BOOK REVIEW

LAW STORY


Reviewed by Akhil Reed Amar⁵

What can you say about a thirty-five-year-old casebook that still lives?
That its first edition⁶ was beautiful and brilliant — probably the most important and influential casebook ever written. That the first edition was nevertheless deeply problematic in its vision of federalism, separation of powers, and “cases and controversies.” That its newly released third edition is better in many respects — more aware (though not univocally and uncritically supportive) of a resurgent vision of federal courts as irreplaceable guardians of federal constitutional rights, and active enforcers of federal constitutional remedies, against both state and federal governments. That, in keeping with the casebook’s underlying vision of legal doctrine, The Federal Courts and the Federal System is itself in the process of working its grand themes pure. That there thus remains modest room for improvement, and good reason to hope that future editions of the casebook will occupy at least part of that room.

That the foregoing statements require more elaboration before they should be accepted.

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I. THE PAST

As *The Federal Courts and the Federal System* makes abundantly clear, full understanding of contemporary issues of federal jurisdiction requires a historical investigation of legal doctrines and legal institutions. Thus, the book opens with a chapter discussing the historical origins of article III and describing the broad contours of major jurisdictional statutes from 1789 to date (pp. 1–64). In subsequent chapters, virtually every major doctrinal theme is developed with attention to historical lineage and evolution. Similarly, an ideal account of the casebook itself should begin with a historical inquiry into the book’s origins and antecedents. This seems especially apt for a book whose new preface opens with the following words:

Authors of new editions tend to brag about how much there is that is new. In contrast, we are particularly pleased that so much of the classic First Edition remains alive in this, the Third. We have sought to retain the historical and analytical richness of the first two editions, as well as their editorial method . . . (p. xxi).


When Professors Henry Hart and Herbert Wechsler published the first edition of their casebook on federal courts in 1953, they were greeted with a unanimous and near-deafening chorus of accolades from the scholarly community. In the pages of this *Review*, Professor Kurland described the book as “the definitive text on the subject of federal jurisdiction in spite of its casebook label. It is a text largely in the sense that Plato’s Socratic dialogues constitute a text.”7 Professor Mishkin’s words in the *University of Chicago Law Review* were even more glowing. The book, he wrote:

turns up real gold in its area of law [and] go[es] further, [to] explore new veins and present new ways of refining the precious metal . . . . With an inexorable drive toward meticulous and thorough understanding of their subject, the authors have produced a masterful contribution to the literature of the law and of law teaching.

. . . [T]he analysis is of an order difficult to match anywhere.8

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7 Kurland, Book Review, 67 HARV. L. REV. 906, 907 (1954). Professor Kurland had served earlier as the President of the *Harvard Law Review*, as had Professor Hart, and as a law clerk to Justice Felix Frankfurter, to whom the first edition was dedicated.

8 Mishkin, Book Review, 21 U. CHI. L. REV. 776, 776–78 (1954). Professor Mishkin had served earlier as an editor of the *Columbia Law Review*, on which Professor Wechsler had served even earlier as Editor-in-Chief. He subsequently became one of the editors of the second and third editions of the casebook.
Like "precious metal," The Federal Courts and the Federal System radiated a sense of beauty and permanence to its many admirers. Professor Barrett's contemporaneous essay in the California Law Review also used gold metaphors to describe the book, and the Georgetown Law Journal declared:

This is the case-book to end all case-books on the subject; it may fairly be said to be the last word; a massive affair, so complete and exhaustive, so competently, indeed inspiringly, written as to render any new book in this field extremely unlikely for some time to come.

How are we to account for this truly extraordinary reception? Much of the first edition's unique strength derives from its sheer scope. The breadth of the issues covered and the depth of historical and legal analysis are staggering. The experience of reading the book is humbling — all the more so to those who fancy themselves "experts" in federal jurisdiction. In almost every chapter, even self-styled experts are likely to encounter myriad and important cases, doctrines, issues, articles, and arguments that they had not previously known or considered. My own initial encounter with the first edition left me feeling exactly the way Professor Barrett felt some thirty years before:

From his first using of the book this reviewer learned how little he really knew about the subject. After the tenth time through the book he expects still to be learning, still to be wondering what the answers are to many of the questions posed by the authors.

By the sheer breadth and depth of their presentation, Professors Hart and Wechsler succeeded in defining the pedagogic canon of what has come to be one of the most important fields of public law in late twentieth-century America, variously described in modern law school course catalogues as "federal courts" or "federal jurisdiction."

But The Federal Courts and the Federal System is more than simply "the most comprehensive and most thoughtful collection of materials relating to the federal courts which have ever been gath-

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9 See Barrett, Book Review, 42 CALIF. L. REV. 202, 203 (1954) ("Most of the text notes are pure teacher's gold.").


11 See P. BOBBITT, CONSTITUTIONAL FATE 43 (1982) ("This extraordinary work is perhaps the most influential casebook ever written. It is the book most frequently cited by the Supreme Court both generally and in constitutional opinions."). It should be noted that Professor Bobbitt's book is itself an extraordinary work that has deeply influenced the general ideas and approach of this Review.

12 Barrett, supra note 9, at 203.

13 See Resolution of the Faculty, 78 COLUM. L. REV. 947, 949 (1978) (stating that the casebook "accomplished the almost unthinkable feat of producing consensus among law teachers about materials of pedagogy").
As important as the book is bibliographically, it is probably even more significant methodologically in defining what has come to be one of the most important schools of legal thought in late twentieth-century America, typically described as "the legal process school." Although the jurisprudential richness of this school resists a simple one-line encapsulation and can best be appreciated by immersion in the book itself, a rough-and-ready description of the school might read something like this. The legal process school focuses primary attention on who is, or ought, to make a given legal decision, and how that decision is, or ought, to be made. Is, or ought, a particular legal question to be resolved by the federal or the state government? By courts, legislatures, or executive agencies? If by courts, at the trial level or by appellate tribunals? If at trial, by judges or juries? Subject to what standard of appellate review? And so on. The question what is or ought to be the substantive law governing citizen behavior in a given area is no longer the sole, or even the dominant, object of legal analysis. Rather, legal process analysis illuminates how substantive norms governing primary conduct shape, and are in turn shaped by, organizational structure and procedural rules.

The legal process methodology dovetails nicely with the scope of federal jurisdiction as a discrete field of study. Indeed, the methodology seems to have helped set the boundaries of the field as defined by Hart and Wechsler — a fact of which the original editors were acutely self-conscious:

The book deals mainly with these problems of federal-state relationships but it also has two secondary themes. In varying contexts we pose the issue of what courts are good for — and are not good for — seeking thus to open up the whole range of questions as to the appropriate relationship between the federal courts and other organs of federal and state government. We also pose throughout problems of the organization and management of the federal courts . . . (1st ed. p. xii).

Although the casebook stands as a monumental landmark in federal jurisdiction and legal process, it does not stand alone: the general issues it posed were at the forefront of legal scholarship in the early 1950's. Indeed, in retrospect, the years 1953 and 1954 appear as — the metaphor is hard to resist — "the golden age" of federal jurisdiction and legal process scholarship. Consider, for example, the arresting number of now-classic articles and significant student Notes in this genre published in those two years by only two law reviews, representing Professor Hart's and Professor Wechsler's respective schools:

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Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic\(^\text{15}\)
Hill, The Erie Doctrine in Bankruptcy\(^\text{16}\)
Note, The Expansion of Federal Question Jurisdiction to Maritime Claims: A New Jurisdictional Theory\(^\text{17}\)
Note, Supreme Court Review of State Interpretations of Federal Law Incorporated by Reference\(^\text{18}\)

Hart, Professor Crosskey and Judicial Review (Book Review)\(^\text{19}\)
Note, The Equitable Remedial Rights Doctrine: Past and Present\(^\text{20}\)
Note, From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century\(^\text{21}\)

Mishkin, The Federal “Question” in the District Courts\(^\text{22}\)
Note, Clearfield, Clouded Field of the Federal Common Law\(^\text{23}\)
Note, Effect of the Federal Constitution in Requiring State Post-Conviction Remedies\(^\text{24}\)
Note, Federal Statutes Without Limitations Provisions\(^\text{25}\)

Freund, Umpiring the Federal System\(^\text{26}\)
Hart, The Relations Between State and Federal Law\(^\text{27}\)
Wechsler, The Political Safeguards of Federalism\(^\text{28}\)

Equally arresting is the number of student editors on the editorial boards of the above-listed volumes who went on to become teachers of federal jurisdiction, legal process, and constitutional law — yet another signal that the era was one of great intellectual ferment at

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\(^{15}\) 66 HARV. L. REV. 1362 (1953).
\(^{17}\) 66 HARV. L. REV. 1498 (1953).
\(^{19}\) 67 HARV. L. REV. 836 (1954).
\(^{21}\) 53 COLUM. L. REV. 157 (1953).
\(^{22}\) 53 COLUM. L. REV. 991 (1953).
\(^{23}\) 53 COLUM. L. REV. 1143 (1953).
\(^{24}\) 53 COLUM. L. REV. 68 (1953).
\(^{25}\) 54 COLUM. L. REV. 561 (1954). Professor Freund was a colleague of Professor Hart on the Harvard Law School faculty. Like Professor Hart, he had served earlier as President of the Harvard Law Review and had clerked for Justice Brandeis.
\(^{26}\) 54 COLUM. L. REV. 489 (1954).
\(^{27}\) 54 COLUM. L. REV. 543 (1954).
Harvard and Columbia under the intellectual leadership of Professors Hart and Wechsler.29

Harvard:
Phillip E. Areeda (Legal Process)
Norman Dorsen (Constitutional Law and Legal Process)
Gerald Gunther (Constitutional Law and Federal Jurisdiction)
Kenneth L. Karst (Constitutional Law and Federal Courts)
Andrew Kaufman (Constitutional Law)

Columbia:
Lino Graglia (Constitutional Law)
Geoffrey C. Hazard, Jr. (Federal Jurisdiction)
Yale Kamisar (Constitutional Law)
Harold Korn (Constitutional Law and Federal Jurisdiction)
Robert Pitofsky (Federal Jurisdiction)

B. Antecedents: 1938

The fruition of the legal process school was hardly an overnight event. Many of the ideas and perspectives elaborated in "golden age" works — most obviously the first edition of the casebook itself — had been gestating for years. Nor did the legal process tradition take root in an intellectual vacuum. The school was born as a response to the legal realist tradition that had gained ascendency during the first half of the twentieth century.

According to the legal realists, adjudication was not, and could never be, wholly mechanical and apolitical. Thus, judges unavoidably made law — at least interstitially. Largely in response to the success of the realists, the emerging legal process school began to reformulate the inquiry. Given that judges unavoidably made substantive law at times, what kinds of law could they legitimately make, and when? What kinds of legal decisions were better left to other institutional and political actors? Even if judicial enforcement of substantive

29 The subject matter descriptions below are taken from ASS'N OF AMERICAN LAW SCHOOLS, DIRECTORY OF LAW TEACHERS 1987–1988 (1987). To be sure, not all of the scholars listed in the text would consider these to be their dominant areas of scholarly concern. Professor Areeda's scholarship, for example, has primarily been in antitrust. Yet perhaps the influence of Hart and Wechsler is subtly revealed in the fact that even scholars specializing in other fields continue to identify themselves as teachers of courses related to the legal process tradition. For a more dramatic example of Hart and Wechsler's influence, see the work of Professor Gunther.

Interestingly, the corresponding volumes of the Yale Law Journal contained virtually no legal process scholarship of similarly enduring significance, and so far as I can tell, no one on Yale's editorial boards in these years went on to become a legal process scholar. This is not surprising, given that the legal process approach was not particularly well represented on the Yale faculty in the early 1950's. Cf. Kester, Faculty Participation in the Student-Edited Law Review, 35 J. LEGAL EDUC. 14 (1986) (discussing the importance of faculty influence on the Harvard Law Review).
norms of behavior (whether derived from the Constitution, statutes, or case law) often required that judges make controversial policy choices, could not metanorms of jurisdiction and procedure transcend many immediate substantive controversies? Put another way, even if people violently disagreed about what the law in a given area was or ought to be, might they nevertheless agree that the legal decision in that area ought to be made by a given legal institution (for example, a federal court) acting under certain specified rules of operation (for example, rules of selection, jurisdiction, procedure, and decision)? If the quest for a "brooding omnipresence" of substantive norms was necessarily misguided, might not a search for a "natural," or at least widely acceptable, law of second-order rules of procedure and jurisdiction yield fruit?30

On a more political and less abstract level, legal realism fueled growing political opposition in the early twentieth century to federal court decisions interpreting the Constitution, statutes, and the common law in a fashion that generally favored business interests. If, as the realists insisted, such decisions often turned on controversial policy choices, by what right did unelected federal judges ever displace the policy decisions of Congress or of state judges and legislators? Once again, the legal process school can be seen as a response to the realists. By paying strict attention to second-order rules allocating power between federal courts and other institutions, the legal process theorists sought to specify with precision the boundaries and purposes of federal judicial power. Once these boundaries and purposes were specified, federal judicial decisionmaking could be both legitimated and restrained.

It is undoubtedly simplistic, but nevertheless convenient and illuminating, to assign the legal process school a precise birthdate: April 25, 1938. On that day, the Supreme Court decided a case that, more than any other, appears to have shaped the agenda and analysis of the legal process school over the next sixteen years; a case that, even in the third edition of Hart & Wechsler, remains the most cited (p. lx); a case that John Hart Ely has described as having "mythic" proportions31 — Erie Railroad Co. v. Tompkins.32

Until it reached the Supreme Court, Erie was seen as a case about a question of substantive law — namely, what duty of care a railroad

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30 [A]s a true disciple of Justice Brandeis, [Henry Hart] saw the integrity and fitness of the legal process as a kind of transcendent natural law, a law above laws, standing as the scientific process does to the mutable body of science itself, and reminding us that there is indeed a morality of morality.


32 304 U.S. 64 (1938).
owed to a pedestrian on its right-of-way along and near the rails. But on certiorari, the Supreme Court recast the case. The real issue, according to the Court's legal process reconceptualization, was not one of substantive tort law, but one of the appropriate role of federal courts in relation to both Congress and state courts. Precisely because the realists had shown that the common law of tort had to be made, not found, and because the Progressives and New Dealers had demonstrated that the particular choices made by federal judges in common law tort cases were politically controversial, the Court in *Erie* asked whether federal judges ought to be in the business of fashioning a general federal common law.

The *Erie* Court's answer to this question can also be seen as influenced by legal realism. If common law decisions penned by state judges represented state policy just as much as statutes written by state legislators, then it made little sense for federal judges to defer to the latter, but not the former. Indeed, Professor Hart later wrote that this argument was *Erie*'s "essential rationale."  

At the same time, *Erie* illustrated how legal process theory might help blunt the legal realist charge of result-oriented jurisprudence. By focusing on second-order rules of power allocation, Justice Brandeis could write a "principled" decision in *Erie* whose immediate result — denial of recovery to a sympathetic plaintiff against a Goliath railroad — probably ran counter to the Justice's general inclination against big business. Of course, over the general run of cases, Justice Brandeis may well have believed that the second-order rule announced in *Erie* might incline federal courts to treat big business more strictly, for those courts would be bound by the predictably more populist decisions of state judges less sympathetic to corporate America.  

Legal process rules were not always "neutral" in an outcome-indifferent sense — process, of course, has a substance of its own — but faithful adherence to these rules did hold out the promise of restraining ad hoc judicial decisionmaking. This theme of "principled" decisionmaking transcending the immediate outcome of the case at bar would, of course, pervade later writings of Professors Hart and Wechsler.

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33 Hart, *supra* note 27, at 512; see also *Erie*, 304 U.S. at 78 ("[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

34 Cf. H. Fink & M. Tushnet, *Federal Jurisdiction: Policy and Practice* 179, 190 (2d ed. 1987) (suggesting that state judges, being less insulated from the political process, tended to be less favorable to corporate concerns than did federal judges in the early twentieth century).


C. Problems

A case as rich as *Erie* can be read in many ways; it is thus important to see how the main thrust of legal process thinking over the next generation invoked *Erie* as a case about federal judicial restraint in relation to state courts, Congress, and parties to lawsuits. The legal process school's image of federal courts was an exceedingly modest one, portraying the article III judiciary as fungible with state courts, wholly dependent on Congress for its subject matter jurisdiction, and incapable of doing more than passively resolving traditional disputes framed by private parties. Yet this reading of *Erie* was not ineluctable. Indeed, from another perspective, *Erie* can be seen as inviting a much broader vision of federalism, separation of powers, and "cases and controversies" — a vision emphasizing the right and responsibility of federal judges to act as unique and active expositors of federal law.

1. Federalism. — Consider first the relationship between state and federal courts. In *Guaranty Trust Co. v. York*, Justice Frankfurter — to whom the first edition of Hart & Wechsler was dedicated — invoked *Erie* for the proposition that "a federal court adjudicating a State-created right ... is ..., in effect, only another court of the state." Although Professors Hart and Wechsler were not uncritical of Justice Frankfurter's opinion in *York*, their own writings were curiously infected with a similar willingness to equate state and federal courts. Thus, Professor Hart's celebrated Dialogue treats state courts as fungible with federal courts in enforcing federal rights. In Hart's view, although the Constitution requires that some court be open to hear all claims involving federal constitutional rights, Congress has broad authority to decide whether that court will be state or federal. If Congress can give state courts the last word over many cases arising under the federal Constitution, it presumably follows a fortiori that Congress can also do so in many cases arising under federal statutes and treaties. Professor Wechsler's writings are

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37 My analysis in this section has been influenced by the pioneering work of my colleague Jan Deutsch. See, e.g., Deutsch, Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science, 20 STAN. L. REV. 169 (1968); Deutsch, Precedent and Adjudication, 83 YALE L.J. 1553 (1974).

38 326 U.S. 99 (1945).

39 Id. at 108.


even more explicit in affirming virtually plenary congressional power to vest state courts with the last word on federal rights. In effect, both authors adopt the *York*-like thesis that "a [state] court adjudicating a [federally] created right is only another court of the [federal government]."

Yet this view masks vital differences between state and federal courts — differences that any satisfactory legal process theory must take into account. As Professor Hazard notes:

Trying to assimilate the federal courts to state courts is in any case impossible and therefore quixotic, even if we look at it in terms of "legal rules," as [Justice Frankfurter’s opinion in] *Guaranty* put the question. If we look at the legal rules as a whole, and not simply those to be seen through an inverted telescope, we find that:

— Federal judges have life tenure, while most state judges do not, a condition that is the product of legal rules.
— Federal judges are appointed by the President of the United States, and confirmed by the United States Senate, and have a commission to prove it, status characteristics that state judges do not have and which are created by legal rules.
— Federal judges are elected by a multi-filter, relatively visible, ultimately high level appointive process, a basis of investiture not enjoyed by most state judges, who are chosen through low visibility nomination and nearly invisible election, except where their selection is by political election — selection systems that are founded on legal rules.
— Federal judges are part of the United States Government[,] . . . an entire institutional matrix that is the creature of legal rules.

I have argued elsewhere that the structural superiority of federal courts in federal question cases is strongly supported by the text, history, and structure of article III. But even more, it is also supported by *Erie* itself — although admittedly a different reading of *Erie* than that which prevailed through “the golden age.” This reading emphasizes *Erie*’s implications for federal judicial responsibility rather than federal judicial restraint: if *Erie* says that state courts are the unique and definitive expounders of state law, why isn’t the most plausible corollary that federal courts are the unique and definitive expounders of federal law?

45 See generally Amar, supra note 42.
2. Separation of Powers. — To this question, Hart and Wechsler answered that federal courts could be unique and definitive, but only if Congress so desired. Thus, for the original editors, the modest role of federal courts vis-à-vis state courts was related to their modest role vis-à-vis Congress.

This modest image of the federal judiciary does have some support in Erie. As Professor Mishkin has argued, Congress probably could have legislated the tort law rule of decision implicated by the facts of Erie under its general power to regulate railroads engaged in traffic affecting interstate commerce.47 Erie therefore implies that the power of Congress to displace state tort law does not suggest that federal courts enjoy a corresponding power absent congressional authorization. To support this reading of Erie, Professor Mishkin appealed to Professor Wechsler's analysis of "the political safeguards of federalism,"48 which emphasized the ways in which the political branches of the federal government are constitutionally structured to be attentive to states' rights and interests.49 Unsurprisingly, Professor Wechsler used this set of structural linkages to argue for judicial restraint: federal courts should hesitate to invalidate congressional statutes in the name of states' rights, because those rights are well protected by the internal structure of the political branches.50

Once again, however, it is possible to offer a different reading of Erie and the constitutional structure — a reading stressing not federal judicial restraint, but rather federal judicial responsibility to enforce constitutional norms. Justice Brandeis' opinion for the Court in Erie declared that Congress was "without power to enact as statutes" rules of decision for all diversity cases in federal courts.51 Although Professor Mishkin is correct in implying that this statement was not necessary to decide Erie on its facts, Judge Friendly was equally correct in insisting that this language was part of the ratio decidendi

By focusing judicial attention on the nature of the right being enforced, Erie caused the principle of a specialized federal common law, binding on all courts because of its source, to develop within a quarter century into a powerful unifying force... A psychiatrist might say that, having rid itself of subconscious feelings of guilt for federal poaching on state preserves, the Supreme Court became freer to insist on deference to federal decisions by the states where deference was due.

Id.


48 See Mishkin, The Thread, supra note 47, at 1685 & n.13; Mishkin, Variousness, supra note 47, at 800 n.12.

49 See generally Wechsler, supra note 28.

50 See id. at 558–60.

51 See 304 U.S. at 72; see also id. at 78 ("Congress has no power to declare substantive rules of common law applicable in a State . . . .").
of *Erie*. Although *Erie* could have been decided on the narrower grounds suggested by Professor Mishkin, it was not.

Thus, the *Erie* Court held, inter alia, that the diversity and necessary and proper clauses, standing alone, would not authorize Congress to pass a statute displacing all substantive state law in diversity cases. Presumably, such congressional legislation would violate states’ rights guaranteed by the tenth amendment. So read, *Erie* stands as a precedent in tension with, rather than supportive of, Professor Wechsler’s plea for federal judicial restraint in enforcing federalism-based constitutional limits against Congress. When carefully examined, *Erie*’s particular line of argument thus offers a surprisingly vivid image of the federal judiciary as a guardian of rights against, and not a servant of, Congress.

This image becomes all the more clear when one turns from *Erie* to the Constitution itself. Far from giving Congress plenary discretion to decide whether state or federal courts are to have the last word on the meaning of federal rights, the Constitution declares that “the judicial power of the United States shall [that is, ‘must’] be vested” in the article III judiciary, and “shall [again, ‘must’] extend to all cases arising under” federal law. This language suggests that federal judicial power is equal and coordinate, not subordinate, to Congress’ federal legislative powers. Jurisdiction is vested by the Constitution itself, and congressional power to modify that jurisdiction is plainly bounded by the mandatory language of “shall” and “all.” Nor do Professor Wechsler’s observations about the constitutional structure of Congress give us good reason to ignore these clear textual mandates against Congress. At most, “the political safeguards of federalism” justify judicial restraint when alleged states’ rights are at stake; the “safeguards” do not argue for restraint when other claims of constitutional right — for example, individual rights protected under various clauses in the first eight amendments — are implicated.

Indeed, whether or not Professor Wechsler is aware of the tension, his own arguments about political safeguards furnish strong affirma-

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52 See Friendly, supra note 46, at 385, 392–98. Like Professor Hart, Judge Friendly had been taught by then-Professor Frankfurter, had served as President of the *Harvard Law Review*, and had clerked for Justice Brandeis. The third edition is dedicated to the late Judge Friendly.


54 U.S. CONST. art. III, §§ 1–2.

55 I recognize that my claims here — that article III “plainly” and “clear[ly]” mandates that some federal court be open, at least on appeal, to resolve any given federal question case finally — are controversial ones. For an attempt to defend these claims in much greater detail than is possible here, see Amar, cited above in note 42.

56 Professor Wechsler is well aware of this. See Wechsler, supra note 28, at 560 n.59. But see infra note 96.
tive reasons to reject the Hart-Wechsler position that Congress may give state courts the last word on federal constitutional rights. Precisely because of the myriad structural linkages between state governments and Congress (all beautifully illustrated by Wechsler) and the equally evident role of state courts as part of, and intimately linked to the rest of, state government (emphasized by Professor Hart’s analysis of Erie), it makes little sense to view Congress as an adequate guardian against state constitutional violations, or to view state courts as adequate guardians against congressional violations. To put the point in language that Hart and Wechsler deploy with great skill elsewhere in their book, the Framers did not trust Congress with the power to shift final jurisdiction in federal question cases to state courts because the interests of Congress and those courts were not sufficiently “adverse.” Both were likely to be too dependent on state legislatures and on temporary or parochial majorities. Yet a number of vital constitutional rights in article I, section 10 were directed against state legislatures, state majorities, and the entities dependent on them, including state courts. Hence, the Framers decided to commit final resolution of all constitutional cases to federal judges free of the political webs connecting Congress, state legislatures, state courts, and temporary parochial majorities.

3. Cases and Controversies. — Yet if Hart and Wechsler’s vision was one of judicial modesty, it certainly was not one of judicial abdication. Indeed, when Professor Crosskey and Judge Hand each challenged the doctrine of judicial review in the mid-fifties, each editor responded with his own eloquent and spirited defense of the

57 See Amar, supra note 42, at 222–29, 250 (relying on the same political safeguards noted by Professor Wechsler to argue against his view of virtually plenary congressional power over federal jurisdiction).
58 See supra p. 695.
59 See, e.g., First Edition, supra note 6, at 78.
60 Although the most important set of individual rights against state governments today is found in the Reconstruction amendments, these amendments represent a continuation of — and not a break with — the animating spirit of the original Constitution. The self-executing restrictions on states imposed by article I, section 10, preventing state legislatures from passing bills of attainder and ex post facto laws, were considered by the Federalists as among the most important clauses of the original Constitution. See infra p. 708.
61 For a more careful attempt to develop this argument, see Amar, cited above in note 42, at 222–29. Although federal judges are appointed by the political branches of the federal government, “the permanent tenure by which the appointments are held in that department must soon destroy all sense of dependence on the authority conferring them.” The Federalist No. 51, at 347 (J. Madison) (C. Rossiter ed. 1961).
62 See 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1007 (1953) (“Judicial review was not meant to be provided generally in the Constitution, as to acts of Congress.”).
doctrine. At first, these defenses might seem inconsistent with the Hart-Wechsler view in the jurisdiction-stripping context that federal courts do not occupy an irreplaceable role as guardians of federal constitutional rights. Yet the two positions are reconcilable by emphasizing the distinctions between action and inaction, and between malfeasance and nonfeasance. Even if Congress need not confer federal jurisdiction over a given constitutional case at all, once a federal court is seized of jurisdiction it can only decide the case according to law. Federal courts therefore must be free to disregard even a congressional statute if they deem that statute inconsistent with the higher legal commands of the Constitution.

According to the editors, it was better — and permissible, if Congress so desired — for federal courts to say nothing at all than for them to say something lawless or unprincipled. This was a theme to which Professor Wechsler returned in his famous Holmes Lecture on “Neutral Principles,” published in the November 1959 Harvard Law Review, and one that Professor Hart underscored in his own Foreword in the same issue, in which he argued that the Supreme Court should decide far fewer cases each term and spend more time hammering out a principled opinion in each case. Indeed, Hart would later dramatize his personal commitment to the maxim “if you can’t say something principled, then don’t say anything at all” with a poignant finale to his own Holmes Lectures, delivered in 1963. In the middle of the period allotted for his final lecture, he confessed to the audience his inability to find a principled and satisfactory solution to the problem he had posed for himself. And then he sat down.

Thus, both Hart and Wechsler synthesized a defense of Congress against federal courts in the jurisdiction-stripping debate with an even stronger defense of federal courts against Congress in the debate over judicial review. The key to this synthesis lay in their emphasis on the notion of “case or controversy”; judicial review was presented as simply the incidental by-product of deciding properly framed private law disputes that Congress chose to assign to the federal courts. It is thus not surprising that Hart and Wechsler devoted the first doctrinal chapter of their casebook to an elaboration of myriad subdoctrines of

64 See Hart, supra note 19 (responding to Crosskey); Wechsler, supra note 36, at 2–10 (responding to Hand).
66 See Wechsler, supra note 36.
67 See Hart, supra note 36.
68 For dramatic recounts of this event, see P. Bobbitt, cited above in note 11, at 55–57, and Bok, Professor Henry Melvin Hart, Jr., 82 Harv. L. Rev. 1591, 1592 (1969). Professor Hart’s Holmes Lectures were never published.
“cases and controversies” — finality, ripeness, mootness, standing, justiciability, and so forth — or that it is in this chapter that *Marbury v. Madison* appears.

Once again, *Erie* can be marshalled in support of this vision of the federal judicial function; the Court’s constitutional discussion occurred in the context of deciding a classic private law dispute. Yet here too, *Erie* can be read in a rather different way that emphasizes the responsibility of federal courts to declare federal norms rather than merely to resolve disputes. To begin with, the Court need not have heard the case at all, but *chose* to through the discretionary writ of certiorari. There is an important difference between a Supreme Court decision invalidating an act of Congress when the Court has no other choice — because it is legally obliged to hear a given case — and an otherwise similar invalidation that occurs because the Court has exercised its discretion to reach out and opine on an issue. Such discretion enables the Court to act affirmatively, rather than wait passively, to decide on which areas of law to expound. Even more significantly, the *Erie* Court overruled a century-old line of cases and decided major questions of constitutional law despite the fact that those questions were not briefed by either party and were not even presented in the railroad’s certiorari petition. In essence, the Court reached out to expound public norms in a manner that went far beyond the way in which the parties had framed their dispute. Together, these facts suggest an image of Supreme Court judicial review as more than merely the unavoidable side effect of deciding private law disputes.

**D. Alternatives**

But surely to say all this — to suggest an image of the federal courts as structurally superior to state courts on matters of federal law, as equal and coordinate to Congress, and as active expounders of public norms rather than passive resolvers of disputes — is to play *Hamlet* without the Prince. For during “the golden age” of the legal process school, the Supreme Court decided a case that embodied this vision far more than *Erie* itself; a case that would in fact supplant *Erie* as the dominant case shaping the outlook and agenda of the next

69 *5 U.S. (1 Cranch) 137 (1803).* *Marbury* is of course a distinctly double-edged case for Hart and Wechsler. Although the opinion does contain language presenting judicial review as simply the incidental by-product of deciding particular cases, *see id.* at 177–78, many of the constitutional questions addressed by the *Marbury* Court were obviously unnecessary to decide the case. *See G. GUNther, Constitutional Law 12 (11th ed. 1985)*; *cf.* infra text accompanying notes 70, 76, 138 & 152 (critiquing the narrow dispute-resolution model of article III adjudication.).

70 *See H. FINK & M. Tushnet, supra note 34, at 187–88; Friendly, supra note 46, at 399 n.71.*
generation of legal scholars; a case that Professors Hart and Wechsler never fully succeeded in coming to grips with\(^{71}\) — Brown v. Board of Education.\(^{72}\)

Brown called into question every central tenet of the legal process theory embodied in the first edition of The Federal Courts and the Federal System. As a matter of federalism, Brown and its progeny dramatized the obvious lack of fungibility between state and federal courts; profound differences in methods of selection, tenure of office, and institutional mindset gave lie to the “myth of parity”\(^{73}\) implied, however subtly and perhaps unconsciously, by the Hart-Wechsler line in the jurisdiction-stripping debate. As a matter of separation of powers, the civil rights cases exemplified the federal judiciary’s equal and coordinate role within the national government. Despite powerful voices calling for judicial restraint until Congress acted pursuant to its powers under section five of the fourteenth amendment\(^{74}\) — an argument that can be seen as a variant of the Mishkin argument outside the Erie context\(^{75}\) — federal courts forged ahead and policed state compliance with the self-executing provisions of section one. Finally, as a matter of “case or controversy,” Brown and later cases looked extraordinarily different, at both the rights-declaration and remedial phases, from the traditional bipolar law disputes paradigmatic of “the business of the Colonial courts and the courts of Westminster when the Constitution was framed.”\(^{76}\) Brown itself, for example, did not arise when a single black student refused to vacate

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\(^{71}\) See, e.g., Wechsler, supra note 36, at 31–35 (questioning Brown). Is it possible that Professor Hart’s other major collaboration never got off the ground because Hart’s underlying vision was partially mooted by Brown before the book ever reached the final stages of publication? Perhaps the title says it all: H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tent. ed. 1958) (emphasis added). It is also perhaps revealing that Professor Hart never succeeded in revising the first edition of The Federal Courts and the Federal System in response to Brown and other landmark Warren Court opinions.

Like Hart, Professor Sacks had served as the President of the Harvard Law Review. Before joining the Harvard Law faculty as a colleague of Hart, Sacks clerked for Justice Frankfurter.\(^{72}\)

\(^{72}\) 347 U.S. 483 (1954).

\(^{73}\) This phrase derives from Professor Neuborne’s superb essay, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977).

\(^{74}\) Cf. L. Hand, supra note 63, at 55 (labeling as “curious” the Brown Court’s failure to address the section five issue).

\(^{75}\) See supra p. 698.

\(^{76}\) First Edition, supra note 6, at 174 (quoting Justice Frankfurter). Although Professors Hart and Wechsler are not uncritical of this formulation, the very attention they devote to this and similar formulations, and the entire structure of their second chapter, which collects various subdoctrines under the heading of “cases and controversies,” have, I believe, led to utterly mystifying and misguided thinking about standing. The proper test for whether a “case” exists is not historical, procedural, or prudential, but substantive: does some substantive law in existence today — not 200 years ago — give this plaintiff a cause of action against this defendant? See infra note 154.
her desk in an all-white classroom, simply raising the equal protection clause as a defense in a subsequent trespass action. Rather, it involved multiple class actions seeking "affirmative" injunctive relief — relief that would not simply restore the status quo ante, but would lead to a new status quo that had never before existed, namely, integrated public schools. Brown influenced not simply the form of adjudication, but its very meaning. Indeed, within only a few years the need to implement Brown led the Court in Cooper v. Aaron\(^77\) to give voice to the broadest conception of Supreme Court judicial review it had ever articulated, a conception that saw Supreme Court review as the very embodiment of the Constitution's meaning rather than a means of resolving private disputes.\(^78\)

In retrospect, the paucity of discussion in the "golden age" law reviews cited above of the segregation cases then pending is perhaps even more arresting than the breadth and depth of legal process scholarship in those volumes. From November 1952 to June 1954, the Harvard Law Review discussed segregation in only one Note — on The Proper Scope of the Civil Rights Acts\(^79\) — and a single article by Dean Leflar and Professor Wylie Davis — on Segregation in the Public Schools.\(^80\) The Columbia Law Review published virtually nothing on point; even its 1954 symposium on federalism, which included articles by Professors Hart, Wechsler, and Freund and spanned almost one hundred pages, contains only a single passing reference to the momentous issues of federalism then awaiting resolution in the segregation cases.\(^81\)

Indeed, several of the most important arguments set forth by legal process theorists in the "golden age" seem rather implausible in light of Brown. Consider again, for example, the triumphant finale to Hart's Dialogue, which proclaims that state courts are "the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."\(^82\) Even if this argument makes some sense if one thinks only of constitutional rights against the federal government,\(^83\) doesn't it simply overlook the structural inadequacies of state courts

\(^77\) 358 U.S. 1 (1958).

\(^78\) See id. at 18 (equating Supreme Court interpretation of the Constitution with "the supreme Law of the Land"). But see Note, The Senate and the Constitution, 97 YALE L.J. 1111 (1988) (critiquing Cooper's overbroad dicta regarding the meaning of Supreme Court review).

\(^79\) 66 HARV. L. REV. 1285 (1953). Two other Notes in these years may have been written in possible (though unarticulated) anticipation of state court resistance to Brown. See Note, Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941, 67 HARV. L. REV. 1251 (1954); Note, Judge Spencer Roane of Virginia: Champion of States' Rights — Foe of John Marshall, 66 HARV. L. REV. 1242 (1953).


\(^81\) See Freund, supra note 26, at 564.

\(^82\) Hart, supra note 15, at 1401.

\(^83\) But see Amar, supra note 42, at 224–28.
as "guarantors of constitutional rights" against states in cases like Brown.\textsuperscript{84}

Consider also Professor Hart's language in his 1954 Article on The Relations Between State and Federal Law\textsuperscript{85} in which he supports his distinctive vision of federalism by invoking, first, a Taney Court case about extradition and, second, the eleventh amendment:

Federal law often says to the states, "Don't do any of these things," leaving outside the scope of its prohibition a wide range of alternative courses of action. But it is illuminating to observe how rarely it says, "Do this thing," leaving no choice but to go ahead and do it. . . .

. . . "And we think it clear," said Chief Justice Taney in [Kentucky v. Dennison\textsuperscript{86}], "that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." Taney's statement can stand today, [with a few exceptions that do] little to bring into question the principle of the rule. . . .

. . . Lower federal courts may prohibit state officers, in their individual capacity, from taking action under color of office in violation of law. But an action to compel the performance of an affirmative act would encounter, ordinarily, the bar of the Eleventh Amendment.\textsuperscript{87}

When I first read these words several years ago, I wrote in the margin, "Given Brown, this makes little sense!" That was basically the same sentiment the Supreme Court expressed two Terms ago in Puerto Rico v. Branstad,\textsuperscript{88} which overruled Dennison and explicitly relied on both Brown and Cooper.\textsuperscript{89} One can only hope the Court shows similarly sound constitutional judgment this Term in the pending Union Gas case,\textsuperscript{90} which affords the Court a happy chance to undo much of the mischief done by its earlier eleventh amendment decisions that Hart

\textsuperscript{84} See Hart, supra note 15, at 1396. Indeed, the Dialogue's failure to attend centrally to constitutional rights against states was subtly suggested a few pages earlier, when Professor Hart tellingly failed to mention 28 U.S.C. § 1343 as a "general grant[] of jurisdiction." Id. Unlike § 1331, which Professor Hart mentioned, § 1343 specifically focuses on constitutional rights against states. Both jurisdictional statutes date to the Reconstruction. Hart's failure to mention § 1343 is all the more telling because that section had no minimum dollar limit, and thus filled the "principle hole" Hart identified in § 1331. See id.

\textsuperscript{85} 54 COLUM. L. REV. 489 (1954).

\textsuperscript{86} 65 U.S. (24 How.) 66 (1861).

\textsuperscript{87} Hart, supra note 27, at 515–16.

\textsuperscript{88} 107 S. Ct. 2802 (1987).

\textsuperscript{89} See id. at 2808. Interestingly, the editors of the third edition describe Dennison as a sport, limited by the "extraordinary circumstances" surrounding the case (p. 1191 n.1). Compare this with Professor Hart's invocation of the case as a cornerstone of American federalism. See supra text accompanying note 87.

relied upon in the passage cited above. In the wake of Brown, Hans v. Louisiana and its progeny are no less derelict than was Dennison.

But even before Brown, Dennison and Hans were derelict cases, faithless to the deep structure of both the original Constitution and the Reconstruction amendments; even had the segregation cases not been looming on the horizon as the first edition went to press, Professors Hart and Wechsler should have been more aware of the problematic nature of their vision of federal courts. Brown, after all, only revived the Reconstruction amendments; it did not invent them. Even if one were to look only at case law, the seeds of Brown were evident throughout the period from 1938 to 1954 in the burgeoning doctrine of selective incorporation and in a dramatic series of civil rights cases orchestrated by the NAACP. Indeed, on the very same day that Justice Brandeis (for whom Hart had clerked) wrote the Court's opinion in Erie, Justice Stone (for whom Wechsler had clerked) handed down the Court's opinion in United States v. Carolene Products Co., whose now-famous footnote four clearly foreshadowed both increasing incorporation and the outcome of the segregation cases. Nowhere cited in the first edition, Carolene Products and its footnote held out a vision of federal courts as irreplaceable structural guardians of certain constitutional rights against both Congress and the states.

91 The Union Gas case presents the Court with a clear chance to hold that, contrary to Professor Hart's assumptions, the eleventh amendment simply does not apply to federal question cases — and therefore in no way bars federal courts from ordering affirmative relief against states on the basis of federal law. For a general discussion of the eleventh amendment, see Amar, cited above in note 53, at 1466–92.

92 134 U.S. 1 (1890) (holding that principles of sovereign immunity underlying the eleventh amendment oust federal jurisdiction even when the plaintiff's claim against the state arises out of an alleged constitutional violation by the state). Hans has been widely and devastatingly denounced by legal scholars in recent years. The third edition contains a good general discussion (pp. 1159–221).


95 304 U.S. 144 (1938).

96 See id. at 152 n.4. Professor Wechsler did cite footnote four at the very end of his essay on political safeguards. See Wechsler, supra note 28, at 560 n.59. Yet, although he recognized that the footnote's affirmation of the role of federal courts in protecting individual rights powerfully undercut the argument for congressional supremacy in the debate over judicial review, he apparently failed to see the footnote's parallel implications against congressional supremacy in the debate about jurisdiction-stripping.
Like *Erie*, *Carolene Products* can be assimilated into the legal process tradition: like the first edition of *Hart & Wechsler*, footnote four sought to say “what [federal] courts are good for” and the rest of the opinion sought to say what they were “not good for” (1st ed. p. xii). Indeed, it is probably not coincidental that the two most prominent works of Dean Ely, perhaps the leading process theorist of the generation following Hart and Wechsler, are elaborations of *Erie* and *Carolene Products*, respectively.97

Footnote four, however, conjures up a rather different image of federal courts than that suggested by much of the “golden age” scholarship. According to this vision, the role of federal courts is not simply — in Paul Freund’s words — to “umpire[e] the federal system,”98 but is also to protect individuals against government. However subtly, Freund’s phrase suggests that the role of the federal courts is merely to draw boundaries between Congress and the states and among the separate states in order to prevent excessive nationalism or parochialism. By contrast, the vision of footnote four more properly suggests (1) that there are certain powers that neither Congress nor the states should have — such as the power to pass a bill of attainder;99 (2) that federal courts have a unique structural role to play in protecting individuals against government;100 and (3) that state governments pose dangers not simply to the interests of other states and their citizens, as single-minded focus on diversity cases after *Erie* might suggest, but also to the constitutional rights of their own citizens.101 Virtually all of the cases cited in footnote four involve constitutional rights against one’s own state. The fact that, in many cases, the individual possesses a virtually identical right against Congress undercuts any notion that Congress itself can be trusted to protect those rights adequately if allowed plenary control over federal jurisdiction.

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97 See J. ELY, supra note 35 (elaborating on *Carolene Products*); Ely, supra note 31 (elaborating on *Erie*). It is probably coincidental that Dean Ely was born in the same year as the cases he so carefully elaborated — 1938. See ASS’N OF AMERICAN LAW SCHOOLS, supra note 29, at 316. It is not surprising, however, that, compared to “golden age” scholarship, Dean Ely’s legal process vision was far more influenced by *Brown* and the general jurisprudence of the Court under Chief Justice Warren — for whom Ely clerked and to whom he dedicated his book. Cf. Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T 223–25 (V. Blasi ed. 1983) (discussing differences in outlook between those constitutional scholars born before the New Deal and those born after).


99 See U.S. CONST. art. I, § 9, cl. 3; id. § 10, cl. 1; see also Amar, supra note 42, at 222–29.

100 See Amar, supra note 42, at 222–29, 263 & n.189.

101 See id. at 208 n.9, 247 n.134; Amar, supra note 53, at 1440–41, and sources cited therein.
When one looks beyond the case law to the Constitution itself, the Carolene Products-Brown vision is only strengthened. The Reconstruction amendments were hardly premised on any myth of parity between federal and state courts in protecting individual rights against the states. Nor were federal courts enforcing these amendments seen as simply servants of Congress; indeed, one of the most important consequences of dividing early unitary draft language of the fourteenth amendment into a self-executing section one and a congressionally empowering section five was to allow federal courts to police state compliance even in the absence of congressional support. 103

But the Carolene Products-Brown vision has even deeper roots than the Reconstruction. One of the Federalists’ most important goals in the 1780’s was to forge a strong set of rights that individuals could assert against abuses by their own state governments, as dramatized by article I, section 10 — the Federalist forbear of the fourteenth amendment. 104 Federal courts were to have a unique role in enforcing those rights. 105 Indeed, the Philadelphia convention deliberately voted to commit ultimate enforcement of these rights against states to federal courts and not to Congress. 106 The editors of the first edition failed to grasp the full implications of all this. For example, in their opening chapter, they quoted from a 1787 letter by James Madison:

The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most steadfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects. A reform, therefore, which does not make some provision for private right must be materially defective. 107

102 For an important case decided only months after Carolene Products and placing the Court on the road to Brown, see Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), which invalidated a state policy of denying blacks admission to state law schools and paying for tuition at out-of-state schools.


105 See id. supra note 42, at 222–29.

106 See id. at 223 n.69, 248–50, 250 n.146. Alexander Hamilton wrote:

By a limited Constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.


Yet they immediately follow this quotation with language that borders on non sequitur in suggesting that Madison did err: "But the sheer weakness of the Confederation was the most urgent reason for change . . ." (1st ed. p. 11 n.19). And the remainder of the passage reflects an image of federal courts as merely umpires of the federal system and servants of Congress.

To end my discussion of the first edition with a far more dramatic and significant example, the original editors seriously distorted the position of the most important proponent of an alternative vision of the federal judiciary. Joseph Story was undoubtedly one of the most important Associate Justices ever to sit on the Supreme Court — many would argue the most important. His opinion for the Court in Martin v. Hunter's Lessee was undoubtedly one of his most important opinions — many would argue the most important, especially in the field of federal jurisdiction. This opinion was later elaborated on in his 1833 Commentaries on the Constitution, undoubtedly one of the most important post-ratification works on the Constitution — again, many would argue the most important.

Given the importance of this argument, it is stunning to see how sloppily Hart and Wechsler treated it. (Is it possible that the editors' devotion to Erie led them to dismiss too quickly anything penned by Joseph Story, the author of Swift v. Tyson?) Several of the most persuasive and powerful passages in Martin and the Commentaries are never quoted or even mentioned. The reader is simply never made aware of the fact that Story drew a sharp distinction between the two tiers of federal jurisdiction — the first involving "all cases" arising under federal law, "all cases" in admiralty, and "all cases" affecting ambassadors; the second involving "controversies" defined by party status, such as diversity jurisdiction.

108 But see G. Wood, The Creation of the American Republic, 1776–1787, at 463–67 (1969) (stating that the most urgent reason for change in the minds of leading Federalists was dissatisfaction with internal government within individual states, just as Madison suggested).
109 14 U.S. (1 Wheat.) 304 (1816).
110 The other major candidate is Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).
114 See, e.g., 3 J. Story, supra note 111, § 1696, at 572 ("[It] is clear, from the language of the constitution, that, in one form or the other, it is absolutely obligatory upon congress, to vest all the jurisdiction in the national courts, in that class of cases at least, where it has declared, that it shall extend to 'all cases.'" (emphasis in original)).
115 The original editors' crabbed treatment of Martin's discussion of the mandatory nature of federal jurisdiction is especially anomalous in light of their "general . . . practice of printing leading cases in their entirety" (p. xxi).
116 See Amar, supra note 42, at 210–19.
Story argued that all cases in the first tier must fall within the original or appellate jurisdiction of the federal judiciary; Congress could decide which article III court could hear a given first-tier case, but it could not oust all federal jurisdiction over the case. In the second tier, by contrast, Story implied that Congress enjoyed plenary power to strip all federal courts of jurisdiction and thereby give state courts the last word. Admittedly, these passages are in some tension with other things that Story said, which Hart and Wechsler quote and persuasively pounce on (1st ed. pp. 292–94). But surely the reader is entitled to see Story's best arguments in addition to his weakest ones.117

To recap: despite the depth, breadth, and brilliance of the first edition, its image of federal courts was deeply problematic, to say the least. The original editors' vision of federalism, separation of powers, and "cases and controversies" was in serious tension with the legal topography circa 1954, with some elements present from the very beginning of the legal process tradition in 1938, and with the text, history, and structure of both the Federalist Constitution and the Republican Reconstruction.

E. Revisions: 1973


117 The editors compound the injustice to Story by quoting another Story opinion somewhat out of context in order to imply more political motivation on his part than may well have existed. Compare First Edition, supra note 6, at 294 (arguing that White v. Fenner, 29 F. Cas. 1015 (C.C.R.I. 1818) (No. 17,547), "indicates that [Story] did not consider the constitutional imperative to be self-executing") with Amar, supra note 42, at 257 n.168 (arguing that White indicates only that Story did not believe that lower federal court jurisdiction was self-executing).
118 G. Wood, supra note 108.
120 369 U.S. 186 (1962).
124 380 U.S. 479 (1965).
125 392 U.S. 83 (1968).
126 403 U.S. 388 (1971).
The casebook’s initial response to these events was disappointing — for twenty years there was silence;127 then, in 1973 (exactly thirty-five years after Erie) there appeared a second edition of the casebook, which in retrospect seems like a last-ditch effort to prop up the increasingly problematic vision of the first edition. To be sure, new cases and scholarship were mentioned, but their lessons were not fully integrated into the book’s analytic structure. Perhaps the editors felt that any major modification of the first edition’s substantive vision would be faithless to the genius of the original — that anything else would not be Hart & Wechsler. But if such a concern lay behind the second edition, it was misguided. The real genius of the first edition — its enduring contribution to American law — lay not in its particular substantive vision, but in its legal process methodology. Its purest nuggets were the basic questions it asked, and not the particular answers it implied. The challenge facing the editors of the third edition, then, was to preserve the insights and power of legal process analysis — “to retain the historical and analytic richness” (p. xxi) of the original editors — while modifying some of the specific substantive positions endorsed or implied by the earlier editions.

II. THE PRESENT

Judged by this standard, the third edition gets high marks.128 Indeed, so much is improved that, to echo words written thirty-five years ago about the first edition, “[a] modest reviewer is required to apologize, whatever else he says, for not praising all its fine points; they are too many to be listed. It is simply an extraordinary book: in range, in scholarship, in penetration.”129

Some of the improvements are evident simply from side-by-side comparison of the tables of contents. Whereas the first edition treated both federal question and diversity jurisdiction in a single chapter, the third edition expands the material on the former and relegates the latter to a much later chapter — changes to be cheered by those followers of Justice Story who believe that the two categories of jurisdiction are fundamentally different as a matter not simply of policy, but of constitutional law.130

Another fine innovation is a new chapter integrating various doctrinal issues related to suits against state and federal governments and their officials (pp. 1080–307). Building on the premises of Marbury

127 See supra notes 66–68 and accompanying text.
128 The second edition scores lower on this scale. In virtually every area discussed below, the major improvements took place between the second and third editions and not between the first and second.
130 See Amar, supra note 42, at 240–54.
v. Madison\textsuperscript{131} — itself a suit seeking affirmative relief against a federal official despite the absence of an obvious violation of common law rights — the Supreme Court in this century has read the Constitution as creating self-executing rights of action against government officials for both injunctive relief\textsuperscript{132} and damages.\textsuperscript{133} In 1954, Henry Hart expressed doubt about such developments because they seemed to leapfrog what he saw as the traditional eighteenth- and nineteenth-century requirement that even unconstitutional government action must infringe upon a common law or statutory right before a well-framed case or controversy could be made out.\textsuperscript{134} Similarly, as has already been mentioned, Hart questioned whether affirmative relief against state governments was consistent with the eleventh amendment.\textsuperscript{135} By contrast, Professors Shapiro and Meltzer, two of the editors of the third edition, have been rather critical of several of the assumptions underlying Hart's analysis — assumptions about the structure of federalism, the meaning of the eleventh amendment, the essential nature of “cases and controversies,” and the need for strict distinctions between “affirmative” and “negative” remedies.\textsuperscript{136} Perhaps because of the healthy dialectical tension between the views of an original editor and those of later ones, the new chapter succeeds in presenting a balanced and thoughtful analysis of the many issues implicated in this rapidly changing subfield.\textsuperscript{137}

\textsuperscript{131} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{132} See, e.g., Ex parte Young, 209 U.S. 123, 155–56 (1908).


\textsuperscript{134} See Hart, supra note 27, at 523–24 (questioning the validity of injunctive relief based only on the Constitution); id. at 528 n.144 (questioning the existence of a damage remedy based only on the Constitution); cf. First Edition, supra note 6, at 795 (questioning the extant case law’s differential treatment of preventive and compensatory relief).

\textsuperscript{135} See supra p. 705.


Professor Shapiro arrived as a student at Harvard Law School in 1954, only months after Brown was decided. He subsequently served as a Note Editor on the Harvard Law Review, clerked for Justice Harlan, joined the Harvard Law School faculty, and became an editor of the second and third editions of the casebook. Before becoming an editor of the third edition, Professor Meltzer had served as President of the Harvard Law Review (in 1974–1975), and as a law clerk to Justice Stewart, and had joined the Harvard Law School faculty.

\textsuperscript{137} Another fine example of this dialectic occurs in Chapter Five’s discussion of the adequacy of state procedural grounds (pp. 590–638). Compare Meltzer, State Court Forfeitures of Federal
Improvements are also evident in many places where the new work follows the first edition’s basic organization. Two particularly fine examples occur in Chapter Two’s analysis of “cases and controversies.” The first consists of a thoughtful presentation of two different, and admittedly stylized, conceptions of “cases and controversies” — the traditional “dispute resolution” model and an emerging “public action” model (pp. 79–82). From the very outset, the reader is alerted to a way of thinking about federal jurisdiction that goes beyond the assumptions of the editors of the first edition; indeed, the new editors explicitly invoke the “[s]chool desegregation cases” (p. 80) and invite the reader to ask herself throughout the chapter “whether a significant change in overall conception is occurring and, if so, whether such a change is warranted” (p. 82). Several pages later, the new editors follow this invitation with a sensitive and sophisticated analysis of “the breakdown of the common-law model” (p. 121), “[t]he emergence of a new conception of constitutional rights” (p. 122), and various ways of conceptualizing the notion of “standing” (pp. 121–23).

Even more dramatic may be the way the third edition revises the original editors’ analysis of Congress’ power to restrict federal jurisdiction. The analytic notes now begin with a section recaptioned “The Position of Justice Story,” which presents a far more careful summary and analysis of his various lines of argument (pp. 366–68). A later section entitled “The Current Debate” (pp. 379–87) carefully disentangles issues that the first edition had tended to conflate. For example, the original editors had opened their chapter with a back-to-back presentation of Sheldon v. Sill and Ex parte McCardle. This ordering of the cases might easily be read to imply that because, as Sheldon held, Congress has broad power to restrict lower federal court jurisdiction and, as McCardle held, it also has broad power to restrict the Supreme Court’s appellate jurisdiction, it must necessarily follow that Congress can do both at the same time and thus leave many

Rights, 99 HARV. L. REV. 1128 (1986) (arguing that, where the underlying substantive law is federal, rules of waiver in state court should be governed by federal common law) with Hart, supra note 27, at 508 (“The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.”) and Hart, supra note 36 (making a similar argument) and Wechsler, The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review, 34 WASH. & LEE L. REV. 1043, 1054 (1977) (“The problem of federal-state relations is the same, moreover, whether the antecedent state law issue is substantive or procedural. It is difficult to understand, therefore, why there should be a difference in the nature or the scope of the Supreme Court’s examination of the state determinations.”).

138 A change in overall conception may well be occurring in the minds of the casebook editors, but it must be emphasized that “the public action” model is no upstart, as even the current edition at times might seem to imply. In Marbury itself, the “public action” model is intertwined with the “dispute resolution” model. See supra note 69.

139 49 U.S. (8 How.) 441 (1850).

140 74 U.S. (7 Wall.) 506 (1869).
federal question cases to state courts for final resolution. This implied argument is later made explicit by the Dialogue. As the third edition makes clear, however, even if Sheldon and McCadle are read "for all they are worth," it need not follow that Congress can simultaneously divest both the Supreme Court and lower federal courts of jurisdiction over any given federal question case. Instead, as the new editors remind the reader, "[t]he question of the power of Congress to limit federal court jurisdiction is not a unitary one" (p. 379).

The pages that follow this reminder are exemplary — not only of the high standard of scholarship and fairness that informs the entire book, but also in an even deeper sense: they establish by example what good legal scholarship is and can be. Cases, commentary, and historical material are elegantly and succinctly summarized, synthesized, and analyzed. Although the editors do not shrink from posing hard questions about each of the current competing theories about jurisdiction-stripping (including, it must be said in the interest of full disclosure, the theory that this reviewer has propounded (pp. 385–87)), they never distort those theories. It is not easy to be both gracious and incisive, but the editors here pull off this combination with remarkable skill. As a result, the reader's attention is focused both on the strongest lines of argument that have thus far emerged and on those areas where much more hard thinking and research need to be done.

III. The Future

It bears repeating that there is far more superb material — both old and new — in the third edition than any single Review could hope to describe and engage. The preceding remarks have focused particular attention on jurisdiction-stripping issues for two main reasons. First, this is an area in which I have a personal scholarly interest. But there is a second, deeper, and less personal reason for emphasizing jurisdiction-stripping. The issues it raises go to the very essence of one's conception of "the federal courts and the federal system." Federalism, separation of powers, "cases and controversies" — all are powerfully implicated in, and illuminated by, one's position in the jurisdiction-stripping debate. The original editors were keenly aware of the centrality of the issues raised by the Dialogue. In the words of their preface:

An understanding of the constitutional powers of Congress simply to distribute jurisdiction between state and federal courts . . . is an essential foundation for consideration, throughout the remainder of

141 See First Edition, supra note 6, at 312–13, 335–38.
the course, of the issues of legislative and interpretive policy which
the existence of these powers must continually pose (1st ed. p. xiii).

Although subsequent scholars of federal jurisdiction have not always
shared the Dialogue's particular views about the scope of Congress' constitutional power "simply to distribute jurisdiction between state
and federal courts," these scholars have in the main agreed with Hart
and Wechsler about the overarching importance of the issue. Hence
the tremendous outpouring of scholarship on the topic since 1953 and
the extraordinary attention paid to the Dialogue itself.

These observations suggest possible lines of development that
might be usefully considered for subsequent editions of, or supple-
ments to, the casebook. One important set of issues now touched
on by the third edition's section on jurisdiction-stripping concerns the
parity, or lack thereof, of state and federal courts: are these courts
fungible as a matter of either sociology or constitutional law? The
first edition's discussion of jurisdiction-stripping did not even raise the
question; parity was simply, and to my mind erroneously, assumed.
The third edition is better on this count (pp. 384 & n.34, 386 & n.39),
but even it fails to develop the issue with the degree of care and
precision that are the hallmarks of the book. This failing is all the
more significant because — as with so many aspects of the jurisdic-
tion-stripping debate — the question of parity between state and federal
courts has implications for a vast set of other doctrinal issues: absten-
tion, the eleventh amendment, res judicata, collateral review, the so-
called Rooker-Feldman doctrine, certiorari, and habeas corpus, to
two just a few. Yet I cannot recall anything more than a passing
reference, if that, to parity in any of these other contexts; indeed, I
cannot recall even a single citation outside the jurisdiction-stripping
discussion to Professor Neuborne's classic article on The Myth of
Parity.

142 To be sure, the revisions made for the third edition reflect Herculean labors of many
persons over many years. By raising the issue of still more revisions, I do not mean to deny
the editors a well-deserved rest, but it does not seem too early to begin to think about the next
round of editing.

143 This assumption is built into the Dialogue's repeated and unselfconscious use of the word
"court" — a word that obscures the obvious structural, textual, and historical differences between
state judges and article III judges. See Amar, supra note 42, at 238 n.115.

144 I must confess a certain degree of surprise at the current editors' description of Rooker
v. Fidelity Trust, 263 U.S. 413 (1923), as a "classic" (p. xxi).

145 For a fine analysis of how the parity issue plays out in many of these contexts, see Fallon,

146 Neuborne, supra note 73. In the jurisdiction-stripping discussion, I can recall only a
single — and uncharacteristically cryptic and unilluminating — reference to Professor Neuborne's
essay (p. 384 n.34). My hedging on these points leads me to make another suggestion that is
perhaps substantively trivial, but that would, I think, significantly improve the handiness of
the book as a reference tool and teaching manual: future editions should include a table of
authorities in addition to a table of cases.
This failure to address parity as a central theme of the third edition is all the more surprising when one looks at the other scholarship of the current editors. Their work has focused considerably more on the parity issue than did the scholarship of the original editors. For example, one of Professor Bator’s most important recent contributions to federal courts scholarship is a thoughtful and provocative 1981 essay responding to Professor Neuborne’s article and exploring implications of the parity issue in various doctrinal areas, including Younger abstention. Yet, although the third edition’s section on Younger does a splendid job of synthesizing much of the scholarship about this line of cases (pp. 1392–405, 1420–33) and does in fact cite to other portions of Professor Bator’s article (p. 1404), it does not mention his discussion of parity.

In sum, the importance of the parity issue, and the existence of two competing schools of thought on it, suggest that future editors should, at the very least, flag the parity question with greater care at the outset of the book, and invite the reader to keep it in mind throughout — much as the current editors have alerted the reader at the outset to the existence of two competing schools of thought about “cases and controversies.”

A second issue that could usefully be identified at the outset is whether the menu of “cases and controversies” listed in article III is unitary or two-tiered: should we treat “cases and controversies” as an undifferentiated unit — as Chapter Two implicitly does in its very title — or is it more useful and illuminating to follow the precise language of article III by distinguishing between, on the one hand, federal question, admiralty, and ambassador cases, which are all defined by subject matter, and, on the other, diversity-type controversies, which are all defined by party status?

Once again, this is an issue that is centrally implicated in the jurisdiction-stripping debate, although the first edition skirted the

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147 See Bator, The State Courts and Federal Constitutional Litigation, 22 WM. & MARY L. REV. 605 (1981). Professor Bator was a first year student at Harvard Law School during the 1953–1954 year, during which his brother served as Developments Editor for Volume 67 of the Harvard Law Review. Two years later, Bator served as President of the Review. He subsequently served as a law clerk for Justice Harlan, joined the Harvard Law School faculty, and became an editor of the second and third editions of the casebook.


149 Other editors of the third edition have also discussed the parity issue. See, e.g., Meltzer, supra note 137, at 1136 n.28 (citing Neuborne and suggesting that there is “significant evidence that federal courts are generally, though by no means uniformly, more protective than state courts of particular federal rights”).

150 See Amar, supra note 42, at 240–54; supra pp. 709–10.
question through selective quotation of Justice Story's views. And once again, the third edition is much better on this score (pp. 367-68, 385-86) — but perhaps still more could be usefully done, given the considerable number of other doctrinal contexts in which the issue arises. For example: should ancillary and pendent party jurisdiction be more liberal when a federal court is exercising jurisdiction over a federal question case rather than a diversity controversy? Should abstention policy vary depending on whether a federal question case or a diversity controversy is before the court? Although the third edition poses these questions (pp. 1688, 1358), they might be sharpened by reminding the reader of Justice Story's argument that cases and controversies were qualitatively different as a matter of constitutional law.  

Indeed, perhaps the very distinction between cases and controversies may shed additional light on the distinction that is prominently featured at the outset of the third edition: namely, the distinction between the "dispute resolution" and "public action" models of adjudication (pp. 79-82). In an unpublished manuscript, Robert Pushaw argues that there are "functional differences between a 'case' — where a judge's law-declaring role is paramount, and a 'controversy' — where a judge's ability as a dispute-resolver is highlighted."  

This line of analysis may help the reader to see old problems in new ways. Consider Erie v. Tompkins one final time. If the role of federal courts in a diversity controversy is more akin to that of an impartial "arbitrator," "umpire," or "mediator" than to that of a norm-declarer authoritatively expounding "what the law is," then why should federal judges create a "controversy" where none exists? Where, as was true in Erie, state courts of both New York and Pennsylvania — the home states of the respective parties — agree that Pennsylvania state court tort decisions should govern, why should a federal court arbitrating the dispute not abide by that agreement? Where, on the other hand, a federal question case is before a federal court, a more active judicial role may be in order. Thus, the Erie Court went beyond dispute-resolution on the federal constitutional issues it reached out to decide, even while laying down a general rule that federal courts should not act as primary norm-declarers in ordi-

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151 A debate is currently raging between those who read the eleventh amendment as barring federal court jurisdiction over certain federal question cases, and those who see the amendment as simply repealing federal jurisdiction over a type of diversity controversy, thereby leaving intact plenary federal question jurisdiction (pp. 1159-221). In contrast to their treatment of pendent party jurisdiction and abstention, the editors here do a very nice job of reminding the reader of the possible relevance of a two-tiered view of article III to this debate (p. 1169 n.16).

152 R. Pushaw, Article III's Case/Controversy Distinction and the Function of Federal Courts (June 1987) (unpublished manuscript on file with the author); cf. Amar, supra note 42, at 244 n.128.

153 See Friendly, supra note 46, at 401.
nary diversity controversies posing only state law questions. To the extent that *Érie* was a case it invites a rather expansive role for the federal judiciary; to the extent that it was a controversy, it implies a more limited "arbitration" role.

The centrality of norm-declaration in federal question cases invites a rethinking of a host of doctrines often, but perhaps wrongly, catalogued as "jurisdictional": standing,154 ripeness,155 declaratory judgments,156 mootness,157 finality,158 adequate and independent state

154 Attention to the etymological linkages between "case" and "cause" should help to remind us that a properly framed case in which a plaintiff has "standing" is simply one in which she has a cause of action. Yet whether such a cause of action exists cannot be determined by staring at the words of article III; one must look outside that article to substantive constitutional, statutory, and common law norms. Although the current editors suggest as much (pp. 122–23, 173), perhaps they would be truer to this insight by putting the entire discussion of standing in their chapter on federal common law alongside cases like *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). This would make clear that standing is primarily an issue of substantive law.

Any legitimate interest in guaranteeing adverse issues of cases can easily be handled through the Federal Rules of Civil Procedure. For example, a judge could allow liberal participation by amici and appointed counsel. Prudential concerns are better addressed through certiorari policy than through the creation of a doctrine that applies to all federal courts (p. 87 & n.9).

155 Like standing, ripeness obviously turns on one's conception not of article III, but of the substantive interests asserted. A first amendment absolutist like Hugo Black and a balancer like Felix Frankfurter will predictably disagree about whether a given anticipatory challenge to a law allowing prior restraint in certain specified circumstances is ripe because the absolutist deems various facts that have not yet materialized irrelevant — prior restraint is always impermissible — whereas a balancer might find those facts dispositive. But this is a disagreement about the meaning of the first amendment, and not about article III.

Similarly, the ripeness of the Does' claim in *Roe v. Wade*, 410 U.S. 113 (1973), depends on whether the fourteenth amendment is read as only protecting a right to procure an abortion without government interference or as also protecting a right to engage in sex without government-created fear. Once again, it is unsatisfactory to treat this, as the Court did, as an article III question. The answer will depend on a careful analysis of the fourteenth amendment, which the Court nowhere even mentioned in its summary ripeness disposition. *See id.* at 127–29.

156 Why should declaratory judgments be seen as posing a special "problem" (1st ed. p. 126)? Every damage award or permanent injunction implicitly relies on an underlying judicial declaratory judgment of legal rights. Indeed, this is the difference between arbitrators, who can award money, and judges, who says "what the law is." It should be seen as more of a "problem" when judges fail to write opinions justifying their decisions with declarations of law, for the very word jurisdiction is "composed of JUS and DICTO, juris, dictio, or a speaking or pronouncing of the law." *The Federalist No. 81*, at 489 n.* (A. Hamilton) (C. Rossiter ed. 1961). Interestingly, the editors omit this section from their reprinting of *The Federalist No. 81* (pp. 26–28), and do not prominently identify norm-declaration in their definition of the "essential aspect of the judicial function" (p. 67).

157 Where past injury has in fact occurred, why is a case ever deemed moot? Even if money damages or injunctive remedies are inappropriate, a declaratory judgment is always possible. (It seems this should also always be a sufficient prospective remedy to satisfy the "redressability" prong of standing (p. 128).) Why are pieces of paper with Presidents' pictures on them more obviously remedial for a past nonmonetary harm than a piece of paper signed by a judge saying that defendant violated plaintiff's rights? Why, then, did the Court imply that the possibility
and advisory opinions, to name a few. This Review is hardly the place to elaborate such rethinking in detail, although I have attempted in the footnotes to hint at possible lines of development in each of the above-mentioned areas. Several of these lines have been thoughtfully pursued in recent years by scholars and further development seems likely.

This brings me to my final point: the long-term future direction of Hart & Wechsler cannot be predicted with perfect precision because that direction will be influenced by the direction of legal scholarship as a whole. Although I have suggested possible paths of doctrinal development, I cannot claim a high degree of certainty in these predictions. I am, however, more confident in making a more general prediction that future editions of Hart & Wechsler will be profoundly influenced by the general character of legal scholarship, which the book has always sought to synthesize. The first edition's weaknesses and omissions were in large part reflective of omissions in "golden age" legal scholarship generally. These omissions, in turn, were in part due to the considerable inbreeding within legal process circles. (Consider, for example, the intricate web of connections among Brandeis, Frankfurter, Hart, Wechsler, Sacks, Freund, Kurland, Hill, and Mishkin.) If the third edition is better in many respects, it is

of a back pay award might be necessary to avoid mootness in Powell v. McCormack, 395 U.S. 486, 495–500 (1969)? Even if one insists on thinking in crass economic terms, Adam Clayton Powell would no doubt have been willing to pay for a declaratory judgment in his favor, and the defendants would probably have been willing to pay to avoid such a judgment. Under this view, the only properly moot case is one in which a properly ripe anticipatory challenge is brought, and subsequent events make clear that the challenged conduct is unlikely ever to materialize. The third edition presents just such a hypothetical (p. 81). Apart from this scenario, mootness is not generally symmetrical to ripeness. In an unripe case, conduct challenged as illegal may never occur; in a moot case, it already has (with the one qualification just noted).

What does finality have to do with the proper exercise of judicial power? Lower court opinions have always been subject to review by higher courts, but does their obvious lack of finality render these opinions problematic? And if the real issue is the possibility not of judicial review, but of legislative or executive revision occasioned by possible refusal to appropriate money or enforce injunctive relief, is not judicial entry of a declaratory judgment itself a final judgment on the law immune from revision by other branches?

Even if an independent and adequate state law prevents the Supreme Court from entering a coercive remedy on behalf of a petitioner, why is the Court jurisdictionally precluded from declaring whether the petitioner's federal rights were violated? Of course, even if jurisdictional authority to furnish such a remedy exists, equitable discretion and considerations of resource allocation may generally counsel against exercise of that authority.

The prohibition against "advisory opinions" should mean only that federal courts should not give advice about wise policy, but should confine themselves to legal judgments. Properly understood, the advisory opinion doctrine is rather similar to the political question doctrine as defined by Professor Wechsler (pp. 293–94). Both should rest only on a finding that the Constitution has committed a policy decision to another branch of government; neither should operate to prevent federal courts from saying "what the law is."

See supra notes 7–8, 16, 26, 52 & 71.
because legal scholarship since 1953 has illuminated some issues obscured during the "golden age."

The story of *The Federal Courts and the Federal System* has thus been inextricably intertwined with the story of American legal scholarship as a whole. And that story, in turn, has been in part the story of intergenerational tension — the story of the great difficulty with which one generation is able to see the world as it will appear to the next.\(^\text{162}\)

What can you say with certainty about what the next chapter of this law story will hold?\(^\text{163}\)


\(^{163}\) How else could one fittingly end (or begin) a discussion of Hart & Wechsler, but with a question?