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Book Review: Reclaiming the Federal Courts. by Larry W. Yackle.

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RECLAIMING THE FEDERAL COURTS. By Larry W. Yackle.* Cambridge, Massachusetts.: Harvard University Press. 1994. Pp. 297. Hardcover, $39.95.

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The 1960's and 1970's are gone, and with them that brief period in which a progressive Supreme Court expanded the protections of the Constitution in the face of contrary majority views. Increasingly, scholars question whether this description is even accurate, whether the federal courts did act in a countermajoritarian fashion[1] and whether they were able to or did much to effect social change beyond that accomplished in the political process.[2] But something unique in judicial history did seem to have happened during the era of the Warren Court. For many liberal scholars, this time was Camelot.

Larry Yackle is one of those scholars. In his recent, penetrating book on federal jurisdiction, Yackle plainly yearns for those lost golden days. The problem, as Yackle sees it, is that "[t]he Supreme Court's decisions in recent years have taken far too much decision-making authority away from the federal courts and given it to the courts of the states. In that process, the federal courts have lost the capacity to check the great power of government in American society." Yackle paints *the* current issue in the law of federal jurisdiction as "a heated ideological debate between those I will dare call 'liberals,' who almost always prefer the federal courts in cases in which federal rights must be

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1. Barry Friedman, *Dialogue and Judicial Review*, 91 Mich. L. Rev. 577, 607-09 (1993).

2. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (U. of Chicago Press, 1991); Girardeau A. Spann, *Race Against the Court* (New York U. Press, 1993).

determined, and those I will call 'conservatives,' who typically urge that the state courts be employed." "Lest there be any doubt," he proclaims with apparent pride, "I am a liberal."

Yackle not only yearns for bygone days, he comes with a prescription to return to them. To meet the threat that Yackle sees, "Congress should enact a series of new statutes to reclaim the federal courts for their vital role in this constitutional democracy." While much of his book is a detailed "internal critique" of the rightward trend of federal jurisdiction, each chapter concludes with a specific statutory suggestion to address the criticisms he levels. Some of the legislation Yackle seeks would be new, or would implement reform proposals long ignored by Congress, such as the extension of federal question jurisdiction beyond the bounds of the *Mottley* well-pleaded complaint rule.[3] But much of Yackle's legislative agenda quite obviously is designed to reverse the restrictions placed upon the exercise of federal jurisdiction by the Rehnquist Court.

I will have my questions to ask about Yackle's agenda, about where it is he is going, why he wants to go there, and whether his agenda will get him where he wants to go. Despite my questions, however, make no mistake about the value of this book. *Reclaiming the Federal Courts* is a passionate piece of work by a scholar who cares deeply about the use of the law, and courts, to ease the plight of the victims of government excess. It is popular in these times to worry about the victims of government excess,[4] but the populace seldom seems concerned when government excess threatens individual liberties, particularly when the liberties at stake are those of individuals who "are either unpopular in themselves (for example, the rights of criminal defendants) or are asserted by unpopular people (for example, political dissenters)." In any society that dares to call itself free, these people need champions, and their champions are the guardians of the liberty of all of us. Yackle is one of these champions.

Yackle particularly deserves credit for the mission he accepts, that of unmasking the arcane law of federal jurisdiction to reveal its impact on substantive rights. Yackle leaves to others the "diminution of individual liberty that has attended the coming of the Rehnquist Court." While he addresses the "erosion of federal rights indirectly," his ground is the "[d]eadly dry and con-

3. *Louisville and Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908).

4. This, in part, seems to be the concern of the Contract with America. E.g., Ed Gillespie and Bob Schellhas, eds., *Contract With America* 125 (Times Books, 1994) ("Isn't it time we got Washington off our backs?").

fusing doctrines" that we call the law of federal jurisdiction. Yackle cogently attacks this technical body of law with force and vision, making the impact of jurisdictional decisions plain for all to see.

Following an introduction, there are essentially two parts to Yackle's book. There is a first chapter in which Yackle sets the stage, detailing the debate over the relative parity of federal and state courts, and reviewing the history that leads Yackle to conclude we have come to favor a "Legal Process" model of federal jurisdiction. In this chapter, Yackle expresses his evident disdain for what he sees to be the Legal Process argument that litigation in any court is as good as the next. Rather, it is his preference that "federal question cases [ ] be in federal court." What follows are four chapters treating, in this order, justiciability, federal question jurisdiction, abstention, and habeas corpus. In each chapter Yackle ably describes the doctrinal development, criticizes it, and concludes with a legislative proposal that would open wide the doors of the federal courts. Indeed, no mere proposals are these; Yackle actually has drafted the necessary statutes.

While Yackle's legislative agenda is designed to answer questions about what the law of federal jurisdiction should be, in reality the book raises far more questions than it answers. That, in and of itself, might be a good thing. The questions raised, however, are troubling in a way that extends far beyond this book to the entire endeavor of federal jurisdiction scholarship. Yackle is stuck in a time warp, as are many of the scholars that write in the area of federal jurisdiction. Yackle criticizes the Legal Process methodology, but in a sense he is trapped in it, as are his contemporaries.[5]

The problem finds its root, and all too often its branch, in Hart and Wechsler's seminal federal jurisdiction casebook. As Akhil Amar has observed, the book was out of date almost at the time it was published.[6] Writing before *Brown v. Board of Education*,[7] and much of the work of the Warren Court, the Hart and Wechsler approach maintains an almost naive belief that state

5. For an interesting recent debate about the utility of the Hart and Wechsler paradigm, see Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 Vand. L. Rev. 953 (1994); Michael Wells, *Busting the Hart and Wechsler Paradigm*, 11 Const. Comm. 557 (1994); Richard H. Fallon, Jr., *Comparing Federal Courts "Paradigms,"* 12 Const. Comm. 3 (1995). See also Mary Brigid McManamon, *Challenging the Hart and Wechsler Paradigm*, 27 Conn. L. Rev. 833 (1995).

6. Akhil Reed Amar, *Law Story*, 102 Harv. L. Rev. 688, 703 (1989).

7. 347 U.S. 483 (1954). As I completed this article, I relied on the current (third) edition of the Hart and Wechsler case book for citations. In the current edition *Brown* is

and federal courts are fungible, and a now counter-historical position that state courts are the ultimate guardians of constitutional liberty. That might once have been, and may be again, but as Yackle ably points out, during the Warren era the federal courts were the ones that mattered to civil libertarians, and the differences between state and federal courts often were vast. Thus, Yackle's gripe with Hart and Wechsler is that they assumed "there was nothing to choose between the federal and state courts. There *was* something to be explored and decided. Hart and Wechsler ducked the really fundamental question."

The disappointment is that Yackle, like many federal jurisdiction scholars, has done little more than decide the parity question in favor of federal courts. Moreover, Yackle seems to do so from *within*, rather than *without*, the Legal Process model. Refighting old battles with new (or, for that matter, old) premises may not have much to do with today's landscape. Yackle's book is a thorough repudiation of the current state of the law of federal jurisdiction, but ultimately the book falls short of prescribing what I believe is a pertinent agenda for the future.

I, like Yackle, have an internal and external critique. Initially, I identify what seem to be five fundamental difficulties with Yackle's own agenda. Then, I map out briefly the directions I believe federal jurisdiction scholarship should move to take us into the next century.

First, Yackle's legislative agenda seems poorly designed to address what really concerns him, the vindication of federal rights. In large part the poor fit between agenda and problem finds its root in a certain schizophrenia to Yackle's project. At times, Yackle says his concern is seeing that federal *rights* be vindicated in federal courts.[8] At other times, Yackle says he wants federal *questions* resolved in federal courts.[9] The two are not the same, however.

While it is evident Yackle's real goal is enforcement of federal civil *rights*, sweeping all federal *questions* into federal courts will only limit the availability of federal courts to do what Yackle

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mentioned but three times, none significantly. See Bator, et. al., *The Federal Courts and the Federal System* (Foundation Press, 3d ed. 1988).

8. E.g., Larry W. Yackle, *Reclaiming the Federal Courts* 4 (Harvard U. Press, 1994) ("The federal courts are under siege and can be rescued, and federal rights with them,. . ."); id. at 9 (" 'liberals,' who almost always prefer the federal courts in cases in which federal rights must be determined,. . .").

9. E.g., id. at 3 ("I begin with the arguments supporting a preference for federal courts in cases implicating federal legal questions."); id. at 12 ("I have said that liberals generally prefer the federal courts in federal question cases.").

wants. As Yackle observes, federal judicial resources are limited. Yet, Yackle calls for sweeping federal jurisdiction in almost every instance. Take, for example, his chapter on "arising under" jurisdiction. He proposes that the federal courts "shall have jurisdiction of any civil action in which it appears that the determination or application of a substantial question of federal law can resolve the dispute between the parties." Further, "[i]t shall be sufficient if the complaint . . . advances a claim for relief in which the federal question is an essential element." Under Yackle's proposed statute "the federal district courts would have jurisdiction in a case like *Merrell Dow*."[10] *Merrell Dow* was a case in which plaintiffs brought a product liability action involving the drug Bendectin in state court. One of their causes of action alleged negligence for violating the labeling requirements of the federal Food, Drug, and Cosmetic Act. On the basis of that claim, defendants removed the action to federal court. The Supreme Court held removal was inappropriate.

Whether cases like *Merrell Dow* belong in federal court is a difficult and interesting question, but it is mystifying why ensuring they can be there is part of Yackle's agenda. To the contrary, one might suppose that Yackle would not want numerous state tort actions to crowd out plaintiffs with federal rights claims. Similarly, Yackle essentially would reverse most abstention doctrines, including *Burford*[11] abstention, a doctrine that requires federal courts to defer to certain state administrative proceedings. *Burford* itself would have involved the federal courts in complicated proceedings to determine where oil wells could be drilled, yet the federal claims in the case were quite tenuous. The problem, as I discuss later, is one of resource allocation. If protecting federal rights is the goal, moving all federal questions to federal court hardly seems the solution.

Almost odder than what Yackle includes, however, is what he ignores. For example, Yackle fails to tackle the Eleventh Amendment. Similarly, he has little to say about judicially fashioned immunity doctrines.[12] Both these doctrinal areas present huge obstacles to full relief for those whose federal rights were

10. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986). Yackle at 251 n.45 (cited in note 8). Yackle does agree Congress could explicitly provide that no such jurisdiction exists for private lawsuits to enforce the Food, Drug, and Cosmetic Act. Yackle at 251 (cited in note 8).

11. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

12. This may be because strictly speaking these doctrines are not jurisdictional, but at other times Yackle does not adhere to this distinction. See Yackle at 177-84 (cited in note 8) (discussing *Teague v. Lane*, 489 U.S. 288 (1989), and the doctrine of retroactivity).

violated. At the same time, even under existing "arising under" jurisdictional rules, the plaintiffs Yackle really cares about, like Richard Steffel,[13] already get into federal court. Yackle seems to have adopted a "more is better" approach, rather than designing his strategy to fit his ideological goal.

Second, even if Yackle's agenda is the correct one, it is entirely unclear why he thinks there is any hope of getting Congress to go along. The best example here is habeas corpus jurisdiction. Yackle is one of the nation's preeminent advocates of the Great Writ, and the proposals in his book would overturn many of the barriers to relief imposed by the Supreme Court. He writes, however, at a time when habeas corpus jurisdiction has been under consistent and severe attack in Congress. As I write, Congress appears poised to take action to curtail the writ. While I share many of Yackle's beliefs with regard to habeas jurisdiction, he might have recommended something with greater plausibility. Much of the book shares this aura of the Utopian yet unachievable.

Third, even if Yackle could get his proposals through Congress, it is unclear why he thinks Congress necessarily is better than the courts at allocating federal jurisdiction to achieve the goals he wishes. Yackle takes me to task for suggesting that the formulation of federal jurisdiction is or ought to be a shared endeavor between the federal courts and Congress.[14] But Congress

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13. *Steffel v. Thompson*, 415 U.S. 452 (1974). Yackle begins the "arising under" chapter with Steffel's story. These case-based vignettes at the start of each chapter are an effective teaching tool, but in this case the choice of story is telling. *Steffel* involved a plaintiff who came to federal court seeking a declaratory judgment that a threatened state prosecution for handbilling against the Vietnam war violated his first amendment rights. The federal courts took jurisdiction, and even declined to abstain although Steffel's companion was being prosecuted. I have always had some difficulty squaring cases like *Steffel*, seeking a declaration that a state law prosecution would violate federal rights, with cases like *Franchise of California Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983) and *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). Those latter cases seem to hold that "[i]f, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking." Charles A. Wright, et. al., 10A *Federal Practice and Procedure* § 2767 at 744-45 (West, 2d ed. 1983) (quoted in Yackle at 111 (cited in note 8)). Yackle seems to share my difficulty, though he valiantly tries to reconcile the lines. Yackle at 110-12 (cited in note 8). Yackle ultimately would reject the *Skelly Oil* rule, but what is ironic is that Yackle would bring *Tax Board* and *Skelly*—in which federal civil rights are not involved—into federal court, while *Steffel* already is there.

14. Yackle at 138 (cited in note 8). Actually, Yackle focuses too much on one footnote I have written, ignoring to some extent the point of the broader work. In *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 Nw. U. L. Rev. 1 (1990), I argue that the Constitution should be read as granting shared power to Congress and the Supreme Court to define the extent of federal jurisdiction. I briefly muse that if the Constitution is interpreted to permit Congress to foist jurisdiction upon the federal courts, perhaps Congress can restrict that jurisdiction as well. My narrow point simply

necessarily must paint with a broad brush. Yackle's own suggestions would, as I have observed, flood the federal courts. Shared jurisdictional authority permits the courts to curtail excessive jurisdictional grants. That is not to say that judicial jurisdictional decisions are always wise ones, and, when the courts stray from the ideal, further congressional legislation may be in order. That "dialogue" is the central point of the article Yackle discusses. But Yackle's own example of the history of statutory federal question jurisdiction suggests that simply to let Congress make the decisions might overwhelm the courts with cases, taking up judicial resources needed to address Yackle's real concern.

Fourth, and related, it is unclear how Yackle can really believe that drafting statutes like the ones he has will compel federal courts to do as he wishes. The history of federal jurisdiction is replete with examples of the Supreme Court creatively interpreting statutes to achieve the goal it wishes. The federal question statute is one notorious example. Another is the habeas corpus statute, whose language has meant many things at different times, depending upon the proclivities of the Justices. Yackle's answers seem to be "clarity" in drafting and his proposal for a catchall provision that requires jurisdictional statutes to be "construed in a manner most favorable to the immediate adjudication of federal claims in federal court." But one person's clarity is another's ambiguity, as is evident from Yackle's somewhat astonishing conclusion that "§ 1983[ ] *is* an express exception to the Anti-Injunction Act, ..."[15] Taking Yackle's federal question statute as an example, how clear is it to mandate federal jurisdiction if a federal question is "an essential element" of a claim for relief? Was the federal question in *Merrell Dow* "essential" when the complaint spelled out several claims, and the claim in question was essentially one of state law? I can easily see the Supreme Court holding otherwise.

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was to question the soundness of the position taken by some scholars that the granting and restricting powers are not governed by the same rules. My *broader* point was that there is a constitutional tension between congressional and Supreme Court power over jurisdiction that is resolved as a practical matter on a case-by-case basis, as the Court decides whether it must acquiesce in congressional pronouncements, or can exercise creative statutory construction to avoid conclusions that seem an inappropriate allocation of jurisdictional authority. While Yackle does not like the jurisdictional conclusions of the present Supreme Court, the Warren Court seems testament to the idea that at times judicial flexibility may serve to protect rights. Thus, I am uncertain why Yackle disagrees with my conclusions (although I also recognize I am being used as a foil).

15. Yackle at 126 (cited in note 8). As I have observed elsewhere, on its face § 1983 gives "absolutely no clue of being such an exception." Friedman, 85 Nw. U. L. Rev. at 18 (cited in note 14). Yackle's support, ironically, is not the statute, but the Supreme Court decision in *Mitchum v. Foster*, 407 U.S. 225 (1972). Yackle at 259 n.32 (cited in note 8).

Fifth, and most important, it is very difficult to understand why Yackle necessarily wants to force the federal courts to decide the cases he cares about. Yackle states that "there is a relationship between rights themselves and the courts available to enforce them," but is far too uncritical of exactly what the relationship is. For this reason, Yackle's solution is to mandate the exercise of federal jurisdiction in almost every case. There may be a virtue to the "passive virtues," however." It is common currency, accepted by Yackle, that decisions denying justiciability generally reflect hostility to claims on the merits. Put another way, if you force the courts to decide in many cases they find nonjusticiable, they are likely to decide *against* claims of federal right. Given this, why force the decision at all, when one could hope the case for justiciability could be more effectively made (or more sympathetically heard) when the courts are more open to the validity of the claim on the merits?

While these five concerns indicate the problematic nature of Yackle's approach, I think they all follow from a larger problem, one to which I alluded earlier, and one that haunts much of the scholarship in this area. The problem is that the entire corpus of work is inexorably driven by the parity debate, which in turn results from the seminal nature of Hart and Wechsler's legal-process-oriented work. Applying legal process principles, Hart and Wechsler did assume a certain fungibility of state and federal courts, a fungibility that was evidently problematic during the Warren Court era. Because Hart and Wechsler's work *was* seminal and because its underlying premise *was* problematic, a tension arose which scholars are trying to resolve to this day: Is it possible to adhere to the Hart and Wechsler approach while disagreeing with their resolution of the parity question (and therefore with many of their conclusions)?[16] This tension presents itself repeatedly in today's federal jurisdiction scholarship. In some instances, the tension manifests itself in an explicit debate about the parity question.[17] More frequently, old battles simply

16. It may be unfair to lump Hart and Wechsler together here. The casebook itself is a teaching tool, more suggestive of answers than definitive. It is not at all clear that the two agreed on conclusions, as their other work makes clear. For example, Wechsler seemingly would give Congress much more control over federal jurisdiction than Hart. Compare Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001 (1965) with Henry M. Hart, Jr., *The Power of Congress to Limit The Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953). See Friedman, 85 Nw. U. L. Rev. at 31 n.173 (cited in note 14) (discussing how Hart's and Wechsler's positions diverge).

17. See, e.g., Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. Rev. 233 (1988); Martin H. Redish, *Judicial Parity, Litigant*

are refought over the same ground Hart and Wechsler plowed.[18] This latter approach is evident in Yackle's choice of subject matter: justiciability,[19] abstention, federal question jurisdiction, and habeas corpus.

Two problems permeate much of current federal jurisdiction scholarship. First, parity is not a fixed concept and, second, Hart and Wechsler's agenda, while pertinent, does not necessarily define what should be our own. The challenge we face is to develop an agenda for the law of federal jurisdiction that will take us into the next century. Part of that challenge is recognizing how the mutability of the parity question should affect old questions. The other part is recognizing what the new questions are that deserve attention.

The parity question is not as simple or straightforward as Yackle or others make it. While the federal courts were unquestionably the place to be in the 1960's and 1970's, that has not always been true in the past and may not be true today. Looking backward, the nationalizing Supreme Court under John Marshall was hero in some respects, but certainly villain when it came to the Alien and Sedition Acts. During the Lochner Era, both state and federal courts proved their recalcitrance, but it is debatable which court system was the real problem.[20] Northern state

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Choice, and Democratic Theory: A Comment On Federal Jurisdiction and Constitutional Rights, 36 UCLA L. Rev. 329 (1988).

18. I may be equally guilty here. Barry Friedman, *A Revisionist Theory of Abstention*, 88 Mich. L. Rev. 530 (1989); Barry Friedman, *A Tale of Two Habeas*, 73 Minn. L. Rev. 247 (1988). I am not without countless companions, however. In the last few years, the AALS Section on Federal Courts program has treated the parity debate (Symposium: Federalism and Parity, 71 B.U. L. Rev. 593-664 (1991)), habeas corpus (*The Future of Habeas Corpus: Reflections on* Teague v. Lane *and Beyond*, 66 S. Cal. L. Rev. 2331-2531 (1993)), and federal common law making (Federal Courts Symposium, 12 Pace L. Rev. 227-357 (1992)).

19. Actually, justiciability—although it does pose the question of access to the federal courts—does not, strictly speaking, flow from the parity debate. Because many state courts also apply justiciability doctrines, a non-justiciable controversy may be barred from any court. Thus, in a sense, Yackle's treatment of justiciability seems a little out of place.

20. See, e.g., Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. Amer. Hist. 63, 64 (1985) (recognizing state courts seen as even more reactionary than Supreme Court, but arguing that "with only a few exceptions, state courts moved consistently toward approval of a wide range of reform legislation"); Howard Gillman, *The Constitution Beseiged* 160-65 (Duke U. Press, 1993) (discussing state court upholding of minimum wage laws, and Supreme Court striking of such a law in *Adkins v. Children's Hospital*). Recall that the *federal* courts were attacked for standing in the way of progress, and the attack was fueled by United States Supreme Court decisions *overturning* favorable decisions of state courts. E.g., *Traux v. Corrigan*, 257 U.S. 312 (1921) (overturning Arizona state decision permitting picketing in labor controversy); *Lochner v. New York*, 198 U.S. 45 (1905) (overturning New York state decision upholding maximum hour law for bakers).

courts faced off with the Supreme Court over slavery.[21] Parity (or disparity) inevitably is a shifting concept. But the problem is even more complicated, for the nature of rights being protected also changes. While it is debatable whether federal or state courts were more protective of federal rights during the *Lochner* Era,[22] it is certain Yackle does not think *any* court should have been protecting *those* federal constitutional rights.[23] *Ex Parte Young*, a rights-*protective* jurisdictional decision, was protective of economic rights.[24] Similarly, state courts challenged federal courts on the slavery issue, but the federal court position was in favor of the federal right to the return of fugitive slaves. Those who prefer federal courts to vindicate federal rights also have a selective view of what those rights should be. Given the changing nature of the rights protected by courts, and the changing susceptibility of court systems to claims of right, there is limited utility in any jurisdictional theory that always prefers one court system.

Jurisdictional theory must account, somehow, with both the changing approaches of state and federal courts and the changing nature of rights. While this phenomenon does not necessarily undermine keeping the federal courts open, it does raise new sets of questions. Yackle criticizes Erwin Chemerinsky's "litigant choice"[25] solution to the parity problem, but Chemerinsky seems correct, even if one is not persuaded by the tone of his argument. If rights protection is the issue, more courts and more constitutions are the right direction, not simply pushing cases into federal court. What may be wrong are doctrines like *Pennhurst*, which keep federal courts from entertaining joint federal-state constitutional challenges to state action.[26] The relevant question is, assessing all the cases that might be brought, which ones make most sense in which forum? There are implications here for diversity jurisdiction, for review of state administrative proceedings, and even for hearing fundamental rights claims. Many state courts recently have demonstrated a willingness to protect rights that far exceeds that of the federal courts. Civil liberties lawyer

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21. E.g., *Ableman v. Booth*, 62 U.S. 506 (1859).

22. See supra note 22.

23. Yackle at 23 (cited in note 8) ("they chose the wrong rights to protect").

24. *Ex Parte Young*, 209 U.S. 123 (1908). See James W. Ely, Jr., *The Chief Justiceship of Melville W. Fuller, 1888-1910* at 184 (U. of South Carolina Press, 1995) (discussing *Ex Parte Young*'s protection of property rights and Progressive's unhappiness with the decision).

25. See Yackle at 42-43 (cited in note 8), discussing Chemerinsky, 36 UCLA L. Rev. at 33 (cited in note 17).

26. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984).

today are going to think long and hard about which court system to use, at least in states in which the state constitution is being revitalized.

At bottom, jurisdiction is an allocative decision. The task is to identify the claims that might be brought and assign them to the tribunals most suited to addressing those claims. These tribunals do not simply include state and federal courts, but private tribunals for alternate dispute resolution and numerous and varying state and federal administrative courts. Questions of ideology assuredly are relevant in making these allocative decisions, but so are questions of cost and accessibility.

Moreover, jurisdictional allocation has to take place against the backdrop of the pressing problems of the moment. Protection of constitutional rights deservedly is a paramount consideration.[27] But there are many other problems that a sensible jurisdictional scheme must take into account. Civil justice is becoming beyond the financial grasp of ordinary citizens. Newly created federal offenses are swamping the federal courts. A good deal of civil enforcement is taking place at the administrative level, and under programs of cooperative federalism many of these cases (which may involve federal rights) have their start in administrative agencies.

The changing nature of the parity question, and the plethora of new problems that confront us, suggest that the law of federal jurisdiction needs to confront itself with much more than the problems stated in Hart and Wechsler's terms and played out endlessly today. Federal courts scholars need to turn their attention to these new problems. While some are doing so,[28] too much time is being spent on rethinking old problems in old

27. Even with regard to constitutional rights, the bulk of these cases are criminal cases that inevitably will be litigated in state court. Habeas corpus is little answer, given the minuscule number of cases in which the writ is granted. See Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. Cal. L. Rev. 2507, 2524 (1993). Professor Bator argued persuasively long ago that state courts inescapably will play a central and continuing role in the adjudication of federal rights claims. Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 Wm. & Mary L. Rev. 605 (1981).

28. Much of Judith Resnik's work addresses new concerns facing federal courts. See, e.g., Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 Ga. L. Rev. 909 (1990). Ann Althouse has shown even old subjects can be addressed from quite a different perspective. Ann Althouse, *Standing, In Fluffy Slippers*, 77 Va. L. Rev. 1177 (1991). As part of a symposium on the Future of Federal Courts Scholarship and Teaching, Resnik and Althouse recently provided perspectives on possible new directions in federal jurisdiction scholarship. Judith Resnik, *Rereading 'The Federal Courts': Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 Vand. L. Rev. 1021 (1994); Ann Althouse, *Late Night Confessions in the Hart and Wechshler Hotel*, 47 Vand. L. Rev. 993 (1994).

terms. Federal courts scholars should join civil procedure scholars in thinking of ways to streamline civil justice and best utilize limited federal resources. They should join criminal law scholars in addressing the proper use of federal criminal authority. They should be concerned with gender and race bias in the courts. Even in the area of enforcing constitutional rights it may be time to devise new procedures or courts that make it easier for plaintiffs to have their claims heard quickly and cheaply. Not every civil rights suit is a pathbreaking public law action, but the prohibitive cost of litigation may forestall claims being heard, notwithstanding the availability of attorneys' fees.

Moreover, in addressing these new areas, federal courts scholars need to open themselves up to the work being done in other disciplines. The parity question itself raises overtones of institutional choice, yet little federal courts scholarship draws from the insights of public choice, game theory, or law and economics generally. Federal courts scholarship has proven itself remarkably insular, perhaps for reasons of the intricacy of the doctrine making it inaccessible or uninteresting to scholars outside the field. But federal courts scholars should seek to apply these tools to our own discipline.

This is admittedly a gangly, open-ended plea for innovation and redirection. That is because the issues and problems that confront court systems these days are gangly and open-ended. But sorting out the problems of the next century are where our efforts should be. There is something mystical and Talmudic about the winding doctrine of abstention, habeas corpus, justiciability, and federal question jurisdiction that no doubt draws us into the web of Hart and Wechsler's world and keeps us there. But if we are to be relevant, we must be forward-looking. The 1960's are gone, and the future is upon us.