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## Book Review, Challenging the Hart and Wechsler Paradigm

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# CHALLENGING THE HART AND WECHSLER PARADIGM

*Mary Brigid McManamon\**

FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER. By *Louise Weinberg*. St. Paul, Minn.: West Publishing Co. 1994. lxvii, 1168, appendices A-G, index. \$52.00; 1995 Supplement. xxi, 244, appendices E & F, index. \$13.50.

## I. INTRODUCTION

In 1932, a prescient Herbert Wechsler noted that Felix Frankfurter's new Federal Courts casebook<sup>1</sup> "conditions the method which an instructor can adopt, as surely as it does the mental processes of the students who use it."<sup>2</sup> Professor Frankfurter's book began the transformation of the Federal Courts course from one on federal court procedure to one on the political theory of the federal judiciary.<sup>3</sup> Two

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1. FELIX FRANKFURTER & WILBER G. KATZ, CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE (1931). For an explanation as to why this co-authored work is referred to in the text as Professor Frankfurter's alone, see Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism,"* 27 GA. L. REV. 697, 740 n.257 (1993).

A note on terminology: Professor Frankfurter's book, like other early books in the field, referred to the field it covered as "Federal Jurisdiction and Procedure." See, e.g., ARMISTEAD M. DOBIE, CASES ON FEDERAL JURISDICTION AND PROCEDURE (1935); HAROLD R. MEDINA, CASES ON FEDERAL JURISDICTION AND PROCEDURE (1926). While variants of this title are still used today, see, e.g., ERWIN CHERMERINSKY, FEDERAL JURISDICTION (2d ed. 1994); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER (2d ed. 1990), this Review will use the more modern title, Federal Courts, see AALS DIRECTORY OF LAW TEACHERS 1994-95, at 1094, to refer to courses or books in the field.

2. Herbert Wechsler, Book Review, 32 COLUM. L. REV. 774, 778 (1932).

3. For a detailed discussion of the early development of the Federal Courts course and Professor Frankfurter's impact on that development, see McManamon, *supra* note 1, at 757-70; see also Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 681-86 (1989) [hereinafter Resnik, *Dependent Sovereigns*] (discussing development of topics understood to be within Federal Courts domain).

decades later, following in Professor Frankfurter's theoretical footsteps, Professors Wechsler and Henry M. Hart, Jr., published their own Federal Courts casebook.<sup>4</sup> This book completed the transformation of the Federal Courts course.<sup>5</sup> Today, prominent Federal Courts scholars agree that, "[i]n the Federal Courts field, Hart and Wechsler established the reigning paradigm."<sup>6</sup>

In January 1994, Federal Courts teachers gathered in Orlando, Florida, to discuss the future of scholarship in their field. The speakers were noted authors Ann Althouse, Richard H. Fallon, Jr., Henry P. Monaghan, and Judith Resnik.<sup>7</sup> Before addressing the future, however, each of the panelists addressed the "reigning paradigm." Given the dominance of a structure over forty years old, scholars in other fields have referred to Federal Courts as "an intellectually benighted backwater."<sup>8</sup> Therefore, as the first speaker noted, "[n]ot surprisingly, a number of people would like to throw off the Hart and Wechsler yoke and get on with something else. But what?"<sup>9</sup>

The panelists made a number of suggestions about the form of a challenge to the established paradigm. One speaker suggested that such a challenge could easily come from *within* the paradigm.<sup>10</sup> Louise

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4. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953) [hereinafter HART & WECHSLER (1st ed.)]. The second edition of this book appeared in 1973, PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973) [hereinafter HART & WECHSLER (2d ed.)], and the third edition appeared in 1988, PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (3d ed. 1988) [hereinafter HART & WECHSLER (3d ed.)].

5. McManamon, *supra* note 1, at 768-70; Resnik, *Dependent Sovereigns*, *supra* note 3, at 685-86; accord Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 961 n.37 (1994).

6. Fallon, *supra* note 5, at 955-56; accord Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993, 999 (1994) ("The Hart and Wechsler book—that 'monumental landmark'—is the foundation upon which the rest of us build our scholarship.") (footnotes omitted); Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1025 (1994) [hereinafter Resnik, *Rereading*] (noting that "no major reorganization of the structure has occurred"); see also Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 688 (1989) (reviewing HART & WECHSLER (3d ed.), *supra* note 4) (noting that "first edition was beautiful and brilliant — probably the most important and influential casebook ever written") (footnote omitted); *Teaching Law a Century Ago*, 4 CONST. COMMENT. 7, 8 (1987) (describing Hart and Wechsler book as "intellectual monument").

7. Professors Althouse, Fallon, and Resnik published articles based on their remarks in the *Vanderbilt Law Review*. Althouse, *supra* note 6; Fallon, *supra* note 5; Resnik, *Rereading*, *supra* note 6.

8. Fallon, *supra* note 5, at 956; accord Althouse, *supra* note 6, at 997-98.

9. Fallon, *supra* note 5, at 955.

10. *Id.* at 977-79.

Weinberg has edited a new casebook on Federal Courts<sup>11</sup> in which she does just that: she challenges the paradigm from within. As Professor Weinberg herself notes, “[t]his work has its intellectual provenance in the tradition begun by Hart & Wechsler.”<sup>12</sup> Explaining why her book has “so traditional a feel,”<sup>13</sup> she notes that the course as she envisions it “goes on being about federalism, the separation of powers, judicial process—and politics.”<sup>14</sup>

No matter how “traditional” Professor Weinberg’s book “feels,” it challenges the established paradigm. She accomplishes this challenge in two ways: through her organization of traditional Federal Courts materials and through her answers to the classic Federal Courts questions. The result is an important work in the field that will undoubtedly advance the study of the federal courts. Moreover, the book certainly accomplishes its primary purpose: it is an interesting, different casebook that is both fun to teach from and challenging for professor and student alike.

## II. CHALLENGING THE PARADIGM FROM WITHIN

What is the Hart and Wechsler paradigm? One part of the answer is that, today, “Federal Courts is more properly an advanced course in public law than one in civil procedure.”<sup>15</sup> No casebook author, however, is interested in turning Federal Courts back into the pre-Frankfurter course in federal procedure in which students learned such information as, “What is the salary of judges of the federal district courts?” and “Who takes the place of the clerk of a federal district court in the case of his death?”<sup>16</sup> Professor Weinberg certainly does not wish to do so.<sup>17</sup>

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11. LOUISE WEINBERG, *FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER* (1994 & Supp. 1995).

12. *Id.* at ix.

13. *Id.* at v.

14. *Id.*

15. *Id.*; see also Fallon, *supra* note 5, at 962-63 (noting that “the alternative conception that Hart and Wechsler explicitly rejected [was] an advanced course in Civil Procedure”); cf. WAYNE MCCORMACK, *FEDERAL COURTS*, at v (1984) (describing book as one about federal procedure as opposed to “[t]raditional federal courts courses, and the books prepared for them, [which] have leapt joyously, but with little introduction, into the fascinating and arcane problems of federalism in the judicial system.”).

16. CARL C. WHEATON, *CASES ON FEDERAL PROCEDURE* 672 (1921). The Wheaton book, as well as other early Federal Courts books, did teach “meatier” subjects, of course. For example, students learned about federal common law, *id.* at 1-16, and subject matter jurisdiction, *e.g. id.* at 40-205. These pre-Frankfurter books, however, as the examples in text so clearly illustrate, taught Federal Courts from a “nuts and bolts” approach, not a theoretical one. For a more detailed description of these early books and the courses taught from them, see McManamon,

There is, moreover, a good reason for having the advanced public law course that is Federal Courts in the curriculum. The structure of the government, and in particular the court system, is an important area of study. The issues raised in Federal Courts are burning issues not only for poor "benighted" Federal Courts scholars; these issues have sparked the interest of the person on the street from the beginning of the Republic.<sup>18</sup> For example, does not almost everyone in a community have strong reactions, whether positive or negative, when a federal judge orders that the local school system be desegregated?<sup>19</sup> Discussions of-

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*supra* note 1, at 757-62.

Even though today's civil procedure courses are more theoretical, too, there still has been no real effort to teach Federal Courts from a procedural perspective. One author in recent years proposed making Federal Courts a more procedural course, *see* MCCORMACK, *supra* note 15, but his book has not been updated for a decade. Moreover, with the growth of the procedure field in the last couple of decades, numerous advanced courses focusing on procedure have developed independently of the Federal Courts course. *See, e.g.* RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (2d ed. 1992). Thus, whatever vacuum was created in the procedure field by the development of a theoretical course in Federal Courts has been amply filled by other courses.

17. *See supra* text accompanying note 14.

18. This phenomenon is not new. Since the beginning of the Republic, Americans have debated the role of the federal judiciary vis-à-vis the political branches and the states. For example, in 1802, the congressional debates on the federal judiciary, II ANNALS OF CONG. 362-64, 476-81, 510-985 (1802), were of such public interest that they were published in newspapers and books. *See, e.g.*, DEBATES IN THE CONGRESS OF THE UNITED STATES ON THE BILL FOR REPEALING THE LAW "FOR THE MORE CONVENIENT ORGANIZATION OF THE COURTS OF THE UNITED STATES" (Albany, Collier & Stockwell 1802); DEBATES IN THE SENATE OF THE UNITED STATES ON THE JUDICIARY (Philadelphia, E. Bronson 1802); *see also* MORTON BORDEN, *THE FEDERALISM OF JAMES A. BAYARD* 123 (Columbia Studies in the Social Sciences No. 584, 1968)(noting that minority leader Bayard's speech on the judiciary was printed in every newspaper biographer examined).

19. Another example of a community's focusing on the role of the federal judiciary instead of the merits of a case can be found in the ongoing controversy over the federally-mandated cap on the prison population of the city of Philadelphia. In 1991, Federal District Court Judge Norma Shapiro approved a consent decree setting this cap in a case complaining about the overcrowding in Philadelphia prisons. *Harris v. Reeves*, 761 F. Supp. 382 (E.D. Pa. 1991). The controversy surrounding that cap continues today. The *Philadelphia Inquirer* reported that "[l]ess than 24 hours after President Clinton signed the new crime bill, the Rendell administration asked a federal judge . . . to immediately remove a cap on the city prison population that Mayor Rendell and District Attorney Lynne M. Abraham say has made Philadelphia a haven for criminals." Julia Cass, *Philadelphia Files Federal Petition To Lift Prison Population Cap*, PHILA. INQUIRER, Sept. 15, 1994, at A1. When the judge refused, debate focused on her role and not on the prison conditions. *See, e.g.*, Letter from Richard Thompson to the Editor, PHILA. DAILY NEWS, Sept. 9, 1994, at 47 (criticizing Judge Shapiro's "imperious regulation of state and city judicial systems"); Letter from Marc Konell to the Editor, *id.* (describing judge as "the almighty and unaccountable Judge Norma Shapiro"); Letter from John A. Taylor to the Editor, *id.* (calling judge's rulings "adamant and arrogant stand on the prison cap"); Letter from William Palmer to the Editor, *id.* (referring to judge as "her holiness" and "the dimwit").

ten focus on the judge and whether he or she properly protected federal constitutional rights or needlessly interfered in state affairs, rather than on the underlying merits of the Equal Protection claims.<sup>20</sup> As future officers of the court, law students ought to be familiar with the role of the judiciary in our system of government.<sup>21</sup> Professor Weinberg agrees, for her book presents a course in public law.<sup>22</sup> Hence, one can say that her challenge to the paradigm comes from within.

A second part of the Hart and Wechsler paradigm is the subject matter of the course as defined by the classic questions and their orthodox answers.<sup>23</sup> The basic areas of inquiry are the following: What is the proper measure of deference owed by the federal courts to the political branches of the federal government? What measure of control does Congress have over the jurisdiction of the federal courts? What is the proper measure of deference owed by the federal courts to state courts and officials? Although the Hart and Wechsler paradigm is found in a casebook, not a treatise, these questions "are not raised merely to be straddled. Most often the authors do have a specific position on the relevant issues and their questions suggest their approach."<sup>24</sup> The classic answers to these questions are built on this basic hornbook premise: "It is a principle of first importance that the federal courts are courts of

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20. Some might say that the process issues give people a safe haven to avoid discussing the more dangerous issues of the merits. *See infra* note 43 and accompanying text.

21. Upon the publication of the first edition of the Hart and Wechsler casebook, one reviewer noted:

I suspect it may be argued, at least in the smaller schools, that the curriculum cannot afford time enough to do the book justice . . . . It does not include any material on the FRCP, nor is it . . . well adapted for use in a course in federal practice. To this "practical" argument, I can only reply that the course envisaged by Messrs. Hart and Wechsler is one that a law school educating lawyers for service under a federal system cannot afford to forego.

Adam Yarmolinsky, Book Review, 7 J. LEGAL EDUC. 119, 120 (1954).

22. "I offer this book in the conviction that Federal Courts is more properly an advanced course in public law than one in civil procedure." WEINBERG, *supra* note 11, at v.

23. Fallon, *supra* note 5, at 954-55. Professor Resnik forcefully demonstrates that the Federal Courts field is defined by those issues that are—and are not—studied. *See generally* Resnik, *Rereading*, *supra* note 6, at 1035-47. For example, she asks, "Under which of the Hart and Wechsler topics should we discuss that federal judges are reportedly uninterested in Title VII sex discrimination claims?" *Id.* at 1042; *see also* Resnik, *Dependent Sovereigns*, *supra* note 3 (discussing impact of traditional Federal Courts course on federal courts and their relationship to Indian tribes).

24. Paul J. Mishkin, Book Review, 21 U. CHI. L. REV. 776, 777 (1954) (reviewing HART & WECHSLER (1st ed.), *supra* note 4); *accord* William F. Young, Jr., Book Review, 32 TEX. L. REV. 483, 484 (1954) (reviewing HART & WECHSLER (1st ed.), *supra* note 4) ("It is clear, is it not, that some of [the authors'] question marks are gratuitous?").

limited jurisdiction."<sup>25</sup> Thus, the received wisdom tells us the following:<sup>26</sup> the federal courts owe deference to the political branches, as is demonstrated by, *inter alia*, the justiciability doctrines;<sup>27</sup> Congress has almost complete control over the jurisdiction of the federal courts,<sup>28</sup> as is demonstrated in the famous, "penetrating"<sup>29</sup> dialogue by Professor Hart;<sup>30</sup> and because of "our federalism," as taught to us by Professor Frankfurter,<sup>31</sup> the federal courts must show delicacy in dealing with

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25. CHARLES ALLEN WRIGHT, *THE LAW OF FEDERAL COURTS* 27 (5th ed. 1994).

26. The following brief summary of the law is, of course, an oversimplification of a very complex field. Not everyone has accepted the Hart and Wechsler solutions to the Federal Courts questions, as the lively literature demonstrates. Professor Fallon noted, "Numerous scholars have questioned and rejected Hart and Wechsler's particular substantive positions. Indeed, the editors of the second and especially the third edition have revised the casebook's substantive stance in a number of important respects." Fallon, *supra* note 5, at 960; see Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) (discussing different approaches to various Federal Courts issues).

There is, nonetheless, a certain orthodoxy in Federal Courts law, which is found in the treatises and casebooks. For example, on the issue of congressional control of federal jurisdiction, see *infra* notes 28-30 and accompanying text, one of the leading treatises states: "The orthodox view . . . is that Congress possesses plenary power to confer or withhold appellate jurisdiction." WRIGHT, *supra* note 25, at 42. While Akhil Reed Amar has challenged this orthodoxy, see, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) (arguing that Congress cannot withhold completely subject matter jurisdiction over cases involving federal questions, admiralty, and ambassadors), his thesis is presented to students in one of the popular casebooks thus:

Is there any basis in either that history [of Article III] or that language to support the dichotomy urged by Professor Amar? . . . Is it reasonable to suppose that the framers were such poor draftsmen? Is it reasonable to accept Professor Amar's construction of the framers' intent, when there exists no evidence in all of the framers' debates on congressional power over federal court jurisdiction, as extensive as they were, to support his suggested interpretation?

MARTIN H. REDISH & GENE R. NICHOL, *FEDERAL COURTS* 116 (3d ed. 1994).

27. "Hart and Wechsler viewed Congress, not the federal courts, as the appropriate principal agent of change and policy development." Fallon, *supra* note 5, at 957-58.

28. "Notoriously, [Hart and Wechsler] . . . regarded Congress as having broad powers to define the limits of federal judicial power and to substitute state for federal courts." *Id.* at 958.

29. Mishkin, *supra* note 24, at 777; Leland L. Tolman, Book Review, 54 COLUM. L. REV. 650, 652 (1954) (reviewing HART & WECHSLER (1st ed.), *supra* note 4); accord Warner W. Gardner, Book Review, 54 COLUM. L. REV. 653, 654 (1954) (reviewing HART & WECHSLER (1st ed.), *supra* note 4) (describing dialogue as "searching"); Young, *supra* note 24, at 484 (noting dialogue drafted with "marvelous dexterity and subtlety").

30. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953), reprinted in HART & WECHSLER (1st ed.), *supra* note 4, at 312-40, and in HART & WECHSLER (2d ed.), *supra* note 4, at 330-60, and in HART & WECHSLER (3d ed.), *supra* note 4, at 393-423.

31. For an in-depth discussion of the impact that Professor, and later Justice, Frankfurter had on the development of modern notions of "our federalism," see generally McManamon, *supra* note 1.

the States.<sup>32</sup>

How have these answers become “orthodoxy”?<sup>33</sup> One answer is the third part of the paradigm: several generations of students have been taught from a book in which “the authors insist on the cleavage between substantive and remedial law.”<sup>34</sup> Thus we have been taught a series of neutral jurisdictional principles, divorced from political and factual reality.<sup>35</sup> This way of teaching Federal Courts has produced a “cheerful” story.<sup>36</sup> Without asking whether a decision was unfair based on the merits, we debate the jurisdictional solutions of our forefathers using their methodological assumptions.<sup>37</sup>

When one looks beyond the so-called neutral Federal Courts principles, however, one sees that the Supreme Court’s choices are value-laden. For every neutral principle that the Supreme Court adopted, there is an equally neutral principle that was rejected. For example, in *Erie Railroad Co. v. Tompkins*,<sup>38</sup> the Supreme Court decided that the word “laws” in the Rules of Decision Act includes common law. That holding replaced the equally-neutral proposition that the word “laws” refers to statutes and does not include the common law. Likewise, in *Owen Equipment & Erection Co. v. Kroger*,<sup>39</sup> the Court adopted a neutral principle restricting a federal plaintiff’s rights to bring ancillary nonfederal claims to federal court. This new principle replaced the equally-neutral pre-*Kroger* principle that once a plaintiff states a claim within the jurisdiction of the federal courts, those courts will attempt to do complete justice between the parties, including deciding all the claims in the case.<sup>40</sup>

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32. “To Hart and Wechsler, preserving spheres of state sovereign autonomy was a matter of foremost importance.” Fallon, *supra* note 5, at 957. The doctrines showing this delicacy include the various abstention doctrines, the interpretation of the anti-injunction act, the Eleventh Amendment jurisprudence, and habeas corpus limitations.

33. *See supra* note 26.

34. Young, *supra* note 24, at 488; accord Althouse, *supra* note 6, at 997 (describing Federal Courts field as “concentration on threshold doctrines, forever concerned only with *getting into* court—permanently confined to the antechamber, forever denied *substance*”).

35. *See* Fallon, *supra* note 5, at 963-69 (discussing legal process principles).

36. Resnik, *Rereading*, *supra* note 6, at 1035.

37. Fallon, *supra* note 5, at 969. Hence one law professor could “scoff[]: ‘I knew when I was a *student* that Federal Courts was the ultimate law school mind game!’” Althouse, *supra* note 6, at 998.

38. 304 U.S. 64 (1938).

39. 437 U.S. 365 (1978).

40. For an in-depth discussion of the pre-*Kroger* scope of ancillary jurisdiction, see generally Mary Brigid McManamon, *Dispelling the Myths of Pendent and Ancillary Jurisdiction: The Ramifications of a Revised History*, 46 WASH. & LEE L. REV. 863 (1989).

Modern Federal Courts scholars generally consider the later principles to be more correct than the earlier ones. Why is that? Many jurists assume that the Hart and Wechsler methodological assumptions are right and that the Supreme Court followed them. When one looks beyond the principles of the paradigm, however, to the facts surrounding the cases, one finds a different answer to the question. Neither result is necessarily invalid. Rather, the Supreme Court chose one principle over the other for nonneutral reasons.<sup>41</sup> In *Erie*, a segment of the Court had come to disfavor diversity jurisdiction. In *Kroger*, that attitude was exacerbated by growing concern over federal dockets and a resultant animosity toward plaintiffs. For these reasons, the Court changed the law in both cases, and Mr. Tompkins and Ms. Kroger went home without redress, despite the jury awards both had received at the trial level.

In order to evaluate the Federal Courts paradigm, the cases must be studied in their full context, including the underlying substance of the claims and the political motivations of the Court.<sup>42</sup> This inquiry may be a painful one for us; after all, most people like to hear a "cheerful" story. Perhaps our neighbors prefer to discuss the conduct of the federal judge in a desegregation case because that is a safer topic for polite conversation than the question of whether local school authorities can provide a lesser education for the black children of the community.<sup>43</sup> But those of us who undertake to study the federal courts need to face those difficult issues.

In addition to fleshing out the underlying facts of the cases we study, it would be beneficial to look at the doctrines from new perspectives.<sup>44</sup> For example, just because we have been told that *Siler v. Louisville & Nashville Railroad*<sup>45</sup> is a pendent jurisdiction case, *Railroad Commission of Texas v. Pullman Co.*<sup>46</sup> is an abstention case, and *Pennhurst State School & Hospital v. Halderman*<sup>47</sup> is an Eleventh

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41. For an insightful discussion of the politics behind Federal Courts decisions, see Michael Wells, *Rhetoric and Reality in the Law of Federal Courts: Professor Fallon's Faulty Premise*, 6 CONST. COMMENT. 367 (1989).

42. Resnik, *Rereading*, *supra* note 6, at 1048 ("What is needed in teaching and scholarship in this field is frank discussion of the political and social power struggles of the present and the past and how those issues play out doctrinally and structurally.")

43. See *supra* text accompanying notes 19-20. Remember the old aphorism that one should not talk about religion or politics.

44. See Althouse, *supra* note 6, at 1005-17 (discussing the impact on course of rearranging order of cases).

45. 213 U.S. 175 (1909).

46. 312 U.S. 496 (1941).

47. 465 U.S. 89 (1984).

Amendment case, does not mean that we must leave them in those particular pigeonholes. Reading them together gives one a very different view of federal court power than does reading them separately. Moreover, reading cases from a particular Court, no matter what the chapter heading, gives a much clearer picture of the Court and the ideologies underlying its holdings than just focusing on the topic assigned by the paradigm. For example, when one reads *Erie*<sup>48</sup> together with *Pullman*<sup>49</sup> and *Toucey v. New York Life Insurance Co.*,<sup>50</sup> an anti-injunction act case, one can see the sea change in the Court which cannot be seen when the cases are left in their assigned categories.

Professor Weinberg takes these challenging steps. She puts political context into the discussion of the cases. Moreover, she frequently mixes and matches cases from different Federal Courts pigeonholes. The result is a brave new work that causes one to reflect not only on the classic answers to the Federal Courts questions, but also on the questions themselves.

### III. EVALUATING THE CHALLENGE

#### A. *The Structure of Professor Weinberg's Book*

While other Federal Courts books focus on the *limitations* of the federal courts caused by our structure of government, Professor Weinberg's new casebook is unabashedly about their *power*. In short, her book is about opening the federal courthouse doors, rather than about closing them. This difference is apparent from the very first chapter, if not the title.<sup>51</sup>

The Hart and Wechsler model, followed by virtually every book in the field,<sup>52</sup> begins the study of the federal courts<sup>53</sup> by presenting the

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48. 304 U.S. 64 (1938).

49. 312 U.S. 496 (1941).

50. 314 U.S. 118 (1941).

51. While Professor Weinberg hints at her focus in the title with the words "Judicial Power," *see supra* note 11, her focus is not clear because she also uses the phrase "Judicial Federalism," which is generally used as a code phrase to mean deference to state power.

52. In recent years, only one other Federal Courts book, HOWARD P. FINK & MARK TUSHNET, *FEDERAL JURISDICTION: POLICY AND PRACTICE* (2d ed. 1987), has failed to start with the subject of justiciability. The Fink and Tushnet book was seen as a challenge to the reigning Federal Courts paradigm, *see* Thomas D. Rowe, Jr., *Teaching Federal Courts from a Little Red Book*, 1985 DUKE L.J. 833 (book review); Michael E. Solimine, *Trashing Federal Jurisdiction*, 35 CASE W. RES. L. REV. 335 (1984) (book review), but is no longer in print. However, Professors Fink and Tushnet, along with Linda S. Mullenix and Thomas D. Rowe, Jr., are currently working on a new book, tentatively titled *FEDERAL COURTS FOR THE TWENTY-FIRST*

limits on the federal judiciary imposed by the "case or controversy" language of Article III of the Constitution.<sup>54</sup> Although the first case in most Federal Courts books<sup>55</sup> is *Marbury v. Madison*,<sup>56</sup> the quintessential statement of judicial power, the discussion immediately turns to restrictions on judicial review, to wit, the standing, ripeness, mootness, and political question doctrines.<sup>57</sup> From this beginning, the students are taught to regard the rest of the subject with the thought uppermost in their minds that the federal courts are courts of limited jurisdiction.

Professor Weinberg's book also begins with *Marbury*,<sup>58</sup> but she quickly disabuses us of any sense of the familiar. Instead of justiciability, she follows *Marbury* with *Erie Railroad v. Tompkins*.<sup>59</sup> While one might think that this novel approach is just another way of demonstrating the limitations of the federal courts, using principles of federalism rather than separation of powers,<sup>60</sup> Professor Weinberg has

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53. The Hart and Wechsler book actually begins with a chapter on the history of the federal judiciary. The authors, however, noted: "The opening chapter is intended primarily for introductory reading rather than classroom discussion." HART & WECHSLER (1st ed.), *supra* note 4, at xii, *reprinted in* HART & WECHSLER (2d ed.), *supra* note 4, at xx, *and in* HART & WECHSLER (3d ed.), *supra* note 4, at xxviii. This chapter is not repeated in other Federal Courts casebooks.

54. The U.S. Constitution states:

The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— to all *Cases* affecting Ambassadors, other public Ministers and Consuls;— to all *Cases* of admiralty and maritime Jurisdiction;— to *Controversies* to which the United States shall be a Party;— to *Controversies* between two or more States;— between a State and Citizens of another State;— between Citizens of Different States,— between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, ¶ 1 (emphasis added).

55. Of the Federal Courts casebooks currently in print, only two, DONALD DOERNBERG & C. KEITH WINGATE, *FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS* (1994), and CHARLES T. MCCORMICK ET AL., *FEDERAL COURTS* (9th ed. 1992), do not begin with *Marbury*.

56. 5 U.S. (1 Cranch) 137 (1803).

57. DAVID P. CURRIE, *FEDERAL COURTS* ch. 1, §§ 1-3 (4th ed. 1990); DOERNBERG & WINGATE, *supra* note 55, ch.1; HART & WECHSLER (3d ed.), *supra* note 4, ch. 2; PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF THE FEDERAL STATE RELATIONS* ch. 1, §§ 1-3 (3d ed. 1994); MCCORMICK ET AL., *supra* note 55, ch.1; REDISH & NICHOL, *supra* note 26, ch.1.

58. WEINBERG, *supra* note 11, at 2. Professor Weinberg only quotes two paragraphs of the case at this point. She defers full treatment of *Marbury* till Chapter 3. *See infra* text accompanying note 63.

59. 304 U.S. 64 (1938), *excerpted in* WEINBERG, *supra* note 11, at 4.

60. Justice Harlan described *Erie* as "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and

other ideas. She uses *Marbury* and *Erie* to present the proposition that federal courts have the power and the duty to declare federal common law.<sup>61</sup> This introduction is followed immediately by the most extensive discussion in any casebook of federal court power to imply private rights of action.<sup>62</sup> After studying the judicial power to make federal law, the students turn in Chapter 2 to the topics, not treated comprehensively in any other casebook, of federal supremacy and preemption. It is only after laying this groundwork that Professor Weinberg moves on, in Chapter 3, to the more familiar terrain of judicial review and the justiciability doctrines. From this beginning the students are taught to regard the rest of the subject with the thought uppermost in their minds that the federal courts have the power and the duty to declare supreme federal law.

After this surprising Part One, Professor Weinberg deals with the more traditional subjects associated with separation of powers and federalism. With each subject, however, she adds something that makes her presentation unique.

Part Two presents topics generally associated with the separation of powers. Chapter 3 begins with judicial review and justiciability.<sup>63</sup> Then follows an unusual section on the power of the executive branch over the judiciary, including such topics as the power of nomination, nonacquiescence, and nonenforcement. The section concludes with the familiar subject of congressional control over federal court jurisdiction, but here, too, there is new material. Professor Weinberg adds, for example, an interesting section on legislative attempts at revision of Supreme

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federal systems." *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring); accord John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 695 (1974) ("Erie is by no means simply a case. . . . [I]t implicates, indeed perhaps it is, the very essence of our federalism." (footnotes omitted)).

61. This proposition should not surprise anyone familiar with Professor Weinberg's scholarship. See, e.g., Louise Weinberg, *Federal Common Law*, NW. U. L. REV. 805 (1989) (discussing power and duty of federal courts to declare federal common law).

62. Professor Weinberg spends over 100 pages on implied rights of action in Chapter 1, "The Judicial Power to Make Federal Law." WEINBERG, *supra* note 11, at 21-124. In contrast, the other Federal Courts books spend at most about half that many pages on implied rights of action. CURRIE, *supra* note 57, at 370-79; DOERNBERG & WINGATE, *supra* note 55, at 296-352; HART & WECHSLER (3d ed.), *supra* note 4, at 917-50; LOW & JEFFRIES, *supra* note 57, at 386-446; REDISH & NICHOL, *supra* note 26, at 435-77.

63. There is a comprehensive treatment of the political question doctrine, WEINBERG, *supra* note 11, at 305-51, but standing is only introduced at this point in the material, *id.* at 298-304. There is a much more in-depth and interesting section on standing later, in the context of injunctions against state officials. *Id.* at 922-48. Other justiciability doctrines are given only a brief treatment. *Id.* at 304-05.

Court holdings, such as the flag-burning statute of 1990.<sup>64</sup>

Chapter 4 is entitled "Federal Judicial Power Over Federal Questions." Before turning to the expected subjects of the constitutional and statutory "arising under" jurisdiction of the district courts, however, there are two long sections on Supreme Court power. The first, unique among Federal Courts books, presents the Supreme Court as authoritative expositor of federal law. This extremely interesting section discusses different theories of interpretation and analyzes the jurisprudence of a number of justices. Professor Weinberg is not afraid to point out inconsistencies in justices' opinions and suggest the political realities beyond the Court's choice of reasoning.<sup>65</sup> The second section is a more conventional one on the power of the Supreme Court to revise state court judgments. Following her pattern, Professor Weinberg presents the strong statement of the Court's power found in *Martin v. Hunter's Lessee*<sup>66</sup> first, and then follows with the limits on that power, such as the "adequate and independent state ground" rule.

Although Part Two focuses to a large degree on the relationship among the three federal branches of government, Professor Weinberg entitles it "The Dual-Court System," referring to the existence of federal and state judiciaries with overlapping jurisdiction. This view of the subject finds its direct roots in Professor Hart's famous dialogue on the power of Congress to control federal court jurisdiction.<sup>67</sup> Like her teacher,<sup>68</sup> Professor Weinberg declares that congressional control should not be too troubling because "[t]he existence of the dual-court system does suggest at least that whatever the power of Congress over the jurisdiction of federal courts, the state courts stand as ultimate guardians of the rights of Americans."<sup>69</sup> She is, however, more cautious than her teacher, for she believes that "there are limits on the

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64. In response to *Texas v. Johnson*, 491 U.S. 397 (1989), in which the Supreme Court held that state laws forbidding desecration of the flag violated the First Amendment, Congress enacted a statute banning all flag desecration, whether politically motivated or not. Flag Protection Act of 1989, Pub.L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700 (Supp. V 1993)). The Supreme Court found that this statute also violated the First Amendment in *United States v. Eichman*, 496 U.S. 310 (1990).

65. See, e.g., WEINBERG, *supra* note 11, at 439-40 (noting Court's inconsistent approach in *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), and *NOW v. Scheidler*, 114 S. Ct. 798 (1994)); *id.* at 462-64 (noting underlying reasons for Rehnquist Court's stance on *stare decisis*).

66. 14 U.S. (1 Wheat.) 304 (1816).

67. See *supra* notes 28-30 and accompanying text.

68. Professor Weinberg was a student of Professor Hart. WEINBERG, *supra* note 11, at ix.

69. *Id.* at 278 (citing Hart, *supra* note 30).

extent to which the state courts can serve as ultimate guardians of Americans' rights."<sup>70</sup>

The next two parts of Professor Weinberg's book deal primarily with federalism concerns. Part Three, "Judicial Federalism," treats the relationship between the federal and state courts. The familiar topics contained in Chapter 5 include intersystemic res judicata, abstention, habeas corpus, removal, and anti-suit injunctions. Part Four considers the relationship between the federal courts and government, primarily state, officials. Chapter 6 covers the Eleventh Amendment limitation on suing a state in federal court. This chapter is followed by material in Chapter 7 on suits for injunctions against state officials and in Chapter 8 on suits for damages against state and other government officials.<sup>71</sup>

The final part, Five, is entirely new. It deals with the modern developments of public interest and other complex litigation in the federal courts.<sup>72</sup> At the 1993 Association of American Law Schools annual meeting, Federal Courts teachers agreed that the federal courts have an important role to play in large-scale litigation, probably well into the twenty-first century. Just what that role will be must be examined. Professor Weinberg has made an important contribution to the study of Federal Courts by adding this subject to her book.<sup>73</sup>

### B. *The Book's Shortcomings*

One aspect of Professor Weinberg's book that is disappointing is that, on occasion, she shies away from political controversy. Her occasional reticence is especially disappointing because when she does share the political context of a doctrine's development, she does it well. For example, she does a brilliant job in the section on "Our Federalism."<sup>74</sup> For the first time in any casebook, she pairs the 1971 abstention case, *Younger v. Harris*,<sup>75</sup> with the 1972 anti-injunction act case, *Mitchum v. Foster*,<sup>76</sup> and demonstrates through her notes and questions why the

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70. *Id.*

71. It is interesting that in Part Four, Professor Weinberg reverses her normal pattern. Here the limits on suit against States are presented before the power to sue state officials.

72. Professor Weinberg presages this discussion in Chapter 2. There she introduces the students to complicated choice of law problems in mass tort actions. WEINBERG, *supra* note 11, at 263-75.

73. See also Resnik, *Rereading*, *supra* note 6, at 1025-35 (calling for more realistic look at what federal courts of today are doing, rather than studying only the court structure of 1953).

74. WEINBERG, *supra* note 11, at 700-28.

75. 401 U.S. 37 (1971).

76. 407 U.S. 225 (1972).

two cases were decided as they were and what effect they have on each other.<sup>77</sup>

Despite Professor Weinberg's perception of the political nature of many Federal Courts decisions and her ability to handle such issues deftly, there are a number of times where she could have gone into more depth, but did not. An example is her section on *Pullman* abstention. In *Pullman*, the Supreme Court invented abstention by declining to hear a case that was clearly within its jurisdiction. One immediately asks, "why?" The Court's motivation was probably a combination of a desire to put an end to the infamous *Lochner* era, in which federal courts interfered frequently with state government, and a desire to avoid a controversial decision on the very touchy subject of racial discrimination.<sup>78</sup> Professor Weinberg notes that the Court's analysis "seems strained,"<sup>79</sup> but she does not suggest what the political undercurrents might have been that led to this decision. She also notes that the doctrine was used to different extents during the Warren, Burger, and Rehnquist Courts, but she gives no suggestion as to why. Moreover, she only hints at the Rehnquist Court's finding of a more effective way to get rid of these suits through the Eleventh Amendment in *Pennhurst State School & Hospital v. Halderman*.<sup>80</sup> This insightful pairing of materials from different Federal Courts "pigeonholes," here, abstention and the Eleventh Amendment, is what makes Professor Weinberg's book so exciting. One is disappointed when she does not take the next step of fully analyzing the implications of, and bases for, significant Supreme Court decisions.

#### IV. THE BOOK AS A TEACHING TOOL

I taught from Professor Weinberg's casebook last semester. It is a good teaching tool. She aimed at providing material for a three-credit, one-semester course in Federal Courts.<sup>81</sup> She was successful. The book has enough material that the instructor can omit an occasional topic if it is not particularly interesting to him or her, but not so much material that professor and students alike are daunted. In general, Professor

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77. WEINBERG, *supra* note 11, at 715-19.

78. See McManamon, *supra* note 1, at 780-82 (discussing possible motivations for *Pullman* abstention); Resnik, *Rereading*, *supra* note 6, at 1038-41 (same).

79. WEINBERG, *supra* note 11, at 603.

80. 465 U.S. 89 (1984); see WEINBERG, *supra* note 11, at 607 (referring reader to later discussion of *Pennhurst*).

81. WEINBERG, *supra* note 11, at v.

Weinberg introduces a topic with a key case. She follows the case with several pages of note material on different aspects of that case, including prior history and subsequent development of the doctrine presented. Moreover, she asks pointed questions that help shape an excellent class discussion. Although her own answers to the questions are generally clear, she usually presents enough material on both sides of the issue to allow for lively debate.<sup>82</sup>

Professor Weinberg has “taken seriously the job of editing [Supreme Court opinions].”<sup>83</sup> This willingness to delete material has led to some instances in which more material is taken out than a particular instructor might like. That is a necessary evil of any edit; we all have our “pet” passages, after all. On the whole, however, the editing job is a good one. Enough material is presented to the students so they understand both the outcome and the reasoning of the main cases, without being lost in more pages of material than they can reasonably digest. The result is intelligent class discussion of the assigned reading.

## V. CONCLUSION

In sum, Professor Weinberg’s book is an important contribution to the study of Federal Courts. Because it challenges the traditional structure of the course, it will probably be controversial.<sup>84</sup> Professor Weinberg herself recognizes that the material as she presents it is not necessarily “the *orthodox* position.”<sup>85</sup> It is her willingness to express a different view, however, that makes the book so interesting. As another reviewer once said, “One at times disagrees with [the authors] . . . . But that in itself only adds to the stimulation and challenge.”<sup>86</sup> We have been teaching from the “reigning paradigm” for too long. A fresh look at the subject is warranted, and Professor Weinberg provides it with her new casebook.

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82. Occasionally, Professor Weinberg’s commentary is one-sided. See, for example, her remarks about executive control over the judiciary, *id.* at 351-58, which leaves little room for debate over the Bush Administration’s actions.

83. *Id.* at vii.

84. Professor Weinberg is no stranger to controversy. See, for example, her exchange with Martin H. Redish over the scope of federal common law. Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761 (1989); Weinberg, *supra* note 61; Martin H. Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U. L. REV. 853 (1989); Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860 (1989).

85. WEINBERG, *supra* note 11, at 20.

86. Mishkin, *supra* note 24, at 777.