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# i. Article III:

\*“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;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.”

# I. The Judicial Function and the Role of the Courts

## A. Marbury v. Madison

\*NB: Madisonian compromise: Article III lets Congress establish inferior courts or not

\*Takeaways from *Marbury v. Madison*

1. Three parts of a right: Substance (right), Procedure (remedy), Jurisdiction (judicial review)
2. Jurisdiction stripping: After Marbury, Congress can only strip SCOTUS of *appellate* jur. Can’t make app jur original.
3. Injury Model: Court only has jur if there’s a case & controversy.
   1. standing doctrine: (1) injury, (2) must be caused by D, (3) must be redressable by a court
   2. Ripeness: injury must have happened or be imminent (declaratory judgments)
   3. Mootness: injury is gone (exception: CORYER: capable of repitition yet evading review)

\*Law-Saying Model: NB: arg that low % of cert grants indicates SCOTUS does have a law-saying role

\*Courts must comply with SCOTUS on fed law.

\*Legislature may have less obligation to comply: don’t enforce, just pass laws

\*Executives may have greater obligation to comply: enforce; but maybe need discretion

## B. Advisory Opinions & Constitutional Avoidance (Ashwander)

\*Pro: don’t declare con law broader than necessary; don’t decide con law issue if other issue can dispose of the case; read the statute in a way that it doesn’t violate the constitution (or even raise doubt about the constitution)

\*Con: actually gives judges more discretion: requires a mangled interpretation of the statute in order to avoid const’l Q

\*RULE: Only the judiciary gets to interpret the U.S. constitution. *Cooper v. Aaron* (9-0).

\*RULE: Congress can strip review under the APA but can’t strip review under the Constitution. *Webster v. Doe*.

# II. State Courts

## A. Exclusive Federal Jurisdiction and Removal

\*Four ways Congress can set jurisdiction

1. Exclusive: states only (though risk of commandeering?)
2. Exclusive: feds only (rationales: state court bias; expertise; uniformity)
3. Concurrent: federal and state jur
4. Removal: Cong can block state court jur by authorizing removal, both civil & criminal. *TN v. Davis.*

\*RULE: strong presumption in favor of concurrent state court jurisdiction, unless: explicit statutory directive; implication from LH; or clear incompatibility btw state-court jur and fed interests. *Tafflin v. Levitt* (1990). RATI: MADCOMP: Cong can dissolve FDCs.

## B. What Can State Courts Do To Fed Officials?

\*spectrum: habeas/mandamus (no) → injunctions (maybe) → damages/remedies at law (yes)

\*RULE: state courts lack mandamus power against federal officials. *McClung v. Silliman* (1821).

\*RULE: state courts can hear damages suits against fed officials. *Bivens*.

\*RULE: circuits divided re: whether state court can enjoin fed officials.

\*RULE: state ct can’t order habeas for fed prisoner. *Tarble’s Case* (SCOTUS 1872). (Wrong. Would mean MADCOMP wrong.)

## C. Obligation to Enforce Federal Law (*Testa* and Commandeering)

\*RULE (legislature): Cong can’t compel states to adopt legislation. *N.Y. v. U.S.*

\*RULE (executive): Cong can’t compel local law enforcement to run gun checks. *Printz v. U.S.*

\*RULE (st admin): FDC can compel state admin agency to consider adopting fed rules. *FERC*.

\*RULE (judiciary): Feds can compel state courts to hear fed claims. *Testa*.

\*BUT: maybe *Testa* only means concurrent jurisdiction (*Tafflin*), Congress can put exclusive jur in state courts.

\*BUT: state court can refuse to hear fed CoX if valid excuse: jurisdictional argument not discriminatory against fed st or interest. Valid excuse: “in this state we don’t entertain suits against foreign corporations.” Invalid excuse: “don’t like § 1983!”

\*RULE: Invalid excuse: sending damages claims against (st or fed) prison wardens to court of claims. *Haywood* (2009).

# III. SCOTUS’s Appellate Jurisdiction

## A. Review of State Court Judgments: The Laws of Transmutation

\*Q: is there (a) jurisdiction in SCOTUS (not FDCs), or (b) is there an adequate and independent state ground?

1. SCOTUS has jur to hear some cases coming from the high st ct. Hunter’s Lessee.
2. SCOTUS has jur to hear fed Qs, will not decide state law Qs. Murdock.
   1. Is there a federal Q, and was it actually decided by the state court?
   2. Did the state court decide the federal Q correctly? If yes, affirm. If no, then 3.
3. SCOTUS has jur if state ground is adequate or independent but not both.
   1. SCOTUS has no jur if state ground is both adequate & independent. Fox Film.
   2. Adequate? Ask: would changing the outcome of fed Q change the overall outcome? If not, state ground is adequate.
   3. Independent? Ask: are the fed and state issues independent? If fed & state issues are not independent, SCOTUS can address state law. There are 3 ways the issues are not independent:
      1. Antecedent (Manipulation): If st ct can manipulate st law to bar access to fed law, SCOTUS has jur to examine state ct’s analysis of st law to see if st ct abused its discretion. Ind. ex rel Anderson; Hunter’s Lessee.
         1. State law could be procedure (Staub) or substance (Anderson, Beaver).
         2. def manipulation: “does st ct deviate from past practice?” (not “does st ct screw over federal claims?”)
         3. No manipulation: fed courts won’t disturb high st ct.
         4. Yes manipulation: fed courts will decide or remand.
      2. Incorporated: if fed law incorporates state law, SCOTUS has jur to examine analysis for discrim. Beaver.
         1. If no discrimination, stop; if there is discrimination, go to the merits.
      3. Incorporated: if state law incorporates fed law, SCOTUS has jur to check for uniformity. Johnson; Van Cott.
         1. NB: risk of advisory opinions! SCOTUS will end up saying state ground is adequate but dicta, FYI you misread Lawrence v. TX (in the interest of uniformity). St ct will say we’re not using your definition, just happen to use the same one. Van Cott.

## B. Review of State Court Judgments: Adequate & Independent

\*RULE: State ground was adequate & independent. Fed decision can’t change outcome, so SCOTUS has no jur. *Fox Film*.

### 1. Basis for state high court’s decision is ambiguous

\*RULE: if ambiguous, presume st grounds not independent unless “clear and plain” stmt: “basis is state law.” *MI v. Long* (1990).

***\*RULE: If state court underprotects fed right, SCOTUS has jur.***

***\*RULE: If state court overprotects fed right, SCOTUS has jur only if grounds are ambiguous or grounds are federal.***

1. State court decides entirely on state ground and underprotects: SCOTUS has jur, not adequate.
2. State court decides entirely on state ground and overprotects: SCOTUS has no jur, adeq & ind.
3. State court decides entirely on fed ground and underprotects *or* overprotects: SCOTUS has jur. Fed Q.
4. State court decides on both state and federal law, underprotects: SCOTUS has jur.
5. State court decides on both state and federal law, overprotects: SCOTUS has no jur, adeq (can’t change outcome).
   1. this is why Stevens suggests that SCOTUS should presume state grounds are independent; *see notes*.
6. State court decides on ambiguous grounds, underprotects: SCOTUS has jur.
7. State court decides on ambiguous grounds, overprotects: SCOTUS has jur. *Long*.

### 2. Substance: When SCOTUS has jurisdiction to review substantive state law

\**Anderson*: st law not independent b/c used to manipulate (IN high court said no K under state law, did not reach fed Q).

\**Beaver*: st law not indepedent because fed law incorporates state law def, SCOTUS has jur to check for discrim against fed interests.

\**Johnson/Van Cott*: st law not adequate b/c st law incorporates fed law. If reverse fed ground (for uniformity), outcome changes.

### 3. Procedure: When SCOTUS has jurisdiction to review state procedural rules

\*RULE: procedural rules are almost always adequate but not independent (because they’re antecedent, can be used to manipulate).

\*RULE: SCOTUS has jur to review a state procedure that blocks fed rights if:

1. unduly burdensome (*Davis v. Wechsler*), inconsistent application (*Williams v. GA*), arbitrary & meaningless (*Staub*).
   1. BUT: st ct decision to be tough on violation of state procedural rule can be adeq & indep. *Beard v. Kindler* (2009).
   2. BUT: high st ct can sometimes dismiss summarily, sometimes require specifics. *Walker v. Martin* (2011).
2. novel application: court more likely to find cheating w/ a novel rule. *NAACP v. Alabama ex rel Patterson*; *Reich*.
   1. NB: If no case law to compare, check for failure to look at persuasive authority.
3. due process: if rule violates fed due process, that’s its own fed Q. *Brinkerhoff* (admin remedy was cut off).
4. state rule does not rest on a legit state interest or interest is otherwise satisfied. *Henry v. MS* (no one follows).

\*RULE: can’t play bait-and-switch with an ex post remedy, that violates due process. *Reich v. Collins* (1994).

# IV-1. FDC Jurisdiction: Fed Q Jur

## A. The Constitutional Grant vs. The Statutory Grant

\*RULE: Const + Stat: FDC only has jur if it satisfies (a) Osborn and (b) Grable.

\*RULE (constitution): “the judicial power shall extend to all cases … arising under [U.S. const, Laws and treaties]”

\*RULE (constitution): fed ct has jur if case contains a “fed ingredient,” e.g. fed statute, fed party (like Bank of US). *Osborn* (1824).

\*RULE (statutory): usually statutory jur must be w/i Constitution, but sometimes Cong can go beyond “protective jur.” *Lincoln Mills*.

\*RULE (statutory option 1): FDC has jur only if *P’s* complaint lays out a fed CoX. *Mottley* (1908).

\*RULE (statutory option 2): FDC has jur only if suit arises under fed CoX. *American Well Works* (1916).

\*RULE: Reverse Incorporation: fed CoX no guarantee if draws on state custom. *Shoshone Mining* (1900).

\*RULE: Incorporation: lack of fed CoX not fatal if state law incorporates fed law. *Smith v. KC Title & Trust* (1921).

\*BUT: lack of fed Cox fatal when state CoX just uses fed definition. *Chesapeake v. Moore*. (1934).

\*BUT: lack of fed CoX fatal when state CoX says viol of fed law creates presumption of neg. *Merrell Dow* (’86).

\*RULE (statutory option 3): lack of fed CoX not fatal if, on face of complaint, fed issue is (*Grable* 2005):

1. necessarily presented (*PROF: Is fed gov’t a party? Is CoX state or fed?*)
2. disputed
3. substantial (*PROF: Is the case going to have precedential value or is it confined to its facts?*)
4. Cong’l intent re: balance of power among fed and state courts. (*PROF: Are we worried about hordes or comity? Do we trust st ct, or are we worried about uniformity/expertise/bias?* )

## 2. Removal

\*RULE: fed removal (1441): defendant can only remove if plaintiff could have started in fed ct under *Mottley*. § 1441.

\*RULE: for fed officials (1442): must offer a federal defense and must have been acting in your official capacity. *Mesa*.

\*RULE: for fed officials (1442): whether acting in federal capacity is a federal Q. *Gutierrez de Martinez v. Lamagno* (1995).

# IV-2. FDC Jurisdiction: Habeas Corpus

\*CL: Courts only allowed to ask: was prisoner in custody based on legal process, or did sentencing court lack jurisdiction?

## A. Habeas: Scope of the Writ

\*US Law: Constitution: suspension clause; stat: 28 USC § 2254: only if “in custody” and in violation of US Const/laws/treaties.

\*RULE: “Custody”: includes mental institution custody; parole and probation.

\*RULE: gradual expansion of habeas jur

\*RULE: habeas is not just checking for valid jur; as broad as § 2254; any claim of const’l error in st ct. *Brown v. Allen* (1953).

\*NB, Jackson’s concurrence: “We’re not final because we’re infallible, but we’re infallible only because we’re final”

\*NB: State judges hate it: fed’ism (fed threat to state sovereignty); Comity (respect for st courts; Finality; Judicial Resources

\*RULE: Habeas ct *should* hear claim of insufficient evidence to convict if raised in st ct. *Jackson v. VA* (1979).

\*RULE: Habeas ct *should* hear claim of racial discrim in choosing grand jury foreman. *Rose v. Mitchell* (1979).

\*RULE: Habeas ct *should* hear claim re: Miranda (5A right not to incriminate is not like 4A). *Withrow* (1993).

\*RULE: Habeas ct *should not* hear claim of 4A violation if fully and fairly litigated below. *Stone v. Powell* (1976).

\*BUT: Fed habeas ct *should* hear claim of 6A violation if counsel’s failure was 4A. *Kimmelman v. Morrison*.

\*RULE: Habeas ct *should not* hear claim of actual innocence: no const’l right to new evidence. *Herrera v. Collins* (1993).

\*BUT: Habeas ct *should* hear claim of act innocence (no other const’l claim) if evidence strong. *House v. Bell* (2006).

\*BUT: SCOTUS might sit in original habeas to hear *Herrera* claim of actual innocence. *Troy Davis*.

\*RULE: Habeas ct *should* hear claim of IAC by appellate attorney for failure to raise IAC claim about failure by trial attorney if state doesn’t allow IAC claim on direct appeal. *Martinez v. Ryan* (2012).

## B. Habeas: *Teague*: If you’re contesting your conviction on habeas, do you get the benefit of a “new rule”?

\*RULE: In prison. New SCOTUS case, if it were law while you were on trial, would change outcome. Can you sue on that basis?

🡪If “old rule”: on direct review (conviction not yet final): yes

🡪If “old rule”: on habeas: yes

🡪If “new rule”: on direct review (conviction not yet final): yes

🡪If “new rule”: on habeas: no, unless *Teague* 1 or 2 applies.

\*RULE: *Teague 1 & 2*: if a new rule is decided after your conviction is final, you don’t get the benefit on habeas review unless:

1. “Teague 1” (substance): you were punished for conduct that is now constitutionally protected:
   1. Benefit: if new rule renders death penalty inappropriate for children / mentally ill. *Penry.*
   2. Benefit: if new rule makes sodomy laws no longer valid. *Lawrence v. TX.*
   3. Benefit: if new rule changes definition of “using a gun” so now you were not using it. *Bousley*.
   4. Benefit: if new rule renders sentence unconst’l for the crime you committed.
   5. No benefit: if new rule bars a state’s attempt to raise prior convictions (w/r/t double jeopardy). *Caspari*.
2. “Teague 2” (procedure): problem w/ “fundamental fairness” of trial and goes to guilt/innocence
   1. Benefit: e.g. *Gideon*. (And that’s about it.)

### 1. What is a “new rule”?

\*def *new rule*: breaks ground; result not dictated by precedent; imposes new obligation on state or feds. *Teague*.

\*RULE: Court wants cases to be “new rules”! That way rights are not expanded. But will only create them on direct review.

\**Butler v. McKellar* (1990): Butler’s conviction becomes final post-*Edwards* (if prisoner invokes 5A, gotta stop interrogation) but pre-*Roberson* (gotta stop even if 2d interrogation is on a diff’t topic). Can Butler sue on Habeas and cite *Roberson*? H: No, *Roberson* is a new rule, Butler can’t cite it on habeas.

\**Chaidez v. U.S.*: 1: D’s conviction becomse final. 2: SCOTUS decides *Padilla v. KY* (effective counsel includes advice about deportation). 3: Can Chaidez sue on habeas and cite *Padilla*? PROF prediction: it’s a new rule, no benefit.

\*RULE: State court discretion: can apply a new SCOTUS case retroactively even if a fed court wouldn’t. *Danforth v. MN* (2008).

### 2. Retroactivity

\*def *retroactivity*: whether *Teague* 1 or 2 applies; whether petitioner can cite on habeas a case decided after conviction final.

\*RULE: *threshold*: SCOTUS will only announce a new rule on direct review, won’t even hear an appeal from habeas if it would create a new rule (because would force it to declare a new rule, then deny it to the party before it).

\*BUT: *Lockyer*: if Teague = 2254(d), maybe not a threshold issue.

\*BUT: n.b., new rules apply fully to everyone still on direct review. *Griffith*(1987). E.g., SCOTUS case decided before final appeal.

## C. Habeas: AEDPA

\*AEDPA: habeas court can’t grant relief unless the state court conviction was “contrary to, or involved an unreasonable application of, federal law clearly established by SCOTUS” (§ 2254(d)(1)) or was based on an unreasonable determination of the facts (d(2)).

\*RULE 1: “contrary to”: If state court decision was *opposite* of fed law, correct the error. *Williams v. Taylor* (2000).

\*RULE 2: “unreasonable application of law”:

\*RULE: RP std: if state court got it a little wrong, we’ll let it slide. *Williams v. Taylor* (2000).

\*CONC: “incorrect” std: if SCOTUS would rule the other way, we’ll look at it and will do so! (Stevens)

\*RULE: “unreasonable” depends on rule’s specificity; if general, court has more leeway. *Yarborough* (2004).

\*RULE 3: unreasonable determination of the facts. § 2254(d)(2).

\*RULE: important ways AEDPA departs from *Teague*

1. Only SCOTUS decisions can be “clearly established”; circuits not enough. But maybe statute or constitutional amendment?
2. “contrary to” and “unreasonable application” only apply to old rules. Do the *Teague* exceptions still apply for new rules? AEDPA doesn’t preclude them; if it bars the Teague exceptions, Court could hold 2254(d) unconst’l, b/c suspension clause.

\*RULE: fed courts have discretion to treat 2254(d) as a threshold issue or not. *Lockyer v. Andrade* (2003).

\*RULE: If SCOTUS hands down new rule after first appeal but before second appeal, and second appeal is not granted cert, then it’s *Teague*, not *Griffith*, and you don’t get benefit of the new rule. *Greene v. Fisher* (2011 9-0).

\*NB: If PA S.Ct. had accepted review, should have based it on Gray even if Gray were new rule, *Griffith*!!!

## D. Habeas: Procedural Default

### 1. Procedural Default: Overview

\*RULE: If a defendant wants to raise on habeas a claim that was not litigated below, he may do so only if there was cause (a reason he did not raise the claim below) and prejudice (he was hurt by the failure of the court to hear the claim). *Wainwright v. Sykes* (1977).

\*RULE: if st ct does not excuse procedural default, and habeas ct finds cause & prejudice, it will decide merits of that claim.

\*RULE: if st ct excuses procedural default, habeas ct need not look for cause & prejudice, will decide merits of that claim.

\*RULE: if st ct does not consider the procedural default, must raise & litigate in PCR before going to habeas.

\*RULE: failure to preserve a claim in a petition for discretionary review will bar that claim on habeas. *O’Sullivan* (1999). This is the rule even though many states do not provide a right to counsel when seeking discretionary review. *Moffitt.*

\*RULE: if ambiguous whether st ct denied claim based on merits or procedure, presume st ct ruled on merits, *Harris v. Reed*.

\*BUT: presumption is rebuttable. *Coleman*.

\*RULE: not about jur: default is a defensestate must raise. *Trest*. But habeas court can bring it up sua sponte. *McDonough*.

\*BFTA: this shows how habeas is like an appeal: procedural default = adeq & ind state ground, cause and prejudice = manipulation.

\*OLD RULE: habeas ct can hear unlitigated claim as long as D did not intentionally bypass proper procedure. *Fay v. Noia* (1963).

### 2. Cause: Three Good Reasons and the “Actual Innocence” Alternative

1. Novel: I defaulted on this claim b/c it’s new law, my lawyer didn’t know about it: OK. *Reed v. Ross*
   1. BUT: if you defaulted because the law is new, probably can’t get the benefit of it. *Teague*.
2. IAC: I default on this claim because my lawyer screwed up.
   1. BUT: lawyer screwed up but not enough to satisfy *Strickland*: not a “cause” that justifies default. *Murray v. Carrier*.
   2. BUT: lawyer screwed up b/c he assumed objection would have been “futile”: not a cause that justifies default. *Engle*.
3. State Interference (“External Impediment”) 🡪 only one that matters; basically looking for manip like under adeq & ind rules
   1. Cause that justifies default: *Brady*: I didn’t know about it because DA didn’t tell me. (the bulk of “cause” claims).
   2. Cause that justifies default: I didn’t know about it b/c DA didn’t tell me, even if good faith/inadvertent. *Strickler.*
   3. Cause that justifies default: I didn’t file claim b/c state deliberately mangled jury balance. *Amadeo*.
4. The “Actual Innocence”: I don’t have a good reason why I failed to raise this below, but it shows I’m innocent.
   1. RULE: despite procedural default, can get habeas review if probably “actually innocent.” *Murray v. Carrier*.
   2. RULE: claim of innocence not enough by itself, need const’l claim. *Herrera.* (But maybe ok if lots of evidence.)
   3. RULE: def: “actual innocence” = “more likely than not that no reasonable juror would have convicted.” *Schlup*.
   4. RULE: in dp sentencing, must show that w/o error, no reasonable juror would have convicted. *Sawyer v. Whitney*.

### 3. Prejudice: Two Ways

1. Error at trial created “actual and substantial disadvantage.” *Frady*.
2. “Reasonable probability of a different result” based on withholding *material Brady* material. *Dretke*.

## E. Habeas: Exhaustion, Successive Petitions and Factfinding

### 1. Habeas: AEDPA Rule for Successive Petitions

\*RULE: Want to make a second petition under AEDPA?

1. Can’t raise same claims. § 2254(b)(1). Even new evidence can’t go to same claims! *Cullen*.
2. Can’t raise new claims unless
   1. new rule *or*
   2. new facts that couldn’t find before *and* the facts establish innocence.

\*NB: “new facts” requires innocence, “new rule” does not require innocence.

\*RULE: ripeness: bar on successive petitions does not apply if claim was unripe the first time. *Panetti v. Quarterman* (2007).

### 2. Habeas: Exhaustion

\*RULE: have to exhaust state and admin remedies.

\*RULE: can satisfy exhaustion, must seek discretionary review in st supreme, but not SCOTUS cert. *O’Sullivan.*

\*RULE: can satisfy exhaustion without seeking state PCR, but must use PCR for issues not raised on direct appeal.

\*RULE: can satisfy exhaustion if missed window for state direct appeal, but this is probably a procedural default.

\*RULE: preserve: must raise same claim in st ct and on habeas, and must be properly presented (i.e. raised in federal terms all along).

\*RULE: habeas ct must dismiss a petition that includes a mixture of exhausted and unexhausted claims. *Rose v. Lundy* (1982).

\*BUT: when unexhausted claims become exhausted, new petition is not barred. *Slack v. McDaniel*.

### 3. Habeas: Factfinding

\*RULE: Must defer to state courts on both facts and law. § 2254(d). (old rule: *Brown v. Allen*: habeas ct *could* defer, not req’d.)

\*RULE: Presume no evidentiary hearing. Can only get one for facts that the petitioner “failed to develop” (§2254(e)(2)) if:

1. new rule of const’l law where *Teague* exception applies, *and* innocence, or
2. new facts *and* innocence.

🡪TA: same as successive petitions, but both law & facts require innocence

\*BUT: failure to develop facts in state court not enough to bar a fed evidentiary hearing. *Michael Williams v. Taylor* (2000).

\*RULE: Even if manage to get new facts in through a 2254(e)(2) hearing, *can’t* use them in a successive petition on the same claim, only on a new claim. *Cullen v. Pinholster* (2011). DISS (Soto): this is really rare, allowing new evidence won't upset the balance.

\*TA: if facts establish a new claim that was not adjudicated, the habeas court will hear it. Eg, *House v. Bell*.

# IV-3. FDC Jurisdiction: Civil Rights

## A. The Fourteenth Amendment and § 1983

\*STAT: 14A: No “state shall deprive any person of life, liberty, or property w/o ***due process*** of law; nor deny to any person within its jurisdiction the ***equal protection*** of the laws.”

\*STAT: § 1983: “any person who, ***under color of any statute, ordinance, regulation, custom, or usages of any State*** who causes…deprivation of [federal Const’l and statutory] rights…shall be liable.”

1) overturn unconst’l state laws (eg, Black codes)

2) provide remedy where state law is inadequate (e.g. a state tort CoX like the law in *Monroe*)

3) provide remedy where state law adequate in theory but not in practice

## B. What is “State Action”?

\*RULE (constitution): under the 14A, action by anyone wearing a state uniform is state action. *Home Telephone v. L.A.* (1913).

\*RULE (statute): under § 1983, action by state officers under “badge of authority” is state action. *Monroe v. Pape*.

\*TA: *coextensive*: clothed in state authority = “under color of state law” (§ 1983) = “state action” (14A).

## C. Bivens

\*RULE: Constitution provides implied remedy directly under 14A, even though no authorizing statute. *Bivens* (1971).

\*RATI: If there’s a right there must be a remedy. *Marbury*.

\*RULE: FDC has diversity jur over state tort action for damages against fed officers. *Bell v. Hood* (1942).

\*TAQ: If *Marbury* is right and every right has a remedy, don’t need § 1983! If *Monroe* is right, need a statute for *Bivens*!

\*NB: *Bivens* Expansion

\*RULE: 5A equal protection has an implied RoX and cong’l aide can sue based on sex discrim. *Davis v. Passman* (1979).

\*RULE: Cong can’t legislate away a remedy for a const’l violation. *Davis v. Passman*. (~*Webster v. Doe*!)

\*RULE: 8A has implied RoX, prisoners can sue fed COs, FTCA does not explicitly say no other remedy. *Carlson* (1980).

### 1. Bivens Exceptions

\*RULE: no Bivens remedy if:

1. “Special factors counseling hesitation.” Bivens. RATI: sort of like political Q.
   1. EG: No Bivens remedy if deference to military. Chappell. Even if egregious (forced LSD). Stanley.
2. Congress has provided an “alt remedy” that is “adequate.”
   1. RULE: Alt remedy can be adequate even if it only provides back benefits but no damages. Schweiker (1988).
   2. RULE: If alt remedy is adequate, ct can excuse Cong’l failure to say the alternative is exclusive. Bush v. Lucas (1983).
      1. BUT: Ct not obligated to excuse Cong’l failure to say alternative is exclusive, can find a Bivens remedy. Carlson.
   3. RULE: If Cong says alternative is exclusive, maybe can’t check for adequacy. Hui.
   4. RULE: No, court *will* examine for adequacy; state remedy “adequate” if comparable incentives/compensation. *Minneci*.

\*RULE: Bivens remedy not avail for suing fed agencies, just fed officers. *FDIC v. Meyer* (1994).

\*RULE: Bivens remedy not avail if you haven’t exhausted admin remedies. *Corr’l Services Corp v. Malesko* (2001).

\*RULE: Bivens remedy not avail if you haven’t exhausted admin (even if the agency is harassing you). *Wilkie v. Robbins* (2007).

\*BFTA: SCOTUS usually finds a remedy when private actors serving public functions (like private prisons)

# V. Allocation of Cases Between State and Federal Court

## A. Diversity Jurisdiction

\*def “bias”: make a decision based on something other than the merits

\*BFTA: skeptical that there’s a fair way to fairly split cases between fed and state court

\*RULE: must have complete diversity: every P must be from different state from every D. *Kroger*.

\*RULE: citizenship is based on RPIA: real party in interest: does party have anything at stake, a duty or responsibility? *Rose v. Giammati* (S.D. Ohio1989). H: FDC has jur where RPIA is the comm’r (NY), not MLB (OH + every state).

# V-1. Pick Both Courts: Abstention and Certification

\*BFTA: Either-Or problem not a problem! Either end up in fed court via appeal, or can have both (via cert, double-track, etc).

## A. *Pullman* Abstention

\*RULE: in case with Fed Q + state claims, fed ct should abstain (stay proceedings and let state court go first) if there is (i) a novel or unsettled issue of state law, (ii) and resolving it allows const’l avoidance. *Pullman* (1941).

🡪TA: If state interprets st claim to let fed claim through: carry on. If state blocks: fed ct resumes to see if state law unconst’l.

\*RULE: When should the fed ct abstain because the state court can avoid the fed const’l issue?

\*RULE: yes *Pullman* abstain: if state law is “susceptible” to an avoiding construction. *Midkiff*.

\*RULE: don’t *Pullman* abstain if only extensive adjudications will settle the law. *Baggett*.

\*BUT: yes *Pullman* abstain if state const’l provision unique. *Askew v. Hargrave*.

\*RULE: don’t *Pullman* abstain when state law issue is congruent to federal rule. *Harris County v. Moore*.

\*RULE: facial (tax scheme): because fed claim is congruent w/ state claim, fed ct is precluded from relitigating. *San Remo*.

\*RULE: applied (taking): *England* reservation ineffective, can’t reserve fed claim that fed ct can’t hear, citing *Williamson*. *San Remo*.

## B. *Thibodaux* abstention

\*RULE: in diversity case that only raises state claims, fed ct should abstain if novel/unsettled issue of st law. *Thibodaux*.

\*RULE: abstain for broad legal issues (less concerned about state court bias); for narrow issues, fed ct should just decide it (more concerned about bias). *Allegheny v. Mashuda* (1959).

## C. Certification

\*NB: criteria are more relaxed for certification than for Pullman abstention. *Arizonans for Official English*.

\*NB: all states allow certification by SCOTUS or Circuit; most allow cert by FDCs.

\*NB: many state high courts will only look at a state law issue if the issue would decide the case.

\**Lehman Brothers v. Schein* (1974): diversity case, no fed Q; SCOTUS vacates 2d circuit and tells FDC to certify to FL SCt.

## D. *Pennhurst* & Double Tracking (*Kline*)

\*RULE: fed ct can not issue injunction against state officials based on state law, they have 11th A immunity. *Pennhurst*.

### *1. Options after Pennhurst*

\*BUT: despite Pennhurst, can get relief against state officials:

1. in fed ct if state consented to suit (and thus waived 11A protection);
2. in fed ct if suit is only federal claims, including claim to enjoin state official under federal law (*Young*);
3. in fed ct if suit is against a muni or muni official, whom the 11A does not protect;
4. in state ct if suit is state and federal claims if you make an *England* reservation; or
5. in state ct w/ state claims and in fed ct/ with federal claims and you rush to judgment. *Kline* *v. Burke*.

\*NB: *Pennhurst* ≠ *Pullman* b/c state law not antecedent.

\*RULE: no injunction for concurrently pending diversity suits; just race to judgment! *Kline v. Burke Construction Co.* (1922)

\*BUT: problem with double-tracking: preclusion!

* 1. Fed court finishes first, win: enjoin state court in protection of jurisdiction (AIA exception 3).
  2. Fed court finishes first, lose: lose state claims, can’t re-raise (issue precluded).
  3. State court finishes first, win: enjoin fed court.
  4. State acourt finishes first, lose: lose fed claims, can’t re-raise (claim precluded, could have been raised).

\*NB: in personam vs. in rem

\*in personam: race to judgment (both courts proceed simultaneously)

\*in rem: race to the courthouse (court that starts first can enjoin the other)

## E. *Burford* Abstention

\*I: comity, not const’l avoidance

\*RULE: fed ct should abstain from interfering with state admin agency if difficult Qs of state law involves major state interest *or* review would disrupt coherent state policy. *Burford v. Sun Oil Co.* (1943), *AL v. Southern Ry.* (1951) (only application of *Burford*).

\*PROF TA: issue is state agency rule requires coherence *and* thus review centered on one trial court.

\*PROF TA: state enforcement interest: Ps are corps in the state, no diversity. Substantve dp claim will fail, issues are financial.

## F. *Colorado River* Abstention

\*RULE: in diversity, FDC can abstain only in “exceptional circumstances.” *Colorado River*.

\*abstain if avoid duplicative lit; convenient for the parties; avoid piecemail lit (in rem); cong’l preference for st ct.

\*RULE: if A sues B in A’s state ct, B sues in fed ct to enjoin, fed ct will abstain. *Brillhart*. (Plus no complete diversity, no removal.)

\*RULE: if FDC abuses discretion to abstain (it should not have), SCOTUS can compel arbitration. *Moses Cone Hospital* (1983).

\*RULE: in suits for declaratory judgments, FDC have more discretion to abstain. *Wilton v. Seven Falls Co.* (1995).

\*RULE: an order refusing a stay of a fed action: not appealable; an order granting a stay of a fed action: appealable.

# V-2. Pick One Court: The Problem of Preclusion and AIA/Younger

\*RULE: state proceedings will have preclusive effect in fed ct if there was full & fair opportunity to litigate the fed claims. (Cherm.)

## A. AIA: The Anti-Injunction Act

\*STAT: AIA: Federal court can’t enjoin state proceedings *except as*:

1. “expressly authorized by an Act of Congress.”
   1. RULE: very narrow. *Atlantic Coast Line* (1970). All exceptions are very narrow!
   2. RULE: very broad: statute need not mention AIA or expressly refer to enjoining state proceeding; just need a fed right or remedy that could be frustrated w/o enjoining st ct. *Mitchum v. Foster* (1972).
2. where necessary “in aid of its jurisdiction.”
   1. RULE: very narrow. Only applies in rem. *Atlantic Coast Line RR* (1970, J. Black).
   2. E.g., if proceeding in rem, can enjoin st ct b/c two courts can’t have jur over one res at the same time! *Hagan*.
   3. E.g., if fed statute grants exclusive jurisdiction.
   4. NB: this is *pre*-judgment: both proceedings are currently ongoing.
3. “to protect and effectuate its judgments” (the “relitigation exception”).
   1. NB: this is *post*-judgment: fed ct has adjudicated, can enjoin state court from issuing a contradictory ruling.

\*RULE: in § 1983 action, judges are not obligated by AIA to not enjoin, have discretion to enjoin or not. *Mitchum*.

\*RULE: in statute that is not §1983, there will be a lack of express authorization; AIA blocks and never get to *Younger*.

\*RULE: You can get into federal court via anticipatory action (don’t break the law!):

1. proceeding against you is not yet ongoing or pending in state court *and*
2. you sue first (assuming you can survive standing and ripeness problems)

## B. *Younger*: If State Proceedings Ongoing, Fed Ct *Can’t* Provide Injunctive or Declaratory Relief

\*RULE: fed ct can’t enjoin an ongoing state proceeding if there is a significant state enforcement interest, such as

\*YES: Criminal proceeding. *Younger* (1971).

\*YES: Civil proceeding “in aid of” criminal proceedings. *Huffman* (1975) (state sues to abate showing of obscence movies).

\*YES: Civil enforcement action in which state is a party. *Trainor* (1977) (state sues to recover for welfare fraud).

\*YES: Private lawsuit in which a significant state interest is at issue, such as:

🡪YES: enforcing decisions of st courts. *Pennzoil* (1987).

🡪YES: combatting discrimination. *Dayton Christian Schools* (1986). (can’t enjoin state admin proceeding.)

🡪YES: conduct of attorneys. *Midsex Ethics Comm. v. NJ Bar Ass’n* (1982). (can’t enjoin bar disciplinary proceeding)

🡪NO: validity of state statute can be challenged in fed ct b/c not an ongoing proceeding. *Wooley v. Maynard*.

🡪NO: validity of state utility rate can be challenged in fed ct b/c not an ongoing proceeding. *NOPSI* (1989).

🡪***TA: Fed ct can enjoin if challenge is facial (NOPSI) but not applied (Pennzoil). But: ripeness/overbreadth.***

\*BUT: *Younger* exceptions: fed court can enjoin state proceeding “if immediate & irreparable harm”:

1. “bad faith harassment”: i.e., equitable solution b/c damages inadequate; common claim in FDC. *Dombrowski*.
2. “patently and flagrantly unconst’l”: Even egregious statute (Syndicalism Act in *Younger*) or st ct action (*Trainor*)not enuf.
3. Bias: no “full & fair opp” to litigate in st ct, denial of dp. (E.g, ALJ is incompetent/biased, FDC can enjoin. *Berryhill*.)

\*RULE: fed ct can not issue a declaratory judgment against an ongoing st ct proceeding, either. *Samuels v. Mackell* (1971).

## C. If State Proceedings Ongoing, Fed Ct *Can* Provide Damages

\*RULE: fed ct can issue damages despite an ongoing st ct proceeding (b/c remedy is not equitable or discretionary). *Quackenbush*.

\*BUT: usually fed ct will stay pending state judgment. (And then RJ likely to bar fed damages after state decision final!)

## D. See below, V-3(B) (“Interest Analysis”)

## E. 1983, Preclusion and Track-Picking

\*NB: Preclusion = no civil habeas (st ct denies crim D rights, can go to fed ct twice; st ct denies civil rights, can go to fed ct once).

\*RULE: for §1983 worry about track-picking; for habeas worry about exhaustion.

\*RULE: §1983 is supplement to available state remedies, state remedies not exclusive. *Monroe* (state court), *Patsy* (state admin).

\*RULE: If had full & fair opportunity to litigate fed claims in st ct and lost, can’t relitigate in fed ct. *McCurry*(i.e., issue preclusion).

\*RULE: If you *could have brought* fed claims in st ct but chose not to, can’t relitigate in fed ct. *Migra* (i.e., claim preclusion).

\*RULE: If you *could have brought* fed claims in fed ct but chose st admin proceeding, can’t relitigate in fed ct. *TN v. Elliott* (1986).

\*RULE: If you *could not have brought* fed claim in st ct (e.g., antitrust), state CE rules apply: can’t relitigate in fed ct. *Marrese*.

\*RULE: Use state preclusion rule: if st ct would accord CE effect to earlier st ct decision, fed ct should, too. *Kremer* (1982). E.g., state preclusion rule might explain when a state court adjudication is “final,” or CE effect of settlement. *Matsushita* (1996).

### 1. Allen v. McCurry (1980)

\*HIST: cops find drugs in McCurry's house; has 4A claim but can't bring habeas (*Stone*), so brings § 1983. H: Can't bring.

\*BF: Wrong under *Monroe* and *Mitchum*.

\*TA: Easy to get precluded b/c no mutuality req’t! §1983 action precluded even though cops were not parties in prosecution.

\*MCCURRY HYPOS: What if:

\*lose 4A claim in st ct, bring habeas? No. *Stone*.

\*lose 5A claim in st ct, bring habeas? Yes.

\*lose 5A claim in st ct, win in habeas ct, bring 1983 claim? Yes, b/c habeas ct found that no full & fair opp in st ct.

\*win 5A claim in st ct, bring 1983 claim? Yes, but can’t use issue preclusion offensively (would have to win the claim again).

# V-3. Solutions to the Preclusion Problem

## A. When Does Interest Analysis Fail?

\*When does interest analysis work (have your fed interest heard in fed ct) and when does it fail because you’re in state court?

\****Works***: Involuntary D (Criminal): Not precluded, habeas (minus 4A). But exhaustion requirement.

\****Works***: Voluntary P: Precluded. No right to *England* reserve, blew your chance to start in fed ct. *Migra* is right.

🡪prof thinks fails b/c no fed forum despite valid fed claim

\****Fails***: Involuntary P: Precluded. You should be able to *England* reserve, which is why *San Remo* is wrong.

\****Fails***: Enforce D (Civil) procedural: *Trainor:* state civ enforcement to recover welfare fraud (despite valid dp claim).

\****Fails***: Enforce D (Civil) substance: *Dayton Schools* (admin rvw can continue despite valid 1A claim), *Huffman*/*Mitchum* (prosecution can continue despite valid 1A claim). Solution: sue for equitable relief before proceeding begins!

\****Fails***: Civil D has a federal defense: *Pennzoil, Mottley* (despite valid fed defense, *Mottley* rule kills removal).

\****Works***: Civil P in fed ct w/ state claims: *Pullman*, *Thibodaux* (fed interest heard in fed forum).

\****Works***: Civil P in fed ct w/ state law claim against state official: *Pennhurst* (no fed interest).

\*NB: The Postulate asks a different question: can you get a federal claim heard at all; PROF is concerned w/ fed claim in fed forum.

\*RULE: Does a party in state court get one bite at the federal apple at two?

\*RULE: Criminal D: two. (SCOTUS review + habeas). *McCurry*, *Younger*.

\*RULE: Everyone else: one (SCOTUS review).

## B. How to fix when interest analysis fails? How can you get your fed claim into fed court?

### 1. You have federal claims and state claims; how do you get fed claims into fed court?

1. Remove to fed court. (But must satisfy §1441 or §1442.)
2. Pick state court and file both state and fed claims there. (But worry about preclusion.)
3. Pick both and go to state court first, save fed claims for later. *Pullman*/*Thibodaux*/Certification + *England*.
4. Pick both and do both simultaneously. *Kline* (double-tracking).
5. Arg: there should be civil habeas every time interest analysis fails!

### 2. Three Governing Principles

1. Congress: lots of power to allocate cases to state vs. fed court
2. Don’t break the law (no action pending, no state enforcement interest 🡪 can go to fed ct.)
3. Preclusion: was the plaintff in state court voluntarily or involuntarily? See Section A above.

## C. Don’t break the law: Anticipatory Actions & Declaratory & Injunctive Relief in *Steffel*/*Hicks*/*Doran*

\*RULE: fed ct *can’t* give declaratory relief if state starts before fed gets to merits. *Hicks.* No relief despite prosecutorial harassment!

\*RULE: fed ct *can* give declaratory relief if no ongoing state prosecution (even if threatened, as long as not pending). *Steffel* (1974).

\*RULE: fed ct *can* give injunctive relief if no ongoing state prosecution. *Doran v. Salem Inn, Inc.* (1975).

\*NB: 2 owners comply w/ shutdown, 1 doesn’t. If none complied: *Younger*, no fed suit. If all complied: unripe, no fed suit.

\*RULE: fed ct *can* enjoin state statute if no ongoing prosecution. *Wooley v. Maynard* (1977). (Maybe just *Younger* harass exception?)

\*RULE: fed ct *could have given* declaratory relief to school that wants to fire teacher; after firing, blocked (*Younger*). *Dayton Schools*.

\*RULE: ***Ripeness***: if there’s a law on the books and you claim to be prepared to violate it, ripe! BUT:

1. Overbreadth Doctrine: fed ct reluctant to strike down state statutes facially.
2. Exec Action (admin): Do we know for *sure* how agency will act, and will create a hardship?
3. Exec Action (discretionary): *O’Shea*, *Lyons*, *Rizzo*.

## D. *England*

\*RULE: if fed ct *Pullman* abstains, party forced into st ct can reserve its fed claims for when it’s back in fed ct. *England* (1964).

\*BUT: in fed ct and fed & state claims are substantially the same: fed ct won’t abstain. *Pullman*, *Harris County*.

\*BUT: in state ct and fed & state claims are substantially the same: precluded, *England* reservation will be invalid. *San Remo*.

***\*TA: if fed & state claims are the same, don’t raise either one in state court: reserve fed claim and let state claim go.***

\*RULE: in order to make sure you actually save your fed claims for fed ct, you must:

1. identify the specific fed Qs you are reserving (*Windsor*) *and*
2. make the reservation before the state court reaches a “complete and final adjudication” on the fed issues.

\*RULE: party with fed takings claim must exhaust compensation request in st ct *Williamson Cty*. (Prof: almost as stupid as *Stone*.)

### 1. When should a party be allowed to England reserve?

1. Not “congruent”: It should be allowed anytime fed and state interests compete! But not when they’re congruent. Friedman.
2. Involuntary state court Ps: It should be allowed whenever *forced* into st ct. *San Remo* (forced to st ct by *Williamson*).
3. Involuntary state court Ps in fed ct: It should be allowed when you start in fed ct and *then forced* into st ct. *Pullman*.
4. Civil Ds in Private Lit: Friedman.
5. Civil Ds in Enforcement Lit: Friedman. *San Remo*.

## E. Ripeness, Standing & Mootness

\*RULE: standing = spectrum from unripe (future injury unlikely) 🡪 ripe 🡪 moot (injury is past)

\*RULE: fed ct won’t enjoin state officials for unfair bail policy (unripe), past incarceration not enough (moot). *O’Shea*.

🡪NB: if *Younger* exception for prosecutorial harassment, fed ct can enjoin; but fed ct assumes state appeals adequate.

\*RULE: can’t enjoin LAPD from using chokeholds, future damage speculative (unripe). Damages claim can be severed. *Lyons*.

# VI. Immunities

\*NB: can pierce 11th A immunity (by abrogation or by Young), can pierce QI (by lack of good faith or by right being clearly established); but suit will still be in official capacity.

# VI-1. Immunity: State Immunity & the 11th Amendment

### 1. Theories of the 11A

\*see notes p. 87

## A. The Rule

\*RULE: Citizen of State B can’t sue State A in federal court. 11th Amendment.

\*RULE: Citizen of State A can’t sue State A in federal court, even in fed Q cases. *Hans v. La.* (1890).

\*BUT: State A can sue State B, Fed Gov’t can sue State B: no 11th A immunity. *KS v. CO.* (Only injunction. *Edelman*.)

\*BUT: Appeals of state crim convictions to SCOTUS are not suits against the state. *Cohens v. VA*.

\*BUT: Individual can sue a county in fed court. *Lincoln County v. Luning*.

\*BUT: Citizen of State B can sue State A in State B state court. *NV v. Hall*.

\*BUT: maybe Citizen of State B can sue State A in fed ct if there’s fed Q jur?

\*RULE: 11th A blocks suits against state officials as well as states, *Osborn* is a dead letter. *Edelman*; *Madrazzo v. GA.*

## B. Suing State Officials

\*RULE: if the state law or state action is unconst’l, then the official is not acting on behalf of the state. *Ex Parte Young* (1908).

\*CF: *Home Telephone*: state official = state for 14th A; *Young*: state official ≠ state for 11th A!

\*TA: You can sue a state official but only for injunctive relief. *Young* + *Edelman*.

\*BUT: 11A bars suit against state officers even in personal capacity, *Young* is “discretionary.” *Idaho v. Coeur d’Alene Tribe* (1997).

\*BUT: corp can proceed against individual state agency commissioners. *Verizon* (2002 Scalia 9-0).

## C. Suing State Officials: Injunctions:Yes, Damages:No

\*RULE: can suest official for injunctions (prospective); can’t sue for damages (retrospective). *Edelman v. Jordan* (1974).

🡪PROF: seems to under-deter states! Can violate all they want, worst that happens is they have to stop.

\*RULE: can’t suefor injunctive relief if you’re demanding specific performance of a K. *In re Ayers* (1887).

\*RULE: can suefor fees ancillary to an injunctive remedy (cost for court-ordered program). *Milliken* (1977).

\*RULE: can suefor fees ancillary to injunctive relief (attorney fees). *Hutto v. Finney* (1978). RATI: Cong’l intent to pierce 11A.

## D. Suing State Officials: Abrogation

\*RULE: Cong can allow suits as long as it’s under 14A § 5. *Fitzpatrick*. (Not Art. I / Commerce Clause. *Seminole Tribe*.)

\*RATI: 14th A comes after the 11A.

\*RULE: Cong can’t allow suits unless that’s a remedy congruent & proportional to violation of a federal right. *Boerne*.

\*RULE: Cong can allow suits if it makes (a) a clear stmt of abrogation and (b) provides sufficient evidence of state violations. *Hibbs*.

\*RULE: Cong can allow suits without congruence & proportionality if the violation is an “actual const’l violation.” *Georgia*.

\*RULE: Cong can’t allow suits against states in state courts. *Alden v. Maine* (1999).

\*DISS (Souter): 11A should not apply in Fed Q, only in diversity; supremacy; *Testa v. Katt*.

\*DICTA: “must turn square corners when dealing with the government”

### 1. Abrogation Invalid Under Boerne (i.e., state can’t be sued)

\*RULE: Statute authorizing suits against states (patent infringement) invalid, not sufficiently tailored. *Florida Prepaid* (1999).

\*RULE: Statute authorizing suit against states (VAWA) invalid, not sufficiently tailored. *U.S. v. Morrison* (2000).

\*RULE: Statute authorizing suit against states (ADEA) invalid, no evidence of state viols. *Kimel v. Florida Bd. of Regents* (2000).

\*RULE: Statute authorizing suit against states (ADA) invalid, no evidence of state viols. *U. Alabama v. Garrett* (2001).

### 2. Abrogation Valid Under Boerne (i.e., state can be sued)

\*RULE: Congress has greater latitude to legislate under 14A § 5 when dealing with a claim that receives heightened scrutiny. *Lane*.

\*RULE: ADA abrogation valid: clear stmt + sufficient evidence (access to courts gets high scrutiny). *Lane*.

\*RULE: FMLA abrogation valid: clear stmt + suff’t evidence of violation (gender discrim gets intermediate scrutiny). *Hibbs*.

\*RULE: ADA abrogation valid: clear stmt + “actual const’l violation” (fundamental right gets high scrutiny). *U.S. v. Georgia*.

\*RULE: Abrogation under bankruptcy powers OK. *Central Va. Comm. College v. Katz* (2006). (Bankruptcy but not patents?)

## E. Suing State Officials: Waiver

\*RULE: If a state waives its immunity and consents to suit in federal court, the 11th A does not bar the action. *Atascadero* (1985).

\*RULE: A state can waive its immunity by: litigating; statute (“we consent to being sued in fed ct,” e.g. FTCA); removal. *Lapides*.

\*RULE: The fed gov’t can use it’sspending power (*Dole*) to demand a waiver of 11th A immunity in exchange for federal money as long as it’s congruent & proportional.

# VI-2. Immunity: Municipal Liability and Individual Liability

## A. Rationales for Immunity

\*RULE: Absolute and Qualified Immunity are immunity from money damages.

\*Arg do grant immunity: don’t want to chill enforcement or recruiting; don’t want distracting lawsuits

\*Arg don’t grant immunity: want to vindicate rights; want to remedy and deter violations

## B. Absolute immunity

\*RULE: automatically dismiss if D was acting within scope of authority (function, not office).

\*RATI: too important to be sued; without immunity, judges and prosecutors would be constantly sued; need discretion; alternatives (electoral check on elected officials, appeals for prosecutors and judges)

### 1. Who gets absolute immunity?

\*RULE: President: absolute immunity for acts w/i “outer perimeter” of duty. *Nixon v. Fitzgerald*.

\*RULE: Presidential aides: absolute immunity if work in “sensitive areas.”

\*RULE: Cabinet members: QI. *Butz*.

\*RULE: Fed legislators & legislative aides: absolute immunity for legislative acts (“speech & debate”). *Gravel*.

\*RULE: State legislators & legislative aides: absolute immunity for legislative acts. *Tenney v. Brandhove*.

\*RULE: Judges: absolute immunity for “judicial acts.” *Stump*.

\*EG: approving parents request to sterilize daughter w/o her knowledge: judicial act (even though ex parte), immunity. *Stump*.

\*BUT: no immunity if acting in “clear absence of all jurisdiction” or not a “judicial act.” Firing clerk = administrative.

\*RULE: Prosecutors: absolute immunity for prosecutorial role (though not investigatory role). *Imbler*.

\*BUT: AG Mitchell authorized a warrantless wiretap for national security: investigatory, no immunity. *Mitchell v. Forsyth*.

\*EG: failure to train ADAs on *Brady* rules: is prosecutorial (though looks like admin), immunity. *Van de Kamp v. Goldstein*.

\*EG: Ashcroft is just a supervisor, no liability. *Ashcroft v. Iqbal* (2009).

\*RULE: Police who relied on counsel: no absolute immunity when judge signs off on PC, cop should have known no PC. *Briggs*.

## C. Qualified Immunity

***\*RULE: gov’t official in discretionary function gets QI if right was not “clearly established” + acted in good faith. Harlow.***

\*RULE: FDC can look at either prong first. *Pearson*.

\*Arg: first decide if P’s rights were violated; then decide if right was est’d. If ***yes-yes***, remedy. If ***yes-no*** (right was not est’d + there is good faith) then no remedy.

\*Arg: first decide if right was clearly established, then you can have const’l avoidance. *Ashwander*.

\*RULE: immunity is for functions: no immunity for ministerial functions b/c if ministerial, not discretionary, can’t be good faith!

\*RULE: Good faith immunity is an affirmative defense; (1) presumes knowledge of and respect for basic const’l rights; (2) official reasonably should have known he was violating const’l rights or did so w/ malicious intention. *Harlow v. Fitzgerald* (1982).

### 1. “Clearly Established Law”

\*RULE: Sufficient: SCOTUS case on point.

\*RULE: Sufficient: Lower fed ct cases on point, as long as consensus. *Lanier*.

\*RULE: Insufficient: Lower fed ct cases w/ no consensus or circuit split. *Safford Schools v. Redding*.

\*BUT: clear decision by a Circuit makes the law clearly established within that circuit, even if dicta. *Camreta v. Greene*.

\*RULE: Sufficient: lawlessness apparent in light of preexisting law; no need for specific case on point. *Hope v. Pelzer*.

\*RULE: Availability of QI turns not on the general right but its application to particular facts. *Anderson v. Creighton*.

### 2. Personal Capacity, Official Capacity, and Municipal Liability Under Monell & Owen

\*RULE: If cop sued in personal capacity, may claim QI. *Tenney v. Brandhove*.

\*RULE: If cop sued in personal capacity, can only award damages & attorney’s fees against the officer, not the gov’t. *KY v. Graham*.

\*RULE: If cop sued in official capacity, can order gov’t to pay damages and attorney’s fees if notice & opportunity to defend. *Holt*.

\*RULE: Cop will be sued in official capacity when goal is equitable relief. *Hutto v. Finney*.

\*RULE: municipality can be sued even if law not clearly est’d (and even if cops get QI). *Owen v. Independence*.

\*BUT: municipality can be sued only if it’s a policy or custom. *Monell v. Dept. of Soc. Servs.* (1978).

\*BUT: municipality can’t be sued for punitive damages. *Newport v. Fact Concerts*.

### 3. What is a “policy or custom”?

\*RULE: official written policy *or* single decision of a “policymaking official.” *Pembaur v. Cincinnati*.

\*RULE: state law determines who is a “policymaking official.” *St. Louis v. Praprotnik*.

\*RULE: failure to train: municipality can be liable only if deliberate indifference to const’l rights. *Canton v. Harris*.

\*EG: failure to train ADAs on *Brady* rules: insufficient pattern. *Connick v. Thompson* (2011).

\*RULE: Must be “deliberately indifferent” to a particular const’l injury. *County Commissioners v. Brown*.

### 4. Remedial gap

\*Gap 1: unestablished right violated by state official: no $$.

\*Gap 2: unestablished right violated by muni official, no muni policy *or* action by policymaking official: no $$.

🡪*Must be neither; either one would create liab*.

\*HYPOS: Cop acts before and after SCOTUS case clearly establishes that a practice is unconst’l.

\*rights violated by state official: not clearly est’d: official not liable, state not liable. GAP.

\*rights violated by state official: clearly est’d: official liable, state not liable.

\*rights violated by muni official, not clearly est’d, written policy: officer not liable, muni liable.

\*rights violated by muni official, clearly est’d, written policy: officer liable, muni liable.

\*rights violated by muni official, not clearly est’d, policymaker acts: officer not liable, chief not liable, muni liable.

\*rights violated by muni official, clearly est’d, policymaker acts: officer liable, chief liable, muni not liable (BUT: *Canton*).

\*rights violated by muni official, not clearly est’d, no policy or policymaker act: officer not liable, muni not liable. GAP.

\*rights violated by muni official, clearly est’d, no policy or policymaker acts: officer liable, muni not liable (BUT: *Canton.*)

\*rights violated by muni official, not clearly est’d, no policy, chief is the one who shoots: chief liable, muni liable.

\*rights violated by muni official, clearly est’d, no policy, chief is the one who shoots: chief liable, muni liable.

# VII. Jurisdiction Stripping and The Dialogue

## A. Hypos

\*HYPO: can Congress say no fed ct has jur to consider constitutionality of any part of the ACA?

\*Arg yes: Cong can define jur of FDCs, can make exceptions from SCOTUS’s jur. *Yakus, McCardle*.

\*Arg no: separation of powers; Courts say what the law is; state court is inadequate alternative.

\*HYPO: can Congress say SCOTUS has no app jur to consider constitutionality of any part of the ACA?

\*Arg yes: Exceptions. Art. III § 2(2): Cong can strip app jur under “exceptions” and “regulations.”

\*Arg no: This is within SCOTUS’s “essential role,” can’t strip its jurisdiction.

\*HYPO: Cong creates MCs to try ECs; all review in 10th Cir w/ jur *only* to ask if MC decision “in accordance w/ law.” TA: *Crowell*.

\*NB: MADCOMP: Madisonian Compromise: Up to Congress to create lower federal courts.

\*NB: Art III § 2: “The judicial power shall extend to all cases”

\*NB: Theory of “full vesting” (but vesting isn’t full! Exceptions for incomplete diversity; $75K amt req’t; originally no fed Q jur; SCOTUS originally could hear case only if state court *denied* a fed right).

## B. The Big Four Cases: *Sheldon, McCardle, Klein, Yakus*

\*RULE: No right to proceed initially in fed ct; Cong can define jur of FDCs under “ordain and establish.” *Sheldon v. Sill* (1850).

🡪RATI: const’l jur (Art III defines outer limit) **>** stat jur (Cong can give less or not create FDCs at all).

\*RULE: Cong can make “exceptions” to SCOTUS’s jur. Art. III § 2(2). *Ex Parte McCardle* (1869). Strip valid.

🡪SCOTUS retains its inherent appellate jur over habeas cases. *Yerger*.

\*RULE: Cong can’t strip jur to protect its unconst’l statute. *Klein* (1871). Strip invalid.

🡪RATI: statute unconst’l on its face: infringed on executive pardon power. Cong trying to influence outcome on the merits.

🡪PROF: Maybe Klein has more precedential value than McCardle; need to consider McCardle in extroardinary context.

\*RULE: Cong can put exclusive jur in admin court as long as it’s an “adequate alternative.” *Yakus* (1944). Strip valid.

## C. The Little Ones: *Crowell*, *Betaglia*, etc.

\*RULE: Cong can strip FDC jur to enjoin unions. *Lauf v. Shinner & Co.* (1938).

\*RULE: Cong can strip FDC jur to hear challenges to price controls. *Lockerty v. Phillips* (1943).

\*RULE: Cong can’t strip FDC jur to hear Qs of law in a private dispute, FDC can hear Qs of law de novo. *Crowell v. Benson* (1932).

\*RULE: If const’l right at issue, FDC always has jur to determine if it has jur. *Betaglia v. GM* (2d Cir. 1948). Strip invalid.

\*RULE: Cong can control path to particular remedy; Cong can’t eliminate *all* remedies. *Cary v. Curtis* (1845).

\*RULE: can’t play bait-and-switch with an ex post remedy, that violates due proc, which pierces 11th A immunity. *Reich v. Collins*.

## D. The Suspension Clause: When Can Congress Strip Habeas Jurisdiction?

\*RULE: Cong is limited in power to strip jur from lower FDC, nowhere to get habeas! *Tarble’s Case*. \*PROF: wrong, MADCOMP*.*

\*RULE: Violates suspension clause: precluding all judicial review, unless Cong uses magic words. *St. Cyr* (2001).

\*RULE: Does not violate suspension clause: AEDPA successive pet rule is not a suspension b/c SCOTUS retained original jur to hear habeas. *Felker* (1996 9-0). (cf. Hertz note on Troy Davis.)

\*RULE: Does not violate suspension clause: Real ID Act of 2005 denies habeas jur for deportation: circuits can hear any and all const’l/fed law claims that are cognizable on habeas.

\*TAQ: What about sufficiency of the evidence? Does it apply only to pure law or also mixed Qs of fact and law? Is there really a distinction? Aren’t mixed Qs more important to Ds? But maybe habeas is only about settling pure Qs of law?

## E. The Dialogue

\****The Question***: Does Cong’l power to determine jurisdiction affect the power to vindicate rights?

\****The postulate***: one always has access to a constitutional court:

1. to rule on
   1. claims of entitlement or sufficiency of judicial process *or*
   2. claims that rights are violated and not vindicated
2. And to provide such process if the claim is sustained.

\*RULE: Just a right to *some* remedy, *some*where; not a right any particular remedy, or any particular court.

### 1. Initial inquiries

1. Do you have a right to proceed initially in fed ct? No. *Sheldon*. Madisonian compromise.
2. Can state court just refuse to hear fed claim? No. *Testa*. But Congress can strip SCOTUS’s appellate jur. *McCardle.*
3. “Exceptions” power: Congress can strip all app jur except “essential role”: uniformity, supremacy, vindication of fed rights.
4. Do you have a right to proceed or be proceeded against in one fed ct vs another (D-NY vs. D-NJ)?
   1. Crim Ds: tried in district where crime occurred.
   2. Civil Ps: Cong has plenary powers, can do anything.
   3. Civil Ds: personal jur provides a limit. (Although maybe nationwide service of process is invalid.)
5. Do you have a right to be in an Art. III court vs an Art. I court (federal agency ALJ)?
   1. RULE: Cong can designate an adequate alternative (federal) remedy. *Yakus*.
   2. RULE: Crim Ds have a right to an Art III court. *Yakus*.
   3. RULE: for others, depends on nature of right asserted & availability of review in const’l court. *Crowell v. Benson*.
      1. If suing gov’t: less right to Art III court, *Yakus*. If private suit (two people; CL): more right to Art III court.

### 2.What are the rights of Ps and Ds to judicial process?

(a) Overview: Four Takeaways:

\*TA: minimum is review of (i) questions of law and (ii) suffiency of the evidence in a const’l court.

\*TA: maybe Criminal Ds and Class 3 Ps will get more fact review.

\*TA: what process is due depends on circumstances, but courts must have right to check adequacy of process.

\*TA: There’s no right to jurisdiction unless there’s a right being deprived.

\*RULE: Jur-stripping can only hurt rights of Ps.

* 1. Not worried about *judicial Ds* (who are already in court): Ds can’t be hurt by denial of jur, only helped.
  2. RULE: def *P who becomes an enforcement D*: if P loses his suit, gov’t will enforce rights against him. *Crowell*.
  3. RULE: jur can either strike down the stripping of jur *or* find in favor of D. *Yakus*.

\*RULE: What Rights Do Defendants Get?

1. Civil Ds: minimum process is legal questions, including sufficiency of evidence and Qs of law in Art. III court.
   * 1. Yakus: Congress can: take away legal defenses but must have “one good avenue”: alternative adequate scheme.
     2. Yakus: Congress can’t: close off *all* possible remedies. *Curtis*.
     3. Crowell (updated): Congress can: delegate fact-finding to agencies.
     4. Crowell (updated): Congress can’t: strip Art. III’s court to review de novo Qs of law.
     5. NB: Can delegate law to agency if “law” includes “discretion in shaping judicially enforceable duties.”
     6. NB: Cong can delegate to agency despite 7A b/c 7A only protects suits at CL; most admin cases not damages.
2. Criminal Ds: same rights as civil Ds, ***plus***: jury, trial, etc.
   * 1. selective service cases (“induction”): Cong uses courts for enforcement only: were you the person called or not?
        1. RULE: can’t defend and claim exemption, all you can say is, “not me”; if it’s you, go to jail. *Falbo*.
        2. RULE: can’t defend and claim exemption; must exhaust admin remedies. *Estep*.
        3. RULE: can defend in Art. III court and claim harassment/retaliation. *Oestereich*.
     2. RULE: crim prosecution for being deported and then re-entering; D objects b/c crim liability being determined by admin agency; H: yes, *Yakus* only OK in extreme emergency, entitled to fed ct. *Mendoza-Lopez*.
3. What Rights Do the 3 Categories of Plaintiffs Get?
   1. I want the gov’t to help me
      1. ***I want the gov’t to help me enforce a private right*** (e.g., P in a tort suit; FLSA claim)
         1. e.g. you have CoX against another person, Congress strips court of right to hear it, puts in agency
         2. RULE: Art. III court always has jur to determine if it has jur. *Betaglia* (Portal-to-Portal case).
         3. RULE: in return for giving new CoX against brokers, have to submit to lesser procedures. Valid. *Schor*.
         4. RULE: Cong’l silence = desire to preclude judicial rvw. *Switchmen’s Un v. Nat’l Mediation Bd* (1943).
         5. Limit on *Yakus*: torts, Ks… common law! *Most process* when Cong is shoving CL RoX into an agency.
      2. ***I want help directly from the gov’t*** (entitlements, e.g., P in a benefits case)
         1. HART ARG: Entitled to least process: a benefit, not a right. (Wrong, *Matthews*: right to some process).
         2. BUT: if they do have process, Cong’l power to impair it is same as Class 3 Ps.
   2. ***I want the gov’t to not harm me*** (e.g. habeas esp. immigrants)
      1. HART ARG: Entitled to most process: “If the court finds that what is being done is invalid, its duty is simply to declare the jur’l limit invalid also, and then proceed under the grant of gen jur.”
      2. RATI: strong liberty interest
      3. RULE: tax payment is a penalty, can only be enforced by crim law. Enjoin collection. *Lipke* (1922).
      4. BUT: Knauff & Mezei violate the fundamental postulate: can’t defer, must see if process is *adequate*.
         1. RULE: non-resident aliens trying to get in: whatever Cong decides. *Knauff* (1950).
         2. RULE: resident aliens trying to get in: whatever AG decides. *Mezei* (1953).

### 3. Don’t worry about Sovereign Immunity

1. Only immunizes the state gov’t! Can still sue sovereign officials (*Young*) and munis (*Owen*).
2. Waiver: gov’t has pressure to waive immunity (e.g. takings cases; will waive it in contracts or no one will want to K w/ gov’t.)
3. Safeguards: Constitution (takings clause protects taking of property) and political (electoral check protects taking of liberty).

### 4. Don’t worry about Jurisdiction Stripping

1. Gen jur exists under habeas (liberty), takings (property), § 1331, All Writs Act.
2. EG: Fed Ct has gen jur to examine a hard labor scheme (a facial challenge). *Wong Wing v. U.S.* (1896).
3. EG: Fed Ct has gen jur to examine process for citizenship ruling (an as applied challenge). *Ng Fung Ho v. White* (1922).
4. BUT: what if Cong eliminates grant of general jur? A: They probably won’t! Fair courts lend credibility to democracy.
5. Safeguards: Cong won’t be able to gang up on a suspect class because there are safeguards:
6. Const’l: SCOTUS can adopt a “saving construction” (e.g. *Hamdan*), plus can’t suspend habeas b/c suspension clause
   1. TA: True! SCOTUS does lots of const’l avoidance! *St. Cyr* (saving consruction of suspension clause)
   2. TA: True! SCOTUS actually does check to see if the substitute is adequate. Court asks, what would be const’l prereqs? If no jur, just deals with it. *Boumedienne*, *St. Cyr*, *Hamdi*.
7. Political: courts require a clear stmt so political check can operate, e.g. *Merrymen*: CJ knows he can’t enforce writ, files so public can respond at ballot box)
8. State Courts: can’t strip from both fed cts and st cts; st ct can refuse to abide by unconst’l declaration of exclusive jur, just use gen jur; SCOTUS limited in how it can strike down holdings of state courts; state courts bound by *Testa*.
9. Congress can’t strip appellate jur in the “essential role.” Must be jur to determine jur. *Bataglia*.
10. Congress’s bad motives limited by *Klein*.

### 5. Updating the Dialogue

\*Fallon and Meltzer arg: may not be a remedy for every right, just need to have a system that generally remedies the right, so enough deterrence to make the system work. PROF is skeptical: what about *Lyons*? Strip search case this term?

\**see notes on theory*

# VIII. Military Commissions, Military Tribunals and Gitmo

\*RULE: can’t try citizens in MC “when courts are open.” *Ex Parte Milligan* (1866).

\*RULE: can try citizen in MC if citizen is an uninformed “enemy combatant” held in U.S. *Quirin* (1942).

\*TA: How to reconcile? Maybe: Quirin admitted crime, Milligan did not; FDR was gonna execute Quirin anyway.

\*RULE: no habeas for enemy aliens abroad. *Eisentrager* (1950). (TAQ: no rights at all, or just no jur?)

\*NB: DTA: sets up combatant status review tribunals (CSRT) to determine if detainment is OK; MCs to try for war crimes.

## A. Gitmo Cases: Statutory Habeas Grant in 28 USC § 2241

\*RULE: Alien EC at Gitmo: get habeas. *Rasul* (2004). (RATI: Gitmo is under U.S. control, effectively U.S. territory.)

\*RULE: Alien EC at Gitmo: get habeas. DTA creating MCs does not strip jur of fed cts, require superclear statement. *Hamdan* (2006).

## B. Gitmo Cases: Constitutional

\*RULE: U.S. citizen at Gitmo: can be detained (AUMF) but entitled to adequate alternative (“basic process”). *Hamdi* (2004).

\*DISS (Scalia & Stevens): no suspension (courts are open), to detain citizen must charge him; if not, he has habeas. *Milligan*.

\*RULE: Alien EC at Gitmo: get habeas. MCA procedures are not an adequate substitute. *Boumediene I* (2008).

\*RATI: U.S. has de facto sovereignty over Gitmo.

\*RULE: MCA §7 is unconst’l suspension of the writ (and invalid jur strip), but DTA and CSRT ok. *Boumediene II* (2008).

\*RATI: right to provide new facts on rvw; court must have power to review law and facts and to release the prisoner

\*DISS (Roberts): paradox of majority is that “any interp of that statute that would make it an adequate substitute for habeas must be rejected, b/c Cong could not possibly have intended to enact an adeq sub for habeas” (***accurate criticism***).

\*RULE: CSRT insufficient b/c all evidence is so vague, remand for new CSRT. *Parhat v. Gates* (DC Cir 2008).

\*RULE: U.S. part of multinat’l force, but U.S. courts have habeas jur b/c U.S. is really in charge. *Rums v. Padil* (2004); *Munaf* (2008).