Buffalo Law Review

Volume 28 | Number 2 Article 3

4-1-1979

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Recommended Citation
Al Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 Buff. L. Rev. 383 (1979).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol28/iss2/3

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STUDIES IN BOUNDARY THEORY*: THREE ESSAYS IN ADJUDICATION AND POLITICS**

AL KATZ***

INTRODUCTION

A full explication of Boundary Theory must await another occasion, but a brief outline of its key concepts is set forth here in order to place the following essays in perspective.

Boundary Theory seeks to unpack certain fundamental characteristics of the form of human experience. It is, because it must be, at once a method and a theory of consciousness. As a method, Boundary Theory asserts that if one approaches a problem with the attitude that the problem is or was a solution to some (other) problem, it becomes possible to understand the nature of that solution by asking whether it struck a middle course between alternatives, or whether it saw the situation as inevitably binary, or whether it transcended the alternatives in a novel synthesis. Boundary Theory asserts that the number of available choices is thereby exhausted. This approach opens up the dynamics of genesis and historical change; the preferences or blind spots of a person or a period; the staying power of a theory and its weaknesses.

As a theory of consciousness, Boundary Theory asserts that human thought is contained within a finite number of forms. These forms are fundamental and should not be understood as necessarily confining human intelligence. Boundary Theory seeks to show that

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* Along with Six Essays on Crime and Criminal Law (unpublished 1978), one of which has been published in somewhat different form as Katz and Teitelbaum, *PINS Jurisdiction, the Vagueness Doctrine, and the Rule of Law*, in A. GOUGH & L. TEITELBAUM, BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT 201-34 (1977), *reprinted in* 53 IND. L.J. 1 (1977), the three essays published here complete the individual Studies in Boundary Theory.

** Though he would no doubt take exception to much of what is said herein, this paper is dedicated to the memory of David Louisell.

*** Professor of Law, State University of New York at Buffalo. I am indebted to Bob Gordon for over five years of vigorous skepticism and stingy enthusiasm. My association with Kennedy has been shorter and episodic but no less intense. I have relied on these two friends to flag gross mistakes of fact and theory; remaining errors in these classes may be attributed to their failure to take care that my reputation as a scholar be not further damaged. I will take my own lumps on mistakes of doctrine. I am also grateful to Konefsky, Lindgren, and Schlegel for reading countless fragments and for keeping me from taking my peculiar perception of the world too seriously.

human reason works with a small, basic set of perceptual-intellectual categories: unity, duality, mediation. This basic set is highly elaborated by two additional categories: the relation of wholes and parts, and transcendence. The combinations and permutations of these five categories are entirely a function of the existence of two types of boundaries: Vacuum Boundaries and Live Boundaries. "Vacuum Boundary" describes a distinction between two opposed phenomena where there is no third term, no compromise, no mediation. A Vacuum Boundary is a line. "Live Boundary" describes a distinction between two opposed phenomena separated by a "space" that partakes of both but is neither: compromise, mediation, ambiguity.

Boundary Theory is genetically related to the foundations of human experience. Human birth is simultaneously a moment of separation and symbiotic unity that, in addition, inaugurates a history of social connection. Without more, this development places Boundary Theory at the heart of human experience: the understanding of *difference* that constitutes one version of individual identity; the understanding of *similarity* or connection that constitutes another version of identity. While Boundary Theory does not rest on a naive biologism, it does assert that under all cultural circumstances the primal human experience is constituted by consciousness of similarity and difference. For example, even Piaget's cognitive-developmental theory holds that the primary forms of understanding are object conversation (unity), classification (similarity), and seriation (difference).[1] Similarity and difference, in the form of the experience of connectedness and disconnectedness, are at the root of all social relations, and therefore all social theories. Thus the social theory of capitalism emphasizes individual identity as a dynamic of differences; the social theory of socialism emphasizes individual identity as a dynamic of similarities.

The essay that follows is intended as an application of Boundary Theory to three concrete problems of adjudication and politics. The essay is a "test" of the theory in the same sense as any other test of a theory; no assertion is (or can be) made that the examples prove the theory, or that other approaches could not produce more satisfactory understanding.

The studies contained in this essay take up three classic legal

1. J. PIAGET, GENETIC EPISTEMOLOGY (1970).

problems from the perspective of Boundary Theory. Each may be identified by reference to an equally classic legal decision: *Ex parte Young;*[2] *Harris v. Balk;*[3] *Erie Railroad v. Tompkins.*[4] The first study tries to understand the relation between the eleventh and fourteenth amendments; the second deals with the relation between *in rem* and *in personam* jurisdiction; the final study attempts a perspective on the relation of substance to procedure. Each of these problems is constituted by a binary situation that is eventually elaborated by the creation of a middle space that purports to resolve a perceived dilemma. The initial duality is Vacuum Bounded in that it asserts a relation of difference. The middle term that comes to be inserted within the original duality reconstitutes the situation as a Live Boundary. The essays in their present form attempt to show that in these contexts the transformation from Vacuum to Live Boundary is a strategy for avoiding choice on matters of fundamental political significance. In doing so a choice was, of course, made—and I shall try to say something about the nature and significance of that choice.

Two cautionary notes: First, a good deal of the material in this essay is the subject of an existing scholarly debate. While I am persuaded that my version is sound, the general usefulness of Boundary Theory is not necessarily destroyed by my errors of application. Second, this essay is not the easiest to read. One reason for the difficulty is that I assume the reader has a certain familiarity with background ideas and language. I do not fully recapitulate arguments available elsewhere. The result is a degree of density uncommon in legal literature. For this I apologize and offer the hope that the prose can be simplified when the whole work is completed. But a generation of scholars that appears able to pass over phrases like "pareto optimal" without blushing should have no difficulty with the phrase "civil society," for example.

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2. 209 U.S. 123 (1908).
3. 198 U.S. 215 (1905).
4. 304 U.S. 64 (1938).

I. "State Action" and Actions Against the "State"

In this essay I will consider the relationship between the eleventh amendment bar to federal jurisdiction over suits against the several states, and fourteenth amendment substantive constraints on state action. The eleventh amendment erects an absolute barrier to the *vindication* of claims against the states; the fourteenth amendment establishes substantive restraints on actions that can be *attributed* to the states as political corporations. When may the actions of a person be attributed to the state? In what mode may interests harmed by such actions be vindicated? Legal doctrines of attribution and vindication thus specify the concrete relationship between state action and actions against the states. Behind this specific legal duality of attribution and vindication, however, are more abstract ideas of politics and social order that help shape legal doctrine. This paper relates two sets of ideas about politics and social order to legal doctrines of attribution and vindication. The first of these is the relationship of the *continuity* of the social order to modes of political *representation;* the second is the somewhat less abstract and more institutional question of the relationship of *responsibility* for official action to the exercise of *legitimate* power to provide a remedy.

I shall discuss these three sets of ideas and doctrines in the following way. I will begin by briefly recounting a line of American political thought from the revolutionary period to the end of the 18th century. I will try to understand this line of thought as an effort to work through specific problems of continuity and representation. I shall show how this effort led to the emergence of two "theories" of representation in the Federal Constitution. I shall call one the theory of agency and the other the theory of the corporate-state. The two theories of representation—the former held largely by federalists, the latter by antifederalists—embodied and generated different views of the responsibility of political agents and the legitimacy of judicial intervention. The two theories of representation and the different views of responsibility and legitimacy shed light on the crisis of *Chisholm v. Georgia*[5] and the problematic language of the eleventh amendment. I will argue that one reason the eleventh amendment was written in terms of judicial

5. 2 U.S. (2 Dall.) 419 (1793).

legitimacy was that the problem of responsibility could not be solved because there remained in the Federal Constitution two quite distinct ideas about representation.

Once the crisis around *Chisholm* is understood in this way, it becomes clear that while the eleventh amendment was a victory for antifederalists, it was also a victory for the essentially federalist theory of agency representation. The evidence for this proposition will be the concrete legal doctrines of attribution and vindication which, for the first seventy-five years of the 19th century, engendered no legal doctrine of "state action" in the sense of a doctrine establishing corporate responsibility for official harm-producing behavior. During this period both the attribution of responsibility and the mode of vindication were personal; state action entered, if at all, as the exculpatory *defense* of legal authority.

Against this background it will be possible to appreciate more fully the legal problems generated by the fourteenth amendment's articulation of rights specifically against the states as corporate bodies. I shall try to understand these legal problems along three dimensions. First, though the 19th century had developed a legal doctrine of attribution and vindication that reflected acceptance of an agency theory of representation, the fourteenth amendment postulated the legal responsibility of the corporate-state. This assertion of corporate-state legal responsibility meant that existing legal doctrine attributing responsibility to state agents personally was no longer coherent. Second, postulating corporate-state responsibility also meant accepting, at some level of consciousness, an important conceptual truth: that the corporate-state was capable of acting against the people as an "autonomous" corporation and not as their representative. This conceptual truth created a vacuum within representation: who represented the people when the state acted against them as an autonomous corporation? Third, the possibility of autonomous corporate action, in reviving the general issue of representation, necessarily revived the problem of judicial legitimacy: federal judicial intervention to impose corporate-state responsibility was specifically precluded by the eleventh amendment.

My major point will be that all three dimensions of this crisis were avoided at the level of legal doctrine primarily by *splitting* the attribution of (state) responsibility from the modes of (personal) vindication, and secondarily by accepting into constitutional law the notion of apparent agency authority. The contradictions

within the two theories of representation and the dilemma of responsibility and legitimacy were thus mediated by a legal doctrine that could have it both ways in all cases save one: legal actions that demanded money damages from the corporate-state. Analysis in the terms suggested thus leads to an increased appreciation of the significance of these cases. I will conclude by suggesting several general implications for politics and law.

A. *Representation and Civil Society*

Revolutionary America rejected English social organization and its theory of representation. In liberal English thought, society consisted of the Crown, the aristocracy, and the common people. When these three estates were present in the "mixed" government of Parliament, the entire body politic was present by "virtual" representation. Revolutionary American republicanism, however, rejected hierarchial social organization and held to a belief in the inherent virtue of civil society and its unity of interest in the common good. Given this belief in the preexisting virtue of civil society, its constitution in a broad sense was not perceived as the basic problem. Rather, the essential task was to develop a form of government that would confirm and protect republicanism. Given republicanism, the English form of "virtual" representation would not do.[6]

Republicanism appeared most consistent with "actual" representation. That is, if furthering the common welfare was the end of government, it followed that government should be directly responsible to the people. But early efforts to develop a system of actual representation ran into serious theoretical and practical difficulties. In theory, if civil society were really united in interest, only one representative was necessary. In practice, local communities (counties or towns) sent actual representatives to a legislative body that tended to split into factions rather than exemplify a unity of interest in the common good. Unity of interest, if it existed at all, appeared to be confined to local communities, and this sug-

6. On Revolutionary and post-Revolutionary ideology and politics, I rely heavily on B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); J. POCOCK, THE MACHIAVELLIAN MOMENT 506-52 (1975); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969). For accounts of earlier organicist theories, see E. KANTOROWICZ, THE KING'S TWO BODIES (1957); L. LOEMKER, STRUGGLE FOR SYNTHESIS: THE SEVENTEENTH CENTURY BACKGROUND OF LEIBNITZ'S SYNTHESIS OF ORDER AND FREEDOM (1972); M. WALTZER, THE REVOLUTION OF THE SAINTS 171-183 (1965). On the theory of political virtue, see J. LOCKE, TWO TREATISES OF GOVERNMENT 108-10 (Laslett ed. 1960).

gested, according to republican ideology, that local communities constituted the *communitas* of civil society. Consequently, there was no theoretical basis precluding the secession of local communities from post-Revolutionary state organization; the continuity of the latter was endangered.

So long as belief in the preexisting unity and virtue of civil society held firm, there was no way to ensure the binding effect of majoritarian legislation and the continuity of the states as communities. But abandoning belief in the preexisting unity and virtue of civil society meant that the people had to be seen as in a state of nature. That is, there had to be, prior to a political contract between rulers and ruled, a social contract that would assure the continuity of civil society and provide a basis for political society. The notion of a social contract established the binding effect of majoritarian legislation and secured the supremacy of the social contract over that legislation. These two principles were the major contribution of the period to future developments, though neither was accepted at the time without considerable confusion and doubt.

For a significant number of the social and intellectual elite, the state constitutions were a theoretical and practical disaster. They tended to produce "factional" legislation that bore none of the marks of virtue as that notion was understood.[7] Furthermore, egalitarian republican ideology allowed new "elements" in society to be raised to positions of power, and the elite saw this power being used to further self-interest and to indulge a "lust for luxury" rather than to promote the common good.[8] Finally, private rights and private power—understood at the time as the virtues of social distinction and property—were threatened by a legislative supremacy that did not respect virtue but spoke in the name of public power and public right. The ideology of equality, when realized in politics, confronted the class structure of civil society.

7. The post-Revolutionary period spawned sharply divided political parties in the teeth of this hostility to "faction." Professor Buel explains the apparent paradox as a consequence of the insecurity of ruling elites in the 1790's, and of relative degrees of confidence in the stability (continuity) of republicanism. R. BUEL, SECURING THE REVOLUTION (1972). I relate this crisis of authority to criminal law doctrine in my essay, Innocence and Guilt (unpublished 1978).

8. The shift in fashion from buckles to shoestrings and slippers put 20,000 British citizens out of work at the end of the 18th century. Madison took this opportunity to praise the "manly sentiments of American citizens . . . who are occupied in supplying wants, which being founded in solid utility," ensured subsistence and a "dignified sense of social rights." 6 WRITINGS OF JAMES MADISON 100 (G. Hunt ed. 1906).

In the immediate post-Revolutionary period, then, the states solved the problem of representation with a social contract and majoritarian politics. In doing so, however, it was necessary to abandon belief in the unity of interest and the domination of virtue in civil society; but without unity and virtue, moral continuity became a problem.

B. *Continuity and Political Society*

The federalist thought informing the creation of the Constitution turned revolutionary republicanism on its head. In revolutionary republicanism the moral notion of the preexisting unity and virtue of civil society was a postulate of the general good. Federalism, however, insisted that political power should reflect the particular virtues of social distinction and property so that political virtue might create general social virtue. The older belief in the inherent good of civil society was replaced by a belief that civil society must be made good[9] by a political society drawn more fully from the "better classes."[10] The revolutionary republican belief in social equality was replaced by the federalist doctrine of political equality concretized in "universal" suffrage.[11] Finally,

9. Compare Professor White's statement of

> the ultimate ambiguity of the American Revolutionary mind: its failure to come to a single conclusion on the role of government with regard to man's natural rights. Was it merely to guard them, to see to it that they were not invaded? Or was it to abet and favor the people in attaining certain God-proposed ends?

M. WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 256 (1978). White argues that in the drafting of the Declaration of Independence, Jefferson was himself caught up in this theoretical struggle, and hypothesizes that "the victory went to the Jefferson who thought that government should merely see to it that man did not enjoy *less* happiness than he could enjoy in what James Wilson called 'an independent and unconnected state of nature.'" *Id.* at 255. This is the ambiguity of *responsibility* that I shall argue is repeatedly transformed into an issue of *legitimacy.* See text accompanying notes 117-21 *infra* for a brief discussion of the "substantive due process" crisis of the 1930's in these terms. For a recent statement of Jefferson's final position as stated in the Declaration, but freed of ambiguity and history, see Kadish, *Respect for Life and Regard for Rights in the Criminal Law,* 64 CALIF. L. REV. 871, 885 (1976).

10. *But see* J. HABERMAS, THEORY AND PRACTICE 82-120 (1973) for the view that the absence of this belief in the American Revolution distinguishes it from the French Revolution. But the crisis of the post-Revolutionary period was that the people did not differentiate themselves in such a way as to yield up a natural aristocracy. *See* G. WOOD, *supra* note 6, at 391-425.

The bearing of Locke's epistemology of self-evident principles on the right to rule is discussed in M. WHITE, *supra* note 9; the argument is summarized in *id.* at 48-52.

11. Suffrage was, of course, limited to property holders. The rationale for this in the thought of Hamilton and Adams can be traced directly to Blackstone (*see* M. WHITE, *supra* note 9, at 258-67) whose "defect of will" theory (1 W. BLACKSTONE, COMMENTARIES *170-71) may, in turn, be traced to 17th century English Revolutionary principles. *See* C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 107-59 (1962). I dis-

federal power would insure moral continuity by protecting minority (property) interests from the excesses of state majorities. Federalist thought took the social assumption of revolutionary republicanism—the unity of interest in civil society—and realized it *by negation* in the construction of political society: unity of interest would be restored by a governing elite that universalized its particular interests.[12]

The political doctrine of sovereignty was the specific technique used to solve the problem of moral continuity generated by the state's solution to the problem or representation; federalism located sovereignty in the national population. That is, where the preexisting unity of civil society had once provided moral continuity, the political notion of sovereignty would now serve. But national popular sovereignty as a solution to the problem of moral continuity raised new problems of representation for the federal union.[13]

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cuss the significance of will in relation to the development of criminal law in Innocence and Guilt, *supra* note 7. On Blackstone, see Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979) Part III B(3) (a).

12. The Republicans believed the measures of government should fit the expectations of the governed [public opinion], because they had faith in republics. The Federalists believed rather that the social order was artificial, that contrivance was necessary to its preservation, and that the decisions of an elite must never take second place to the prejudice of the people.

R. BUEL, *supra* note 7, at 91-92. "Federalists talked both as if virtue was to be restored, and as if it had vanished and must be replaced by new paradigms." J. POCOCK, *supra* note 6, at 520. *See* Yarbrough, *Republicanism Reconsidered: Some Thoughts on the Foundation and Preservation of the American Republic*, 41 REV. OF POLITICS 61 (1979), arguing that the framers "sought to combine the advantages of liberal freedom and republican virtue, without the disadvantages of either." *Id.* at 63.

13. *See* J. POCOCK, *supra* note 6, at 519:

The Country tradition in English politics—partially descended from Harrington's republicanism, in which rotation ensures that the people take part in government as individuals and by turns, rather than through representatives—had made an important contribution toward redefining England as a Commonwealth when it stressed the importance of short parliaments. The implication was that the people, being propertied and independent, were by definition virtuous, but that their representatives were constantly exposed to the temptations of power and corruption; it was therefore necessary that the representation should return regularly to the represented, to have virtue renewed *(ridurre ai principii)* by the choice of new representatives if necessary. Virtue was an active principle, and in the election of a new parliament the people displayed virtue in action and performed more than a Hobbesian role. But it now became hard to decide whether the electors were one estate or order of the commonwealth (a classical Many) and the elected another (a classical Few), the relations between whom must be preserved from corruption; or whether the elected were at bottom mere servants, stewards, or ministers, who must be presumed corruptible virtually by definition. If the latter, then they must be considered delegates, subject to instruction and recall; but there would be the difficulty that the relation between them and their electors would no longer be a virtuous relation between civic equals. During the

C. *Agency and Corporate-State*

Two plausible "theories" of representation might be drawn from the Constitution. I shall call one the agency theory; the other the corporate-state theory.

The agency theory may be developed along the following lines. Under the federalist notion of popular national sovereignty, the rulers became the ruled, but the power of the people as rulers was limited to suffrage. Put another way, the role of the people in government was extended in theory and limited in practice. Given the limitation, further assurance was needed that the people would not soon lose their control. This assurance was provided by giving the old notion of separation of powers new meaning and central significance. In federalist thought, the separation of powers would not only serve the negative function of limiting power by fragmenting it, but the fragmented parts would—out of self-interest[14]—control the other parts. Since political power was to be self-controlling and could accommodate an indefinite range of particular interests, the limited role of the people in government presented no special problem. Finally, the distribution of powers was to be stated in the Constitution itself.

In outline this is the constitutional theory of agency. The people

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years of the American crisis, Burke was propounding to the electors of Bristol the view that their representative was chosen by them to act for the good of the whole realm, and thus to play a part which they could not play themselves. He therefore owed them the exercise of his judgment concerning the common good, even when it conflicted with theirs. They would be exercising their judgment with equal propriety if they decided not to reelect him at the close of his term, but they should not seek to impede his judgment by instructing or recalling him.

The first major national crisis of representation after the adoption of the Constitution was the ratification of the Jay Treaty. Federalists took the position that the view of the majority was unknown, and that in any case the wisdom and virtue of the elected Senate and President should prevail over the poorly informed passions of the moment. Republicans thought that the rulers should be ruled by the (sovereign) people. *See* R. BUEL, *supra* note 7, at 105-12.

14. *See* THE FEDERALIST Nos. 10, 51 (J. Madison). *See also* 6 WRITINGS OF JAMES MADISON 91-93, *supra* note 8, where Madison plainly states that Federalism and the separation of powers are *together* a necessary middle position between the dual evils of schism (anarchy) and consolidation (monarchy). This essay was published five years after the *Federalist Papers* and one year after he openly broke with Hamilton on the issue of the Bank.

Madison's views on federalism and the separation of powers, as expressed in the *Federalist Papers,* are tied to prevalent late 18th century views that held that individual human motivation is irrational and self-interested, but may produce a general good when properly organized. *See* A. LOVEJOY, *The Theory of Human Nature in the American Constitution and the Method of Counterpoise (Lecture II),* in REFLECTIONS ON HUMAN NATURE 35-65 (1961). An interesting general discussion may be found in A. HIRSCHMAN, THE PASSIONS AND THE INTERESTS 20-31 (1977).

elect agents all of whom represent the people. The form of this representation is specified in the Constitution, and direct enforcement of the specification is entrusted to agents. The Constitution stands between the people and their agents: agents derive their authority from it, and that authority is to be effectively circumscribed by other agents who also draw their authority from the Constitution. An agent represents the people only so long as he acts within constitutionally specified authority.

The corporate-state theory may be developed as follows. The political society established by the Constitution did not organically "represent" civil society in the way the "mixed" government of Parliament "represented" the three estates. The absence of an organic connection marks the separation of political and civil society. The Constitution vests all political power in the government for the purpose of administering for the general good. Popular sovereignty is largely a fiction since the people have no legal or effective political power beyond suffrage. While functions and power may be divided within the corporate state, the latter retains a monopoly of legal power. The state represents the people, but because it is not organically related to the people it is also capable of acting against them as an autonomous corporation. For this reason specific protections against state action are needed, and these must be stated in the Constitution itself.

Briefly detailing these two "theories" of representation is important for several reasons. The agency theory implies that the relations between state and federal governments are relations among four different agents of a national sovereign people who, in their wisdom, saw fit to distribute functions and powers in this way. The agency theory thus plays down the significance of the corporate-state. The corporate-state version, however, regards the creation of a federal union as an act affecting the several states only to the limited extent specified in the Constitution. The agency theory depends crucially on the idea of *national* popular sovereignty; the corporate-state theory either denies it or gives it another more limited meaning.

Both versions of constitutional representation agree that the Constitution stands between the people and their representatives, and in both versions the question of legitimacy and political responsibility are central. The two differ, however, on whether responsibility for official malfeasance is to be corporate or individual. Both notions of responsibility present serious legal complexities.

The agency notion implies that agents are personally responsible for unauthorized action, but assumes that this responsibility is dependent on common law rules of civil liability. In the corporate-state version, the state represents the people and individual officers represent the state, but the question of when unauthorized action binds the state is not really solved until the early 20th century, and the more abstract question of who represents the people when the state acts against the people in its capacity as an autonomous corporation has never been solved at all.

This brief sketch of a line of American political thought began with the most fundamental issues of continuity and representation, developed into the two "theories" of representation in the Federal Constitution, and ended by identifying the questions of judicial legitimacy and corporate responsibility as major political and legal concerns at the end of the 18th century. The questions of legitimacy and responsibility are at the heart of *Chisholm v. Georgia*[15] and the eleventh amendment; the sketch of American political thought culminates in the case and the amendment, and the specific legal problem of attribution and vindication begins there. In the following sections I will try to understand the legal doctrines of attribution and vindication in their relation to problems of representation and continuity, the two "theories" of representation, and the questions of legitimacy and responsibility.

D. *Continuity and Corporate-State Responsibility*

The heart of *Chisholm* is that a court of the United States may legitimately hold a state of the Union corporately responsible. The import of the eleventh amendment's reversal of the case remains mysterious precisely because it is not clear whether it rejected judicial legitimacy or corporate responsibility. To be sure, it is formally an amendment to article III jurisdiction, but cases through the 19th century provide considerable evidence that it intended a rejection of corporate responsibility. That is, I suggest that the amendment was written in terms of judicial legitimacy because the problem of corporate responsibility could not be solved at the time, and perhaps remains unsolvable. There are several related reasons for the historical conundrum regarding responsibility.

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15. 2 U.S. (2 Dall.) 419 (1793).

First, the two constitutional theories of representation—the theory of agency and the theory of the corporate-state—were hardly neat, clearly stated "theories." Federalist doctrine favored the agency notion because it fit nicely with the postulate of national popular sovereignty and the separation of powers. But federalist doctrine tended to undermine the prestige and independence of the states. The postulate of a national popular sovereignty, coupled with the general 18th century belief in the indivisibility of sovereignty, left state governments without any independent political base. In federalist theory, state governments received their power by delegation from national to local populations. Antifederalists, therefore, tended to favor the corporate state theory.

Second, antifederalist reliance on the corporate-state theory presented a most complex problem in the context of *Chisholm.* The theory held that the corporate-state represented the people in the several states. This implied that the corporate-state existed legitimately only as representative of the people; since it had no autonomous existence, it was incapable of acting against the people, or at least incapable of being held responsible when it did so. When the "state" acted against the people, responsibility had to be located elsewhere—in agents acting in the name of the state. In this way the antifederalists used the federalist theory of agency to distance corporate-state responsibility.

Third, the federalist theory of agency was itself plainly inconsistent with the corporate-state responsibility upon which *Chisholm* insisted. Federalists were prepared to use the corporate-state theory in order to hold the states responsible because the several states were not sovereign, but they could hardly do so consistent with a belief in a "stateless" society of the people and their agents.

Finally, since the action in *Chisholm* was for money debt the people of Georgia would ultimately pay the award. In dealing with this aspect of the case neither theory of representation was of much help. The agency theory was entirely irrelevant in the terms in which it was generally understood. The corporate-state theory had to concede that in contracting the debt as well as in paying it (should there be an award) the state was representing the people and not acting against them as an autonomous corporation; hence the question presented did not involve the responsibility of the autonomous corporate-state.

The eleventh amendment was a *partial* victory for the corporate-state theory and the notion of divisible sovereignity. But the

victory was not total;[16] in a real sense the amendment was also a victory for the agency theory of representation. In the following paragraphs I will argue that the amendment encouraged working through a legal doctrine that firmly embedded the theory of agency in American constitutional law. The complex doctrinal story may be summarized as follows. Since after the eleventh amendment neither the several states nor the federal government could be held corporately responsible, the legal burden fell on agents. What changed over time was the relationship between the people and their agents. In original federalist theory, this relationship was mediated by the Constitution, but otherwise it was di-

16. *See* Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism,* 89 HARV. L. REV. 682 (1976). In his effort to reconcile the eleventh amendment cases, Professor Tribe makes two essential arguments that oversimplify the historical context. He argues that the drafters of the constitutional plan (1) established or recognized a divisible (federal-state) sovereignty; and (2) understood that the Congress would be more representative of state interests than the judiciary. On the first point he relies entirely on Hamilton in THE FEDERALIST No. 81, but according to Professor Goebel, Hamilton was there arguing to the narrow point of Supreme Court superiority; his comments on state sovereignty should not be read broadly. 1 J. GOEBEL, O.W. HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 313-16 (1971).

More generally, the antifederalists never accepted federalist efforts to explain their theory of "coequal sovereignties" and had on their side the accepted historical "truth" that sovereignty was indivisible. James Wilson's argument that sovereignty remained in the people as a whole reconciled the two factions only if one accepted a state "sovereignty" delegated by the national population. Professor Tribe makes the mistake of assuming that a question more or less settled by the Civil War was settled by the original Constitution. *See* G. WOOD, *supra* note 6, at 524-36.

As to the second argument, the superior representative capacity of the Congress, Tribe disregards the significance of the federalist theory of agency. "The Federalists . . . had transformed political power into an indistinguishable agency of the people . . . ." *Id.* at 549. He cites THE FEDERADIST No. 46 (J. Madison), for the proposition that "Congress will be attentive to concerns of state governments as separate sovereigns," 89 HARV. L. REV. at 695, but THE FEDERALIST No. 46 opens with a statement of the general agency notion. Furthermore, its paean to Congressional solicitude is difficult to square with the broadside attack on "legislative usurpation and oppression" in THE FEDERALIST No. 47 (J. Madison).

My argument in the text is that the constitutional structure is ambivalent on basic issues of representation, responsibility and legitimacy. Notwithstanding Tribe's tour de force to the contrary, the ambivalence is our inheritance; witness the recent case of National League of Cities v. Usery, 426 U.S. 833 (1976), involving congressional extension of wage and hour protection to public employees. The Supreme Court felt moved to intervene on behalf of state and local governments, though the latter were adequately represented in the Congress that passed the bill. The point is made by Justice Brennan, dissenting, *id.* at 876-77 (citing THE FEDERALIST Nos. 45 and 46 (J. Madison)).

In his recent paper *Unraveling National League of Cities,* 90 HARV. L. REV. 1065 (1977), Professor Tribe purports to reaffirm these views with friendly footnote citation, *id.* at 1071 n.26, 1074 n.36. But the text tells a different story. "As long as judges do not fully and irrevocably repudiate the possibility of *ever* rejecting majoritarian political and economic choices, there is no honest way for them to escape the burdens of substantive judgment *in every case.* We may well believe that unelected judges will sometimes perform that task badly. But so will anyone else, including legislators. True, they are elected—but they cannot avoid being as removed from their constituents as are most judges." *Id.* at 1087.

rect.[17] However, as a consequence of the partial victory of the corporate-state theory reflected in the amendment, through the 19th century the relationship between the people and their agents became further mediated by the corporate-state: agents were agents of the state, not of the people directly. In the post-Civil War period this attenuation posed some very difficult problems.

E. *Representation and Agency*

The sense in which the eleventh amendment encouraged a doctrine that firmly embedded the agency theory of representation in American legal thought is this: After passage of that amendment, vindication of claims arising from official (state) action had to take the form of personal actions against the official. Plaintiffs gained no legal advantage from attempting to attribute the action of the agent to the state. Indeed, before the 1870's there was no *plaintiff's* doctrine of state attribution; there were no "state action" cases in the modern sense. Actions against officers of the several states were brought under common counts; state action entered the case *defensively* as confession and avoidance by way of legal justification. The *Dartmouth College* case for example, was an action in trover "for the book of records, corporate seal, and other corporate property . . . ."[18] The jury found Woodward liable for $20,000 if the New Hampshire acts amending the college charter were found unconstitutional. Because Woodward died before the opinion of the Supreme Court was announced, judgment *nunc pro tunc* for that amount plus costs was entered against him by the Court.[19]

17. In Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), it was apparently argued that the real party defendant was the people of Georgia, "and when their agents are unfaithful, the acts of those agents cease to be obligatory." *Id.* at 132. Chief Justice Marshall responded "that the people can act only by these agents, and that, while within the powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen . . . ." *Id.* at 132-33.

18. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 624 (1819). In addition, Providence Bank v. Billings & Pittman, 29 U.S. (4 Pet.) 514 (1830) and Jefferson Branch Bank v. Skelley, 66 U.S. (1 Black) 436 (1861), were both actions in trespass against sheriffs and treasurers who had seized funds from the banks in default of tax payments, the banks claiming tax immunity under their corporate charters. Defendants sought to avoid judgment for the conversion by relying on the state legislation which plaintiffs claimed, in replication, impaired the obligation of contract.

19. Pre-1875 cases were, of course, initiated in state court absent diversity of citizenship. The structure of these early cases was, therefore, the same whether the defendant was a state or federal officer. For example, compare *Dartmouth College* with Palmer v. Allen, 11 U.S. (7 Cranch) 550 (1813), a Connecticut action for assault and battery and false imprisonment against a deputy United States marshal.

After the Civil War, confusion arose when the famous case of *In re Ayers*[20] summarized the legal posture of the parties in a partially modern way: (1) the claimant alleged that defendant was acting on behalf of the state; (2) the constitutional claim stripped the defendant's act of its official jurisdiction and (3) left it as a "personal act of the individual" that violates a common law right "for which plaintiff is entitled to a remedy against the wrongdoer in his individual character." Throughout the century the claim of unlawful state action had functioned only to rebut the defense of agency.[21] The confusion generated by the first point in the *Ayers* formulation was a consequence of the effort, in post-1875 cases, to plead federal subject matter jurisdiction. Before *Ex parte Young* the effort ran into trouble. On the one hand, so long as attribution and vindication were personal, the action of the agent was attributed to him in his personal capacity and not as representative, and the mode of vindication—the remedy—ran against the officer personally. Consequently, there could be no federal jurisdiction. On the other hand, where the plaintiff alleged federal subject matter jurisdiction, he ran afoul of the eleventh amendment. Arguing before the Supreme Court, counsel for Ayers posed the crucial question:

> In the Virginia cases, . . . this court held that every officer of a State who acted for the State in the execution of its laws was the State under the Fourteenth Amendment. Shall the State be bound for their act and yet their act not be the State's under the immunity of the Eleventh Amendment?[22]

20. 123 U.S. 443 (1887).

21. The following two examples indicate the marginal survival of this 19th century structure: "When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. Federal Law, however, supplies the defense, if the conduct complained of was done pursuant to a federally imposed duty, or immunity from suit." Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) (citations omitted).

> Accordingly, they argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts. In this scheme the Fourth Amendment would serve merely to limit the extent to which agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them . . . .

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 390-91 (1971).

22. 123 U.S. at 465 (citation omitted). The significance of *Ayers* may be less than commonly supposed. Plaintiffs there alleged that the state had issued tax coupons that were negotiable and acceptable in payment of state taxes. Ayers, as attorney general, was bringing suit under claim of statutory authority against individuals who attempted to use the coupons to discharge state tax obligations. Plaintiffs claimed that these suits destroyed negotiability and that the authorizing statute impaired the obligation of contract; an in-

Through most of the 19th century, therefore, legitimate judicial intervention was confined to enforcing the personal responsibility of officials; attribution and vindication were personal when a representative acted beyond his agency authority.

F. *Responsibility and Attribution*

The eleventh amendment marked a partial victory for the corporate-state theory of representation, while the 19th century "state action" cases worked out the legal form of the agency theory. Taken together they provided the basis for a new solution to a set of old problems that were revived after the Civil War. These problems involved the distinction between the state as representative of the people and the state as an autonomous corporation capable of acting against the people, the related problem of state corporate responsibility, and the positioning of the corporate-state between the people and their agents.

The fourteenth amendment plainly recognizes the possibility of an autonomous corporate-state acting against the people by denying rights: it makes action under color of state law the basis of liability, and this establishes its direct confrontation with the eleventh amendment. Until *Ex parte Young* no principled resolution appeared to answer the question posed by Ayers' counsel. On the one hand, if the question of attribution remained tied to forms of personal vindication, the case could proceed on the agency theory and the fourteenth amendment could be ignored. On the other hand, if vindication were tied to official attribution, the

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junction against Ayers was prayed for. First, the Court had a great deal of trouble with the cause of action as a matter of contract law. The proceedings initiated by Ayers were "no breach of any contract subsisting between complainants and the State of Virginia." Further, the destruction of negotiability and general loss in market value were

> not direct and legal consequences of any breach of the contract made with the State of Virginia . . . . As such damage could not be recovered in a direct action upon the contract, if the State were suable at law, so neither can it be made the foundation of any preventive relief by injunction.

Id. at 496. Second, the Court viewed the contract clause as conferring individual rights

> only indirectly and incidentally . . . . In any judicial proceeding necessary to vindicate his rights under a contract affected by such legislation, the individual has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution.

Id. at 504 (quoting Carter v. Greenhow, 114 U.S. 317 (1884)). The model case is plainly Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). Given this view of actionability under the contract clause, *Young* may be distinguished as a fourteenth amendment case; it does not necessarily overrule *Ayers.*

corporate-state could be held responsible and the eleventh amendment would be ignored. But the two aspects could be split so that attribution reflected corporate-state responsibility while vindication reflected agent responsibility. The significance of *Ex parte Young* lies precisely in its firm resolve to split attribution from vindication and not in its abandonment of reliance on common law rights in favor of a federal cause of action,[23] or in its shift from common law forms of action to equitable intervention.[24] After 1908 no one claimed that it was incoherent to hold an agent *personally liable* for acting *as an agent* of the state.

Attributing the action of agents to the state was possible only with firm acceptance of the view that the corporate-state stood between the people and their agents. The unconstitutional acts of an agent had to be attributed to the corporate-state, not to the people. But neither splitting the question of attribution from the question of vindication, nor inserting the corporate-state between the people and their agents, solved the problem of the corporate-state's dual character as representative of the people and as autonomous corporation capable of acting against the people.[25] This is a serious conceptual problem. First, it is possible to read the eleventh amendment as barring actions against the state only when the state is acting as representative of the people. Since the state cannot represent the people when it acts against them by denying fourteenth amendment rights, the eleventh amendment vanishes in the face of a state action claim. Second, it is possible to read the fourteenth

23. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 935 (2d ed. 1973) [hereinafter cited as Hart & Wechsler].

24. *See* Tribe, *supra* note 16, at 687 n.26. Both Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430 (1869), and Pacific R.R. v. Maguire, 87 U.S. (20 Wall.) 36 (1873), were bills in equity for injunctive relief against tax collectors, claiming that the tax violated the contract clause. In *Rouse* the Court said:

> [W]e are of the opinion that the State of Missouri did make a contract on sufficient consideration with the Home of the Friendless, to exempt the property of the corporation from taxation, and that the attempt made [to collect the tax] *on behalf of the State through its authorized agent,* notwithstanding this agreement, . . . cannot be allowed.

75 U.S. (8 Wall.) at 438-39 (emphasis added).

25. This is but one aspect of a far more general phenomenon of modern political institutions.

> [I]n the liberal design the state was to be an instrumentality of the society rather than vice versa—an instrumentality specialized in the exercise of rule *over* the society. If this conception involves an implicit contradiction (how can the state both serve the society and rule over it?), the explanation for it lies in the fact that the society was not a fused but a split reality.

G. Poggi, The Development of the Modern State 118-19 (1978).

amendment as being addressed to the states as autonomous corporations and not as representatives of the people. But this reading leaves open the question of who represents the people in the several states when the state acts autonomously. In an ordinary state action case like *Young*, an attorney for the state typically represents the named agent-defendant. But if the state is acting as an autonomous corporation, its interests are not isomorphic with those of the people. Who represents the people?

The problem of the dual character of the corporate-state was to be "solved" in *Home Telephone & Telegraph v. City of Los Angeles*[26] by simply importing an "apparent authority" notion from agency law and making the question of actual authority irrelevant. This case recognizes that the corporate-state speaks with many voices; the defendant's may be but an illegal murmur in a chorus of constitutional compliance. For the purposes of attribution, it matters only that the defendant have apparent state authority; that he act under color of law. Accepting mere apparent authority as a basis for attributing agency action to the state had avoided condemnation of the corporate-state as such. Avoiding direct corporate condemnation also avoided the question of the representative relation of the corporate-state to the people. Finally, since apparent authority was relevant only to the question of attribution, litigation could proceed on the otherwise fictional premise that the case was brought against the agent personally. This fiction[27] was preserved by splitting attribution and vindication: attribution was official, but the form of vindication remained personal.

In summary, I have argued that the paradoxical relationship between the eleventh amendment and the fourteenth amendment was "resolved" by the construction of three Live Boundaries.

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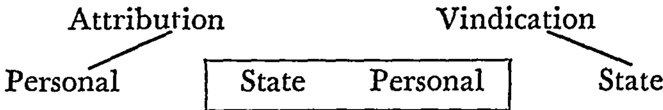
26. 227 U.S. 278 (1913).

27. On the "fiction" of Ex parte Young, see Perez v. Ledesma, 401 U.S. 82, 93, 106-20 (1971) (Brennan, J., concurring and dissenting).

I. Responsibility could be attributed to the officer personally or to the state; vindication could run against the officer personally or against the state. *Ex parte Young* took one from each:



II. *Young* also rejected the notion that responsibility had to be attributed to either the people or their agents. Instead it read the fourteenth amendment as situating the corporate-state between the two:

III. Points I and II above, by attributing responsibility to the state for acts against the people, brought to the surface the problem of the dual character of the corporate-state that was "solved" by the *Home Telephone* case:

G. *Legitimacy and Vindication*

I argued earlier that the eleventh amendment was probably framed in terms of judicial legitimacy because the problem of corporate responsibility could not be solved. Behind the question of corporate responsibility was the question of the relationship of the corporate-state to the people in the several states. Behind that relationship was the problem of the divisibility of sovereignty and the role of the federal government in protecting rights. One of the major concerns of the early federalists was that states would not respect minority (property) rights, and protection of these rights was an aspect of the general good that political society would secure for civil society. The federalists were certain that in protecting (property) rights the Constitution would place federal agents be-

tween state agents (or the corporate-state) and the people in the several states, and that this would require constitutional interpretation. The separation of powers within the federal government was thus tied to federalism by identifying the protection of rights with the general good, and by the notion of national popular sovereignty. In plainest terms, judicial intervention in state affairs did not necessarily protect the people of the state from their state government in any concrete sense, but it served the general good of the national population by enforcing abstract rights. Federal judicial intervention is thus the historical manifestation of the old federalist belief in the necessity for political society to create a virtuous civil society. Thus, it is inevitable that in concrete cases, judicial intervention for the general good and popular sovereignty (that is, the actual will of the people as manifested in politics) tend to confront each other as contradictions. Because of this confrontation, judicial legitimacy becomes problematic. But this problem too was to be "resolved" by forms of mediation implicit in *Ex parte Young*.

In the normal state action case after *Ex parte Young*, attribution is official but vindication is personal. This personal form of vindication became the accepted fictional mechanism through which state law or policy is judicially manipulated. Federal intervention is thus mediated through two forms that roughly reflect the agency and the corporate-state theories of representation. The form of vindication is personal, which means that the order runs against a particular officer. This formalism preserves legitimacy by placing the judiciary between the people and nonjudicial agents in accordance with the constitutional plan to commit the control of agents to other agents. In addition, the federal judiciary is placed between the corporate-state and an undifferentiated civil society—undifferentiated in that the people in the several states are not distinguished from the (sovereign) national population.[28] The problem with damage actions against the state is that they undermine these two forms of mediation.

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28. "The statute under which this action was brought, 42 U.S.C. § 1983 (1976), established in our law the role of the Federal Government as a guarantor of basic federal rights against state power." Hicks v. Miranda, 422 U.S. 322, 355-56 (1975) (Stewart, J., dissenting). Indeed, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people." Mitchum v. Foster, 407 U.S. 225, 239 (1972). *See also* Zwichler v. Koota, 389 U.S. 241, 245-48 (1967); McNeese v. Board of Educ., 373 U.S. 668, 671-73 (1963); Monroe v. Pape, 365 U.S. 167 (1961). For a different articulation of this mediation at the level of doctrine, see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 80-81 (1960).

First, damage actions against the state destroy the brilliant tour de force of *Ex parte Young* by assimilating attribution and vindication. That is, a damage action against the state no longer holds vindication personal. Attribution and vindication must both be official.

Second, the form of the action raises the question whether the wrongful act or policy is to be attributed to the state acting as representative of the people, or in its capacity as an autonomous corporation acting against the people. Since the money to pay the judgment must, inevitably, come from the people, both constructions lead in the same direction. Either the state was acting as representative of the people when it denied them rights, or the people are responsible for the actions of the autonomous corporate-state. In either view, the action for damages requires that the judiciary directly confront the people in the several states.

Third, directly confronting the people in the several states and holding them responsible for a denial of rights tends to confirm the constitutional theory of agency. That is, a state agent acting for the people in the several states did wrong, and the Constitution committed the control of agents to other agents—here the federal judiciary.

Fourth, this direct confrontation turns agency against the people and thus raises the problem of sovereignty: How may the federal judiciary, which is an agent of the people, hold the people responsible for the actions of other agents? To be sure, there are at least two simplistic answers. One is that the people in the several states are not sovereign. Since only the national collectivity is sovereign, there is no special incongruity in the people of a state being held responsible by a federal agency: the ruled have not turned against the rulers. The other simplistic answer is that the sovereign people established the Constitution as a legal device that would mediate between the people and their agents. So long as the federal judiciary enforces the Constitution in a colorably valid way within the damage action, it acts properly as an agent of the sovereign people and not against them.

Finally, the damage action realizes the old federalist belief in the necessity for political society to impose virtue on civil society. The people of the state, having acted through state agents to deny rights, must be brought to virtue by federal (judicial) agents.

All of these implications may be understood as aspects of a

single phenomenon. The splitting of attribution and vindication avoided a confrontation between abstract ideas of politics and law and the concrete realities of power and values. That is:

> So long as the distinction between civil and political society remains abstract it can be lived with, but the distinction is troublesome when it means placing the majority of a population under a judicial order to pay damages to a minority of a population.[29]
>
> The "split" or "dual" sovereignty notion, regarded as crucial to American federalism, works tolerably well until it becomes the central issue in a dispute over concrete issues of power or values.
>
> One need not choose between the two constitutional theories of representation—the agency theory and the corporate-state theory—so long as their implications remain abstract, but if one theory or the other determines the outcome of a question of responsibility or power, the issues must be resolved. The "coherence" of American politics depends on knowing whether officials are direct agents of the people or are agents of a corporate-state that represents the people but is capable of acting against them.

The difficulty of resolving abstract ideas of politics and law in concrete circumstances of power and values helps explain the tendency to treat questions of responsibility as though they were questions of legitimacy. I mentioned earlier that the eleventh amendment may have been written in terms of judicial legitimacy because the question of corporate responsibility was so difficult.[30] The fourteenth amendment was written in terms of corporate responsibility, but it did not foresee what this would mean for legitimacy. The tendency to treat questions of responsibility as questions of legitimacy can be seen at work in the two major contemporary social issues of crime and race. In law, the problem of crime becomes the issue of police control; the problem of race focuses on school segregation. In turn, the issue of police control is narrowed to the troublesome remedy of the exclusionary rule; school segregation is narrowed to bussing. Bussing and the exclusionary rule quickly become issues of judicial legitimacy.

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29. This would have been the case in Edelman v. Jordan, 415 U.S. 651 (1974). For an elaboration of *Edelman*'s formalism, see Hutto v. Finney, 437 U.S. 678, 689-93 (1978).

30. *See* text accompanying note 5 *supra*.

H. *Recent Developments*

Fitzpatrick v. Bitzer[31] illustrates the tendency of issues of responsibility to become issues of legitimacy. The case is factually simple. The 1972 amendments to Title VII of the Civil Rights Act of 1964 brought state employees within its terms, and provided employees with a right to recover money damages against the states as employers in violation of Title VII. The eleventh amendment was asserted as a bar to the federal suit. The Supreme Court held that the eleventh amendment was "necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment."[32] In enacting the 1972 amendments, Congress had acted under section 5, and in doing so had lifted the eleventh amendment bar. All prior cases raising the issue in the context of damage actions against the states could be explained by the absence of congressional action under section 5. Hence, the issue had *never* been one of state responsibility, but merely one of judicial legitimacy.

For its interpretation of the fourteenth amendment in general, and section 5 in particular, the Court relied almost exclusively on *Ex parte Virginia.*[33] This important case was read as providing the solution rather than setting the terms of the problem. Recall the question of counsel in *In re Ayers:* How shall the complainant allege state action and yet not be subject to the eleventh amendment bar? The answer given by the Court in *Fitzpatrick,* reading the fourteenth amendment through *Ex parte Virginia,* is that the amendment worked a profound shift in power to the federal government: that this "addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them."[34] *Ex parte Virginia,* of course, was concerned with the relationship between the states and the "general government"; it said nothing about the impact of the fourteenth amendment on the separation of powers within the general government. The *Fitzpatrick* opinion implies that "general government" should be read as "Congress"; that the fourteenth amendment transformed an issue of federalism into an issue of the separation of powers.[35] This transformation raises a number of problems not addressed in *Fitzpatrick.*

31. 427 U.S. 445 (1976).
32. *Id.* at 456.
33. 100 U.S. 339 (1879).
34. *Id.* at 346.
35. Professor Tribe attributes this transformation to the eleventh amendment itself. "[I]t remains true after the eleventh amendment, just as it was true prior to *Chisholm,*

Since the eleventh amendment was written as an amendment to the judicial power set forth in article III, it has never been supposed that Congress is free to grant that which the Constitution (as so amended) withheld. On its narrow holding, *Marbury v. Madison*[36] remains rather solid constitutional law. To the extent that it does, *Marbury* must mean that since the eleventh amendment removed federal judicial power over states in suits by private parties, the judicial power of Article III no longer extends to such cases, and Congress may not grant jurisdiction beyond the terms of that article as amended.[37] In transforming an issue of federalism into one of separation of powers, the *Fitzpatrick* Court implicitly rejected this line of argument. It read the fourteenth amendment as amending the eleventh by restoring the withdrawn judicial power, but the Court denied that the restoration was self-executing; it could not be exercised without an act of Congress. There are two critical difficulties with this reading of the three constitutional provisions at issue. First, the judicial power in article III has never been regarded as self-executing; federal judicial jurisdiction is statutory.[38] Second, the separation of powers thesis in *Fitzpatrick* disregards the original significance of the eleventh amendment; the separation of powers thesis implies that its aim could have been readily accomplished by simple amendment to the Judiciary Act of 1789.[39]

Again, it is important not to lose the major point. Structural discussion of the relation between congressional and judicial power in this context has general significance for two reasons. First, such discussion implicitly concedes that federalism and the separation of powers are *related* properties of American constitutional government.[40] Second, it tends to shift the focus of discussion and interest from the former to the latter, so that issues of responsibility become issues of legitimacy.

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that Congress . . . can effectuate the valid substantive purposes of federal law by (1) compelling states to submit to adjudication in federal courts . . . ." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-37, at 139 (1978).

36. 5 U.S. (1 Cranch) 137 (1803).

37. I am aware of the *Tidewater* problem, but read broadly that case overrules *Marbury*. Textile Workers v. Lincoln Mills, 353 U.S. 448, 460-84 (1957) (Frankfurter, J., dissenting). To be sure, conferring jurisdiction by state waiver of immunity introduces an anomaly into article III jurisprudence.

38. For views to the contrary, see HART & WECHSLER, *supra* note 23, at 313-15.

39. Judiciary Act of Sept. 24, 1789, ch. XX, § 14, 1 Stat. 73.

40. *But see* Elrod v. Burns, 427 U.S. 347, 352 (1976) (plurality opinion by Brennan, J., joined by Marshall & White, J.J.) ("the separation-of-powers principle like the political question doctrine, has no applicability to the federal judiciary's relationship to the States.").

In *Fitzpatrick v. Bitzer* the state appears as an employer. This suggests two lines of thought. First, as an employer, the state acts as an autonomous corporation delivering services. Corporate-state activities of this sort have frequently raised problems of federal-state relations, and almost as frequently have been resolved by a functional analysis suggesting the capacity of the corporate-state to act as a quasi-private corporation.[41] This line of thought raises the question whether *Fitzpatrick* means that the people are to be held responsible for the quasi-private acts of the corporate-state. Second, *Fitzpatrick* does not answer the question of the scope of congressional power where the state acts as an agent of the people. Is congressional power over vindication as broad as the attribution doctrine of "state action"? I suppose a case similar to *Monroe v. Pape*,[42] in which a state officer violates state and federal law simultaneously, and there is no indication of a state policy supporting the officer. The question is whether Congress may provide for damage actions *against the state* in this situation. *Fitzpatrick* does not in terms establish a doctrine of vindication as broad as the doctrine of attribution set forth in *Home Telephone and Telegraph v. Los Angeles*.[43]

41. *E.g.*, Employees of Dep't of Pub. Health & Welfare v. Missouri, 411 U.S. 279 (1973); Parden v. Terminal R.R., 377 U.S. 184 (1964); New York v. United States, 326 U.S. 572 (1946). *But see* National League of Cities v. Usery, 426 U.S. 833 (1976).

42. 365 U.S. 167 (1961).

43. 227 U.S. 278 (1913). *See* text accompanying note 26 *supra*.

II. QUASI-IN-REM JURISDICTION*

Introduction

The problem of party jurisdiction cannot be properly understood in terms of issues such as "fair notice" or "territorial sovereignty." Rather, the story of the rise and fall of *Pennoyer v. Neff*[44] is part of a long, and perhaps unconcluded,[45] struggle with the distinction between property relations and social relations. I will make two basic points. First, *Pennoyer* did not erect a Vacuum Boundary between in rem and in personam jurisdiction, though the case has been read in that way. A Vacuum Bounded structure would have presented serious difficulties in dealing with the common run of contemporary cases. I shall argue that *Pennoyer* articulated a Live Boundary structure that had been developing for 200 years. Characteristically, the middle space in this structure, what we now call quasi-in-rem[46] jurisdiction, was most important because it reflected the ambiguity of the distinction between social relations and property relations.[47]

Second, I shall attempt to show that the consistent course of the case law from the late 18th century through the end of the 19th century elaborated and enlarged the category of quasi-in-rem jurisdiction. All the problem cases—the cases worth litigating—involved jurisdiction quasi-in-rem. Furthermore, these cases involved legislative enlargements of the scope of state court jurisdiction confronting a more or less reluctant judiciary. Finally, the core substance of this middle category was the action of debt.

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* My thanks to Mary Frances Clark for her research assistance.

44. 95 U.S. 714 (1877).

45. *See e.g.*, Seider v. Roth, 17 N.Y. 2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). *Seider* has, however, survived the decision in Shaffer v. Heitner, 433 U.S. 186 (1977) extending "minimum contact" analysis to the question of presence for purposes of quasi-in-rem jurisdiction. O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir. 1978); Baden v. Staples, 45 N.Y.2d 889, 383 N.E.2d 110, 410 N.Y.S.2d 808 (1978). *See also* note 100 & accompanying text *infra*.

46. Justice Field uses the phrase in Freeman v. Alderson, 119 U.S. 185 (1886). I have not found an earlier reported case in which the phrase appears. It is not in the 5th edition of C. DRAKE, THE LAW OF SUITS BY ATTACHMENT (1878), but appears in the 7th (1891) edition at § 448a.

47. On the treatment of this distinction in Blackstone, see Kennedy, *supra* note 11, at Part IV. An equally difficult distinction between personal rights and property rights appears in the context of the Civil Rights jurisdiction, 28 U.S.C. § 1343(3) (1976). *See* Lynch v. Household Finance Corp., 405 U.S. 538 (1972); Hague v. C.I.O., 307 U.S. 493, 531 (1939) (Stone, J., concurring); Johnson v. Harder, 438 F.2d 7 (2nd Cir. 1971).

A. *Duality*

Consider the following contemporary critique of *Pennoyer:*

> Its inadequacy as a general theory can be summarized as follows: whereas an object is "property" because people have legal claims to it, and any legal claim for material redress is a claim to be compensated in property, Pennoyer requires the impossibility of thinking of property without an owner and compensation without payment.[48]

There are several problems with this critique. It is always tempting to castigate the thought of another time because it is so easy to do—easier, at least, than to understand it from the perspective of that time. The quoted passage criticizes the opinion in *Pennoyer* for failing to see that social relations and property relations are reversible.[49] But this is like sneering at the Romans for failing to understand that slaves are people with equal rights, or finding quaint the medieval conception of the "King's Two Bodies," or attributing a seriously truncated intelligence to those 18th century thinkers who held that sovereignty could not by its nature be subject to limiting principles. Maitland once remarked upon "the vast gulf which to our minds divides the 'give me what I own' and 'give me what I am owed',"[50] but he did not criticize 12th century lawyers for failing to note this "obvious" distinction.[51]

There is a real sense in which *Pennoyer* did in fact treat social relations and property relations as reversible, however. Since state court jurisdiction could be founded on power over either persons or property the two could be considered as functional equivalents, though judgments based on one or the other might have different consequences. The general proposition that state court judgments should have extra-territorial consequences had been established at least since the Articles of Confederation. Extra-territorial effect was not an issue in principle. The disputed question was whether a state court could secure power over a person by seizing his property. The 19th century jurisdiction cases clearly indicate that property could be substituted for persons and vice versa.

The reversibility of persons and property was only partial and

48. Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241, 281.

49. In Piaget's sense: A reversible operation changes the form of a constant substance. See his PSYCHOLOGY AND EPISTEMOLOGY (A. Rosin trans. 1971).

50. *Compare* Harris v. Balk, 198 U.S. 215 (1905) *with* Pennington v. Fourth Nat'l Bank, 243 U.S. 269 (1917).

51. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 362 (5th ed. 1956).

limited, and this limited reversibility constituted the core of the problem of party jurisdiction in the 19th century. All of the hard cases for one hundred years prior to *Pennoyer* involve either of two problems of reversibility: May power over property be substituted for power over the person of the defendant; does the case at hand involve social relations or property relations.[52]

Understanding the *Pennoyer* "system" requires more than a catalogue of logical flaws; it requires, at least, asking some questions about the sort of problem with which *Pennoyer* might have been concerned.

B. *Injustice*

The *Pennoyer* Court could not have been concerned with injustice in the sense that it perceived existing doctrine as treating a class of litigants unfairly. Cases truly in personam were not a problem because in those cases the defendant was actually served or voluntarily appeared, or both. In personam actions in equity had routinely affected title to lands located outside the jurisdiction since the 17th century; since the defendant was present he could be ordered to take action affecting the status of the foreign land.[53] Suits in personam presented some problems in early 19th century American equity cases affecting title to lands located in other states. Doctrinal nuance aside, the matter seems to have been sub-

52. The two problems are not always readily distinguished—as where plaintiff claims under a contract which provides that in return for land improvement services a parcel thereof is to be conveyed to him. The complaint may include both a count for specific performance of the contract to convey and an action for debt, with jurisdiction secured by attachment of the property. *See* Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336 (1850).

53. *See* Arglasse v. Muschamp, 23 Eng. Rep. 322 (Ch. 1682). To be sure, there were doctrinal limits to the exercise of this power. For example, where petitioner was a joint tenant and the bill prayed for an accounting and partition of lands located in Ireland, the Chancellor denied jurisdiction over the latter on the ground that it was in the nature of a common law writ and would not lie for foreign lands. Cartwright v. Pettus, 22 Eng. Rep. 916 (Ch. 1675). These doctrinal limitations appear to have been elaborated through the 18th century. For example, equity would not order the delivery of possession in foreign lands, Roberdeau v. Rous, 26 Eng. Rep. 342 (Ch. 1738); nor would it direct the specific distribution of a legacy in Scotland, Provost of Edinborough v. Aubery, 27 Eng. Rep. 157 (Ch. 1753); nor would it take jurisdiction in probate where the estate was either in the colonies or plantations because the substantive law was different, whereas the general principles of equity were the same everywhere. *See* Burn v. Cole, 27 Eng. Rep. 277 (Ch. 1762), Pike v. Hoare, 27 Eng. Rep. 286 (Ch. 1763). That these cases in no way affected the general principle is clear from the fact that they fall on both sides of the famous case of Penn v. Lord Baltimore, 27 Eng. Rep. 1132 (Ch. 1750), which upheld jurisdiction over a bill for the specific performance of Articles entered into between the parties in England and stipulating the location of the Maryland-Pennsylvania border. As a doctrinal matter the cases were plainly distinguishable.

stantially settled by 1810.[54] Cases truly in rem were not a problem because the ancient fiction that seizure of the property constituted constructive notice was never questioned. Cases quasi-in-rem had always been more troublesome and there is rhetoric about injustice in a number of cases earlier in the century. Nevertheless, a mere seven years before *Pennoyer* the Court had decided a tort case[55]—an otherwise classic in personam form of action[56]—where jurisdiction over the absent tortfeasor was secured by the seizure of his local property with notice effected by publication. The case deals with the scope of the judgment as a major issue, but there is no indication that anyone thought it was unjust for the state to subject the property to forced sale as a consequence of its owner's failure to appear and defend in the tort suit.

Pennoyer iterates the truism that without actual service on the person or seizure of his property state courts are without judicial power; but that had been true for well over a century in both English and American courts. The outcome of many of these cases may have been unfair, but it is difficult to find cases from this period which perceive any unfairness in applying accepted doctrine.[57] It may be true that "the law in 1877 with respect to notice was in sorry condition,"[58] but there are few doctrinal matters about which that could not be said—then or now.

C. *Notice*

Even if *Pennoyer* was not concerned with injustice, it is at least plausible that as a doctrinal matter notice had become a critical issue. I shall frame the question as: Under what circum-

54. Massie v. Watts, 10 U.S. (6 Cranch) 148 (1810) is an opinion by Marshall which follows the English authority of Penn v. Lord Baltimore, 27 Eng. Rep. 1132 (Ch. 1750). Where both parties were served and appearing, equity could act on the person of the defendant even if the performance compelled affected title to out-of-state land. To this extent jurisdiction over the person was reversible with jurisdiction over the land. Ward v. Arredondo, 1 Hopk. Ch. 213 (N.Y. 1824) sustained equity jurisdiction when only the deed was present in New York, and was thus wrongly decided in view of then current doctrine.

55. Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870).

56. "[I]n the absence of statutory provision allowing attachments to issue in actions founded on *tort,* it has been uniformly held, that in such actions it will not lie." C. DRAKE, THE LAW OF SUITS BY ATTACHMENT § 10 (7th ed. 1891).

57. Thus the New York Court of Appeals: "We have not been referred to any adjudications, holding that no man's right of property can be affected by a judicial proceeding unless he have personal notice." Matter of The Empire City Bank, 18 N.Y. 199, 215 (1858).

58. Hazard, *supra* note 48, at 252.

stances was notice perceived as a serious problem of doctrine, and how was this problem solved—if at all?

In the American cases from the end of the 18th century to the Civil War three principles are completely accepted, though variously articulated. First, notice to defendants, express or implied, was a requirement of natural justice. Second, statutory exceptions to the common law were to be strictly construed. Third, two kinds of defective judicial judgments existed: voidable judgments containing an error of law but nonetheless binding on collateral review; void judgments containing a jurisdictional defect not binding on collateral review. All the cases worth litigating prior to *Pennoyer* were decided according to one or more of these principles.

The principle of notice as a requirement of natural justice has a legal context without which it is incoherent. That legal context is constituted by the litany of common law fictions which rendered implied notice the equivalent of actual notice, thereby satisfying natural justice. There is some dispute over whether the implied notice generated by seizure of the res in true in rem cases was part of the principle of natural justice or an exception to it. This uncertainty is not very interesting because without doubt the implied notice doctrine of true in rem cases was solidly based in the common law, and the common law was closely identified with natural justice. More importantly, the uncertainty had no concrete consequences because all of the enlargements of state court jurisdiction which resulted in cases that made law were the result of legislation. Since these expansions were statutory, the second principle could be used.

Because extensions of state court jurisdiction were statutory there was no occasion to deal with the question whether the standard doctrine of constructive notice applicable to true in rem cases constituted an exception to the principle of natural justice or was a part of it.[59] Instead, it was well accepted early in the 19th century that if the court rendering a default judgment complied with the authorizing statute, strictly construed, that judgment was res judicata or was to be given full faith and credit. Of course, lawyers of the period had little difficulty finding procedural error or insufficiency in the record. Had the principle of strict construction been taken literally the underlying statutory provisions would have

59. Hazard, *supra* note 48, at 251.

been nullified. It was necessary to distinguish among procedural defects.

The third principle distinguished jurisdictional defects from mere errors of law.[60] Jurisdictional defects voided the judgment while mere errors of law did not. No general statement can be made about the sorts of defects considered jurisdictional; no general concept seems to have been applied.

The implications of these three principles are clear. Cases truly in rem raise no problem of notice because they arise under common law doctrine and are therefore consistent with the principle of natural justice. Cases truly in personam raise no problem of notice because the defendant is actually served or voluntarily appears, or both. The problem of notice arises entirely out of proceedings under statutes, and classically in actions of debt.[61] If there

60. The distinction was not limited to the context of party jurisdiction. *See* Ex parte Kearney, 20 U.S. (7 Wheat.) 38 (1822); Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830). The rule is stated in C. DRAKE, THE LAW OF SUITS BY ATTACHMENT § 87a (5th ed. 1878).

61. Quasi-in-rem jurisdiction is an outgrowth of the Custom of London, and by the Custom "all attachments are grounded on actions of debt." C. DRAKE, THE LAW OF SUITS BY ATTACHMENT § 9 (7th ed. 1891). American statutes modeled on the Custom, and eventually extending it considerably, were enacted early in the 18th century. *See* note 65 *infra.*

> In its nature this remedy is certainly anomalous. As it exists under the custom of London, it has hardly any feature of a common-law proceeding. At common law the first step in an action, without which no other can be taken, is to obtain service of process on the defendant; under the custom, this is not only not done, but it was declared by Lord Mansfield, that the very essence of the custom is that the defendant shall not have notice. At common law a debtor's property can be reached for the payment of his debt, only under a *fieri facias*; under the custom, it is subjected to a preliminary attachment, under which it is so held as to deprive the owner of control over it, until the plaintiff's claim be secured or satisfied. At common law only tangible property can be subjected to execution; under the custom, a debt due to the defendant is attached, and appropriated to the payment of his debt. At common law, after obtaining judgment, the plaintiff is entitled to execution without any further act on his part; under the custom, he cannot have execution of the garnishee's debt, without giving pledges to refund to the defendant the amount paid by the garnishee, if the defendant, within a year and a day, appear and disprove the debt for which the attachment is obtained.
>
> In these and other respects the proceeding under the custom has an individuality entirely foreign to the common law. Its peculiar features have in the main been preserved in its more enlarged and diversified development in this country. The most material differences as it exists among us, are, the necessity of notice to the defendant, either actual or constructive; the direct action of the attachment on tangible property, as well as its indirect effect upon debts, and upon property in the garnishee's hands; the necessity for the presentation of special grounds for resort to it; and the requirement of a cautionary bond, to be executed by the plaintiff and sureties, to indemnify the defendant against damage resulting from the attachment. Still the remedy is, with us, regarded and treated as *sui generis*, and is practically much favored in legislation, though, frequently spoken of by courts as not entitled to peculiar favor at their hands.

C. DRAKE, THE LAW OF SUITS BY ATTACHMENT § 4 (7th ed. 1891).

was a problem of notice prior to *Pennoyer* the problematic situation was constituted by quasi-in-rem jurisdiction. Moreover, the procedural form of quasi-in-rem attachment reflects the ambiguity of the underlying substantive relation: debt is ambiguously classified as a social obligation and as a property right.

One late 18th century case illustrates the fundamental structure because it does not involve a statute. In *Phelps v. Holker,*[62] a creditor brought an action for debt in Massachusetts against the absent debtor. The creditor attached a blanket belonging to his debtor which was in the possession of a local third party. Judgment for the creditor was by default, and the creditor brought suit on the judgment in Pennsylvania to recover the deficiency. The issue for the Pennsylvania court was whether the Massachusetts judgment was prima facie or conclusive evidence of the debt under the full faith and credit clause of the Articles of Confederation. Chief Justice M'Kean said: "This is a proceeding *in rem,* and ought not certainly to be extended further than the property attached."[63] The Pennsylvania court agreed that the Massachusetts judgment was only prima facie evidence of the debt. *Phelps* thus articulates in 1788 what later became standard quasi-in-rem doctrine. Massachusetts could conclusively determine property rights in the blanket; but it had no jurisdiction over the debt as such.[64] It should be noted that at this time no one supposed that an action for debt absolutely required actual notice to the defendant, and no one argued that as to the blanket the Massachusetts judgment resulted in unfairness to the defendant. The original proceeding was considered in rem, but any subsequent action to recover a deficiency must be considered in personam. To this limited extent social relations and property relations were reversible before the close of the 18th century.[65]

62. 1 U.S. (1 Dall.) 261 (S. Ct. Pa. 1788).

63. *Id.* at 264.

64. It is interesting that Mr. Ingersoll, representing the creditor argued that "the *Garnishee* has it always in his power to send notice to the Defendant." *Id.* at 263.

65. The Pennsylvania Supreme Court's treatment of *Phelps* might well have been influenced by a 1705 Pennsylvania law of attachment patterned on the Custom of London. *See* M'Clenachan v. M'Carty, 1 U.S. (1 Dall.) 375 (1788). The statute is construed by Justice Bushrod Washington on circuit in Fisher v. Consequa, 9 F. Cas. 120 (C.C.D. Pa. 1809) (No. 4,816). *Phelps* was frequently cited and followed. *See, e.g.,* Kilburn v. Woodworth, 5 Johns. 37 (N.Y. Sup. Ct. 1809), a case involving a Massachusetts judgment based on the attachment of a bedstead. Kibbe v. Kibbe, Kirby 119 (Conn. 1786), also involved a Massachusetts judgment based on the (dubious) attachment of a handkerchief.

D. *Three Principles*

The following cases illustrate the interplay of the three doctrinal principles: notice as a requirement of natural justice, strict statutory construction and the distinction between jurisdictional and non-jurisdictional errors in following statutory procedures. Again, there was no argument in any of these cases that the action was essentially in personam, or that actual notice was required regardless of statutory provisions to the contrary.

Hollingsworth v. Barbour[66] was a bill in equity alleging equitable title to certain lands upon a parol agreement to convey with consideration paid. Since the defendant owner died without executing a conveyance, plaintiff's bill (brought in 1814) sought a conveyance from all unknown heirs of the deceased. The chancellor purported to follow a Kentucky procedure contained in Acts of 1786 and 1802 which provided for service by publication in cases brought against unknown heirs where plaintiff claims as a "locator" or under a written instrument. Plaintiff had judgment by default, and commissioners appointed for the purpose conveyed the land in 1815. The subsequent action to set aside this conveyance was brought by persons claiming under prior patents or by adverse possession.

The chancellor's decree could have been sustained on one of two grounds: either as a proceeding in rem or as one authorized by special statute. The federal courts hearing the case rejected the former on the ground that a decree in chancery for the conveyance of land had never been considered in rem. Moreover, there had not been any *prior* condemnation and seizure of the land.[67] As for the second ground, the Kentucky statutory scheme was read as applying only where the plaintiff was a "locator" or claiming under a written instrument. The federal courts held that the original plaintiff was neither, so the bill in equity could not be sustained under the statutes if the defect was jurisdictional. The Supreme Court held that the defect was jurisdictional since Kentucky "law

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66. 29 U.S. (4 Pet.) 466 (1830).

67. The doctrinal requirement of prior seizure was given constitutional significance by *Pennoyer*. Professor Hazard asserts that the requirement of seizure prior to judgment was "wholly novel" on the ground that Field's opinion seems to require *actual* seizure of the land in proceedings in rem. Hazard, *supra* note 48, at 269. His reading of *Pennoyer* on this point may be questioned. The relevant section in Drake's treatise to which he points is authority for the proposition that actual seizure was not even permitted, and this section is reproduced without change in the editions published after *Pennoyer*. If *Pennoyer* constitutionalized a rule of actual seizure, as Hazard suggests, the leading treatise never noticed the fact.

did not authorize [service by] publication at all"[68] on the facts of this case. Consequently, the publication notice actually given could not be considered implied or constructive notice. In addition, the 1802 statute provided for substitute service where the identity of the heirs was unknown, but here the original plaintiff brought his bill without knowing whether or not heirs even existed, and the record was otherwise silent on the question. The Court held, as a further jurisdictional defect, that the statute was intended to provide for actions against unknown heirs, not nonexistent ones.[69]

The original action in *Voorhees v. Bank of United States*[70] was brought in 1807 under an 1805 Ohio statute providing for attachment and notice by publication. Counsel for defendant in ejectment (claiming under the original defendant) vigorously argued in the Supreme Court that the original proceeding was not in rem:

> The debt does not grow out of the property attached; there is no offense committed or duty neglected in regard to it, to form the basis of the proceeding. The particular property seized is not in default; no offense has been committed by means of it or in relation to it; there is no debt constituting a lien on it . . . . The issue to be tried . . . is whether the person defendant is debtor, and the amount of the debt . . . .[71]

But the Court never responded to the point. It did, however, take up the argument that the default judgment, with execution on the property attached, was defective because the record did not show that notice by publication, required and permitted by Ohio law, had ever been made. Justice Baldwin for the Court had no doubt that a clear distinction could be made between mere errors of law and jurisdictional defects.[72] The defect alleged here—silence

68. 29 U.S. at 476.

69. *Id.* at 477. *See also* Harris v. Hardeman, 55 U.S. (14 How.) 334, 343-44 (1852); McDaniel v. Sappinton, 3 Ky. (Hard.) 100 (1807) (holding that the statutory remedy by attachment, being in derogation of the common law, should be strictly pursued).

70. 35 U.S. (10 Pet.) 449 (1836).

71. *Id.* at 466-67.

72. According to Justice Baldwin, jurisdictional and non-jurisdictional errors were Vacuum Bounded.

> The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally . . . . In the one case, it is a record importing absolute verity; in the other, mere waste paper: there can be no middle character assigned to judicial proceedings, which are irreversible for error.

Id. at 474-75.

in the record—was plainly not jurisdictional. Furthermore, the need for security in land titles was thought to preclude ready disturbance of conveyances. According to the Court, if defendant in default had moved to set aside the judgment in 1808 he might have been entitled to the value of the land, but certainly not the land itself![73]

Boswell's Lessee v. Otis[74] also arose under Ohio statutory procedures. The original bill in equity claimed both a debt for services rendered and a contract to convey; service was by publication and there was no attachment prior to judgment. Counsel for plaintiff in ejectment argued that a proceeding to settle title to land would be in rem, that the chancellor would have jurisdiction, and that a procedure of foreign attachment to settle a common law debt was "substantially a proceeding in rem" and would support a default judgment. The Ohio statute authorized substitute service only in cases of contracts to convey, so that form could not be used in an action of debt. Thus the original decree in equity was unauthorized by the 1824 Ohio statute in two respects: A simple action of debt was not covered, and substitute service in actions for specific performance of contracts to convey was limited to the land subject of the contract. (The contract to convey covered "Lot #9" and execution of the judgment was on "Lot #7".) "[T]he Legislature may, perhaps, subject other lands to the payment of the judgment on the attachment after the sale of the lands first attached. But no such proceeding is authorized by the act under which this procedure was had."[75]

These few cases illustrate the following points. In the first half of the 19th century the problem of notice arose entirely in the context of quasi-in-rem cases. State legislatures consistently provided for substitute service. The cases were decided largely on statutory grounds pursuant to the principle of strict construction. No problem of notice was perceived whenever property was seized prior to judgment as authorized by statute. To this extent there is implicit acceptance of the reversibility of property relations and social relations. But even in proceedings by attachment, neither statutes nor adjudications permitted extension of the judgment beyond the attached property.[76] To this extent the *ir*reversi-

73. *Id.* at 476.
74. 50 U.S. (9 How.) 336 (1850).
75. *Id.* at 349.
76. Even the New York statute at issue in D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850), provided that judgments in suits against joint debtors, where less than all have

bility of property relations and social relations was implicitly asserted. The disputed cases fall into the Live Boundary space between cases in rem (property relations) and cases in personam (social relations).

E. *State Power*

There are a number of reasons why state power vis-a-vis other states was not perceived as a problem in the area of party jurisdiction through most of the 19th century. Cases truly in rem and truly in personam did not raise a power issue for the same reason they did not raise a notice issue.[77] In addition, no doctrinal distinction was drawn between res judicata cases and full faith and credit cases. The same principles of natural justice, strict construction, and jurisdictional error applied in either event.[78] Consequently, any serious issue of state power would necessarily arise in quasi-in-rem cases, for those were the ones involving legislatively authorized extensions of jurisdiction over absent parties. Issues of state power arose in two circumstances. First, where a quasi-in-rem judgment plaintiff sought to use his judgment to recover a deficiency against the defendant found in another state. Second, where the property attached was an intangible.

A consistent line of cases for at least a century barred the efforts of quasi-in-rem judgment plaintiffs from suing on their judgments to obtain a deficiency. The view of the matter taken by the Pennsylvania Supreme Court in *Phelps v. Holker*[79] in 1788 was elaborated by the United States Supreme Court in 1870 without substantial change:

> No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit.[80]

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been actually served or otherwise appeared, may be executed against absent joint debtors "but . . . not . . . against the *body* or against the *sole* property of any person not brought into court." *Id.* at 173 (emphasis supplied).

77. *See* II (B) *supra.*

78. Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870) was one of the very important post-war cases decided before *Pennoyer,* and was litigated entirely within Tennessee.

79. 1 U.S. (1 Dall.) 261 (S. Ct. Pa. 1788).

80. Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 318 (1870).

Given this clear and consistently articulated doctrine, it is unlikely that suits for deficiency based on quasi-in-rem judgments could plausibly raise any serious issue of state power.

The matter was much more troublesome, however, where the property attached was intangible. Such cases brought together two sorts of uncertainty. First, they were quasi-in-rem cases, which meant that they had aspects of both the in personam and the in rem form; they recognized that social relations and property relations were reversible to a limited degree. Second, where jurisdiction was founded on the attachment of an intangible there was uncertainty about *whether* that which was seized was property, and if "it" was property, *where* it was located. The issue of state power in the 19th century arose only in this very limited—but important—set of cases. The central point is that this issue of state power turned entirely on a twofold uncertainty regarding the boundary between social relations and property relations. Since I have previously discussed the first aspect, quasi-in-rem in general, I turn now to the second aspect: the problem of intangibles, particularly that of debt.

According to the Custom of London a debtor could be sued wherever found; as Justice Holt put it in *Andrews v. Clerke,*[81] the debt follows the debtor. This notion made perfect sense since debts were commonly regarded as the personal obligation of debtors; the action of debt was solidly in personam. It does not easily follow from this that a debt may be seized as property securing jursdiction quasi-in-rem. In the post-Civil War period, however, there arose a second line of cases holding that debts were the property of creditors.[82] These two lines of cases appeared irreconcilable.

81. 90 Eng. Rep. 619 (circa 1700).

82. The cases with clear and extended discussion of the matter are Mason v. Beebee, 44 F. 556 (S.D. Iowa 1890); Alabama Great So. R.R. v. Chumley, 92 Ala. 317, 9 So. 286 (1890); Atchison, T. & S.F. R.R. v. Maggard, 6 Colo. App. 85, 39 P. 985 (1895); Missouri Pac. Ry. v. Sharritt, 43 Kan. 375, 23 P. 430 (1890); Illinois Cent. R.R. v. Smith, 70 Miss. 344, 12 So. 461 (1892). It is important to note that these cases all arise after *Pennoyer* and after the *State Tax Cases* of 1872, 82 U.S. 300 (1872). In Louisville & Nashville R.R. v. Nash, 118 Ala. 477, 23 So. 825 (1897), counsel for the railroad which had paid a prior garnishment judgment said: "The confusion in the authorities on this subject results from applying the rules of determining the *situs* for the purposes of *taxation* to questions of *situs* for purposes of jurisdiction in the courts." 118 Ala. at 480. It is also interesting that virtually all of these cases involve railroad wage-debts, and the state courts were, without exception, hostile to foreign attachment judgments which destroy the wage-debt, particularly in the presence of a local statute exempting wages from garnishment. The Supreme Court's opinion in Chicago, R.I. & P. Ry. v. Sturm, 174 U.S. 710 (1899), is plainly to the contrary. *See* text accompanying notes 84 & 85 *infra*.

In the *State Tax Cases* of 1872,[83] for example, Justice Field's opinion for the Court held that debts in the form of bonds were the property of creditors and these assets followed the creditor. Where only the obligation was within the boundaries of a state in the sense that the debtor was there, the state could not tax the interest on the bonds—the interest taken to be the local debtor's obligaton. But in the context of jurisdiction the matter remained confused at least until 1899 when the Court decided *Chicago, R.I.&P. Ry. v. Sturm*.[84] Justice McKenna's opinion reconciles the two lines of cases in the following way:

> Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of *his* creditors. If it can be done in any other way than by process against the jurisdiction of his debtor, that way does not occur to us.[85]

This transformation of an obligation of the debtor into an asset held by the creditor[86] is best illustrated by the classic three party situation found in *Sturm* and *Harris v. Balk*.[87] The three parties occupied four roles. Plaintiff's debtor, the absent defendant, was also the creditor of the garnishee who was the party actually served and appearing in court. The thing seized was the personal obligation of the garnishee conceived of as the property of the person to whom that obligation was owed. That is, the personal obligation of the garnishee was treated as an asset of the absent defendant; hence it was subject to attachment and seizure like any other asset of an absent defendant. The garnishee became a reified accounts receivable, thus transforming a social relation into a property relation.[88]

This reversibility was significant for the issue of state power.

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83. 82 U.S. 300 (1872).

84. 174 U.S. 710 (1899). "Any attempt to reconcile the conflicting authorities on the question of the *situs* of a debt for the purpose of garnishment would be vain, but analogy, as well as reason and justice to the creditor, would seem to fix it at the domicile of the creditor . . . ." Louisville & Nashville R.R. v. Nash, 118 Ala. 477, 485, 23 So. 825, 827-28 (1897) (emphasis added).

85. 174 U.S. at 716.

86. As a formal matter, this means that a transitive operation has become a reversible operation. Thus, as a transitive operation: If *A* (garnishee) owes *B* (absent defendant), and *B* owes *C* (creditor-plaintiff), then *A* owes *C*. As a reversible operation: if a debt is the same as an asset then as an asset it may satisfy a debt.

87. 198 U.S. 215 (1905).

88. The most dramatic historical form of this legal transformation is slavery. *See* J. NOONAN, PERSONS AND MASKS OF THE LAW (1976). For a more sophisticated treatment, see E. GENOVESE, ROLL, JORDAN, ROLL 28-31 (1974).

First, since the exercise of state power was a function of physical control, it could not be justified unless founded on the presence of persons or property. In turn, presence depended, in the case of property, on an agreed definition of the concept. To the extent there was uncertainty on the matter of definition up to the end of the 19th century, particularly in the matter of debt, the bounds of state power could not be resolved. Put another way, the boundaries of state power depended on an accepted definition of property. Even well into the 20th century, there is no other serious issue of state power in the context of party jurisdiction.

The *Sturm* case, decided just six years before *Harris v. Balk*, is particularly interesting because it indicates how narrow the issue in *Harris* really was, and because it shows precisely how the supposed issue of state power was simply a reflection of a question of property. The facts of *Sturm* were very similar to those of *Harris*. The railroad owed wages to Sturm who lived and worked in Kansas. A creditor of Sturm attached this wage debt in Iowa. The railroad, a citizen of both states, conceded the debt, and the plaintiff creditor had judgment. Sturm subsequently sued the railroad in Kansas to collect the wages owed. The railroad pleaded payment, but Sturm argued that under Kansas case law the situs of a debt (wages owed) followed the creditor (Sturm) because it was the creditor's asset.[89] The putative state power issue was Iowa's capacity to foreclose Sturm's claim for wages in consequence of its power over his debtor (railroad). The resolution of this issue depended upon whether the creditor may treat the railroad's obligation to Sturm as Sturm's asset. Once it was decided that *an obligation* to pay money to another could be treated as *an asset* of the person to whom it is owed, and that the obligation (in the person of the obligor) could be seized as (though it were) property, the issue of state power was no longer pressing.

Having held in *Sturm* that debts were the property of creditors held by debtors in the form of an obligation, the issue in *Harris v. Balk* was all but foreclosed. It would have been difficult for the *Harris* Court to have held that the obligation of a debtor is to be treated as an asset of his creditor only when he is in one place rather than another. To be sure, the *Sturm* Court specifically reserved decision on the question of the temporary presence of the

89. He also argued that the Kansas wage exemption should have applied in the Iowa proceedings.

debtor-garnishee within the jurisdiction[90] and this lends some credence to the view that the problem of state power was viewed as separable from the conceptual definition of property. But there is a more plausible reason for reserving the question of temporary presence. According to the 1891 edition of *Drake on Attachment,* the Custom of London and "the uniform tenor of the [American] adjudications is that whether the defendant reside or not in the State in which the attachment is obtained, a non-resident cannot be subjected to garnishment there . . . ."[91] The question had to be left open because almost two centuries of doctrine had developed around the problem of the absconding debtor, not the miraculously appearing garnishee. Consequently, if the Court in *Harris* had been concerned with state power, there was this solid body of doctrine dating back to the Custom of London which would have allowed it to deny jurisdiction on the facts of the case without disturbing any of its prior decisions in this respect. But the issue was property, not state power.

Minor's 1901 treatise on conflicts,[92] upon which the *Harris* Court relied, enumerates six alternative theories for resolving the basic attachment situation. One is not an alternative at all,[93] and the remaining five are simple variations on a smaller set of basic choices: the debt follows the creditor (as in the *State Tax Cases* of 1872), or the debt follows the debtor (as in *Sturm*). A third possible rule limits the situs of the debt to the *domicile* of the debtor. The first choice had already been rejected by the Court in *Sturm* and was inconsistent with a century of American practice elaborating the Custom of London. The third choice was based on the mere fiction that debts were payable out of the debtor's funds which were presumptively located at his domicile, and in any event provided no assurance that absent defendants would be notified of a pending lawsuit. Minor himself took the view that the second alternative represented the "true" theory,[94] and the

90. 174 U.S. at 716.

91. C. DRAKE, THE LAW OF SUITS BY ATTACHMENT § 474 (7th ed. 1891).

92. R. MINOR, CONFLICT OF LAWS (1901).

93. *The place where the debt was payable* fixed its situs only when the garnishee was a non-resident; an exception to the general rule rather than an alternative theory.

94. Minor believed that this theory preserved what he called the "dual nature of the debt, which, while placing the creditor's *right* to sue (or chose in action) with the creditor, places the debtor's obligation to pay and the creditor's *ability* to exact payment with the debtor." R. MINOR, CONFLICT OF LAWS 287 (1901). The duality in this formulation is rather hard to find. Under his "true" theory debts would be treated no differently from horses or blankets.

Harris Court concurred without dwelling on the serious conceptual dispute that lay behind it.

F. *Transformation*

By the mid-20th century these issues of party jurisdiction are discussed wholly in terms of the twin notions of state power and fairness to litigants. I have tried to argue that the issue in the earlier period was different; it is more accurately characterized as one of private law rather than public law. More broadly, I have argued that the troublesome cases fell between clearly understood notions: in that Live Boundary space between social relations and property relations; between jurisdiction in personam and jurisdiction in rem. This Live Boundary space, doctrinally labelled quasi-in-rem, was functionally similar to the doctrine of *Ex parte Young*. That is, the quasi-in-rem concept split the question of personal obligation from the question of rights in the attached property, the same way *Young* split the questions of attribution and vindication.

The analysis I have suggested raises two larger problems the contours of which I will only suggest. First, the evidence indicates that by the end of the 19th century just about any type of lawsuit could be treated as a proceeding "essentially" in rem. Given this movement, why was it so important to retain a correlative in personam "essence" found in the doctrine that a judgment quasi-in-rem was in no way personally binding on the absent party? In other words, why was the reversibility of social relations and property relations only partial? I suggest, though there are surely large gaps in the evidence, that it was partial because of a contradiction between ends. On the one hand, the common law of property had been a law of feudal relations from which a bourgeois law of social relations was being derived. This effort had been in progress for at least two centuries; jurisdictional rules were certainly no more than a small corner of the field. On the other hand, the need to protect credit tended to resist this trend in certain contexts. Thus, if the creditor-debtor relationship was one of obligation, jurisdiction over the body of the latter would be necessary, but this would not provide maximum protection for creditors.[95]

95. The need to protect the security of credit was frequently inconsistent with the need to protect the security of land titles. Proceeding by foreign attachment, jurisdiction quasi-in-rem, served the former but undercut the latter where the property attached and

Treating this relationship as one of property, however, looked like feudalism.[96] Quasi-in-rem jurisdiction mediated this contradiction for a time, but it was a crucial time.

Second, the form of this mediation appears to have changed in the 20th century. To be sure, the cases, from *International Shoe*[97] on, chew over the 19th century doctrinal complex, but the niceties of private law in general, and the concept of property in particular, no longer appear critical in the major cases. While there is reason to believe this transformation was part of that larger transformation which followed the disintegration of classical conceptualism,[98] a somewhat different point can be made. Justice Jackson glumly observed that under 19th century doctrine notice was not required when the proceeding was in rem, and the proceeding was in rem whenever notice was not required.[99] There is some truth in this, but a similar observation may be made of minimum contact doctrine: it is unfair to subject defendants to a jurisdiction with which their contacts are less than minimum; minimum contacts are satisfied when it is not unfair to subject defendants to suit in a particular jurisdiction. However, the circularity in either 19th or 20th century doctrine misses the point. I have tried to show that in 19th century doctrine the critical cases involved social relations which were reified in order to found jurisdiction quasi-in-rem: a relation of debt became an asset. Under post-1940 doctrine the movement was reversed: be-

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executed on was land. See the discussion of *Voorhees*, text accompanying notes 70-73 *supra*, for a decision preferring the security of land titles over that of creditors. Drake ties the American expansion of the writ of attachment to a need to protect credit which became particularly serious in America as a consequence of federalism, interstate mobility, the expansion of credit and the abolition of debtors prison. C. DRAKE, THE LAW OF SUITS BY ATTACHMENT § 3 (5th ed. 1878).

96. Admiralty aside, in rem was the procedural equivalent of land law, and land law remained essentially feudal well into the 20th century. But the action for debt was the procedural equivalent of the bill of exchange, and the latter was long associated with the liberal benefits of moveable property, the rise of the mercantile class and, in Montesquieu, with inherent limits on arbitrary governance. *See* A. HIRSCHMAN, THE PASSIONS AND THE INTERESTS 69-81 (1977). However, the point in the text should not be taken too broadly. I intend only to suggest the possibility of a contradiction in relevant ideology. The contradiction is analogous to that noted by Genovese in his treatment of 19th century American slaveholders: on the one hand, a view of economic life structured according to the "possessive individualism" of contractarian liberalism. On the other hand, a view of social life structured according to a patriarchial, organic system of essential statuses. E. GENOVESE, THE WORLD THE SLAVEHOLDERS MADE, Part II, ch. 1 (1969). Blackstone's treatment of the matter is discussed in Kennedy, *supra* note 11, at Part IV C.

97. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

98. *See* D. Kennedy, The Rise and Fall of Classical Legal Thought 1850-1940 ch. 5 (unpublished 1976).

99. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950).

fore an asset could form the basis of jurisdiction there had to be some contact between its owner and some person(s) within the jurisdiction.[100] Property relations are transformed back into social relations when subjected to minimum contacts analysis.[101] Mediating this transformation is the judicial method of assessment known as balancing.

100. Shaffer v. Heitner, 433 U.S. 186 (1977), the most recent word on the subject, was a stockholder's derivative action against a Delaware corporation and a number of non-resident officers and directors. Plaintiff's bill in equity essentially alleged mismanagement resulting in substantial corporate losses. Jurisdiction was secured by sequestering stock held by the non-resident defendants which, by Delaware law, were deemed present in the state without regard to the actual location of the certificates. The Court seized the occasion to hold that in rem and quasi-in-rem jurisdiction should be subjected to the minimum contacts standards applicable to in personam actions. Shaffer thus rounds out the 20th century reversal of the 19th century sequence: where the 19th century gradually allowed most in personam suits to be brought as in rem actions through the mediation of quasi-in-rem jurisdiction, the 20th century has gradually reversed this process by progressively treating property relations as social relations. *Shaffer* holds that for jurisdiction to attach a set of social relations must be established between the parties, the claim, and the place.

101. Compare Marx, commenting on the inability of economists to recognize exchange-value as a social relation because of the "illusions of the Monetary System": "This emerges clearly in their confession of naive astonishment when the phenomenon that they have just ponderously described as a thing reappears as a social relation and, a moment later, having been defined as a social relation, teases them once more as a thing." K. MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 35 (Dobb trans. 1970). *See* Hazard, note 48 & accompanying text *supra*.

III. Substance and Procedure: A Live Boundary for Erie

A. *Classifying: Substance and Procedure*

My point of departure for this discussion of *Erie R.R. v. Tompkins*[102] is the recently developed conception of the structure of American legal thought in the post-Civil War period. The major characteristic of this "classical" period is its division of basic legal notions into "powers absolute within their spheres."[103] This conception appears to have permeated all, or most, areas of law, but I shall be concerned here only with the dualistic relation between the states and the federal government.

In this "classical" conception, the states and the federal government were separate sovereigns each enjoying autonomy within its appropriate sphere of power. The language in *Tarble's Case* is representative:

> There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their restrictive spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other.[104]

Erie's solution to the misconception, or "unconstitutional" theory, of *Swift v. Tyson*[105] was to simply apply this classical notion of tightly bounded spheres of autonomous power to the context of diversity jurisdiction.

The *Erie* principle has been universally accepted and praised, but nearly all of its progeny have been seriously criticized; no subsequent case seems to be a simple particularization of the general principle. Instead, the history of the *Erie* doctrine is constituted by a series of "tests" for determining the distribution of particular issues into the separate spheres of state and federal power. But, like *Erie* itself, each test has been merely a set of dualistic notions which spawned analytic binds at lower levels of generality. Thus

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102. 304 U.S. 64 (1938).
103. D. Kennedy, The Rise and Fall of Classical Legal Thought 1850-1940 ch. 2 (unpublished 1976).
104. 80 U.S. (13 Wall.) 397, 406 (1871).
105. 41 U.S. (16 Pet.) 1 (1842).

in *Guaranty Trust Co. v. York*[106] the Court distinguished between rules which affected the outcome of litigation and those which did not; Henry Hart attempted to salvage this mysterious clarification of *Erie*'s dualism by distinguishing rules affecting primary private activity from rules relevant to litigation only;[107] more recent attempts distinguish rules reflecting significant state policies from those which do not.[108] The latter effort commends itself by virtue of the fact that it puts judges and scholars to a great deal more effort and research than the simple *Sibbach v. Wilson*[109] test of whether the rule in question "really" regulates procedure. Under *Sibbach,* all a judge could do after stating the test was assert that the rule in question did or did not *really* regulate procedure, and perhaps try to give a reason or two. Needless to say, there would always be equally good reasons for the opposite conclusion. The inquiry into policies, however, requires a good deal more research and purports to result in richer opinions. But, as recent scholarship so painfully indicates,[110] research into policies frequently turns up very little useful information; in the end policies seem invented to suit the occasion.

There is, however, another doctrinal history of the post-*Erie* period. This alternative history is constituted by a series of attempts to solve the problem of dualism by the insertion of a middle category between "powers absolute within their spheres." The simplest of these attempts suggested the possibility of quasi-procedural rules.[111] The suggestion never caught on. Undoubtedly no one believed that calling a rule quasi-procedural was much of a solution since the ultimate distribution was necessarily dualistic: either the states or the federal government would have law making power. Quasi-procedural rules, if they existed, would have to be placed in one sphere or the other so it hardly mattered what the rules were called.

Hanna v. Plumer[112] is a more sophisticated attempt to define a middle category. *Hanna* would create a middle category composed of rules which are rationally capable of being characterized

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106. 326 U.S. 99 (1945).

107. *See generally* HART & WECHSLER, *supra* note 23.

108. Ely, *The Irrepressible Myth of Erie,* 87 HARV. L. REV. 693 (1974).

109. 312 U.S. 1 (1941).

110. Chayes, *Some Further Last Words on Erie—The Bead Game,* 87 HARV. L. REV. 741 (1974).

111. HART & WECHSLER, *supra* note 23, at 713.

112. 380 U.S. 460 (1965).

as either substance or procedure. The case holds that where a rule may rationally be placed in either category, a rule authorized by Congress may control without doing violence to either *Erie* or the Constitution. Justice Harlan's objection to this resolution of *Erie*'s conceptual dualism expresses his preference for a dualistic particularizing principle: he argues for the distinction between rules regulating primary private activity and those which refer to litigation. But there is more to his dissent than a preference for dualism; his objection is also grounded on the view that the Court's "arguably procedural, ergo Constitutional" test constituted a federalist tour de force. Given this objection, Harlan might have nevertheless abandoned *Erie*'s dualism by suggesting an "arguably substantive, ergo unconstitutional" test. This hypothetical alternative test would have had the advantage of creating a middle category while holding federalist expansion in check. However, in the context of *Hanna* it would have had the disadvantage of invalidating a Federal Rule of Civil Procedure. Harlan's dilemma was that he could not simultaneously defer both to the states and to the Congress unless he adhered to the "classical" dualism of separate powers absolute within their spheres.

However, a slightly more complicated version of the "arguably procedural" test may be attached to the distinction, drawn by the *Hanna* Court, between cases falling under the Rules of Decision Act (the "true" *Erie* cases) and those cases to be decided under the Rules Enabling Act. This middle category would function in the following way: In cases under the Rules of Decision Act, a rule which is arguably substantive should generate the application of state law. In cases under the Rules Enabling Act, a rule which is arguably procedural should generate the application of federal law. This somewhat more complicated middle category —arguably procedural/arguably substantive—satisfies the claim that Acts of Congress (or rules made pursuant to the Rules Enabling Act) should have more power to displace state law than federal court made rules[113]—the separation of powers issue within the problem of federalism. It also satisfies the claim that the Rules of Decision Act expressed a decided preference for state law even where there was potential federal power over the matter[114]—cases like *Erie* itself.

113. Mishkin, *Some Further Last Words on Erie—The Thread,* 87 HARV. L. REV. 1682 (1974).

114. Ely, *supra* note 108, at 704-06.

The middle category constructed in this way has a further characteristic of significance for the separation of powers issue within the *Erie* problem of federalism. In the "classical" conception of powers absolute within their spheres, a federal court "monitored" the distribution of competence but perceived itself as otherwise neutral. The *Erie* decision is totally consistent with this view. The contemporary version of the classical conception is the argument that the importance of the distinction between cases under the Rules of Decision Act (true *Erie* cases) and the Rules Enabling Act lies in the superior authority of Congress (over the federal courts) to displace otherwise applicable state rules.[115] The middle category suggested here, however, places *both* Congress and the federal courts in mediating positions with respect to these issues of federalism. That is, congressional action generates an "arguably procedural" orientation, but it remains for the courts to determine whether the matter is arguable or not. Reciprocally, in the absence of congressional action, under the Rules of Decision Act, the "arguably substantive, ergo state law" orientation, applies. In this situation deference is paid to the congressional preference expressed in the Rules of Decision Act, and deference is paid to the states by the arguably substantive test, but it remains for the federal courts to determine whether the matter is arguable.

B. *Splitting: Court and Congress*

Consequently, it is possible to understand substance and procedure as separated by a Live Boundary. *Swift* was a disaster because it neither created a clear conceptual distinction which would satisfy federalist theory, nor pointed toward a coherent middle position. As I have tried to show in previous sections, a coherent Live Boundary in the context of personal jurisdiction was achieved by splitting the question of personal obligation from the question of rights in the attached property; in the context of actions against the states, by splitting the question of attribution from the question of vindication. *Swift* failed to relate the separation of powers

115. This view is common in current research. There are two dominant strands to the argument: (1) the framers intentions; (2) the fact of state representation in the Congress. Both are reflected in two minor strands: (1) the intention of the framers of the fourteenth amendment; (2) the continuing life of the tenth amendment through which the federal courts protect the states from the stupidity of their representatives in the Congress. My dissent from these arguments is recorded in note 16 *supra*.

issue to the federalism issue. Whether a rule is arguably procedural/substantive might be a question for the court, but the disposition of the matter in the event of arguability—the federalism issue—may be pretermitted by Congress.

From this perspective *Erie* was as much a failure as *Swift*. What the latter attempted to achieve by tour de force the former achieved by "classical" conceptualism. The two cases are consistent in that both deny the possibility of a Live Boundary between legal issues to which state law applies and those to which federal law applies.

It is not true, therefore, that *Erie* overruled both *Swift* and a conception of law. This view replaces a federalist tour de force (*Swift*) with a positivist tour de force (*Erie*). The "general law" of *Swift* never specified its legitimizing authority. The rule of decision *Swift* applied was, at best, grounded in custom; at worst, it was grounded in the general authority of judges to adjudicate particular cases. Positivist ideology rejects the former outright. As to the latter, it insists that judges point to some authority independent of the authority to be exercised in the particular case. But we certainly know now—even if they didn't know then—that whatever authority exists independent of that to be exercised in the particular case falls far short of an imperative. In litigated cases judges confront conflicting rules, or at least conflicts over the applicability or interpretation of rules. In these cases the voice of the sovereign babbles in its articulations. Even closer to the point are those cases in which the sovereign—in the guise of judges in prior cases within the jurisdiction—has not spoken at all. Positivism has always been at a loss to account honestly for these cases. A judge who decides such a case after exploring the articulated wisdom of other sovereigns is not easily distinguished from Justice Story in *Swift*. The dispute at this juncture must shift ground: the distinction needs to be one of attitude. The judge *feels bound* by prior articulations within sovereignty; he is only *advised* by external authority. Perhaps there is something to this difference of mood, but it is a far cry from the initial positivist claim that *Erie* overruled a way of looking at law. At best the case was present at the inauguration of an era of judicial deference in general, and federal judicial deference in particular.

This mood of deference put *Erie* at odds with itself. On the one hand, the conceptual distinction between substance and procedure was articulated as the key to the deployment of power be-

tween sovereigns. This was the federalism issue. On the other hand, the mood implied federal judicial deference to Congress, and on this separation of powers issue *Erie* was silent. Nevertheless, the mood opened up the possibility of a middle position, a possibility which remained unarticulated until *Hanna*. When this possibility is realized, as in the arguably procedural/arguably substantive thesis I have suggested, the mood of deference becomes concretized as legal doctrine.[116]

C. *Deferring: Legitimacy and Responsibility*

The mood of deference simply reflects the fundamental issues of (judicial) legitimacy and (corporate) responsibility within a theory of representation,[117] this time in the context of the diversity jurisdiction. This issue has been traditionally posed as: Was the diversity jurisdiction meant to provide a neutral forum only, or did it leave open the possibility of being a source of non-discriminatory (better) rules of decision? The latter view is exemplified by *Swift*, the former view by *Erie*—or at least modern *Erie* scholarship. But *Swift* not only rejected a diversity jurisdiction limited to neutrality; it also perceived the question as simply one of federalism. The modern view is necessarily ambivalent about the true scope of the jurisdiction, but resolves the question as a function of the separation of powers: the scope of the diversity clause is for Congress to determine.

This modern view is based on an implicit constitutional "theory" which may be briefly stated in two alternative formulations: (1) The constitutional distribution of powers within the federal government is easier to understand/manage than the distribution of powers between the federal and state governments. Issues of (judicial) legitimacy are easier than issues of (corporate) responsibility; (2) There is no viable theory limiting (federal)

116. H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 545-46 (tent. ed. 1958):

> A school of legal writers occupied themselves during the twenties and thirties happily and sometimes usefully debunking what are called the "myths" of judicial rationality and objectivity. See, *e.g.*, FRANK, LAW AND THE MODERN MIND (1930). During the forties and fifties there has grown up, and been fostered sometimes by the same writers, a myth of legislative omni-competence reaching on occasion heights of fantasy beyond any which the earlier myths ever attained. It can safely be predicted that this latter-day myth is destined for an even more drastic debunking in the sixties.

117. *See* text accompanying note 5 *supra*.

legislative power, but there is a viable theory limiting (federal) judicial power. The problem of corporate responsibility remains unsolved. Both versions make the same claim; the first is in a more legal form than the second, political, version. The critical point is that this modern view presupposes, and is presupposed by, the mood of deference. Within this mood all constitutional questions may be resolved—though of course some will be more difficult than others.

The mood of deference is the post-positivist universal mediator in constitutional theory. Issues of federalism are resolved by reference to the separation of powers, and these issues are in turn resolved through the mood of deference. This universal mediation would not be possible without the firmly accepted notion that politics and law must be distinct orders of experience. The great irony of judicial review is that it begins as a dubious usurpation of politics by law, but ultimately leaves plenty of room for the resolution of political issues within law through the mood of deference.

D. *Balancing*: *Law and Politics*

The mood of deference requires one further component in order to fulfill its current role as universal mediator. The mood is brought to the surface by that famous confrontation of law and politics in 1937. The court-packing plan[118] was the supreme vindication of that schoolish naiveté which is awed by the beauty of checks and balances at work. In this confrontation law was checked by politics and emerged deferential. But for anyone who believed in *Marbury v. Madison* and the rule of law, the confrontation was a disaster. The *theory* of the political check is fine, but the rule of law requires that it rarely occur lest the distinction between law and politics disintegrate.[119] The way to obviate the necessity of a

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118. *See* Leuchtenberg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 Sup. Ct. Rev. 347.

119. *Cf.* Hart & Wechsler, *supra* note 23, at 363:

> Could it be argued that it is politically healthy that Professor Ratner's position has never been authoritatively accepted and that the limits of Congressional power have never been completely clarified? Does the existence of a Congressional power of unspecified scope help the maintenance of a desirable tension between Court and Congress? In some circumstances, may not attempts to restrict jurisdiction be an appropriate and important way for the political branches to register disagreement with the Court and to channel and focus such contrary opinions in a way that will come to the Court's attention? And it is not enormously significant in

real political check is to insert that check within the rule of law itself:[120] thus the powers of the political branches of government may be balanced like any other set of "interests" would be. In this way balancing is inserted within the mood of deference *as its method and meaning.*[121]

Concluding Thought

Middle positions are ubiquitous in modern legal discourse, and there is something important to be said about that. But equally important is the attitude that regards them as inevitable, almost natural phenomena: the best poor humanity can hope for after the fall. The suggestion that a choice between alternatives is possible or desirable is regarded as just the sort of ideological absolutism liberal democracy was intended to forestall. Choosing between alternatives is impossible without a metaphysics of truth or knowledge of the good, and liberal democracy denies all forms of absolutism. Just as Madison sought to steer a middle course between anarchy and monarchy, modern legal discourse is dedicated to avoiding choice at all levels of doctrinal elaboration. Between every pair of alternatives modern legal thought inserts a method in the form of a principle (equitable or otherwise), or a doctrine like "implication," or a mode of discretion, or a maxim of inter-

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> this regard that, ever since McCardle, such "attempts" have, in the main, been just that, that Congress has not significantly cut back the Supreme Court's jurisdiction in a "vindictive" manner despite the enormous unpopularity from time to time of some of its rulings?

120. *See id.* at 364:

> [C]ould it not be argued that, politically and psychologically, the legitimacy of judicial review is enormously buttressed by the continuing existence of Congressional power to curtail jurisdiction? That the continuing existence of this power, rather than being a threat to judicial independence, is one of its important (though subtle) bulwarks?

Similarly, discretion, once considered to be the antithesis of law by scholars like Henry Hart, may come to be viewed as part of its essential quality. I discuss this in Disorienting Deviance and the Rule of Law (unpublished 1978).

121. There are three histories of balancing which have yet to be tied together: the doctrinal history from the early 20th century to the present; the philosophy of the good dating from Aristotle; the liberal theory from 17th century religious thought which takes form as a central political concept in the 18th century. For an example of the last, see J. HILL, THE CENTURY OF REVOLUTIONS: 1603-1714, at 252-53 (1961):

> Fear of the vulgar, of the emotional, of anything extreme, was deeply rooted in the social anxieties of Restoration England. Enthusiasm was associated with lower class revolution: the propertied classes had learned the dangers of carrying things to extremes, and were learning the virtues of compromise. Halifax saw God Almighty as a trimmer too, "divided between his two great attributes, his mercy and his justice."

On the situating of the judiciary in the middle for balance *see id.* at 297-99.

pretation, or a burden of proof. But the structure of thought is always the same, and its theoretical basis is very simple. The truth may not be knowable in general, but it may be known in particular. To be sure, this statement collapses with its utterance, but with a final desperate effort it enters that wider discourse of method in science that currently contains the hottest war of its history. The question is: How can there be an objective method if there can be no objective knowledge of substance? Modern legal thought enters on the fringes of this theatre because that is its only hope of resolving the contradiction that threatens to destroy what is left of the rule of law. This contradiction has two aspects. First, how can the method used to decide particulars be objectively valid while substantive truth is shrouded in mystery? Second, if the middle way is inevitable, necessary, unavoidable, it becomes the true way by virtue of its inevitability. But if it is the true way, how has liberal democratic theory avoided its own devilish spectre? If the middle way is the truth, it is not the middle way but simply a form of absolutism.