Federal Courts classnotes, Fall 2005. Malla Pollack.

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Tuesday, August 23

Introduction

- What is a federal judiciary *for*?
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    - To protect property (?) (Madison)
    - To *control* state governments (?) (and make them protect individual rights, e.g.)
    - To control the federal government?
- Is there parity between state and federal courts? I.e., are state courts as good as feeral courts?
- The federal judiciary in the constitution
    - The Constitution requires only a Supreme Court—but it *allows* lower courts, and these were created by the very first Congress.
    - Note that the Constitution is a poorly written document (see, e.g., the original provisions for electing the president).
        - (Also, by the way, was Thomas Jefferson an awful person? He had slaves, the Hemings thing, and he lied and ignored reality.)
- A3§2c2: jurisdiction of the Supreme Court: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."
    - Who gets all the cases that the Court has no original jurisdiction over?
        - The state courts?
        - And if so, what law applies? (See A6c2—the Supremacy Clause.)
    - Why does the Court get original jurisdiction over what it does?
        - Ambassadors (of *other* countries, this means): you don't want state courts mushing up foreign policy (cf. A1§10c1—no state shall enter into any treaty, and A1§10c3—no interstate compacts without congressional consent).
        - Other public Ministers and Consuls: it's not clear who these are—there may not be any caselaw on this. But, consider the canon of construction that says that things are alike within lists—this could mean that these are folks *like* Ambassadors.
        - States as party
- (N.b.: the Constitution as a contract:
    - Between the people?
    - Or between the separate state governments?
    - Or between the people of each separate states?)

- The First Judiciary Act:
    - Passed right away.
    - Gave some federal question jurisdiction
    - Had the Court's justices riding circuit.
- The Civil War Amendments
    - Note am14§2: no extra representation for those without a right to vote (see "male"; if it said "people," the northern states would have lost representation, too).
    - To what extent is the judiciary part of these?
        - *City of Boerne*: re: the Religious Freedom Restoration Act
        - Despite am14§5, Congress could not interfere with state government, the Court said. So, Congress can only enforce, not change am14 rules. The Court employs a proportionality test, here.
        - *Seminole Tribe*

Thursday, August 25

The Schiavo cases

- Note how this issue split conservatives up into the pro-lifers and the pro-states' righters—or, in other words, into those who are conservative as to legal substance and those who are conservative as to governmental structure.
- *Cruzan*: the case out of Missouri where the family of a comatose patient petitioned for termination.
    - Note that even if the whole family agrees to death, the *doctor* and the *hospital* are still interested in a court order (to protect themselves).
    - The state court required clear and convincing evidence and didn't find it. Thus, itc. was the *reverse* of *Schiavo*—the Court held that a state has a right to require clear and convincing evidence.
- In *Schiavo*, Florida too required clear and convincing evidence—but it *was* found.
- PL 109-3
    - This doesn't purport to change any substantive rights—in fact it says that that's *not* what it's doing.
    - It limits all causes of action to those that arise under *federal* law (because that's all it *could* do under A3 (because these are all Florida residents)).
    - Why was this statute passed at all?
        - Political motivations:
            - Garnering favor from pro-lifers
            - Painting federal courts as bad
            - The possibility of establishing precedent of a right to life
                - Whenever right to life comes up, think of:
                    - Abortion
                    - Terminal patients

- And the death penalty
    - Congress recently passed the Antiterrorism and Effective Death Penalty Act, which made postconviction relief even harder in death penalty cases.
    - Note the (arguable) inconsistency between the right to life / antiabortion stance and a shared support for the death penalty.

- Claims raised in *Schiavo*:
    - am14 fair trial
    - am14 procedural due process
    - Equal Protection
    - Religious freedom
        - N.b.: *Kraemer*, *Batson*, and *NYT v. Sullivan*
        - *But*, the state court *decided* that there was clear and convincing evidence that Schiavo *did not* want to die (so, how can her religious freedom be implicated by something she didn't want to do??)
        - *If* the Court was willing to find state action, then because of the de novo requirement in PL 109-3, the district court would have had to *take evidence* on what Schiavo wanted to do (!!).
        - (Note "Congress" in am1, and compare the other Bill of Rights amendments (e.g., am4—in England, it was common for private parties (guilds, mainly) to conduct searches).)
- Note the en banc rules:
    - Each panel in a circuit is bound by a decision of every other panel, unless the circuit goes en banc, in which case it can adjust the precedent.
    - The circuit can sua sponte go en banc, or the parties can petition for it.
- Is PL 109-3 constitutional?
- Note the All Writs Act issue itc.

Federal law in state courts

- Note how the states' righters positions have changed:
    - 1787: state courts should be allowed to do (almost) anything
    - Now: state courts shouldn't be burdened with federal claims

  Why? Well, nowadays, the federal courts are hearing *lots* of cases. And if the federal courts went away, state courts would have to do all of that.
- The general rule: unless Congress says otherwise, state courts have concurrent jurisdiction.
    - And, in fact, state courts have a *duty* to hear federal questions—*unless* they have a valid excuse.
        - A valid excuse is apparently only where the state's legislature hasn't given the court jurisdiction.

        - See *Douglas* (1929) (p48x) (but how does *McKnett* (1934) (p48x) differ?)
    - How does the Supremacy Clause even matter here?
        - See the Sandalow article (pp49-51x): there are three possibilities:
            - State courts are required to hear federal claims only when Congress expressly says so.
            - The Court could direct state courts to hear a federal claim when it would materially advance the purposes of a federal statute.
            - The Court could create a general obligation, with exceptions, that state courts hear every federal claim that they have jurisdiction over. (This is the one that the Court has picked.)
        - Another possibility, according to Pollack: maybe the Court is using a plain meaning rue in reading state jurisdictional statutes—i.e., rather than assuming that state courts are dissing federal law, maybe the Court is reading the state statutes strictly.
- *Howlett* (1990) (p35)
    - Pollack says that itc. isn't about the definition of "jurisdiction." It's about the viability of the cause of action (namely, the definition of "sovereign immunity").
        - And so maybe the Court is simply saying that "jurisdiction" ≠ "immunity."

Friday, August 26

- *Bivens* actions: these are directly under the Constitution (but implied). And they must be against a federal officer.
- *Fankell* (1997) (p52)
    - Immunity:
        - Qualified: where, technically, damages come from the individual (although the government usually indemnifies). If an officer couldn't have reasonably thought that the was doing anything wrong, then he's immune.
        - Absolute: e.g., the judge in your case; the prosecutor when prosecuting.
    - Why would someone bring a § 1983 action in state court?
        - Federal-state comity—certain types of § 1983 actions will lead to federal court abstention.
        - Case or controversy—certain actions aren't justiciable in federal court.
        - Better judges—e.g., stupider judges.
        - Jury use rules.
        - Class action rules.
        - Geography.
        - Waiting lists.
        - Claim joinder rules.

- More writing in federal courts (more oral in state court).
- Appeal rules:
  - In New York, you can appeal almost anything *during* trial.
  - But in the federal system, and in Idaho, you have to have a final decision.
    - Except, federal *caselaw* allows immediate appeals from § 1983 non-factual immunity determinations (Idaho, however, does not allow this).

- Here, Δs are complaining that this Idaho rule burdens them.
- The general rule is that with a federal claim in state court, you're stuck with the state procedure.
  - Why?
    - The Supremacy Clause—but why hasn't it been read to include procedure?
      - Original intent surely doesn't include procedure.
      - But still, why not?
        - Economic impact on the states? But see fn.10:
          - Point 1: Δs had the same chance they would have had in federal court.
          - Point 2: what intrusion on Idaho if *already had it*?
- Notice how the Court deals with Idaho as if it were *one person*—but there are a bunch of interests involved here, all of which are part of the "state."
- "Neutral," n.b.
- Outcome-determinativeness
  - Stevens uses this to refer to how things will be at the end of (hypothetical) trial.
    - But what about settlement!!!? It *is* outcome determinative there!! I.e., if there's an immediate appeal and Δs win, there will be no settlement. If they lose, there will almost surely be a settlement.
  - And notice by trying to protect the state, the Court forces it to pay more money.

<u>Tuesday, August 30</u>

- Ruby Ridge
  - The FBI was operating with special, more aggressive rules of engagement.
  - The local county prosecutor filed an involuntary manslaughter charge against one of the FBI snipers, on the grounds that firing a shot into an invisible area in a residence was criminal recklessness.
    - The sniper invoked the federal officer removal statute (28 USC § 1442).

            - How does removal work? The person who wants to remove does *not* file a motion—rather, he just gives notice of removal. The other side must then file a motion with the federal court if it wants to case sent back.
        - The case never went to trial (probably due to political pressure).
    - But what if the case had not been dropped?
        - Assume the FBI rule of engagement was reasonable, but *general* (i.e., gave no specific instructions—the sniper had the option, but wasn't required to do what he did).
        - And assume a state criminally reckless manslaughter statute.
        - Does the FBI rule include as background the state statute??
- The commandeering cases
    - *FERC* (in Amar article); then the radioactive waste case; then the ADEA case; then *Printz* (the Brady Bill case).
- *Tarble's Case* (1872)
    - Note Constitutional authority re: armies and militias, especially A1§8c6—providing for militias, disciplining, etc.
        - So, itc. is easy, right??

Thursday, September 1

- *Bouie* (1964) (p107x): criminal trespass where the state court claimed it was merely interpreting state law.
- (Note neutrality (and *Bush v. Gore*): Pollack thinks that neutrality is almost entirely subjective—see property law (and consider Proudhon: property law is only neutral as to those who got there first and get the land).)
- *Murdock* and modern law
    - Before: the Court looked first at the federal ground, and reversed if the decision was possibly wrong there.
    - N.b. the Bush and Mattis article.
    - Note #3 in *Murdock*—it used to be that you couldn't petition the Supreme Court unless you lost.
        - But that had to do with the jurisdictional statute.
        - (Also note how this values people's, rather than states', rights more highly.)
    - *Long* only deals with the situation where the highest state court decision isn't clear as to its grounds.
    - *Murdock* allowed for rulings by the Court where there were adequate and independent state grounds.
        - Under the modern rule, the Court looks for AISG—and if so, the Court says it has *no jurisdiction* (it doesn't just decline to review). Yet *no statute has changed since Murdock*. So, this must be unconstitutional—is it??

        - (*Herb* was the first case where the Court started articulating the AISG doctrine clearly.)
    - In any case, which is the better rule?
        - Note the advisory opinion argument—the Court rules lots of times and doesn't end up changing the outcome. So, what's the problem?
        - The advisory opinion cases:
            - Pension for revolutionary soldiers—a separation of powers problem.
            - George Washington asked for advice on the extent of presidential foreign policy powers.
        - Part of the reason for the AISG doctrine, Pollack thinks, is that the Court is buried in cases.
- *Long* (1983) (p92)
    - Itc. deals with when the highest state court decision isn't clear—in which case there are four options, Stevens says (p97).
    - Why did the Court even want to say anything about this case? Because they wanted to clarify am4 and *Terry*.
    - Note how under the old jurisdictional statute (*Murdock*), this Court definitely couldn't review this case—because it wasn't decided against the individual.
- *Bush v. Gore* (2000) (p103)
    - Precedent checking:
        - *McPherson v. Blacker* (1892) (p106x): Pollack says this had nothing to do with the state legislature determining elector selection.
        - *Take Back Tampa*: Pollack says that this also did not say what the Court says it did.
        - And there are other mischaracterizations, says Pollack.
    - Monoghan article (p122x): the Court argues that it should take state caselaw back to old state law if there's federal law reason to stay with the old caselaw.
        - Monaghan demonstrates that the Court had ancillary jurisdiction to do this.
        - Others argue that there's not a time one / time two problem here.
    - Note "legislature" in A2§1c2 ("Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .").
        - *Not* the state supreme court, Rehnquist would point out, in arguing for Supreme Court jurisdiction.

Friday, September 2

Federal common law

- *Little Lake Misere* (1973) (p124)
    - Itc. is a good example of "states as bad actors" federalism.
    - *Erie* (1938)

        - Also, *Clearfield Trust* (1941), where the Court backed away from *Erie* with respect to federal paper.
    - But, even before *Erie*, state law regarding real estate governed, the Court said.
        - See fn.10 and contrast pp132-33 (discussing *Burnison*, *Fox*, and others—fn.10 does *not* expressly overrule these (!)).
    - What does itc. mean about "specific" and "general"?
        - What about the idea that the possibility of states undermining federal policy of bird preserves? Well, this doesn't work, because the federal government wanted to sell *mining* rights (not preserve the bird preserves (!)).
        - Land rules weren't important enough to Congress here that they would write them into the statute—so how is this "specific" enough?
            - I.e., how do we distinguish *Burnison* and *Fox*?
                - Well, those involved property left by individuals to the U.S.--not, exactly, any kind of certainty in land deals.
                - But, mainly—*money*. In *Burnison* and *Fox*, nothing would ruin the federal budget.
                    - Note the Spending Clause (A1§8c1): and note that we're still fighting about the meaning of this clause. Some argue that it gives the federal government general police powers—but the Court has never bought this argument.
                        - In any case, though, see the Spending Clause cases (federal strings-attached money—Pollack doesn't think there's a Court case that says the feds went too far).
- *Clearfield Trust* (1943) (p133x)
- The money is the determining factor theory: view it as insurance—as a tax collector, the U.S. government is the ultimate insurer (short of a socialist government).
    - Yet, as in *Clearfield*, this insuring is exactly what the Court is preventing the government from doing.

Tuesday, September 6

- *Boyle* (1988) (p138)
    - Note that the dissent is yelling the "Congress decided not to pass this!!" Pollack says there are a bunch of cases where someone argues that the fact that Congress decided not to pass something should be important.
    - What's the majority's best argument?
        - Federal contract (and pass-through costs)
        - FTCA immunity
            - Note that there's some federal common law immunity out there, too.

The majority says that itc. "borders" upon two unique federal interest area ("borders" is as good as it can do).

- Note how the majority is trouncing on both the states and Congress.
- The majority argument deconstructed:
  - ¶0p140: that privity was required until 1962 in Virginia. But it's been 40 years since then—even the most laggard state has product liability torts now!!
  - Is there anything going on here besides money?
    - Maybe a preference for a strong executive and judiciary, but not a strong Congress (??).
- Note how the Court took itc. before there was a circuit split—in fact, itc. was decided below on the same day that the CA recognized a military contractor defense (Pollack thinks that maybe the Court was itching to craft the rule it crafted itc.)
- What should the Court's attitude to Congressional silence/inaction be? (Well, you need to know *why* Congress didn't act.)
- How much is left of "there is no Federal common law" after itc.??
- Distinguishing *Boyle* and *Miree*:
  - Specificity of the contract requirements.
  - In *Boyle*, the design is arguably *reasonable*—not so in *Miree*.

Thursday, September 8

Implied private rights of action

- It's hard to say, with these cases, whether the majority is grounded in a theory about implication of rights of action or grounded on liking or disliking the particular policy to be enforced (or not).
- *And*, the cases are *not* consistent, no matter what the Court says.
- Note how all of this interrelates to administrative agencies:
  - Private rights of action can *help* a cash-strapped agency enforce something.
  - But they can also *hurt* an agency that hasn't gotten around to interpreting something (because the agency, not the Court, is the expert).
    - But, Pollack asks, is this really such a big problem?
      - The Court can ask the agency for a brief (but, recall *Michigan v. Long*, and the arrogance of doing this; and, it undermines the agency's resources, still).
      - The Court could set up a private action, but one where you can win only if the agency is clearly in favor of you winning.
  - Note the *Sandoval* problem (see nhp174): a private right of action only reaches as far as the statute does—not as far as any regulations do.
- The *Cort* factors:

- Separation of powers concerns:
  - Special class
  - Legislative intent
  - Further purposes
- Federalism concerns:
  - State's province

- Note two things that are *like* private rights of action (the *Cort* situation is kind of like both of these):
  - Citizen standing to bring suits
    - Note that in *Cort*, the Π was a shareholder and qualified to vote.
  - Negligence per se
- The power to imply a right of action
  - Powell's dissent in *Cannon* (p166)
    - This not phrased as a lack of SMJ argument, but that's what it is (and note that federal judges can always raise SMJ concerns, and sua sponte).
    - Here, you have:
      - The idea that Congress has never assigned the Court the job of embracing these disputes, because there's no express language.
        - But Congress knows what the Courts do—they imply private rights of action (this is the ratification by nonaction argument).
          - Legislative intent:
            - What the *bill* meant (but to whom??)
            - What *Congress* meant (but does "it" have a mind? What about "they"?)
            - And what about old statutes? I.e., what about the intent of the Congresses that did not amend them?
            - What about the change of incumbents in the White House?
              - Some administrations don't want certain things enforced. Is it reasonable to allow the executive to change enforcement policies??
        - The statement at ¶2p167: "By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve."
          - This is weird, Pollack says—jurisdictional statutes don't deal with particular causes of action; rather, "all causes of action arising under the law of the U.S."
          - Contrast *Boyle* with Powell's dissent in *Cort* [*Cannon*?]

        - The idea that implying a cause of action encourages Congress to punt to the Courts.
            - What's wrong with this argument, Pollack asks.
- *Jackson* (2005) (h/o)
    - Note the Spending Clause statutes—strings must be express, so that the states understand the bargain. (Pollack thinks that this is the dissent's best argument.)

Friday, September 9

Rights of action for the United States

- *Hudson and Goodwin* (1812) (p185)
    - This is about criminal libel.
    - Note how the Court is *not* talking about due process—it's talking about *jurisdiction*. That's how it starts out, in fact.
    - What if itc. was about a libel made at sea?
        - Did the states cede any policy power at all the U.S.??
- *Standard Oil* (1947) (p187)
    - This is a civil case.
        - Pollack asks: why is this a "more difficult question," as the casebook authors say??
    - Question 1: whose law governs?
        - The Court says that federal law does. But the Court focuses on the relationship between the U.S. and Standard Oil.
            - Doesn't California law govern car crashes that happen in California??
                - Well, there's federal money involved here, Pollack would point out.
                    - And we can distinguish *Boyle* because here it's the U.S. that wants the money.
            - So, why does the U.S. win? Because Congress hasn't allowed it.
                - But could Congress even pass such a statute, Pollack asks.

Rights of action to enforce constitutional rights

- *Bivens* (1971) (p190)
    - Consider the legal gap, with an am4 violation:
        - If you're charged, you have a remedy—the exclusionary rule.
        - If you're warned in advance, you have a remedy—injunction (*Young*).
        - But if you're not charged, and you're not warned in advance, what can

you do? *Bivens*.

Tuesday, September 13

- Between *Bivens* and *Schweiker*, the whole presumption changes:
  - *Bivens*: every rights has a remedy, and courts determine the remedy.
  - *Schweiker*: only Congress can determine the remedy.
- *Schweiker* (1998) (p210)
  - Dissent at ¶3p210: what does Brennan say are the minimums for an adequate remedy?
    - At least an opportunity to raise the constitutional issue Note that ALJs can't hear constitutional claims. An ALJ can only look at the application of rules and statutes.
      - How does the majority respond? It says that there is no separate place for the constitutional problem here—the Πs have just one problem, that they don't receive their benefits.
      - Note history: 1981 was when the SSA changes at issue itc. began. This was the beginning of the Reagan administration, which brought welfare reform and, from there, the explosion in the homeless population. And so then Congress pulled back.
    - And also at least consequential damages. Why are these so important? Because you have to at least restart your life after losing benefits like this.
      - How does the majority respond? It says that damages are up to Congress to provide or. See, e.g., ¶1p209. This is, Pollack says, "not seeing the blood."
  - Dissent at ¶2p213: social welfare and due process are not an area where courts are incompetent to act.
- How can we make sense of these cases?
  - Yes, a right of action:
    - am4 (*Bivens*)
    - federal prisons (*Carlson*)
    - congressional aide (*Davis*)
  - No right of action:
    - Military officer (*Schweiker*)
    - LSD testing in the military
    - federal civil service
    - private federal prisons (*Malesko*)

  Is this a distinction here between the sovereign and proprietary role of government?
    - Well, except what about *Davis* (the congressional aide)? Maybe the Speech and Debate Clause fixes this.

- Except still, what about *Malesko* (private federal prisons)?
    - An earlier case said that there can be no *Bivens* actions against agencies.
    - *Malesko* says that a corporation can't be *Bivens*ed either, because it's not effective deterrence.

Thursday, September 15

Customary international law

- Torture Victim Protection Act of 1991 (h/o)
    - This is limited to torture by foreign nations. If the U.S. is willing to hold foreign individuals liable in the U.S. for torture under color of law, is it putting its people at risk when they're abroad?
        - Consider, especially, the war in Iraq.
        - This is a:
            - Federal courts issue
            - A pragmatic issue
            - A legitimacy issue
- International law and *use cogens*: what powers in the world need to agree in order to form an international *use cogens* norm?
- Note the slaves who left with the British after the Revolution—the British didn't see slaves as "property," in the treaty's terms.
- Note an unupdated part in the casebook—the Court overruled the juvenile death penalty, 5 – 4, last year.
    - Scalia's dissent:
        - The majority argument was that national consensus has evolved so that now the juvenile death penalty is cruel and unusual. *And* that there's an international consensus against it.
            - O'Connor in dissent: there is no national consensus. But see, e.g., a Mississippi Supreme Court decision deciding, against Court precedent, to strike down the juvenile death penalty.
        - Scalia is upset about the use of international law.
- Note the difference between self-executing and non-self-executing treaties.
- Federalism and international law
    - Note *Missouri v. Holland* (on migratory birds).
    - And also *Boos v. Berry* (on picketing near an embassy): itc. says that Congress can't use its treaty power to override a constitutional barrier (am1).
    - And also, of course, separation of powers and international law with respect to treaty-making.
- References to international law in the Constitution itself:
    - "Unusual" in am8
    - "Foreign states" in A3 and am11

        - Law of Nations Clause (A1§8c10)
        - Others?
- Scalia in *Sosa*:
    - Pre-*Erie* federal common law versus post-*Erie* federal common law—two different things.
        - But what about the federal paper cases!!?

Friday, September 16

Congressional limitations on federal court jurisdiction

- *McCardle* (1868) (p242)
    - Note the arguments during the Reconstruction for justifying federal supervision:
        - Estoppel: you're states, but you can't claim those benefits because you seceded.
        - Territories: you're territories, over which the federal government has exclusive control.
        - War powers: even though there's no war anymore, the South is still in the "grip of war." This is the argument that was most frequently and successfully invoked.
    - The Court dodged every single constitutional challenge to the Reconstruction Acts.
    - So, what does itc. mean?
        - The broadest reading is that Congress can do whatever it wants.
        - Another simple reading is that Congress didn't take away all habeas jurisdiction so there's not a problem.
            - The Court has played this game over and over, Pollack says (see, e.g., fnbp246).
            - (And, the Court never looks at the merits of original habeas petitions, in real life.)
- How could you construct an argument that Congress can *not* shut down Court review?
    - Separation of powers
        - And note the early cases that demonstrate an intent to have the Court review (e.g., *Zenger*).
    - Constitutional text?
        - "Exception" as implying a proportion.
        - "All"in A2§2 (Amar)
        - "Exception" only modifies "Fact"
        - Amendments:
            - am14 (with respect to the states)
            - am5 (with respect to the feds)

Some have argued that Due Process requires review by an *independent* judiciary (thus, only the federal judiciary).

Tuesday, September 20

Congressional expansion of federal court jurisdiction

- Protective jurisdiction
  - "The greater power includes the lesser"
    - Here, i.e., if Congress can substantively legislate and thus confer jurisdiction, then it should be able to *just* legislate to give jurisdiction.
    - Compare "greater includes lesser" arguments in intellectual property law (Commerce Clause and copyright) and bankruptcy (Commerce Clause and Bankruptcy Clause):
      - The Court has said that you can't use a larger clause to bypass a more targeted clause.
  - *Lincoln Mills* (1957) (p266)
    - Note the argument that § 301 *is* substantive—that Congress is saying that state law should apply to these cases.
  - Note the well-pleaded complaint rule.
  - Cases:
    - *Osborn* (1824): national bank—yes.
    - *Lincoln Mills* (1857): union—yes.
    - Railroad removal cases (100 U.S. 1) (1885): national railroads—yes.
      - Frankfurter, in dissent, pointed out the changes between *Lincoln Mills* and the Railroad cases:
        - 28 USC § 1349
        - The well-pleaded complaint rule
    - *Schumacher* (1934) (p268c): bankruptcy—yes.
    - *Verlinden* (1983): FSIA—yes.
    - *Mesa* (1989): federal employee's removal—no (federal defense required).
    - *Lamagno* (1995): employee certification—yes.
    - *Tidewater Transfer* (1949):
      - 7-2: DC is not a "state"
      - 6-3: that you can get in an Article I court does not mean you can get in an Article III court
      - 5-4: DC treated as a state for diversity jurisdiction

So, we just have *Mesa* that denied expansion. Notice that the Court isn't taking on Congress, there; and, DOJ was in favor of the denial.

What's going on here? Theories:

- There's a federal question in these cases/statutes.
- The party needs protection.
- Federal policy needs protection.
- am14 and interstate biases (see 79 Notre Dame L. Rev. 1925).

Tuesday, September 7

Reopening final judgments

- *Plaut* (1995)
  - Pollack says the majority opinion is "formalism run amok."
  - Time trap jurisprudence: this was created by *Beam*, in several areas of law.
    - Before *Beam*, the rule was a balancing, based on equitable principles.
    - *Beam*: Pollack says that if Congress had done what Congress did in *Beam*, it would have been a due process violation.
      - Note a Supreme Court decision on the Antiterrorism and Effective Death Penalty Act—giving a year for filing, where maybe there was no such provision in the statute.
      - Stevens's dissent, Pollack thinks, seems to be saying that Congress should be able to fix what the Court did in *Beam*.
        - Why couldn't the Court fix this? Because of the "case or controversy" requirement—so, the Court wouldn't fix it until such a case was presented to it.
  - Note that the Court didn't say anything that would influence who would win on the *merits—that* was the problem in the colonial cases cited itc.
  - Is there a *Plaut* problem in the Schiavo statute? See § 2 ("notwithstanding any prior State court determination").
    - But they're state courts—and so maybe am14 changes the analysis.
      - *Is* a difference in the analysis for reopening final judgments between separation of powers concerns (reopening federal court judgments) and federalism concerns (reopening state court judgments)?
        - What about *Sampeyreac* (¶3p345)? No—this was reopening a territorial court's final judgment (a territorial court is an Article I court, not a state court).
        - *Calder* (1798) (p334) would suggest that Schiavo is okay (but *not* with respect to *Plaut*—Scalia is only using the dicta in *Calder*).

Thursday, September 29

Non-Article III courts

- *Northern Pipeline* (1982) (p286)
  - Note Rehnquist quoting the poem "Dover Beach" in his concurrence ("darkling plain").
  - Interpreting later Constitutional amendments:
    - Originalists will look at the history of just that amendment; but they won't read the remainder of the 1789 constitution in light of later amendments.
  - First, what does A3 say about A1 courts?
    - Pollack: the *text* doesn't permit A1 courts (constitutional history clearly does, but not the text). So, we can forget about being textualists.
      - Part II.A: is this just a rhetorical flourish, since we're obviously not following A3?
  - Public rights doctrine: this began with cases against the government (especially with requests for money (e.g. pensions)).
    - The problem with doing this in A3 courts was that the person would only be paid if Congress disbursed the money.
      - But, n.b., an A3 court can't enforce *anything*, so should we really bet our A3/A1 distinction on this?
    - Note the "new property": the possibility of a property interest in government benefits.
  - Part III
    - There's no claim that this is based on the text.
    - Three "narrow" exceptions to the A3 court requirement:
      - White and the majority of commentators say that these categories are nonsense.
        - See n25p292: on the "unifying principle". What's this saying?
          - "Here, but no further"?
          - History is the only logic?
  - Dissent:
    - Pollack: the dissent is lying about what the plurality is saying:
      - E.g., p303 on in personam/in rem jurisdiction distinction.
      - Also, the dissent makes a big deal about the handling of state law matters.

      Is the plurality actually conerned about either of these things??
    - See ¶3p303, which says there's no separation of powers concern, because it's state courts that are losing their power.
  - Note an article on itc. by James Fander:
    - Arguing from the constitutional text:
      - A1§8c9: Congress can constitute "tribunals" inferior to the Supreme Court.
      - A3§1: Congress can "ordain and establish" "courts" inferior to

the Supreme Court.
- See the preamble re: "ordain"; and also the connection to divinity.
- Fander argues that "tribunal" ≠ "court."

- Arguments here (non-A3 courts):
  - Return to the constitutional text
  - Admit we're not following the constitutional text and do whatever
  - Balance (but these balancing tests seem to erode)
  - Insist on A3 court control and review of A1 courts
    - But, in A3 *both* the Court and the interior judges have protections. This suggests that the framers didn't think appellate review would solve the problem.
    - Also, appellate review can't fix a bad trial.
  - Fander: use the "tribunal" ≠ "court" argument to retie us to the constitutional text:
    - Requirements:
      1. Must have a unitary Supreme Court
      2. The Court must be *Supreme*
      3. Tribunals must be inferior
    - Note that A1§8c9 is the only place in the final constitution with "Tribunal." But, in earlier drafts, Tribunal and Court was mixed up throughout.
    - Fander sees *Schor* and *Thomas* as the Court not following *Northern Pipeline*, but rather balancing as requested by the *Northern Pipeline* dissent.
- *Schor* (1986) (p317x): is the majority really saying that if there are no personal problems then there are no structural problems??

Friday, September 30

Standing

- "A Multiracial Society with Segregated Schools": a report from the Harvard Civil Rights Project.
- Pollack says that in reality, standing is simply a dodge. The Court uses it to avoid merits when they want to (see the law review articles cited in the *Allen* dissent).
- The rule: *Allen* at p361.
- Separation of powers:
  - But what about checks and balances?! How can the Court check and balance if it plays these standing games, Pollack asks.
    - What does the court system exist to do??
      - (Note the religious aspect of school desegregation—it's more okay to talk about "religious" schools than "segregated"

schools.)
- Note the catch-22 at ¶2p364—Πs didn't allege enough.
  - Maybe Πs did allege this (see the dissent).
  - Sometimes, you read discovery to allege something.
  - Why not just ask Πs to allege this?
  - What about judicial notice?
    - See *Norwood*, where the allegation needed was accepted as historical fact.
      - The majority distinguishes *Norwood* because there, Πs were parties to a school desegregation injunction.
- When litigating standing, analogize to prior cases.

Tuesday, October 11

- Is modern standing doctrine just an attempt to delegitimize all suits other than private contract suits?
- Is there really a standing requirement in the constitution?
  - Does "case or controversy" really create a standing requirement?
    - Consider A3§2 [??]
    - Why couldn't Congress constitutionally confer private AG power to citizens, like in *Lujan*? Because Congress thinks about these powers very carefully, and adds citizen suits where it truly wants them.
- "Procedural injury" (from *Lujan*)
  - If procedure is so important in criminal law, how can Scalia claim that it can't be in civil law?
- Question of whether someone has to have standing—see *Schlesinger* (p375x).
- *Flast* (1968) (p382x)
  - This sets up a weird nexus test (that Pollack doesn't understand).
    - Note how the first half of this test gets caught in its own trap in *Valley Forge*, because it's not a taxing and spending case.
      - And, who *could* sue in *Valley Forge*? (Only a nonreligious nonprofit who actually wants the property.)
- What if the Court recognized public choice theory—that voting doesn't work? What would the Court be able to do??
- What about the fact that the Court only grants cert. in cases where interests are diffuse enough that it's going to get tons of amici? Doesn't this show that standing doctrine is a facade??

Friday, October 14

- Recall the official doctrine, from *Allen*, at 361
- *Raines* (1997) (p408)

- Note *Clinton v. NY*, where the Court did hold the Line Item Veto unconstitutional.
    - Standing analysis there:
        - NYC had a special social security waiver. The Court was unanimous in holding that NY had standing (even though there was another appeal pending—isn't that a ripeness issue??).
        - And Idaho potato coop was also involved—the dissent argued that the coop did not have standing because the harm to it was too speculative (it was only harm that might result from a third-party's tax writeoff).
- *Coleman* (1939) (p410c)
- Itc., the Court is stuck with only the A3 component of standing, because of the broad standing provision in the act itself.
- Note "departmentalism" in judicial review (comes from Jefferson): the Court should not tell other branches how to interpret the constitution with respect to those branches' activities.
    - See Kraemmer (sp.).
    - Pollack's problem with itc. is that the Court keeps getting things wrong.
- *Elk Grove* (2004) (p26p)
    - The Court, in order to hold no standing here, completely upsets the long-existing noncustodial parent standing doctrine in federal courts.
    - This is completely a prudential standing case (compare *Raines*, a completely constitutional standing case).

Tuesday, October 18

- Third party standing
    - Associational/representational standing: organizations often sue on behalf of their members:
        - One or more members must have standing
        - The claim must be related to its purposes

      See *Lujan*.
    - *Singleton* (1976) (p414)
        - The holding itc. gives *direct*, not third-party, standing.
            - Part II.B has only a plurality (except for the first four sentences —but note sentence three... huh?).
        - Re: the merits itc., the courts have upheld denial of Medicaid for abortion (see *Mather v. Roe*).
        - Concurrence:
            - Obstacle to rightholders' own claim:
                - *Warth* (p420c, p376x): is the concurrence's parenthetical wrong? No, but it's kind of misleading—in *Warth* there

were three sets of Πs:
- The second set were taxpayers from a neighboring city, claiming a higher tax burden. This was thrown out in part due to the fact that they were third parties, no rightholders.
- The third set was an organization in the neighboring city, claiming that some emmbers were taxpayers in the *actual town*. The Court said this wasn't similar enough to *Taficante v. Met Life* for standing, because there was no claim here based on the Civil Rights Act and because there was no connection between the members and those actually injured.
- There were also some construction companies who claimed lost profits. They didn't have standing, the Court said, because with organizational standing you must look at the remedy requested. And here, not all members lost profits and so the organization would not be a good surrogate for only a subpart of its membership. With respect to an injunction, there was no claim of a specific project that would be affected, so the harm was not sufficiently immediate.

- So, under Powell's argument, who *could* have had standing?

- ¶1p421: there's no direct interference with the abortion decision here, Powell says.
  - This is a "negative rights only" view.
- ¶2p421: there's nothing more at stake here than remuneration, Powell says.
  - Isn't this contrary to the constraining-standing arguments that say that standing should be limited to things *like* remuneration (and not public interest stuff).
  - However, not *Ashwander* (constitutional avoidance stuff).
- ¶2p421: at the end of this paragraph there's a slippery slope argument.
  - Remember *Craig v. Boren*, which granted standing to a bar owner with respect to a gender-discriminating drinking age—is there a reason why itc. should be different than *Craig*?

- So, ultimately, the Court doesn't throw out any argument—including the argument of the constitutional violations of the patients (!!).

Thursday, October 20

Ripeness

- Ripeness and third-party standing:
  - See n1p42 (Brilmayer article)
  - *Lyons* (1983) (p438x)

  If you phrase it as:
    - Other people have this problem, then it's a third-party standing issue.
    - It hasn't happened to me yet, then it's a ripeness issue.
- The Declaratory Judgment Act: you still have to have a "case of actual controversy."
- What happens if the Court waits too long:
  - People get hurt.
  - Lower courts don't know what to do.
  - Things become *customary*—and the Court will likely uphold them later.
- Constitutional versus prudential/pragmatic components of ripeness:
  - Which is *Poe*??
  - *Duke Power* (1978) (p435x)
- Note *United Public Workers* (1947) (p435x): you can think of this as a limit on the overbreadth doctrine.
- Note that the two cases we have where ripeness is found in marginal cases have to do with money.
  - *Duke Power* ultimately impacted investment interests (the Price-Anderson Act was passed to calm investors).
  - So, what if the Π in *Poe* had been a corporation raising money to start an abortion clinic??
  - Is it that money is more quantifiable? And personal?
    - Some have theories that hard evidence (e.g., statistics) drives out soft evidence.
- Is there a difference in the futurity aspect of *Poe* and *Haworth* (p434x)??

Friday, October 21

Mootness

[missed class]

Tuesday, October 25

Finality and appellate review

- Why is the Court more wishy washy on § 1257 (state courts) than § 1291?
    - Because § 1292(b) is an express bypass mechanism.
- Note that there's not anything constitutional here—it's all about the federal courts statutes.
    - So, the Court is very pragmatic about it.
- Note mandamus, especially as a route if the district court denies your § 1292(b) certification.
- *Coopers & Lybrand* (1978) (p587)
    - Collateral order and death knell arguments, here.
        - The Court says that death knell doesn't make something appealable (this is very nasty to small, low-dollar class actions).
            - Why?
                - Because of what Congress said--"final."
                - Because it would be a waste of judicial resources.
        - How are collateral order doctrine and death knell doctrine different?? Why is the former okay, but not the latter??
- *Cohen* (1949) (p594x): collateral order doctrine
    - See also ¶2p589: the order must:
        - Conclusively deterine
        - Resolve an important, completely separate issue
        - Be effectively unreviewable on appeal from final judgment
    - Why isn't class certification a collateral order?
        - See FRCP 23(a)
        - Not conclusively determined—these orders are never really final until judgment.
        - Also, they can be reviewable on appeal from final judgment.
        - *And*, it's not a separate issue—part of class certification looks to the merits (typicality, similarity).
- *Gillespie* (1964) (p595x)
    - Just ignore itc.?? Certainly, the Court is more flexible on finality than it is in the later cases.
- *Risjord* (1981) (p597x)
    - How is this not effectively unreviewable? Could you really get a retrial just because you didn't have the attorney you liked??
- Exceptions to finality:
    - § 1292(b)
    - Mandamus
    - FRCP 54(b)

Review of final state court decisions

- By statute, you have to have a final judgment—there are no statute or rule exceptions.
    - Yet, this is mushy. See four exceptions in *Cox*.
- Federal versus state standing
    - (This shouldn't be in this part of the casebook, Pollack says. It should be with

the standing stuff.)
- See *ASARCO* (1989) (p621x)

Thursday, October 27

Abstention

- *Rooker-Feldman* isn't really an abstention doctrine, it's a jurisdictional problem.
- The main abstention doctrines:
  - *Colorado River*
  - *Burford*
  - *Pullman*
  - *Younger*

  Note, though, that there are others that are more minor—like family law diversity cases.
- Does this all make sense?
  - Federal courts have a *duty* to exercise full jurisdiction—but then howcome we've got these abstention doctrines?
    - This is incredibly inefficient.
- State law issues:
  - Note the possibility of a certified question from federal court to a state court.
  - Compulsory counterclaims
  - Preclusion: some judgments are inherently tentative
    - Family law judgments
    - Many injunctions
- *Colorado River* (1976) (628)
  - Why abstention here?
    - Why not *Burford* abstention?
      - Maybe because there are no *Burford* cases where the U.S. is a party.
        - See Stevens's separate dissent.
- Forms of abstention:
  - A stay
  - Dismissal and remand (this can't be done for money damages prayers)
    - See *Quackenbush* (1996) (p646x): no reason is given, really.
    - Note forum non conveniens.
- *Rooker-Feldman*
  - Except for habeas (and Schiavo), Congress hasn't given district courts appellate jurisdiction over state court decisions.
  - *Rooker* (1923) (p93px)
  - *Feldman* (1983) (p93px)
    - You can bring legislative-based claims re: a D.C. court to federal

district court, but you can't bring judicial-based claims.
        - n16: both obvious state-to-federal district court "appeals" and "inextricably intertwined claims" will be abstained from.
            - What are "inextricably intertwined claims"? Do they include things you should have brought up?
    - *Saudi Basic* (2005) (p93px)
        - Itc. says that *Rooker-Feldman* has nothing to do with concurrent federal-state jurisdiction *unless* there's already a state court decision *before* the federal suit is filed. Here, only preclusion principles are at work.

Friday, October 28

- Pullman abstention
    - *Pullman* (1941) (p648)
        - Later, it becomes clear that *Pullman* abstention is not discretionary. *And* that it's reviewed de novo.
        - What changed between *Siler* (1909) (p651x) and *Pullman* (1941)?
            - *Erie*!! (1936) Which changed the willingness of federal courts to make state law guesses.
    - *San Remo Hotel* (2005) (p96p)
        - The Πs here didn't do as a bad a lawyering job as the note suggests.
        - This was a unanimous decision (one separate opinion).
        - *England* (1964) (p658) and *Windsor* (1957) (p657x)
            - You have to tell the state court that you're reserving you right to return to federal court (this comes up only if you go to district court first, and it pulls *Pullman* on you).
        - What happens if the state court won't listen to your reservation of federal claims, but rather the state court decides both your state and federal claims?
            - The Court says that *England* doesn't kill general principles of preclusion. And the federal courts can't make exceptions to Congress's preclusion statute. (!!)
- By the way—how are district court abstention decisions final?!!

Tuesday, November 1

- *Rooker-Feldman*
    - See *City of Chicago v. Int'l College of Surgeons*: re: whether *Rooker-Feldman* is applicable to administrative decisions.
        - Could the pendent jurisdiction statute include a state administrative decision??

        - The dissent raised *Rooker* and said that the majority would have to allow federal court review of all state court decisions.
        - Itc. strongly weakens Pollack's theory that *Rooker-Feldman* doesn't include state administrative decisions.
- *Younger* abstention
    - The Anti-Injunction Act and § 1983
        - See *Mitchum*
    - *Ex parte Young* (1908) (p933)
        - This is a case about money, Pollack notes.
        - A Minnesota statute fixed railroad prices, and a federal court held the Minnesota AG in contempt for enforcing the statutes.
        - Itc. says you can get around state sovereign immunity if:
            1. You sue the official.
            2. You ask only for prospective, nonmonetary relief.
    - But, *Younger* (1971) (p666) then says that even despite *Young*, you still can't get a federal court to enjoin a state.
    - *Douglas* (1943) (p662x): while being prosecuted in state court, Δ brings a claim seeking an injunction against his a future such prosecutions.
    - *Dombrowski* (1965) (p663x)
        - Here:
            - There's possibly harassment.
            - There's possibly repeated bad faith prosecution.
        - Itc. can possibly be read to say that *any* prosecution under overbroad, vague am1 law is harassing and can be enjoined.
    - *Younger* (1971) (p666)
        - The Court could have decided itc. narrowly, using *Brandenburg* (which held this statute unconstitutional). But it didn't. I.e., the Court could have said that "if there's a clear federal defense, then let the state court get it right."
        - Since itc., it's clear that any exceptions suggested in *Younger* are actually nonexistent (see ¶1p670).
            - There are cases that say am1 is different, though.
        - Note *Younger* on what the federal courts are for--¶2p673.
    - *Ex parte Royall* (1886) (p681): habeas
        - One reason for *Younger* might be that such injunctions might allow bypassing of habeas procedural hurdles.
    - You can't use the declaratory judgment bypass tactic, either (see *Samuels* (1971) (p677x)).
- Note *Penhurst* abstention: a federal court won't enjoin a state official on the basis of state law.

Thursday, November 3

- *Younger* abstention, continued
  - The bad faith exception
    - Note the court's presumption/deference to good faith of government officers (!!).
      - Why? Especially considering the premises of the American Constitution. Isn't this willful blindness??
  - *Younger* rules so far:
    - Once you're indicted, you can't get a federal injunction.
    - Or a declaratory judgment , because it could turn into an injunction.
  - *Steffel* (1974) (p686)
    - The district and appeals court deny all relief, using *Samuels* to say that declaratory judgments = injunctions, as far as *Younger* goes.
    - The Court reverses:
      - It's enough for a "case or controversy" that you've been threatened but not indicted.
      - And you can get a declaratory judgment.
    - Res judicata:
      - If you do get a declaratory judgment, what good does it do you? Because declaratory judgments (and injunctions) aren't final. So, the state court could simply accept a less broad, constitutional reading of the statute and convict you.
        - (Note that there is a *special* "unconstitutional on its face" doctrine for am1 laws—it allows for the law to be read as constitutional even after being declared unconstitutional on its face. (With other areas, this is not so.))
      - So, if the state court ignores the declaratory judgment you got, can you go to federal court again and get an injunction?
        - This is an open question—there are no cases.
  - *Hicks* (1975) (p696x)
    - (Note that Douglas is still on the Court for itc.)
    - The state amends its charge to add the theater owners, after the federal court suit had begun.
      - This is enough to mandate abstention, the Court says:
        1. Δs already had a substantial stake before the amendment.
        2. And, the complaint was filed before federal proceedings began.
  - *Doran* (1975) (p697x)
    - So, do you beat *Hicks* by asking for a preliminary injunction?
      - Yes, but you have to actually be under threat of prosecution to get a preliminary injunction.
        - So, you've got to convince a federal court that you're going to go out of business, e.g.--before the end of the suit (!!). This will be hard.

- So, can the state win whenever it wants to? I.e., if the prosecutor had added the other corporations in *Doran*, would it be *Hicks*?? Pollack doesn't know.
- *Huffman* (1975) (p699x): *Younger* keeps going on state appeal.
- Habeas for these Δs? See 28 USC § 2254(e)(2)(A)(i).

Friday, November 4

[missed class]

Tuesday, November 8

Anti-injunction acts

- *ACL* (1970) (p721)
  - The key question here—and the disagreement between the majority and the dissent—is: what did the original district court decide?
    - And why assumed that the federal court got it wrong (¶0p725)??
- Note that there's a recent 9th Circuit case about siding involving the Anti-Injunction Act.
- Note the All Writs Act and Schiavo—see *Dean Foods*, cited in dissent.

Thursday, November 10

- The Tax Injunction Act
  - *Hibbs* (2004) (p96p)
    - Itc. is important for:
      - Its construction of the Tax Injunction Act
      - Being a great example of statutory construction by the Court
        - (Except that the don't-use-legislative-history argument isn't made here—both sides use it.)
          - Note the hierarchy of legislative history (see Sutherland on Statutory Construction):
            - Committee reports (if more than one, the most important one is the conference committee report).
            - Floor remarks (the best are the remarks by the bill sponsor).
            - Hearings (including prepared remarks).
            - changes in draft bills.
            - Documents sent to congresspeople
    - The majority's statutory construction moves:

- Stare decisis (the dissent says, so what, because no one's pressed the point before).
- "Assessment" in the IRC
- Neighboring words
- Rule against superfluities
    - This is bullshit, Pollack says. Especially in older documents where people were paid by the word (see, e.g., "will and testament").
- Purpose of the Act
    - Eliminate disparity between in- and out-of- state taxpayers.
    - Stop taxpayers from withholding tax (while suits are pending).

  The dissent adds two other purposes:
    - State courts should decide what state law means (but this is not at issue itc., the majority poins out).
    - Federal courts shouldn't interfere with state *systems* of taxes (relying on *Grace Brethren*).

Friday, November 11

§ 1983

- *Monroe* (1961) (p1066)
    - Many criticize itc. as judicial activism. Why?
        - An assumption that § 1983 wasn't meant for situations where the action was not authorized by state law or custom. I.e., that it was for lack of constitutional law or practice in the Reconstruction South.
- Immunity
    - Qualified immunity: now a purely objective standard
        - *Wood* establishes an objective and subjective standard.
        - Then *Harlow* throws out the subjective standard (¶3p1096).
        - Then *Anderson*: the Court assumed that *Harlow*'s objective-only standard is for *all* qualified immunity situations.
        - Note *Crawford-El* (p1098x)

  Things to know about qualified immunity:
    - You won't get discovery unless you can make a showing.
    - In federal courts, you have an immediate right of appeal on denial of qualified immunity (unless there's a fact question about what you (an official) actually *did*—i.e., on the "did the

official violate a clear right" prong of the QI test).
- Immunity in *Bivens* actions is exactly the same as for § 1983 actions (the cases are even cross-cited).
- No constitutional avoidance (!!!)
    - First, the courts decide if a constitutional right was violated.
    - Then, they determine whether there's qualified immunity.

Note that this is *not* done under § 2254(d)(1) (habeas).

Tuesday, November 15

- Public officer suits: there's a difference between official capacity and personal capacity.
    - Despite what O'Connor says, Pollack thinks that this is just a pleading game. And it maybe goes back to England and Charles I.
    - am11: this has been read as narrowing diversity jurisdiction. It does not say that a citizen can't sue his own state, though. Nevertheless, the Court has read it as prohibiting citizen suits against their own state's government.
        - *Alden v. Maine*: Congress can't force a state to stand suit for a federal cause of action in state court.
    - But, then there's § 1983:
        - *Ex parte Young*: this allowed official capacity suits for injunctions (not for damages).
        - So, § 1983 actions must be personal capacity suits.
            - But, the state will usually indemnify and supply defense counsel.
                - Note the Idaho Tort Claim Act: if Δ was conceivably acting within the scope of his official duties, the state *must* defend and indemnify (unless the state proves *in court* that Δ was acting outside of his authority).
                - So, it's all just a smokescreen, Pollack says. (But does it make any sense??)
- Government immunity
    - Note the history of corporate law:
        - Originally, all corporations were chartered.
        - And, originally, cities were ventures by merchants.
        - And, still in 1871, you have the idea that corporations are somehow different.
    - Also, most school desegregation suits were against school boards.
    - Note *Hafer*, where Δ calls the Court on its own personal-official fiction.
    - *Monell* (1978) (p1117)

- Itc. overrules the municipal immunity part of *Monell*.
    - Why?
        - Because obliging a state to enforce something is not the same as (and is more imposing than) relieving a state of immunity.
- This case shows why many judges are hesitant to use legislative history —itc. shows how it can be used coherently for either side.

Thursday, November 17

- Retroactivity:
    - Everything is retroactive
        - I.e., *Chevron v. Huson* has been overruled. See p1159 (*Harper*), and also *Jim Beam*.
- The current municipal immunity doctrine:
    - Municipal corporations and local government entities are strictly liable in § 1983 actions if and only if their violation of law is a matter of policy or custom (i.e., it is not mere vicarious liability).
- *Owen* (1980) (p1134)
    - The majority's concern might be that if qualified immunity continues, nobody will have to pay for § 1983 violations.
    - Lots of things are going on here:
        - The liberty interest in reputation rule—which was maybe a mistake, because of am1, and maybe was misapplied itc. in any case.
        - Whether municipalities should have some immunity.
        - Whether things ought to be applied retroactively always.
        - Congressional silence (see, e.g., ¶3p1149)
            - What's the *baseline* from which Congress works?
            - The Sherman Amendment—this had to do with vicarious liability for *riots*! And this is the best thing from the legislative history that either side could find to help!
- Note that qualified immunity decisions are decided by a judge in § 1983 cases.

Friday, November 18

- Municipal immunity—what's a "policy"?
    - This question *can* be easy—as when there's an ordinance.
    - But, what if there's nothing of general applicability?
        - Well, we could just say that then there's immunity (this is what Powell argues for in dissent in *Pembauer* (1986) (p1160x)).
        - Stevens answers this question in his dissent in *Praprotnik* (see

p1177).
- *Praprotnik* (1988) (p1163)
  - Note that there's a jury verdict here—but the Court acts as if there's not (!!).
    - Is what a "policy" is a pure question of law? As the plurality maintains?
  - See O'Connor's statement of the problem at ¶2p1167.
  - Pollack thinks that O'Connor obviously just didn't like what the jury did here, and so makes the question a pure question of law.

Tuesday, November 29

- What wrongs?
  - *Paul* (1976) (p1184)
    - (N.b.: Pollack says that the Burger and Rehnquist Courts have taken axes to § 1983. Itc. is a new set of axes that we're looking at--"what wrongs?")
    - Is this a good way for Rehnquist to do what he wants to do?
      - See nn. on pp.1199, suggesting better ways.
      - What's wrong with Rehnquist's way? He goes and limits the Constitution *itself*!!
        - How could Rehnquist have done this without going to the Constitution, if there's no legislative history support for limiting § 1983 below the Constitution?
          - Federal court efficiency argument, towards reinvigorating the pre-*Monroe* "custom and usage" approach.
          - Mess with immunity lines.
          - Intent versus negligence
        - Positions on limiting § 1983? Either that state torts can be § 1983s (i.e., that § 1983 should be wide open) or that the Court should limit § 1983—but how?
    - See ¶3p1186: "Those who [adopted am14]..." Isn't it the adoption of § 1983 that we're concerned with, not am14?
    - Pollack says that if an attorney filed a brief treating caselaw the way Rehnquist does itc., she'd file a Rule 11 motion.
  - N.b. *Wilkinson v. Austin* (June, 2005): another limiting of "liberty interest."

Thursday, December 1

[missed class]

Friday, December 2

[missed class]