**Federal Courts**

1. Introduction
   1. Article III
      1. Section 1
         1. Madisonian Compromise – Constitution creates the SC and gives Congress the power to create lower FEDERAL courts
         2. Life tenure
         3. Guaranteed compensation
      2. Section 2
         1. “The judicial Power shall extend…
            1. …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;
            2. …to all Cases affecting Ambassadors, other public Ministers and Consuls;
            3. …to all Cases of Admiralty and maritime Jurisdiction;
            4. …to Controversies to which the United States shall be a Party;
            5. …to Controversies between two or more STATEs;
            6. …between a STATE and Citizens of another STATE;
            7. …between Citizens of different STATEs;
            8. …between Citizens of the same STATE claiming Lands under the Grants of different STATEs,
            9. …and between a STATE, or the Citizens thereof, and foreign STATEs, Citizens or Subjects.”
         2. Exceptions Clause
   2. Judiciary Acts
      1. First Judiciary Act of 1789
         1. note:
            1. the H/W paradigm accords the 1789 Act quasi-constitutional status
            2. generally believed to reflect framers’ original understanding of Art III
         2. courts
            1. SC: original and appellate jurisdiction
            2. DC: as trial courts
            3. Circuit Courts: trial courts with limited appellate responsibilities

no circuit judges

justices of the SC and judges of DC rode circuit

* + - 1. jurisdiction
         1. largely diversity and admiralty cases
         2. no FEDERAL general jurisdiction, except for criminal cases
         3. SC original jurisdiction tracked Art III §2 (ambassadors, STATEs)
         4. SC appellate jurisdiction:

review in civil cases over $2000

review of STATE court decisions:

striking FEDERAL law as unconstitutional

upholding STATE laws against claims of unconstitutionality

=>wherever a claim based on FEDERAL law was denied

* + - 1. history
         1. from the start, the FEDERAL courts were hamstrung by lack of appellate jurisdiction
         2. the courts’ caseload grew with growth of interSTATE transportation
         3. the civil war also resulted in a lot of new FEDERAL legislation
    1. 1875: General FEDERAL Question Jurisdiction
       - 1. creates massive backlog
         2. as a result , the district courts exercised massive discretion without effective appellate review
    2. 1891: Evarts Act
       1. created current structure of FEDERAL courts
       2. new set of courts: Courts of Appeal (but it took another 20 years for the “circuit courts” to disappear)
       3. compromise: increased appellate supervision, while encouraging uniformity of FEDERAL law
          1. the idea was to create a few large circuits:

geographical uniformity

inter-district disparities could be resolved by SC

* + - * 1. free up SC to deal with issues of public importance

also moving from mandatory jurisdiction 🡪 discretionary jurisdiction

* + 1. 1925: SC gets certiorari jurisdiction over about ½ of docket
    2. 1988: SC gets compete certiorari jurisdiction

1. Judicial Review and Separation of Powers
   1. Nature of the Power of Judicial Review: Marbury v. Madison and beyond
      1. Marbury v. Madison (U.S. 1803) (p. 55). SC lacked jurisdiction to decide the case before it.
         1. § 13 of 1789 Judiciary Act grants SC original jurisdiction over cases for writ of mandamus (highly controversial ruling)
         2. Art. III § 2 does NOT grant original jurisdiction
         3. Congress’ grant of original jurisdiction for mandamus was unconstitutional, in violation of Art. III
      2. “JUDICIAL REVIEW” – the power to refuse to give effect to an Act of Congress because that Act conflicts with the U.S. Constitution
         1. NOTE: this narrower view is consistent with the PRIVATE RIGHTS MODEL
         2. Modern justification: All branches have the opportunity to pass on constitutionality—judicial review is the judiciary’s
         3. PRIVATE RIGHTS MODEL (DISPUTE RESOLUTION MODEL) (pp. 67-68)
            1. Power of judicial review is anomalous under a substantially democratic Constitution and is tolerable only insofar as necessary to the resolution of cases
            2. Definition of justiciable “cases” should be restricted to the kinds of disputes historically viewed as appropriate for judicial resolution—paradigmatically, those in which a Δ’s violation of a legal duty to the Π has caused a distinct and palpable injury to an economic or other legally protected interest
            3. Courts should avoid any role as a general overseer of government conduct and should especially avoid the award of remedies that invade traditional legislative and executive prerogatives
         4. PUBLIC RIGHTS MODEL (pp. 68-69)
            1. Would permit any citizen to bring a “public action” to challenge allegedly unlawful government conduct
            2. Judiciary should NOT be viewed as a mere settler of disputes, but rather as an institution with a distinctive capacity to declare and explicate public values—norms that transcend individual controversies
            3. Defend’s courts’ exercise of broad remedial powers in cases challenging the operation of such public institutions as schools, prisons, and mental hospitals—relief cannot and should not be limited to undoing particular violations, but should involve judges in the management and reshaping of those institutions
         5. NOTE on these models…
            1. They are stylized and do NOT do that much work
            2. They may overlap
            3. They do have implications for standing, stare decisis, and res judicata
   2. Standing Under Article III
      1. Allen v. Wright (U.S. 1984) (p. 114). Under Art. III, the principle of separation of powers counsels against recognizing standing in a case brought not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the executive branch to fulfill its legal duties.
         1. Enforcement problem: the IRS could do more
         2. Πs alleged 2 injuries:
            1. Harm from mere fact of government financial aid to discriminatory schools

Generalized grievance that government is acting illegally does NOT constitute judicially cognizable injury

“Stigmatic injury” is too widely shared

* + - * 1. FEDERAL tax exemptions to racially discriminatory private schools in Πs’ communities impair their ability to have their public schools desegregated

Legally cognizable, BUT fails because the alleged injury is NOT fairly traceable to unlawful conduct of the IRS

Speculative and simply unclear, so Court falls back on separation of powers argument (p. 121)

* + - 1. Court say Standing Doctrine comes from separation of powers, as if it comes from the “case or controversy” requirement of Art. III (p. 117)
      2. NOTE: Court never says whether separation of powers concerns are valid or invalid—just says that the Court is concerned and so finds NO standing
      3. TRANS-SUBSTANTIVE STANDING TEST (does NOT differ on a case-by-case basis):
         1. ART. III STANDING INQUIRY

INJURY IN FACT

“distinct and palpable,” NOT “abstract” or “conjectural” or “hypothetical”

Legally cognizable injuries from common law have been expanded

Ideological Πs will NOT have INJURY IN FACT

For generalized grievances, the political process of Congress is better suited/more responsive when wide numbers are affected (BUT see Akins)

CAUSATION

“fairly traceable” – alleged unlawful conduct must link to Π’s injury

“redressability” – court’s action can bring relief

* + - * 1. Prudential component of standing (p. 117)

“general prohibition on a litigant’s raising another person’s legal rights”

“rule barring adjudications of generalized grievances more appropriately addressed in the representative branches”

“requirement that a Π’s complaint fall within the zone of interests protected by the law invoked”

* + - 1. DISSENT:
         1. Court could mean one of 3 things by its invocation of separation of powers.

Simply expressing idea that if the Π lacks Art. III standing to bring a lawsuit, then there is no “case or controversy” within the meaning of Art. III and hance the matter is not within the area of responsibility assigned to the Judiciary by the Constitution

Saying that the Court will require a more direct causal connection when it is troubled by the separation of powers implications of the cases before it

Court could be saying that it will not treat as legally cognizable injuries that stem from an administrative decision concerning how enforcement resources will be allocated

* + - * 1. Points to clear (economic) causal link
        2. Standing requirements already take into account SEPARATION OF POWERS concerns

If there are other extraordinary SEPARATION OF POWERS concerns, they should be resolved on justiciability grounds (on the merits)

STANDING and JUSTICIABILITY doctrines are separate—conflating the two is unfair

* + 1. Why standing?
       1. Older, narrower interpretation of SEPARATION OF POWERS
          1. Courts formulate rulings for factual contexts
          2. Π should have a stake in the outcome
       2. Now, we talk in terms of institutional balance when we talk SEPARATION OF POWERS
    2. STANDING v. JUSTICIABILITY – look at the parties v. look at the merits
    3. Frothingham v. Mellon (U.S. 1923) (p. 127). Π taxpayer alleged Maternity Act would increase her tax liability and “thereby take her property without due process of law”
       1. PRIVATE RIGHTS case: “The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.
       2. Court would not “assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly [the Court] does not possess”
    4. Flast v. Cohen (U.S. 1968) (p. 128). Π taxpayer alleged that FEDERAL statute violated the Establishment Clause by providing financial support for educational programs in religious schools. Establishment clause specifically limited Congress’ taxing and spending power.
       1. Standing doctrine contains a mix of “constitutional requirements and policy considerations”
          1. Suggested Frothingham rested on policy rather than constitutional grounds
       2. “The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a FEDERAL court and not on the issues he wishes to have adjudicated.”
       3. NEXUS: STANDING AND JUSTICIABILITY
          1. Although it was “not relevant that the substantive issues in the litigation might be nonjusticiable, … prior decisions establish that, in ruling on standing, it is both appropriate and necessary to look at the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated.”
          2. TEST: Nexus of FEDERAL taxpayers has 2 aspects: Taxpayer must establish…

Logical link between that status and the type of legislative enactment attacked

Nexus between that status and the precise nature of the constitutional infringement alleged

* + - 1. Distinguished Frothingham as involving no allegation that Congress “had breached a specific limitation upon its taxing and spending power”; Flast claimed a violation of her personal constitutional rights
      2. DISSENT: Justice Harlan would have held that “individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if [but only if] Congress has authorized such suits [as it had under various regulatory statutes.

Avoids SEPARATION OF POWERS concerns

* + - 1. Valley Forge Christioan College v. American United for Separation of Chrch and Stat, Inc. (U.S. 1982) (p. 130, 161). Cut back Flast. NO STANDING under the Establishment Clause
         1. Taxpayers lacked standing—failed first part of Flast NEXUS TEST for 2 reasons:

Source of their complaint was NOT a congressional action, BUT a decision by HEW to transfer a parcel of FEDERAL property

Authorizing statute was an exercise of Congress’ power under the Property Clause rather than the Taxing and Spending Clause

* + 1. Fletcher (p. 130): Standing inquiry should be based not on a trans-substantive case or controversy doctrine, but rather on the meaning of the particular constitutional or statutory provision
    2. What constitutes INJURY IN FACT for Art. III purposes?
       1. Sierra Club v. Morton (U.S. 1972) (p. 132). NO INJURY. Though non-economic harm of the kind alleged (special interest in aesthetics and ecology of natural area) could satisfy the injury-in-fact requirement, “the ‘INJURY IN FACT’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured. … Nowhere…did the Club STATE that its members use [the area in question] for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the Δs.”
       2. United States v. Richardson (U.S. 1974) (p. 133, 161). NO INJURY. Π lacked standing to litigate whether the CIA was violating Art. I § 9, cl. 7 (requiring “a regular Statement and Account of the Receipts and Expenditures of all public Money”) by accounting for its expenditures, in accordance with a FEDERAL statute, “solely on the certificate of the Director” because there was no nexus between status of taxpayer and failure of Congress to require the Executive Branch to supply a more detailed report of expenditures.
          1. Generalized grievances: “Subject matter is committed to the surveillance of Congress, and ultimately to the political process.”
          2. Powell CONCURRING: Court’s strength is in its legitimacy and public confidence—the more it operates as a general overseer of the representative branches, the more it loses its strength

Public confidence is why the counter-majoritarian implications of judicial review are OK

* + - 1. Heckler v. Matthews (U.S. 1984) (p. 134). INJURY. Court upheld standing in unequal treatment case under the Social Security Act. Because Π asserted the right to receive benefits and not a substantive right to any particular amount of benefits, Π’s standing does not depend on his ability to obtain increased Social Security payments.
         1. Discrimination itself can cause serious non-economic injuries
         2. Distinguish Allen v. Wright on Fletcher theory and Equal Protection Clause.
      2. Lujan v. National Wildlife Federation (U.S. 1990). NO INJURY. Diminution of Πs’ recreation opportunities were too general to be legally cognizable—only one member used “unspecified areas” of the “immense tract of territory” in question.
         1. Πs’ averments that they intended to travel abroad and observe endangered species again were insufficient to establish “imminent” injury—should have bought tickets
         2. Endangered Species Act’s “citizen-suit” provision found UNCONSTITUTIONAL as applied to Πs who would otherwise lack standing under Art. III

SEPARATION OF POWERS: “To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed,’ Art. II, §3. It would enable the courts, with the permission of Congress, ‘to assume a position of authority over the governmental acts of another and co-equal department,” Frothingham

Art. III is a barrier to private attorneys general

NOTE: intrusion into the Executive Branch (Art. II) reasons are different from Art. III reasons

* + - * 1. Why have “citizen-suit” provisions?

Efficiency – how many AGs can the U.S. hire?

Politics – Executive Branch does NOT always agree with the laws on the books, i.e., insofar as enforcement—private citizens can pick up the slack of indifferent or even hostile administrations (underenforcement concern)

BUT SEPARATION OF POWERS: it is the Executive’s duty to enforce the laws, NOT private citizens’ or the courts’ duty

FUNCTIONALLY: the Judicial Branch is unaccountable politically and the interference between politically accountable branches introduces unwanted and ill-placed politics on checks and balances and the judiciary

* + - * 1. Only time the SC has clearly invalidated a congressional grant of standing based upon Art. III
      1. Friends of the Earth Inc. v. Laidlaw Environmental Services (TOC) Inc. (U.S. 2000) (p. 135). INJURY. The “relevant showing for purposes of Art. III standing…is NOT injury to the environment BUT injury to the Π.” Court found injury to Πs resulted from their “reasonable concern” that pollution had damaged land they otherwise would have used.
    1. CAUSATION and REDRESSABILITY
       1. Linda R.S. v. Richard D. (U.S. 1973) (p. 136). INSUFFICIENT NEXUS between Π’s injury and government action to justify judicial intervention to force STATE officials to prosecute deadbeat dads of illegitimate children, too
          1. “in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”
       2. Simon v. Eastern Kentucky Welfare Rights Org. (U.s. 1976) (p. 136). PURELY SPECULATIVE that denial of access to hospital services [from which the Πs suffered] in fact results from IRS’s decision , or that a court-ordered return by the IRS to their previous policy would result in these Πs receiving the hospital services they desire.
       3. Regents of the University of California v. Bakke (U.S. 1978) (p .137.) INJURY TRACEABLE AND REDRESSABLE. Relief would redress the injury Bakke had suffered by having been deprived, simply because of his race, of the chance to *compete* for every place in the entering class.
       4. Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville (U.S. 1993) (p. 137). AFFIRMATIVE ACTION. “The ‘INJURY IN FACT’ in an equal protection case…is the denial of equal treatment resulting from the imposition of [a barrier that makes it more difficult for members of a group to obtain a benefit], NOT the ultimate inability to obtain the benefit.
          1. NOTE: sometimes courts characterize the injury as a loss of the ultimate benefit
       5. Clinton v. New York (U.S. 1998) (p. 137). STANDING UPHELD. Injury characterized as the deprivation of a “bargaining chip” in sales negotiations that “inflicted sufficient likelihood of economic injury to establish standing.”
    2. STANDING DOCTRINE IS MALLEABLE (p. 138)
    3. TIMING: Steel Co. v. Citizens for a Better Environment (U.S. 1998) (p. 138). Outside of exceptional circumstances, a FEDERAL court must resolve Art. III standing Q before reaching non-jurisdictional Qs
    4. FEDERAL Election Commission v. Akins (U.S. 1998) (p. 143). Congress has the constitutional power to authorize FEDERAL courts to adjudicate lawsuits, i.e., grant standing, subject to Art. III limitations.
       1. BROAD statutory standing for “any party aggrieved” (p. 144)
       2. INJURY IN FACT consisted of Π’s inability to obtain information
          1. Injury is “sufficiently concrete and specific that the fact that it is widely shared does NOT deprive Congress of constitutional power to authorized its vindication in the FEDERAL courts”
       3. PLUS “fairly traceable” and “redressable”
       4. Logical NEXUS inquiry is NOT relevant in this case in light of FECA statute
          1. SC distinguished Richardson and Flast on the relevance of finding a logical nexus
          2. Seems to invoke Fletcher idea (p. 130), linking standing with an implied right of action—do NOT overSTATE this
       5. DISSENT: Why did SC develop generalized grievance v. particularized grievance in the first place?
    5. CIVIL RIGHTS ENFORCEMENT: Trafficante v. Metropolitan Life Ins. Co. (U.S. 1972) (p. 150). Civil Rights Act of 1968 “showed ‘a congressional intention to define standing as broadly as is permitted by Art. III…’ insofar as tenants of the same housing unit are concerned”
       1. NOTE: Hard to find Art. III standing in the absence of the Act
    6. CONCLUSIONS on the conjunction of Lujan and Akins:
       1. “The … injury required by Art. III may exist solely in virtue of ‘statutes creating legal rights, the invasion of which creates standing.’ ” Lujan.
       2. In creating legal rights the invasion of which will create standin, Congress’ power is solely one of “elevating to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate at law” Lujan.
       3. Whatever else may or may not count as a “concrete, de facto” injury “previously inadequate at law,” the inability to procure information to which Congress has created a right is a now-settled example
    7. STANDING OF TAXPAYERS (pp. 161-62)
       1. Richardson
       2. Reservists
       3. Valley Forge Christian College
    8. ACTIONS BY STATES AND MUNICIPALITIES
       1. Municipal corporations have generally been denied standing in the FEDERAL courts to attack legislation as violative of the FEDERAL Constitution, on the ground that they have no rights against the STATE of which they are a creature.
          1. EXCEPTION: standing under the SUPREMACY CLAUSE
    9. ACTIONS BY VOTERS
       1. Baker v. Carr (U.S. 1962) (p. 163). A sufficient “personal stake in the outcome of the adjudication” of malapportionment of STATE legislature was alleged “to insure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional Qs”
       2. Department of Commerce v. United States House of Representatives (U.S. 1999) (p. 163). Standing upheld for Πs who claimed that they were likely to suffer “intraSTATE vote dilution” as a result of STATE reliance on the FEDERAL census for STATE districting purposes
       3. 3 kinds of voter interests that potentially might be at stake in voting rights cases:
          1. Interest in being able to participate in elections
          2. Interest in being able to aggregate one’s vote with like-minded others to influence electoral outcomes
          3. Interest in achieving governance responsive to one’s values and preferences
       4. Shaw v. Reno (U.S. 1993) (p. 164). Standing upheld in contest of majority-minority redistricting case in North Carolina, which was alleged to violate Πs’ rights under the EQUAL PROTECTION CLAUSE to participate in an electoral process whose structure was not unduly traceable to considerations of race.
       5. United States v. Hays (U.S. 1995) (p. 164). Persons living outside a voting district lacked standing to challenge the legislation establishing the district as an unconstitutional racial gerrymander
    10. ACTIONS BY LEGISLATORS
        1. Coleman v. Miller (U.S. 1939) (p. 165). Kansas STATE legislators who had voted against ratification of the Child Labor Amendment had standing to seek review of a STATE court’s refusal to enjoin STATE officials from certifying that Kansas had ratified the amendment.
        2. Powell v. McCormack (U.S. 1969) (p. 165). Implicitly recognized the standing of a member of Congress to sue alleging that he had been unlawfully excluded from the 89th Congress—personal pecuniary interest in receiving back pay for the session.
        3. Kennedy v. Sampson (D.C. Cir. 1974) (p. 165). Recognized Sen. Kennedy’s standing on the ground that a pocket veto, if unconstitutional, improperly deprived him of an effective vote to enact legislation or to override a veto
        4. Raines v. Byrd (U.S. 1997) (p. 166). SC rejected the standing of six present and former members of the House and Senate to challenge the constitutionality of the Line Item Veto Act, which specifically authorized suit for declaratory judgment and injunctive relief by “[a]ny Member of Congress or any individual adversely affected.”
           1. PERSONAL v. INSTITUTIONAL INJURY: Standing depends on a showing of “personal injury”
           2. SEPARATION OF POWERS: “our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the FEDERAL Government was unconstitutional”
           3. Πs claimed dilution of voting power.

Coleman distinguished as standing “at most … for the proposition 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 does not go into effect), on the ground that their votes have been completely nullified

* + 1. QUI TAM ACTIONS
       1. Vermont Agency of Natural Resources v. United States ex rel. Stevens (U.S. 2000) (pp. 155-56). Relators, as assignees of the Government’s claims, have Art. III standing to assert the INJURY IN FACT suffered by the assignor
          1. NOTE: SC expresses no opinion on the Q whether qui tam actions violate Art. II, in particular the APPOINTMENTS CLAUSE of § 2 and the TAKE CARE CLAUSE of § 3.
    2. MAYBE there is a presumption for the ability/prerogative of the FEDERAL courts to judge constitutional violations (rather than other statutory or regulatory violations) in standing cases, BUT the SC has NEVER ruled this way
  1. POLITICAL QS (NON-JUSTICIABILITY)
     1. Nixon v. United States (U.S. 1993) (p. 244). The POLITICAL QUESTION DOCTRINE dictates that the court abstain from making judgments on controversies committed to another branch of government.
        1. RULE: “A controversy is nonjusticiable—i.e., involves a political question—where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’ ”
        2. STANDARD: “the concept of a textual commitment to a coordinate political department is NOT completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”
           1. “Constitutional commitment” would have been a better term than “textual commitment.” See Powell (p. 248)
        3. Art. I, § 3, cl. 6 grants to the Senate the sole power to impeach
        4. SEPARATION OF POWERS:
           1. Judicial role in impeachments is expressly rejected due to the possibility of bias. Review of impeachment proceedings would raise the same problem.
           2. Impeachment was designed to be the only check on judicial power by the legislature
           3. Ultimate Q: who decides?
        5. Impeachment procedure already contains adequate protections against abuse without judicial review—Senate decision to use fact-finding committee to “try” a judge was within the prerogative of the Senate
     2. Where there really is a textual commitment for another branch to decide, then the courts should NOT step in, BUT otherwise it is the judiciary’s job to make decisions on the Constitution
        1. Prudence protects the Court vis-à-vis political Q doctrine: discretion allows the judiciary to avoid undermining itself
        2. THINK: inconsistencies are immaterial because justiciability is employed to protect the SC’s integrity and function—that is where the SC’s legitimacy lies
     3. Wechsler (p. 254): Political Q Doctrine is more than broad discretion; it involves an act of constitutional interpretation
        1. Justice White CONCURRING in Nixon: “At best, [the prudential] approach offers only the illusion of deference and respect by substituting impressionistic assessment for constitutional analysis.”
        2. Under Art. III the SC has jurisdiction of cases arising under the Constitution
     4. Baker v. Carr (U.S. 1962) (p. 257). Leading modern political Q case.
        1. ISSUE: whether an equal protection challenge to the apportionment of the Tennessee legislature raised a nonjusticiable political question?
        2. Colegrove v. Green (U.S. 1946) (p. 257). Challenge to congressional districting in Illinois, based on the GUARANTEE CLAUSE, presented a nonjusticiable political Q.
           1. Distinguishing Colegrove: suit under the GUARANTEE CLAUSE had no relevance to a suit under the EQUAL PROTECTION CLAUSE
        3. Brennan goes over the whole history of political Q doctrine
           1. Subject areas thought to raise nonjusticiable political Qs:

Foreign relations

Qs involving dates of duration of hostilities

Formal validity of legislative enactments

Status of Indian tribes

Qs about whether a republican form of government exists in the STATEs

* + - * 1. BUT: political Q inquiry is case-by-case
      1. POLITICAL Q STANDARD (p. 258): “Prominent on the surface of any case held to involve a political Q is found…
         1. …a textually demonstrable constitutional commitment of the issue to a coordinate political department;
         2. …or a lack of judicially discoverable and manageable standards for resolving it;
         3. …or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
         4. …or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
         5. …or an unusual need for unquestioning adherence to a political decision already made;
         6. …or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”
      2. NOTE: these 6 standards tell you almost nothing about how a case will come out
         1. Usually other considerations drive the court in manipulating the Baker standards disingenuously
      3. Mere fact that a case has political stakes or has generated political controversy clearly does NOT render it nonjusticiable under political Q doctrine (p. 265)
    1. Davis v. Bandemer (U.S. 1986) (p. 259). Judicially manageable standards are available to decide gerrymandering cases.
    2. United States Department of Commerce v. Montana (U.S. 1992) (p. 259). Unanimous SC rejected Montana’s claims that that a statutorily-mandated method of apportioning members of the House among the STATEs violated the Constitution’s APPORTIONMENT CLAUSE and rejected the government’s contention that the choice among alternative methods of apportionment presented a nonjusticiable political Q.
       1. Interpretation of the APPORTIONMENT CLAUSE is “well within the competence of the judiciary”
    3. GUARANTEE CLAUSE
       1. Luther v. Borden (U.S. 1849) (p. 259). “Congress must necessarily decide what government is established in the STATE before it can determine whether it is republican or not. And when the senators and representatives of a STATE are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of government, and could not be questioned in a judicial tribunal.”
       2. NOTE: Since Luther, the SC has never expressly found a GUARANTEE CLAUSE claim to present a justiciable Q (pp. 260-61)
    4. Foreign Relations – given Baker, this factor is not enough to determine nonjusticiability
       1. Goldwater v. Carter (U.S. 1979) (p. 262). On the merits, President had authority to terminate a mutual defense treaty with Taiwan without the approval of either two-thirds of the Senate or a majority of both houses of Congress.
          1. Rehnquist did NOT say there was a “textual commitment” (Constitution is silent), BUT did find no judicially manageable standards because different treaties might be terminated in different ways
       2. Decision to go to war is nonjusticiable (p. 264)

Political Q Doctrine may be shrinking to a vanishing point: consider the spectrum…

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Marbury v. Madison | Wechsler: | Baker v. Carr | Bickel: | One of many doctrines of deference |
| - Broad discretion to the political branches is exercise of constitutionally granted power | - Political Q is a narrow doctrine—certain parts of Constitution say where there is no jurisdiction for the courts (Nixon).  - NOTE: what the other body does may be unconstitutional  - NOT up to the courts to decide  - idea of textual commitment  - Congress is to decide Qs of GUARANTEE CLAUSE  - judicially manageable standards | - it’s NOT categories, BUT features of different Qs (p. 258)  - all inquiries ask whether the authority is vested in another branch (constitutional commitment)  - other considerations after the first two on p. 258 may be prudential | - precise doctrinal formulation (a la Wechsler) is misleading  - political Q is NOT like other doctrines  - it is about court’s counter-majoritarian role to accomplish vindication of constitutional principles, rooting such decisions in majority beliefs/acceptance  - SC must have room to maneuver to maintain its legitimacy/authority  - Baker is a cover for much more discretionary inquiry | - SC and political branches reconcile democracy with constitutional principle  - amounts to division of labor (i.e., the courts are good at protecting minorities, BUT NOT so good at representing democratic majority)  - e.g., impeachment  - e.g., New Deal created a compromise on economic legislation deference |

1. Power to Control the Jurisdiction of STATE FEDERAL Courts
   1. Power to Restrict FEDERAL Jurisdiction
      1. Art. III
         1. EXCEPTIONS CLAUSE – SC’s appellate jurisdiction is subject to congressional exceptions
         2. In light of MADISONIAN COMPROMISE, Congress’ power to “ordain and establish” FEDERAL tribunals “inferior” to the SC has generally been understood to include the power to create lower FEDERAL courts vested with less than the maximum jurisdiction that the Constitution would allow
      2. Judiciary Act of 1789 – Congress has never vested the full “judicial Power”
         1. Some limits:
            1. Until 1875, general FEDERAL Q jurisdiction in civil cases was NOT available

Still subject to WELL-PLEADED COMPLAINT RULE

* + - * 1. Complete diversity requirement of Strawbridge and amount in controversy requirement
        2. From 1789 to 1914, SC had jurisdiction to review STATE court decisions online if the STATE court had denied a claim of FEDERAL right
    1. PARITY (pp. 323-26)
    2. CONGRESS, JURISDICTION, AND…
       1. LOWER FEDERAL COURTS
          1. Arguments against creating lower FEDERAL courts

Within Congress’ discretion NOT to

Lower FEDERAL courts are NOT a constitutional creation

STATE courts would be available to hear FEDERAL cases

* + - * 1. Martin v. Hunter’s Lessee (U.S.1816) (pp. 331-34). Obligatory force of Art. III on Congress to create and confer jurisdiction upon the lower FEDERAL courts.

Justice Story’s 3 points:

Congress is obligated to vest all of the judicial power “either in an original or appellate form” in SOME FEDERAL court

If any cases descried in Art. III are beyond the jurisdiction of the STATE courts, and thus NOT capable of review on appeal from a STATE court to the SC, Congress would be obligated to create inferior FEDERAL courts in order that these cases might be entertained in SOME FEDERAL court

NOTE: Justice Story never says what these cases may be

Congressional obligation is restricted to the first three categories of cases described in Art. III § 2, where the Framers used “all”

Modern variants of Justice Story’s positions (pp. 333-34)

Tarble’s Case is often cited to support Justice Story

NOTE ALSO: history and modern cases (e.g., St. Cyr) practically mandate lower FEDERAL courts

Originalism is clearly an option, BUT pragmatism, now, essentially or effectively mandates lower FEDERAL courts

There is NO possibility that the SC could exercise proper review, given only its appellate jurisdiction

It’s probably just highly academic to speculate or try to support elimination of the lower FEDERAL courts

* + - * 1. 2-TIER HYPOTHESIS – Amar (p. 343):

Art. III establishes 2 tiers of FEDERAL jurisdiction:

Tier 1: comprising the first 3 categories in which FEDERAL jurisdiction (in either original or appellate form) is mandatory in “all cases”

Congress may NOT deny BOTH SC and lower FEDERAL court jurisdiction with respect to the same class of cases within the mandatory tier

Tier 2: consisting of the remaining 6 categories, in which the decision whether to vest FEDERAL jurisdiction is a matter for discretionary judgment by Congress

Encompasses discretion contemplated by Madisonian Compromise

About whether to create lower FEDERAL courts

About creating exceptions to SC’s appellate jurisdiction

Support:

Uses of the word “all” during drafting

1789 Judiciary Act was reasonably consistent with 2-tier hypothesis

SC support in Martin v. Hunter’s Lessee and other cases

Criticism – Meltzer (p. 344):

Amar’s textual arguments are NOT self-evidently valid—there are other possible explanations for the provision of jurisdiction of “all cases” in some categories and the reference to “controversies” in others

Fit between Amar hypothesis and 1789 Judiciary Act is less good than Amar suggests, especially insofar as § 25 allowed review of FEDERAL questions decided in STATE courts only when the decision was adverse to a claim of constitutional right

Early SC dicta less probative than Amar suggests

Challenge to structural superiority of 2-tier hypothesis: are cases in which Amar views jurisdiction as mandatory—including cases of admiralty and maritime jurisdiction—clearly more important than those in which the U.S. is a party, those between STATEs, and suits by foreign STATEs, for example?

* + - * 1. Sheldon v. Sill (U.S. 1850) (p. 326). Congress has the power to remove a case or controversy from the jurisdiction of the FEDERAL courts.

“Courts created by statute can have no jurisdiction but such as the statute confers.”

“The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.”

NOTE: Seems to suggest no Art. III limitations on Congress

* + - * 1. What limits are there on congressional powers over jurisdiction? (pp. 334-34)

INTERNAL – Art. III

Sheldon is understood to support the proposition that there are NO internal restrictions on Congress’ power to limit LOWER FEDERAL court jurisdiction

EXTERNAL – other constitutional limitations, e.g., 5th AMENDMENT DUE PROCESS

* + - * 1. SEPARATION OF POWERS

On one hand, Congress’ limiting jurisdiction can look like a subversion of Marbury v. Madison and thus judicial review

On the other hand, judicial review may just be on method for interpreting the Constitution, AND other methods exist (i.e., in the Congress and Executive)

* + - 1. SUPREME COURT (appellate jurisdiction)
         1. What constitutional reason is there for SC appellate jurisdiction?

Congress has the power to make exceptions

EXCEPTIONS CLAUSE

Hart’s “Dialogue” (pp. 338, 348, 352): Exceptions are limited by prohibition against undermining essential functions of the SC

Ratner (p. 338): Congress CANNOT destroy the SC’s essential role—to be constitutionally valid, exceptions to the SC’s appellate jurisdiction must NOT negate the SC’s “essential constitutional functions of maintaining the uniformity and supremacy of FEDERAL law”

Criticism: confusing the familiar with the necessary (p. 339)

Exceptions apply to second non-mandatory tier in 2-tier hypothesis

Ex parte McCardle (U.S. 1869) (p. 328). McCardle claimed Reconstruction was unconstitutional. Although the SC derives its appellate jurisdiction from the Constitution, the Constitution also gives Congress the express power to make exceptions to that appellate jurisdiction.

1867 Judiciary Act described “affirmatively” the SC’s jurisdiction, and “this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it.”

Clear example of judicial restraint

NOTE: Only the statute under McCardle was appealed (1867 Act)—there are other HABEAS CORPUS statutes that McCardle can use AND the SC WILL entertain jurisdiction

Can be cited for 2 opposite propositions:

SC will NOT look into Congress’ motives and uphold Congress’ power under the EXCEPTIONS CLAUSE

Where there is more than one remedy, SC will allow Congress to eliminate one

McCardle is a weak precedent for understanding the EXCEPTIONS CLAUSE

* + - * 1. NOTE: how often Congress has tried to limit jurisdiction AND how infrequently it actually does

RESULT = AMBIGUITY

Friedman (p. 342): ambiguity is good because it allows flexibility

Tames Congress from interfering with SC’s role in judicial review

SC is more chaste in exercising judicial review because it is NOT keen on provoking jurisdiction-stripping by Congress

* + - * 1. United States v. Klein (U.S. 1871) (p. 339). Opposite of McCardle. Congress CANNOT change the rule midstream to alter the outcome.

BUT: the multitude of grounds for the decision also weaken it

* + - 1. NO FEDERAL COURTS AT ALL
         1. 2-tier hypothesis is an example, BUT 1789 Judiciary Act is very problematic when talking about “mandatory” jurisdiction
      2. STATE AND FEDERAL COURTS
         1. Is there a constitutional problem with denying all judicial forums?

Must reject 2-tier hypothesis to proceed with Q

STATE courts do NOT necessarily uphold FEDERAL constitutional rights when they uphold STATE constitutional rights

POLITCAL Q DOCTRINE suggests that NOT every constitutional claim is entitled to a remedy

MAYBE if Congress creates a FEDERAL STATUTORY right, it can take it away through closing all judicial forums, BUT the same CANNOT be said of FEDERAL CONSTITUTIONAL rights

Battaglia v. General Motors Corp. (U.S. 1948) (p. 346). SC has the power to decide whether a congressional Act limiting jurisdiction is itself unconstitutional.

EXTERNAL LIMIT: “[E]xercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Firth Amendment. That is to say, while Congress has te undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must note so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.”

SOVEREIGN IMMUNITY (pp. 350-51)

Denial of jurisdiction amounts to denial of all remedies, which is much more stringent than the limitations the sovereign immunity imposes upon remedies

Hart’s Dialogue (pp. 350-51):

“[W]here constitutional rights are at stake the courts are properly astute, in construing statutes, to avoid the conclusion that Congress intended to use the privilege of immunity, or of withdrawing jurisdiction in order to defeat them.”

Challenges to denial of one remedy “can rarely be of a constitutional dimension”

Multiplicity of remedies presents the issue of denial of any remedy from ever being squarely presented in taxpayer cases, for example

Fallon & Meltzer (pp. 351-52):

2 traditional constitutional remedial principles:

Principle that there should be individually effective redress for all violations of constitutional rights is strong BUT NOT unyielding; it can sometimes be outweighed by the kinds of practical imperatives that underlie immunity doctrines, for example

More structural principle that “demands a system of constitutional remedies adequate to keep government generally within the bounds of law” is “more unyielding in its own terms, but can tolerate the denial of particular remedies, and sometimes of [any] individual redress to the victim of a constitutional violation.”

Consistent with Hart’s contention that it is a “necessary postulate of constitutional government” that “a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained”

SUSPENSION CLAUSE – clearly, in certain specialized circumstances Congress can deny all remedies

Immigration and Naturalization Serv. v. St. Cyr (U.S. 2001) (pp. 353-54). Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act did NOT preclude FEDERAL HABEAS CORPUS review of the Q whether as a matter of law, the Attorney General possessed discretion to suspend the deportation of a resident alien.

CONSTITUTIONAL AVOIDANCE: a finding of preclusion of review “of a pure question of law by any court would give rise to substantial constitutional questions” under the SUSPENSION CLAUSE. “[A]t the absolute minimum, the SUSPENSION CLAUSE protects the writ ‘as it existed in 1789’

History supports the proposition that there seems to be a background assumption that HABEAS CORPUS is generally available

SUSPENSION CLAUSE Qs that would be present in a finding of a preclusion of HABEAS CORPUS would be “difficult and significant”

Total preclusion of judicial review would raise substantial DUE PROCESS and EQUAL PROTECTION issues (pp. 356-57)

* + - * 1. Constitutional avoidance of congressional no-jurisdiction laws (p. 347)

Webster v. Doe (U.S. 1988) (p. 347). Avoiding “serious constitutional questions” mandated finding that Congress did NOT strip jurisdiction over constitutional claim

Narrow statutory interpretation

* + - * 1. Limitations of Authority on Enforcement Courts

Lockerty v. Phillips (U.S. 1943) (p. 358). Upholds congressional power to concentrate jurisdiction.

Yakus v. United States (U.S. 1944) (p. 359). Exception to Lockerty RULE where the invalidity of a congressional act is a defense to a criminal prosecution

* 1. Power to Allocate to Non-Article III Courts
     1. Key distinctions between Art. III and Art. I courts that invoke SEPARATION OF POWERS and fairness to litigants:
        1. Life tenure
        2. Salary protection
        3. Art. I courts are established under NECESSARY AND PROPER CLAUSE
           1. Art. I § 8 – to constitute tribunals inferior to the SC

BUT this is probably governed by Art. III

BUT this makes things even more problematic

* + 1. 2 broad categories of Art. I courts:
       1. Adjudicatory bodies of administrative agencies (ADJUNCTS)
          1. Characteristics:

Decisions are NOT self-executing

Adjudication is used a vehicle for policymaking—permits coordination of rulemaking and adjudication in the service of policy goals

Justified under Art. III on the theory that judicial review of agencies’ decisionmaking retains “the essential elements” of the judicial power in an Art. III court

Existing Art. III courts are a necessary factor in maintaining the legitimacy of agency courts

* + - * 1. Crowell v. Benson (U.S. 1932) (p. 362). The opening that allows for agency adjudication and review in Art. III courts

Limitations of agency courts protecting the essential attributes of Art. III power:

De novo review of law

De novo review of jurisdictional and constitutional facts

Some review of fact-finding

Agency could NOT enforce its own judgment

Courts have since loosened up with de novo review and the Chevron Doctrine

* + - 1. Legislative courts (pp. 377-79) (EXCEPTIONS)
         1. Characteristics:

Decisions are final and enforceable unless appealed

Less likely to have policymaking responsibilities

Justified as permissible exceptions to Art. III’s tenure and salary protections

Rooted in historical types (from Northern Pipeline):

Territorial Courts

Could hear anything (Art. III categories and beyond)

“In legislating for [territories], Congress exercises the combined powers of the general, and of a STATE government”

Military Courts

Appear constitutionally beyond Q as a practical matter

Courts to adjudicate PUBLIC RIGHTS disputes

Historically, the contours of such courts have never been fully or clearly defined

NOT necessary that U.S. government is party to a suit

CANNOT try criminal cases

NOT clear why these exceptions are OK, if you do NOT take into account history

Public rights exception is problematic:

Uncertain

Expansive

Perverse – areas subject to congressional authority and important to that power are judged by the court of the body regulating those respective subject areas

What theories ground public rights as an exception to the exclusivity of Art. III courts?

EXECUTIVE DISCRETION

It seems intuitively that cases where the government is a party are most susceptible to concerns over political influence, non-Art. III concerns

HISTORY: Under earlier conceptions, the Executive Branch had broad discretion (e.g., in customs duties or possession)

There was NO notion that there was judicial review or due process of executive actions in the same way as in Art. III courts

Because Congress was granting you a benefit that did NOT previously exist

EFFICIENCY: Even if historical reasons no longer hold, there appear to be a triage or efficiency rationale for maintaining public rights courts

Also maintains agency-expertise-type advantages

SOVEREIGN IMMUNITY

If the FEDERAL government does NOT have to allow opportunity for suit, theN when it does, it does NOT need to create full-blown adjudicatory bodies in the Art. III mold

* + 1. Northern Pipeline (U.S. 1982) (pp. 380). Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters relating to those existing under bankruptcy laws.
       1. 2 principles (from Crowell and Raddatz that aid in determining the extent to which Congress may constitutionally vest traditionally judicial functions in non-Art. III courts:
          1. “First, it is clear that when Congress creates a substantive FEDERAL right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges.”
          2. “Second, the functions of the adjunct must be limited in such a way that ‘the essential attributes’ of judicial power are retained in the Art. III court.”
       2. Problems with bankruptcy courts in contract to agency model of Crowell:
          1. Too much Art. III-type authority

Scope of jurisdiction

Remedial powers

Enforcement

Subject to more deferential review

Most substantive of Brennan’s distinctions

* + - 1. Q: Brennan says that it matters that this is a STATE law right and NOT a FEDERALly created right, BUT he does NOT say or justify what the difference in result would be, so why say it?
         1. A: most FEDERAL agencies are closer to bankruptcy courts than to Crowell

Brennan does NOT want to up heave the administrative STATE

* + - 1. The Northern Pipeline PROBLEM (pp. 386-87):
         1. Assume:

that the “deep” problem presented by Northern Pipeline was the possibility that the historic role of Art. III courts in the constitutional scheme would be eroded by the piecemeal vesting of adjudicative responsibilities in non-Art. III FEDERAL tribunals AND

that the Government had indeed failed to furnish an adequate “limiting principle”

* + - * 1. 5 potential responses:

ART. III EXCLUSIVITY – restrictive reading of Art. III as mandating that if there are any FEDERAL adjudicative tribunals at all, they must be Art. III courts

Exceptions undermine this interpretation of congressional intent

HISTORICAL EXCEPTIONS – a short list of exceptions had been legitimated by some mix of textual analysis and historical experience, but further departures could be justified only by reference to a historically accepted exception

NECESSARY AND PROPER TEST – views Art. III as indifferent whether jurisdiction is vested in an Art. III court, a legislative court, or an administrative agency—only relevant Q would be whether the use of a non-Art. III FEDERAL tribunal was “necessary and proper” under Art. I and whether it offended some other constitutional provision, such as the DUE PROCESS CLAUSE or 7th Amendment

BALANCING (endorsed by Justice White DISSENT) – Art. III values are weighed against the interests supporting adjudication by a non-Art. III FEDERAL tribunal

APPELLATE REVIEW – treat sufficiently searching appellate review by an Art. III court as both necessary and sufficient to legitimate initial adjudication by a FEDERAL legislative court or administrative agency

* + - * 1. PUBLIC RIGHTS (p. 381): FEDERAL government has to be a party—necessary BUT NOT sufficient means of distinguishing private rights from public rights

Justice Brennan: PUBLIC RIGHTS is a lesser included power since Congress can repeal laws or NOT pass them in the first place

BUT: Thomas v. Union Carbide rejected the view that “ a matter of public right must at a minimum arise between the government and others”

* + - * 1. SOVEREIGN IMMUNITY: if Congress can exert the greater authority, the certainly it can do the lesser

When U.S. is Δ: certainly, Congress can create a tribunal under Art. I if it is going to create a tribunal at all

When U.S. is Π: FEDERAL government has such high executive discretion, BUT 5th Amendment does seem to open up some of the sovereign immunity and open government to liability

BUT REALIZE: through both sovereign immunity and executive discretion, the FEDERAL government can effectively deny a remedy

* + - * 1. BACKWARDNESS of holding: STATE-created common law rights need to be heard in Art. III courts
    1. Thomas v. Union Carbide Agricultural Products Co. (U.S. 1985) (p. 395). SC is moving away from Brennan’s plurality analysis in Northern Pipeline to the approach advocated by the dissenting opinion of Justice White—becomes clear in Schor.
    2. Commodity Futures Trading Comm’n v. Schor (U.S. 1986) (p. 387). Broad grant of power in Commodity Exchange Act clearly authorizes promulgation of regulations providing for adjudication of common law counterclaims arising out of the same transaction as a reparations complaint. No impermissible motivation for Congress’ action AND heightened efficiency and practicality made this Art. I court OK.
       1. Again: STATE law claim being decided by an Art. I tribunals
       2. Changed the Northern Pipeline PLURALITY analysis to BALANCING TEST + efficiency and pragmatism + waiver
       3. CFTC’s jurisdiction over counterclaims is “eminently reasonable and well within the scope of its delegated authority” (p. 389)
       4. Schor waived right to full trial of counterclaim before an Art. III court
          1. Distinguished Northern Pipeline: absence of consent to initial adjudication in non-Art. III court
       5. Twofold importance of Art. III (v. non-Art. III courts) (p. 390):
          1. FAIRNESS – “preserves to litigants their interest in an impartial and independent FEDERAL adjudication of claims within the judicial power of the United States”
          2. SEPARATION OF POWERS/CHECKS AND BALANCES (structural argument)– “serves as ‘an inseparable element of the constitutional system of checks and balances,’” Northern Pipeline
       6. NO FORMALISTIC approach to judicial examination of Congress’ authorization of the adjudication of Art. III business in non-Art. III tribunals
          1. INSTEAD the SC has engaged in case-by-case INQUIRY of the following factors none of which are determinative, with an eye to the practical effect of Congress’ authorization (p. 391)

BALANCING TEST is NOT categorical (a la Northern Pipeline)

Extent to which the essential attributes of judicial power are reserved to Art. III courts

Conversely, the extent to which the non-Art. III forum exercises the range of jurisdiction and powers normally vested only in Art. III courts

Origins and importance of the right to be adjudicated

Concerns that drove Congress to depart from the requirements of Art. III

* + - 1. Forum choice and waiver are evidence that Congress was NOT trying to subvert SEPARATION OF POWERS
      2. CFTC scheme is more like the agency model in Crowell v. bankruptcy courts found unconstitutional in Northern Pipeline (pp. 391-92):
         1. CFTC orders are enforceable only by order of the District Court
         2. CFTC orders are also reviewed under the same “weight of the evidence” STANDARD sustained in Crowell rather than the more deferential standard found lacking in Northern Pipeline
         3. CFTC legal rulings are subject to de novo review
         4. CFTC, unlike the bankruptcy courts under the 1978 Act, does NOT exercise “all ordinary powers of district courts”
      3. Justice O’Connor seems to be saying that Congress had a good enough reason for creating the FCTC and vesting It with is adjudicatory power
         1. Art. III does NOT give the SC an answer until it the SC looks at Art. III from a SEPARATION OF POWERS standpoint
    1. FORMALISM v. FUNCTIONALISM
       1. Northern Pipeline: FORMALISM in SEPARATION OF POWERS looks arbitrary
       2. Schor: FUNCTIONALISM leads to incremental chipping away of SEPARATION OF POWERS
    2. Adjudication by NON-Art. III tribunals and the 7th AMENDMENT
       1. Granfinanciera, S.A. v. Nordberg (U.S. 1989) (p. 397).
          1. Q: does 7th AMENDMENT confer on petitioners a right to a jury trial in the face of Congress’ decision to allow a non-Art. II tribunal to adjudicate the claims against them?

Coextensive inquiry: Q linked Congress’ power to withhold trial by jury to the Q of Congress’ power to provide for adjudication in a non-Art. III tribunal.

CRUCIAL INQUIRY: whether the right to recover a fraudulent conveyance should be viewed a “public” or “private”?

Justice Brennan distinguished Schor, which involved a private right, on the basis that there was consent to jurisdiction of non-Art. III tribunal without a jury

Reliance on reformulation of PUBLIC RIGHTS doctrine offered in Justice Brennan’s concurring opinion in Thomas v. Union Carbide (p. 398):

STANDARD: PRIVATE rights can be PUBLIC rights when they are so closely integrated in to a public regulatory scheme “as to be a matter appropriate for agency resolution with limited involvement by the Art. III judiciary”

A: Right to recover a fraudulent conveyance did NOT qualify as a public right under this STANDARD—it was a private right, legal in nature, which carried with it the 7th Amend guarantee of a jury trial

Langenkamp v. Culp (U.S. 1990) (p. 398). Creditors who submit claims against a bankrupt’s eSTATE have no right to a jury when they are sued by the trustee to recover allegedly preferential transfers. “Legal” claim under Granfinanciera takes on an “equitable nature”.

* + - 1. NLRB v. Jones & Laughlin Steel Corp. (U.S. 1937) (p. 400). “[7th AMENDMENT] has NO application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. It does NOT apply where the proceeding is NOT in the nature of a suit at common law.”
      2. Curtis v. Loehter (U.S. 1974) (p. 400). Jury trial right may depend on whether adjudication takes place in an agency or an Art. III court.
         1. 7th AMENDMENT does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in the ordinary courts of law.
         2. Distinguished NLRB as merely standing for the proposition that 7th AMENDMENT is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere agency adjudicatory body in statutory scheme
      3. Atlas Roofing Co. (U.S. 1977) (p. 400). PUBLIC v. PRIVATE rights: “At least in cases win which public rights are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the 7th AMENDMENT does NOT prohibit Congress form assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.”
    1. Conjunction of Northern Pipeline, Schor, and Granfinanciera (p. 401): 5-step strategy for determining the constitutionality of non-Art. III adjudicatory provisions
       1. Ask whether the provision falls within one of the “exceptional” categories identified by the Northern Pipeline plurality
          1. If so, the provision passes constitutional muster
       2. Ask next whether it might nonetheless be justified under the kind of balancing test applied in Schor
          1. Consent will often be of crucial significance
          2. In cases in which the functional justifications for utilizing a NON-ART. III tribunal are especially strong, one way to rationalized the result may be to classify the right in issue—even if involving the liability of one private party to another—as sufficiently bound up with an integrated regulatory scheme to come within the rationale, if NOT the historic scope, of the PUBLIC RIGHTS doctrine
       3. Q remains whether a jury trial is required under the 7th AMENDMENT
          1. Ordinarily the ART. III and 7th AMENDMENT TESTS will be coextensive, BUT there are many exceptions, as perhaps in Granfinanciera itself
       4. If a jury trial is required under the 7th AMENDMENT, and if a jury trial would be incompatible with the nature of the particular forum provided by Congress, this incompatibility may yield the conclusion that assignment of the dispute to that particular forum is constitutionally impermissible
       5. Beyond the 7th AMENDMENT, proceedings that can permissibly occur in a NON-ART. III tribunal are of course subject to other EXTERNAL constitutional restrictions, such as those arising from the DUE PROCESS CLAUSE
          1. BUT the DUE PROCESS CLAUSE, of its own force, does NOT require adjudication by a judge with the tenure and salary requirements of ART. III in any case in which ART. III does NOT apply of its own force
    2. Magistrate Judges (pp. 403-07)
    3. Military Tribunals or Commissions (pp. 407-16)
  1. Power to Regulate Jurisdiction of STATE Courts
     1. Tafflin v. Levitt (U.S. 1990) (p. 418). IMPLICATION FROM MADISONIAN COMPROMISE: STATE courts have concurrent jurisdiction over FEDERAL claims, unless a statute STATEs otherwise, the legislative history indicates otherwise, or the interests of the STATE and FEDERAL government are incompatible.
        1. SUPREMACY CLAUSE is the source of limitation of concurrent jurisdiction
        2. Q: When can the presumption of concurrent jurisdiction be overridden?
           1. A: Gulf Offshore TEST:

By an EXPLICIT statutory (congressional) directive

Must include terms like “exclusive” and “sole”

By unmistakable IMPLICATION from legislative history

Strict construction demands unmistakable evidence

By a clear INCOMPATIBILITY between STATE-court jurisdiction and FEDERAL interests

Looks like balance of uniformity, parity, and receptivity concerns v. STATE court jurisdiction

ASIDE: parity and uniformity could be deemed “necessary and proper”—NECESSARY AND PROPER CLAUSE and ART. III

CONCURRENCE: Justice Scalia would require that “STATE-court jurisdiction would plainly disrupt the statutory scheme” (p. 423)

* + - 1. Gulf Offshore v. Mobil Oil Corp. (U.S. 1981) (p. 421): Key FACTORS in determining COMPATIBILITY:
         1. Desirability of uniform interpretation
         2. Expertise of FEDERAL judges
         3. Greater hospitality of FEDERAL courts to FEDERAL claims
      2. CONGRESSIONAL INTENT RULE: to rebut presumption of concurrent jurisdiction, Q is whether Congress in its deliberations may be said to have affirmatively or unmistakably intended jurisdiction to be exclusively FEDERAL
      3. CONCURRENCE:
         1. SUPREMACY CLAUSE requires an affirmative act: unmistakable implication in the legislative history alone is NOT sufficient to prevent STATE concurrent jurisdiction—implication in the text of the statute is required
         2. Incompatible STATE and FEDERAL interests may NOT always be enough to bar concurrent STATE jurisdiction
      4. Q: Why do STATEs have jurisdiction over FEDERAL causes of action?
         1. A: CONCURRENCE (p. 422):

“The laws of the United States are laws in the several STATEs, and just as much binding on the citizens and courts thereof as the STATE laws are”

Jurisdiction over the parties brings jurisdiction over claims

* + 1. PRESUMPTION in favor of concurrent STATE jurisdiction comes from:
       1. Implication of the MADISONIAN COMPROMISE
          1. i.e., STATE court jurisdiction is constitutionally acceptable
       2. The FEDERAList No. 82 (Alexander Hamilton): “the STATEs will retain all *pre-existing* authorities, which may not be exclusively delegated toe the FEDERAL head”—Congress could NOT divest the STATEs of pre-existing jurisdiction
       3. General principle of transitory causes of action
          1. e.g., STATE of N.Y. can hear claims under another STATE’s and FEDERAL law
       4. Judicial efficiency
       5. Unified government, even in a FEDERAL system (Tafflin)
       6. Jurisdiction over the parties
    2. Foundations of Congressional Authority: Judiciary Acts (pp. 424-25)
    3. Congress’ jurisdiction-setting options (p. 425):
       1. Exclusive STATE original jurisdiction, subject to appellate review by the SC
       2. Exclusive FEDERAL jurisdiction
          1. Arguments in favor (to considerable extent, arguments assume lack of parity):

Desirability of UNIFORM interpretation of FEDERAL law

Presumptive EXPERTISE of FEDERAL judges in dealing with FEDERAL issues

“the probability that the FEDERAL courts will be more sympathetic to a new FEDERAL stature than will STATE courts”

SUPREMACY of FEDERAL law

* + - * 1. BUT: Structural implications of the MADISONIAN COMPROMISE mean Congress will have to incur a cost for taking away STATE court jurisdiction
      1. Concurrent STATE and FEDERAL jurisdiction, with STATE court decisions subject to SC review
         1. Offers benefits of convenience and choice of forum
      2. Concurrent STATE and FEDERAL jurisdiction, but with a right of STATE courts defendants to remove to FEDERAL court
    1. Identify IMPLIED exclusion of STATE jurisdiction
       1. Claflin v. Houseman (U.S. 1876) (p. 427). A STATE court retains jurisdiction, notwithstanding a grant of FEDERAL jurisdiction, where STATE jurisdiction “is NOT excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.”
       2. General Inv. Co. v. Lake Shore & M.S. Ry. (U.S. 1922) (p. 428). FEDERAL antitrust laws impliedly exclude STATE court jurisdiction of FEDERAL antitrust claims.
       3. Gulf Offshore Co. v. Mobil Oil Corp. (U.S. 1981) (p. 428). Formulated 3-part TEST for implied exclusivity employed by the SC in Tafflin.
          1. “Permitting STATE courts to entertain FEDERAL causes of action facilitates the enforcement of FEDERAL rights.” (p. 421)
       4. Yellow Freight System, Inc. v. Donnelly (U.S. 1962) (p. 428). STATE courts have concurrent jurisdiction over private civil actions brought under Title VII of the 1964 Civil Rights Act
          1. Omission of any express provision making FEDERAL jurisdiction exclusive “is strong, and arguably sufficient, evidence that Congress had no such intent”
    2. Tarble’s Case (U.S. 1872) (p. 433). A STATE court has no jurisdiction to issue a writ of HABEAS CORPUS releasing a person held by the United States or one of its officers.
       1. No STATE can authorize jurisdiction within the jurisdiction of another, independent government
       2. FEDERAL courts can exercise HABEAS jurisdiction under the SUPREMACY CLAUSE
       3. INCOMPATIBILITY: SC makes assessment that Congress made a mistake by NOT saying anything about STATE court HABEAS CORPUS
          1. THINK: BUT why make this determination at all?

Justification is that Congress can just override the SC

* + - 1. Maybe this is a POLICY ruling:
         1. Decision does NOT point to a FEDERAL HABEAS statute, BUT rather talks about spheres of sovereignty generally
         2. PROBLEMATIC as a constitutional ruling in light of the SUSPENSION CLAUSE
         3. Tarble’s Case reflects a whole way of thinking about STATE courts vis-à-vis FEDERAL courts

Tafflin INCOMPATIBILITY

* + - * 1. Maybe this is a FEDERAL COMMON LAW ruling
      1. NOTE: Often cited to support Justice Story in Martin v. Hunter’s Lessee
      2. NOTES
         1. Constitutionally mandated exclusion?

Historical argument that some categories of FEDERAL jurisdiction—including FEDERAL criminal cases and suits against FEDERAL officers for specific relief—were inherently exclusive of STATE court jurisdiction (p. 437)

BUT: because the RULE of Tarble’s Case bars a STATE court from providing constitutionally required review when a FEDERAL officer is the Δ, it would violate the 5th AMENDMENT to prevent the FEDERAL courts form hearing these cases

Thus, Congress’ power to control the jurisdiction of the lower FEDERAL courts must be limited by a 5th AMENDMENT obligation to provide a FEDERAL forum to protect constitutional rights where Tarble’s Case prevents a STATE court from acting

Notwithstanding the MADISONIAN COMPROMISE and the language of ART. III, Congress is constitutionally obliged to create lower FEDERAL courts

* + - * 1. Alternative foundations for Tarble’s Case

INS v. St. Cyr (U.S. 2001) (p. 439).

Considered DICTUM:

“at the absolute minimum, the SUSPENSION CLAUSE protects the writ [of HABEAS CORPUS] ‘as it existed in 1789’”

“a serious SUSPENSION CLAUSE issue would be presented if” Congress were to withdraw the HABEAS CORPUS jurisdiction of FEDERAL judges to review FEDERAL detentions “and provide[] no adequate substitute.”

FEDERAL COMMON LAW of STATE-FEDERAL relations, framed by the courts but subject to Congress’ control

Draws on the premise of Reconstruction constitutionalism to presume STATE courts insufficiently trustworthy to issue mandatory orders to FEDERAL officials, BUT would permit Congress to override that presumption by a sufficiently clear Statement or, possibly, by failing to confer FEDERAL jurisdiction

* + - * 1. STATE jurisdiction in other proceedings against FEDERAL officials

MANDAMUS

McClung v. Silliman *(*U.S. 1821) (p. 440). STATE court lacked jurisdiction of a suit for mandamus to compel the register of a FEDERAL land office to make a conveyance.

U.S. had denied to its own courts authority to issue such a mandamus to an executive official

Mandamus is NOT among the reserved powers of the STATES just because it is not communicated by law to FEDERAL courts

THINKS: Hamilton: The Federalist, No. 82

DAMAGES ACTIONS

SC has routinely sustained STATE court jurisdiction in damages actions against FEDERAL officials averring tortious conduct unsupported by the claimed authority.

BUT FEDERALISM, comity, and local prejudice concerns may weigh against STATE jurisdiction over FEDERAL officers in damages actions (Clinton v. Jones (U.S. 1997) (p. 441))

Actions AT LAW for SPECIFIC RELIEF

Slocum v. Mayberry (U.S. 1817) (p. 442). Sustained a STATE court action for replevin of a cargo seized and held by customs officers, where the statutes gave no right to hold the cargo with the vessel.

“the act of Congress neither expressly, nor by implication, forbids the STATE courts to take cognizance of suits instituted for property in possession of an officer of the United Sates, not detained under some law of the United States; consequently their jurisdiction remains”

SC also assumed STATEs may try ejectment actions against FEDERAL officers

INJUNCTIONS

SC has NOT yet decided whether STATE courts have jurisdiction to entertain injunction actions against FEDERAL officers

* + - * 1. NOTE: A decision against STATE court jurisdiction, whether in an injunction or other type of suit, may mean that the Π has no remedy at all against the Δ (p. 442)
    1. Testa v. Katt (U.S. 1947) (p. 443). A STATE court CANNOT refuse to enforce a right arising from FEDERAL law for reasons of conflict with STATE policy or “want of wisdom” on the part of Congress.
       1. A STATE court refusing jurisdiction…
          1. “flies in the face of the fact that the STATEs of the Union constitute a nation”
          2. “disregards the purpose and effect of Article VI, § 2 of the Constitution” (“This Constitution…shall be supreme Law of the Land; and the Judges in every STATE shall be bound thereby, any Thing in the Constitution or Laws of any STATE to the Contrary notwithstanding.”)
       2. For a STATE to say that FEDERAL policy being in conflict with its own proscribes enforcement of a FEDERAL act is to ignore the policy espoused by Congress for all the people and all the STATEs.
       3. NOTES
          1. Congress has the power to impose jurisdiction because of…

The spirit (NOT the text) of the SUPREMACY CLAUSE

This is always connected to the NECESSARY AND PROPER CLAUSE

Implication from the MADISONIAN COMPROMISE

It was expected that STATE courts would hear FEDERAL claims

It is in the STATEs’ interests to hear FEDERAL claims

STATE court jurisdiction over FEDERAL claims gives STATEs power

Congressional imposition of jurisdiction over FEDERAL claims on STATE courts preserves the MADISONIAN COMPROMISE

Would NOT want to leave it to all the STATEs individually to decide whether or NOT they will hear FEDERAL claims—NON-uniformity would compel Congress to create lower FEDERAL courts

The power to create FEDERAL courts gives continuing power to eliminate the FEDERAL courts; therefore, Congress has the power to impose FEDERAL claim jurisdiction on STATE courts

* + - * 1. Following Testa, the SC seems to presume that Congress does have the power to force STATE courts to hear FEDERAL claims
        2. STATE Obligations of NON-Discrimination

Mondou v. New York (U.S. 1912) (p. 447). STATE courts must accept jurisdiction of FEDERAL claims on the ground that a STATE court with acknowledged jurisdiction over analogous STATE law claims could not discriminate against FEDERAL claims based on an underlying policy disagreement with the FEDERAL statute.

McKnett v. St. Louis & S.F. Ry. (U.S. 1934) (p. 447). Emphasized RULE of NON-discrimination by STATE courts against FEDERAL claims from Mondou.

Howlett v. Rose (U.S. 199) (p. 448). STATE courts are obliged to entertain suits under § 1983.

“a STATE court may NOT deny a FEDERAL right, when the parties and controversy are properly before it, in the absence of a ‘VALID EXCUSE’”

Since a STATE statute had waived sovereign immunity in comparable actions under STATE law, the SC found that the STATE’s excuse—that waiver did not extend to § 1983 actions—discriminatory and therefore invalid

Alden v. Maine (U.S. 1999) (p. 448). The 11th AMENDMENT ratifies an “original [constitutional] understanding” that the STATEs enjoy “sovereign immunity from unconsented suits against them and, accordingly, that Congress lacks power under ART. I to compel STATE courts to exercise jurisdiction over such suits.

Congress may force STATE courts to accept jurisdiction of suits against the STATEs when legislating under § 5 of the 14th AMENDMENT because “in adopting the FOURTEENTH AMENDMENT, the people required the STATEs to surrender a potion of the sovereignty that had been preserved to them by the original Constitution”

* + - * 1. VALID EXCUSES

In cases NOT involving discrimination against FEDERAL claims, the SC has recognized, BUT has NOT clarified the scope of Congress’ power to impose jurisdiction if it wished to do so.

Douglas v. New York, N.H. & H.R.R. (U.S. 1929) (p. 449).

FEDERAL Employers’ Liability Act applies equally to citizens of a STATE who are nonresidents of the STATE

FELA “does NOT purport to require STATE Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned”

NO duty upon STATE courts to exercise jurisdiction under FELA against an otherwise valid excuse

Herb v. Pitcairn (U.S. 1945) (p. 449). SC acknowledged STATEs’ authority to allocate jurisdiction among its courts. NO discrimination against FEDERAL claim.

Missouri ex rel. Southern Ry. v. Mayfield (U.S. 1945) (p. 449). Reiterated Statement of Douglas that there is nothing in FELA that forced the STATE courts to entertain litigation against an otherwise VALID EXCUSE

Doctrine of *forum non conveniens* is a VALID EXCUSE if NOT applied with discrimination to NON-residents

* + - * 1. Felder v. Casey (.S. 1988) (p. 450). SC refused to permit application of a STATE notice-of-claim statute to a FEDERAL civil rights action filed in STATE court under § 1983 because the SC found the statute discriminated against the precise type of civil rights actions that Congress had created in § 1983.

ONLY decision that might be viewed as overriding a STATE’s non-discriminatory refusal to entertain a FEDERAL cause of action

* + - * 1. 10th AMENDMENT and Related Doctrines

OVERRULED: ~~National League of Cities v. Usery (U.S. 1976) (p. 451). SC invalidated amendments to the Fair Labor Standards Act that extended the statute’s minimum wage and maximum hours provisions to most STATE employees~~

~~DISTINCTION: FEDERAL regulation of private activity v. regulation “directed to the STATEs as STATEs”~~

~~Regulation of traditional government functions involving matters “essential to [the] separate and independent existence” of the STATEs lay beyond the Congress’ power under the COMMERCE CLAUSE and the 10th AMENDMENT~~

OVERRULED in Garcia v. San Antonio Metropolitan Transit Auth.—rationale had proved exceedingly difficult to apply

FERC v. Mississippi (U.S. 1982) (p. 451). SC relied heavily on Testa to uphold Act directing STATE utility regulatory authorities to take certain actions.

Area of public utility regulation was one that Congress could choose to preempt altogether and that STATEs could avoid the FEDERAL obligation by opting not to regulate

Garcia v. San Antonio Metropolitan Transit Auth. (U.S. 1985) (p. 451). “[We] continue to recognize that the STATEs occupy a special and specify position in our constitutional system and that the scope of Congress’ authority under the COMMERCE CLAUSE must reflect that position. BUT the principal and basic limit on the FEDERAL commerce power is that inherent in all congressional action—the built-in restraints that our system provides through STATE participation in FEDERAL government action.”

New York v. United States (U.S. 1992) (p. 451). NO COMMANDEERING OF STATE LEGISLATURES: Despite Garcia, the Court invalidated a congressional Act as outside the scope of the commerce power for “commandeering” the STATEs into regulating.

DISTINGUISHING:

Garcia – statute there “subjected a STATE to the same legislation applicable to private parties”

FERC – only required that the STATEs give “consideration” to FEDERAL standards

Testa – “FEDERAL statutes enforceable in STATE courts do, in a sense, direct STATE judges to enforce them, but this sort of FEDERAL ‘direction’ of STATE judges is mandated by the text of the SUPREMACY CLAUSE. No comparable constitutional provision authorizes Congress to command STATE legislatures to legislate.”

Printz v. United States (U.S. 1997) (p. 452). NO COMMANDEERING OF STATE EXECUTIVE: Just as the FEDERAL government may NOT order STATEs to legislate, neither may it “command the STATEs’ officers, or those of their political subdivisions, to administer or enforce a FEDERAL regulatory program”

DISTINGUISHING:

FERC – “merely imposed preconditions to continued STATE regulation of an otherwise pre-empted field, … and required STATE administrative agencies to apply FEDERAL law while acting in a judicial capacity, in accord with Testa”

Testa – followed New York v. United Staes: SUPREMACY CLAUSE requires STATE courts to enforce FEDERAL law, BUT does NOT impose similar obligations on other STATE officials

1. FEDERAL Review of STATE Court Decisions
   1. Direct Review in the Supreme Court
      1. Background
         1. Casebook pp. 53-54, 1595-99, 1612-20
      2. Establishment of Jurisdiction
         1. Judiciary Act of 1789 and Amendments of 1867 (pp. 466-67)
            1. NOTE:

The H/W paradigm accords the 1789 Act quasi-constitutional status

Generally believed to reflect framers’ original understanding of Art III

* + - * 1. Courts

SC: original and appellate jurisdiction

DC: as trial courts

Circuit Courts: trial courts with limited appellate responsibilities

No circuit judges

Justices of the SC and judges of DC rode circuit

* + - * 1. Jurisdiction

Largely diversity and admiralty cases

No FEDERAL general jurisdiction, except for criminal cases

FEDERAL courts given HABEAS jurisdiction for the first time over STATE prisoners

SC original jurisdiction tracked Art III §2 (ambassadors, STATEs)

SC appellate jurisdiction:

Review in civil cases over $2000

Review of STATE court decisions:

Striking FEDERAL law as unconstitutional

Upholding STATE laws against claims of unconstitutionality

Wherever a claim based on FEDERAL law was denied

* + - * 1. History

From the start, the FEDERAL courts were hamstrung by lack of appellate jurisdiction

The courts’ caseload grew with growth of interSTATE transportation

The civil war also resulted in a lot of new FEDERAL legislation

* + - 1. Judiciary Act of 1914
         1. Authorized review of STATE court decisions upholding a claim of FEDERAL right
         2. Introduced discretionary writ of certiorari
      2. Expansion of Certiorari Jurisdiction
         1. 1916 Judiciary Act: certiorari review for rights claimed under US authority, regardless of outcome; mandatory review for validity of the authority itself.
         2. 1925 Judiciary Act: certiorari review further increased; mandatory review only for cases against the validity of treaty or FEDERAL law
         3. 1988: fully discretionary docket
      3. Rules of the SC
         1. Supreme Court Rules 10-16 set out the procedure on petitions for certiorari
         2. Among the SC’s considerations: whether…

“a STATE court of last resort has decided an important FEDERAL question in a way that conflicts with the decision of another STATE court of last resort or of a United States court of appeals”

“a STATE court … has decided an important Q of FEDERAL law that has not been, but should be, settled by this Court, or has decided an important FEDERAL Q in a way that conflicts with relevant decisions of this Court”

* + - 1. 28 USC § 1257:
         1. “Final judgments or decrees rendered by the highest court of a STATE in which a decision could be had, may be reviewed by the SC by writ of certiorari where the validity of a treaty or statute of the US is drawn in question or where the validity of a statute of any STATE is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the US, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, or the treaties or statutes of, or any commission held or authority exercised under, the US.”
         2. Interpretations of the language

SCOPE: SC review of final judgments means only review of FEDERAL issue (Murdock)

FINALITY: SC review must wait for finality as to entire case (FEDERAL and STATE issues), with 4 exceptions (Cox)

* + - 1. Martin v. Hunter’s Lessee (U.S. 1816) (p. 468). Since the appellate power of the United States extends to cases pending in the STATE courts and the Judiciary Act authorizes the exercise of this jurisdiction, FEDERAL courts may hear appeals from STATE court decisions.
         1. SC has power to review STATE court decisions involving FEDERAL claims, at least on the civil side
         2. Rationale

History: 1789 Judiciary Act

Tradition:

SC power to review STATE court decision in place for 30 years

NOT contested

Part of constitutional tradition

Constitution: ART. III gives SC judicial power over ALL cases or controversies, NOT only those in FEDERAL courts

Policy: FEDERAL goals can only be secured and effectuated by adequate FEDERAL review of STATE court decisions that involve FEDERAL law

* + - 1. IASG: Murdock v. City of Memphis (U.S. 1875) (p. 483). The SC will NOT review a suit resting on an adequate and independent STATE ground that supports a STATE court decision, even when the case contains a FEDERAL Q.
         1. 1867 Amendment to 1789 Judiciary Act did NOT contain restrictive last sentence of previous versions
         2. NOT reasonable or just to examine other, FEDERAL Qs when the Q upon which review is conditioned was rightly decided in STATE court
         3. PROBLEMS with re-examining all allowable Qs:

FRICTION – reversing STATE courts and affirming FEDERAL grounds

TOO MUCH WORK – docket and case load

* + - * 1. Basis of § 25 is that jurisdiction was limited to the correction of errors relating solely to FEDERAL law
        2. When FEDERAL Q was erroneously decided against STATE court Π, the SC must reverse the STATE court when…

The FEDERAL Q is the only issue in the case

Other issues “are NOT of such controlling influence on the whole case that they are alone sufficient to support the judgment”

Notwithstanding other issues, “the issue raised by the FEDERAL Q is such that its decision must dispose of the whole case”

* + - * 1. DISSENT: Justice Clifford: SC can determine the whole case when a FEDERAL Q is erroneously decided

Worried about STATE courts manipulating STATE law to undermine FEDERAL law

e.g., STATEs can later “fix” or reinterpret STATE law

* + - * 1. NOTE: Murdock is a statutory interpretation case, NOT a constitutional one
        2. NOTES:

Q: what would happen if the SC were deciding STATE Qs?

A: SC could be making STATE law in conflict with STATE courts

Big STARE DECISIS PROBLEM

Big FEDERALISM PROBLEM

Q: could Congress pass a law that allows SC review of the whole case?

A: Murdock asks for a clear statement, after which the SC would examine constitutional issues

ART. III talks about all “cases” arising under FEDERAL law, NOT just FEDERAL Qs

District courts exercise original FEDERAL jurisdiction over some STATE claims along with FEDERAL Qs AND under diversity jurisdiction

BUT: original and appellate jurisdiction operate differently and evoke different requirements—under our system, STATE supreme courts CANNOT get STATE law wrong AND appellate jurisdiction is invoked where law was wrongly decided/interpreted

THINK: seeking to reject the Murdock RULE…

Argument 1: Congress can give original jurisdiction where there is a FEDERAL Q

FEDERAL courts can decide STATE law issues

SC can review the whole case

Therefore:

It must be constitutional for SC review of the whole case, including STATE law

If it is constitutional for the SC to hear the whole case in the FEDERAL system, then it ought to be constitutional to hear the whole case from the STATE system

Therefore: Argument 2: No objection to SC review of diversity action

NOTE: defeating Argument 1 means defeating Argument 2

NOTE: SC has never held that there is a constitutional problem with exercising appellate jurisdiction over STATE law Qs, BUT Murdock suggests it

Appellate v. Original FEDERAL Jurisdiction

ORIGINAL: a FEDERAL court exercising original jurisdiction must decide the entire case, including STATE law Qs, in order to come to judgment

APPELLATE: when SC exercises appellate jurisdiction, it need NOT decide STATE law issues to ensure complete adjudication; those issues have been decided (or will be decided on remand) by the STATE courts

Murdock and Erie

Erie v. Tompkins (U.S. 1938) (p. 493). A FEDERAL court sitting in diversity must follow STATE court decisions on issues of common law

“ANTECEDENT” v. “DISTINCT” STATE Law Grounds

DISTINCT:

Murdock:

the NON-FEDERAL issue (of trust law) was logically and functionally quite distinct from any issue of FEDERAL law—answering the STATE law Q was NOT a necessary antecedent to any Q of FEDERAL law

Had the SC resolved the FEDERAL issue in favor of Murdock, he would have obtained all the relief he sought, regardless of the STATE court’s resolution of the NON-FEDERAL issues

ANTECEDENT:

Martin v. Hunter’s Lessee:

The STATE law Q was an essential antecedent to the application of the FEDERAL treaty provisions giving protection to then-existing land titles.

To obtain the relief he sought, Martin had to prevail on both the NON-FEDERAL issue and the FEDERAL law issue

Where a STATE law ruling serves as an antecedent for determining whether a FEDERAL right has been violated, some review of the basis for the STATE court’s determination of the STATE law Q is essential if the FEDERAL right is to be protected against evasion and discrimination—as Martin itself exemplifies

* + 1. IASG
       1. INTERSTITIAL nature of FEDERAL law
          1. FEDERAL law rarely occupies a legal field completely, totally excluding all participation by the legal systems of the STATEs
          2. Congress acts against the background of STATE common law, assumed to govern unless changed by legislation
       2. Fox Film Corp. v. Muller (U.S. 1935) (p. 496). A STATE court decision that arguably involved a FEDERAL Q may NOT be reviewed by the SC if the decision also rested upon an independent, NON-FEDERAL basis that was adequate to support the STATE court’s judgment.
          1. Current update on the law of Murdock
          2. NOTES:

Q: is this a constitutional RULE or a prudential one?

A:

CONSTITUTIONAL:

ADVISORY OPINIONS are outside the scope of the enumerated powers of the SC

PRUDENTIAL:

FEDERALISM

ADVISORY OPINIONS – SC will NOT answer abstract Qs of law whose resolution will have NO effect (BUT to diminish the power of the SC) because such opinions are NOT the final word on the case or controversy and NOTHING turns on the SC’s decision

Early Development and Present Administration of the Rule

SC has placed the Fox Film RULE squarely on the lack of jurisdiction

Herb v. Pitcairn (U.S. 1945) (p. 497). Suggests constitutional basis for decision: “[O]ur power is to correct wrong judgments, NOT to revise opinions. … [I]f the same judgment would be rendered by the STATE court after we corrected its view of FEDERAL laws, our review could amount to NOTHING more than an ADVISORY OPINION.”

Proper disposition is to dismiss for lack of jurisdiction, NOT affirm as suggested in Murdock

Today the SC will simply deny a petition for certiorari that is lacks jurisdiction to entertain, without noting a reason, jurisdictional or otherwise

Application of the RULE

KEY DISTINCTION: STATE law as ANTECEDENT to FEDERAL law *v.* STATE law as a DISTINCT basis for relief

STATE Law as ANTECEDENT to FEDERAL Law—who prevailed in STATE court?

If (1) the STATE court denies relief to the FEDERAL rightholder by deciding the issue of STATE law adversely, (2)that ground is broad enough to support the judgment, and (3) there is NO basis for questiniong or setting aside the STATE court’s decision of the STATE law issue, then the SC lack jurisdiction to review the FEDERAL Q, because FEDERAL review could NOT change the judgment

HARD Q: is the STATE law ground ADEQUATE?

If the STATE court resolve the STATE law issue in facor of the FEDERAL rightholder, it must then determine the FEDERAL issue—and the SC has jurisdiction to review that determination, however the issue is resolved

STATE Law as a DISTINCT BASIS for Relief

HYPO: taxpayer contends, in a STATE court refund action that a STATE tax violates both the STATE and FEDERAL constitutions…

If the STATE court invalidates the tax under the STATE constitution, without reaching the FEDERAL Q, the SC lacks jurisdiction to review (Δ’s interpretation in Fox Film)

If the STATE court holds the tax invalid under the FEDERAL constitution and independently invalid under the STATE constitution, there is NO jurisdiction to review (Π’s interpretation in Fox Film)

If the STATE court holds the tax valid under both constitutions, the STATE ground CANNOT independently support the judgment, and the FEDERAL law ruling is plainly subject to review

If the STATE court invalidates the tax under the FEDERAL Constitution without reaching the STATE law issue, the settled RULE is that the judgment is reviewable

SC jurisdiction depends on the STATE court’s actual grounds of decision rather than on possible grounds

If SC reverse the STATE court with respect to the FEDERAL Q, the SC will remand to permit the STATE court to resolve the undetermined STATE law issue—the STATE court remains free to reinSTATE its prior judgment on the STATE law ground

SC might vacate STATE court judgments and remand with directions to decide the STATE law ground to avoid a FEDERAL constitutional decision, if possible (p. 500, n. 5)

3 PROBLEMS in Application

SC’s jurisdiction turns on whether a given issue in the case is properly viewed as one of FEDERAL or STATE law

Q may arise whether a STATE law ground is genuinely “independent” of the FEDERAL issue

A STATE court’s opinion may be unclear about whether the judgment rested on an independent STATE law ground, on FEDERAL law, or on both (Michigan v. Long)

* + - 1. Q: what will the SC do when IASG is ambiguous?
         1. A: OPTIONS:

Assume IASG

PROs:

Conserved judicial resources

Avoids unnecessary decisions

Reduces FEDERALISM friction

CONs:

UNIFORMITY problems

OUTCOME problems—litigant may unjustifiably lose

Might encourage STATE courts to craft unclear grounds for decisions

Undue burden on petitioner

Clarification

Stay the case and ask for clarification OR

Vacate and remand for clarification

Justice O’Connor say this causes friction

BUT this argument looks overSTATEd

Delay

May or may NOT be problematic (Dixon v. Duffy (U.S. 1952) (p. 502, n. 5) no clarification form STATE court was forthcoming)

SC generally has a policy role or long-term clarification objective—it may NOT always be about the immediate litigants

* + - 1. Michigan v. Long (U.S. 1983) (p. 501). 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, the decision whether or NOT the FEDERAL courts have jurisdiction to review that decision will be made by accepting as the most reasonable explanation that the STATE court decided the case the way it did because it believed that FEDERAL law required is to do so.
         1. PRESUMPTION in favor of SC jurisdiction
         2. When IASG is ambiguous, the SC has OPTIONS (pp. 502, 511)…

PRESUME IASG: dismissed the case if the decision is unclear

CLARIFICATION: vacated or continued to obtain clarification from STATE court

INDEPENDENT SC EXAMINATION: reviewed the decision to determine whether STATE courts have used FEDERAL law to guide their application of STATE law OR to provide the actual basis for the decision that was reached

PRESUME FEDERAL law grounds: refused to remand for clarification because the STATE case rested on FEDERAL grounds

* + - * 1. TEST: PRESUME FEDERAL law grounds when…

Stat courts decision “fairly appears to rest primarily on federa law, or to be interwoven with the FEDERAL law”

i.e., when the STATE decision cites FEDERAL cases/law with STATE cases/law (Pennsylvania v. Labron (U.S. 1996) (p. 513))

NO plain Statement of IASG

* + - * 1. RATIONALE: Justice O’Connor identified 2 concerns underlying the IASG doctrine

Avoidance of unnecessary decisions of FEDERAL law (especially FEDERAL constitutional law)

Respect for the independence of STATE courts

* + - * 1. JUSTIFICATION: bias in favor of vindication of FEDERAL rights or over-protection is a permissible bias

Originalist view: historical concern that STATE courts would NOT vindicate FEDERAL rights or properly apply FEDERAL law

SC was created for the purpose of assuring the supremacy of FEDERAL law

BUT REMEMBER: over-protecting FEDERAL rights means under-protecting some other values (e.g., institutional rights)

Cost of review is friction with STATE courts AND possible advisory opinion

DIFFERENT COST for ANTECEDENT claims

Presuming a FEDERAL ground means wiping out STATE procedure

BUT the procedural ground is still available to the STATE on remand

NOTE: the results of DISTINCT grounds and ANTECEDENT grounds would be the same in some instances (i.e., when IASG And when STATE procedural grounds are ANTECEDENT)

THINK: where the result is the same it is hard to distinguish the two types of cases

* + - * 1. NO TE: Justice O’Connor formulate the above as a 2-part TEST, BUT it has become an either-or TEST under Ohio v. Johnson (U.S. 1984) (p. 512).
        2. DISSENT: Justice Stevens

Would take jurisdiction ONLY where a FEDERAL right needed vindication

From a constitutional standpoint, over-enforcement of FEDERAL rights is of secondary importance

NOTE: SC has been using Long PRESUMPTION to stop STATEs from over-protecting criminal Δs

If a STATE court wants to give greater protection to its own citizens so be it

NOTE: STATE court rulings can be challenged by referendum

Does NOT make sense to squander SC resources in light of overcrowded dockets

Vacate and remand is far superior approach

* + - * 1. NOTE: you only get Michigan v. Long when STATE courts vindicate FEDERAL rights
        2. NOTES:

REMEMBER: 1914 Judiciary Act gave the SC power for the first time to review STATE court determinations upholding claims of FEDERAL right

Justice Stevens described the Act as designed to permit the SC to review “Lochner-style” over-enforcement of supposed FEDERAL limits on the STATEs’ power to enact social legislation

Significant purpose of ART. III (now implemented by § 1257) is to permit the SC to UNIFY FEDERAL law by reviewing STATE court decisions of FEDERAL Qs

Hamilton in The FEDERAList No. 82

Justice Story in Martin v. Hunter’s Lessee

Alternative of Vacation—addressing Justice O’Connor’s 2 concerns

Clarification is NOT so disrespectful—better that STATE courts be asked rather than told what they have intended

Vacation best avoids unnecessary decisions of FEDERAL law

Long approach is actually MOST likely to generate unnecessary constitutional opinions and waste SC resources (when on remand it becomes clear that the STATE court’s original judgment did rest on STATE law)

Delay is an uncertainty

Other Justifications for Long

Certiorari jurisdiction assumes that SC review should be provided NOT because it is “necessary” to resolve a particular dispute but rather to decide important issues of FEDERAL law—Long maximizes the SC’s flexibility in managing the SC’s docket

FEDERAL Constitution has more than an interstitial role—thus as a matter of probability, an ambiguous STATE court opinion is more likely to have rested on FEDERAL than on STATE constitutional law

BUT NOTE: Long applies to all ambiguous STATE court opinions, NOT merely ones involving FEDERAL constitutional Qs

STATE courts should be clear in the first instance whether their judgments rest on STATE or FEDERAL grounds or both

Post-Long Departures: Sound Jurisdictional Policy or Unwarranted Result-Orientation?

Capital Cities Media, Inc. v. Toole (U.S. 1984) (p. 513). SC reverted back to practice of vacate and remand.

In Long, STATE and FEDERAL constitutional provisions provided DISTINCT grounds of relief

In such cases ambiguity about the presence of IASG arises when the STATE court has upheld the position of the FEDERAL rightholder

In Capital Cities, the possible STATE ground was ANTECEDENT to the FEDERAL right

In such cases ambiguity about the presence of IASG arises when the STATE court has denied the relief sought by the FEDERAL rightholder

Next 3 cases involve the principle that a FEDERAL HABEAS court may NOT review a STATE prisoner’s claim that a STATE conviction violated the FEDERAL Constitution unless the FEDERAL constitutional claim was properly raised in STATE court—STATE law procedure Q was ANTECEDENT

Harris v. Reed (U.S. 1989) (p. 515). FEDERAL HABEAS CORPUS jurisdiction exists unless the STATE court “clearly and expressly states that its judgment rests on a STATE procedural bar”

Coleman v. Thompson (U.S. 1991) (p. 515). SC refused to apply Harris, holding that the FEDERAL claims were NOT subject to review in FEDERAL HABEAS

The STATE court’s order “fairly appear[ed]” to rest on STATE law because it did NOT mention FEDERAL law AND because the motion to dismiss relied solely on the tardiness of the notice of appeal

Ylst v. Nunnemaker (U.S. 1991) (p. 516). FEDERAL claim was barred by the failure to raise it at trial

Ruling rested on a strong presumption, NOT rebutted in the case, that where the last reasoned STATE court opinion on a FEDERAL claim rests on a finding of procedural default, any subsequent STATE court denial of relief did NOT disregard the default and consider the merits

Importance of Long

A STATE court that in fact relies on STATE law can, by simply so stating, avoid SC review

Even when the SC does review an ambiguous decision and reverses on the FEDERAL issue, the STATE courts retain the power on remand to consider independent STATE law grounds and, indeed, to rely on such grounds in reinstating their initial judgment

* + - 1. STATE Tax Commission v. Van Cott (U.S. 517) (p. 517). The SC has authority to review a STATE court decision which incorporates FEDERAL law.
         1. When the highest STATE court decision intends to base its decision on the incorporation of FEDERAL law and STATE law, the grounds for the decision are so interwoven with FEDERAL law that the judgment is NO longer an independent interpretation of STATE law.
         2. NOTES:

Compelled Incorporation of FEDERAL Law

STATE Long-Arm Statutes authorize STATE courts to exercise long-arm jurisdiction in any case permitted by FEDERAL statutory/case law

Parallel STATE Constitutions

Gratuitous Incorporation of FEDERAL Law

STATE Incorporation of FEDERAL Duties

SC has held that STATE court decisions resting on an interpretation of FEDERAL law (e.g., the food and drug laws) present FEDERAL Qs under § 1257

BUT Merrell Dow suggests that rarely, if ever, will such cases be viewed as “arising under” FEDERAL law for purposes of district court original jurisdiction under § 1331

Piggyback Statutes

The FEDERAL interest may simply be too low in some instances where STATE laws or regulations incorporate FEDERAL definitions

Standard Oil Co. of California v. Johnson (U.S. 1942) (p. 521). SC accepted jurisdiction and reversed on a STATE statutory issue because the STATE court’s interpretation of the STATE statute was based NOT merely on STATE law, BUT also on its examination of a relationship controlled by FEDERAL law.

A General Approach?

SUGGESTION: In determining SC jurisdiction to review FEDERAL Qs made relevant by STATE law, the “touchstone … is whether the FEDERAL law is itself operative in the circumstances of the case—whether SC jurisdiction could effect the coordination of the two coextensive and possibly conflicting obligations”

* + - 1. Indiana ex rel. Anderson v. Brand (U.S. 1938) (p. 523). A FEDERAL court may prevent a STATE from acting pursuant to a statue that impairs the contractual rights of its citizens.
         1. STATE law had conferred a contractual right upon the Π, and the STATE legislature was NOT entitled to impair that right by enacting the subsequent legislation repealing the provisions of the previous statute
         2. NOTES:

Exemplifies a range of cases in which FEDERAL law protects interests created primarily by STATE law

CONTRACTS CLAUSE

Q whether an acknowledged contractual obligation has been impaired, within the meaning of the CONTRACT CLAUSE involves only interpretation of the Constitution

CONTRACTS CLAUSE prohibits impairment of contractual rights by legislation (NOT by judicial decision)

DUE PROCESS and TAKINGS CLAUSES

“Old Property”

Demorest v. City Bank Farmers Trust (U.S. 1944) (p. 530). “Whether that STATE court has denied to rights asserted under local law the protection which the Constitution guarantees is a Q upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-FEDERAL grounds, it is the province of this Court to inquire whether the decision of the STATE court rests upon a fair or substantial basis.”

“New Property” and Liberty

Where a protected “property” or “liberty” interest exists, FEDERAL law governs the Qs (1) whether there has been a deprivation, and (2) if so, whether due process was afforded

“New” Property Interests

Board of Regents v. Roth (U.S. 1972) (P. 531). “Property interests, of course, are NOT created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as STATE law…”

Webb’s Famour Pharmacies, Inc. v. Beckwith (U.S. 1980) (p. 532). Despite Roth, the SC based its finding that a property right existed on a FEDERAL definition of property.

College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd. (U.S. 1999) (p. 532). SC has also suggested that in other circumstances the government’s recognition of an entitlement may NOT qualify as property with the meaning of the 14th AMENDMENT

Decision does NOT refer to STATE law or FEDERAL statutory law in determining whether the Π had a property interest.

Liberty Interests

Significant authority recognizes a FEDERAL constitutional dimension to liberty, quite apart from entitlements based on positive law

STATE law can create “liberty” interests, just as it can create property interests

BUT NOT all interests recognized by STATE common law establish an entitlement under the DUE PROCESS CLAUSE

SC has refused to recognize entitlements premised only on institutional practice, insisting instead upon proof that official decisions are governed by “explicitly mandatory language” establishing “substantive predicates” whose satisfaction requires a particular outcome

Mandatory language alone may NOT be sufficient to generate a STATE-created liberty interest

PATTERNING APPROACH: (1) SC first establishes constitutional criteria that a protected interest must satisfy, then (2) examines STATE law to determine if such an interest has been created

* + 1. STATE Procedures and SC Review
       1. Cardinale v. Louisiana (U.S. 1969) (p. 541). FEDERAL constitutional issues must be raised and decided in the STATE court before the FEDERAL courts may rule on the issue.
          1. STATUTE: § 1257
          2. POLICY:

Inadequate record

STATEs should interpret their statutes first

Issue may be blocked by an IASG

* + - * 1. NOTES:

Sources of the RULE

Despite such references to § 1257, the SC in recent years has repeatedly acknowledged that it is unsettled whether the RULE is a jurisdictional requirement or is merely prudential

SC has also stressed, however, that whatever its precise nature, the RULE is strictly enforced and exception to it are extraordinarily rare

Governing STANDARD

New York ex rel. Bryant v. Zimmermann (U.S. 1928) (p. 543). “There are various ways in which the validity of a STATE statute may be drawn in Q on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefore be brought to the attention of the STATE court with fair precision and in due time.”

PROBLEMS in Application

New Claims v. New Arguments

Yee v. City of Escondido (U.S. 1992) (p. 543). If a FEDERAL claim was properly raised in STATE court, a party can raise before the SC any argument in support of that claim, even if the argument was NOT raised in STATE court.

FEDERAL v. STATE Law Claims

SC has long required a litigant to show “that some provision of the FEDERAL, as distinguished from the STATE, Constitution was relied upon,” New York Central & H.R.Co. v. New York (U.S. 1902) (p. 544), and claims that a STATE statute violated the Constitution or denies due process, without more, have been treated as referring to STATE and NOT FEDERAL provisions

Webb v. Webb (U.S. 1981) (p. 544). A litigant who had complained in a STATE court custody suit about a failure to give “full faith and credit” to a prior judgment, but who had NOT mentioned the FULL FAITH AND CREDIT CLAUSE, had presented only a STATE law issue, and thus could NOT raise the FEDERAL constitutional issue in the SC

Exceptions to the RULE (RARE) – PLAIN ERROR

Vachon v. New Hampshire (U.S. 1974) (p. 544). SC reversed STATE high court, relying on the FEDERAL constitutional principle that DUE PROCESS is denied when there is “no evidence” of one element of a crime.

Valchon fell in within the SC’s then-existing mandatory appellate jurisdiction

By disposing of the case on the fact-specific basis that there was “no evidence” of one element of the crime, the SC avoided the obligation it would otherwise have had to decide more difficult constitutional claims that the appellant had properly raised

Wood v. Georgia (U.S. 1981) (p. 545). SC decided an issue that all the Justices acknowledged had NOT been raised in STATE court.

The lack of any presentation of the issue (a potential conflict of interest that might have denied Δs due process) “merely emphasize[s] …why it *is* appropriate for us to consider the issue

* + - 1. Staub v. City of Baxley (U.S. 1958) (p. 546). Although the FEDERAL courts may NOT review STATE cases based upon an “adequate nonFEDERAL ground,” a decision based upon a STATE procedural rule that lacks fair and substantial support is NOT an adequate nonFEDERAL ground and is reviewable.
         1. STATE rule forcing Δ to count off the particular provisions of an ordinance that allegedly violated the Constitution is an “arid ritual of meaningless form”
         2. STATE procedural ground was INADEQUATE to support the judgment below
         3. NOTES:

Cardinale and Staub Compared

Cardinale – FEDERAL issues was never raised or considered in any fashion in STATE court AND SC’s refusal to hear the issue was based on the litigant’s failure to have complied with a FEDERAL rule requiring that some presentation be made in the STATE court

Staub – FEDERAL issue was raised, BUT in a fashion that, the STATE court found, did NOT comply with STATE procedural law AND the Q for the SC was whether the STATE law ruling constituted an adequate STATE procedural ground barring SC review

Adequate STATE Procedure Ground and the Primacy of STATE Practice

Generally, STATE procedural default is an IASG to preclude SC review

DUE PROCESS Violations

SC review plainly CANNOT be foreclosed by a litigant’s noncompliance with a STATE procedural rule that, on its face or as applied, violated the DUE PROCESS CLAUSE

Rather, the validity of a STATE procedural rule under the DUE PROCESS CLAUSE raises an independent FEDERAL Q that the SC has jurisdiction to review, apart from any other FEDERAL issue in the case

Categories:

Unforeseeable Appellate Court Rulings

Strict Time Limits for Pre-Trial Motions

NON-constitutional Bases for Finding STATE Grounds INADEQUATE

STATE Procedural Ground is NOT Fairly Supported by STATE Law Because the Requirement is Novel or has been Inconsistently Applied

Staub – although this point was vigorously disputed in Justice Frankfurter’s DISSENT

NAACP v. Alabama ex rel. Patterson (U.S. 1958) (p. 555). SC unanimously held that the STATE court’s procedural ground was inadequate to bar consideration of FEDERAL constitutional claims.

“petitioner could NOT fairly be deemed to have been apprised of [STATE procedural requirement’s] existence”

“Novelty in procedural requirements CANNOT be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in STATE courts of their FEDERAL constitutional rights.”

James v. Kentucky (U.S. 1984) (p. 555). STATE rule on labeling particular jury charge had NOT been consistently applied in prior cases and hence could NOT bar SC review of the constitutionality of the failure to grant the requested charge.

NOTE: a STATE ruling that is novel or inconsistent could be characterized either as a misapplication of STATE law or as an implicit revision of STATE law

Under either view, the STATE procedural ground will be INADEQUATE and thus will NOT block SC review in the present case, BUT the latter characterization would presumably permit the new ruling to be applied to future cases

STATE Procedural Requirement is Unacceptably Burdensome

Davis v. Wechsler (U.S. 1923) (p. 556). “Whatever springes the STATE may set for those who are endeavoring to assert rights that the STATE confers, the assertion of FEDERAL rights, when plainly and reasonably made, is NOT to be defeated under the name of local practice.”

STATE Court “Discretionary” Refusals to Excuse a Procedural Default

Patterson v. Alabama (U.S. 1935) (p. 557). SC found STATE procedural ruling (on a criminal Δ’s challenge to the exclusion of blacks from the jury) supported by earlier Alabama decisions, BUT nonetheless vacated the judgment.

“We are NOT convinced that the [STATE] court, … confronting the anomalous and grave situation which would be created by…an affirmance of the judgment of death in the companion case of Patterson, … would have considered itself powerless to …[provide appropriate relief]. … At least the STATE court should have an opportunity to examine its powers in light of the situation which has now developed.”

Williams v. Georgia (U.S. 1955) (p. 557). Although acknowledging the validity of the STATE rule, the SC said that “where a STATE allows Qs of this sort to be raised at a later stage and be determined y its courts as a matter of discretion, we are NOT concluded from assuming jurisdiction and deciding whether the STATE court action in the particular circumstances is, in effect, an avoidance of FEDERAL right.”

“BUT the fact that we have jurisdiction does NOT compel us to exercise it.”

Stressing that life was at stake and that the STATE had conceded the constitutional violation, the SC concluded that “orderly procedure requires a remand”

Sullivan v. Little Hunting Park, Inc. (U.S. 1969) (p. 558). Although the STATE procedural ruling was NOT novel, the Virginia decisions “do NOT enable us to say that the Virginia court has so consistently applied its notice requirement as to amount to a self-denial of the power to entertain the FEDERAL claim here presented if the Supreme Court of Appeals desires to do so. … Such a rule, more properly deemed discretionary than jurisdictional, does NOT bar review here by certiorari.”

CONCURRENCE: STATE court had applied its rule much more strictly than in prior cases, in violation of the principle of NAACP v. Alabama

* 1. Collateral Review in Criminal Cases: HABEAS CORPUS
     1. Background
        1. SC has NOT departed from the view that the FEDERAL courts have only that HABEAS jurisdiction given them by Congress
        2. § 2254
           1. Deals specifically with challenges to custody resulting from conviction in STATE court
           2. Gives statutory recognition to the judge-made rule requiring exhaustion of STATE remedies prior to seeking the writ

Antiterrorism and Effective Death Penalty Act of 1996

§ 2254(d) provides that HABEAS relief CANNOT be awarded to a STATE prisoner solely because a STATE court misapplied established constitutional principles to the facts in a particular case; rather, relief is available ONLY when the STATE court determination was “contrary to, or involved an unreasonable application of, clearly established FEDERAL law, as determined by the SC of the United States”

AEDPA also sharply narrows the power of FEDERAL HABEAS courts to conduct evidentiary hearings or to disregard factfindings made in STATE court, as well as their power to entertain more than one HABEAS petition form a prisoner

AEDPA – one-year SOL for collateral attacks by both STATE and FEDERAL prisoners

* + - 1. § 2255
         1. Exclusive post-conviction remedy for FEDERAL convicts collaterally attacking their convictions

Except in the rare case in which it is found to be “inadequate or ineffective to test the legality” of the detention

* + 1. SUSPENSION CLAUSE
       1. “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion of Invasion the public Safety may require it.”
          1. NOTE: the text does NOT explicitly confer a right to HABEAS relief, but merely sets forth when the writ may be suspended
       2. INS v. St. Cyr (U.S. 2001) (p. 1289). SC suggested that the SUSPENSION CLAUSE provides an affirmative right to habeas review
          1. “a serious SUSPENSION CLAUSE issue would be presented if we were to accept the INS’s submission that the 1996 statutes have withdrawn [the power to issue the writ] from FEDERAL judges and provided no adequate substitute for its exercise”
          2. “at the absolute minimum, the SUSPENSION CLAUSE protects the writ ‘as it existed in 1789’”
          3. HABEAS review extends NOT only to constitutional claims, but also to “errors of law, including the erroneous application or interpretation of statutes”
          4. “At its historical core, the writ … has served as a means of reviewing the legality of EXECUTIVE DETENTION”
       3. Right of STATE Prisoners to FEDERAL Post-conviction Review
          1. 2 additional hurdles to the right of STATE prisoners to FEDERAL post-conviction review:

Constitution and STATE Custody

SUSPENSION CLAUSE appears to have been directed only to detention under FEDERAL authority, as was the grant of HABEAS jurisdiction in the Judiciary Act of 1789

Only in 1867 did Congress extend access to the writ to all prisoners held under STATE authority

Right to a FEDERAL Court?

Constitutional understanding that it was for Congress to decide whether to create lower FEDERAL courts at all

Jurisdiction of FEDERAL courts to issue the writ is NOT inherent BUT must be conferred by statute (Ex parte Bollman)

Pertinence of the 14th AMENDMENT

ARGUMENT: interaction of the SUSPENSION CLAUSE and the 14th AMENDMENT gives STATE prisoners a constitutional right to FEDERAL review of constitutional challenges to convictions

BUT the hardest part of the argument is claim of a right to FEDERAL court review, evolving beyond common law origins

SC Interpretation

Swain v. Pressley (U.S. 1977) (p. 1292). SC upheld a provision of the D.C. Code that, for persons convicted of local crimes in the District, replaced FEDERAL HABEAS CORPUS with a statutory motion in the local D.C. courts.

Majority found NO suspension of the writ, noting that the motion was “commensurate” with HABEAS CORPUS and was NOT inadequate merely because the local judges who administer it are NOT ART. III judges

Felker v. Turpin (U.S. 1996) (p. 1292). SC found no suspension of the writ, even though the 1996 amendment tightened pre-existing restrictions on successive petitions.

SC assumed “that the SUSPENSION CLAUSE of the Constitution refers to the writ as it exists today, rather than as it existed in 1789”

BUT CONTRAST with INS v. St. Cyr above

“judgments about the proper scope of the write are ‘normally for Congress to make’”

“The added restrictions which the Act places on second HABEAS petitions are well within the compass of this evolutionary process, and we hold that they do NOT amount to a ‘suspension’ of the writ”

Territorial Jurisdiction: Location of the Petitioner

1948 revisions – FEDERAL prisoner must attack their convictions in the sentencing court, NOT the district of incarceration

1966 revisions – prisoners attacking convictions in STATEs comprising two or more FEDERAL districts may seek HABEAS in the district where incarcerated OR where the convicting court sat

Braden (U.S. 1973) (p. 1294). § 2241(a) requires only that the court “have jurisdiction over the custodian”

Territorial Jurisdiction: Location of the Custodian

Schlanger v. Seamans (U.S. 1971) (p. 1294). A FEDERAL district court in AZ could NOT entertain a petition form an Air Force enlisted man on temporary duty in AZ, since nobody who could be deemed his “custodian” was in the STATE.

Strait v. Laird (U.S. 1972) (p. 1294). An inactive Army reservist could petitions for HABEAS in CA, where he was domiciled because his superior officers were “present” in CA because they processed his discharge application through Army personnel in that STATE.

Where an American citizen is in custody overseas (so that the immediate custodian is outside any district court’s territorial jurisdiction), the District Court of the District of Columbia has exercised jurisdiction over superior officials in the United States

Direct Recourse to the SC

SC Rule 20.4(a): “To justify the granting of a writ of HABEAS CORPUS, the petitioner must show that exception circumstances warrant the exercise of the Court’s discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.”

* + 1. Issues Cognizable
       1. NOTE: SC probably has greater structural concerns than justice concerns when reviewing HABEAS cases
       2. NO LONGER GOVERNING LAW: Brown v. Allen (U.S. 1953) (p. 1302). FEDERAL courts have HABEAS jurisdiction to review convictions after STATE remedies have been exhausted.
          1. GREAT LINE: “We are not final because we are infallible, but we are infallible only because we are final.”
       3. NOTES:
          1. Theory of FEDERAL Relitigation

Appellate Review

Premise: SC, in view of its limited docket, lacks the capacity adequately to protect constitutional rights by exercising direct review over STATE court judgments in criminal cases

HABEAS jurisdiction—though technically NOT appellate review by district courts—serves as a substitute for SC review to ensure that FEDERAL constitutional claims are heard by a FEDERAL court

Quicker and more accessible review by FEDERAL courts

Independent Inquiry into Detention

Fay v. Noia (U.S. 1963) (p. 1309). “The jurisdictional prerequisite [in HABEAS] is NOT the judgment of a STATE court but detention *simpliciter*.”

“HABEAS lies to enforce the right of personal liberty…it cannot revise the STATE court judgment; it can act only on the body of the petitioner.”

On this view, a HABEAS court need NOT observe limits on the scope of review that would apply on direct review by the SC

* + - * 1. EXECUTIVE DETENTION is at the core of HABEAS CORPUS, NOT post-conviction review of STATE rulings
      1. NOTES on the Relevance of Guilt or Innocence to the Scope of the Writ
         1. HABEAS CORPUS is remains open to constitutional claims unrelated to guilt or innocence
         2. Judge Friendly: subject to limitations, a petitioner who received a fair hearing in STATE court should NOT be able collaterally to attack a criminal conviction without making “a colorable showing that an error, whether ‘constitutional’ or NOT, may be producing the continued punishment of an innocent” person

Necessary showing: “a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of [the Δ’s] guilt”

* + - * 1. Schneckloth v. Bustamonte (U.S. 1973) (p. 1319). “I am aware that history reveals no exact tie of the writ of HABEAS CORPUS to a constitutional claim relating to innocence or guilt. … We are now faced, however, with the task of accommodating the historic respect for the finality of the judgment of a committing court with recent Court expansions of the role of the writ. This accommodation can best be achieved … by recourse to the central reason for HABEAS CORPUS: the affording of means, through an extraordinary writ, of redressing an *unjust* incarceration.”
        2. Stone v. Powell (U.S. 1976) (p. 1319). LIMITING THE CONSTITUTIONAL ISSUE COGNIZABLE ON HABEAS: Where the STATE has provided an opportunity for full and fair litigation of a 4th AMENDMENT claim, a STATE prisoner generally CANNOT obtain FEDERAL HABEAS CORPUS relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

Holding rested on the distinctive nature of the 4th AMENDMENT’s exclusionary RULE

Exclusionary RULE is NOT a personal constitutional right of the Δ BUT rather a judicially created remedy designed to safeguard 4th AMENDMENT rights by deterring police misconduct

Consideration of search-and-seizure claims on collateral review provides little extra benefit in discouraging 4th AMENDMENT violations

“in the case of a typical FOURTH AMENDMENT claim, asserted on collateral attack, a convicted Δ is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration”

NOTE: HABEAS relitigation…

Imposes resource costs

Erodes finality

Do NOT know when STATE court judgment will be final

Undermines punishment, it STATEs CANNOT definitely show convicts are wrong

Generates friction between FEDERAL and STATE courts

Threatens the constitutional balance on which FEDERALISM rests

DISSENT:

Declaring that a STATE court that admits evidence obtained in violation of the 4th AMENDMENT “has committed a *constitutional* error,” it follows that the Δ is “ in custody in violation of the Constitution’ within the comprehension of 28 U.S.C. § 2254”

* + - * 1. Refusing to extend Stone

Rose v. Mitchell (U.S. 1979) (p. 1321). On the merits, allegation of racial discrimination in selection of the grand jury is highly unlikely to have led to conviction of an innocent person.

Stone was confined to “cases involving the judicially created exclusionary rule”

Withrow v. Williams (U.S. 1993) (p. 1321). Unlike the 4th AMENDMENT’s exclusionary rule, the Miranda decision “safeguards ‘a fundamental *trial* right’” that is NOT necessarily “divorced from the correct ascertainment of guilt”

Most importantly, eliminating HABEAS review of Miranda claims would NOT significantly unburden the FEDERAL courts of the STATEs: petitioners would simply allege instead that their confessions were involuntary and their admission thus violated the DUE PROCESS CLAUSE, which would require difficult determinations under a totality of the circumstances TEST rather than under Miranda’s “brighter-line” rules

After 1996 amendment, constitutional claims whose recognition would NOT call the prisoner’s guilt into Q remain cognizable on HABEAS CORPUS

* + - * 1. Claims Relating to Innocence

Jackson v. Virginia (U.S. 1979) (p. 1322). The DUE PROCESS requirement of proof beyond a reasonable doubt means NOT only that a jury must be so instructed, BUT also that the Q whether a properly instructed jury could reasonably have found the evidence to establish guilt beyond a reasonable doubt is itself a FEDERAL constitutional Q.

Herrera v. Collins (U.S. 1993) (p. 1323). “Claims of actual innocence based on newly discovered evidence have never been held to STATE a ground for FEDERAL HABEAS relief absent an independent constitutional violation occurring in the underlying STATE criminal proceeding.”

The function of HABEAS review was to redress constitutional violations, NOT to correct factual errors, and review of freestanding innocence claims would severely disrupt the strong STATE interest in finality

“We may assume, for the sake of argument …, that in a capital case a truly persuasive demonstration of ‘actual innocence’” would warrant HABEAS relief “if there were no STATE avenue open to process such a claim.”

DISTINGUISHING Jackson v. Virginia:

Claim in Jackson…

Established an independent constitutional violation

Can be adjudicated merely by reviewing the adequacy of the record of evidence, without new factfinding

Asks only if the verdict of guilt was rational, NOT whether its was correct

* + 1. Retroactivity and HABEAS CORPUS
       1. NOTES on Retroactivity and New Law in HABEAS CORPUS
          1. Traditional RULE on retroactivity: judicial decisions, even if they overrule precedent or otherwise make new law, apply retroactively to the parties in the litigation—and, in turn, to other litigants in all cases that have NOT yet become “final” on direct review
          2. Warren Court Approach: NON-Retroactivity

3-factor TEST for retroactivity:

The purpose of the new rule

The extent of reliance on the old rule

The effect on the administration of justice of retroactive application of the new rule

Critical issue of timing was NOT whether the conviction had become final before the new decision, BUT rather whether the conduct being regulated predated the new decision

* + - * 1. Justice Harlan’s Critique

DISTINCTION: Cases still subject to appeal *v.* cases subject only to HABEAS review

On appeal – courts were bound to apply all decisions retroactively

Should NOT distinguish among litigants because the Constitution does NOT

NO retroactivity on appeal gives the appearance that the SC is legislating

HABEAS CORPUS – NO retroactivity for HABEAS cases

2 exceptions:

For rules that held previously punishable conduct to be constitutionally protected

For constitutional rights of procedure so fundamental as to be “implicit in the concept of ordered liberty”

Distinct issues of HABEAS CORPUS:

Extraordinary remedy

NOT a substitute for an appeal

STATE’s interest in finality called for a narrower scope of judicial inquiry

* + - * 1. Griffith v. Kentucky (U.S. 1987) (p. 1326). “[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates the basic norms of constitutional adjudication”

2 considerations:

“the integrity of judicial review” requires the application of the new rule to “all similar cases pending on direct review

“selective application of new rules violates the principle of treating similarly situated Δs the same”

* + - * 1. Teague v. Lane (U.S. 1989) (p. 1327). Generally, new constitutional rules of criminal procedure will NOT be applicable to those cases that have become final before the new rules are announced.

When a case announces a new rule:

“when it breaks new ground or imposes a new obligation on the STATEs of the FEDERAL Government”

Q: is this really saying anything?

“[A] case announces a new rule if the result was NOT dictated by precedent existing at the time the Δ’s conviction became final”

Justice O’Connor agreed with Justice Harlan: the threat of HABEAS review serves as a necessary incentive to STATE trial and appellate judges to comply with established constitutional principles

BUT:

Incentive to apply FEDERAL law correctly can ONLY apply to existing rules and never to new rules

SC is telling STATE courts NOT to even anticipate the direction of the evolution of FEDERAL law because on HABEAS the “new” interpretation or direction will NOT apply anyway

Incentive to get FEDERAL Qs right is NOT *the* (or *an*) essential function o HABEAS CORPUS

EXECUTIVE DETENTION is at the core of HABEAS CORPUS

2 exceptions from Justice Harlan:

CONSTITUTIONALLY PROTECTED CONDUCT: a new rule should be applied retroactively if it provides that the conduct for which the Δ was prosecuted is constitutionally protected

INCREASED ACCURACY: “all ‘new’ constitutional rules which significantly improve the pre-existing factfinding procedures” should be applied retroactively on HABEAS

BUT: new accuracy-enhancing components of DUE PROCESS are unlikely to emerge

DISSENT: Justice Brennan:

2 exceptions too narrow

More principled way of dealing with the problem of retroactivity:

“We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the Δ in the case and to all others similarly situated”

Avoids advisory opinions

Avoids inequitable treatment of similarly situated Δs

JUSTIFICATIONS for Teague RULE

Finality

Resources

Function of HABEAS CORPUS to give STATE court judges the right incentive to rule correctly on FEDERAL law

BUT see above—incentive CANNOT apply to new rules

Teague RULE is about HABEAS CORPUS under § 2254(d)

PROCEDURE for HABEAS review: Teague is a threshold Q

First, decide whether the constitutional rule upon which petitioner’s claim is based is “new”

Then, determine HABEAS CORPUS relief on the constitutional merits

* + - * 1. Meaning and Implications of Teague

Meaning of “New” Law

Butler v. McKellar (U.S. 1990) (p. 1331). Rejected petitioner’s request for HABEAS relief because the case upon which he relied established a new rule.

“the fact that a court says that its decision … is ‘controlled’ by a prior decision, is NOT conclusive…. Courts frequently view their decisions as being ‘controlled’ or ‘governed’ by prior opinions even when aware of reasonable conclusions reached by earlier courts.

Caspari v. Bohlen (U.S. 1994) (p. 1331). SC’s conclusion that petitioner’s claim was based on new law relied in part on the rejection of that claim by one of two FEDERAL courts of appeals and by two of four STATE courts of last resort to consider it.

SC stressed that “Constitutional law is NOT the exclusive province of the FEDERAL courts, and in the Teague analysis the reasonable vies of STATE courts are entitled to consideration”

Application of Law to Fact

Wright v. West (U.S. 1992) (p. 1332). Interesting for different Justices’ response to the STATE’s position.

Teague Exceptions

Primary Conduct

Penry v. Lynaugh (U.S. 1989) (p. 1332). Only case finding Teague’s first exception applicable

There are NO Teague second exception cases

Criticisms of and Alterntatives to Teague

SC’s conception of “new” law is too broad

By including rules that are clearly foreshadowed or reflect ordinary evolution, it reduces the incentives for STATE courts, and STATE law enforcement officials, to take account of the direction of legal developments

Skepticism about any effort to distinguish old from new rules

Treating some rules as new is incompatible with the common law tradition, in which the meaning of precedents emerges only when they are characterized by subsequent cases

Every rule is both new an, because reconstructed whenever applied, and old, because grounded in existing traditions

Teague merely redirects inequality to similarly situated litigants of the Warren Court

Any approach that is neither fully retroactive nor fully prospective necessarily treats some litigants differently from others

HABEAS CORPUS is a remedy for constitutional wrongdoing

Teague RULE does NOT make sense as a threshold inquiry

Caspari – although a HABEAS court need NOT apply Teague if the STATE does NOT argue it, if the STATE does make the argument, the court must apply Teague before reaching the merits

* + - 1. NOTE on § 2254(d)(1)
         1. Unlike Teague, § 2254(d)(1) applies ONLY when a STATE court decided the constitutional issue
         2. But when § 2254(d)(1) does apply, it curtails the scope of HABEAS review more broadly than does Teague
      2. Terry Williams v. Taylor (U.S. 2000) (p. 1336). “Under § 2254(d)(1), the writ may issue only if … [(1)] the STATE court arrives at a conclusion opposite to that reached by this Court on a Q of law or if the STATE court decides a case differently than this Court has on a set of materially indistinguishable facts[,] or (2) … the STATE court identifies the correct governing legal principle form this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.”
         1. First and fullest discussion of § 2254(d)(1)
         2. “contrary to”

If the STATE court applies a rule that contradicts the governing law set forth in SC cases

Opposite conclusion from SC on a Q of law

Materially indistinguishable facts and different result in STATE court

* + - * 1. “unreasonable application”

Circumstances

Unreasonable application of correct rule to facts

~~Unreasonably extending or refusing to extend precedent where it should apply~~

This came from the 4th Cir., and Justice O’Connor thought it presented some precision problems

One the one hand, it can be “hard to distinguish a decision involving an unreasonable extension of a legal principle from a decision involving an unreasonable application of law to facts”

On the other hand, it can be “difficult to distinguish a decision involving an unreasonable extension of a legal principle from a decision that ‘arrives at a conclusion opposite to that reach by this Court on a Q of law’”

Definition

INQUIRY: FEDERAL HABEAS court “should ask whether the STATE court’s application of clearly established FEDERAL law was objectively unreasonable

From Wright v. West: “an unreasonable application of FEDERAL law is different from an incorrect or erroneous application of FEDERAL law”

* + - * 1. “clearly established” FEDERAL law, as determined by the SC, refers to holdings, NOT dicta, as of the time of the relevant STATE court decision

Teague and “clearly established” law are the same thing

* + - * 1. NOTES:

Constitutionality of the Court’s Interpretation

Justice Stevens suggests that a deferential standard of review would be so extraordinary that its recognition requires a clearer Statement from Congress than is found in § 2254(d)(1)

Citation to Marbury v. Madison could suggest some constitutional concern

ARGUMENT: § 2254(d)(1) would violate ART. III if read to require HABEAS courts to defer to a STATE decision that was erroneous when rendered.

“ART. III requires that a FEDERAL court given jurisdiction by Congress be able, *inter alia*, (1) to decide FEDERAL Qs “based on the whole supreme law—an obligation that extends to reviewing de novo all ‘mixed’ Qs of law but not Qs of historical fact—and (2) to make its judgment remedially effectual”

Thus, “an interpretation of § 2254(d)(1) like that adopted by Justice O’Connor for the Court in Terry Williams is unconstitutional”

BUT: ARGUMENT against ARGUMENT above:

Considerable tension between the approach above and

Teague

Qualified immunity doctrine in constitutional tort actions, which precludes damages awards when an officer acted unconstitutionally but did NOT violate “clearly established law”

Container Corp. of America v. Franchise Tax Bd., in which the SC limited review of a STATE court decision to determining whether the STATE court had identified the correct constitutional standard AND whether its application of that standard “was within the realm of permissible judgment”

The SC’s occasional practice of limiting a grant of certiorari to particular issues, effectively deferring entirely to the STATE court’s determination of other issues

The res judicata doctrine, which limits the power of FEDERAL courts to relitigate constitutional Qs that STATE courts may have decided correctly

Teague Exceptions and §2254(d)(1)

Unlike the Teague doctrine, § 2254(d)(1) recognizes no exceptions

HYPO: suppose a STATE court “reasonably” decides that a prisoner’s conduct is NOT constitutionally protected, BUT the SC late decides (in a different case) that the Constitution does protect the conduct in Q

§ 2254(d)(1) seems to bar relief

When a HABEAS claim was NOT adjudicated in STATE court, § 2254 (d)(1) is NOT implicated, BUT the Teague doctrine (and its exceptions) apply

AEDPA and the Meaning of “Made Retroactively Applicable to Cases on Collateral Review”

Several provisions of the 1996 Act other than § 2254(d)(1) restrict the exercise of HABEAS jurisdiction BUT create exceptions to those restrictions when the prisoner relies on a new constitutional rule that the SC had “made” retroactive to cases on collateral review

Tyler v. Cain. (U.S. 2001) (p. 1350). Petitioner could NOT make the showing that the SC had made a rule retroactively applicable to cases on collateral review.

“made” under § 2244(b)(2)(A) means “held”: “the [statutory] requirement is satisfied only if this Court has held that the new rule is retroactively applicable to cases on collateral review”

It is NOT enough that the SC “establishes principles of retroactivity [as it did in Teague] and leaves the application of those principles to lower courts”

A Threshold Issue?

Teague insists that “newness” is a threshold issues that must be resolved before a FEDERAL court may reach the constitutional merits

This holding is NOT affected by § 2254(d)(1)

Van Tran v. Lindsey (9th Cir. 2000) (p. 1353). “[W]e must first consider whether the STATE court erred”; only after making that determination “may we then consider whether any error involved an unreasonable application of controlling law within the meaning of § 2254(d)(1)

Deference when STATE Opinions are Silent

Early v. Packer (U.S. 2002) (p. 1353). “[S]o long as neither the reasoning nor the result of the STATE-court decision contradicts” SC precedents, the STATE court determination does NOT run afoul of § 2254(d)(1) merely because it fails to cite, or indeed is even unaware of, those precedents.

* + - 1. NOTE on Relitigating the Facts on HABEAS CORPUS
         1. Deference to STATE Court Factfindings

§ 2254(d)(2) precludes HABEAS relief unless the FEDERAL court finds that a STATE court decision was “based on an unreasonable determination of the facts in light of the evidence presented in the STATE court proceeding”

* + 1. Procedural Default
       1. Daniels v. Allen (U.S. 1953) (p. 1359). Petitioner’s failure to have made timely service of STATE court appeal was “decisive” and precluded FEDERAL HABEAS review
          1. NOT entirely clear whether the denial of relief rested on (1) waiver, (2) failure to exhaust STATE remedies, or (3) the presence of an IASG
          2. DISSENT 1:

“I find it difficult to agree with the soundness of a philosophy which prompts this Court to grant a second review where the STATE has granted one but to deny any review at all where the STATE has granted none.”

Objected to “rigid formalistic boundaries” for the “Great Writ”

* + - * 1. DISSENT 2:

Because of the minor default, “ALL opportunities for appeal, both in the North Carolina courts and the FEDERAL courts, are cut off although the North Carolina courts had discretion to hear this appeal.”

* + - 1. Fay v. Noia (U.S. 1963) (p. 1360). Petitioner’s failure to have appealed from his conviction did NOT preclude the exercise of FEDERAL HABEAS jurisdiction.
         1. REJECTED Daniels and Brown v. Allen (companion cases)

Sharply expanded HABEAS review of defaulted claims

* + - * 1. “adequate STATE-ground rule is a function of the limitations of *appellate* review”

HABEAS CORPUS jurisdiction is NOT confined by the concern with judgments and decrees of STATE courts of the appellate function

NO revision of STATE judgment—the Q is the validity of the detention

BUT THINK: functionally, NOT much turns on this distinction because the STATE court may be required to revisit its judgment in determining the validity of detention

* + - * 1. “The jurisdictional prerequisite is NOT the judgment of a STATE court but detention *simpliciter*. … HABEAS lies to enforce the right of personal liberty; when that right is denied and a person confined, the FEDERAL court has the power to release him. Indeed, it has no other power; it cannot revise the STATE court judgment; it can act only on the body of the petitioner.”
        2. Effect: on STATE procedural law *v.* on substantive STATE law

PARAMOUNT FEDERAL INTEREST: “In Noia’s case the only relevant substantive law is FEDERAL—the FOURTEENTH AMENDMENT. STATE law appears only in the procedural framework for adjudicating the substantive FEDERAL Q. The paramount interest is FEDERAL.”

STATE has ONLY an interest in orderly procedure

DISTINGUISHING Murdock, in which the STATE interest is in the autonomy of STATE law within the proper sphere of its substantive regulation

* + - * 1. In case of knowing waiver, “it is open to the FEDERAL court on HABEAS to deny [petitioner] all relief if the STATE courts refused to entertain his FEDERAL claims on the merits”

STANDARD for waiver is VOLUNTARY, KNOWING, and INTENTIONAL

* + - * 1. THINK: if you’re willing to lose both appeals, then the additional deterrent value of NOT making HABEAS review available is insignificant in light of the liberty values potentially at stake
      1. Wainwright v. Sykes (U.S. 1977) (p. 1363). FEDERAL HABEAS CORPUS petitions may NOT challenge convictions based on the failure to raise objections under the STATE’s contemporary objection rule.
         1. Eventually supplants Fay as the STANDARD
         2. CAUSE AND PREJUDICE RULE: HABEAS review should be barred, as on direct appeal, absent a showing of (1) CAUSE for the noncompliance and (2) some showing of actual PREJUDICE resulting from the alleged constitutional violation
         3. Ruling leaves open the definitions of “cause” and “prejudice”
         4. LIMITATION: Holding ONLY applies to situations where the STATE court never decided contentions of FEDERAL law “on the merits in the stat proceeding due to the petitioner’s failure to failure to raise them there as required by STATE procedure”
         5. Reasons for supporting contemporaneous objection rule:

Such rules are common

Enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, NOT years later in a FEDERAL HABEAS proceeding

Enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the FEDERAL constitutional Q

May lead to the exclusion of the evidence objected to, making a major contribution to finality in criminal litigation

* + - * 1. NOTES:

Lee v. Kamna (U.S. 2002) (p. 1373). A STATE procedural default that would NOT bar direct review by the SC (because the procedural ruling is NOT an IASG) also does NOT bar FEDERAL HABEAS CORPUS review.

The Meaning of the Sykes Standard

Introduction

“CAUSE” means only:

Reliance on a novel constitutional claim

Deficient performance by counsel that is sufficiently serious to constitute ineffective assistance of counsel under the 6th AMENDMENT

The STATE’s creation of an “external impediment” to presentation of the claim

A prisoner who establishes “cause” must also establish “prejudice” to gain the right to have a HABEAS court reach the merits (subject to few, narrow exceptions)

Futility v. Novelty

Engle v. Isaac (U.S. 1982) (p. 1374). Asserted futility of raising an objection at trial does NOT constitute cause.

Reed v. Ross (U.S. 1984) (p. 1375). The novelty of a constitutional claim did constitute cause.

SC found cause because at the time of appeal counsel could NOT reasonably have been expected to know his client had a constitutional argument

Overshadowed by subsequent RULE in Teague and § 2254(d)(1)

Counsel’s Inadvertence

Murray v. Carrier (U.S. 1986) (p. 1376). Default in STATE court barred FEDERAL HABEAS review, emphasizing the “considerable costs” associated with HABEAS review, costs that “do NOT disappear when the default stems from counsel’s ignorance or inadvertence rather than from a deliberate decision … to withhold a claim”

Too costly: FEDERAL HABEAS courts would routinely be required to hold evidentiary hearings to determine what prompted counsel’s failure to failure the claim in Q

Ineffective assistance of counsel is CAUSE for a procedural default: “if procedural default is the result of ineffective assistance of counsel, the SIXTH AMENDMENT itself requires that responsibility for the default be imputed to the STATE”

Ineffective Assistance of Counsel as Cause

NOTE: The first time when a prisoner’s claim of ineffective assistance of counsel can raised is in STATE post-conviction proceedings, where prisoners ordinarily lack counsel

Default on this issue can bar FEDERAL HABEAS review

Coleman v. Thompson (U.S. 1991) (p. 1377). Because the right to counsel does NOT extend to post-conviction proceedings, “a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings”

Left open the possibility that a prisoner has a right to counsel in a STATE collateral proceeding with respect to a claim of ineffective assistance during trial, sentencing, and direct appeal that could NOT have been raised earlier

External Impediment as Cause

Amadeo v. Zant (U.S. 1988) (p. 1378). Deliberate concealment by local prosecution officials constitutes cause because the basis for the claim cannot be reasonably known to the prisoner’s lawyers as a result of “the ‘objective factor’ of ‘some interference by officials’”

Strickler v. Greene (U.S. 1999) (p. 1378). Extended the “external impediment” concept to a situation in which the government’s withholding of information may have been inadvertent.

Prejudice

Prisoner must show that errors at trial “worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions

Actual Innocence

Murray v. Carrier- “in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a FEDERAL HABEAS court may grant the writ evening the absence of a showing of cause for the procedural default”

Sawyer v. Whitley (U.S. 1992) (p. 1380). Prisoner’s claims were foreclosed because NOT raised in a timely manner, as neither would have established “ by clear and convincing evidence” that “no reasonable juror would find [the prisoner] eligible for the death penalty” under STATE law

Prisoners can meet this standard only by showing either that they are innocent of the crime itself OR that no other factor of “other condition of eligibility” for a capital sentence was present

Failure to have introduced mitigating evidence at sentencing does NOT satisfy this standard

Schlup v. Delo (U.S. 1995) (p. 1380). Court held that less exacting showing described in Carrier—that, absent the constitutional error, “it is more likely than not that no reasonable juror would have convicted”—was appropriate

1996 AEDPA on capital cases arising in STATEs whose provision of counsel in STATE post-conviction proceedings satisfies statutorily specified standards:

A FEDERAL HABEAS court may NOT consider a claim that was NOT raised and decided on the merits in STATE court unless the defaulted resulted from…

Unconstitutional STATE action *or*

The SC’s recognition of a new right made retroactively applicable on collateral review *or*

The prisoner’s inability, through the exercise of due diligence, to have discovered the factual predicate for the claim

“actual innocence” is NOT listed

1. FEDERAL Question Jurisdiction
   1. Constitutional Limits
      1. Osborn v. Bank of the United States (U.S. 1824) (p. 823). Congress is capable of granting to FEDERAL district courts original jurisdiction in any case involving the Constitution, laws, or treaties of the United States.
         1. This principle seems clear from ART. III, which declares “that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties”
         2. FEDERAL Q is at the core of the case: congressional act incorporating the bank
            1. Law of the U.S. “forms an ingredient” in the case
         3. Basic premise: every case in which a FEDERAL Q might arise must be capable of being initiated in the FEDERAL courts since the issue of jurisdiction must be determined at the outset of the case
         4. NOTE: SC has never retreated from the expansive reading of ART. III “arising under” jurisdiction in Osborn
         5. THINK: What Osborn allows would mean that there would be a multitude of cases where the hypothetical FEDERAL Q never arises
            1. This is deep into intrusion on the STATEs
            2. Seems that the SC would rather be over-inclusive than under-inclusive to the constitutional extent that Congress can establish original FEDERAL jurisdiction
         6. PROTECTIVE JURISDICTION? There was concern that STATE courts would be hostile to the important FEDERAL interest in the bank
      2. Textile Workers Union v. Lincoln Mills (U.S. 1957) (p. 840). The FEDERAL courts may fashion a FEDERAL substantive law regarding labor contracts in those labor disputes involving FEDERAL rights.
         1. PROTECTIVE JURISDICTION
            1. Congress implicitly allowed the FEDERAL courts to create FEDERAL common law under the general jurisdiction provision

BUT: it is strange for Congress to delegate so much lawmaking authority without direction

* + - 1. DISSENT: Justice Frankfurter
         1. Alternatives to FEDERAL common law option of the majority:

Congress incorporated STATE law as FEDERAL law by reference—therefore controversies “arise under” FEDERAL law as required by ART. III

BUT Congress did NOT actually do this

Other potential problems:

Equal protection (probably weak)

STATE legislatures and courts could be creating FEDERAL law in the future

BUT it is NOT clear that STATE law changes would be incorporated automatically into the FEDERAL act

NON-Delegation is a weak doctrine

Osborn – because Congress could have legislated substantively and thereby could give rise to litigation under a statute of the U.S., it can provide a FEDERAL forum for STATE-created rights although it chose NOT to adopt STATE law as FEDERAL law or to create FEDERAL regulations

Views Osborn as “bank-as-a-U.S.-instrumentality” case

PROTECTIVE JURISDICTION (greater power includes the lesser power argument)

Congress can preempt STATE law, BUT sometimes it might NOT wish to do so

An expedient to Congress

Congress does NOT have to legislate

ONLY STATE courts, NOT laws, are displaced

Premised upon mistrust of STATE courts

BUT ART. III requires cases or controversies arising under FEDERAL law

In this case there is NO substantive FEDERAL law

* + 1. NOTES:
       1. Original and Appellate FEDERAL Q Jurisdiction
          1. Osborn apparently holds that Congress had the constitutional authority to endow the FEDERAL district courts with original “arising under” jurisdiction in any case in which any proposition of FEDERAL law “forms an ingredient” of the case, even though the proposition is unchallenged and unchallengeable
          2. Appellate jurisdiction – presence (or absence) of a FEDERAL “ingredient” is known by the time SC review is sought
          3. Original jurisdiction – it CANNOT be know with certainty which issues will turn out to be decisive
       2. Purpose of “Arising Under” Jurisdiction
          1. Expositing FEDERAL law

BUT this theoretically can be fulfilled with SC appellate jurisdiction

* + - * 1. Enforcing FEDERAL law
      1. Jurisdiction in Bankruptcy Proceedings
         1. Bankruptcy Act of 1867

Lathrop v. Drake (U.S. 1875) (p. 848). 2 distinct classes of district court jurisdiction:

Jurisdiction as a court of bankruptcy

Jurisdiction as an ordinary court of suits relating to the bankruptcy

* + - * 1. Bankruptcy Act of 1898

Suits between the trustee and adverse claimants were NO longer automatically within the FEDERAL courts’ jurisdiction in bankruptcy mattes

Instead, an independent basis of subject matter jurisdiction was required

Exception for consent by Δ

* + - * 1. Bankruptcy Acts of 1978 and 1984

1978 Act

Gave FEDERAL tribunals jurisdiction NOT only over all claims to which a bankrupt’s eSTATE is a party BUT also over “related” disputes to which the eSTATE is NOT a party

Northern Pipeline – SC invalidated certain provisions of the 1978 Act, ruling that Congress had violated ART. III by granting jurisdiction to a NON-ART. III bankruptcy court (rather than to an ART. III district court) over a STATE law claim in tort and contract brought by the bankruptcy eSTATE against a private party

1984 Act

Responded to particular concern in Northern Pipeline by vesting greater control in ART. III judges in non-“core” proceedings

BUT Congress did NOT change the scope of subject matter jurisdiction in bankruptcy

SC has NOT yet ruled on the constitutional validity of this arrangement

* + - * 1. Verlinden B.V. v. Central Bank of Nigeria and the Foreign Sovereign Immunities Act

Verlinden B.V. v. Central Bank of Nigeria (U.S. 1983) (p. 850). SC avoided the need to determine the constitutionality of protective jurisdiction by finding that the case sufficiently contained a FEDERAL ingredient to fall within the scope of Osborn.

THRESHOLD Q: Suit under the FSIA “necessarily raises Qs of substantive FEDERAL law at the very outset, and hence clearly ‘arises under’ FEDERAL law, as that term is used in ART. III.”

Important Qs about the substance of sovereign immunity may arise, and the FSIA provides FEDERAL substantive standards across the board

NOTE: FSIA is NOT really part of the cause of action—FSIA is a defense

That a FEDERAL defense is enough for “arising under” jurisdiction could be a way in which Verlinden goes beyond Osborn

“ART. III ‘arising under’ jurisdiction is broader than FEDERAL Q jurisdiction under §1331”

Congress enacted a “broad statutory framework governing assertions of foreign sovereign immunity” and “deliberately sough to channel cases against foreign sovereigns away from the STATE courts and into FEDERAL courts”

* + - * 1. Mesa v. California and the FEDERAL Officer Removal Statute

Mesa v. California (U.S. 1989) (p. 852). SC again avoided the Q of the constitutionality of protective jurisdiction by statutory construction of § 1442(a), ruling that FEDERAL officer removal is allowed only when the Δ avers a FEDERAL defense

“We have, in the past, not found the need to adopt a theory of ‘protective jurisdiction’ to support ART. III ‘arising under’ jurisdiction, and we do not see any need for doing so here because we do not recognize any FEDERAL interests that are not protected by limiting removal to situations in which a FEDERAL defense is alleged.”

NOTE: SC has never said that it would NOT recognize protective jurisdiction

* + - * 1. Significance of a “Sue and Be Sued” Clause

In Osborn, the constitutional issue arose only if the statutory “sue and be sued” clause was interpreted as conferring FEDERAL court jurisdiction

American Nat’l Red Cross v. S.G. (U.S. 1992) (p. 855). In upholding the Red Cross’ removal of the action from STATE court, the SC ruled that the congressional charter authorizing the Red Cross “to sue and be sued in courts of law and equity, STATE or FEDERAL, within the jurisdiction of the United States” conferred FEDERAL Q jurisdiction

RULE: “a congressional charter’s ‘sue and be sued’ provision may be read to confer FEDERAL court jurisdiction if, but only if, it specifically mentions the FEDERAL courts”

* 1. Statutory Limits
     1. WELL-PLEADED COMPLAINT RULE
        + 1. Louisville and Nashville R.R. v. Mottley (U.S. 1908) (p. 856). A FEDERAL court may NOT exercise jurisdiction over a case merely because an anticipated defense or the response thereto will involve a FEDERAL Q.
        1. NOTES:
           1. JUSTIFICATIONS for the Mottley RULE:

JUDICIAL EFFICIENCY: Bright line rule with few complications is easy to administer

FEDERALISM concerns warrant under-inclusiveness

Respectful to STATEs at a cost to FEDERAL interests

Π’s choice of forum (weak)

* + - * 1. AGAINST the Mottley RULE:

Forced to adjudicate FEDERAL defense in STATE court

Historically and currently, a predominant interest is that FEDERAL law NOT be under-protected for parties asserting it

* + - * 1. Impact of the Mottley RULE

Might be regarded as a technical rule of convenience, designed to avoid making original jurisdiction turn on speculation as to which issues will be decisive in the litigation

BROADER IMPACT: ever since 1887, the general removal statute (now 1441) has been limited to cases falling within the original jurisdiction of the district courts

Exception for § 1442 removal based on a FEDERAL defense in suits against FEDERAL officials

Competing ARGUMENTS:

Wechsler (p. 860): allow removal “by the party who puts forth the FEDERAL right”

“the reason for providing the initial FEDERAL forum is the fear that STATE courts will view the FEDERAL right ungenerously. That reason is quite plainly absent in … the case where the Δ may remove because the Π’s case is FEDERAL. If in any case the reason can be present, it is only in the situations where [under § 1441] removal is denied.”

Posner (p. 861): “In many [cases] the FEDERAL defense would have little merit—would, indeed, have been concocted purely to confer FEDERAL jurisdiction—yet this fact might be impossible to determine with any confidence without having a trial before the trial. I grant that frivolous FEDERAL claims are also a problem when only Πs can use them to get into court, but a less serious problem. If the Π gets thrown out of FEDERAL court because his claim is frivolous, and he must therefore STATE over in STATE court, he has lost time, and the loss may e fatal if meanwhile the statute of limitations has run.”

* + - * 1. Well-Pleaded Complaint RULE and Cases of Exclusive FEDERAL Jurisdiction

Exclusive FEDERAL jurisdiction in the following cases:

Antitrust cases

Patent and copyright cases

Certain securities cases

BUT when important Qs of, for example, FEDERAL antitrust, patent, or copyright law arise as defenses to STATE law claims, the case lies outside of original FEDERAL court jurisdiction

NOTE: Contrary phenomenon—sometimes no dispute exists about FEDERAL law, and the only dispute concerns a Q governed by STATE law (e.g., the validity or meaning of a licensing contract)

* + - * 1. Counterclaims and the Well-Pleaded Complaint RULE

Holmes Group, Inc. v. Vornado Air Circulation Sys. (U.S. 2002) (p. 862). A FEDERAL counterclaim, even when compulsory, doe NOT establish “arising under” jurisdiction.

A contrary rule would …

Permit the Δ to defeat the Π’s forum choice by raising a FEDERAL counterclaim

“radically expand the class of removable cases” and thereby fail to respect “the rightful independence of STATE governments”

Undermine administrative simplicity by making jurisdictional determinations depend on the content not only of the complaint but also of the responsive pleadings

* + 1. Refinements
       1. STATE Incorporation of FEDERAL Law (and vice versa)
          1. American Well Works Co. v. Yayne & Bowler Co. (U.S. 1916) (p. 863). A suit for damages caused to one’s business by a threat to sue for patent infringement is NOT a suit under the patent laws, and therefore may NOT be maintained in FEDERAL court.

CAUSE OF ACTION TEST: “A suit arises under the law that creates the cause of action.”

* + - * 1. NOTES on “Arising Under” Jurisdiction and the CAUSE OF ACTION TEST:

CAUSE OF ACTION TEST

Judge Friendly: “Justice Holmes’ formula is more useful for inclusion that for the exclusion for which it was intended.”

With only the most uncertain and limited exceptions, § 1331 confers FEDERAL Q jurisdiction when the ‘s complaint pleads a non-frivolous FEDERAL cause of action

Substantiality of the Asserted FEDERAL Cause of Action

Bell v. Hood (U.S. 1946) (p. 864). “Jurisdiction … is NOT defeated … by the possibility that the averments might fail to STATE a cause of action on which petitioners could actually recover. … Whether the complaint STATEs a cause of action on which relief could be granted … must be decided after and NOT before the court has assumed jurisdiction…. If the court does later … determine that the allegations in the complaint do NOT STATE a ground for relief, then dismissal of the case would be on the merits, NOT for want of jurisdiction.”

Exception for claims that clearly appear to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous

Frivolousness rule may have been diluted (p. 865, n. 2)

Causes of Action Created by FEDERAL Common Law

Illinois v. Milwaukee (U.S. 1972) (p. 867). § 1331 embraces actions based on FEDERAL common law.

Do All FEDERAL Causes of Action Arise Under FEDERAL Law?

Shoshone Mining Co. v. Rutter (U.S. 1900) (p .868). “Inasmuch, therefore, as the ‘adverse suit’ to determine the right of possession may NOT involve any Q as to the construction or effect of the Constitution or laws of the United States, buy may present simply a Q of fact as to the time of the discovery of the mineral, the location of the claim on the ground, or a determination of the meaning and effect of certain local rules and customs prescribed by the miners of the district, of the effect of STATE statutes, it would seem to follow that it is NOT one which necessarily arises under the Constitution and laws of the United States.”

Raises the Q whether some cases averring FEDERAL causes of action fall outside § 1331

As a general matter, there is FEDERAL jurisdiction when a FEDERAL statute creates a FEDERAL right of action, even if the statute incorporates STATE law standards of liability in substantial part (e.g., FEDERAL Tort Claims Act)

Smith v. Kansas City Title & Trust (U.S. 1921) (p. 869). “The general rule is that, where it appears from the ill or Statement of the Π that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such FEDERAL claim is NOT merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision.”

“the controversy concerns the constitutional validity of an act of Congress, which is directly drawn into Q. The decision depends upon the determination of this issue.”

* + - * 1. Merrell Dow Pharmaceuticals Inc. v. Thompson (U.S. 1986) (p. 870). When Congress has determined that there should be no private FEDERAL cause of action for violation of a particular FEDERAL statute, a complaint alleging a violation of that statute as an element of a STATE cause of action does NOT STATE a claim “arising under the Constitution, laws, or treaties of the United States.”

Merrell Dow is LIMITED to cases where Congress has NOT created a private cause of action

Q: why does the SC say this case is NOT controlled by Smith?

Would open the floodgates in an administrative and regulatory STATE

Because Congress did NOT want to create a cause of action—

Congressional determination that there should be no FEDERAL remedy for the violation of the FDCA is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a STATE cause of action is insufficiently “substantial” to confer FEDERAL Q jurisdiction

NOTE: SC never holds that there is NOT FEDERAL cause of action—it just assumes so because the parties never argued for a FEDERAL cause of action

Some combination of the following factors was present:

Πs are NOT part of the class for whose benefit the statute was passed

Indicia of legislative intent reveal no congressional purpose to provide a private FEDERAL cause of action

FEDERAL cause of action would NOT further the underlying purposes of the legislative scheme

Respondent’s cause of action is a subject traditionally relegated to STATE law

Petitioner’s 3 arguments:

Franchise Tax Board – FEDERAL Q jurisdiction is appropriate when “it appears that some substantial, disputed Q of FEDERAL law is a necessary element of one of the well-pleaded STATE claims”

SC: insufficiently “substantial” nature of the FEDERAL interest

Congress did NOT create a private FEDERAL cause of action

Powerful FEDERAL interest in UNIFORMITY

SC: petitioner should have argued PREEMPTION

SC: FEDERAL review is sufficient to assure UNIFORMITY

Special circumstances that justify FEDERAL jurisdiction

SC: district courts will NOT conduct a case-by-case appraisal of the novelty of the FEDERAL Q asserted as an element of STATE tort

For harder cases policy considerations might help

BUT a bright line rule is better for administrability AND predictability

BUT n. 12 suggests the SC is doing case-by-case analysis of the nature of the FEDERAL interest at stake

SC rejects that argument that STATE law incorporates the FEDERAL standard and applies the STATE standard

NO evidence that STATEs are NOT respecting the FEDERAL standard

NOTE: majority opinion does NOT really ever explain the basis for its decision, BUT it keeps repeating the basic idea that Congress did NOT create a private right of action, which gives rise to the inference that Congress did NOT want STATE law causes of action on the FDCA in FEDERAL court

DISSENT Qs this conclusion—decision NOT to provide a FEDERAL remedy does NOT automatically mean that FEDERAL jurisdiction is lacking

* + - * 1. NOTES on the Scope of “Arising Under” Jurisdiction Under § 1331

Cases Involving Disputes Over Land Originally Owned by the U.S.

Finding Jurisdiction

Hopkins v. Walker (U.S. 1917) (p. 881). Stands with Smith as one of the few SC decisions clearly upholding jurisdiction under the general FEDERAL Q statute over a suit that averred NO FEDERAL cause of action

FEDERAL law governed many of the issues with respect to the validity of competing claims to remove a cloud on title

Denying Jurisdiction

Shulthis v. McDougal (U.S. 1912) (p. 881). Jurisdiction denied because allegations with respect to competing claims are NOT properly par of the Π’s complaint

Joy v. St. Louis (U.S. 1906) (p. 881). Jurisdiction denied because allegations with respect to ‘s title, which was allegedly based on a FEDERAL grant, are NOT properly part of the Π’s pleading

WELL-PLEADED COMPLAINT RULE aspect: a Π may NOT unlock the door to FEDERAL court by including allegations concerning issues of FEDERAL law that are NOT required by pleading rules

This aspect is beside the point when the claim is a FEDERAL cause of action

Moore v. Chesapeake & Ohio Ry. (U.S. 1934) (p. 881). “Qs arising in actions in STATE courts to recover for injuries sustained by employees in intraSTATE commerce and relating to the scope or construction of the FEDERAL Safety Appliance Acts are, of course, FEDERAL Qs which may appropriately be reviewed in this Court. … But it does NOT follow that a suit brought under the STATE statute which defines liability to employees who are injured while engaged in intraSTATE commerce, and brings within the purview of that statue a breach of the duty imposed by the FEDERAL statute, should be regarded as a suit arising under the law of the United States.”

Reconciling Moore and Smith:

Kentucky statute in Moore merely said that a violation of a FEDERAL statute negates defenses of contributory negligence and assumption of risk—because the FEDERAL issues therefore came in, as in Mottley, by way of reply to a defense, Moore failed the WELL-PLEADED COMPLAINT RULE

Meaning and Impact of Merrell Dow

Merrell Dow did NOT overrule Smith

In VIRTUALLY ALL cases in which a Π seeks to rely on the Smith RULE (rather than on the Holmes CAUSE OF ACTION TEST), NO FEDERAL right of action is available

City of Chicago v. International College of Surgeons (U.S. 1997) (p. 883). SC upheld jurisdiction over a STATE-created cause of action that incorporated a FEDERAL ingredient.

Did NOT even mention Merrell Dow or Smith

“‘Even though STATE law creates [a party’s] cause of action, its case might still ‘arise under’ the laws of the United States if a well-pleaded complaint established that its right to relief under STATE law requires resolution of a substantial Q of FEDERAL law’” (quoting Franchise Tax Board)

NOTE: Majority and dissent acknowledged that Π could have filed a FEDERAL cause of action under § 1983

Role of Discretion

Cohen (p. 884) (from Merrell Dow n. 12): “PRAGMATIC STANDARDS for a pragmatic problem” – case-by-case considerations include:

Extent of the caseload increase if jurisdiction is recognized

Extent to which cases “of this class” turn on FEDERAL v. STATE law

Extent of the “necessity for an expert FEDERAL tribunal”

Extent of the “necessity for a sympathetic FEDERAL tribunal”

Shapiro (p. 884) (from Merrell Dow n. 12): for a RANGE OF DISCRETIONARY CHOICES, NOT ad hoc determination

“[The] cases suggest that the Court’s authority, but NOT its obligation, is very broad indeed.”

NOTE: SC relies more on statutory interpretation than discretion

Lower Court Understandings of Merrell Dow

ROUGH GENERAL RULE: Merrell Dow leaves open the possibility that a case requiring the determination of a substantial FEDERAL Q may fall within § 1331 despite the absence of a FEDERAL right of action

Jurisdiction is rarely upheld on this basis

Seinfeld v. Austen (7th Cir. 1994) (p. 885). No §1331 jurisdiction over a derivative action alleging that corporate directors breach their fiduciary duty under STATE law by failing to supervise management, causing the corporation to have to pay $140 million to settle FEDERAL antitrust claims.

§ 1331 jurisdiction demands a FEDERAL right of action, and the necessity to decide a FEDERAL issue embedded in a STATE law cause of action does NOT suffice after Merrell Dow

D’Alessio v. New York Stock Exchange, Inc. (2nd Cir. 2001) (p. 885). STATE common law claims against the Exchange and its officials required construction FEDERAL securities law governing trading on the Exchange.

Looks inconsistent with Merrell Dow n. 15

NOTE: Jurisdictional Q in Smith and Merrell Dow—whether § 1331 should be understood to include some cases in which no FEDERAL cause of action is alleged—does NOT arise particularly often

ONLY 3 SC decision—Hopkins, Smith, and College of Surgeons—clearly uphold jurisdiction on that basis

Hopkins may NOT survive Merrell Dow

* + - 1. Declaratory Judgments
         1. Franchise Tax Board of California v. Construction Laborers Vacation Trust (U.S. 1983) (p. 891). Congress has given the lower FEDERAL courts jurisdiction to hear, originally or by removal form a STATE court, ONLY those cases in which a WELL-PLEADED COMPLAINT establishes either that FEDERAL law creates the cause of action or that the Π’s right to relief necessarily depends on resolution of a substantial Q of FEDERAL law.

1st cause of action is under STATE law and there is a FEDERAL defense

WELL-PLEADED COMPLAINT RULE applies to deny jurisdiction

2nd cause of action for declaratory judgment requires ONLY interpretation of ERISA

Brought under STATE DJ statute

The only Q for the FEDERAL court to decide was a FEDERAL Q

NOTE: there is something clearly perverse about jurisdiction being denied on this cause of action: DJ sought is resolved by Qs of FEDERAL law ONLY, BUT the SC says the case doe NOT arise under FEDERAL law

RULE: if, BUT for the availability of the DJ procedure (either STATE or FEDERAL), the FEDERAL claim would arise only as a defense to a STATE-created action, as in this case, jurisdiction is lacking

From Wycoff (p. 895)

Skelly Oil analysis seems to grant jurisdiction

Hypothetical case where the Trust sues the STATE officials would quite plausibly have been within the FEDERAL Q jurisdiction

ERISA seemed to confer the express right to sue

This case is JUST AN EXCEPTION to Skelly Oil

STATE has NO need of being in FEDERAL court

BUT there are other considerations for FEDERAL jurisdiction (i.e., UNIFORMITY, EXPERTISE, etc.)

NOTE: this case requires drawing a distinction between…

DJ act (which is strictly procedural AND provides NO cause of action) AND

An express declaration of causes of action by Congress

Under the Holmes CAUSE OF ACTION TEST, jurisdiction lies under § 1331 in the latter

* + - * 1. NOTES on the Jurisdictional Significance of the DJ Act and on the Franchise Tax Board Decision

Reach of Skelly Oil

CONGRESSIONAL INTENT: SC says FEDERAL DJ Act was passed to create a new remedy, NOT to expand FEDERAL court jurisdiction

Therefore, if a case could NOT have been brought before the DJ Act, the it should NOT be allowed in FEDERAL court after the Act

Skelly Oil clearly rejected the view that jurisdiction exists merely because a FEDERAL Q is properly set forth in the complaint for a DJ, even though that Q would have arisen only by way of defense or reply in a NON-DJ action between the same parties.

NARROWLY: permit the exercise of jurisdiction over a DJ action ONLY if jurisdiction would also exist in a hypothetical non-DJ action brought by the DJ Π

BROADLY: uphold jurisdiction over a DJ action if jurisdiction would exist in a hypothetical non-DJ action brought by either party

Basis for Declining Jurisdiction in Franchise Tax Board

Although the complaint very likely satisfied the broader interpretation of Skelly Oil, in the end the SC found NO jurisdiction

Why should it matter that the STATE would NOT be prejudiced by a decision remanding the case to STATE court—when the motion to remove was filed by the Trust, which apparently preferred to obtain a FEDERAL court adjudication of the preemption Q and may have feared that the STATE court would give an unduly narrow scope to FEDERAL preemption?

Franchise Tax Board is an EXCEPTION to Skelly Oil

FEDERAL Complaints Asserting that STATE Laws are Preempted

Express Statutory Rights of Action

Shaw Decision and Implied Rights of Action

Shaw v. Delta Air Lines, Inc. (U.S. 1983) (p. 902).

DISTINGUISHING Franchise Tax Board (decided on the same day): FTB was action seeking DJ that STATE laws were NOT preempted by ERISA; here, by contrast, companies subject to ERISE regulation seek injunctions against enforcement of STATE laws they claim are preempted by ERISA, as well as DJ that those laws are preempted

Draws support from Ex parte Young

Lawrence Country v. Lead-Deadwood School Dist. No. 40-1 (U.S. 1985) (p. 902). In dictum SC cited Shaw as upholding the existence of jurisdiction over a suit seeking only a DJ that FEDERAL law preempted a STATE statute.

Golden STATE Transit Corp. v. City of Los Angeles (U.S. 1989) (p. 904). Insofar as § 1983 creates an express FEDERAL right of action to DJ relief, the existence of FEDERAL jurisdiction over that right of action seems clear.

* + - 1. Preemption Removal
         1. “Complete Preemption” Rationale for Removal Under § 1441

Avco Corp. v. Aero Lodge No. 735 (U.S. 1968) (p. 905). A claim that the Δ had violated a collective bargaining agreement, although labeled as a STATE contract claim, necessarily arose under § 301 of the Taft Harley Act and was therefore removable by the Δ.

Caterpillar Inc. v. Williams (U.S. 1987) (p. 905). COMPLETE PREEMPTION DOCTRINE: “Once an area of STATE law has been completely pre-empted, any claim purportedly base on that pre-empted STATE law is considered, from its inception, a FEDERAL claim, and therefore arises under FEDERAL law.

§ 301 inapplicable to a claim for breach of individual employment agreements

* + - * 1. ERISA’s express preemption clause preempts STATE law claims
        2. Preemption cases turn in large part on legislative history

1. Actions Against STATE Officials
   1. STATE Sovereign Immunity and the 11th Amendment
      1. TEXT: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another STATE, or by Citizens or Subjects or any Foreign STATE”
         1. NOTE: 11th AMENDMENT applies by its terms ONLY in the FEDERAL courts
         2. NOTE: parallel to ART. III in the beginning
      2. Origins and Interpretation
         1. Hans v. Louisiana (U.S. 1890) (p. 973). Under the 11th AMENDMENT, the judicial authority of the FEDERAL courts does NOT extend to a suit against a STATE by one of its citizens.
            1. NOTE: text of the 11th AMENDMENT is NOT unclear about intra-STATE suits
            2. 11th AMENDMENT is about disapproval of Chisholm for NOT recognizing that STATEs CANNOT be drawn into court at that behest of an individual
            3. SC recognizes the literal reading of the 11th AMENDMENT to say that NO foreign citizen can use a STATE, then asks what could possess Congress to allow intra-STATE FEDERAL suits?

It must be that Congress also intended to bar intra-STATE FEDERAL claims against STATEs

* + - 1. NOTES on the Origin, Meaning, and Scope of the 11th AMENDMENT
         1. Chisholm v. Georgia (U.S. .1793) (p. 978). SC upheld its jurisdiction as consistent with ART. III’s grant of judicial power over controversies “between a STATE and Citizens of another STATE”

DISSENT: SC could only exercise that jurisdiction conferred by Congress

* + - * 1. 11th AMENDMENT and the Marshall Court

McKesson Corp. v. Division of ABT (U.S. 1990) (p. 980). Citing Cohens, the SC held unanimously the “[t]he ELEVENTH AMENDMENT does NOT constrain the appellate jurisdiction of the SC over cases arising from STATE courts.”

Osborn (U.S. 1824) (p. 980). 11th AMENDMENT did NOT bar suit against STATE officres.

“[I]n all cases where jurisdiction depends on the party, it is the party named in the record.”

Admiralty cases

* + - * 1. Interpretation of Hans, Its Aftermath, and the Continuing Controversy over Its Meaning and Validity

Introduction

Q: how do you understand Hans?

A: IMPLICIT STRUCTURAL NECESSITY

NOTE: it would NOT be the first time the SC found an implicit structure in the Constitution

Common law background:

Implicit in the FEDERALIST structure of the Constitution (based on common law)

Statutory construction of the Judiciary Act (rooted in common law)

Substantive understanding of the 10th AMENDMENT means that some powers are important STATE powers

Because the STATEs exist

There has been NO literal reading of the 11th AMENDMENT since Hans

SC has declined to bar:

Suits against a STATE by another STATE (p. 983)

Suits against a STATE by the U.S. (p. 983)

STATEs may waive their immunity from FEDERAL court suit

In certain limited circumstances, STATE immunity may be abrogated by Congress

“Diversity” Interpretation of the 11th AMENDMENT

Atascadero STATE Hosp. v. Scanlon (U.S. 1985) (p. 983).

DISSENT: 2 distinctions

SOVEREIGN IMMUNITY (a traditional concept barring uncontested suit against the sovereign in any court) *v.* jurisdictional bar to suit in FEDERAL court erected by the 11th AMENDMENT (designed exclusively to regulate the scope of FEDERAL judicial power)

11th AMENDMENT bars FEDERAL jurisdiction in suits based on party status, BUT NOT those based on subject matter—i.e., under the STATE-citizen diversity clause

Justice Brennan’s DISSENT might be supported by Hans

Amar ARGUMENT (p. 985): the language and structure of ART. III, as well as the language of the 11th AMENDMENT’s withdrawal of FEDERAL judicial power, support a limitation of the AMENDMENT to cases in which ART. III jurisdiction would otherwise exist only “because a STATE is party”

Hard to see why the 11th AMENDMENT left out any mention of a suit by a citizen against its own STATE unless you believe in the diversity interpretation

FEDERAL Court Suit Against STATE Agencies and Local Governments

RULE: a suit against at STATEwide agency is considered a suit against the STATE under the 11th AMENDMENT

BUT political subdivisions may be sued

Maybe because in the 19th C. a municipal corporation was viewed as more closely analogous to a private corporation than to a STATE government

FEDERAL Court Suits Against Multi-STATE Agencies

Lake Country ESTATEs, Inc. v. Lake Tahoe Regional Planning Agency (U.S. 1979) (p. 986). SC held that a bi-STATE regional agency created by a congressionally approved interSTATE compact between California and Nevada to coordinate development of Lake Tahoe was NOT immune from suit in FEDERAL court.

* + 1. Suits Against Officers, Suits Against STATEs
       1. Ex parte Young (U.S. 1908) (p. 987). VINDICATING FEDERAL RIGHTS IN THE FACE OF HANS: If an act that a STATE attorney general seeks to enforce is a violation of the FEDERAL Constitution, the officer, in proceeding under the act, comes into conflict with the superior authority of the Constitution and is stripped of his official character and is subject, in his person, to the consequences of his individual act.
          1. Effect of the severe penalty for violating STATE law is that all approaches to the courts all closed
          2. Provisions enforcement of rates are unconstitutional on their face
          3. Assume that the 11th AMENDMENT has full force
          4. RULE: suit against stat officials for violations of FEDERAL rights is NOT suit against the STATE

NO violation of the 11th AMENDMENT

* + - * 1. IMPLIED CAUSE OF ACTION

Perhaps form §1331

Perhaps from 14th AMENDMENT

* + - 1. NOTES on Ex parte Young and Suits Against STATE Officers
         1. “Party-of-Record” RULE: 11th AMENDMENT does NOT apply to suits in which the STATE is NOT a party of record
         2. Post-Reconstruction Bond Cases

Louisiana ex rel. Elliott v. Jumel (U.S. 1883) (p. 992). 11th AMENDMENT barred suit by Louisiana bondholders seeking to require Louisiana officials to honor contractual obligations to collect a property tax and devote its proceeds to paying the STATE bonds.

Officials were NOT personally liable on the contract

SC expressed unwillingness to assume “the control of the administration of the fiscal affairs of the STATE to the extent that may be necessary”

Virginia Coupon Cases

VA statute flatly repudiated prior legislation authorizing the payment of STATE taxes with the interest coupons on STATE bonds

Stat collectors could seize property in payment for taxes owed that were paid by coupons

Poindexter v. Greenhow (U.S. 1885) (p. 993). SC upheld an award of restitution, damages, and injunctive relief against STATE officials who had seized or threatened to seize taxpayers’ property in satisfaction of taxes that had already been paid by bond coupons.

A STATE official who violates the Constitution is stripped of his official character and without defense

VA responded by passing legislation ordering STATE officials to bring suit to recover taxes from taxpayers who had used the coupons as payment

In re Ayers (U.S. 1887) (p. 993). 11th AMENDMENT barred lower court’s award of injunctive relief.

Although the STATE is NOT a party of record and suit is against its officers and agents, who alone can breach the STATE’s contract with Πs, “the suit is still, in substance, though NOT in form, a suit against the STATE”

Acts allegedly threatened by Δs are violations of the assumed contracts between VA and bondholders

Officers are NOT party to the contract

NOTE: tort *v.* contract distinction gets tossed

Significance and Viability of Young

IMPLIED CAUSE OF ACTION

Georgia R.R. & Banking Co. v. Redwine (U.S. 1952). 11th AMENDMENT did NOT bar a FEDERAL court action, based on the CONTRACTS CLAUSE, seeking to enjoin the STATE revenue commissioner from imposing taxes upon property claimed to be exempt pursuant to a STATE charter.

DISTINGUISHING Ayers: there, “complainant had NOT alleged that officers threatened to tax its property in violation of its constitutional rights”

Idaho v. Coeur d’Alene Tribe (U.S. 1997) (p. 994). Suit against STATE officials seeking DJ and injunctive relief based on a claim of ownership of certain submerged lands was barred by the 11th AMENDMENT because the suit was “the functional equivalent” of a quiet title action that “would diminish, even extinguish, the STATE’s control over a vast reach of land and waters long deemed by the STATE to be an integral part of its territory.”

Any RULE from this case might be limited to submerged lands

* + - * 1. NOTES on the Availability of Relief in Suits Against STATE Officers

Edelman v. Jordan (U.S. 1974) (p. 995). While the rationale of Young permitted the part of the judgment that constituted a PROSPECTIVE injunction, the provision for payments of funds “wrongfully withheld” in the past was RETROSPECTIVE relief barred by the 11th AMENDMENT

RULE: Young is limited to PROSPECTIVE RELIEF

Ford Motor Co. v. Department of Treasury (U.S. 1945) (p. 996). “[w]hen the action is in essence one for the recovery of money form the STATE, the STATE is the real, substantial party in interest and is entitled to invoke it sovereign immunity from suit even though individual officials are the nominal Δs.”

WAIVER: mere participation in FEDERAL program did NOT constitute waiver of 11th AMENDMENT immunity

JURISDICTIONAL BAR: failure to raise the defense at trial did NOT preclude Δs from raising it on appeal, since “the ELEVENTH AMENDMENT defense sufficiently partakes of the nature of a jurisdictional bar” to permit its consideration for the first time on appeal

Elusiveness of the PROSPECTIVE-RETROSPECTIVE Distinction

Milliken II (U.S. 1977) (p. 997). SC unanimously upheld a decree where the STATE was required to pay half the cost of educational programs as fitting “squarely within the PROSPECTIVE-compliance exception reaffirmed by Edelman.”

“That the programs are also ‘compensatory’ in nature does NOT change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system.”

NOTE: although the order ran only against STATE officials, it contemplated payment from the STATE treasury

NOTE: might be distinguishable on the ground that this is a desegregation case

Aftermath of Edelman: Quern and Green Decisions

Quern v. Jordan (U.S. 1979) (p. 998). SC unanimously held that order to send explanatory notice to members of Π class “advising them that there are STATE administrative procedures available by which they are entitled to past welfare benefits” “falls on the Ex parte Young side of the ELEVENTH AMENDMENT line rather than on the Edelman side.

Notice simply apprises members of Π class of the existence of whatever administrative procedures may already be available under STATE law

Determination on retroactive benefits rest entirely on the STATE, NOT the FEDERAL court

Green v. Mansour (U.S. 1985) (p. 999). Πs request for DJ that Δ’s past conduct violatied FEDERAL law and for notice of relief was barred by the 11th AMENDMENT when the STATE came into compliance with FEDERAL law, as modified while the suit was pending in district court.

Injunction NO longer available because STATE is in compliance

DJ as a step toward a STATE court damage remedy would be an “end run” around Edelman

Notice order NOT available because it is ancillary to some other appropriate relief

Idaho v. Coeur d’Alene – in particular circumstances, a claim concededly limited to PROSPECTIVE RELIEF was nonetheless outside the scope of Ex parte Young and thus was barred by the 11th AMENDMENT

GENERAL RULE: indemnification does NOT turn a suit against a STATE official into a suit against the STATE

Special Treatment Accorded to Attorney’s Fees Awards

Hutto v. Finney (U.S. 1978) (p. 998). IMPORTANCE OF ENFORCING FEDERAL COURT ORDERS: “The power to impose a fine is properly treated as ancillary to the FEDERAL court’s power to impose injunctive relief”—award of attorneys fees here served the same purpose as a fine.

STATE Court Actions

Alden v. Maine (U.S. 1999) (p. 1000). STATEs are constitutionally entitled to decline, on sovereign immunity grounds, to entertain any action that, under the 11th AMENDMENT, could NOT be maintained in FEDERAL court

* + - * 1. NOTES on the Pennhurst Case and the Bearing of the 11th AMENDMENT on FEDERAL Court Relief for Violations of STATE Law

Pennhurst STATE School & Hosp. v. Halderman (U.S. 1984) (p. 1000). Young and Edelman do NOT apply to suits against STATE officials on the basis of STATE law.

FEDERAL claims were dismissed on the merits—only STATE claim remained

Supplemental jurisdiction may NOT override the 11th AMENDMENT

FEDERAL interest in judicial efficiency is weaker than the STATE interest in immunity

BUT why NOT just apply immunity under STATE law

Q: why should the 11th AMENDMENT provide a protection that STATEs can provide for themselves against STATE claims?

THINK: a STATE official alleged to be acting in violation of STATE law if different than a STATE official alleged to be acting in violation of FEDERAL law while complying with STATE law

This starts to look sort of like an ABSTENTION decision

Pennhurst does NOT apply to tort claims against STATE officials (because such relief does NOT run directly against the government)

Lower courts have NOT read Pennhurst as casting general doubt upon their authority to award relief under STATE law against local government officials absent some significant effect on the STATE treasury

Relevance of Erie

Wholly apart from the 11th AMENDMENT, a decision by a STATE to give STATE officials or agencies immunity from a STATE law cause of action would be binding in a FEDERAL court

* + 1. Waiver and Abrogation
       1. Seminole Tribe of Florida v. Florida (U.S. 1996) (p. 1004). The INDIAN COMMERCE CLAUSE doe NOT grant Congress power to abrogate the STATEs’ sovereign immunity.
          1. Congress provided an “unmistakably clear” Statement in the Indian Gaming Regulatory Act of its intent to abrogate the immunity, BUT that abrogation is ONLY constitutional if the Act itself was passed pursuant to a valid exercise of power

Authority to abrogate STATE 11th AMENDMENT immunity arises from 2 sources:

14th AMENDMENT

14th AMENDMENT, “by expanding FEDERAL power at the expense of STATE autonomy, had fundamentally altered the balance of STATE and FEDERAL power struck by the Constitution”

INTERSTATE COMMERCE CLAUSE under Pennsylvania v. Union Gas Co.

BUT Union Gas has proven to be solitary departure from established law, and insofar as it departs from the established understanding of the 11th AMENDMENT immunity and ART. III, it is OVERRULED

NOTE: Seminole stands for the assertion that there is NO principled way to distinguish between the INDIAN COMMERCE CLAUSE and the INTERSTATE COMMERCE CLAUSE in 11th AMENDMENT jurisprudence

Young did NOT apply

“[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a STATE of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a STATE officer based upon Ex parte Young”

Young would render the remedial scheme superfluous

Young would expose the official (the Governor) to the full remedial powers of the court, including, presumably, contempt sanctions

BUT THINK: Young could have been interpreted in light of the IGRA

NO general equitable remedy, BUT the same remedy as IGRA

NOTE: Seminole would never have gotten to the sovereign immunity Q if if had NOT decided there was NO suit available under Young

DG: it would be odd to think that suit against the Governor was barred by 11th AMENDMENT

DG: looks like SC was aggressive in reaching the constitutional Q

NOTE: explicit congressionally-created remedial schemes have been read as exceptions to Bivens actions (against FEDERAL officials) and Young / § 1983 actions (against STATE officials)

DG: NOT clear what the SC was saying about Young

11th AMENDMENT serves

STATE fisc

STATE dignity

BUT you CANNOT take seriously this “dignity” language

Must be a STRUCTURAL or FUNCTIONAL consideration

* + - 1. NOTES on Congressional Power to Abrogate STATE Immunity and on STATE Consent to Suit in FEDERAL Court
         1. 20th C. Decisions on the Power of Congress to Abrogate STATE Sovereign Immunity in the FEDERAL Courts

Fitzpatrick v. Bitzer (U.S. 1976) (p. 1024). 11th AMENDMENT did NOT bar an award of RETROACTIVE retirement benefits and attorney’s fees under Title VII, to be paid from the STATE treasury

Title VII was enacted pursuant to Congress’ power under 14th AMENDMENT § 5

“When Congress acts pursuant to § 5, NOT only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under on e section of a constitutional AMENDMENT whose other sections by their own terms embody limitations on STATE authority.”

NOTE: majority in Seminole does NOT Q Fitzpatrick’s continued validity

Quern and the CLEAR STATEMENT RULE

Quern – in lengthy dictum, the SC rejected the view that § 1983 should be interpreted to make STATEs subject to suit in FEDERAL court

§ 1983 “does NOT explicitly and by clear language indicate on its face an intent to sweep away the immunity of STATEs”

CLEAR STATEMENT RULE has become the SUPER CLEAR STATEMENT RULE

BUT Hutto v. Finney (U.S. 1978) (p. 1026). Fitzpatrick rationale was applied in the absence of a “clear statement.”

SC concluded that Congress intended to make STATE vulnerable to liability for attorney’s fees in §1983 actions, despite the fact that the Civil Rights Attorney’s Fees Awards Act, § 1988) does NOT specify that fees may be awarded against a STATE

OVERRULED: ~~Pennsylvania v. Union Gas Co. (U.S. 1989) (p. 1026). Congress can abrogate STATE immunity from FEDERAL court suit in the exercise of its power under the COMMERCE CLAUSE.~~

* + - * 1. 5 OPTIONS after Seminole:

A Remedy under Young? YES

To the extent that an injunctive remedies NOT constitutionally required—and surely it is NOT in the case of a statutory right—Congress may certainly bar a private remedy against a STATE officer in spite of Young and § 1983

Idaho v. Coeur d’Alene (U.S. 1997) (p. 1028).

In holding the Young doctrine inapplicable to the FEDERAL court suit in that case, 2 Justices supported an interpretation of the doctrine that would have required a case-by-case balancing of the various STATE and FEDERAL interests in allowing a FEDERAL court disposition of the controversy—that view was REJECTED by the remaining 7 Justices

4 Justices adhered to the broader view of the availability of Young in a suit against STATE officers

3 Justices essentially limited their conclusion that Young was inapplicable to the special case of a dispute over a STATE’s title and ability to regulate submerged and related lands

Verizon Md. Inc. v. Public Serv. Comm’n (U.S. 2002) (p. 1028). Ex parte Young is ALIVE AND WELL in cases involving FEDERAL statutory rights

§ 1331 provided a basis for subject matter jurisdiction over Verizon’s claim

Even assuming that the STATE agency had NOT waived its immunity under the 11th AMENDMENT (by voluntarily participating in the FEDERAL regulatory regime under which the agency decision had been issued), the Young doctrine allowed Verizon to proceed against the individual commissioners

Edelman satisfied: Verizon’s suit did NOT seek to ipose any monetary loss on the STATE for “a past breach of a legal duty”

Seminole satisfied: Congress had NOT fashioned a “detailed remedial scheme” that precluded resort to an implied remedy under Young

Private Suit in a Forum Other than a FEDERAL Court? NO

Alden v. Maine (U.S. 1999) (p. 1029). STATEs enjoy the same constitutional immunity from suit in their own courts.

FEDERAL Maritime Comm’n v. South Carolina STATE Ports Auth. (U.S. 2002) (p. 1029). STATE immunity also applied to a private claim brought against a STATE before a FEDERAL administrative agency

Abrogation of STATE Immunity Under § 5 of the 14th AMENDMENT?

City of Boerne v. Flores (U.S. 1997) (p. 1029). LIMITING § 5 POWER: SC held unconstitutional the Religious Freedom Restoration Act, which attempted to overrule a Supreme Court decision interpreting the 1st and 14th AMENDMENTS, on the ground that although Congress’ power under § 5 extends to the creation of remedies, it does NOT include the power to alter substantive rights.

Florida Prepaid Postsecondary Ed. Expense Bd. V. College Sav. Bank (U.S. 1999) (p. 1029). FURTHER LIMITING § 5 POWER: SC held unconstitutional the Patent Remedy Act, which specifically abrogated any 11th AMENDMENT or other sovereign immunity defense in patent infringement actions.

Congress could NOT abrogate the STATE’s immunity in the exercise of its ART. I powers

Florida had NOT waived its immunity

SC cited Boerne as establishing that for Congress to invoke § 5, “it must identify conduct transgressing the FOURTEENTH AMENDMENT’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct”

“Congress identified NO pattern of patent infringement by the STATEs, let alone a pattern of constitutional violations”—i.e., there was “NO evidence that unremedied patent infringements by STATE had become a problem of national import”

Moreover, patent infringement does NOT constitute a deprivation of property without DUE PROCESS

DUE PROCESS violation can occur ONLY when (1) there is an intentional act that causes injury to property AND (2) a STATE provides insufficient remedies

HIGH THRESHOLD for an Act of Congress to pass muster under § 5 under the next 2 cases…

United States v. Morrison (U.S. 2000) (p. 1030). The provision for a FEDERAL civil remedy in the Violence Against Women Act could NOT be sustained as an exercise of the COMMERCE power or as an exercise of power under § 5.

Remedial provision of the VAWA was too broad in that is “applie[d] uniformly throughout the Nation,” even though Congress’s findings indicate that the problem addressed “does NOT exist in all, or even most, STATEs”

Kimel v. Florida Bd. of Regents (U.S. 2000) (p. 1031). § 5 could NOT furnish a basis for overcoming a STATE’s immunity from private suite under the Age Discrimination in Employment Act

Congress had unequivocally expressed its intent to abrogate the STATEs’ immunity from suit for violation of the Act

Boerne – Congress possesse the power “to enforce” the 14th AMENDMENT’s substantive provisions as interpreted by the Court, BUT NOT the power to determine “*what constitutes*” a constitutional violation.

STANDARD on appropriate remedial *v.* impermissible substantive legislation: consider whether there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end”

NO pattern of age discrimination by public entities

Board of Trustees of the University of Alabama v. Garrett (U.S. 2001) (p. 1031). Congress’ abrogation of STATE immunity from damages actions for violation of Title I of the Americans with Disabilities Act (prohibiting employment discrimination) could NOT be sustained as an exercise of power under § 5.

2 PREREQUISITES for upholding legislative creation of a private damages remedy against the STATEs: (1) a showing of STATE discrimination that violates the 14th AMENDMENT AND (2) a remedy congruent and proportional to the violation

Neither prerequisite had been met

Suits by the STATEs?

Seminole alternative: vest the STATEs with authority to bring FEDERAL court actions to enforces the law against a STATE

Compare to cases reaching opposite conclusions

QUI TAM ACTIONS: Vermont Agency of Natural Resources v. United States ex rel. Stevens (U.S. 2000) (p. 1033).

A *qui tam* relator enjoys ART. III standing

Employing the “longstanding interpretive presumption that ‘person’ does NOT include the sovereign” as well as the “doctrine that statutes should be construed so as to avoid difficult constitutional Qs,” the SC concluded that Congress had NOT clearly expressed its intent to bring STATEs within the definition of “any person” and therefore had NOT subjected the STATEs to liability under the False Claims Act

SC’s opinion leaves open the Q “whether the word ‘person’ encompasses STATE when the United States itself sues under the False Claims Act”

Caminker ARGUMENT for congressional power to authorize *qui tam* actions against the STATEs (p. 1033): rationale for the U.S.-as-party RULE supports the constitutionality of a qui tam suit against a STATE “whatever the structural form of the litigation on the U.S.’s behalf, as long as that structural form is otherwise within the power of Congress to employ”

Consent?

Seminole alternative: enact legislation or initiate other action that would induce either a STATE’s CONSENT to suit or its WAIVER of sovereign immunity as a defense

* + - * 1. Consent to Suit in FEDERAL Court

Consent to Suit Confined to STATE Tribunals

Smith v. Reeves (U.S. 1900) (p. 1034). A STATE may waive sovereign immunity as to suits for tax refunds in its own courts, while retaining its 11th AMENDMENT immunity from such lawsuits in FEDERAL court

“Constructive” Consent

May be based on:

STATE’s acceptance of FEDERAL funds for a particular purpose

STATE’s engagement in FEDERALly regulated activity

STATE’s conduct in ongoing litigation

On the Basis of NON-Litigation Activity

~~Parden v. Terminal Ry. (U.S. 1964) (p. 1035). Alabama had constructively consented to a FEDERAL court negligence action under the FEDERAL Employer’s Liability Act brought by an employ of a STATE-owned railway.~~

~~Congress intended the FELA to subject STATEs to suit in these circumstances~~

~~Combined ABROGATION (“imposition of FELA right of action upon interSTATE railroads … CANNOT be precluded by sovereign immunity) and theory of constructive or implied STATE CONSENT (“Alabama, when it began operation of an interSTATE railroad … [after enactment of the FELA] necessarily consented to such suit as was authorized by the Act”~~

NOTE: insofar as it rested on an ABROGATION theory, it was effectively OVERRULED by Seminole

NOTE: its constructive waiver theory was expressly OVERRULED by College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.

College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd. (U.S. 1999) (p. 1035). Consent CANNOT be based “upon the STATE’s mere presence in a field subject to congressional regulation,” and indeed, to recognize congressional power to “exact constructive waivers through the exercise of ART. I powers would … permit Congress to circumvent the antiabrogation holding of Seminole Tribe.”

“Parden stands as an anomaly in the jurisprudence of sovereign immunity, and indeed in the jurisprudence of constitutional law.”

When it comes to sovereign immunity, “the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the Stat from otherwise lawful activity”

DISTINGUISHING Gardner: Gardner, which held that a bankruptcy court can entertain a trustee’s objections to a claim filed by a STATE, “stands for the unremarkable proposition that a STATE waives its sovereign immunity by voluntarily invoking the jurisdiction of the FEDERAL courts”

DISTINGUISHING Dole: Dole, which upheld Congress’ power to condition a financial grant on a STATE’s agreement to do something it could NOT constitutionally be compelled to do, involved an exercise of the SPENDING CLAUSE power to disburse funds to the STATEs—“such funds are gifts”

BUT NOTE: it looks like Congress can condition receipt of funds on waiver of STATE immunity to FEDERAL claims under Dole

On the Basis of the STATE’s Conduct in Litigation

STATEs waive their sovereign immunity by invoking the jurisdiction of the FEDERAL courts

Lapides v. Board of Regents (U.S. 2002) (p. 1037). “[I]n the context of STATE-law claims, in respect to which the STATE has explicitly waived immunity from STATE-court proceedings,” the :STATE’s act of removing a lawsuit from STATE court to FEDERAL court’ constitutes a waiver of any claim of ELEVENTH AMENDMENT immunity.”

“[W]here a STATE voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and CANNOT escape the results of its own voluntary act by invoking the prohibitions of the ELEVENTH AMENDMENT”

RULE: Q whether particular litigation activities amount to a waiver is a Q of FEDERAL law

NOTE: STATE agency could NOT be sued on a FEDERAL claim under § 1983

* + 1. STATE Immunity in STATE Court
       1. Alden v. Maine (U.S. 1999) (p. 1039). Congress’ delegated powers under ART. I do NOT include the power to subject NON-consenting STATEs to private suits for damages in STATE courts.
          1. SC abandons sovereign immunity as an 11th AMENDMENT doctrine or a common law doctrine

SC says sovereign immunity derives from constitutional structure

* + - * 1. 2 ways STATE sovereign immunity is preserved by FEDERALISM:

FEDERALISM reserves to the STATEs a substantial portion of the nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status—the STATEs “form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere”

From Madison, The FEDERAList No. 39

Even as to matters within the competence of the national government, the constitutional design secures the founding generations’ rejection of “the concept of a central government that would act upon and through the STATEs” in favor of “a system in which the STATE and FEDERAL Governments would exercise the concurrent authority over the people—who were, in Hamilton’s words, ‘the only proper objects of government’”

From Printz v. United States (quoting The FEDERAList No. 15)

* + - * 1. Neither SUPREMACY CLAUSE nor ENUMERATED POWERS by virtue of the NECESSARY AND PROPER CLAUSE confer authority to abrogate the STATEs’ immunity from suit in FEDERAL court
        2. On Hall – Since SC determined that the Constitution did NOT reflect an agreement between the STATE to respect the sovereign immunity of one another, California was free to determine whether it would respect Nevada’s sovereignty as a matter of comity
        3. On Young – exception to sovereign immunity is “based in part on the premise that sovereign immunity bars relief against STATEs and their officers in both STATE and FEDERAL courts, and that certain suits for declaratory or injunctive relief against STATE officers must therefore be permitted if the Constitution is to remain the supreme law of the land”
        4. OUR FEDERALISM

“requires that Congress treat the STATEs in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation”

NO FEDERAL commandeering of STATE governments

“Although Congress may NOT require the legislative or executive branches of the STATEs to enact or administer FEDERAL regulatory programs” (Printz and New York), “it may require STATE courts of ‘adequate and appropriate’ jurisdiction” (Testa v. Katt) “‘to enforce FEDERAL prescriptions, insofar as those prescriptions relate to matters appropriate for the judicial power’” (Printz).

BUT it would be an “unprecedented step, however, to infer from the fact that Congress may declare FEDERAL law binding and enforceable in STATE courts the further principle that Congress’ authority to pursue FEDERAL objectives through STATE judiciaries exceeds not only its power to press other branches of the STATE into its service but even its control over the FEDERAL courts themselves”

Such an inference would stand contrary to McCulloch v. Maryland

Reciprocal FEDERAL immunity privilege in STATE courts

Concern for the STATE fisc

Concern for STATE policy administration

Argument from democracy

Concern for blurring the STATE judicial and political branches

* + - * 1. LIMITS to STATE immunity in STATE courts

SC unwilling to assume that STATEs will refuse to honor the Constitution or obey the binding laws of the U.S.

Consent to suit

Suits brought by the U.S.

14th AMENDMENT § 5

Immunity does NOT extend to STATE officials

Immunity does NOT extend to political subdivisions

* + - * 1. BALANCE: “principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of FEDERAL law and the separate sovereignty of the STATEs”
      1. NOTES on Alden, its Rationale, and Implications
         1. Historical and Textual Debate

BOTH Seminole and Alden analyze historical materials extensively

If majority’s historical analysis is correct, history points to a result difficult to support with any constitutional text, including the 10th and 11th AMENDMENTS

* + - * 1. Relevance of Precedent

Q: did the Alden majority deal fairly with the holdings and rationale of a number of decisions?

General Oil v. Crain (p. 1059).

Majority invokes this case for the proposition that where the Young doctrine allows a FEDERAL court action against a STATE officer to enjoin a constitutional violation, a STATE court must allow a similar remedy

BUT doesn’t the SC appear to say that the STATE courts must be open because the 11th AMENDMENT may preclude suit in FEDERAL court; and that if BOTH FEDERAL and STATE courts are closed to a claim of constitutional right, the impermissible result would be denial of a right?

Reich v. Collins (p. 1059)

Majority STATEs that the case stands ONLY for the proposition that when STATE law appears to provide a tax-refund remedy (and ONLY a refund remedy), the “Constitution itself” (i.e., the DUE PROCESS CLAUSE) requires the STATE to provide the remedy it has promised

BUT if a DUE PROCESS Q would be raised in such a case—at least where the imposition of the tax was challenged under FEDERAL law—why isn’t a comparable DUE PROCESS Q raised by the absence of any STATE remedy for the STATE’s failure to pay wages owing under the FEDERAL law

Nevada v. Hall (U.S. 1979) (p. 1060). Nothing in the FEDERAL Constitution requires one STATE to accord another immunity; consequently, a STATE has the same discretion that a sovereign nation would have in deciding whether to provide immunity in its courts to other sovereigns.

Alden DISTINGUISHES Hall on 2 grounds:

Deal with immunity of a STATE in the courts of another STATE, NOT in its own courts

Why can Congress NOT just authorize private damages actions against a STATE in the courts of a neighboring STATE?

“Our reluctance to find an implied constitutional limit on the power of the STATEs cannot be construed … to support an analogous reluctance to find implied constitutional limits on the power of the FEDERAL Government”

What about the supremacy of FEDERAL law?

Howlett v. Rose (p. 1060).

Majority DISTINGUISHES its reversal of a STATE court decision upholding a sovereign immunity defense by observing that the local school board Δ was NOT an agency of the STATE entitled to sovereign immunity in a FEDERAL court

Taken together with Crain, the clear import of this reasoning is that a STATE’s law of sovereign immunity is preempted in a STATE court ONLY when there is no need for a STATE court to vindicate a FEDERAL right because Congress may authorize suit in a FEDERAL court.

What theory of FEDERALISM would support this result?

* + - * 1. Disjunction Between STATE Sovereignty and STATE Sovereign Immunity

As a justification for a free-standing concept of STATE immunity, the majority in Seminole and (especially) in Alden relied in part on the notion that an unconsented suit against a STATE was an “affront” to its “dignity”

Became the mainstay of the SC’s reasoning in FMC v. South Carolina STATE Ports Auth (U.S. 2002) (p. 1061), holding that STATE sovereign immunity precluded a FEDERAL administrative agency from adjudicating a private party’s complaint against an unconsenting STATE

11th AMENDMENT “is but one particular exemplification” of STATE sovereign immunity

Assuming that the FMC was NOT exercising the “judicial power” conferred by ART. III, Hans presumption of immunity comes into play because FMC adjudications are the type of adjudications the Framers would have thought the STATE had immunity from when the agreed to enter the Union

Affront to dignity “does NOT lessen when an adjudication takes place in an administrative tribunal as opposed to an ART. III court”

Did NOT matter that FMC’s orders were NOT self-executing because of the many pressures on the STATE to appear and defend itself in the administrative proceedings

Administrative proceedings can threaten the STATE fisc in the same way as private judicial suits

* + - * 1. Discrimination Against Πs on the Basis of the Source of Law

Alden majority rejects what is described as a “waiver” argument that the STATE discriminated against the Alden Πs on the basis of the source of law on which they relied

NOTE: Maine did NOT dispute Π’s showing that is allowed suits to be brought against it by STATE employees for wage claims based on STATE law, BUT NOT on FEDERAL law

BUT: in Testa, a STATE’s courts were required to enforce the treble damage provisions of FEDERAL price control law, at the instance of a private Π, at least partly on the ground that “the same type of claim” arising under the STATE’s own law would be enforced by its courts

THINK: If the only significant distinction between the two classes of suits is the source of law on which the Π relies, what more needs to be shown to demonstrate discrimination?

* + - * 1. “Commandeering” of STATE Courts

Alden – the power to press a STATE’s courts into FEDERAL service to coerce other branches of the STATE “is the power … ultimately to commandeer the entire political machinery of the STATE against its will and at the behest of individuals”

THINK:

What about the dual function of courts of the STATEs and of the nation to enforce FEDERAL law against the STATE and its instrumentalities under the SUPREMACY CLAUSE?

Does the Alden holding call into Q the holding of Testa v. Katt?

* + - * 1. Burden on the STATE’s Treasury

THINK: what about the authority of the national government to impose certain financial obligations on STATEs and the authority to enforce that obligation through private suits for damages?

* + - * 1. SUMMARY of Alden Criticism:

SC’s steady expansion of STATE sovereign immunity threatens FEDERAL supremacy by significantly restricting the avenues for effective vindication of FEDERAL rights, both in general and with respect to the 14th AMENDMENT in particular

Q the logical coherence of the Alden and Seminole decisions in light of the SC’s continued adherence to the holding of Garcia, with respect to the broad power of Congress under the COMMERCE CLAUSE to impose substantive obligations on the STATEs

Failure to deal effectively with the Q of the relevance of Testa’s nondiscrimination principle

Fault with the majority’s view that immunity from suit is essential to the healthy operation and political accountability of STATE government

* + - * 1. SUMMARY of Alden Support:

Anomaly would result if FEDERAL rights could be enforced by private damages actions in STATE but not FEDERAL courts

Alden and Seminole represent a moderate path between complete deference to Congress (under Garcia, in their view) and substantial disempowerment of the national legislature (which they argue would result from the abandonment of the Garcia approach

* + - * 1. A 3rd Approach: take the decision as given and then explore the paths that may or may NOT be open to Congress and the Executive for the future enforcement of FEDERAL rights against the STATEs
  1. Statutory Protection Against Unlawful STATE Actions: §1983
     1. The Scope of Statutory Protection
        1. Monroe v. Pape (U.S. 1961) (p. 1072). An action under § 1983 is supplementary to a STATE remedies—STATE remedies need NOT be exhausted before the FEDERAL one is invoked.
           1. 3 main aims of §1983:

Overriding certain kinds of STATE laws

Providing a remedy where STATE law was inadequate

Providing a FEDERAL remedy where the STATE remedy, though adequate in theory, was NOT available in practice

“It is abundantly clear that one reason the legislation was passed was to afford a FEDERAL right in FEDERAL courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, STATE laws might NOT be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the FOURTEENTH AMENDMENT might be denied by the STATE agencies.”

* + - * 1. “under color of STATE” defined

“Misuse of power, possessed by virtue of STATE law and made possible only because the wrongdoer is clothed with the authority of STATE law, action taken ‘under color of’ STATE law.”

* + - * 1. ~~Municipal corporations are NOT liable under § 1983~~
      1. NOTES on § 1983
         1. § 1983 does NOT extend to conduct of FEDERAL officials

Right of action under Bivens instead

* + - * 1. 2 distinct, BUT overlapping propositions from Monroe:

§ 1983 creates a FEDERAL remedy, cognizable in FEDERAL court, against stat officials for violation of FEDERAL rights

That remedy is available even if the official conduct is wholly unauthorized under STATE law

* + - * 1. STATE Action and Private Conduct

To recover under § 1983 for a constitutional tort in violation of the 14th AMENDMENT, the Π must establish an injury resulting from unconstitutional “STATE action”

Lugar v. Edmonson Oil Co. (U.S. 1982) (p. 1080). In a suit against a STATE government official, the STATE action requirement is identical to § 1983’s requirement of conduct under color of STATE law—satisfying the former necessarily satisfies the latter.

American Mfrs. Mut. Ins. Co. v. Sullivan (U.S. 1999) (p. 1080). SC reiterated 2 elements of a § 1983 claim.

Π must show BOTH:

An alleged constitutional deprivation “caused by the exercise of some right or privilege created by the STATE or by a rule of conduct imposed by the STATE or by a person for whom the STATE is responsible AND

That the party charged with the deprivation [is] a person who may fairly be said to be a STATE actor

Brentwood Acad. v. Tennessee Secondary Sch. Athetic Ass’n (U.S. 2001) (p. 1081, n. 5). SC extended the “STATE actor” definition to include nominally private organizations exhibiting “pervasive entwinement” with the STATE

“Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards.”

* + - * 1. STATEs have concurrent jurisdiction in actions under § 1983
        2. Remedial and Procedural Doctrine in § 1983 Actions

Giving structure to § 1983

Establish a FEDERAL common law rule of decision that is designed to promote the statutory purposes

Borrow analogous rules of decisions of the applicable STATE (at least so long as those rules do NOT interfere with FEDERAL purposes)

Followed in selecting the appropriate statute of limitations and in deciding whether a § 1983 action survives if the Π dies during the lawsuit and executor is substituted

3rd possible approach (which the SC has NOT taken): Borrow analogous doctrines from other FEDERAL civil rights statutes

Normal preclusion doctrine applies to § 1983 actions

* + - * 1. ASYMMETRICAL SHIFTING: Attorney’s Fees

Despite statutory language of “discretion,” it has been established that § 1988…

Awards to Πs who prevail by settlement as well as judgment

Δs may NOT automatically recover whenever they prevail, BUT ONLY when the Π’s action was frivolous or vexatious

* + - * 1. § 1983 Remedy and FEDERAL HABEAS CORPUS

SC has effectively subordinated the § 1983 remedy to the writ of HHABEAS CORPUS when the remedies overlap (and to some extent, even when they don’t), holding that § 1983 may NOT be resorted to if the direct or indirect effect of granting relief would be to invalidate an existing STATE court conviction of the § 1983 Π

* + - 1. NOTES on § 1983 as a Remedy for the Violation of a FEDERAL Statute
         1. Maine v. Thiboutot (U.S. 1980) (p. 1093). § 1983 suits for violations of FEDERAL statutes are permissible

2 Qs:

Has the statute created a private right within the meaning of § 1983?

Has the scheme of remedies created by Congress implicitly excluded a private remedy under § 1983?

DG:

Has Congress intended to create a right for a particular class of individuals?

Did Congress in tend the right to be enforceable?

* + - * 1. Has Congress Created a Private Right?

Pennhurst (U.S. 1981) (p. 1094). A § 1983 class action complaining of conditions at a STATE hospital could NOT be maintained on the basis of alleged violations of a FEDERAL statute because the statute in Q die NOT confer any private rights enforceable under § 1983.

2 hard-to-reconcile decisions:

THE EXCEPTION: Wilder (U.S. 1990) (p. 1094). § 1983 permitted a suit by a health car provider who claimed that the STATE had failed to provide “reasonable and adequate” payments as required by FEDERAL law.

Suter (U.S. 1992) (p. 1094). A suit could NOT be brought under §1983 alleging that a STATE had failed to make the “reasonable efforts” required by FEDERAL law as a condition for reimbursement for foster care and adoption services.

Blessing v. Freestone (U.S. 1997) (p. 1094). Title IV-D does NOT create an across-the-board private right to enforce substantial STATE compliance with its provisions in all respects.

Remanded for consideration whether Title IV-D gave rise to “some individually enforceable rights”

Gonzaga University v. Doe (U.S. 2002) (p. 1094). § 1983 action for alleged unlawful disclosure of educational records was foreclosed because the relevant FERPA provisions created NO personal rights enforceable under § 1983.

§ 1983 *v.* Implied Rights of Action

Implied right of action Π must establish intent to create BOTH a private right AND a private remedy

“[O]ur implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983”

DG: there is a PRESUMPTION AGAINST implied rights of action

§ 1983 Π need only show an intent to create a private right

SC explicitly rejected “the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action under § 1983”

* + - * 1. Special Problem of the Application of §1983 to Preemption Claims

Golden STATE Transit Corp. v. City of Los Angeles (U.S. 1989) (p. 1095). SC upheld Golden STATE’s ability to sue under § 1983 for both injunctive and compensatory relief for interference with a FEDERALly protected bargaining relationship.

National Labor Relations Act “creates rights in labor and management both against one another and against the STATE”

Those rights area secured against STATE interference by the SUPREMACY CLAUSE

Availability of a § 1983 remedy “turns on whether the statute, by its terms or as interpreted, creates obligations ‘sufficiently specific and definite’ to be within ‘the competence of the judiciary to enforce,’ is intended to benefit the putative Π, and is NOT foreclose ‘by express provision or other specific evidence from the statute itself

Dennis v. Higgins (U.S. 1991) (p. 1096). A violation of the “dormant” COMMERCE CLAUSE is cognizable in an action under § 1983

* + - * 1. Statutory Supersession of the § 1983 Remedy

Middlesex (U.S. 1981) (p. 1096). When private rights have been created, Congress’ scheme of remedies can foreclose a § 1983 remedy

Wright (U.S. 1987) (p. 1097). § 1983 suit could go forward on the grounds that FEDERAL law created enforceable rights in the tenants AND that HUD’s power to audit its contract with the public housing authority and to cut off funds were insufficient to indicate congressional intent to foreclose enforcement under § 1983.

* + 1. Finding the Proper Δ
       1. SEE CASEBOOK

1. Judicial FEDERALism
   1. Statutory Limitations
      1. Kline v. Burke Construction Company (U.S. 1922) (p. 1142). The STATE or FEDERAL court that first acquires jurisdiction in an in rem case has exclusive authority to decide the dispute.
      2. NOTES on the Coordination of Overlapping STATE Court and FEDERAL Court Jurisdiction
         1. Accommodating Overlapping Jurisdiction – OPTIONS:
            1. Preclusion
            2. Priority to the suite first filed
            3. Best forum
      3. The ANTI-INJUNCTION ACT
         1. Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers (U.S. 1970) (p. 1148). Under § 2283 of the Anti-injunction Act, a FEDERAL court may NOT enjoin a STATE court proceeding unless the injunction is (1) expressly authorized by an Act of Congress, (2) necessary in aid of the court’s jurisdiction, or (3) to protect or effectuate the court’s judgment.
            1. Brotherhood tried to get the FEDERAL district court to decide that the STATE court judge was wrong in distinguishing the Jacksonville case—such an attempt to seek appellate review of a STATE court decision in a FEDERAL district court CANNOT be justified as necessary to protect of effectuate the 1967 order.
            2. Injunction NOT necessary to aid FEDERAL court’s jurisdiction because the STATE and FEDERAL courts had concurrent jurisdiction
         2. Mitchum v. Foster (U.S. 1972) (p. 1153). § 1983 is an “Act of Congress that comes within the “expressly authorized” exception of § 2283 the Anti-injunction Act so as t permit a FEDERAL court to grant an injunction to sate proceedings pending in a STATE court
            1. Criteria of an expressly authorized exception

A FEDERAL law need NOT contain an express reference to § 2283

A FEDERAL law need NOT express authorize an injunction of STATE court proceeding in order to qualify as an exception

An Act of Congress must have created a specific and uniquely FEDERAL right or remedy, enforceable in a FEDERAL court of equity, that could be frustrated if the FEDERAL court were NOT empowered to enjoin a STATE court proceeding

* + - * 1. § 1983 was part of a vast transformation of FEDERALISM
        2. Implied exceptions to § 2283:

“in rem” exception

“relitigation” exception

“superior FEDERAL interest” exception

* + - 1. NOTES on § 2283
         1. Inconsistent imperatives of § 2283

Atlantic Coast Line – stressing the independence of STATE legal systems

Mitchum – arguing that Reconstruction worked a “vast transformation” in the concepts of FEDERALISM and that FEDERAL jurisdiction is needed to protect FEDERAL rights that STATE courts may be unable or unwilling to protect

* + - * 1. Pre-1948 Exceptions

Res Exception

NO SC case has actually upheld an injunction against STATE proceedings on this basis

Several SC cases have sustained the power of FEDERAL courts to enjoin litigants from enforcing judgments fraudulently obtained in STATE courts

* + - * 1. Interpretive Approaches to § 2283

Leiter Minerals, Inc. v. United States (U.S. 1957) (p. 1161). SC recognized additional exception when the “United States … seeks a stay to prevent a threatened irreparable injury to a national interest.”

NLRB v. Nash-Finch Co. (U.S. 1971) (p. 1161). SC extended Leiter rationale to an application for an injunction by the NLRB.

* + - * 1. 3 Statutory Exceptions

“Expressly Authorized” by Congress

Scope of Mitchum

Significance of Mitchum, which holds § 1983 to be an expressly authorized exception to § 2283, plainly depends on the reach of the underlying § 1983 cause of action

Lugar v. Edmonson Oil (U.S. 1982) (p. 1161). Although “a private party’s mere invocation of STATE legal procedures” was NOT action under color of law, the ex parte attachment was and hence could be challenged under § 1983.

Issuance of a STATE court injunction surely constitutes action “under color of law”

Mitchum gave broad construction to “expressly authorized”

Vendo Co. v. Lektro-Vend Corp. (U.S. 1977) (p. 1162). LIMITING Mitchum: NO “expressly authorized” exception to §2283 because NO evidence that Congress “was concerned with the possibility that STATE-court proceedings would be used to violate the Sherman or Clayton Acts.

“In Aid of Its Jurisdiction”

2 primary objectives:

Res exception

To confirm the power of the FEDERAL courts to stay proceedings in STATE cases that have been removed

Richman Brothers (U.S.1955) (p. 1163). SC affirmed the district court’s refusal to issue an injunction: because NO statute authorized the union to file the FEDERAL court suit, the FEDERAL injunction was NOT ancillary to an independently-based, ongoing proceeding; and the SC refused to permit an injunction merely because STATE court jurisdiction has allegedly been preempted.

NOTE: Most lower courts have viewed this the refusal in this case as applying equally to protection of the FEDERAL court’s exclusive jurisdiction

BUT: existence of exclusive jurisdiction may be one relevant factor in determining whether a statue constitutes an “express” exception within the meaning of Mitchum

Class Action Litigation

Some courts and most commentators conclude that in most circumstances FEDERAL courts have NO authority to enjoin rival class actions under current law

Relitigation Exception

PURPOSE: permits a FEDERAL court to enjoin a STATE court to respect the preclusive effect of a FEDERAL judgment

Chick Kam Choo (U.S. 1988) (P. 1165). § 2283 did NOT preclude an injunction insofar as it barred relitigation of a STATE law claim, which the FEDERAL court had previously held to lack merit when it held that Singapore law applied

BUT the SC overturned the injunction insofar as it barred STATE court litigation of the claim based on the law of Singapore: because FEDERAL and STATE forum non conveniens law might differ, the STATE court would NOT necessarily be asked to relitigate the FEDERAL court’s forum non conveniens ruling; and (per Atlantic Coast Line) even if FEDERAL maritime law preempted the STATE’s application of its own forum non conveniens law, no injunction could issue on that basis because that preemption issue had NOT been decided by the FEDERAL court.

NOTE: merely because § 2283 permitted an injunction against the relitigation of the STATE claim did NOT mean that an injunction was required

Parsons Steel (U.S. 1986) (p. 1666). SC overturned an injunction against STATE court proceedings on claims that could have been raised as pendent claims in the prior FEDERAL action.

§ 1738 the FULL FAITH AND CREDIT statute generally requires a FEDERAL court to give a STATE court judgment the same effect that it would have under STATE law

§ 2283 was NOT an exception to § 1738

The relitigation exception was limited “to those situations in which the STATE court has NOT yet ruled on the merits of the res judicata issue. Once the STATE court has finally rejected a claim of res judicata, … FEDERAL courts must turn to STATE law to determine the preclusive effect of the STATE court’s decision.”

* + - * 1. Qs of Coverage

Meaning of “Proceedings”

Commencement of Proceedings

Young held § 2283 inapplicable to an injunction against criminal proceedings NOT yet instituted.

Lynch v. Household Finance Corp. (U.S. 1972) a prejudgment garnishment was NOT a “proceeding” in STATE court within the scope of § 2283, and hence could be enjoined by a FEDERAL court, even though the garnishment might be necessary to obtain satisfaction of any subsequent judgment obtained by the creditor.

Termination of Proceedings and Proceedings Against Different Parties

County of Imperial v. Munoz (U.S. 1980) (p. 1167). SC reversed a STATE court grant of preliminary injunctive relief, relying on Atlantic Coast Line in rejecting the view that that STATE court proceedings had terminated

Unless the FEDERAL Πs were “strangers,” the injunction they sough was barred by § 2283

NOTE: implication is that § 2283 does NOT apply when the STATE litigation involves different parties

DJ

Thikol Chem. Corp. v. Burlington Indus., Inc. (3rd Cir. 1971) (p. 1168). It would be proper to award a DJ as to the validity of a patent even though a parallel STATE proceeding involving the same patent could NOT be enjoined

“Normally, the policy that precludes FEDERAL injunctions … is also applied to prohibit declaratory judgments…. But if the STATE suite is likely to turn on a Q of FEDERAL law with which a FEDERAL court is likely to be more familiar and experienced that the STATE court, and if the STATE court … manifests willingness to hold its hand pending FEDERAL decision on that Q, we think it is neither necessary nor desirable to construe § 2283 as precluding the FEDERAL court from issuing a declaratory judgment on the common FEDERAL Q.”

* 1. Judicially-Developed Limitations: Abstention and Such
     1. Pullman Abstention and Related Doctrines
     2. Younger Abstention and the Doctrine of Equitable Restraint
        1. Basic Doctrine
        2. Complications
        3. Civil Actions