipulations can become a sort of intellectual game or puzzle. And I confess that I take pleasure in solving the complex problems, fitting the words together.

I find satisfaction in teaching and writing about legal concepts with structural qualities. I also teach the course my school calls Constitutional Law I; that is, the constitutional law covering the structural matters of federalism and separation of powers. The issues of substantive rights are taught by someone else the next semester. A constitutional scholar in our political science department told me he would love to teach Con Law at the law school. When I asked whether he preferred the "rights course" or the "structure course," he responded instantly, "the rights course." Who wouldn't? Who doesn't prefer to talk about the *meaning of the rights* and not the dull old *999 federalism and separation of powers material? I had to confess that I do! Why should I enjoy shifting about the formless sands of rights when I can build structures? When I teach I use hand gestures that betray the intense visualization I have of ideas as concrete objects – structure – building blocks. Quite without planning, I move to different spots in the territory of the classroom stage, as if these spots are somehow the loci of various ideological constructions.

The metaphor of the building project seems almost inescapable. We begin with that tract of land we call our "field," and there we construct and build our arguments and theories.²⁴ When I made my first foray into the field of Federal Courts, an exploration into the validity of deferring to state courts in the name of federalism, I called my article "How to *Build* a Separate Sphere."²⁵ The federal and state judicial systems seem like

²⁴ For the classic treatment of metaphors in thought processes, see the endlessly useful George Lakoff and Mark Johnson, *METAPHORS WE LIVE BY* (U. of Chicago, 1980), especially at 47 (stating that "[t]heories (and arguments) are buildings").

²⁵ Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV.L.REV. 1485 (1987). The notion was that cases like *Michigan v. Long* and *Pennhurst* informed the states as to how they could construct separate sovereignty for themselves. See *Michigan v. Long*, 463 U.S. 1032 (1983), and *Pennhurst*, 465 U.S. 89. States do not enjoy immunity from federal intrusion simply because they are states, but by performing in the prescribed manner, they could claim it; that is, "build a separate

distinct structures: I can't help picturing courthouse buildings. The concept of jurisdiction seems to demand the use of architectural metaphors like "the threshold" (which tends to get raised or lowered) and "the courthouse door" (which tends to get widened, narrowed, or slammed shut).

A casebook itself is architectural: it *structures* the course, it is published by *Foundation Press*. The Hart and Wechsler book²⁶ – that "monumental landmark"²⁷ – is the foundation upon which the rest of us build our scholarship. But why do we continue this building project? What *motivates* us?

In the fifties, we genuinely may have shared their vision.²⁸

In the sixties, many of us entered into a new phase, spurred on by an architect-Court that quickly raised new structures, structures that seemed to need the support of the scholarly community. The **1000* rights-driven expansions of federal jurisdiction – *Baker v. Carr*,²⁹ *Fay v. Noia*,³⁰ *Henry v. Mississippi*,³¹ *Dombrowski v. Pfister*³² – generated plentiful work for us then.

In the seventies, outrage may have motivated us: clumsy new artisan-judges moved onto the scene and staged a slow-down, abandoned some of the projects, and threatened to topple key structures.³³ While the pure constructive joy had drained out of our work, there was passion in the critique and urgency in the preservation project. The belief that we had seen the Golden Age³⁴ still warmed us, and we remained optimistic about our ability to return to the work of the Warren Court after this inappropriate, destructive interlude. We wrote articles to the Burger and Rehnquist Courts pointing out their *mistakes*, illuminating their *confusion*, pointing the way back from their "wrong turns."³⁵ We thought we could help them understand the true plans.

sphere" for themselves. Thus, under Long, if a state court clearly rests its decision on an independent and adequate state ground, the Supreme Court will not review the case, 463 U.S. 1032, and under Pennhurst, if a state legislature extends rights to its citizens that go beyond available federal rights, it will be able to confine litigation about those state-created rights to the state courts, 465 U.S. 89.

²⁶ Hart and Wechsler, *THE FEDERAL COURTS* (cited in note 8).

²⁷ Akhil Reed Amar, *Law Story*, 102 HARV.L. REV. 688, 691 (1989).

²⁸ For a discussion of the scholarship in the Hart and Wechsler casebook's Legal Process tradition, see generally *id.*

²⁹ 369 U.S. 186 (1962) (limiting the applicability of political question and standing doctrine, rendering problems of malapportionment judiciable).

³⁰ 372 U.S. 391 (1963) (limiting the deference of federal habeas corpus to state-law procedural defaults to instances in which rights claimants "deliberately bypassed" state procedures).

³¹ 379 U.S. 443 (1965) (limiting Supreme Court deference to state-law procedural defaults to instances in which rights claimants "deliberately bypassed" state procedures).

³² 380 U.S. 479 (1965) (permitting a federal court to enjoin a state court criminal prosecution).

³³ Bob Woodward and Scott Armstrong, *THE BROTHERS* 212-13 (Simon and Schuster, 1979) (cartoon showing the Burger Court Justices demolishing a building representing rights).

³⁴ For use of the term "Golden Age" to describe the Warren Era, see George Kannar, *Citizenship and Scholarship*, 90 COLUM.L.REV. 2017, 2020 (1990); Owen M. Fiss, *The Law Regained*, 74 CORNELL L.REV. 245, 249 (1989). See also William N. Eskridge, *Metaprocedure*, 98 YALE L. J. 945 (1989) (reviewing Robert M. Cover, Owen M. Fiss, and Judith Resnik, *PROCEDURE* (Foundation, 1988)) (characterizing Procedure as premised on an idealization of the Warren Court). I recognize that my use of the term Golden Age to designate the Warren Court Era conflicts with Professor Amar's use of the term to designate the heyday of the Legal Process school in his excellent history of the three editions of the Hart & Wechsler casebook. See Amar, 102 HARV.L.REV. at 691 (cited in note 27). My experience with the law professoriate suggests that the Warren Court, far more than Legal Process scholarship, generated admiration and devotion on a deep psychic level. Scholars may have sensed, however, that they ought to express their admiration in the respectable and legitimating language of Legal Process.

³⁵ See David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV.L.REV. 61 (1984).

The nineties are here now. All of the Justices from the Golden Age have moved on. The clumsy artisans now fancy themselves architects. They propose sweeping new plans that scarcely refer to the plan of the Golden Age. Pointing out deviations from the old plan seems more and more outmoded. The metaphor of a Court that has simply taken a “wrong turn” no longer seems descriptive. We might close ranks and persevere in writing articles demanding a return to the Warren Court’s plan. But over the years this work has grown tiresome: *1001 there is little room for creativity. Moreover, the Golden Age seems less and less like the True Law and more and more like a historical period, the result of a social context and intellectual fashions that no longer hold sway. Even if the Court were repopulated with liberals, one must doubt whether they would simply return to the old project.

What can motivate us now? Is there not despair? Metaphors of death and destruction have taken hold, and we say things like, “The Court has *killed* habeas corpus!” We suggest symposium topics like “The Death of Federal Courts.” Does anyone think of our blighted landscape as a place for prime intellectual achievement anymore? Do we wander like fools through the ruins, raving about a glorious past that recedes toward the vanishing point?

III. SLIPPING OUT INTO THE TWILIGHT

I began my work in this field about a decade ago, as a teacher, quite simply, trying to find some coherence, some sense in the notoriously complex doctrine. Finding a scheme of coherence, a framework, really is the process of understanding. To merely observe that the field is chaotic, arcane, or incoherent is to decline the work of understanding. That rejection of the subject matter may be a fair and appropriate reaction: witness my colleagues who regard Federal Courts as a “mind game” or a “crossword puzzle.” (Indeed, vast numbers of laypersons have this reaction to the entire subject of law.) But assuming we accept the work of teaching Federal Courts, we must search for frameworks and coherencies as a necessary means of thinking about the subject. At the very least, we need heuristic devices.

Over the years I developed a theory, an explanation of the proper basis for allocating cases to the state and federal courts,³⁶ and I have used this theory in class and in a number of articles. In applying this theory, I would receive and review the Supreme Court decisions, hang them out to dry on my framework, and see how they looked. Of course the decisions themselves provided the basis for the framework: this is always a two-way process. One could scarcely come up with a theory of federal courts that had nothing to do with the case law. A theory is refined out of the case law and other articles that have been *1002 refined out of the case law; the case law then is used to support the theory;

³⁶ The most comprehensive statement of my framework is set forth in Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953 (1991) (arguing that federal jurisdictional doctrine, viewing state courts as a resource to be tapped, should defer not to the state’s interest in being left alone to pursue its own policies, but to its capacity to enforce federal rights and to develop alternative rights in state law).

the theory is turned back on the case law; and because of the process of refining the case law, the theory shows why some case law deserves praise and some demands criticism. This entirely circular, inbred process has gone on for so long, in so many diverse voices, and in such lofty and abstract terms that we can regard it as a *culture* and feel that it is a rather substantial thing – not at all embarrassing or ridiculous. So we operate within this culture and can continue to write articles ad infinitum in this mode.

The legal community is like a dreaming brain that constantly fires off impulses and then works furiously to resolve the chaos, to impose the order of a story, to create meaning.³⁷ The mind seeks order, structure: of course, when we read complex material we impose structures. How else could we read? Of course, when we write we build structures. How else could we write? But if we are too naggingly aware that this is just a structure we impose to make sense of complexity, we, in effect, awaken from the dream. The dream state imbued our thoughts and writings with the look of substantial culture. To awaken is to see our work as embarrassing or ridiculous. To awaken is to leave the scholarly community, to slip out of the reception hall and into the twilight.

If the Court writes well, following the guidance of Hart and Wechsler,³⁸ we sleep soundly. If it writes somewhat badly or does somewhat disturbing things, we dream and impose order. But there are times when the Court slaps me awake and I can no longer carry out the task of organizing the material into frameworks. *Butler v. McKellar*³⁹ gave me insomnia. The Court had announced in *Teague v. Lane* that “new rules” of constitutional law could no longer provide the basis for relief at the habeas stage,⁴⁰ and, in *Butler*, the Court gave a shockingly broad meaning to “new rule” – so that any rule not clearly established at the time the conviction became final, any rule still subject to reasonable debate, could no longer be considered on habeas.⁴¹ My dream-state view of the matter was that a “new rule” of constitutional law could not exist, short of a new amendment to the *1003 Constitution,⁴² or at least that rights evolve steadily and rarely burst forth in a manner recognizable as “new.”⁴³ But Chief Justice Rehnquist wrote:

[T]he fact that a court says that its decision is within the “logical compass” of an earlier decision, or indeed that it is “controlled” by a prior decision, is not conclusive for purposes of deciding whether the current decision is a “new rule” under *Teague*. Courts frequently view their decisions as being “controlled” or “governed” by prior opinions even when aware of reasonable contrary conclusions reached by other courts.⁴⁴

³⁷ This model of dreaming is not Freud’s but Hobson’s. See J. Allan Hobson, *THE DREAMING BRAIN* (Basic Books, 1988).

³⁸ For a discussion of the Legal Process conventions reflected in the Hart and Wechsler book, see Amar, 102 HARV.L.REV. at 691 (cited in note 27); Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L.REV. 953 (1994); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L.REV. 609, 619-29 (1991).

³⁹ 494 U.S. 407.

⁴⁰ 489 U.S. 288. There are two rarely applicable exceptions. See *id.* at 311-13.

⁴¹ *Butler*, 494 U.S. at 415.

⁴² This is, of course, the originalist position. See, for example, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX.L.REV. 693 (1976) (rejecting the notion of a “living Constitution”).

⁴³ This is standard Legal Process thinking. See, for example, *Butler*, 494 U.S. 407, 417 (Brennan, J., dissenting).

⁴⁴ *Id.* at 415.

Notice that Chief Justice Rehnquist openly takes the position that the Legal Process methodologies are a scam. *Butler* sent a jolt through the dreaming professorial synapses, and many articles resulted, demanding a return to the various frameworks that various authors had propounded over the years.

It is the violence underlying all of this posturing that causes my insomnia.⁴⁵ *Butler dies*. The Court performs a balancing test in such a way that *Butler's* impending death is never put in the scales. Only the neat, pristine matters of federal interest (the workload of the federal courts) and state interest (finality) are weighed. It seems repellent to fall back into the Federal Courts dream under the circumstances. The academy's strange remove from risky, dangerous human life should unsettle us. I won't say we stand apart from real life – I acknowledge that this too is life – but we lead a life nearly immune from the “distinct and palpable”⁴⁶ injuries that befall the characters in the cases we read. They are not fictional characters, though as we read about them we sit in the same comfy chairs we sit in when we read novels. They genuinely suffer and frequently die, slipping through the fictional web of doctrine upon which we train our eyes.

The field of Federal Courts has a particular tendency to intensify the alienation of the academic. Endlessly we contemplate complex doctrinal frameworks, capacious, wavy abstractions like federalism, and perverse axioms like “avoid unnecessary questions of constitutional *1004 law.” And yet, in the background, clamoring for our psychic attention are Adolph Lyons, choked nearly to death by Los Angeles police,⁴⁷ and Horace Butler, sent to his death by a state that had the good fortune to deny him a lawyer before the Supreme Court announced a minute extension of law that squared precisely with the issue in his case.⁴⁸ The outside world leaks messily onto our intellectual frameworks. Procedure is not pristine.

How should we respond?

We may redouble our efforts to construct intellectual frameworks that account for the suffering and violence that lies behind the intricate doctrines we analyze and critique. Or we may grow weary of our distance and rebel at the thought of composing another traditional article. We may drag on, spurred by the need for tenure, the representations we made when we applied for the grant, or even the impulsive acceptance of a speaking engagement once shrouded in the haze of the future and now imminent.

And here I am, having accepted this speaking engagement and agreed to tell the weary travellers what direction we ought to take for the future. I am deeply embarrassed at the presumptuousness and arrogance inherent in standing up here as a consequence of agreeing some time ago to play the role of prophet! I rather wish someone would tell me the true direction and give me some ideas. After all, if I knew the future destination, I'd be home pounding out the articles, making my reputation by getting there first, not

⁴⁵ The classic discussion of the violence of adjudication is Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

⁴⁶ The Court uses these conventional adjectives to denote injuries substantial enough to provide a litigant with standing to sue in federal court. See, for example, *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

⁴⁷ *Los Angeles v. Lyons*, 461 U.S. 95 (1983).

⁴⁸ *Butler*, 494 U.S. 407.

helping the competition. But I want to reclaim humility by stating that I do not think that a true direction exists, that in the past we made the mistake of believing we were engaged in building monuments to the truth, and that our weariness now comes from the unavoidable recognition that the project is futile. I would like to promote diversity as a replacement for belief in true direction. It is, I argue, not only a more appropriate expression of the way we understand law today (as opposed to in the fifties and sixties) but a much more exciting and interesting approach to writing and teaching.

The course in Federal Courts is the starting point for the scholarship. Through the course Hart and Wechsler defined our field, and through the course we continue to have the power to define and redefine it. I think the course is a ground for ongoing experimentation. Teaching Federal Courts generates ideas for writing about Federal Courts, although for the most part it is only these finished, polished, **1005* often bloated or over-edited articles that we share with each other. Only our students participate in the lively ongoing experimentation with ideas, and we may have no colleagues at our schools who know much of anything about the issues we want to debate. Being a process-oriented person, as Federal Courts scholars tend to be, I want to recommend not necessarily more articles about the *judicial* process but a *scholarly process*, designed to overcome the tedium of the usual articles, to open to each other the vital debate that tends to occur only at the teaching level, and to take advantage of computer technology.

IV. ABANDON FOUNDATION: EXPLORE CYBERSPACE

I invite you to throw aside the oversized, overpriced, blue pebble-textured object manufactured by Foundation Press, the publishing company pretentious enough to contribute to my architectural metaphor. Choose the forty or so cases you feel most stimulated teaching. Delete the parts that bore you. Delete any footnotes you don't absolutely love. Put them in an order that seems interesting, productive, likely to generate new thinking. Put the digitalized material on the computers in your library and let the students download it onto their own discs for free. Laserprint and xerox copies for students who want hard copy (it will cost a third of what a casebook costs, or less). As you teach, type in your notes and questions after the cases – continually write next year's text. At the end of the semester, reshuffle the cases as new connections occur to you. Add to your mix of cases. You can put in all the new Supreme Court cases each year and, after the next semester, delete the ones that did not stimulate or produce new insights. You may find that the order you choose for the cases is quite different from the one conventionally chosen in Hart and Wechsler and the casebooks that follow its model.

I should confess that I have never taught from the Hart and Wechsler casebook, though it was the choice of my Federal Courts professor (Larry Sager) when I took the course in the Spring of 1981. I rejected it out of hand in the Fall of 1984 when I began teaching: the Third Edition⁴⁹ had yet to appear and there was not even a current

⁴⁹ Paul M. Bator, et al., Hart and Wechsler's THE FEDERAL COURTS AND THE FEDERAL SYSTEM (Foundation, 3d ed. 1988).

supplement for the Second Edition.⁵⁰ I used Martin Redish's book,⁵¹ *1006 which was more up to date and followed the Hart and Wechsler model, in shorter form. I later switched to Low and Jeffries,⁵² again because it was new – it also came with the promise of an annual supplement – and had the familiar Hart and Wechsler organization in a shorter form. Why did I not take on the Third Edition of Hart and Wechsler when it appeared in 1988? I felt it was too overloaded with information to serve the students well.⁵³ Note that it is famously intimidating even to teachers.⁵⁴ One can so easily reach the point in Federal Courts where the students become outraged and almost incredulous about the amount of doctrine. In teaching the course, I try to draw students into the ideas and rhetoric and methodologies used by the Court in dealing with the large topics of federalism, separation of powers, and constitutional rights. I try to give them juicy cases and chewable doctrine-chunks so they can be up and “talking Federal Courts” quickly. The doctrinal overload – the endless note cases obsessively adding one little twist after another – represses debate. It suggests to the students (not to mention the teachers) that they can never know enough to have an opinion worth listening to.

So I recommend devising a manageable, big-idea-oriented course, tailored to your own interests and insights.⁵⁵ Experiment. Must *Marbury*⁵⁶ come first? Must we always begin with The Man and His Commission? Most students have been milled through *Marbury* in Con Law by the time they get to us and may not reread it or have *1007 much patience with its historical and legal complexities. Can you plunge into Federal Courts without the classic aphorisms?⁵⁷ Would putting federalism before separation of powers jog some new thinking?

Although I sometimes begin with *Marbury*, lately I've started with *Monroe v. Pape*,⁵⁸ for several reasons that appeal to me at the moment:

1. It has an immediate, timely context capable of stirring passion:

⁵⁰ A book missing the 1983 and 1984 cases – *Allen v. Wright*, 468 U.S. 737 (1984); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Pennhurst*, 465 U.S. 89; *Long*, 463 U.S. 1032; and *Lyons*, 461 U.S. 95 – was absurdly out of date.

⁵¹ Martin H. Redish, *FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS* (West, 1st ed. 1983).

⁵² Peter W. Low and John Calvin Jeffries, Jr., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* (Foundation, 1987).

⁵³ Professor Mullenix noted in 1989 that the Third Edition of Hart & Wechsler was the longest casebook available on the market. See Linda S. Mullenix, *God, Metaprocedure and Materialism at Yale*, 87 Mich.L.Rev. 1139, 1140 n.7 (1989) (reviewing Cover, Fiss, and Resnik, *PROCEDURE* (cited in note 34)).

⁵⁴ See Amar, 102 HARV.L.REV. at 690 (cited in note 27).

⁵⁵ Compare Judith Resnik, “*Naturally*” *Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L.REV. 1682, 1735-36 (1991) (criticizing the canon of cases generally covered in casebooks for their exclusion of feminist issues). I appreciate assaults on the canon and critiques based on exclusion that are aimed at existing packaged, commercial materials. I have engaged in one myself, albeit in the field of Evidence. See Ann Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L.REV. 914 (1994). I think the greatest contribution to packaged Federal Courts materials would be a concerted effort to forefront the effect of race on the case law. I say this because I think it is apparent that race has influenced the history of Federal Courts doctrine, beginning (at least) with the frequently willfully avoided *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859) (asserting a strong federal power against a state court that found the Fugitive Slave Law unconstitutional). See Hart & Wechsler, *THE FEDERAL COURTS* at 380 (cited in note 8) (using the later *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), to illustrate the doctrine established in *Ableman*). While I appreciate attacks on published materials, those centralized compendia of conventionalism, I want to emphasize the liberation of decentralization in composing one's own materials.

⁵⁶ 5 U.S. (1 Cranch) 137 (1803).

⁵⁷ For example: “It is emphatically the province and duty of the judicial department to say what the law is,” *id.* at 177; “[A] government of laws not of men,” *id.* at 163; and “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” *Id.*

⁵⁸ 365 U.S. 167 (1961).

13 Chicago police officers broke into [the Monroes'] home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. ... Mr. Monroe was then taken to the police station and detained on "open" charges for 10 hours, while he was interrogated about a two-day-old murder, ... he was not taken before a magistrate, though one was accessible, ... he was not permitted to call his family or attorney, ... he was subsequently released without criminal charges being preferred against him.⁵⁹

2. It connects jurisdictional questions with the enforcement of individual rights.

3. It conveys an urgent sense of the desirability of federal courts: students tend to see why Monroe would want to use the federal and not the state courts to sue the Chicago police in 1961.

4. It forces students to consider a statutory text (42 U.S.C. § 1983) with a distinct and important legislative history (Reconstruction) that will inform their understanding of federalism.

5. It brings the issue of race immediately to the foreground and makes it a standard topic for discussion throughout the course.

6. It forces students to think about the relationship between substantive and procedural law, because Section 1983 exists in a gray area between substance (it grants no rights but provides a vehicle for asserting rights) and procedure (it does not grant jurisdiction, but its interpretation has a powerful jurisdictional effect).

7. Through a comparison of Justice Douglas's majority opinion and Justice Frankfurter's dissenting opinion, it introduces the central debate about whether federal courts should be regarded as the primary enforcers of the rights of individuals or whether state courts *1008 carry out the primary function, with federal courts serving as a back-stop, activated by state court failure.

Monroe reveals the complexity of jurisdictional problems and the rhetoric they generate. Here we find strong statements in favor of judicial activism, phrased in terms of respect for statutory texts and the intent of a Congress ninety years in the past, with the conspicuous absence of any reference to the civil rights movement of the present. And we find judicial restraint, from a Justice (Frankfurter) who purports to be deeply concerned about present-day governmental abuse ("Modern totalitarianisms have been a stark reminder ..." ⁶⁰), defended in compelling functional terms:

Federal intervention, which must at best be limited to securing those minimal guarantees afforded by the evolving concepts of due process and equal protection,

⁵⁹ Id. at 169.

⁶⁰ Id. at 209 (Frankfurter, J., dissenting).

may in the long run do the individual a disservice by deflecting responsibility from the state lawmakers, who hold the power of providing a far more comprehensive scope of protection. Local society, also, may well be the loser, by relaxing its sense of responsibility and, indeed, perhaps resenting what may appear to it to be outside interference where local authority is ample and more appropriate to supply needed remedies.⁶¹

I do not present any of these ideas as necessary or correct, and I do not stigmatize either of what I call the “federal court primacy position” and the “state court primacy position.” Instead, I strive to get as many ideas out on the table as I can, to develop many strands of discussion, and to enable the students to “talk Federal Courts.”

I follow *Monroe* with *Dombrowski*⁶² and *Younger v. Harris*.⁶³ I used to go right to *Younger*, because of its distinct contrast with *Monroe*. *Younger* draws its federalism not from Reconstruction, but from the founding period, expressed in that wonderfully obtuse and naïve-sounding line, “one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of ‘Our Federalism.’”⁶⁴ *Younger* has the fine disclaimer – to be referred to again and again throughout the course – of “blind deference to States’ Rights.”⁶⁵ And it displays a normative vision of federalism that has some appeal with or without the originalist pedigree: *1009

the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. ... [Federalism,] a system in which there is a sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.⁶⁶

But by the third time through the materials, I found I had come to rely on *Dombrowski* so much in explaining *Younger* that I decided to insert it, even though it would blunt the contrast between *Monroe* and *Younger*. Moreover, *Dombrowski* introduces the voice of Justice Brennan, whose vision of the federal courts permeates the case law.⁶⁷ His position stands in important contrast to that of Justice Frankfurter, who, in my present set of materials, is the most prominent voice for judicial restraint and deference to the states. *Dombrowski* keeps the issue of race in the forefront. It involves a

⁶¹ Id. at 243.

⁶² *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

⁶³ 401 U.S. 37 (1971).

⁶⁴ Id. at 44.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Justice Brennan also wrote the majority opinion in the other central Warren Era federal courts cases, *Baker*, 369 U.S. 186; *Fay*, 372 U.S. 391; and *Henry*, 379 U.S. 443; and has written major dissenting opinions on many of the federal courts issues handled controversially by the later Courts. See, for example, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (Eleventh Amendment); *Teague*, 489 U.S. 288 (habeas corpus); *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986) (federal question jurisdiction); *Allen v. Wright*, 468 U.S. 737 (1984) (standing).

striking pattern of abuse by Louisiana state officials in the form of bad faith prosecutions and threats of prosecution against civil rights workers.⁶⁸ It sets up a jurisdictional problem – whether federal courts should rescue federal rights claimants from state court proceedings – in a context in which intervention seems particularly compelling, and it creates the impression that perhaps federal courts will take up such intervention as a matter of course. This impression is, of course, dispelled in *Younger*, where we learn that deference to state courts is “the normal thing to do.”⁶⁹

Dombrowski and *Younger* also present an introduction to ideas about who may invoke the federal courts’ power, an issue that will thread through the course. Justice Brennan, in *Dombrowski*, encourages litigation to explore the meaning of constitutional rights. He develops the overbreadth doctrine and remarks that “[i]f the rule were otherwise, the contours of regulation would have to be hammered out case by case – and tested only by those hardy enough to risk criminal prosecution.”⁷⁰ *Younger*, on the other hand, boots out for lack of standing **1010* a number of plaintiffs who want to challenge California’s Criminal Syndicalism Act.⁷¹ Farrell Broslawsky, the Los Angeles Valley College history instructor who felt “inhibited” in “teach[ing] about the doctrines of Karl Marx or read[ing] from the Communist Manifesto,”⁷² is a memorable character who sticks with us as a symbol of the sort of person a restraint-bound Court will not tolerate. Even John Harris, Jr., prosecuted under the California statute, will not be rescued from the “cost, anxiety, and inconvenience of having to defend against a single criminal prosecution.”⁷³ Rights claimants will have to be “hardy” after all.

Younger, to my way of thinking, leads directly to *Mitchum*.⁷⁴ *Mitchum* reasserts the strong Reconstruction Era vision of the need for federal courts and seems, at least initially, to be squarely at odds with *Younger*. It presents the questions why the Court in *Younger* would create a freestanding, judge-made doctrine when an explicit statute appeared so clearly to govern and why the Court would make the all-but-laughable interpretation that Section 1983 implicitly “expressly authorize[s]”⁷⁵ an exception to the Anti-Injunction Act. I love the juxtaposition of *Younger* and *Mitchum* and love these questions in part because I think there is an utterly sensible answer (in a word: *Dombrowski*⁷⁶) and in part because they force the students to resolve their perplexity by developing a theory of how the Court “does jurisdiction.”

⁶⁸ *Dombrowski*, 380 U.S. at 482.

⁶⁹ *Younger*, 401 U.S. at 45.

⁷⁰ *Dombrowski*, 380 U.S. at 487.

⁷¹ *Younger*, 401 U.S. at 41-42.

⁷² *Id.* at 39-40.

⁷³ *Id.* at 46.

⁷⁴ *Mitchum v. Foster*, 407 U.S. 225 (1972).

⁷⁵ *Id.* at 243.

⁷⁶ In my view, the Court would not tolerate a flat ban on all injunctions of ongoing state proceedings because it would undercut a core aspect of the role of the federal courts, enforcing federal rights when state courts are inadequate. Its intolerance was so strong that a clear statute could not stop it from making jurisdiction what it thought jurisdiction should be. The Court still did not think that federal courts should routinely enjoin state court proceedings, however, for state courts on the whole *should* shoulder the work of enforcing federal rights that arise within their own proceedings. The *Younger* doctrine as a judge-made doctrine could be tailored to the distinction between state courts that deserved deference and those that did not. See Ann Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L.REV. 1035, 1039-51 (1990).

The sequence of my introductory chapter, which is not the slightest bit inevitable, continues with:

- *Moore v. Sims*,⁷⁷ which shows the applicability of the *Younger* doctrine to civil proceedings, introduces the possibility that the challenged state law might serve a higher value (here, protecting children) ***1011** than the federal rights used to challenge it⁷⁸ and raises questions about the context in which courts ought “to say what the law is.”⁷⁹ The *Sims* brought a classic survey-the-statute-book complaint: one can argue that this is good, because it produces a swift announcement of what rights exist, or that it is bad, because it forces the court to determine the law in an overly abstract context. The *Sims* Court’s rejection of broadly framed litigation contrasts nicely with *Dombrowski* and leads to the most profound questions about how the meaning of rights should develop. Is the incremental, evolutionary mode ideal?

- *Railroad Commission of Texas v. Pullman Company*⁸⁰ picks up a key thread from *Sims*: if the federal court proceeds to hear the attack on state legislation, it will have to interpret the state statute, and the interpretation will never be reviewed by the authoritative state court.⁸¹ *Pullman* introduces a second abstention doctrine,⁸² confronts us with a fact pattern involving racial discrimination, and gives us a second dose of Frankfurterian rhetoric.⁸³ Again, the notion of shaping ***1012** the context for “say[ing] what the law is” can be explored: if there is “undoubtedly ... a substantial constitutional issue,”⁸⁴ why wouldn’t a federal court have a duty to face up to it, and not be cowed by the “sensitive area of social policy”⁸⁵ and the potential for “rigorous congressional restriction”⁸⁶ of judicial power?

⁷⁷ 442 U.S. 415 (1979).

⁷⁸ The challenged Texas Family Code created a procedural structure designed to protect children from abusive parents. The father in the case appears almost certainly to have been abusive, since one of the children was hospitalized for eleven days after an incident that occurred at the child’s school. *Id.* at 419. The parents objected to the state’s procedures under the federal Due Process Clause. *Id.* at 422.

⁷⁹ *Marbury*, 5 U.S. (1 Cranch) at 177. Note how this question connects to the issue of what is “new law” in *Butler v. McKellar*, 494 U.S. 407 (1990). I follow *Sims* in my current draft with a long quote from Justice Scalia’s provocative article, *The Rule of Law as a Law of Rules*, 56 U. CHIL.L.REV. 1175 (1989). Scalia disdains the incremental approach and would like to structure jurisdiction (at least Supreme Court jurisdiction) to maximize the opportunities for propounding broadly applicable rules. *Id.* at 1185-87. I think the Scalia article is especially useful in forestalling simplistic conclusions about the “liberal” and “conservative” approach to jurisdiction.

⁸⁰ 312 U.S. 496 (1941).

⁸¹ *Id.* at 499-500.

⁸² I do not bother with any abstention doctrines beyond *Younger* and *Pullman*, other than a brief note on *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), because, to me, they overload the course with indigestible complexity. On the other hand, if one wanted to cut back somewhere else, an extended exploration into all the forms of abstention doctrine could be very productive. Certainly, one positive value of a book like Hart and Wechsler’s is that it allows a teacher to select from a huge range of cases. The book is so long that one is forced to select from the whole. This may lead you to think that all the cases you would want to cover are already in the book and thus you need only construct an original syllabus with page citations to the classic casebook. In fact, I began with this premise, only to find that half of the cases I wanted to cover in full were not printed as full cases. Moreover, editors necessarily edit their cases down: you may find that casebook editors have omitted the very language that connects the cases for you. The process of accumulating the cases yourself differs in many other ways from the process of cutting back from someone else’s materials. It is inherently more constructive (yes, the building metaphor) and thus more likely to stimulate your creative processes. One’s attitude tends to be different. Instead of thinking: what can I afford to cut? must I really give them all this? can I really expect them to digest all these note cases?, you think: will this case contribute to the experience I want my students to have this semester? No casebook editor preparing materials for a commercial publisher is going to think like this.

⁸³ “Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies.” *Pullman*, 312 U.S. at 500. The first dose, of course, was the *Monroe* dissent.

⁸⁴ *Pullman*, 312 U.S. at 498.

⁸⁵ *Id.*

⁸⁶ *Id.* at 501.

• *Hawaii Housing Authority v. Midkiff*⁸⁷ presents a nicely pragmatic contrast to *Pullman*. Justice O'Connor refuses to be bamboozled by the lawyers' characterization of the state law question as ambiguous (and thus warranting *Pullman* abstention). Moreover, like *Sims*, *Midkiff* shows us a state that, while it may challenge the limit of what the federal Constitution permits, seems to be doing something good – and remarkably progressive (redistributing land).⁸⁸ At this point, students can see that *Pullman* abstention is “the exception and not the rule” though *Younger* abstention remains “the normal thing to do.” I like to ask them why this should be the case, in part because I think there is a good answer to that question.⁸⁹

• *City of Los Angeles v. Lyons*,⁹⁰ like *Monroe*, presents an appalling example of police brutality.⁹¹ It makes the question of race unavoidable as it elaborates the requisites of standing doctrine, a topic begun in *Younger* and *Sims*, and provokes inquiry into whether jurisdictional doctrine operates covertly, essentially deciding the merits. *Lyons* also presents a puzzling suggestion that federalism values counsel against enjoining the police chokehold: I use this to explore the notion of deference, contrasting deference to a court with deference to a police department.⁹²

• *Stone v. Powell*⁹³ throws habeas corpus into the mix and returns to the context of unreasonable searches and seizures, the issue *1013 in *Monroe*. Because Powell, unlike Monroe, was prosecuted,⁹⁴ he had, albeit unwillingly, already made a trip through the state court system. So the question becomes, do federal rights claimants have some sort of entitlement to a hearing in federal court? Do federal rights only take their proper scope when a federal judge says what they are? Two alternatives are presented: one ought to be able to relitigate in federal court (still the general rule on habeas⁹⁵) or relitigation ought to take place only when the state court has failed (the exception to the rule for Fourth Amendment exclusionary rule claims).⁹⁶

• *Allen v. McCurry*⁹⁷ completes the point made in *Stone*. *McCurry* refuses to create a special exception to collateral estoppel for Fourth Amendment claims brought under

⁸⁷ 467 U.S. 229 (1984).

⁸⁸ Id. at 232-34.

⁸⁹ The “normal thing” is to stay with a single case and to assume that the court handling that case can do a good enough job of dealing with any law applicable to it; the exceptional thing is to litigate on two fronts or to assume a court cannot deal with law other than its “own” law. *Younger* avoids two cases and assumes state courts can deal with federal law. 401 U.S. 37. *Pullman* faces two cases and assumes federal courts cannot deal with state law. 312 U.S. 496.

⁹⁰ 461 U.S. 95 (1983).

⁹¹ Id. at 98 (discussing a police chokehold that had caused a number of deaths, used even in the absence of a threat of severe bodily harm).

⁹² This is an issue that recurs in *Butler* when the Court refuses to intrude on a judge who makes a “reasonable” assessment of what the applicable law is and analogizes this refusal to the “good faith” immunity accorded police enforcing an invalid search warrant. See *Butler*, 494 U.S. at 14-15. More can be, or should be, expected of a court than the police.

⁹³ 428 U.S. 465 (1976).

⁹⁴ Compare id. at 469 (concerning a habeas petitioner convicted of murder in state court who challenged a police search that produced substantial evidence) with *Monroe*, 365 U.S. at 169 (concerning a § 1983 damages claim against police who conducted a search in which no evidence was found and consequently no prosecution followed).

⁹⁵ See *Withrow v. Williams*, 113 S.Ct. 1745 (1993); *Wright v. West*, 112 S.Ct. 2482 (1992).

⁹⁶ *Stone*, 428 U.S. 465 (presenting the question of whether the state court offered a “full and fair opportunity to litigate”).

⁹⁷ 449 U.S. 90 (1980).

Section 1983, which, because of *Stone*, escape federal habeas corpus review.⁹⁸ References to Reconstruction's transformed version of federalism fail. Even though a rights claimant making the initial forum selection can choose federal court under *Monroe*,⁹⁹ there is no entitlement to federal court once the state court has already acted.

• *Preiser v. Rodriguez*¹⁰⁰ ends my first chapter, heightening a number of ideas about federalism. Like *McCurry*, it shows the interaction between Section 1983 and habeas corpus. This claim for the return of a prisoner's "good time" credits, which the state had revoked as a punishment for possession of contraband,¹⁰¹ would have fit literally into either statutory vehicle. Why is the rights claimant forced to use habeas corpus, and thus to bring his claim in state court first pursuant to the habeas exhaustion requirement? Isn't the exhaustion requirement inapplicable on the ground that it reflects the assumption that the rights claimant will have been in front of a state court judge at the time the alleged violation occurred?

I feel that, as a teacher, it is not my place to resolve matters into a coherent framework. I consider such an approach boring, if not domineering. I like to think of Federal Courts as "Shakespearean." Only a bad playwright would have one character (the playwright's *1014 mouthpiece) spout all the good, insightful lines and make everyone else a foil. Shakespeare remains vital because he did not have an overt political agenda, and he did not suppress conflict and complexity. Similarly, Federal Courts is an arena of human behavior, a convergence point for all sorts of vital ideas, a forum for ongoing debate. The cases and doctrines represent human aspirations, foibles, absurdity, generosity, empathy, detachment, weariness, idealism. The judges are characters, the litigants characters, and we too are characters. This is my outlook now. If I search for an architectural metaphor, I picture a grand hotel – I'll call it the Hart and Wechsler Hotel – a place through which anyone may pass, carrying intriguing narrative and conceptual baggage. Happy to observe and interpret the transient characters, I have lost interest in building any permanent structures for them.

Let me take my approach to casebook-making a step further, in a direction that aligns with my affinity for decentralization and multiplicity. I have not discussed my materials here because I think they represent the best ordering of the cases, but because they represent a liberating experiment. There are times when I find this experiment so exciting that I want to share it with others, but whenever I think of transforming it into a marketable product I am forced to admit that what is so exciting and natural to me may well seem perverse, alien, and confusing to someone else.¹⁰² In any event, to organize it for mass production, to bind it in a conventional blue or brown hardcover, seems to miss the point. What I like about my materials is their personal quality, tailored to my idiosyncratic array of insights, my level of toleration for complexity, and my love of role playing (I tend to do monologues in the personas of Justices Brennan, Frankfurter, and

⁹⁸ Id. at 103-05.

⁹⁹ Id. at 98-99.

¹⁰⁰ 411 U.S. 475 (1973).

¹⁰¹ Id. at 480-81.

¹⁰² For a discussion of the commercial pitfalls of innovative casebooks, see Laura Kalman, *LEGAL REALISM AT YALE 1927-1960* (U. of N.C., 1986); Mullenix, 87 MICH.L.REV. 1139 (cited in note 53).

many more). I like the mutability of a book on computer disc. I like the casual quality of a looseleaf.¹⁰³

We should view commercial casebooks as obsolescent, to be replaced by computer technology, particularly for the course that is one's primary field of research. Traditional casebooks can serve as "training wheels" for new teachers, until they have the experience to gather their own materials together as described above. But the radical step would be to build up a database of teaching materials on the Internet. As we experiment with different cases, questions, and **1015* materials, we should share the results, and respond to each other, incrementally building up a resource that each of us can download, customize, use, edit, add to, and ultimately upload. The cases are in the public domain, why should anyone make a profit selling them? Law review authors seem quite willing and eager to grant permission to reprint excerpts of their articles. And why should we compulsively horde the various insights that we use in class? Shouldn't the future Federal Courts construction project take place in cyberspace? Instead of waiting for each other to produce a bloated, over-edited article (which we may copy and then never read), we should link up in the lively forum that technology has now made possible. Our colleagues' lack of interest in our "arcane" field could become a nonissue.

V. ABANDON MONUMENTS: WRITE ESSAYS

Teaching and the continual composing of teaching materials create a fertile ground for your ideas – *your* ideas, the ideas that genuinely reflect your background, knowledge, and inclinations. Instead of hewing to the narrowly procedural or propounding fully formed normative theories and lambasting the Court for failing to adhere to them, move to a more easy-going level, admitting into your thought processes any relevant information or ideas, any substantive law that occurs to you, any evidence about history, society, science, or any conceivable theory from another discipline. Abandon the outmoded project of constructing primly reductionist frameworks and demanding that doctrines be designed to fit these frameworks. Stop stultifying your creativity with a mindnumbing sense of obligation to read all the articles that everyone else or everyone else who seems important has ever written. You will probably never write anything genuinely readable and you will probably never genuinely enjoy writing unless you read widely,¹⁰⁴ use what you know, and stop censoring yourself. Write essays that play with ideas, not in an attempt to show everyone the way, but in the spirit of inclusion and ferment, not to control what others may say or what courts may do, but simply to enrich and enliven our impoverished field. **1016*

¹⁰³ Of course, Henry Hart, when tempered with Albert Sacks instead of Herbert Wechsler, liked a looseleaf too. See Henry M. Hart, Jr. and Albert Sacks, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (Cambridge, Mass., Tentative ed., 1958).

¹⁰⁴ To quote Doris Lessing again:
There is only one way to read, which is to browse in libraries and bookshops, picking up books that attract you, reading only those, dropping them when they bore you, skipping the parts that drag – and never, never reading anything because you feel you ought, or because it is part of a trend or a movement.
Lessing, Introduction to *THE GOLDEN NOTEBOOK* at xix (cited in note 1).

The sense that Federal Courts is dead comes from our life-suppressing method of scholarship. I still believe that Federal Courts is fertile territory, full of richness and complexity. It is a bustling hotel full to capacity with all sorts of interesting characters and their ideological baggage. It is the location of a crisis point in the law, where we can see procedure, structures, and the most profound matters of individual rights, social conditions, and political choices in a state of conflict. I have come to see Federal Courts this way from teaching, from restructuring my course in opposition to the conventional compartmentalization, from writing things that my nagging internal critic denounces as “sententious,” and from “read[ing my] way from one sympathy to another, learning to follow [my] own intuitive feeling about what [I] need.”¹⁰⁵

Of the many Federal Courts articles I have written, the one people talk to me about is the one I wrote after giving up a steady diet of standard Federal Courts articles and began reading whatever books caught my attention, often reading only parts, and always suspended in the middle of reading dozens of books at a time.¹⁰⁶ Reading in this way, I often felt derelict in my duties – after all, I had stacks of xeroxed articles in my office I had never read. To assuage my work-ethic guilt, I constantly assured myself that any reading counts as work. While most of these books had no noticeable relationship to Federal Courts or even the law, other than the fact that I, a Federal Courts person, had chosen them, I frequently found places to cite them in my articles, and I felt that I gained by exposure to things capable of shifting my mind in some surprising way. I don’t say any of this to recommend myself, but to recommend the process. I offer this Essay, imperfect as it is, as an example of something I would like to read: a personal analysis of my connection to Federal Courts, a confession of my own psychic ties to issues of structure, and my own tendency to contemplate the substance of rights from the comfortable distance jurisdictional doctrine provides. Are we not human beings, who weave our own personalities into the material we compose? Do you never feel alarmed when you think of your life of involvement with concepts like unripeness, restraint, and abstention? Do you never crack a smile at your own behavior as you devise a framework of reason designed to demonstrate that the Supreme Court of the United States is confused? Do you never armchair-psychoanalyze the writers whose work you read? I invite confession *1017 and personal narrative: how did you come to entertain and embrace the ideas to which you are now wedded?

Write “essays” instead of “articles.” This is not mere label-switching. Calling what you write an essay can bring you into touch with its character as a personal expression, its immediacy, and can make you more aware of its literary quality. An essay is something readable and provocative, not a turgid authoritative disquisition intended to prove what a learned, unassailable authority figure you turned out to be. If you are a pompous windbag, if you write bad prose, be embarrassed. If you find yourself reading the bad prose of a pompous windbag, have the self-respect to throw it aside. Feel some sense of responsibility to the ongoing dialogue about Federal Courts. It can be invigorating and we all can participate. I heartily forgive anyone who writes a turgid authoritative disquisition

¹⁰⁵ Id.

¹⁰⁶ Ann Althouse, *Standing, in Fluffy Slippers*, 77 V.A.L.REV. 1177 (1991).

in order to get tenure (but don't expect me to read it). But to those of you who have won academic freedom: exercise it. *1018

APPENDIX

As indicated in the text of my Essay, I use my own materials, consisting of edited text of the cases cited below, accompanied by my original text, notes, and questions.

CHAPTER I: CLAIMING FEDERAL RIGHTS IN A SYSTEM OF FEDERALISM

- A. The Model of Federal Court Primacy--Asserting Federal Rights in Federal Court: *Monroe v. Pape*, 365 U.S. 167 (1961).
- B. Refusing to Defer to the State Court: *Dombrowski v. Pfister*, 380 U.S. 479 (1965).
- C. The Competing Model of State Court Primacy--Abstention and Deference to the Adequate State Court: *Younger v. Harris*, 401 U.S. 37 (1971).
- D. Eschewing State-Based Deference--A Preference for Federal Courts or a Preference for Judge-made Jurisdiction Doctrine?: *Mitchum v. Foster*, 407 U.S. 225 (1972).
- E. Deference to State Courts/Deference to State Legislation: *Moore v. Sims*, 442 U.S. 415 (1979).
- F. Avoiding Unnecessary Questions of Constitutional Law/Avoiding "Needless Friction" with State Policies: Railroad Commission of *Texas v. Pullman*, 312 U.S. 496 (1941).
- G. Deciding Questions of Constitutional Law and Avoiding Abstention: *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).
- H. Standing and Federalism-based Equitable Restraint: *Los Angeles v. Lyons*, 461 U.S. 95 (1983).
- I. Habeas Corpus and Deference to the Adequate State Court: *Stone v. Powell*, 428 U.S. 465 (1976).
- J. Do Federal Rights Require Federal Courts?: *Allen v. McCurry*, 449 U.S. 90 (1980).
- K. Section 1983, Habeas Corpus, and the Question of Federal or State Court Primacy: *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

CHAPTER 2: CLAIMING FEDERAL RIGHTS IN A SYSTEM OF SEPARATION OF POWERS

- A. The Role of the Judiciary "to say what the Law is": *Marbury v. Madison*, 5 U.S. 137 (1804).
- B. Ripeness--An Early Take on the Right of Privacy: *Poe v. Ullman*, 367 U.S. 497 (1961).
- C. Standing, Reapportionment, and the Warren Court: *Baker v. Carr*, 369 U.S. 186 (1962).
- D. Standing, School Desegregation, and the Burger Court: *Allen v. Wright*, 468 U.S. 737 (1984).
- E. Mootness--An Early Take on Affirmative Action: *DeFunis v. Odegaard*, 416 U.S. 312 (1974).
- F. Recent Debate on Mootness: *Honig v. Doe*, 484 U.S. 305 (1988).
- G. Standing in the United States Supreme Court: *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989).
- H. The Power of Congress to Affect Standing: *Lujan v. Friends of Wildlife*, 112 S.Ct. 2130 (1991).

CHAPTER 3: JURISDICTION IN CASES "ARISING UNDER" FEDERAL LAW

- A. The Supreme Court and the State Courts: *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).
- B. Congressional Control of Federal Court Jurisdiction:
 - Ex Parte McCardle*, 74 U.S. 506 (1868).
 - United States v. Klein*, 80 U.S. 128 (1871).
 - Sheldon v. Sill*, 49 U.S. 441 (1851).
 - Webster v. Doe*, 486 U.S. 592 (1988).
- C. Should Congress Expand the Federal Judiciary?
- D. The Constitutional Meaning of "Arising Under" Jurisdiction:
 - Osborn v. Bank of United States*, 22 U.S. 738 (1825).
 - Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

E. The Statutory Meaning of "Arising Under" Jurisdiction: *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986).

F. The Role of the State Courts:

Howlett v. Rose, 110 S.Ct. 2430 (1990).

In the Matter of Sherman M. Booth, Supreme Court of the State of Wisconsin, June Term 1854.

Ableman v. Booth, 62 U.S. 506 (1858).

CHAPTER 4: THE CONUNDRUM OF THE ELEVENTH AMENDMENT

A. Background: *Chisholm v. Georgia*, 2 U.S. 419 (1794).

B. Theories of Interpretation: *Hans v. Louisiana*, 134 U.S. 1 (1890).

C. The History of a Legal Fiction:

Ex Parte Young, 209 U.S. 123 (1908).

Edelman v. Jordan, 415 U.S. 651 (1974).

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984).

D. The Power of Congress to Abrogate State Immunity: *Pennsylvania v. Union Gas*, 490 U.S. 1 (1989).

E. The Effect on State Courts: *Will v. Michigan*, 491 U.S. 58 (1989).

CHAPTER 5: STRUCTURING THE CONTEXT FOR "SAYING WHAT THE LAW IS"

A. Habeas Corpus Review of the Rights-Limiting State Court--Part I: *Fay v. Noia*, 372 U.S. 391 (1963).

B. Supreme Court Review of the Rights-Limiting State Court: *Henry v. Mississippi*, 379 U.S. 443 (1965).

C. Supreme Court Review of the Rights-Expanding State Court: *Michigan v. Long*, 463 U.S. 1032 (1983).

D. Habeas Review of the Rights-Limiting State Court--Part II:

Coleman v. Thompson, 59 U.S.L.W. 4789 (June 24, 1991).

Teague v. Lane, 489 U.S. 288 (1989).

Butler v. McKellar, 494 U.S. 407 (1990).