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POSITIVISM AND ANTIPOSITIVISM IN FEDERAL COURTS LAW

*Michael Wells**

What is the proper role of rules in federal courts law? Some scholars associated with the Legal Process assert that rules are unimportant here. They believe that the values of principled adjudication and reasoned elaboration should take precedence over the making and application of rules. The area is, in the jargon of jurisprudence, "antipositivist."[1] Others maintain that rules do, or at any rate should, count heavily in federal courts' decision-making.[2] In this Article, I argue that Legal Process scholars are right to spurn formalism in most parts of federal courts law. But the Legal Process model of federal courts law is unsatisfactory; its logic seems to reject rules altogether, yet there are areas where rules do and should control decisions. Hence I seek a different explanation for the general antipositivism of the area.

This Article argues that the weak role of rules in federal courts law may be accounted for and defended without embracing the tenets of the Legal Process. On the contrary, the reason there are few strong rules in this area is related to the justifications for rule-based decisionmaking in general. Those justifications vary in strength depending on context and are comparatively weak in the federal courts context. Rather than generally embracing rules or raising a presumption against them, courts and scholars should take a pragmatic view of the role of rules in federal courts law.[3]

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[1] *See, e.g.*, Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 965 (1994).

[2] *See, e.g.*, Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 207 n.7, 230 n.86, 258 n.169 (1985); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 105 (1984).

[3] For a more general argument in favor of adopting a pragmatic approach to federal courts issues, see Michael Wells, *Busting the Hart & Wechsler Paradigm*, 11 CONST. COMM. 557, 567-86 (1995). For Fallon's response to my argument, see Richard H. Fallon, Jr., *Comparing Federal Courts "Paradigms,"* 12 CONST. COMM. 3 (1995).

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They should decide whether or not to make rules based on the costs and benefits of rules in the context before them. Supreme Court decisions on the role of rules in federal courts law can be understood in these pragmatic terms, though the Court itself rarely reveals its jurisprudential premises.

I. POSITIVIST AND ANTIPOSITIVIST TRADITIONS

The first step in developing this argument is to describe more fully the two competing traditions with which I will take issue. The antipositivist view is articulated in a recent article by Richard Fallon.[4] By "antipositivist," Fallon means that the field should be understood "as a rich, fluid, and evolving set of norms for effective governance and dispute resolution, not as a positivist system of fixed and determinate rules."[5] Fallon characterizes federal courts law as antipositivist in the course of a general defense of the field's scholarly tradition.[6] For Fallon, antipositivism is part and parcel of a "methodological stance,"[7] which he calls the Hart and Wechsler paradigm.[8] Besides antipositivism, other assumptions of the

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[4] Fallon, *supra* note 1.

[5] *Id.* at 965.

[6] *Id.* I follow Fallon in using the term antipositivist to denote a body of doctrines characterized by a paucity of rules. I do not intend, nor do I think Fallon intends, to make any claims about legal philosophy.

[7] *Id.* at 964.

[8] *Id.* at 969. The Hart and Wechsler paradigm is, in turn, a product of the Legal Process, an approach to legal decisionmaking developed after World War II by Henry Hart, Herbert Wechsler, Lon Fuller, Albert Sacks, and others. The Legal Process was a response to pre-War Realist scholarship exposing the activist role that courts exercise, but often try to conceal in their opinions. *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND (1930); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930). *See generally* G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America*, 58 VA. L. REV. 999 (1972).

Legal Process scholars acknowledged the Realist claim that judges act creatively and sought to legitimize judicial invention by stressing the process by which courts should and do make decisions. *See* G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 280-91 (1973) [hereinafter White, *The Evolution of Reasoned Elaboration*]; 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, 619-23 (1991).

Central works of Legal Process scholarship include HENRY M. HART & ALBERT M. SACKS,

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Hart and Wechsler paradigm include: (1) "the principle of institutional settlement," under which "questions of how decisionmaking authority should be allocated are of foremost importance";[9] (2) "the principle of structural interpretation," which holds that "[i]n disputes about the proper allocation of decisionmaking authority, the principles and policies underlying federalism and the separation of powers deserve special weight"; (3) "the principle of the rule of law," which "requires the availability of judicial remedies sufficient to vindicate fundamental legal principles";[10] (4) "the principle of reasoned elaboration," which requires that "[w]hen reasons of fairness, prudence, practicality, coherence, or convenience strongly support a particular principle, courts should 'use every possible resource of construction' to arrive at the result that is so prescribed";[11] and (5) "the neutrality principle," "that courts must be principled in their reasoning," and "should decline to impose substantive judicial judgments on disputes not capable of resolution through the application of neutral principles to sharply defined sets of facts."[12]

There is, however, a strong positivist tradition in federal courts law, both in scholarship and in judicial opinions. On the scholarly front, Martin Redish maintains that the Civil Rights Act of 1871 lays down a rule granting access to federal courts for constitutional claims against state officers, so that the Supreme Court's "abstention" doctrines are illegitimate usurpations of legislative authority.[13] Akhil Amar argues that Article III of the Constitution *requires* Congress to grant access to federal courts, at trial or on

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THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1994); HENRY M. HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Henry M. Hart, *The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[9] Fallon, *supra* note 1, at 964.

[10] *Id.* at 965-66.

[11] *Id.* at 966 (quoting Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 HARV. L. REV. 1362, 1399 (1953)).

[12] *Id.*

[13] Redish, *supra* note 2, at 105.

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appeal, for cases arising under federal law.[14] Before the Court ruled on the applicability of collateral estoppel to 42 U.S.C. § 1983 cases,[15] David Currie maintained that the Full Faith and Credit Act required issue preclusion without regard to any competing policy considerations.[16] The Court's recent cutbacks on access to habeas corpus have brought complaints that the Court shows insufficient respect for settled rules.[17]

The Court itself recently has endorsed rule-oriented arguments. For example, in *Michigan v. Long*,[18] the Supreme Court lamented the failure of prior cases to set down a rule governing review of ambiguous state judgments and proceeded to make such a rule. In *Pennhurst State School & Hospital v. Halderman*,[19] the Court relied on the rule of state sovereign immunity embodied in the Eleventh Amendment to shield states against federal court suits based on state law. In *Lujan v. Defenders of Wildlife*,[20] the Court insisted that "injury in fact" is a prerequisite to standing.

If anything, dissenting Justices are even more fond of rule-based arguments. Formalist criticism of federal courts law comes from across the political spectrum; certainly it is a favorite weapon of conservatives. When the Warren Court relaxed the strict rule against procedural default in habeas corpus in *Fay v. Noia*[21] and later adopted a similar relaxed standard for direct review cases,[22]

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[14] Amar, *supra* note 2. Amar's rule would cover admiralty and cases involving ambassadors, *id.* Robert Clinton advocates a somewhat broader rule limiting congressional power over federal jurisdiction. *See* 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) (concluding constitutional framers intended that Congress allocate to the federal judiciary every type of case or controversy defined by Article 3, Section 2, Clause 1, excluding only trivial cases).

[15] 42 U.S.C. § 1983 (1988).

[16] *See* David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317 (1978) (asserting no exception to requirement of full faith and credit existed for civil rights suits).

[17] *See, e.g.*, Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 941, 1028-46 (1991) (asserting that Court disregarded stare decisis and continuity of decisions in developing new habeas corpus procedural rules).

[18] 463 U.S. 1032, 1033 (1983).

[19] 465 U.S. 89 (1984).

[20] 504 U.S. 555, 560 (1992).

[21] 372 U.S. 391 (1963).

[22] *See* Henry v. Mississippi, 379 U.S. 443, 447-48 (1965) (whether party waived opportunity to raise federal claims depends on analysis of contextual factors).

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Justice Harlan decried the break with precedent. Just a few years ago, the Court in *Pennsylvania v. Union Gas*[23] held that Congress could abrogate the states' Eleventh Amendment immunity. Justice Scalia complained that the Court had defiled the spirit, if not the letter, of *Hans v. Louisiana*,[24] which had accorded the immunity the status of a substantive constitutional prohibition.[25]

Liberals are equally fond of formal arguments. While the Court in *Pennhurst State School*[26] invoked the Eleventh Amendment, Justice Stevens's dissent focuses on what he viewed as the Court's abandonment of seventy-five years of contrary precedent.[27] Dissenting in *Michigan v. Long*,[28] Stevens voiced similar complaints about the Court's decision to abandon long-standing approaches to the problem of ambiguous state judgments. Justice Brennan repeatedly objected to the Burger Court's cutbacks on habeas corpus and expansions of abstention not only on the merits, but also on the ground that they ignored precedent and congressional intent.[29]

Do examples like these undermine Fallon's claim, or are they exceptions to a generally accurate account? This Article argues that neither side of this dispute makes a convincing case. Descriptively, Legal Process scholars seem to have the better of the argument, though rules surely have a bigger place in federal courts law than the sweeping antipositivist principle seems to accord them. In any event, a detailed examination of the doctrine is in order, as Fallon does not pause to document his charge.

More important are the normative implications of the antipositivist principle. It would be wrong to treat the general antipositiv-

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[23] 491 U.S. 1 (1989).

[24] 134 U.S. 1 (1890).

[25] *Union Gas*, 491 U.S. at 29 (Scalia, J., dissenting in part).

[26] 465 U.S. 89 (1984).

[27] *Id.* at 126 (Stevens, J., dissenting).

[28] 463 U.S. 1032, 1065 (1983) (Stevens, J., dissenting).

[29] *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 99 (1977) (Brennan, J., dissenting) (providing example of Burger Court's use of formalist argument); Trainor v. Hernandez, 431 U.S. 434, 450 (1977) (Brennan, J., dissenting) (same); Juidice v. Vail, 430 U.S. 327, 341 (1977) (Brennan, J., dissenting) (same); Stone v. Powell, 428 U.S. 465, 502 (1976) (Brennan, J., dissenting) (same); *see also* Keeney v. Tamayo-Reyes, 504 U.S. 1, 12 (1992) (O'Connor, J., dissenting) (asserting Court has fundamentally changed long-standing habeas corpus jurisdiction).

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ism of federal courts law as a basis for endorsing the Hart and Wechsler paradigm as the appropriate methodology for addressing Federal Courts problems. The reasons behind the comparatively weak force of rules in federal courts law do not necessarily lie in the tenets of the Hart and Wechsler paradigm. Instead, the antipositivism of federal courts law can be severed from the other aspects of the Hart and Wechsler paradigm and explained by the nature of the problems addressed by federal courts law and by the normative force of rule-based decisionmaking.

In brief, the justifications for stating doctrines in the form of rules are predictability and fairness, values that are not uniformly strong across the range of legal problems. These values are weak in most areas of federal courts law, which do not address directives to actors in the world of primary conduct and hence do not give rise to strong arguments for predictability and fairness. In addition, the prospective sources of federal courts rules frequently are unreliable; this unreliability often makes it relatively easy for the Court to defend its choice to eschew rule-based decisions.

Elaborating this thesis requires two inquiries, one into the nature of federal courts doctrine and the other focusing on the pros and cons of rule-based decisionmaking in the federal courts context. As a first step in undertaking these tasks, Part II establishes an analytical framework for identifying and evaluating the role of rules in judicial decisionmaking. Part III then examines federal courts doctrine and confirms the general validity of Fallon's descriptive claim, with some important exceptions. Part IV addresses the normative issues and concludes that the case for rules in federal courts law is weak, simply because the benefits of rules are not worth these costs, and not because the area is "a rich, fluid, and evolving set of norms for effective governance and dispute resolution."[30]

II. RULES

The distinctive feature of rule-based decisionmaking is that the judge refrains from an evaluation of all the moral, social, and political factors that may bear on the proper resolution of the case

[30] Fallon, *supra* note 1, at 965.

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at hand, in favor of deference to a pre-existing directive from a court or a legislature.[31] This approach to adjudication is sometimes called formalism, because the judge, having identified an applicable rule, employs it without an examination of its merits or a consideration of the relevance of its rationale to the instant case.[32] Rule-based decisionmaking occurs when a court strictly follows precedent and reads statutes literally or with close attention to their immediate purposes. Rule-based adjudication is advanced when a court of last resort establishes how specified classes of cases must be treated by lower courts, rather than allowing them to evaluate competing policy considerations for themselves.

No court in a complex legal system could embrace rule-based adjudication without qualification. Too many instances arise where application of a pre-existing rule is so destructive or silly that a compelling case can be made against it. Certainly no American court has been able to resist the pressure to abandon or modify rules in such situations.

Some theorists claim that rules have an "all-or-nothing" quality,[33] so that failure to follow a rule indicates the abandonment of rule-based decisionmaking in favor of something else. But this account of rules seriously understates their role in our system. Rules need not be absolute in order to have force. It does not follow from the fact that rules are sometimes overridden that rule-based decisionmaking has no place in our system. One is not logically compelled either to accept formalism without qualification, or to reject it outright. On the contrary, judges may give presumptive weight to rules, allowing them to govern most fact patterns falling within their terms, while at the same time reserving the right to override them when a sufficiently strong justification exists.[34]

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[31] *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (defining formalism as "screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account").

[32] *Id.* at 536-37 ("Rules get in the way. They exclude from consideration factors that a decisionmaker unconstrained by those rules would take into account.").

[33] *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 24 (1977) ("Rules are applicable in an all-or-nothing fashion.").

[34] *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 113-18, 196 (1991) (noting rules may have exceptions and nonetheless remain rules).

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The key feature of rule-based adjudication, then, is not mechanical adherence to rules. Rather, a judge constrained by rules insists on according them substantial weight, allowing them to determine many of her decisions even if, all things considered, she would have resolved the issue differently. This "presumptive positivism," as Fred Schauer calls it,[35] may well describe a large part of the adjudication that takes place in our system. We could hardly manage if judges chose to re-examine the merits of every rule in every piece of litigation. Looking at the most prominent cases in the highest courts, as we are prone to do, is misleading as evidence of the role of rules in the legal system because those are the very cases in which there may be good reasons to re-evaluate a rule so that the positivist presumption would not apply.

III. THE SCARCITY OF RULES IN FEDERAL COURTS LAW

Professor Schauer shows that rules need not be applied without fail in order to matter in adjudication. Rules may have presumptive force, even in decisionmaking contexts where they are sometimes overridden. Even so, I shall argue that rules are of minor importance in federal courts law, both in descriptive and normative terms. In this Part, I argue that, as an empirical matter, the Supreme Court rarely relies on rules in handling jurisdictional issues, although scholars and dissenting Justices frequently raise formal arguments. The normative issues are addressed in Part IV.[36]

The empirical investigation has three parts. One is to examine the way the Court formulates the law, and in particular the extent to which it states federal courts doctrine in the form of rules, as opposed to factors or standards that courts are to apply to cases as they arise. The latter approach is antithetical to formal reasoning. A second inquiry considers the Court's techniques of statutory interpretation. Rule-based decisionmaking would require the Court to put aside policy analysis in favor of deferring to statutory commands and clearly expressed legislative purposes. Third, when the Court does state a rule, formal decisionmaking would require

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[35] *Id.* at 196.

[36] *See infra* notes 134-177 and accompanying text.

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the Court to follow it in later cases. To the extent that the Court overrules, ignores, or narrowly construes precedent, it departs from the formal model. All three of these inquiries lead to the conclusion that rule-based decisionmaking does not play an important role in most areas of the law of federal courts.

A. RULES AND STANDARDS

One measure of the importance of rules in a decisionmaking regime involves the familiar distinction between rules and standards. A standard authorizes the decisionmaker to take account of a broad array of considerations bearing on the proper resolution of a case. A rule, on the other hand, specifies the manner in which an adjudicator must deal with cases falling within its ambit, leaving little room for the particularities of a given case, even if the ends sought to be achieved by the law would be better served by special treatment.[37]

Some federal courts doctrines are explicitly formulated in ways that make rule-based decisionmaking impossible. In these areas judges are not given rules to apply to the issues before them but standards or factors to be weighed by the judge in light of the particular circumstances. In determining the appropriateness of pendent jurisdiction over state law claims, for example, courts do not apply a rule, but instead estimate the relative importance of state and federal issues.[38] According to *Commodity Futures Trading Commission v. Schor*[39] the jurisdiction of legislative courts turns on "weigh[ing] a number of factors," including

> the extent to which the 'essential attributes of judicial power' are reserved to Article III courts . . . the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally

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[37] *See, e.g.*, Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 57-59 (1992) (discussing debate over rules and standards).

[38] United Mine Workers v. Gibbs, 383 U.S. 715 (1966). *But cf.* Executive Software N. Am., Inc. v. United States Dist. Court, 24 F.3d 1545 (9th Cir. 1994) (holding that recent statute codifying supplemental jurisdiction, 28 U.S.C. § 1367, creates presumption in favor of exercising jurisdiction).

[39] 478 U.S. 833 (1986).

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> vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[40]

In deciding whether to dismiss a case for forum non conveniens, courts do not employ rules, but examine the hardship or inconvenience of litigating in a distant forum on a case-by-case basis.[41] The turn to standards in these areas is obvious. The three broad jurisdictional topics discussed below, however, require more detailed analysis.

1. Justiciability. Litigants have standing to assert federal claims only if they can demonstrate "injury" that is not "too abstract, or otherwise inappropriate, to be considered judicially cognizable," that "the line of causation between the illegal conduct and the injury [is not] too attenuated," and that "the prospect of obtaining relief from the injury as a result of a favorable ruling [is not] too speculative."[42] In applying these criteria the Court engages in a free-wheeling, and usually *sub rosa*, policy analysis, finding that some nontraditional disputes may be adjudicated and that others may not. The reasons seem to have little to do with the concreteness or particularity of the litigant's claimed harm.[43] "Injury" is more often a label attached to the Court's conclusion than a guide to decisionmaking.[44] Similarly, the causation requirement furnishes no rule for decision: Its application turns as much on the Court's substantive values as on the closeness of the connection

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[40] *Id.* at 851.

[41] Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); *see, e.g.*, Mercier v. Sheraton Int'l, Inc., 981 F.2d 1345 (1st Cir. 1992) (applying factors rather than rules).

[42] Allen v. Wright, 468 U.S. 737, 752 (1984). The Court stressed that "[t]hese terms cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise." *Id.* at 751.

[43] Gene R. Nichol, Jr., *Justice Scalia, Standing and Public Law Litigation*, 42 DUKE L.J. 1141, 1154-60 (1993).

[44] *See* Gene R. Nichol, *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1919 (1986) (arguing that injury standard is merely "a vehicle through which judges implement their own perceptions of the proper scope of article III power").

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between the plaintiff's injury and the challenged wrong.[45]

In mootness and ripeness cases, where the central issue is the timing of judicial intervention, the Court balances a variety of factors bearing on the need for judicial intervention. Where changed circumstances present a mootness problem, federal courts must consider, among other things, how likely it is that the dispute will recur,[46] whether the "collateral consequences" of adjudication are sufficiently important to justify judicial intervention,[47] the motivation behind a defendant's change in behavior,[48] and whether there are good practical reasons to keep the suit alive.[49] As for ripeness, the Court balances the need for immediate judicial action, which will vary from one case to another, against the Court's desire to conserve federal judicial resources and to obtain the necessary facts for effective decisionmaking.[50]

2. Federal Common Law. Erie Railroad Co. v. Tompkins[51] held that federal courts must generally follow state law in cases not controlled by the Constitution or a federal statute. Instead of treating *Erie* as a rule forbidding the development of federal common law, however, the Court immediately began to build such a body of decisions. On the very day it decided *Erie*, it ruled in

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[45] *See, e.g.*, Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 17-19 (1982) (discussing problems with causation test); Gene R. Nichol, Jr., *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185 (1981) (arguing against using causation test as standing requirement).

[46] *Cf.* Vitek v. Jones, 445 U.S. 480 (1980) (emphasizing likelihood that challenged wrong would recur).

[47] *See, e.g.*, Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115 (1974) (reversing judgment of mootness).

[48] *See* County of Los Angeles v. Davis, 440 U.S. 625 (1979) (finding mootness because wrong was unlikely to recur).

[49] *See* United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) (allowing class action suit to proceed even though trial court denied class certification and named plaintiff's claim was mooted before appellate review).

[50] *See* Abbott Lab. v. Gardner, 387 U.S. 136 (1967) (allowing pre-enforcement review of regulation). Thus, a particular anticipatory challenge to a criminal statute will be allowed or denied based on the Court's estimation of the continuing threat of prosecution. *Compare* Steffel v. Thompson, 415 U.S. 452 (1974) (finding ripeness) *with* Poe v. Ullman, 367 U.S. 497 (1961) (denying ripeness). In other cases, ripeness depends on a particularized inquiry into whether the issues presented require greater factual development. *Compare* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) (finding ripeness) *with* United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (denying ripeness). *See generally* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987) (examining ripeness doctrine).

[51] 304 U.S. 64 (1938).

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Hinderlider v. LaPlata River & Cherry Creek Ditch Co.[52] that federal common law was appropriate in cases involving disputes between states over water rights. Even then, of course, the formal approach remained available. The Court might have crafted rules identifying discrete problems for which federal common law would be appropriate. It even took a step in this direction in *Clearfield Trust Co. v. United States*,[53] holding that federal law governs rights and duties in commercial paper issued by the federal government. Subsequent rulings in *Bank of America v. Parnell*,[54] *United States v. Kimbell Foods, Inc.*,[55] and *Boyle v. United Technologies*,[56] however, clearly demonstrated the Court's preference for standards that allow case-by-case evaluation of policy considerations for and against the use of federal common law rather than rules categorizing cases on the basis of salient characteristics. Instead of making and adhering to rules turning on the identity of the parties or the mere existence of a federal interest, a court faced with a federal common law problem is obliged to evaluate the strength of that interest in the case at hand, the strength of competing state interests, and the extent to which the federal interest would be threatened by applying state law.

3. Abstention. In order to lessen the friction between federal courts and the states, the Supreme Court has constructed a number of "abstention" doctrines that require federal courts to refrain from exercising jurisdiction even though it is authorized by statute.[57] Most abstention doctrines take the form of standards directing the

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[52] 304 U.S. 92 (1938).

[53] 318 U.S. 363 (1943).

[54] 352 U.S. 29 (1956).

[55] 440 U.S. 715 (1979); *see also* United States v. Yazell, 382 U.S. 341 (1966) (holding no federal interest exists that required local laws to be overridden).

[56] 487 U.S. 500 (1988).

[57] One such abstention doctrine is the principle associated with Younger v. Harris, 401 U.S. 37 (1971). *Younger* abstention bars federal jurisdiction over a case if the plaintiff is a defendant in a pending state criminal proceeding in which the federal issue could be raised as a defense. Like any rule, *Younger* denies the judge discretion in evaluating competing policies and deciding how best to handle the particular case before him.

As the *Younger* doctrine has expanded beyond its "pending criminal case" core, it has become more standard in its application. *See* Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 11 n.9 (1987) ("The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.").

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court to evaluate competing policies and decide how best to handle the particular case. In *Railroad Commission v. Pullman Co.*,[58] the Court held that a federal court may abstain if it finds that the constitutional issue is especially sensitive and the danger that a federal court may err in its reading of local law is significant. Because judges differ in the weight they accord the abstention policies in comparison with the federal plaintiff's interest in a federal forum, the application of these standards is uneven. In the 1960s, for example, the Supreme Court largely abandoned the *Pullman* doctrine, without expressly overruling it, simply by finding that the requisites for its application seldom were met.[59] Later Courts more sensitive to state prerogatives vigorously revived the principle.[60]

A variety of circumstances besides those at work in *Pullman* also may justify federal court deference. Abstention has been ordered on the basis of unsettled state law alone, without the presence of a sensitive constitutional question;[61] where there are important constitutional issues involving a state regulatory scheme but no problem of unsettled state law;[62] and where the same issues are contested in concurrent state and federal litigation.[63] Occasionally the existence of special state judicial or administrative mechanisms will trigger abstention.[64] There is no rule, however, *requiring*

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[58] 312 U.S. 496 (1941).

[59] *See* Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967) (discussing Court's changing treatment of abstention doctrine).

[60] *See, e.g.*, Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988) (holding interpretation of state statute should be certified to state supreme court); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) (finding abstention necessary when state statute is subject to interpretation that could obviate or substantially modify federal question).

[61] *See, e.g.*, Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 483 (1940).

[62] *See, e.g.*, Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 350 (1951).

[63] *Compare* Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976) (finding abstention proper) *with* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) (finding abstention improper).

[64] *See, e.g.*, *Alabama Pub. Serv. Comm'n*, 341 U.S. 341 (holding exercise of federal jurisdiction inappropriate where plaintiff had not invoked state statutory remedy); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (finding abstention in favor of state railroad commission appropriate). *But see* McNeese v. Board of Educ., 373 U.S. 668 (1963) (refusing to abstain

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abstention whenever one of these criteria is present; federal courts often adjudicate cases presenting such features. These are all factors that a court may take into account as part of a wide-ranging inquiry into the advisability of exercising federal authority under the circumstances of a given case.

B. STATUTORY AND CONSTITUTIONAL INTERPRETATION

A second test of a court's commitment to formal constraints on judicial discretion is its treatment of statutes and constitutional directives. While a formalist judge would defer to the rules set forth in a legislative text, or at least attempt to recognize and carry out the underlying aims of the statute in question, a judge who rejects formalism will exercise greater willingness to ignore the text and purpose of the law in favor of what she regards as wise policy. Of course, given these broad descriptions, any area of law will contain numerous examples of each approach. American judges are, after all, both formalists and policymakers. In my view, though, federal courts law falls decidedly away from the formalist, or rule-bound, end of the spectrum. A significant number of central jurisdictional provisions seem to serve less as directives to the courts than as vehicles for the implementation of judicial jurisdictional policy.

One obvious and much-discussed example is the Civil Rights Act of 1871. In sweeping terms, § 1983[65] authorizes federal jurisdiction over constitutional challenges to acts of state officials. With no support in the statutory language and almost none in the legislative history, the Supreme Court erected a variety of barriers to the exercise of federal power under § 1983.[66] Another illustration is

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in favor of state administrative board in school desegregation case).

[65] 42 U.S.C. § 1983 (1988).

[66] For diverse views of this area, see Ann Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035 (1989-90) (examining Court's jurisdictional lawmaking); Jack M. Beermann, *"Bad" Judicial Activism and Liberal Federal-Courts Doctrine: A Comment on Professor Doernberg and Professor Redish*, 40 CASE W. RES. L. REV. 1053 (1989-90) (same); Redish, *supra* note 2 (criticizing Court's erection of barriers to § 1983 actions); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (arguing against rule-based doctrine in this area); Michael Wells, *Why Professor Redish Is Wrong about Abstention*, 19 GA. L. REV. 1097 (1985) (defending Court's common-law role of limiting jurisdiction).

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the Anti-Injunction Act, which forbids federal injunctions against state court proceedings.[67] Throughout the statute's two hundred-year history, the Supreme Court has created exceptions to the prohibition, many of which Congress later adopted.[68] The Court's historic disdain for legislative directives bearing on its duty to review lower court judgments is a less obvious example. Before 1988, the statutory provisions "controlling" Supreme Court review of state judgments explicitly required the Court to hear many cases on appeal and render judgment on the merits.[69] The Court evaded this obligation by dismissing many such cases on the pleadings, without explanation, and refusing to give full precedential weight to the dismissals.[70]

Three other crucial areas of jurisdictional law similarly reflect an almost total lack of deference to legislative text and purpose.

1. The Eleventh Amendment. In response to the Supreme Court's 1793 ruling in *Chisholm v. Georgia*,[71] which held that states enjoy no sovereign immunity against nonresidents' common-law suits brought against them in federal court, Congress proposed and the states ratified the Eleventh Amendment. The Amendment provides that "the judicial power . . . shall not be construed to extend to any suit in law or equity commenced or prosecuted against any one of the United States by citizens of another state, or by citizens or subjects of any foreign state." Judges devoted to process values would either read this language literally[72] or try to

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[67] 28 U.S.C. § 2283 (1988).

[68] *See* PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1320-24 (3d ed. 1988) [hereinafter HART & WECHSLER] (discussing exceptions); HENRY HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1320-24 (3d ed. 1988) (discussing exceptions); *see also* William T. Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330 (1978) (discussing these federalism exceptions).

[69] *See* HART & WECHSLER, *supra* note 68, at 502-03 (discussing statutory basis for Supreme Court review of state judgments).

[70] *See id.* at 727-34 (discussing how court evaded obligation to review state court judgments).

[71] 2 U.S. (2 Dall.) 419 (1793).

[72] *See, e.g.*, Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1345 (1989) (arguing Eleventh Amendment should not be confined to diversity cases).

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identify and implement the purpose behind it.[73] Although the Court occasionally has adopted such an approach,[74] it more often has gone its own way, with little attention either to the Eleventh Amendment's text or its background. For example, the fiction of *Ex parte Young*[75] draws on neither theory, but is overtly described as a compromise balancing state and federal interests.[76] The "carving out" sanctioned by *Fitzpatrick v. Bitzer*[77] avoided taking a position on the historical meaning of the Eleventh Amendment, concluding that state sovereignty is "necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment."[78] More recently, *Pennsylvania v. Union Gas Co.*[79] further expanded *Fitzpatrick* by allowing nullification of state immunity when Congress acts clearly under its Article I powers. Although these decisions may reflect sound jurisdictional policies, it is hard to say what those policies might be. It is clear, however, that these

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[73] Two sharply divergent views have emerged on this issue. Some commentators argue that the Eleventh Amendment must be interpreted against the background of general sovereign immunity existing in the eighteenth century. *Chisholm*, they say, was simply wrong in failing to respect state sovereign immunity, and the peculiar and narrow language of the Amendment was designed to correct the Supreme Court's error. This is the view expressed in Hans v. Louisiana, 134 U.S. 1 (1890). *See also* Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989) (approving *Hans*).

Other commentators maintain that the Constitution itself marked a sharp break with the past. It created a government superior to the states, modifying sovereign immunity and other state prerogatives. According to this view, the Court's error in *Chisholm* was to suppose that the new regime extended to common-law suits like the breach of contract claim at issue in *Chisholm*. The Eleventh Amendment sensibly focuses on foreclosed suits by out-of-staters because they were the only litigants who could take advantage of diversity jurisdiction to sue states in federal court on common-law claims. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247-302 (1985) (Brennan, J., dissenting) ("[T]he Court's Eleventh Amendment doctrine diverges from text and history virtually without regard to underlying purposes or genuinely fundamental interests."); *see also* William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989) (defending diversity explanation of Eleventh Amendment).

[74] *See, e.g.*, *Hans*, 134 U.S. 1 (holding immunity extended to constitutional claims); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (limiting immunity to claims brought under state law).

[75] 209 U.S. 123 (1908).

[76] *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (describing *Ex parte Young* as balancing federal and state interests).

[77] 427 U.S. 445 (1976).

[78] *Id.* at 456.

[79] 491 U.S. 1 (1989).

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policies have little or nothing to do with the language and intention of the Eleventh Amendment.

2. Federal Question Jurisdiction. Under the general federal question statute, enacted in 1875, district courts "have original jurisdiction of all civil actions [arising] under the Constitution, laws, or treaties of the United States."[80] For judges who subscribe to the tenets of the Legal Process, the materials needed to determine and implement the legislative purpose are at hand. The statute tracks the language of Article III, which the Supreme Court in *Osborn v. Bank of the United States*[81] had read broadly. The *Osborn* Court interpreted Article III as authorizing Congress to extend federal jurisdiction to every case in which federal law was an "ingredient" in the cause and might be litigated, whether or not the federal issue was actually raised. The admittedly skimpy legislative history of the 1875 statute indicates that it was meant to take federal jurisdiction as far as *Osborn* permitted,[82] or at least to all cases in which a federal issue was actually litigated.[83]

Instead of relying on these materials, the Supreme Court has made "arising under" doctrine out of whole cloth. One feature of the doctrine is indeed a rule, but a rule invented by the Court itself: The federal issue must appear on the face of a well-pleaded complaint.[84] Sometimes, but not always, the Court imposes the further requirement that the plaintiff's cause of action must arise under federal law;[85] occasionally even this is not enough to

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[80] 28 U.S.C. § 1331 (1988).

[81] 22 U.S. (9 Wheat.) 738 (1824).

[82] *See* HART & WECHSLER, *supra* note 68, at 995-96 (noting the argument that 1875 Act should be read as conferring as much federal question jurisdiction as constitutionally permissible).

[83] *See* James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 649, 650 n.62 (1942) (quoting Section 5 of the 1875 Statute, 18 Stat. 470, 472 (1875) (codified at 28 U.S.C. 380 (1927)); *see also* HART & WECHSLER, *supra* note 68, at 996 ("[T]he 1875 act should be read as conferring . . . the whole of the federal question jurisdiction permissible under the Constitution, or at least the whole of it permissible under the Osborn opinion.").

[84] *See* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) (denying federal jurisdiction where no federal issue appeared on face of complaint, but was only anticipated as defense).

[85] *Compare* Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) (finding federal jurisdiction over state law cause of action to enjoin corporate directors from investing in federal banks because creation of such banks was unconstitutional) *with* American Well Works v. Layne & Bowler Co., 241 U.S. 257 (1916) (finding no federal jurisdiction over suit

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warrant federal jurisdiction.[86] With no statutory text to support it, the Court ruled that declaratory judgment actions should be judged by the allegations of a hypothetical complaint in an analogous enforcement action.[87] The Court then ruled that when the declaratory plaintiff is a state agency, yet another special rule applies: The agency cannot be forced into federal court against its will, despite the normal jurisdictional regime that would permit a defendant to do so.[88]

As Professor William Cohen pointed out long ago, what the Court actually has done is to establish "pragmatic standards for a pragmatic problem."[89] Ordinary tort cases go to state court in spite of a federal issue on the face of the complaint, because most of the issues are governed by state law. By contrast, federal jurisdiction is particularly appropriate when federal constitutional issues are central to the plaintiff's claim, as in *Smith*, even though the cause of action is based on state law. Even when the cause of action is federal, jurisdiction is denied in cases like *Shoshone Mining Co.*, where state law dominates the litigation and the disputes would overburden the federal courts.

3. Habeas Corpus. When the current statute was enacted in 1867, habeas corpus was a procedure permitting persons detained by federal executive authority to obtain judicial review of the legality of their confinement.[90] Furthermore, habeas corpus allowed persons held pursuant to federal judicial process to

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for damages to business caused by threat to sue under patent law because cause of action did not arise under federal patent laws).

[86] *See, e.g.*, Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900) (holding that merely because suit is adverse suit authorized by federal statute, that fact, in and of itself, is not enough to confer federal jurisdiction).

[87] Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

[88] Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983).

[89] William Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 905 (1967); *see also* Shapiro, *supra* note 66, at 568-70 (tracing case-by-case approach federal courts have used in asserting federal question jurisdiction).

[90] *See, e.g.*, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (holding federal circuit court judges are authorized to issue writs of habeas corpus for inquiring into purpose of defendant's confinement).

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challenge the jurisdiction of the committing court.[91] The 1867 statute simply extended habeas jurisdiction to persons held in state custody.[92] Although Congress subsequently has amended the statute only slightly, the law of habeas corpus has changed in fundamental ways. Virtually all habeas reforms have resulted from Supreme Court decisions that amount to a clear repudiation of formalist principles.[93]

The Court began in 1953 by expanding the issues cognizable on habeas.[94] This process culminated in *Brown v. Allen*,[95] when the Court ruled that any constitutional objection to confinement could be raised on habeas. In the 1960s, the Warren Court went further, toppling long-standing rules governing habeas cases. *Jones v. Cunningham*[96] redefined the term "custody," holding that a person could meet the statutory requirement even if he were not confined. *Fay v. Noia*[97] abolished the previous regime of strict procedural default in favor of a "deliberate bypass" test, under which habeas was barred only if the failure to raise an issue in state court reflected a conscious choice. Federal courts adjudicating habeas petitions primarily had relied upon prior state court findings of fact. *Townsend v. Sain*[98] instructed habeas courts to make their own factual investigations in a number of specified situations and whenever "the ends of justice" required.[99]

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[91] *See, e.g., Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830) (refusing to award writ of habeas corpus because committing court had general criminal jurisdiction); *see also* Stone v. Powell, 428 U.S. 465, 475 (1976) (noting that historically, judges limited federal habeas corpus jurisdiction to consideration of sentencing judge's jurisdiction).

[92] Act of February 5, 1867, 14 Stat. 385; *see* HART & WECHSLER, *supra* note 68, at 1466 (detailing scope of 1867 Habeas Statute).

[93] *See* Wainwright v. Sykes, 433 U.S. 72, 81 (1977) (describing Court's activism in habeas area).

[94] *See* Stone v. Powell, 428 U.S. at 475-76 (discussing expansion of scope of habeas corpus).

[95] 344 U.S. 443 (1953).

[96] 371 U.S. 236 (1963); *see* HART & WECHSLER, *supra* note 68, at 1569-72 (discussing later developments reflecting Warren Court's changes in habeas corpus cases).

[97] 372 U.S. 391 (1963).

[98] 372 U.S. 293 (1963).

[99] *Id. Townsend* led, in 1966, to congressional action modifying the criteria for holding a hearing on the facts; the statute is codified at 28 U.S.C. § 2254(d). *See also* Brewer v. Williams, 430 U.S. 387, 395 (1977) (noting that 28 U.S.C. § 2254(d) requires federal habeas corpus courts to accept as correct factual determinations of state court unless case falls within enumerated exception); HART & WECHSLER, *supra* note 68, at 1563-64 (discussing

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Since 1970, a more conservative Court has continued to evince the "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged."[100] *Wainwright v. Sykes*[101] and *Murray v. Carrier*[102] undermined and *Coleman v. Thompson*[103] finally overruled *Noia*. *Keeney v. Tamayo-Reyes*[104] overruled *Townsend*. *Stone v. Powell*[105] excepted Fourth Amendment issues from the general cognizability rule of *Brown*, and *McCleskey v. Zant*[106] restricted access to habeas for prisoners seeking to file a second petition. *Teague v. Lane*[107] and *Butler v. McKellar*[108] barred federal courts from granting habeas relief unless the state court violated the narrowest reasonable reading of Supreme Court precedents at the time the judgment became final.

These developments show that the Court has treated the habeas statute not as a constraint on judicial discretion, but as a vessel into which to pour its views of good jurisdictional policy. Though judicial activism has been a persistent theme ever since 1867, the past thirty years provide the best illustration of how shifts in the Court's agenda are reflected in its treatment of the habeas statute. In the 1960s, when a majority of the justices favored broad access to federal court and an expansive interpretation of constitutional rights, restrictions were lifted. When justices more sensitive to state finality interests were appointed, the habeas remedy contracted. The statute has not significantly constrained the Court's shifting majority from implementing its policy preferences.

C. PRECEDENT

The practice of deciding cases according to precedent is another process-based constraint on freewheeling judicial policymaking. By

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relation between *Townsend* and 28 U.S.C. § 2254(d)).

[100] Wainwright v. Sykes, 433 U.S. 72, 81 (1977).

[101] *Id.*

[102] 477 U.S. 478 (1986).

[103] 501 U.S. 722 (1991).

[104] 504 U.S. 1 (1992).

[105] 428 U.S. 465 (1976).

[106] 499 U.S. 467 (1991).

[107] 489 U.S. 288 (1989).

[108] 494 U.S. 407 (1990).

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adhering to rules announced in prior cases, a court gives up the option of rethinking the issue for itself and reviewing all the moral, political, and social considerations that bear on the question.[109] In federal courts law, however, fidelity to precedent is as rare as a good-faith effort to enforce statutory language and purpose. Examination of the Court's decisions reveals that policy preferences prevailing at a given point in time tend to outrank precedent as a guide to decisionmaking.[110]

Many instances of the Supreme Court's unwillingness to be restrained by precedent appear in its recent decisions. Time and time again the Justices either have explicitly overruled or significantly undermined jurisdictional doctrines instituted by the liberal Court of the 1960s. Some of these cases were discussed in the preceding section on statutory interpretation.[111] The Warren Court's constitutional decisions received no more deference from the Burger Court. *Flast v. Cohen*[112] allowed a taxpayer standing to challenge federal grants to religious schools as violations of the Establishment Clause. *Valley Forge Christian College v. Americans United for Separation of Church & State*[113] purported to distinguish *Flast* by denying standing to object to an executive department grant to a religious school. The distinction was, at best, contrived.[114] Similarly, the Warren Court's jurisdictional common-law decisions were unable to withstand the Burger Court's onslaught. For example, the 1965 case of *Dombrowski v. Pfister*[115] broadened access to federal court for First Amendment

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[109] *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) (examining use of precedent both in its legal context and elsewhere).

[110] Of course, lower courts are bound by the current set of Supreme Court rulings, which often significantly curtail their discretion. My point is that the Supreme Court itself does not give great weight to its own prior decisions.

[111] *See supra* notes 65-108 and accompanying text (discussing restraint on federal courts by statutory and constitutional interpretation).

[112] 392 U.S. 83 (1968).

[113] 454 U.S. 464 (1982).

[114] *See* Gene R. Nichol, Jr., *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C. L. REV. 798 (1983) (discussing Supreme Court's inconsistent use of standing doctrine to deny plaintiff's actions). Additionally, the Warren Court's tentative efforts to curb state sovereign immunity, in summary dispositions, were abruptly reversed in Edelman v. Jordan, 415 U.S. 651 (1974). *See* HART & WECHSLER, *supra* note 68, at 730 (summarizing *Edelman*'s holding).

[115] 380 U.S. 479 (1965).

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overbreadth claims by excepting such claims from the general rule against enjoining state proceedings. Just six years later, the new Court overruled *Dombrowski* in the seminal decision of *Younger v. Harris*.[116]

The current Court's targets are not limited to Warren Court landmarks. *Pennhurst State School & Hospital v. Halderman*[117] seriously undermined the rule of *Siler v. Louisville & Nashville Railroad*[118] that federal courts should, if possible, dispose of constitutional claims on state law grounds. In a move to bolster state sovereignty, the Supreme Court in *Pennhurst* refused to continue the decades-old practice of extending the *Ex parte Young*[119] fiction to state law claims.

The recent turmoil in federal courts law cannot be characterized as an aberration explicable by the rise of both liberal and conservative activism over the past forty years: Instability is a persistent feature of federal courts law. Throughout the course of our history and across a broad range of issues, precedents have given way to shifting policy agendas. *Coleman v. Thompson*[120] overruled *Noia*,[121] which in turn had overruled *Brown v. Allen*.[122] *Flast v. Cohen* treated *Frothingham v. Mellon*[123] as cavalierly as *Valley Forge* dealt with *Flast*.[124]

This pattern recurs in other areas. The law governing Supreme Court review of state judgments seems always to be in a state of flux, as the Court oscillates from one standard to another in reviewing ambiguous state rulings.[125] Sometimes the court has

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[116] 401 U.S. 37 (1971); *see* Michael Wells, *The Unimportance of Precedent in the Law of Federal Courts*, 39 DEPAUL L. REV. 357, 366-68 (1989) (discussing *Dombrowski* and its treatment in *Younger*).

[117] 465 U.S. 89 (1984).

[118] 213 U.S. 175 (1909).

[119] 209 U.S. 123 (1908).

[120] 501 U.S. 722 (1991).

[121] 372 U.S. 391 (1963).

[122] 344 U.S. 443 (1953).

[123] 262 U.S. 447 (1923).

[124] *See* Wells, *supra* note 116, at 357, 360-63 (discussing Court's treatment of *Frothingham* in *Flast*).

[125] *See* HART & WECHSLER, *supra* note 68, at 548 (providing explanations and examples of Court's varying standards).

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presumed that state decisions do not depend on federal law;[126] sometimes it has remanded cases for clarification;[127] and sometimes the Court has undertaken its own inquiry into state court decisionmaking.[128] In *Michigan v. Long*[129] the Burger Court rejected all these approaches in favor of a new one, under which it presumed that the state case rests on federal grounds.[130]

The same theme appears in legislative courts cases. Before *Commodity Futures Trading Commission v. Schor*[131] laid down a balancing test, the law designed to determine whether an Article I court was valid consisted of a series of failed attempts to articulate and enforce a rule.[132] It is too soon to tell whether a similar fate awaits *Schor* itself.[133] In these as in other areas of federal courts law, it is not impossible for the Court to construct rules governing jurisdictional issues; rather, the Court has preferred not to use rules.

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[126] *See, e.g.*, Lynch v. New York *ex rel.* Pierson, 293 U.S. 52 (1934) (presuming state decisions do not depend on federal law); Eustis v. Bolles, 150 U.S. 361 (1893) (same); Klinger v. Missouri, 80 U.S. (13 Wall.) 257 (1871) (same).

[127] *See, e.g.*, California v. Krivda, 409 U.S. 33 (1972) (per curiam) (remanding state decision for clarification); Herb v. Pitcairn, 324 U.S. 117 (1945) (same); Minnesota v. National Tea Co., 309 U.S. 551 (1940) (same).

[128] *See, e.g.*, Texas v. Brown, 460 U.S. 730 (1983) (providing example of Supreme Court making its own independent inquiry into state decisions); Oregon v. Kennedy, 456 U.S. 667 (1982) (same); Johnson v. Risk, 137 U.S. 300 (1890) (same).

[129] 463 U.S. 1032 (1983).

[130] Shortly after *Long*, the Court reverted to the practice of vacating and remanding. *See, e.g.*, Capital Cities Media, Inc. v. Toole, 466 U.S. 378 (1984). Perhaps *Capital Cities* can be distinguished, for there was no state court opinion at all. Further, the Court has sometimes failed to apply the *Long* principle in the habeas context, where jurisdiction of the district court depends on whether the state court relied on federal or state grounds. *See* HART & WECHSLER, *supra* note 68, at 552-53; *id.* at 71-74 (Supp. 1993) (describing Court's varying application of *Long* principle). *Compare* Harris v. Reed, 489 U.S. 255 (1989) (applying *Long* principle) *with* Coleman v. Thompson, 501 U.S. 722 (1991) (departing from *Long* presumption) *and* Ylst v. Nunnemaker, 501 U.S. 797 (1991) (same).

[131] 478 U.S. 833 (1986).

[132] *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 239-53 (1990) (discussing Court's approaches to determining legislative court validity).

[133] *Cf.* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 64 (1989) (holding that the Seventh Amendment requires jury trial in suit by bankruptcy trustee to recover a fraudulent conveyance, and leaving open the question "whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges"). This reasoning suggests a reversion to rule-based decisionmaking in the area, away from *Schor*'s balancing test.

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IV. UNDERSTANDING AND EVALUATING THE COURT'S PERFORMANCE

Why does the Supreme Court resist constraint by rules over a wide range of issues in federal courts law? Does it deserve criticism or praise for evaluating competing policies on a case-by-case basis rather than relying on pre-existing legislative or judicial directives? In addressing these questions, one must not be distracted by the merits of particular jurisdictional regimes. It is noteworthy that both the Warren Court and the conservative majority of the seventies and eighties took policy-oriented approaches to federal courts issues. This methodological continuity, coupled with sharp differences in reasoning and outcomes, demonstrates that the Court's thematic unwillingness to be bound by rules cuts across ideological lines. What needs to be understood, explained, and evaluated is the relative unimportance of constraints on judicial discretion in federal courts law. The issue is not the merits of one or another group of jurisdictional policy choices, but why the Court refuses to defer to earlier decisions and whether its persistent insistence on rethinking these issues for itself is defensible.

According to the Hart and Wechsler school, the answer lies in the value of principled adjudication and reasoned elaboration. This school contends that federal courts law should be understood as "a rich, fluid, and evolving set of norms for effective governance and dispute resolution, not as a system of fixed and determinate rules."[134] Furthermore, courts should not be bound by rules that leave them powerless to improve the law. Rather, "[w]hen reasons of fairness, prudence, practicality, coherence, or convenience strongly support a particular principle, courts should 'use every possible resource of construction' to arrive at the result that is so prescribed."[135]

There is, however, significant dissonance between this rationale for antipositivism and the Court's performance. The Court has not made "a rich, fluid, and evolving set of norms" in federal courts law. Instead, especially over the past forty years, the Court's

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[134] Fallon, *supra* note 1, at 965.

[135] *Id.* at 966 (quoting Hart, *supra* note 11, at 1399).

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jurisdictional regime has careened wildly in response to one or another dominant ideology. Similarly, the Court's reasons hardly have been limited to "fairness, prudence, practicality, coherence, or convenience." A more accurate characterization, based on the examples detailed in Part III, is that naked politics counts for as much or more than these more neutral reasons.

A better and simpler explanation begins with two propositions. First, following rules is easier where the sources of rules are clear and harder where the sources are obscure. In the latter context, the enemies of rule-based decisionmaking have an advantage from the start. Second, following rules has costs and benefits; those costs and benefits vary from one doctrinal context to another, and are weak in federal courts law.

A. UNRELIABLE SOURCES

Part of the reason why rules are weak in the federal courts context lies in the nature of the legal materials from which rules might be drawn. A necessary condition to following rules is that decisionmakers be able to determine what the rule is. There is no guarantee that decisionmakers will apply even a rule as straightforward as a stop sign, for they are never bound unless they choose to be. All the same, rule-based decisionmaking is easier in a context where the legal materials furnish unambiguous directions. If nothing else, it is easy to identify the putative rule.

By the same token, identifying a rule is difficult or impossible when the governing language is ambiguous or opaque or the context of the enactment lies in the distant past and is hard to recapture. Even when the legal materials are equivocal, dedicated formalists might try to confine their analysis of them to inquiries into the meanings of words, the structure of the enactment, the framers' contemporaneous statements, and other matters bearing on identifying a rule. But formalists likely will fail to persuade other participants in the interpretive process to do so. To the extent the textual sources of rules fail to give clear directions, there will be room for the forces on either side of interpretive issues to argue the merits as well.

In the federal courts context, the relevant legal materials include the constitutional provisions of Article III and the Eleventh

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Amendment, jurisdictional statutes, and precedent cases. I am not concerned here with precedents, which the Court can hand down whenever it pleases. The problem is that the statutory and constitutional sources for rules often fail to provide anything close to unambiguous guidance. Two examples, detailed earlier, are the odd wording of the Eleventh Amendment and the ensuing debates over the intent behind those words,[136] and the absence of any indication that the 1875 Congress thought through its apparent extension of federal question jurisdiction to its constitutionally permissible boundaries.[137] This theme also is illustrated by the Anti-Injunction Act and the 1867 Habeas Corpus Act. The intended scope of each of these statutes is at best murky: The Anti-Injunction Act may have been intended merely to limit the powers of an individual Supreme Court Justice to grant injunctions,[138] while the Habeas Statute, enacted just after the Civil War, may have been aimed at protecting the freedmen against new forms of bondage.[139] Frustration is the likely result of any inquiry into the content of the rule that the framers of such provisions may have had in mind. Article III,[140] the Eleventh Amendment, and many jurisdictional statutes invite policy analysis rather than rule identification.

The opacity of many federal courts law materials is only a partial explanation for the paucity of rules in the area. Whatever the failings of the constitutional and statutory provisions, the Court

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[136] *See supra* text accompanying notes 71-79 (discussing differing views of Eleventh Amendment, sovereign immunity).

[137] *See supra* text accompanying notes 80-89 (discussing Court's varying interpretations of federal question jurisdiction).

[138] *Compare* Mayton, *supra* note 68 (presenting evidence for narrow view of statute's intended scope) *with* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970) (taking far broader view of statute's intended reach).

[139] *Compare* Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965) (marshalling evidence for narrow view of habeas corpus) *with* 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) (arguing for broader view of habeas law).

[140] Akhil Amar believes that Article III contains a rule that federal jurisdiction must be available, at trial or on appeal, for any federal question. *See* Amar, *supra* note 2. Daniel Meltzer, however, has effectively rebutted the textual and structural arguments Amar offers. *See* Daniel Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1573-1608 (1990). Ironically, Meltzer thinks Amar's most persuasive arguments are those that emphasize modern policy considerations. *Id.* at 1612-13.

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could, if it wanted, develop rules in its case law. Yet we have seen that precedent is not especially strong either. A more fundamental objection to rules in federal courts law is that the normative case for rules is comparatively weak in this field.

B. THE COSTS AND BENEFITS OF RULES VS. POLICY-MAKING

Foes of formalism maintain that it does not serve worthy goals.[141] Adherence to a rule inevitably deprives a court of a chance to reconsider, in the light of new conditions or new arguments, the policy considerations bearing on the case at hand and perhaps to produce a better outcome than the one prescribed by the rule. Rules may continue to be applied long after conditions have changed or the values motivating them have lost their appeal. Nothing is more frustrating to the legal reformer than the attitude among judges or legislators that respect for the past forecloses rethinking of doctrines bearing on some issue, even if the law in the area is plainly foolish.

This argument is not without force; however, it hardly serves as an all-purpose refutation of formal argument. The opportunity to improve the law is lost through reliance on rules, and this is a real cost of formalism.[142] But that lost opportunity purchases something of real value. In exchange for foregoing the chance to make the law better, courts that follow rules help to maintain stability and predictability in the law, so that persons can manage their affairs without constantly worrying about potential changes[143] and expending resources in order to avoid the ill effects such changes may produce.[144] In addition, the chance to make the law

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[141] *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 130-48 (1990) (rejecting formalism as precluding best outcome in each case).

[142] *See* H.L.A. HART, THE CONCEPT OF LAW 121-32 (1961) (positing that reliance on rules costs courts opportunity to improve law).

[143] *See* RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 60-62 (1961) (discussing rules' abilities to allow persons to gauge their actions); *see also* Schauer, *supra* note 109, at 597 (same).

[144] *See* Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970) (distinguishing primary activity, where stable rules are important, from remedial law aimed at effectuating "well established primary rules"); MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 10-11, 48, 63, 96 (1988) (describing potential waste of resources); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 30-33 (3d ed. 1986) (contrasting static and dynamic aspects of rights);

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better carries with it the risk that a court which takes the opportunity to decide each case as it thinks best will end up making things worse than if it simply had followed a rule. Distrust of judges and other decisionmakers asked to administer the law is a powerful reason for legislatures and high courts to establish rules and insist that they be followed.[145] Finally, following rules is a more efficient way of resolving cases than undertaking a full-fledged policy analysis in each case. Given the demands on judges' time and energy and the need to decide cases within a reasonable time, rule-based decisionmaking often will be an attractive alternative.[146]

Here, then, is the central problem underlying the role of rules in federal courts law, or anywhere else. The normative value of formalism turns on a kind of cost-benefit analysis. Which of these competing values is more compelling: the potential benefits of exercising judicial discretion to arrive at the best possible result in a given case, or pursuing the more certain, if less exciting, goals of efficiency in adjudication, reinforcing the stability and predictability of law, and avoiding the ill effects of misjudgments on the part of well-meaning judges who really are botching the law? Determining whether rule-based decisionmaking is preferable to wide-ranging judicial discretion requires an evaluation of the pros and cons of these two approaches to adjudication.

1. Primary and Secondary Rules. This inquiry need not arrive at the same answer in every field of law;[147] on the contrary, the strengths of the interests at stake vary from one doctrinal context to another. Stability is especially important where persons enter into relationships or invest resources with an eye toward the future and need to be able to count on the rules remaining more or less

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WASSERSTROM, *supra* note 143, at 61-62 (discussing role of rules and effects on behavior).

[145] *See* SCHAUER, *supra* note 34, at 158-62 (using distrust of judges as reason to endorse formalism).

[146] *See* POSNER, *supra* note 144, at 515 (stating that adherence to precedent is most economical system for parties and tribunals); Schauer, *supra* note 109, at 599 (discussing rule of precedent as means for decisionmaking efficiency); WASSERSTROM, *supra* note 143, at 72-73 (same).

[147] *See* Schauer, *supra* note 31, at 542 (arguing that language of rules should restrict decisionmakers but "[w]hether, when, and where the game is worth the candle . . . cannot be determined acontextually").

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the same in order for the enterprise to prosper.[148] For this reason, arguments for stating the law in terms of rules and sticking to precedents are comparatively strong with respect to such matters as the construction of contractual terms, or "rules of property law governing the legal effect of dispositions of real estate, or other questions of title."[149] In some doctrinal contexts, it seems especially important to curb discretion on the part of trial judges and street-level officials. One justification for the *Miranda* rule, which requires officers to inform criminal suspects of their rights before interrogating them, rather than a regime in which the voluntariness of a confession turns on the totality of the circumstances, is that police and low-level officials cannot be trusted to give sufficient respect to suspects' rights in the absence of a hard rule obliging them to do so.[150]

By contrast, the balance of interests may well come out quite differently when the topic is the role of rules in jurisdictional law. In order to understand why, it is useful to recall H.L.A. Hart's distinction between primary rules, which "are concerned with the actions that individuals must or must not do," and secondary rules, which "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."[151] Bodies of law like torts, property, and contracts, which govern activity in daily life, are groups of primary rules. In contrast, the jurisdictional issues addressed in federal courts law, allocating cases between federal and state courts, regulating Supreme Court review of state judgments, identifying proper plaintiffs, and evaluating the present fitness of a dispute for resolution, are secondary rules.

Stability counts for considerably more in the legal regime governing primary activity than in federal courts law. Both for

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[148] *See, e.g.*, Kerr Steamship Co. v. Radio Corp. of Am., 157 N.E. 140, 142 (N.Y. 1927) (finding that changes in long-standing doctrines should come from legislature rather than courts).

[149] EISENBERG, *supra* note 144, at 122; *see also* Schauer, *supra* note 109, at 598 (discussing trade-off between efficiency of precedent and its suboptimal results).

[150] *See* Schauer, *The Occasions of Constitutional Interpretation*, 72 B.U. L. REV. 729, 734-37 (1992) (using *Miranda* as an example of why "many power-limiting aspects . . . are based on a distrust of the ability of certain governmental decision-makers to take, or refrain from taking, certain kinds of actions").

[151] HART, *supra* note 142, at 92.

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psychological well-being and to encourage investment in the future, people need to be able to count on stable rules of primary behavior. In deciding on the terms of a contract, the purchase of property, or whether to take a chance on a risky left turn, individuals do not consider whether any litigation that might arise will go to federal or state court.[152] On the other hand, an unstable regime of property law would have dire consequences for investment in improvements on property, for the owners would never know if they could reap the benefits of their efforts.

In contrast, people remain largely oblivious to jurisdictional law.[153] Process-based critics of federal courts law accurately note that "much uncertainty surrounds the decision of many jurisdictional issues."[154] Critics are wrong, however, to think that this uncertainty is a grave problem. An unstable body of law on Supreme Court review of state judgments, access to federal courts under the "arising under" jurisdiction, habeas corpus, or civil rights jurisdictional statutes, is unlikely to affect actors' everyday decisions, simply because these jurisdictional rules do not create rights and obligations. They merely determine the forums in which conflicting claims regarding rights and obligations defined by other bodies of law may be adjudicated.[155]

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[152] Wells, *supra* note 116, at 381. Before Erie R.R. v. Tompkins, 304 U.S. 64 (1938), forum choice could determine the rights and duties of the parties; the resulting unfairness was one reason for *Erie*'s holding that federal courts must follow state common-law rules in such cases. *Id.* at 74-78.

[153] *Cf.* Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970) (distinguishing primary activity, where stable rules are important, from remedial law aimed at effectuating "well-established primary rules"); *see also* Hanna v. Plumer, 380 U.S. 460, 474-78 (1965) (Harlan, J., concurring) ("The choice of the Federal Rule would have no effect on the primary stages of private activity from which torts arise, and only the most minimal effect on behavior following the commission of the tort.").

[154] Martha Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 684 (1981).

[155] The point here is not that jurisdictional law has no impact on the substantive rights and duties of litigants, only that it is not perceived as having such an impact by most people in the world of primary activity. My view is that jurisdictional arrangements have important, though indirect, substantive consequences. *See* Michael Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499, 516-18 (1989) (discussing substantive effects of jurisdictional arrangements in areas of standing and allocation of constitutional adjudication between state and federal courts).

Insofar as stability is important for psychological well-being and investment in the future, what matters is not the reality of things but the general perception, however inaccurate, of

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Although the distinction between primary and secondary rules is useful, it is hardly decisive in identifying decision-making realms where rules are or are not important. Tort law concerns primary activity, yet it is governed largely by standards like "reasonable care." Perhaps one reason is that most people do not anticipate having accidents in the first place and thus do not need more definite rules to govern their behavior. Conversely, in some aspects of jurisdictional law, predictability and efficiency still are worthy goals, even though primary rights and obligations are not at issue. Lawyers need to know whether their cases should be brought in federal or state court without the need for lengthy analysis or perhaps even judicial proceedings to determine jurisdiction.

An example of a jurisdictional doctrine that benefits from certainty is the well-pleaded complaint rule. Although complying with the well-pleaded complaint rule will not guarantee that a case will be allowed into federal court, failing that test will nearly always keep it out.[156] Knowing this, lawyers can plan their strategies more effectively than under a system in which federal question jurisdiction analysis hinges on the particular facts of the case. Another example is the rule of *Strawbridge v. Curtiss*[157] that limits diversity jurisdiction to cases in which all defendants are from states different from all the plaintiffs. By making

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that reality. If most people most of the time do not perceive a connection between jurisdictional rules and substantive outcomes, then instability in federal courts law is not a major problem. *See* Wells, *supra* note 116, at 382-83 (discussing effect of jurisdictional rules on case outcomes).

[156] *See, e.g.*, Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) (denying circuit court's jurisdiction where there was no diversity of citizenship and plaintiff failed to assert federal question). For an argument that the benefits of this rule come at too high a price, see Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Jurisdiction*, 38 HASTINGS L.J. 597 (1987).

Other examples of rule-based doctrines grounded in efficiency are collateral estoppel and res judicata. These doctrines preclude federal courts from re-examining issues actually litigated and causes of action that could have been litigated in prior state proceedings, even when the federal plaintiff raises constitutional claims. *See* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984) (denying petitioner's § 1983 claim, which was not litigated in state court; preclusive effect of state court judgment in federal court determined by state law); Allen v. McCurry, 449 U.S. 90 (1980) (rejecting view that state court judgments have no issue-preclusive effect in § 1983 suits).

[157] 7 U.S. (3 Cranch) 267 (1806).

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resolution of the diversity issue more predictable, this rule simplifies litigation at the price of keeping out of federal court some cases where the policies behind the diversity jurisdiction are powerful. Similarly, there is no access to Supreme Court review where the state court judgment rests on an adequate and independent state law ground,[158] even though there may be good reasons for reviewing a given state judgment within the scope of this rule.[159]

The durability of rules like these shows that the price of formalism is sometimes well worth paying. In the absence of specific rules on access to federal court, debates over jurisdictional issues would consume enormous amounts of time and energy. The current jurisdictional regime, particularly the doctrine of federal question jurisdiction, may give too little weight to the need for efficiency; but the argument must not be pushed too far. The reasoning behind it suggests the utility of drawing a distinction between jurisdictional issues that arise frequently and those that arise less often. Many federal courts issues, such as the propriety of abstention, the legitimacy of a legislative court, the scope of federal common law, the issue of justiciability, and the process of dealing with ambiguous state judgments, arise infrequently in practice. Although there are many habeas corpus cases, the instability here concerns the broad policies underlying access to habeas, an issue on which the Court only changes its mind once in a generation, and not the day-to-day administration of the law. In all these areas, the unpredictability arising from an absence of rules interferes little with efficiency in litigation simply because the issues do not often arise, regardless of how much effort it takes to resolve them when they do come up. On such questions, it seems appropriate for the Court to prefer an "all things considered" approach to adjudication over one that emphasizes the comparatively slight benefits of stability.

A recent sovereign immunity case, *Hilton v. South Carolina*

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[158] *See, e.g.*, Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) (denying federal jurisdiction where state decision rests on independent and adequate state law grounds).

[159] For arguments against the adequate and independent state ground doctrine, see Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291 (1986).

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Public Railways Commission,[160] illustrates another setting in which stability may be the dominant value. Years earlier, in *Parden v. Terminal Railway*, the Court held that workers injured on state-operated railroads could sue for damages under the Federal Employers Liability Act (FELA), notwithstanding the Eleventh Amendment and even though the FELA contains no explicit language authorizing suits against states.[161] After *Parden*, the Court undercut its rationale by requiring a "clear statement" by Congress in order to override state immunity.[162] *Welch v. Texas Department of Highways & Public Transportation*[163] then overruled the Eleventh Amendment ruling in *Parden* for the lack of a clear statement in the FELA.

The plaintiff in *Hilton*, an injured worker on a state railroad, sought to evade *Welch* by suing the state in state court, where *Welch*'s Eleventh Amendment holding would not by its terms preclude suit.[164] Yet the policy considerations behind *Welch* are equally applicable to suits in state courts. The Court adhered to the *Parden* precedent even though *Welch* had undercut its foundations.[165] Justice Kennedy's opinion explained, partially in reliance on *Parden*, that many workers' compensation laws "specifically exclude railroad workers from their coverage because of the assumption that FELA provides adequate protection for those workers."[166]

This case illustrates that the distinction I have drawn between primary and secondary rules is not always well taken. Jurisdictional rulings do sometimes induce reliance. In *Hilton*, abandoning the old rule in favor of following current policy would do more harm than good, for it would "dislodge settled rights and expectations or require an extensive legislative response."[167]

2. *Distrust.* Distrust of decisionmakers also cuts across the

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[160] 502 U.S. 197 (1991).

[161] 377 U.S. 184 (1964).

[162] *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (holding general authorization by state constitution for suit in federal court insufficient to abrogate Eleventh Amendment).

[163] 483 U.S. 468 (1987).

[164] *Hilton*, 502 U.S. 197.

[165] *Id.*

[166] *Id.* at 202.

[167] *Id.*

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primary-secondary distinction. One might have little confidence in the ability of a decisionmaker to handle the policy issues bearing on jurisdictional rules, and some of the situations in which the Supreme Court does choose to make rules in federal courts law may well be explained in just this way. Consider three well-entrenched rules: *Donovan v. City of Dallas*[168] barred state judges from enjoining federal judicial proceedings; *Tarble's Case*[169] forbade state judges from granting habeas corpus release to a person in federal custody; and *Testa v. Katt*[170] told state courts that they may not refuse to adjudicate federal causes of action, except in exceptional circumstances.

Are these cases embarrassments to my argument that the costs of rule-based decisionmaking generally are greater than its benefits in the federal courts context? On the contrary, they illustrate the utility of thinking about the appropriate role of rules as a contextual analysis of costs and benefits. The case for rules is stronger in connection with the issues addressed in cases like *Donovan*, *Tarble*, and *Testa* than it is in much of the rest of federal courts law. *Donovan* and *Tarble* concern the powers of state judges to interfere with the operation of the federal government. Where crucial governmental interests are at stake, the Supreme Court evidently lacks confidence in state courts' judgment.[171] The issue in cases like *Testa* is whether the supremacy of federal law may be sacrificed to the state court's preference not to adjudicate federal questions. Rather than entrust that inquiry to the state court's discretion, the Supreme Court prefers a general rule subject to a

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[168] 377 U.S. 408 (1964).

[169] 80 U.S. (13 Wall.) 397 (1871).

[170] 330 U.S. 386 (1947); *see also* Howlett v. Rose, 496 U.S. 356 (1990) (holding state law sovereign immunity unavailable to school board in § 1983 action brought in state court if it would be unavailable in federal court); Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1 (1912) (holding that state court cannot, on grounds of inconvenience or confusion, refuse to enforce remedy given by act of Congress in regard to subject within Congress's domain).

[171] *Cf.* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (ascribing civil liberties lawyers' preference for federal court to institutional differences between state and federal courts, the latter of which are more likely to rule in favor of federal claims).

Interestingly, the Court does *not* distrust state courts in the civil liberties context. *See, e.g.*, Deakins v. Monaghan, 484 U.S. 193, 203 (1988) (it would be "inappropriate" to assume "that the States cannot be trusted to enforce federal rights with adequate diligence"); Allen v. McCurry, 449 U.S. 90, 105 (1980) (similar); Stone v. Powell, 428 U.S. 465, 493-94 n.35 (similar).

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narrow exception for such neutral concerns as forum non conveniens and lack of territorial jurisdiction.[172]

By contrast, federal district and circuit judges usually receive much more leeway.[173] The parts of federal courts law that the Court formulates as standards, like justiciability, norms for making federal common law, and criteria for assigning cases to legislative courts typically afford federal judges broad discretion. From the Court's perspective, this group of decisionmakers may seem more trustworthy, in general, than the street-level officers and state judges that must be kept under careful watch with substantive rules like *Miranda* and jurisdictional rules like *Donovan*, *Testa*, and *Tarble*. In any event, review by the circuit courts and the Supreme Court furnish an alternate means of controlling wayward decisions. In these circumstances it is easy to appreciate the benefits of a doctrinal system that forgoes rules in favor of a more nuanced analysis of an array of factors.

Thus far this analysis has begged crucial issues relating to the most important federal courts policymaker of all: Is the Supreme Court itself a trustworthy lawmaker? And who decides that question? What sanctions are available if the Court goes astray? On constitutional questions like the meaning of Article III and the scope of the Eleventh Amendment, *Marbury v. Madison*[174] means that for practical purposes, the Supreme Court almost always is the ultimate policymaker. The Court is answerable only to future majorities on the Court and to the amendment process.

Congress may override most Supreme Court lawmaking in the jurisdictional area, for most federal courts issues are matters of statutory and jurisdictional common law. Yet a fair characteriza-

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[172] *See, e.g.*, Herb v. Pitcairn, 324 U.S. 117 (1945) (involving territorial jurisdiction); Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929) (involving forum non conveniens).

[173] An exception is the rule in Younger v. Harris, 401 U.S. 37 (1971), which forbids federal adjudication of constitutional challenges to pending state prosecutions. Six years earlier the Court had opened the federal courthouse door to such suits. *See* Dombrowski v. Pfister, 380 U.S. 479 (1965) (enjoining prosecution under subversive activities and Communist control law when First Amendment rights not adequately protected). The result was a torrent of new federal litigation. *See* Frank L. Maraist, *Federal Injunctive relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535, 606 (1970). The *Younger* rule may have successfully cabined this kind of litigation. *See also supra* note 57 (discussing *Younger* abstention).

[174] 5 U.S. (1 Cranch) 137 (1803).

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tion of Congress's activity in the field is that it enacted a number of highly ambiguous jurisdictional statutes between 1789 and 1875 and then left it up to the Court to construct a jurisdictional regime around them.[175] Congress might have kept a close watch on this process and ensured that the Court implemented Congress's policy preferences. In practice, it has stepped in only rarely to override a Supreme Court decision.

Martin Redish argues that the Court violates the separation of powers when it rejects formalist principles in interpreting jurisdictional statutes.[176] Keep in mind, however, that the availability of congressional revocation stands as a safeguard against abuse of the Court's assertion of authority.[177] For this reason, a broad role for the Court in the jurisdictional area may be more acceptable than it is in constitutional law, where Congress cannot readily overturn decisions of which it does not approve. This notion of ratification-by-inaction is easily abused and should be viewed with caution. However, a sustained practice over two centuries in an area of high visibility is rather different from, say, congressional silence in the face of a single decision in an obscure area of the law. The course of events suggests that the Court long ago decided that it is the better lawmaker on jurisdictional issues, and Congress seems to have agreed.

V. CONCLUSION

Federal courts law is more antipositivist than positivist, though not so much so as Hart and Wechsler's antipositivist principle would suggest. More important, the reasons for rules' weak role in the area can be explained in terms of their high costs and low benefits in the federal courts context. It is not necessary to rely, as Fallon and other adherents of Hart and Wechsler would have it, on

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[175] *See* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990) (discussing nineteenth-century jurisdictional statutes and the Court's response).

[176] *See* Redish, *supra* note 2 (arguing Court's rejection of formalism in jurisdictional context violates separation of powers).

[177] *See* Althouse, *supra* note 66, at 1048-49 (emphasizing congressional power over Court's jurisdiction).

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the normative value of a coherent and principled body of federal courts doctrine.

If Fallon were right, it would be hard to explain the parts of federal courts doctrine in which rule-based decisionmaking thrives, such as the rules forbidding state judges from enjoining federal judicial proceedings, granting habeas corpus to federal prisoners, and refusing to adjudicate federal causes of action;[178] the well-pleaded complaint rule;[179] and the complete diversity rule.[180] Preoccupied with the more general features of the Hart and Wechsler paradigm, Fallon does not examine the antipositivist principle closely enough to uncover these pockets of positivist doctrine. Further, Fallon fails to explain why the Court's decisions in these areas do not obey the general principle that federal courts law should be understood "as a rich, fluid, and evolving set of norms for effective governance and dispute resolution, not as a positivist system of fixed and determinate rules."[181] It is doubtful that any such explanation is possible within the confines of the Hart and Wechsler paradigm. The effort to achieve coherence in the law is a foundational principle of Hart and Wechsler and of the Legal Process in general.[182] Rule-based decisionmaking always is at odds with the demands of coherence, for following a rule necessarily deprives the decisionmaker of the opportunity to improve the law.[183]

By contrast, I have proposed a pragmatic analysis of the role of rules in federal courts law. The pragmatic model avoids reliance

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[178] *See supra* text accompanying notes 168-172 (citing these three areas of federal courts law where cost-benefit analysis favors adherence to rules).

[179] *See supra* text accompanying note 156 (identifying well-pleaded complaint rule as an area of federal courts law that is amenable to rule-based decisionmaking).

[180] *See supra* text accompanying note 157 (stating complete diversity rule lends itself to formalist approach).

[181] Fallon, *supra* note 1, at 965.

[182] *See* HART & SACKS, *supra* note 8, at 143-50 (discussing coherence in the law); RONALD DWORKIN, LAW'S EMPIRE 167 (1986) (same); ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 47 (1970) (same); HERBERT WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 21 (1961) (same); *see also* White, *The Evolution of Reasoned Elaboration*, *supra* note 8, at 286-91 (discussing Hart & Sacks's "Reasoned Elaboration").

[183] *See* Frederick Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847, 848-50 (1987) (discussing formalism's lack of ability to make positive legal changes).

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on foundational principles like coherence[184] or, for that matter, positivism. As applied to the question of whether the law should be formulated in rule-like terms, the pragmatic paradigm stresses the costs and benefits of rule-based decisionmaking and the varying value of rules across doctrinal contexts. This approach is descriptively more powerful than the Hart and Wechsler paradigm, in that it can account not only for the general antipositivism of federal courts law, but also for the areas in which rules do dominate the doctrine. It is normatively more appealing than Hart and Wechsler because the value of coherence that animates the Legal Process is not especially strong in areas like federal courts, where primary rights and obligations are at stake only indirectly, if at all.[185] Where coherence is not a compelling value, pragmatic concerns should have controlling force. So it is with regard to the role of rules in federal courts law.

Although the foregoing discussion of federal courts methodology may seem to have little practical relevance, I believe it actually has profound implications for the future of federal courts doctrine. As the recent dramatic developments in habeas corpus jurisdiction illustrate, barriers to sweeping change, whether based on rules or coherence, are in fact comparatively weak here. Just as the Warren Court revolutionized the area by increasing the scope of federal judicial power, the Burger and Rehnquist Courts that followed dismantled much of the jurisdictional edifice erected in the 1960s. If history is any guide, we should not expect the current jurisdictional regime to endure much beyond the working lives of the Supreme Court Justices who made it.

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[184] *See* Wells, *supra* note 3, at 567-68 (proposing pragmatic paradigm of federal courts law in which "the strength of a value may vary according to context").

[185] *Id.* at 570, 576-85.

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