SOVEREIGN IMMUNITY WILL NOT BE TESTED

Nature of the Federal Judicial Function: Cases and Controversies

*Marbury v. Madison*
- Enunciates political question doctrine for the first time (but this isn’t one)
  - Presidential appointments may be political, but when other duties are imposed on those officers by legislature, he’s an officer of the law (so M can sue the Sec of State for mandamus)
- Statute seems to give SC appellate jurisdiction over mandamus (so case should have been dismissed for want of jurisdiction); instead, interpreted as giving SC original jurisdiction
- Congress cannot expand court’s original jurisdiction. Would undermine Const.
  - Original & appellate grants are exclusive.
- Court can’t enforce act repugnant to constitution; it’s void
  - Emphatically the duty & province of judiciary to say what law is.

Two models of constitutional adjudication:
- Dispute resolution / private rights
- Public rights

*Cohens v. VA:* “no more right to decline an exercise of jurisdiction that is given, than to usurp that which is not given.”

3 types of applications of SC rules:
- Retroactive: applies to all pending cases
- Non-retroactive: insofar as not applied to all pending cases @ time of decision
  - Some criminal-law decisions of the Warren Court: non-retroactivity should depend on “the purpose of the newly-propounded rule, the reliance placed on prior decisions, & effect of retroactive application on administration of justice”
  - Habeas corpus & *Teague v. Lane*
  - Little, if any, non-retroactive adjudication in civil cases. *Chevron Oil Co v. Huson*
- Purely prospective: not even applied to cases in which rules are formulated
  - Seldom treated as a live alternative

Prohibition on advisory opinions:
- Questions posed to SC about war in Europe btw France & GBR
- Prohibition doesn’t really seem to rest in history.
- *Steel Co v. Citizens for a Better Environment:* Scalia believes that “hypothetical jurisdiction” cases (proceed to merits first, rather than resolving jurisdictional Qs @ threshold) is advisory op
- Declaratory judgments: establish legal rights & relations of interested party in actual case / controversy
  - Federal DJA upheld as constitutional
  - Dispute must be “definite & concrete,” not “hypothetical or abstract.” Must be “adjudication of present right on established facts.”
  - But, *Calderon v. Ashmus* (seeking DJA for habeas filing limitations period): no Art. III case b/c DJA, to be justiciable, “must seek a ruling capable of resolving the entire, underlying case, rather than ask a court ‘merely’ to ‘determine a collateral legal issue governing certain aspects of pending or future suits.’”
- Of course, Art. III prohibition on ad op doesn’t extend to state courts.

Constitutional Avoidance—is power of judicial review so sensitive, ultimate, & countermajoritarian that it should be a last resort?
- *Ashwander v. TVA*, Brandeis concurrence: lists avoidance rules developed by Ct
  - Will not pass on constitutionality of legislation in friendly, nonadversary proceeding
  - Will not anticipate Q of constitutional law in advance of need of deciding it
  - Will not pass upon validity of statute upon complaint by one who’s not injured by it
    - These 3 have been subsumed by justiciability doctrines
  - Next four are prudential concerns:
    - Will not “formulate rule of constitutional law broader than required by precise facts to which it’s applied”
    - Will not pass on const Q, even though properly presented, if there’re also other grounds on which to dispose of case
    - Not pass on constitutionality @ insistance of one who avails self of statute’s benefits
    - “When the validity of an act of Congress is drawn into question, and even if a serious doubt of constitutionality is raised, ... this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”
      - This is the avoidance canon. Rule of statutory construction.
      - Supported by 1) empirical assumption that Congress wouldn’t want to push into forbidden or doubtful territory (but wouldn’t they, sometimes?); 2) resistance norm: erects barrier to legislation that gets too close to edge
      - But: 1) can create ridiculous penumbra from already overinterpreted const; 2) allows judges to interpret statutes w/o having to defend their reasoning.

**Issues of Parties, Requirement of Finality, and Prohibition Against Feigned & Collusive Suits**

**Hayburn’ Case** (1792)—act called upon courts to determine eligibility for veterans’ pensions
- Problem of AG acting *ex officio*: motion was not allowed (by SC). Why? B/c he had no personal stake? SC never pronounced judgment on motion for mandamus
- Rptr’s FN: Judicial independence requires that Article III cts not be subject to requisition by Cong or Pres to act as subordinates in those 2 branches in performance of those branches’s characteristic functions
  - Judges might have considered functions “nonjudicial” b/c lack of 2 adverse parties
  - But, *Tutun v. US*: rulings on naturalization petitions satisfy case / controversy req. Conducted through regular judicial proceeding; US always a potential adverse party
  - Intra-branch disputes , or intergov’t disputes, not necessarily a barrier to justiciability
- *Plaut v. Spendthrift Farm*. *Hayburn’s Case* stands for principle that Congress cannot vest review of decisions of Article III courts in officials of Executive branch.
  - This implicates extradition proceedings & judicial removal orders.
- Claims against US are justiciable, even though Congress has to approve the allocation of $$ for recovery.

**US v. Klein** (discussed below): questioned power of Congress to “prescribe rules of decision ... in cases pending before [courts].”
- How broadly can this be taken? Courts are obligated to apply law as @ time of decision, including new statutes enacted after judgment below.
- In *Robertson v. Seattle Audubon*, Ct. construed a statute to amend substantive law, not *instruct a court in how to apply pre-existing law*. Is this the key difference? The Ct. didn’t reach *Klein*, so unsure.
- *Plaut*: Congress can’t order courts to reopen final judgments in private lawsuits. Ct. did not question Congress’s power to establish retroactive liability, so long as this didn’t attack a final judgment (such as dismissal b/c time-barred)
Schiavo: special law instructed federal courts to consider case de novo. Might it have violated Klein by changing preclusion rules for the state judgments below? We’ll never know US v. Johnson (1943)—no collusive suits, which are not “adversary.” Suit was conducted under dominion of 1 party.

This doesn’t prevent litigation of test cases (violating law just once & only for bringing a case)

Validity of VRA sustained against this (among other) challenges in SC v. Katzenbach. J. Black alone perceived the problem: where’s the case or controversy that arises out of gov’t wanting to know, in advance, what a state may constitutionally adopt?

Moore: no case or controversy where both litigants desired that anti-busing statute is unconst

How does this square w/ consent decrees; uncontested naturalization?

SOG confession of errors are generally accepted, but Ct. sometimes says it does so on “independent examination of the record.”

Standing

Judicial limitations on exercise on federal jurisdiction:

General prohibition against raising a 3rd party’s rights

Bar to adjudicating generalized grievances more appropriately addressed in representative branches

Requirement that P fall w/in the zone of interests that the law protects.

Core of standing:

P must allege personal injury

Allen v. Wright (IRS granting tax-exempt status to racially-discriminatory private schools):

- Asserted right to have gov’t act in accord w/ law is not sufficient, by itself, to confer jurisdiction.
- Can’t gain standing based on stigmatizing influence of racism unless you’re personally denied equal treatment.
- But, diminished ability to receive education in racially-integrated schools will satisfy 1st prong. standing.

Frothingham v. Mellon: no taxpayer standing. Also, Doremus v. Board of Ed. (better case)

- Different from Flast in that P was trying to enforce structural right, not her own personal const. right.
- Affirmed in DaimlerChrysler Corp v. Cuno. no standing to challenge tax under dormant Commerce Clause—injuries are conjectural & shared

- Keeps Establishment Clause separate.

Flast v. Cohen: taxpayer standing OK in Establishment Clause cases b/c EC limits gov’t spending power; reserving Q of whether this applies to other clauses.

- Taxpayer must establish 1) logical link btw status (taxpayer) & type of legislative enactment, and 2) nexus btw status & precise nature of constitutional infringement.

Valley Forge Christian College v. Americans United for the Separation of Church and State: cut back on Flast: limited to Est. Clause & Spending Clause issues; also, cannot base standing on shared right for gov’t to not Establish.
Sierra Club v. Morton: no standing to challenge development of ski resort in national park: club didn’t state that members use the park or that members/club would be affected in any way.

US v. Richardson: no standing to litigate whether CIA violates Accounting Clause by not providing public list of expenditures.

Heckler v. Mathews: standing to challenge social security system that paid out more to women: he was OK b/c he challenged the right to receive benefits w/o sex discrimination, not a right to specific amount of benefits.

Lujan v. NWF: environmentalists lacked standing to challenge mining increase on public lands; only one member claimed to use land, & that was an unspecified part of huge tract.

Friends of the Earth v. Laidlaw Environmental Services: Ps did have standing b/c of reasonable concern that pollution had damaged lands they’d have otherwise used.

McConnell v. FEC: injury must be “actual or imminent”; the “I’d like to buy air time in the next election cycle” is too remote.

Elk Grove v. Newdow: father lacks prudential standing b/c of uncertain law & his interests are potentially adverse to his daughter (Stevens)

Fairly traceable to D’s conduct

Allen v. Wright: causation too attenuated to say that ending tax-exempt status for racist private schools would fix the problem
  - Don’t know how many discriminatory private schools; if schools would change policies w/o tax exempt status, if parents would take kids out of private schools for this
  - Brennan & Stevens: that’s nonsense

Linda RS v. Richard D: Linda’s failure to get child support was not fairly traceable to gov’t’s policy of only bringing non-support prosecutions vs. fathers of legitimate children; idea that payment would result from prosecution is “at best, speculative”

Simon v. Eastern KY Welfare Rights: no standing for indigents challenging IRS’s elimination of requirement that hospitals provide care for indigents to get favorable tax treatment.

Being deprived of the chance to compete for a benefit counts for standing.


Redressable

- Allen v. Wright: separation of powers underlies standing; complaints about the way that the government does its business are not properly directed at judicial forum
  - Stevens: is the court saying there’s no standing? That it will require a more direct causal nexus? That it will not treat as cognizable injuries stemming from administrative decision on allocation of resources?
  - As to the 3rd: the contention is that IRS violates a specific part of const., that’s a legal question.

State not bound by federal standing requirements

- But, if feds wouldn’t have had standing in the first place, once a state final judgment was entered, SC can get standing based on that final judgment. ASARCO Inc. v. Kadish
- Gray area if the state court proceeding doesn’t alter legal rights. *Nike v. Kasky*

  - “Order of operations” disagreement: Scalia, & maybe the court, think that Article III standing requirements must be resolved before merits question (avoids “hypothetical jurisdiction”): *Steel Co v. Citizens for a Better Environment*
    - May not apply to statutory standing.
  - Can’t ride piggyback on someone else’s claim to get standing. *Diamond v. Charles*
  - Statutory standing: *FEC v. Akins*—suing to get AIPAC declared as a PAC & to have to disclose information
    - Voter standing is like taxpayer standing: your vote doesn’t decide election, & one person’s taxes is a pittance of total:
      - Difference here (why standing here but none in *Richardson*) must be that the statute grants standing to a party “aggrieved.” Majority interprets that to mean “a losing party in the underlying agency action.”
    - Majority: Congress has created injury under the statute; so no “logical nexus” per *Flast* is required
      - Injury in fact: can’t get information
      - “Generalized grievance” is only a concern where the harm is not only widely shared, but also abstract / indefinite
        - So there can be an “injury in fact” when the injury is widely shared
    - Scalia: “aggrieved” must mean more than “rejected complainant”; must mean something more particularized
      - Generalized grievances are of concern even when they’re not abstract.
      - Otherwise, creation of an individual right to sue transfers authority from Executive to the courts.
    - *Trafficante v. Metropolitan Life Ins. Co.*: through statute, black & white tenant could sue landlord for discriminating against non-white rental applicants. Lost benefit of living in an integrated community, stigma (shame) of community, etc.
      - Would have lacked standing, otherwise
    - *Havens Realty Corp. v. Coleman*: black “tester” (pretends to be renter / purchaser) has standing to sue under Fair Housing Act
    - *Lujan v. Defenders of Wildlife* (Scalia):
      - Groups failed to present evidence of injury in fact—no specific plans to visit the countries & see the animals again (not imminent)
      - Also failed to demonstrate redressability; agencies spending were not parties to the decision.
      - Citizen-suit provision was unconstitutional as applied to parties:
        - To permit this type of citizen suit would be to transfer from President to citizen the duty to “Take Care that the laws are faithfully executed.”
        - Can create injury, but can’t abandon the requirement of injury-in-fact
      - Kennedy concurrence: Congress must at least ID the injury it seeks to vindicate & relate the injury to the class of people who can bring suit.
    - *Friends of the Earth v. Laidlaw Environmental Services*: civil penalties sought by Ps carried a deterrent effect that made it likely, vs. speculative, that penalties would redress injury by abating gov’t action.
Qui Tam actions: relator (person bringing suit) has standing to bring qui tam action (seeking civil payment & damages vs. any person who procured payment on false claim against gov’t—$$ goes to treasury with relator getting a cut).

Summary:
- Injury required by Article III may exist solely through statutes that create rights, the invasion of which creates standing
- Congress’s power is solely that of elevating concrete, de facto injuries to legal significance
- Right to information is a well-settled example of this.

Hypo: Schiavo case: Drobak thinks it’s pretty easy that there, Congress could create standing.

Separation of powers: Scalia cares about this a lot (“Take Care” clause)
- Municipal corporations generally lack standing to challenge state legislation as violative of federal constitution b/c they’re creatures of the state. Exception: supremacy clause.
- Voter standing: voter has standing b/c of 1) interest in participating in elections, 2) interest in being able to aggregate vote to influence outcomes, 3) interest in achieving gov’t responsive to one’s values
  - To challenge racial gerrymander, must assert that your own voting rights are affected; people living outside district can’t challenge
- Congressman standing: can challenge failure to seat (right to the seat if you’re elected) or for enactment of a law if you voted for it. But, Raines v. Byrd, no standing to challenge Line Item Veto Act by Congressmen; no showing of personal injury (loss of political power doesn’t cut it)
- Officials: have standing if they claim they have to choose between enforcing a law that’s unconstitutional and being punished for not acting. Board of Ed. v. Allen
- Organizational standing: Sierra Club v. Morton. Orgs have standing to sue on behalf of members when:
  - Members have standing in own right
  - Interests the org seeks to protect are germane to members interests
  - Neither the claim asserted nor the relief requested requires that members participate in the suit.

3rd party standing:
- Grants 3rd party the right to raise arguments that the 1st party would be able to raise, had he been a party.
  - Court treats this area as prudential.
- Requirements
  - Some sort of relationship between 1st and 3rd party
  - Some sort of impediment to 1st party (3rd party)’s assertion of own rights through litigation.
  - Kowalski v. Tesmer: attorneys challenging Michigan’s representation statute were not able to raise rights of indigents—there was no relationship, and indigents had succeeded in Michigan’s appellate court (so no impediment)
- Court doesn’t usually distinguish btw P & D 3rd party standing.
- Craig v. Boren—“saloon keeper” had standing to assert EP rights of under-21 males
  - Has sufficient interest in the outcome to litigate
  - Because you have the right to raise the claim as a defense to suit, can raise rights as a Plaintiff
- **Barrows v. Jackson**—could defend against suit for violating racially restrictive covenant by raising that it was unconstitutional (though she was a white woman & not discriminated against)
- **Griswold v. Conn.**—accessory can raise D that the principal offense is not, nor can be, a crime.
  - Why, though? Seems that, except perhaps for *Batson* challenges, the 3rd parties would have standing themselves to bring the suit.
  - **Pearce v. Society of Sisters**—parochial school can assert the rights of parents

  - As applied & facial challenges; problem of separability:
    - Case not fully developed on those facts; doesn’t make sense to invalidate statute based on one bad application.
    - Don’t want to make disputes abstract
    - D has no personal right to escape punishment if statute is valid as to him
    - States can adopt narrowing constructions.
    - **Yazoo v. Miss. Vally RR**—Court usually will not consider constitutionality of the statute as applied to other cases:
      - RR was penalized for not settling after the RR lost the case.
    - Severability: idea that invalid applications of statute can be severed from valid applications w/o invalidating the statute as a whole.
      - Factual question: Court’s inquiry is of legislative intent: would Congress have enacted the valid portions independent of the invalid portions?
      - Presence / absence of severability clause is not dispositive.
    - **Coates v. City of Cincinnati**—ordinance about loitering “annoyingly” is struck down
      - Unconstitutionally vague and broad
      - In this case, didn’t know whether the criminal D’s conduct was constitutionally proscribable or not. Didn’t follow *Coates*
      - In speech cases (which this is not), you’re permitted to facial challenges & not just “as applied (to you)” challenges.
      - Overturns *Yazoo* in 1st Amendment area (this case about assoc.)

**Mootness, Ripeness, Political Question**

- **Mootness:**
  - Jurisdictional question—according to Court’s holdings
    - Rehnquist disagrees and thinks it’s prudential
  - “Standing over time”
    - But, sometimes D’s conduct will be too speculative for standing but not too speculative to overcome mootness
    - Sunk costs may be a concern.
  - **DeFunis v. Odegaard** case is moot when it ceases to be “definite and concrete” and no longer “touches the legal relations of parties having adverse legal interests
    - Exception: voluntary cessation of illegal activity doesn’t make case moot
    - Exception: Question that is “capable of repetition, yet evading review”
      - If a state SC has spoken, that shaves off litigation time in the future and makes this exception less likely
      - State’s agreement that it will let *DeFunis* stay on in school to finish out his time makes the case moot. Tarred reputation not enough to create case.
  - Criminal mootness: if you serve your time, case is moot; tarnished reputation not enough. But if you sue for damages, even $1, case is not moot.
After serving time, case is moot if there are no possibility of collateral consequences imposed b/c of challenged conviction.

But, mootness in attacks on sentences

Death of d moots case.

Iron Arrow v. Heckler: if case is mooted by voluntary action of a non-party, Ds face heavy burden to establish mootness b/c they could resume their conduct

City of Erie v. Pap's AM: even though the porn dealer had gone out of business, city had suffered continuing injury from not being able to enforce public nudity prohibitions. So case not moot

Adult industry did a good job of picking a P.

Capable of repetition: in absence of class action, means possibility of recurrence w/ respect to complaining party.

Roe, for ex: she can get pregnant again

Collateral consequences: may make the case not moot

Procedure

Munsingwear: mooted case ordinarily gets dismissed

Bancorp: but not necessarily, if case was mooted by voluntary settlement (once the SC has granted cert)

ASARCO: if state becomes moot on review from state court judgments, dismiss & leave the state court judgment intact

Mootness is a question of federal law; not bound by state judgment of mootness

Mootness & class actions.

Once a class is certified, the case doesn’t get mooted even if the named P no longer has a good claim. Sosna

Even if class is denied and the P's claim becomes moot, P may still litigated it. Gehrity

P brings 2 claims: 1) merits, 2) that he should represent class

Class cert denial may be reversed above.

This is a justiciability problem. Majority in Gehrity is letting the class cert rule create standing. Dissent is treating mootness (or, standing) as jurisdictional

Ripeness: another timing problem: suing too soon.

United Public Workers v. Mitchell: Hatch act prevented civil servants from campaigning. Union workers wanted to campaign but wanted not to risk their jobs. Court held that their case wasn’t ripe

Never argue that the law was violated; court doesn’t render advisory opinions, even in declaratory judgment context (isn’t that the point?)

Maybe here, the difference is that one of the Ps had violated the law. So court could rule the other Ps’s claims weren’t ripe but let case go fwd

P. 228 n.8: Mitchell is probably wrong, and cases mesh better w/o Mitchell, but it’s still good law

The note discusses a case where the Court entertained anticipatory attacks on the Hatch acts, w/o discussing ripeness. The pleadings were a little more specific, but suggests that Mitchell was wrong.

Adler: cold-war law about being fired as teacher for being member of communist party. Frankfurter alone perceived the ripeness problem; thought Mitchell was right (& that there was more ripeness in Mitchell)
Abbot Labs v. Gardner

- Two-part test for mootness:
  - Fitness of the issues for judicial decision
    - Here, all parties agree the issue of whether the Comm’r properly construed the statute was a legal one
    - Declaratory judgment an appropriate avenue for that
  - Hardship caused by withholding judicial decision
    - Ps either have to comply with the rules or risk heavy sanctions
- Possible distinction between this and Mitchell: here, even compliance with the law costs significant time and money (labeling requirements). In Mitchell it costs nothing.
- Companion case Toilet Goods: the Comm’r may inspect and may refuse certification of some additives—that’s not enough to adjudicate before application of rule

- Lujan: no final agency action to challenge; broad attack on regulations or policies is not “ripe” for review
- Reno v. Cath. Social Services: not ripe b/c regulations do not impose penalty, but limit availability of benefit. If P had applied & been denied benefit, then ok
- Sierra Club v. Morton (standing case). If no standing, is there also not ripeness? Doctrines might overlap.
- Duke Power: standing & ripeness yield to expediency
  - Price-Anderson act limits liability for accidents in nuclear plants—suit about its constitutionality; investor-owned utilities will not build nuke plants unless this is in place.
  - There’s no injury at all; the harm is purely collateral
- Difficult to find pattern of ripeness applications in the criminal context. Sometimes have to show prosecution or probable prosecution, but sometimes not. Sometimes, the fear must be more than “imaginary or wholly speculative.”
  - O’Shea v. Littleton: past unconstitutional conduct is not necessarily evidence of threat of future unconstitutional conduct. Also, importance of pleading w/ specificity for ripeness.
  - Rejects injunction as “ongoing federal audit of state criminal proceedings
  - Here, no challenged statute but rather pattern of past events
- Lyons (chokehold case): no jurisdiction to enjoin the chokehold (damages not before court): speculation that police will apply it unconstitutionally for any traffic stop or petty offense, or that Lyons will be chokeheld again.
  - Court treated this as standing case, but could be viewed as mootness / ripeness.
- Court treats the doctrine as Article III requirement, but it may be discretionary.

- Political question
  - Standards for political question: Baker v. Carr (Tenn. lack of redistricting)
    - Aspects of political question (1st 2 are most important)
      - Textually demonstrable commitment of issue to another branch
      - Lack of judicially discoverable & manageable standards for resolution
- Impossibility of deciding w/o initial policy choice for nonjudicial discretion
- Impossibility of court’s undertaking w/o expressing a lack of respect to coordinate branch
  - Of course, every time a statute is struck down there’s a lack of respect
- Unusual need for unquestioning adherence to prior political decision
- Potential for embarrassment by pronouncements from multiple branches.
  - “One-person, one vote”—pretty easy to get from the facts of Baker
  - Distinguishes Guarantee clause (nonjusticiable) from Equal Protection clause—dissenters thought this was sophistry, like Spending clause vs. Establishment clause in taxpayer standing cases
    - Luther v. Borden, the RI revolution, is the main Guarantee clause case. SC has never found case under that clause to be justiciable
  - Political gerrymanders are nonjusticiable PQs, see Vieth v. Jubelirer, as distinct from race-based gerrymanders (justiciable)
  - Marbury v. Madison: questions should be “political”, & thus unreviewable, if official possessed discretion to act as he did.
  - Nixon v. US—judicial impeachment
    - Senate has sole power to try impeachment. Textually demonstrable commitment to another branch
    - Would be inappropriate for Court to check the Congressional check on the judiciary
    - White: agrees w/ broad deference, but unwilling to remove this from SC oversight entirely. Also, “sole” is about setting up Senate vs. House, not vs. Court.
    - Souter: if the trial wasn’t even arguably fair (flip a coin), SC could review
  - Powell v. McCormack: “each house shall be judge of qualifications of own members” did not present a political question—this was a “textually demonstrable commitment” to judge qualifications that the constitution lays out (age, etc.)
  - IR questions might be nonjusticiable political questions: President’s power to terminate treaties, engaging in Vietnam War, etc. War given to President & Congress.
  - Fact that case has high political stakes doesn’t render it political question. Bush v. Gore. “The doctrine is one of political questions, not political cases.

Review of State Court decisions
  - Martin v. Hunter’s Lessee
    - SC has power to review federal questions arising in state court:
      - Constitution contemplates that questions w/in Art. III jurisdiction will arise in state courts, sometimes
    - Reasons for this holding:
      - More solicitude for federal rights in federal forum
      - Need for uniformity
- Otherwise, Ps could always elect state court & Ds might be deprived of right to a federal forum.
  - In deciding the case, court decided the state issue too
    - Acknowledges that if decision below rested on adequate & independent state law grounds, SC has no appellate jurisdiction—but, says it did not rest on those grounds.

- Ways the SC can enforce its mandate against state courts
  - New review of final judgment—preferable over mandamus
  - Writ of mandamus
  - Entry of judgment (*Martin; NY Times v. Sullivan*)

- Remedies for violation of mandates: mandamus, entry of judgment, contempt

- *Murdock v. City of Memphis*
  - Required that, for Court to have review over state court decisions of federal questions, the question must have been raised & decided against the federal right.
  - Not the case that once a decision gets to the supreme court, *everything* is open to re-examination
  - Must look @ the record to see whether decision on the federal question alone is sufficient to dispose of the case, or to require its reversal.
  - Requirements:
    - Federal question must have been raised & presented to state court
    - Federal question must have been decided by state court, or that its decision was necessary to the judgment / decree rendered
    - Decision must have been against the federal right claimed
    - SC has jurisdiction an must examine judgment so far as to be able to decide whether federal claim was correctly adjudicated.
      - If so: decision affirmed
      - If erroneous: ask whether there’s an independent & adequate state law ground for the judgment (if so, affirm)
      - If federal question is necessary to final judgment, reverse the judgment & either render judgment or remand the case.
  - Meaning of the Judiciary Act didn’t change w/ deletion of sentence authorizing review.
  - Authority to hear state issues comes from the “arising under” clause; supplemental jurisdiction OK b/c in all cases *arising under* (according to Drobak)
  - Our editors & some commentators read *Murdock*, b/c of the last sentence of the 1st (not full) paragraph of p. 487 as holding that supplemental jurisdiction would be unconstitutional
    - Drobak thinks this view doesn’t make much sense and doesn’t jive with the language of Article III.
    - Editors would distinguish district court power to hear supplemental jurisdiction from appellate review over state law issues from state court, but that interpretation is not in the words of Article III.

- Important: antecedent vs. distinct state law grounds.
  - Antecedent: resolution of state law issue is necessary, in some part, to the resolution of the federal issue
  - Distinct: answering the state law question is not necessary antecedent to any question of federal law.
Where the matters are distinct, book’s authors think that SC does not need power to review the state court’s determination

- *Fox Film Corp. v. Muller*: “when the judgment of a state court rests “on two grounds, one of which is federal and the other nonfederal... our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment.”
  - After *Murdock* this was viewed as prudential. Today, jurisdictional
  - So, proper approach is for Court to dismiss for want of jurisdiction. @ Cert stage, proper approach is to deny cert if Ct. lacks jurisdiction (and Ct. then doesn’t say why)
  - State law as antecedent:
    - If:
      - If a state court denies relief to federal rightholder by deciding issue adversely
      - Ground is broad enough to support judgment
      - No basis for questioning / setting aside the state court’s decision on state law issue
    - No grounds to review federal Q; federal review couldn’t change judgment
    - Hard question is on pt.3, as in *Martin v. Hunter’s Lessee*: resolution of federal question may require SC to review stat elaw.
    - But if state court resolves state law issue in favor of federal rightholder, then SC must determine federal issue: reviewability depends on which party prevailed below.

- If a state court reaches judgment based on federal law w/o reaching state-law issue, the judgment is reviewable: SC jurisdiction depends on state’s actual grounds of decision, not possible grounds.

- *Michigan v. Long* (1983)—how to tell when a state law ground is independent and adequate (case was about 4th amendment violation)
  - “When a state court decision fairly appears to rest primarily on federal law, or to be interwoven w/ federal law, and when adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did b/c the federal law required it to do so.”
    - “And” means “or,” see *Ohio v. Johnson*
    - If the state court indicates clearly & expressly that its decision rests on alternate & independent state grounds, that’s fine.
  - Ambiguity—possible alternatives
    - Certify the issue to state court to resolve (or remand or whatever)
    - SC try to resolve ambiguity by itself
    - Presume that decision rested on adequate & independent ground unless proof otherwise
    - The *Long* result.
  - Reviewing judgments when claims of federal right upheld:
    - Promote unity
    - “Unfreeze” state political process—if SC can’t review these claims, would freeze law in that state subject only to US Const. amendment
Also: Stevens’s view that this is improper seems to rest on the idea that the only federal rights in question are individual rights. What about structural rights or state’s rights?

- How important is this, really? Can add a qualifier, like NH SC: “we just rely on SCOTUS precedent for its persuasive effect & are not bound by it”

- Also: state long-arm statutes that make jurisdictional reach the maximum permitted by federal constitution. Now all of those are reviewable, since nested federal element.
  - Parallel state constitutions that are “automatically interpreted as broadly,” too

- Also, would have been pretty far-reaching in the days of mandatory jurisdiction for SC. Now, just increases the buffet of cases from which court can pick.

- **State Tax Comm’n v. Van Cott (1939)**
  - State decision rested upon interpretation of federal tax code
  - SC had since overturned the prior case
  - Vacate & remand back to Utah: not clear how much *Graves* (prior case) drove the outcome.

- **Indiana ex re. Anderson v. Brand (1938)**
  - Contract clause case. In order to determine whether there was a violation of the Contracts Clause, the SC had to review whether there was a contract in the first place. Ordinarily that would be governed by state law. But here, the Court finds that contractual rights existed (& that the clause was violated) in spite of a state court finding of no contractual rights.
    - So there’s some aspect of federal “contractness” that exists & defines the scope of what state may define as contractual rights.

- This is relevant today for questions of “new property” and “liberty” interest
  - New property = employment, social welfare benefits, etc.—instead of contract rights pre-New Deal Court
  - Federal law governs: 1) whether there is a deprivation, and 2) whether due process was afforded (or whether there was an unconstitutional taking, etc., depending on the clause implicated.)
  - More complicated question: which law governs whether a protected interest exists?
  - Property interests are not created by constitution, but created & defined by state law

- **Webb’s Fabulous Pharmacies v. Beckwith**
  - Court found a property interest in connection with a takings clause claim, in spite of state law
    - But no question that FL had misapplied law
    - This suggests that FL’s definition of property was impermissible under takings clause.
  - There have also been cases where state’s definition of an entitlement doesn’t qualify as “property” under the 14th amendment.
  - Similarly, federal constitutional dimension to liberty, regardless of positive law.

**Federal Common Law**
Nature of Federal Judicial Function

Congressional Control over Distribution of Judicial Power Among Federal and State Courts

Congressional Regulation of Federal Jurisdiction

- History of Congressional Power over Jurisdiction:
  - Constitutional clauses
    - Article III, s. 2, cl.3: appellate jurisdiction subject to “such Exceptions as the Congress shall make”
    - Article III, s.1: provides for 1 S.Ct. & such inferior courts as Congres may establish.
      - Includes power to establish lower federal courts w/ less than maximum allowable jurisdiction.
  - Congress has never vested entire judicial power that would be permissible
    - Rule of *Strawbridge v. Curtiss*, requiring complete diversity, restricts diversity jurisdiction more than Constitution (which allows minimal div)
    - First judiciary act didn’t confer fed. q. jurisdiction on courts—not until reconstruction
    - Until 1914, SC only had jurisdiction to review state court decisions of federal questions if the state court had denied a claim of federal right.
    - Congress has limited jurisdiction by 1) exclusive FedJur & 2) removal
  - Debates over constitutionality of jurisdiction-stripping legislation
  - Parity debate (btw state & federal courts)
    - As an empirical concept
      - Posner—Widely believed that federal judges are, on average, of higher quality.
        - Does this mean they’re more likely to reach the correct ruling?
        - Could also frame question as “are state courts as likely to uphold a claim of federal right?”
      - Neuborne: federal courts are more likely to uphold fed rights:
        - Fed judgeships more prestigious & better paid
        - Life tenure & insulation from political pressures
        - Fed judges part of tradition of upholding federal rights
    - As a constitutional concept—do some cases require decision by federal courts?
      - Congress doesn’t have to create lower federal courts, so no
      - Judicial power “shall be vested” in fed cts, so yes

- *Sheldon v. Sill* (1850)
  - Lower courts can have less than maximum allowable jurisdiction, and they have whatever jurisdiction is conferred upon them by statute
    - Statutes granting jurisdiction are read as impliedly excluding whatever’s not stated
  - Here, there was diversity, but statute treated an assignee as from the same state as the assignor, so under that rule there wouldn’t be diversity & no suit. And that was constitutional.

- *Ex parte McCordle* (1869)
Affirmative description of federal courts’ jurisdiction in statute has been understood to imply a negative of types of jurisdiction not in statute.

Congress repealed appellate jurisdiction of SC in habeas cases out of fear that court would strike down Reconstruction (as it hinted in Ex parte Milligan).

Congress can do this: it stripped jurisdiction to hear this case, which it can do under the Exceptions clause.

- This isn’t Congress changing a rule of decision in mid-case.
- Also, this doesn’t repeal all habeas corpus jurisdiction. SC still had jurisdiction over HC cases not cast as “appeals,” see Ex parte Yerger.
- Court’s language doesn’t seem to admit exceptions: powerful statement of what Congress can do. But would it have come out differently if ALL HC jurisdiction was repealed?

- For instance, in abortion / school prayer / Gitmo cases, Congress was trying to shut the door completely to these claims.

- 6 distinctions in Congress’s power to limit jurisdiction:
  - Power to limit jurisdiction of lower federal courts, when matters that are w/in original jurisdiction of state & appellate of SCOTUS
  - Power to limit power to limit SCOTUS appellate jurisdiction of cases still w/in lower federal court jurisdiction
  - Power of Congress to withdraw matters from jurisdiction of all fed.cts. (state courts keep jurisdiction)
  - Power of Congress to withdraw jurisdiction from state AND Art.III fed. cts. w/o putting jurisdiction in an alternative tribunal
  - Power to apportion jurisdiction among federal courts & divvy up responsibility for deciding issues presented by a single case
  - Power to invest responsibility in non-Art.III courts and take those matters away from fed & state courts (see 4 above)

**Congressional Power to Exclude Cases from Lower Federal Courts**

- Justice Story’s position in Martin v. Hunter’s Lessee: mandatory federal jurisdiction
  - Language of Art. III mandates jurisdiction: SC must be established
  - Congress must create lower federal courts to vest jurisdiction that, under the Constitution, is both vested exclusively in the US and of which the SC can’t take original jurisdiction
    - If state can’t grant HC, and SC can’t hear it originally (Marbury), some lower federal court must be able to
  - For the Art. III clauses where “all” was used (to “all” cases & controversies), there’s mandatory jurisdiction; but not where “all” wasn’t used (to controversies)

- Internal vs. external restraints:
  - Article III might not limit ability to strip jurisdiction. But might another part of the constitution? Example: Equal Protection might prevent stripping jurisdiction over cases w/ black Ps

- Norris-LaGuardia Act
  - Narrowly restricted the authority of federal courts to enjoin strikes in labor disputes or enforce contracts that condition employment on not joining a union
  - In Lauf v. E.G. Shinner & Co., SC cryptically rejected suggestion that this restriction violated the Constitution. “No doubt” of Congress’s power to limit inferior court jurisdiction. (This was 1938, post-Roberts revolution)
- SC says Congress can do this under Art. III
- But, in earlier part of the century, SC had held that state legislative attempts
to do similar things were unconstitutional
  - Substantive DP right to impose this condition on employment
  - Depriving remedy, when others who suffered similar invasion of
    common law property rights violated EP

- Hart’s Dialogue & other scholars suggest that to be constitutionally valid, “exceptions”
cannot negate the SC’s essential role in the constitutional plan. I agree with “Q”—that
  seems pretty indeterminate to me.

**Congressional Power over SC Appellate Jurisdiction**
- *United States v. Klein*—the one case invalidating a statute that limited SC jurisdiction
  - More Reconstruction legislation: pardon evidence of disloyalty (was previously
evidence of loyalty); directed SC to dismiss pending claims based on pardon for want
  of jurisdiction.
  - Invocation of language of “jurisdiction” not a talisman
  - Questions power of Congress to prescribe rules of decision in pending cases—but
    book says this can’t be taken at face value, see p. 99 (prior in outline)
  - Interferes w/ presidential pardon power
  - Jurisdiction-stripping legislation is unconstitutional if enacted as a means to an
    unconstitutional end. Doesn’t fit w/in Exceptions Clause power
    - Unclear how far this goes
- AEDPA—*Felker v. Turpin*—SC avoided constitutional questions about Congress’s power to
  limit its appellate jurisdiction

**Congressional Power to Withdraw All Federal Jurisdiction**
- Limits have traditionally been accepted for diversity; SC has never addressed such limits w/
  respect to federal question jurisdiction
- Sager: Constitution requires original or appellate federal jurisdiction of constitutional claims.
  Large constitutional interest in adjudication by a judge w/ Art.III safeguards.
- Amar: “two tier” theory—Congress must vest original or appellate jurisdiction in the “all”
categories of Art. III, s. 2. Relies on history & text.
  - Meltzer—critiques this. In particular, the “cases & controversies” language might
    regard difference btw civil & criminal, and all might underscore that all are included
- Indian Law—*Santa Clara v. Martinez*: federal courts possess no jurisdiction over suits to
  enforce Indian Civil Rights Act. Suits have to be filed in tribal courts & no SC review

**Congressional Preclusion of Both State & Federal Court Jurisdiction**
- Portal-to-Portal Act (1947), correcting parts of Fair Labor Standards Act of 1938
  - Dispute: FLSA mandated time-and-a-half for 40+ hour weeks; Court held that
    “work week” included travel & incidental activities that were not previously regarded
    as compensable
  - P2P act fixed this and also stripped jurisdiction over lawsuits raising the prior
    interpretation
  - Universally rejected that this destroyed vested rights in violation of 5th Amendment
  - Judge Chase, in *Battaglia v. General Motors Corp*: Congress has power to give & restrict
    jurisdiction but can’t do this in violation of Takings Clause
    - Reads outside restraint on jurisdiction (outside Art. III)
    - SC has never ruled on this
Constitutional avoidance: some cases strain to say that jurisdiction-restricting statutes permit judicial review of constitutional question.

Does the political question doctrine refute the notion that courts must be available to rule on every claim of constitutional rights? What about sovereign immunity?

Hart’s view: the denial of all jurisdiction to hear a case is one thing; the denial of a particular remedy while others are left available is something else altogether (and is OK)

SC’s statements & retreading on statements:

- Tax:
  - *Reich v. Collin*: denial by state courts of recovery of state taxes exacted in violation of US law violates the 14th amendment, sov.imm. notwithstanding
  - *Alden v. Maine*: state’s sov.imm. only yielded b/c state, in requiring taxpayers to pay first & litigate later, had promised to provide a post-deprivation remedy & was bound by DP

- Takings:
  - *First English Evangelical v. LA County*: in the event of a taking, compensation remedy is required by const. But question of whether sovereign immunity could preclude remedy was not squarely presented
  - *City of Monterey v. Del Monte*: Uncertain question whether “sovereign immunity rational retains vitality” for compensation claims.

- Suspension clause.
  - *Ex parte Bollman* (1807)—jurisdiction of federal courts to issue writ was not inherent, but must be conferred by statute. But didn’t resolve whether withdrawal, once conferred, might be “suspension”
  - *INS v. St. Cyr* (2001)—INS statute appeared to preclude habeas corpus review
    - @ minimum, Suspension Clause protects write as it existed in 1789
    - Habeas corpus was not only about challenging unlawful, extrajudicial detentions, but about challenging findings of law in the court authorizing detentions
    - Avoidance canon: if the statute were interpreted to preclude review, would present “difficult and significant” constitutional questions
    - So, interpret the statute to allow review
    - Scalia: this creates a “superclear statement, magic words requirement.”

- After *St. Cyr*, Congress enacted REAL ID act, which removed habeas corpus jurisdiction over immigration & substituted limited review in US CoA, including constitutional claims & claims of law (but not review for abuse of discretion).

Unsure of how this affects fed jur

Congressional Apportionment of Jurisdiction Among Federal Courts and Resulting Limitations on the Authority of Enforcement Courts

- When Congress attempts to preclude a federal court from independently deciding an issue in a case before it by vesting responsibility for decision of that issue in a different federal court.

- Emergency Price Control Act of 1932: Congress created a Price Administrator to fix maximum prices & rents
  - Emergency Court of Appeals (ECA) had powers of district court, but could not issue TRO or interlocutory decree staying effectiveness of any order, reg, or price
    - Had to protest w/ Administrator, & if denied, file w/ ECA. SC could review ECA’s decisions.
  - Constitutionality challenged in *Lockerty v. Phillips*
Congress can create lower courts, divvy up jurisdiction. No doubt of power to force ppl into ECA, or to petition Admin. beforehand.
- Not passing upon question of interlocutory relief; that part is separable.
  - *Yakus v. US*: claim of invalidity of PCA or a regulation as a defense to criminal prosecution
    - Act interpreted to bar attack upon regulation in criminal trial (but could happen in ECA).
    - No denial of DP: ECA provides reasonable opportunity to be heard & present evid.
    - Congress can make criminal 1) violation of a reg by one who fails to avail self of admin procedure, or 2) splitting trial between agency & court.
    - No denial of right to trial by jury: subject to DP requirements, Congress can criminalize violation of a price reg.
  - How much did *Yakus* depend on wartime footing? See *US v. Mendoza-Lopez*: noted this feature of *Lopez* in holding that “an enforcement court could not predicate a finding of criminal violation on a previous administrative determination where there was no meaningful opportunity to seek judicial review of the administrative ruling.” (book’s summary).

**Congressional Power to Allocate Authority to Non-Article III Tribunals**
- *Crowell v. Benson*—hearing on the facts granted in agency setting; were to be binding on court.
  - Act contemplates that on questions of fact w/in scope of authority & supported by evidence, the findings of deputy commissioner are final.
    - Use of administrative method for these purpose is constitutional, if notice, opportunity to be heard, & findings are based on evidence.
  - Congress may establish “legislative” courts (vs. constitutional [Art. III] cts.) in “public rights” cases (see below)
    - This is a private rights case, but Congress can use this type of procedure.
  - But, when facts are fundamental or “jurisdictional”—i.e., their existence is a condition precedent to operation of the statutory scheme, judiciary must have independent review of facts.
    - In cases to enforce constitutional rights, US judicial power extends to independent determinations of Qs of law & of fact.
    - Interprets statute not to create a problem.

- Brandeis thinks that Congress could deny trial de novo on issue of empl.
- *Crowell* significant for what it authorizes—# of ALJs is huge (1300 official, 4000+ total).
- Article III values @ stake in cases like *Crowell*.
  - Ensure fair adjudication for individual litigants.
  - Maintain system of judicial review & remedies that keeps gov’t w/in bounds of law.
  - Preserve judicial integrity by not forcing courts to apply penalties b/c of bad call.

- *Murray’s Lessee v. Hoboken Land & Improvement*—ct upheld power of executive official to audit & impose summary attachment.
  - Anytime you apply law to facts, you’re acting somewhat judicially. But executive officers have to do this all the time, & don’t need to go into court. Judicial power is “neither a platonic essence nor a pre-existing empirical classification.”
  - Also, drew “public rights / private rights” distinction:
    - Public rights—Congress may or may not put them in courts. Never been defined, but 3 examples:
      - Claims against US (maybe b/c of sov.imm.?)
      - Disputes from coercive gov’t conduct outside of crim law.
• Immigration issues
  ▪ Crowell suggests that public rights cases might be removable from courts, but this is against a background of common law officer suits.
  ▪ Private rights—typically, suits @ common law
    - Apparently, in such cases, non-constitutional and non-jurisdictional facts can be made binding on courts through agency findings
    - Vitality of the “jurisdictional facts” doctrine is disputed. Currently, independent judicial factfinding/judgment rarely occurs; instead, redetermination of facts on administrative record

- Chevron deference—when a court reviews agency const. of statute:
  o Ask first if Congress has spoken to the question—if yes, that ends the inquiry
  o If statute is silent or ambiguous, Court asks whether agency’s answer is based on permissible construction of statute
    ▪ Reviewing court must accept a reasonable construction, even if wrong.

- Criminal law:
  o Private rights cases (despite gov’t P); agency can’t directly punish
  o Yakus—criminal enforcement court can be bound to give conclusive effect to decisions of prior judicial proceeding
  o Falbo v. US—registrant being prosecuted for failure to report for induction could not defend on the ground of wrongful classification & entitlement to exemption
  o Estep v. US—But, Falbo was really about failure to exhaust remedies. If he did, he could challenge on the grounds that there was no basis for classification (but, not on grounds that it was erroneous
  o US v. Mendoza-Lopez—alien tried to collaterally attack earlier deportation
    ▪ @ minimum, result of admin proceeding can’t make conclusive an element of criminal offense if judicial review was effectively denied (in 1st proceeding)
    ▪ So if prior procedure effectively prevented judicial review, alien must be allowed to collaterally attack the use of that proceeding as element of criminal offense.

Note on Legislative Courts:
- Courts created under Art. I rather than III; lack protections like life tenure
- Have existed since the beginning; hard to argue that they’re unconstitutional.
- Historical practice:
  o Territorial courts (pre-statehood in the territories)
  o Military tribunals & courts-martial
  o Courts to adjudicate public rights disputes (federal claims, tax court, vet appeals)
- Distinguishing legislative courts from administrative agencies:
  o Enforceability: legislative court decisions are final & enforceable; decisions of agencies require enforcement action in federal court
  o Legislative courts are less likely to have policymaking functions; admin law is a vehicle for policymaking, coordinates rulemaking w/ adjudication
  o Legislative court justified as “exception”; admin justified w/ reference to A.III
- Seem to be few kinds of judicial business that can’t be assigned to legislative court
- Northern Pipeline v. Marathon Pipe Line (1982)
  o Bankruptcy courts were to resolve all legal controversies arising in or related to bankruptcy proceedings; A.III courts had review power.
  o Brennan (plurality): legislative courts limited to 3 exceptions above
Congress has substantial authority to prescribe how right will be adjudicated; functions of an adjunct must be limited such that essential aspects of judicial power remain in Article III courts.

Claims for breach of contract are state law type cases, have all the power of the district courts, decisions reviewable under “clearly erroneous” standard

- Rehnquist: doesn’t agree w/plurality’s cabining past cases into the 3 exceptions, but no precedent sanctions what the bankruptcy court can do here
- White (dissent): from the structure of bankruptcy & experience of bankruptcy judge w/state law, this makes sense

Would allow Congress to assign work to A.I court w/ A.III as expressing one value that must be balanced vs. competing constitutional values

**Commodity Futures Trading Comm’n v. Schor (1986)**

- Federal claim & state law counterclaim in a A.I court created to hear reparation proceedings about Commodities; A.I jurisdiction upheld as constitutional.
- Schor waived right to full trial in A.III ct. – how important is this?
- Decline to absolutism about what categories of cases may be tried to legislative court (this is private right case), or to a statement that state law claims are out of bounds.
- This case leaves more of the “essential attributes of judicial power” than *Northern Pipeline*.
  - Deals only w/ particularized area of law; NP extended to all civil proceedings relating to bankruptcy
  - Orders here, unlike NP, are enforceable only by order of dist.ct.
  - Reviewable under “weight of evidence” standard, rather than deferential NP standard; legal rulings subject to de novo review
  - Courts here don’t exercise all ordinary powers of district courts.

**Thomas**—predates *CFTC v. Schor*—requirement of binding arbitration, subject to judicial review only for “fraud, misrep, or other misconduct” for some EPA thing

- Although this is liability of one party to another, has characteristics of public rights dispute b/c of complex regulatory scheme (public rights = X v. US or US v. X)
- Also, danger of encroachment on A.III powers is @ minimum when no unwilling defendant is subject to judicial enforcement (here, enforcement through arbitration)
- Brennan: would class this a public rights dispute.

**Granfinanciera**—Trustee in bankruptcy filed suit to recover $$ transferred to Gran

- Brennan: suit was equitable, not legal.
- If Cong can assign action to non-Art. III tribunal, 7th Amendment is not an independent bar to adjudication by a non-jury factfinder
- Crucial inquiry: is the right to recover “public” or “private”? Drawn on *Thomas*, where public right exists in complex reg scheme, not just X v. US
- Not public right here, therefore trial by jury—but oddly, leaves open the question of whether that trial can be conducted in bankruptcy court. **WEIRD**
- Scalia: wants traditional definition of public rights (X v. US)

**Atlas Roofing**—where public rights are being litigated (uses Scalia-preferred definition), 7th Amendment doesn’t prohibit Congress from assigning factfinding function & initial adjudication to admin forum w/o jury.

Intersection of *NP, Schor, & Granfianciera*—to assess constitutionality of adjudication by non A.III ct:
- As first if provision falls w/in one of the NP exceptions
- If not, might it still be justified under a Schor balancing test? Consent may be of crucial significance. Also, might classify right as sufficiently bound up w/ reg scheme to come w/in rationale of public rights doctrine.
- If can be tried in non-A.III ct., question remains whether jury trial required under 7th amendment: ordinarily will be coextensive. If jury trial required, & that would be inconsistent w/ this forum, assignment may be constitutionally impermissible.

Note on Magistrate Judges
- Describes nature of magistracy; analytically distinct from legislative courts b/c operates w/in the article III judiciary.
- US v. Raddatz interpreted statute that let magistrate hear evidence on suppression motion as requiring de novo decision by a judge, but not de novo hearing of the evidence
  o Survived DP challenge: similar to admin procedure; dist.ct. has plenary discretion. Enough that the procedure takes place under judicial control
- Unanimously upheld jurisdiction of magistrate to try civil case if both parties consent
- Gomez v. US: courts may not assign to magistrates the duty of presiding over selection of a felony jury w/o D's consent. Peretz v. US: with D's consent, it's OK.

Military Tribunals / Commissions
- Important distinctions, leading up to Hamdan: geographic US vs. outside US (Gitmo counts as US, per Rasul; Scalia wants to revisit this); rights of citizens vs. aliens (Milligan and Quirin are both citizens)
  o Insofar as person (citizen or no) challenges use of military tribunals w/in US, the Suspension Clause applies.
  o If military tribunals used on foreign soil to try foreign citizens who aren’t subsequently imprisoned in US, Johnson v. Eisentrager suggests (but doesn’t say) that federal court lacks jurisdiction (statutory or const) to issue the writ
    ▪ But, Braden v. 30th Judicial Circuit statute conferring habeas jurisdiction only requires jurisdiction over the custodian, not the prisoner.
- Constitution permits use of military tribunals; unclear div of power btw Pres & Cong
- Occupying pwr can use military tribunals to try ppl abroad (as in Germany & Japan)

Ex parte Milligan: citizen tried in military tribunal in Indiana. Unconst. b/c citizen, & b/c Indiana had never been in revolt: courts were open & processes unobstructed
Ex parte Quirin: offenders against the law of war are triable & punishable b/f military tribunals
- One of the Germans claimed American citizenship; Ct. confined Milligan to the facts & noted that Milligan was not a member of an enemy army (nor a combatant in violation of laws of war)

Hamdi v. Rumsfeld: use of military tribunal to classify as enemy combatant (important distinction from Quirin); detention upon such finding
- O’Connor (plurality): American citizen enjoys no constitutional immunity from punishment or detention as enemy combatant, as permissible under laws of war
  o Possible that the “process” he’s “due,” to challenge his status, could be provided by military tribunal
- Scalia (dissent): military tribunals have no valid role in non-criminal detention of citizens
  o Habeas corpus bars detention of citizen as enemy combatant w/o trial for crime
  o Jurisdictional facts here are not conceded (unlike Quirin)
Rasul v. Bush—ct upheld D.D.C. jurisdiction to consider challenges to legality of detention @ gitmo
- P’s presence w/in territorial jur of dist.ct. is not a strict requirement; previous cases upheld ability to issue writ based on jurisdiction over custodian.
- Presumption of extraterritoriality doesn’t apply when Ps held in territorial jurisdiction of US

Hamdan v. Rumsfeld—DTA: gave D.C. Cir. exclusive jurisdiction to review “final” decision of military comm’n convicting an alien of war crimes. Review limited to: whether final decision is consistent w/ standards & procedures of DTA, and of constitution
- Stevens (majority, most places):
  o Interprets statute not to withdraw jurisdiction. Congress didn’t make the jurisdiction-stripping part apply to pending cases. Presumably, per McCardle, no constitutional problem had they done so
  o No specific congressional act justifies military commission
  o Plurality only: military commissions have been used: where martial law is declared; to try civilians under military gov’t, when civilian gov’t doesn’t function; when enemies have violated laws of war
    ▪ But, conspiracy not a violation of the law of war
  o Regardless of that, comm’n lacks power to proceed:
    ▪ Have most procedural protections, but D & his atty can be excluded from learning what evidence was presented against D in closed session. Or, tell D’s atty but forbid atty from telling client what happened in the session
    ▪ Military comm’n typically has same procedures as court-martial; “practicality” determination by President is insufficient to justify variances from C-M
    ▪ Nothing demonstrates it’d be impracticable to apply C-M here
  o Procedures adopted to try Hamdan violate the Geneva convention
    ▪ Common Art 3 applies to this, even if conflict not between signatories
    ▪ Requires that Hamdan be tried b/f regularly constituted court
    ▪ Plurality: that includes whether the tribunal affords “all the judicial guarantees which are recognized as indispensable by civilized peoples.”
- Breyer (concurrence): dissenters say this will stop us from preventing future attacks, but ultimately, it comes down to the fact that Congress hasn’t given Pres the authority.
- Kennedy (concurrence): Congress has power & prerogative to change controlling statutes; given lack of authorization, no need to consider the extra issues in majority: CA3’s standard; whether Art. 75 of Protocol 1 of Geneva Convention is binding; conspiracy charge
- Scalia (dissenting): Ct. lacks jurisdiction. That is clear from the statute.
  o And this wouldn’t violate Suspension Clause, b/c Gitmo is outside territorial jurisdiction of US & Hamdan is an alien enemy. See Johnson v. Eisentrager
    ▪ But even if Hamdan were protected, substitution of collateral remedy does not constitute suspension of habeas.
  o The “constitutional doubt” doctrine is BS here, yet again.
- Thomas:
  o President has primary responsibility for national security & foreign relations. Congress has substantial role, but provision of broad authority through AUMF shouldn’t be read as negation of that not explicitly granted. & court shouldn’t second-guess pres’s determination about military commission.
  o Hamdan’s offenses are appropriate for trial by military comm’n under laws of war
    ▪ Ultimately rests on plurality’s determination of lack of military necessity, but this is a policy & military judgment. And ridiculous, to say that a military
comm’n can’t charge conspiracy to commit a war crime but must catch them in the act.
  - President has determined that it’s impracticable to apply rules of court-martial here; court shouldn’t arrogate that to itself.
  - Common Article 3 claim is shot down on several grounds.
    - Alito: Common Article 3 question—whether military tribunals are regularly constituted courts—must be determined by reference to domestic law. Alito says “YES.”
    - Does it / should it matter than in Quiroin, Roosevelt might have disobeyed a contrary result but in Hamdan, the court was acting about widespread complaint about Bush admin?

Extraneous

Tidewater—Ct. upheld Congress’s allowing a d.c. citizen to sue in federal court in diversity, though d.c. citizen not a citizen of state. Congress gives courts jurisdiction over more than A.III allows

Federal Authority and State Court Jurisdiction

Tafflin v. Levitt (1990)—state courts have concurrent jurisdiction over civil RICO actions
  - Presumption that states are competent to adjudicate federal law. Can be rebutted if:
    o Explicit statutory directive (no)
    o Unmistakable implication from legislative history (congress didn’t consider)
    o Clear incompatibility btw state-court jurisdiction & federal interests; factors incl:
      ▪ Desirability of uniform interpretation
        - State cts will be guided by federal precedent; fed cts not bound by state interpretation (so no danger of non-uniform crim law)
      ▪ Expertise of federal judges in federal law
      ▪ Assumed greater hospitality of federal courts to federal claims
  - Scalia: believes it takes affirmative, express act by Cong to oust state jurisdiction
    o #3 can only mean that statute only mentions fed.ct., plus state-ct. jurisdiction would plainly disrupt statutory scheme. Broader reading is too far.

Possibilities: 1) exclusive state ct jurisdiction & SC review; 2) exclusive fed jur; 3) concurrent fed & state jur, w/ SC review; 4) concurrent jur + removal
  - Federal antitrust laws implicitly exclude state jurisdiction. Clayton act creates 3x damages; is duplicated in RICO (but read differently from RICO)

Tenn v. Davis
  - Upheld constitutionality of removal statute for defense to murder that D was a federal agent & had right to enter the land; “case” can be said to arise under federal law depends on correct construction of federal law.

More cautious view in Mesa v. CA: permitted federal officer removal only when D officer avers a federal defense, rather than just claiming innocence
  - Read Davis as: claim of self-D depended on application of federal law (splitting hairs?)

Tarble’s Case: state lacks power to issue writs of HC against federal gov’t
  - A lot of this case rests on military aspect, but also hierarchy btw the two. Similar to idea of territorial sovereignty, that Wisc. couldn’t issue writ v. Minn, & vice versa
  - Similarly, state can’t issue writ of mandamus to federal official
  - But, can sue federal official in state ct for damages. Why? Historic vs. unusual remedy?
  - State courts cannot enjoin federal proceedings, though the opposite can happen

Testa v. Katt (1947)—RI cannot decline to hear a federal c/a based on a policy of not enforcing “penal laws” of an “international sense”
  - Doesn’t matter that RI wouldn’t hear penal laws of other states, or of feds.
These aren’t laws of foreign sovereign; supremacy clause mandates that states must hear
- This is based on FELA cases: state aren’t free to decline jurisdiction over federal c/a
- Language implies that there might be a “valid” excuse—perhaps FNC?
- Frankfurter’s view (prior case): no foreign jurisdiction can confer jurisdiction on state. But state legislature can give itself jurisdiction to enforce foreign (incl federal) law, no matter the source

Other decisions:
- State courts can’t refuse to hear case just b/c it comes from federal law, nor discriminate vs. federal law as compared to similar state claims
- Valid excuses: S/L has run, if the Act doesn’t require states to take jurisdiction; FNC
  - *Folder*: only exception to this: state notice-of-claim statute couldn’t apply to 1983 b/c that discriminates vs. the type of c/a in 1983

Congress can’t commandeer other state officers into federal service as with state judges:
- *Nat’l League v. Usury*: couldn’t extend minimum wage & maximum hrs to state employees
  - Case overruled in *Garcia v. San Antonio Metro Transit.*
- *FERC v. Miss.*: directing state regulatory authorities to implement federal rules OK
- *Printz v. US*: court overstepped const bounds by directing local law enforcement officials to conduct background checks on would-be gun purchasers. Supremacy Clause does not require state officials to enforce federal law
- *Gregory v. Ashcroft*: federal ADEA doesn’t apply to mandatory retirement age for MO state judges

General rule: federal law takes state courts as it finds them:
- *Dice v. Akron, Canton & Youngstown RR* (1952): federal law governs the standard of releases; federal rights could be injured if states were permitted to have the final say over what defenses can & cannot be raised, when a release is void; right to trial by jury is part & parcel of FELA remedy
- *Brown v. Western RR*: pleading rules of states couldn’t impose “unnecessary burdens on the rights of recovery under federal laws.”; has to do w/ how much the rules dig into ‘substantive rights.”

Suits Challenging State Official Action
11th Amendment & State Sovereign Immunity
*Hans v. Louisiana*
- Reads 11th Amendment to enact blanket sovereign immunity for states: state cannot be sued by its own citizen
  - Inherent in nature of sovereignty not to be subjectable to suit w/o consent
  - Also sees sovereign immunity as inherent in Article III: Congress “did not intend to invest its courts with any new and strange jurisdictions.”
- A lot of sitting judges disagree with this reading (see Brennan’s dissent in *Atascadero*), but it’s law: instead, 11th amendment only intended to close off diversity jurisdiction over Citizen A vs. State B
- Court has declined to ban suits by State A vs. State B; also, states can waive sov imm

McKesson Corp v. Div of ABT (relying on *Cohns v. VA*): 11th Amendment doesn’t constrain appellate jurisdiction of SC over cases arising from state courts.
*Osborne v. Bank of US*: CJ Marshall: 11th amendment does not bar suits against state officers. Limited to situations where the state is a party of record.
- Main way to get around sovereign immunity
- Other case: But, sometimes suits against state officials will be reviewed as really suits vs states

Suits vs. statewide agencies regarded as suits against states
But, suits vs. counties / municipalities are not.

*Ex parte Young* (1908)

- Violation of RR rate law would result in fine of $5,000 or imprisonment of 5 years, or both; no means to test law w/o subjecting self to this possible punishment
- Fines & punishments so enormous for even unsuccessful attempt to test validity of laws, that the enforcement provisions for rates are unconstitutional on face
- But the suit is against Young, a state officer; TRO prohibited him from enforcing law
  - State has no authority to enforce a law that’s invalid b/c unconstitutional; therefore, if AG seeks to enforce such a law, he’s stripped of official character
- Federal court can enjoin official from enforcing state law (note: holding doesn’t apply to damages)

Damages issue:
- If you’re trying to get to the state treasury through an individual, 11th amendment bars
- But, if the damage award is against an individual, no 11th amendment problem. Whether the state indemnifies is irrelevant (b/c that’s a waiver of sovereignty)
- Notes also indicate that you can sue for back taxes, even though that’d come from treasury. Maybe b/c it’s restitution, not damages

Post-reconstruction bond cases
- Suits vs. official, when that official threatens violation of personal or property rights of complainant, are not barred by 11th Amendment. *VA Coupon Cases*
- But, when you’re trying to enforce obligations of state (enforce performance on K), it constitutes a suit vs. state even if the officer is the named party. *In re Ayers, LA ex rel. Elliot v. Jumel*
- Also, *Idaho v. Coeur d’Alene Tribe* suit vs. state officials based on a claim of ownership of submerged lands violated 11th Amendment
  - Kennedy & Rehnquist: *Young* had become essentially discretionary
  - O’Connor, Scalia, Thomas: doesn’t join this recharacterization, but uphold state sovereignty b/c of importance of submerged lands to state sovereignty; tribe can’t eliminate state regulatory power by suing officials rather than state

- 1983 creates cause of action vs. people who cause any citizen the deprivation of rights, liberties, etc., under constitution or laws of US
- Statutory counterpart of *Bivens* (and pre-dates *Bivens*)

- Congress intended (and 1983 grants) a remedy to parties deprived of constitutional rights by an official’s abuse of position
  - Remedy is available even if the official conduct is wholly unauthorized by state law; Cong has power to enforce 14th amendment against those who have badge of authority from state, whether acting in accord w/ authority or misusing it
  - Was intended to override certain state laws; provide remedy where state law inadequate; & also where state remedy is adequate in theory but unavailable in practice
  - Harlan: Constitutional rights are of a different character than state rights, even if protected by state tort law; this regime makes sense
o Rejects FF’s position that 1983 only applies to lawlessness, state tolerating crime. Other 1983 law.

- **Qualified immunity:** conduct must violate “clearly established statutory or constitutional rights of which a reasonable person would have had knowledge.”
  - Applies to officers sued in personal capacity
  - Legislative, judicial, prosecutorial officials have absolute immunity
  - Official capacity: gov’t is real party in interest (ordinary method for seeking equitable relief)

- Ppl sue under 1983 b/c you can get atty fees if you win (incl settlement); can sue in federal or state court (and get attys fees either place; substantive law comes with)

- **Monell:** municipality is a person who can be sued under 1983 (might be liable for failing to train cops, if DI; but could not be sued for a rogue cop who tries to solicit sex)
  - Liable under respondeat superior theory, but only when officers are violating federal law pursuant to gov’t policy or custom (FF’s rejected position in *Papel*!)
  - *Will v. MI Dept of State Police:* neither state nor state official acting in official capacity is a person w/in meaning of 1983

- Statute doesn’t specify measure of damages, immunity, etc.
  - Federal common law rule of decision for official immunities & damages
  - Borrow rules of decisions from state (@ least to extent not inconsistent)—for S/L periods & determining what happens on P’s death

- **Maine v. Thiboutot:** 1983 is not limited to laws providing for equal rights, but applies to all federal rights
  - If there’s a remedy provided in the federal statute itself, 1983 might not apply
  - If there’s no remedy in the statute:
    - Has the statute created a private right w/in meaning of 1983?
    - If so, has scheme of remedies “implicitly excluded a private remedy under 1983?”—Look for the elaborateness of the regulatory regime.

**Remedies for Constitutional Violations**

- **Borak:** high water mark of implication of private right of action for statutory violations
  - Dealing with Securities Exchange Act; ct. found private enforcement made sense as supplement

- **Cort v. Ashe:** 4 criteria to determine whether a statute creates private cause of action
  - Over time, only #2 is important: indication of legislative intent (whether explicit or implicit) to create or deny a c/a
  - Other, old reqs: is P a member of the class for whose benefit the statute was enacted? Is implication of a private right consistent w/ purposes of scheme? Is c/a traditionally of state law, so would be inappropriate to imply federal c/a?

- **Sandoval:** important b/c used in *Bivens*
  - Black letter law: “‘[P]rivate rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.’”

- These cases are important for how you read the constitution to get to *Bivens*

- **Ward v. Love County** (1920)
  - Indians suing to get their $$ back. B/c of prior suit, the tax was unconstitutional
Since tax wasn’t voluntary, money got through imposition can be recovered back.  
Reject challenge to SC jurisdiction: property right was protected by constitution  
Constitution seems to afford affirmative remedy for violation, here  
But, not really damages here; restitution instead  
- Due Process requires some way of attacking tax. Either injunction b/f, or compensation (restitution) after. Reich v. Collins. Seems required by Const.  
- General Oil v. Crain, decided same day as Young can grant injunction vs. enforcement of state law in order to enforce Constitution, despite 11th Amendment.  
  - Again, Ct. finding a remedy  
- Ex parte Young (see sov.imm section): about power of federal court to prevent constitutional violation  
  - Despite the language of Young, there’s little support for a general right to obtain anticipatory relief  
- Bivens v. Six Unknown ... (1971)—suit for violation of 4th amendment rights; pretty egregious facts, & no other means of redress.  
  - Holds that the 4th amendment permits suit for damages for cops’s unconstitutional conduct.  
  - Seems like this is created as a “constitutional tort,” but where did the duty come from?  
    - Doesn’t seem that there was a duty, and 4th amendment doesn’t say anything about money damages  
    - Might be creation of a new remedy from pre-existing duty  
  - To Drobak, the more this is like a tort, the more this seems appropriate for court  
  - Harlan’s concurrence: if grant of jurisdiction to federal court is enough to let it grant injunctions, then statute should also be sufficient to empower it to grant dam  
- Immunity: same as 1983 (absolute: for judge, president, prosecutor)  
- Initial extension of Bivens:  
  - Davis v. Passman:  
    - Davis fired from her job w/ Congressman Passman, allegedly b/c of unconstitutional sex discrimination in violation of 5th Amendment DP  
    - For Davis, b/c Passman was no longer a congressman, it was also damages or nothing  
  - Carlson v. Green: upheld damages remedy in action alleging federal prison officials had failed to provide medical attention in violation of 8th amendment.  
    - FTCA was insufficient protector of citizens’s constitutional rights  
- Retrenchment:  
  - 2 cases, Bush v. Lucas & Schmierer v. Chilicky, retrenchment was based on the existence of alternate remedies  
  - 2 cases in absence of effective remedy:  
    - Chappell v. Wallace: no constitutional claim of race discrimination vs. superior officers in Navy, b/c it would be inappropriate in light of the internal disciplinary structure of military  
    - US v. Stanley: LSD administered in Army testing; Bivens is inappropriate in the military context at all.  
  - Bivens remedies is available only against gov’t officials, not agencies: FDIC v. Meyer; deterrence purposes would be lost here, & the P was just trying to circumvent immunity (which Bivens contemplates)
Malesko: *Bivens* is only vs. individual Ds; if one can’t sue federal gov’t, can’t sue a contractor acting under color of fed law either.

- Rehnquist: This P isn’t in search of a remedy or cause of action; when those conditions didn’t exist, we’ve rejected invitations to extend *Bivens*
- Scalia: *Bivens* is a relic of days when court took power to create constitutional causes of action. We’ve abandoned the power to create “implications” in statutory construction field, see *Alexander v. Sandoval*, and we should abandon it (& limit *Bivens* to its circumstances) in constitutional context as well.

- This view is winning; *Bivens* not being applied to more cases.

**Judicial Federalism: Limitations on Dist Ct Jurisdiction or Its Exercise**

*Kline v. Burke Constr Co.* (1922)

- Anti-Injunction Act prohibits federal courts from enjoining state proceedings
- All writs act exception: if injunction is necessary for exercise of jurisdiction
  - Applies to *in rem* action: 1st court to acquire jurisdiction over the property can enjoin other courts
  - But, that necessity doesn’t exist in *in personam* action; another action for the same cause in another jurisdiction is not “precluded”
- Also, apparently sees past the trick of trying to enjoin the parties from suing rather than the court from hearing the suit.
- Courts are “equal” b/c Congress could make federal trial cts supreme, but chooses not to
  
  *Kline* generates a race to judgment (preclusion), rather than race to the courthouse

Can be especially a problem in class actions

**Statutory Limitations on Federal Court Jurisdiction—Anti-Injunction Act**

*Atlantic Coast Line RR v. Brotherhood of Locomotive Engineers*

- Current (as of 1970) form of law: fed.ct. may not enjoin State proceedings: except as expressly authorized by Act of Congress; necessary in aid of jurisdiction (also *in rem*, and abt staying proceedings removed to dist.cts.), or to protect / effectuate judgments (incl enjoin relitigation)
- RR got injunction in state ct vs. picketing. Subsequent SC case held that this couldn’t be enjoined. State refused to lift the injunction, so fed.ct. enjoined RR from availing itself of its benefit
- Exceptions do not apply here: not “necessary” in aid of jur, but related to jur (not enough);
  proper course, if Union must picket, is to appeal through state to SC
- Also not enough to have a federally protected right
- Brennan disagrees with this & would allow federal injunction, natch

*Mitchum v. Foster*—1983 expressly authorizes federal court to enjoin pending state proceeding

- To “expressly authorize,” exception, federal law need not contain express reference to AIA; need not expressly authorize injunction of state court proceeding; instead, must create specifically & uniquely federal right / remedy, enforceable in federal court of equity, that could be frustrated if the federal court couldn’t enjoin.
- 1983 was about interposing fed gov’t btw states & people (incl btw state cts & ppl); injunction vs state court can be necessary to prevent “great, immediate, irreparable loss of const rights”
- *Younger v. Harris* & abstention might be another barrier to injunction
*Vendo v. Leko-Vend:* declines expanding *Mitchum* to allow injunction of state proceedings under federal antitrust law—if that were allowed, 2283 (AIA) would be eviscerated: all federal laws authorizing injunctive relief would be an exception to AIA (plurality)

- Limited concurrence: injunction could be issued but only when state suits are part of “baseless, repetitive claims” being used as anti-competitive device.

Exclusive federal jurisdiction doesn’t necessarily mean federal ct can enjoin

Some federal courts read the “in aid of jurisdiction” language to allow injunction of some overlapping class action stuff.

- This would prevent the other court from determining whether res judicata applied

*Chick Kam Choo:* relitigation exception: SC upheld federal court injunction on issue of which law applies (Singapore law vs. TX tort law); but not on FNC (b/c Texas’s FNC law might differ)

*Parsons Steel:* if you want injunction, must get b/f state ct. decision goes to judgment; too late once there are 2 decisions.

*Ex parte Young*—AIA inapplicable to injunction against criminal proceedings not yet instituted.

*Lynch*—prejudgment garnishment is not a “proceeding” & can be enjoined.

Other stuff:

- *Johnson Act of 1934*—prevents district cts from enjoining compliance w/ order of state body fixing rates for public utility, when (all 4) 1) jurisdiction is based solely on diversity or constitutional violation; 2) order doesn’t interfere w/ interstate commerce; 3) order made after reasonable notice & hearing; plain, speedy & efficient remedy may be had in state

- *Tax Injunction Act of 1937*—dist ct shall not enjoin collection of state tax where plain, speedy, & efficient remedy may be had in state courts.
  - Filing of over 300 separate claims to protect federal claim is wanting
  - But, 2 year delay is not un“speedy,” though regrettable
  - Absence of interest doesn’t render remedy not plain, speedy, efficient
  - Declaratory judgments barred
  - Comity bars damages actions, too.
  - But, suits by US to enjoin state taxation of an instrumentality that asserts federal immunity from taxation is OK
  - If 1983 case brought in state on state tax law basis, it doesn’t authorize injunctive / declaratory relief vs. state tax law.

**Judicially-Developed Limitations on Federal Court Jurisdiction**

**Exhaustion of Non-Judicial Remedies**

- *Prentis:* if a state court acts in a “legislative” capacity (like establishing a rate), federal circuit court will have jurisdiction over timely challenge; if decision of state’s highest court is judicial, only review is by SC

- Norm that Ps must exhaust (nonjudicial) admin remedies as precondition to fed challenge
  - Exhaustion of admin remedies not required in 1983 actions (nor exhaustion of state remedies in general, per *Moura v. Pape*)
  - But, PLRA requires exhaustion of available admin remedies before challenging prison conditions under 1983 or any other federal law.

**Abstention: Pullman and Related Doctrines**

- *RR Comm’n of TX v. Pullman:* state law having only white employees run Pullman cars
- Unsure of the TX issue: that the comm’n’s order is unauthorized by state law.
- When 1) resolution of state law Q in particular way would avoid necessity of deciding federal Q; 2) relevant state law unclear; 3) resolution of fed const Q adverse to Ds might generate
“needless friction” with state policies, & 4) fed const Q touched sensitive area of social policy where cts oughtn’t enter unless no alternative is open—courts might abstain
  o Foundations in equity. *Quackenbush* says that relief must be equitable (discretionary) for *Pullman* to apply; *Pullman* abstention doesn't apply to damages actions.
  o But, abstention might support a decision to postpone damages action, so *Quackenbush* may make little difference (however, the above is correct)

- **Pullman abstention can apply to 1983**
  - *Propper*: *Pullman* abstention inappropriate for nonconstitutional issues. Diff might be avoidance canon, which, w/ respect for states & w/ equity considerations, drives this
    o Some (but not most) lower courts have circumvented this by trying to create a constitutional conflict w/ application of state statute through supremacy clause
  - *Pennhurst*: 11th Amendment denies fed.cts. jurisdiction to award injunctive relief vs. state officials based on state law.—this was the original basis for *Pullman*
  - *Askew v. Hargrave*: Ct. remanded for consideration whether to abstain: abstention would have been based on constitutional avoidance alone, not misconstruing state law.
  - Sometimes, if a state law issue would moot / modify the federal issue, *P must go to state ct. first* for a determination, even if *P* hasn’t brought state law claims
    o **This is a 6th Circuit determination; SCOTUS hasn't decided**
      o But, under SC law, if someone (not you) has a pending case that might resolve the state issue, you might have to wait & see what the result is
  - State law is unsettled when: “the statute is of an uncertain nature, and is obviously susceptible of a limiting construction.”
    o Newness of statute & lack of precedent relevant, but not dispositive.
  - As an alternative to making litigants pursue declaratory judgment action all the way up state ladder, most state courts now have certification procedures.
    o *AZ for Official English v. AZ*: fed.ct. shouldn't have ruled on constitutionality w/o first certifying amendment’s meaning to the state
    o Certification question must be potentially determinative of the case.
  - *Harris Cty Comm’rs Ct v. Moore*: will not order abstention when federal claim is not complicated by an unresolved state-law question, even if *Ps* might have sought relief under similar part of state constitution.
    o But, if challenged statute is part of integrated scheme of constitutional provisions, statutes, regs, & scheme as a whole calls for clarifying interpretation of state courts, have required district cts to abstain
  - When proceeding in state court, state must be advised of federal challenges, even if he wants to reserve the Qs
    o Bare adjudication doesn’t suffice: ct must be asked to interpret statute in light of objections
    o But if ct. decides the federal questions, party is bound by state court determination only if party did elect to seek complete & final adjudication of rights in state court.
      ▪ Don’t need to explicitly preserve rights, just don’t voluntarily give it up.
      ▪ *England*
      ▪ But, *San Remo*: if the issue you give to the state court is the “functional equivalent” of federal issue (coextensive state const provision), then issue preclusion will apply.
- **Burford** (administrative) abstention
- Oil & gas regs: very complex, lot of diverse interests; state provides unified method for creating policy & determining cases through agency & state court
- & ultimate federal review remains a possibility
- Extended to RR cases, *Alabama Pub. Serv. Comm’n v. Southern Ry.* Reg of RR is primarily the concern of the state
- Burford abstention hasn’t been applied since *Southern*, but continues to be cited by the Ct. as in “this is not Burford abstention.”
- *CO River*’s summary of it: when timely & adequate state ct review is available, federal court must decline to interfere w/ proceedings / orders of state admin agencies 1) where there are difficult Qs of law bearing on policy problems of substantial public import whose results transcend case @ bar, or 2) where exercise of federal review would be disruptive of state efforts to establish consistent policy.
- Also, this type of abstention is limited by *Quackenbush*
  - *Thibodaux* (diversity) abstention:
    - Abstention in eminent domain proceeding, when it wasn’t clear if the municipalities had condemnation authority under state law
    - This was intimately involved with sovereign prerogative, particularly apportionment of power btw city & state
      - But, *Marbury*: when state (eminent domain) law is clear, & only analysis is factual, no abstention
    - No SC case has upheld abstention just on *Thibodaux*; lower courts resist. But cited approvingly, like *Burford*
    - Abstention, even in absence of action by agency, when adjudication of state law issue (in diversity) would require “sensitive & uncertain decisions of policy better made by the state judiciary.”
  - *Younger v. Harris*—federal court should not enjoin state prosecution absent “special circumstances.”
    - Reasons: 1) equity jurisprudence: cts of equity shouldn’t act where remedy @ law is adequate & no irreparable injury; 2) comity—respect for state functions; 3) “Our Federalism”—recognition of valid interests of both, don’t interfere in legit activs.
    - Chilling effect on rights is not enough to alone justify injunction
  - *Dombrowski*: ct allowed injunction; still good law, cts view as diff from *Younger b/c of facts
    - There, it was alleged that the prosecutions were not w/ expectation of getting convictions, but were party of a plan to discourage assertion of federal rights by blacks in LA (prosecutions were for subversive activities)
    - That was enough for irreparable injury
  - Criticisms of *Younger*
    - Like *Pullman*, *Younger* applies to 1983
    - Relegates Ps to state forums they expect to be least sympathetic
    - Erects frequently-insuperable barriers to prospective & class relief
  - *Samuels v. Mackell*: *Younger* applies to declaratory, as well as injunctive, relief vs. pending state criminal prosecution.
  - Possible exceptions to prosecution:
    - Bad faith prosecution or harassment—SC has never authorized intervention under this
    - Patent & flagrantly unconstitutional statute—probably has little force
    - Other extraordinary circumstances—unclear what this means.
- **Steffel v. Thompson**—Declaratory Judgment that state criminal law is unconstitutional can be obtained when there is no pending prosecution, even if injunction couldn’t issue
  - Prosecution must be threatened, in non-“imaginary / speculative” sense—standing & ripeness barriers must be surmounted
    - Doesn’t apply to pending prosecution for past conduct.
  - Case doesn’t answer the “would an injunction be OK” question. But in any event, an injunction is a less harsh / intrusive remedy.
  - Engrafting prerequisites for equitable jurisdiction onto DJA would defy Congressional intent to make DJ available when equitable relief would be inappropriate
- What about after the DJ: if state prosecutes, is proper remedy an injunction, or arguing preclusion?
  - Rehnquist, in Steffel, thinks that injunction predicated on the DJ is inappropriate
    - But if state court must only treat the DJ as the views of a coordinate court, what good is it?
    - On the other hand, if you can get an injunction, what’s the point of postponing (and of Brennan’s rationale of “less intrusive”)?
  - Book doesn’t give an answer; probably hasn’t been decided.
- Injunction against non-pending actions: upheld in *Wooley v. Maynard*, and then in some other cases w/o mention of abstention
- Exhaustion of state law remedies
  - Required (in a way) before seeking relief in federal court, to get around *Younger* & abstention—have to see it through to final judgment. *Huffman v. Pursue*
  - But once the judgment is final, you can seek review (with res judicata, possibly); no requirement that you exhaust, only that you’re done. *Ellis v. Dyson*
  - Real answer is regardless of how you come out on exhaustion, it’s issue preclusion
- *Hicks v. Miranda*—reverse removal doctrine
  - Filed suit in federal court first, & sought (but did not receive) TRO
  - If state criminal proceedings are begun vs. federal Ps after federal complaint is filed but b/f any proceedings of substance on the merits in federal court, *Younger* applies
    - If you can get TRO or prelim injunction b/f crim stuff, you’re safe
  - This case is also more complicated in that there was already a pending criminal proceeding—just not against the appellees. However, the holding remains
- Extensions of equitable restraint to civil actions, etc.
  - *Huffman v. Pursue*: civil proceeding to abate obscenity; *Younger* applies, it’s like a criminal proceeding. The rationale counsels restraint.
  - *Trainor v. Hernandez*: state proceeding to recover welfare payments. Civil, but the Court (5-4) says *Younger* applies. Drobak thinks it’s b/c state could have brought fraud charge.
  - *Moore v. Sims*: *Younger* applies to proceeding where state seeks custody of abused kids
  - *NOPSI*: *Younger* does not apply to state judicial proceeding reviewing legislative or executive action—*Younger* doesn’t apply to legislative action that doesn’t require, or hasn’t led to, enforcement suits
  - But, *Younger* to protect important state interests, even when not criminal & when state’s not a party:
    - *Juidice v. Vail*: *Younger* applies to civil contempt proceedings
Pennzoil v. Texaco: Younger abstention proper when Texaco tried to seek declaration & injunction that the “post bond for judgment” was unconstitutional ($11 bill judgment / bond)

- Maybe Txco should have sought mandamus, or figured out a way to do this through TX courts

NOPSI explained these cases as applying Younger to “civil proceedings involving certain orders that are uniquely in furtherance of the state courts’s ability to perform their judicial functions.”

- Unclear how Younger applies to damages action vs. state official.
- Administrative proceedings of a judicial nature:
  - Middlesex: federal interference w/ lawyer discipline procedure was inappropriate, so long as lawyer had adequate opportunity to raise 1st amendment claim.
  - Ohio Civil Rights v. Dayton Christian Schools: Younger applies to state admin proceedings of an enforcement nature (alleged sex discrim)
    - Court sees this as consistent w/ 1983’s “no exhaustion required”: unlike Patsy, the admin proceedings here are coercive, not remedial, began b/f substantial federal action, involve imp state interest
    - Proceedings are coercive b/c agency sues you
    - Note that if agency hasn’t yet sued, NOPSI (above) applies
  - SC has never ruled on what happens when the admin decision becomes final: may you go to fed ct, or must you stay in state ct sys?

- Rizzo: suggests that Younger applies beyond judicial branch & apply to states generally (prohibit injunction vs. executive branch officials); never been followed

- CO River Water Conservation Dist v. US—a whole other type of abstention
  - Suit adjudicating water rights in CO
  - Very limited use doctrine—ct. says this doesn’t fall under any other abstention
    - But, would seem to be a good candidate for Burford abstention, since the adjudication of water rights needs cohesive state policy
    - On the other hand, state law appears to be settled, & there’s no questions of policy presented for decision. “You tell me if it’s like this or not.” Water regulation problems are not as complex.
  - Seems there’s 4 factors, no 1 is dispositive: Who has control over property (water, here CO); forum non conveniens concerns; avoidance of piecemeal litigation; order in which jurisdiction is obtained
    - Here fed.ct. obtained jurisdiction first, kinda—the suits were ongoing, but US became a party in fed.ct. b/f state ct.
    - Plus, find support for this in consent to jurisdiction given by McCarran Amendment

- Moses Cone: Court does not abstain; enforces arbitration
  - If you look @ the facts, you’ll get a lot of piecemeal litigation. Take arbitration case w/ grain of salt.

- In CO River, none of the justices questioned Kline v. Burke Constr Co, which held that federal court should exercise jurisdiction when there’s already pending a related state court in personam action.

- Ankenbrandt v. Richards: “domestic relations” exception to federal jurisdiction: encompasses cases involving issuance of divorce, alimony, or child custody decree
But that exception is not itself abstention—it’s statutory, & Younger abstention was improper here.

Grant of statutory jurisdiction was based on precedents & Congress’s failure to object to them.

Blackmun finds no statutory basis for the exception, would rather call it abstention & be done. But majority’s view is the law.

- Probate exception: Markham v. Allen: fed ct has no jurisdiction to probate a will or administer an estate (also statutory exception). But, federal courts have jurisdiction to entertain suits of claimants vs. decedent’s estate, so long as it doesn’t interfere w/ probate proceedings or assume general jurisdiction of probate.

  - It seems that if the state allows other matters inter partes (such as challenges to will, etc.), fed.cts. can hear them when there’s diversity of citizenship & enough $$.  


    - Probate exception reserves probate / annulment of will; administration of D’s estate; precludes fed cts from endeavoring to dispose of property in custody of probate ct

    - But, doesn’t bar federal courts from adjudicating matters outside those confines & otherwise w/in fed jur

Res Judicata and Other Aspects of Concurrent / Successive Jurisdiction

- Claim preclusion (res judicata): cannot split theories

  - If you failed to raise a theory, 2nd suit on another theory out of the same transaction will be barred by claim preclusion

  - Also cannot split damages (personal / property damages) or remedies (injunction / damages)

- Issue preclusion (collateral estoppel): the issue must have been one actually litigated.

  - Issue must have been essential to the judgment

  - Nonmutual issue preclusion will sometimes work—this is use of issue preclusion against a party to a prior lawsuit by a nonparty to that lawsuit.

  - Can purposely withhold issues so that they’re not litigated (but must worry about claim preclusion)

  - Major changes in the law can be an exception to issue preclusion. Commissioner v. Sunnen

    - If another party (such as US) controlled the litigation but wasn’t the actual litigant, issue preclusion might apply. Montana v. US

- Issue preclusion, but not claim preclusion, applies to declaratory judgments.

  - Semtek v. Lockheed Martin

    - Effect of federal judgment (diversity) on a subsequent state case is not governed by full faith & credit clause or statute (28 U.S.C. 1738)

      - That statute, on p. 1422 governs effect of state judgment on subsequent state or federal case

      - I think the effect of a federal judgment in a federal question case would be governed by Rule 41(b) (or FRCP more generally)

    - But for federal common law of claim preclusion, look to the common law of the state where the court sits.

      - So state court in MD looks to claim preclusion law of CA to see if CA would have precluded the claim; if yes, MD must too
  - No nonmutual issue preclusion against the government
    - Need to develop intercircuit conflict
    - Gov’t a party to a huge # of lawsuits; not fair
    - SOG’s discretion in which cases to take up on appeal; would be a huge waste of resources to litigate everything.
    - Executive changes lead to changes in enforcement.
  - This means that you can have two circuits with different rules (say 2 and 8), but because of claim preclusion in a suit from the 8th, the law might be different in the 2nd circuit for that litigant than for everyone else.
    - Gov’t can keep making arg, even if a serial loser, so long as nonfrivolous basis for doing so (Rule 11)
    - Can maybe stop this through class action
    - Nonacquiescence by federal agencies in circuit court decisions might lead to threats of contempt, or injunctions
  - Scholarly argument in book: intracircuit nonacquiescence OK, but only where not “arbitrary and capricious” (agency must secure uniform national policy, agency’s position is fairly arguable, and is seeking vindication in C/A & SC)

- Allen v. McCurry:
  - Issue Preclusion applies to 1983 suit when a former criminal D is suing police officers for a constitutional violation and that issue was litigated in the criminal proceeding (say, a motion to suppress)
  - Powerful holding: through Younger abstention (state goes first), Ps can block a 1983 case. Then, issue preclusion under McCurry
  - Have to make assumption of mutuality (state = allen), which is fair b/c everything involved in litigation of the issue in criminal trial is b/c of officers’s conduct

- Kremer v. Chemical Constr. Corp: § 1738 directs federal courts to give same preclusive effect to state court resolutions as would be given in the courts of the rendering state
  - Possible now that unappealed agency decision prevents suing in 1983 in fed.ct.

- Migra v. Warren City School Dist.: § 1738 requires claim preclusion to same effect that it would be given in state courts.
  - Possible now that you might be forced to litigate 1983 in state court
  - And of course, can’t split @ federal level b/c of supplemental jurisdiction: would have to litigate 1983 w/ state claim.

- Open question: the preclusive effect of a state judgment on federal claims that could not have been brought in state court (antitrust action, for ex.)
  - SC in Marrese v. American Academy of Orthopaedic Surgeons: have to look at the preclusion law of the state. If the state law says no preclusive effect on claims over which the state court has no jurisdiction, there’s no problem. But if the state law accords preclusive effect, unsure what to do—and that’s left open.

- Open question for class actions...
  - Or, maybe not anymore. Matsushita v. Epstein: state class action settled b/f federal one; settlement released all class members (overlapping classes) of all claims, even federal Securities claims (which couldn’t be brought in state court). Ct. held that decision on preclusive effect must be made w/ reference to state law—even w/ respect to a federal claim over which state court had no jurisdiction
But still, leaves open the Q what would have happened if state had tried to hear the Securities claims—what preclusive effect then?

- **Univ. of Tenn. v. Elliot**: factfinding by state agency acting in judicial capacity was to be given the same preclusive effect (in 1983 suit) to which it would be entitled in the state courts.
  - But, not for Title VII, b/c that would be inconsistent w/ trial de novo provision

- **Rooker-Feldman**
  - **Rooker**: grant of statutory jurisdiction to SC to review state court judgments implicitly excluded district court jurisdiction & furnished independent basis for prohibiting collateral attack on judgments.
  - Largely forgotten, but then **Feldman**: district court without authority to review final determinations of DC C./A.
  - Premise is that SC is the only federal court with jurisdiction to review state court cases.
  - Lower courts haven’t agreed on scope & application. **Kamilewicz**: federal action barred even if state judgment was entered w/o personal jurisdiction over absent class members.
  - **Drobak**: this shouldn’t exist—it’s just gussied-up preclusion