Habeas

* (1) Must be in custody
* (2) Must be asserting non-4th right
* (3) Must exhaust st remedies for same matter unless:
  + absence of available st process
  + circumstances exist that render process ineffective to protect rights
  + Note: if claim arises after exhaust 🡪 typically no need to return to st court
  + Note: if habeas pet contains both exhausted and unexhausted claims 🡪 all dismissed (*Rose*)
* (4) If successive application:
  + and previously adjudicated 🡪 won’t hear
  + not previously adjudicated 🡪 may hear if:
    - claim relies on new rule of const law made retroactive to cases on collateral review by SC
    - new facts + diligence + no factfinder would have found guilty
* (5) If seeking “new” const rule on habeas, won’t hear unless:
  + conduct for which D prosecuted actually const’ly protected
  + “implicit in concept of ordered liberty”
* (6) If procedural default in st court, won’t hear unless:
  + cause
    - reliance on novel const claim
    - ineffective assistance of counsel (note rules when 6A claim can only be brought on post-conviction review)
    - st created external impediment to presentation of claim
  + & prejudice
  + or actual innocence (*Murray*)
* (7) If issues already raised and litigated in st court:
  + relief not granted unless st court decision adjudicated on the merits is “contrary to” or “unreasonable application” of clearly established fed law, as determined by SC
  + if st court doesn’t say how reached conclusion, SC assumes valid argument was basis if plausible (*Harrington*)
  + clearly estab’d law: SC decisions as of time of last st court adjudication on merits, not necessary when D’s conviction became final (*Greene*)
  + determination of facts presumed correct unless rebut by clear and convincing
* (8) If have no claims regarding const violation but strong claim of actual innocence 🡪 maybe can get relief (*Herrera*)
* To get new factfinding that matters:
  + must be the case that (*Cullen*):
    - (1) claim was not previously litigated in st court (aka procedurally defaulted with cause)
    - (2) claim was previously litigated in st court and decision was contrary to or unreasonable app of clearly estab’d law by virtue of st court determination being clearly wrong on the merits
  + then:
    - showing of innocence + new rule made retroactive
    - showing of innocence + new facts + due diligence

Lower Fed Courts

* Always ask: Jxn?
  + Statutory:
    - (1) P’s cause of action created by a fed law (*AWW*, but *Shoshone*), or
    - (2) P’s cause of action based on st law, but a fed law that creates a cause of action or reflects an important national interest is an essential component of the P’s complaint (*Smith*); consider also whether (*Merrell Dow*, *Grable*):
      * taking jxn would violate congressional intent
      * would increase fed case load substantially
  + Const: whenever fed law is potential ingredient of a case
  + BUT: look out for jxn stripping
* Removal only when case could have been filed originally in fed ct (or preemption)
  + State law claims may also be removed if supplemental
* If suing **fed officer** for **money damages** for violaton of const right 🡪 *Bivens* action
  + (1) No action if:
    - special factors, or
    - Congress has specified alternative adequate remedy
  + (2) Officer gets absolute immunity if judge, prosecutor, legislator, legislative aide doing their function; president w/i outer perimeter of responsibilities (possibly other exec officials, but see *Mitchell*)
  + (3) Otherwise fed officer gets qualifies immunity:
    - Shielded from liability as long as conduct does not violate clearly established statutory or const rights of which reasonable person would have known
    - If suing in personal capacity can get retrospective damages; unclear if suing in official capacity whether can get retrospective (no 11A bar)
  + (4) Unclear if preclusion could apply, but possibly (analogize *McCurry*)
* If seeking to **enjoin** a **fed officer** 🡪 go ahead
  + Note: no immunity against injunction
  + (1) If claims were raised in st proceedings (crim, civ, or admin), fed ct will preclude if courts in the st that made decision would 🡪 look to st law (*McCurry*)
  + (2) If had opportunity to bring claims in st proceeding but chose not to 🡪 may not raise in fed court (*Migra*)
    - Note: unclear if this rule applies when st proceedings were criminal as opposed to civil
  + Maybe look for *Pullman*, but doubt it bc st law wouldn’t be issue here
* If suing **st officer** for **money damages**:
  + for violation of **st** law 🡪 can’t in fed court (*Pennhurst*) [see st court decision tree]
  + for violation of **fed** law 🡪 1983
    - (1) Has to have acted under color of st law – no matter if unauth’d/illegal (*Monroe*)
    - (2) If ongoing st criminal case, not barred by *Younger* but court may stay case until st court reaches judgment in order to avoid preclusion (*Quackenbush*)
      * if ongoing st civil/admin case 🡪 double tracking
    - (3) If claims were raised in st proceedings (crim, civ, or admin), fed ct will preclude if courts in the st that made decision would 🡪 look to st law (*McCurry*)
    - (4) If had opportunity to bring claims in st proceeding but chose not to 🡪 may not raise in fed court (*Migra*)
      * Note: unclear if this rule applies when st proceedings were criminal as opposed to civil
    - (5) If suing in personal capacity:
      * If officer judge, prosecutor, legislator, legislative aide doing their function; president w/i outer perimeter of responsibilities 🡪 absolute immunity (possibly other exec officials, but see *Mitchell*)
      * Otherwise 🡪 officer has qualified immunity
        + Shielded from liability as long as conduct does not violate clearly established statutory or const rights of which reasonable person would have known
        + Can get retrospective relief
    - (6) if suing in official capacity, can only get prospective, not retrospective, relief (*Edelman*) (note: this isn’t really damages)
* If seeking to **enjoin** a **st officer** 🡪
  + for violation of **st** law 🡪 can’t in fed court (*Pennhurst*) [see st court decision tree]
  + for violation of **fed** law 🡪
    - Note: no immunity against injunctions
    - Note: no 11A bar to enjoining officer (*Younger*)
    - (1) If claims were raised in st proceedings (crim, civ, or admin), fed ct will preclude if courts in the st that made decision would 🡪 look to st law (*McCurry*)
    - (2) If had opportunity to bring claims in st proceeding but chose not to 🡪 may not raise in fed court (*Migra*)
      * Note: unclear if this rule applies when st proceedings were criminal as opposed to civil
    - (3) If there is an unsettled st law issue and st court’s clarification of st law might make const ruling unnecessary 🡪
      * *Pullman* abstain, or
      * Certify Q to st court
      * Note: if *Pullman* abstain, can reserve fed issues for resolution in fed court so long as (*England*):
        + (1) Express intention to reserve fed claims (on record best, but need not be explicit)
        + (2) Don’t seek complete and final adjudication of fed issues in st courts

Note: may have to break this rule for certain claims (takings – *San Remo*)

* + - (4) If unified st admin scheme 🡪 consider *Burford* or *CO River* abstain
    - (5) If complicated st law issue in diversity 🡪 *Thibodaux*
* If seeking to **enjoin** **st proceedings** or **declaratory relief** relating to prosecution:
  + Note: proceding must be same parties and as little as indictment may count
  + (1) AIA will bar injunction (not clear if declaratory relief also) unless:
    - (a) expressly authorized by Act of Congress (1983 is)
    - (b) necessary in aid of jxn (limited to res), or
    - (c) necessary to effectuate its judgments (limited to specific parties)
  + (2) If pending crim / civ in aid of crim / civ enf / civ with imp st interests / coerc. admin proceeding 🡪 can’t bc *Younger*, unless:
    - (a) st crim statute patently and flagrantly unconst
    - (b) bad faith or harassment by st prosecutors
    - (c) bias / no “full and fair opp” to litigate
    - Note: in 1983, will always be seeking to enjoin civ action w/ imp st interests because will have been st action by the officer 🡪 can’t enjoin under *Younger*
  + (3) If st proceedings have not yet been commenced:
    - may obtain declaratory relief or preliminary injunction as long as:
      * claim is ripe: real and immediate threatened or actual injury
      * st prosecution is not commenced before fed ct procedures are substantially completed (*Hicks*)
    - may obtain permanent injunction as long as:
      * claim is ripe: real and immediate threatened or actual injury
      * st prosecution is not commenced before fed ct procedures are substantially completed (*Hicks*), and
      * clear showing that necessary to afford adequate protection of const rights (*Maynard*)
  + (4) Remember REMOVAL
* If suing **st** for **money damages** or **injunction**:
  + Can’t under 11A, unless consent, waiver, bankruptcy (*Katz*), or abrogation under 14A
  + Only abrogation under 14A if:
    - intent to do so unmistakably clear
      * 1983 fails test
    - protecting rights that have been recognized by the courts, and
    - remedy is congruent and proportional to the evidence of violation of rights by the sts
      * if P alleges const violation 🡪 remedy is c&p
      * if statute is dealing w/ type of discrim that receives heightened scrutiny or fundamental right 🡪 remedy prob c&p b/c SC will find sufficient evidence of violation of rights by sts
      * if neither of above 🡪 only c&p if Cong found pervasive unconst st conduct
* If suing **municipality** for **damages** (1983) or **injunction**:
  + (1) Will be immune, unless action alleged to be unconst implements or executes an official policy
    - Note: not liable for punitive damages
    - Note: doesn’t matter if officials acting in indiv capacity get immunity
  + (2) If there is an unsettled st law issue and st court’s clarification of st law might make const ruling unnecessary 🡪
    - *Pullman* abstain, or
    - Certify Q to st court
    - Note: if *Pullman* abstain, can reserve fed issues for resolution in fed court so long as (*England*):
      * (1) Express intention to reserve fed claims (on record best, but need not be explicit)
      * (2) Don’t seek complete and final adjudication of fed issues in st courts
        + Note: may have to break this rule for certain claims (takings – *San Remo*)
  + (3) If unified st admin scheme 🡪 consider *Burford* or *CO River* abstain
* If suing gov agencies, corporations (e.g., contractor prison), private person (e.g., contractor prison emp)🡪 can’t under *Bivens*

St Court

* Always ask: Jxn?
  + Presume concurrent for fed questions, but can be displaced if:
    - (1) expressly by Congress
    - (2) “unmistakable implication” from legis history (Scalia says no)
    - (3) clear incompatibility with fed interests
  + Can’t discriminate against fed claims; need valid excuse (*Testa*)
  + Can’t issue writs of habeas to fed officers (*Tarbles*)
  + BUT: look out for jxn stripping
* If suing **fed officer** for **money damages** (*Bivens*):
  + (1) No action if:
    - special factors, or
    - Congress has specified alternative adequate remedy
  + (2) If ongoing st proceeding, may stay case (depends on st law)
  + (3) Officer gets absolute immunity if judge, prosecutor, legislator, legislative aide doing their function; president w/i outer perimeter of responsibilities (possibly other exec officials, but see *Mitchell*)
  + (4) Otherwise fed officer gets qualified immunity:
    - Shielded from liability as long as conduct does not violate clearly established statutory or const rights of which reasonable person would have known
    - If suing in personal capacity can get retrospective damages; unclear if suing in official capacity whether can (no 11A bar)
  + (5) Removal available under §1442 if acted “under color of fed authority” (*TN v. Davis*)
    - *Mesa*: doesn’t count if acting outside auth, like postal worker driving on sidewalk
  + (7) Unclear if preclusion could apply, but possibly (state law)
* If seeking to **enjoin** a **fed officer** 🡪 OK
  + Note: no immunity against injunctions
  + Note: possibly can analogize *Tarbles* to say can’t, esp if acting in realm of const authority (e.g. war powers)
* If suing **st officer** for **damages**:
  + For violation of st law 🡪 apply st law
  + For violation of Const / laws of US 🡪 1983
    - Note: 11A poses no bar (*Ex parte Young*)
    - (1) Has to have acted under color of st law – no matter if unauth’d/illegal (*Monroe*)
    - (2) If suing in personal capacity:
      * If officer judge, prosecutor, legislator, legislative aide doing their function; president w/i outer perimeter of responsibilities 🡪 absolute immunity (possibly other exec officials, but see *Mitchell*)
      * Otherwise 🡪 officer has qualified immunity
        + Shielded from liability as long as conduct does not violate clearly established statutory or const rights of which reasonable person would have known
      * Can get retrospective relief
    - (3) if suing in official capacity, can only get prospective, not retrospective, relief (*Edelman*) (note: this isn’t really damages)
* If seeking to **enjoin** a **state officer** 🡪
  + under **fed** law 🡪 OK
    - no immunity against injunctions for fed suits
    - state immunities and defenses not relevant in fed suits
  + under **st** law 🡪 probably OK, but possibly additional st immunities granted
* If suing **st** for **damages** or **injunction**:
  + St has sovereign immunity – cannot be sued unless consent or waiver (*Alden*)
  + Congress cannot abrogate
* If suing **municipality** for **damages** (1983) or **injunction**:
  + Will be immune, unless action alleged to be unconst implements or executes an official policy
    - Note: not liable for punitive damages
    - Note: doesn’t matter if officials acting in indiv capacity get immunity
* If made a D in st court:
  + To remove:
    - Need complete diversity or original fed Q jxn [see fed ct decision tree]
    - No fed defense removal
    - Can argue preemption
  + To enjoin proceeding 🡪 see fed ct decision tree
  + To make second case in fed court by suing officer/municipality for damages, injunction 🡪 see fed ct decision tree

Supreme Court Review of St Court Judgments

* (1) If only st grounds 🡪 no review
* (2) If grounds are ambiguous 🡪 presume fed (*Long*)
* (3) If st grounds A&I 🡪 no review unless:
  + st ground (including procedural default) could interfere w/ fed rights 🡪 SC will look to see if has been manipulation (*Staub*); procedural grounds not adequate if:
    - novel, inconsistent, burdensome, or was discretionary refusal to excuse default
    - doesn’t serve legitimate st interest (*Henry*)
  + procedural ground invalid under DP 🡪 SC review (*Brinkerhoff*)
  + fed law incorporates a st law ground/term 🡪 SC will review st law to determine whether discrimination (*Beaver*)
  + st law incorporates fed law 🡪 SC has jxn (*Standard Oil*)
  + st law doesn’t incorporate fed law, but seems to rely on it 🡪 maybe SC can hear case (*Van Cott*)
* (4) BUT: look out for jxn stripping

Jxn Stripping

* Sort of unaccounted for problem: what if Congress tries to preclude all judicial review of const claims 🡪 Court has avoided this serious const question (*Webster*)
* If Congress restricts availability of jxn for parties:
  + Crim Ds must get Art. III court (*Yakus*, *Mendoza-Lopez*)
    - Problem: draft cases (*Falbo*, *Estrep*)
  + Civil Ds (*Crowell*):
    - Must get Art. III review of questions of law and challenge to sufficiency of evidence
    - No right to review of factual questions (can be Art. I court)
  + Private right Ps: *Betaglia* suggests must be some jxn
  + Ps against gov’t with no coercion (ie benefits) 🡪 *Matthews* says get some
  + Ps trying to oppose gov’t coercion:
    - Problem: under *Sill* Congress can eliminate lower fed courts
      * Eisenberg: no they can’t anymore b/c of changing realities
      * Amar: Art. III court must have jxn over fed Q and admiralty (ok if just SC tho)
    - Fall back on grants of general jxn (*Wong Wing*, *Ng Fung Ho*)
      * Problem: applicant for admission cases (*Mezei*, *Knauf*)
    - Problem: default of grants of general jxn:
      * Habeas can’t be suspended (*St. Cyr*)
      * Unlikely to happen
      * Courts construct so no default
      * Backstop of st courts
        + Strange that st courts could hear and not feds (Scalia *Webster*)
        + Cant refuse to hear fed claims (*Testa*)

If refuse 🡪 SC review

Problem: Congress can take away SC review under *McCardle*; historically only jxn to hear st court denials of fed rights

Solution:

*McCardle* distinguishable

*Klien*: can’t prescribe a rule of decision (but seems iffy)

Hart: “exceptions” can’t destroy essential role

Weschler: too bad

Calabresi: can’t; overrule *Marbury*

* + - * + Problem of *Tarbles* inhibiting injunctive relief

Redish: overrule

Maybe distinguishable bc fed military auth

* + - * + If Congress tries to take away jxn of st courts:

Should refuse as unconst if no fed remedy (*Marbury*)

Retain jxn to inquire as to whether jxn strip was const since jxn is primitive

Problem: BF asks if really the case