Federal Courts outline, Fall 2005. Malla Pollack.

I. FEDERAL LAW IN STATE COURTS

A. STATE COURT POWER TO HEAR FEDERAL QUESTIONS

1. *Gulf Offshore* (1981) (n1p32x): state courts may assume subject matter jurisdiction over a federal cause of action. The Court will presume concurrent jurisdiction-- this presumption can be rebutted by: (1) an explicit statutory objective, (2) unmistakable implication, or (3) a clear incompatibility between state-court jurisdiction and federal interests."

a) *Tafflin v. Levitt* (1990) (n2p33x): the majority says RICO, which is silent on whether concurrent jurisdiction, has none of the three *Gulf Offshore* things. Scalia and Kennedy, concurring, object to (2) (implication) and a little bit to (3) (incompatibility) of the *Gulf Offshore* test, and would instead require an affirmative act of Congress to divest state court jurisdiction.

2. Congressional power to limit state court jurisdiction (nn6-7p238): Congress generally can make exceptions to the jurisdiction of state courts (see, e.g., 28 USC 1338 (limiting copyright jurisdiction to federal courts) and 28 USC 1446(e) (no state court jurisdiction after removal to federal court)).

B. STATE COURT DUTIES WITH RESPECT TO FEDERAL LAW

1. Duty to hear federal questions

a) pc- *Howlett v. Rose* (1990) (p35): federal law is a part of state law, and so a state court can't deny a federal right properly presented for adjudication unless it has a "valid excuse." A definitely potential "valid excuse" is a neutral state rule that isn't inconsistent with federal law.

(1) Valid excuses:

(a) Neither Pf. nor Df. a resident (*Douglas*).

(b) Cause of action arose outside of jurisdiction *(Pitcairn).*

(c) Forum non conveniens, enforced impartially (*Mayfield*).

(2) Itc.: a 1983 claim against a school board. The Court says that whether the state court refused to let the claim proceed against the school because (a) the school board was immune or (b) the court had no jurisdiction to hear 1983 claims, the state court was wrong.

(a) If the refusal was based on immunity grounds, then the state court would have adopted substantive "federal" law in conflict with the Court's own decisions.

(b) If the refusal was based on jurisdiction, then the state court simply can't have it both ways-- if the state court has general jurisdiction, then that's what it's got.

(3) *Testa v. Katt* (1947) (p45): the fact that Rhode Island had an established policy of not enforcing penal statutes of other jurisdictions is not a valid excuse. The Court says that the Rhode Island courts had to enforce the World War II Emergency Price Control Act, which specified that fed and state courts had concurrent jurisdiction, even though it was "penal" in nature, because Rhode Island court had jurisdiction "adequate and appropriate" to adjudicate it.

(a) *Claflin v. Houseman* (1876): the state courts *can* hear federal causes of

action (although in *Testa* the Court read this case as establishing a *duty* to hear them).

b) FELA (Federal Employer's Liability Act)

(1) *Moundou* (1912) (n3ip47x): state court refuses to hear FELA claim because it conflicts with state policy; Court says: "does the state court have adequate jurisdiction to hear such a claim? yes; therefore, they have to"

(2) c- *Douglas* (1929) (n3iip48x): state court refuses to hear FELA claim where both Pf. and Df. were from another state; because refusal was grounded in discretion set out by local law, the state court had a valid excuse, the Court said.

(3) c- *McKnett* (1934) (n3iiip48x): Alabama court refuses to hear FELA cause of action that arose in another state, where Alabama courts consistently refused to hear causes of action arising in other states, but Alabama statute required state courts to take jurisdiction of causes arising "by common law or the statutes of *another state*"; the Court said, essentially, that "another state" includes federal law-- holding that a state court can't discriminate solely because the source of law is federal.

(4) *Pitcairn* (1945) (n3ivp49x): Illinois city court refuses to take jurisdiction of FELA case because its jurisdiction was limited to causes arising in the city; Court says this is okay.

(5) *Mayfield* (1950) (n3ivp49x): state court refuses to take jurisdiction of FELA case, exercising forum non conveniens where claim was by nonresident against foreign corporation on out-of-state cause; Court says this is okay.

c) c- Anti-commandeering: the federal government may not compel the states to enact or administer a federal regulatory program. (from *New York v. U.S.* (1992) (p51x) and *Printz* (1997) (n5p51x)). *Printz* distinguished "commandeering" of state judges-- through the duty to hear federal causes-- on the grounds that they're bound by the supremacy clause to enforce state (and therefore U.S.) law.

(1) *Alden v. Maine* (1999) (p52x): this case, which the casebook says invoked the anti-commandeering principle to override state sovereign immunity in state courts, is not contradictory to the *Printz* distinction.

(2) See also *FERC*, in the Amar article (h/o).

d) c- Sandalow, *Henry . . .* and the Adequate State Ground (p49x): three possibilities for what the Supremacy Clause means for state courts and federal claims: (1) state courts must hear federal claims only when Congress says so, (2) state courts must hear federal claims when Congress or the Court says so, or (3) state courts must hear federal claims unless there's a reason that they shouldn't (this is what the Court has picked).

(1) Pollack suggests option (4): state courts must hear federal claims whenever their jurisdictional statute's plain meaning gives them jurisdiction to.

2. Duty to apply federal procedures

a) pc- *Fankell* (1997) (p52): although federal (case)law construes FRAP to give a right to immediate appeal from a determination of no qualified immunity in a 1983 case, Idaho is (1) not required to construe its own appellate rules to give such a right (because federal courts can't impose interpretations of state law) and

(2) not preempted by federal law with respect to its construction of its appellate rules (because the grant or denial of immediate appeal from qualified immunity determinations is not "outcome-determinative," the Court says).

(1) Compare *Felder v. Casey* (1988) (n1p57x): here, the state has a notice-of-claim (within 120 days) requirement, which wasn't met by a party making a 1983 claim. The Court said that this notice requirement would "burden the exercise of a federal right" and that the state can "not alter the outcome of federal claims it chooses to entertain."

(a) Hold: "A law that predictably alters the outcome of 1983 claims depending solely on whether they are brought in state or federal court within the same state is obviously inconsistent with [the] federal interest in intra-state uniformity."

b) FELA

(1) *Dice* (1952) (n2ip59): state court could not deny a jury trial where federal law allowed one--"the right to trial by jury is too substantial a part of the rights accorded by [FELA] to permit it to be classified as a mere local rule of procedure."

(2) *Western Railway* (1949) (n2iip62): state court could not employ its local practice of construing complaints "most strongly against the pleader" where federal courts would not-- "this federal right cannot be defeated by the forms of local practice."

c) Defendant-raised federal claims: there is apparently not a different analysis here--

(1) *Jackson* (1964) (n4ip64): state court could not employ procedure that allowed voluntariness of confession to be decided as part of general jury verdict, but rather must "actually and reliably" determine it, as federal courts would.

(2) *Chapman* (1967) (n4iip64): state court must apply federal harmless error standard.

C. STATE COURT PRECLUSION FROM HEARING FEDERAL QUESTIONS

1. c- *Tarble's Case* (1872) (n2p66): the Court says a state court can't issue a writ of habeas corpus for the discharge of someone held under the authority of the U.S. (here a minor drafted). Neither the U.S. or state governments, the Court says, "can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the national government to preserve its rightful supremacy." The Court specifically then notes the federal authority to raise and support armies and worries that if states could issue habeas, they could debilitate the national army.

a) Note that Amar challenges itc., saying that "each government can deploy its powers to police the constitutional limits on the other's." See the Amar article (h/o) and fncp68.

2. *McClung v. Silliman* (1821) (n4p68): state courts cannot issue mandamus against federal officers. The Court says that a state court could not issue a writ of mandamus on a federal officer to convey land to someone who claimed it-- the Court says that "the conduct of such an officer can only be controlled by the power that created him." However, the Court noted that a damages action to recover the specific property might be possible.

3. *Donovan v. Dallas* (1964) (n6p71): the Texas Supreme Court issues a writ of prohibition to bar plaintiffs from proceeding with litigation in federal court, and the Court says that it can't do this-- the federal litigants had a right to proceed in federal court based in tradition of concurrent jurisdiction (qualified by the in rem exception) and federal statute.

a) What relevance to *Donovan* of the Anti-Injunction Act, the casebook asks (n7p73).

4. Arnold, The Power of State Courts to Enjoin Federal Officers (n5p69): Arnold says that it's settled that state courts can award damages, possession of specific property, and punish for crimes to federal officers; and that it's settled that state courts cannot issue writs of mandamus and habeas corpus against them. What's not clear is whether they can enjoin federal officers, although many courts assume it.

II. FEDERAL COURT CREATION OF FEDERAL LAW

A. FEDERAL COMMON LAW

1. United States a Party

a) Creation

(1) pc- *Little Lake Misere Land Co.* (1973) (p124): the Court applies federal (common) law to determine the meaning of an land transaction agreement between the U.S. and a private party, despite noting that even before *Erie* the Court had applied local law to real property issues. "The duties imposed upon the United State and the rights acquired by it find their roots in the same federal sources. In absence of an applicable act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."

(a) The Court justifies this on the grounds that the land in question here was acquired under federal law (the Migratory Bird Conservation Act) for federal purposes (although the purposes in question-- mining-- were not related to the purposes of the Act). Because "this land acquisition is one arising from and bearing heavily upon a federal regulatory program, the choice of law task is a federal task," the Court says, citing *Clearfield Trust*. And so, the federal courts need to do the "interstitial federal lawmaking" particularly when the United States is a party and the issues are "substantially related to an established program of government operation."

(b) The Court distinguishes *Burnison* and *Fox* (fn10p126) on the grounds that itc. Congress has "explicitly displaced state law in the course of exercising clear constitutional regulatory power over a particular subject." It distinguishes the opposite end of the spectrum, *Sunderland*, on the grounds that Congress specifically told the Court what to do. So, itc. is a case where Congress "fails to specify whether or to what extent it contemplates displacement of state law," and so the Court gets to decide.

i) Pollack would distinguish *Burnison* and *Fox* on the realist grounds that they didn't concern enough of a substantial federal monetary stake that would impact the federal budget, whereas itc. does. See itc. at p128: "making the best possible use of limited federal conservation appropriations."

ii) *Fox* (1877) (p132x): the Court upholds a New York state law which prevents decedents from devising to the U.S.

iii) *Burnison* (1950) (p133x): the Court upholds California state law which prevents decedents from devising to the U.S.

(c) c- *Erie* (1938)

(2) c- *Clearfield Trust* (1943) (n2p133): the rights and duties of the U.S. on commercial paper which it issues are governed by federal rather than local law, and with federal paper the Court will craft its own federal law, rather than borrow state law, because of the interest in national uniformity.

(a) The *Clearfield* two step process:

i) First, determine whether federal law applies.

ii) Second, if it does, determine whether to borrow state law or craft the federal law from whole cloth.

(b) Note 28 USC 1345-- U.S. as plaintiff jurisdiction.

(3) Judicial creation of rights of action for the United States

(a) pc- *Hudson and Goodwin* (1812) (p185): in a criminal prosecution for libel of the President and Congress, the Court says that the judiciary must have certain implied powers, such as contempt and other maintenance of court order, but it does not have power to create common law crimes.

i) Note the prediction here (noted at n1p187) of the "twin rationales" (federalism and separation of powers) of *Erie*.

(b) c- *Standard Oil* (1947) (n2p187): in a civil suit by the U.S. against a company whose truck hit a U.S. soldier, the Court says that federal law governs, noting the importance of the U.S.'s need to protect its soldiers from harm and the fact that the "government's purse is affected." Furthermore, the Court determined that it would not borrow state law because of the government-soldier relationship, the need for uniformity in this area, and the comparative irrelevance of the question to the states compared to the federal government. *But*, then the Court decided that it would not create a right of action for the U.S., saying that that would be Congress's job (!!).

i) Pollack asks, though, whether Congress could even pass such a statute (consider the *Erie* debate, wrt. this question).

ii) *Gilman* (1954) (n3p189): the Court follows *Standard Oil*, refusing to find a right of action for the U.S. to be indemnified by an employee who caused it to be liable under the Federal Tort Claims Act, noting that Congress made no express provision for it.

a. Why is the Court reluctant to create rights of action for the U.S., but eager to do it for private litigants (see p190)?? Because the Court thinks Congress can take care of itself??

b) Content

(1) pc- *Little Lake Misere Land Co.* (1973) (p124): the determination of whether to borrow state law is a question of federal policy, and hostile state rules won't be borrowed. Rather, the federal common law when the U.S. is a party will probably always be favorable to the U.S.: "in a setting in which the rights of

the U.S. are at issue in a contract to which it is a party and the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that program."

(2) c- *Clearfield Trust* (1943) (n2p133): with federal paper the Court will craft its own federal law, rather than borrow state law, because of the interest in national uniformity.

(3) *DeSylva v. Ballentine* (1956) (n5p135): in determining the meaning of "children" in the Copyright Act, federal law applies but the Court borrows state law (although notes that it would not refer to state law if the state defined the terms "in a way entirely strange to those familiar with its ordinary usage").

(4) The Federal Tort Claims Act (28 USC 1346(b)) (n5p135): explicitly requires borrowing state law.

2. Private Parties

a) Suits between private parties

(1) pc- *Boyle v. United Technologies Corp.* (1988) (p138): the Court chooses to apply federal (common) law "in the absence of either a clear statutory prescription or a direct conflict between federal and state law" because of "uniquely federal interests" that are "so committed by the Constitution and laws of the U.S. to federal control." Here, the products liability of a federal defense contractor "borders" on areas of "uniquely federal interests": federal contracts and civil liability of federal officials (relevant here, the Court says, because the same interest-- in "getting the government's work done"-- is implicated).

(a) Two necessary conditions for displacement of state law in suits between private parties:

i) At least "bordering" a "uniquely federal interest," and

ii) Either a "significant conflict" between the federal interest and the operation of state law or the application of state law would "frustrate specific objectives of federal policy."

a. But this doesn't have to be as sharp a conflict as is necessary for ordinary preemption.

(b) On borrowing state law (fn4p141): the Court doesn't really see a distinction, at least itc., between displacement of state law and displacement of federal law's incorporation of state law.

(c) FTCA analogy: the Court analogizes to the FTCA, which excepts from its consent to suits against the government claims based on performance of a discretionary government duty.

(d) Pass-through costs: the Court notes that imposing liability judgments on federal contractors would mean the contractors would pass costs on to the government.

(e) Precise holding: no liability for design defects in military equipment pursuant to state law where (1) the U.S. approved reasonably precise specifications (2) which the equipment conformed to and (3) the supplier warned the U.S. about dangers it knew about.

(f) The dissent points out vigorously that Congress considered a bill to do just

what the Court does here, but did not pass it.

(2) c- *Miree* (1977) (p146c, n1iiip153): state law was not displaced where plaintiffs sue as third-party beneficiaries to a contract between the FAA and a county airport that prohibited unsafe use of land around the airport. The Court noted that the resolution of the claim would have no direct effect on the "U.S. or its Treasury" and that "since only the rights of private litigants are at issue here" *Clearfield Trust* did not apply.

(a) The *Boyle* Court distinguished itc. because the plaintiff didn't seek to impose a duty "contrary" to the government contract, but wanted to *enforce* the government contract.

i) Pollack would distinguish *Boyle* and *Miree* on the grounds that the contract requirements were more specific in *Boyle* and that the design in *Boyle* was arguably reasonable but unreasonable in *Miree*.

(3) *Parnell* (1956) (n1ip150): state law was not displaced where a private bank sued holders of stolen federal bonds, the Court noting that the litigation was purely between private parties and didn't "touch the rights and duties of the U.S."

(a) Black and Douglas, dissenting, thought federal law merchant should apply to all federal paper.

(4) *Wallis* (1966) (n1iip151): state law was not displaced in a suit between private parties involving an oil and gas lease issued under a federal statute, because the Court found no significant threat to any federal policy or interest.

(a) The Court said that for state law to be displaced, there must be at least a conflict between an *actual* federal policy or interest and the use of state law-- "whether latent federal power should be exercised is primarily a decision for Congress" and "even where there is related federal legislation in an area, Congress acts against the background of the total corpus juris of the states."

i) If there *is* a threat to a federal interest, then the Court said it would go on to consider:

a. The strength of the state interest,

b. The feasibility of creating a judicial substitute,

c. and "other similar factors."

b) Suits against federal officers

Comment: The issues here are closely intertwined with official immunity issues.

(1) *Howard v. Lyons* (1959) (n2ip154): federal law governed in a defamation action against a federal officer acting in the course of his duties, the Court saying that "no subject could be one or more peculiarly federal concern."

(a) *Barr v. Matteo* (1959) (p2iip154): a companion case to *Howard* stating that the rule there is not just limited to high-ranking federal officers.

(2) *Westfall v. Erwin* (1988) (n2iiip155): official immunity should no extend to nondiscretionary functions, the Court says, because the traditional justifications for immunity (avoiding timidity of officers and vexation of them by frequent lawsuits) are not present when there is no discretion.

3. Statutes of Limitations

a) *Agency Holding Corp.* (1987) (n1p156): in determining the SOL for civil RICO claims, the Court decided to borrow the SOL from the most closely analogous federal statute. However, the Court said it would normally borrow state law for SOLs, saying that "given our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law."

B. CUSTOMARY INTERNATIONAL LAW

1. *Filartiga v. Pena-Irala* (2d Cir. 1980): the court, in an Alien Tort Statute action, says that the "law of nations" is the "customs and usages of civilized nations" which is found in the "works of jurists and commentators." These sources, the court determines, say that torture is prohibited by the law of nations.

a) Jurisdiction: the court determines that it has SMJ because the case "arises under the laws of the United States" (A3), namely the ATS. In reaching this conclusion, the court rejects the argument that Congress must affirmatively define the "law of nations" for it to be "law of the U.S."

2. pc- *Sosa v. Alvarez-Machain* (2004) (p4p): the Court concludes that the ATS gives jurisdiction to hear claims of "law of nations" violations, but that the cause of action must come from the common law *both as received* at independence and *as expanded* over time but "rest[ing] on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms we have recognized." Here, pfs. claims of "arbitrary arrest" and detention did not come within those (even expanded) paradigms.

a) "Federal courts should not recognize private claims under FCL for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when ATS was enacted." (p13p).

(1) There may be further limitation than this, though, the Court suggests, such as exhaustion and "case-specific deference to the political branches." (fn21p13p).

b) Scalia, dissenting, is upset that the Court is creating FCL after *Erie* "closed that door."

3. Torture Victim Protection Act of 1991 (h/o): this act creates a civil action against individuals who torture anybody under color of *foreign* law (only).

4. N.b. federalism and international law: c- *Missouri v. Holland* (migratory birds), c- *Boos v. Berry* (picketing near an embassy; the Court held that Congress can't use its treaty power to override a constitutional barrier).

III. CONGRESSIONAL CONTROL OF FEDERAL COURTS

A. SETTING FEDERAL JURISDICTION

1. Limiting Jurisdiction

a) Supreme Court

Comment: A3s2c2: 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.

(1) Express "exception"

(a) c- *Ex Parte McCardle* (1868) (p242): the Court considers Congress's repeal of a statute authorizing federal habeas appeals to the Supreme Court and says that the repeal is an "express" "exception" to the Court's appellate jurisdiction.

i) The Court notes that it still has jurisdiction to issue "original" habeas writs because the repealer only excepted appeals from lower courts. (This power to issue original writs is okay under A3, the Court has said, because it is a form of "appellate" jurisdiction.)

(2) Implied "exception": the generally accepted view is that Congress has impliedly "excepted" the Court's jurisdiction over all cases to which it has not affirmatively granted it jurisdiction by statute.

(3) N.b., could Congress shut down all Court review under the Exceptions Clause? There are a number of arguments against this:

(a) "Exception" implies a proportion, not complete foreclosure (the "essential functions" thesis (n3p256)).

(b) Independent unconstitutionality: some exceptions would violate other parts of the Constitution (e.g. A1s9 (powers denied) and the Bill of Rights) (n4p259).

(c) "All": A3s2c1 says that the "judicial power shall extend to *all* Cases . . . [but not "all" Controversies]." Amar argues that this is significant (p255x).

(d) "Exception" only modifies "as to . . . *fact*."

(e) Due process: some argue that due process requires review by an *independent* judiciary (and so necessarily by the federal judiciary).

(f) No discrimination against constitutional claims (see *Webster* (1988) (n4p248) and n6p261)).

b) Lower federal courts

(1) *Sheldon v. Sill* (1850) (n3p247): the Court says that because the lower federal courts are congressionally created, Congress "may withhold from any court of its creation jurisdiction *of any* of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."

(2) *Webster v. Doe* (1988) (n4p248): "when Congress intends to preclude judicial review of *constitutional* claims its intent to do so must be clear."

(a) Scalia, dissenting, says that only Congress can determine which constitutional claims are reviewable by federal courts-- "it is simply untenable that there must be a judicial remedy for every constitutional violation" (citing the Speech or Debate Clause and the political question doctrine, among others).

2. Expanding Jurisdiction

Comment: A3s2c1: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

28 USC 1331:"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States."

a) Protective jurisdiction: whether Congress can authorize "arising under"

jurisdiction in the absence of a substantive federal claim (so called because it gives federal jurisdiction to "protect" litigants by providing an arguably neutral, or procedurally advantageous, or otherwise better forum than state court).

(1) c- *Osborn* (1824) (n2p263): the Marshall Court says that Congress can give the circuit court jurisdiction whenever a federal question is presented, even if other, non-federal questions are presented. Here, with a case concerning the national bank, Marshall said that federal questions would *always* be (at least a hypothetical) federal question presented.

(a) c- *Railroad Removal Cases* (1885) (p271c)

(2) pc- *Lincoln Mills* (1957) (p266): the Court says that the Labor Management Relations Act's, protective jurisdiction grant to unions was okay, because it authorized the federal courts to develop FCL to enforce labor contracts.

(a) Frankfurter, dissenting, argues that protective jurisdiction is not constitutional, and that the "greater power includes the lesser" argument cannot satisfy the A3 requirements. He would, rather, essentially abrogate *Osborn* and the *Railroad Removal Cases*. He distinguishes the Bankruptcy Act (which authorizes private causes of action in federal court based entirely on state law) on the ground that the Congress specifically has a bankruptcy power and thus bankruptcy cases always have a background federal question.

i) N.b. that the Court has rejected other "greater power includes the lesser" arguments (Commerce Clause and Copyright Clause, Commerce Clause and Bankruptcy Clause), saying that you can't use a larger clause to bypass a more targeted clause.

ii) c- *Schumacher* (1934) (p268c): the Court okays the protective jurisdiction granted by the Bankruptcy Act.

(3) c- *Verlinden* (1983) (n1p273): the Court okays jurisdiction (granted by statute comporting with A3-- not protective) granted by the Foreign Sovereign Immunities Act, allowing foreign plaintiffs to sue foreign states in federal court because these suits will necessarily raise federal questions, citing the Foreign Commerce Clause and the presence of foreign relations issues.

(a) The Court expressly notes (fn17p274) that it decided the case on the grounds that FSIA was a grant within the A3 power, and *not* that it was constitutional "protective jurisdiction."

(4) c- *Mesa* (1989) (n3p277): the Court says that federal officer removal (28 USC 1442(a)(1)) requires allegation of a federal defense-- the mere fact that defendants are federal officer is does not independently support "arising under" jurisdiction. The Court rejects an argument for protective jurisdiction, finding no federal interests prejudiced by forcing the defendants to state court.

(5) c- *Lamagno* (1995): the Court said it could review a certification that a federal employee was acting within the scope of his duties, which under the Westfall Act meant that the federal government became the defendant, even where the District Court had rejected the certification. Souter, dissenting, however, said that after the District Court rejected the certfication, the federal courts lost jurisdiction because the suit was then merely a state tort suit. The Court responded to this argument by saying that any case under the Westfall Act

would raise a federal question from the outset and that any consideration of state claims would be okay as pendent jurisdiction.

(6) pc- *Tidewater Transfer* (1949) (p283): DC citizens can invoke A3 diversity jurisdiction.

(a) 7 members: DC is not a "state" for purposes of diversity jurisdiction.

(b) 6 members: DC citizens can't get into Article III courts on the ground that Congress could create Article I courts to do the same thing.

(c) 5 members (3 + 2): DC citizens can invoke diversity jurisdiction-- under no agreed theory.

(7) c- 79 Notre Dame LR 1925

b) N.b., theories for upholding jurisdictional grants:

(1) Actually "arising under" a federal question

(2) Protective jurisdiction for a litigant (arising under a hypothetical federal question)

(a) Interstate biases and am14, n.b.

(3) Protective jurisdiction for federal policy

B. REOPENING FINAL JUDGMENTS

1. pc- *Plaut* (1995) (p329): the Court says that Congress could not reopen final judgments of A3 courts-- specifically, SEA 10(b) private actions that had been dismissed as time barred under *Lampf* (which put a one year SOL on 10(b) claims) and *Beam* (which said that a new rule of law announced and applied to the parties in a case must also be applied to all cases pending on direct review). The Court reasoned that constitutional history shows that the A3 courts have power "not merely to rule on cases, but to *decide* them," and so final decision is a constitutional line that Congress cannot come across.

a) "Having achieved finality, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was." (p335c).

b) The Court also suggested that the unusualness of Congress attempting to set aside a final judgment implied unconstitutionality-- "that prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed." (p337c).

c) Before *Beam*, the test for whether a new rule of law would be applied to cases pending on direct review was a balancing test, based on equitable principles.

2. *Miller v. French* (2000) (p352): the Court upholds PLRA's automatic stay provision, which mandates automatic stays of continuing injunctions in certain situations. The Court distinguishes *Plaut* as dealing with reopening the dismissal of a suit seeking money damages from itc., dealing with prospective relief which is "under a continuing, executory decree [and] remains subject to alteration due to changes in the underlying law."

3. c- PL 109-3 (Schiavo): is there a *Plaut* problem here (sec. 2 says "notwithstanding any prior State court determination")? Does the fact that these are state courts make a difference?

a) *Sampeyreac* (1833) (g3p345c): reopening of a territorial (A1) court's final

judgment.

b) *Calder* (1798) (p334c): the Court noted that the Connecticut legislature had power to reopen its state's court's judgments. This would suggest that PL 109-3 is okay.

C. CREATING NON-ARTICLE III COURTS

1. pc- *Northern Pipeline* (1982) (p286): the Court strikes down the bankruptcy courts as infringing on the A3 courts.

a) Exceptions argument

(1) The Court recognizes three exceptions to the requirement that the judicial power be exercised by A3 courts:

(a) Territorial courts: assumed that the framers intended Congress to exercise the general powers of government in the territories.

(b) Courts-martial: assumed that the political branches have "extraordinary control" over military affairs.

(c) Public rights doctrine: that the litigation of private rights is at the core of the judicial power, whereas matters involving public rights can be resolved by the political branches.

i) This doctrine, the Court says, is grounded in the traditional principle of sovereign immunity, separation of powers, and "a historical understanding that certain prerogatives were reserved to the political branches of government."

(2) The Court rejects the argument that there should be a new exception, based in Congress's bankruptcy powers. The Court says that there is no limiting principle in such an exception and so it would threaten separation of powers.

(3) White, dissenting, says that the exceptions are wrong-- that A1 courts have been allowed to do everything that A3 courts can do.

b) Adjunct argument: the Court rejects the argument that the bankruptcy courts are mere "adjuncts" to the A3 courts (like federal magistrates and administrative agencies), saying instead that they adjudicate non-statutory rights and exercise all the "essential attributes" of the judicial power.

(1) "When Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated." (p296c).

(a) But, "the functions of the adjunct must be limited in such a way that 'the essential attributes' of judicial power are retained in the A3 court." (p296c).

(b) And but, Congress doesn't possess the same degree of discretion "in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights *not* created by Congress [constitutional rights, i.e.]."

(2) White dissenting, argues that there are no separation of powers concerns because it's only the state courts that are losing power-- bankruptcy claims would ordinarily be state law claims and so would be heard by state courts, not A3 courts.

c) White, dissenting, would have a balancing test: A3 versus "competing constitutional values and legislative responsibilities."

2. c- *Thomas v. Union Carbide* (1985) (n1p317): the Court upholds a statutory mandatory arbitration provision that limited judicial review only for "fraud and misconduct." The Court said that *Northern Pipeline* was only about A1 courts' power to issue binding orders arising under *state* law without the litigants' consent and with only limited judicial review. The right here was a federal right (compensation for trade secrets), and so *Northern Pipeline* didn't apply (and the Court noted that because the right was enmeshed in a federal regulatory scheme, it was like a public right).

3. c- *Schor* (1986) (p317x): the Court upholds A1 adjudication of a private right arising under state law, distinguishing between "personal" and "structural" protections of A3. The "personal" protections could be waived by filing in an A1 court, but the "structural" protections are mandatory. Even though under the scheme here the parties got to choose where the claim went, the Court said that the intrusion on the A3 courts was de minimis because the A3 courts still had the *power* to hear the claim.

4. N.b., arguments regarding non-A3 courts:

a) We should return to the constitutional text-- no non-A3 courts

b) We should admit that were not following the constitutional text and just do whatever (see White, dissenting in *Northern Pipeline*)

c) We should insist on A3 court control of A1 courts.

(1) However, note that in A3 *both* the supreme and inferior judges are protected-- this suggests that the framers didn't think appellate review would solve the problem. And, plus, appellate review can't fix a bad trial.

d) We should read the A1s8c9 "tribunal" as something different than the "courts" in A3s1, to allow A1 courts while staying faithful to the constitutional text. The requirements would be:

(1) There must be a unitary Supreme Court

(2) The Court must be supreme

(3) The tribunals must be inferior

IV. JUSTICIABILITY

A. STANDING

1. Direct Standing

a) Basic Standing

(1) Constitutional component

(a) pc- *Allen* (1984) (p357): no standing for parents of black public school children challenging the lack of adequate IRS procedures for denying tax-exempt status to racially discriminatory private schools. Their claim that the government was giving financial aid to discriminatory schools was not sufficient to allege an injury in fact; and their claim that this impaired their ability to have their public schools desegregated was not fairly traceable to the IRS's conduct.

i) <u>The A3 component of standing</u> (p361c)

a. Injury in fact: distinct and palpable, not abstract, conjectural, or hypothetical.

1) This can't be just a claim to have the government avoid

violation of the law (p362c).

2) And it can't be just a stigmatic injury unless *you personally* were denied equal treatment. (p362c).

b. Traceability: the injury has to be fairly traceable to the challenged action.

1) Here, pfs. just didn't allege that there were enough discriminatory private schools receiving tax exemptions to make an appreciable difference in public school integration. (p364c).

2) c- *Norwood* (1973) (p366c): the Court distinguishes itc., where this allegation was treated as historical fact, because itc. the pfs. were party to a school desegregation order and thus had a personal interest "created by law."

3) *Warth* (1975) (n3p376): employing the same traceability reasoning as *Allen*.

4) *Associated General Contractors* (1978) (n3p376x): members of a group barricaded from a public benefit need not allege that he would have obtained the benefit *but for* the barrier in order to have standing.

c. Redressability: relief from the injury must be likely to follow from a favorable decision.

ii) <u>The prudential component of standing</u> (361c)

a. Third party standing: general prohibition on raising another person's legal rights

b. Political question doctrine: no adjudication of generalized grievances more appropriately addressed by the political branches.

c. Zone of interests: complaint must fall within the zone of interests protected by the law invoked.

(b) c- *Schlesinger* (1974) (n1p375): no standing for an organization challenging Congressmen holding reserve commissions in the armed forces, in violation of A1s6c2 (Congressmen can't hold other federal office). The Court said that the interest involved was shared with all members of the public and was too abstract. The lack of an alternative plaintiff did not matter.

(c) *Duke Power* (1978) (n5p377): no subject-matter nexus between the right asserted and the injury alleged is required to show standing.

(d) pc- *Lujan* (1992) (p388): the Court says that pf. organization challenging a new DOI ESA rule alleged no injury in fact because none of its members actually had a plane ticket to visit the overseas areas affected.

(e) c- *Raines* (1997) (p408): Congressmen had no standing to challenge the line item veto, despite statutory standing specifically granted them, because they alleged no injury in fact to themselves and only an abstract institutional injury (and in any case weren't authorized by Congress to represent the institution).

i) c- *Coleman* (1939) (p410c): 21 of 40 Kansas senators had standing to

challenge ratification of a federal constitutional amendment. This meant, the Court said in *Raines*, that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or not), on the ground that their votes have been completely nullified." (p410c).

a. Note "departmentalism": that the Court shouldn't tell other branches how to interpret the Constitution with respect to those branches unique activities.

(f) Standing in state court cases reviewed in federal court

i) c- *ASARCO* (1989) (n5p620): the Court can review a final state court decision where the litigants did not originally have A3 standing, because on federal review "petitioners allege a specific injury stemming from the state court decree, a decree which rests on principles of federal law." "We may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review."

(2) Prudential component

(a) pc- *Elk Grove* (2004) (p26p): no standing for a noncustodial parent challenging a school district's requirement that each class recite the Pledge of Allegiance. The Court notes various (prudential) reasons for declining standing, including its policies of nonintervention in domestic relations cases and constitutional avoidance. "It is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. . . . The prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law."

i) The Court justifies prudential standing: "Without such limitations, the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."

b) Taxpayer Standing

(1) *Frothingham* (1923) (n2p381): the Court says that the fact that a statute imposes additional taxation on individuals is a matter of public and not individual concern, and so there's no general taxpayer standing.

(2) c- *Flast* (1968) (n3p382): the Court says that the *Frothingham* holding was only prudential, and that there can be taxpayer standing there's the requisite "nexuses." Itc., pfs. challenged spending as violating the Establishment Clause, and thus satisfied both nexuses.

(a) Taxpayer standing "nexuses" test

i) Taxpayers can only challenge exercises of the taxing and spending power (because the taxpayer must establish a logical link between his taxpayer status and the type of legislative enactment attacked).

a. c- *Valley Forge* (1982) (n5p384): pf. taxpayers had no taxpayer

standing to challenge, on Establishment Clause grounds, the disposition of surplus property because they didn't satisfy the power nexus-- the Court said that Congress was exercising its Property Clause (A4s3c2) power, not its taxing or spending powers.

ii) Taxpayers must show that the challenged enactment exceed specific [other]constitutional limitations imposed upon the exercise of congressional taxing and spending-- not simply that the enactment is generally beyond the powers delegated by A1s8.

a. *Richardson* (1974) (n4p383): pf. didn't satisfy the limitation nexus where he challenged the failure of the CIA to disclose expenditures (under the Accounts Clause (A1s9c7)). That is, he alleged no specific limitation on the actual spending power-- just that the spending wasn't disclosed.

c) Statutory Standing

(1) pc- *Lujan* (1992) (p388): even though Congress provided a citizen suit action in the ESA, pfs. still needed to show injury in fact-- other than mere procedural injury-- to have standing in federal court under A3.

(a) As to citizen suit provisions, Sunstein argues that when Congress provides for citizen suit, it is granting a cause of action, which is a property interest-- and so it's the invasion of the property interest that's the injury in fact.

(b) *Laidlaw* (n3p405) (2000): pf. organization adequately alleged injury in fact to have standing under CWA citizen suit provision, because it alleged that certain members lived close to the affected areas and liked to recreate there.

2. Third-Party Standing

a) c- *Singleton* (1976) (p414): pf. doctors have standing to challenge a state law excluding abortions from Medicaid benefits, even though they are asserting (in part) their patients' rights (although only a plurality holds the latter).

(1) Reasons for prudential third-party standing bar (p415c):

(a) The holders of the rights may not want to assert them or will be able to enjoy them anyway.

(b) The holders of the rights are usually the best people to assert the rights.

(2) Analysis of third-party standing (p416c): factors:

(a) The relationship of the litigant to the rightholder: whether the enjoyment of the right is inextricably bound up with the activity the litigant wants to pursue and whether the relationship is such that the litigant is nearly as effective a proponent as the rightholder.

i) See n3p423.

(b) The ability of the rightholder to assert his own right: if there is some genuine obstacle to the rightholder's own assertion, third-party standing is usually okay.

i) *Barrows* (1953) (n2ip423): a defendant landowner could assert the rights of blacks prevented from occupying his home due to a racially

restrictive covenant, the Court noting that it would be "difficult if not impossible" for the blacks to present their grievance before any court.

ii) *Eisenstadt* (1972) (n2iip423): a doctor who distributed contraceptives could assert (in defense to the distribution violation) the recipients' rights in challenging a law that prevented contraceptive use because the recipients were not subject to prosecution.

iii) But *Schlesinger*, however, said that the lack of an alternative plaintiff didn't matter (?).

(3) Powell, dissenting from the third-party standing holding (mostly), saying that the doctors should (prudentially) be denied standing to assert their patients' rights because there is no obstacle to the patients asserting their own rights. He makes a slippery slope argument, arguing that third-party standing here would mean all service providers could assert their clients' rights.

b) c- *Craig v. Boren* (1976) (n4p424): a barowner could assert the rights of his customers to challenge a gender-discriminatory drinking age-- even though there was no relationship or obstacle. This is "dilution" or "adversely affect" third-party standing.

c) **Organizational Standing**: an organization can sue on behalf of its members and have standing if (1) one or more members have standing and (2) the claim is related to the organization's purposes. See *Lujan*.

d) **Overbreadth** (n5p425): a litigant whose conduct is not constitutionally protected may challenge the validity of an am1 speech law as it might be applied to one whose conduct would be constitutionally protected, and is not required to show obstacle, relationship, or even an identifiable third party.

B. RIPENESS

1. c- *Poe* (1961) (p426): challenges by patients and a doctor to a state law prohibiting contraceptive use were not ripe because prosecution was not plausibly imminent-- "the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the state's prosecuting officials if real threat of enforcement is wanting." (p428c). The Court mentions two factors for analyzing ripeness: (1) appropriateness of the issues for decision by a court and (2) actual hardship to the litigants of denying them the relief sought (p428c).

a) Justifications for ripeness doctrine (p427c):

(1) Constitutional avoidance (*Ashwander* (1936) (p427c))

(2) Adjudication of live conflicts only

(3) Separation of powers and the courts' role

2. c- *United Public Workers* (1947) (p435x): federal workers' challenges to the Hatch Act, prohibiting federal employees from participating in political campaigns, were not ripe based on merely alleged desires to participate, the Court noting that "should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories."

3. c- *Haworth* (1937) (n3p434): the Court upholds the declaratory judgment procedure, noting that "it is the nature of the controversy, not the method of its presentation or

the particular party who presents it, that is determinative."

4. *O'Shea* (1974) (n7p437): itc. illustrates a ripeness/equity/federalism gray area: general challenges against judges' illegal bond-setting were not justiciable because it wasn't really ripe, wasn't really appropriate because the pfs. had an adequate remedy at law, and called for *Younger* abstention because it sought to restrain an as-yet-commenced state criminal prosecution.
5. **Ripeness and Standing Gray Area**
   a) c- *Duke Power* (1978) (n6p435): where injuries alleged were unrelated to the claimed protections, the pfs. still had standing and their claims were ripe, the Court noting that there were good reasons for prompt resolution (namely, that the purpose of the act in question was to eliminate doubts about the scope of liability for nuclear plants) and that the Court would "be in no better position later than we are now to decide the question."
   b) **Ripeness and third-party standing gray area**
      (1) c- Brilmayer article (n1p432): someone wanting to challenge a prohibition against campaign signs could either assert his neighbor's rights to put them up and be barred by no-third-party standing, or assert his rights to put them up in the future and be barred by ripeness.
      (2) c- *Lyons* (1983) (p438x): a pf. had standing to seek money damages for a police chokehold, but did not have standing to seek injunctive relief against future use of the chokholds.

C. MOOTNESS

1. *DeFunis* (1974) (n6p445): an am14 challenge to a law school's minority admissions program was moot because the law school had admitted the pf. and the law school said it wouldn't seek to cancel his registration.
2. **Voluntary Cessation of Illegal Activity**
   a) *W.T. Grant Co.* (1953) (n2p440): a criminal defendant could not moot an antitrust prosecution by having certain directors resign, the Court saying that "although a case might be moot if the defendants could demonstrate that there is no reasonable expectation that the wrong will be repeated, a mere disclaimer of an intent to revive the illegal practice is insufficient." (p441x).
   b) *Alladin's Castle* (1982) (p441x): a municipal ordinance was struck down after it had been repealed, the Court noting that the case was not moot as long as the city was still free to reenact it.
3. **Capable of Repetition, Yet Evading Review**
   a) *Bellotti* (1978) (p442x): a corporation could challenge a statute forbidding corporate expenditures to influence voter referenda, even though the referendum it wanted to promote had already been voted down, the Court noting that similar referenda had been proposed four times before and in each case the time between proposal and submission to the voters had been to short to allow complete judicial review.
   b) *Honig* (1988) (n4p442): pfs. could challenge a provision requiring a disabled child to stay in his current placement pending review of any changes, even though review was complete, because the issue was CORYER.
      (1) Rehnquist, concurring, said if mootness came at all from A3, CORYER

wouldn't be a valid exception.

(a) *Kandyland* (2000) (n5p444): the Court seems to follow this idea, entertaining a claim where mootness, if jurisdictional, would deprive the Court of jurisdiction (thus suggesting that CORYER is strictly prudential).

4. Mootness in Class Actions

a) p- *Geraghty* (1980) (p447): a proposed prisoner class action, denied certification, was not moot after the certification-seeking plaintiff was released, the Court noting that "a plaintiff who brings a class action presents two separate issues for judicial resolution: the claim on the merits and the claim that he is entitled to represent a class," and that the "proposed representative retains a 'personal stake' in obtaining class certification." After the proposed representative's claims are moot, though, the focus shifts to whether the representative can fairly represent the class, under FRCP 23(a).

(1) Two aspects of mootness (p447c):

(a) Live: issues presented are no longer live

(b) Personal stake: the parties lack a legally cognizable interest in the outcome

b) *Sosna* (1975) (n1p456): certified class action not moot after representative's claims moot.

c) *Franks* (1976) (n2p456): *Sosna* doesn't just apply to CORYER claims, but to all class actions.

d) *Roper* (1980) (n3p457): proposed class action not moot after district court entered judgment for individual plaintiffs instead of certifying the class.

V. FEDERAL COURT JURISDICTION

A. SUPREME COURT REVIEW OF STATE COURT DECISIONS

1. Finality of State Court Decisions

Comment: 28 USC 1257(a): "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . ."

a) c- *Cox Broadcasting v. Cohn* (1975) (n2p607): the Court recognizes that it allows exceptions to the "finality" required by 28 USC 1257, and said that it could review a reversal and remand from a state's supreme court, citing the "later review would seriously erode federal policy" exception because delaying decision would "leave unanswered an important question under am1."

(1) Four exceptions to finality requirement (p60c):

(a) Federal issue conclusive or outcome preordained: even if there's an entire trial left for state court, if the federal issue is conclusive or the outcome of further proceedings is preordained, the judgment on the federal issues is deemed final.

(b) Federal issue will survive anyway: if the federal issue will require decision regardless of the outcome of further state-court proceedings, the federal issue is finally decided.

(c) Federal issue cannot be reviewed later

(d) Later review would seriously erode federal policy

(2) Rehnquist, dissenting, says that comity and federalism are significant parts of

1257 and should be as important as "federal policy."

b) *Southland Corp. v. Keating* (1984) (n4p612): the Court uses the *Cox* "federal policy" exception to review a state court decision that the Federal Arbitration Act doesn't conflict with state law.

c) *Hathorn v. Lovorn* (1982) (n5p613): the Court said it could review an earlier state high court decision in a case after remand, even though the state court said that its earlier decision was "the law of the case" by that point.

d) *Fort Wayne Books v. Indiana* (1989) (n6p614): the Court said it could review a criminal RICO case where the state supreme court had reversed a dismissal of charges, noting that even though "the general rule is that finality [in criminal cases] is defined by a judgment of conviction and the imposition of a sentence," the case fit in the "federal policy" exception to 1257 finality because of am1 issues involved.

e) *Rooker-Feldman* Doctrine

(1) pc- *Saudi Basic* (2005) (p93px): "the *Rooker-Feldman* doctrine is confined to cases brought by state-court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments"-- in those cases, the district court does not have jurisdiction because 1257 vests jurisdiction to review state court judgments only the Court. Thus, when there is *parallel* state and federal court litigation, *Rooker-Feldman* doesn't apply, even if the state court reaches judgment before the federal court does (preclusion, however, might still apply).

(a) Also, the Court said that 1257 does not mean a district court doesn't have jurisdiction just because party wants to litigate in federal court a matter previously litigated in state court-- if a federal pf. "presents some *independent* claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party, then there is jurisdiction" (but state preclusion law must be applied).

(b) c- *Rooker* (1923) (p93px)

(c) c- *Feldman* (1983) (p93px): both obvious "appeals" to federal district court *and* "inextricably intertwined claims" (does this include things you *should* have brought up?) will be barred by *Rooker-Feldman*.

2. Adequate and Independent State Grounds

a) c- *Pitcairn* (1945) (n2p90x): the traditional rationale for the AISG doctrine: federalism and limited federal court jurisdiction-- the Court's power over state judgments is only to correct them "to the extent that they incorrectly adjudge federal rights." Further the Court does not have the power to render advisory opinions, which it thinks it would be doing if the state court could render the same judgment even after the Court reversed.

(1) The advisory opinion justification: Pollack notes that the Court rules a lot of times without changing the outcome-- so what's the problem. (Part of the reason for AISG, Pollack thinks, is that the Court is buried in cases.)

(2) c- *Murdock* (1875) (p89): this is the old doctrine: the federal question simply must have been presented to the state court and decided by it *against* the appellant (this last requirement came from an old jurisdictional statute); if so,

the Court looked first to see if the federal question was wrongly decided; if it was, then the Court would look to see if there was an adequate state ground. But, the Court could still rule where there were AISG-- yet now the Court says it has *no jurisdiction* where there are no AISG (!!).

b) Clarity of Grounds

(1) pc- *Michigan v. Long* (1983) (p92): in an am4 case, the state supreme court mentioned the state constitution twice, the defendant argues that the state constitution provides greater protection than am4.

(a) The Court holds that "when a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law and when the 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 because it believed federal law required it to do so."

(b) Then it adopts the plain statement rule: "If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinoin that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result." The Court justifies the plain statement rule because it "protects the integrity of state courts."

(c) Justifications for the AISG doctrine cited itc.:

i) Independence of state courts

ii) Avoidance of advisory opinions

(d) Stevens, dissenting, says that there are four ways of handling an unclear state court opinion:

i) Asking the state court, directly, what it meant.

ii) Attempting to infer what it meant.

iii) Presuming that adequate state grounds are independent.

iv) Presuming that adequate state grounds are not independent.

a. This is what the Court chose itc., and Stevens doesn't like it, especially since the criminal defendant won in state court-- Stevens would have the Court's primary role in reviewing state decisions to *vindicate* federal rights when they are trammeled on. (Note that under the old jurisdictional statute (see *Murdock*), the Court couldn't hear this case because it wasn't decided against the individual, Pollack says).

b. Stevens also notes stare decisis, and in particular *National Tea* (fn4p100).

c) Independence of Grounds

d) Adequacy of Grounds

(1) pc- *Bush v. Gore* (2000) (p103): Rehnquist, concurring, invokes inadequacy of state grounds to disturb the state court recount order-- namely that the state court manipulated state law to defeat federal rights. Here, Rehnquist points to A2s1c2, which specifically says that electors for President shall be appointed

by the state *legislature*, and says that the state court is required therefore to defer to the state legislature, which he says wanted to be in the safe harbor provided by federal law. Thus, Rehnquist would hold that "the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II."

(a) The Ginsburg dissent gives a good synopsis of the cases where the Court has rejected state law interpretation by a state court-- see p116.

(b) c- *McPhereson v. Blacker* (1892) (p106c): mischaracterized

(c) c- *Take Tack Tampa*: mischaracterized

(d) c- Monaghan, Supreme Court Review of State-Court Determinations of State Law (p122x): Monaghan argues that the Court has a kind of "ancillary jurisdiction" over state law whenever the applicable federal constitutional provision directly constrains or incorporates state law" (e.g., A2s1c2 in *Bush*).

(2) c- *Bouie* (1964) (p107x): the Court said that a state court's interpretation of a state penal statute impermissibly broadened the scope of that statute beyond what a fair reading provided, violating due process. The state court claimed it was merely interpreter state criminal trespass law, in a black sit-in case.

(a) *NAACP v. Alabama ex rel. Patterson* (1957) (n1p119): "our jurisdiction is not defeated if the nonfederal ground relied upon by the state court is "without any fair or substantial support."

(b) This rule will also be applied where the state enforces its procedures "with pointless severity" or "so as to force resort to an arid ritual of meaningless form." See n2p120.

B. FINALITY OF FEDERAL COURT DECISIONS

Comment: 28 USC 1291: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . ."

1. pc- *Coopers & Lybrand* (1978) (p587): the Court holds that denial of class certification does not satisfy the collateral order doctrine (because these orders are subject to revision, concerns issues enmeshed with the merits, and is subject to effective review after final judgment) and abrogates the death knell doctrine (because Congress required a "final" judgment and because it would be a waste of judicial resources, anyway).

a) The collateral order doctrine (p589c):

(1) The order must conclusively determine the disputed question.

(2) The order must resolve an important issue completely separate from the merits.

(3) The order must be effectively unreviewable on appeal from a final judgment.

b) c- *Cohen* (1949) (n1p594): the Court crafts the collateral order doctrine, allowing immediate appeal a state security-for-costs provision should be applied in federal court.

2. c- *Gillespie* (1964) (p595x): the Court allows immediate appeal of dismissal of state tort claims from a federal suit, giving a "practical rather than a technical construction" to finality and weighing "the inconvenience of piecemeal review" against "the danger of denying justice by delay" and saying that it would "treat this obviously marginal

case as final and appealable."

3. c- *Risjord* (1981) (p597x): the Court says that an order denying a motion to disqualify counsel for conflict of interest did not satisfy the "effectively unreviewable" prong of the collateral order doctrine and so was not immediately appealable.
4. *Moses H. Cone Memorial Hospital* (1983) (n4p598): a district court order staying a federal suit in favor or state court proceedings was "final," because there would be no further litigation in the federal forum and thus the parties were "effectively out of court." The Court said that the order satisfied the collateral order doctrine, too, saying the only close question was the first, "conclusively determined," prong but determined that the stay was inconclusive "only in the technical sense" since the district court gave no indication that it contemplated reconsidering.
   a) *Gulfstream Aerospace* (1988) (n4p604): a district court order *denying* a stay/dismissal motion for *Colorado River* abstention was not immediately appealable under COD, 1292(a)(1), or through mandamus.
5. **Exceptions**
   a) 28 USC 1292(b): discretionary interlocutory appeal, requiring consent of both the district court and the court of appeals.
   b) Mandamus
   c) FRCP 54(b): authorizing separate final judgments for multiple claims or parties.

C. ABSTENTION

1. ***Burford* Abstention**: where "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." "It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of sate efforts to establish a coherent policy with respect to a matter of substantial public concern." (p631c).
   a) *Burford* (1943) (n2p641): the Court abstains in a case about Texas oil policy which raised "a number of problems of no general [federal] significance on which a federal court can only try to ascertain state law."
2. ***Pullman* Abstention**: cases that present "a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." (p631c).
   a) pc- *Pullman* (1941) (p648): the Court abstains where a substantial constitutional issue was raised but could be avoided if the state decided that question on strictly state law grounds.
      (1) c- *Siler* (1909) (n1p651): the Court decides a constitutional issue that could be avoided by letting a state court decide it on state law grounds. After itc. came *Erie* and *Ashwander*, then *Pullman*.
   b) *Constantineau* (1971) (n3p652): abstention was not appropriate where the only question was whether a state statute was constitutional or not-- the pf. didn't have to first try to win in state court when this was the only question.
      (1) Note that *Pullman* abstention is appropriate in 1983 cases (fnep652).
   c) **Preventing *Pullman* abstention**
      (1) c- *England* (1964) (p658) and c- *Windsor* (1957) (p657x): you must tell the state court that you're want it to not decide your federal questions so that you can litigate those in federal court.

(a) c- *San Remo Hotel* (2005) (p96p): if the state court doesn't listen to you, you're screwed, because although the federal courts don't have to abstain, they do have to follow the preclusion statute.

d) c- Williamson County

3. ***Younger* Abstention**: where "absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal [or in some cases civil] proceedings." (p632c).

a) pc- *Younger* (1971) (p666): where pfs. claimed that they felt inhibited by possible prosecution under a state speech law, but there was no actual threatened prosecution, the Court abstained, citing longstanding public policy (evinced by the AIA) of not enjoining state criminal proceedings (which in turn is grounded in equity, comity, and federalism doctrine). Even a "chilling effect" on speech was not enough, the Court said, to overcome this policy.

(1) Exceptions: for "extraordinary circumstances":

Comment: Successful assertion of these exceptions are "rare," says the casebook. (n8p681).

(a) Patently unconstitutional state law

(b) Bad faith

(c) Harrassment

(2) *Samuels* (1971) (n3p677): *Younger* applies to pfs. seeking federal declaratory relief, too.

(3) c- *Ex parte Royall* (1886) (p681): federal habeas exhaustion requirement--seems to buttress *Younger*.

(4) c- *Douglas* (1943) (p662x): injunction of state criminal proceedings is appropriate only on "a showing of danger and irreparable injury."

(5) c- *Dombrowski* (1965) (p663x): the Court recognized that federalism tempered *Ex parte Young*, but still enjoined the state criminal prosecution, noting the allegation of overbreadth and possible harassment. This case can be read to say that *any* prosecution under a vague and overbroad am1 law is harassing.

(6) c- Ex parte Young (1908) (p933)

b) Criminal

(1) c- *Steffel* (1974) (p686):

(2) c- *Hicks* (1975) (p696x)

(3) c- Doran (1975) (p697x)

(4) c- Huffman (1975) (p699x)

c) Civil

d) Anti-Injunction Acts

(1) The Anti-Injunction Act

(a) c- *Mitchum* (1972) (n1p683): 1983 suits are an exception to the AIA, under the "expressly authorized" clause there.

(b) c- ACL (1970) (p721)

(c) c- Schiavo

i) c- Dean Foods

(2) The Taxpayer Injunction Act

(a) pc- Hibbs (2004) (p96p)

i) c- Grace Brethren

4. ***Colorado River* Abstention**: cases that fall "within none of the abstention categories," but yet "there are principles" like "wise judicial administration," "conservation of judicial resources," and "comprehensive disposition of litigation," that govern the contemporaneous exercise of concurrent jurisdiction.
   a) pc- *Colorado River* (1976) (p628): here, the Court pointed to the "clear federal policy" of avoiding piecemeal adjudication of water rights (evinced in the McCarran Amendment), the absence of any substantial proceedings in district court, the extensive involvement of state water rights, the 300-mile distance between the district court and the water district in question, and existing participation of the U.S. in state court proceedings, to justify affirming the district court's decision to abstain.
5. **Other abstention doctrines**
   a) *Pennhurst* abstention (fnap652): a federal court will not enjoin a state official on state law grounds.
   b) Family law diversity cases
6. **Mechanics of abstention**: c- *Quackenbush* (1996) (p646x): although federal courts can abstain by staying or dismissing and remanding actions for equitable or discretionary relief, the only option in damages suits is to stay.

VI. PRIVATE ENFORCEMENT OF FEDERAL LAW

A. IMPLIED RIGHTS OF ACTION

1. Rights of Action to Enforce Federal Statutes

Comment: Compare 42 USC 1983 enforcement of federal statutes through "and laws" (e.g. Thiboutot).

a) Power to imply

(1) c- *Cannon* (1979) (p166): the Court finds a private right of action to enforce Title IX, but Powell, dissenting, argues that the Court does not have the power to imply rights of action.

(a) Powell, dissenting, says that a federal court should not infer a private cause of action absent "compelling evidence of affirmative congressional intent," citing separation of powers concerns (that the "legislative process with its public scrutiny and participation has been bypassed") and jurisdictional bars ("by creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has no assigned it to resolve").

i) Pollack says the jurisdictional argument is weird, because jurisdictional statutes don't deal with particular causes of action, but rather say things like "all causes of action arising under the law of the U.S."

ii) Compare *Boyle* (federal common law in suits between private parties) with this approach to separation of powers.

(2) c- *Sandoval* ((fnhp174): there can be no implied private right of action to enforce a regulation, the Court says.

b) Determining whether to imply

(1) pc- *Cort v. Ash* (1975) (p159): the Court finds no implied private right of action to enforce a federal criminal statute prohibiting corporations from election activities. The Court employs a multifactor test in looking for a right of action.

(a) Factors for determining whether a private remedy is implicit in a statute:

i) Separation of powers concerns:

a. Whether the plaintiff is one of the class for whose special benefit the statute was enacted (i.e., whether the statute creates a federal right in favor of the plaintiff)

1) Itc., the Court says that the statute was focused on preventing corruption of elections, not on internal relations between corporations and their shareholders.

b. Whether there is any legislative intent evidence to create or deny a remedy

1) Itc., the Court finds nothing in the legislative history indicating an intention to provide a damages remedy.

c. Whether a right of action would be consistent with the underlying purposes of the legislative scheme

1) Itc., the Court says that recovery of damages in a derivative action wouldn't further Congress's purpose-- preventing corruption in elections.

ii) Federalism concerns:

a. Whether the cause of action one that is traditionally relegated to state law

1) Itc., the Court notes that corporations are state law creatures, and so says it's appropriate to relegate the plaintiff to state law remedies.

(b) The Court notes that a criminal statute *might* contain a private right of action, even though the one here does not.

(c) *J.I. Case Co. v. Borak* (1964) (n1p163): in this older case, the Court found an implied right of action in section 14 of the Securities and Exchange Act (about proxy rules), noting that it's purpose was to protect investors and that private enforcement of proxy rules would be a good supplement to SEC enforcement. The Court replaced the approach from itc.-- which would provide remedies when necessary-- with the multifactor approach in *Cort*.

(2) *Touche Ross & Co.* (1979) (n3p168x): the Court begins to restrict implied rights of action, saying that "our task is limited solely to determining whether Congress intended to create the private right of action asserted" and that "the ultimate question is [only] one of congressional intent."

(3) *TAMA v. Lewis* (1979) (n3p169x): "the question whether a statute creates a cause of action is basically a matter of statutory construction."

(4) *Curran* (1982) (n4p171x): the Court notes that the statute in question had been amended in 1974, a time when the Court "routinely and consistently

recognized implied rights of action."

(5) *Thompson* (1988) (n3p170x): the Court seems to lessen the restrictiveness of *Touche Ross* and *TAMA*, saying that "the implied cause of action would [mean nothing] were it limited to correcting drafting errors."

(6) pc- *Jackson v. Birmingham* (2005) (h/o): the implied right of action to enforce Title IX includes claims of retalitation for complaining about sex discrimination, noting the broad purposes given TIX by Congress, the fact that Congress passed TIX shortly after the Court determined, in *Sullivan*, that there was an implied right of action for retaliation in 42 USC 1982.

(a) Spending Clause argument: the Court rejects the argument that implying a right of action would mean that the strings attached to federal funding would thus not be clear to the states, since this implied right of action has come out of the blue-- the Court says that the states should have been on notice since the Court has been implying rights of action left and right since *Cannon*.

(b) The dissent (Thomas, Rehnquist, Scalia, and Kennedy), would require a "plain intent" by Congress before there could be any private right of action.

c) Scope of an implied right of action

(1) p- *Gebser v. Lago Vista ISD* (1998) (p176): the Court says that a school district can't be liable in a Title IX implied right of action suit unless some official with corrective authority had actual notice of or was deliberately indifferent to the violative conduct. Unlike Title VII, where the scope of the private right is express, with Title IX the Court "has a measure of latitute to shape a sensible remedial scheme that best comports with the statute" and so it looks at Title IX and determines that Congress wouldn't have wanted damages recoveries resting merely on vicarious liability or constructive notice.

(a) Stevens, dissenting, says that the Court's decision does not comport with traditional agency law or the *Franklin* presumption that all remedies are available for implied private rights of action.

d) Remedies available

(1) *Franklin* (1992) (n5p172): the Court says it will presume all remedies are available unless Congress has expressly indicated otherwise.

e) Also: citizen standing, negligence per se (similar to implied rights of action to enforce statutes).

2. Rights of Action to Enforce Constitutional Rights

Comment: Re: immunity, see 1983 official immunity (1983 section) and suits against federal officers (FCL section).

a) Yes

(1) pc- *Bivens* (1971) (p190): the Court finds an implied private right of action to enforce am4 against federal actors and obtain money damages-- i.e., a pf. is not relegated merely to state causes of action already available (such as trespass). The Court reasons that am4, by its terms, is an independent limitation on federal action, that state actions like trespass aren't good enough remedies for enforcement of am4, and that there are no "special factors counseling hesitation in the absence of affirmative action by Congress," no

explicit statutory prohibition against the relief sought, and no exclusive statutory remedy. Damages are available, the Court says, because they are historically available for invasions of personal interests and there's no special reason (e.g., federal fiscal policy where the U.S. is a party, like *Standard Oil*) to deny them here.

(a) The Court does not address immunity, but it turns out that the same immunity analysis as with 1983 applies here.

(b) The dissenters argue that only Congress can create this right of action (as it did against states with 1983), and that even if the Court could create the action it's a bad idea because of the avalanche of lawsuits it will result in.

(c) Note that *Ex Parte Young* (1908) (p202x) established a federal cause of action for injunctive relief against a federal officer.

(2) c- *Carlson* (1980) (n1iip216): the Court recognizes an implied private right of action to enforce the Cruel and Unusual Punishment Clause, articulating that either (1) "special factors" or (2) Congressionally provided exclusive substitute could foreclose a *Bivens* action. And here, re (2), even though Congress provided the FTCA, that act didn't provide a "clear congressional mandate" that Congress wanted pfs. relegated exclusively to its remedies.

(3) c- *Davis* (1979) (n1ip215): the Court recognizes an implied private right of action to enforce the am5 Due Process Clause for a congressional employee, but remanded for consideration of whether the Speech or Debate Clause rose to the level of a "special factor counseling hesitation." Also, the Court recognized the action, for sex discrimination, despite Congressional action in that are-- Title VII.

b) No

(1) c- *Schweiker* (1998) (p210): the Court pumps up the "special factors counseling hesitation" idea from *Bivens* in order to refuse to recognize and implied private right of action for damages for a due process challenge to benefits revocation, where (like *Bush*) Congress had provided some remedy but not "complete relief" and the statutory right (to benefits granted) could not be separated from the constitutional right.

(a) Brennan, dissenting, argues that there must at least be an opportunity to raise the constitutional issues and an opportunity to get consequential damages-- if Congress does not provide for these, the Court must provide them, especially since here Congress, Brennan says, did not intentionally choose to not allow them (i.e., the congressional inaction itc. was inadvertant and anyhow inaction alone should not be a "special factor" counseling hesitation).

i) The dissent distinguishes *Chappell* and *Bush* as concerning areas where Congress has special expertise; and points out *Davis* and *Carlson* where the Court recognized rights of action despite congressional competence to address the issues there.

(2) *Chappell* (1983) (p206c): the Court refuses to recognize an implied right of action for enlisted military personnel against unconstitutional actions of their superior officers, reasoning that military life is special and Congress haven't provided a damages remedy and so the Court would be interfering with

Congress's special authority in this field.

(3) *Bush* (1983) (p206c, n2ip219): the Court refuses to recognize an implied right of action for a federal employee who alleged demotion in violation of am1, reasoning that Congress had provided for administrative remedies for civil servants and so the Court would be interfering in an area where Congress had already given special attention to the policies concerned.

(4) *Stanley* (1987) (n2iip220): the Court refuses to recognize an implied right of action for a military officer secretly given LSD by the army, the Court looking at Congress's special authority under the Constitution to regulate the armed forces and saying that that was a good enough special factor alone, regardless of whether Congress had otherwise spoken.

(5) c- *Malesko* (2001) (n3p221): the Court refuses to recognize an implied right of action against a private corporation operating a halfway house, reasoning that a *Bivens* action would not be a deterrent (see *Meyers* (p222x), where the Court refused to recognize a *Bivens* action against federal agencies as opposed to the invididual officers employed by them).

c) c- Reverse 1983 actions (Amar article): Amar suggests that states ought to (and ought to be able) to create 1983-like statutes providing causes of action to sue federal officials in state court for violations of federal constitutional rights.

B. 42 U.S.C. § 1983

1. Immunity

a) Official Immunity

(1) c- Alden v. Maine

(2) Absolute immunity

(3) Qualified immunity

(a) c- Wood

(b) c- Harlow

(c) c- Anderson

(d) c- Crawford-El (p1098x)

b) Municipal Immunity

(1) c- Hafer

(2) c- Monell (1978) (p1117)

(a) Retroactivity

i) c- Huson

ii) c- Harper

iii) c- Beam

(3) c- Owen (1980) (p1134)

(4) c- Pembauer (1986) (p1160x)

(5) c- Praprotnik (1988) (p1163)

2. Rights Enforceable

a) "Liberty" and "Property"

b) Process Due

c) Nonconstitutional Rights

Comment: Compare implied private rights of action to enforce federal statutes (e.g. Cannon).

3. why bring 1983 claim in state court (see classnotes 8/26)

VII. leftover

A.

1. *City of Boerne* (and am14s5); *Seminole Tribe*, too

2. *Schiavo*

a) *Cruzan*

b) PL 109-3

c) *Batson*

d) *Kraemer*

e) *NYT v. Sullivan*