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# Rhetoric and Reality in the Law of Federal Courts: Professor Fallon's Faulty Premise

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# RHETORIC AND REALITY IN THE LAW OF FEDERAL COURTS: PROFESSOR FALLON'S FAULTY PREMISE

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Richard Fallon's recent article, "The Ideologies of Federal Courts Law,"[1] offers valuable insights into a bewildering body of Supreme Court doctrine. He effectively demonstrates the "substantial doctrinal instability" (p. 1164) of this body of law, and also discerns a pattern amid the chaos. Fallon's treatment of the case law and the scholarship is fair-minded, meticulous and incisive.

I disagree, however, with one aspect of Fallon's thesis. In my view, he falters when identifying sources of the discontinuity in the doctrine. In Part I of his article he argues that the decisions reflect "two sets of incompatible assumptions" which "influence . . . thought about judicial federalism issues" and "produc[e] a conflicted and self-contradictory body of law." (p. 1143) The "Federalist" model favors state courts and views the states as sovereign entities at least in some respects free from national control. (pp. 1151-57) The "Nationalist" model would abrogate state sovereignty and assign a larger role to federal courts in constitutional adjudication. (pp. 1158-64) At the outset of the article, Fallon declares that his models represent two divergent "deep structures of understanding" of the federal system and the roles within it of federal and state courts. (p. 1147) He insists that the models are not reducible to "crudely political" stances aimed at attaining conflicting substantive goals. (p. 1147)

I believe Fallon is mistaken in thinking that the clash between partisans of the Federalist and Nationalist models can be traced to disagreements over governmental structure and judicial roles. The value of Fallon's models depends on how they fare in comparison with a raw ideological approach or the task of explaining what the Court does and why. I find that they do not illuminate the case law

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1. Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988). (The article is hereafter cited by page number only.)

as well as a straightforward emphasis on substance and hence are inferior to the "crudely political" thesis Fallon rejects. In short, Fallon's thesis is wrong. The conflict and contradiction in this area rest on politics rather than conflicting "deep structures of understanding" of the federal system.

The difference between Fallon's reading of this body of law and mine is rooted in our beliefs about the nature of the law of federal courts. Fallon thinks that law, including federal courts law, is partially autonomous from politics, so that judges are not merely political actors. They adopt Federalist or Nationalist ideology because of divergent views as to what constitutes the best distribution of power between federal and state courts. In making allocation decisions, they implement a theory of governmental structure and judicial roles, but do not simply seek to further one or another set of outcomes on the merits of constitutional issues.

It seems to me this latter, "crudely political" view of judicial motivation yields a more plausible and more powerful account of most judges' behavior than does Fallon's thesis. Since state courts are more likely than federal courts to favor the state in resolving the merits of hard constitutional cases, jurisdictional questions present the Court with an opportunity to promote either the individual's interest in stronger constitutional guarantees or the state's interest in greater regulatory authority. The primary reason the Warren Court broadened federal jurisdiction for civil rights plaintiffs and habeas corpus petitioners was to enhance their chances of winning lawsuits. The Burger Court's cutbacks on federal jurisdiction are motivated largely by a desire for state regulatory interests to prevail more often.

This is the reality of federal court's law. Judicial talk about comity and state sovereignty on the one hand, and the tradition of broad federal jurisdiction to enforce federal rights on the other, is little more than rhetorical window dressing. Fallon is aware of the powerful arguments favoring the crudely political thesis (pp. 1146-47 & nn.17-18), and he occasionally comes close to acknowledging the strong role of substance, but he can never quite bring himself to face the terrible truth (pp. 1148, 1228, 1250).

In part I of this Comment, I describe Fallon's thesis in sufficient detail for the benefit of readers who are not familiar with his article. In Part II, I examine the foundations of Fallon's models. I argue that the models do not offer as powerful an explanation of the doctrinal chaos as the crudely political thesis he shuns as "a reductionist mistake." (p. 1347) I conclude with some thoughts on why Fallon mistook raw ideology for deep structures of understanding.

## I

Professor Fallon's topic is the case law and scholarship bearing on "judicial federalism," a term he uses "to encompass virtually all questions involving the respective competencies of state and federal courts to adjudicate issues and award remedies in cases of joint state and federal interest." (p. 1142 n.1) Some of these problems arise when a litigant seeks to challenge state or local governmental action on federal constitutional grounds, and the Court must determine whether to assign the adjudication of these issues to state or federal court. This category embraces the *Younger* doctrine and other restraints on federal court interference with state proceedings, the scope of the states' eleventh amendment immunity from suit in federal court, the extent of Congress's power to limit the jurisdiction of federal courts, and the federal district courts' authority to grant relief to state prisoners on habeas corpus. Fallon also deals with cases bearing on the power of state courts over federal officers and on their power to refuse to enforce federal law.

Some of these matters are ostensibly questions of statutory interpretation, such as the relation of the anti-injunction act and the full faith and credit statute to section 1983. Others, like congressional power over federal jurisdiction and the eleventh amendment immunity, are constitutional questions. The *Younger* doctrine and similar abstention rules are judge-made limits on the exercise of federal jurisdiction.

Whatever the source of particular rules, the whole area "is wracked by internal contradictions." (p. 1142) For example, the Court held in *Mitchum v. Foster*[2] that federal courts in section 1983 cases may enjoin state proceedings in order to enforce federal rights, in spite of the anti-injunction act. A year earlier it had relied on the policy of federal-state comity underlying the anti-injunction act to hold, in *Younger v. Harris*,[3] that such interference is generally inappropriate. *Mitchum* emphasized the intent of the framers of section 1983 to provide access to federal court despite the availability of a state forum. Yet later decisions oblige the federal courts to defer to prior state judgments, on account of the full faith and credit statute and common law principles of res judicata and collateral estoppel.[4] As for the eleventh amendment and state sovereign immunity, the Court has held that the states are immune from suit in federal court

2. 407 U.S. 225 (1972).

3. 401 U.S. 37 (1971).

4. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984); Allen v. McCurry, 449 U.S. 90 (1980).

even where the plaintiff asserts constitutional claims,[5] that the immunity may be circumvented by naming an officer rather than the state as defendant,[6] but that this technique cannot be used for state-law claims.[7] The Court has also held that the state officer loophole applies only to "prospective" and not "retrospective" relief even on federal grounds,[8] but that a remedial reading program for black children subjected to segregated schooling in the past is "prospective" relief.[9] More examples, amply proving Fallon's assertion that this body of law is characterized by "contradiction, unpredictability, and volatility" (p. 1224) may be found in Part II of his article, where he discusses these and other issues. (pp. 1164-1224)

How shall we account for this confusion in federal courts doctrine? While much of the law of judicial federalism is formally statutory or constitutional, neither these texts nor the circumstances attending their enactment provide much guidance in determining how they should be read. (pp. 1147-48, 1226, 1228, 1250) Most of the relevant provisions date from the early years of the republic, and so were not drafted with current conditions or issues in mind. (pp. 1165, 1173) In addition, the legislative histories of these enactments contain contradictory elements, so that conscientious efforts to derive their meaning may yield divergent conclusions. (pp. 1188-93) Finally, some of them come to us with little or no legislative history to work with (p. 1174 n.131), or else the legislative history includes scant treatment of jurisdictional issues.[10]

For these reasons, the legal materials bearing on questions of judicial federalism are open to widely disparate interpretations, and the perspective a judge or scholar brings to an issue takes on enormous weight. (pp. 1165, 1173) Here we come to the crux of Fallon's argument. He discerns in the cases and the literature two competing sets of premises (pp. 1152-54, 1158-60), or assumptions (p. 1143), or "ideologies" (pp. 1141, 1147, 1150), regarding the respective roles of state and federal courts in our system. He argues that the tensions in the case law arise from the tensions between these two broad perspectives. (pp. 1150-51, 1223-24)

Fallon identifies a "Federalist" model and a "Nationalist" model. Since these models are vital to Fallon's thesis and to my

5. Hans v. Louisiana, 134 U.S. 1 (1890).
6. Ex Parte Young, 209 U.S. 123 (1908).
7. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984).
8. Edelman v. Jordan, 415 U.S. 651 (1974).
9. Milliken v. Bradley (II), 433 U.S. 267 (1977).
10. *See, e.g.*, Wells, *The Past and the Future of Constitutional Torts*, 19 CONN. L. REV. 53, 65-68 (1986) (on the legislative history of section 1983).

critique, it is useful to set them forth in full. The premises of the "Federalist" model are:

> (1) Within the constitutional scheme, the states retain many of the prerogatives and responsibilities, and therefore must enjoy at least some of the immunities, associated with the concept of sovereignty. (p. 1152)
>
> (2) State courts are constitutionally as competent as federal courts to adjudicate federal issues and to award remedies necessary to vindicate federal constitutional norms. (p. 1153)
>
> (3) Absent clear evidence to the contrary, it should be presumed that Congress, in enacting jurisdictional legislation, regards the state courts as being as competent as federal courts to adjudicate federal issues fairly and expeditiously.
>
> (4) Absent clear evidence to the contrary, federal judges should assume that state courts are as fair and competent as federal courts in the enforcement of federal constitutional norms and should craft doctrines of judge-made law accordingly. (p. 1154)

The premises of the "Nationalist" model are:

> (1) The Constitution embodies a strong conception of national supremacy that exalts federal interests, especially the federal interest in the effective enforcement of constitutional rights, above asserted state sovereignty interests.
>
> (2) The Constitution contemplates a special role for the federal judiciary, different in kind from that assigned to state courts, in ensuring the supremacy of national authority. (p. 1159)
>
> (3) Absent clear evidence of contrary legislative intent, there should be a presumption in the construction of jurisdictional statutes that Congress generally legislates sympathetically to federal rights by authorizing easy access, as of right, to the lower federal courts.
>
> (4) Absent clear evidence to the contrary, federal judges should assume that federal courts are likely to be more prompt and effective than state courts in protecting federal constitutional rights, and they should craft doctrines of judge-made law that permit the federal courts to act as the presumptively available enforcers of constitutional norms. (p. 1160)

Judges reach conflicting answers to judicial federalism issues because "the relevant legal materials either are vague or point in conflicting directions," so that "it is virtually impossible to test the persuasiveness of competing evidence, arguments, and interpretations without at least an informed understanding of the generally prevailing systemic norms." (p. 1157, pp. 1163-64) Accordingly, in adjudicating specific issues, a judge who begins from Federalist premises will tend to favor a much larger role for state courts than his counterpart who holds Nationalist views. This disagreement over premises helps to account for the differences between the opinions of Justices Frankfurter, Harlan, Powell, O'Connor and Rehnquist, on the one hand, and those of Justices Douglas, Brennan, Marshall, Stevens, and Blackmun on the other. (p. 1146, pp. 1156-57, 1162-63, 1146)

## II

Fallon believes that these models possess considerable explanatory power. They are not merely "rhetorical structures" (p. 1149) employed to rationalize results reached on other grounds. Rather, they "serve as ideal types of structures of thought about judicial federalism," which "illuminate a number of areas of conflict and contradiction." (p. 1145) In his view, "for some serious federal courts thinkers" these "deep structures of understanding may determine the resolution of many questions." (p. 1147) Attention to the models "can sharpen understanding of the conflict and contradiction embodied in present law and of the tendencies of thought that produce them." (p. 1150)

It is here that Fallon errs. His models accurately summarize the divergent rhetorical traditions judges bring to adjudicating issues of judicial federalism. But the models do not explain the underlying sources of conflict in the case law. On the contrary, these models do more to obscure than to reveal the real reasons behind the opinions. Judges are motivated by substantive values far more than by abstract propositions about the structure of government or the respective roles of federal and state courts. Fallon's models are merely tools for arriving at jurisdictional rulings designed to promote one or another set of outcomes in constitutional cases.

What are the sources of Fallon's models? Why would someone adopt one or the other set of premises as a guide to the resolution of jurisdictional issues? Fallon focuses primarily on history. The two models reflect different interpretations of the 1787 constitution, the first eleven amendments, and the Civil War amendments. Federalists think "the Constitution is most importantly a document that allocates power among entities of government." (p. 1152) They maintain that "the framers continued to view the states as important," (pp. 1152-53) and that the eleventh amendment "embod[ies] a fundamental principle of state sovereign immunity." (p. 1153)

The third federalist premise, on construing jurisdictional legislation, relies not only on the intent of the framers but on a theory of "congressional psychology," which "posits that Congress ordinarily legislates consistently with the assumption of state court parity that underlies article III and the supremacy clause." (p. 1155) The fourth premise, guiding judges as they make jurisdictional rules, is based not only on "the dignity of the state in the constitutional scheme" but also on "[s]everal instrumental arguments," including "elicit[ing] the wisdom and expertise of state courts," the "political desirability" of assigning constitutional challenges to state courts,

and a judgment that allocating these cases to state courts will "improve the quality of state court justice." (p. 1155)

The Nationalist model "provides a revisionist interpretation of the original Constitution" and "also finds historical foundations in the revisions of federal relations . . . that followed the Civil War." (p. 1158) Nationalists stress that "proponents of broad national authority" prevailed at the Convention. They contend that the 1787 document "should be interpreted as embodying their historical triumph," that is, "as vesting very expansive powers in Congress, even against the states, and as contemplating federal jurisdiction adequate to vindicate national supremacy over anticipated state recalcitrance." (p. 1158) Nationalists find further support for their theory of judicial federalism in the Civil War amendments. The thirteenth, fourteenth, and fifteenth amendments placed important new restraints on the states and authorized Congress to implement those limits by legislation. As a result, "state sovereignty . . . must be viewed as vastly diminished, if not eviscerated, by the Reconstruction amendments." (p. 1159)

The Nationalist model also rests on "two empirical propositions and one normative judgment." (p. 1161) The empirical claims are "that state courts are not as fair and effective as federal courts in enforcing constitutional rights," and that Congress, in enacting such statutes as section 1983, "acted out of suspicion, if not antipathy toward state courts and wholly rejected notions of practical parity." (p. 1161) The normative judgment is that "the value of enforcing constitutional liberties" takes priority over "the structural values asserted to protect state sovereignty and efficiency interests." (p. 1162)

It is evident from this Nationalist "normative judgment" that substantive considerations figure in the choice between the two models. A judge who values constitutional liberties more than state sovereignty is more likely to adopt the Nationalist premise than one who does not. But Fallon does not think judges decide jurisdictional questions on the basis of whether federal or state courts are more likely to decide the merits as they would prefer. He considers it "a reductionist mistake to view federal courts arguments as nearly always crudely political ones in which judges and theorists claim for their predilections the status of law." (p. 1147) A judge's "ideological orientation" matters, but not in such a naked and unadorned form. Rather, "the models illuminate the way in which ideology exerts its influence." (p. 1147) While some judges may take a crudely political stance on these matters, "[a]t least for some serious federal courts thinkers, deep structures of understanding may deter-

mine the outcome of many questions."[11] (p. 1147)

Fallon holds an unwarranted belief in the explanatory power of his models. In claiming so much for them, Fallon seems to misunderstand the nature of these models and their role in adjudication. The models are not "deep structures of understanding" which can "illuminate" the opinions. Fallon himself takes pains to explain them as encapsulated statements of judgments reached on the basis of inquiry into the intent of the framers of the 1787 constitution, the eleventh, thirteenth, fourteenth, and fifteenth amendments, important jurisdictional statutes, and on the basis of various psychological, empirical, and value judgments. The reality that illuminates and explains the decisions is not the rhetoric that judges and academics deploy to justify their views on allocation issues, but the reasons why they choose one or the other of these rhetorical structures. (pp. 1163-64)

Focusing on the foundations Fallon lays for the premises of his models leads us to a fundamental objection to his thesis. As the description of those foundations in the foregoing section demonstrates, Fallon resorts heavily on judgments about the intent of the framers as sources for the models. Yet the power of the models themselves derives from the ambiguity, gaps, and conflict in the materials bearing on the intent of the framers. It is precisely because those materials can yield diametrically opposed interpretations that the assumptions comprising the models exert so much influence on outcomes. (pp. 1147-48, 1163-64, 1165-66, 1173-77, 1180-83, 1189-93, 1216-20, 1226, 1228, 1250) The significance of the models lies largely in the gravitational force they exert on groups of judges and academics, dividing the universe of solutions into two in the large body of cases where the intent of the framers is open to debate, and pulling everyone into one or the other camp.[12] (pp. 1157, 1162-63)

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11. The importance of Fallon's contribution depends not merely on whether "some serious federal courts thinkers" are influenced by considerations other than raw ideology. It depends on how many of them are. To the extent Fallon seeks to explain the case law it depends on how many judges respond to such factors.

12. The substantive values a judge brings to the analysis of federal courts issues colors not only his approach to discerning the framers' intent, but also many of the other considerations Fallon identifies as underpinnings of the models. The value choice embodied in the fourth Nationalist premise is self evident. The Nationalist "empirical judgment" that federal judges are more competent and sympathetic to federal rights reflects a preference that claims of federal substantive right prevail over contrary state interests in close cases where the choice of forum could make a difference in the resolution of the merits. The Federalist rejection of this premise is similarly motivated. *See* Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283, 296-302, 319-24 (1988). The Federalist emphasis of state sovereignty is even more directly substantive if it entails absolute state immunity from suit, for immunity is tantamount to absolving the state of substantive obligations and denying the plaintiff's claimed

How can the models be based on judgments about the intent of the framers and at the same time be determinants of decisions about their intent? Fallon escapes this dilemma by reminding us of the role of political, or substantive, or ideological considerations. Because the historical materials are ambiguous, the ideological orientation a judge brings to their interpretation takes on enormous importance. (pp. 1148, 1163, 1228, 1250) But if this is so, then ideology determines the way historical materials are read, and the historical materials themselves provide little if any underpinning for the models. Their inspiration is largely, if not wholly, political.

Why, then, is a "crudely political" reading of the cases "a reductionist mistake"? (p. 1147) Fallon does not seem to recognize the tension between his claim that ideology determines how a judge will interpret historical materials and his denial that judicial motivation can be reduced to political terms. It is probably wrong to conclude that Fallon's account of his models is internally inconsistent. No doubt he means to say that ideology may affect the interpretation of historical materials without necessarily determining the answers to questions about the framers' intent, for the historical materials themselves may restrict the range of choice. In addition, ideological orientation may be understood in more principled terms than the substantive thesis would imply. Judges may resort to it not to promote one or another outcome on the merits but only to implement their preferences on questions of governmental structure and the respective roles of federal and state courts within the federal system.

Notice, however, that Fallon does not bother to justify his dismissal of the reductive approach, which I will call "the substantive thesis." He disposes of the problem by dropping a footnote in which he cites a brief passage from an article by Jefferson Powell about Justice Rehnquist's theory of federalism. (p. 1146 & n.19) Professor Powell claims that Rehnquist's predilection for state power is motivated by a principled commitment to federalist governmental structure and not a belief that state governments and state courts are more likely to share his substantive values.[13] Whatever the merits of Powell's evaluation of Rehnquist's sincerity,[14] this one citation standing alone is hardly an adequate response to the substantive thesis.

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rights. The "instrumental factors" behind Federalist thought are of secondary importance in explaining the cases. *See id.*, at 302-07, 315-18.

13. *See* Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1362-63 (1982).

14. For a more skeptical appraisal, see Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

Let us then compare the substantive thesis with Fallon's models. If Fallon is right, then judges will remain faithful to the models even when their substantive goals would counsel betrayal of these principles of governmental structure and judicial role. We may then ask whether Fallon's models illuminate or explain reality as well as the crudely political approach he rejects. In my view, raw ideology is a much more convincing explanation for the behavior or participants in judicial federalism controversies than the modulated ideology Fallon seems to favor.[15]

This judgment is based in part on what we can learn by putting the allocation issue into historical perspective, and in part on the superior explanatory power of the substantive thesis. No one disputes that the group of contemporary judges who favor broad federal jurisdiction is roughly the same as the group favoring liberal and libertarian views, while judges who favor state interests on the merits also support greater state court power. (pp. 1156-57, 1162-63) From a substantive point of view, the reason for the similarity of the groupings is plain enough. Federal courts are more likely than most state courts to favor liberal and libertarian positions on the merits.[16] One's position on jurisdictional issues is dictated in large part by these substantive considerations.

In terms of Fallon's models, this fit between jurisdictional views and substantive outcomes must be more or less a happy coincidence for judges. Suppose the Republicans stay in office long enough, remain committed to moving the federal courts to the right, and find sufficiently accurate litmus tests for the selection of new judges to accomplish this feat. In that event, the federal courts may become more conservative than many state courts. If Fallon is right, then adherents of the Federalist model will remain faithful to it even if their substantive values would be better served by broadening federal jurisdiction.[17]

I am skeptical that judges are so deeply committed to principles of governmental structure and judicial role. On the contrary, our history suggests that political groupings choose sides in the jurisdictional contest depending on how they think jurisdictional rules

15. I do not claim that historical materials and the other considerations Fallon identifies as underpinnings for his models exercise *no* restraint on judges in judicial federalism cases, nor that ideology *never* operates on the plane of systemic structure and institutional rules. For example, I would describe Justice John Harlan and Professor Henry Hart as principled Federalists. The question is which approach packs *more* explanatory punch, Fallon's models or the crudely political interpretation he shuns. I argue that the substantive thesis is a more powerful tool for illuminating the cases.

16. *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121-28 (1977).

17. Since Nationalist judges and scholars typically advocate giving the constitutional claimant a choice between federal and state court, they would not face a similar difficulty.

will affect the merits. At times the dominant mood in the federal courts has not favored liberal political positions. In the era of substantive due process, federal courts were more sympathetic than state courts to the constitutional claims advanced by business interests. In those days, political liberals favored state court jurisdiction and conservatives pushed for greater federal court power.[18] Before the Civil War state courts in the North were less sympathetic than federal courts to slaveowners' suits to recover fugitive blacks. Southern slaveowners sought expansive federal jurisdiction, while Northern abolitionists defended the prerogatives of state courts.[19] As Fallon acknowledges, "[t]he association of the models with substantive political beliefs is historically contingent." (p. 1146 n.17)

These shifts of allegiance over time do not conclusively prove that a judge's preference for federal or state jurisdiction is merely political. Perhaps abolitionists and New Deal liberals genuinely believed in strengthening state court power for its own sake, independent of substance. And perhaps modern liberals share their predecessors' substantive positions and differ with them on questions of governmental structure. In my view, a far more plausible interpretation of these shifts over time is that both liberals and conservatives view the allocation decision as an opportunity to pursue substantive ends and tailor their jurisdictional theories accordingly. They have in the past, and they probably will in the future.

A substantive interpretation of the contradictions in the law of judicial federalism also supplies a more powerful explanatory tool than does Fallon's emphasis on variant views of governmental structure. For the most part the substantive and structural theories point to the same outcomes on judicial federalism issues.[20] Whether a modern judge is motivated by a vision of government where federal courts are dominant or by a desire to promote strong enforcement of federal rights, he will support broad access to federal court. The converse is true of judges who favor more state power as a matter of structural federalism or who seek to further

18. *See* Neuborne, *supra* note 16, at 1106-08.

19. *See id.* at 1110-14.

20. To the extent Fallon's models and raw ideology each explain much of the law, one good reason for preferring raw ideology is that it is simpler. We know the substantive values of judges from their positions on a range of substantive issues. The only additional premise needed to complete the substantive thesis is that these predilections carry weight when they confront jurisdictional issues, too. In order to accept Fallon's models, we must believe that judges work out abstract theories of governmental structure and judicial roles, which are related to but distinct from their substantive ideology. And we must believe that these abstract beliefs matter more to judges in the resolution of jurisdictional issues than does crude politics. It seems pointless to construct such a complex explanation unless it is more powerful than the simpler one.

state substantive interests. There are, however, two areas of doctrine which Fallon does not discuss and on which the political and the structural theses may diverge. These are Supreme Court review of state judgments and federal common law. Important Supreme Court decisions on each of these matters are better explained by substance than structure.

*Supreme Court review of state judgments.* Everyone agrees on the legitimacy of Supreme Court review of state judgments that turn on federal law or affect federal rights. In establishing specific rules governing Supreme Court review, however, there is room to accord state courts more or less autonomy. Suppose a state court's opinion is ambiguous. The opinion contains discussion of both state and federal authority, and so it is unclear whether or not the state court meant to ground its ruling in federal law. The Federalist model, with its emphasis on preserving state sovereignty and state court power, would incline toward presuming that such an opinion rests on state grounds and thus is not reviewable by the Supreme Court. Nationalist thought, which posits a prominent role for federal courts in general and the Supreme Court in particular in adjudicating federal law, would raise the opposite presumption and insist on Supreme Court review of ambiguous state decisions.

So much for theory. In practice, the supposedly Nationalist Warren Court, which expanded federal court power in cases like *Monroe v. Pape*,[21] *Fay v. Noia*,[22] and *Dombrowski v. Pfister*,[23] ordinarily refused to review ambiguous state judgments.[24] It rarely reexamined any cases in which the federal claimant won in state court, even where the state decision clearly rested on federal law.[25] The Federalist Burger Court, which cut back federal court power in *Younger v. Harris*,[26] *Wainwright v. Sykes*,[27] and *Stone v. Powell*,[28] also decided *Michigan v. Long*,[29] the most important recent case on the scope of Supreme Court review of state judgments. *Long* erected for the first time in our history a presumption that ambiguous state opinions are based on federal law, thereby expanding the range of state cases subject to Supreme Court review. At the same time, the Burger Court proved much more likely than its predecessor to

21. 365 U.S. 167 (1961).
22. 372 U.S. 391 (1963).
23. 380 U.S. 479 (1965).
24. *See* Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 197, 200 (1965); Jankovich v. Indiana Toll Rd. Comm., 379 U.S. 487, 489-92 (1965).
25. *See* Michigan v. Long, 463 U.S. 1032, 1069-70 (1983) (Stevens, J., dissenting).
26. 401 U.S. 37 (1971).
27. 433 U.S. 72 (1977).
28. 428 U.S. 465 (1976).
29. 463 U.S. 1032 (1983).

review state decisions that unambiguously favored federal constitutional claims.[30]

Fallon's Nationalist and Federalist models fail to account for the Court's treatment of Supreme Court review. He seems to recognize this (p. 1147 & n.18), but understandably does not dwell on the issue. A crude substantive approach to judicial motivation fares much better. Ambiguity in the state court opinion only matters when the constitutional claimant has won in state court. If he lost there, then Supreme Court review will always be within the Court's power. The Warren Court, whose substantive agenda consisted of expanding federal rights, saw no compelling reason to review state court decisions favoring the constitutional claimant. The Burger Court, whose substantive aims included cutting back on constitutional rights in favor of governmental regulatory interests, sought to root out state courts' overly zealous enforcement of constitutional restraints on government.

*Federal Common Law.* When an issue is not governed by federal statutory or constitutional law, yet its resolution will affect important federal interests, the question arises whether to make a federal common law rule or to borrow state law as the federal rule.[31] A Federalist orientation, with its emphasis on state sovereignty, would suggest resort to state law, while Nationalist premises favor a federal rule. Again, however, important Supreme Court decisions are incompatible with Fallon's models. In cases where judges' theories of governmental structure clash with their substantive social and political values, the latter often prevail.

In *United States v. Yazell*,[32] for example, the Warren Court had to decide whether state or federal law governed the government's right to attach property to satisfy a defaulted federal loan. In spite of precedent authorizing a federal rule,[33] the Court applied a state law insulating a married woman's separate property. If this is a surprising turn for a predominantly Nationalist court, it is readily understandable in terms of the substantive social policy concerns of the egalitarian Warren Court. The holding protected a poor debtor against collection by a big, rich creditor.

Given the current Court's evident sympathy for Federalist premises, one might expect it to borrow state law in cases like this

30. *See supra* note 25. *See also*, Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1243-44 (1978).

31. *See, e.g.*, United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979); Miree v. DeKalb Co., 433 U.S. 25 (1977).

32. 382 U.S. 341 (1966).

33. *See* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (federal common law rules apply in federal government litigation).

rather than making federal common law rules. It does follow this approach, but only so long as its substantive agenda is not implicated in the choice. A recent case, *Boyle v. United Technologies Corp.*,[34] illustrates the limits of the Court's allegiance to Federalist premises. *Boyle* was a products liability suit arising out of an army helicopter crash, brought against a military contractor. The plaintiff's cause of action was based on state tort law. Although no federal constitutional provision or statute shielded the contractor from suit, Justice Scalia's opinion for the Court refused to permit state law to control. Over the dissent of Justices Brennan, Marshall, Blackmun, and Stevens, the Court created a federal common law immunity from tort suits for military contractors, a holding in considerable tension with Federalist thought.[35] The evident basis for the outcome is the current Court's strong substantive commitment to giving the military a free hand. Time and again, in a variety of contexts, the Court has repulsed efforts to impose legal restraints on military activity.[36] Federalist ideology could not compete with this substantive value.

If the substantive thesis could explain cases like *Boyle* and *Long* better than Fallon's models, yet failed to explain many other cases as well as the models, then my focus on these cases would be unfair and misleading. As it happens, *Boyle* and *Long* are noteworthy just because they are among the few cases where my predictions would differ from Fallon's. In the important areas Fallon surveys, where the issue is whether federal or state courts should adjudicate a constitutional challenge to state action, substance and structure point to the same conclusions. While neither is a perfect predictor of judicial behavior, they break down in the same cases. *Fitzpatrick v. Bitzer*,[37] which permits Congress to abrogate the states' eleventh amendment immunity when enacting legislation under section five

34. 108 S. Ct. 2510 (1988).

35. *Id.* at 2514. Nor are the dissenters a group one ordinarily associates with fidelity to the Federalist model.

36. *See, e.g.*, United States v. Stanley, 107 U.S. 3054 (1987); United States v. Albertini, 472 U.S. 675 (1985); Chappell v. Wallace, 462 U.S. 296 (1983); Parker v. Levy, 417 U.S. 733 (1974).

Fallon's thesis covers only the law of judicial federalism. This is not the only part of the law of federal courts that is plagued by conflict and instability. Another is standing to sue, which deals with who is an appropriate person to challenge government action and is beyond the range of Fallon's models. Many of the conflicts within this body of law can be traced to the impact of substantive values on decisions about who should be granted standing. *See, e.g.*, Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 658-59 (1985).

For a fuller discussion of the role of substantive values in this area, see Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499 (1989).

37. 427 U.S. 445 (1976).

of the fourteenth amendment, was a unanimous decision written by Justice Rehnquist. Justice Brennan joined in *Younger v. Harris*,[38] where the Court curbed federal court interference with state proceedings. Neither of these votes is consistent with my thesis but neither would be predicted by Fallon's models either. To the extent that they lead to different predictions, "crude reductionism" works better than Fallon's models.

Richard Fallon is an intelligent, careful, imaginative and dedicated scholar. How did he go wrong? While an answer to this kind of question must be speculative, I would like to venture one anyway. The reason is not that he must de-emphasize the importance of substance in order to achieve his other objectives. Stressing the role of raw ideology as the underpinning for the models does not fatally undermine either his account of the contradiction and instability in the case law in Part II or his call for a "between the poles" approach to judicial federalism issues in Part III.[39] (p. 1231) The problem lies in some of Fallon's fundamental beliefs about law. He believes in "the partial autonomy of law from politics," (p. 1230) he "assume[s] that legal reasoning can be either good or bad," (p. 1227 n.383] and he affirms that "constitutional and statutory interpretation are precisely that—interpretation, not lawmaking." (pp. 1248-49) He thinks that "the judicial function includes a responsibility for the development of a body of law that permits fair the predictable application." (p. 1227) He also believes that judges should and generally do abide by such restraints as fidelity to principle, precedent, and the framers' intent.[40] Fallon is reluctant to embrace a crudely political account of any body of doctrine, so he almost reflexively rejects the political explanation of judicial federalism doctrine and deceives himself that he has found a viable alternative.

One does not have to be a cynic or a nihilist to believe that judges do not always follow the constraints Fallon rightly considers so important. The law of federal courts in general, and judicial federalism in particular, is especially vulnerable to the charge that law is merely politics by another name. It is an area where decisions often have substantive implications, yet those implications are ob-

38. 401 U.S. 37 (1971). See Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977), for a suggestion that tactical considerations may have played a part in Brennan's decision to go along with *Younger*.

39. Recognizing the significance of substance should, however, make us less sanguine about the likelihood that either side will move to the finely calibrated balancing approach Fallon favors. When the debate is mainly over whose substantive values are to prevail, and not about governmental structure and judicial roles, the stakes are higher and whichever side has the votes will likely want to impose its will rather than compromise with the other.

40. *See* Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

lique, indirect, and uncertain. In addition, the rulings can readily be explained in neutral terms, no matter what their real motivation. Furthermore, much of the doctrine is so recondite that the average person, even the average lawyer, is never quite sure what is going on in a federal courts opinion. For many judges of all political stripes, the temptation to manipulate jurisdictional principles to serve substantive ends, while concealing the dirty deed behind a cloud of Federalist or Nationalist rhetoric, is too great to resist. This happens often enough to justify the assertion that naked politics explains most of the law of judicial federalism.