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Treatise Writing and Federal Jurisdiction Scholarship: Does Doctrine Matter When Law is Politics?

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TREATISE WRITING AND FEDERAL JURISDICTION SCHOLARSHIP: DOES DOCTRINE MATTER WHEN LAW IS POLITICS?

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FEDERAL JURISDICTION. By *Erwin Chemerinsky.* Boston, Toronto & London: Little, Brown and Co. 1989. Pp. xxv, 801. $29.50. FEDERAL JURISDICTION 1990 SUPPLEMENT. By *Erwin Chemerinsky.* Boston: Little Brown. 1990. Pp. 134. $9.95.

Reviewing books is much harder than the "two thumbs up" approach of Siskel and Ebert. One could merely describe a book, place it within scholarly literature, and evaluate it. Or, one could take on a far more complex task: rethinking starting points, and measuring a book not just on its own terms, but against the framework of an emerging new movement in the literature.

I have unqualified praise for Erwin Chemerinsky's *Federal Jurisdiction* at the descriptive level. As I develop in the first part of this review, it is a thorough, elegantly written summary of basic federal jurisdiction principles. It asks difficult questions at the right times, places debates on controversial issues at the forefront, gives enough history to place law within context, presents competing policy arguments, surfaces the political questions underlying federal jurisdiction questions, and forces readers to challenge unreasonable legal principles. It is the kind of book that those who teach are glad to recommend to students, that those who practice can use for immediate reference, and that those who are learning for the first time can read to bring clarity to the muck that law often appears to be. I reserve criticism to only one point: the book often reveals underlying ideological tensions in doctrine, but does not explicitly offer its own coherent ideology or answers to the problems it raises.

On a more prescriptive level, however, as someone deeply enmeshed in studying federal jurisdiction law and scholarship that is increasingly hostile to doctrinal analysis, I wonder whether or not the book's careful attention to doctrine makes any sense.[1] Given the

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1. This is no mere idle curiosity. I am deeply invested in traditional legal scholarship. To the extent that developments in my field challenge the utility of treatise writing, they confront the

Supreme Court's propensity to treat federal jurisdiction as a special preserve, governed by political commitments that make precedents, statutes, and policy arguments mere impediments to the enactment of whatever philosophy animates the Court at any given time, is it worthwhile patiently to plumb the depths of cases and statutory provisions? Is a treatise (or for that matter any federal courts scholarship) that treats doctrine seriously a useful tool for understanding law and furthering its development?

I turn to these questions in the second part of this review with a discussion of the "law" of federal courts in an era informed by the insights of critical theory. I review the Supreme Court's willingness to ignore doctrine and the deep ambivalence of recent federal jurisdiction scholarship about whether or not doctrine can constrain decisionmakers. Next, I suggest that treatise writing in general seems inconsistent with our evolving politicized jurisprudence. I argue that although treatises have evolved from their positivist origins, and have embraced the policy orientation of realism, they have yet to come to grips with law as politics. I neverthless conclude that despite fundamental challenges to the value of doctrine, treatises such as Erwin Chemerinsky's *Federal Jurisdiction* are useful to the development of a just and fair system of federal jurisdiction. I end with a call for making the book, and others like it, even more valuable through the addition of explicitly normative discussions to their texts.

I

In *Federal Jurisdiction,* Chemerinsky's central purpose is "to describe and analyze the doctrines and policies that shape the jurisdiction of the courts of the United States" (p. xix). The book sets forth three subsidiary goals to accomplish this purpose: first, "to state clearly the current law defining the jurisdiction of the federal courts"; second, "to identify important unresolved issues and to describe the positions of the lower courts on these questions"; and third, "to examine the underlying, competing policy considerations" of each area of the law (p. xix).

The book is organized into three parts. Part I deals with constitutional and statutory limits on federal court jurisdiction. It specifically addresses justiciability, congressional control of federal court jurisdiction, congressional power to create legislative courts, federal subject matter jurisdiction, and the federal common law. Part II concerns federal court relief against governments and government officers. It covers the structure of section 1983 liability, the availability of statutory and common law remedies against the federal government and

importance of my work as well. Thus, it should come as no shock to the reader of this review that I am inclined to conclude that *Federal Jurisdiction* (read my work too!) retains importance despite assaults on the value of doctrine.

officers, state and federal sovereign immunity, and personal immunity of government officers. Part III focuses on federal review of state court judgments and proceedings. It includes discussions of Supreme Court review of state court judgments, statutory controls over federal jurisdiction to review state action, *Pullman,*[2] *Thibodaux,*[3] *Burford,*[4] *Younger,*[5] and *Colorado River*[6] abstention, and federal court habeas corpus jurisdiction.

With nothing else, *Federal Jurisdiction*'s superb coverage and excellent descriptions of the current state of the law would mark it as a valuable teaching tool. But the book goes much further; it presents the significant questions facing the federal courts and offers cogent criticisms of the law (and sometimes legal scholarship).[7]

Coverage — A one-volume treatise on a subject as complex as federal jurisdiction poses very difficult questions about the scope of coverage, the issues to highlight, and the topics to stress. Some courses in federal jurisdiction focus primarily on complex civil procedure.[8] Others concentrate on structural issues such as justiciability, congressional control of jurisdiction, and the subject matter jurisdiction of the federal courts.[9] Others primarily address civil rights litigation.[10] It is

2. Railroad Commn. of Texas v. Pullman Co., 312 U.S. 496 (1941).

3. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

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

5. Younger v. Harris, 401 U.S. 37 (1971).

6. Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976).

7. The book's only significant failing is that it fails to provide its own approach to the most difficult problems it addresses. Thus, while the book effectively presents the myriad competing arguments on contested federal jurisdiction issues, it is agnostic about how the courts should resolve these issues. As I discuss below, this flaw undermines the potential power of the book.

8. Such a course might address topics like venue, *Erie,* personal jurisdiction, and joinder as part of its main focus. Some federal courts casebooks recognize this and provide substantial relevant materials. *See, e.g.,* C. MCCORMICK, J. CHADBOURN & C. WRIGHT, CASES AND MATERIALS ON FEDERAL COURTS (8th ed. 1988) (covering such materials); W. MCCORMACK, FEDERAL COURTS (1984) (same).

9. Every federal courts casebook devotes a substantial amount of space to these topics. *See, e.g.,* P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65-295, 362-500, 960-1089, 1656-1700 (3d ed. 1988); D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 19-138, 139-326 (4th ed. 1990); P. LOW & J. JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 1-158, 159-268, 431-593 (2d ed. 1989); M. REDISH, FEDERAL COURTS: CASES, COMMENTS, AND QUESTIONS 1-173, 174-327, 408-483, 565-603 (2d ed. 1988).

10. It is only in the last decade that federal courts materials and courses have begun to focus on civil rights litigation. Although federal courts casebooks a decade ago had materials dealing with sovereign immunity, they did not have a substantial focus on litigation under 42 U.S.C. § 1983. *See, e.g.,* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1634 (2d ed. 1973) (index listing only five pages on the topic of "[f]ederal protection against state and local public officials"); D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 1030 (2d ed. 1975) (index listing only seven topics related to "[s]uits to redress deprivation of civil rights," covering less than 100 pages). Recent casebooks give extensive coverage to § 1983. *See, e.g.,* P. BATOR, P. MISHKIN, D. MELTZER & D. SHAPIRO, *supra* note 9, at 1090-307; D. CURRIE, *supra* note 9, 379-425, 474-84; P. LOW & J. JEFFRIES, *supra* note 9, at 880-1137.

no small or unimportant task for the author of a treatise to choose among these topics.

Chemerinsky chose well in *Federal Jurisdiction.* He omits most procedural issues such as service of process, pleading, joinder, discovery, and summary judgment, in favor of extensive coverage of structural issues and civil rights litigation. Given the comprehensive coverage of process in most civil procedure courses, and the wealth of secondary materials addressing these subjects, Chemerinsky's coverage choices are quite sensible. Moreover, his heavy emphasis on civil rights litigation sets *Federal Jurisdiction* apart from other serious single-volume treatises in the field.[11]

Chemerinsky's decision to include civil rights litigation reflects the growing importance of such litigation to the Supreme Court.[12] As federal jurisdiction courses shift their attention to civil rights litigation, Chemerinsky's coverage ensures that *Federal Jurisdiction* will be an important instructional aid; it covers traditional topics, as other books do, but it adds new coverage that is otherwise lacking.

Treatment of Issues — Federal Jurisdiction is more than merely descriptive, however. It also identifies the thorny unresolved issues that confront the federal system, the important policies relevant to thinking about these issues, and, at times, the author's views on the proper resolution of the problems posed.

For example, the book's treatment of the eleventh amendment is

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11. Neither M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER (2d ed. 1990), nor C. WRIGHT, THE LAW OF FEDERAL COURTS (4th ed. 1983), specifically addresses § 1983 litigation. Chemerinsky devotes nearly one fifth of *Federal Jurisdiction* to litigation against federal and state governments. *See* pp. 369-488. His additional coverage of the eleventh amendment adds another 65 pages analyzing litigation against the government. Pp. 325-68.

While Chemerinsky's coverage sets *Federal Jurisdiction* apart from other treatises, they nonetheless remain powerful resources for federal jurisdiction teachers. Wright's book is a classic. I recommend it to students in both civil procedure and federal courts courses. Even in its current outdated version, the book provides significant amounts of information on a wide range of topics. I also recommend the Redish book. It is not a conventional treatise, as it makes no claims to broad-scale coverage. Rather, the book shows how a thorough and active mind attacks difficult federal courts problems. Thus, the book is both an introduction to legal scholarship in the field and an inviting target for critical analysis. Either way it forces students to think about the subject.

12. In recent years, the Court has increasingly issued opinions dealing with numerous questions in cases involving litigation against the government: the eleventh amendment, *see* Port Authority Trans-Hudson Corp. v. Feeney, 110 S. Ct. 1868 (1990); Hoffman v. Connecticut Dept. of Income Maintenance, 492 U.S. 96 (1989); Dellmuth v. Muth, 491 U.S. 223 (1989); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); § 1983, *see* Zinermon v. Burch, 494 U.S. 113 (1990) (scope of § 1983); Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) (definition of person); City of Canton v. Harris, 489 U.S. 378 (1989) (municipal liability); City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) (same).

The growing importance of civil rights litigation influenced Professors Bator, Meltzer, Mishkin, and Shapiro to revise substantially the Hart and Wechsler federal courts casebook. *See* P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, *supra* note 9, at xxii. Professors Low and Jeffries go so far as to suggest that § 1983 litigation is one of "the two most important structures of modern federalism." P. LOW & J. JEFFRIES, *supra* note 9, at xix.

full, clear, and challenging. Chemerinsky begins by posing the central problem of the eleventh amendment:

> An expansive reading of the Eleventh Amendment effectively immunizes the actions of state governments from federal court review, even when a state violates the most fundamental constitutional rights. Hence, the Eleventh Amendment protects state autonomy by immunizing states from suits in federal court, but it provides this independence by risking the ability to enforce basic federal rights. [pp. 325-26]

Having posed this problem, the book sets forth current eleventh amendment doctrine, theories and policies that inform the doctrine, and the unsettled issues facing the federal courts.

On the one hand, the presentation is quite conventional. It recounts the history of the adoption of the amendment, and analyzes the major sovereign immunity doctrinal strands from the text of the amendment to its expansion in *Hans v. Louisiana*[13] to its curtailment in *Ex parte Young*[14] to its refinement in *Edelman v. Jordan,*[15] *Fitzpatrick v. Bitzer,*[16] and more recent cases. On the other hand, however, the book takes an interesting rhetorical approach to some of the doctrinal incoherency of the eleventh amendment. Chemerinsky addresses these in a taxonomy of "Ways Around the Eleventh Amendment."[17] Explicitly analyzing the Supreme Court's varied and inconsistent opinions with this particular label reveals the instrumentalism[18] inherent in sovereign immunity doctrine and reinforces the indeterminacy of federal courts doctrine. It simultaneously provides guidance to students hungry for a way to defeat restrictions on making the government do the right thing.

Ultimately, Chemerinsky comes to some hard conclusions about the eleventh amendment jurisprudence of the Supreme Court: first, it gives "undue weight to the principle of sovereign immunity"; second, its use of history is probably inaccurate; and third, the jurisprudence is "increasingly incoherent and wrought with fictions" (p. 367). Yet, in making predictions, Chemerinsky is decidedly more reserved, noting only that change will be inevitable given new Court personnel, but

13. 134 U.S. 1 (1890).

14. 209 U.S. 123 (1908).

15. 415 U.S. 651 (1974).

16. 427 U.S. 445 (1976).

17. Pp. 343-66. These discussions include the injunctive suit against officers exception, the fourteenth amendment exception, and the waiver and abrogation doctrines.

18. Providing an instrumental guide to those using the treatise is central to its mission. Lawyers will use whatever tools are available to persuade a judge to find a particular result. Thus, the classic treatise presents all available persuasive legal "tricks." This is essentially a neutral, descriptive exercise. Tricks on both sides of an issue are equally presented. As we move into a more explicitly political era of legal analysis, treatise writers may need to do more than set forth arguments that may be used instrumentally by others. They may need to set forth their own analyses of which arguments are superior to others because they will lead to "better" results. *See infra* notes 66-70 and accompanying text.

failing to argue for the proper direction of that change.[19]

The recent supplement to *Federal Jurisdiction* suggests that Chemerinsky has stepped up his criticism of the Court's eleventh amendment jurisprudence, as well as the views of other scholars. Thus, he concludes:

> What is troubling about the debate over the Eleventh Amendment on the bench and among scholars is the emphasis on textual and historical analysis. Both sides attempt to justify their views by invoking the words of the amendment and quotations from the Framers about sovereign immunity. As is virtually always the case, such textual and historical analysis is inconclusive. Each side marshals quotations that appear to support its position. More important, in light of the extensive criticisms of "originalist" constitutional approaches, analysis should not turn on the text or the Framers' intent. The real issue to be debated is the relative importance to be given to state accountability as opposed to state immunity. Yet, this has not been the central focus of either the opinions or the law review articles.
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> Indeed, the reliance on the text and the Framers' intent seems disingenuous. Conservative members of the Court think that preserving state sovereign immunity is more important than allowing suits against states in federal court . . . to redress violations of the Constitution and federal laws. Therefore, they search for and use historical evidence to support this position. More liberal justices have an opposite position, believing that assuring state compliance with federal law is more important than upholding state sovereign immunity. Accordingly, they cite textual and historical evidence to support this position.
>
> The real question, then, is not what the Framers might have thought, but rather what is the appropriate role of state sovereign immunity in the American system of government? Under what circumstances does sovereign immunity justify limiting state government accountability, and when should states be liable in federal court?[20]

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19. In light of the widespread dissatisfaction with the current law . . . change is quite possible. . . . If the Eleventh Amendment only limits diversity suits, then the state would be subject to suit in federal court for all violations of the Constitution and laws of the United States. . . . On the other hand, state governments would be subjected to more suits, thus imposing substantial financial costs to state treasuries and raising the federalism issues inherent in Eleventh Amendment analysis. With the changes in the composition of the Court, and the close votes in the most recent cases, the law of the Eleventh Amendment might change dramatically in the future.

Pp. 367-68.

I argue in the second part of this review that treatises traditionally have taken a facially neutral approach to controversial questions. They present both sides of an argument and leave it to judges and others to reach "correct" answers. I believe that this approach cannot be sustained over the long haul. Scholars have views on controversial subjects, and they have the power to influence the direction of the law by their views. Thus, their failure to offer their vision (or more candidly reveal their predispositions so that others can evaluate their work in context) diminishes the power of the presentations they do make. *See infra* notes 66-69 and accompanying text.

20. SUPP. p. 51 (footnotes omitted). I have made similar arguments about the need for forthright policy discussion and avoidance of misleading with history in another context. *See* Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741 (1987).

Given Chemerinsky's call for a discussion of competing policies, with full blown ideological honesty, one would have expected *Federal Jurisdiction* to offer a far more substantive conclusion than the one it ultimately presents: "It is to be hoped that more candid discussion of these questions can advance the debate over the Eleventh Amendment and perhaps even resolve the doctrinal mess in this area of the law."[21]

That *Federal Jurisdiction* brings the reader to the brink of a rigorous normative discussion of the eleventh amendment, but then backs off, is not, unfortunately, atypical for the book.[22] Its treatment of parity is similarly unfulfilled. As discussed in the book, "[p]arity is the issue of whether, overall, state courts are equal to federal courts in their ability and willingness to protect federal rights" (p. 29). It is an issue upon which a wide gulf separates supporters of broad federal jurisdiction, who argue that state courts cannot be trusted to protect federal rights and that federal courts are much more likely to be protective of those rights, and others who maintain that the two systems are equal in their ability to protect federal rights (pp. 30-31). Moreover, the book explicitly notes that the parity discussion is frequently pretextual, serving as a screen for conservatives who try to channel litigation to state courts to achieve certain substantive goals and as cover for liberals who try to preserve federal authority for their own substantive purposes (pp. 31-32). Yet, after identifying this split and its underlying ideological base, the book comes to the unsatisfying conclusion that "[t]he parity debate is probably unresolvable because parity is an empirical question — whether one court system is as good as another — for which it is unlikely there will ever be any meaningful empirical measure."[23] Again the discussion takes the reader to the point of understanding the unresolvable doctrinal problem, and seeing its normative base, but fails to provide either the author's own value

21. SUPP. pp. 51-52. In fairness to Professor Chemerinsky, he has developed a more telling and cogent position on these issues in his other scholarship. *See* Chemerinsky, *Congress, the Supreme Court, and the Eleventh Amendment: A Comment on the Decisions During the 1988-89 Term,* 39 DEPAUL L. REV. 321 (1990). I wish that he had brought more of his views to the forefront of the book. Otherwise, his criticism directed at the Court and other scholars for their failure to articulate and fight about the real issues of government accountability might be turned back on his project. As I argue below, *Federal Jurisdiction* would become an even more effective treatise by specifically taking a position on the questions being raised and by laying out the fullness of the ideological debate.

22. Or, for that matter, treatises and legal scholarship more generally.

23. P. 32. Framing the parity debate as an empirical question may in fact be the nub of the problem. Whether state courts *in fact* are as competent, diligent, and committed to individual rights and liberties as are federal courts is unlikely to matter in individual cases, in which individual litigants *believe* that one court or the other is favorably disposed to their litigation. Similarly, even in the face of contradictory evidence, litigants, judges, and federal courts' scholars are deeply influenced by their *faith* in one system or another. Phrased in this way, parity presents a problem regardless of empirical data. The problem is not factual, it is political. Seeing the question in political terms makes explicit the underlying competing value choices at stake. Thus, it exposes the choice between maximizing state authority by restricting access to federal courts or maximizing individual autonomy by giving litigants choices between alternative forums.

judgment or a means of evaluating the debate to help the reader resolve the problem for herself.[24]

Chemerinsky's discussion of federalism and comity issues similarly raises ideological stakes, but avoids stating a personal preference or even a tie-breaking procedure to deal with the issues.[25] Thus, he notes

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24. Chemerinsky has presented a more explicit solution to the problem in a recent article. *See* Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary,* 36 UCLA L. REV. 233 (1988) (arguing that parity ought to be a matter of litigant choice). Advocating litigant choice is an attractive alternative when one frames the parity question as an empirical matter, but it is not a solution if one sees the problem in ideological terms. What justifies giving the choice to the litigant? Is it any more respectful of state authority to pass the decision to avoid state court from federal decisionmakers into the hands of individual litigants? If one values placing authority into the hands of local governments, at least for an initial decision, why should that preference be overcome by the competing values of maximizing choice or preserving federal access? More plainly, if one's parity attitude is a reflection of a naked preference for the results of one forum or the other, how does a preference for litigant choice provide an answer?

There are reasons that a treatise writer would avoid an extended discussion of such value-laden questions. Those of us trained as legal realists have a strong commitment to recognizing relative merit to multiple perspectives on any given topic. By attempting to set forth a preference for one of those perspectives, a legal scholar or treatise writer may undermine some of our traditional legal commitments to the appearance of neutrality. Treatises were born in a positivist era that assumed principles could be found through inductive reasoning and later applied deductively to reach answers to current problems. Although realists see principles as a complex result of reasoning, power, intuition, and intellect, they nonetheless maintain at least a facade of neutrality. Doing so fits our rhetorical conventions. But doing so also raises significant questions: Why study doctrine if it is nothing more than argument fodder? Why collect cases, carefully analyze them, and present competing arguments, if results really turn purely on ideology? I address this dilemma below and argue that the collection remains important, but only as a predicate to beginning a more normatively explicit approach. *See infra* notes 66-70 and accompanying text.

25. His discussion of standing also illustrates this shortcoming. The main volume of *Federal Jurisdiction* contains a detailed discussion of standing, especially as it evolved during the Burger court era. *See* pp. 48-63. Much of this discussion is quite critical of the Court, but in the end does no more than suggest that

> [i]t is difficult to identify a principle that explains why aesthetic or economic injuries are sufficient for standing, but stigma or marital happiness are not. The only conclusion is that in addition to injuries to common law, constitutional, and statutory rights, a plaintiff has standing if he or she asserts an injury that the Court deems as sufficient for standing purposes.

P. 63. The supplement describes a strong antidote to current doctrine by outlining recent scholarly criticisms of the Court. *See* SUPP. p. 12 (citing Bandes, *The Idea of a Case,* 42 STAN. L. REV. 227 (1990); Fletcher, *The Structure of Standing,* 98 YALE L.J. 221 (1988); Sunstein, *Standing and the Privatization of Public Law,* 88 COLUM. L. REV. 1432 (1988); Winter, *The Metaphor of Standing and the Problem of Self-Governance,* 40 STAN. L. REV. 1371 (1988)). The discussion does no more, however, than suggest that these articles are an alternative to the Court's jurisprudence. It fails to stake out its own position. *See* SUPP. p. 12:

> Although the recent articles . . . are in many respects quite different, they share a vision of how standing doctrines should facilitate the federal courts' crucial role in upholding the Constitution and federal laws. This view of standing is quite different from that embodied in the decisions of the Burger and Rehnquist Courts that limited access to the federal courts.

I recognize that Chemerinsky's choice to downplay his resolution of the debate between the scholars and the Court leaves it to the reader to make the choice. He therefore avoids stacking the deck in favor of his own viewpoint. Nonetheless, I think that he could still leave the matter to the reader, but only after weighing in with his own views on the subject, examining the costs and benefits of that view and why he rejects contrary views, or making a suggestion as to what factors the reader ought to take account of before coming to a judgment, or at least presenting an admonition that the stakes are too high to have no opinion as to which view is correct.

that "[w]ithout a doubt, a justice's or a commentator's views about the appropriate content of jurisdictional rules often depends on his or her position on the substantive issues involved," and further, that people are willing to favor restriction of federal jurisdiction when doing so will achieve a desired result in state court, and that individuals will favor expanding access to federal court when doing so results in a preferred outcome (p. 33). The explicit recognition of the influence that these political positions have on the doctrines of federalism and comity, does not, however, lead the author to expose his own. He offers no opinion or preference.[26]

Even with these criticisms, I want to emphasize the important contribution that *Federal Jurisdiction* makes. Students who read federal courts decisions are often lost, sometimes merely in the complexity of the questions raised and the extraordinarily convoluted explanations the courts offer for their decisions.[27] Even more often, students fail to appreciate the deeply charged political questions that are packed into the technical questions in federal jurisdiction cases.[28]

Federal Jurisdiction always clarifies the muddy, and often makes transparent the opaque political stakes of federal jurisdiction issues. This makes the book extremely valuable.

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26. Instead, he concludes rather conventionally that

> [j]urisdictional rules often determine the outcome in specific cases; hence, it hardly is surprising that debates over the scope of federal court jurisdiction often turn on views about the appropriate nature of American government and, practically speaking, the best courses of action to achieve the desired outcomes. Separation of powers and federalism issues are thus discussed throughout this volume.

P. 33.

27. Everyone has a favorite incomprehensible Supreme Court federal jurisdiction decision. My own is National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949). The case is best known today for its "holding" that Congress cannot expand federal court jurisdiction beyond the limits of article III of the Constitution. Yet, the opinion itself upholds the grant of federal court jurisdiction over suits by and against citizens of the District of Columbia — an authority not explicitly found in article III. Moreover, majorities of the Court reject each proffered justification for the jurisdiction, concluding that the District of Columbia is not a state for purposes of the diversity jurisdiction and that Congress has no power to expand federal jurisdiction. Yet, because each of these theories attracted some adherents (two for the "district is a state" argument and three for the congressional power argument) a majority of the court upheld the statute. *See* pp. 178-79 (discussing the case). Only the kind of careful discussion that a treatise provides (or the patience to spend an hour of class time just explaining what a court has done) can make such a case intelligible.

28. Students who read Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), often see the issue of whether Congress can give article III questions to non-article III courts as a "who cares" issue. They become so lost in the bankruptcy context, which obscures the political consequences posed by a decision to permit Congress to manipulate article III, that they are thankful merely for a clear answer to the question that the case poses. But when the same issue — whether Congress can avoid federal courts — is raised in a more controversial context such as busing, abortion, or apportionment, students appreciate the loaded political drama represented by so technical a case as *Northern Pipeline*. Thus, a treatise that constantly demonstrates the ideological underpinnings of even the most technical questions, as does *Federal Jurisdiction*, is an immensely helpful teaching tool.

II

Yet, even as I conclude that *Federal Jurisdiction* is a valuable addition to the federal courts literature, another voice suggests caution: How valuable is a book that is firmly within the positivist tradition of treatise writing[29] and the realist tradition of policy analysis[30] in an era of naked political decisionmaking?

As I suggest below, even though our jurisprudence has become avowedly political, treatises such as *Federal Jurisdiction* retain significance to students, practitioners, and judges. In order to enhance their importance, however, treatise writers must accept roles as sources of authority who affect the politics of decisionmaking. Treatises must evolve to become much more explicitly ideological. Treatises ought to

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29. Treatises, such as *Federal Jurisdiction,* implicitly assume that traditional legal materials and analyses matter. Therefore they collect, synthesize, and analyze doctrine flowing from cases, precedents, statutes, constitutional provisions, legislative histories, and other written legal materials. These represent the data from which one can construct "law."

Such law construction is beholden to positivism. It sees law as a science (though perhaps one informed by the art of its practitioners). Treatise writing is a straightforward application of this science: First, it applies "laws" contained in constitutional and statutory law deductively to govern factual disputes within their ambit. Second, it treats cases as data bits from which one reasons inductively to find legal propositions. These propositions then become "laws," similar to statutory or constitutional provisions, from which one may deduce outcomes in similar disputed situations. Third, it decides novel situations that fall between the crack of the cases and enacted laws by analogizing them to extant legal rules. Thus, once the analogy is drawn, the positivist, scientific model takes hold and permits deduction and induction to expand accordingly.

30. Effective realist treatises reveal the inherent weakness of highly formalistic, structured models of legal reasoning. Even fully committed, rules-driven positivists recognize the tremendous discretion in conventional legal analysis: one must determine the meaning of ambiguous language, choose from competing legal propositions that are equally drawn from prior case law, and make judgments about which analogy is properly drawn. Moreover, only the very narrow-minded fail to recognize law's indeterminacy, at least in difficult cases. Therefore, realist legal analysis recognizes multiple possible answers to legal problems. From deciding what a case means, to understanding the factual content of either a dispute or the precedents that might govern that dispute, to understanding the language of enacted law written generations ago, legal analysts must exercise judgment.

Despite the positivist origin of treatises, realists seek to explain the development of law through many external factors — political, cultural, ideological. They embrace policy analysis to help resolve ambiguities in legal rules. The best treatises, such as *Federal Jurisdiction,* discuss alternative policy choices from among competing models of public welfare. Armed with these perspectives, therefore, such treatises present legal materials against a broad contextual background that makes doctrine an important, though not exclusively determinant, factor in resolving debated legal questions.

Realist treatises may still face a conceptual difficulty, however. While positivists merrily collect cases and enacted law, "discovering" the countless ways they cohere, and thereby predict future legal developments, realists might well believe that catalogues of cases, statutes, and policies do little to determine outcomes and that social or political factors better predict decisions than do legal principles. Therefore, realists who understand law as highly contingent, internally unpredictable, and understandable only in social context, might wonder why they should bother assiduously pulling together the law, if the law may better be explained by external factors beyond doctrinal frontiers.

Rejecting doctrine as a force unto itself does not, however, banish traditional legal data from legal discourse. Rather, doctrine remains important because of its rhetorical function as a constraint on acceptable outcomes. Doctrine sets the terms for policy discussions and outlines the range of foreseeable results. Doctrine provides a code for lawmaking.

advocate positions.[31]

Politics and Ideology in the Law of Federal Courts — Chemerinsky notes time and again in *Federal Jurisdiction*[32] that the law of federal jurisdiction is teeming with political undercurrents. As even a cursory analysis of doctrine across a wide range of federal jurisdiction topics reveals, he couldn't be more accurate: federal courts doctrine is unimportant to many Supreme Court holdings. Two illustrations make the point:

(1) *The Adequate and Independent State Grounds Doctrine* — At least since *Murdock v. City of Memphis*[33] the Supreme Court has precluded itself from reviewing decisions of state courts that rest on adequate and independent state grounds.[34] One persistent problem that the Court has faced in implementing the adequate and independent state grounds doctrine has been how to resolve ambiguity in the grounds offered in state court opinions. The Court's decisions are a jumble of inconsistencies, ranging from presuming the independence of state grounds[35] to deciding for itself the "true" basis of state

31. My colleague Bob Clinton has suggested that Felix Cohen's original 1942 *Handbook of Federal Indian Law* may be the best example of an avowedly ideological and instrumental treatise. Thus, Cohen stated his purpose in writing his treatise was to "empower Native Americans and avoid their oppression." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW xix (1942). Further he explained that what made the treatise possible was

> a set of beliefs that form the intellectual equipment of a generation — a belief that our treatment of the Indian in the past is not something of which a democracy can be proud, a belief that the protection of minority rights and the substitution of reason and agreement for force and dictation represent a contribution to civilization, a belief that confusion and ignorance in fields of law are allies of despostism, a belief that it is the duty of the Government to aid oppressed groups in the understanding and appreciation of their legal rights.

Id. at xxxii; *cf.* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE (1972) (opinions of authors on how to resolve questions sprinkled throughout text, but without self-conscious reference to underlying ideology).

32. *See supra* notes 13-26 and accompanying text.

33. 87 U.S. (20 Wall.) 590 (1874).

34. As I have explained elsewhere:

> A decision based on state law is *adequate* if the judgment in the case would necessarily be affirmed even if any decision on federal law were reversed. For example, suppose in a state criminal prosecution the defendant moves to exclude evidence under both the fourth amendment of the United States Constitution and under a state's constitution. If a state court rules in favor of the defendant under the state constitution, its decision will be adequate to support the judgment regardless of the outcome on the federal issue. It is adequate because the state is free to extend rights under its own constitution beyond federal law, unless state law is preempted. If, however, the state court ruled against the defendant, its decision ordinarily would not be adequate, since a reversal on the federal constitutional claim would change the outcome of the case. This decision is not adequate because state constitutional law cannot be read more narrowly than applicable parallel federal law. A decision based on state law is not *independent* of federal law if the state ground is tied to federal law. For example, where a state might bind its interpretation of a state constitutional provision to the interpretation of parallel federal provisions, the state ground cannot preclude federal review because a reversal on the federal ground will lead to a reversal of the supposed state ground.

Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1292-93 n.2 (1986).

35. *See, e.g.*, Durley v. Mayo, 351 U.S. 277, 284-85 (1956); Lynch v. New York, 293 U.S. 52, 54-55 (1934).

grounds[36] to taking a middle course of asking the state court to clarify its opinion.[37]

In spite of the great variance of the Court's opinions, throughout the long history of the doctrine none of the Court's decisions had resolved ambiguity in state grounds by explicitly presuming Supreme Court jurisdiction until *Michigan v. Long.*[38] In that case the Court held for the first time that it would thereafter presume state grounds to be dependent on federal grounds, unless the record revealed clearly that the federal grounds were cited only as the precedent of another forum. The Court then prescribed for state judges how to make sufficiently "plain statements" to assure the independence of state grounds.

That the Supreme Court's adequacy rules evolved over time is no surprise. What makes *Michigan v. Long* an exemplar of the deeply politicized nature of federal jurisdiction scholarship is the way that the case turns conventional doctrine on its head and forces judges into unnatural positions given their prior writings. The Court justifies its opinion on federalism and administration of justice grounds, neither of which can be sustained.[39] More importantly, however, given the prior positions of both the majority and dissenting justices, the best explanation of the holding in the case is that it is a product of ideology or

36. *See, e.g.,* Texas v. Brown, 460 U.S. 730, 732-33 n.1 (1983); Oregon v. Kennedy, 456 U.S. 667, 670-71 (1983).

37. *See, e.g.,* Herb v. Pitcairn, 324 U.S. 117, 128 (1945) (continuance of jurisdiction pending clarification from state court); Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940) (vacating judgment to receive clarification from state court upon remand).

38. 463 U.S. 1032 (1983).

39. The Court suggests that its novel decision is necessary to "provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet . . . preserve the integrity of federal law." 463 U.S. at 1041. It is apparent, however, that the opinion impinges on the very goals it sets forth: (1) the opinion tells state judges how to write their opinions; (2) the Court's direction creates subtle incentives to alter the way state judges think, write, and decide cases; (3) the changes may interfere with state judges' role in state political processes; (4) the new rule in fact may increase the difficulty in administering justice by creating a new layer of federal review that may later be ignored by state judges; and (5) the rule is unnecessary given the Court's certiorari jurisdiction. *See* Matasar & Bruch, *supra* note 34, at 1367-89.

result orientation,[40] not tight doctrinal analysis.[41]

(2) *Federal Common Law* — Federal common law is court-made law that "implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law . . . ."[42] Federal common law governs a wide range of federal litigation. When federal interests are strong, and the need for a single rule is great, federal common law is specific and uniform; it generally preempts otherwise applicable state laws.[43] In some instances, however, federal common law minimally displaces otherwise applicable state laws because it borrows state rules as federal law and preempts state principles only where they seriously conflict with federal interests or are otherwise aberrant.[44] Moreover, in some cases involving disputes between private persons, federal common law is rejected altogether because the federal interests involved are too attenuated to justify displacement of state law.[45]

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40. *Michigan v. Long* has been assailed by scholars, *see* Seid, *Schizoid Federalism, Supreme Court Power, and Inadequate State Ground Theory:* Michigan v. Long, 18 CREIGHTON L. REV. 1 (1984); Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of* Michigan v. Long, 59 NOTRE DAME L. REV. 1118 (1984); *The Supreme Court, 1982 Term,* 97 HARV. L. REV. 70, 224-30 (1983), and state courts, *see* State v. Jackson, 672 P.2d 255, 261-65 (Mont. 1983) (Shea, J., dissenting); 672 P.2d at 260-61 (Sheehy, J., dissenting), as a direct assault on independent state lawmaking power. In particular, the opinion is claimed to be a veiled attempt by the Court to undermine state court judges' ability to act to expand the rights of criminal defendants. *See* State v. Jackson, 672 P.2d 255, 264-65 (Mont. 1983) (Shea, J., dissenting) (citing Florida v. Casal, 462 U.S. 637, 638 (1983) (Burger, C.J., concurring)).

Chemerinsky discusses *Michigan v. Long* in *Federal Jurisdiction.* P. 546-51. He describes the background to the case (pp. 546-47), its facts, holding, and dissent (pp. 547-49), arguments in favor of the case (pp. 549-50), and arguments against it (p. 550). He specifically suggests how the case might be seen as a purely ideological consequence of the Court's outcome orientation. Pp. 550-51. Yet, he ends without a view as to the proper rule, concluding only that "[a]t a minimum *Michigan v. Long* clarified the law." P. 551.

41. As Professor Michael Wells argues, the majority in *Michigan v. Long* consists of judges who in virtually every other context of federal jurisdiction take a narrow view of federal authority. Wells, *Rhetoric and Reality in the Law of Federal Courts: Professor Fallon's Faulty Premise,* 6 CONST. COMM. 367, 378 (1989). Further, he suggests that the dissenters are the judges who generally are favorably disposed to extending federal power. *Id.* He then offers the following explanation for the result:

> A crude substantive approach to judicial motivation fares much better [than other alternative explanations of the opinion]. Ambiguity in the state court opinion only matters when the constitutional claimant 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.

Id. at 379.

42. D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 472 (1942) (footnote omitted) (Jackson, J., concurring).

43. *See, e.g.,* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

44. *See, e.g.,* United States v. Kimbell Foods, Inc., 440 U.S. 715, 739-40 (1979).

45. *See, e.g.,* Miree v. DeKalb County, 433 U.S. 25 (1977).

Recently, the Supreme Court revisited many of these federal common law principles in *Boyle v. United Technologies Corp.*[46] The case involved the question whether government military contractors in diversity products liability suits are entitled to a federal common law defense to suits brought by victims of defectively designed products. Despite strong lines of cases suggesting the unavailability of federal common law in suits between private parties, and cases suggesting a preference for borrowing state law as federal common law in the absence of a strong justification to do otherwise,[47] the Court adopted a uniform federal defense that precluded recovery against the contractor.

Boyle is inconsistent with federal courts doctrine. Its result makes sense only through an ideological lens. The opinion coheres nicely with other Rehnquist Court majority decisions that favor the military.[48] Similarly, the dissent of Justices Brennan, Marshall, Blackmun, and Stevens, who are not usually thought of as hostile to the exercise of federal power or the creation of federal common law, fits with their usual preference for the individual's right to recover. *Boyle* shows, once again, that in difficult cases, doctrine, no matter how closely analyzed, is a poor stand-in for ideology in explaining case results.[49]

Cases such as *Michigan v. Long* and *Boyle*[50] suggest why recent federal courts scholarship has turned from close doctrinal analysis to discussing the ideology of federal jurisdiction. That turn is reflected in three recent federal jurisdiction articles.

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46. 487 U.S. 500 (1988).

47. *See* Green & Matasar, *The Supreme Court and the Products Liability Crisis: Lessons from* Boyle's *Government Contractor Defense,* 63 S. CAL. L. REV. 637, 643-84 (1990) (arguing that the Court's opinion is doctrinally indefensible).

48. *See* United States v. Stanley, 483 U.S. 669 (1987) (no implied right of action directly under the Constitution against members of the military command); United States v. Johnson, 481 U.S. 681 (1987) (tort claims immunity of the military extended to civilian defendants working with the military).

49. *See* Weinberg, *Federal Common Law,* 83 NW. U. L. REV. 805, 849 (1989) (noting unusual treatment of doctrine by *Boyle;* suggesting political explanation for the case); Wells, *supra* note 41, at 380 ("The evident basis for the outcome [in *Boyle*] is the current Court's strong substantive commitment to giving the military a free hand.").

Chemerinsky discusses *Boyle* but does not take a position on whether it was correctly decided. P. 308.

50. It would not be difficult to expand the list of federal jurisdiction doctrines that are best explained by ideological differences among members of the Supreme Court. Good candidates for discussion would include the eleventh amendment, the personal immunities doctrine, and the supplemental jurisdiction doctrine. Chemerinsky himself has amply demonstrated the problems with the Court's eleventh amendment cases. *See supra* notes 13-21 and accompanying text. For a review of the doctrinal chaos in the Court's personal immunities cases, see Matasar, *supra* note 20. A contrast of Aldinger v. Howard, 427 U.S. 1 (1976), to Finley v. United States, 490 U.S. 545 (1989), illustrates just some of the many problems with the Court's supplemental jurisdiction cases. For a more detailed discussion, see Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction,* 71 CALIF. L. REV. 1399, 1401 (1983).

Just a little over two years ago, Professor Richard Fallon published *The Ideologies of Federal Courts Law.*[51] The article asserts that the law of federal jurisdiction is a product of two competing ideologies: the federalist model and the nationalist model. The federalist model resolves federal jurisdiction questions in favor of state court authority. It assumes parity between state and federal courts and views the states as independent sovereigns, free from excessive federal regulation. The nationalist model subordinates state sovereignty to federal rights, assumes the supremacy of federal law, and claims that federal courts have an advantage over state courts in protecting individual rights and liberties.[52]

Fallon argues that these two competing federal jurisdiction ideologies are incompatible and that the tension between them has led to doctrinal incoherence in the law of federal courts. He demonstrates in great detail the many doctrines — for example, abstention, habeas corpus, and the eleventh amendment — in which federal jurisdiction principles are unstable, contradictory, unpredictable, and volatile.[53] Ultimately, Fallon argues that commitment to the two models of federal jurisdiction best explains results in cases,[54] and accounts for the variance in opinions of different members of the Supreme Court.[55]

Professor Michael Wells takes Fallon's argument to another level.[56] Wells posits that Fallon is mistaken in thinking that the competing ideological models are "deep structures of understanding [that] may determine the resolution of many questions."[57] Instead, Wells argues that Fallon's competing models of federal jurisdiction are nothing more than signposts to underlying ideological preferences of judges.[58] Thus, Wells thinks that Fallon incorrectly rejects the thesis that federal jurisdiction decisions are a product of a judge's personal political preferences.[59]

Wells sets forth a competing explanation of federal courts decisions:

> One does not have to be a cynic or a nihilist to believe that judges do not always follow the constraints . . . . 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 oblique, indirect, and uncertain. In addition, the rulings can

51. Fallon, *The Ideologies of Federal Courts Law,* 74 VA. L. REV. 1141 (1988).

52. *See id.* at 1143-57.

53. *Id.* at 1142-1224.

54. *Id.* at 1145-47.

55. *Id.* at 1146, 1156-57, 1162-63.

56. *See* Wells, *supra* note 41.

57. Fallon, *supra* note 51, at 1147, *quoted in* Wells, *supra* note 41, at 372.

58. Wells, *supra* note 41, at 373.

59. *Id.* at 373-74.

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.[60]

In a recent article on the Supreme Court's methodology in section 1983 cases, Professor Jack Beermann set forth a thesis embracing Wells' vision of law as politics, but one which also attempts, as does Fallon, to categorize the various motives of the Justices.[61] Beermann begins with an analysis of several issues under section 1983 concluding that the doctrine is in disarray, and that the inconsistencies of the Court's decisions are a reflection of its political choices.[62] As he concludes:

Commentators have long attacked the Court's method of construing § 1983, charging the Court with ignoring congressional intent; applying false history as a smokescreen for the Justices' personal views; having inconsistent theories concerning § 1983's relationship to the preexisting common law and federal structure; and, in general, lacking a theory under which to develop the statute. To these allegations I would add the charge that some Justices are outright hostile to § 1983 and to § 1983 plaintiffs, and veil their hostility only thinly beneath the most rudimentary, unelaborated "policy arguments." . . .

The confusion over § 1983 is a symptom of a larger problem, . . . the "impoverishment" of political arguments in our law. We do not have a developed language for addressing the political questions that lurk behind legalistic discussions of § 1983; instead we apply history that can be manipulated to justify any result, statutory "constructions" that are never quite convincing, and policy arguments that are more like incantations of magic formulae than descriptions of consequences in the real world. . . .

The indeterminacy of legalistic analysis of § 1983 should send us back to political discussion over the function and consequences of civil rights enforcement . . . . [O]nce the legal arguments . . . are exposed as indeterminate and politically charged, the reasonable method for the courts is to turn back to the political dialogue that legal argument was designed to replace. . . . Courts . . . should open up the policy debate to competing theories and data, and assess more pragmatically all available evidence of the consequences of their policy-based decisions.[63]

60. *Id.* at 381-82. Chemerinsky presents a very good summary of the Fallon and Wells debate. *See* SUPP. pp. 1-3.

61. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989).

62. *Id.* at 54-88.

63. *Id.* at 52-53 (footnotes omitted).

Beermann then goes on to outline what the terms of an openly political debate about federal jurisdiction would look like by contrasting three competing visions for the federal courts in civil rights cases: the liberal, rights-based reformist perspective; the conservative, authority-defending perspective; and the radical, "tool of oppression" perspective.[64] He concludes with a discussion of how these political views might be used to decide controversial questions under section 1983.[65]

Treatises and Doctrine — Against the backdrop of Supreme Court decisions that cast doubt on the value of doctrine, adrift in a sea of legal scholarship that questions whether traditional legal analysis matters at all, Erwin Chemerinsky has described the "law" of federal jurisdiction. In spite of the increasingly "disreputable" position of doctrine in our evolving jurisprudence, I think Chemerinsky has engaged in a very important enterprise. It is an enterprise, however, that must adapt to the coming political model of decisionmaking in order to fulfill its potential.

Federal Jurisdiction is nevertheless an important book, even though "law is politics." First, even those of us who think law is politics in the Supreme Court acknowledge that the lower courts act as if they are constrained by doctrine. Thus, lower court judges faithfully peruse precedent, try to reconcile irreconcilable cases, look hard at history, and weigh competing policy concerns. For them, a treatise is extraordinarily valuable. It collects in one place relevant legal materials and it summarizes the range of arguments about disputed questions. In so doing, treatises save an enormous amount of time and guide courts' analyses.

Second, some questions, even in federal jurisdiction cases, have easy, noncontroversial answers. Yet, because an area of law is so vast that the typical lawyer, student, or judge can only know a slight portion of the law, treatises are vital to pulling together the grist of applicable legal principles. Having a source that sets forth what is *not* controversial is often far more important to the daily functioning of law than a source addressed only to those once-in-a-lifetime disputes that work their way the U.S. Supreme Court.

Third, treatises help students. Perhaps we in the academy have forgotten the fog in which we were perpetually surrounded as students. Blinded by our ability to see answers to simple questions, and

64. *Id.* at 89-94.

65. *Id.* at 94-101. I find myself relatively indifferent to the Fallon, Wells, Beermann debate. In one way or another each of them is making similar points: (1) that the doctrine of federal courts cases cannot explain case results; (2) that the real explanation of federal courts opinion is found in ideology, politics, values, etc.; (3) that to understand the direction of the law one must look to normativity. I find my indifference to be a function of my instrumentalism. Once we know that law is politics, who cares? What prescriptions do we scholars have to move to the next level? Thus, as I read Fallon, Wells, and Beermann, I keep wishing that they would go on to set forth their views and enter the normative debate. Perhaps that cuts against our tradition as scholars, but it does seem consistent with the conclusion that law and politics go together.

our belief that difficult questions have no "right" answers, we frequently underestimate our student's need for guidance in even identifying when something is a legal problem — simple or complex. A book that provides a blackletter framework within which our students can place their questions makes teaching easier and learning more likely.

Federal Jurisdiction succeeds well on all three of these indices. It is an important reference for lower court judges facing federal jurisdiction questions. It gives practitioners, students, and scholars clear guidance about the noncontroversial questions of federal courts law. Finally, it is a blessing to our students. It is written clearly and concisely. More importantly, it provides answers to many federal jurisdiction problems (answers we scholars might challenge as theoretically indeterminant, but which we know are unchallenged, and practically speaking, unchallengeable).

Nonetheless, I am still left with an uneasy feeling that *Federal Jurisdiction* could do more by taking a more explicitly normative approach. The classic positivist treatise has already given way in the era of legal realism to broader, more policy-based analyses. Thus, books such as *Federal Jurisdiction* already contain detailed descriptions of competing policy debates, map out contradictions in the law, and pose difficult and often unresolvable legal questions. It is only another small step, therefore, for such treatises to face squarely assaults on the value of doctrine and policy analysis.

I believe that treatises must now evolve once again, beyond legal realism, into avowedly normative tools. If, as the cases suggest, cutting edge issues are decided by implicit values, and if, as recent scholarship suggests, politics determine cases, legal scholars and even treatise writers may be forced into becoming advocates.

Treatises are a rhetorically important part of our legal discourse. They are keepers of legal traditions that describe fields of law. Their powerful recitations of history and the development of doctrine create a shared base from which new students, scholars, and judges launch attacks on significant issues as they arise. Treatise discussions of doctrine, statutes and their interpretations, and relevant policies provide a basic framework for analyzing legal problems. These frameworks encapsulate the contradictions of law and reveal the competing arguments on disputed questions.

Therefore, whether intentionally written to influence the development of law or not, treatises likely will remain crucial to the rhetoric of law. Students "learn" from treatises, lawyers cite them for authority, and judges use them to justify their opinions.[66] Even if one be-

66. Recognizing that the arguments treatises make may influence the results in real cases explains why legal realists may write treatises. *Cf.* Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 179 n.32 (1990) (suggesting that the "only kind of normative legal thought

lieves that these instrumental uses of treatises are no more than covers for the actual political motivations of legal actors, one should not dismiss treatises as unimportant. That treatises are being used to persuade suggests power in the positions being taken by authors. At the least, treatise writers ought to recognize this fact, see their project as influential to the development of law (or how it is discussed), and forthrightly state their views.[67]

Facial neutrality in treatise writing has had a long and important life. It was the only permissible stance of formalists who thought of law as science and who believed in right answers to legal problems. It was also a sensible stance for legal realists who used process as a security against unbridled discretion,[68] and who sought "neutral principles"[69] to guide decisionmaking. It is hard to imagine, however, that treatises can sustain neutrality in face of our current understanding of the political nature of law. They are certain to be unpacked and their underlying ideological commitments thereby revealed.

As authority, treatises are used to make arguments, to do justice and injustice, and to influence others. For a treatise writer to assert neutrality, when others will use the work in ways that the writer would find abhorrent, is a forsaking of professional responsibility. Treatise writers and other legal scholars ought to take the next logical

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that might actually be having some significant and authentic normative effect on judicial decisionmaking . . . is the work of treatise writers," but discounting the effect because treatises simply reflect "the modes of thought and norms already extant in the courts."). Treatise writers are lawyers. They have political beliefs. They know how to make instrumental use of legal materials to further those beliefs. Unfortunately, acknowledging the instrumental rhetorical function of treatise writing may bring scholars into conflict with one of the most important presuppositions of "scholarship" — neutrality.

Scholars often act as if all competing policy choices are equally plausible or valid as a matter of choice. Their desire for just results resides in their faith that the process of lawmaking ensures its ultimate fairness. Accordingly, if they must recognize simultaneously that the form of the arguments they make in their scholarship may influence a decision, they must question neutrality itself. They must accept that those who create arguments bear some responsibility for how law develops.

Most legal actors, including those who write treatises, have some impression about what results they would prefer. Thus, the treatise writer who has a belief in the correctness of any given result, but who writes with a facade of neutrality, may inadvertently help to produce "bad" law when others make instrumental use of the writer's work.

67. Writers ought to place their views at the forefront, and thereby subject them to scholarly and judicial debate. Hiding their views prevents them from being challenged and impoverishes our discourse. Furthermore, treatise writers should take an advocate's role. Doing so empowers readers to better assess the value of the arguments raised by the writer (which now may be hidden behind a positivist facade), and subject them to oversight by others who have a contrary view. Doing so enables writers openly to reveal the hidden forces that shape their legal analysis.

I'm tempted to think of this as an ethical imperative for legal scholars. Lawyers are already in the moral quandary of separating their professional and personal selves. *See* Matasar, *The Pain of Moral Lawyering*, 75 IOWA L. REV. 975 (1990). We in the academy would be well-served to avoid the same trap.

68. *See* Amar, *Law Story*, 102 HARV. L. REV. 688, 689-702 (1989) (exploring process commitment of federal courts scholars a generation ago).

69. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

step: they must take explicit positions on legal issues, justify them under conventional analysis, explore competing policies, make clear the underlying political or ideological issues involved, *and* state their own positions on those issues.

Law often can be reduced to choices between equally plausible answers to problems. Our answers to such questions must be justified, honestly. The problem is one of tie breaking; treatises can help us design tie-breaking strategies.[70]

I have asked whether doctrine continues to matter in the ever-evolving legal discourse of which treatises are a part. By pondering the role of treatise writing in the coming years, I have posed a question

70. My own tie breaking procedure in federal jurisdiction cases is pretty complicated. As a child of the civil rights and antiwar movements, I came to think of the federal courts as critical to the maintenance of a just society. By inclination, therefore, I believe that federal courts ought to be freely accessible. Accordingly, in jurisdictional disputes — such as whether a federal court should abstain, or whether sovereign immunity should bar a federal court from issuing a remedy to an individual harmed by state action — I favor federal access. I recognize that others come from a different perspective. They see the federal courts as interfering with the basic freedoms associated with living in a particular state. They see the federal courts as impeding the will of local majoritarian political preferences. They resolve ambiguity against access to federal court.

Both they and I can muster cases, statutes, histories, and interpretations of various legal positions. We both can generate strongly felt "policy" claims. We have tied. Our goal in tie breaking is now to capture those who have less committed predispositions with the arguments we raise. Good tie breaking rhetorical practice calls for further justifications beyond our naked preferences, although such preferences alone succeed if we can garner the votes. Elegance seems to suggest that we set forth some additional rationales for our preferences.

For me, the next step in constructing a rationale for favoring federal court access is to pose a rhetorical question. Since neither I, nor my opponent, can "prove" the correctness of our position, perhaps the best measure of which view to adopt is to choose the one that will cause the least harm if it is "incorrect." Simply put: What happens if a court erroneously adopts one preference for federal access as opposed to the other? Can an "error" in one direction be more easily corrected than an "error" in the opposite direction?

I make the following argument: open access to the federal court generally benefits plaintiffs because they are usually the parties who seek federal jurisdiction. The class of plaintiffs in much of federal litigation — minorities, criminal defendants, victims of economic misbehavior — is poor, unorganized, and relatively powerless, at least in comparison to the class of defendants in federal court. That class of defendants — police officers, other government officials, economically organized enterprises, and governments themselves — is generally harmed by resolving ambiguity in favor of federal access because the class is frequently opposed to federal jurisdiction. The class members are, however, wealthier, better organized, and more powerful than the plaintiffs. Thus, at least at the margin, we might expect that those harmed by resolving ambiguity in favor of federal access are more likely than those benefited by access to reverse "erroneous" federal jurisdiction decisions. Given that those harmed by access are closer to the state governing process, and that they often represent state majoritarian positions (or at least are capable of organizing as an interest group to affect those positions) they would seem to be more likely to use political process to override the decision to open federal court access than would their opponents. To this tale one might add structural and institutional reasons for federal judges — who possess life tenure and protection against the diminishment of their salaries — to protect those with less power to influence majoritarian political process. Therefore, courts ordinarily should resolve ambiguity in favor of open access.

Of course there is a contrary position — trust me, I can set it forth if necessary. The point of tie breaking is not to prove that one is correct. The purpose of spelling out the complicated set of judgments that go into tie breaking is to force a truthful exchange on why scholars and courts reach certain outcomes. What I advocate then is nothing more novel than saying that we should state what we believe and reveal the complex inner voice that helps us deal with the difficult questions.

not just to the relevance of the treatise, but to the work of all of us who read cases and statutes for a living and believe that what we say and do may influence law. Doctrine does matter. It is the fundament of all legal analysis, even in cases where law is ideology with another name. Books such as *Federal Jurisdiction* stand on the threshold of an emerging vision of law and legal scholarship. We scholars must shed our old neutral veneer and take on a clear ideological shine.