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Citation: 53 St. Louis U. L.J. 779 2008-2009

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## FEDERAL JURISDICTION ACCORDING TO PROFESSOR FRANKFURTER

EVAN TSEN LEE\*

The birth of the modern course in “Federal Courts” or “Federal Jurisdiction” is usually traced to the publication in 1953 of Henry M. Hart and Herbert Wechsler’s *The Federal Courts and the Federal System*.<sup>1</sup> I do not wish to depreciate the magisterial accomplishment of that volume in any way. In this review, however, I examine a casebook that was the intellectual forebear of *Hart and Wechsler*: Felix Frankfurter and Wilber G. Katz,<sup>2</sup> *Cases and Other Authorities on Federal Jurisdiction and Procedure* (1931). I hope this look back will provide an interesting perspective on the future of the course.

### I

Felix Frankfurter was born in Vienna in 1882, the third of six children.<sup>3</sup> His father, Leopold, was a rather ineffectual man, a romantic and connoisseur of the finer things in life, but a guileless and slightly indolent businessman who could barely keep the family financially afloat in the rough economic waters of late nineteenth century Vienna.<sup>4</sup> His mother Emma was stouter and more practical, pushing the boys toward education, directing them away from their ne’er-do-well father<sup>5</sup> and toward their Uncle Solomon, a highly accomplished

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\* Professor, University of California, Hastings College of the Law. A portion of this essay was taken from my forthcoming book, tentatively titled, *THE STORY OF STANDING: THE LIFE AND TIMES OF JUDICIAL RESTRAINT IN AMERICA* (Oxford University Press).

1. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1st ed. 1953).

2. In 1931 Wilber Katz had just started a long career on the faculty of the University of Chicago Law School, where he would eventually serve as Dean. *Professor Katz Retires*, *THE GARGOYLE: ALUMNI BULLETIN OF THE UNIVERSITY OF WISCONSIN LAW SCHOOL*, Spring 1970, at v. He received his LL.B. and S.J.D. degrees from Harvard. *Id.* His fields of expertise were corporations and church-state relations. *See id.*

3. MICHAEL E. PARRISH, *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS* 7, 8 (1982).

4. *See id.* at 8.

5. *Id.* at 12.

scholar who was appointed director of the state library.<sup>6</sup> Young Felix particularly admired that Solomon had become “a spokesman for Jewish interests in the city and a *shtadlan* (backstairs petitioner) with the gentile power structure.”<sup>7</sup> In 1894, Emma reluctantly packed up the children and followed Leopold to New York, where he sought to start afresh.<sup>8</sup>

The Frankfurters settled on the predominantly Jewish Lower East Side.<sup>9</sup> In his comprehensive biography of Frankfurter’s pre-Court years, Michael Parrish documents how the Frankfurters “settled initially on Seventh Street, near Tompkins Square and Cooper Union, in the heavily German-speaking neighborhood where the sober residents voted Republican, admired their wealthy coreligionists—the Seligmans, Warburgs, and Strauses—and hoped to maintain a comfortable distance from the boisterous, Yiddish-speaking masses on Henry and Cherry Streets.”<sup>10</sup> The German Jews on the Lower East Side were attracted to gentility, which carried with it a certain social conservatism and respect for pedigreed institutions and practices; the Eastern European Jews were generally poorer, more ideological, more political, more devout, and often more radical.<sup>11</sup> Young Felix adopted the values of the German Jewish community pretty much down the line, with one glaring exception—like his Uncle Solomon, he loved politics.<sup>12</sup>

Though he struggled to understand the devoutness of the Eastern Europeans—to his mother’s eternal consternation, Felix had inherited his father’s agnosticism—he found the Eastern Europeans intellectually fascinating.<sup>13</sup> At City College, Frankfurter had his first real exposure to these idealistic and bohemian thinkers, whose “conversations often turned to anarchism, revolution, Emma Goldman, dialectical materialism, and free love.”<sup>14</sup> This was a far cry from the German-Jewish students whose company he usually kept, immersed in their quest for respectability and personal achievement.<sup>15</sup> Frankfurter could see the virtues and vices on both sides, and throughout his career he sought to marry the passion for justice and social change with a profound respect for history and institutions. It eventually led him to forsake the dreamier professions of journalist or poet in favor of becoming a reform-minded lawyer.<sup>16</sup>

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6. *Id.* at 9, 12.

7. *Id.* at 9.

8. PARRISH, *supra* note 3, at 9.

9. *Id.* at 11.

10. *Id.* at 9.

11. *Id.* at 11, 15.

12. *Id.* at 13.

13. PARRISH, *supra* note 3, at 15–16.

14. *Id.* at 15.

15. *Id.*

16. *Id.* at 16.

First, however, there was the matter of legal training. After two brief stints in night classes at local schools, which he found dull, Frankfurter enrolled at Harvard Law School in the fall of 1902.<sup>17</sup> There, “[i]n high-ceilinged Austin Hall, . . . the waistcoated doyens of the legal profession—James Barr Ames, Samuel Williston, John Chipman Gray, Joseph Doddridge Brannan, and Joseph Henry Beale—attempted to make gentlemen and lawyers out of the scions of the Anglo-Saxon establishment and a handful of immigrants.”<sup>18</sup>

Among these faculty members, Gray was a strong influence.<sup>19</sup> He hired Frankfurter as a research assistant.<sup>20</sup> Frankfurter undoubtedly read Gray’s *The Nature and Sources of the Law*,<sup>21</sup> which rejected the jurisprudence of natural rights “in favor of a pragmatic interpretation of the origin of legal rules that located them in the shifting configurations of social life and the varying responses of judges to these changing circumstances.”<sup>22</sup> Like his friend Holmes, Gray had breathed the deep skepticism that led both of them to scorn Langdell’s orthodoxy and Brewer’s and Sutherland’s views of natural rights.<sup>23</sup>

Frankfurter would develop a habit of personal adulation for and loyalty to certain figures (Holmes, Brandeis, and Franklin Roosevelt), but his absorption of the ideas of James Bradley Thayer cannot be attributed to a personal relationship between the two. Thayer died the year Frankfurter got to Harvard.<sup>24</sup> Yet, according to Parrish, “Thayer had a profound influence upon Frankfurter, who read [his paper] ‘The Origin and Scope of the American Doctrine of Constitutional Law’ so many times that he could recite whole passages from memory.”<sup>25</sup> Thayer’s rule of “clear error” became a cornerstone of Frankfurter’s professional indoctrination.<sup>26</sup> He held this belief uncritically, as a first principle of American constitutionalism, in need of no justification. “Above all,” wrote Parrish, “he wished to promote the ideal of judicial restraint in the tradition of Thayer and Holmes. Judges, he believed, should not substitute their own policy choices for those of the popular branches.”<sup>27</sup>

It was not only this abstract commitment to judicial restraint that drove Frankfurter. There was a strong instrumental motivation as well: as a

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17. *Id.*

18. PARRISH, *supra* note 3, at 16–17.

19. *Id.* at 20.

20. *Id.* at 19.

21. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* (Roland Gray ed., 2d ed. 1931).

22. PARRISH, *supra* note 3, at 20.

23. *Id.* at 17, 20.

24. *Id.*

25. *Id.* at 21.

26. *See, e.g.*, Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1007–08 (1923).

27. PARRISH, *supra* note 3, at 65.

consistent advocate of reform, he understood that it was courts, and federal courts in particular, that stood in the way.<sup>28</sup> Although Frankfurter had long been critical of the use of the diversity jurisdiction and substantive due process to foil progressive reform legislation, it was the 1923 decision of *Adkins v. Children's Hospital*<sup>29</sup> that really stuck in his craw.<sup>30</sup> The hospital challenged the District of Columbia's minimum wage law for women, alleging that it violated the principle of liberty of contract as enunciated in the substantive due process decisions. Frankfurter defended the statute before the Supreme Court.<sup>31</sup> In the wake of cases like *Muller v. Oregon*,<sup>32</sup> *McLean v. Arkansas*,<sup>33</sup> and *Bunting v. Oregon*<sup>34</sup> (which he had argued successfully), Frankfurter was confident that the tide against wage and hour legislation had turned for good.<sup>35</sup> But Justice Sutherland, quoting wholesale from *Lochner v. New York*,<sup>36</sup> distinguished the wage law *sub judice* from the hours legislation in *Muller* and *Bunting*.<sup>37</sup> (Even Taft dissented, though he could not bring himself to join Holmes's characteristically blunt opinion. Brandeis recused himself.) Stunned, Frankfurter came to the conclusion that the Court had to be forcibly removed from the business of reviewing such legislation. "The whole thing we thought gained in 1912 is now thrown overboard and we are just where we were" he wrote to Learned Hand.<sup>38</sup> "I confess I did not expect it again."<sup>39</sup> Shortly thereafter, in the pages of *The New Republic*, he advocated the repeal of the Due Process Clause.<sup>40</sup>

Frankfurter's zeal for judicial restraint grew out of the combination of deep professional indoctrination and longstanding political frustration. As Parrish summed it up, Frankfurter believed that the Constitution "permitted vigorous, effective government and social experimentation."<sup>41</sup> He wanted to give the legislature more latitude than even Holmes or Brandeis did.<sup>42</sup> He disapproved of *Pennsylvania Coal Co. v. Mahon*,<sup>43</sup> in which Holmes's majority opinion struck down a statute aimed at protecting dwellings from improvident mining

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28. *Id.* at 21–22.

29. 261 U.S. 525 (1923).

30. PARRISH, *supra* note 3, at 165.

31. *Id.*

32. 208 U.S. 412 (1908).

33. 211 U.S. 539 (1909).

34. 243 U.S. 426 (1917).

35. See PARRISH, *supra* note 3, at 165.

36. 198 U.S. 45 (1905).

37. *Adkins v. Children's Hosp.*, 261 U.S. 525, 548–54 (1923).

38. PARRISH, *supra* note 3, at 165.

39. *Id.*

40. *Id.*

41. *Id.* at 167.

42. *Id.* at 166.

43. 260 U.S. 393, 414 (1922).

activity. And he criticized *Wolff Packing Co. v. Court of Industrial Relations*,<sup>44</sup> which struck down a Kansas scheme that authorized compulsory arbitration and price-fixing. Holmes and Brandeis had gone along with that one.<sup>45</sup> Frankfurter wrote: “Thus fails another social experiment . . . not because it has been tried and found wanting, but because it has been tried and found unconstitutional.”<sup>46</sup> It was this almost unremittingly negative attitude toward judicial review that Frankfurter took into his *Federal Jurisdiction* casebook.

## II

*Cases and Other Authorities on Federal Jurisdiction and Procedure*<sup>47</sup> was not just another book treating federal practice as a set of purely technical requirements, viewed entirely from the standpoint of the lawyer trying to negotiate the procedural labyrinth on behalf of his client. Instead, it viewed the subject from the standpoint of a statesman or social engineer, prodding the reader to think about how the federal courts could best contribute to the advancement of the polity. The book’s introduction is worth recounting at some length:

[T]he historic experience subsumed under the phrase “federal jurisdiction and procedure” is not merely an account of the technical regulation of the business of administering law through the courts. The particular system of courts with which we are concerned, unlike other courts, serves a special political purpose. The federal judiciary is one of the most powerful means for achieving the adjustments upon which the success of a federated nation rests. Federal jurisdiction is thus an important part of the public law of the United States. That the interaction between the political power of states and central government is conveyed, as it often is, through nice questions of judicial competence and procedure only adds zest to the exploration of such issues, and for their solution demands the statesman’s gift of imagination as well as the disciplined training of the lawyer.<sup>48</sup>

In a sense, Frankfurter and Katz found a litigant-centered course on federal practice and turned it into a course on the federal judicial role in American political structure, viewed from an Olympian systemic perspective. Of course, this is too grandiose a statement; it is hard to see how venue, for example, affects political structure. It is nonetheless true that the editors passed over several important federal jurisdictional specialties—admiralty, bankruptcy,

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44. 262 U.S. 522, 544 (1923).

45. PARRISH, *supra* note 3, at 167.

46. *Id.*

47. FELIX FRANKFURTER & WILBER G. KATZ, *CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE* (1931).

48. *Id.* at vi–vii.

federal criminal law, Indian land litigation, patents—because they were too “specialized,” and as such, lay at the periphery of the structural dynamic.<sup>49</sup> On the other hand, review of decisions of the Supreme Court of the Philippine Islands merited inclusion, as Frankfurter’s experience in Teddy Roosevelt’s War Department convinced him of the topic’s political importance.<sup>50</sup>

Of the casebook’s 732 pages (not including tables and appendices), the first 125 are devoted to a chapter entitled “Constitutional Limits of the Judicial Power—‘Case or Controversy.’” The chapter begins with the prohibition on advisory opinions (*Hayburn’s Case*<sup>51</sup> and *Gordon v. United States*<sup>52</sup>), then moves to the question of what matters were presented in a sufficiently judicial form for adjudication (*Interstate Commerce Commission v. Brimson*,<sup>53</sup> *Old Colony Trust Co. v. Commissioner*,<sup>54</sup> *Muskrat v. United States*,<sup>55</sup> and the “Correspondence of the Justices”<sup>56</sup>). The chapter then discusses “case or controversy” problems associated with injunctions against the enforcement of legislation, starting with *Ex parte Young*<sup>57</sup> and directly proceeding to what today is referred to as “standing” cases (*Terrace v. Thompson*,<sup>58</sup> *Frothingham v. Mellon*,<sup>59</sup> and *Buchanan v. Warley*<sup>60</sup>). The next principal case is *Barker Painting Co. v. Local No. 734, Brotherhood of Painters*,<sup>61</sup> an obscure two-paragraph Holmes opinion denying that courts have any general warrant to discourse on matters beyond the immediate controversy. The note cases following *Barker* include *Lord v. Veazie*<sup>62</sup> and *Chicago & Grand Trunk Railway Co. v. Wellman*<sup>63</sup> (no jurisdiction over feigned or collusive cases).

49. *Id.* at viii n.1.

50. Two decades earlier, Frankfurter served as Legal Adviser to the Bureau of Insular Affairs in the War Department under his first mentor, Henry Stimson. See PARRISH, *supra* note 3, at 42. In that capacity, he successfully defended Governor General of the Philippines, W. Cameron Forbes, from charges that he had illegally detained and deported Chinese aliens from the islands. *Tiaco v. Forbes*, 228 U.S. 549, 554, 558 (1913). On the other hand, before leaving the War Department, Frankfurter also “drafted a proposal for expanded Filipino participation in the islands’ government.” PARRISH, *supra* note 3, at 45.

51. 2 U.S. (2 Dall.) 409 (1792).

52. 69 U.S. (2 Wall.) 561 (1864).

53. 154 U.S. 447 (1894).

54. 279 U.S. 716 (1929).

55. 219 U.S. 346 (1911).

56. Letter from Thomas Jefferson to Chief Justice Jay and Associate Justices (July 18, 1793), in 3 THE CORRESPONDENCE & PUBLIC PAPERS OF JOHN JAY 1782–1793, at 486, 486–87 (Henry P. Johnston ed., 1891).

57. 209 U.S. 123 (1908).

58. 263 U.S. 197 (1923).

59. 262 U.S. 447 (1923).

60. 245 U.S. 60 (1917).

61. 281 U.S. 462 (1930).

62. 49 U.S. (8 How.) 251 (1850).

63. 143 U.S. 339 (1892).

The next group of cases relate to “mootness” (*Hylton v. United States*,<sup>64</sup> *Southern Pacific Terminal Co. v. Interstate Commerce Commission*,<sup>65</sup> and *United States v. Alaska Steamship Co.*<sup>66</sup>). The case that follows, *Fidelity National Bank v. Swope*,<sup>67</sup> questions whether a state court judgment constitutes a “case or controversy” within the meaning of Article III and therefore can be reviewed in the U.S. Supreme Court. It is followed by the text of the then-proposed Federal Declaratory Judgment Act and the Brandeis opinion casting doubts on its constitutionality (*Willing v. Chicago Auditorium Ass’n*<sup>68</sup>). Then arise two cases in which the U.S. Supreme Court dismisses appeals because it finds the lower court judgments to be legislative or administrative in nature rather than judicial (*Postum Cereal Co. v. California Fig Nut Co.*<sup>69</sup> and *Keller v. Potomac Electric Power Co.*<sup>70</sup>), which thematically seem better grouped with *Swope*. The “case or controversy” chapter ends with what today is referred to as the “political question” doctrine (*Pacific States Telephone & Telegraph Co. v. Oregon*<sup>71</sup>).

As the chapter heading “Case or Controversy” denotes, this first segment of the book is concerned with outlining the constitutional outer limits of the circumstances under which Article III courts may adjudicate. Occasionally, Frankfurter and Katz highlight cases taking a relatively expansive view of such circumstances,<sup>72</sup> but the chapter’s dominant theme is how the circumstances for proper adjudication are generally limited. The federal judicial machinery operates only when fed an honest, antagonistic assertion of a vested right, and even then only in a form familiar to the courts at Westminster at the turn of the eighteenth century. Frankfurter’s pedagogy reflected a nation’s impatience with judicial invalidations of Progressive legislation, most prominently local ordinances regulating working conditions and railroad rate regulations. State and local lawmakers needed the latitude to combat the disastrous side effects of industrialization, mechanization, and urbanization. At a time when federal judges protected vested rights with an almost religious fervor, Progressives like Frankfurter and Brandeis argued for tight constitutional limits on federal judicial review.

Chapter Two covers the phenomenon of “legislative courts”—tribunals created by virtue of Congress’s Article I powers, whose judges lacked life

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64. 3 U.S. (3 Dall.) 171 (1796).

65. 219 U.S. 498 (1911).

66. 253 U.S. 113 (1920).

67. 274 U.S. 123, 133–35 (1927).

68. 277 U.S. 274 (1928).

69. 272 U.S. 693 (1927).

70. 261 U.S. 428 (1923).

71. 223 U.S. 118 (1912).

72. See, e.g., *Buchanan v. Warley*, 245 U.S. 60 (1917); *Pac. Terminal Co. v. ICC*, 219 U.S. 498 (1911); *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

tenure and salary protection. This chapter primarily consists of two principal cases, *American Insurance Co. v. 356 Bales of Cotton*<sup>73</sup> and *Ex parte Bakelite Corp.*,<sup>74</sup> which validate territorial courts and the court of claims, respectively, as exercises of congressional power. The validity of legislative courts was critical to the Progressive movement and to what was about to become the New Deal. A strong chief executive could appoint Progressively-minded commissioners to federal agencies, which would have the first pass at adjudicating many of the claims arising under their enabling statutes. Even with some limited form of judicial review, the vested rights jurisprudence of most federal judges—expressed in large part through the doctrines of liberty of contract and substantive due process—could be sidestepped.

Section One of Chapter Three covers the doctrines that were eventually overturned by *Erie Railroad Co. v. Tompkins*.<sup>75</sup> *Swift v. Tyson*<sup>76</sup> was, of course, a principal bogey, along with its unobvious modern reaffirmation in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab and Transfer Co.*<sup>77</sup> These decisions gave corporations ample cover from populist (sometimes redistributionist) state law by invoking diversity jurisdiction. But Frankfurter gave pride of place in his “Judicial Activism Hall of Shame” to the opinion by Justice David Brewer delivered for the Court in *Western Union Telegraph Co. v. Call Publishing Co.*<sup>78</sup> As Edward A. Purcell, Jr. wrote in *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America*:

*Western Union* was classic Brewer. Asserting the existence of a national common law, he held that it governed interstate commerce and that it was independent of both Congress and the states. By recognizing a distinctly national common law, moreover, he implied that it reached to the limits of national power and established that the Supreme Court of the United States was its authoritative voice.<sup>79</sup>

Such expansion of federal judicial power, at the cost of Congress and the states, was the worst of all worlds for advocates of social and industrial reforms.

Section Two of Chapter Three contains cases that illustrate the reverse of what eventually became *Erie*—that is, the proposition that Congress and the

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73. 26 U.S. (1 Pet.) 511 (1828).

74. 279 U.S. 438 (1929).

75. 304 U.S. 64 (1938).

76. 41 U.S. (16 Pet.) 1 (1842).

77. 276 U.S. 518 (1928).

78. 181 U.S. 92 (1901).

79. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 54–55 (2000).

federal courts had the power to fashion rules of procedure in cases governed by state liability rules. Section Three, Chapter Three, covers cases that insist federal distinctions between law and equity would be applied to diversity cases in states that abolished such distinctions. A quotation from one such case, written by Justice Brewer, typifies the idea: "It is well settled that the jurisdiction of the Federal courts, sitting as courts of equity, is neither enlarged nor diminished by state legislation."<sup>80</sup> In a number of these cases, this meant refusing equitable relief for what was deemed nothing more than a legal claim.<sup>81</sup>

Chapter Four covers "Jurisdiction of District Courts." Section One is devoted to diversity, including the operation of the "assignee clause,"<sup>82</sup> the requirement of complete diversity,<sup>83</sup> the reach of "ancillary jurisdiction,"<sup>84</sup> corporate citizenship,<sup>85</sup> and the anti-collusion clause.<sup>86</sup> Section One concludes with the problem of shareholder derivative suits brought for the purpose of creating diversity that would not otherwise exist (*Hawes v. Oakland*<sup>87</sup> and *City of Chicago v. Mills*<sup>88</sup>) and a couple of bankruptcy receivership cases.

Section Two, covering federal question jurisdiction, of course includes *Osborn v. Bank of the United States*<sup>89</sup> (federal question merely need be an ingredient of cause of action) and *Louisville & Nashville Railroad v. Mottley*<sup>90</sup> (well-pleaded complaint rule). Interestingly, it also includes *Ex parte Young*,<sup>91</sup> which held that the question of whether rates were confiscatory under substantive due process, and the question of whether penalties for violation of those rates were so draconian as to deny procedural due process, both arose under federal law. The casebook editors include the Court's extended discussion of the Eleventh Amendment question and a relatively full version of Justice Harlan's dissent.<sup>92</sup> Following *Ex parte Young*, the editors reprint the full text of 28 U.S.C. § 380, which prohibited federal injunctions against state officer enforcement of state statutes except by a three-judge court.<sup>93</sup> The

80. *Mississippi Mills v. Cohn*, 150 U.S. 202, 204 (1893).

81. *See, e.g., Thompson v. R.R. Cos.*, 73 U.S. (6 Wall.) 134 (1867); *Bennett v. Butterworth*, 52 U.S. (11 How.) 669, 676 (1850).

82. *See, e.g., Sowell v. Fed. Reserve Bank*, 268 U.S. 449 (1925); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

83. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

84. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).

85. *Covington Drawbridge Co. v. Shepherd*, 61 U.S. (20 How.) 227 (1857).

86. *Miller & Lux Inc. v. E. Side Canal & Irrigation Co.*, 211 U.S. 293 (1908).

87. 104 U.S. 450 (1881).

88. 204 U.S. 321 (1907).

89. 22 U.S. (9 Wheat.) 738, 823 (1824).

90. 211 U.S. 149, 153 (1908).

91. 209 U.S. 123, 144–45 (1908).

92. FRANKFURTER & KATZ, *supra* note 47, at 324–29, 331–34.

93. *Id.* at 334–36.

editors' hostility toward *Young* is evident, as such injunctions formed a major impediment to the Progressive cause. After three cases dealing with the procedure of three-judge courts, the editors put *Prentis v. Atlantic Coast Line Co.*,<sup>94</sup> in which the Court reversed federal circuit court decrees enjoining enforcement of rates on the ground that the plaintiff railroad was required to make use of an appeal to the state supreme court before petitioning a federal court of equity. Placement of *Prentis* in the chapter on federal question jurisdiction implies that the ruling was jurisdictional, but Justice Holmes cites "comity and convenience,"<sup>95</sup> which suggests that *Prentis* is instead an early form of abstention. Section Two concludes with *Siler v. Louisville & Nashville Railroad*<sup>96</sup> (pendent jurisdiction) and that logical tour de force *Home Telephone & Telegraph Co. v. City of Los Angeles*<sup>97</sup> (act of state official abusing authority constitutes state action for Fourteenth Amendment purposes, despite *Young's* holding that the official is not the "state" for Eleventh Amendment purposes). Finally, a footnote on page 388 seems to foreshadow the abstention doctrine that Frankfurter himself would deliver for the Court twelve years later in *Railroad Commission of Texas v. Pullman Co.*<sup>98</sup>

With one possible exception, Sections Three through Seven of Chapter Four cover unremarkable technical ground. Section Three contains seventy-seven pages of removal cases, including the fussiest of procedural details about removal and remand procedure—nothing with any political overtones. Section Four covers the probate and domestic relations doctrine, and Sections Six and Seven cover jurisdictional amount and venue, respectively.

Section Five, on federal habeas corpus, rates only two principal cases, but they are good ones. *In re Neagle*<sup>99</sup> was the Wild West tale of a scorned couple's attempt to assassinate Justice Stephen Field. In the summer of 1888, while riding circuit in California, Justice Field sat in judgment on a case impugning the validity of the marriage of Mr. and Mrs. David S. Terry.<sup>100</sup> The Terrys took very great exception to the court's proceeding, accusing Field of

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94. 211 U.S. 210, 229–230 (1908).

95. *Id.* at 229.

96. 213 U.S. 175, 191 (1909).

97. 227 U.S. 278, 288–89, 293 (1913).

98. 312 U.S. 496, 501 (1941). The footnote stated in part:

Consider to what extent the decision [*Gilchrist v. Interborough Rapid Transit Co.*, 279 U.S. 159 (1929), another case disallowing an injunction where appeal within the state court system could have been had] was influenced by the fact that the case involved the construction of difficult statutes and contracts not theretofore passed upon by the state courts. *Cf. Railroad Commission v. Los Angeles Railway Corporation*, 280 U.S. 145 (1929).

FRANKFURTER & KATZ, *supra* note 3, at 388 n.1.

99. 135 U.S. 1 (1890).

100. *Id.* at 42–43.

having been “bought.”<sup>101</sup> After creating such a courtroom commotion that they were both imprisoned for contempt, the Terrys quite publicly vowed they would kill Field.<sup>102</sup> The next summer, Justice Field returned to California on official business.<sup>103</sup> It was fully expected that the Terrys would attempt to harm the judge, and one Neagle was assigned to protect him.<sup>104</sup> The Terrys managed to find their way into a railroad dining car in which Justice Field was having breakfast, and they made their move.<sup>105</sup> Neagle foiled the assassination attempt by shooting David S. Terry dead.<sup>106</sup> For reasons not explained in the opinion, the San Joaquin County Sheriff took custody of Neagle, who petitioned the federal court for his release.<sup>107</sup> Unsurprisingly, the federal circuit court granted the writ, and the United States Supreme Court, Justice Field recusing himself, affirmed.<sup>108</sup>

The other habeas case was *Moore v. Dempsey*,<sup>109</sup> which grew out of an attack in September 1919 on a black church in Arkansas. A white man was killed in the ensuing violence, and five black men were arrested and charged with his murder.<sup>110</sup> A lynch mob showed up at the jail, but they were turned back by a variety of white officials with a promise that the five would be executed in accordance with the law.<sup>111</sup> The ensuing trial was a farce, lasting only forty-five minutes, with five minutes of jury deliberations before returning verdicts of first-degree murder.<sup>112</sup> Black witnesses were “whipped and tortured until they would say what was wanted,” Justice Holmes wrote for the majority.<sup>113</sup> “The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result.”<sup>114</sup> Holmes held that the district court should not have dismissed the writ upon demurrer, but instead should have examined the petitioners’ factual allegations for itself, given that, if the allegations had been true, they would have rendered “the trial absolutely void.”<sup>115</sup>

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101. *Id.* at 44–45.

102. *Id.* at 45–46.

103. *See id.* at 52.

104. *Neagle*, 135 U.S. at 52.

105. *Id.* at 52–53.

106. *Id.* at 53.

107. *Id.* at 3–6.

108. *Id.* at 7, 76. The decision to affirm was not unanimous. Justice Lamar and Chief Justice Fuller dissented on federalism grounds. *See id.* at 76–77.

109. 261 U.S. 86 (1923).

110. *Id.*

111. *Id.* at 88–89.

112. *Id.* at 89.

113. *Id.*

114. *Moore*, 261 U.S. 86, 89.

115. *Id.* at 92.

Chapter Five is titled “Concurrent Jurisdiction of State and Federal Courts.” It is a surprisingly<sup>116</sup> slender thirty-six pages. The chapter leads off with the *Second Employers’ Liability Cases*,<sup>117</sup> holding that a state court could properly enforce a federal employer liability statute. *Minneapolis & St. Louis Railroad v. Bombolis*<sup>118</sup> is next, holding that the mere presence of a federal statutory cause of action did not mean the Seventh Amendment’s requirement of jury unanimity applied. The remainder of the chapter’s contents deal with what is modernly referred to as the “Anti-Injunction Act.”<sup>119</sup> *Kline v. Burke Construction Co.*<sup>120</sup> reiterated the principle that federal courts acting *in personam* may not enjoin parallel proceedings in state court. In *Lion Bonding & Surety Co. v. Karatz*,<sup>121</sup> Justice Brandeis held that if a state court acting *in rem* takes possession of the subject property first, it ousts all other courts, including federal courts, of jurisdiction. After a lengthy opinion in a case involving counsel misconduct (*Harkin v. Brundage*<sup>122</sup>), the chapter closes with *Wells Fargo & Co. v. Taylor*,<sup>123</sup> in which the Court held that the suit *sub judice* was not truly “one to stay proceedings in a state court.”<sup>124</sup>

Chapter Six, “Jurisdiction of Circuit Courts of Appeal,” is even thinner than the previous one. There is a Brandeis opinion in a Prohibition Act case interpreting the final judgment rule (*Cogen v. United States*<sup>125</sup>) and a Learned Hand opinion, *Miller v. Maryland Casualty Co.*,<sup>126</sup> refusing to exercise appellate review over a jury verdict alleged to have been for a grossly insufficient amount of damages.

The remainder of the book is devoted to the jurisdiction of the United States Supreme Court. Chapter Seven, “Appellate Jurisdiction of the Supreme Court,” very deliberately leads off with *Ex parte McCardle*,<sup>127</sup> immediately and dramatically demonstrating congressional control over that appellate jurisdiction, even when such control was exercised for the most overtly political of reasons. This principle was most congenial to Frankfurter’s agenda, which was to enable the insulation of congressional reforms from conservative federal judges generally, and especially the “Four Horsemen”

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116. Surprising, given the incredible range of problems that can arise when two courts have jurisdiction over the same subject matter.

117. 223 U.S. 1, 59 (1912).

118. 241 U.S. 211, 217, 221–22 (1916).

119. 28 U.S.C. § 2283 (2000).

120. 260 U.S. 226, 235 (1922).

121. 262 U.S. 77, 88–89 (1923).

122. 276 U.S. 36 (1928).

123. 254 U.S. 175 (1920).

124. *Id.* at 186.

125. 278 U.S. 221 (1929).

126. 40 F.2d 463, 464 (2d Cir. 1930).

127. 74 U.S. (7 Wall.) 506, 513–14 (1869).

(McReynolds, Butler, Van Devanter, and Sutherland). Then, after three opinions on the technical propriety of mandamus, the chapter launches into the subject of reviewing state court decisions. *Martin v. Hunter's Lessee*<sup>128</sup> is of course first. It is perhaps significant that Justice Johnson's concurrence is reprinted extensively, emphasizing that the Supreme Court has power only over the people and subject matter involved in the lawsuit, and not over the state court itself. If Justice Johnson's separate opinion was not a sufficient reply to Justice Story's exertion of federal judicial power in *Martin, Murdock v. City of Memphis*<sup>129</sup> provided further rejoinder. State courts could be the only authoritative expositors of state law.

Outside of *Martin* and *Murdock*, the most important cases in this section are *Dahnke-Walker Milling Co. v. Bondurant*,<sup>130</sup> *King Manufacturing Co. v. City Council of Augusta*,<sup>131</sup> *Cuyahoga River Power Co. v. Northern Realty Co.*,<sup>132</sup> and *Broad River Power Co. v. South Carolina*.<sup>133</sup> Each one was an important platform for Frankfurter's remonstrance against federal interference with state economic reforms. In *Dahnke-Walker*, the majority held that the case was properly before the Court on a writ of error.<sup>134</sup> The state court had upheld a Kentucky statute placing conditions on out-of-state corporations doing business in the state. Justice Brandeis (the Kentuckian) dissented, arguing that the Court had construed the jurisdictional statute far too liberally; this sort of case could be heard only on writ of certiorari.<sup>135</sup> *King Manufacturing* involved a municipal ordinance fixing utility rates.<sup>136</sup> The question was whether such ordinance constituted a "state statute" within the meaning of the jurisdictional statute.<sup>137</sup> The majority held that it did, though it upheld the constitutionality of the ordinance on the merits.<sup>138</sup> Justices Brandeis and Holmes dissented, again arguing that such a case could be raised only on writ of certiorari, and not as a matter of right pursuant to a writ of error.<sup>139</sup> *Cuyahoga River Power* was dismissed for want of jurisdiction because of the presence of an independent and adequate state ground.<sup>140</sup> The same occurred with *Broad River Power*, although the disposition on rehearing

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128. 14 U.S. (1 Wheat.) 304 (1816).

129. 87 U.S. (20 Wall.) 590 (1875).

130. 257 U.S. 282 (1921).

131. 277 U.S. 100 (1928).

132. 244 U.S. 300 (1917).

133. 281 U.S. 537, *aff'd on reh'g*, 282 U.S. 187 (1930).

134. *Dahnke-Walker*, 257 U.S. 282, 290.

135. *Id.* at 293 (Brandeis, J., dissenting).

136. *King Mfg. Co. v. City Council*, 277 U.S. 100, 101 (1928).

137. *Id.* at 102.

138. *Id.* at 114–15.

139. *Id.* at 116 (Brandeis, J., dissenting).

140. *Cuyahoga River Power Co. v. N. Realty Co.*, 244 U.S. 300, 304 (1917).

clearly revealed the fault lines on the Court.<sup>141</sup> The South Carolina Supreme Court had ordered the utility to resume operation of a particular line in Columbia.<sup>142</sup> The utility claimed that it would lose money if it were forced to do so, and that such losses would constitute a deprivation of property without due process. The Four Horsemen were willing to dismiss for want of jurisdiction only after examining the merits, which revealed a shaky factual basis for the constitutional claim.<sup>143</sup> Holmes, Brandeis, Stone, and the Chief Justice stood by the Court's original dismissal,<sup>144</sup> which purportedly had not inquired into the strength of the merits, but rather only determined that the judgment was supported by a state ground that was "substantial."<sup>145</sup> In each of these four cases, there was no mistaking the editors' normative take. Businesses challenging reform measures in state court could not be given an automatic appeal to the Supreme Court. If they could demonstrate a true likelihood of constitutional violation, the Court could always review by way of certiorari.

For the sake of completeness, Chapter Eight covers the original jurisdiction of the Supreme Court. The first case is *Marbury v. Madison*.<sup>146</sup> To the uninitiated reader, the case's significance in American jurisprudence would be completely unapparent. The opinion was edited down to two and a half pages. The facts were compressed into a single paragraph. The excerpt ends with "and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised. . . . The rule must be discharged."<sup>147</sup> The entire discussion of judicial review is missing. The case is in the book for a single purpose, which is to illustrate the historic difference between original and appellate jurisdiction. There is virtually no mention of *Marbury* anywhere else in the book.

It is certainly true that the majesty of *Marbury*'s dicta does not match its doctrinal reality. "It is emphatically the province and duty of the judicial department to say what the law is" connotes a false exclusivity. It also suggests a license to discourse on the law at will. But *Marbury* can just as well stand for the proposition that constitutional adjudication is warranted only as a last resort, when a claim of vested rights runs headlong into an otherwise valid legislative enactment, and there is no other way to resolve the claim. In that

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141. See *Broad River Power Co. v. South Carolina (Broad River II)*, 282 U.S. 187, 192–93 (1930).

142. *Broad River Power Co. v. South Carolina (Broad River I)*, 281 U.S. 537, 539 (1930).

143. See *Broad River II*, 282 U.S. at 192–93.

144. *Id.* at 193.

145. *Broad River I*, 281 U.S. at 548.

146. 5 U.S. (1 Cranch) 137 (1803).

147. FRANKFURTER & KATZ, *supra* note 47, at 692.

light, Frankfurter's choice to reduce *Marbury* to a technical aperçu on original jurisdiction is remarkable.

Only one other case merits mention. *Georgia v. Tennessee Copper Co.*<sup>148</sup> was a bill in equity filed by the State of Georgia in the United States Supreme Court, seeking "to enjoin the defendant Copper Companies from discharging noxious gas from their works in Tennessee" into Georgia airspace. Holmes spoke for the majority, granting the injunction, and placing states on a quite different footing (standing?) than private litigants, at least for certain purposes.<sup>149</sup> "The case has been argued largely as if it were one between two private parties; but it is not," Holmes wrote.<sup>150</sup> "The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the [affected] territory . . . . This is a suit by a State for an injury to it in its capacity of *quasi-sovereign*."<sup>151</sup> Frankfurter could see the structural importance of this case. State sovereignty did not only mean immunity from suit or from certain types of federal legislation; it meant special privileges as a plaintiff in a federal court of equity. Justice Stevens finally seized on this insight exactly a century later in *Massachusetts v. EPA*.<sup>152</sup>

### III

To my eye, three things stand out about the Frankfurter and Katz text. First, it is as much a book about political theory—and only secondarily about procedure—as a writer could get away with under the circumstances. Most of the material is about structural protection for the decision-making authority of Congress, state legislatures, administrative agencies, or state courts, rather than about what strategic advantages counsel might secure, or about the protection of the integrity of adjudication for the benefit of litigants. It is hard to imagine a pedagogic text much more overtly aimed at political theory and less at the timeless principles of common law adjudication, given the Langdellian orthodoxy that still largely held sway at Harvard in 1931.<sup>153</sup>

Second, the book has a readily discernable normative take. In a day when "notes and questions" were not generally available to rebut the rhetoric of a

148. 206 U.S. 230, 236 (1907).

149. *See id.* at 237.

150. *Id.*

151. *Id.*

152. 549 U.S. 497, 518–19 (2007).

153. It is true that Frankfurter's course on "Public Utilities" was famously unstructured. "We were not learning law," Parrish quotes one student as saying. PARRISH, *supra* note 3, at 66. "[T]hat was not our business. We were gaining some measure of understanding of law that both reflected and shaped a nation's growth—some understanding of its method and some appreciation of its content." *Id.* Another student devoted a poem to the course: "You learn no law in Public U/That is its fascination/But Felix gives a point of view/And pleasant conversation." *Id.* at 65.

wrongheaded majority opinion, the editors made their views known by the selection of certain opinions and by giving full exposition to certain dissents, a very large number of which were written by Holmes or Brandeis. The book is fair, in the sense that the big cases cutting against Frankfurter's view of federal judicial restraint are generally included (*Marbury* aside). But one is left with few doubts about what that view is.

Third, it is clearly a book about the federal judiciary's place in the structure of American constitutional government. By volume and emphasis, the book gives pride of place to separation of powers over federalism, but whatever order they are given, they are the two structural principles around which the text coheres.

Each of these three features raises an issue for the future of the Federal Courts curriculum. Should the course primarily be one about political theory, or should it primarily be one about federal court procedure? Most of our students, after all, are not going on to be academics or statesmen. This issue is a microcosm of a larger dilemma that American law schools have faced for a long time: practice or theory? At the top schools, at least, theory has won the day. This is hardly the place to settle such a huge question. Suffice it to say that treating the Federal Courts course as primarily about American political theory ought to be no more controversial than teaching criminal law out of the Model Penal Code or teaching tort law as a vehicle for social control. Of course, theory and practice are not always mutually exclusive, and surely there is room in the course for some discussion of procedural rules that have little structural import. But if there is to be a serious attempt to examine the structure of American government systematically—even through the eyes of federal courts—it is hard to see room for such doctrines as venue, court of appeals jurisdiction, the Tidewater problem, joinder, service of process, interpleader, interdistrict transfer, and attorney's fees. Indeed, the complexity of recent official immunity and federal habeas corpus doctrine threatens to overshadow their structural importance. And it has been decades since an Anti-Injunction Act case has had important political overtones.

On the matter of normative take, I see room for individuality. My personal experience is that most students (at Hastings, at least) are conventionally left-liberal and therefore are sympathetic to criticism of the restrictive justiciability, procedural due process, and habeas corpus decisions of the Burger, Rehnquist, and Roberts Courts. They of course expect to be clear on where the agreed-upon doctrine ends and criticism begins, and they also want to know the best arguments supporting these restrictive doctrines. But they tend to grow impatient with what they correctly perceive as an artificial effort to give perfectly equal time to the supporting and detracting arguments. At the other end of the spectrum, a very heavy-handed approach will stifle legitimate discussion and questions from all but the most intrepid or confrontational students. One possibility would be to have a meticulously balanced text with a

clearly opinionated instructor, or vice-versa. In the end, so long as there is full disclosure, almost any of these approaches can work.

Finally, what of my observation that the Frankfurter and Katz book is about the place of the federal courts in American constitutional government? If the course is essentially one about federal judicial power vis-à-vis the other branches and the states, then perhaps it should be one part of a three-semester course in Constitutional Law (which might be renamed something like American Constitutional Government). Much of the Federal Courts curriculum is already taught in the “structural” part of Constitutional Law, but not in much depth. Better to break out those issues directly pertaining to federal judicial power and put them in a separate semester. But it should be made clear that federal judicial power is part and parcel of a larger system of decision-making allocation under the Constitution.

So I conclude this essay with a proposal. Turn the two-semester course in Constitutional Law into a three-semester course. The first semester would cover the federal judicial power, including the foundation of judicial review, subject matter jurisdiction (including supplemental jurisdiction and removal), the justiciability doctrines, jurisdiction stripping, federal common law, the Eleventh Amendment, concurrent jurisdiction (featuring abstention), and independent and adequate state grounds. As suggested above, I would leave topics like joinder, venue, interpleader, intervention, service of process, and interdistrict transfer to courses like Civil Procedure and Complex Litigation. (I would also leave territorial jurisdiction to Civil Procedure, as it has fewer structural implications than subject matter jurisdiction.) The second semester would include congressional power, executive power, preemption of state law, the relationship of the Commerce Clause to federalism, and the relationship of congressional power to executive power with respect to foreign affairs. The third semester, of course, would cover individual liberties.<sup>154</sup> I would then eliminate “Federal Courts” as a separate course, leaving such topics as Section 1983 and habeas corpus to a course on civil rights.

I do not claim that this proposal is in some way mandated by the Frankfurter and Katz text, or that the idea of making the course cohere around “federal judicial power in constitutional government” is original to Frankfurter and Katz. Every Federal Courts casebook on the market today displays that basic emphasis (although many of those books contain topics that are more procedural than politically structural). I do claim that portraying the federal judicial power not in isolation, but explicitly as one component of an endlessly complex and largely fluid system of constitutional government, is the format that would do the greatest justice to the Frankfurterian idea.

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154. I realize my proposal is unlikely to be adopted because it entails pushing “individual rights” to the second year of law school.