Nature of the Fed’l Judicial Function:

Marbury v. Madison
Retroactivity v. Non-retroactivity
- Retroactivity: Fidelity to precedent, finality, political capital. Some discretion for extraordinary circumstances. Non-retroactivity facilitates implementation of sweeping constitutional reforms.
- Purely Prospective = advisory opinion.

A). No Advisory Opinions (Letter from Jefferson)
- Partially Constitutional (Art III case/controv, Sep of Pwrs (use Cabinet); sep of pwrs.)
- Partially Discretionary (Better decision-making if concrete facts and adversary parties.)

B). Constitutional avoidance
- Ashwanter: Brandeis Concurring: Ct will exercise restraint w/r/t constitutional considerations in certain circumstances
  - 3 Situations, restraint Constitutionally required (Modern Justiceability):
    - Adversariness, Ripeness, Injury.
  - Other times, restraint Prudential: Breadth of Decision (no broader than necessary), Last resort (resolve on non-constit Q if possible); Constitutional Avoidance (rule of construction: construe statutes to be constitutional unless plainly contrary to legislative intent)

C). No Revision:
- Executive Revision:
  - Can’t revise judicial decisions (separation of pwrs) and can’t assign nonjudicial functions to Art III cts. But judges can consider the matters as commissioners. (Hayburn’s case).
- Congressional Revision:
  - Congress can change law at any point prior to final decision and Ct must AP that law (even on appeal) but Cong can’t proscribe rules of decision in specific cases. Must change the substantive law prospectively (Seattle Audobon - affecting all future litigants) rather than telling Ct how to interpret existing legal standards (Klein – pres pardons).
- Revision on Appeal: In accepting appeal from non-Art III ct, SC must consider whether its decision wd be subject to revision.
  - (Ex: Waterman: Can’t review President’s decision to accept/deny agency order b/c this is a matter of presidential discretion. Reviewing agency order which merely has effect of recommendation to president wd be to issue an advisory opinion.)

D). Adverse Parties Required by Art III (case/controv)
- Applications/Petitions by private parties – US is always potential adverse party.
- Feigned/Collusive (Friendly) Suits Not Justiceable.
Justiceability

A). Standing: Purpose is to ensure Concrete Adversariness of the Parties (Art III Case/Controv)

- Constitutional Requirements: (Art III Case/Controv)
  - Concrete Personal Injury to Self
  - Traceable to the alleged wrongdoing
  - Redressable by relief requested.

- Prudential Requirements:
  - Cannot Assert Third Party Rights
  - Cannot Bring Generalized Grievances More Appropriate for Legislature.

Injury:

- **Abstract Right to have Govt act in accordance w/ the law is not sufficient (too
generalized – take up w/ legislature).**
  - Ct likely will not force Govt to enforce laws/prosecute crimes - Interfere w/
    Prosecutorial Discretion (raises Separation of Powers Issues).

- Must have personal/Concrete Injury to Self.
  - (Env Cases: Must show injury to yourself/your org; injury to environment not
    sufficient; Recreational Interest may be sufficiently implicated if make concrete
    averments that you use the land).
  - (Voter Standing: Can’t complain about gerrymandering in a diff district – is
    generalized grievance for legislature).

- **Deprivation of right to compete is sufficient injury.**

- **Sufficient injury if indiv must choose b/t (a) abiding by statute and suffering
  irremediable economic loss and (b) violating statute and facing sanctions. (Coates – bar
  owner and m 18-21).**

- **Loss in State Court might create sufficient injury** for standing in federal court on
  Appeal. If it doesn’t, then the State Ct decision is not given res judicata effect in
  subsequent fed’l litigation.

- **Congress can create judicially cognizable categories of injury** up to Art III limits by
  creating statutory rights, the violation of which results in injury.
  - Akins – Right to Info – without the statute wd be a generalized grievance.

- **But** maybe can’t disregard the Art III requirement of injury altogether.
  - Plurality in Lujan – Endangered Species Citizen Suit Provision.
  - Byrd – Congress can’t give legislators standing to challenge Constitutionality of
    the Line Item Veto b/c they suffer no personal loss. (Legislators have standing
    only when they are deprived of a personal entitlement – such as a job or money).

Redressability:

- **Must not depend on the actions of 3rd parties** – Too Speculative.
  - Allen v. Wright – Trying to get IRS to enforce denial of tax exemptions;
    speculative whether the desired injunction wd redress the injury by aiding deseg
    in pub schools. Denial of tax exemptions → private schools changing policy in
    response → Parents putting their children in pub schools in response).
(Linda S: Relief requested is prosecution of ex-husband; entirely speculative whether this wd result in his payment of child support).

**Taxpayers:**
- *Frothingham* – Taxpayer’s Interest in treasury is not sufficient injury (is minimal).
- *Flast* – Taxpayer’s challenge to statute on grounds that Congress used taxing and spending pwrs to work a violation of the Establishment Clause have cognizable injury b/c
  Established a Nexus b/t
  - Status (Taxpayers) → Challenged Statute (their taxes fund the statute)
  - Status (Taxpayers) → Alleged Constit’l Deprivation (Establishment Clause established to prevent Cong from being able to use taxing/spending clause to support the establishment of religion).
- Might be very narrow. Indiv’s must allege improper use of taxing and spending clause (i.e. financial injury) and Ct wdn’t extend to CC.

Is Some Give: *Duke Pwr*: Stevens Concurring said fudged on justiceability b/c of the important issue at hand.

**Third Party Standing:** Whether P permitted to raise rights of third parties.
- Discretionary. Consider whether (a) Special Relationship; (b) Third Party Unlikely to Bring Suit; (c) Enforcement proceeding (faces criminal/other sanctions); (d) First Amendment Cases:
  - *Yazoo*: Usually will only consider constitutionality As-Applied to P. (R: Severability, Narrowing Construction, No Concrete Facts).
  - *Coates*: Is exception in First Amendment Cases: If the statute is, on its face, overbroad or vague, then allow indiv before us to assert rights of third parties. (Don’t need facts if statute unconstitutional on its face).

**B). Mootness:** Suit brought too late; no longer any real controversy.
- Exceptions:
  - (a) *Voluntary Cessation of Illegal Conduct*
  - (b) *Capable of Repetition yet Evading Review* (as to this P – unless class action).
  - (c) *Collateral Consequences to Criminal Prosecution*
- *(Defunis v. Odegaard:* Unless there’s Standing at all points of the litigation, must dismiss. If Ct’s decision is unable to resolve the dispute, there is no Case/Controversy and is no Art III judicial pwr (wd just be advisory opinion.).)
- *May be situations where possibility that activity will resume is insufficient to establish standing but sufficient to overcome mootness.* (R: Sunk Costs; Less Abstract a Dispute). *(Friends of the Earth v. Laidlaw:* Mootness not same as Standing; is discretionary and must consider practical implications.)

Mootness is itself fed’l Q. If state says moot, SC can still review mootness inquiry. *(Jafco).*

**Mootness in Class Actions: Gereghty**
- If mooted on appeal from denial of class certification, P can continue to rep class on cert issue, but if wins, cannot rep on merits issue. (R: Difficult to find P who can rep through process w/out being mooted – practical considerations)
- If mooted after class cert, just find diff named P (class is now own entity).
C). Ripeness: Case brought too early; no controversy yet. (Ultimate Q of justiciability is whether there’s sufficient injury to warrant judicial intervention.)

Pre-Enforcement Review:
- *Mitchell*: Ps haven’t yet violated Hatch Act and there is no imminent threat of enforcement. Too general a complaint (just dislike policy).

- *Abbot Labs*: (pharmaceuticals)
  - (1) **Fitness** for judicial review (sufficiently concrete/adverse);
  - (2) **Hardship** to parties of withholding review:
    - *(a) Advance Action Required* (requires immediate changes in Ps conduct) and
    - *(b) Irremediable Adverse Consequences* (serious penalties/sanctions) flow from requiring later challenge.
      *• (So takings claims usually less likely to be justiceable than 1st Am claims – can’t unchill speech but can give back prop).*

- (Also consider: (3) Purely Legal Q or Need Facts of Enforcement (i.e. As-Applied)?; (4) Record of Enforcement?; (5) How Certain is the Injury to Arise in the Future?; (6) Do the parties really have a stake?; (7) Economic v. Non-Economic Injury?)

- Lots of discretion (b/c of the hardship factor) – Ct will try to protect its polit capital.

- Cts **reluctant to grant injunctions** against state police, cts, judges, etc:
  - Difficult to enforce; Involve Extensive Judicial Audit.
  - Principal of equity that injunction not be granted unless no adequate remedy at law. If no immediate threat of injury and is remedy at law, no injunction.
    - *(Littleton - Claim disc enforcement of law against blacks is discouraging participation in boycott).*

- *Lyons*: P has **standing for damages, but not ripe for injunction** (b/c is generalized grievance – relying on fact it cd happen to anyone rather than showing it’ll happen to him; also speculative harm - can’t prove he’ll be subject to chokehold again in future).

D). Political Q Doctrine: Is a limited Form of Judicial Abstention; The ct backs out as a third branch and leaves it to the other two (democratic) branches (rely on media etc). Don’t want to intrude on the functions of the other branches. Diff Coalitions.

- (1) **Textually Demonstrable Constitutional Commitment** of the Issue to a Coordinate Political Branch (*Nixon* – senate has ‘sole’ pwr to try impeachments).

- (2) **Lack of Judicially Discoverable and Manageable Standards** (apportionment pre *Baker v. Carr*).

Prudential Considerations:
- (3) Impossibility of deciding w/out an **initial policy determination** of the Kind Clearly for Non-judicial Decision (e.g. Guarantee Clause – Luther v. Borden).

- (4) Wd Express a **Lack of Respect** Due to Coordinate Branches of Government

- (5) Need for Unquestioning Adherence to Political Decisions already Made – **Finality**

- (6) Potentiality for Embarrassment from multifarious Pronouncements by Various Depts on a single Q.

- *Nixon*: Impeachment is only check on judiciary. Its completely w/in the discretion of the judiciary.
Souter’s Concurrance: *Senator’s action might be so far beyond scope of its constit’l au, ct can intervene despite prudential considerations.*
   - *Baker v. Carr* – Not polit Q where redistricting is on basis of race (in violation of eq protection clause) – Congress clearly has gone too far.

- *Goldwater v. Carter:* (Whether Pres can terminate treaty w/out Congr Approval) – Sensitive area of foreign affairs; dispute b/t coequal branches of govt. (Brennan says don’t decide whether pres can do it but decide antecedent Q of whether particular branch has been constit’ly designated the repository of polit decision-making pwr).

**Polit Q Doctrine is Means of Saving Political Capital:**
- Ct distinguishes b/t remedies (Kent State): Polit Q to grant injunction against milit; but not to award damages. Maybe b/c of Political Capital.
- Some argue *Bush v. Gore* demonstrates that the ct’s fearlessness w/r/t polit capital in modern era (no longer prudent b/c no fear of extensive jurisd stripping).
  - But Posner’s view: Whatever Congress did wd have been viewed as raw politics.
- Reverse Polit Q Doctrine: Political considerations will sometimes counsel the Ct to abstain but sometimes to intervene.

**Congressional Control of the Distribution of Judicial Pwr**

**A). Congressional Regulation of Federal Jurisdiction:**
- Sources:
  - Art III §1: Pwr to create inferior cts. In light of Madisonian compromise, has been understood to give Cong pwr to vest inferior fed’l cts will less than max fed’l judicial pwr.
  - Art III §2: Pwr to “make exceptions” to SC’s Appellate Jurisdiction.
- Some suggest Congress’s ability to remove fed’l jurisd (strip jurisd) is necessary to make judicial work in a democracy legitimate.
- The Parity Debate: Fed’l Cts thought to be (a) More prestigious so more tech competent; (b) More insulated from politics (b/c lifetime tenure); (c) Long tradition of fed’l rights.

(1) Congressional Pwr to Limit Lwr Ct jurisd:
- *Sheldon v. Sill:* Cong creates inf fed’l cts and in doing so can limit their jurisd below Art III limits; just can’t grant pwrs not enumerated theren.
  - Indicates are no internal restraints in Art III limiting Congress’s Ability to get rid of all inferior cts.
- But J. Story’s Manditory thry of Art III (Dictum in Martin v. Hunter’s Lessee): Says the federal judicial pwr shall vest in SC and inferior cts.
  - (But has never been the state of the law – Congress has never vested the full judicial pwr in diversity for example; no FQ jurisd in First Judiciary Act).
  - One reading limits this thry to those cases in which the word “all” is used.

(2) Congressional Pwr to Limit SC’s Appellate Jurisd:
- *Ex Parte McCordle* (Cong took away SC App jurisd while Appeal pending b/c feared wd strike down Reconstruction Acts): Congress clearly has pwr to make exceptions to SC’s App Jurisd. *The Ct cannot inquire into Congress’s motives.*
• Indicates Cong can strip jurisd b/c doesn’t like ct’s decisions (so cts mindful).

But **limits** to Congress’s ability to remove SC App Jurisd altogether:

- [Internal Restraint]: At some point, *broad exceptions are inconsistent w/ the exceptions clause*: no longer an exception but rather destruction of SC’s App jurisd under §2.
- [External Restraint: ] Prof Hart: *Essential Role* of SC in Constit Plan to maintain uniformity/supremacy of fed’l law.)
- [External Restraint]: If Cong took away all SC App Jurisd, wd be *viol of DP* b/c wd be no opp for review from lwr fed’l cts.

**Klein** (Presidential Pardons): * Invocation of the language of jurisd is not a talisman* and not every Congressional attempt to influence the outcome of a case can be justified as the exercise of a pwr over jurisd. Ct scrutinized Congress’s real motive – revision of Ct’s decision – b/c here is impinging on executive order.

(3) Congress’s Pwr to Remove both Fed’l and State Jurisd (w/out placing it in some Alt Tribunal):

- **1. Limited by DP Clause (External Restraint).** Battaglia v. GM Corp (Portal-To-Portal Act) (2nd Cir). While Congress has pwr to w/hold jurisd, it must not exercise that pwr in a way that deprive person of life, liberty, or property w/out DP.
  - Drobak:
    - Supremacy Cl justifies taking away jurisd over fed’l statutes from State Cts.
    - Art III, §1 Justifies taking away fed’l jurisd of inferior cts.
    - Art III, §2 justifies taking away appellate jurisd over the SC.
    - BUT when put together, violates DP clause. Through the Act, Congress **took away/destroyed prop rights**.
  - Denial of all remedies (i.e. refusing to allow claims to be heard in any ct) over constitutional claims is likely *impermissible* violation of DP. But Congress nevertheless can tinker w/ remedies. (Tax Cases; As long as there is a remedy at some point is no DP violation).

- **2. May be limited by Structural Principles.** Fallon v. Meltzer: Is both individual and structural element to the Constitutional Tradition. While principle that individuals shd be able to access remedies for constitutional violation is strong, it is not unyielding (e.g. polit Q doctrine; state immunity doctrines). But thestructuralprincipaldemands a sys of const’l remedies adequate to keep govt generally w/in the bounds of law and is more unyielding. *(Judicial Review Essential Tool for Keeping other Branches from Exceeding their Constit’l Authority)*.

- **3. May also be limited by Suspension Clause.** St. Cyr: Essentially imposes a super clear magic words statement before a congressional enactment will be read to repeal HC. Indicate that Susp Cl prob wd arise if constit read to remove all HC jurisd from fed’l cts.

(4) Pwr of Congress to Confr Jurisdiction on Non-Article III Cts: Whether pwr Art III says may be given to Fed’l Cts may be given to other agencies.

- **3 Historically Recognized Categories** for which Congress can give jurisd over matters to which the fed’l judicial pwr might extend, to non Art III cts: Territorial Cts (D.C. Cir), Milit Cts, and Public Rights (complaints against the government, customs, taxes, etc).

- **Art III Limits:**
  - Crowell v. Benson (tort claim adjudicated in Employee’s Compensation Comm’n): Even Private Rights may be adjudicated in non-Art III cts if they are acting as *adjuncts* to Art III cts.
The “essential attributes” of the fed’l judicial pwr are retained in Art III reviewing ct.

The agency decision must be reviewable, but doesn’t have to be reviewable de novo (here can set aside only if “not in accordance w/ the law.”) (Says ‘jurisdictional facts’ must be reviewable de novo, but today are treated like any other facts).

(Involved an Agency Ct. Agency Cts are distinguishable from Legislative cts in that (a) their orders are not self-executing, (b) they may be guided by policy considerations, and (c) Agency cts have traditionally been justified under Art III b/c they act as adjuncts such that the “essential elements” of the judicial pwr remain in Art III Cts.)

- **Northern Pipeline:** (only case to strike down legisl ct; Bankrupt ct and K claim)
  - The only 3 categories of cases for which Art III does not bar the creation of legislative cts (fed’l cts w/out Art III protections) are the traditional categ’s. (They presented some extraordinary need.).
  - But **Private Rights Disputes are inherently disputes for Art III cts** (no sp need) and must be adjudicated in Art III cts.
    - When Congress creates private rights, it has great discretion in provide for adjudication of those rights in legislative cts. But those cts must be adjuncts to Art III cts and cannot overstep them. (Here not adjunct: was given plenary pwr).

- **Thomas v. Union Carbide:** (EPA arbitration): While the precise dispute was private (liability of one indiv to another), had many of the characteristics of a public rights dispute b/c it arose under a complex regulatory regime.

- **Schor** (Mixed lawsuit: Reparations, a Pub Right Iss, w/ Breach of K CC):
  - Art III §1 has 2 purposes: (1) Safeguard litigants’ rights to have claims decided by indep judges (which can be waived) and (2) A more structural principal to safeguard the role of the independent judiciary (cannot be waived).
  - Non-Art III ct can litigate private disputes if: (1) the parties consent and (2) Structural Principal not impeded upon too much (Balance Extent of the harm to the essential attributes of Art III cts against the Congress’s concerns in assigning these functions to non Art-III cts; in balancing consider whether historical dispute or new dispute.)
    - Here, permissible: only small number of cases Art III cts cd hear may be heard in the legisl ct (not many K CCs); everything is reviewable de novo by Art III ct; Imp Cong’r Concern: avoid piecemeal litig, efficiency, expertise, immunity from polit pressure, jurisd over CCs limited to that necess to make reparations procedure workable).

- **7th Am Limits**
  - **Granfinanciera:** 7th Am rights to jury trial for CL cases is guaranteed for cases qualified as private right cases, even where properly adjudicated in agency cts. (i.e. even where acting as adjunct).
    - No jury trial right for public rights case (*Atlas*).
    - (Practically, legisl cts may provide the jury trial if (a) designated to do so by D.C. and (b) has consent of the parties).
• **DP limits: Agency Cts and Criminal Cases:**
  o Congress can require an indiv first seek an Agency determination on a matter before he can appeal to a fed’l ct.
  o That agency determination can be made binding in an enforcement action brought later.
  o If the indiv didn’t take advantage of the process, he can be precluded from raising the claim as a defense to a later criminal prosecution in fed’l ct.
    ▪ *(Yakus:* Forfeited his right, shd have raised unconstitutionality in agency first; the crim enforcement ct can now enforce the act but can’t rule on its validity).
  o But in order to be binding in a later enforcement action, the agency determination must have included sufficient DP, including some meaningful judicial review.
    ▪ *(Mendoza-Lopez:* The deportation proceedings didn’t allow him meaningful review at time of deportation; so allow him to do it now).
  o But it is permissible for such review to be largely deferential to the agency determination.
    ▪ *(Estep:* Agency determination is final even though it may be erroneous unless there’s no basis in fact for its finding).

• **SUMMARY:** So to determine whether legislative ct can adjudicate private rights, consider:
  o Permissible Under Art III? - (1) Traditional Category?; (2) Adjunct to Art III ct?; (3) Like Public Right?; (4) Schor Balancing?
  o Permissible Under 7th Am? – 7th Am guarantee jury trial?
  o Permissible under DP Cl/other constit’l provisions?

(4) **Military Tribunals:** Whether Congress can have indiv tried by milit trib depends on (a) whether US Citizen or Alien and (b) whether on US or Foreign Soil.

  • *Ex Parte Milligan:* US citizen on US soil can’t be tried by milit tribunals where the civilian cts are open and functioning; this is b/c Jury trial right and 4th/5th/6th Am protections guaranteed to all US Citizens.
  • *Ex Parte Quiran:* Citizenship does not preclude jurisd of milit tribunal of D is unlawful combatant.
  • *Eisenbrager:* The pres is exclusively responsible for trying aliens in foreign territories (b/c this constitutes diplomatic and foreign affairs). Moreover, enemy aliens detained on foreign soil and not brought to US have no constit rights and there’s no recourse to Art III whatsoever.
  • *Hamdi:* Am citizen in guantanamo bay cannot be held indefinitely and have right to DP. But milit tribunal may suffice to give process.
  • *Hamden:* Alien in guantanamo bay. Ct brings Congress back in. Pres can do this (suspend HC) but only w/ Congressional authorization. Congress did not give him blank check.

(5) **Congress’s pwr to assign non-art III duties to Art III cts:**

  • *Tidewater:* Congress can confir jurisd on Art III cts to hear cases outside of Art III, but it must be judicial “business.” Congress can give jurisd to hear suits b/t citizens of D.C. and citizens of other states though D.C. is not a state. Dissent says Art III presents clear/abs boundaries.
Federal Authority and State Cts’ Jurisdiction: Dual Sovereignty but Supremacy Cl

Dual Sovereignty:
- *Tafflin v. Levitt*: Ours is a sys of dual sovereignty. There is a presumption of concurrant jurisd b/t states and fed’l cts unless Congress affirmatively provides for exclusive fed’l jurisd by:
  - (a) explicit statutory directive (merely granting jurisd to fed’l cts not enough);
  - (b) unmistakable implication from legisl history; or
  - (c) clear incompatibility b/t state ct jurisd and fed’l interests (for example the desirability of uniform fed’l interpretation).

Can’t interfere w/ Fed’l Ct Proceedings (Supremacy Clause):
- **States cannot grant writs of Mandamus** (*Silliman*) or **HC petitions** (*Tarble’s Case*) to compel fed’l official action but can entertain damages actions against fed’l officials.
  - HC and Mandamus actions alter fed’l off’ls actions immediately (in *Tarble’s* case, wd have caused irreparable harm before state ct errors cd be corrected and made it impossible to run the natl army).
  - Damages actions also alter fed’l officials’ actions, but occurs much more in the future. So as to damages, SC review is adequate to prevent irreparable harm from state ct errors.
- But fed’l judges can enjoin state proceedings – Supremacy Clause.

Discrimination:
- **States cannot discriminate against Fed’l Laws** (Supremacy Clause) by dismissing/refusing to enforce a right arising under them just b/c state ct disagrees w/ the fed’l policy or already has state law addressing the matter; needs valid excuse. (*Testa v. Katt*: RI refuses to enforce fed’l treble damages penalty statute; was discrimination b/c enforced their own).
  - But if the state wd always dismiss for a certain reason, is not discrimination for it to refuse to enforce the fed’l law.
  - Maybe valid excuse is where dismissal is based on procedure, not the merits.
- Supremacy Clause **means state cts have to enforce fed’l law but not state agents.** (*Printz v. US*: Congress can’t direct state law enf to run background checks).
  - So, Though Congress can apparently commandeer state courts, it cannot commandeer state officials.

Choice of Law for enforcement of fed’l rights in state cts: The Ct has tremendous pwr under *Reverse Eerie Doctrine* to affect state cts, so it must restrain itself.
- **Categorical Apprch: Dice v. Youngstown** (FELA action; fed’l and state law differs as to validity of release and jury trial right):
  - State cts **must apply fed’l substantive law** when adjudicating fed’l issues.
  - Moreover, a state cannot apply its own procedural rules to fed’l law if the state law is burdensome on the fed’l right. (*Right to jury* trial is substantial part of right afforded by the statute and cannot be deemed a ‘mere rule of procedure.’)
- **Outcome Determinative Apprch: Felder v. Casey**: State ct cannot dismiss §1983 claim for failing to comply w/ state notice of claim statute.
Imposes unnecessary burdens upon right of recovery authorized by fed’l law. The state cannot demand compliance w/ outcome determinative rules which are inapplicable when the fed’l claim is brought in fed’l ct.

- *Brown v. W. RR*: Can’t AP detailed pleading req when fed’l ct req’s only notice pleading (is like imposing higher burden of proof); *Jinx*: States must toll their SOLs b/c necessary to fed’l policy under suppl jurisd statute; *Gillins*: Congress can create rules of evi for state cts for fed’l purpose.

(Congress’s pwr to mandate that states follow certain procedural rules may not be unlimited. Dual Sovereignty means Congress must not unnecessarily impede on state sovereignty beyond level necessary to protect fed’l rights/ensure prop enf of fed’l statutes.)

**SC and the States:**

- (SC review of state ct decisions is now completely discretionary – grant of cert).

**A) SC Review of State Ct Decisions:**

- *Martin v. Hunter’s Lessee* (Va refused to recognize SC’s reversal on appeal as binding it): SC has Appellate Jurisdiction to review fed’l law issues and antecedent state law issues (which are necessary to decision of the fed’l law issue) decided in state ct.
  - R: Art III §2 says SC’s App jurisdt extends to “all cases” arising under (makes no distinction b/t those decided in state ct and those decided in fed’l ct).
  - Usually SC, after deciding appeal, will remand to state ct w/ order to issue decision “not inconsistent w/ this judgment.” But where the State Ct refuses to obey, it can either (a) enter judgment itself (as it did here) or (b) issue writ of mandamus (an order) to the state ct and, if it fails to comply, hold the state ct in contempt of ct.

- *Murdock v. City of Memphis*: SC Can’t review from state cts state law issues that are distinct/independent of fed’l law issues (i.e. unnecessary to resolution of fed’l issue).

- *Fox Film Corp v Muller*: If there’s an independent and adequate state law ground supporting the judgment, then there’s no fed’l jurisd over the case (even over the fed’l issues involved) because the Ct’s decision on the fed’l law issue cd not affect the outcome.
  - Do not even evaluate whether the state ct’s decision on the state law issue was right or wrong. So long as it was not w/out fair support, let it stand.
  - (But if the St Ct dec on the state issue had no fair support, can review it: *Ward v. Love County*: Oklahoma SC’s conclusion that the taxes were paid voluntarily by the Choctaw was w/out fair/substantial support).

- *Michigan v. Long*: When state ct’s opinion appears to rest on fed’l law issue and fails to indicate the existence of an adequate and independent state law basis for the judgment, the SC will assume that the ct decided on the fed’l law issue and assume appellate jurisd.
  - *Boilerplate*: If a state chooses to merely rely on state law precedent, it need only make a “plain statement” that the fed’l cases are being used only for guidance and do not compel the judgment reached.
• When deciding antecedent state law Q, SC will accord deference to the conclusion reached by the State SC but will itself make the ultimate decision
  o (Indiana Ex Rel Brand: Ks Clause issue; SC decided whether there was a K).
  o (Bush v. Gore: Art II, §2 says the appointments of electors must be in a manner the legislature elects. FL SC so misinterpreted the state statute that it actually changed state law and violated DP. So, SC cd intervene on the state law issue which was antecedent to DP issue.

**Remedies for Constitutional Violations:**

A) Whether Private Cause of Action Arises Under Fed’l Statute:
  • Borak implied cause of action. But Sandoval said whether private cause of action depended solely upon congressional intent. (Must be clear on face of statute).

B) Whether Private Cause of Action Arises Under Constitution:
  **Implied Cause of Action:**
  • Ward v. Love County (Ok coerced Choctaw into paying taxes): For every constitutional violation, there must be a remedy; no statute is necessary. If remedy were not now granted, wd be DP viol.
    o (B/c Ps cd not get injunction beforehand, damages must now be available after the fact – otherwise wd be DP violation.)
  • While a state may choose b/t pre-deprivation and post-deprivation remedies, it must provide one or another to satisfy DP (Reich v. Collins). (So don’t need to provide both injunction and damages)

C) Right to Anticipatory Relief.
  • Ex Parte Young: An individual has a constitutional right to anticipatory relief (via declaratory or injunctive action) before having to choose between (a) forgoing conduct thought to be constitutionally protected and (b) engaging in that conduct and suffering the statutory penalties if the claim of constitutional protection is found to lack merit.
    o (The penalties for violation of the allegedly confiscatory RR rate regulation was so enormous that the Ps wd be too intimidated to test the validity of the legislation.)
    o So, SC has pwr to enjoin unconstitutional State Action.

D). Bivens Action. §1983 grants remedy against constitutional violations only against state and local officers; Bivens affords a way to award damages against fed’l officers too.
  • Bivens (4th Am violation): Violation of Constitutional rights by fed’l agents acting under color of law gives rise to tort cause of action for damages directly under the Constitution.
    o The Ct doesn’t make clear the source of this right.
      ▪ Suggests that general jurisdiction (§1331) provides Ct pwr to fashion remedies so as to afford relief. J Harlan Concurring says §1331 gives right to grant equitable relief for all areas of SMJ, so it also empowers fed’l cts to grant traditional remedy at law (damages).
    o 2 Limits:
      ▪ (1) Special Factors Counseling hesitation for implication of damage remedy under the constitution. (Used in Chappel v. Wallace to justify not implying this remedy in the context of the military; they must seek statutory remedy).
- **(2) Creation of an equally effective remedy in the view of Congress.**
  (Allows Congress to enact statutes eliminating Bivens rights).
  (*Schweiker v. Chilicky*: SSA adequate remedy though provided for less damages than available at CL).
- 6 Constitutional torts recognized, but cts have been cutting back: (*Malesko*: Ct suggests that Bivins was relic of heady days where cts were willing to imply remedies to fed’l statutes; much less willing to do that today. Moreover, Bivins is appropriate where there is a P looking for a remedy; here P had state tort law remedies and Bureau of Prisons remedies.) (*Sandoval*: Shdn’t legislate from the bench.)

**E) Suits Challenging State Official Action**
- Abs Immunity: prosecutorial and legisl functions enjoy abs imm from damages (i.e. judges acting as judges). Qualified Immunity: long as the conduct does not violate well established constitutional rights of which reasonable person shd have known, immunity attaches and shields the indiv from damages liability.
- **11th Amendment** and State Sovereign Immunity:
  - 11th Am adopted in response to Ct’s conclusion in *Chisolm v. Ga* that, under Art III, a state ct be sued by citizen of another state/foreign country.
  - *Hans v. Louisianana* (suit by own citizen under FQ jurisd): Nonliteral reading of 11th Am makes clear that doctrine of sovereign immunity means an unconsenting state cannot be made a D in suit brought by an individual. But, state can give up immunity and be sued by its own consent.  
    - *Cohens v. Va*: A writ of error, which is entirely defensive and seeks no affirmative relief, isn’t a “suit” w/in the meaning of the 11th Am.  
  - **The Party of the Record Rule**: 11th Am inapplicable in suits where the state is not a party of record (i.e. can get around 11th Am by suing indiv state officers).
    - BUT, *In Re Ayers*: Ps suing to get enforcement of K w/ State, but the indiv off’ls are not party to the K. So in suing the individuals they’re really suing the state. 11th Am immunity APs.
  - *Ex Parte Young*: Where officials seek to engage in/enforce an unconstitutional act, they are stripped of their official character and sued as individuals. (They’re not acting under state au when they act unconstitutionally).
    - (Shd be read narrowly – Is like equity case: such harm to the RR EEs under this law, ct must step in and use its pwr to grant injunction. But wdn’t be case if it cd merely be remedied by damages – then must go to state cts).
    - (Is risk that the law will turn out to not be unconstitutional; then the off’l wasn’t stripped of official au and 11th Am AP’d and the suit is unconstit).
    - (But b/c is not abs imm, must be some ct – state or fed – that can tell pple whether the state has violated the statute).
  - Remedies:
    - Is no problem w/ a prospective injunction (even if it costs the State money in the future).
    - W/ damages, if the damages come from the indiv state official’s pocket, then no 11th Am problem (even if state indemnifies: that constitutes a waiver).
    - But can’t sue the state for money out of the treasury even if you sue in name.)
Congress reacts to Ex Parte Young’s Injunction of State Offic’l – starts taking away Fed’l Cts’ pwrs to enjoin State entities.

C) Federal Statutory Protection Against State Official Action: §1983

- §1983: Where any ‘person’ acts under color of state law subjects V to deprivation of any Constitutional rights, V entitled to bring suit in law/equity (entitled to damages or injunction). P also automatically gets attorney’s fees he wins; Ds don’t automatically get att fees if it wins.
- Qualified Immunity shields off’l who was just following orders if reasonably didn’t believe was violating consit rights.
- Monroe v. Pape: Fed’l remedies available though state remedies might exist. §1983 APs against those who carry a badge of au of State whether they act in accordance w/ their au or misuse it. (respondeat/superior).
  - Dissent: Frankfurter: Point of §1983 is to deal w/ systematic probs/customs of the state (i.e. cases where state is responsible for the abuse); not to punish for rogue cop. (is expansion of §1983 from post-civil war era).
  - (Remedies: Soverign immunity APs to the state; Allows action for injunction and restitution. But can’t sue for damages against state.)
- Monell: Municipalities may be sued under §1983, but respondeat superior does not apply to them (b/c not ‘person’); so must show the municipality is responsible for the conduct.
  - (R for differential treatment of Municipal liability and State liability under §1983: Desire not to make govt treasury automatically liable.
  - States can take adv of immunity and then just reimburse indiv officer (if acting in scope of au) or refuse to reimburse (if acting as rogue cop). But municipalities don’t have benefit of immunity.)
  - Pembaur v. City of Cincinnati: Liability can arise not only from law but also from orders and acts of certain high level off’ls who rep the au of the municipality and whose actions “may fairly be said to rep off’l policy.”
  - Bd of City Comm’nrs v Brown: If inadequate training of municipality which leads off’ls to act improperly not sufficient to impose liability unless constituted deliberate indifference by town (need at least gross negl, not just ordin negl).
- Whether §1983 can create cause of action for violation of fed’l law (rather than consttit):
  - But now is recognized that Congress can expressly or impliedly preclude §1983 COAs through provision of another remedy by statute. (Ask whether Congress, in providing the other remedy, intended to preclude §1983 remedy).

Judicial Federalism

Anti-I Act (§2283):

- Coordination of Concurrent Jurisd: Kline v. Burke Construction:
  - In general, state cts and fed’l cts can hear an action over the same subject matter. When action gets judgment in one court first, that judgment is given res judicata effect in the second court. (Q whether claim preclusion applies is resolved by the ct in which suit is still pending).
But is exception for actions in rem: there the ct that first gets the res is entitled to proceed w/out interference (b/c the All Writs Act §1651 authorizes fed’l cts to issue injunctions necessary for the exercise of its juris). Fed’l ct can enjoin the state proceeding if it gets the res first.

B). Statutory Limitations on Fed’l Ct Jurisd:

1. Anti-Injunction Act (§2283): Fed’l cts cannot grant injunctions to stay st ct proceedings unless (a) injunction expressly authorized by act of congress, (b) injunction is necessary in aid of D.C.’s jurisd, or (c) injunction is necessary to protect/effectuate D.C.’s judgments.
- Even where exception permits fed’l ct injunction, it doesn’t require it (is discretionary).
- Can’t get around Anti-I act by enjoining the parties rather than the state court. But it bars only injunctions against state judicial proceedings, not administrative/legislative proceedings (Bacon).
- Atlantic Coastline: Can’t use fed’l cts as state appellate cts; must appeal erroneous state decision up through state sys. No injunction.
  - (RR cdn’t get inj in fed’l ct so got one in st ct; then SC concluded in diff case that cdn’t enjoin picketing of union activity; state ct wd not dissolve the injunction, so instead of appealing, sought to enjoin st ct’s inj in fed’l ct). After RR failed to get the inj in fed’l ct on fed’l law grounds and then went to state ct on state law gounds, union shd have argued claim preclusion (RR can’t split thries since fed’l ct cd have heard its state law claims under supplemental jurisd) and, if lost, appealed up through state sys.
  - Says 2nd ct gets to decide whether claim preclusion APs – presumably even if 100 2nd cts as in case of class action litigation (Relitigation exception to Anti-I Act may AP in which case the fed’l ct might use its discretion to enjoin).
  - J Easterbrook in Hickey v. Duffy (7th Cir) suggests §1983 falls under the expressly authorized exception only where the state litigation is itself the violation of the constitution (Cong was concerned st ct proceedings wd be used to work deprivation of blacks’ consti rights).
  - Vendo: Clayton Act doesn’t fall under “expressly authorized” exception b/c, unlike §1983, purpose wasn’t concerned w/ possibility that state ct proceedings wd be used to violate the Sherman/Clayton Acts. (But if was pattern of lawsuits, wd trigger Sherman Act injunction and act as express exception).
- (b) Relitigation Exception: Chick Kam Choo: In order for relitigation exception to apply, the issue being relitigated in state ct must have actually been decided by fed’l ct. Here fed’l and state forum non conveniens law differed; so, no relitigation on that issue.
  - (Essentially issue preclusion; but instead of leaving the decision as to preclusive effect to the state ct, the exceptions allows fed’l ct to enjoin at its discretion – Will likely have to establish more than that the issue has already been litigated b/t the parties: vexatious, highly inconvenient, need for speedy relief, etc.).
  - Parsons Steel: If wait too long and state ct decides the res judicata issue, you just have 2 valid judgments. No claim preclusion, and no litigation exception (no
role for fed’l ct – must just appeal up state sys). (Shd have sought fed’l injunction to effectuate claim preclusive effect right away).

- **(c) In aid of/Protecting its Jurisdiction Exception: Removal** is easiest (if after removal state ct proceedings continue, can enjoin). Probably can’t use just b/c there’s exclusive fed’l injunction if there’s no pending fed’l ct proceeding (*Richman Bros*).

2. Judge-Made Limitations on Federal Ct Jurisdiction:

A). Exhaustion of State Non-judicial (Administrative) Remedies:

- **Prentis**: But, when protesting state comm’n, must exhaust state administrative remedies provided for by state statute (appeal to state SC) before asking fed’l ct for injunction.
  - But if the rate is affirmed by the State SC Ps can appeal to fed’l ct; **no res judicata effect** b/c the state decision is legislative, not “judicial.” (Rate-making is making rules for future).
  - (But if the state functions judicially, is res judicata effect; can’t then go to fed’l sys; can only appeal state ct dec to the SC)
  - (Purpose of exhaustion req: avoid premature interrupt of agency procedures, take adv of agency expertise, give agency chance to correct its errors, promote efficiency)

- **But no need to exhaust state remedies before going to fed’l ct when the state ct’s role is adjudicative** (injury to P has already occurred) rather than administrative/legislative. *Bacon*.

- **Moreover, no need to exhaust state administrative remedies before resorting to fed’l cts w/ §1983 actions** (b/c §1983 was rooted in distrust of state officials; such distrust applies to state administrative agencies as well as other officials). *Patsy v. Board of Regents*.

B). Pullman Abstention:

- **Pullman** (Tx RR Comm’n essentially req’d that Pullman RR have white Porters): Fed’l cts shd not enter into sensitive areas of social policy unless no alternative is open. Cd avoid the sensitive constitutional Q by deciding on the state law issue (this wd avoid needless friction w/ state policies). Ct has au to decide the antecedent state law Q but the state law issue is difficult. So **stay** the fed’l ct judgment and allow state ct to decide the state law issue (must get to SC before fed’l ct will take off table).
  - Criticisms: *Cohens v. Va*: It is as much a treason to constist to refuse to take jurisd that was given as to take jurisd not given; results in great time delays (must get to state SC) but certification has helped.
  - Support: Principals of federalism suggest we shd allow state cts to develop state law; Judicial restraint is why cts are so well respected; Not giving up jurisd. (Rs: **equitable discretion; federalism and comity; constitutional avoidance cannon** - Constitutional avoidance cannon doesn’t come into play w/ fed’l statutes b/c no fed’l constit at play).

- **Arizonians for Off’l English**: Not complicated state law iss but ct abstains b/c state hasn’t gotten to say anything on the issue yet. States shd get the first crack at sensitive/controversial issues.

- **Harrison County**: when the state law issue is so wrapped up w/ state policy scheme, fed’l ct shdn’t decide it.
Pullman Abstention is applicable in §1983 cases as well (despite fact §1983 rooted in distrust of state off’ls; is prolly b/c §1983 exception wd swallow the rule; moreover b/c fed’l ct doesn’t dismiss, can retake the issue if state misbehaves).

Quackenbush: Fed’l cts have the pwr to dismiss or remand cases based on abstention principals only where the relief being sought is equitable/discretionary. Abstention principals might support a fed’l ct’s decision to postpone adjudication of damages actions (which are not discretionary), but dismissal/remand not appropriate.

England: Where fed’l case stayed and the parties go to state ct, the party is bound by the state ct determination of the fed’l issue only if he chose to have it decide both claims. He may forestall any conclusion he has not elected to return to D.C. by telling the state ct that he is saving the fed’l issue for fed’l determination. If uses magic words “reserve right to…” then no claim preclusion on fed’l issue when return to fed’l ct.

(If there’s no st law claim pending w/ another P, shd the fed’l ct abstain, making this P bring a state law claim to resolve the difficult st law iss?) – Undecided.

(Abstention applicable in both diversity and fed’l Q cases: Shd abstain more in fed’l Q cases (allows avoidance); Shd abstain less in diversity cases (diversity granted b/c of fear of state discrim against out of stater.).)

(Burford and Thibodaux Abstention Go to whether abstention is ever justified in absence of possibility of constitutional avoidance.)

(i) Burford Abstention: Abstention to avoid disruption of coordinated policy-making by state agencies and state cts. Dismiss (don’t just stay as under Pullman).

- Burford: (Administrative Decision; oil drilling) Given the complexities of oil and gas regulation, fed’l misinterpretations of state law are almost certain and such fed’l errors are dangerous to the success of state policies. B/c state has such strong interest, abstain and allow state ct to review Administrative Agency Decision.
  - (Col River teaches us you need more than just complex litigation: need area where there is difficult state law and mistakes by fed’l ct makes difficult for states to pursue state policy)
  - Southern Ry: Burford Abstention applied though state law issue was clear. Abstained b/c of strong state interest – seems to be special coop b/t comm’n and state cts.
  - Burford hasn’t been invoked since S. Ry.

(ii) Thibodoux Abstention (Diversity Case; no Fed’l Q): Broader than Burford b/c omits Burford req of coordinated policy-making b/t state agencies and state cts.

- Abstention when adjudication of the state law issue wd require “sensitive and uncertain decisions of policy” better made by a state judiciary.” (Isn’t just an eminent domain case).
  - (Maybe both doctrines just indicate that when state law issues are sufficiently difficult, sufficiently important, and sufficiently bound up w/ other state laws or administration, the fed’l ct shd sometimes abstain).

C). Equitable Restraint: (Ct restrains self from granting injunctions)

Younger v. Harris (P brings §1983 claim to enjoin pending state criminal proceeding): Federal courts will not intervene to enjoin pending criminal proceedings.

- R: (1) Equitable Principles: Don’t provide equitable relief unless there’s no adequate remedy at law and failure to grant injunction wd result in great and irreparable imminent injury. Here, P can raise his claim that the statute is
unconstitutional under the First Amendment as a defense in the state ct criminal proceeding and there’s no indication of bad faith. (Wd be diff if was bad faith prosecution or series of bad faith prosecutions brought to chill speech). Moreover, crim prosec is pending so not big deal to have him raise there. (2) “Our Federalism”/principles of comity.

- Younger Abstention, unlike normal Pullman abstention, involves dismissal of the case (so both the fed’l and state claims must be decided in state court) rather than merely a stay.
  - Drombowski: Younger does not bar injunction of pending state criminal proceedings where State is harassing P through a series of bad faith prosecutions. Then is no adequate remedy at law.
  - Samuels v. Mackell: Normally, declaratory judgments are just as intrusive to pending prosecutions as are injunctions (so Younger still applies in suits seeking declaratory judgment against pending state crim prosecution).
  - Steffel v Thompson: But when no criminal prosecution is pending, declaratory judgment may be available though injunctive relief (which requires a showing of irreparable injury) wd not be proper. (But P wd still have to surmount standing barriers – show genuine threat of enforcement).
    - (1) Declaratory relief is less intrusive than an injunction: though it is persuasive, it is not ultimately coercive (noncompliance is inappropriate but not contempt). (⇒ But it still has preclusive effect).
      - The rest of the justices think purpose of declaratory judgment is to put state on notice of the rights of the D. If state prosecute again, SC will issue injunction (in order to protect/effectuate the declaratory judgment). Then if prosecute again, will hold in contempt. So declaratory J is less intrusive than injunction b/c it is half-way step toward injunction; don’t intrude immediately on the state – do it slowly.
      - (Drobak wd immediately issue injunction against the state ct proceeding in order to effectuate the fed’l judgment (preclusive effect); but fed’l ct might refuse to issue such injunction on grounds that Younger v. Harris teaches us to trust the state cts to abide by the preclusive effect of the declaratory judgment).
    - (2) When no pending state prosecution, P is in difficult position. Since there’s no pending case to resolve the Q, P must either break law and be prosecuted or must refrain from exercising constitutional rights. – This is precisely the context in which Declaratory Judgment Act shd come into play.
    - (3) To require fed’l ct to step aside when there’s no pending state prosecution wd turn Federalism on its head – wd be blind deference to the state.

Has been a slippery slope expansion of Younger:
  - Hicks v. Miranda (Deep Throat): Where state criminal proceedings are begun against fed’l P after fed’l complaint is filed but before proceedings of substance on the merits have taken place in fed’l ct, Younger abstention shd apply.
    - Allows Reverse Removal: After fed’l proceedings are begun, the state can ‘remove’ to state ct by instituting a criminal prosecution.
But can prevent “reverse removal” by creating procedures of substance on the merits in Fed’l ct: Seek a Preliminary Injunction or TRO. (But have to win the TRO/Prelim Inj to prevent reverse removal; Request and denial wasn’t enough in Hicks).

Younger can be applied in Civil Cases that are like Criminal Cases so long as they afford the fed’l Ps meaningful opportunity to raise their fed’l constitutional claims.

(Huffman: State institutes civil proceedings to confiscate obscene movie; Trainor: Civil state proceeding instituted for welfare fraud – now embraces all civil enforcement actions brought by the state.)

Younger can be applied in civil cases that are unlike Criminal Cases (where State is not even a party) but they involve Important State Functions (as long as is meaningful opp to pursue fed’l constitutional claims): Proceedings involving judicial Procedure (necessary to perform their judicial f(x)).

(Judice v. Vail: Suit itself is b/t private parties but the state has strong interest in civil contempt process; so, on Younger grounds, refuses to entertain suit to enjoin state contempt proceedings as unconstit)

(Penzoil v. Texico: State’s bond requirement made state appeal inaccessible, but Ct refused to enjoin. – Even though the state procedures work a deprivation of DP the fed’l ct refuses to intervene).

Agency Procedure that involve an important state issue and is of a judicial nature (enforcement proceeding).

(Middlesex: Lawyer charged w/ bar violation. Ct abstains for a bar determination)

Ohio Civil Rights Comm’n v. Dayton Christian Schools.

- Even if the constitutional claim cd not be raised in the agency action, it suffices that they cd be heard on st ct review (provides sufficiently meaningful opportunity for review of the constitutional claims).

(Patsy says no requirement of exhaustion of state nonjudicial remedies for §1983 claims; but here the agency proceeding is coercive (state says school violated constitutional rights. So while don’t have to exhaust state remedies as a §1983 P, if you are the subject of agency enforcement action, have to appeal up through the administrative system if there are important state interests that counsel fed’l ct’s utilization of Younger Abstention).

R for AP of Younger Abstention (which requires deference to state cts) to state agencies: the agency decision is appealable to st ct, so the fed’l ct in deferring to the state agency is really deferring to the state ct.

- But if st ct is acting nonjudicially (i.e. administratively), then Younger abstention does not AP (Hawaii Housing Au v. Midkiff).

- NOPSI (city counsel’s denial of utility rate increase): Younger doesn’t apply to judicial review of state legislative or executive action; such a broad rule wd make a mockery of rule that only exceptional circumstances allow abstention.

D). Parallel Proceedings

Colorado River: There are narrow circumstances permitting (not requiring) dismissal of fed’l suit due to presence of a concurrent state proceeding for reasons of wise judicial administration. (Much more limited than Abstention – Rarely Used).

- Must weigh reasons to take jurisd against reasons to not take; Consider: (a) avoidance of piecemeal litigation(inconsistences b/t overlapping litigation); (b)
state ct’s assumption of jurisd over a res; (c) state ct’s greater convenience; (d) order of the suit.
  - In case where it’s, A v. B in st ct; and A v. B in Fed’l Ct, this is fine. Both cases shd go ahead: is 2 pple.
  - Where it’s A v. 1000 Ds in Fed’l ct; A v. 1000 in St ct, more problem here.
    - Isn’t about comity/federalism but judicial administration/efficiency of a judicial scheme involving concurrent/overlapping jurisd.

E) Domestic Relations Exception to Federal Diversity Jurisdiction:
- *Akenbrandt v. Richards* (suit to recover monetary damages for sexual abuse): Majority says there is a narrow “domestic relations” exception to fed’l diversity jurisdiction which divests the fed’l cts of the pwr to issue divorce, alimony, and child custody decrees. (R: Historical understanding of the Diversity statute). **But only applies where P seeks such a decree; doesn’t apply where they allege D committed torts.** So there is diversity.
  - Dissent syas cts have historically abstained from domestic relations cases but it is purely discretionary and there is no such exception to diversity jurisd.

F) The Probate Exception:
- *Markham v. Allen*: Fed’l ct has no jurisd to probate a will or administer an estate. (R: historical understanding of jurisd statutes). But have jurisd to entertain suits by creditors/heirs/other claimants so long as don’t interfere w/ administration. (Claims are satisfied out of the estate; they don’t concern probate administration).

**Res Judicata**

- **Claim Preclusion:** Cannot split claims (theories) or remedies into 2 suits. Get one bite at the apple.
  - A claim is every right coming out of one grouping of facts (same transaction/group of transactions).
  - Is no non-mutual claim preclusion: must be same parties or in privity.
- **Issue Preclusion (Collateral Estoppel):** Narrower: the Issue must actually have been litigated and must have been essential to the judgment. (So, if you litigate in state ct/criminal proceeding and keep your fed’l claims in your pocket, not barred).
  - Is non-mutual issue preclusion: Losing party in S1 may be barred from relitigating the issue w/ any other person in a subsequent proceeding. (But winning D can’t assert it against new D).
- **Effect of Fed’l Js on subsequent State Proceedings:** The Ct in S2 determines claim preclusive effect of S1, but they apply the claim preclusion law of the state in which S1 sits (so long as the fed’l ct in S1 is sitting in diversity). (On other hand, if the fed’l ct in S1 sits in fed’l Q, then fed’l CL preclusion laws govern that decision’s claim preclusive effect).
  - *Semtek*: Fed’l ct in Ca dismissed ‘on the merits’ b/c sol ran; is 2nd suit brought in Md precluded by fed’l ct’s dismissal? **Md looks to the claim preclusion law of Ca to determine whether to give the fed’l Ct’s diversity judgment claim preclusive effect.** (B/c of Full Faith and Credit Clause).
- **(A) Issue Preclusion:**
  - If change in law, no Issue Preclusion.
Issue Preclusion in Govt Litigation: Ct allows nonmutual issue preclusion so long as there’s full and fair litigation in S1.

- BUT nonmutual issue preclusion is not applicable against the govt. Claim preclusion and mutual issue preclusion still applies against the govt. *Mendoza.*