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WHY LAW STUDENTS SHOULD TAKE THE FEDERAL COURTS COURSE

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INTRODUCTION

When second-year law students ask me why they should take the third-year course in Federal Courts, I usually tell them that it's a capstone course—one that deepens their understanding of the building-block classes they've already taken. My reference is to courses in Constitutional Law, Administrative Law, Civil Procedure, Employment Discrimination, Labor Law, Admiralty, and other federal-law-related topics. And to prove my point, I pose two questions. First, from their understanding of *Erie*,¹ is there federal common law? And second, does the U.S. Supreme Court ever have the power to decide the meaning of state law, contrary to the decision of the state high court from which an appeal is taken? Ninety-five percent of the responses to both questions are “No.” So when I tell them there is indeed federal common law² and that the U.S. Supreme Court may reverse a state court's decision on the meaning of its own law,³ I invariably am assured of a few more students for next year's federal courts class.

I. TRENDS ON THE SUPREME COURT AND IN CONGRESS

In recent years, the Supreme Court has decided several cases which have given new meaning to the terms “federalism”—respect for the states; and “separation of powers”—respect for a co-equal branch of the federal

* Callis Family Professor of Law, Saint Louis University School of Law. This article is dedicated to Paul J. Mishkin, who taught me Federal Courts in law school and who, in the words of Henry Hart and Herbert Wechsler's acknowledgment of Felix Frankfurter, “first opened [my mind] to these problems.” See HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, at ix (1st ed. 1953). The author acknowledges the invaluable suggestions on earlier drafts of this article from colleagues, practitioners, and my former students in Federal Courts.

1. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that federal district court judges in diversity cases must apply state substantive law rather than federal common law in deciding the case).

2. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

3. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

government. These decisions have involved a clash between these two doctrines resulting in a weakening of Congress's powers in order to protect the interests of the states.

There have been many such decisions, typically decided by a 5-4 vote, addressing the question whether Congress may provide remedies to persons, usually state employees, for the state's violation of federal law. In the first of the modern cases, *Seminole Tribe of Florida v. Florida*,⁴ the Court struck down a provision of a federal statute that permitted the tribe to sue the state. The Court reasoned that the Eleventh Amendment⁵ was a restriction on Congress's power under Article I, Section Eight "to regulate Commerce . . . with the Indian Tribes."⁶ And in *Alden v. Maine*,⁷ the Court held that the result is the same if Congress permits a suit against the state in state court for violation of the Fair Labor Standards Act (FLSA). There the ruling was based not on the Eleventh Amendment, which only applies to suits against the state in federal court, but on the doctrine of sovereign immunity—a doctrine that is inherent in the Constitution and that, like the Eleventh Amendment, prevents Congress from giving private parties⁸ a remedy against the state under Article I, section 8. The state is still obligated to obey the federal law; however, the law cannot be enforced by private individuals, unless the state consents to suit.⁹ Thus, in the area of the Eleventh Amendment and sovereign immunity, no court—state or federal—may give a remedy to plaintiffs in a suit against the state, even though there is a clear violation of federal law.¹⁰ The majority of today's Court—albeit a bare majority—is more concerned about the infringement on state sovereignty occasioned by the federal statute than the loss of a remedy to individuals whose federal statutory rights have been violated.

4. 517 U.S. 44 (1996).

5. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

6. The one exception where a state may be sued by an individual pursuant to a statute enacted under Congress's Article I, Section Eight power is the power to "establish . . . uniform laws on the subject of Bankruptcies throughout the United States." See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).

7. 527 U.S. 706 (1999)

8. The Eleventh Amendment and sovereign immunity do not apply where the United States seeks to enforce the law.

9. The Court had previously held that the FLSA, when applied to the states, was an unconstitutional exercise of the commerce power under the Tenth Amendment in *National League of Cities v. Usery*, 426 U.S. 833, 851–52 (1976), but *Usery* was overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

10. In general, injunctive and declaratory judgment relief may be obtained against a state official, but damages against the official are not permitted if the payment is going to come from the state. See *Ex parte Young*, 209 U.S. 123, 155–56 (1908).

Given its inability to provide a private remedy against the states despite its Article I, Section Eight power, Congress has relied on an alternative constitutional provision: its power to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments. (Most of the cases have involved the reach of Section Five of the Fourteenth Amendment, hence the term, "Section Five power.") For the most part, the Court has invalidated these efforts on the grounds that Congress has the power only to enforce the amendments, not to enact substantive law that differs from what the Court has said violates the amendments.¹¹ For example, in *Kimel v. Florida Board of Regents*,¹² state employees alleged age discrimination, in violation of the Age Discrimination in Employment Act of 1967 (ADEA). The Court held that this portion of the ADEA was unconstitutional. It contended that Congress was in effect making age discrimination a violation of the Equal Protection Clause, whereas the Court in previous decisions had held that age discrimination by the state, unlike race or gender discrimination, is not generally a violation of the Constitution.¹³

Besides making it clear that only federal laws that are actual remedies for constitutional violations pass muster under the enforcement clauses, the Court has devised a test to determine what is a remedy: a remedy must be congruent and proportional to constitutional violations by the state. This standard requires the Court to evaluate the kind of evidence presented to Congress. The dissenting Justices view this requirement as inappropriate, because it puts the Court in the position of second-guessing a co-equal branch of government.¹⁴

The difference between a decision like *Boerne* on Congress's power under Section Five and a decision like *Seminole Tribe* that Congress has violated the

11. The most important case for the proposition that Congress under the Enforcement Clauses of the Civil Rights Amendments may only provide remedies for what the Court would find are violations of the substantive provisions of the Amendments is *City of Boerne v. Flores*, 521 U.S. 507, 527–28 (1997), disapproving contrary language in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), that gave a broader reading to Congress's enforcement power. The latter case involved an issue of voting rights, an area in which the Court has traditionally deferred to Congress. Whether today's Court will continue to be so deferential will be determined in *Northwest Austin Municipal Utility District Number One v. Holder*, probable jurisdiction noted, January 9, 2009, argued April 29, 2009. Transcript of Oral Argument, Nw. Austin Mun. Util. Dist. No. 1 v. Holder, No. 08-3222 (U.S. Apr. 29, 2009). The question presented is "whether the appellant is eligible to 'bail out' from the preclearance requirement of Section 5 of the Voting Rights Act, and whether Congress provided sufficient justification of current voting discrimination when it extended the requirement in 2006 for another twenty-five years."

12. 528 U.S. 62 (2000).

13. See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314–17 (1976).

14. It is also a topic that is of great interest to senators on the Judiciary Committee when they question Supreme Court nominees. See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 549–645 (2005).

Eleventh Amendment by using its Article I, Section Eight powers is that in the former case, the law is invalid as far as it applies to the states; in the latter, the law still substantively regulates the states, but a private individual cannot sue the state for its violation.¹⁵

While demonstrating its concern that the state itself not be sued by private individuals under federal statutes, the Court has been more willing to override federalism concerns by permitting Congress to override state laws through the doctrine of preemption. This doctrine prevents the application of state law on the ground that federal law, either expressly or by implication, supersedes—or preempts—it. For example, in the 2008 case of *Rowe v. New Hampshire Motor Transport Ass'n*,¹⁶ the Court held, 5-4, that the federal Motor Carrier Act of 1980¹⁷ preempted a Maine statute regulating delivery of tobacco products. But the preemption argument does not always prevail: in another 2008 cigarette case from Maine, also a 5-4 decision,¹⁸ the Court held that federal cigarette labeling laws, which prohibited states from imposing health warnings on cigarette packaging, did not preempt a state law concerned with deceptive advertising. Also favoring the preemption doctrine, the Bush Administration enacted approximately sixty regulations from 2006 to 2008 preempting state laws in a variety of areas.¹⁹

In all these developments, there are at least two common threads: Plaintiffs are deprived of remedies when the Eleventh Amendment, sovereign immunity, or federal preemption doctrines apply, and defendants, whether the state or corporations, benefit. Similar trends favoring defendants in securities cases have been under way since 1995, both substantively and in terms of getting those cases out of state court and into federal court. In the federal Private Securities Litigation Reform Act of 1995²⁰ (PSLRA), designed to prevent what

15. In *Morrison*, Congress did not have the power under the Commerce Clause to regulate non-economic criminal activity. See *United States v. Morrison*, 529 U.S. 598 618–19, 626–27 (2000).

16. 552 U.S. ___, 128 S.Ct. 989, 995–96 (2008).

17. Pub. L. No. 96-296, 94 Stat. 793.

18. *Altria Group v. Good*, 555 U.S. ___, 129 S. Ct. 538 (2008).

19. Jess Bravin, *Altria Case Deals Blow to Efforts Reining in Lawsuits*, WALL ST. J., Dec. 16, 2008, at A1. President Obama recently issued a memorandum reversing the Bush policy of unchecked preemption via agency regulations. See Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies (May 20, 2009), available at http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Preemption/. The memorandum directs agencies to use preemption language in regulations “only when such statements have a sufficient legal basis,” and it further instructs agencies to review regulations promulgated in the past ten years to decide whether they meet this new standard. *Id.* The Supreme Court heard argument in a recent preemption case, *Cuomo v. Clearing House Ass'n*, on April 28, 2009. Transcript of Oral Argument, *Cuomo v. Clearing House Ass'n*, No. 08-453 (U.S. Apr. 28, 2009).

20. Pub. L. No. 104-67, 109 Stat. 737.

Congress felt were abuses in litigation brought under SEC Rule 10b-5 and Section 10(b) of the Securities Exchange Act, Congress made it more difficult for cases to proceed without more specific proof the Act was violated. In the Securities Litigation Uniform Standards Act of 1998²¹ (SLUSA), Congress preempted state law claims involving fraud in the purchase or sale of securities. In a unanimous 2006 opinion, the Supreme Court extended the reach of this law to include preemption of state law claims that the person was induced to hold securities.²² And in the Class Action Fairness Act of 2005²³ (CAFA), Congress changed the previous law on the removability of class action diversity cases to federal court, making it much easier for defendants to get their cases into federal court and out of state courts they perceive as plaintiff-friendly.

The pro-defendant tilt has not been limited to federal statutory developments: As Justice Brennan noted in a 1977 law journal article, the Supreme Court has for many years been cutting back on an expansive reading of the constitutional protections concerning civil rights and liberties.²⁴ This trend prompted Brennan to encourage plaintiffs to seek redress under state constitutional provisions rather than federal. A similar shift has occurred in the area of federal habeas corpus. Federal courts, once willing to hear habeas claims of state prisoners that their constitutional rights were violated in their state trial under *Fay v. Noia*,²⁵ have been unwilling to do so under *Wainwright v. Sykes*.²⁶ The majority and dissenting justices in *Sykes* engaged in heated debates on the propriety of denying any remedy to state habeas petitioners whose misfortune was to be represented by counsel whose mistakes prevented any court, state or federal, from ever hearing the petitioners' constitutional defenses.²⁷

Consistent with these federal statutory and constitutional developments, the Court has largely abandoned the use of federal common law to imply remedies from federal statutes²⁸ and the Constitution.²⁹ There has been one

21. Pub. L. No. 105-353, 112 Stat. 3227.

22. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 87 (2006).

23. Pub. L. No. 109-2, 119 Stat. 4.

24. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

25. 372 U.S. 391, 440-41 (1963).

26. 433 U.S. 72, 91 (1977).

27. *See id.* at 113 (Brennan, J. dissenting) ("Punishing a lawyer's unintentional errors by closing the federal courthouse door to his client is both a senseless and misdirected method of deterring the slighting of state rules.").

28. *See J.I. Case Co. v. Borak*, 377 U.S. 426, 433-35 (1964).

29. *Compare Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (allowing recovery for damages upon proof of a violation of the Fourth Amendment), with Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, in CATO SUPREME COURT REVIEW 2006-2007, at 23 (Mark K. Moller

exception. In *Boyle v. United Technologies Corp.*,³⁰ the Court was willing to use federal common law to provide a defense to a state tort claim. That case established for the first time the federal common law defense-contractor defense. The dissenters accused the majority of favoring the interests of corporations over those of the victims of corporate negligence.³¹ The Court has demonstrated a recent unwillingness to read provisions of federal treaties to protect individual rights in state criminal cases—that is, unless the treaty itself explicitly states the provisions are to be self-executing. Otherwise, the Court has said, Congress must pass legislation explicitly applying those protections to trials in the U.S. courts.³²

II. ONLY IN AMERICA: A DUAL SYSTEM OF TRIAL COURTS

From their previous law courses involving federal law, the students are somewhat aware of the developments discussed above. They have not, however, addressed systematically a question that is prompted by these developments: what is the value of the United States having a dual system of trial and intermediate appellate courts, one state and one federal, while other countries have only one set of trial and appellate courts, with a constitutional court—the equivalent of the U.S. Supreme Court—to resolve finally the federal issues?³³ From their first year Civil Procedure course, students are familiar with the problems of forum-shopping in the context of diversity jurisdiction in the years prior to *Erie*,³⁴ when plaintiffs could game the system by choosing whichever court, state or federal, would use the more favorable law (state law or federal common law). *Erie*, of course, was aimed at stopping this kind of forum-shopping by directing federal courts sitting in diversity to follow state substantive law rather than federal common law. Much of the discussion in connection with *Erie* revolves around this question: When is the state law substantive, requiring the federal court to follow state law, and when is it procedural, permitting the federal court to follow federal law?³⁵

ed., 2007) (discussing the Court's unwillingness to provide remedies for certain constitutional wrongs).

30. 487 U.S. 500, 504–06 (1988).

31. *See id.* at 530–31 (Brennan, J., dissenting).

32. *Medellin v. Texas*, 552 U.S. ___, 128 S. Ct. 1346, 1356–57 (2008).

33. Another country with parallel lower state and federal courts is Switzerland. *See* Fridolin M.R. Walther, *The Swiss Legal System: A Guide for Foreign Researchers*, 29 INT'L J. LEGAL INFO. 1, 5–6 (2001).

34. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 74–77 (1938).

35. *Compare Guar. Trust Co. v. York*, 326 U.S. 99, 110 (1945) (declaring that federal courts should apply state statute of limitations under outcome-determinative test), *with* *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537–38 (1958) (noting that although the outcome might have been different if the case were tried in state court, plaintiff was entitled to a jury trial even though the judge would have been the fact-finder in state court). The Federal Rules of

The existence of two sets of trial and appellate courts to hear federal questions presents similar problems: A state court may decide a federal question one way; the federal court across the street may decide it the other;³⁶ and until the Supreme Court resolves the conflict,³⁷ there are two different judicial interpretations of the meaning of federal law within a state.³⁸ So, to determine whether to apply state or federal procedure, should the outcome-determinative test of *Erie* apply? In *Felder v. Casey*,³⁹ the Court held that a state's notice-of-claim statute, which would have barred plaintiff's § 1983 claim, was preempted by federal law, which had no such provision and would thus have burdened federal rights.⁴⁰ The *Felder* Court also referenced *Erie*, and some scholars have argued that such cases are examples of "reverse *Erie*."⁴¹ Others, however, note the asymmetry of the two situations: State

Evidence, not state rules, would apply to the admissibility of expert testimony. See *Brooks v. Am. Broad. Cos.*, 999 F.2d 167, 173 (6th Cir. 1993) (addressing the applicability of FED. R. EVID. 702–705). In contrast the state rules of evidence would apply, not the federal rules, where the issues are presumptions, privileges, and competency of witnesses. See FED. R. EVID. 302, 501, 601.

36. Compare *Bishop v. Colaw*, 450 F.2d 1069, 1077 (8th Cir. 1971) (holding a ban on long hair by the St. Charles County School District unconstitutional), with *Kraus v. Bd. of Educ.*, 492 S.W.2d 783, 786 (Mo. 1973) (holding that a school board may constitutionally regulate hair length). In the most recently completed term of the Supreme Court, October 2007 Term, the Court issued opinions on the merits in sixty-seven cases, twelve of which came from the states. *The Supreme Court 2007 Term—The Statistics*, 122 HARV. L. REV. 516, 525 (2008). This is the lowest number of merits opinions since the October 1953 Term. That means that most decisions by the lower courts, either state or federal, will not be reviewed, and thus most conflicting decisions on matters of federal law are left standing.

37. One of the three reasons set forth for granting certiorari by the U.S. Supreme Court is a conflict on an important federal question between a state court of last resort and a decision of a U.S. Court of Appeals or another state court of last resort. SUP. CT. R. 10(b).

38. A federal habeas court may, in effect, reverse the decision of a state criminal court on matters of constitutional law, but the scope of federal habeas has narrowed in recent years. See *supra* notes 24–27 and accompanying text.

39. 487 U.S. 131 (1988).

40. *Id.* at 141. Two areas where state courts and federal courts may reach different results in federal question cases involve summary judgments and qualification of experts. See *supra* note 35. Must state courts follow federal law in this area on the grounds that federal rights would thereby be burdened if the state law were followed? The Supreme Court rejected that argument in *Johnson v. Fankell*, 520 U.S. 911 (1997) and permitted the state court in a § 1983 case to apply its rule denying an interlocutory appeal by a state official from the denial of qualified immunity by the trial judge, *id.* at 922–23, despite the contrary rule that would apply were the case to have been heard in a federal court under *Behrens v. Pelletier*, 516 U.S. 299, 308–09 (1996).

41. See, e.g., Kevin M. Clermont, *Federal Courts, Practice & Procedure: Reverse-Erie*, 82 NOTRE DAME L. REV. 1 (2006).

courts must, under the Supremacy Clause, follow federal policy, whereas federal courts are under no such obligation to follow state law.⁴²

From their first-year Civil Procedure course, students will recall that federal courts have jurisdiction in diversity and federal question cases. The students are surprised, however, to learn that although diversity jurisdiction existed from the very first Judiciary Act in 1789, there was no general federal question jurisdiction until after the Civil War. Thus, during most of the first 100 years of the existence of lower federal courts, there were only two ways federal questions could be heard in federal court—first, if there was a specific federal statute granting jurisdiction or second, if the federal claim arose in the context of a diversity case.

Many students believe that cases involving federal statutes, such as 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, may be heard only in federal court, not in state court. To the contrary, the presumption is that federal questions will be heard by state courts. Only if Congress explicitly denies jurisdiction to state courts are they disabled from hearing such cases.⁴³ Students are also often surprised to learn that Article III does not require Congress to create the lower federal courts⁴⁴—that the United States could have followed the practice of other countries of leaving the trial and initial appeal of federal questions, constitutional and statutory, to the equivalent of state courts. After all, state officers take an oath to support the U.S. Constitution, and there is a separate obligation on state judges to follow federal

42. See, e.g., RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 414–15 (6th ed. 2009). In *Haywood v. Drown*, the Court considered “[w]hether a state’s withdrawal of jurisdiction over certain . . . claims against state corrections employees—from state courts of general jurisdiction—may be constitutionally applied to exclude federal claims under Section 1983 . . . when . . . the state legislature withdrew jurisdiction because it concluded that permitting such lawsuits is bad policy.” See Brief for Respondents at i, *Haywood v. Drown*, No. 07-10374 (U.S. Sept. 29, 2008). The Court held that despite the State’s equal treatment of state and federal claims under the procedural rule at issue, the provision violated the Supremacy Clause because it was “contrary to Congress’ judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages.” *Haywood v. Drown*, 556 U.S. ___, No. 07-10374, 2009 WL 1443136, at *1 (May 26, 2009).

43. *Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990) (“This deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim.”). Even if state courts do not want to hear federal claims, they must do so, unless they have a valid excuse not to hear them. See *Testa v. Katt*, 330 U.S. 386, 394 (1947).

44. *Nevada v. Hicks*, 533 U.S. 353, 366–67 (2001) (“Article III . . . leaves to Congress the decision whether to create lower federal courts at all.”). Students are equally surprised to learn that state criminal prosecutions may take place in federal district court. See, e.g., *Tennessee v. Davis*, 100 U.S. 257, 259, 271 (1879) (criminal prosecution of officer’s enforcing federal revenue law in state court removable to federal court). The general removal statute now covers any federal officer raising a federal defense. 28 U.S.C. § 1442 (2006).

law, “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁴⁵

I return to the question of why the United States has federal trial courts at the end of the course when we discuss federal question jurisdiction. The specific question we consider then is whether there is such a doctrine as protective jurisdiction, by which federal courts are able to hear a case because it involves an entity, like the U.S. Bank,⁴⁶ or a topic, like labor-management contracts,⁴⁷ even though the substantive law to be applied is state law. The students quickly see the need for federal jurisdiction. They understand that state courts might be biased against a party (the U.S. Bank) or the subject matter (labor-management contracts), just as they might be biased against a party from another state, with this difference—diversity jurisdiction is explicitly mentioned in Article III as a basis for jurisdiction, but not so “protective jurisdiction.” That leads to a discussion of whether Article III’s grant of jurisdiction for cases “arising under this Constitution, the Laws of the United States, and Treaties” is broad enough to encompass protective jurisdiction.

Students who are asked why there should be lower federal courts typically respond by saying federal judges are less political than state judges and therefore can better render decisions based on the law rather than personal preferences. Compared to state judges, who might be unwilling to rule against state political figures involved in future judicial re-election campaigns, federal judges, with life tenure and salary protection, are more likely to be willing to rule against state political figures.⁴⁸ That leads to a discussion of how federal judges are appointed compared to state judges and an examination of the backgrounds of members of the state and federal judiciaries.⁴⁹ Students are usually aware of the federal appointments process and may have heard about elections of state judges,⁵⁰ but they are usually unaware of the non-partisan

45. U.S. CONST. art. VI, § 2.

46. See *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

47. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

48. It is very unlikely state courts would get the opportunity to rule against federal officials because of the ability of the federal official to remove the case to federal court. See *supra* note 44 and accompanying text. Even in the absence of a removal statute, the Supreme Court has prohibited state courts from taking jurisdiction against federal officials, at least in the context of a habeas corpus action where federal courts did have jurisdiction. See, e.g., *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 411 (1871) (“If a party thus held be illegally imprisoned it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release.”).

49. To introduce students to this topic, I often invite federal judges to speak to my classes. In the Fall of 2008–2009 semester, Judge Duane Benton of the U.S. Court of Appeals for the Eighth Circuit spoke to my Constitutional Law II class. He had a unique perspective, having served for many years on the Supreme Court of Missouri prior to joining the Eighth Circuit.

50. In *Republican Party of Minnesota v. White*, 526 U.S. 765 (2002), the Supreme Court held the First Amendment was violated by a state supreme court canon of judicial ethics that

court plans that limit the governor's influence on the selection of judges.⁵¹ Students are often surprised to learn that many federal judges have had significant political experience prior to joining the bench⁵²—and that this is not necessarily a negative in terms of being a good judge. Students are interested in lawyers' preferences on the method of judicial selection: To the extent non-partisan selection plans or electoral contests result in selection of judges favorable—or at least not unfavorable—to plaintiffs, those systems will be preferred by plaintiffs' lawyers. Defense lawyers, however, tend to prefer the federal appointments process, especially given the recent conservative appointees to the federal bench. Some conservative lawyers are supportive of

prohibited a judicial candidate running for office from “announc[ing] his or her views on disputed legal or political issues.” In *Caperton v. A.T. Massey Coal Co.*, argued March 3, 2009, the Court faces the problem of financial contributions to a judge's campaign and how that might influence a decision by the judge in a case coming before him. See *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2008 WL 918444 (W. Va. Apr. 3, 2008), *cert. granted*, 129 S. Ct. 593 (Nov. 14, 2008). The question presented is “[w]hether a judge's failure to recuse himself from a case in which he received substantial campaign donations from one of the parties violates the Due Process rights of the other party.” Court to Rule on When Judges Must Recuse Themselves (Nov. 14, 2008), <http://otd.oyez.org/articles/2008/11/18/court-rule-when-judges-must-recuse-themselves-nov-14-2008>; see Brief for Petitioners at I, *Caperton v. A.T. Massey Coal Co.*, No. 08-22 (U.S. Dec. 29, 2008).

51. Under the Missouri Nonpartisan Court Plan, the Governor appoints three members of the seven-person Appellate Judicial Commission, lawyers who are members of the Missouri Bar select three lawyers to the Commission, and the chair is the Chief Justice of the Missouri Supreme Court. MO. CONST. art. V, § 25(a)–(g). The Commission sends three names to the Governor, who must select from the slate presented to him. *Id.* After serving for at least a year, the judge stands for retention at a non-contested election and must receive approval from a majority of the voters; thereafter, there is another retention vote after each term of office. See *id.* Supreme Court and appellate judges are appointed under the Missouri Plan, whereas most trial judges run for election in these states, except in major metropolitan areas. See *id.*

52. Until the 1980s, they had often worked in some capacity for one of the U.S. senators in the state—on the senator's staff or a fundraiser for senatorial campaigns—and senators played a major role in sending names of potential district court nominees to the President, especially when the President and the senator were from the same political party. See NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 192–93 (2005). However, beginning in the Reagan presidency, the judicial philosophy of the appointee has become the most important factor in nominating district court and court of appeals judges. See *id.* at 160, 193–94. Since the failed nomination of Judge Robert Bork to the U.S. Supreme Court in 1987, judicial philosophy has come to be the predominant factor in nominating Supreme Court Justices. See *id.* at 115.

efforts to elect judges.⁵³ Other conservative groups have concluded the Missouri Plan is better for business than judicial elections.⁵⁴

Another justification for having the lower federal courts often given by students is that federal judges historically have been more sympathetic to claims of federal plaintiffs—particularly in cases involving civil rights and civil liberties—both in terms of finding of facts and interpreting federal law. Historically, the context for Congress's giving federal courts general federal question jurisdiction was the Reconstruction era, when it was assumed state courts would not give a sympathetic hearing to claims brought by beneficiaries of the newly enacted civil rights laws. Similar concerns prompted Congress to enact civil rights removal statutes⁵⁵ as well as statutes permitting federal officials who are enforcing federal law to remove suits against them in state courts, both civil and criminal.⁵⁶

The issue of the federal judiciary's sympathy to plaintiffs resurfaces when we discuss the constitutionality of federal legislation stripping federal courts of jurisdiction over certain substantive areas of law. In arguing that such laws are unconstitutional, some scholars maintain that federal courts, because of their insulation from political control through the provisions of Article III, have a special role in constitutional interpretation that cannot be played by state courts.⁵⁷ Assuming that was the case in Warren Court era of the 1960s, is it still true today?

III. FORUM SHOPPING: STATE VERSUS FEDERAL COURT

It is at this point that the world of theory meets the world of practice. And it is another reason why students find the course so interesting: Depending on the demographics of a particular community, plaintiffs' lawyers may or may not prefer federal courts to state courts. Among the myriad factors the plaintiff's lawyer must weigh are: whether there is a right to a jury,⁵⁸ the

53. See Michael DeBow et al., *The Case for Partisan Judicial Elections*, The Federalist Society (Jan. 1, 2003), http://www.fed-soc.org/publications/PubID.90/pub_detail.asp (“[D]efense lawyers should not be automatically seen as faithful protectors of the interests of businesses and consumers on the nominating commissions of Missouri Plan states.”).

54. See Joshua C. Hall & Russell S. Sobel, *Is the “Missouri Plan” Good for Missouri? The Economics of Judicial Selection*, Show-Me Institute Policy Study Number 15, at 1 (May 21, 2008), available at http://showmeinstitute.org/docLib/20080515_smi_study_15.pdf (“Based on our analysis, Missouri’s current system is far superior to several of the alternatives.”).

55. 28 U.S.C. § 1443 (2006).

56. 28 U.S.C. § 1442 (2006).

57. See, e.g., Lawrence G. Sager, *The Supreme Court 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

58. In federal court, the Seventh Amendment to the U.S. Constitution guarantees a right to a jury trial if the matter would have been tried to a jury at common law, but that amendment has not

demographics of the jury pool, including race⁵⁹ and gender;⁶⁰ the extent of voir dire;⁶¹ the ability of the plaintiff to get to the jury rather than having the case dismissed on summary judgment;⁶² the need for unanimity in getting a

yet been incorporated into the Fourteenth Amendment, and thus a state is not required to provide a civil jury as a matter of federal constitutional law. And it is not the case that plaintiffs always prefer a jury trial. *See, e.g.*, *Curtis v. Loether*, 415 U.S. 189 (1974). In *Curtis*, the black plaintiff sued the white defendant for housing discrimination under Title VIII of the Civil Rights Act of 1968 (Fair Housing Act). 42 U.S.C. § 3601 (2000). The defendant sought a jury trial, but the plaintiff argued the case should be tried to the judge. The Court, in an opinion by Justice Thurgood Marshall, held the defendant was entitled to a jury trial under the Seventh Amendment.

59. According to the 2000 census, the racial composition of St. Louis City residents 21 and over was 49% white, 45% black, and 6% Hispanic, Asian, Indian, or "Other." The Annual Jury Management Report indicated that for the 2007–2008 time period, the percentage of prospective jurors "summoned, qualified and available for impanelment" was 57% white, 41% black and 2% Hispanic, Asian, Indian or "Other." Annual Jury Management Report, Office of the Jury Supervisor, July 1, 2007–June 30, 2008, at p. 4. Statistics are not kept on the racial composition of a typical panel, but anecdotal evidence suggests that blacks are disproportionately struck—in criminal cases by the prosecutor who believes they cannot give a fair hearing to the state because of their distrust of police officers and in civil cases by defendants who believe blacks are pro-plaintiff. The percentage of blacks qualified as jurors on August 22, 2005 in the three divisions making up the Eastern District of Missouri compared to their percentage of the population in the divisions is as follows: Eastern Division—10.33%/16.00%; Northern Division—1.33%/3.60%; Southeastern Division—1.00%/5.60%. Report on Operation of the Jury Selection Plan, August 22, 2005 (on file with publication). As in the state system, there are no statistics kept by the court on the percentages of blacks on petit juries. Race-based peremptory challenges of jurors have been held to be unconstitutional in the following situations: by prosecutors in criminal cases, *Batson v. Kentucky*, 476 U.S. 79 (1986); by a defendant in a criminal case, *Georgia v. McCollum*, 505 U.S. 42 (1992); and by litigants in civil cases, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). In *People v. Superior Court*, 10 Cal. Rptr. 2d 873 (Cal. Ct. App. 1992), a California appellate court held that *Batson* applies to a motion to disqualify a judge based on his race.

60. Concurring in *J.E.B. v. Alabama ex rel. T.B.*, a case in which the state used most of its peremptory challenges to strike males in the context of a paternity and child support case and which the Court disapproved, Justice O'Connor wrote:

We know that, like race, gender matters. A plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors. Moreover, though there have been no similarly definitive studies regarding, for example, sexual harassment, child custody, or spousal or child abuse, one need not be a sexist to share the intuition that, in certain cases, a person's gender and resulting life experience will be relevant to his or her view of the case.

511 U.S. 127, 148–49 (O'Connor concurring) (citation omitted) (citing REID HASTIE, ET. AL., *INSIDE THE JURY* 140–41 (1983) (collecting and summarizing empirical studies)).

61. Lawyers typically have more involvement in voir dire in state courts than in federal courts, jury pools are usually larger than in federal courts and state judges are usually more willing to permit strikes of jurors for cause than are federal judges.

62. Compare the frequency of summary judgment in federal employment discrimination cases with the ease of getting to the jury in FELA cases under federal law. *Dice v. Akron Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952).

verdict,⁶³ and the perceived sympathy or lack thereof of the trial and appellate courts in the two systems.⁶⁴ In some geographical areas, plaintiffs' lawyers will avoid state courts, particularly where the community is hostile to the federal claims and judges are elected by an unsympathetic citizenry, or where the judges are unfamiliar with the subject matter of the case. Similarly, defense counsel may seek out state courts, particularly specialized courts, such as Delaware's Chancery Court that has developed an expertise in corporate law or Miami-Dade's Business Division.⁶⁵

Federal employment discrimination cases have been analyzed in recent years, based on data from the Administrative Office of the United States Courts. A 2004 study indicated that such cases were the largest component of federal civil cases, 10% of the civil docket. At all stages—pre-trial, trial, and appeal—plaintiffs in employment cases fared badly.⁶⁶ A 2008 study indicates that these cases now make up just 6% of the district courts' civil docket. Although in civil cases as a whole the affirmance rate by the U.S. courts of appeals is 80%, defendants in employment discrimination cases have a 41% chance of reversal and plaintiffs just a 9% chance of reversal. That "might help to explain the last seven years' drop of over 20% in plaintiffs' bringing cases in the federal district courts."⁶⁷

Given the reasons discussed above, it is not surprising that defendants generally want to remove their cases to federal court. Under the general removal statute, defendants may remove to federal court "any civil action brought in a State court of which the district courts of the United States have

63. In the federal system, unanimity is required, in both civil and criminal cases; in many state civil trials, only a three-fourths verdict is required, and in some states, criminal cases may also be decided by non-unanimous votes. See *Apodaca v. Oregon*, 406 U.S. 404 (1972). Capital cases may require unanimity. See Robbie Brown, *In Georgia, Push to End Unanimity for Execution*, N.Y. TIMES, Dec. 17, 2008, at A14.

64. Charlie Savage, *Appeals Courts Pushed to Right by Bush Choices*, N.Y. TIMES, Oct. 29, 2008, at A1 ("Republican-appointed judges, most of them conservatives, are projected to make up about 62 percent of the bench next Inauguration Day, up from 50 percent when Mr. Bush took office. They control 10 of the 13 circuits, while judges appointed by Democrats have a dwindling majority on just one circuit."). The article notes that many of the judges appointed by President George W. Bush are young, hence they are likely to be on the bench for many years. *Id.* At the time President Obama took office, there were 13 vacancies on the U.S. Courts of Appeals (7.3%) and 42 vacancies on the U.S. District Courts (6.2%). Vacancy Summary—110th Congress, http://www.uscourts.gov/cfapps/webnova/CF_FB_301/archived/summary01_01_09.html.

65. There are also specialized federal courts, for example, the Federal Circuit for patent appeals.

66. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Cases Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004)

67. Stewart J. Schwab & Kevin M. Clermont, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 HARV. L. & POL'Y REV. (forthcoming 2009).

original jurisdiction.”⁶⁸ Diversity cases may be removed only if none of the defendants are residents of the state in which the action is brought.⁶⁹ As a result, plaintiffs’ lawyers in some federal districts will file employment discrimination cases under state law against the out-of-state company instead of seeking to bring their cases to federal courts. They will attempt to defeat removal by adding a non-diverse party, such as the supervisor, who may be sued as a party under state employment discrimination laws. In the general removal statute, Congress has prohibited the removal of cases from state to federal court in the following instances: Federal Employment Liability Act cases brought against a railroad,⁷⁰ state workers’ compensation cases,⁷¹ and civil cases brought under the Violence Against Women Act of 1994.⁷² In addition to the general removal statute, Congress has prohibited removal in statutes governing specific areas of federal law.⁷³ Clearly, if Congress were to determine that plaintiffs ought to have the final choice on where to file suits in other substantive areas, such as Title VII, it could make similar exceptions and prohibit removal.

Typically, state courts will not have the support of law clerks to conduct legal research, whereas federal judges may rely on clerks to do extensive research. This disparity may influence the decision on where to file (or whether to remove), especially in cases where legal issues are important. Litigating cases in federal court presents challenges not experienced in state court. Federal judges are not, as a general rule, as accessible as in state court. Most motions are submitted in writing and not argued. Hearings on qualifying experts to testify can take many days.⁷⁴ The effort required for preparation of

68. 28 U.S.C. § 1441(a) (2006).

69. *Id.* § 1441(b). In CAFA, *supra* note 23, Congress permitted removal where there is minimal diversity, that is, where one plaintiff and one defendant are from different states, thus making removal much easier in class actions covered under that statute.

70. 28 U.S.C. § 1445(a) (2006). Suits for less than \$10,000 brought against common carriers are not removable under 28 U.S.C. § 1445(b). Most FELA cases filed by injured railroad workers around the country are filed in state court. Interview with Jerome Schlichter, President, Academy of Rail Labor Attorneys in St. Louis, Mo. (Dec. 14, 2008).

71. 28 U.S.C. § 1445(c) (2006).

72. *Id.* § 1445(d).

73. *See, e.g.*, 46 U.S.C. app. § 688(a) (2000) (dealing with cases under the Jones Act where a seaman or railworker is injured in the course of employment); *Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 356 (5th Cir. 1999); *Alajoki v. Inland Steel Co.*, 635 F. Supp. 398 (E.D. Mich. 1985); *see also* 15 U.S.C. § 77v(a); *but see* 15 U.S.C. § 78bb(f)(2) (providing an exception for certain class actions that may be removed under SLUSA).

74. In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the Court held that the test set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) for admissibility of testimony by an expert had been rejected by Federal Rule of Evidence 702. In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the Court limited the role of courts of appeals in reviewing the district courts’ decisions on whether or not to admit the testimony to an abuse of discretion

the pretrial order is extensive. ADR, authorized by the Civil Justice Reform Act of 1990,⁷⁵ adds costs to the parties, who must pay their own counsel as well as those of the mediator.⁷⁶ These pretrial requirements encourage settlements—whether because they focus the parties on the strengths and weaknesses of their positions before trial or because they wear out one side or the other—and in the long run, may lower costs to the parties.⁷⁷ But faced with these costs, a sole practitioner, especially when representing a client on a contingent fee, may avoid federal court altogether,⁷⁸ inconsistent with

standard. And in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court held the *Daubert* standard applied to non-scientific expert testimony. Although the Court in *Daubert* intended expert testimony to be more liberally admitted than it was under *Frye*, in fact, it has resulted in more limited use of expert testimony compared to state courts, typically to the disadvantage of the plaintiff. *Daubert*, *Joiner*, and *Kumho* have now been codified in Federal Rules of Evidence 701, 702, and 703. If the testimony of plaintiff's expert is excluded on *Daubert* grounds, the consequence is likely to be the granting of defendant's summary judgment motion, because that often means the plaintiff is unable to prove causation without an expert's testimony. In *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. banc 2003), the Missouri Supreme Court rejected both the *Frye* and *Daubert* standards in favor of the Missouri statute on expert testimony in civil cases, section 490.065 of the Revised Statutes of Missouri, which incorporates some of the Federal Rules of Evidence regarding expert testimony but rejects other parts. Whether it will turn out to be more or less restrictive than *Daubert* is yet to be determined.

Another evidentiary area where different rules can influence a choice of forum is the admissibility of evidence on subsequent remedial measures in product liability cases, where states often do not follow the exclusionary rule of the Federal Rules of Evidence. FED. R. EVID. 407.

75. Pub. L. No. 101-650, 104 Stat. 5089. This Act required each district court to implement a civil justice expense and delay reduction plan, to include referring "appropriate cases to alternative dispute resolution programs . . . including mediation." 28 U.S.C. § 473 (2006). In its findings, Congress was concerned about the "cost and delay in civil litigation and its impact on access to the courts." *Id.* § 102. In some districts, mediation is voluntary; in others, it may be imposed by the judge on the parties without consent.

76. In some districts, mediators serve pro bono.

77. Since 2003, the District Court for the Middle District of Pennsylvania has surveyed both parties and attorneys involved in mediation. Most mediations in this district are voluntary. Of the 612 attorney responses received as of January, 2009, 91% (540) indicated the benefits outweighed the costs. Of the parties who responded, 86% (190) indicated the benefits outweighed the costs. In terms of costs to the parties—out of pocket and attorneys fees (during this time period, the mediators in this district served pro bono)—59% of the attorneys estimated that the cost to their client was \$2,500 or less, 21% estimated the costs were between \$2500 and \$5,000, 9% estimated costs were between \$5,000 and \$10,000, and 4% estimated the costs were over \$10,000. (Survey on file with author). Of course, in a district where mediation is not voluntary, and where mediators' fees must be paid by the parties, the surveys are likely to have different outcomes.

78. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court held that due process required a waiver of the filing and service of process fees in the context of divorce. However, the Court upheld filing fees for bankruptcy in *United States v. Kras*, 409 U.S. 434 (1973). In *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), the Court held that due process required the state to provide a record

Congress's intent to control costs and increase access to the federal courts. These reasons may explain, in part, why the percentage of federal cases nationwide resolved by trial fell from 11.5% in 1962 to 1.8% in 2002.⁷⁹

CONCLUSION

Federal Courts is a course that is both highly theoretical and quite practical for students. Having taught it for over twenty years, I find it the most challenging course I teach—and the most rewarding. Over the years, many returning graduates have told me that, to their surprise, the course proved quite helpful for many of the subject-matter areas covered on their bar examinations. And many former students have told me that it proved to be invaluable for their work in the federal courts—as law clerks, judges, or practitioners. The question of why we have lower federal courts is worth raising anew, and the answers are likely to differ for each generation of law students.

from the trial that resulted in termination of parental rights to enable her to appeal. Since a plaintiff has the option of filing the federal claim in state court, it is unlikely there would be a due process problem, but if defendant removes, the cost issues discussed in text resurface.

79. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462–63 (2004).