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Review Essay: Who's Afraid of Henry Hart?

Michael Wells

WHO'S AFRAID OF HENRY HART?

*Michael Wells**

No law book has enjoyed greater acclaim from distinguished commentators over a sustained period than has *Hart & Wechsler's The Federal Courts and the Federal System.*[1] Indeed, the praise seems to escalate from one edition to the next. Reviewing the first edition, published forty-three years ago, Philip Kurland called it "the definitive text on the subject of federal jurisdiction."[2] Paul Mishkin added that "the analysis is of an order difficult to match anywhere."[3] In his review of the second edition, published in 1973,[4] Henry Monaghan began by praising the first for having "deservedly achieved a reputation that is extraordinary among casebooks," and then continued: "[M]y view is that the second edition is at nearly every material point better than its predecessor."[5] When the third edition appeared in 1988,[6] Akhil Amar called the first edition "beautiful and brilliant," and thought the third "better in many respects."[7] No doubt similar encomia will greet the recently published fourth edition.[8] Certainly the research is as thorough, the analysis as trenchant, and the questions as probing as ever. *Hart & Wechsler* continues to set the standard that other books must aspire to meet.

Yet technical virtuosity and comparative merit are not the only tests by which a casebook may be judged. At the risk of

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1. Henry M. Hart, Jr. and Herbert Wechsler, *The Federal Courts and the Federal System* (Foundation Press, 1953).

2. Philip B. Kurland, Book Review, 67 Harv. L. Rev. 906, 907 (1954).

3. Paul J. Mishkin, Book Review, 21 U. Chi. L. Rev. 776, 778 (1954).

4. Paul M. Bator, et al., *Hart & Wechsler's The Federal Courts and the Federal System* (Foundation Press, 2d ed. 1973).

5. Henry P. Monaghan, Book Review, 87 Harv. L. Rev. 889, 889-90 (1974).

6. Paul M. Bator, et al., *Hart & Wechsler's The Federal Courts and the Federal System* (Foundation Press, 3d ed. 1988).

7. Akhil Amar, *Law Story*, Book Review of *Hart & Wechsler's The Federal Courts and the Federal System*, 102 Harv. L. Rev. 688, 688 (1989). Amar appears to be less enthusiastic about the second edition. See id. at 710-11.

8. Richard H. Fallon, Daniel J. Meltzer, & David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* (Foundation Press, 4th ed. 1996) ("*Hart & Wechsler Fourth*").

losing my union card in the Federal Courts workshop, I propose to show that the editors, through all four editions, are fundamentally misguided in their approach to Federal Courts law. The main criteria for the selection and treatment of materials is a model of Federal Courts law elaborated by Henry Hart and Herbert Wechsler forty years ago, in the first edition, and called by one of the current editors the "Hart & Wechsler Paradigm."[9] The editors' premise is that a casebook should follow the Supreme Court's treatment of the doctrinal problems, asking questions about such matters as the adequacy of the Court's explanations, the implications of the Court's reasoning for the future, and consistency among the cases. According to the Court, and *Hart & Wechsler*, Federal Courts law is mainly an effort to achieve such worthy aims as striving for finality, for efficiency in litigation, and for uniformity in federal law, assigning cases on the basis of institutional competence, minimizing friction between federal and state courts, and avoiding unnecessary constitutional decisions. For the sake of convenience in exposition, I refer to this set of goals as "jurisdictional policy."

Jurisdictional policy does help to explain and justify Federal Courts law, but it does not deserve the status *Hart & Wechsler* accords it. Focusing their attention on jurisdictional policy, the editors fail to develop the substantive themes that animate much of Federal Courts law. The Supreme Court and, less often, Congress regularly set jurisdictional policy aside and employ Federal Courts law as a means of favoring one side or the other on the merits of the underlying litigation. For example, over the past two decades the Court has transformed federal habeas corpus by steadily chipping away at access to federal courts for state prisoners seeking to challenge their confinement on constitutional grounds.[10] While jurisdictional policies of promoting finality and respect for state procedures may help account for the Court's habeas cases, the Court's general substantive stand against broad constitutional rights of criminal procedure very likely influences these decisions as well. Though *Hart & Wechsler* mentions the political context of contemporary habeas law, the book contains not so much as a single note explicitly exploring the substantive theme, contenting itself with questions about the strength and

9. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 Vand. L. Rev. 953, 955-57 (1994); id. at 960 (noting that "the book retains an unmistakable continuity").

10. See, e.g., Larry W. Yackle, *The Habeas Hagioscope*, 66 S. Cal. L. Rev. 2331, 2355-2416 (1993); Kathleen Patchel, *The New Habeas*, 42 Hastings L.J. 939 (1991).

implications of the jurisdictional policies advanced in the opinions.[11]

Hart & Wechsler's neglect of substantive aims produces a distorted picture of what the Supreme Court and Congress do in Federal Courts cases, and why they do it. In addition, shunting aside substantive themes hampers any examination of the normative question of whether and how much substance *ought* to count for in Federal Courts law. The very success of the book exacerbates the problem. As one of the current editors puts it, *Hart & Wechsler* "defined the field as we now know it" and exercises "pervasive influence on Federal Courts teaching and scholarship."[12] Other casebooks seek to imitate it, generally (according to casebook sales agents) by offering a "more teachable" version of *Hart & Wechsler*.[13] Scholars accept its premises as the foundation for their projects, often producing work that is not as incisive as it could be, simply because they do not grapple with all of the matters at stake in the cases.

This article questions the methodology *Hart & Wechsler*, and Federal Courts scholars who follow its lead, use in addressing Federal Courts issues. Part I lays out the *Hart & Wechsler* model of Federal Courts law. Part II distinguishes naked substance from jurisdictional policy and traces the impact of substantive themes on jurisdictional doctrine. Part III finds fault with the fourth edition's treatment of substance. Part IV explains why these themes are given little systematic attention by this and other casebooks. Part V argues that the editors are wrong to deemphasize them.

I. *HART & WECHSLER*'S FEDERAL COURTS LAW

The worth and influence of a casebook depend largely on how much thought goes into the selection of materials. Anyone can gather cases bearing on a topic and assemble them in a bound volume. What is hard and valuable is to understand the area well enough to grasp its underlying structure. In this way a talented editor may abstract away from the mass of data and identify general normative and descriptive propositions that successfully represent the doctrine and its underpinnings. The great strength of *Hart & Wechsler* is the sophisticated model of Federal

11. See *Hart & Wechsler Fourth* at 1373-1443 (cited in note 8). The discussion of the political context in which the Court has made habeas law, see, e.g., id. at 1360-61, is not the same thing as "substance," as I use the term. See text at notes 48-49, 84, 94.

12. Fallon, 47 Vand. L. Rev. at 956 (cited in note 9).

13. The plainest example is Peter W. Low and John Calvin Jeffries, Jr., *Federal Courts and the Law of Federal-State Relations* (Foundation Press, 3d ed. 1994).

Courts law that underlies the materials. Richard Fallon, one of the editors of the fourth edition, calls the model the "Hart & Wechsler paradigm." The paradigm is never stated explicitly in the book itself, but is embedded in the choice of materials and the commentary on them. In describing it, I rely upon Fallon's article on the topic.

As Fallon points out, the Hart & Wechsler paradigm is based on the theory of adjudication developed in the other great work Henry Hart produced in the 1950s, *The Legal Process*,[14] co-authored with Albert Sacks.[15] Some parts of the paradigm are *Legal Process* methodological precepts that apply to judicial decision making in general, whether the issue comes from Federal Courts, property, workers' compensation, or any other area. These include, for example, the "anti-positivist principle" that law should be conceived as "a rich, fluid, and evolving set of norms . . . not as a positivist system of fixed and determinate rules,"[16] and "the principle of reasoned elaboration," that "the judicial role . . . is limited to the reasoned elaboration of principles and policies that are ultimately traceable to more democratically legitimate decisionmakers."[17] I have examined these parts of the Hart & Wechsler paradigm in earlier articles.[18]

Here I wish to take up the feature of the paradigm that bears most directly on Federal Courts law. This is the proposition that "questions of how decision-making authority should be allocated are of foremost importance."[19] Accordingly, *The Federal Courts and the Federal System* defined the field of Federal Courts in terms of allocations of authority among the branches of the national government and between the national and state governments.[20] The reason these questions of institutional design are so important lies in a proposition Hart and Sacks called "the principle of institutional settlement."[21]

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14. Henry Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, W. Eskridge and P. Frickey, eds. 1994).

15. See Fallon, 47 Vand. L. Rev. at 957-58, 961, 964-66 (cited in note 9).

16. Id. at 965.

17. Id. at 966.

18. See Michael Wells, *Busting the Hart & Wechsler Paradigm*, 11 Const. Comm. 557 (1995); Michael Wells, *Positivism and Anti-Positivism in Federal Courts Law*, 29 Ga. L. Rev. 655 (1995).

19. Fallon, 47 Vand. L. Rev. at 964 (cited in note 9).

20. Id. at 956.

21. The materials were widely distributed, but remained unpublished until recently. Hart & Sacks, *The Legal Process* (cited in note 14).

A. Institutional Settlement

The principle of institutional settlement "expresses a judgment that decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding on the whole society unless and until they are duly changed."[22] It would be a mistake to suppose that Hart and Sacks are merely stating the truism that we should obey the law. Dismissing institutional settlement in this way would seriously underappreciate its significance for Federal Courts law. Hart and Sacks call institutional settlement "the central idea of law," explaining that any society must provide for procedures to settle disputes about the content and application of law, whatever the substantive law may be.[23] In a small society, the constitutive arrangements may be as simple as a single ruler or a council of elders, but "in a complex modern society, the questions demanding settlement are too numerous" for such a solution. Moreover, in allocating these questions among governmental institutions, it is useful to keep in mind the varying competencies of courts, agencies, and legislatures, for "different procedures and personnel invariably prove to be appropriate for deciding different kinds of questions,"[24] and the arrangements will vary from one society to another.

Though institutional settlement has received little explicit attention in Federal Courts scholarship, it is the central organizing principle of *The Federal Courts and the Federal System*.[25] Fallon correctly points out that "it comes close to defining the Federal Courts field all by itself."[26] In our system of government, the powers to settle disputes are distributed among institutions by means of federalism, which divides decision-making among the national and state governments, and the separation of powers, which splits up the power of the national government among the executive, legislative, and judicial branches.[27] In order to work out the implications of the principle of institutional settlement in our system, we must ask questions about the institutional competence of courts compared with other branches of government, and of state versus federal courts, with the aim of seeing to it "that the principle of institutional settlement operates not merely

22. Id. at 4.
23. Id.
24. Id.
25. See Fallon, 47 Vand. L. Rev. at 962, 964, 967 (cited in note 9).
26. Id. at 967.
27. See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 490 (1954) (federalism and separation of powers are means of dividing up governmental power among a variety of institutions).

as a principle of necessity but as a principle of justice."[28] This task defines the scope of Federal Courts law, as conceived by Henry Hart and Herbert Wechsler,[29] and their successors down through the years have remained faithful to their conception of the area, even as they depart from the doctrinal positions staked out by the book's original editors.

B. Jurisdictional Policies

Institutional settlement not only defines the field of Federal Courts for Hart & Wechsler; it also generates the framework of jurisdictional policies within which those issues should be resolved. For the sake of drawing the distinction, crucial to my argument, between jurisdictional policy and substance, it will be useful to describe briefly some of the major jurisdictional policies that guide the decision of Federal Courts cases under the Hart & Wechsler paradigm. Keep in mind that this is not a hornbook summary of black letter law. Some of these propositions are quite controversial, even among scholars who claim to share the Hart & Wechsler mantle.

1. Institutional competence is a major consideration throughout the field. For example, in determining whether a given litigant has standing to raise an issue, courts following the Hart & Wechsler model ask whether the litigant has a sufficient personal stake to assure the adverseness needed for a full airing of the issues.[30] If a dispute is brought to court before there is a sufficiently concrete issue to permit effective adjudication, it will be dismissed for lack of ripeness.[31] Under the *Pullman* abstention doctrine, unsettled state law issues should be left for the state courts, because only they may authoritatively resolve them.[32] In the same vein, the Supreme Court should not undertake to review state court decisions that rest on adequate and independent state law grounds.[33] *Erie Railroad Co. v. Tompkins*[34] establishes that ordinary common law rules are within the competence of state courts, so that federal courts may not go their own way on such matters.

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28. Hart & Sacks, *The Legal Process* at 6 (cited in note 14).

29. See Hart, 54 Colum. L. Rev. at 489-91 (cited in note 27) (describing the problems of institutional settlement in our federal system).

30. E.g., *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

31. E.g., *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

32. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

33. E.g., *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

34. 304 U.S. 64, 78 (1938).

2. One implication of institutional settlement, embodied in the doctrines of res judicata and collateral estoppel, is that once an issue is decided by fair procedures, the outcome is entitled to respect by other courts. In a dual judicial system like our own, this means that the courts of one sovereign should not reconsider issues resolved by another, or hear causes of action that could have been raised in the earlier proceeding,[35] even if the case raises federal constitutional issues.[36]

3. Litigants are expected to raise issues in accordance with the valid procedures of the court in which they find themselves. In order to enforce respect for those procedures, litigants who fail to do so will be precluded from raising them later on Supreme Court review of state judgments[37] or in habeas corpus proceedings in federal district court.[38]

4. The problem of friction between federal and state courts arises when the litigants struggle over which system will decide an issue, as where one party brings suit in state court and the other then attempts to secure federal jurisdiction. The problem is dealt with by a general rule, set forth in the Anti-Injunction Act, that federal courts generally may not interfere with pending state cases,[39] and by judge-made rules addressing contexts in which the statute does not apply.[40]

5. In the system of institutional settlement, courts are generally subordinate to Congress. This relationship is reflected in Article III of the Constitution, which gives Congress power over the creation and (by implication) the jurisdiction of federal courts.[41]

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35. Full Faith and Credit, 28 U.S.C. § 1738 (1989).

36. See *Migra v. Warren City School Dist. Bd. Of Education*, 465 U.S. 75 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980).

37. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Editors of *Hart & Wechsler* have disagreed among themselves over how strict the procedural default rule should be. See *Hart & Wechsler Fourth* at 576-77 (cited in note 8).

38. *Coleman v. Thompson*, 501 U.S. 722 (1991).

39. 28 U.S.C. § 2283 (1990).

40. E.g., *Younger v. Harris*, 401 U.S. 37 (1971).

41. *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). The proposition in the text is contested by some scholars working within the Hart & Wechsler tradition. See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741 (1984). The founders themselves quarreled over whether Congress possesses untrammelled power to restrict the Supreme Court's appellate jurisdiction. Compare Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1364-65 (1953) (no) with Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1005-06 (1965) (yes).

6. Our system of institutional settlement, however, is not one of absolute legislative supremacy. Since *Marbury v. Madison*,[42] judicial review of the constitutionality of legislative and executive action has been a part of it. There are at least two important implications of this principle for federal courts law. Congress may not evade judicial review by cutting off access to *all* courts for federal constitutional issues.[43] The principle of finality is also limited by due process. If a state procedure does not provide a full and fair opportunity to raise federal issues, then litigants should have access to federal court to assert them.[44]

7. Of course, it is better to avoid friction than to seek it out. Sometimes, courts will have to confront the majoritarian branches by deciding constitutional issues. But courts should, if possible, strive to resolve the case at hand on other grounds. Accordingly, federal courts should, if possible, resolve cases on nonconstitutional grounds. One justification for narrow review of state judgments, and for the standing, ripeness, and mootness doctrines, is that absent a pressing need to resolve a constitutional issue, federal courts should decline to do so.[45]

8. It is implicit in the principle of institutional settlement that issues of federal law should be *settled*, and settled in the same way everywhere. The utilitarian justification for uniformity of national law is easy to appreciate, for a body of law cannot effectively realize its aims unless it speaks with one voice everywhere.[46]

9. Another uncontroversial goal of the practice of institutional settlement is achieving greater efficiency in the system of dispute resolution, through doctrines like supplemental jurisdiction,[47] which avoids piecemeal litigation, and the well-pleaded complaint rule, which normally yields a quick and unambiguous

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42. 5 U.S. (1 Cranch) 137 (1803).

43. Cf. *Webster v. Doe*, 486 U.S. 592, 603 (1988) (interpreting arguably ambiguous statute as permitting access in order to avoid the "serious constitutional question" that would arise if it were construed otherwise).

44. See Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 Wm. & Mary L. Rev. 605, 626 (1981); Michael G. Collins, *The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Court Proceedings*, 66 N.C. L. Rev. 49 (1987).

45. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 346 (1936) (Brandeis, J., concurring) (discussing techniques for avoiding constitutional issues).

46. E.g., *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

47. Supplemental Jurisdiction, 28 U.S.C. § 1367 (1996). See also *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

answer to the question of whether a case is within the federal question jurisdiction.[48]

II. SUBSTANTIVE THEMES IN FEDERAL COURTS LAW

By the terms "substantive themes," "naked politics," and their variants, I mean to distinguish between the jurisdictional policies adumbrated above, on the one hand, and jurisdictional decisions motivated by a preference that one side or the other prevail on the merits of the litigation or gain a tactical advantage that may prove decisive in close cases. This is not at all the case when Federal Courts doctrines are based on jurisdictional policy. Though Federal Courts issues always arise in the course of litigation over substantive rights and duties, the central characteristic of jurisdictional policies is that they are not aimed at giving one side or the other an advantage in the litigation. Policies like uniformity, finality, efficiency, institutional competence, and avoiding federal-state friction are trans-substantive, in that they apply across the whole range of substantive issues. Their aim is to facilitate law making and dispute resolution in our complex system of government, with its division of power between national and state governments and among three branches of the national government.

Some Federal Courts decisions and statutes, however, cannot plausibly be explained by jurisdictional policy alone. Consider the doctrine stemming from *Younger v. Harris*.[49] *Younger* itself merely holds that a federal court may not ordinarily enjoin a pending state criminal prosecution, even where the state defendant/federal plaintiff raises a constitutional objection to the state case.[50] It may be defended as an uncontroversial application of the jurisdictional policy of avoiding friction between federal and state courts. But the Court has extended *Younger* to cover state civil and administrative proceedings, where the state interest is presumably weaker.[51] *Moore v. Sims*[52] obliges litigants to remain in state court even where the federal issues are not defenses but permissive counterclaims. Again, the anti-friction pol-

48. E.g., *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908). See also *Hart & Wechsler Fourth* at 910-11 (cited in note 8).

49. 401 U.S. 37 (1971).

50. Id. at 43-44.

51. See *Hart & Wechsler Fourth* at 1300-08 (cited in note 8).

52. 442 U.S. 415 (1979).

icy seems weak here. In *Hicks v. Miranda*[53] the Court applied *Younger* where the federal case was brought first, so that the policy of deference would seem to cut the other way. *Doran v. Salem Inn, Inc.*[54] can be read as requiring federal dismissal even where it is impossible to raise the federal issue in the state case. Fidelity to the jurisdictional policy of assuring access to the courts to raise constitutional claims would call for upholding federal jurisdiction.[55]

How, then, are these cases to be explained? The Court that crafted the *Younger* doctrine is noted for the general theme of pruning the growth of constitutional rights that flowered in the 1960s. The effect of the *Younger* doctrine is to direct federal constitutional claims to state courts. State courts are less likely to favor the constitutional claimant in close cases than are the federal courts, for reasons that will be explained shortly. Though the Supreme Court does not acknowledge it, the weakness of the jurisdictional policy arguments for cases like *Hicks*, *Doran*, and *Moore* suggest that the extension of *Younger* beyond its narrow holding is motivated largely by the Court's preference that the state get the advantage of a sympathetic forum in close constitutional cases.

As the *Younger* doctrine illustrates, the main avenue for manipulating jurisdictional doctrine toward substantive ends lies in the selection of rules for allocating cases between federal and state courts.[56] Federal and state courts are not fungible. They differ for a variety of reasons, including the judges' backgrounds, "psychological set," and methods of selection. Perhaps most important, Article III guarantees federal judges life tenure during good behavior, while many state judges must stand for election. Subject to majoritarian pressure, state courts tend to give more respect than do federal courts to the state's arguments in consti-

53. 422 U.S. 332, 349 (1975) (holding that the federal court must defer so long as the state prosecution is brought before there have been "proceedings of substance on the merits" in federal court).

54. 422 U.S. 922, 929-31 (1975) (holding that federal litigants who are not being prosecuted in state court may obtain preliminary injunctive relief in federal court, but that a litigant who is being prosecuted in state court may not obtain interim relief, even though the state court lacks jurisdiction to grant such relief).

55. See Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 S. Ct. Rev. 193, 238.

56. Other opportunities for manipulating jurisdictional doctrines toward substantive ends arise in connection with standing, Supreme Court review, the Eleventh Amendment, and federal common law. See Michael Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 Wm. & Mary L. Rev. 499, 504-10, 520-40 (1989); Michael Wells, *Rhetoric and Reality in the Law of Federal Courts: Professor Fallon's Faulty Premise*, 6 Const. Comm. 367, 378-80 (1989).

tutional cases.[57] The outcome of a close case, where there are open issues of law or difficult issues of fact,[58] may turn on whether the case is assigned to state or federal court.[59] The substantive impact of allocation decisions could not be proven decisively without controlled tests in which the same disputes are litigated in both fora. Yet the behavior of lawyers seems to validate it. A glance at the federal and state case reporters will show that, given a choice, lawyers for persons with constitutional claims by and large prefer federal court.[60] It is an open secret that lawyers make arguments based on jurisdictional policy when their real motive is to acquire a litigating edge.[61] Nor could any judge fail to appreciate the substantive consequences of jurisdictional decisions.[62]

In short, there is "weak parity" between federal and state courts. By weak parity, I mean that state courts are sufficiently well-informed and well-intentioned to give claims of federal right a fair hearing, so that a litigant could not plausibly claim in the ordinary case that he was denied due process by state court adju-

57. Cf. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689, 726-29 (1995) (arguing that, for this reason, elective judiciaries are constitutionally dubious).

58. My premise here is that the legal materials do not yield answers to these close cases where the allocation decision matters and yet each forum is constitutionally adequate. See, e.g., Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 34-37, 188-96 (Oxford U. Press, 1991); Hans Kelsen, *Pure Theory of Law* 352 (M. Knight trans., U. of California Press, 1967); H.L.A. Hart, *The Concept of Law* 121-23 (Clarendon Press, 1961). Ronald Dworkin has argued that, in a sense, every case has a right answer. See Ronald Dworkin, *Taking Rights Seriously* 81-130 (Duckworth & Co., 1977). Dworkin seems to agree, however, that it may be impossible to demonstrate with any confidence that one or another answer is right. See Ronald Dworkin, *Law's Empire* viii-ix (Belknap Press, 1986).

Suppose Dworkin is correct in maintaining that there is a right answer to the substantive issue, in that a judge of Herculean talent could find one. Perhaps one court is more likely to get to that right answer than the other. Even so, this possibility cannot provide a persuasive ground for preferring one court over the other. In these hard cases we do not know what the right answer is or how to arrive at it. The legal materials *necessarily* contain no criteria by which to evaluate a court's claim that its allocation decision is really based on getting at the right answer. Accepting the "right answer" argument would effectively foreclose any criticism that an allocation decision improperly rests on substantive grounds. For these reasons, I find it unacceptably facile to answer the charge that naked substance lies behind an allocation rule by claiming that the rule is really based on a presumption as to which court is more likely to arrive at the right answer.

59. See generally Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977). Cf. Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. Legal Stud. 257, 281 (1995) (empirical study of federal judges, showing that in close cases, but not the mass of cases, outcomes vary according to judicial background).

60. See Theodore Eisenberg and Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 655 n.72 (1987).

61. See Neuborne, 90 Harv. L. Rev. at 1115-16 (cited in note 59).

62. See Wells, 30 Wm. & Mary L. Rev. at 505-10 (cited in note 56).

dication. At the same time, state courts are not interchangeable with federal courts.[63] In these circumstances, the opportunity is present for naked politics to influence jurisdictional decisions.[64] When it is not unfair to send a case to state court, the principle of assuring due process does not compel federal jurisdiction. Yet both sides have a strong incentive to argue for what may be described as the home court advantage. Knowing that their jurisdictional decisions may have substantive impact, judges will be tempted to take this into account in making them. In very general terms, litigation over constitutional rights is a conflict between the substantive interests of persons seeking to limit state regulation of their activities, on the one hand, and the state's interest in pursuing its regulatory interests free of judicial interference, on the other. Judges who, in the main, favor constitutional claims, will be inclined to favor broad access to federal court, while judges whose substantive preferences lie with state interests in regulation may prefer to channel constitutional cases to state court.

The *Younger* doctrine is not an isolated instance of raw substance influencing Federal Courts decisions. The significance of naked politics may be appreciated by noting the global movements of Federal Courts law over the past forty years. Since the first edition of *Hart & Wechsler*, Federal Courts law has undergone a revolution and a counter-revolution. Under Chief Justice Earl Warren, the Court in the 1960s eased access to federal court for federal constitutional claims. *Monroe v. Pape*[65] reinvigorated a ninety-year old civil rights statute, reading it as authorizing a federal cause of action to redress virtually any constitutional violation committed by a state officer. *Dombrowski v. Pfister*[66] loosened restrictions on federal injunctions against state proceedings. The *Pullman* abstention doctrine fell into disuse,[67] once again

63. See Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DePaul L. Rev. 797, 797 & n. 3 (1995); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. Rev. 609, 610-11 (1991).

64. See generally Wells, 30 Wm. & Mary L. Rev. (cited in note 56); Michael Wells, *Is Disparity a Problem?*, 22 Ga. L. Rev. 283, 296-324 (1988).

65. 365 U.S. 167, 183 (1961) (federal suit to redress constitutional violations is appropriate even where the state provides a remedy).

66. 380 U.S. 479, 489-92 (1965) (the state statute's overbreadth is sufficient justification for making an exception to the rule against federal equitable intervention to stop a threatened state prosecution).

67. *Hart & Wechsler Fourth* at 1237 (cited in note 8).

strengthening access to federal court. In cases like *Fay v. Noia*[68] and *Townsend v. Sain*[69] the Court made federal habeas corpus broadly available to persons convicted of crimes in state court. *Baker v. Carr*[70] and *Flast v. Cohen*[71] lowered the "standing to sue" barrier to federal court access. The Eleventh Amendment's prohibition on federal suits against states appeared to be moribund.[72]

When the composition of the Court began to change, so did the outcomes of Federal Courts issues. *Dombrowski* was eviscerated in *Younger v. Harris*,[73] a case the Court then used as the starting point for a sustained campaign of curbing access to federal court where a state forum was available to the federal plaintiff.[74] Beginning with *Wainwright v. Sykes*[75] the new Court dismantled the Warren Court's habeas regime step by step.[76] *Allen v. Wright*[77] and *Valley Forge Christian College v. Americans United for Separation of Church and State*[78] halted the Warren Court's erosion of standing restrictions. *Michigan v. Long*[79] boosted the conservative Court's power to review state court decisions expanding federal rights, while *Pennhurst State School*

68. 372 U.S. 391, 438 (1963) (federal habeas court may excuse a prisoner's procedural default in state court unless the default reflects a "deliberate bypass" of state procedures).

69. 372 U.S. 293, 313 (1963) (authorizing federal fact-finding hearings in habeas in a broad array of circumstances).

70. 369 U.S. 186, 209-10 (1962) (permitting voters to challenge legislative districting on the ground that disparities in the number of voters violate their rights to equal protection).

71. 392 U.S. 83, 103 (1968) (permitting taxpayers to challenge federal expenditure on establishment clause grounds).

72. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (allowing monetary recovery against a state government as part of equitable relief, without discussing the Eleventh Amendment); *Parden v. Terminal Railway*, 377 U.S. 184, 196 (1964) (allowing monetary recovery against a state government on an ill-defined waiver theory). See also *Edelman v. Jordan*, 415 U.S. 651, 670 (1974) (discussing *Shapiro*).

73. 401 U.S. 37 (1971).

74. See *Hart & Wechsler Fourth* at 1291-1308 (cited in note 8).

75. 433 U.S. 72, 90-91 (1977) (procedural defaults will be excused on habeas only on a showing of "cause" and "prejudice"). An earlier case, *Stone v. Powell*, 428 U.S. 465, 481-82 (1976) (no habeas for Fourth Amendment claims where the petitioner had a full and fair opportunity to litigate them in state court), was a false start, having little impact outside its narrow holding. See *Hart & Wechsler Fourth* at 1389 (cited in note 8).

76. See text accompanying note 10.

77. 468 U.S. 737, 751 (1984) (setting strict standards of "traceability" and "redressability" as barriers to standing).

78. 454 U.S. 464, 479-80 (1982) (denying taxpayer standing to challenge decisions by executive agencies).

79. 463 U.S. 1032, 1040-41 (1983) (raising a presumption that ambiguous state court decisions are based on federal law).

and Hospital v. Halderman[80] and *Milliken v. Bradley*[81] invoked the Eleventh Amendment to hinder federal court reform of state practices.

No doubt a detailed analysis of all of the strands of doctrine at issue in these cases would show that each, standing alone, could plausibly be justified in terms of jurisdictional policy.[82] But it is all too easy to miss the forest by looking solely at the trees. When one considers the body of cases as a whole, it is evident that the Court of the 1960s began from one set of premises, and the Court of the past twenty-five years from another.[83] The key variable is naked politics. The sole unifying theme throughout the past forty years of Federal Courts developments is that, by and large, the Court's jurisdictional program mirrored its substantive agenda.[84] The Warren Court, favoring expansion of federal rights, sought to enhance their content not merely by rulings on the merits, but by extending access to federal court for their enforcement. The Burger and Rehnquist Courts tried to cut back the content of federal rights, not just by rulings on the merits, but also by precluding access to federal district courts and by extending its own power to review state decisions that may have expanded federal rights.

Ann Althouse rightly warns against viewing Federal Courts as a "stark picture of ideological Justices using jurisdiction as a

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80. 465 U.S. 89, 121 (1984) (the principle that federal courts may enjoin state officials does not extend to relief based on state law).

81. 433 U.S. 267, 282 (1977) (equitable relief may not be ordered against local government that did not commit a constitutional violation, even if such relief would be necessary to remedy the violation committed by another local government of the same state).

82. For example, the Warren Court habeas decisions were surely based, in part, on a well-founded fear that state courts, especially in the South, would *not* provide a fair forum for federal claims in the era of civil rights protests. See *Hart & Wechsler Fourth* at 1359-60 (cited in note 8); Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793 (1965). Nor do I doubt that the recent cutbacks reflect the current majority's respect for finality. But neither set of cases can satisfactorily be explained *solely* in terms of jurisdictional policies. Liberal justices and scholars continue to defend the Warren Court regime long after the premise of state court inadequacy has lost its force. By the same token, the current Court's barriers go well beyond what is needed to assure respect for finality. See Richard H. Fallon, Jr., and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1796, 1816-20 (1991).

83. See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 Va. L. Rev. 1141, 1142-43, 1151-1202, 1215-24 (1988).

84. See Wells, 6 Const. Comm. at 372-81 (cited in note 56). My article is a response to Fallon's explanation that the tensions in the case law result from competing "structures of thought" rather than "crudely political" conflict. Fallon, 74 Va. L. Rev. at 1147, 1149 (cited in note 83).

smokescreen for a political agenda."[85] In arguing that substance accounts for many jurisdictional decisions, I do not mean to reduce the area to one in which naked politics decides every issue. The influence of substance resembles a gravitational force that, while invisible to the eye, pulls in one direction or another without necessarily controlling the outcome of a given dispute. It must always compete with such formal considerations as the value of following rules laid down in precedents or statutes, though, as noted earlier, rule-based arguments tend to lack force in Federal Courts law. A more serious competitor is jurisdictional policy. The various jurisdictional policies may carry at least as much weight as naked politics, especially in cases where the substantive implications of ruling one way or the other are slight or uncertain.

For example, in some situations institutional competence may favor the federal forum, even apart from concerns of basic fairness, simply because federal judges are more talented than state judges. As grounds for federal jurisdiction over federal tax and patent cases, this argument has merit. When the issues are constitutional questions bearing on civil rights and liberties, it seems more of a makeweight. These cases require no specialized knowledge; their intellectual challenges are within the grasp of the average lawyer. Given the importance of value choices in resolving hard constitutional questions,[86] partisans of federal jurisdiction are probably motivated more by a desire for a sympathetic forum than by considerations of competence.

Similarly, the policy of uniform federal law may favor federal courts. But the uniformity policy cannot plausibly justify broad access to federal court for constitutional claims. When Congress regards uniformity as important, it creates specialized federal courts, or at least imposes exclusive federal jurisdiction. Proponents of broad access to federal court in constitutional cases do not advance either of these proposals and rarely if ever rely on uniformity even as a makeweight. They typically seek to give litigants a *choice* between federal and state court.

85. See Ann Althouse, *Federal Jurisdiction and the Enforcement of Federal Rights: Can Congress Bring Back the Warren Era?*, 20 L. & Social Inquiry 1067, 1075-79 (1995) (reviewing Larry Yackle, *Reclaiming the Federal Courts* (1994)).

86. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189, 1246-47 (1987).

III. SUBSTANCE IN *HART & WECHSLER*

Fallon, Meltzer and Shapiro include many references to the political settings in which Congress and the Supreme Court render jurisdictional decisions.[87] Even so, it seems to me that the editors give substantive themes far less attention than they deserve. The paradox may be resolved by keeping in mind that some jurisdictional policies have significant political overtones. In particular, the goals of allocating jurisdiction on the basis of institutional competence and assuring a fair forum often require Congress or the Court to consider the political context.

The editors go wrong by failing to draw the crucial distinction between "naked politics"—*i.e.*, basing jurisdictional law on nothing more than a preference for the substantive interests of one side or the other—and the effort to realize the Legal Process aspirations of institutional competence and fair forums. These jurisdictional policies are discussed in the cases and in the notes, while "naked politics" is rarely mentioned and never elaborated. The effect, perhaps unintentional, may be to incline the trusting reader toward (mis)understanding the relationship between politics and Federal Courts law exclusively in terms of jurisdictional policy rather than raw substance. Alternatively, a suspicious reader unschooled in the subtleties of the naked substance/jurisdictional policy distinction may too quickly dismiss the Court's proffered reasons.

For example, the materials on procedural default suggest that inadequate state ground cases from the civil rights era may reflect "bend[ing] the jurisdictional rules to be able adequately to deal with a pressing set of social, legal and political problems."[88] In the absence of some explicit discussion of naked politics as a possible ground for those decisions, the reader will be ill-equipped to decide whether this is a reference to raw substance or to the jurisdictional policy of assuring litigants a fair forum. The First Amendment overbreadth doctrine relaxes standing requirements in free speech cases, but this is not necessarily ex-

87. In a letter commenting on a draft of this paper, Professor Meltzer told me that, as he sees it, a partial list of such substantive themes would include issues addressed in *Hart & Wechsler Fourth* at pp. 35, 38, 74-76, 80, 85, 136-37, 139-40, 149-50, 172, 174, 208-10, 265-69, 350, 351-54, 364, 452, 486, 536-38, 540, 542-43, 570, 576, 588 n.8, 604, 608-09, 625, 639, 654, 758, 841-43, 875, 901, 911, 1082, 1121-22, 1212, 1233, 1267, 1268, 1356-59, 1361, 1387, 1410, 1444, 1492, 1572-77, 1708, 1711, 1712-13, and 1713-14 (cited in note 8). Letter from Daniel Meltzer to Michael Wells, Aug. 9, 1996 (on file with author).

88. *Hart & Wechsler Fourth* at 576-77 (cited in note 8). See also id. at 604 (on the scope of Supreme Court review of facts found by state courts); id. at 1268 (noting that *Younger* may be criticized for its failure to grant access to a "sympathetic" forum for the assertion of federal claims).

plained by naked politics. As the editors note, the conventional Legal Process account of the doctrine is that free speech is an especially fragile right requiring special solicitude.[89] The Court's reluctance to recognize standing to obtain "structural" injunctions may be based on simple hostility to the substantive rights advanced in the cases, but it is discussed in the cases in terms of the Court's doubts about the institutional competence of federal courts to manage such relief and whether those doubts are justified.[90]

In each of these areas, it may well be that the better explanation of the Court's ruling is naked substance, unmoored from any jurisdictional policy. My point is that there is little in the casebook's treatment of doctrinal foundations that would invite the reader to draw that conclusion. Conversely, a cynical reader may jump to the unwarranted conclusion that naked substance lies behind decisions that are actually justified in terms of jurisdictional policy. I believe, for example, that the civil rights-era inadequate state ground cases *can* be defended in such terms. By failing to distinguish between jurisdictional policy and raw politics, the editors miss an opportunity to improve the book. They could have enhanced our understanding by focusing the reader's attention on whether, and to what extent, contemporary Federal Courts law can be adequately explained in terms of the Hart & Wechsler paradigm and the jurisdictional policies that it embraces.

There are, of course, exceptions to the book's general blurring of the line between substance and jurisdictional policy. For example, the editors suggest that the liberal standing and ripeness rulings in *Duke Power Co. v. Carolina Environmental Study Group*[91] may "most plausibly [be] explained" on raw substantive grounds. Another example is the treatment of *Michigan v. Long*,[92] and the cases that came after it, where the editors do

89. Id. at 208-10. See also id. at 639 (on relaxing finality requirements in free speech cases).

90. Id. at 265-70. See also id. at 1082 (*Pennhurst* may be motivated by the majority's dislike of structural relief).

91. 438 U.S. 59, 72-82 (1978) (holding ripeness and standing requirements met for a dispute in which the injury had no relation to the claimed constitutional violation). See *Hart & Wechsler Fourth* at 150, 258 (cited in note 8).

92. 463 U.S. 1032 (1983). This case expanded the Supreme Court's power to review state judgments by holding that ambiguous state judgments would be presumed to rest on federal grounds. As I have explained elsewhere, the effect of the ruling is to permit the Court to review cases where the state court ruled in favor of the federal claimant. Hence, it favors the substantive interests of the state over those of constitutional claimants. See Wells, 30 Wm. & Mary L. Rev. at 523-27 (cited in note 56). In later cases, where applying the *Long* rule would have opened the federal courts to constitutional claimants, thus

name substance as a likely culprit for the Court's selective enforcement of its holding. An intriguing question in the notes suggests a more systematic role for substance. The editors ask whether the Court's practice may "illustrate a general principle: jurisdictional rules tend to move in the direction of allowing more intensive supervision in areas of the law where the Supreme Court is in the process of changing the relevant substantive rules and wants to assure itself that the state courts are complying with the new dispensation[.]"[93] The editors direct critical fire at other cases from the Burger and Rehnquist eras, but generally without openly suggesting that substance is the basis of the rulings.[94]

Do these scattered references to substantive themes signal a break with the book's traditional focus on institutional competence, avoiding friction, efficiency, uniformity, and the like? There is still far too little explicit treatment of naked substance to justify drawing that conclusion. These references, though promising, seem to me to be better characterized as deviations from the jurisdictional policy norm that continues to dominate the selection and treatment of the materials, rather than as evidence of a commitment to a methodical exploration of naked politics in Federal Courts law. The current editors are, at best, equivocal in their stance toward substantive themes.

Perhaps the best illustration of the editors' unwillingness to grasp the nettle is their treatment of federal-state parity. Compared with its predecessors, and its current competitors, the fourth edition makes some progress in exploring the parity problem.[95] The editors survey the debate over whether there is dis-

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favoring their substantive interests, the Court has not always remained faithful to that rule. See *Hart & Wechsler Fourth* at 540-43 (cited in note 8).

93. *Hart & Wechsler Fourth* at 542-43 (cited in note 8). Other examples of substantive themes may include linking the "public rights model" of adjudication with "the substantive expansion of constitutional rights, especially under the Warren Court of the 1960s," id. at 80; and identifying the substantive basis of some of Congress's restrictions on federal jurisdiction, id. at 364.

94. See, e.g., id. at 140-41, 147-48, 172, 268-69, 1082, 1295-96, 1297-98, 1308, 1411, and 1440.

95. See Amar, 102 Harv. L. Rev. at 715-16 (cited in note 7). Reviewing the third edition, Professor Amar noted that, though the third edition was better on parity than the previous two, "even it fail[ed] to develop the issue with the degree of care and precision that are the hallmarks of the book." Id. at 715.

As for competing casebooks, some of them contain very brief discussions of parity, see, e.g., Robert N. Clinton, Richard A. Matasar and Michael G. Collins, *Federal Courts* 829-30 (Little, Brown & Co., 1996); Low and Jeffries, *Federal Courts and the Law of Federal-State Relations* at 210 (cited in note 13); Louise Weinberg, *Federal Courts* 277-78 (West, 1994); Martin H. Redish and Gene R. Nichol, *Federal Courts* 688 (West, 3d ed. 1994); Donald L. Doernberg and C. Keith Wingate, *Federal Courts, Federalism and Sepa-*

parity between federal and state courts as an empirical question. But they quickly pass over the topic, failing to identify "weak parity" as an option, much less to address its substantive implications. As a result, they lack the means to provide complete explanations of doctrinal developments.

For example, they briefly contrast Warren Court habeas corpus doctrine with the restrictive habeas decisions of the Burger and Rehnquist Courts, pointing out that the latter "are seen as having a different substantive agenda—one that embraces greater reluctance to interfere with the state courts, and greater faith in their quality."[96] In the absence of some discussion of weak parity and naked substance, the reader is apt to conclude that the difference between the earlier and later periods is solely about jurisdictional policies of competence and fairness: The Warren Court questioned the "quality" of state judges, while its successors did not.

The editors cite an empirical study that purported to show parity, and note criticisms of the study. But they do not explore the matter in any depth and make no independent evaluation of the issue, though the study itself seems to support weak parity rather than fungibility.[97] They cite newspaper stories from 1991 for the proposition that after years of Republican appointments to the federal bench, some constitutional litigants began to prefer state over federal court, but do not give any figures. They ignore statistics showing a steady rise in federal civil rights filings through the Bush administration.[98] A survey of the advance sheets would reveal that far greater numbers of constitutional litigants continue to prefer federal court. In any event, the newspaper stories cited in *Hart & Wechsler Fourth* are now somewhat dated after several years of Clinton appointments. The overall effect of the editors' treatment is to create the impression, un-

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ration of Powers 635 (West, 1994); but none of these treatments are as good as *Hart & Wechsler*'s. I can find no references to the parity issue in David P. Currie, *Federal Courts* (West, 1990) or in Charles T. McCormick, James H. Chadbourn and Charles Alan Wright, *Federal Courts* (Foundation Press, 9th ed. 1992).

The best account of the parity problem may be found in a brand new casebook, H. Fink, et al., *Federal Courts in the 21st Century* 9-19 (Michie Law Publishers, 1996).

96. *Hart & Wechsler Fourth* at 1361 (cited in note 8); see also id. at 1410.

97. Id. at 351-53, citing Solimine and Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 Hastings Const. L.Q. 213 (1983) (finding that federal courts upheld constitutional claims 41% of the time, as opposed to 32% for state courts). See also Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. Rev. 233, 261-69 (1988) (criticizing Solimine and Walker).

98. See Theodore Eisenberg, *Civil Rights Legislation* 184-85 (Michie Co., 4th ed. 1996).

warranted in my view, that there is room for doubt about the empirical question of whether parity does or does not exist.

Much more space is devoted to "parity as a constitutional concept," the name the editors give to the issue of whether Article III obliges Congress to provide a federal forum for review of federal issues.[99] This, of course, is a doctrinal problem that fits neatly within the Hart & Wechsler terms of discourse. However it should be answered, one examines the legal materials and reasons from them to a resolution. The editors are plainly more comfortable dealing with this kind of problem than with the real-world parity issue.

IV. HOW SUBSTANCE UNDERMINES THE HART & WECHSLER PARADIGM

Why is substance given such short shrift in *Hart & Wechsler*? The editors do not say.[100] The answer cannot be that they are blind to its presence, for in their scholarship Professors Fallon and Meltzer recognize that substance influences Federal Courts doctrine.[101] Perhaps the editors think naked politics warrants little attention because it is of minor importance in explaining Federal Courts law. If substance influenced only an occasional case, it would have little impact on the utility of the Hart & Wechsler paradigm. No model explains everything; even theories of the physical world do not account for every observation. The social world is more unruly. Courts do err, and the "naked politics" cases could be understood as deviations from the norm. One point of a model, after all, is to provide a framework for analysis that will help identify the errors.

This explanation for minimizing substance does not suffice. Over the past forty years, substance has dominated the major movements in Federal Courts doctrine, first in the Warren

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99. See *Hart & Wechsler Fourth* at 353-54, 373-79 (cited in note 8).

100. The decision is all the more puzzling in that elsewhere Fallon has claimed that substance is fully compatible with the Hart & Wechsler paradigm. See Richard H. Fallon, Jr., *Comparing Federal Courts "Paradigms,"* 12 Const. Comm. 3, 6-7 (1995). But it is unclear whether he means "naked" substance, as I define that term. See text at notes 47-48. As I argue in the paragraphs below, Fallon is mistaken if he thinks that naked substance can be reconciled with Hart & Wechsler.

101. See Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. Cal. L. Rev. 2507, 2511 n. 20 (1993) ("I do not doubt that people who seek to restrict habeas jurisdiction generally prefer more limited constitutional protections—or that, more generally, federalism arguments often mask substantive ends. [But substance should not necessarily be determinative.]"); Fallon, 12 Const. Comm. at 6 (cited in note 100) (asserting that "[n]o sensible partisan of the Hart & Wechsler paradigm thinks that 'jurisdictional policy' could be as innocent of substantive concerns as [Wells] maintains that the paradigm demands").

Court's expansions of access to federal court, and then in the conservative reaction that followed and continues to the present. Substantive themes cannot be dismissed as aberrations from the norm. Naked politics exercises decisive influence in decisions on standing, the *Younger* doctrine, habeas corpus, Supreme Court review of state judgments, and the Eleventh Amendment.[102]

A more likely explanation for the editors' equivocal stance toward naked substance is that recognizing a prominent role for substance in the casebook would undermine the whole enterprise of constructing Federal Courts law on Legal Process principles. Showing why this is so begins with an examination of the foundations of *Hart & Wechsler*, which lie in the principle of institutional settlement. In a sense, it is merely a boring necessity that some institution of government must lay down binding decrees on legal issues. But institutional settlement has a normative dimension as well as a descriptive one, and it is the normative aspect that Hart and Sacks emphasized at the outset of *The Legal Process*. Decisions reached by established procedures "*ought to be accepted as binding.*"[103] They should be accepted because the alternative to these "regularized and peaceable means of decision" is "disintegrating resort to violence."[104] Since we must live together under conditions of interdependence if we are to satisfy our wants, we are all better off living in peace.[105]

Why do Hart and Sacks stress the value of institutional settlement so heavily? *The Legal Process* was a response to Holmes and the Realist scholars of the early twentieth century, who showed that judges often do not mechanically deduce results from pre-existing legal rules, but exercise judgment to resolve issues to which the legal materials offer no clear answer.[106] The Realist critique suggested that law making may be nothing more than the outcome of a struggle between conflicting interests, unconstrained by any transcendent standards of justice or fairness. It became an urgent priority among legal theorists to come up with a response to nihilism that could withstand intellectual scru-

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102. See Wells, 71 B.U. L. Rev. at 640-41 (cited in note 63); Wells, 30 Wm. & Mary L. Rev. at 519-40 (cited in note 56).

103. Hart & Sacks, *The Legal Process* at 4 (cited in note 14) (emphasis added).

104. Id.

105. See id. at 1-2.

106. See, e.g., Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 Cornell L.Q. 274 (1929). See also Laura Kalman, *Legal Realism at Yale, 1927-1960* at 223 (U. of North Carolina Press, 1986); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 Va. L. Rev. 279, 280-91 (1973).

tiny.[107] In addition, the Realist critique cast doubt on the legitimacy of judicial law making. Judges lack the imprimatur of election to a policy-making post, and now they were deprived of the pretense that they merely deduced results from the extant rules. How, if at all, could judicial creativity be justified?[108]

After World War II, a number of scholars, including Henry Hart, Albert Sacks, and Herbert Wechsler, undertook to meet the challenges posed by Realism. Herein lies the genesis of *The Legal Process*, and the jurisprudential movement that we know by the name of the book. According to Legal Process scholars, the Realists were right in their claims that legal rules are indeterminate and that judges make law on the basis of social policy. But the Realists were wrong to think that judges merely impose their own policy preferences. Moreover, Legal Process scholars maintained that Realism does not imply nihilism. Accepting the Realist critique of formalism does not mean endorsing the view that law making is merely a matter of deciding whose selfish interests will prevail.

Institutional settlement is Hart & Sacks's primary response to the threat of nihilism posed by the Realists' debunking of formalism.[109] They explain its importance in the most basic terms: If people are to achieve their aims in life, they must live together "under conditions of interdependence."[110] In order to do so, they "must obviously have a set of understandings or arrangements of some kind about the terms upon which they are doing so."[111] Their "*substantive* understandings," about proper conduct, "necessarily imply the existence of what may be called *constitutive or*

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107. See Neil Duxbury, *The Reinvention of American Legal Realism*, 12 Legal Stud. 137, 154 (1992).

108. See Bruce Ackerman, *Law and the Modern Mind* by Jerome Frank, 103 Daedalus 119, 123 (1974); Amar, 102 Harv. L. Rev. at 693-94 (cited in note 7).

109. Along with the principle of institutional settlement, Hart and Sacks maintained that judges are constrained in a variety of other ways from simply imposing their wills. According to *The Legal Process*, judges do not decide cases based on hunches or their personal preferences. Though legal rules do not and cannot cover every issue that may arise, the legal materials available to judges include not only rules but also "principles and policies" that "are used and useful as guides to the exercise of a trained and responsible discretion." Hart & Sacks, *The Legal Process* at 143 (cited in note 14). Adjudication consists in the reasoned elaboration of the whole body of legal materials, including rules, principles, and policies, to the resolution of the issue at hand. In statutory cases, judges are not put to a choice between reading the statute literally and doing with it what they please. Rather, they should and do strive to discern the purposes of the legislation and to implement them. See William Eskridge and Philip Frickey, *An Historical and Critical Introduction to The Legal Process*, in Hart & Sacks, *The Legal Process* at xci-xcvi (cited in note 14).

110. Hart & Sacks, *The Legal Process* at 3 (cited in note 14).

111. Id.

procedural understandings or arrangements about how questions in connection with arrangements of both types are to be settled."[112] These arrangements, which determine which institutions are to settle particular questions, "are obviously more fundamental than the substantive arrangements . . . since they are at once the source of the substantive arrangements and the indispensable means of making them work effectively."[113]

For Hart and his colleagues, the legal process, with institutional settlement at its base, saves us from nihilism. Debates over substantive issues may well pit the narrow interests of one group against another. Even so, the process of making and applying law is not a morally empty realm in which the strong or devious prevail and the weak and innocent must submit. The legal process has a moral value of its own, independent of substantive outcomes.[114] Decisions by courts and legislatures deserve general respect, even from the losers, because they are the product of "regularized and peaceable means of decision" rather than resort to naked force. Just as the alternative to setting up legal institutions and legal process is "disintegrating resort to violence," so also "defiance of institutional settlements touches on or may touch the very foundations of civil order, and . . . without civil order, morality and justice in anybody's view of them are impossible."[115]

The normative value of institutional settlement has an important corollary: An institutional system may be more or less worthy of our respect. Though we should accept the outcomes of duly authorized procedures "unless and until they are duly changed,"[116] we are not obliged to accept blindly just any system of institutional settlement. Rather, "[t]he lawyer's business in any given institutional system is to help in seeing that the principle of institutional settlement operates not merely as a principle of necessity but as a principle of justice."[117] It is plain from the context that Hart and Sacks mean that the institutional system should aspire to operate as a principle of *procedural* justice. Our aim should be the "constant improvement" of our procedures "in the effort to assure that they yield decisions which are not merely

112. Id.
113. Id. at 3-4.
114. See Paul A. Freund, *Henry M. Hart, Jr.: In Memorium*, 82 Harv. L. Rev. 1595, 1596 (1969) (Hart "saw the integrity and fitness of the legal process as a kind of transcendent natural law, a law above laws, . . . reminding us that there is indeed a morality of morality").
115. Hart & Sacks, *The Legal Process* at 109 (cited in note 14).
116. Id. at 4.
117. Id. at 6.

preferable to the chaos of no decision but are calculated as well as may be affirmatively to advance the larger purposes of the society."[118]

For the jurisdictional system to make a plausible claim to general allegiance, it must be constructed as though we were behind a Rawlsian veil of ignorance.[119] If we are to give due regard to *everyone's* substantive preferences, the procedural system must not favor *any* set of substantive outcomes. Once inadequate or unfair procedures are eliminated, substance should play no role in allocating jurisdiction, though of course the ultimate end is to achieve the best set of substantive outcomes in a "long term and aggregate sense."[120]

Understanding the normative dimension of institutional settlement enables us to make important and subtle distinctions between ostensibly similar rationales for federal jurisdiction. Take the difference between sympathy and fairness. Under Hart's model the inadequacy or unfairness of a state forum is a valid basis for access to federal court, while the greater likelihood that a federal judge will look kindly upon federal claims is not. Sympathy is an euphemism for giving the plaintiff a substantive advantage, and institutional settlement cannot be "a principle of justice" if substance is permitted to influence the procedures for deciding substantive issues. The whole point of institutional settlement is to provide a disinterested means for settling substantive disputes, such that, whatever our views of substantive rights and duties, we can fairly be asked to accept the substantive outcomes the system produces. As Fallon puts it,

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118. Id.

119. Cf. J. Rawls, *A Theory of Justice* 136-42 (Harvard U. Press, 1971) (maintaining that persons would reach a just social contract if they were deprived of information about "how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations"). According to Rawls, "[t]he veil of ignorance makes possible a unanimous choice of a particular conception of justice." Id. at 140. Unanimity is important, because "[i]t enables us to say of the preferred conception of justice that it represents a genuine reconciliation of interests." Id. at 142.

I do not mean to conscript Rawls onto Hart's team. His topic is political philosophy, not federal jurisdiction. The differences may be important. All the same, I do think that the analogy is an apt one.

120. Fallon, 12 Const. Comm. at 7-8 (cited in note 100). In this attenuated sense, "substance" does have a role in Federal Courts law under the Hart & Wechsler paradigm. Hart and Sacks's utilitarian view of the goals of the legal system sets as the ultimate aim of jurisdictional law, and of all law, the creation of the body of substantive law that will best permit human beings to live the good life. At the same time, basing jurisdictional law on naked politics is out of order. The point of Hart & Wechsler is that jurisdictional rules should *not* be based on the substantive interests of the parties, but on jurisdictional policies that will guide us toward an effective *system* of law making and dispute resolution.

> In a post-Realist world, legal norms are frequently indeterminate. Moreover, in a demonstrably pluralistic society, we cannot expect consensus about appropriate answers to many urgent questions of substantive justice. But most of us, Hart & Wechsler assume, are prepared to accept the claim to legitimacy of thoughtful, unbiased decisions by government officials who are reasonably empowered to make such decisions. On this assumption rest our hopes for the rule of law.[121]

Deciding allocation issues on the basis of sympathy amounts to allowing one side to the substantive dispute to gain an advantage by imposing jurisdictional rules that favor its substantive interests, rigging the game as it were. In that event, the loser cannot fairly be expected to accept the legitimacy of the outcome.[122] Using substance to decide allocation issues undercuts the normative value of the principle of institutional settlement. Federal Courts law can no longer serve as an answer to Realist-inspired skepticism about the legitimacy of adjudication.

V. WHY SUBSTANCE BELONGS IN FEDERAL COURTS CASEBOOKS

Given the references to political context that do appear in *Hart & Wechsler Fourth*, it may be a bit unfair to take Fallon, Meltzer and Shapiro to task for their failure to pay more attention to naked substance. At the same time, there is something to be said for holding the leading book in the field to a high standard. It is, after all, the example that others follow. In any event, though I use the fourth edition as a convenient target, my main aim is not to single it out for criticism, but to make a broader point about the methodology of Federal Courts casebooks and scholarship: At present, substance receives only rudimentary at-

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121. Fallon, 47 Vand. L. Rev. at 964 (cited in note 9).

122. This emphasis on designing legal institutions with the aim of achieving broad agreement on the fairness, if not the content, of the outcomes they produce is a central Legal Process theme. Besides the principle of institutional settlement, its influence may be seen in Hart's critique of Supreme Court opinion writing for failure to reflect "[the] life principle" that "reason is the life of the law and not just votes for your side," Henry Hart, *The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 125 (1959); in Wechsler's call for constitutional decisions based on "grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply," H. Wechsler, *Principles, Politics, and Fundamental Law* 21 (Harvard U. Press, 1961); and in Lon Fuller's insistence that adjudication is an appropriate process only for "bipolar" disputes in which each of two contending parties advances arguments based on legal materials and the task of the judge, cast as a neutral arbiter, is simply to choose between them rather than exercise broad discretion to impose his own will, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 365, 370-71, 394-95 (1978).

tention from Federal Courts scholars, including, but by no means limited to, Fallon, Meltzer and Shapiro. In my view, the tension between institutional settlement and unadorned substance ought to be a central theme of Federal Courts law, one that is examined in the systematic and explicit way that is currently reserved for doctrinal matters.

Whether to include substantive themes in the Federal Courts casebook depends on a judgment of the costs and benefits of doing so. The first answer an editor is likely to give against putting something in his casebook is that there is not room for it. But that response would carry little weight here. In terms of space, adding substance to the casebook is just a matter of including a few extra questions and notes here and there. If the editors are worried about space, I could suggest any number of topics that might be omitted or abbreviated for the sake of including substance. For example, the twelve pages devoted to the distinction, under pre-1988 law, between mandatory and discretionary Supreme Court review of state judgments[123] might be reduced, since it is now "of merely historical interest."[124] Students need no instruction in the substantive themes that affect Federal Courts law, for most will have already taken Constitutional Law and Criminal Procedure. Many will grasp the substantive themes quickly; they are evident to anyone willing to look for them.

But including substance is costly in other ways. Since substance subverts the Hart & Wechsler project, putting it in the book amounts to abandoning, or at least modifying, the Legal Process's project of making Federal Courts law a bulwark against nihilism. Bringing substance into the discussion of Federal Courts doctrine in a systematic way would require the editors to sacrifice the notion that Federal Courts law is strictly a body of trans-substantive law designed to mediate among conflicting political interests toward the end of maximizing the social good. If we value *Hart & Wechsler*'s aims highly enough, as the editors evidently do, then perhaps it is best to continue to minimize the role of substance in the book. But the value of those aims depends in part on how likely they are to prevail in the real world. Fallon understands that, for better or worse, Henry Hart's ideals no longer have as much currency as they once did, at least not outside the circle of *Hart & Wechsler* acolytes.[125] However realis-

123. *Hart & Wechsler Fourth* at 644-56 (cited in note 8).

124. Id. at 644. Nor is it clear to me why the *Northern Pipeline* case gets 16 pages, id. at 399-416, and *Commodity Futures Trading Comm'n* another eight, id. at 422-30, given that the issues in the two cases are similar, though the results diverge.

125. Fallon, 47 Vand. L. Rev. at 971 (cited in note 9).

tic it may have been in 1953 to think that we could achieve consensus, it is plain today that ideological conflict is inescapable in public law, at least for the time being.[126] The instability in Federal Courts law over the past forty years shows that either side will exploit the opportunities afforded by jurisdictional law to promote its substantive agenda. Given that Hart's aspirations probably will not be realized in any event, compromising them may be a small price to pay for the greater realism that more attention to substance would bring to Federal Courts casebooks.

Perhaps I am too skeptical about the chance that Legal Process aspirations can be realized. Because I share many Legal Process ideals, I would like to think that Hart's project can succeed, at least partly, in spite of the beating it has taken in recent decades. But this cannot happen unless scholars and students take seriously the normative issues underpinning *Hart & Wechsler*. At present, they are not invited to do so. Federal Courts students and scholars receive the unspoken message that the doctrine is supposed to be aimed at a body of law based on jurisdictional policy, a message that rests, in turn, on an implicit normative judgment that it is wrong to base jurisdictional law on naked substance. They are evidently expected to accept this as a given, for the book's fragmentary treatment of politics denies them the opportunity to debate the proposition that institutional settlement is a more valuable goal than pursuing a substantive agenda by jurisdictional means. In fact, the principle of institutional settlement is never mentioned in *Hart & Wechsler*.

Legal Process goals would be better served by bringing the principle of institutional settlement into the casebook, noting the conflict between it and the substantive themes that threaten it, and presenting arguments on all sides. Instead of taking the value of institutional settlement for granted, the leading casebook in the field should question its own premises. This would entail a basic shift in methodology. Rather than taking the principle of institutional settlement as the premise of Federal Courts law, and always attempting to solve jurisdictional issues by reference to jurisdictional policy, scholars would have to eschew the whole effort to build Federal Courts law on a foundation. We need to take a more pragmatic view of the area, acknowledging that jurisdictional policies may be overridden by raw politics, and un-

126. See Eskridge and Frickey, *An Historical and Critical Introduction to The Legal Process*, in Hart & Sacks, *The Legal Process* at cxviii-cxxv (cited in note 14); Wells, 71 B.U. L. Rev. at 629-36 (cited in note 63).

derstanding that the value of institutional settlement may not carry the day against a substantive agenda in a given context.

Suppose that substance is indeed an illegitimate ground for allocation decisions. Nonetheless, it exerts palpable influence. Ignoring it is hardly the way to fight it. If the Legal Process project is to be revived, students must be given a chance to appreciate its value. When the normative issue is made explicit and students are obliged to confront the choice between institutional settlement and substantive aims, they may leave the course with a better understanding of the value of institutional settlement and a stronger commitment to it. If they do not, the battle is lost anyway. It is better to face that possibility than to shrink from it. By declining to debate the normative foundations of Federal Courts law, *Hart & Wechsler*'s editors commit a distressingly familiar error. The strongest point Critical Legal Studies has made against traditional scholarship is the failure of scholars in the Legal Process tradition to identify and defend their premises.[127]

Normative debate is needed not only on the threshold question of whether institutional settlement may be compromised in favor of substantive themes, but also on narrower doctrinal questions. Take it as given that, right or wrong, the Supreme Court long ago abandoned absolute fidelity to institutional settlement in favor of using Federal Courts law to pursue a variety of substantive goals. A host of questions, left unaddressed in *Hart & Wechsler*, arise: How is the value of institutional settlement to be measured against substantive goals in a given context? Are some jurisdictional policies strong enough to overcome substantive aims, while others are not? Are some substantive aims stronger than others? What contextual circumstances favor jurisdictional policy and which favor substance?

For example, respect for the integrity of state enforcement proceedings seems to be an especially important jurisdictional policy, so that, as Paul Bator noted, "[i]t is . . . not only not surprising but . . . virtually inevitable that" neither Congress nor the Supreme Court has permitted removal of whole cases from state to federal courts based on a federal defense, except in extraordinary circumstances.[128] Even prudent liberals agree.[129] On

127. See G. Edward White, *The Inevitability of Critical Legal Studies*, 36 Stan. L. Rev. 649, 661-70 (1984); Joseph Singer, *Legal Realism Now*, 76 Cal. L. Rev. 465, 518-19 (1988) (reviewing Laura Kalman, *Legal Realism at Yale: 1927-1960* (1986)); Robert W. Gordon, *New Developments in Legal Theory*, in *The Politics of Law* 414-16 (Pantheon Books, rev. ed. 1990).

128. See Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 Wm. & Mary L. Rev. 605, 611-12 (1981).

the other hand, avoidance of unnecessary constitutional decisions evidently has little force in contemporary Federal Courts law. Twice the Burger Court overrode the avoidance policy in order to pursue substantive aims.[130] As for the varying importance of substantive rights, the Warren Court's expansion of habeas corpus suggests that the Court considered sympathetic enforcement of constitutional rights of criminal procedure a sufficiently strong substantive aim to overcome the finality policy. First Amendment rights have often received especially solicitous treatment in jurisdictional law. By contrast, the constitutional rights of taxpayers get less respect.[131] Are these distinctions appropriate? In order to articulate questions like this, one must step outside the Hart & Wechsler paradigm.

The case for including naked substance is equally strong when it is put on descriptive grounds. Fallon notes that "the Hart & Wechsler paradigm reflects an insider's largely internalized standards of what is sayable and unsayable, relevant and irrelevant, persuasive and unpersuasive in legal argument about Federal Courts issues."[132] Substance should be minimized because the "paradigm's principal function is not to predict outcomes, but to suggest, invoke, and elucidate some of the norms that help to constitute legal argument about Federal Courts issues." In addition, it "serves an important pedagogical function of imbuing students with some constitutive conventions of legal argument."[133] Since the Court does not deploy substantive arguments, they are not among those norms and conventions, and need not be examined in a systematic way. Judging from the evidence offered by the fourth edition, Fallon and his co-editors remain uncertain as to just how much attention should be devoted to substance, and are especially wary of exploring the subversive implications of "weak parity."[134]

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129. See, e.g., Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569, 1631-32 (1990).

130. See Wells, 30 Wm. & Mary L. Rev. at 520-27 (cited in note 56) (discussing *Pennhurst State School and Hospital v. Halderman* and *Michigan v. Long*).

131. Compare *Flast v. Cohen*, 392 U.S. 83 (1968) (recognizing taxpayer standing to challenge Congressional expenditure on establishment clause grounds), and the Court's special "willing[ness] to relax finality requirements in order to protect speech interests against the erosion that can attend delay," *Hart & Wechsler Fourth* at 639 (cited in note 8), with the Tax Injunction Act, 28 U.S.C. § 1341, and *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981), which bar litigants challenging state taxes from federal district court so long as an adequate remedy is available in state court.

132. Fallon, 12 Const. Comm. at 10 (cited in note 100).

133. Id. at 12.

134. See text at notes 87-99.

This justification for privileging jurisdictional policy over substance is hardly compelling. Let us grant that one aim of a casebook is to describe the norms and conventions of legal argument. A casebook, especially a casebook that defines the field and sets the scholarly agenda, should do more than that. It ought to portray the reality of what courts do. Since substantive themes influence much of Federal Courts law, students should be taught about that influence, and scholars should examine those themes. A casebook should permit students and scholars not only to appreciate the internal logic of legal argument, but also to stand outside the doctrine and appraise it free of commitments to the Court's conventions. Students benefit from learning not only the conventions of argument but also the real forces that lie behind the Court's pieties. Scholars should explore those forces and their implications rather than trying to analyze problems within a model that is not fully adequate to the task.[135]

Fallon concedes that Hart & Wechsler is "by no means a unique perspective," defending it nonetheless as "one view of the cathedral," that is "capable of generating genuine insights."[136] But showing that the Hart & Wechsler paradigm has value is hardly a sufficient defense of the editors' decision to continue to build the casebook around it. Permit me to draw an analogy: every navigator knows that geocentric astronomy has its uses even after Copernicus.[137] Yet its practitioners are not likely to obtain appointments in modern astronomy departments. In deciding whether to adopt Legal Process principles as their framework, the editors of the leading casebook in the field ought not to content themselves with a model that yields "genuine insights." They should ask whether they could do better. If a different framework would generate a more sophisticated

135. I concede that neither side to a dispute about Federal Courts issues is likely to find it useful to publicly advance unadorned arguments based on substance. Nor are judges, whatever their politics, likely to invoke substance in support of their positions on Federal Courts issues. This, in itself, is an interesting feature of Federal Courts discourse. The general rejection of such arguments may reflect the normative allure of institutional settlement. The reason why neither side considers naked politics to be a congenial argument is that we all prefer to present ourselves to the world as persons who pursue the public good, and arguments based on litigation advantage and the like cast some doubt on that image. See Wells, 29 Ga. L. Rev. at 283-86 (cited in note 18). Casting their arguments in terms of jurisdictional policy, while pursuing substantive ends, allows the disputants to avoid choosing between the two, and hence to have their cake and eat it, too, so to speak.

136. Fallon, 12 Const. Comm. at 12 (cited in note 100).

137. See Thomas Kuhn, *The Copernican Revolution; Planetary Astronomy in the Development of Western Thought* 38, 58 (Harvard U. Press, 1957).

understanding and a more penetrating analysis, it ought to be preferred.

So far as I can tell, Fallon and his co-editors have not undertaken any such inquiry. In my view, a fair comparison of an approach that includes substance against the Hart & Wechsler approach would favor the former as an explanatory tool. Recall, for example, the earlier discussion of the turbulence of modern Federal Courts law. Nothing in the realm of jurisdictional policy can fully account for the Warren Court's jurisdictional revolution in habeas corpus, standing, and access to federal injunctive relief. Nor can jurisdictional policy by itself provide a plausible reason for the Rehnquist Court's assault on the habeas regime and the growth of the *Younger* doctrine. If it is true, as Fallon asserts, that Legal Process scholars "are quite adept at predicting judicial outcomes,"[138] the reason is that, for all their obeisance to the Legal Process catechism, they fully grasp the lessons of Realism.

While including substance in the casebook would compromise some Legal Process ideals, it would serve another ideal—that of candor. A tenet of the Legal Process is that candor is a requisite of legitimacy in adjudication. According to David Shapiro, "candor is the sine qua non of all other restraints on abuse of judicial power," since "judges who regard themselves as free to distort or misstate the reasons for their actions can avoid the sanctions of criticism and condemnation that honest disclosure of their motivation may entail."[139] Given the ubiquity of substance in Federal Courts law, the Supreme Court should be called to account for it. One function of legal scholarship is "sustained, disinterested, and competent criticism of the professional quality of the Court's opinions."[140] Attention to substantive themes by the leading casebook in the field would be an effective way of calling the Court's attention to the need for more candor about naked politics in Federal Courts law. Excluding substance not only shortchanges students, but also gives the Court a free ride.[141]

Besides concealing some of the reasons for its decisions, the Supreme Court's lack of candor, and *Hart & Wechsler*'s passive

138. Fallon, 12 Const. Comm. at 12 (cited in note 100).

139. David L. Shapiro, *In Defense of Judicial Candor*, 100 Harv. L. Rev. 731, 737 (1987).

140. Hart, 73 Harv. L. Rev. at 125 (cited in note 122).

141. On this point I may be at odds with Ann Althouse, who is "afraid that open acknowledgement of the political nature of jurisdictional choices will have the unwanted consequence of undermining the legitimacy of any judicial rights-enforcing agenda." Althouse, 20 L. & Social Inquiry at 1081 (cited in note 85). I doubt whether the legitimacy Althouse seeks is attainable in the absence of candor.

complicity in it, has unfortunate implications for modern Federal Courts scholarship. Since *Hart & Wechsler* dominates the field, scholars view it as the only game in town, and feel constrained to make their arguments in the vocabulary of the paradigm. Yet many contemporary Federal Courts scholars object to the Court's rulings on grounds that are more correctly characterized as substantive. They respond to this dilemma in diverse ways, none of which is satisfactory. Fallon, for example, vainly tries to expand the paradigm in a way that would subvert its purpose, insisting that the Hart & Wechsler canon permits the allocation of cases to federal courts because they are more likely to sympathize with federal claims.[142] Erwin Chemerinsky tries to justify access to federal court in terms of litigant choice, without making a judgment on parity.[143] Having constrained himself in this way, he cannot adequately explain why the preference of the party seeking federal access ought to prevail over that of his adversary.[144] Martin Redish[145] and Akhil Amar[146] try to escape the Hart & Wechsler trap by resort to formal arguments based on Article III and section 1983. Their efforts, too, fall short, mainly because formal arguments generally lack persuasive force in Federal Courts law.[147] In each case the critique would pack more punch if it were straightforwardly framed in substantive terms.[148]

142. See Fallon, 12 Const. Comm. at 7 (cited in note 100), where Fallon lumps together fairness and sympathy: "Can contemporary federal courts implement section 1983 without weighing the extent to which state courts and agencies are likely to provide fair and sympathetic fora for the vindication of federal rights? Although others might disagree, I do not think so." As noted earlier, conflating the two is a mistake, because fairness is a jurisdictional policy within the Hart & Wechsler paradigm, while sympathy is an euphemism for naked politics. See text at notes 120-22.

143. See Chemerinsky, 36 UCLA L. Rev. at 236-37 (cited in note 97).

144. See Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. Rev. 329, 339-42 (1988). See also Richard A. Matasar, *Treatise Writing and Federal Jurisdiction Scholarship: Does Doctrine Matter When Law Is Politics?*, 89 Mich. L. Rev. 1499, 1505-07, 1516-18 (1991) (reviewing E. Chemerinsky, *Federal Jurisdiction* (1989)) (regretting Chemerinsky's reluctance to engage in normative debate of the political issues at stake in Federal Courts cases).

145. See, e.g., Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71 (1984).

146. See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985).

147. See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543 (1985); Daniel Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569 (1990); Michael L. Wells and Edward J. Larson, *Original Intent and Article III*, 70 Tul. L. Rev. 75 (1995).

148. For an example of the sort of argument I find more illuminating, see Larry W. Yackle, *Reclaiming the Federal Courts* (Harvard U. Press, 1994) (analyzing Federal Courts problems from an avowedly liberal substantive perspective). In recommending the book, I do not mean to endorse Yackle's proposals for law reform. In my view, jurisdictional policy deserves more respect than Yackle gives it when, for example, he recommends that

CONCLUSION

One might be forgiven for wondering if the decision by Fallon, Meltzer and Shapiro to stick with the Hart & Wechsler paradigm could withstand a dispassionate evaluation of its advantages and demerits. I suspect that one reason the editors remain faithful to Hart & Wechsler is simple (and admirable) loyalty to great men who made immense contributions to the field. Another may be intellectual conservatism of the sort that kept the Ptolemaic astronomers in business for many decades after Copernicus:[149] so long as the book remains the leader in the field, neither the editors nor the publisher see any compelling reason to change it. Decades of inbreeding among the Federal Courts elite may contribute to the problem. Nearly everything that Federal Courts scholars learn about the area comes from Henry Hart, Herbert Wechsler, and their students.[150] Their reluctance to admit troubling ideas into the canon may be explained in terms of their socialization into the ways of the tribe. Theorists of the sociology of knowledge teach that people trained in the values and beliefs of a group tend to take these to be true, ignoring, marginalizing, or rationalizing anything to the contrary.[151] Finally, the very nobility of the Hart & Wechsler pedigree is itself an obstacle to change. A danger of working within a great tradition is that the editors, and Federal Courts scholars who follow their lead, may have invested too much intellectual capital in its success. Complacency may have set in, and with it a reluctance to challenge ways of thinking to which they have become accustomed.

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the well-pleaded complaint rule be abandoned, id. at 100-04, 114; that defendants in state civil cases be permitted to remove the litigation to federal court based on a federal defense or counterclaim, id. at 116-18; and that the *Younger* doctrine be abolished for facial challenges to state statutes, id. at 144-48.

I would like to see similar treatments of Federal Courts law written from a conservative perspective. My aim is to change (and, I hope, reinvigorate) the terms of the debate over federal jurisdiction rather than to promote one or another doctrinal regime.

149. Kuhn, *Copernican Revolution* at 224 (cited in note 137).

150. See Amar, 102 Harv. L. Rev. at 691-93 (cited in note 7).

151. See Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality* 129-55 (Doubleday, 1966). Cf. Kuhn, *Copernican Revolution* at 135 (cited in note 137) (on the "band-wagon effect" among scientists).