**Overview of the Federal System**

**Institutional Settlement** (Hart and Weschler; Hart and Sacks): Law should allocate decisions to the institutions best suited to decide them, and the system must respect the finality of a decision. Many Federal Courts doctrines carry out this principle.

**FEDERAL COURTS**

❒ Supreme Court ❒ Appellate Courts ❒ District Courts ❒ Art. I Judges & Adjuncts

**Supreme Court**

Art III, §1: *The Judicial Power of the United States, shall be vested in one Supreme Court … .*

Main decisions of the Constitutional Convention:

1. National judicial power would operate on the states and on individuals
2. **Madisonian Compromise:** Judicial power would vest in a Supreme Court, and Congress would have discretion to establish lower courts
3. The Federal judiciary would be independent of the other branches
4. Judicial power would be “judicial only,” but would include the power to review the constitutionality of legislation
5. The Supreme Court would exercise original and appellate jurisdiction

First Judiciary Act of 1789

❒ Establishes a supreme court (six justices), indicating that art. III is not self-executing

❒ **Original Jurisdiction:** Largely tracks the constitution (art. III, §1), *except—*

* States as parties: Explicitly excepts suits between a state and its citizens
* Ambassadors: Limits to suits *against* ambassadors to those consistent with the law of nations, and to suits brought by ambassadors, or in which a consul shall be a party.

❒ **Appellate Jurisdiction:** This *does not* run the full length of the Constitution—

* Dollar amount: Final judgments of circuit courts reviewable only if $2000+
* Criminal cases: No AJ in criminal cases, though *habeas* jurisdiction is conferred
* Review of State Court judgments: *Three cases*: (1) decision *against* the validity of a treaty or statute of the U.S.; (2) decision upholding the *validity of a state statute* under the constitution, treaties, or laws of the United States; (3) decision *against* any claim of right under the Constitution, treaties, or laws of the U.S.
* Writ of error: Allowed for review only on the face of the record

Modernization of the Court: In 1914, the discretionary writ of certiorari is introduced, and review of decisions upholding a claim of right is authorized. In 1988, Congress eliminated all appeals as of right, and made state court judgments reviewable only by writ of cert.

*Today*, this has led to rising disunity among districts, and a general reluctance to take cases from the states.

**Circuit Courts:** Originally established with appellate and original jurisdiction—

❒ District Courts were reviewed on writ of error in civil cases

❒ Admiralty and maritime cases were reviewed on appeal

🕱 Both were subject to amount in controversy requirements.

❒ Federal crimes: Circuit Courts had exclusive original jurisdiction

The Evarts Act of 1891 changed this structure, and the Judicial Code of 1948 changed the name.

**District Courts:** Originally these had only diversity jurisdiction. The Act of 1789 did not create general federal question jurisdiction, nor did it provide for suits against the U.S.

**Article I Judges and Adjuncts to Article III Courts**

*Article I Judges*: ❒ D.C. Courts ❒ Territories ❒ Tax Court

 ❒ Federal Claims ❒ Military courts ❒ ALJs

*Adjuncts*: ❒ Magistrate judges (appointed by district courts for eight-year terms, and may try jury/non-jury trials with parties’ consent)

 ❒ Bankruptcy judges (appointed by court of appeals for 14 years)

**The Nature of the Judicial Power** (*Marbury v. Madison*)

**INHERENT POWER**

*“It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.*”

*Marbury* thus depends on a notion of inherent authority that is not in the constitution. We might say that this allows Marshall to reach and decide the constitutional question, despite the fact that: (1) the constitution was susceptible of alternate readings;[[1]](#footnote-1) and (2) the statute was ambiguous enough to decide this case on the grounds of statutory interpretation.

Chemerinsky argues that this provides the basis for the understanding that the Court is empowered to decide the meaning of the Constitution. This is suspect. *Marbury* could also support the view that each branch decides the meaning of the Constitution within its own competence, or the idea that the Constitution is subject to interpretation and contestation.

**HOLDING:** Congress may not go outside the boundaries of Article III, nor may it reapportion constitutional jurisdiction. *If Congress cannot do this, it limits the power to create citizen suits*.

**Article III and the Courts:** Advisory Opinions

**BASIC RULE:** Article III courts are not permitted to issue advisory opinions. It is not clear what the ban on advisory opinions is or how far it extends. *Basic Principles—*

❒ Ban on non-judicial activity (*Heyburn’s case*) ❒ Finality/no revision (*Heyburn’s case*)

❒ Requirement of adversity (*Muskrat*) ❒ Case or controversy (Article III; *Marbury*)

**HEYBURN’S CASE** (U.S. 1792)

*Proposition*: There are some assignments that cannot be given to the courts as institutions, but that may be voluntarily assumed by judges as individuals. *Two main principles—*

❒ **Non-Judicial Activity** (NY letter): *Neither the legislative nor the executive branches, can constitutionally assign to the judicial any duties, but such as are properly judicial*.

❒ **Finality** (NY letter):The power established here is not judicial, because it is explicitly subject to executive and legislative revision. Recall the principle of **institutional settlement**.

❒ **Commissioners:** The NY justices consent to being appointed as commissioners, which are more in the orbit of Article I than Article III. Penn. judges are more cautious.

❒ **Judicial Review** (NY letter): *It is the duty of each [branch] to abstain from, and to oppose, encroachments.*

❒ **Avoidance:** The NY judges choose to interpret the act as appointing commissioners.

❒ **Judicial Power** (Penn.): *This act is not of a judicial nature*. It seems the judges are worried that mere fact-finding, and not the disposition of cases, is non-judicial.

❒ **Separation of Powers:** The Penn. judges' letter seems to indicate a feeling that the president, under the “take care” clause, is superintending the constitution.

**CORRESPONDENCE OF THE JUSTICES**

*Two principles*—

❒ **Case and Controversy:** Jay links advisory opinions with the case and controversy clause, establishing that the prohibition on advisory opinions is constitutionally based.

“Moreover, the Court has made clear that the Case-or-Controversy Clause helps to implement the more general principle of **separation of powers** by keeping the courts from addressing problems in the absence of a specific, limited conflict,” as legislatures do (Doernberg).

❒ **Court of last resort**

**MUSKRAT v. U.S.** (U.S. 1911)

*Holding*: The parties here are not adverse, and the congressional law authorizing suit is essentially an authorization for an advisory opinion, in violation of the **case and controversy** requirement. The fact that the parties had also instituted suit in D.C. Court does not change things, but does indicate that the problems of this case could be solved by switching the parties or the forum.

**Article III and the Courts:** Standing

*In limiting the judicial power to “Cases” and “Controversies,” Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official action. (Summers).*

**BASIC RULE** (*see Allen v. Wright*):

*Constitutional*: ❒ Injury in fact ❒ Fairly traceable ❒ Redressability

Note that our **conception of the constitution** affects not only the injury in fact, but also redressability and causation.

*Prudential*: ❒ Generalized grievance ❒ Third-party rights ❒ Zone of interest

**INJURY IN FACT**

❒ “distinct and palpable” (*Allen*) 🕱 Not abstract, hypothetical, conjectural (*Allen*; *Summers*)

❒ Logical nexus between status/injury and some conception of a right (*Richardson*; *Akins*)

In *Richardson*, the court found no such nexus between the status of a taxpayer and Congress’s failure to report CIA expenditures. In *Akin* the court said it was sufficient that the plaintiffs wanted PAC information to help them and others evaluate candidates for office. The distinction is that the info here **will** affect the vote.

❒ Imminence requirement (*Lyons*; *Summers*)

In *Lyons*, the court barred injunctive relief against a chokehold policy, reasoning that it was **no more than conjecture** that the plaintiff would be put in another such hold. In *Summers*, the Court was put off by the lack of certainty that any particular plaintiff would “stumble across” the projects in question, as well as the fact that government action was discretionary. It rejected Breyer’s *realistic likelihood* standard.

❒ Assignees (*Sprint*) (*see below*) ❒ Procedural injury *plus* concrete interest (*Summers*)

❒ Organizational standing may exist where specific members are identified (*NAACP v. Ala.*)

❒ *Stigmatic injury* (*Allen*): This can work only if the plaintiffs were *actually denied* a benefit.[[2]](#footnote-2)

❒ It remains an open question whether increased risk as a result of government action

🕱 Requesting that government comply with the law (*Allen*) 🕱 Review official axn (*Lyons*)

**TRACEABILITY**

❒ *Allen* requires strong links in the chain of causation

“Only if withdrawal … would make an appreciable difference” in respondents’ communities. In dissent, Brennan tries to argue that this should be a **question of fact**. The question of causation should be limited to a **pleading standard**.

❒ *Allen* also draws on a theory of separation of powers (FN 26): action should not be “fairly traceable” if it involves the interaction of a government policy with a host of **private actors**.

This is where Stevens’ dissent gets off. He argues, first, that causation can be found by common sense, and, second, that concerns about the “prerogatives of other branches” should not be imported into standing.

**REDRESSABILITY**

🕱 Third parties: *Allen* and others indicate that reliance on actions of third parties undermines redressability. But then how is *Akins* (voter standing) explained?

🕱 Dispatch: SoP principle that government should enjoy wide latitude in dispatch of its duties

❒ Logical nexus: Though this is said to be an injury theory, it provides the pathway for thinking about redressability and tracability. It substitutes for more cabined notions in *Akins*.

**GENERALIZED GRIEVANCES**

***Vindicating the public interest is the function of Congress and the Chief Executive*** (*Lujan*).

*This doctrine remains of ambiguous constitutional or prudential status* (*Akins*). *But even if it is constitutional, Congress may be able to create new substantive rights, and thus define new injuries in fact. But the congressionally created right of action might still need to be accompanied by an individualized injury.* (*Lujan*). ***Very unclear****.*

❒ Citizen suits: Might still need individualized injury (*Lujan*).

❒ Voter standing: Claims “directly related to voting are sufficiently concrete (*Akins*)

**ZONE OF INTEREST**

❒ Explicit congressional authorization (*Akins*)

**SPECIAL ISSUES: PLEADING**

*“The court has an independent obligation to ensure standing exists, regardless of whether it is challenged by any of the parties*.” (*Summers*). The court may be importing an *Iqbal*-style plausibility standard into reading the record, and it may require a *de novo* look, at least with **organizational** standing.

**SPECIAL ISSUES: TAXPAYER STANDING**

🕱 No standing to challenge the constitutionality of federal expenditures (*Frothingham*)

❒ Standing to challenge violations of taxing power itself (*Flast*) *if—*

❒ Challenging Congressional action under article I, §8, taxing clause

❒ Challenged tax exceeds specific constitutional limitations (e.g., Establishment Clause)

❒ Formal allocation of funds to surpass those limits (*Hein* plurality)

**SPECIAL ISSUES: STATE LAW AND STANDING**

❒ Court may take a defendant’s appeal from state court where plaintiff would not have had standing in a federal court (*ASARCO*).

🕱 The reverse is probably not true—if plaintiff appealed, court would have found no standing

These types of cases present a problem for the court. The court could have denied cert, allowing the state judgment to stand, or it could have dismissed the case after granting cert. These approaches would have left a cloud on the title, as the judgment quieting title would have been unreviewable in federal courts and thus have unclear *res judicata* effect. Or the Court could have vacated the judgment below, but this would in effect impose article III requirements on state courts if they want their judgments to hold up. This might be possible under the supremacy clause, and it would **prevent the precedential effect of federal judgments from being hijacked by state courts**, but it would **preclude experimentalism**.

**SPECIAL ISSUES: STATE SOVEREIGNTY AND PROP 8**

*Perry v. Schwarzenegger*: The government declined to appeal an adverse judgment in the Proposition 8 case. The proponents of the referendum intervened, and the Ninth Circuit focused on the question of their standing to carry the case alone. **Standing to defend an appeal must be demonstrated**. The court certified: (1) whether the proponents have a *personal injury* because of **state-created authority**; or (2) whether proponents essentially **are official representatives of the state** (but see *Heyburn’s case* on *ex officio* claims). (These might be a single question if the issue is the delegation of sovereignty.) The question of redressability becomes one regarding the proponents’ ability to give plaintiffs’ relief they seek, but remember that the proponents here have been given the authority to engage in extra-legislative lawmaking. Another question: can the state delegate authority to defend an unconstitutional provision (*cf. Ex Parte Young*)?

**STANDING—THEORY AND JUSTIFICATIONS**

* **Courts as a “last resort”:** This is a particularly strong theory of separation of powers (*see Vander Jagt v. O’Neill* (Bork, J., concurring)). The courts constitute an “unelected, unrepresentative judiciary,” and should be resorted to only when adjudication is “consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.” (*Allen*). Disputes that are too “vague” or “attenuated” are best to be resolved elsewhere. This idea hooks up with the justifications against advisory opinions.
	+ **Latitude:** “Government has traditionally been granted the widest latitude in the ‘dispatch of its own internal affairs.’” (*Allen v. Wright*).
	+ *Allen* and other cases emphasize the take care clause, noting that it is generally the president’s job to ensure the public interest, and that neither Congress nor the Courts should tread lightly in encroaching on this duty (*Lujan*).
* **Adversity:** The parties should have the requisite incentives to develop the record. (*Sprint*; *cf. Muskrat*)
	+ **Plaintiff’s stake:** “The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement.” (*Allen v. Wright*). Stevens, dissenting in that case, argues that this is the justification for standing, exclusive of broader separation of powers concerns.

**STRETCHING THE LIMITS: STANDING IN PRIVATE RIGHTS**

In the *Sprint* case, the Court (rather unhelpfully, HH argues) imports standing discussions into the private-law context. This is the case concerning assignees pressing contract claims. The court finds that telecommunications “aggregators” may pursue the claims. *Theories—*

❒ **Adversity:** The aggregators, though not paid per recovery, have a strong *reputational* interest in pursuing the claims and fully developing the record.

❒ **Separation of Powers:** These common-law claims actually operate within the orbit of a federal regulatory scheme. Perhaps the court is properly respecting SoP by working in tandem with a system of regulation. (*Does this threaten the last resort idea?*)

**Article III and Congress:** Appellate Jurisdiction of S. Ct.

*[T]he supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make*. (Art. III, §2, cl. 2).[[3]](#footnote-3)

**BASIC RULE:**

❒ Clear Statement: Look at the language of the statute to determine whether Congress really intended an ouster of jurisdiction (*Ex Parte McCardle*; *Ex Parte Yerger*).

❒ Exigent Circumstances: The Court in *McCardle* upheld the repeal of *habeas corpus* in light of “imperious public exigency.” (*Yerger*).

❒ Alternative Remedies: Reading *McCardle* and *Yerger* together, some have argued that Congress may withdraw jurisdiction if and only if it leaves some alternative pathway to relief available. **But note that this may be peculiar to *habeas corpus*** (*external limit?*).

🕱 Rules of Decision: Prescribing “arbitrary rules of decision” crosses the line. *Elements—*

❒ Invasion of ind. judgment ❒ Separation of powers ❒ [Congressional intent?]

In *Klein*, Congress directed the particular weight to be given to certain evidence, and provided that proof of any pardon in which the claimant admitted taking part in the rebellion would automatically lead to dismissal. The Court said that congress impermissibly prescribed an **arbitrary rule of decision**, as opposed to simply allowing the Court to apply its ordinary rules to **new circumstances** (*Wheeling Bridge*). Note also the difference with *McCardle—*that case only imposed a dismissal; *Klein* would have required *reversal*. Thus, in the first case, the court would have retained some **judicial independence**.

**EXTERNAL LIMITATIONS ON WITHDRAWAL**

Do the Bill of Rights and other provisions provide a check on the Exceptions power of Congress?

* **Conception of Rights:** The extent to which one views a right as being “burdened” by the restriction of jurisdiction will depend on how one understands the constitutional right.
* **Powers:** Some, like Gunther, argue that a withdrawal might simply be Congress deciding on the most appropriate forum for settling certain disputes.
* **State behavior:** Will state court control lead to more restrictive results?

**THEORIES OF WITHDRAWAL**

* L. Ratner: “[S]ome avenue must remain open to permit ultimate resolution by the Supreme Court of persistent conflicts between state and federal law or in the interpretation of federal law by lower courts.” Congress cannot undermine these *essential functions*.
	+ This is important for the **supremacy clause**. It’s possible that supremacy and uniformity could have been achieved without appellate jurisdiction, but not today.
	+ Withdrawal of appellate jurisdiction gives states the green light to go below the constitutional floor.
* G. Gunther: The argument confuses the familiar with the necessary. The early Judiciary Act seemed more concerned with supremacy than uniformity. Moreover, the concern with separation of powers is matched by a concern with checks and balances. Congressional control is one check on the courts.

**Article III and Congress:** Lower Federal Courts

*The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.* (Art. III, §1).

**BASIC RULE**

*Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies.* (*Sheldon v. Sill*). *Any limitations—*

*Prudential*: ❒ Courts tend to avoid the constitutional question (*e.g.*, *Oestereich*).

*Internal*: ❒ State courts aren’t open? (not clear, but the courts are open in *Sheldon*)

 ❒ Constitutional/statutory claim? (*Sheldon* was diversity—common law)

 ❒ Congress cannot force the courts to reopen final judgments (*Plaut*)[[4]](#footnote-4)

*External*: ❒ Due process and deprivation of property rights (*Battaglia* (read broadly))

**SPECIAL ISSUES: LIMITATIONS ON REMEDIES**

*Lauf v. E.G. Shiner*: Statute that allowed courts to grant inunctions only on specific findings is upheld on the *Sheldon v. Sill* principle. *Possible limitations to this holding—*

❒ Inherent authority: Why is it not in the nature of the judicial power to craft remedies?

❒ Rules of Decision: This encroaches upon *Klein*—Congress can’t prescribe a rule of decision

❒ Due Process/Property (*cf. Battaglia*).

 **THEORIES OF LOWER FEDERAL COURTS**

❒ Constitutional Requirement: Justice Story expresses the view that Article III requires that Congress vest the *whole* of the judicial power (original or appellate) in some federal court. (*Hunter’s Lessee*). He emphasizes the term “shall,” in harmony with Articles I & II.[[5]](#footnote-5)

❒ Congressional Discretion: “Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies.” (*Sheldon v. Sill*). *Salient points—*

❒ Non-Retrogression: Theodore Eisenberg argues that the courts may not have originally been required to create the lower federal courts, but they cannot abolish them now. The Founders must have originally presumed that appellate review by the Supreme Court would provide the needed redress. The existence of discretionary review today necessitates the continued existence of lower federal courts. *Problems—*

❒ Not supported by early statutes ❒ Threatens the constitutionality of certiorari

❒ Appellate review of what? What about article I courts?

**Article III and Congress:** Legislative Courts

*The Congress shall have Power … to constitute tribunals inferior to the supreme Court.* (Art. I, §8, cl. 9). *The judicial Power of the United States, shall be vested in one Supreme Court and in such inferior courts, as Congress may from time to time ordain and establish.* (Art. III, §1).

**MODERN TEST** (*CFTC v. Schor*): *Consider the following—*

*Basic test*: Balance Article I necessities with Article III values. Consider individual liberty, which may be obviated by consent of the litigant.

❒ Reservation of the essential attributes of judicial power in Article III courts. *Consider—*

❒ Fact-finding ❒ Law declaring ❒ Law enforcement ❒ Independent oversight

❒ Financial or political independence?

This can be problematized very easily. *Crowell* demonstrates that agencies can be conclusive fact-finders, and *Chevron* affords great deference to agencies as lawmakers/law-declarers. It’s clear that the existence of some kind of review is important, and the standards for review cannot be too strict. (*cf.* **adjunct theory**).

❒ Exercise of Article III power by the Article I court. *Consider—*

❒ Continued availability of federal courts

❒ Standard of review in federal courts (“weight of the evidence” in *Schor* & *Crowell*)

❒ *De novo* review ❒ Bindingness of judgment (*Northern Pipeline*)

❒ Origin and importance of the right (*e.g.*, common law, admiralty)

❒ Private, common law rights generally get **searching review** when assigned to LCs

❒ Assignment of a “narrow class of common law claims” as adjunct to an undisputed Article I function is OK (*Schor*)

❒ Congressional purpose

❒ Legislative aggrandizement: Private adjudications of little political significance” do not pose a problem of separation of powers; the concern is that of legislative self-aggrandizement relative to the court system.[[6]](#footnote-6)

🕱 Consent: The court in *Schor* says that consent cannot be dispositive, but it does spend a long time discussing the fact that the party consented.

**EXTERNAL CONSTRAINTS**

❒ Seventh Amendment (*Granfinanciera*): The question “whether Article III allows Congress to assign its adjudication to a tribunal that does not employ juries as factfinders **requires the same answer** as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal.” Thus, a common-law claim at *law* (not equity) requires a jury trial under the Seventh Amendment, and may not be assigned. Parallel statutory claims may be so assigned, but only if they involve **public rights**.

❒ Other limitations? *E.g.,* due process, equal protection.

**CATEGORICAL APPROACH** (*Northern Pipeline* (pl.)): *Must fit into one of these categories—*

❒ Territorial courts (art. IV, §3, cl. 2)

Congress has *exclusive* power to regulate the territories. Territorial courts are “created in virtue of the general right of **sovereignty** which exists in the government, or which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States.” *Canter*. This certainly takes care of the federalism concern, but isn’t Congress bound by the constitution, including art. III?

❒ Courts martial (art. I, §8, cls. 13–14)

This is “historically understood as giving the political Branches … **extraordinary control** over the **precise** subject matter at issue.” (*Northern Pipeline* plurality).

❒ Public rights (*Murray’s Lessee[[7]](#footnote-7)*) (*see also Thomas* (common-law private claims))

These are generally disputes between private parties and the government—**statutory entitlements and interests**. Because Congress created these rights, it can attach whatever procedures it wants. This is connected to the doctrine of **sovereign immunity**. Note that this area of *jurisdiction* doctrine is radically at odds with the due process revolution, the high-water mark of which is *Goldberg v. Kelly*.

❒ Private suits so closely integrated into a public regulatory scheme (*Thomas*). *Consider—*

❒ Complex regulatory scheme ❒ Consent (*why would this matter?*)

❒ Possible scheme for U.S. to be a party ❒ Article III review is available

🕱 Expediency is *not* a ground (Brennan plurality opinion) (But this *best explains* everything!)

 **SEPARATION OF POWERS & LEG. COURTS—IDEAS AND THEORIES**

* Subject matter: Justice White argues that there is *no difference* in principle between what can be assigned to an Article I court and an Article III court. This draws on insights from Harlan and Vinson. But what about **agency capture**?
* Adjunct theory: Locates agencies under the umbrella of Article III, and is based on a concept of **supervision**. The adjunct must preserve “essential attributes of judicial power.”

**MAGISTRATE JUDGES AS ADJUNCTS**

Federal magistrates serve a fixed term of four or eight years, they are subject to removal by the district’s judges, and their salaries may be reduced by Congress. (*Raddatz* upheld this scheme).

*Powers in absence of parties’ consent—*

❒ Hold evidentiary hearings and make recs on dispositive motions, *de novo* review

❒ Hold hearings and determine non-dispositive motions, with clear error review

🕱 Cannot engage in jury selection over defendant’s objection

*Powers with parties “consent”[[8]](#footnote-8)*

❒ Conduct all proceedings (civil) and order judgment ❒ Jury selection (*Peretz*)

*Theories of consent—why is this acceptable* (*Pacemaker Diagnostic*; *Peretz*)

❒ Right to Article III judges: May be waived if not asserted by litigants

❒ Separation of Powers: Courts engage in “substantial control” over the system (**adj. theory**)

**Federal Question Jurisdiction:** Constitutional Test

*The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority*. (Art. III, §2, cl.1).

**BASIC PROCESS**

❒ Interpret the statutory grant of jurisdiction

❒ Generally, clear statement is the rule in Federal Courts doctrine. *BUT—*

❒ “Sue and be sued”: Grants jx if and only if it mentions federal courts (*Am. Red Cross*)

It’s generally pretty unclear how “sue and be sued” is anything more than a grant of capacity/personality. The *American Red Cross* reading (a 5-4 decision) is based on similar reasoning from *Osborne*. See 234ff.

❒ Determine the constitutionality of jurisdiction.[[9]](#footnote-9) *The Osborn tests—*

❒ Any question (*broad*): Jurisdiction to the “full extent of the constitution, laws, and treaties of the United States, when **any question respecting them** shall assume such a form that the judicial power is capable of acting on it.”

❒ Disposition (*narrow*): “the title or right set up by the party, may be **defeated by one construction** … and **sustained** by the opposite….”

*Verlinden* uses this test. The case of Foreign Sovereign Immunity did not merely involve a speculative possibility of FQ. “By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide … whether and under what circumstances foreign nations should be amenable to suit.” This must be **considered by the court in *every case***, like *Osborn*.

❒ Ingredient (*inchoate questions?*): “when a question to which the judicial power of the Union is extended by the constitution, forms an **ingredient of the original cause**.”[[10]](#footnote-10)

*Marshall’s theory of co-extensive power*: “All governments which are not extremely defective in their organization must possess, within themselves the means of expounding as well as enforcing their own laws.” (*Osborn*). Some scholars associate this with the broad test

**ARTICLE I POWERS & ARTICLE III** (*Lincoln Mills*): *Many approaches—*

❒ Substantive rules of decision: Douglas holds that §301 directs courts to fashion substantive rules of decision (*federal common law*), “absorbing” state law if necessary. This is consistent with Wyzanski’s view of §301, that state law would become federalized.

❒ Inherent power: §301 creates jurisdiction, and the court has inherent power to fashion remedies (Harlan and Burton, concurring)

❒ Protective Jx 1.0: Congress can grant jx to create federal common law to the extent it has Article I power to legislate (*see Tidewater* plurality). FF: all we have is diversity jx.

❒ Protective Jx 2.0 (Mishkin): Congressional power under Article I, *plus*—

❒ “articulated and active federal policy” (Mishkin)

❒ federal policy plus “federal rights existing in the interstices of actions” (Frankfurter)

**Federal Question Jurisdiction:** The Statutory Test

*The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States*. (18 U.S.C. §1331).

**MAIN ISSUES:** ❒ Placement ❒ Substantiality

**PLACEMENT OF THE FEDERAL ISSUE**

Well-Pleased Complaint (*Mottley*): The federal issue must be on the face of a well-pleaded complaint that sufficiently alleges all claims, elements, etc. *Not—*

🕱 Affirmative defenses 🕱 Counterclaims 🕱 Responses to affirmative defenses

*Mottley* could also stand for the proposition that where we have a state cause of action, plus a federal element, we have statutory federal question jurisdiction. This has not remained stable in light of the substantiality cases.

*Plaintiff Omits a Federal Claim from the Complaint: Two theories—*

❒ Master of the claim (*Caterpillar* (LMRA)): Plaintiff can elect to plead state claims[[11]](#footnote-11)

🕱 Preemption (*Avco*; *Met Life v. Taylor*; *Beneficial Nat’l Bank*): If Congress has completely preempted state law (*e.g.* ERISA), the effort to plead a state claim is unavailing.

**SUBSTANTIALITY:** (AWW 🡪 Smith 🡪 Moore 🡪 Gully 🡪 ~~Dow~~ 🡪 Grable 🡪 Empire)

*Grable test*: ❒ State law claim ❒ Necessarily raises federal issue ❒ Actually disputed

 ❒ Substantial ❒ W/o upsetting (fed-state) balance of responsibilities

When is a federal issue disputed and substantial? *Empire Healthchoice factors—*

❒ Federal gov. action (*notice*) ❒ Interp. of federal law, not fact (*inst. settlement*)

❒ Effect on federal docket (*Empire* would have led to a groundswell of cases covered by state law)

❒ Fiscal impact (*Grable* (taxes)) ❒ “Clear” statements by Congress (*Dow*; *Empire*)

*Bright-line cases* (*may still have inclusionary value*)*—*

❒ Federal cause of action required (*American Well Works*)

❒ Where complaint alleges violation of a statute (passes *Mottley*), the court will require a private, federal cause of action—must be “independently enforceable.” (*Merrill-Dow*).

*Contextual cases—*

❒ *Smith v. Kansas City Title & Trust*: *Two elements—*

❒ Right to relief turns upon the construction or application of federal law

❒ Federal claim is “not merely colorable, and rests upon a reasonable foundation.”

❒ Federal issue must be really and substantially in dispute (*Gully*) (not helpful)

❒ Consider the *importance* of the *nature* of the federal interest at stake (*Merrill Dow*, n.12)

❒ Issue is substantial when it implicates federal interests (*Merrill-Dow*, Brennan dissent)

*Problem holdings—*

❒ At least some federal rule of decision is required (reading *Shoshone*) (this is an outlier case)

❒ Federal issue is not substantial if it implicates only state concerns (one way to read *Moore*)[[12]](#footnote-12)

**Federal Question Jurisdiction:** Special Problems in Statutory Jx

*Each of these problem areas concern the location of the federal issue* (*e.g.*, *Mottley*)*.*

**DECLARATORY JUDGMENTS**

*Basic principle*: The Declaratory Judgment Act did not alter jurisdiction.[[13]](#footnote-13) *Look through*.

❒ View underlying coercive case to determine whether a FQ exists under *Mottley* (*Skelly*).

❒ Note that there may be hypothetical actions belonging to *defendant* (*E. Edelman*)

❒ Consider authorizing statute to determine whether plaintiff could bring suit (*Finance Tax Board* (an ERISA issue)).[[14]](#footnote-14) (*This helps select between multiple hypothetical coercive cases*).

The rationale in *FTB* looks to the grant of ability to bring claims in ERISA itself. Only the *beneficiaries* (and participants/fiduciaries) would be able to do so. This leaves the door open for beneficiaries to bring suit.

**ARBITRATION**

*Basic rule*: Look through the arbitration complaint to determine whether there would be federal jurisdiction of the underlying controversy (*Vaden*).

*Federal Arbitration Act*: “any U.S. district court which … would have jurisdiction … in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties.” *Two interpretations—*

❒ Requires looking through to the entire suit related to the sought arbitration (*Vaden*)

❒ Requires looking only to the portion for which arbitration is sought (*Vaden*, Roberts dissent)

In this case, the majority’s reading is actually **less permissive**. Discover had sued, a state action, and Vaden counterclaimed with “federalized” claims. By looking to the entire suit, as it stood, the case would not satisfy *Mottley*. The dissent said this privileged the order in which the claimants filed. Ginsburg: that’s nothing new.

*Growing uneasiness with* Mottley? *Consider Roberts’ dissent* (*Varden*)—

❒ Uneasiness with sequence ❒ Emphasis that federal law would govern the substance

**COMPLETE PREEMPTION—AN EXCEPTION [OR COROLLARY] TO *MOTTLEY***

*Basic rule*: Where complete preemption exists, Court assumes federal claim on WPC. This is not an affirmative defense, but transforms the action.

*Four-step test* (*e.g.*, *Beneficial*)*—*

❒ Consider preemptive force of the statutory text (*Avco* (LMRA §301 was “so total”))

❒ Consider Congressional intent to preempt completely (*MetLife*; *Beneficial National Bank*)

❒ Did Congress intend to provide an exclusive cause of action (*Beneficial*)?

🕱 Simple preemption, without more, does not constitute complete preemption (*FTB*)

**Federal Common Law:** Applicable Law and Content

*“Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.”* (*Erie Railroad v. Tompkins*)

**GENERAL INQUIRY**:

❒ Constitutional competence (*congress/court*)? ❒ Need for uniformity? ❒ Content?

**Justice Friendly’s types of Federal Common Law** (*In Praise of Erie,* 1964)—

❒ Spontaneous Generation in cases of government contracts or interstate commerce

❒ Implication of a right of action to enforce law that specified different or no sanctions

❒ Construing a jurisdictional statute as a command to fashion federal law

❒ Filling in statutory interstices (*e.g.*, statute of limitations, finding burden of proof)

**QUESTION 1: FEDERAL COMPETENCE**

❒ Rights of the U.S. arising under federal programs (*Kimbell Foods* (SBA; FHA); *Clearfield Trust*)

*Clearfield Trust*: *“When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power.”* (referring to issuance of paper by U.S.)

❒ Even where U.S. is not a party where a federal program/act creates a right (*Yazell*)

❒ International law (*Sabbatino*) (this displaces state regulation in the absence of any federal statute)

❒ Other uniquely federal enclaves (*Boyle* (disputed in Brennan dissent))

Scalia gets through this door in *Boyle* by finding that cases against government contractors would have an impact on federal procurement—it would have a significant **financial effect** on the U.S. Brennan argues that the failure to pass similar bills on contractor immunity indicates that **Congress has no interest** in the area.

**QUESTION 2: FEDERAL INTEREST** **& UNIFORMITY**

❒ Potential for **significant conflict** with federal interests (*Kimbell Foods*; *Boyle*)

In *Boyle*, Scalia says he needs more than financial interest to get past this second hurdle. He argues that the FTCA indicates a need for **discretionary space** on the part of regulators. This gets him past step 2.

❒ Vast scale and frequency of federal involvement in the area (*Clearfield*)

❒ It is necessary for uniform federal law to govern foreign relations (*Sabbatino*)

🕱 Where U.S. is not a party, the court is less likely to find a need (*Parnell*; *Agent Orange*)

*Don’t take this too far.* The court held that state law applied to a dispute with respect to the question of who has the burden of showing good faith. The court said that *Clearfield* would control if this were about questions related to the nature of the federally issued bonds that were at stake in the case. (*Unclear*).

🕱 Where government could have removed onerous state law by contract (*Yazell* (SBA loan))

🕱 Solicitude for state interests (*Yazell* (especially in domain of the family))

🕱 Fed interests are on both sides, and neither maps clearly onto uniformity (*Agent Orange*)

🕱 Do not balance state interests against federal (*Clearfield Trust*)

**QUESTION 3: CREATING CONTENT**

Court may “adopt” the state rule or fashion a general rule (*Kimbell Foods*). *Consider—*

❒ Must the federal program be “uniform in character” (also asked in step 2)?

❒ Will using state law frustrate the federal purpose?

❒ Will fed. law disrupt commercial transactions predicated on state law (*context-sensitive*)?

*Sources—*

❒ Federal law merchant[[15]](#footnote-15) (*Clearfield Trust*) ❒ Customary int’l law (*Sabbatino*)

❒ Analogy to inapplicable statutes, or straight-up lawmaking (*Boyle*)

**SPECIAL PROBLEMS—ADOPTION OF STATE LAW**

*Yazell* points to the consequences of ambiguity in the decision to use state law. The court may find a federal enclave but decide to use state law. (*Lincoln Mills*). Or state law may apply by its own force. **This has jurisdictional consequences**.

**SPECIAL PROBLEMS—PROTECTIVE FEDERAL COMMON LAW**

*Sabbatino* and *Boyle* find the court creating substantive rules of federal common law in absence of any particular federal statute on point. Indeed, in *Boyle*, such a statute had failed to have been passed. This indicates that, where the federal interest is strong (*or perhaps exclusive*) the court crafts substantive rules to protect it. However, there is one difference: *Sabbatino* draws on existing principles of international law, whereas *Boyle* makes stuff up.

**A NEW TEST? *BOYLE* AND THE RECONSIDERATION OF FCL**

❒ Competence: Where there is a federal interest at stake

❒ Conflict: Where a unique federal purpose is in significant conflict with state law, you may draft FCL. Otherwise, assume state law applies.

**Federal Common Law:** Implying Private Rights of Action

*The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury*. (*Marbury v. Madison* (quoted in *Bivens*)). *Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief*. (*Bell v. Hood*, quoted in *Bivens*).

**BASIC PRINCIPLE OF BIVENS ACTIONS**

The Court allowed actions for damages against officials for the following—

❒ Fourth Amendment violation (*Bivens*) ❒ Eight Amendment (*Carlson v. Green*)

**Theories of Bivens Actions:**

❒ Constitutional (Brennan majority): The Fourth Amendment *itself* provides an “independent limitation on federal power.” Furthermore, state law may not serve to limit federal power. Thus the cause of action arises from the Constitution itself. Damages are the standard remedy—the court may apply something else if Congress suggests. (Scalia seems to take up and criticize this idea in *Malesko* (concurring).)

❒ Inherent power/Federal Common Law (Harlan concurrence): The Court has an independent obligation to enforce the Constitution. The cause of action derives from the common law, and from the court’s inherent power to fashion remedies. This leaves room for Congress.

❒ State law is sufficient (Blackmun dissent) ❒ Congress must act (Black dissent)

**LIMIATIONS ON BIVENS[[16]](#footnote-16)**

❒ Special factors counseling hesitation in absence of affirmative action by Congress (*Bivens*).[[17]](#footnote-17)

Brennan (*Chilicky*, dissenting) argues that special factors relate to instances where the Congress enjoys a **special expertise that the judiciary lacks**. This includes such areas as the military (*Chappell*) and the civil service (*Lucas*). Social welfare programs do not involve special public employer-employee relationship, but rather involve the relationship between government and governed at the core of due process.

❒ Federal fiscal policy (*Bivens*; *Standard Oil* (U.S. could create liability at any time))

❒ Liability for *ultra vires* but constitutional actions (*Bivens*)

❒ Military (*Chappell* (discrimination); *Stanley* (experimentation)[[18]](#footnote-18))

❒ Civil service? (*Lucas*) ❒ Social welfare under art. I (*Chilicky*)

🕱 *Sandoval* (recognizing actions to redress retaliation against those who resist gov. imposition on their property rights would “**invite claims in every sphere of legitimate governmental action**.”)

❒ State remedies—

 *Bivens* lies only where the plaintiff had no other avenue of relief (*Malesko* (tort remedy))

This is wild stuff. Sued corporation and halfway house employee for Eight Amendment violation. The Court found that state tort remedy existed, and that **separation of powers** prevented *Bivens* implication. Never mind that *Bivens* had refused to make its holding contingent on the unavailability of other remedies. Stevens, for four dissenters, argued that in fact alternative remedies were available to *Bivens. Compare* with *Boyle*: this indicates that the courts’ power to fashion immunities is *strong*, whereas the power to create causes of action is relatively weak. It also indicates the clear **common law** status of *Boyle* strengthens it as compared to the ambiguous status of the *Bivens* remedy. (*See* Scalia concurrence in *Malesko*).

❒ Congressional remedies (*Carlson*): *Both prongs have been watered down—*

❒ Intended to substitute: *Which way does clear statement cut?*

❒ Congress must explicitly state its intention to substitute (*Bivens*)

❒ Creation of a remedy will be presumed to be exclusive unless stated (*Chilicky*)

❒ Viewed as equally effective: *Whose “view” of effectiveness matters?*

❒ Court review (*Carlson*) (court takes a hard look at congressional remedy)

FTCA provided action only against the government, no punitive damages were available, no jury trial right, and remedies were limited to conduct actionable under state law. This was not enough.

❒ Middle position (*Lucas*) (“elaborate judicial system” for relief argues against *Bivens* remedy, even if it provides “incomplete” but adequate relief)

❒ Deference to Congress (*Chilicky*): “*When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanism for constitutional violations that may occur in the course of its administration, we have not created additional* Bivens *remedies*.”

❒ Immunity (*qualified/absolute*)

**IMPLYING REMEDIES IN STATUTES:** *Sandoval* suggests a restrictive approach (*see* 498).

**The Eleventh Amendment:** State Sovereign Immunity

**BASIC DOCTRINE** (*Hans v. Louisiana*)

*Rule*: Individuals cannot sue states in federal courts (*Hans*). *Exceptions—*

❒ Criminal appeals (*Cohens* *v. Va.*) ❒ State consent ❒ *Ex parte Young* actions

❒ §5 abrogation (*Fitzpatrick*) ❒ Suits by states/US ❒ Municipalities

**PRINCIPLES—THE DOCTRINE AS IT STANDS TODAY**

❒ The doctrine of state sovereign immunity is not rooted in the text of Article III or in the 11th Amendment. It predates the convention, as a principle of the common law (*see Hans*).

❒ Immunity inhibits congressional power to abrogate immunity, as it inheres in the normative structure of the constitution (*Seminole Tribe*).

❒ Moreover, Congress cannot compel a non-consenting state to be the subject of a lawsuit in state court (*Alden v. Maine*).

❒ However, Congress *does* have the power under §5 of the 14th Amendment to create causes of action that are enforceable, if it speaks clearly and the remedy is proportionate (*below*).

❒ Individuals also have limited ability to seek prospective injunctions against officials (*Young*)

**HISTORICAL NOTE—SOVEREIGN IMMUNITY BEFORE THE 11th AMENDMENT**

Article III §2: *The judicial Power shall extend … to Controversies … between two or more states;—between a State and Citizens of another State;* *… and between a State … and foreign States, Citizens or Subjects*.

**Constitutional Debate:** In *Federalist 81*, Hamilton assured readers that states would not be amenable to suit in a federal court. And, while no state constitution explicitly codified a right to sovereign immunity, the common law of every state recognized immunity. But there was a movement to have the 10th Amendment codify a principle of sovereign immunity, and Madison refused.

Chisholm v. Ga.: *Each judge wrote separately, expounding different theories—*

❒ Blair & Cushing: Article III demonstrates states’ consent to suit in federal courts

❒ Wilson: The Constitution is an act by the people binding states to honor claims

❒ Jay: Sovereign immunity is “feudal,” inapplicable to Article III (but distinguished state/fed)

🕱 Iredell: Article III conferred only such power as would be recognized at common law, and there was no common-law precedent for actions of assumpsit against the state.

***EX PARTE YOUNG* ACTIONS**

*Basic rule*: A person who alleges a violation of federal law may bring an equitable suit against a federal officer to enjoin official action. *Criteria—*

❒ Breach of federal law/Const. ❒ Equitable remedy (*e.g.* injunction against enforcement)

❒ Prospective relief (*Edelman*)

❒ “Ancillary effect” on the state treasury is permissible (*Edelman*)

*Edelman* expresses concern for fiscal policy, the idea being that financial effects that are more than ancillary would impact too heavily the state treasury. Douglas’s dissent points out that this distinction doesn’t hold.

❒ Not “compensatory” in nature—effectively for money damages against the state (*Edelman*)

*Milliken v. Bradley* reads an expensive injunction as non-compensatory. A desegregation-related order promised to cost millions. The court upheld the injunction as ensuring the prospective benefits of a unitary school system. It may be that the beneficiaries would not necessarily be the same children as the parties’.

**Limitations on *Ex Parte Young* actions:**

🕱 Where Congress has created a remedial scheme to enforce a right (*Seminole Tribe*)

🕱 Court cannot interfere where criminal proceedings are already pending(*Ex Parte Young*)

🕱 Quiet title actions should be exempted (*Coeur d’Alene* plurality)

🕱 Special factors counseling hesitation (*Coeur d’Alene*, Kennedy & Rehnquist)

This is nuts. Kennedy first argues that *Ex Parte Young* actions are discretionary. This makes sense if he’s referring to the fact that the mode of equitable relief is always discretionary, but another thing if he means jurisdiction. He said the action should primarily be available where: (1) there is **no state remedy**; or (2) the case calls for **interpretation of federal law**. Availability of state remedies, Kennedy said, was a “special factor” counseling hesitation. O’Connor thought this was off the wall, and Thomas and Scalia also didn’t join this part.

🕱 Declaratory judgment is not available where state has cured the violation (*Mansour*)

This case was the last in a line of **notice relief** efforts. *Quern v. Jordan* established that an *Ex Parte Young* action could gain, as part of a prospective injunction, a notice to all injured parties that they may have a state or administrative remedy available. This was an attempt to ensure preclusive effect in those courts. *Green v. Mansour* goes some way toward closing off that possibility.

**Objections:** *The Court in* Ex Parte Young *responds to three objections—*

❒ Discretion: This does not interfere with official discretion, because officials do not have general discretion to disobey the law.

❒ Stripping: The state has no immunity to give when it acts beyond its authority.

❒ Criminal proceedings cannot be interfered with (a medieval common-law idea)

Harlan’s dissent picks up at least the second strand, if not the first, and says we must have faith in state courts. *Testa v. Katt* and *Alden v. Maine* together erase Harlan’s premise—the state courts will no longer necessarily be open to federal constitutional challenges against the state.

**Two Theoretical Puzzles of *Ex Parte Young*:**

❒ State Action:

The official’s action is imputed to the state for the purposes of the 14th Amd., thus providing §1331 jx, but, because the action is unconstitutional, he not an arm of the state for the purposes of the 11th Amd.

❒ Competence:

The court determines constitutionality before it determines immunity, though if it had not had immunity, it would not have been able to assess the constitutional question. The answer must be the that the court has jurisdiction to determine its own jx, but the court doesn’t say this, and it’s not clear that’s what they’re doing.

**STATE VS. STATE ACTIONS AS AN EXCEPTION TO SOVEREIGN IMMUNITY**

*Basic rule*: States may sue other states, but a state cannot act as a nominal plaintiff on behalf of individual claimants against another state. *Precedent—*

❒ Where there is no formal, identifiable individual interest in or control of the litigation, cases have been allowed to proceed, even though state may distribute damages (*Kan.* *v. Colo.*).

🕱 Where bondholders assigned bonds to the state but remained beneficiaries, a no-go.

**MUNICIPALITIES AND OTHER SUB-STATE ENTITIES**

*Basic rule*: Municipalities are not states for the 11th Amd., but are state actors for the 14th (*Home Telephone and Telegraph*; *Northern Ins.* (extending to counties)). *Exceptions—*

❒ Where the entity is an “arm of the state” (noted in *Northern Ins.*).

❒ A bi-state entity where there is “good reason to believe that states structured the agency” to enjoy immunity, and congress concurred in that purpose (*Lake County Estates*, 643)

**STATE CONSENT**

*Clear Statement rule*: “We will find waiver only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.” (*Edelman*). *Like all constitutional rights, waiver must be—*

❒ Voluntary ❒ Knowing ❒ Informed

❒ Super-clear statement requirement (*Atascadero*; *Raygor*; *Muth*): A statute must clearly express the intention to have the state sued in federal court (*Atascadero*). Legislative history will be irrelevant (*Muth*).

Eskridge and Frickey argue that this development is actually counter-majoritarian. The plethora of clear statements “not only pose the possibility of ignoring legislative expectation, but they also make it quite hard for Congress to express its expectations on the issue.”

*Special rules—*

🕱 Mere participation in a government program is insufficient, nor is §1983 (*Edelman*)

❒ A decision to remove constitutes a waiver of immunity (*Laipides*)

An earlier decision, *Schacht*, went up to the line on this point, but indicated that immunity could still be asserted after removal.

**What is Consent/Waiver?**

The court has never clearly articulated whether sovereign immunity is a defense that must be raised or lost, or whether it is wholly jurisdictional, and can be raised by the court itself—

* *Edelman*: Immunity is sufficiently jurisdictional that it need not be raised at trial.
* *Schacht* & *Lapides*: These cases ended up with the idea that removal could constitute waiver. If so, it seems that immunity can’t be jurisdictional on these cases.

**ABROGATION BY CONGRESS:** *Two general rules—*

❒ Section 5: Congress may abrogate under §5, subject to *Boerne* (*Fitzpatrick*). *Inquiry—*

❒ Clear statement by Congress (*or super-clear statement*, *see Atascadero*); *and—*

❒ Congress is *remedying a per se violation* (*Fitzpatrick*); *OR*

❒ Prophylactic action in aid of enforcing existing rights (“appropriate legislation” §5), and the action is congruent and proportional (*Boerne*)—“pattern of illegality” (*Fla. Prepaid*)

For non-suspect classifications, such as age (*Kimel*) and disability (*Garrett*), violations get rational basis review. Therefore, Congress must find a **pattern of irrationality** (*Garrett*). Breyer notes that the importation of a standard of review into a standard of legislation makes little sense (*id.* dissent). Scalia argued that the pattern must be found at the **state level only** (not municipality), and indicated that the legislation might be constitutional as to some states and not others (*Hibbs* dissent).

🕱 Article I: Congress *may not* abrogate under its article I power (*Seminole Tribe*). *Exceptions—*

❒ Bankruptcy cases (*Katz*) ❒ Other carve-outs? (*Seminole Tribe*, Souter dissent)

❒ *Penn. v. Union Gas* (no longer good law; see 695) ❒ *In rem* (*Katz*) (this is wrong)

**Abrogation and the Relationship between Amendments:**

Congress’s ability to abrogate turns on the relationship between Article I, the 11th Amd., and the 14th Amd. The Court has shifted its position on this point—

❒ Equal force: Both amendments continue in full force (*Ex Parte Young*)

❒ Last in time: §5, having come after the 11th Amd., allows Congress to abrogate (*Fitzpatrick*)

**Selected Rants about *Seminole Tribe*:**

Breadth of *Seminole Tribe*: The court holds that the reasoning in *Hans* and the principle of sovereign immunity amounts to a universal principle of law that encompasses all of article I. Thus, it takes in all of the Article I powers. Souter’s dissent criticizes this overbreadth, and his reasoning leads to the notion of carve-outs.

Importation of *Bivens* reasoning: The court imports the theory of congressional intent from the *Bivens* line of cases, specifically *Chilicky*. This was forecast in Kennedy’s opinion in *Coeur d’Alene*. The Court inferred congressional intent to have an exclusive negotiation remedy from the face of the statute. (This is the remedy the court just struck down.) So it uses a line of reasoning that was designed to prevent the court from fashioning a cause of action to oust the court of equitable authority. This is not a good analogy. The source of relief in *Bivens* and in *Seminole Tribe* is different—*Bivens* draws directly from the constitution, while *Tribe* was an expressly passed statute. The source of the cause of action is likewise different (court-implied/statute), as is the defendant in the suit.

Dissents: Stevens, following his reasoning in *Union Gas*, rejects state sovereign immunity as a constitutional bar. The constitutional prohibition is limited to diversity cases, and anything else that *Hans* adds is only common law, and Congress can abrogate it. This is clearly leaving open a day where this might prevail. Souter invites the court to consider whether *Hans* could remain the rule, but that Congress could still abrogate under some aspects of art. I.

Problem of Carve-Outs (*Katz*): The majority in this case seemed to want to say that bankruptcy was a special case, and that sates were concerned about uniformity and ceded immunity in this area. Stevens also noted the *in rem* nature of the proceedings in bankruptcy. Four justices dissented, on the ground that there is nothing to distinguish bankruptcy from anything else in the constitution. Quite true. Also, it should be noted that a preference action is not *in rem*, and at any rate, *Couer d’Alene* stands for the idea that *in rem* proceedings could be the most problematic of all with respect to state sovereignty.

**CLOSING STATE COURT: *ALDEN v. MAINE***

*Principle*: State sovereign immunity is a common-law principle, in the background of Article I, and it limits *all* of Congress’s power to create causes in *any forum*.

1. Article 13 of the Judiciary Act could be read to confer mandamus power only in appellate jurisdiction, or to confer only mandamus *power*, leaving the question of jurisdiction to the constitution and other sections, or to refer to *inherent* or *ancillary* jurisdiction— mandamus refers to the inherent supervisory power of a supreme court. This latter reading creates a problem, because it seems like *Marbury* itself relies on a certain notion of inherent power. Marshall notes that appellate jurisdiction “**revises and corrects**” lower courts, and it does not superintend. What else goes without saying—rulemaking, contempt? What limitations go without saying? [↑](#footnote-ref-1)
2. Note that what the court is doing here is disagreeing with a particular conception of equality and state action. [↑](#footnote-ref-2)
3. As we discussed in class, this is susceptible of three readings: (1) Congress has wide discretion over appellate jurisdiction; (2) to protect juries, Congress can limit jurisdiction as to *facts* only; (3) Congress can reapportion the Court’s jurisdiction. Reading (3) is precluded by *Marbury*, and reading (2) is advanced by almost no one. [↑](#footnote-ref-3)
4. *Plaut* demonstrates that there is something unique about final judgments for the separation of powers. There is a **historical justification:** the Colonial system allowed assemblies to revise judgments, and this was addressed at the Convention. But there is also a reason relating to **institutional settlement:** the final judgment is the “last word” of the judicial department. The dissent, however, points out that this particular judgment was only removing a statute of limitations bar to hearing the case, and was not even prescribing a particular result. It draws on Madison’s “flexible” notion of the separation of powers, and indicates that the real reason for finality relates to “impartial application of the law,” which is not at issue here. [↑](#footnote-ref-4)
5. Story seemed to think that this was required, otherwise state courts might not have jurisdiction over certain classes of federal cases. This does not consider the possibility that the constitution requires state court jurisdiction in some circumstances (*Testa v. Katt*). [↑](#footnote-ref-5)
6. This is incorrect if we’re worried at all about agency capture. In fact, the assignment of a narrow class of claims makes capture even more likely than an omnibus bill. [↑](#footnote-ref-6)
7. “[T]here are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States.” [↑](#footnote-ref-7)
8. *See* *Pacemaker Diagnostic* (Schroeder dissenting) (p. 369). [↑](#footnote-ref-8)
9. The majority and dissent agree in *Osborn* that “the court which has jurisdiction over the principal question must have jurisdiction over every question.” [↑](#footnote-ref-9)
10. *Osborn* itself seemed to be decided on this ground. Marshall notes that the Bank is a **“mere creature” of statute**, and its rights to contract and sue would lurk in every case. **Relevance of “Juridical Entities”?** Frankfurter discusses the *Osborn-Pacific Railroad* line of cases, noting that unions under Taft-Hartley, like the Bank etc., may be considered juridical entities relying on federal law, and this was the rationale for jx in *Osborn*. He seems to think it is simply imprudent to extend this line of cases. (242-44). [↑](#footnote-ref-10)
11. *Caterpillar* held LMRA preempts st. law only with respect to employer-union contracts. May be so limited. [↑](#footnote-ref-11)
12. In *Moore*, a Ky. statute incorporated federal safety regulations by holding that their violation negated certain affirmative defenses. Maybe *Moore* can be reconciled by saying that it does not meet *Mottley*. The problem with this is that some scholars believe that, in this kind of claim, the plaintiff had to frontload the federal issue. [↑](#footnote-ref-12)
13. Historically, it was taken as given that the Federal Declaratory Judgment Act was not intended to enlarge the jx of the federal courts (*Skelly Oil*). But that’s not true, either on the face of the statute or the legislative history. This makes sense with how it works—it generally entitles the bringer of the action to assert an affirmative defense as an action. The federal issue thus appears on the complaint (*Mottley*), the cause of action comes under a federal statute, and the resolution will be made by federal law. [↑](#footnote-ref-13)
14. Note that *Finance Tax Board* imports the FDJ rationale into **state declaratory judgment statutes**. The *Skelly* test was based on the idea that Congress did not intend to enlarge federal jurisdiction (*Aetna*). Not true for the state. [↑](#footnote-ref-14)
15. Note that this will tend to resemble pre-*Erie* federal general common law. [↑](#footnote-ref-15)
16. **Substantive limitations?** *Bivens* has not been extended past the Fourth Amendment, Eighth Amendment, and the Due Process Clause of the Fifth (*Passman*). *Willkie* is the most recent rejection of a creative attempt to establish a *Bivens* remedy. *Lucas* rejected a First Amendment *Bivens* argument. The Court has indicated in *Malesko* that it favors limiting *Bivens* to amendments 4, 5, and 8. [↑](#footnote-ref-16)
17. *Carlson* clarified that **defendant** had the burden of showing factors. This may have changed with *Chiliky*. [↑](#footnote-ref-17)
18. O’Connor dissented in this case, arguing that experimentation falls outside the military mission. [↑](#footnote-ref-18)