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Federal Jurisdiction

Thomas E. Baker
Florida International University College of Law

FEDERAL JURISDICTION

by Thomas E. Baker *

I. "THE SYLLABUS"[1]

I have lived in the United States Court of Appeals for the Fifth Circuit as a law student, law clerk, law teacher, and lawyer. Much of my academic career has involved that great court.[2] I am honored to participate in this survey. Anticipating a readership of federal judges and practicing lawyers, however, gives me pause.

The court,[3] counsel and commentators must be aware of the reality that our courts of appeals sit in most cases both as the appeal of right and as the final review. In the Dedication to last year's survey, Justice White made the point:

> The Supreme Court of the United States reviews only a small percentage of all judgments issued by the twelve courts of appeals. Each of the courts of appeals, therefore, is for all practical pur-

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* Professor of Law, Texas Tech University. B.S., Florida State University, 1974; J.D., University of Florida, 1977.

From August 1977 to August 1979, I was privileged to serve as law clerk to the Honorable James C. Hill, then Judge of the United States Court of Appeals for the Fifth Circuit, now serving in the Eleventh Circuit. I dedicate this article to Judge Hill on the occasion of his tenth anniversary as a judge in the grand tradition of the third article. As my mentor and friend, I owe him a great deal more.

1. "The syllabus" and what follows are the mere reflection of my subject. By disclaimer, I urge my readers to experience the court's handiwork firsthand.

> NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906).

Reporter's Note, Slip Opinions of the Supreme Court of the United States.

2. *See, e.g.*, Baker, *A Postscript on Precedent in the Divided Fifth Circuit*, 36 SW. L.J. 725 (1982); Baker, *Constitutional Law*, 27 LOY. L. REV. 805 (1981); Panel Discussion by C. Wright, L. Powe & T. Baker, *Recent Supreme Court Decisions of Impact on Jurisdiction and Procedure in the Lower Federal Courts*, 40th Annual Judicial Conference of the Fifth Judicial Circuit (Apr. 12, 1983).

3. The generic reference "the court" will be used throughout the remainder of this article. "The court" is the appropriate reference both to the entire court of appeals and to a particular division or panel. *See* Western Pac. R.R. Corp. v. Western Pac. R.R., 345 U.S. 247 (1953). When relevant, I will distinguish considerations by an en banc court from a three-judge panel.

> poses the final expositor of the federal law within its geographical jurisdiction. This crucial fact makes each of those courts a tremendously important influence in the development of the federal law, both constitutional and statutory. Hence, it is an obviously useful and significant service to keep close track of and to publicize, particularly for the benefit of lawyers and judges, the work of the circuits.[4]

The already weighty burden of judgment must become still heavier with the realization that, if not less fallible, these courts' decisions are more final in all areas of federal law, not just in federal jurisdiction.[5] As a result, the judges more than ever "need the needle from cloistered academe."[6] Still it is with trepidation that I move from grading bluebooks to grading Federal Reporter, Second Series.[7] If I seem critical of the court or its decisions in the following pages, with then Professor Holmes, I "trust that no one will understand me to be speaking with disrespect . . . [for] one may criticize even what one reveres."[8]

As with most law review writing, this article likely exists more to be written than to be read. I know that I have learned a great deal in its writing. As Justice White has suggested, however, surveys such as this should be written for lawyers. I have striven to approach these decisions with learning, but from a practical point of view.[9] Perhaps, some lawyer in some federal court sometime will use something said here in the lawmaking partnership between bench and bar. That would be grand. It would be enough for me to pique a curiosity about

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4. White, *Dedication, Fifth Circuit Symposium*, 15 TEX. TECH L. REV. ix (1984).

Justice Rehnquist recently concluded, "The [Supreme] Court cannot review a sufficiently significant portion of the decisions of any federal court of appeals to maintain the supervisory authority that it maintained over the federal courts fifty years ago; it simply is not able or willing, given the other constraints on its time, to review all the decisions that result in a conflict in the applicability of federal law." Rehnquist, *A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System*, 28 ST. LOUIS U. L.J. 1, 4-5 (1984).

5. My paraphrase is borrowed from Justice Jackson's observation on the Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953).

6. Goldberg, *Introduction*, 7 TEX. TECH L. REV. 243 (1976).

7. Judge Goldberg, however, on behalf of the Court, has asked for such feedback: "Our papers are only rarely graded by our superiors, the Judges of the United States Supreme Court; hence, the only marks we can hope to receive come from the pages of the law journals of the nation, and we are grateful both for your criticisms and for your accolades and only hope that each year we will receive better marks." *Id.*

8. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 473 (1897).

9. "Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one." Sweatt v. Painter, 339 U.S. 629, 634 (1950) (Vinson, C.J.).

the somewhat arcane topic of federal jurisdiction. Charles Dickens, who once worked in a law office, wrote, "we lawyers are always curious, always inquisitive, always picking up odds and ends for our patchwork minds, since there is no knowing when and where they may fit into some corner. . . ."[10]

Before going on with my "odds and ends" of survey period developments, one basic concept about my subject needs mention.[11] The threshold "principle of first importance [is] that the federal courts are courts of limited jurisdiction."[12] Thus, every federal court decision, in effect, is a precedent in federal jurisdiction.[13] The jurisdictional inquiry has always been two dimensional. Since the time of the Framers,[14] the scope of federal judicial power has been determined first, by examination of article III of the Constitution and, second by interpretation of the particular enabling act of Congress.[15] In this essay, I cannot catalogue every implicit decision for jurisdiction. Instead, I

10. C. DICKENS, LITTLE DORRITT, *reprinted in* THE WORKS OF CHARLES DICKENS, LITTLE DORRITT, National Library Edition, Book II, Ch. XII at 182 (1857).

11. The survey period is from July 1, 1983 to June 30, 1984.

One event ending the survey period is at least footnoteworthy. On July 1, 1984, the former Fifth Circuit "cease[d] to exist." Fifth Circuit Court of Appeals Reorganization Act of 1980, 28 U.S.C. §§ 1, 41 (1982). Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 SW. L.J. 687, 705-07 (1981). I lament the final passing of a truly great court. *See* Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787 (1980); *but see* Clark, *Remarks at the Dedication of the New Fifth Circuit*, 13 TEX. TECH L. REV. 233 (1982).

12. C. WRIGHT, THE LAW OF FEDERAL COURTS § 7, at 22 (4th ed. 1984).

13. "Before a federal court exercises any governmental power, it has a duty to determine its own jurisdiction to act." Edgar v. Mite Corp., 457 U.S. 624, 653 (1982) (Stevens, J., concurring in part and concurring in the judgment).

14. "As preliminary to any investigation of the merits . . . this court deems it proper to declare, that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States." *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807) (Marshall, C.J.).

15. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 442 (1849); Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809).

The second consideration has been the subject of great scholarly activity as of late. *E.g.*, Sager, *Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts in the Supreme Court 1980 Term*, 95 HARV. L. REV. 17 (1981). In my opinion, "[t]he congressional dominion to expand and to contract federal court jurisdiction always has been correctly considered to be a plenary incident of the Article III power to 'from time to time ordain and establish' the 'inferior courts' of the United States." Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal to "Up the Ante" in Diversity Jurisdiction*, 102 F.R.D. 299, 302 (1984) . The judges of the Fifth Circuit seem to agree with me. *See*, MRT Exploration Co. v. McNamara, 731 F.2d 260 (5th Cir. May 1984); Texas v. United States, 730 F.2d 409 (5th Cir. Apr. 1984); Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation, 730 F.2d 195 (5th Cir. Apr. 1984); International Bhd. of Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157 (5th Cir. Sept. 1983).

have been selective. I endeavor here to inform my reader of general survey developments and to comment on the most significant particulars. A broad grouping of the survey decisions yields my subtopics: judicial power, federal questions, diversity, and federalism. My subtitles further my theme—determining whether a piece of litigation appropriately belongs in or out of the federal court.[16] As then Chief Judge Brown introduced an earlier edition of this survey: "[T]he United States courts in the Fifth Circuit are always open. We are open to all who have a right to come in, and for those who do not have a right we are still open so that we can tell them so."[17]

II. "THE JUDICIAL POWER OF THE UNITED STATES. . . ."[18]

Some perennial issues introduce the federal jurisdiction portion of this survey. Concerns for ancillary and pendent jurisdiction, the standing doctrine, and the case or controversy concern for mootness remind us of the higher law dimension of our subject and the vagueness of its boundaries.

A. *Pendent Jurisdiction*

Although the Supreme Court twice has failed to make the distinction, keep separate the two related concepts of ancillary jurisdiction and pendent jurisdiction.[19] The two concepts have in common the curious notion that if a federal court has some jurisdiction it may have the power to reach beyond it and decide disputes not otherwise cognizable. The ancillary variation applies to claims and parties joined after the complaint by parties other than the plaintiff. The pendent variation applies to claims raised by the plaintiff in the complaint. During the survey period, the latter variation played prominently in a pair of decisions.[20] Pendent jurisdiction allows a dis-

16. I leave to others the discussion of court procedures once the litigation has been assigned properly to a federal forum. *See*, Crump, *Civil Procedure, Fifth Circuit Symposium*, 16 TEX. TECH L. REV. 115 (1984).

17. Brown, *Introduction*, 8 TEX. TECH L. REV. 841, 844-45 (1977).

18. U.S. CONST. art. III, § 1 cl. 1.

19. Professor Wright makes the distinction and notes the Supreme Court's two refusals. C. WRIGHT, *supra* note 13, § 19 at 103 n.1 (citing Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 n.8 (1978) and Aldinger v. Howard, 427 U.S. 1, 13 (1976)).

20. *See also* Mooney Aircraft Corp. v. Foster (*In re* Mooney Aircraft, Inc.), 730 F.2d 367 (5th Cir. Apr. 1984) (remanding with instructions to dismiss for want of ancillary jurisdiction an application in the Bankruptcy Court to reopen the estate and enjoin state wrongful death actions brought against the purchaser of the assets of the bankrupt company that had manufactured the aircraft involved in the fatal accidents).

trict court to reach a plaintiff's state law claim if jurisdiction exists over a "substantial" federal claim, the federal and state law claims derive from a "common nucleus of operative fact," and the related claims are such that a plaintiff "would ordinarily be expected to try them all in one proceeding."[21] Exercise of pendent jurisdiction is committed to district court discretion and the Fifth Circuit regularly defers to that discretion.[22] Four factors guide the exercise of this discretion and its review: First, whether the state or federal issues dominate "in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought;" second, the federalism concern for avoiding unnecessary federal decisions of state law "as a matter of comity and to promote justice between the parties, by procuring for them a surefooted reading of applicable law;" third, general concerns for "judicial economy, convenience, and fairness to the litigants;" and finally, whether determination of the state law issue will preempt a constitutional issue.[23] Even though the claim may be jurisdictionally pendent, the federal court may still choose to avoid decision by invoking some device like abstention or certification.[24]

These pendent jurisdiction principles are illustrated by one survey decision each way. In the first, *Laird v. Board of Trustees*,[25] practicing physicians brought suit challenging a university system's policy on use of campus infirmary facilities under the fourteenth amendment and state law. The court held that pendent jurisdiction could not be exercised, finding that state law issues predominated, were of statewide importance, and were unsettled. Concerns for economy, convenience, and fairness also buttressed the decision to dismiss the state claims because the federal claims had been dismissed prior to trial. In the second, *Transource International, Inc. v. Trinity Industries, Inc.*,[26] the court affirmed the exercise of pendent jurisdiction over state law antitrust claims, even though the federal antitrust claims were dis-

21. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

22. Wheeler v. Cosden Oil and Chem. Co., 734 F.2d 254, 262 (5th Cir. June 1984); Hamman v. Southwestern Gas Pipeline, Inc., 721 F.2d 140, 144 (5th Cir. Dec. 1983). *But see* Ware v. Reed, 709 F.2d 345, 354 (5th Cir. July 1983).

23. Laird v. Board of Trustees, 721 F.2d 529, 534 (5th Cir. Dec. 1983) (citing Hagans v. Lavine, 415 U.S. 528, 546 (1974) and United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)).

24. *Compare* Sandefur v. Cherry, 718 F.2d 682, 689-90 (5th Cir. Oct. 1983) (opining abstention proper and certifying question to state court) *with* Walker v. U-Haul Co., 734 F.2d 1068, 1075 (5th Cir. June 1984) (interpreting state statute as matter of first impression).

25. 721 F.2d 529 (5th Cir. Dec. 1983). *See also infra* text accompanying notes 185-95.

26. 725 F.2d 274 (5th Cir. Feb. 1984).

posed of on summary judgment. The federal claims were not deemed frivolous and therefore were sufficiently "substantial" to anchor the state law claim.

Common sense would suggest that court timing in dismissing the federal claim should control. If the federal claim falls before trial, usually the pendent state claim "should be dismissed as well."[27] Of course, in a complex case in which pretrial proceedings and discovery have been extensive, efficient use of judicial resources impells the federal court to go on. It may be that the allowable scope of the trial court's discretion is so broad that the appellate court only "lip-synches" the factorial test before affirmance, at least when the discretion has been exercised in favor of jurisdiction. If it seems curious to begin a discussion of federal jurisdiction with a doctrine that allows the reach of state law claims, remember that this functional concept goes back to Chief Justice Marshall's day[28] and, as we have seen, continues to be a viable technique. Such are the boundaries of article III power.[29]

B. *Standing*

The federal judicial power is generally limited to a consideration of "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[30] As a court *qua* court, the federal tribunal must consider the jurisdictional doctrines of standing and mootness.

Justice Douglas' oft-quoted remark that "[g]eneralizations about standing to sue are largely worthless as such," is always well-taken.[31] Black letter rules are more easily stated than applied. The standing inquiry is focused on the individual and not on the suit. . . "on the *party* seeking to get his complaint before a federal court and not on the *issues* he wishes to have adjudicated."[32] Standing jurisprudence

27. 383 U.S. at 726.

28. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 822-23 (1824).

29. Even when the federal court has the power to hear the controversy, the almost mystical doctrine of *forum non conveniens* may allow for dismissal in favor of some more convenient foreign forum. With the economies of the three Fifth Circuit States becoming more international, this arcane doctrine is occurring more frequently. *See* Koke v. Phillips Petroleum Co., 730 F.2d 211 (5th Cir. Apr. 1984); Gahr Devs., Inc. v. Nedlloyd Lijnen, B.V., 723 F.2d 1190 (5th Cir. Jan. 1984); Diaz v. Humboldt, 722 F.2d 1216 (5th Cir. Jan. 1984); Perusahaan Umum Listrik Negara Pusat v. M/V Tel Aviv, 711 F.2d 1231 (5th Cir. Aug. 1983).

30. Flast v. Cohen, 392 U.S. 83, 94-95 (1968).

31. Association of Data Processing Serv. Org's., Inc. v. Camp, 397 U.S. 150, 151 (1970).

32. 392 U.S. at 99 (emphasis added). The Supreme Court seems to be moving away from

has two sources. Article III itself requires: (1) injury in fact: "the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' "; (2) causation: "the injury 'fairly can be traced to the challenged action' "; and (3) redressability: the injury " 'is likely to be redressed by a favorable decision.' "[33] Those are the constitutional minima. The courts have imposed additional prudential principles not themselves constitutionally required: (1) a plaintiff usually may not invoke the rights and interests of third parties; (2) the grievance must be individual to the plaintiff and not merely generally suffered by the public; and (3) the injury must adversely affect the plaintiff within the zone of interests protected by the substantive statutory or constitutional protection.[34]

The most significant survey decision on individual standing was *KVUE, Inc. v. Moore*.[35] A television broadcaster challenged the constitutionality of a Texas statute establishing the rates for political advertising on radio and television and requiring sponsors to identify themselves.[36] The broadcaster had standing to sue. The threat of prosecution, usually insufficient alone, was very real because the plaintiff had violated the statute by charging higher than the statutory rate and alleged a desire to continue doing so in the face of written protests by some advertisers and a county attorney's announced willingness to prosecute. Plaintiff thus climbed through a narrow window into federal court: "persons having no fears of state prosecution except those that are imaginary or speculative" are shut out, as are persons charged with a state criminal offense who may raise the constitutional issue before the state court as a defense.[37] Likely alone dispositive of the standing issue was the fact that the plaintiff had alleged an actual monetary loss suffered from past obedience to the statute. The causation and redressability factors followed; the statute caused the injury and the injury would be redressed by a declaration of unconstitutionality.

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this motion. *See* Allen v. Wright, 104 S. Ct. 3315 (1984); City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983).

33. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (citations omitted).

34. *Id.* at 474-75.

35. 709 F.2d 922 (5th Cir. July 1983). The opinion also discussed the "case or controversy" issue of justiciability. *Id.* at 927.

36. TEX. ELEC. CODE ANN. art. 14.09 (Vernon Supp. 1982).

37. Younger v. Harris, 401 U.S. 37, 42, 49 (1971).

The prudential principle against representative standing figured prominently in *Save Our Wetlands, Inc. v. Sands*.[38] Save Our Wetlands is a nonprofit corporation organized "to explore, enjoy and preserve the State's wetlands, estuaries, forests, waters, streams, wildlife and wilderness."[39] The organization sued to prevent construction of a twenty-five mile long electric transmission line along the west bank of the Mississippi River. The court applied an exception to the prudential principle against representative standing which in public interest litigation has assumed near swallowing proportions.[40] Under the applicable section 10 of the Administrative Procedure Act, the organization had standing.[41] First, the members of the organization otherwise would have had standing under section 10. Their injury in fact involved aesthetics and well-being. The concern that the president of the organization fished the area and members would be aesthetically assaulted as they "ride through there on a pirouge" was enough. Because the action sought to compel an environmental impact statement, the court excused the speculativeness of the actual damages. Second, the interests sought to be protected were germane to the organization's purpose as evidenced in its articles of incorporation and a resolution to preserve the Mississippi River environment. Third, neither the claim nor the requested relief would require the personal participation of the organization's members in the law suit. The court thus seemed to blur the distinction between the criteria for representative standing and the criteria for traditional standing.

The *KVUE, Inc.* and *Save Our Wetlands* decisions are typical of the area in one regard; the injury in fact criterion has become the *sine qua non* of standing, which, once satisfied, usually preempts further concern for causation and redressability. These latter factors, however, may become determinative on occasion as they seemed to be in two other survey decisions. In the first, because plaintiffs alleged injuries were caused by the employer's hiring and termination practices, they could not seek class-wide redress involving other employment

38. 711 F.2d 634 (5th Cir. Aug. 1983).

39. *Id.* at 640.

40. Baker, *Constitutional Law*, 27 LOY. L. REV. 805, 807-08 (1981). *See also* United States v. Cronn, 717 F.2d 164, 169-70 (5th Cir. Sept. 1983).

41. 711 F.2d at 639-40; *See also* 5 U.S.C. § 702 (1982).

In other survey decisions, the concept of statutory standing received some attention. *See* Walker v. U-Haul Co., 734 F.2d 1068, 1073 n.19 (5th Cir. June 1984) (Sherman Act, 15 U.S.C. § 2 (1982)); Transource Int'l, Inc. v. Trinity Indus., Inc., 725 F.2d 274, 280-81 (5th Cir. Feb. 1984) (Sherman Act, 15 U.S.C. §§ 1, 2 (1982) and Clayton Act, 15 U.S.C. § 14 (1982)).

practices such as compensation, promotion, placement, and maternity practices.[42] In the second, the plaintiff lacked standing to challenge a state fixed fee per arrest system for constables because there was no realistic likelihood that the system would cause him harm in the future even though he had once before been arrested.[43] Thus careful counsel and court will consider each of the three criteria independently.

C. *Mootness*

Mootness is a second doctrine the federal tribunal must consider within the adversarial tradition. In contrast to the standing doctrine with its concern of parties, the mootness doctrine focuses judicial attention on "the sequence of litigation events out of a traditional and constitutional concern for the very existence of a 'case or controversy' itself."[44] If the matter once in controversy is resolved, then the judgment of the court has nothing to accomplish. The lack of a judicial task ends the article III power. Justiciability must be actual and present, not merely speculative and historical. As simple as the statement of principle is, however, its application has given the courts fits.[45] During the survey period, the court decided several mootness issues necessarily on a case-by-case basis.

Several decisions declared that the matter *sub judice* was moot and, consequently, jurisdiction was at an end: when a criminal defendant died while his direct appeal was pending;[46] when their children were returned to the plaintiff-parents seeking rehabilitative and ameliorative state services by reason of the temporary separation by the state agency;[47] when a state court determined the dispositive child custody issue underlying the federal merits;[48] when an individual

42. Vuyanich v. Republic Nat'l Bank, 723 F.2d 1195, 1200 (5th Cir. Jan. 1984).

43. Brown v. Edwards, 721 F.2d 1442, 1445 (5th Cir. Jan. 1984).

Equitable relief in such cases may be more difficult to obtain after the Supreme Court's decision in City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983).

44. Hill & Baker, *Dam Federal Jurisdiction!*, 32 EMORY L.J. 3, 18 (1983).

45. For an example, read through the complicated series of opinions in Edgar v. Mite Corp., 457 U.S. 624 (1982).

46. United States v. Cammarata, 721 F.2d 134 (5th Cir. Nov. 1983). In such matters "all proceedings had in the prosecution from its inception are abated." *Id. See generally* United States v. Pauline, 625 F.2d 684 (5th Cir. 1980).

47. Dorsey v. Moore, 719 F.2d 1263, 1264-65 (5th Cir. Nov. 1983).

48. Franks v. Smith, 717 F.2d 183, 185 (5th Cir. Oct. 1983) (dictum). The related fourth amendment issue was not thereby made moot, and was remanded for consideration on the merits. *Id.* at 186.

plaintiff became a citizen and could reapply for a commission as a notary public;[49] and when a subsequent state court decision resulted in both petitioner and respondent seeking dismissal of the federal habeas matter to allow for the pursuit of a state remedy.[50]

Invoking mootness is not a talisman, however, always ending in instant dismissal. The court has developed a habit of remanding to the district court for the mootness determination when the continuing viability of the controversy is, in the least bit, unclear.[51] In a once difficult and confused area, the mootness doctrine now clearly supports jurisdiction in criminal cases because of possible collateral legal consequences even after release from sentence.[52] A plaintiff whose injunctive remedy may be made moot by post-filing events may avoid the doctrine by seeking money damages.[53] Finally, a commonly applied exception allows an otherwise moot controversy to survive. A suit may be raised from a mootness grave if the controversy is "capable of repetition yet evading review."[54] Properly narrowed this exception applies if, and only if, the challenged action is of such brief duration as to be completed before the ordinary course of litigation has run and there is a reasonable likelihood that the complainant will suffer the same action again.[55]

Two survey decisions illustrate the last-mentioned exception. In

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49. Vargas v. Strake, 710 F.2d 190, 192 (5th Cir. July 1983). *rev'd on other grounds sub nom.* Bernal v. Fairter, 104 S. Ct. 2312 (1984). The suit challenging the constitutionality of the citizenship requirement went forward in the name of a plaintiff who had not been naturalized. *Id.*

50. Bullard v. Estelle, 708 F.2d 1020, 1023 (5th Cir. July 1983). Such exit collusion should be distinguished from the situation in which the concerted effort is to gain entry into federal court. The general rule is for dismissal of collusive suits, but there are famous examples to the contrary. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Lord v. Veazie, 49 U.S. (8 How.) 251 (1850).

51. *See* Jefferson Bank & Trust Co. v. Van Niman, 722 F.2d 251, 252 (5th Cir. Jan. 1984) (suit to set aside sale and order new sale of vessel possibly mooted by alleged resale on the day before appellate argument); Ratner v. Sioux Natural Gas Corp., 719 F.2d 801, 803 (5th Cir. Nov. 1983) (suit by nonsettling defendants possibly mooted by district court approved settlement in favor of plaintiff); Jordan v. City of Greenwood, 711 F.2d 667, 669 (5th Cir. Aug. 1983) (remanded for consideration of subsequent amendment of statute which possibly could control suit and moot the constitutional issue).

52. Ridgway v. Baker, 720 F.2d 1409, 1411-12 n.2 (5th Cir. Dec. 1983). *See generally* Lane v. Williams, 455 U.S. 624 (1982); Sibron v. New York, 392 U.S. 40 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968).

53. Niles v. University Interscholastic League, 715 F.2d 1027, 1030 n.1 (5th Cir. Sept. 1983), *cert. denied*, 104 S. Ct. 1289 (1984). *But see* City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983).

54. *See* Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

55. C. WRIGHT, *supra* note 13, § 12 at 55.

Valley Construction Co. v. Marsh,[56] the court held that the present unavailability of the questioned contracts for bidding did not moot nonminority plaintiffs' suit against the government challenging as arbitrary the setting aside of contracts for a minority enterprise program. First, the evading review criterion included the appellate process which takes longer than the bidding. Second, the likelihood of repetition was obvious to the court since letting bids on contracts was constant. The court also found the exception satisfied in *Gulf Coast Industrial Workers' Union v. Exxon Co.*[57] While an appeal was pending from the union's successful suit for a preliminary injunction, the arbitrator entered an award in favor of the union. The injunction had forbade the employer from disapproving a health insurance carrier until the arbitration over health coverage was completed. It was enough for the court to suggest that the same union might seek another preliminary injunction pending another arbitration. Such is the chimerical nature of the mootness doctrine and the "capable of repetition yet evading review" exception.

III. ". . . ALL CASES, IN LAW AND EQUITY, ARISING UNDER THIS CONSTITUTION, THE LAWS OF THE UNITED STATES, AND TREATIES MADE, OR WHICH SHALL BE MADE UNDER THEIR AUTHORITY . . . ."[58]

A. *General Federal Questions*

Creating an understanding of the "arising under" jurisdiction phrase found in article III and the general civil statute, section 1331,[59] could occupy this entire volume and still be rendered in a vain attempt. The preeminent federal jurisdiction scholar has observed, "Though the meaning of this phrase has attracted the interest of such giants of the bench as Marshall, Waite, Bradley, the first Harlan, Holmes, Cardozo, and Frankfurter, and has been the subject of voluminous scholarly writing, it cannot be said that any clear test has yet been developed."[60] Far be it from me to arrogate to add my name to

56. 714 F.2d 26 (5th Cir. Sept. 1983).

57. 712 F.2d 161 (5th Cir. Aug. 1983).

58. U.S. CONST. art. III § 2, cl. 1.

59. 28 U.S.C. § 1331 (1982) provides: "The district courts shall have original jurisdiction of all civil action *arising under* the Constitution, laws, or treaties of the United States." (emphasis added).

60. C. WRIGHT, *supra* note 13, § 17, at 91 ("The key phrase, both in the Constitution and in the statute, is 'arises [sic] under.' ").

such a distinguished list of failure. Instead, I have chosen three survey decisions to discuss here with the hope that some of the subtlety and nuance of this fascinating and important topic may be appreciated.[61]

Powers v. South Central United Food & Commercial Workers Unions and Employers Health & Welfare Trust[62] is first. The issue was whether the action was one arising under federal law.[63] The court began with first principles; under the well-pleaded complaint rule, jurisdiction "must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose."[64] Even an anticipated defense based on federal preemption of state law is irrelevant under the rule.[65] The plaintiff *sub judice* was a participant in a jointly trusteed employee health and welfare plan (the "Plan") maintained in accordance with the Labor Management Relations Act[66] and subject to the Employee Retirement Income Security Act.[67] She sued the

61. *See, e.g.*, EEOC v. Hernando Bank, Inc., 724 F.2d 1188, 1192-93 (5th Cir. Feb. 1984) (suit was one "arising under" Fair Labor Standards Act of 1938, §§ 16(c), 17 as amended, 29 U.S.C. §§ 216(c), 217 (1982)); Smith v. Winter, 717 F.2d 191, 198-99 (5th Cir. Oct. 1983) (Complaint failed to allege cause of action "arising under" Voting Rights Act of 1965, as amended 42 U.S.C. §§ 1973 to 1973bb-1 (1982)); Niles v. University Interscholastic League, 715 F.2d 1027, 1029-30 (5th Cir. Sept. 1983), *cert. denied*, 104 S. Ct. 1289 (1984) (complaint "arising under" the Constitution); United States v. O'Neil, 709 F.2d 361, 375 (5th Cir. July 1983) (remand for amendment of complaint to comply with well-pleaded complaint rule).

62. 719 F.2d 760 (5th Cir. Oct. 1983).

63. The court considered both the general federal question statute, Section 1331, *see supra* note 60 and, 28 U.S.C. § 1337(a) (1982) which provides for original jurisdiction over civil actions arising under federal statutes regulating trade or commerce. The analysis under both statutes was the same. 719 F.2d at 767.

The decisive issue concerning "arising under" itself arose in the context of removal jurisdiction. The suit had been brought in state court originally and was removed to the district which ruled that because the state court did not have jurisdiction the district court had no derivative jurisdiction and the suit was dismissed. The Fifth Circuit held that since the suit did not fall within the federal jurisdiction, the state court did have jurisdiction and the removal/dismisal based on the argued federal question of preemption was improper. Ultimately, the matter was remanded to the district court with instructions to remand to the state court. Such are the vagaries of removal jurisdiction, which did not figure in any prominent survey decision, for which I, in turn, am grateful. *See*, Ridgway v. Baker, 720 F.2d 1409 (5th Cir. Dec. 1983); Smith v. Winter, 717 F.2d 191 (5th Cir. Oct. 1983).

64. 719 F.2d at 763 (quoting Taylor v. Anderson, 234 U.S. 74, 75-76 (1914)). The rule often becomes critical in removal situations. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 103 S. Ct. 2841 (1983).

65. 719 F.2d at 764-65.

66. 29 U.S.C. §§ 141-187 (1982).

67. 29 U.S.C. §§ 1001-1461 (1982).

Plan alleging that the Plan's misrepresentation of coverage constituted negligence and fraud and violated the Texas Deceptive Trade Practices-Consumer Protection Act.[68] The preemption of state law by the federal statutes arose only as a defense in the Plan's pleadings. Applying the well-pleaded complaint rule, the Court held that the cause of action arose under state law. Here the court seemed to finesse the arising under standard by applying the narrow choice among competing formulations that the suit arises under the "law that creates the cause of action."[69] Last considered was the corollary to the well-pleaded complaint rule that a plaintiff may not defeat removal[70] by such artificial pleading as to leave out essential federal issues.[71] Even though plaintiff had filed a parallel suit in federal court alleging violations of the federal statutes which the defendant Plan asserted preempted her state law suit in state court, her insistence on maintaining the independent state law suit was honored.[72]

In a classic survey transition, the second decision for discussion came in *Lowe v. Ingalls Shipbuilding*.[73] While the jurisdiction of federal courts to enter declaratory judgments has long been secure,[74] that device sometimes confuses the "arising under" inquiry. Of course, the court in *Lowe* began with the well-pleaded complaint rule.[75] Going beyond the just considered *Powers* opinion's facile statement that the case arises under the law creating the cause of action,[76] the court noted that the federal element must be essential considering the nature of the claim.[77] The court's test resembled one prominent commentator's distillation: "a substantial claim founded 'directly' upon

68. TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63 (Vernon Supp. 1984).

69. 719 F.2d at 765 (quoting American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916). There are several other permutations of the "arising under" standard. *See generally* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3562-3567 (1975).

70. *See supra* note 64.

71. 719 F.2d at 765-67. *See generally* Federated Dep't Stores, Inc., v. Moitie, 452 U.S. 394, 397 n.2 (1981); *In re* Carter, 618 F.2d 1093 (5th Cir. 1980), *cert. denied*, 450 U.S. 947 (1981).

72. 719 F.2d at 766 n.5.

73. 723 F.2d 1173 (5th Cir. Jan. 1984).

74. *See*, Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). *But see* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 103 S. Ct. 2841 (1983).

75. *See supra* note 65 and accompanying text.

76. *See supra* note 20 and accompanying text.

77. 723 F.2d at 1178.

federal law."[78] Devotees of federal jurisdiction, however, are reminded of another distinguished commentator's reaction: "this [test] seems as good as any, but it must be recognized that the books contain some results, and a good deal more language, inconsistent with it."[79] At least, it explains the court's holding in *Lowe*. The plaintiffs sought a declaration whether a shipyard employer, self-insured under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA),[80] which has paid compensation under LHWCA to employees contracting asbestosis during their employment, has an independent cause of action against the manufacturer of asbestos-containing products used in the shipyard, for the excess of the compensation so paid over the amount for which the employees settle their third party claims against the manufacturer.[81] Of course, the declaratory judgment statute is procedural only and creates no subject matter jurisdiction.[82] Plaintiffs-employees did not assert a claim arising under LHWCA against the shipyard employers but sought the declaration on the effect of LHWCA on claims the shipyard employers might otherwise have against the manufacturers. The fact that the cause of action was the declaratory defendant's does not control, rather, the question becomes whether the declaratory defendant could have litigated the precise issue in a coercive action in federal court.[83] On the question whether there is federal question jurisdiction when "a party seeks a declaration that he is immune, by virtue of federal law, from a nonfederal claim that the other party may have," some decisions adopt a broad view that sustains jurisdiction and other decisions adopt a narrow view that denies it.[84] In *Lowe* the Fifth Circuit decided to adopt the narrow view and held there was no jurisdiction, noting the Supreme Court's recent indication of approval of that view.[85] The court admitted[86] that this holding arguably was a retreat

78. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 168 (1953).

79. C. WRIGHT, *supra* note 13, § 17 at 96.

80. 33 U.S.C. §§ 901-950 (1982).

81. *See* Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969).

82. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950).

83. 104 C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2767, at 740 (2d ed. 1983).

84. *Id.* at 742, *quoted in* Lowe v. Ingalls Shipbuilding, 723 F.2d 1173, 1180 (5th Cir. Jan. 1984).

85. 723 F.2d at 1180 (citing Franchise Tax Bd. v. Construction Laborers Vacation Trust, 103 S. Ct. 2841, 2850 (1983)).

86. 723 F.2d at 1180-81 n.7.

from the more expansive view taken in earlier Fifth Circuit decisions[87] which, at the time they were decided, had gone beyond decisions in other circuits.[88] On the basis of later decided Supreme Court precedent, the *Lowe* court distinguished those prior Fifth Circuit decisions as examples of an exception in favor of jurisdiction when a plaintiff seeks injunctive relief against imminent state regulation which is preempted by a federal statute.[89] Nevertheless, this decision portends a slight narrowing of the federal question jurisdiction in declaratory actions.[90]

The last considered federal question decision raises an interesting issue of federal jurisdiction, but the court did not reach the issue. If that seems anomalous, it was, anomalous jurisdiction that is! The majority in *Linn v. Chivatero*[91] said, "we need not determine whether the plaintiffs have met the strict requirements for the exercise of anomalous jurisdiction . . . nor need we decide the interesting question of whether the doctrine of anomalous jurisdiction survives. . . ."[92] What is anomalous jurisdiction?[93] The doctrine has empowered a federal court to order the return of property improperly seized by federal

87. *See* Braniff Int'l, Inc. v. Florida Pub. Serv. Comm'n, 576 F.2d 1100 (5th Cir. 1978); St. Louis Southwestern Ry. Co. v. City of Tyler, 375 F.2d 938 (5th Cir. 1967); Florida East Coast Ry. v. Jacksonville Terminal Co., 328 F.2d 720 (5th Cir.), *cert. denied*, 379 U.S. 830 (1964).

88. McFaddin Express, Inc. v. Adley Corp., 346 F.2d 424 (2d Cir., 1965), *cert. denied*, 382 U.S. 1026 (1966); Chicago & N.W. Ry. v. Toledo, Peoria & W. R.R., 324 F.2d 936 (7th Cir. 1963).

89. 723 F.2d at 1180-81 n.7 (citing Shaw v. Delta Air Lines, Inc., 103 S. Ct. 2890, 2899 n.14 (1983)).

90. *See generally* Note, *Federal Jurisdiction Over Preemption Claims: A Post-Franchise Tax Board Analysis*, 62 TEX. L. REV. 893 (1984).

91. 714 F.2d 1278 (5th Cir. Sept. 1983).

92. *Id.* at 1281. The majority opinion, written by Judge Randall and joined by Judge Thornberry, held that the district court had general federal question jurisdiction under § 1331 and that the Anti-Injunction Act, 26 U.S.C. § 7421(a) (1982), did not apply to bar plaintiff's request for an injunction ordering the return of documents produced in response to an Internal Revenue Service summons.

Chief Judge Clark, concurring in the judgment agreed that there was jurisdiction and would have applied the Anti-Injunction Act, but concluded that an exception to the Act could apply under Enochs v. William Packing & Navigation Co., 370 U.S. 1 (1962). Thus he agreed with the court's judgment reversing and remanding for further consideration. 714 F.2d at 1285, 1289 (Clark, C.J., concurring in the judgment).

The issues beyond anomalous jurisdiction are not of concern here, although the Anti-Injunction Act is another good example of congressional power to control federal court jurisdiction. *See supra* note 16.

93. Prior opinions detail the origins and content of the doctrine. *See, e.g.*, Richey v. Smith, 515 F.2d 1239, 1243-45 (5th Cir. 1975); Hunsucker v. Phinney, 497 F.2d 29, 31-35 (5th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975).

officers before the initiation of any civil or criminal proceedings. It has been analogized to the federal rule of criminal procedure allowing for motions of return of property[94] and to general notions of equity. The notion was based on the courts' inherent power to supervise the actions of officers of the courts and was extended, most importantly, to apply to IRS agents. The decisions may be described as restraintful as exercise has been reserved for the most egregious situations showing a "callous" disregard for constitutional rights. Candidly, application involved looking forward to the merits.[95]

I agree with the forceful argument by Chief Judge Clark, concurring in the judgment: "The doctrine should be put to rest."[96] Even assuming *arguendo* that the concept was once valid, today it is a doctrine *sans* rationale. Originally, the jurisdiction was fabricated to circumvent the amount in controversy requirement in general federal question cases, now itself an anachronism.[97] Today, "[i]t is impossible to imagine a case in which anomalous jurisdiction would have existed that [does] not involve a federal question."[98] *Linn* is its own best example. The plaintiffs alleged violations of their rights under the fourth and fifth amendment — clearly a federal question. Finally, anomalous jurisdiction runs counter to the congressional policy against court interference in the collection of taxes underlying the Anti-Injunction Act. It may be that the majority's careful reservation of the issue quoted above successfully postpones decision for another day, but Chief Judge Clark's side opinion seems to belie that reading.[99] As Justice Jackson once observed, "[t]he case which irresistably comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent," —

94. *See* FED. R. CRIM. P. 41(e). This provision merely codifies the doctrine. *See* Pieper v. United States, 460 F.Supp. 94, 96 n.1 (D. Minn. 1978).

95. *See* 714 F.2d at 1286 (Clark, C.J., concurring in the judgment).

96. *Id.*

97. 28 U.S.C. § 1331 (1982).

The amount in controversy may still be important under special federal question statutes. *See*, Martinez v. United States, 728 F.2d 694 (5th Cir. Mar. 1984); Wardsworth v. United States, 721 F.2d 503 (5th Cir. Dec. 1983), *petition for cert. filed*, 52 U.S.L.W. 3806 (U.S. Apr. 19, 1984) (No. 83-1706).

98. 714 F.2d at 1285 (Clark, C.J., concurring in the judgment).

99. Chief Judge Clark's approach is more straightforward. First, there is no anomalous jurisdiction. Second, there is general federal question jurisdiction. Third, the Anti-Injunction Act prohibits court action unless it is clear that the government may not prevail and that the taxpayer has suffered irreparable injury and the legal remedy is inadequate. *Id.* at 1287-88 (Clark, C.J., concurring in the judgment). *See also* Zernial v. United States, 714 F.2d 431 (5th Cir. Sept. 1983).

consented.' "[100]

B. *Civil Rights Jurisdiction*

One special category of federal questions merits attention here, for some of the federal jurisdiction issues predominate the substantive doctrine. While the substantive law of civil rights is treated elsewhere in this survey, here I wish to mention a few jurisdictional developments.[101] Although section 1983 provides a remedy for "any citizen of the United States or other person within the jurisdiction thereof,"[102] there is still the obvious, but sometimes overlooked, notion of standing.[103] For example, a couple in whose care a child had been left for two and one-half years could not sue officials for an alleged deprivation of the custody of child without due process because they were not related biologically and they had not adopted the child legally. State law and the relevant federal decisions permitted suit only by "those who have interests stronger than those deriving from an informal social unit."[104] On the other side of a civil rights action, the defendant must be a "person" and the word has become something of a term of art.[105]

The identity of the person sued often determines the existence

100. Everson v. Board of Educ., 330 U.S. 1, 19 (1947) (Jackson, J., dissenting).

101. *See* Rees, *First Amendment, Fifth Circuit Symposium*, 16 TEX. TECH L. REV. 187 (1984); Lee, *Employment Discrimination, Fifth Circuit Symposium*, 16 TEX. TECH L. REV. 207 (1984); Bubany, *Criminal Law & Procedure, Fifth Circuit Symposium*, 16 TEX. TECH L. REV. 269 (1984).

Except to note a representative sample here, I will not discuss decisions involving either the alternative substantive provisions or the matter of attorney fees. *See*, Page v. U.S. Indus., Inc., 726 F.2d 1038 (5th Cir. Mar. 1984) (discrimination in employment); Carter v. Orleans Parish Pub. Schools, 725 F.2d 261 (5th Cir. Feb. 1984) (Rehabilitation Act); Villanueva v. McInnis, 723 F.2d 414 (5th Cir. Jan. 1984) (conspiracy); Hart v. Walker, 720 F.2d 1436 (5th Cir. Dec. 1983) (attorney fees); Commonwealth Oil Ref. Co. v. EEOC, 720 F.2d 1383 (5th Cir. Dec. 1983) (attorney fees); Gaspard v. United States, 713 F.2d 1097 (5th Cir. Sept. 1983) (directly under the Constitution); EEOC v. University of Texas Health Sciences Center, 710 F.2d 1091 (5th Cir. Aug. 1983) (age discrimination); Richardson v. Byrd, 709 F.2d 1016 (5th Cir. July 1983), *cert. denied*, 104 S. Ct. 1000 (1984) (attorney fees).

102. 42 U.S.C. § 1983 (1982).

103. *See supra* notes 32-44 and accompanying text.

104. Franks v. Smith, 721 F.2d 153, 155 (5th Cir. Dec. 1983). *See* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977) (foster parents); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father); Armstrong v. Manzo, 380 U.S. 545 (1965) (divorced father)).

105. C. WRIGHT, *supra* note 13, § 22A, at 121. *Compare, e.g.*, Monell v. Department of Social Servs., 436 U.S. 658 (1978) *with* Monroe v. Pape, 365 U.S. 167 (1967).

The issue is recurring. *See generally* Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. Apr. 1984) (en banc).

and the degree of immunity. The immunity doctrines have created multiple pigeon holes, each specifically labelled.[106] Three gradations of immunity further complicate the matter. First, there is absolute immunity, which protects against any liability for all actions in an official capacity and is reserved for few officials such as judges and prosecutors.[107] With such actors, the only issue is whether the conduct involved was within the scope of their official duties. If a judge, for example, the conduct issue is whether the function is normally performed by a judge and whether the party dealt with the judge in an official capacity.[108] Second, there is a qualified immunity, a protection for reasonable dealings. This defense permits state officers to be subjected to suit only if their conduct clearly violated an established statutory or constitutional right of which a reasonable person would have known.[109] Third, some defendants have no immunity. In this category, the most significant survey pronouncement came from the Supreme Court in *Tower v. Glover*.[110] There the Supreme Court held that although an appointed attorney does not act "under color of" state law by virtue of the appointment, the state action requirement is met when the attorney engages in a conspiracy to deprive the defendant of federal rights.[111] More importantly, the Supreme Court went on to hold that state public defenders are not immune from liability in such a case. This result dramatically changes Fifth Circuit law. *McCoy v. Gordon*,[112] decided during the survey period is illustrative. Plaintiff, a convicted murderer serving a life sentence, sued all the officials involved in his prosecution including the state judge, various

106. *See* Tower v. Glover, 104 S. Ct. 2820 (1984) (state public defenders); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (presidential aides); Nixon v. Fitzgerald, 457 U.S. 731 (1982) (president); Supreme Court of Va. v. Virginia Consumers Union, Inc., 446 U.S. 719 (1980) (judges); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (legislators); Butz v. Economou, 438 U.S. 478 (1978) (members of the executive); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Scheuer v. Rhodes, 416 U.S. 232 (1974) (governors).

107. McCoy v. Gordon, 709 F.2d 1060, 1062 (5th Cir. July 1983).

108. Thomas v. Sams, 734 F.2d 185, 189-90 (5th Cir. May 1984); Arsenaux v. Roberts, 726 F.2d 1022, 1023 (5th Cir. 1982). *See also* Ryland v. Shapiro, 708 F.2d 967, 975-76 (5th Cir. July 1983).

109. *See*, Howard v. Fortenberry, 723 F.2d 1206 (5th Cir. Feb. 1984) (regional and parish sanitarians); Stokes v. Delcambre, 710 F.2d 1120 (5th Cir. Aug. 1983), *cert. denied*, 104 S. Ct. 2150 (1984) (sheriff and deputy); Galvan v. Garmon, 710 F.2d 214 (5th Cir. July 1983) (probation officer); Ryland v. Shapiro, 708 F.2d 967 (5th Cir. July 1983) (prosecutors outside role).

110. 104 S. Ct. 2820 (1984).

111. *Id.* at 2824. *See also* Polk County v. Dodson, 454 U.S. 312 (1981); Dennis v. Sparks, 449 U.S. 24 (1980).

112. 709 F.2d 1060 (5th Cir. July 1983).

county officials, the prosecutor, and his own two lawyers, one of whom was appointed. The court dismissed the appeal as to all but one of the non-lawyer defendants. After *Tower*, the allegation that his own two lawyers conspired with the other defendants may have saved the claim against them from dismissal. In states like Texas, which have no public defender system and rely on the appointments system in indigent cases, the potential of the *Tower* holding is obvious. Suits by *pro se* plaintiffs with prison return addresses are an everyday reality. Defending against civil rights suits, even spurious claims, may dramatically increase both the burden of the bars' professional responsibility *pro bono publico* and the cost of malfeasance.

In the area of substantive law, civil rights cases ignore the Bard's warning that "borrowing dulls the edge of husbandry."[113] The civil rights statutes have no limitation provision. The federal courts go a borrowing from the forum state's statutes of limitation, choosing the one most analogous. This is not always easy, for the federal court must divine the "essential nature" or "gravamen" of the complaint.[114] The analogies may be strained.[115] One point is distinct—the determination when a federal cause of action accrued is a question of federal, not state, law.[116] In other matters as well, state law curiously is of little consequence. It is now settled that state judicial remedies need not be exhausted in civil rights suits, although labelling the complaint a petition for habeas corpus relief triggers an exhaustion requirement.[117] The general rule is that the federal remedy is available re-

113. *Neither a borrower nor a lender be;*
For loan oft loses both itself and friend;
And borrowing dulls the edge of husbandry.

W. Shakespeare: HAMLET — PRINCE OF DENMARK, Act I, Scene III.

114. Suthoff v. Yazoo County Indus. Dev. Corp., 722 F.2d 133, 136 (5th Cir. Dec. 1983), *cert. denied*, 104 S. Ct. 2389 (1984).

115. *See, e.g.*, Cervantes v. Imco, Halliburton Servs., 724 F.2d 511, 513 n.4 (5th Cir. Feb. 1984) (parties agreed); *Suthoff*, 722 F.2d at 136-37 (landowners' claim that defendants conspired to have city initiate expropriation proceedings analogized to abuse of process); Watts v. Graves, 720 F.2d 1416, 1422-23 (5th Cir. Dec. 1983) (state officials violations of federal law analogous to one year state limitation category); Cross v. Lucius, 713 F.2d 153, 156-59 (5th Cir. Sept. 1983) (action for wrongful deprivation of black ancestor's land analogized to state prescription statute).

116. *Suthoff*, 722 F.2d at 138; *Watts*, 720 F.2d at 1422-23.

117. *See* Davis v. Page, 714 F.2d 512 (5th Cir. Sept. 1983) (*per curiam*); Jackson v. Torres, 720 F.2d 877 (5th Cir. Dec. 1983). The Fifth Circuit did not persuade the Supreme Court that exhaustion was appropriate. Pasty v. Florida Int'l Univ., 634 F.2d 900 (5th Cir. 1981) (en banc), *rev'd sub nom.* Patsy v. Board of Regents, 457 U.S. 496 (1982); Brantley v. Surles, 718 F.2d 1354, 1359-60 (5th Cir. Nov. 1983).

gardless of the availability of an adequate remedy under state law.[118] The court pushed this notion so far as to suggest that "the possibility that a parent's claim for the wrongful death of a child under section 1983 may have an existence quite apart from the state's wrongful death provision."[119] Finally, state law may be relevant to eliminate the federal cause of action. If there is a state tort cause of action which provides adequate postdeprivation redress then that may provide all the process due.[120]

IV. "CONTROVERSIES . . . BETWEEN CITIZENS OF DIFFERENT STATES . . . ."[121]

Caveat lector! I am a notorious diversity abolitionist.[122] I wish I did not have to write this section. Congress shows no immediate sign of overcoming its inertia and folly, however, and the federal courts continue to bear the burden of these cases.[123] Therefore, a mere survey writer has no choice but to summarize developments.

A. *General Issues*

Garden variety diversity cases provide little grist for the commentator's mill. The requirement for diversity of citizenship, of course, is jurisdictional and in multiple party litigation lapses by plaintiff's counsel in joining defendants can cause difficulties.[124] Be-

118. Brantley v. Surles, 718 F.2d 1354, 1357-58 (5th Cir. Nov. 1983).

119. Logan v. Hollier, 711 F.2d 690, 691 (5th Cir. Aug. 1983), *cert. denied*, 104 S. Ct. 1909 (1984). *Cf.* Jones v. Hildebrant, 432 U.S. 183 (1977) (dismissing claim for wrongful death of child under § 1983 because said claim was never pleaded in petitioner's complaint nor presented in petition for certiorari).

120. Parratt v. Taylor, 451 U.S. 527 (1981). *See generally* Hill & Baker, *supra* note 45, at 51-56. *See also* McCrae v. Hankins, 720 F.2d 863, 869-70 (5th Cir. Dec. 1983); McCoy v. Gordon, 709 F.2d 1060, 1062-63 (5th Cir. July 1983); Thompson v. Steele, 709 F.2d 381, 383 (5th Cir. July 1983), *cert. denied*, 104 S. Ct. 248 (1984).

121. U.S. CONST. art. III, § 2, cl. 5.

122. Baker, *supra* note 16, at 301.

123. The Fifth Circuit has recognized, however, that a magistrate may conduct trials and enter final judgments in a diversity case with the consent of the parties. 28 U.S.C. § 636(c) (1982); Puryear v. Ede's Ltd., 731 F.2d 1153, 1154 (5th Cir. Apr. 1984). *Accord* Collins v. Foreman, 729 F.2d 108 (2d Cir. 1984), *petition for cert. filed*, 52 U.S.L.W. 3777 (U.S. Apr. 2, 1984) (No. 83-1616); Goldstein v. Kelleher, 728 F.2d 32 (1st Cir. 1984); Pacemaker Diagnostic Clinic of America, Inc. v. Istromedix, Inc., 725 F.2d 537 (9th Cir. 1984) (en banc) *petition for cert. filed*, 52 U.S.L.W. 3875 (U.S. May 16, 1984) (No. 83-1873); Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983). In districts with long trial delays, this option may be attractive to judges, lawyers, and litigants. *See generally* Note, *Federal Magistrates and the Principles of Article III*, 97 HARV. L. REV. 1947 (1984).

124. Verret v. Elliot Equip. Corp., 734 F.2d 235, 237 (5th Cir. June 1984) (plaintiff's join-

cause the matter is jurisdictional, the court has a "duty to notice party alignment and apply proper realignment *sua sponte* on appeal."[125] The court is to determine realignment according to "the principal purpose of the suit and the primary and controlling matter in dispute."[126] In *Lowe v. Ingalls Shipbuilding*, one defendant had no dispute with the plaintiffs. However, on the principle issue that defendant took the plaintiffs' position opposite to the other named defendant. Thus, realignment as a plaintiff was necessary, although the move destroyed diversity.

B. *Section 1359*

The most significant diversity jurisdiction decision during the survey period was *Bianca v. Parke-Davis Pharmaceutical Division of Warner-Lambert Co.*[127] Section 1359 provides that a district court does not have jurisdiction over a civil action "in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."[128] The issue in *Bianca* was whether the citizenship of an administratrix should be disregarded under section 1359. An eleven year old girl from Mississippi contacted aplastic anemia and died after taking a cold medication. The parents, also from Mississippi, resolved to sue the prescribing physician, the supplying pharmacist, and the manufacturer of the drug. Over the course of preparing for suit, the parents became so distraught that they decided either to find an administrator or to forego the litigation. They selected the mother's sister, Ms. Bianca, a resident of Louisiana, as a person with sufficient family ties to press the suit. When the state court appointed administratrix brought a diversity suit for wrongful death, the two individual defendants, each a resident of Mississippi, raised section 1359.

The history of section 1359 outside the Fifth Circuit is a another

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ing of nondiverse defendant ended jurisdiction and court would not set aside the denial of the motion to set aside dismissal even though state prescription period had run); De Melo v. Toche Marine, Inc., 711 F.2d 1260, 1262 n.1 (5th Cir. Aug. 1983) (diversity jurisdiction alleged only after nondiverse defendant was dismissed).

125. Lowe v. Ingalls Shipbuilding, 723 F.2d 1173, 1178 (5th Cir. Jan. 1984). *See also supra* notes 74-91 and accompanying text.

126. *Id.* at 1178 (quoting Indemnity Ins. Co. of N. Am. v. First Nat'l Bank, 351 F.2d 519, 522 (5th Cir. 1965).

127. 723 F.2d 392 (5th Cir. Jan. 1984).

128. 28 U.S.C. § 1359 (1982).

whole chapter.[129] Within the Fifth Circuit, the Court adopted the "motive/function" test in 1970.[130] Although a question of fact, federal law applied. The nominal real party in interest under state law was a formalism behind which the federal court would look.[131] The Fifth Circuit has refined the test over the years.[132] First, the Court asked whether there was a motive to manufacture diversity. Second, the Court evaluated the substance of the appointment to determine if it was worthy of recognition. The *Bianca* opinion still further refined the analysis in two important particulars: first, the administrator need not have a substantial stake in the wrongful death action brought for the estate.[133] Second, the unlikelihood that the administrator will encounter bias as an out-of-stater is irrelevant.[134] Next, the court rejected a rival test from the Fourth Circuit.[135] The Fourth Circuit had adopted a "substantial stake" test which virtually ignored motive and only considered whether the administrator had a substantial stake in the outcome of the diversity suit.[136] While the rejected Fourth Circuit test was more direct and easier to apply and furthered the purposes of diversity jurisdiction, the language of the statute controlled. In what may be the first ever application of the plain meaning rule to the obscurant section 1359, the *Bianca* panel concluded that motive was made controlling by the statutory phrase "has been improperly or collusively made or joined *to invoke* the jurisdiction."[137]

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129. *See generally*, 14 C. WRIGHT, A. MILLER, E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3637-3642 (1982).

130. Bass v. Texas Power & Light Co., 432 F.2d 763 (5th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971).

131. The test came from the Third Circuit. McSparran v. Weist, 402 F.2d 867, 876 (3d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 903 (1969).

132. *See* White v. Lee Marine Corp., 434 F.2d 1096 (5th Cir. 1970); Green v. Hale, 433 F.2d 324 (5th Cir. 1970); Bass v. Texas Power & Light Co., 432 F.2d 763 (5th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971).

133. 723 F.2d at 398.

134. *Id.* at 396.

135. It seems curious that the court deemed itself competent even to evaluate the Fourth Circuit's approach. To have adopted the competing approach would have meant the overruling of prior Fifth Circuit precedents. Despite the *Bianca* panel's hubris, the rule of interpanel accord is a Fifth Circuit fixture. "[E]arlier decisions of any panel [are] binding precedent, absent intervening en banc or Supreme Court action." Baker, *supra* note 12 at 723. *Cf. also* FED. R. APP. P. 35(a)(1) (full court consideration may be "necessary to secure or maintain uniformity of its decisions").

136. *See* Bishop v. Hendricks, 495 F.2d 289 (4th Cir.), *cert. denied*, 419 U.S. 1056 (1974). *See also* Gross v. Hougland, 712 F.2d 1034, 1039 n.10 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1281 (1984) (rejecting Fourth Circuit's approach); Betar v. DeHavilland Aircraft of Canada, Ltd., 603 F.2d 30, 35-36 (7th Cir. 1979), *cert. denied*, 444 U.S. 1098 (1980).

137. 723 F.2d at 398 (quoting 28 U.S.C. § 1359 (1982)) (emphasis added by the court). At

Maintaining Fifth Circuit precedent, the court held for something of a totality of circumstances approach. On remand, motive and purpose were to be the ultimate inquiry. Factors to be considered included: (1) the relationship between representative and represented; (2) the representative's powers and duties; (3) any special ability possessed by the representative; (4) whether some nondiverse individual would be a more natural choice; (5) any announced explanation of the choice; and (6) whether the suit is wholly local in nature.[138] The district court may disregard the citizenship of an administratrix only after applying these factors and finding that the representative was named with a purpose to manufacture diversity.[139] Significantly, the court suggested an exception in dictum that diversity jurisdiction would be upheld even if the administratrix is named with a purpose to create diversity, so long as the person has a stake in the outcome or substantial duties beyond the suit.[140] Such is the rule in the Fourth and Tenth Circuits already.[141] Whatever the future of the law in the Fifth Circuit, the *Bianca* decision will be a landmark in the law of section 1359.

C. *The Erie Doctrine*

We have it on the best of authority that "[n]o issue in the whole field of federal jurisprudence has been more difficult than determining the meaning of [the Rules of Decision Act]."[142] Since 1789, the controversy has been whether the decisions of state courts are "the laws of the several states" and hence binding on federal courts in diversity.[143] Since then the Supreme Court's answer has changed from negative[144] to ambiguous[145] to affirmative[146] and has always been con-

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least the court did not simply look up the words in a common dictionary. *See* Corabi v. Auto Racing, Inc., 264 F.2d 784, 788 (3d Cir. 1959) (en banc).

The American Law Institute would have the citizenship of the represented party attributed to the representative. AMERICAN LAW INSTITUTE STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1301(b)(4) (Official Draft 1969).

138. 723 F.2d at 395 (quoting Green v. Hale, 433 F.2d 324, 329 (5th Cir. 1970)).

139. *Id.* at 398.

140. *Id.* at 398 n.7.

141. *See* Hackney v. Newman Memorial Hosp., 621 F.2d 1069 (10th Cir.) *cert. denied*, 449 U.S. 982 (1980); Bishop v. Hendricks, 495 F.2d 289 (4th Cir.), *cert. denied*, 419 U.S. 1056 (1974).

142. C. WRIGHT, *supra* note 13, § 54, at 347.

143. Judiciary Act of 1789, § 34, 1 Stat. 92, *codified* 28 U.S.C. § 1652 (1982).

144. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

145. The leading proceduralist of the period wrote in 1928 "though the cases here are

troversial. So much so that a cynic might suggest that a great deal of the controversy is a by product of the tenure track.[147] Too much of federalism is at stake, however, to be overly cynical. Space and time limitations prevent a canvass of this area. I will have to rely on vague and distant socratic dialogues from first year civil procedure. For example, "Was the holding in *Erie R. Co. v. Tompkins* really constitutionally required?"[148] For present purposes, it is enough to borrow from Judge Learned Hand the observation that we live in " 'erie-antompkinated' days."[149] State common law is a rule of decision in diversity cases.

The related question, which state's law controls, was answered in *Klaxon Co. v. Stentor Electric Manufacturing Co.*[150] The *Klaxon* corollary requires that a federal court must apply the conflict of laws rule of the state in which it is sitting whenever a question arises as to which substantive state law applies.[151] When a diversity case is transferred from one federal court to another, the *Klaxon* rule goes so far as to oblige the transferee court to apply the conflict of laws rules of the transferor court's state.[152]

These rules are clear of statement but are difficult to apply. The determination of the conflict of law rule of the forum state may be

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legion, these rules and their application are notoriously far from clear." DOBIE, FEDERAL PROCEDURE 558 (1928), *quoted in* C. WRIGHT, *supra* note 13, § 54, at 348.

146. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

147. *See generally* C. WRIGHT, *supra* note 13, §§ 54-60, at 347-97 (for citations to a representative sampling of the relevant literature).

148. *See id.* § 56 at 359-64. Answer: "On an issue that left the scholarly writers so divided, and about which the Supreme Court has been so cryptic, it would be foolhardy to venture a confident answer . . . . If the Court believes it is deliberately deciding a constitutional question, it is wise to suppose that the constitutional question has been decided, unless and until some later Court suggests a different answer." *Id.* at 362-63.

149. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 269 (1946). *See generally* Younger, *What Happened in Erie*, 56 TEX. L. REV. 1011 (1978).

While there is no federal general common law there is indeed a federal common law. *See* Wayne v. TVA, 730 F.2d 392, 398 (5th Cir. Apr. 1984); Wehling v. CBS, 721 F.2d 507, 508 (5th Cir. Dec. 1983).

150. 313 U.S. 487 (1941).

151. *Id.* at 496. The rule has been criticized as encouraging forum shopping among the state courts and as failing to take the opportunity for the disinterested federal courts to create a coherent system of conflict of laws. C. WRIGHT, *supra* note 13, §57, at 369. The Supreme Court has persisted despite these criticisms. *See* Day and Zimmerman, Inc. v. Challoner, 423 U.S. 3, 4 (1975).

152. James v. Bell Helicopter Co., 715 F.2d 166, 169 (5th Cir. Sept. 1983); Cowan v. Ford Motor Co., 713 F.2d 100, 104 (5th Cir. Aug. 1983). *See generally* 28 U.S.C. § 1404(a) (1982); Van Dusen v. Barrack, 376 U.S. 612 (1964).

troublesome for the federal court, and, at times, may be confusing. Consider *Morris v. LTV Corp.*[153] and *Brown v. Cities Service Oil Co.*,[154] both of survey vintage. In *Morris*, a contract action, the court applied a general and dated Texas conflict of laws rule that questions of substantive law are controlled by the laws of the state where the cause of action arose, but matters of remedy and of procedure are governed by the laws of the state where the action is brought.[155] In *Brown*, a tort action, the court applied the Texas conflict of laws rule that questions of substantive law are controlled by the tort law of the state having the most significant relationship to the facts and circumstances surrounding the controversy.[156] Both cases relied on precedents from the Supreme Court of Texas. Prior to the Fifth Circuit's decisions in *Morris* and *Brown*, the Supreme Court of Texas had announced a new conflicts rule in contract cases which applied the law of the state with the most significant relationship to the particular issue,[157] which paralleled its 1979 decision which had adopted a similar approach in tort law.[158] Finally, note that determining the conflict rule is half the task. Application may tax the role-playing ability of the federal court, as when a district court in Louisiana must pretend to be a Louisiana state court pretending to be a Kansas state court.[159] Nothing much strange there.

Even if the federal judges are persuaded that a generic state precedent is unsound they may not disagree with the state judges.[160] The federal judges, however, may in fact disagree among themselves on just what the state rule really is,[161] even to the point of a fourteen judge en banc review and eight-three-three division,[162] in what has to be seen as a waste of judicial resources. Indicia of state law is not

153. 725 F.2d 1024 (5th Cir. Mar. 1984).
154. 733 F.2d 1156 (5th Cir. June 1984).
155. 725 F.2d at 1027.
156. 733 F.2d at 1159.
157. Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984).
158. Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979). *See* Crim v. International Harvestor Co., 646 F.2d 161 (5th Cir. 1981).
159. Delhomme Indus., Inc. v. Houston Beechcraft, Inc., 735 F.2d 177 (5th Cir. July 1984).
160. *See* Hermann v. General Motors Corp., 720 F.2d 414, 415 (5th Cir. Nov. 1983) ("[G]enerically similar factual situation" in state decision controlled).
161. Morgan v. Freeman, 715 F.2d 185, 190 (5th Cir. Sept. 1983) (Jolly, J., dissenting); Measday v. Kwik-Kopy Corp., 713 F.2d 118, 128 (5th Cir. Aug. 1983) (Rubin, J., dissenting).
162. *See* Edwards Co. v. Monogram Indus., Inc., 730 F.2d 977 (5th Cir. Apr. 1984) (en banc). *See also* Sturgeon v. Strachan Shipping Co., 731 F.2d 255 (5th Cir. May 1984) (en banc).

limited to recent, definitive holdings of the jurisdiction's highest court. The most recent and most authoritative decisions applicable are, however, controlling.[163] A single decision rendered nearly seventy years ago may be enough.[164] The federal court is *Erie* bound to follow an authoritative holding of an intermediate state court unless it is persuaded that a higher state court would disagree.[165] When the intermediate state courts are divided, the federal court may even role play the part of state supreme court and resolve the conflict.[166] Finally, prior federal readings of state law "tea leaves" are to be followed unless valid reason exists to reject them.[167] This last notion also applies to the relationship between federal trial and appellate courts. Although a district court's conclusions of fact are subject to rule 52's "clearly erroneous" standard of review, the appellate court is free to reexamine and reach its own conclusions of law.[168] But a federal district court's determination of the law of the forum state is entitled to great weight on review due to the trial court's experience and familiarity with the law of the state.[169]

Federal courts exercising diversity jurisdiction, however, still remain federal courts. The state of the art in Supreme Court precedent distinguishes between issues governed by the federal rules of procedure and issues not so governed.[170] First, when applicable, a valid

163. Brumley Estate v. Iowa Beef Processors, Inc., 715 F.2d 996, 997 (5th Cir. Sept. 1983), *cert. denied*, 104 S. Ct. 1288 (1984).

164. *See* 713 F.2d at 126.

165. Taylor v. Jim Walter Corp., 731 F.2d 266, 267 (5th Cir. May 1984); Birmingham Fire Ins. Co. v. Winegardner and Hammons, Inc., 714 F.2d 548, 550 (5th Cir. Sept. 1983).

166. *See* McLaughlin v. Herman & Herman, 729 F.2d 331, 334 (5th Cir. Apr. 1984).

167. *See* Hasty v. Rust Eng'g Co., 726 F.2d 1068, 1070 (5th Cir. Mar. 1984) (United States Supreme Court decision dismissing appeal from Texas Supreme Court for want of a substantial federal question); Aetna Cas. & Sur. Co. v. Guynes, 713 F.2d 1187, 1190 (5th Cir. Sept. 1983) (prior Fifth Circuit decision).

168. *See* FED. R. CIV. P. 52(a); *See* Sierra Club v. Sigler, 695 F.2d 957, 967 (5th Cir. 1983); United States v. Grayson County State Bank, 656 F.2d 1070, 1075 (5th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

169. *See* Acree v. Shell Oil Co., 721 F.2d 524, 525 (5th Cir. Dec. 1983); Smith v. Mobil Corp., 719 F.2d 1313, 1317 (5th Cir. Nov. 1983); Halpern v. Lexington Ins. Co., 715 F.2d 191, 192 (5th Cir. Sept. 1983); Humphrey v. C.G. Jung Educ. Center, 714 F.2d 477, 480 (5th Cir. Sept. 1983).

While the rule seems well-ensconced in the Fifth Circuit, the Ninth Circuit en banc court recently cast off on its own course by holding that district court's interpretations of state law will be reviewed under an independent de novo standard. Churchill v. F/V Fjord, 739 F.2d 1395 (9th Cir. 1984) (en banc).

170. Hanna v. Plumer, 380 U.S. 460 (1965).

How we arrived at our present state and much of the subtlety and nuance of the art of

rule of federal procedure commands obedience. Second, for issues not controlled by the first rule, the federal court is obliged to consider "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[171] Survey decisions were typical. Under the first rule, the federal court in a diversity suit must follow the federal rules of evidence,[172] the federal rules of civil procedure,[173] and general federal procedures for the manner of conducting the proceeding.[174]

Application of the second rule draws an important line. The "constitutional power of the states to regulate the relations among their people" is on one side, and the "constitutional power of the federal government to determine how its courts are to be operated" is on the other.[175] One recurring survey phenomenon illustrates the importance of this line. Discouragement of forum shopping and avoidance of inequitable administration of state law require that "a defendant is amenable to the personal jurisdiction of a federal court in a diversity case to the extent permitted a state court in the state where the federal court sits."[176] Besides its frequency of application, this rule has two characteristics which yield a peculiar synthesis. First, under the *Erie* doctrine the forum state's long arm provision must apply, including state court interpretations. Second, the state statute, as interpreted, must satisfy the fourteenth amendment's due process standard, as applied on the particular facts.[177] Thus, the state law, including a state

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such decisions is left to the reader's other devices. *See generally* 19 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4508-4513 (1976).

171. 380 U.S. at 470-72.

172. Cook v. McDonough Power Equip., Inc., 720 F.2d 829, 831 (5th Cir. Dec. 1983) (FED. R. EVID. 407); Carter v. Massey-Ferguson, Inc., 716 F.2d 344, 347 (5th Cir. Oct. 1983) (FED. R. EVID. 401).

173. Timberlake v. A.H. Robins Co., 727 F.2d 1363, 1364 (5th Cir. Mar. 1984) (FED. R. CIV. P. 56(e)); Rosales v. Honda Motor Co., 726 F.2d 259, 260 (5th Cir. Mar. 1984) (FED. R. CIV. P. 42(b)); Kelly v. Commercial Union Ins. Co., 709 F.2d 973, 977 (5th Cir. July 1983) (FED. R. CIV. P. 19(a)).

174. Martin v. Texaco, Inc., 726 F.2d 207, 216 (5th Cir. Mar. 1984) (manner of giving instructions); Big John, B.V. v. Indian Head Grain Co., 718 F.2d 143, 148 (5th Cir. Oct. 1983) (materials submitted to and used by jury); McHann v. Firestone Tire and Rubber Co., 713 F.2d 161, 164 (5th Cir. Sept. 1983) (sufficiency of evidence to create a jury question).

175. C. WRIGHT, *supra* note 13, § 59 at 387.

See Walters v. Inexco Oil Co., 725 F.2d 1014, 1017 (5th Cir. Mar. 1984) (Mississippi statute imposing a penalty on an unsuccessful appellant applies in a federal diversity case); Baber v. Edman, 719 F.2d 122, 123 (5th Cir. Nov. 1983) (state notice statute binds federal diversity court in malpractice action).

176. DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1264 (5th Cir. Aug. 1983).

177. In the exercise of in personam jurisdiction, the constitution requires that a nonresi-

law thesis and a federal constitutional thesis, binds the federal court.[178] As a result of the *Erie* doctrine, then, the federal court must evaluate the constitutionality of the state's long arm statutes.[179]

V. "OUR FEDERALISM"[180]

I borrow Justice Black's heartfelt phrase to mean more than the doctrine it serves as sobriquet. In this section I mean to discuss generally the relations between state and federal courts. This matter is of no small significance. Indeed, "[t]he happy relation of States to Nation — constituting as it does our central political problem — is to no small extent dependent upon the wisdom with which the scope and limits of the federal courts are determined."[181]

A. *Sovereign Immunity*

Generally, relations between state officials and federal courts are structured by notions of sovereign immunity and the eleventh amendment.[182] The constitutional provision does not act as a grant of immunity to the states. The states are not exempted from the limits of federal law but are still suable for actions within the amendment, but only in state court. Far from being some forgotten and esoteric aside in constitutional law, these concepts "go to the very heart of a federal system and affect the allocation of power between the United States and the several states."[183]

There are five hornbook issues in each application of eleventh amendment jurisprudence: first, whether "the plaintiff [is] one to whom the amendment applies"; second, whether "the suit [is] truly

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dent defendant have some minimum contacts with the forum state resulting from affirmative acts and imposing the obligation to defend in the forum is not unfair or unreasonable. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Hanson v. Denckla, 357 U.S. 235 (1958).

178. 711 F.2d at 1265.

179. *See* Growden v. Ed Bowlin and Assoc., Inc., 733 F.2d 1149 (5th Cir. June 1984); Union Carbide Corp. v. UGI Corp., 731 F.2d 1186 (5th Cir. 1984); Estate of Portnoy v. Cessna Aircraft Co., 730 F.2d 286 (5th Cir. Apr. 1984); DeMelo v. Toche Marine, Inc., 711 F.2d 1260 (5th Cir. Aug. 1983).

180. Younger v. Harris, 401 U.S. 37, 43-46 (1971) (Black, J.).

181. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT — A STUDY IN THE FEDERAL JUDICIAL SYSTEM 2 (1928).

182. The eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

183. C. WRIGHT, *supra* note 13, § 48, at 286.

against the state"; third, whether "the suit seek[s] relief in a manner that is barred by the amendment"; fourth, whether "the state [has] waived its immunity"; and finally, whether some "congressional statute . . . override[s] the immunity."[184] During the survey period, the Supreme Court rewrote those principles, especially the third, in *Pennhurst State School & Hospital v. Halderman*,[185] a decision which has already begun to work significant changes in Fifth Circuit law.[186] Plaintiffs sued various state and county officials alleging violations of several federal rights, both constitutional and statutory, and a state statutory right. The judgment before the Supreme Court did not reach the federal issues but held for the plaintiffs on the pendent state law claim and entered broad injunctive relief.[187] The Supreme Court majority rethought basic eleventh amendment theory. At one time the bar was interpreted to prohibit any suits in which the plaintiff sought to restrain or to compel the action of a state official performing official duties imposed by constitutional state laws.[188] Later judicial refinements narrowed the bar to prohibit private plaintiffs from imposing a liability which must be paid from public funds from the state treasury either in damages or in expenses necessary to comply with a prospective order.[189] Now the bar is once again broadened. The *Halderman* majority began with the major premise that the eleventh amendment bars suit against state officials when the state is the real, substantial party in interest. *Ex parte Young*,[190] rightly considered one of the most important constitutional decisions in the history of the Republic, was the Supreme Court's minor premise. That decision recognized the important exception that a suit challenging the federal constitutionality of a state official's action is not one against the state. The Supreme Court created this fiction and the judicial creator has

184. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 55 (2d ed. 1983). *See generally* Baker, *Constitutional Law*, 27 LOY. L. REV. 805, 815-19 (1981).

185. 104 S. Ct. 900 (1984).

186. *See* McGruder v. Necaise, 733 F.2d 1146, 1148 (5th Cir. June 1984) (citing Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900 (1984)). *See also* Clay v. Texas Women's Univ., 728 F.2d 714, 715-16 (5th Cir. Mar. 1984).

187. The litigation history is complicated. Halderman v. Pennhurst State School & Hospital, 446 F.Supp. 1295 (E.D. Pa. 1978), *aff'd in part & rev'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd & remanded*, 451 U.S. 1 (1981), *on remand*, 673 F.2d 347 (3d Cir. 1982) (en banc), *rev'd & remanded*, 104 S. Ct. 900 (1984).

188. Lummis v. White, 629 F.2d 397, 401 (5th Cir. 1980) (citing Worcester County Trust Co. v. Riley, 302 U.S. 292, 296-300 (1937)).

189. *Id.* at 401-02.

190. 209 U.S. 123 (1908).

since maintained control. The Court had declined to extend the fiction to allow costly retroactive relief based on the supremacy of federal law.[191] The *Halderman* majority concluded that there was no need to reconcile the states' immunity with state law. It held that state law claims against state officials brought into federal court under pendent jurisdiction were barred by the eleventh amendment.[192] As a result of this holding, the Court realized that many federal claims would be brought in state courts or the federal and state claims would be bifurcated and proceed independently. But the majority concluded that efficiency, convenience, and fairness were not part of the eleventh amendment.[193]

While I can resist the temptation to launch a long exploration of this precedent here, I cannot overemphasize its importance. In the Fifth Circuit, appending state law claims to federal claims has been an everyday occurrence.[194] All of that is changed now. The eleventh amendment seems to require that we sort through claims against state officials and assign those sounding in federal law to the federal court and those sounding in state law to the state court, although the later forum can hear both.

Considerations of federalism also overwhelm decisions about the relations between the federal courts and their counterpart state courts. For example, federal district courts do not have appellate jurisdiction to review, modify, or nullify a final order of a state court. As basic as this principle is, it was controverted in *Howell v. State Bar of Texas*.[195] In *Howell*, the plaintiff brought a civil rights action challenging the result of a state court disciplinary proceeding against him. The district court dismissed and a Fifth Circuit panel reversed.[196] The Supreme Court reversed and remanded for reconsideration under *District of Columbia Court of Appeals v. Feldman*.[197] In *Feldman* the Supreme Court had held that in such claims the district court has no jurisdiction involving such state judicial proceedings even if the constitution is invoked. That review was saved for the Supreme Court

191. Edleman v. Jordan, 415 U.S. 651 (1974).

192. 104 S. Ct. at 917-19.

193. *Id.* at 919-21. *See also supra* notes 20-30 and accompanying text.

194. *See, e.g.*, Breath v. Cronvich, 734 F.2d 225 (5th Cir. June 1984); Wheeler v. Cosden Oil and Chem. Co., 734 F.2d 254 (5th Cir. June 1984); Clay v. Texas Women's Univ., 728 F.2d 714 (5th Cir. March 1984); Howard v. Fortenberry, 723 F.2d 1206 (5th Cir. Feb. 1984).

195. 710 F.2d 1075 (5th Cir. Aug. 1983), *cert. denied*, 104 S. Ct. 2152 (1984).

196. 674 F.2d 1027 (5th Cir. 1982).

197. 103 S. Ct. 1303 (1983).

alone. The district court does have jurisdiction, however, over general challenges to state bar rules promulgated extrajudicially which do not involve a final judgment of a state court. In *Howell*, the Fifth Circuit panel simply followed that distinction on remand.[198]

B. *Abstention*

The abstention doctrines provide a most important mechanism for adjusting the tension between the two judiciaries. During the survey period, the court relied on the *Pullman* doctrine and the *Younger* doctrine.[199]

The *Pullman* abstention doctrine, named for the Supreme Court decision of creation,[200] provides that "a federal court may, and ordinarily should, refrain from deciding a case in which state action is challenged in federal court as contrary to the federal constitution if there are unsettled questions of state law that may be dispositive of the case and avoid the need for deciding the constitutional question."[201] Such positive statements of the doctrine coexist in Fifth Circuit case law with hostile precedents which emphasize that the principle is judicially created and controlled and should be a severely

198. 710 F.2d at 1078.

199. A third abstention doctrine, not used during the survey period, takes its name from Burford v. Sun Oil Co., 319 U.S. 315 (1943). Such abstention is appropriate when the federal court should defer to the state's administration of its own affairs. The federal suit is dismissed to avoid needless conflict with matters of local concern. *See generally* 17 C. WRIGHT, A. MILLER, & E. COOPER, Federal Practice and Procedure § 4245 (1976).

Two other hybrids of abstention also did not figure in survey developments. Some federal courts have stayed their hand if there is a parallel state court action pending or if a diversity case will oblige the decision of a difficult state law question. *See* United Servs. Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir. 1964), *cert. denied sub nom.* Paul Revere Life Ins. Co. v. First National Bank, 377 U.S. 935 (1965); P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949). Modern Supreme Court precedents render such wild-cat abstentions very suspect. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 103 S. Ct. 927 (1983); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

200. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). *See generally* Fuld, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

201. United Home Rentals, Inc. v. Texas Real Estate Comm'n, 716 F.2d 324, 331 (5th Cir. Oct. 1983), *cert. denied*, 104 S. Ct. 1712 (1984).

Penhurst State School & Hospital may have a significant effect on *Pullman* abstention. *See supra* notes 186-195 and accompanying text. The decision may reduce the frequency of this type of abstention because the federal courts will not have as many state law claims to use to avoid federal issues. Most likely, the federal courts will decide more federal issues since the alternative state law issues will not be before them.

circumscribed exception to a general rule of going forward.[202] A frequently quoted Fifth Circuit version lists three considerations: whether the disposition of a state law issue might eliminate or narrow the scope of the federal constitutional issue; whether the question of state law is important and obscure; and whether a federal decision might later conflict with state court decisions and the regulatory scheme.[203] There is also a dimension of judicial hierarchy involved since the issue is discretionary with the district court. If the survey decisions are representative, the Fifth Circuit is more reluctant to reverse a decision to abstain than to reverse a decision not to abstain. This may be explained by the nature of *Pullman* abstention which does not prevent federal court review, but merely postpones it for good reason. The decisions do give some good examples of the court's attitude. Abstention was proper when the scope and entitlement of indigent residents under state law was uncertain in a suit challenging the criteria for the controverted aid;[204] when a state statute is susceptible of two constructions one of which will obviate the federal constitutional issue;[205] and, when the constitutionality of a state agency's interpretation of a state statute was the subject of review in the state agency or state courts.[206] Abstention was not proper when the parallel state action at issue had been concluded prior to the motion to abstain[207] and when the constitutional preemption issue would exist regardless of which of the competing interpretations of a state statute was chosen.[208]

Today's *Younger* abstention doctrine, sometimes called the nonintervention doctrine and often euphemised the doctrine of "Our Federalism," may be traced to a 1971 Supreme Court decision[209] and its *sequellae*.[210] Based on considerations of equity, comity, and federal-

202. Pietzsch v. Mattox, 719 F.2d 129, 131 (5th Cir. Nov. 1983).

203. High Ol'Times, Inc. v. Busbee, 621 F.2d 135, 139 (5th Cir. 1980).

204. Mireles v. Crosby County, 724 F.2d 431, 433 (5th Cir. Jan. 1984).

205. Pietzsch v. Mattox, 719 F.2d 129, 132 (5th Cir. Nov. 1983). Even if I could add my vote for reversal to Judge Tate's, "we" would still affirm by an equally divided court. *Id.* at 132-34 (Tate, J., dissenting).

206. United Home Rentals v. Texas Real Estate Comm'n, 716 F.2d 324 (5th Cir. Oct. 1983). Judge Tate would lose 3:1 if I had a vote in this one. *Id.* at 334-35 (Tate, J., dissenting).

207. Dorsey v. Moore, 719 F.2d 1263, 1265 (5th Cir. Nov. 1983).

208. KVUE, Inc., v. Moore, 709 F.2d 922, 931 (5th Cir. July 1983).

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

210. *E.g.*, Trainor v. Hernandez, 431 U.S. 434 (1977); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Steffel v. Thompson, 415 U.S. 452 (1974); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

ism, a federal district court must abstain from granting either declaratory or injunctive relief when a state criminal action or its equivalent is pending against the federal plaintiff. *DeSpain v. Johnston*[211] represents a thoughtful Fifth Circuit application during the survey period. The *Younger* doctrine strikes the balance between state and federal interests after due consideration of the nature of the state proceedings, the timing of the federal proceedings, and the need for a federal forum to protect the constitutional right. First, there is a presumption that a federal court should abstain when a state criminal proceeding is pending which is overcome only by a showing of bad faith or an intent to harass.[212] This presumption applies to certain state civil proceedings when the importance of the state interest is analogous to that of a criminal prosecution.[213] When the federal action follows the state action the need for abstention is greatest, and the state interest continues through the completion of the state appellate process.[214] To overcome the presumption for abstention, the federal plaintiff must demonstrate that there will be no opportunity to raise the federal issue in the state proceeding.[215] In *DeSpain*, the court held that the district court should have abstained from granting a restraining order effectively halting a legitimate state investigation into an allegation of child abuse and enjoining a pending state court proceeding. The importance of the state interest was obvious. State court jurisdiction had already been invoked when an investigator for a state agency requested an *ex parte* state court order to cooperate in the investigation and remained pending until the conclusion of the unavailed state appeal. The state procedure for a motion to dissolve the *ex parte* order to cooperate provided an opportunity to litigate the federal issues, and the federal plaintiffs could not rely on their failure to pursue that opportunity to be heard. Nothing in the record suggested the application of an exception to the general rule.[216] Federalism obliged abstention.

In one-half the states, another federal court abstention option ex-

211. 731 F.2d 1171 (5th Cir. May 1984). *See also* McDonald v. Burrows, 731 F.2d 294 (5th Cir. May 1984) (held federal injunction was not appropriate against state extradition and criminal prosecution notwithstanding ongoing bankruptcy proceedings).

212. 401 U.S. at 47.

213. 420 U.S. at 605. *See also* Moore v. Sims, 442 U.S. 415 (1979).

214. *See* 420 U.S. at 608; Duke v. Texas, 477 F.2d 244, 252 (5th Cir. 1973).

215. 442 U.S. at 425-26, 430.

216. Indeed, the Supreme Court had recently evaluated the particular state scheme in Moore v. Sims, *id.* at 415.

ists as a creation of state procedure, certification of state questions to the highest state court for decision.[217] The device is discretionary and the federal court wisely should evaluate the strengths and weaknesses in the particular situation. The Supreme Court has observed that "[i]t does...in the long run save time, energy, and resources and helps build a cooperative judicial federalism."[218] *Pullman* abstention cases are the most appropriate candidates for certification.[219] Rather than stay or dismiss the federal action to allow the parties to pursue a declaratory judgment through state trial and appellate proceedings, the certification device puts the question directly to the state supreme court. While there is some legitimate disagreement on the general desirability of certification, most commentators,[220] this one included, are convinced that the option adds to our federalism.

Louisiana has a certification procedure.[221] The Fifth Circuit may certify questions of state law to the Louisiana Supreme Court and regularly does so.[222] The Louisiana Supreme Court may answer the questions and regularly does so.[223] Mississippi has a certification procedure.[224] The Fifth Circuit may certify questions of state law to the Mississippi Supreme Court and regularly does so.[225] The Mississippi

217. *See* Lehman Bros. v. Schein, 416 U.S. 386 (1974); Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960). *See generally* 17 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4248 (1978).

218. 416 U.S. at 391.

219. C. WRIGHT, *supra* note 13, at 315.

220. *E.g.*, Brown, *Certification-Federalism in Action*, 7 CUM. L. REV. 455 (1977); Roth, *Certified Questions from the Federal Courts: Review and Re-proposal*, 34 U. MIAMI L. REV. 1 (1979).

221. LA. REV. STAT. ANN. § 13:72:1 (West Supp. 1983); L. SUP. CT. R. XII.

222. *See, e.g.*, Sandefur v. Cherry, 721 F.2d 511 (5th Cir. Dec. 1983); Sturgeon v. Strachan Shipping Co., 731 F.2d 255 (5th Cir. May 1984) (en banc), *cert. denied*, 53 U.S.L.W. 3269 (Oct. 9, 1984) (No. 84-222); McCain v. Commercial Union Ins. Co., 719 F.2d 1271 (5th Cir. Nov. 1983).

Of course, the federal court is not required to do so. *See* Thompson v. Johns-Manville Sales Corp., 714 F.2d 581, 583-85 (5th Cir. Sept. 1983) (Goldberg, J., dissenting), *cert. denied*, 104 S.Ct. 1598 (1984).

223. *E.g.*, Louviere v. Shell Oil Co., 720 F.2d 1403 (5th Cir. Dec. 1983) (disposition on basis of state court answer).

Of course, the state court may decline to answer. *E.g.*, Sturgeon v. Strachan Shipping Co., 731 F.2d 255 (5th Cir. May 1984) (en banc), *cert. filed*, 53 U.S.L.W. 3269 (Oct. 9, 1984) (No. 84-222); Banks v. Hyatt Corp., 722 F.2d 214 (5th Cir. Jan. 1984).

224. MISS. SUP. CT. R. 46.

225. *See* Mills v. Danison Oil Corp., 720 F.2d 874 (5th Cir. Dec. 1983); Allstate Ins. Corp. v. Randall, 708 F.2d 197 (5th Cir. July 1983).

Supreme Court may answer the questions and regularly does so.[226] Texas has no certification procedure. The Fifth Circuit cannot ask and the Texas Supreme Court cannot answer questions of state law. The reason is that such a procedure would violate the Texas Supreme Court's broad definition of the state constitution's ban on advisory opinions.[227] Texas may, however, come on-line soon. An ad hoc committee has been appointed to draft a proposal for allowing federal court certification of state law to the Texas Supreme Court. That committee, chaired by Chief Judge Sessions of the Western District of Texas, has proposed a state constitutional amendment authorizing the Texas Supreme Court to develop certification procedures. The proposal to place the matter on the ballot will be part of the legislative program of the Supreme Court and State Bar of Texas at the next session of the legislature.[228] Such an option would be preferable to the present difficulties the court has in extrapolating from Texas state court decisions which may be scarce, confusing or conflicting.[229] Certainly a panel certification ending in a definitive state law ruling would be preferable to the delay, expense and waste of judicial resources on rehearing in an en banc court[230] "writing on the wind."[231] We must await further legislative and electoral developments.

C. *Habeas Corpus*

There is agreement that "The Great Writ" has become the

226. *See* Government Employees Ins. Co. v. Brown, 727 F.2d 470 (5th Cir. Mar. 1984); Nelson v. James, 714 F.2d 545 (5th Cir. Sept. 1983).

Of course, the state court may decline to answer. *E.g.*, Cowan v. Ford Motor Co., 719 F.2d 785 (5th Cir. Nov. 1983).

227. *See* United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965), (*commented on in* Note, *Refusal of State Court to Assume Jurisdiction After Federal Abstention*, 20 SW. L.J. 402 (1966); Note, *Courts — Advisory Opinions — State Court Has No Jurisdiction to Render a Declaratory Judgment When a Federal Court Has Abstained and Retained Jurisdiction Over the Case*, 44 TEX. L. REV. 1394 (1966).

228. Letter from Honorable William S. Sessions, Chief Judge United States District Court for the Western District of Texas, to Professor Thomas E. Baker (June 18, 1984).

Model provisions have been drafted. *See* AMERICAN LAW INSTITUTE STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1374(e) (Official Draft 1969); 12 UNIFORM STATE LAWS 49-56 (1967).

229. *See e.g.*, Harris v. Sentry Title Co., 715 F.2d 941 (5th Cir. Sept. 1983), *cert. denied*, 104 S. Ct. 2679 (1984); Marcotte v. American Motorists Ins. Co., 709 F.2d 378 (5th Cir. July 1983).

230. Edwards Co. v. Monogram Indus., Inc., 730 F.2d 977 (5th Cir. Apr. 1984).

231. Thompson v. Johns-Manville Sales Corp., 714 F.2d 581, 583 (5th Cir. 1983) (Goldberg, J., dissenting), *cert. denied*, 104 S. Ct. 1598 (1984).

" 'Great(ly Abused) Writ.' "[232] There is disagreement, however, about just who the abusers are. Those on one side suggest that state prisoners have perverted the procedure destroying finality and doing violence to federalism.[233] Those on the other side say that the Supreme Court has seriously harmed what a leading commentator on the writ calls "the machinery by which great and familiar substantive principles are translated into effective law."[234] The statistics tell the true story. During the year ending June 30, 1983, a judgment for the petitioner was entered in 174 out of 8,176 federal applications for the writ nationwide, about 3%.[235] While most habeas petitioners appear *pro se*, the lawyer reader might be appointed or choose to appear *pro bono publico*. This discussion then becomes more practical beyond the issues of federalism involved.[236] During the survey period, federalism issues were debated in the context of the exhaustion requirement, res judicata, and procedural default.[237]

The leading Fifth Circuit decision on exhaustion of state remedies is *Vela v. Estelle*.[238] The principle there may be stated succinctly:

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232. Galtieri v. Wainwright, 582 F.2d 348, 365 (5th Cir. 1978) (en banc) (Hill, J., specially concurring).

233. Because this section addresses Our Federalism, I do not discuss decisions under 28 U.S.C. § 2255 (1982), although some issues are similar. The Fifth Circuit's federal prisoner docket emphasizes direct criminal appeals and such decisions are scarce anyway. *See* United States v. Saldana, 731 F.2d 1192 (5th Cir. May 1984); United States v. Santora, 711 F.2d 41 (5th Cir. July 1983); Alford v. United States, 709 F.2d 418 (5th Cir. July 1983).

234. L. YACKLE, POSTCONVICTION REMEDIES v (1981).

235. Rodriguez v. McKaskle, 724 F.2d 463, 466 (5th Cir. Feb. 1984). The writ is granted "in at most 4% of the cases in which it is sought." C. WRIGHT, *supra* note 13, § 53, at 345.

236. It must be a bit disconcerting to have one's name spread in the pages of the reports and headnoted under key numbers about incompetent and ineffective counsel. *Cf.* Jones v. Estelle, 722 F.2d 159 (5th Cir. Dec. 1983) (petitioners failure to interject ineffective assistance of counsel claim in second habeas petition worked waiver of said claim in third petition, therefore effective assistance standard met), *cert. denied sub nom.* Jones v. McKaskle, 104 S. Ct. 2356 (1984); Gray v. Lucas, 710 F.2d 1048 (5th Cir. July 1983). *See infra* note 239.

237. Other traditional habeas topics were less controversial. Battieste v. Baton Rouge, 732 F.2d 439 (5th Cir. May 1984) (custody); Rumbaugh v. McKaskle, 730 F.2d 291 (5th Cir. Apr. 1984) (standing of next friend); Davis v. Page, 714 F.2d 512 (5th Cir. Sept. 1983) (en banc), *cert. denied*, 104 S. Ct. 735 (1984) (relationship to civil rights action).

238. 708 F.2d 954 (5th Cir. July 1983), *cert. denied sub nom.* McKaskle v. Vela, 104 S. Ct. 736 (1984). "*Vela* and the cases it cited represent the law of the circuit." Rodriguez v. McKaskle, 724 F.2d 463, 466 (5th Cir. Feb. 1984).

Here I follow what a colleague in the same situation of advocate-commentator called "the time honored distinction among practitioners between 'the interesting cases' and the 'other fellow's cases.' " Baier, *Constitutional Law*, 29 LOY. L. REV. 647, 649 (1983). I served as court-appointed counsel in the Fifth Circuit and before the Supreme Court on behalf of the Petitioner, Conrado U. Vela. This footnote "should be regarded as an admission required by candor rather than as an assertion impelled by immodesty." F. WIENER, CIVILIANS UNDER

"a state prisoner must normally exhaust all available state remedies before he can apply for federal habeas relief. . . ."[239] The principle is not jurisdictional. Rather, the requirement derives from considerations of comity, "serv[ing] to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights."[240] To satisfy the principle, a habeas petitioner must have "fairly presented the substance" of the claim to the state court.[241] Usually, the answer is clear whether the particular claim was[242] or was not[243] presented in the state forum. Cases like *Vela* and the survey decision *Rodriguez v. McKaskle*[244] exemplify the more difficult application. In *Vela*, the right to counsel issue had been presented *pro se* in the state courts and in the federal district court identifying only three critical incidents of incompetence at the state sentencing hearing. Before the Fifth Circuit, appointed counsel emphasized those three egregious errors and identified dozens of other inadequacies in the transcript to demonstrate a cumulative ineffectiveness. The State cried foul for lack of exhaustion. The court held that the claim had been exhausted because the entire record had been before the state court which had, in fact, applied a totality of the circumstances definition of effectiveness of counsel.[245] In *Rodriguez*, however, while the claim of ineffectiveness had been raised generally before the state court, the particular inadequacies argued were *dehors* the record and had been developed for the first time in the federal district court hearing and were first fully decided there. Therefore, the petition was dismissed even though, in the court's words, "[n]ow that the case has been tried, a decision on the merits would eliminate the need for fur-

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MILITARY JUSTICE at 3 n.1 (1967). I also note my strong disagreement with Former Chief Judge Brown's remonstrance that "it is a disruptive confusion of roles for law professors to participate actively as counsel in actual cases, trial or appellate." Brown, *Is the Corpus (Juris) Terminally Ill?*, 12 TEX. TECH L. REV. 13, 19 (1981).

239. 708 F.2d at 958. *See also* 28 U.S.C. § 2254(b)(c) (1982).

240. Duckworth v. Serrano, 454 U.S. 1, 3 (1981). *See also* Rose v. Lundy, 455 U.S. 509 (1982); Picard v. Connor, 404 U.S. 270 (1971).

241. 708 F.2d at 958.

242. Browne v. Estelle, 712 F.2d 1003 (5th Cir. Aug. 1983) (precise issue raised on direct and collateral appeals to state courts and precedents decided afterwards need not be reexhausted).

243. Irving v. Thigpen, 732 F.2d 1215 (5th Cir. May 1984) (equal protection claim not previously presented to state court).

244. 724 F.2d 463 (5th Cir. Feb. 1984).

245. *See* Strickland v. Washington, 104 S. Ct. 2052 (1984); United States v. Cronic, 104 S. Ct. 2039 (1984).

ther effort by the state judicial system, reduce further litigation expense, avoid delay, and eliminate the possible need for later judicial review."[246] A federal district court must dismiss a "mixed" petition containing both exhausted and unexhausted claims and the court of appeals may not rule on only the exhausted claim unless it was the only claim in the district court and the unexhausted claims were added on appeal.[247] The state may waive the exhaustion requirement either expressly or implicitly, as it is not jurisdictional.[248] In fact, the federal court will overlook the failure to exhaust when the delay of state court resolution is so extreme that direct appellate review cannot be considered an effective state court remedy. A pattern of such delay occurred as a consequence of the serious backlog of cases in the Texas Court of Criminal Appeals. Appellate delays up to five years meant that the state prisoner could serve half of a severe sentence without being able to exhaust state remedies.[249] That situation was too much for the Fifth Circuit, although recent state court reforms should ease the state docket problem.[250]

Traditionally, habeas procedure is an exception to the doctrine of res judicata and a federal court may grant relief in spite of a prior rejection of the claim by a state court.[251] There is, however, a statutory presumption of correctness in state court findings of historical fact.[252] There must, of course, have been a state hearing with factual

246. 724 F.2d at 467.

247. Williams v. Maggio, 727 F.2d 1387, 1389 (5th Cir. Mar. 1984).

The law in this area has changed rapidly. *See* Burns v. Estelle, 695 F.2d 847, 851 (5th Cir. 1983) (abandoning Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978) (en banc)). *See also* Hill & Baker, *supra* note 45, at 66-68.

248. McGee v. Estelle, 722 F.2d 1206, 1210, 1212 (5th Cir. Jan. 1984) (en banc); Resendez v. McKaskle, 722 F.2d 227, 229 (5th Cir. Jan. 1984).

249. Vail v. Estelle, 711 F.2d 630, 632 (5th Cir. Aug. 1983). *See also* Shelton v. Heard, 696 F.2d 1127 (5th Cir. 1983).

250. Jurisdiction to hear criminal appeals was divided among all the Texas intermediate courts in 1980. *See* TEX. CONST. art. V, § 1.

251. Allen v. McCurry, 449 U.S. 90, 98 n.12 (1980); Brown v. Allen, 344 U.S. 443, 456 (1953).

Since 1976, fourth amendment issues have not been relitigable unless the petitioner demonstrates a lack of an opportunity for full and fair litigation of the issues in the state court. Stone v. Powell, 428 U.S. 465, 494 (1976); Brantley v. McKaskle, 722 F.2d 187, 189 (5th Cir. Jan. 1984). An alleged error of law by the state court, even of constitutional law, is not enough to overcome the bar. Sonnier v. Maggio, 720 F.2d 401, 409 (5th Cir. Nov. 1983).

252. 28 U.S.C. § 2254(d) (1982). In contrast, the district court is under a statutory obligation to make an independent determination of contested factual findings made by a magistrate. 28 U.S.C. § 636(b)(1) (1982). *See* Hernandez v. Estelle, 711 F.2d 619, 620 (5th Cir. Aug. 1983).

findings, express or implied.[253] Such findings may not be upset merely because the federal court disagrees, but may be set aside if they lack fair support in the record.[254] Under such a standard, state court factual findings are generally immune, but not always.[255] State courts' legal conclusions are carefully excepted, however, to allow independent federal review.[256] In such situations, counsel are wise to include in their brief a separate introductory section on the applicable standard of review.[257]

Somewhat related to the relitigation between state and federal courts, the issue of relitigation in federal courts by successive petitions raises concerns for finality and against piecemeal petitions. Perhaps because they feel the writ has been abused recently, the judges seem more willing to invoke the power of dismissal for abuse of the writ, but appear reluctant to exercise it. Despite Supreme Court entreaties to make commonplace dismissals for abuse of the writ,[258] in the Fifth Circuit actual dismissal is still of "rare and extraordinary application."[259] Dismissal is appropriate only when it is demonstrated that the petitioner either deliberately withheld a claim from a previous petition or was "inexcusably neglectful."[260]

Federalism also remains an important theme in consideration of a state's contemporaneous objection rule. The Supreme Court has

253. Armstead v. Maggio, 720 F.2d 894 (5th Cir. Dec. 1983); Smith v. Estelle, 711 F.2d 677 (5th Cir. Aug. 1983), *cert. denied*, 104 S. Ct. 1685 (1984).

254. Maggio v. Fulford, 103 S. Ct. 2261 (1983); Marshall v. Lonberger, 103 S. Ct. 843 (1983); Sumner v. Mata, 449 U.S. 539 (1981). *See* 28 U.S.C. § 2254(d) (1982) (creates several specific categories for overcoming the presumption of correctness).

255. Byrd v. McKaskle, 733 F.2d 1133, 1138 (5th Cir. June 1984); Carrillo v. Perkins, 723 F.2d 1165, 1168-69 (5th Cir. Jan. 1984); Dunn v. Maggio, 712 F.2d 998, 1000-01 (5th Cir. Aug. 1983), *cert. denied*, 104 S. Ct. 1297 (1984); Asper v. Estelle, 709 F.2d 356, 357 (5th Cir. July 1983).

256. Austin v. McKaskle, 724 F.2d 1153, 1156 (5th Cir. Feb. 1984); Plunkett v. Estelle, 709 F.2d 1004, 1008 (5th Cir. July 1983), *cert. denied*, 104 S. Ct. 1000 (1984).

257. *See* G. RAHDERT & L. ROTH, APPEALS TO THE FIFTH CIRCUIT MANUAL Ch. 21 at 10 (1977).

258. *See* Rose v. Lundy, 455 U.S. 509, 520-21 (1982) (plurality); 28 U.S.C. § 2254 (1982) and Habeas Rule 9(b) following. *See also* Woodward v. Hutchins, 104 S. Ct. 752 (1984); Williams v. King, 104 S. Ct. 562 (1984).

259. Vaughan v. Estelle, 671 F.2d 152, 153 (5th Cir. 1982) (quoting Poprskar v. Estelle, 612 F.2d 1003, 1007 (5th Cir. 1980)). *See generally* Green v. City of Montezuma, 650 F.2d 648, 650-51 (5th Cir. 1981).

260. *See* Resendez v. McKaskle, 722 F.2d 227, 231 (5th Cir. Jan. 1984); Jones v. Estelle, 722 F.2d 159 (5th Cir. Dec. 1983) (en banc); Williams v. King, 722 F.2d 104, 105 (5th Cir. Dec. 1983); Baker v. Estelle, 715 F.2d 1031, 1034 (5th Cir. Sept. 1983), *cert. denied*, 104 S. Ct. 1609 (1984); Sockwell v. Maggio, 709 F.2d 341, 344 (5th Cir. July 1983).

held that when a state prisoner procedurally defaults a claim by failing to comply with the state's requirement for a contemporaneous objection the issue is precluded likewise in the federal habeas court absent some showing of cause and prejudice.[261] The Fifth Circuit is strict in applying this rule even to the extent of not considering an issue when defense counsel's objection was only on state law grounds and did not raise or preserve a federal constitutional issue involving the same testimony.[262] The exception for cause and prejudice is still of uncertain dimension.[263] In Fifth Circuit decisions, however, it is almost certain that the court will refuse to find the exception satisfied, at least for a failure to object at trial.[264] The contrapositive of the rule also applies. When a state court has reached the issue despite the want of a preserving objection, the federal court is not barred by the principles of federalism from likewise deciding the issue.[265] There are cases in which it is not clear just what the state court has done. Usually, any ambiguity is resolved in favor of the petitioner, as it should be, for the federalism concern is for the state court and not for the state respondent.[266]

Justice Holmes once observed, "*habeas corpus* cuts through all forms and goes to the very tissue of the structure."[267] Once the federal habeas court decides to reach the merits, the review includes all the rights we hold most sacred.[268] Arrayed against these concerns are

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261. Reed v. Ross, 104 S. Ct. 2901 (1984); Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977).

262. Byrd v. McKaskle, 733 F.2d 1133, 1139 (5th Cir. June 1984).

263. *See generally* Comment, *Habeas Corpus — The Supreme Court Defines The Wainwright v. Sykes "Cause and Prejudice" Standard*, 19 WAKE FOREST L. REV. 441 (1983). *Cf.* Reed v. Ross, 104 S. Ct. 2901, 2913 n.1 (1984) (Rehnquist, J., dissenting) ("Part of the Court's opinion suggests that it might be of two minds on the matter.").

264. *See* Weaver v. McKaskle, 733 F.2d 1103, 1105-07 (5th Cir. May 1984) (discussing Fifth Circuit case law).

265. Plunkett v. Estelle, 709 F.2d 1004, 1007 (5th Cir. July 1983), *cert. denied*, 104 S. Ct. 1000 (1984).

266. A per curiam survey decision may claim aberrational status. Rollins v. Maggio, 711 F.2d 592, 593 (5th Cir. July 1983) (phrase "[t]here is no merit in petitioner's claim" in state court opinion deemed not sufficient). Judge Randall was correct to point out precedents holding more ambiguous language sufficient. *Id.* at 594 (Randall, J., dissenting) (citing Henry v. Wainwright, 686 F.2d 311, 313 (5th Cir. 1982), *vacated*, 103 S. Ct. 3566 (1983)); Clark v. Blackburn, 632 F.2d 531, 533 n.1 (5th Cir. 1980). *Cf.* Michigan v. Long, 103 S. Ct. 3469 (1983).

267. Frank v. Magnum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

268. *See* Byrd v. McKaskle, 733 F.2d 1133 (5th Cir. June 1984) (due process in resentencing); Liner v. Phelps, 731 F.2d 1201 (5th Cir. May 1984) (due process in indictment); Williams v. Maggio, 727 F.2d 1387 (5th Cir. March 1984) (voluntariness of confession); Carrillo v.

the most sobering of states' interests in enforcing the criminal law, including the application of the ultimate sanction — the death penalty. The Fifth Circuit has become somewhat preoccupied with the death penalty as a result of the frequency with which the death penalty is imposed in its three states. According to the latest available government statistics, at year end 1981 there were approximately 838 persons under sentence of death in the United States and 181 of them are on death row in Louisiana, Mississippi, and Texas.[269] Habeas decisions in death cases are a significant point of federalism friction.[270] In October, the court recognized this and adopted new rules and new procedures to enhance the fairness and efficiency with which these cases are processed. A portion of the court's Preliminary Statement is instructive here:

> Because cases in which a federal district court or the Fifth Circuit Court of Appeals is asked to stay execution of a state court judgment always involve issues of fundamental importance and require handling with meticulous care, the Fifth Circuit Judicial Council has undertaken a study of the procedures followed in this circuit when such relief is sought. This occurs most often in cases in which a state court has sentenced a defendant to be executed. The legal questions presented are usually complex and difficult. The life of an accused may be at stake. Vital state interests may be involved. Yet the petitioner seeks reversal of the judgment of a state court, frequently that of the state's highest court. We must assure that all of the constitutional rights of the parties have been protected, and we must also observe the constitutional division of authority between the state and federal courts. When the case involves capital punishment, our decision affects not only the accused but also the interests of the victim's family and the public.[271]

One partial solution for the procedural problems inherent in these

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Perkins, 723 F.2d 1165 (5th Cir. Jan. 1984) (right to confrontation); Armstead v. Maggio, 720 F.2d 894 (5th Cir. Dec. 1983) (assistance of counsel); Plunkett v. Estelle, 709 F.2d 1005 (5th Cir. July 1983), *cert. denied*, 104 S. Ct. 1000 (1984) (procedural due process); Holmes v. King, 709 F.2d 965 (5th Cir. July 1983), *cert. denied*, 104 S. Ct. 429 (1984) (self-incrimination).

269. BUREAU OF STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1981, at 6 (Dec. 1981) (persons under sentence of death, by jurisdiction, year end 1981). *See also* Thompson v. Wainwright, 714 F.2d 1495, 1505 n. 6 (11th Cir. 1983) (noting that the Eleventh Circuit contains one-third of prisoners under sentence of death in country).

270. *See e.g.*, Narcisse v. Maggio, 725 F.2d 969 (5th Cir. Feb. 1984); Skillern v. Estelle, 720 F.2d 839 (5th Cir. Dec. 1983); Autry v. Estelle, 719 F.2d 1247 (5th Cir. Oct. 1983); Williams v. King, 719 F.2d 729 (5th Cir. Oct. 1983); Gray v. Lucas, 710 F.2d 1048 (5th Cir. July 1983); Porter v. Estelle, 709 F.2d 944 (5th Cir. July 1983).

271. 718 F.2d No. 3-719 F.2d No. 1 at CXII (Dec. 5, 1983). *See also* 4th Cir. Local Rule

cases is beyond the court's power. In a speech at the 1984 Fifth Circuit Judicial Conference Governor Edwin W. Edwards of Louisiana suggested a new state procedure to reduce the intensity and frequency of federalism confrontations in death penalty reviews.[272] He suggested that the state executive not establish an execution date until the state supreme court certifies that direct and collateral challenges are complete in both the state and the federal courts. In Governor Edwards' suggestion, any subsequent federal application would then be subject to dismissal for abuse of the writ in all but the most exceptional cases. Of course, the state court decision that federal jurisdiction was at an end would itself be a federal question. This state procedure would do much to eliminate the present difficulties of last minute stays of execution in which court, counsel, and prisoner act and react under such intense pressures. The court and Governor Edwards are to be commended for developing creative strategies to cope with these most serious issues of federalism.

22(b) 737 F.2d No. 2-738 F.2d No. 1 at CXXIII (July 2, 1984) (certificate and telephonic procedure in death penalty appeals).

Counsel who regularly appear in the Fifth Circuit should obtain RULES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (1983), which contains the Federal Rules of Appellate Procedure, the Local Rules of the Fifth Circuit, and the Internal Operating Procedures.

272. Address by Honorable Edwin W. Edwards, 41st Judicial Conference of the Fifth Judicial Circuit, New Orleans, Louisiana (June 1, 1984).