1) Structure and existence of federal judiciary
- a) Merits
  - i) pros
    - (1) Supremacy clause: declaration that constitution is binding on courts, and that clause will bind the states
    - (2) Resolve non-state (foreign) issues (article III, section 2) (before the Judiciary act, this was all that the courts heard -- note opposition view: Congress *create all of the courts that the constitution alludes to for the specific constitutional jurisdiction*: full extent of judicial power be vested somewhere in the federal courts only for admiralty, federal question, and ambassadors[1]
      - (a) admiralty
      - (b) Ambassadors
      - (c) Federal questions
  - ii) Purpose: reasons that the states can't do both things constitution doesn't take the power to hear federal issues away from them
    - (1) Inherently biased in enforcement[2]
    - (2) Disuniformity "local spirit" (deep inherent parochially that can't be judge) [3]
    - (3) State courts are not life tenured[4]
    - (4) Could be a problem with stature and procedure in the state courts adjudicating federal issues[5]
  - iii) Article three does not specific if judicial powers should be in federal or state court anyway
- b) Theoretical models (progressed from 1789 with limited jurisdiction, to post-civil war habeas jurisdiction, to 1871 constitutional and federal law questions, to 1960s protection of federal rights existing in the federal system, to 1970s where state courts may have more original jurisdiction) **see** *habeas* ¶ 3) below page 29
  - i) model #1: Hamilton's model (federal courts should hear federal issues initially) -- post judgement removal could be similar to this. We seem to be moving toward a model where state courts have primary jurisdiction. There is nothing in Article 3 which obligates a federal court to be the forum for judicial review, and state courts are the equivalent of federal courts for these purposes. **Federal courts, according to Hamilton is supposed to an oversight, such as in Habeas or in post-judgement civil rights review (see later) -- see** *habeas* ¶ 3) below page 29
    - (1) US Supreme Court
    - (2) Federal Courts: Lower federal courts can also be trial courts for federal issues (as in Article 3), therefore there could also be appellate federal courts -- see *habeas* ¶ 3) below page 29
    - (3) State Court
      - (a) Accountability (?): state courts would have to take responsibility for their interoperation of federal laws
      - (b) Administratively easier (more venues)
        - (i) More perspectives and more diverse
      - (c) Removal problem (federal courts might be forum)
  - ii) Model #2 -- with Federal Review of Civil rights issues, we are progressing to model #2 which started in the 1960s
    - (1) US Supreme Court
    - (2) State goes directly to the Supreme Court or Federal Courts goes directly to the Supreme Court
  - iii) Model #3 -- minimalist model
    - (1) No federal courts – state courts reviewed only by Supreme Court in federal issues
- c) Ability of Congress to limit jurisdiction of federal courts
  - i) Supreme Court
    - (1) Supreme Court held that provided that there was *some* opportunity for review (without permission of other courts) that preclusion of review was possible[6]
      - (a) *Cf* Madisonian view that only the SC will have jurisdiction over state decisions
      - (b) Madisonian believed that political pressures on state government would not come from other branches of state government
    - (2) "exceptions and regulations" language of Constitution will does not eliminate trial by jury [7]
    - (3) in giving appellate jurisdiction to SC, there will be no abolition of trial by jury[8]
    - (4) Language of statute (§ 25): states that there needs to be a Federal controversy in order for the SC to review a statute

[1] Professor Amar
[2] Federalist Paper 81
[3] Federalist Paper 81
[4] Federalist Paper 81
[5] Federalist Paper 81
[6] Fekler
[7] Federalist Paper 81
[8] Federalist Paper 81

(a) One can interpret the real question at issue as being so narrowly a federal issue that the issue is really one of state law and that the real question at issue is really one of state law, and the SC is really giving an advisory opinion[9]

(b) But, if the federal treaty is burdened by the interpretation of state law, than the SC can review

(i) Federal treaty construction that is drawn into question can be heard by the SC, even if based on state law[10]

(5) Language of Article 3: SC shall have appellate jurisdiction, both as to Law and Fact, with such Exception and under such Regulation as the Congress shall make --proponents argue that this is an important check on judicial power[11]

(a) Pro-stripping

(i) Policy: check on court's authority[12] based on assumption that Democracy is based on majority rule

(ii) Textual pro-strippers argue that this is a way allows specific strips of jurisdiction

1. under the Judiciary Act, the SC could only here cases that had gone to the state's highest court
2. only in the 1914 did the SC get the power to review decisions of a state court that ruled in favor of a constitutional right

(iii) presidential pro-strippers

1. there are direct and indirect exceptions to SC review (from McCardle)

[9] Martin v. Hunters

[10]

Name	Martin v. Hunters Lessee, page 495
Facts	Recent Treaty held seised after certain date could be devised to alien. Plaintiff therefore should get land. If the land was not in use, it escheted to the state. State law question of when title vested. **This is not a federal question, therefore**
Holding	Federal right (treaty) turns on the application of state law. Constitution vests the entire judicial power in one branch.

[11] Perry

[12] Prof Michael Perry

a. Direct exception: Congress passes a statute excepting

b. Indirect exception: by negative implication: For example "*there are two things that the Supreme Court can hear #1 and # 2.*": This means that they can't here #3. [13]

i. **there must be some route to get to the Supreme Court – whether via direct habeas appeal or not** -- **see** *habeas* ¶ 3) below page 29

ii. Framers saw that an appeal to the Supreme Court was more important for Supremacy clauses than for uniformity. (Article 3 speaks to an independent court)

iii. Note: this is different with state court, where it is presumed that for most acts (Habeas excepted) a course of action will exist in state court.[14] -- **see** *habeas* ¶ 3) below page 29

[13]

Name	Ex Parte McCardle (1869)
Facts	Habeas case where a newspaperman was put in jail as a federal prisoner and he was trying to get to the Supreme Court, but in the middle of his case, Congress took away federal court power to get review. There was jurisdiction for federal court to review detention by state and local authority. While the case was pending, Congress removed appellate jurisdiction.
Holding	Congress can make exceptions to the Supreme Court's jurisdiction. SC can hear everything, unless congress makes an constitutional exception Lower Courts can hear nothing unless given specifically by congress. This is an indirect forum of Congress taking away Supreme Court power.
Note	Even without jurisdiction, Petitioner still had other appeals route

[14] Tagglin

2. In a worst case scenario, if there are two grounds for SC repeal, Congress can repeal one of them[15]
    a. Any continuing basis for Sc review, no matter how unlikely is sufficient to render any other provision constitutional[16]
3. There may be Constitutional jurisdiction strips (i.e. strips that don't deprive people of property, or infringe upon the other constitutional functions)

(b) anti-stripping
  (i) policy
    1. stripping won't actually change substantive rights, because precedents remain in place, effectively freezing law
    2. stripping might be an invitation to legislatures contravene SC doctrine
    3. Congress can't use its power to contravene things that violate other Constitutional provisions
  (ii) textual anti-strippers argue that the word "exceptions" only modifies the word "fact"
  (iii) theorists: although Congress has the power to limit the SC power, like all constitutional powers, it can't be anti-constitutional
    1. McCardle is distinguished in that there was still a means of SC review
    2. Congress cannot direct nor adjudicate results in particular cases[17]

[15]

Name	Ex Parte Yerger (1869)
Facts	Habeas case where a **released** newspaperman challenged the underlying reconstruction statute. Charges were dismissed before review.
Holding	SC held that it did have jurisdiction, but was mooted.

[16] Felker
[17]

Name	US v. Klein
Facts	Congress directed court to view a presidential pardon as evidence of anti-American activities. This could have been restricting the effective power of presidential pardons. Could also have been depriving people of a vested property right without due process.
Holding	• Congress can't tell courts how to adjudicate. However, Congress can create exceptions • Congress can't interfere with executive function

(iv) Orthodox view: SC is final articulator of state law, but if the states are left to follow federal law with no appeals process then there is no incentive for the states to follow federal law[18] -- and there may need to be oversight as to whether or the states are sabotoshing federal law (antecedent state law doctrine)
  1. Note: Federal court will give preclusive effect to state court[19] and State administrative procedures of a judicial nature[20] -- note, when bringing a title 7 issue, an unreviewed decision will not be given preclusive effect as to its facts.[21]
  2. If state courts violate due process de novo review possible
  3. State determination will be given the same preclusive effect as state law would grant

[18] Justice Story in Martin v. Hunter's Lessee
[19] Younger
[20] Migra
[21]

Name	Univ of TN v. Elliot page 1498
Facts	ALJ determination that dismissed state employee not fired discriminatorily. Brought action in federal court to appeal under title 7.
Holding	• No § 1738 full faith and credit (§ 1738 was before administrative agencies). • But the possibility of fashioning common law preclusive remedies exists. • § 1983 actions will give preclusive effect to fact-finding by state administrative agencies acting in judicial capacity.

them in § 1983 actions[22] -- will remit to states if necessary to see preclusive effect[23] -- cf other view that there should be an issue by issue inquiry

(v) Common sense: too much stripping would result in state jurisdiction, and we wouldn't want that, now would we?
   1. State court retain the power, to investigate if there is a constitutional deprivation is going to take place because of some state court jurisdictional problem, it can pass on the merits of the litigants claims, then the state court can pass on the merits of the litigants
   2. Congress doesn't have the power to prevent state courts of general jurisdiction from passing on the constitutionality of any attempts to take away its jurisdiction whether by congress, or by state legislatures
      a. If it is unconstitutional it can disregard the statute and do what it thinks under the constitution
      b. In contrast, congress can prevent federal courts from doing it
   3. If a constitutional deprivation is going to take place because of some state court jurisdictional problem, it can pass on the merits of the litigants claims
      a. State courts have the power to investigate whether or not Congress is trying to "shut them down" – on jurisdiction or remedies.
   4. If there is a constitutional deprivation, than the state court can pass on the merits of the litigant's claim, regardless of whether congress tries to stop them, and the federal court can say that Congress has gone to far
   5. If it is unconstitutional it can disregard the statute and do what it thinks under the constitution
   6. Severability may bring issues into state court, but provides a common sense reason for the federal courts to hear them: this could raise issues of justiciability when severance starts to interfere with whether or not something is a political question (could invalidate the entire statute)
      a. severability: (not constitutional) if it is going to turn out that the Plaintiff is going to be able to go into a state court, and have the merits of claim heard, than he has a good common sense (not constitutional) way to get into federal court:
      b. if one cannot be prevented from litigating in the state court, than Congress didn't intend for this whole jurisdictional withdrawing statute to take in effect, in part
      c. (it could be argued) It goes against our common sense understanding, when there is a constitutional challenge as to whether or not the merits of that statute are legitimate, as in the emergency price control act, and it shut the federal and state courts from hearing that claim – where you will be able to get a hearing on the substantive argument, structurally where you can go, is the state courts
         i. congress has more power to shut the federal court doors, than it does to shut the state court doors
      d. one is going with their substantive claim into the state court

[22]

Name	Kremer page 1493
Facts	State agency determination appealed unsuccessfully to state courts (finding that administrative agency decision was not arbitrary and capricious), before filing with federal administrative agency. Filed in district court.
Holding	State court's rejection of appeal was preclusive to same weight it would be in state courts.
Dissent	Appeal to state court was not on its merits.

[23] Maurice

i. at this point – you might want to say that the federal jurisdiction withdrawal is appropriate, but one also understands that from a common sense prospect, that if some court is going to pass on the substantive merits of this act, including the withdrawal of interlocutory relief – don't you think that Congress would have wanted to here it, than if so then don't invoke severability

(6) Enhancing: Marbury is usually read as establishing that Congress can't enlarge SC's jurisdiction (ie Article III is the ceiling of the SC's original jurisdiction)

(7) There may be a danger of the SC reviewing state law issues, in such a way that it is just issuing an advisory opinion

ii) Lower Article III courts: Under the " (i) All restrictions are made by congress (entirely under the "Great Madisonian Compromise" is defined as congress has the power to create lower federal power to create lower federal courts with less than the all of the powers.[24] However, only the outer limits were there. Congress has discretion to vest whatever power it wants in the lower federal courts, and it has never vested full article 3 power in the lower federal courts.

(1) Federal Courts must have full judicial power, unrestricted[25] *"you are out of our control"*

(a) Once courts are created they must have the judicial power to decide all matters described in article III

(b) Never followed but Once an article 3 court has jurisdiction, it must consider the entire constitutional issue

(2) Congressional Discretion to decide jurisdiction[26]: *"I made you, and I can control you"*: Sheldon view that courts don't have jurisdiction outside what Congress specifically granted them (i.e. limit their jurisdiction)

(a) The complete diversity requirement is an interpretation of what is found in the constitution[27]

(b) Article three does not specific if judicial powers should be in federal or state court anyway

(i) Power of congress to decide not to create lower federal courts implies a real and important limit on its power to restrict state courts from hearing federal claims -- state courts must be lurking in the shadows in case Congress gets lazy

(c) Since Congress has the discretion as to whether or not to establish the courts, it can control their jurisdiction

(i) Congress may limit jurisdiction of a lower federal court (for example no more cases can be brought in: "no Supreme Court jurisdiction over prayer in schools" might really be viewed be "substantially a first amendment issues in the federal court", which is a federal question. So, a political question becomes a federal question[28]

(ii) "political truth is that the disposable political power belongs to Congress"[29]

(iii) Federal Court can be precluded from enjoining a state court action[30]: so, specific powers must be granted to the courts by Congress[31]

1. (this could be a theory of state law last resort)

[24] One side said that federal court creation should be mandatory, and the other side was that no federal courts except for supreme court review of state court judgements.

[25] Gordon Young

[26] Charles Rice

[27] Stawbrdige

[28]

Name	Sheldon v. Sills
Facts	Federal Court faced with whether it had jurisdiction over a non-diverse case resulting from the assignment of a debt (where only the assignee was diverse.) Judiciary act prohibited diversity jurisdiction based on assigned debt, and this was challenged as being unconstitutional.
Holding	No jurisdiction because not a diversity case, and Congress restricted the federal courts to hearing diversity issues.

[29] Sheldon

[30] Kline v. Burke

[31] Kline v. Burke

(d) there is nothing in the constitution which requires Congress to confer equity jurisdiction on the lower courts[32]
   (i) Jurisdiction with a string is prohibited: In a criminal case, Congress can't invoke the legitimacy of the federal court, and tell people that they can't hear the constitutional claim. However, constitutional challenges have to be raised in initial proceeding. This question must be raised in that first criminal enforcement proceeding.[33]

32

Name	Lockerty (1943)
Facts	During WWII a group of meat dealers sought to challenge the statute that prevented them from challenge the regulation in district court. They had not exhausted their administrative remedies. Because there was exclusive jurisdiction given to an article III court.
Holding	Once an article 3 court has been asked to take jurisdiction, it must also consider the entire constitution. Seprability: sever an invalid part and keep the rest. Not all statutes are severable. – This implies that judge feels that there is something with the statute. (Later Yakus says so as well.)
Note	• Once an article 3 court has been asked to take jurisdiction, it must also consider the entire constitution. Seprability: sever an invalid part and keep the rest. Not all statutes are severable. – This implies that judge feels that there is something with the statute. (Later Yakus says so as well.) • Yakus and Lockerdy may come to different results, partially because Rutlage and Stone disagree about the merits of whether or not emergency procedures are properly followed by Congress in each situation

33

1. If Congress gives the court the power to rule on a case, then they cannot preclude them from reviewing the constitutionality of that case -- once a court has been asked to take jurisdiction, they must also consider the whole constitution. But, one must plead, initially

(ii) Otherwise known as "greater power doesn't necessarily include the lesser power": Congress can't grant selective non-constitutional jurisdiction

(iii) Note, in Tarbles theories think that in an issue of releasing a prisoner, some forum has to exist somewhere.

(iv) Two views of constitutional restraint
   1. Constitutional interpretation: Tarbles is not a constitutional restraint, it is only a constitutional interpretation. – Then it falls the a void, the federal courts are shut, and there is no jurisdiction, and therefore we are in state court.
   2. Constitutional restraint: Other view: (tale wagging the dog view) they argue that

Name	Yakus
Facts	Federal District Court criminal proceeding brought for violating price control act. Court could only here things as they relate to the stateute, and not constitutional issue.
Holding	Federal district court must hear constitutional implication, and no authority or body can intervene to force the judicial body to disregard it. The legislature was really depriving people of a right to trial by jury.
	• Note: Still had to erercise remedies in price control court and raise constitutional issues • Yakus and Lockerdy may come to different results, partially because Rutlage and Stone disagree about the merits of whether or not emergency procedures are properly followed by Congress in each situation

Tarbles isn't interpretation, it is constitutional, and the state courts are disabled from issuing writs of Habeas, and we have no where to go, and they argue that Congress, in fact, is limited in how far in can go in taking jurisdiction -- **see** *habeas* ¶ 3) below page 29

(3) Constitutional requirement for some federal courts: *The Constitution requires that I make you and put the whole judicial power somewhere anything else would be jurisdiction stripping*

(a) There are some cases that can't be heard by state courts, and can't be heard in the SC with original jurisdiction, so, lower federal courts must exist or there would be no tribunal[34]

(i) Supreme court precedent may make it impossible for certain writs of mandamus to be obtained. This may be based on the faulty reading of Marbury that Congress can't expand the SC's original jurisdiction

(b) If no court at all existed to hear Habeas petitions, that SC must here it.[35] (i.e. state courts can't hear federal Habeas pleas)[36] -- but most circumstances where this situation would exist would be unconstitutional anyway, so if state courts are closed, Federal courts must hear -- **see** *habeas* ¶ 3) below page 29

(c) Textual approach: the word "all" is included in the sections relating to "Admiralty" and "Ambassadors" but the word "all" is not used to define the courts power to adjudicate other (enumerated) matters[37] -- claimed not to be supported by history[38]

(d) Framer intent: Framers intended some federal court to hear originally or on appeal every claim[39]

(i) Sources of framers' intent

1. Federalist papers (Public article to persuade the people to take on the constitutional)
2. Constitution
3. Delegates notes
4. First judiciary act

(e) Theory: Federal Courts must always exist to keep the state courts in check[40]

(4) Specific Constitutional Limits: *I can't restrict your jurisdiction in a way that violates other constitutional provisions*

(a) Can't restrict in a manner that would violate due process

(b) Foreclosure of deprivation of vested rights to new property is unconstitutional[41]

(c) Where defects in administrative proceeding foreclose judicial review, and alternative means of obtaining review must be main available[42][43]

(i) cf other view that there should be an issue by issue inquiry

(d) Once an article 3 court has jurisdiction, it must consider the entire constitutional issue

(5) Limits on remedies still unresolved

(6) Congressional power to enlarge jurisdiction of Federal Courts beyond scope of article III

iii) Article I Courts: *Congress made it out of thin air, and it can't give it any more power than it has*

(1) Power

(a) A court that is the creature of congress, wholly and completely, it can only do what Congress has the power to do

(b) Fact finding

(i) Article one courts can do fact finding for article 3 courts

(2) Review There can be judicial review of wholly legislative creations

(3) stripping

(a) Just serves at the pleasure of congress (for example ALJ case)

d) State court concurrent jurisdiction over federal issues: state courts power predates constitution and it was never taken away from them.

[34] Justice Story in Martin v. Hunter's Lessee

[35] Eisentrager: Habeas Plea from person imprisoned by American military in Germany. Note: Habeas petitions are substantively linked to jurisdiction of a state court.

[36] Tarble's Case

[37] Professor Amar

[38] Professor Meltzer

[39] Professor Eisenberg

[40] Professor Sager

[41] Johnson v. robinson

[42] Mendoza- Lopez

[43] TN v. Elliot

i) Note: Under _Allen state courts decisions will be given preclusive effect[44] as will state administrative proceedings of a judicial nature[45][46]

ii) Article 3 doesn't say whether the stuff-enumerated powers in it should reside in state or federal courts, anyway.

iii) Problems with forcing federal questions on the state courts
   (1) Might impede SC review
   (2) Would the choice of law impact the finding of fact
   (3) Rights burdening:
      (a) Shifting back between state and federal courts for interpretation delays enforcement of the federal right
      (b) These counterarguement concern the crushing caseloads already burdening the state judiciaries
      (c) the risk of inadequate adjudication of federal rights in state courts.
         (i) States may have a "neutral door-closing policy" which precludes certain remedies.[47] -- "valid excuse doctrine"
         (ii) States may it impractical to bring an action in state court
            1. Could be a Goldberg v. Kelley issue
               a. There is still the question of whether or not constitutional rights are exportable with Americans
            2. State statutes of limitations and notice of claim statutes may be held to be burdensome[48]

[44] Allen
[45] Migra
[46] TN v. Elliot
[47] Testa
[48]

Name	Felder v. Casey page 475, 487, 488, 827, 1123, 1229
Facts	State notice of claim statutes applied to state and federal law making claims against government valid only if filed in short period of time (120 days). Plaintiff was suing under § 1983.
Holding	120 statutes of limitations on claims against government was burdensome, and hence not applicable to claims against federal government.

(iii) Creation of a federal common law: usually unclear whether Congress has taken and given the power to make that law or not: Cases -- some say that it comes form constitutional itself. Requires looking at the constitutionality of the creation of the statute, not whether there is authority from congress to create statute (check this, as this may compete with other models
   1. Does federal government have the power: distinguished from Eerie: Eerie was about states having jurisdiction over their own issue
      a. Explicit (jurisdiction might arise from just alleging that something results from a rule of federal common law)
         i. Lincoln Mills: Congress wanted courts to develop federal common law for labor disputes (by granting jurisdiction)[49]
         ii. Admiralty: might not need to be a jurisdictional grant
         iii. Examples: 10b5. Tort law is not
         iv. Habeas in constitution
         v. Just compensation in constitution
      b. Implicit (jurisdiction might arise from just that something results from a rule of federal common laws)
         i. State v. state: might only be intuitive that the courts use a federal common law, rather than federal courts applying state law[50] (question is there an inequity in that there is a problem of their rights to use state law)
         ii. Private party v. private party: an indirect drain on the treasury is enough, and the US will ultimately bear the cost of tort liability[51]:

[49] Lincoln Mills (Dissent by Frankfurter is that it is purely a procedural question)
[50] Hinderlider
[51]

Name	Boyle, 770

majority: case by case determination of whether it is an area for federal common law v. deference to congress necessary

iii. Private party v. government: when dealing in an area which touches on government function there is a power to create federal common law

iv. Congressional silence might be a choice[52], but it might be that a decision not to act should really be regarded as a negative choice

v. Creation of constitutional remedies is also the issue

2. Discretion
   a. Would ask what is so terrible about state law in the area[53]

Facts	Son killed in helicopter crash under government contract. Defendant claims should be adjudicated under federal law
Holding	Even an indirect drain on treasury should be treated as one, and the citizenry will ultimately have to bear the cost of tort liability
Dissent	Court should defer to congress as to whether or not contractors are covered under federal law. Congress should do something so that it can know which body it should apply.

[52] Dissent in Bivens

[53]

Name	Clearfield Trust	***Page***	621
Facts	Endorsement forgery problem of a check issued by the federal government. Difference in the way it would be handled under federal and state law.		

i. Uniformity
ii. Would state rule be contrary to federal interest
iii. Creating access to lower federal courts

b. Statutes of limitation: 1990: semi-solution, with 4 year sol on federal statutes, but it wasn't retrospective to new statutes
   i. apply state law (no uniformity), but this is saying that there is a power, but a choice not to
   ii. borrow from analogous federal law
   iii. no statute of limitations (use laches)
   iv. court created own sol (it is a contradiction to say that there is such things as a common law of sol)

c. criteria
   i. degree of conflict
   ii. need for uniformity
   iii. how much is it a rule that deals with judicial sensibility

3. state court creation of common law :
   a. note: state legislatures have less control over state courts than congress does over federal

4. If Congress doesn't take some authority (for example tort law) that is given to it in the constitutional, then the courts can't make federal common law in this area -- **note: there will be a difference between making common law and interpreting a statute**
   a. Majority: if procedural grounds are inadequate, they may be making up a federal common law

Holding	Negotiable instruments issued by the federal government are governed under a federal common law. Applying state law rules would subject the federal government to uncertainty.

i. If there is no ability of the SC to force its doctrines on the states, than the creation of a federal common law is a way to reach the merits of an issue
ii. Could understand that these things are rules shaping the jurisdictional ambit
iii. It could be that this is only a body of law for the SC
iv. Disputes of what would normally constitute a state law issue between states (ie property) would be settled by a federal common law[54]

b. Minority: *Federal Common law forfeitures*: don't even need precedent: – SC doctrines of (cause, procedure, etc.) are develop a federal common law of forfeitures. There is a coherent doctrine than it applies just as much in the state court as anywhere else

5. State's common law definitions may make it impossible, to fulfil a right, in which case the federal court is doesn't need to use state law[55]
   a. If Congress federalized the area it can make up its own law
   b. Can use analogous federal statute
   c. Can borrow state law
   d. State Procedure will govern who decides issues:

[54] Hinderleiter

[55]

Name	Dice (illiterate rr worker)
Facts	FELA claim was waived by a release that under state law may have been fraudulently induced.
Holding	Federal Common law will be created, especially when Congress has federalized the area
Dissent	State is under no duty to treat its common law claims differently because there is a similar federal right

i. ie Issues of law (including equitable issues) will be given to judges to decide in federal court
ii. **but** in some states to juries unless there is a federal right to a jury, for example
iii. Must go to every amendment to see whether or not it applies to states to see if the right to trial by jury is an important part of federal policy

6. If a state is adjudicating a federal issue, the state may find itself creating federal common law
7. Federal common law Remedies: quest for looking to what remedies are adequate or appropriate -- 4 views
   a. Using common law or equity for remedies, the court must see what is adequate or appropriate
   b. SC is telling the state court to come up with adequate remedy (policing borders of state law remedies for constitutional violations)
   c. Federal common law of remedies (attached to a federal right)[56]
   d. A new common law remedy (for example fashioning a common law remedy of refund)
8. Procedure to use when creating federal common law
   a. Depending on the nature of the remedy requested, the case might not be allowed into federal court, except on appeal
      i. Federal common law has a universal system of application
      ii. If federal common law is really policing the states, than one can't get into federal court on a federal common law defense, because it does not fall within the court's "arising under" jurisdiction (for example immunities are not cause of action)

[56] Bivens

b. Federal common law will often be created when adequate and independent procedural grounds fail
c. If states are going to regulate an area, that could be federalized (for example preempted) than they should be following Federal Procedures.[57] – Note: Federal court will give preclusive effect to state administrative proceedings of a judicial nature[58] in § 1983[59]

(d) 1960s view saw that Federal courts should enforce federal rights

iv) pro-striping of state courts:

(1) There may be a time when **removal jurisdiction** is necessary, such as when State Crimes are held against the Federal Government officer[60] or when a federal employee is sued for operation of a motor vehicle[61]: but this could be contrary to the well-pleaded complaint rule, § 1738 and res judicatta.

(a) Right to remove a case from state to federal courts is statutory, based on the will of Congress[62]

(b) Usually only civil actions are removable including[63]

(c) Jurisdiction is derivative -- if the court that removes it has no jurisdiction, the federal court doesn't acquire jurisdiction[64]

(d) Removal based only on pleadings, not on amended pleadings[65]

(e) Injunctions to preclude actions in other courts (anti-injunction act § 2283)

(i) Court first to acquire jurisdiction shall proceed without interference from other jurisdiction[66] --

(ii) Lower federal courts should not be used as appellate jurisdiction over state courts[67][68]

57

Name	Ferc: 476, 490
Facts	MS failed to consider Statute's requirement to consider adoption of certain utility rate design.
Holding	If the state chooses to regulate in a combined federal-state area, then the state must not burden the Federalization by failing to follow the Federal Government's legislation. Hence, administrative agencies must not burden federal rights, either.
Dissent	Application of Testa to legislative power expands Testa. The power for states to chose legislation is a fundamental of sovereignty.

[58] Migra
[59] TN v. Elliot
[60]

Name	TN v. Davis page 455
Facts	Tax collector shot a couple of moonshiners while trying to collect tax, and state court tried tax collector.
Holding	Federal removal jurisdiction possible (though this was not based on the Plaintiff's case in chief, as that was a state criminal law issue)

Problems	Post-judgment removal could be an end-run around *res judicatta and full faith and credit statute*

[61] 28 USC 2679d
[62] Gold-Washing and Water
[63] 28 USC 1441a
[64] Lambert Run Coal Company
[65] American Fire and Casualty
[66]

Name	Klein v. Burke page 1185
Facts	Competing federal legal action at the same time as a state equity action.
Holding	Anti-injunction act 28 USC § 2283, allows in persona actions to be carried on by the first court to get jurisdiction. Courts created by the general government. Whenever a federal court issues an injunction against state proceedings, the first thing it needs to consider is whether the injunction would be unconstitutional to interfere with state proceeding.

[67]

Name	Atlantic Coast R.R. lines page 1189

(iii) Statutory Exceptions (tight construction)[69]
1. Bankruptcy
2. Removal[70]
3. Admiralty
4. Interpleader
5. habeas

(iv) Common law exceptions

1. necessary in aid of the jurisdiction
   a. In rem: it draws to the federal court the possession or control of the res – therefore it can defeat jurisdiction of state court (if it stands to
   b. irreparable harm[71]
   c. In persona: rule is not applicable[72] as it is probably not necessary
      i. Note; a good deal of the time, this will have the same hypothetical effect as a federal appellate decision[73]
   d. If the state court had jurisdiction, a controversy over a question of personal liability doesn't involve to possession or control of a thing.

2. § 1983 is exception to anti-injunction act – provided that the petition satisfy equitable requirements[74]
   a. § 1983 suits will consider constitutional issues that the states decide to be settled[75]
3. limits on ability of federal courts to issue injunctions

Procedure	• Attempt failed to get federal injunction, succeeded in getting state injunction. Meanwhile, federal court held that picketing was a constitutional right. Petition for rehearing denied in federal court. • State court refused to lift injunction • Federal court granted injunction staying enforcement of state law • affirmed by appellate (circuit) court
Facts	Question as to whether an earlier federal court decision is preclusive or not. If the federal court dismissed on procedural grounds, than it could be heard again. If it was on the merits, than it has the right to have an injunction.
Holding	Lower courts federal courts should not grant injunctions if they are overseeing in an appellate fashion the lower courts. If the federal court ruled on the merits, than its decision should be upheld on the merits if necessary. If the federal court dismissed the case on procedural grounds, than the state court should be free to hear the matter.
Dissent	

[68] Federalist paper 82
[69] Atlantic Coast rr line
[70] Mitcham; Dietzsch v. Huidekoper
[71] Black in Young v. Harris
[72] Klein
[73] Atlatnic rr
[74] Mitcham
[75]

Name	Allen v. McCurry (page 1484)
Facts	• Defendant raised constitutional claims at pretrial suppression hearing, but failed to litigate 5th amendment claim at trial • Was barred under Powell from habeas. • Suit was against police officers, who wanted to use the state court's partial rejection of Defendant's constitutional rights. • Police defendants claimed that he was barred from bringing the claim, since it was partially rejected. • McCurry claimed that the unavailability of Habeas prevented the police from raising collateral estoppel as a shied.
Holding	Res judicata will apply even though the earlier court was a state court. There is no reason not to trust the state courts.
Dissent	The defendant is an involuntary litigant in criminal proceedings, and also risks waiving his constitutional claims at trial

a. federalism (our federalism): system in which there is sensitivity to the legitimate interests of both state and national government, and in which the national government, anxious though it may be to vindicate and protect federal right and federal intents, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states."[76]
b. equity: whether there is, or is not, an available remedy at law available
c. Comity
i. Still needs to be respect for state judges
d. irreparable harm[77]
i. for example federal defense can't be raised in state court[78]
4. government can enjoined other parties[79]
5. prior to beginning actions[80]
6. no-judicial (administrative proceedings)[81][82] [83]
7. Declaratory judgement[84]
(v) Abstention doctrine: Abstaining from hearing cases on equitable grounds[85]

[76] Black in Younger v. Harris
[77] Black in Young v. Harris
[78] Gerstein v. Pugh
[79] Leiter Minerals v. US
[80] ex-parte young
[81] Prentis
[82] Gibson v. Berryhill
[83] TN v. Elliot
[84] Thiokol
[85]

Name	**Pullman**
Facts	Racial discrimination on railway line that was by state administrative proceeding. Claimed that order was unconstitutional.
Holding	Abstained, if a definitive issue on the state issue would terminate the controversy. If an unnecessary decision would be made, it is better to abstain.

1. Court can, in the interests of develop a better state law, and comity, allow a state court to rule on an issue on its *legal merits* – rather than granting federal injunctive relief – and may look at social factors (reading the social fabric)
(f) In modern times federal equitable relief is generally not available[86] -- law is based on criminal not civil
(i) Reasoning
1. Injunctions are extraordinary relief
a. For example if the federal and state courts were unified, an injunction would be asking for an equitable relief when a legal one is available
b. Citizens are expected to have to deal with incarceration during trial[87]
2. Declaration v. injunction
a. Injunction requires a showing of irreparable injury
b. Declaration
i. Really a precedent, as doesn't have RJ effect
3. Pending v. non-pending (this is the deep tension between the right, and the risk people need to take to preserve it)
a. Pending: Definition of pending[88]: *after the federal complain is filed but before any proceeds of substance (which,*

[86] Younger
[87] Younger
[88]

Name	Hicks page 1291
Facts	Seizure of deep throat. Movie theatre owners do not defend in state court and go to federal court.
Holding	Owners had to go to federal Court.
Dissent	State can avoid defending federal suits by filing quickly in state courts. This may give the states leeway.

according to Hicks has to be quite a lot of proceeding of substance on the merits) in the merits have taken place[89] -- this rule has the effect of making the state handle the federal issues in a timely fashion

i. has to be quite a lot of proceeding of substance on the merits[90]
ii. Pending actions would require an affirmative action by another court to take jurisdiction
iii. State cannot move in any way at all
iv. Can deal with Dombrowski bad faith harassment
v. Declarations are not available against pending state criminal proceedings[91] (they are not as intrusive as injunctions)[92]
vi. Preliminary injunction: proceeding of substance on the merits[93] filed in federal court against state prosecutor (leaves little time to file injunction)
vii. Actions on appeal cannot be enjoined (SC review possible) if exhausted[94]
viii. Wooley: State prosecution pending when federal suit was filed[95]

b. Non-pending
   i. **Preliminary injunction**: proceeding of substance on the merits[96] filed in federal court against state prosecutor (leaves little time to file injunction)
   ii. **Permanent injunction**: in exceptional circumstances a federal court will grant a permant injunction to state action[97]
   iii. No requirement for one court to wrest jurisdiction from another
   iv. Equity, comity does apply (though Younger may be a rhetorical snowjob).
   v. There is a tension between Mitcham and Younger about whether or not state judges are the equivalent of federal judge and vice-versa. If they are, than an equitable decree issued by a federal judge is an affront to federalism. – there is debate as to whether Younger is constitutional or procedural, but most see it as procedural.
   vi. federalism do not apply

4. Criminal v. civil
   a. Contempt: If the state parties are private litigants, Younger will apply[98]
   b. Enforcement of bond requirement as well[99]
   c. Open issue for civil cases
   d. If the state is the Plaintiff , and it is criminal in character, refer to Younger

[89] Hicks
[90] Hicks
[91] Samuels v. Mackell
[92]

Name	Doran v. Salem Inn
Facts	Law against topless dancing enforced against three topless bar owners. Three bars saught declaration in federal court saying topless dancing ok. 1 of the three bars.
Holding	Preliminary injunctive relief granted to all who abided by the order, but not the one who continued.

[93] Hawaii Housing Authoriy
[94] Huffman

[95] Wooley
[96] Hawaii Housing Authoriy
[97] Wooley
[98] Juidice
[99] Pennzoil

abstention[100] -- later expanded to all in which the state is a party[101]

e. If it is a suit to review, there is no abstention[102]

f.

5. Creation of a mere chilling effect will place a burden on the state courts
6. There is no real threat to the 1st amendment[103]
7. Request for monetary relief in federal court against state court proceedings: Younger might not apply, but still open questions

[100] Huffman
[101] Trainor
[102] Nopsi
[103]

Name	Younger (Criminal case)
Facts	Question of whether a federal court should enjoin prosecution of someone from distributing communist leaflets. Intervenor brought suit in that they were similarly situated or they would face legal uncertainty. State defendant as Plaintiff Federal court as a Plaintiff and asks for an injunction to halt a pending criminal proceeding on the grounds that the statute is unconstitutional on its face
Holding	• Federal injunction not granted. There was no real, or articulated violation of constitutional rights at stake. Nor was bad faith prosecution alleged. i. • Any proceeding that is in aid of a criminal statute (even thoough technically civil) is deemed to be in the aid of younger) • Note: Younger abstention is not based on anti-injunction act. • **If the Plaintiff wants to bring action again in state court, can reserve their Federal claims under England v. Medical examiners.**

(ii) Exceptions (these exceptions evince a tension between requiring people to risk one's freedom for a constitutional right, and having to forego that freedom forever)

1. Repeated bad faith prosecutions (criminal case)
   a. If someone has declaratory ruling from federal court this can be prima facie bad faith
2. Patent unconstitutional state statute (criminal case)
3. Futility: it may be that if the prior decisional law, on circumstances similar to the instant indicates that the action has only one conclusion to it, that you might be able to try to get into the federal court doors on the grounds that it is futile
4. Procedurally inadequate state grounds for raising federal defense.
5. Federal defense cannot be raised in state proceeding[104] (could be an unreasonable bail issue
6. "chilling effect" of Dombrowski no longer available[105] as in *Younger*
   a. enjoining overbroad statutes don't really accomplish anything – and state can't even have the chance to modify it
      i. people are expected to be able to withstand criminal trials
   b. Younger appears to draw bright lines based on policy, but when the policy decisions disappear
7. State court for hearing federal cause of action is inadequate[106]

(g) Declaratory relief is available[107] -- no need to subject self to arrest to challenge

[104] Gerstein
[105] Younger v. Harris
[106] Gibson v. Barryhill (Administrative proceedings inadequate)
[107]

(i) Violation of declaratory relief means bad faith
(ii) Declarations may be less intrusive than injunctions
(iii) Declarations allow state to construe their law in a constitutional manner

(2) Times
(a) Past: Federal court will res judicatta to apply state court's ruling[108]
(b) Future: declaration
(c) Continuing: probably can't get it
(d) Present treated like future[109]

(3) There are some instances of exclusive grants to federal courts
(a) Anti-trust: no exclusive language explicitly in the statute
(b) State court can't grant Habeas to federal Prisoners[110] (as in most cases some forum exists) -- this might be an implied grant of jurisdiction. One might need to see an alternative federal remedy --
(i) "Hidden shoal" in Federal Regulation: and Woods argue that if all forums are excluded, than it is unconstitutional
(ii) State power to review federal government issues: If there is an implied grant of exclusive jurisdiction, and federal review, then the federal courts have exclusive jurisdiction.
1. If congress strips away this jurisdiction, than the states have this jurisdiction – it is automatic, congress can't eliminate the federal remedy, and the Plaintiff could go to the state court. (So says Reddish)[111]

(4) if state courts are hearing federal actions there may be disuniformity, even though there may be, from time to time, standards articulated by federal courts

Facts	State prosecution threatened, question of whether a declaratory judgement is precluded.
Holding	Declaratory judgement with no action pending is not barred by anti-injunction act. They are not intrusive.

[108] Allen v. McCurray
[109] Willy
[110]

Name	Tarbles
Facts	Habeas petition by father in Michigan state court to get his son out of the military
Holding	State courts can't grant federal Habeas claims. State court claimed that it wasn't the concern of the state because it was • Ranks of the army • State court's couldn't do it fast, as it would be appealed • Undermine federal policies • State court used a "spheres of power" language, but this language might not be constitutional, but just a references to a limitation on state power.

[111]

Name	Tarbles
Facts	Issue: Does the state court of MI have jurisdiction to hear habeas claims of federal detainees. Habeas petition by father in Michigan state court to get his son out of the military
Holding	• State courts can't grant federal Habeas claims. • State court claimed that it wasn't the concern of the state because it was • Ranks of the army • State court's couldn't do it fast, as it would be appealed • Undermine federal policies • State court used a "spheres of power" language, but this language might not be constitutional, but just a references to a limitation on state power.
	State court usage of the term "spheres of power" might actually be grounds fpr precluding parties from seeking review in a federal court, as it is not constitutional language.

v) anti-stripping: Power of congress to decide not to create lower federal courts implies a real and important limit on its power to restrict state courts from hearing federal claims -- state courts must be lurking in the shadows in case Congress gets lazy. Note: "deeply routed presumption in favor of concurrent jurisdiction"[112] -- there is no natural injunction between federal-state and state-federal
  (1) examples of concurrent state-federal jurisdiction
    (a) RICO (would need explicit statutory directive that state courts could not hear"[113]
  (2) State court retain the power, to investigate if there is a constitutional deprivation is going to take place because of some state court jurisdictional problem, it can pass on the merits of the litigants claims, then the state court can pass on the merits of the litigants
  (3) Congress doesn't have the power to prevent state courts of general jurisdiction from passing on the constitutionality of any attempts to take away its jurisdiction whether by congress, or by state legislatures
    (a) If it is unconstitutional it can disregard the statute and do what it thinks under the constitution
    (b) In contrast, congress can prevent federal courts from doing it
  (4) If a constitutional deprivation is going to take place because of some state court jurisdictional problem, it can pass on the merits of the litigants claims
    (a) State courts have the power to investigate whether or not Congress is trying to "shut them down" – on jurisdiction or remedies.
  (5) If there is a constitutional deprivation, than the state court can pass on the merits of the litigant's claim, regardless of whether congress tries to stop them, and the federal court can say that Congress has gone to far
  (6) If it is unconstitutional it can disregard the statute and do what it thinks under the constitution
  (7) Severability may bring issues into state court, but provides a common sense reason for the federal courts to hear them
    (a) severability: (not constitutional) if it is going to turn out that the Plaintiff is going to be able to go into a state court, and have the merits of claim heard, than he has a good common sense (not constitutional) way to get into federal court:
    (b) if one cannot be prevented from litigating in the state court, than Congress didn't intend for this whole jurisdictional withdrawing statute to take in effect, in part
    (c) (it could be argued) It goes against our common sense understanding, when there is a constitutional challenge as to whether or not the merits of that statute are legitimate, as in the emergency price control act, and it shut the federal and state courts from hearing that claim – where you will be able to get a hearing on the substantive argument, structurally where you can go, is the state courts
      (i) congress has more power to shut the federal court doors, than it does to shut the state court doors
    (d) one is going with their substantive claim into the state court
      (i) at this point – you might want to say that the federal jurisdiction withdrawal is appropriate, but one also understands that from a common sense perspective, that if some court is going to pass on the substantive merits of this act, including the withdrawal of interlocutory relief – don't you think that Congress would have wanted to here it, than if so then don't invoke severability
  (8) State courts will be the ultimate guarantor of a constitutional right if the federal courts are precluded: the state courts have a general jurisdiction to fall back on[114]
    (a) Yakus and Lockerdy may come to different results, partially because Rutlage and Stone disagree about the merits of whether or not emergency procedures are properly followed by Congress in each situation
      (i) The merits of some situations, and the overall benefits, may, in some cases overwhelm the necessity of judicial review. This hasn't been tested.[115]

[112] Raffline
[113] Tagglin
[114] Prof Hart
[115] Stone in Yakus (looking at Congress's actions on the merits).

(b) State power to adjudicate federal cause of actions: normal rule is that when a statute is silent, sate and federal courts have concurrent jurisdiction[116][117]
(i) Concurrent jurisdiction : state court will look to congressional intent, and follow the common law of the federal court[118]
1. Cf Anti-trust issues which are exclusively federal.

(9) 2nd Amendment and militias may be the final check on Congress taking jurisdiction. This may be the tale wagging the dog.

vi) Supreme Court Direct Review over state court decisions: constitution doesn't authorize the SC to review decisions of state courts (for example it is unusual for one sovereign to have jurisdiction over another). Note: we are unsure as to whether Habeas standards are supposed to comport with direct standards
(1) Standard for appellate review of federal decisions (for reference)
(a) No excuse of a procedural default unless the error was plain[119]
(b) Footnote which says that Habeas Standards are supposed to be in parity with direct standards[120]
(2) Standard of review
(a) old: Storey seems to want "fresh review"[121]
(b) new: **fair support** – if there is fair support than we are not really worried that the state court has prevented a federal right from coming to fruition
(3) Statutory exceptions
(a) Federal Officer removal (federal offices can remove, as the states have conceded sovereignty)[122]: prosecution against any officer or agency or person acting under him for any act of such office[123] -- would need to show all actions were in the scope of their duty[124] **exception to well-pleaded complaint rule**
(i) Requires that officer assert federal defense[125]
(b) Post-judgement civil rights removal for inability or denial of rights in state court[126]
(i) Purpose:
1. State courts usually trusted to protect federal rights
(ii) But, § 1983 can't be used to grant an immediate release from prison[127] (certain claim must be brought into exhaustion)
1. There is no exhaustion requirement for equitable relief[128]
a. Can't use if the ultimate issue is about immediate release[129]
b. In 1983, state court ruling on constitutional issues are res judicata.[130]
2. No need to exhaust state administrative[131] or judicial remedies[132]
3. Money damages require exhaustion[133]
(iii) Rights protected
1. Usually only racial equality issues[134]
a. Pervasive and explicit state law that denies racial equality[135] (for example whites only juries)[136]
b. State courts must have already considered the validity of the statute[137]
2. Federal law prohibits prosecution on certain grounds[138]

[116] Claflin
[117] Charles Dowd Box
[118] Taflin
[119] FRCrim Proc 52(b)
[120] Reed v. Ross
[121] Storey in Martin v. Hunters
[122] TN v. Davis
[123] 28 USC 1442
[124] Willingham v. Morgan
[125] Mesa v. CA
[126] 28 USC 1443
[127] Preiser
[128] Patsy v. Board of Regents
[129] Preiser
[130] Allen
[131] TN v. Elliot
[132] Monroe
[133] Heck
[134] Rachel
[135] Greenwood
[136] Stauder
[137] Gibson

3. Illegal acts of state officials not included[139]

(iv) remedies

1. Prisoner can't bring a § 1983 suit which would recover damages for a conviction unless the conviction has been overturned on appeal or Habeas[140]

(v) State court judgements have collateral estoppel effect in federal court (usually for civil judgements)[141] -- dissent: this puts criminal defendant in a bind

(vi) Appeal: Decisions to remove, and/or remand are both reviewable on appeal -- not true with basic removal statute[142]

(c) If a 1983 claim will invalidate an existing state court conviction of a 1983 Plaintiff, the 1983 claim will be subordinated to Habeas[143]

(i) 1983 will consider state law determinations of constitutional fact to be res judicata – even if they could not have been relitigated by habeas

(ii) 1983 will go along with § 1738, full faith and credit[144]

(d) Habeas corpus (1867 act was a counterpart to post judgement civil rights removal) – is an exception to § § 1738 (Full faith and credit) and res judicata: there are no system-wide determinations via Habeas[145]

(i) Note: Habeas is granted to SC and lower courts[146]

(ii) **see** *habeas* **¶ 3) below** page 29

(4) Current common law: Review is now possible in any case where the validity of a treaty or statute of the Us is drawn in question or where the validity of a state statute is drawn in question or where the validity of a state statute is drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the US, or where any title, right, privilege, or immunity is specifically set up or claim under the Constitution, treat, statutes of, or commission held or authority exercise under the US[147]

(a) General rules

(i) Question as to whether an issue can be deliberately bypassed (from Habeas Case)[148]

(ii) SC will accept as binding upon it state court decisions of state law[149], provided they do not conflict with supremacy clause obligations

(iii) SC won't review a state decision at all of that decision rests on an adequate state ground[150]

(iv) even if there are independent and adequate state grounds for a decision, the SC may still review (though this is getting close to an advisory opinion) because there are good policy reasons to look at it

1. could be long-term, chilling presidential effects

(v) two views: there can always be a jurisprudentially argument of how the federal law influences the state law

1. Old Murdock review: if adequate and independent grounds will just dismiss
2. Fox Film (black letter view):[151]
   a. policy reasons explain why it is a bad idea to just dismiss
   b. As part of the courts initial decision it will decide whether it has jurisdiction to review, and may just dismiss for lack of jurisdiction
   c. The Supreme Court has, in reviewing cases in which Federal Law was interpreted for the Plaintiff said that it comes close to an advisory opinion to rule of federal law.

(vi) Opposition: Framers may have intended the SC to review state law questions[152]

[138] Georgia
[139] Greenwood
[140] Heck v. Humphrey
[141] Allen
[142] 28 USC 1447d
[143] Preiser
[144] Allen
[145] CAlderon
[146] 28 USC 2241a
[147] 28 USC A1257.3.
[148] Brown v. MS
[149] Murdock
[150] Murdock
[151] check Fox films

(vii) **Logical Antecedent** is defined as when a federal right **turns on a** state right and is permissible subject of review by the SC[153] -- and the court will look at the underlying state law issue, and possibly reverse.
1. Presumption: unless there is a clear statement that its decision was grounded on state law, the SC will review[154]
2. Federal rights can often be based on state law concepts of property and contracts, which could trigger Supreme Court Review of state law -- if a federal right turns on a state right, than the state cannot be the last word on the state law
   a. Antecedent state law doctrine: somehow the state courts are evading their federal law obligations
3. Exercise of state police power (mentioned in Bran) may be counteracted by the contracts clause of the constitution[155]

(b) Ask state court to certify what its grounds were Could be giving state courts an opportunity to insulate themselves from federal law

(c) Final decision of highest state court needed to hear cases need (final decision liberally construed) (four categories)
(i) Further proceedings yet to occur in state courts but for the federal issue is conclusive or the outcome of further proceedings preordained[156]
(ii) Federal decision will require decision regardless of outcome of future state proceedings[157]
(iii) Federal claim has been decided with further proceeding on the merits in the state courts to come, but in which later review of the federal issue cannot be had whatever the ultimate outcome of the case
(iv) Situations where the federal issue has been finally decide in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by the court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in the state proceedings still to come
(v) If defendant demurs to state law claim, saying that the claim is unconstitutional, and the highest court remands the case for trial. After that trial, and another look by the Appellate court (applying the law of the case) the SC will hear it[158]
1. Stevens said that when state courts rule in favor of a defendant, the point should be moot.[159]: in fact the Supreme court should go back to the old § 25 in which the SC couldn't take a case which the state court upheld
2. Supremacy, rather than uniformity is at issue
3. They have been given a license to try to interpret state constitutions in a way that is more expansive
4. Could be an underlying motive to use this presumption of taking jurisdiction

(d) Easy ways to tell the state court's grounds
(i) Certification or amendment of judgment
(ii) SC will dismiss, since the party invoking the jurisdiction has the burden of proving federal jurisdiction
(iii) Vacate judgement below and remand so the state court can clarify
(iv) Continue the case so that it can give the parties an opportunity for clarification
(v) Can take jurisdiction

(e) Adequate state Substantive grounds as grounds for lower court 's decisions

[152] Crosskey, qtd on p 519 fn 2
[153] Indiana v. Brand. Check this
[154] Mi v. Long
[155] Indiana v. Brant
[156] Cox
[157] Cox
[158] Hathorn v. Lovorn and Great western Tel
[159] Dissent in Michigan v. Long

(i) Three methods of reasoning that may trigger SC review of sate court interpretations of state law
    1. Citation by state supreme of an idiosyncratic state law that is adequate and independent
        a. State courts can always claim that the state is binding authority
    2. Cite a federal issue: analogizing from whatever sources people want
    3. State law incorporated by references
        a. In point of fact the SC doesn't usually hold that this is an adequate state ground
        b. Where a state statute incorporate federal law by reference, the SC may review a state court decision as to that statute, pass on the federal question that is incorporated by reference and remand to state court to reconsider its interoperation of the state in like of the interoperation of underlying federal law[160]

(ii) Will only be subject to review based on the supremacy clause

(iii) There may be unspoken remedies created in the constitution (such as in a Bivens action)
    1. Constitutional torts: No constitutional right without a Remedy[161] -- will look to existing remedies

(iv) Note: in criminal actions, there is no way to chose the forum
    1. Easier to spot an overburdening of a federal right, as there is absolutely no way directly into federal court
    2. Couple be a state manipulation of procedure
    3. Exception: if the very act of bringing the defendant to trial in state court would be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be died[162] -- but despite this removal right, doesn't mean they can be commenced in Federal Court[163]

[160] Standard Oil of CA
[161] From Marbury
[162] City of Greenwood, Johnson v. MS, Redish
[163] Martin v Wyzanski

(v) Non-existence of state law remedy is grounds for review by SC.[164] Even if there may also be original federal jurisdiction as a constitutional tort.

(f) Adequate state procedural grounds as grounds for lower court 's decisions: **Inadequate state ground rule**: SC may look to see if the Procedure in the state is an example of "Meaningless form"[165] -- dissent accuses majority of reviewing every state law

[164]

Name	Ward v. Love
Facts	Indian tribe, in treaty with the United States was granted a tax immunity together with a non-alienation of land clause. Provisions of treaty were inserted into state constitution. State turns around and takes away restrictions on alienation together with tax immunity. Indians pay taxes and sue. State court holds. In the past, the SC had held that the state was required to enjoin municipalities from interfering with a vested property right. This time, however, the remedy is refund, not enjoinment • Voluntary payment • No refund statute • Monies already disbursed • State statute of limitations precluded.
Holding	Three ways to look at it • State court had few independent justifications, leading to SC review • Specific constitutional remedies to go along with constitutional rights. • Actual Bivens.

[165]

Name	Staub v. Baxley
Facts	Union People arrested for not getting a permit to recruit. Constitutionally challenged, state court dismissed complaint for not being specific.

(i) SC will look to see if the rule is applied uniformly by the state (for example not a novel way)

(ii) if the federal issue is never raised (even in a manner that doesn't comport with state law) the court may lose jurisdiction altogether[166]

(iii) change in state law: court will look to the law in effect at the time the action arose[167] if there is *seasonable notice* of federal claim[168]

1. **this could bring up a state sovereignty issue**

(5) Adequate state procedural and substantive grounds for federal rights (not to be confused with independent and adequate grounds)

(a) Adequate state procedural grounds

(i) Note: courts have upheld failures to object as required by local procedure[169]

1. Contemporaneous objection serves a legitimate state interest[170]

(ii) If the state procedural interest (for example judicial expediency) can be reached in another way, than the SC can grab the case and review – hence a two tier inquiry[171]

1. Legitimate state procedural rule (as opposed to an arid ritual of meaningless forum) [172]
2. Brennan says "if you could have satisfied the rule in some other way" – than it will serve the same purpose. if you can serve the purposes behind the rule in some other way, and still reach and litigate the federal claim, than you are obligated to do that. [173]

a. State can rebut by showing that if the procedural rule is the only way to do it – [174]

(iii) Every time the SC reaches beyond the state procedure to hear a federal substantive question,

1. Could be a suspicion that the states are not acting honorably
2. SC may find itself reviewing, on an ad hoc basis, the adequacy of state law remedies

(iv) Procedural differences between state and federal courts -- state courts can't discriminate against federal laws at least in circumstances were there would be similar claims that would be heard by the courts[175]

1. Any discrimination has to be based on a "neutral door closing policy" -- if that remedy exists in the state, it is not neutral - esp. if there is an explicit grant of concurrent jurisdiction (esp. if there is an explicit jurisdiction): **Supremacy clause obligation**

(v) State courts obligated to hear federal claims: "deeply routed presumption in favor of concurrent jurisdiction"[176]

1. State courts can't discriminate against federal claims[177]

(vi) State procedural grounds for dismissing a case (ie notice of claim statutes) may on their face be

Holding	State rule was meaningless function, and was applied in a novel way. Could have been dealt with by saying that procedure was inadequate grounds under the state constitution. Dissent (Frankfurter): Deciding whether the rule is annoying is a search for "meaningless form" and is really judging the effectiveness and quality of the statute.

[166] Cardinale
[167] Brinkerhoff-Faris Trust and Savings
[168] Herndon
[169] Henry v. MS
[170] Henry v. MS
[171] Henry v. MS
[172] Henry v. MS
[173] Henry v. MS
[174] Henry v. MS
[175]

Name	Testa page 469
Facts	Rhode Island court refused to hear a federal claim for triple damages under the Emergency Price Control Act, but there were similar actions under RI law. There was concurrent jurisdiction.
Holding	If a similar claim or remedy exists under state law, than a state court must hear it.

[176] Raffline
[177] Mondou

adequate, but are really so burdensome over a federal right that they are inadequate
1. Steps to analyze federal right (in a federalized area)f
   a. Existence of statute
   b. Concurrent or exclusive jurisdiction
      i. Might have to look to default or federal common law
   c. Burdening of right: 5th amendment right to be heard
      i. Is state law discriminatory or not? --
      ii. then apply federal procedure
      iii. Is state procedure content neutral? – in going to law or equity Is it content neutral?

(vii) SC may be creating a federal procedural common law (similar to Dice)
1. Federal courts needs authority to act (but some say that the federal courts don't even need to make these inquiries)
   a. Explicitly given to federal courts
   b. Federal right
   c. Something exclusively federal (for example international relations) or congressional statutes
   d. Constitutional tort -- Bivens actions
      i. Where congress has not acted, but the constitutional grants a right
2. In a non-federalized area federal courts need to follow state law

(viii) Note: most failures to follow state procure are really a failure on the part of counsel to follow state procedure

(6) a lot of states grant review over "enhanced" Federal rights[178] and there is some discussion as to whether those decisions should be reviewable. Article 3 speaks of supplemental jurisdiction, which is jurisdiction over the whole case

(7) SC review over federal rights: seems to be only review of federal things (for example constitution or treaty when its construction by the state court) is drawn into question). "Construction" seems to be applied broadly to mean "application"[179]. Nevertheless, states will still have the last word on state law.[180]

(8) When hearing a case in Diversity, the SC could review a decision of state law, but not when a purely state law issues comes up from state court[181]. Court said that despite a change in the statute, it was not meant to limit review to just the state courts.
   (a) SC review of state law questions would impair the development of states to develop their own law[182] -- SC isn't going to reach out and decide a case of state law
      (i) Prohibition on review of moot cases
         1. Under Murdock Review of state law questions was not necessary to the purposes for which federal review jurisdiction was granted – to preserve and ensure uniformity of federal rights
         2. SC doesn't have jurisdiction to review that the state constitution alone
         3. Old rule was that when the state court held its own statute invalid yielding to powers, appeal was unnecessary[183]
         4. New rule: Act of 1914, allowed SC to hear things where the state court had sustained the federal claim

vii) States don't need to have courts, anyway (no requirement in the constitution)

[178] Michigan v. Long

[179] Storey in Martin v. Hinters

[180]

Name	Martin v. Hunters Lessee, page 495
Facts	Recent Treaty held seised after certain date could be devised to alien. Plaintiff therefore should get land. If the land was not in use, it escheted to the state. State law question of when title vested. **This is not a federal question, therefore**
Holding	Federal right (treaty) turns on the application of state law. Constitution vests the entire judicial power in one branch.

[181] Murdock

[182] Murdock

[183] Commonwealth Bank of KY v. Griffith

viii) States could be possibly be eliminated from federal jurisdiction under article 10

e) Congressional preclusion of both Federal and State Jurisdiction
   i) State courts would be pried open first because Congress has less control over state court jurisdiction
   ii) State courts will be the ultimate guarantor of a constitutional right if the federal courts are precluded: the state courts have a general jurisdiction to fall back on[184]

2) Sovereign immunity in regards to the states-- 11th amendment[185] sovereignty issues. We are unsure if 11th amendment is a rule of construction or not, under Hans,[186] no citizen was allowed to sue their state, either[187] (Dissent sees only common law immunity for state governments)
   a) Article 3 may allow a suit
      i) If a suit is brought in diversity and the claims against a state drop out, the court may still keep[188]
      ii) Reverse Tarbles cases
   b) Appeals are not subject to sovereign immunity restrictions[189]
   c) Policy arguments
      i) Question is whether it should be seen that the state is being forced by the federal courts to comply (choice of form and federal state relations)
         (1) Should the states allow themselves to be protected
         (2) States should be able to opt out

[184] Prof Hart
[185] *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.*
[186]

Name	Hans
Facts	No diversity in suit as to whether could state could impair obligation of contracts by refusing to pay interest owed on bonds.
Holding	Dismissed. 11th amendment extends to bother FQJ and Diversity
Dissent	If the 11th amendment only restricts diversity suits, and doesn't effect FQJ than Hans was wrongly decided

[187] Hans v. LA
[188] See Pendehurst
[189] Cohens (sp) in Hans v. La

ii) Allowing the lower federal courts to fashion a remedy, may be placing the lower federal courts in a position where they have not had jurisdiction before
iii) Administration of public affairs may become controlled by judicial tribunals[190]

d) congressional abrogation of sovereign immunity because 11th applied to federal courts, and 14th amendment incorporates (question: if we view these things as a question of federal common law, does this mean that the states must hear suits against them)
   i) deference to congress
      (1) views
         (a) current view sovereign immunity constitutional –
            (i) current view is one of constitutional current view is that congress can only override 11th by acting within the 14th amendment – congress can act to create remedies for constitutional torts[191]
               1. can only use pre-existing constitutional rights – congress cannot be burrowing and finding new constitutional rights, that the SC's job[192]
               2. but, if the state courts have completely closed the doors, we can leave them open again by having he federal courts hear the case[193]
         (b) sovereign immunity federal common law
            (i) general rule is that Congress can't override the 11th amendment except when acting under the 14th
            (ii) in giving defense to congress is must be realized that Congress, since Marbury can't expand jurisdiction
            (iii) in looking at sovereign immunity (for money damages) may be in a position to question what the congressional intent was[194]

[190] Alden v. Me
[191] Seminole
[192] City of Berne
[193] Seminole
[194]

Name	Pennsylvania v. Union Gas page 1085
Procedure	US v. Gas for superfund. Gas impledes PA. District dismisses PA under 11th amendment.

(2) dicta: § 1983 may not include sufficient intent to make states liable[195], congressional intent doesn't need to be in the text of statute[196]
(a) § 1983 will accept state constitutional applications[197]
(3) in legislating under the commerce clause, congress has the ability to grant a remedy which would include a remedy (including money damages) against a state[198]

ii) Constitutional interpretation of 11th amendment precludes all susuits against state government, and under Hans bars all suits: federal court subject matter jurisdiction is limited by states' sovereign immunity
(1) Jurisdictional bar, Defendants could raise the 11th amendment in court of appeals[199] (federal courts can't hear suits against state government)
(a) SUBJECT MATTER JURISDICTION can't be gained by consent or waiver – and even consent by a state would not given the federal court jurisdiction to be sued in a federal court (unlike the Tucker act cases or state board of claims)
(i) Federal Courts have to raise the objections sua esponte on their own to SUBJECT MATTER JURISDICTION, but the court is not sure if this is jurisdictional or not[200]
(ii) There might be a problem in that if sovereign immunity is a limit on federal judicial power, this might conflict with supremacy clause theories
(b) Could be a federalist hedge in favor of state power
(2) Limitation on only subject matter jurisdiction based solely on diversity jurisdiction[201]: how would state sovereignty be weighted against sovereignty
(a) Majority: Restriction on subject matter jurisdiction of federal courts and bars suits against states[202] -- [203]
(i) If the 11th amendment reinstates common law immunity, than federal laws can authorize, because statutes can override common law, and federal statutes are supreme over the states.
(ii) If sovereign immunity is constitutional than statutes can't override constitution
(b) Minority: precludes subject matter jurisdiction against states based on diversity jurisdiction
(i) States can be sued by any congressional statutes

iii) 11th amendment only applies to federal courts

e) determining whether official state action – other than unconstitutional statutes (on their face[204]) or rulings of the highest court, the state court gets the first crack at it[205] -- can go up on appeal to the SC
i) if the state doesn't say it loudly and clearly, than there has not been state action, and these defendant are saying that not only does the state have to authorize (normally cities doesn't actually make statutes) -- using constitutional remedy[206]

Facts	State may have been partially liable for superfund liability.
Holding	• Congress must make its intent to override the 11th by the 14th. Statute includes the word "persons" and states are included in the definition of the words "person". • Commerce clause may allow congress to put in liability for states. • 11th amendment doesn't apply to non-common law actions
Concurrence by Stevens	No ability to abrogate sovereign immunity. However, could sue based on 1) Official immunity pass-throughs 2) prospective relief's 3) vindication of federal rights. There are prudential concerns about whether or not the SC should hear the case in the first place, but this matter is so freakin' important that the court should hear it.

[195] Quern
[196] Hutto
[197] Allen
[198] Pennsylvania
[199] Adelman v. Jordan
[200] Patsy v. Board of Regents, cf. Wisc. Dept of Corrections v. Schocht
[201] Refering to Chisholm,
[202] Penn. V Union Gas
[203] Seminole Tribe of FL
[204] Younger
[205] Homes
[206]

Name	Home Telegraph, page 1105
Facts	14th amendment claim that city ordinance set telegraph rates were too low.

ii) supplemental Federal remedy to state remedy § 1983 -- Statutes can allow direct pass into federal court[207] -- later may not need to be requested an denied before the former is sought (defendant needs to be a person).
  (1) Actions by a police officer, even if unauthorized, so long as cloaked under state law is under § 1983
    (a) State can conclusively determine whether actions are constitutional in criminal trial[208]
  (2) Dissent: these cases belong in state court
  (3) Two categories of 1983 actions
    (a) Unauthorized action
    (b) Official government actions that violate the constitution
iii) reasons
  (1) lower federal courts are not reviewing state court decisions
  (2) allows states to develop their own body of law
  (3) psychological federalism: state can find wrongs done by its own officers
  (4) if the state actually defies the supremacy clause, and doesn't give it its due, than the right avenue for addressing it is the US SC on review
    (a) here the SC says that if you did this, you would be eviscerating article 3 FQJ, you would be taking a huge trick out of article 3 FQJ, you would have no ability to go into federal court in the first instance
    (b) court read the 14th amendment as essentially creating a separate cause of action in federal court unconstitutional conduct[209]
iv) sovereign immunity for federal issues in state courts: Testa v. Katt says that the state court may need to investigate whether or not there is a neutral door closing policy regarding these suits
v) basic questions[210]
  (1) states are still not precluded from their obligations to the supremacy clause[211]
  (2) whether or not the state has asserted its sovereign immunity in a neutral fashion[212]
vi) rule: states cannot be forced to hear federal questions against the state itself[213]

Procedure	Federal court refused to grant restraining order.
Holding	State official were acting unconstitutionally, but as the result of an enabling action. Note: this is a constitutional (not statutory cause of action).

207

Name	Monroe v. Pape
Facts	Violation of civil rights by police officers
Holding	Legislative history looks at this as a statutory matter, looks to KKK history, can't look to HT (because this is a statute) is that the letter of the law may be ok, but it might not be enforced.
Dissent	No evidence that there isn't an adequate remedy under state law.

208 Allen

209 Home Telegraph
210 Alden
211 Alden
212 Alden
213

Name	Alden v. Maine Supp page 124
Facts	State workers claimed that state had violated Fair Labor states act. They sued the state of Maine in their own court, begging the question of whether congress has the power to subject nonconsenting states to suits in their own courts. There seems to have been no waiver and consent in this case.
Procedure	Filed first in federal court. Dismissed. Upheld by appeals court. Filed in state court. Dismissed. On direct appeal to SC of US dismissal affirmed.

(1) dissent: not jurisdictional, probably not a good idea to confuse the 11th amendment with the 10th amendment in that the 11th amendment doesn't reserve the maintenance of certain rights for the state – the 11th amendment doesn't create constraints

(2) § 1983 **against officers**: federal court has original jurisdiction, Federal Remedy. Where state remedy, while adequate in theory, is not available in practice[214]--

vii) state legislatures might not be able to shut state court doors to hear certain issues (something that the constitution provides a remedy for) (will assume that legislatures act in good faith)[215]

(1) state courts will always have the power to hear it—something that there is a remedy

f) possible remedy is suit by Atty. General against states – which may provide for a remedy[216] (check this)

g) Pass-through

i) If the constitution itself (not common law) requires remedies, than the state courts must hear it[217] (for example injunction, refund, or something that the states are obligated to provide)

(1) Can be subject to appeal

ii) Suits against cities, and agencies that are not sufficiently state controlled[218]

Holding	• State courts are under the blanket of sovereign immunity. Powers delegated to congress under article 1 of the Constitutional include the power to subject nonconsenting states to private suits for damages in state courts. • Might be policy concerns about forcing states to abrogate their own suits • State courts must entertain consenting suits against the state when the constitutional itself requires remedies
Dissent	Opinion is treating the 11th amendment as if it were the 10th amendment in that this isn't necessary a power which is granted to the states

[214] sss
[215] Alden
[216] Kennedy in Alden
[217] Alden v. Me
[218] Penhurts

(1) State funding of an agency doesn't give something sovereign immunity[219]

iii) State agencies: even if there is no risk of the state itself bearing the eventual responsibility than the suit is not barred – also have to inquire as to whether the fiscal responsibility does lie (esp. with a local government)

(1) Criteria from Profession Pagan

(a) Will a judgement against the entity be satisfied with funds in the state treasury

(b) Does the state government exert significant control over the entity's decisions and actions

(c) Does the state executive branch of legislature appoint the city's policy makers

(d) Does the state law characterize the agency as a state agency rather than as a subdivision

iv) Local officers have no immunity: relief can be granted by federal courts under state law against county officials[220]

v) Suits against state officers (no pendant state law claims against state officers)

(1) Can't sue state officers for

(a) Quiet title to submerged land[221]

(b) Pendant state law claims against state officers

(c) If there is a comprehensive enforcement mechanism

(2) Preclusion only when the state is actually named as a defendant[222] -- where jurisdiction depends on the party, it is the party named in the record is what matters

(3) Individual capacity suits where state officer was acting in their individual capacity and not **doing the work of the state**[223]

[219] Lake County States
[220] Lundgren
[221] C'oere d'alene tribe
[222] Osborne v. Bank of US
[223]

Name	Haffer
Facts	Firing of democrats by republicans.
Holding	Personal capacity are attempts to impose individual liability on a government officer for actions taken under color of state law. Just because someone was acting in an official capacity – **official capacity is defined as how the officer was sued**

(4) No *retrospective* relief, and it is irrelevant whether the individual officers is the named the defendant rather than the state[224]
  (a) Criticism: both involve more, and there is no guarantee that prospective relief would cost less.[225] – conceptual problems
  (b) Distinguishing prospective from retrospective relief
    (i) Remedial measure for past harms are prospective, even if they are a remedy for past harms[226]
    (ii) Atty's fees for 42 USC § 1988 (civil rights) are not retrospective: because it is ancillary to the injunctive relief ordered in favor of the Plaintiff 's [227] (note: also based on congressional override of 11th amendment)
(5) Injunctive relief even when will enjoin from an official state policy[228] a.k.a. prospective or ancillary relief

[224]

Name	Adelman
Facts	State didn't process welfare applications according to federal standards. Plaintiff wanted 1) injunction to comply with federal guidelines in the future 2) injunction requiring back payments of all the funds that were previously improperly withheld.
Holding	11th amendment doesn't bar order barring state compliance in the future.

[225] Adelman
[226] Miliken
[227] Hutto
[228]

Name	Ex parte Young
Facts	MN had a rr rate regime structure. RR wanted an injunction to prevent enforcement of the law on commerce clause. MN officer tried to enforce. Habeas corpus claim.
Holding	Unconstitutional acts not protected. 11th doesn't bar suits against state officers to enjoin violations of federal law. Illegal acts are stripped of state authority.
Criticism	Fictional distinction between state and it officers. State is real party in interest.

  (a) Unconstitutional by officers acts not protected
  (b) Doesn't matter if it would cost a lot of money to comply[229]
    (i) For example welfare benefits can't be denied[230]
(6) Monetary relief
  (a) Could sue officers in their individual capacity for damages, out of own pockets[231] (individual capacity suit)
    (i) State indemnification doesn't matter
    (ii) Still must overcome qualified immunity issues[232]
  (b) Suits for money damages to be paid from state treasury are barred[233]

vi) States waiver of 11th amendment immunity and consent to suit
vii) 14th amendment exception (14th amendment may trump the 11th amendment)
viii) states v. states[234] suing to protect its own interests, and not to protect the proprietary interests of its citizens
ix) admiralty provided that *in rem jurisdiction is proper*[235]

h) waiver by sates of 11th amendment sovereign immunity
i) explicit waiver: satututes must include intention to e sued in federal court
  (1) cannot be general waiver of 11th sovereign immunity (can't just say "in any court of competant jurisdiction[236]
  (2) valid waiver could include a specification of venue which could include a federal court[237]
ii) constructive waiver
  (1) may only exist if Congress explicitly evidence an attempt to make state's liable[238] -- and if the state appears to voluntarily want to engage in that conduct

i) procedural alternatives

[229] Kern v. Jordan; Miliken v. Bardley, Adleman
[230] Graham v. Richardson
[231] Ford Motor
[232] 11th amendment
[233] Ford Motor
[234] Colorado v. New Mexico
[235] Fl Dept of State v. Treasure Salvors, and Deep Sea Research
[236] Kennecott Copper Corp
[237] Path (
[238] Adedelman

i) a suit that is properly before the federal court with both state and federal claims, when the federal claims drop out, under Penhurts, supplemental jurisdiction may fail[239]
(1) will be a bar of relief based on state law in federal court
ii) stripping state officers of immunity[240] esp. if the state officer acted tortiously[241]
(1) when the official is engaged in conduct that the sovereign has not authorized[242]
(2) when he has engaged in conduct that the sovereign has forbidden[243]
j) doctrinal alternatives
i) abstention doctrine where there are in progress court proceedings
ii) but, if the state courts have completely closed the doors, we can leave them open again by having he federal courts hear the case[244]

3) **Habeas is a remedy designed by the courts[245] --** procedure and number of "bites" defined by courts, under Teague, due to the retroactivity test, the only inquiry is whether the state court misread the law as it stood at the time[246]
a) Uses:
i) prisoners
(1) Federal prisoners[247]
(2) State prisoners[248] -- but state prisoners must have exhausted all available state remedies[249]
(3) Conviction by military court
(4) Denial of parole
(5) Release from custody of someone who was acting pursuant to the direction of a foreign national and in accordance with international law[250]
ii) Civil confinement
iii) Deportation order
iv) Extradition order
v) Securing testimony[251]
b) Reasoning
i) Form of oversight[252] of a particular class of cases

239

Name	Pennhurst page 1077 (dissent on page 1079)
Procedure	Federal and state claims heard in District Court. Upheld on merits in C-o-a, but only with regards to federal claims . SC held that federal claims did not include a remedy. Remanded for decision of whether other claims were valid, to continue federal jurisdiction, 3rd circuit held that there was a state law claim. SC held that because of sovereign immunity, the federal court could not hear state law claim.
Facts	State and Federal cause of action. SC held that federal cause of action did not create any substantive rights. SC held that federal courts could not grant relief based on state law based on 11th amendment (if the state is the real party in interest).
Holding	• No jurisdiction if the federal claims drop out – even if due to remedial reasons. • Powell: Pendant jurisdiction is just a judge-made doctrine of efficiency, and constitutional right.
Dissent	Officer's wrong stripped him of constitutional protections, making the suit one against him, rather than one against the state. Pendant jurisdiction, based on prior cases is valid, because action is against the officer, not the state. There can still be ultra vires actions.

240 Laron
241 Disset in Pennhurts page 1080

242 Larosn
243 Larson
244 Seminole
245 Bron

Brown	Mere error sufficient
Stone	Will only protect rights against public (ie no 4th amendment)

246 Teague
247 28 USC 2255
248 28 USC 2254
249 28 USC 2254b
250 28 USC 2241c4
251 28 USC 2241c5
252 Hamilton in Federalist Paper 82

(1) Lower federal can't enjoin state proceedings[253]
ii) Protects rights that the public has -- not individual rights[254]
iii) Allowing relitigation of constitution issues of habeas because of the failure of state courts to give adequate protection to constitutional rights[255]
iv) Reduce burden on federal courts because states might get it right the first time
(1) custody is illegal when based on constitutional illegal
(a) Constitution provides a remedy to a remedy whenever based on constitutional error
(2) Cruel and usual punishment issues
(3) if there a court has decided that there is no error, than one would need to recognize that judgement
(4) exception to res judcatta is made because Habeas corpus might be a protection of a liberty interest
v) any federal claim looked at in the state court may be looked at in federal habeas corpus – three rationales[256]
(1) Custody is fundamentally illegal if it is based on a constitutional error: The 1867 act might be a specific congressional mandate that they don't need to extend full faith and credit to state court judgement in this area[257]
(2) 1867 act essentially expressed the idea that every person who has a potential of custody is entitled to a hearing, if there is a federal dimension to the case, as opposed to having to make due with the state hearing[258]
(a) this view is linked to the rest of what went on post civil war
(b) congress may have thought if there was a federal dimension to the case, it must be held in the state court
(3) Substitute for appellate SC review: to review legal questions. The factual record is determined in the state court.
(a) SC couldn't do what everyone thought it would do before
(b) The state courts might not get enough of what the federal rights are

[253] Atlantic rr
[254] Strone v. Powell
[255] Brown
[256] Brown v. Allen
[257] Brown v. Allen
[258] Brown v. Allen

vi) SC isn't the only forum for Habeas because We can't just rely on a court of low volume – this is the law accepting the facts, as the state court developed
vii) state court good for determining facts[259]
(1) exhaustion [260]
(2) develop good state law[261]
viii) History -- questions of jurisdiction, and whether or not the court, in failing to hearing a habeas claim is violating separation of powers
(1) Until 1915, the federal court was interpreted as only able to look at jurisdictional defects
(a) Of course to convict someone under an unconstitutional statute may be an issue of jurisdiction
(2) In 1915, the court expanded its idea of what a federal court could do
(a) They said that they were there to address problems of fairness in the state court proceedings
(b) If you bring a claim which says that there was something wrong with the state court, then they will here that
ix) Protection of federally created interests
(1) custody interest
(2) liberty interests
c) Hurdles
i) Shoe ins because of per se constitutional violations
(1) Racial composition can always be brought in[262]
(2) Miranda[263]
(3) Whether or not evidence presented at trial measure up to reasonable doubt (violates due process)[264] -- new statute doesn't differentiate between innocence and other constitutional claims (6th amendment)
ii) Constitutional issue
(1) Default as to whether an issue was a constitutional issue or not
(a) Early Warren Court: unless strategically ignored, one could raise them. Forfeiture of federal remedies does

[259] TN v. Davis
[260] TN v. Davis
[261] TN v. Davis
[262] Rose v. Mitchell
[263] Withrow v. Williams
[264] Jackson v. Virginias

not legitimize state court unconstitutional conduct[265] (assumes that procedural negligence is neglect) -- **now overturned** [266]

(b) Later Burger Court: if the defendant could demonstrate actual innocence or cause for the procedural default -- **default is that the procedural default is not jurisdictional, but rather must be preserved by the government –** procedural defaults are not jurisdictional, and must be preserved by the government – so the government must preserve the issue on appeal[267] (for example substituting cause and prejudice rule for deliberate bypass). (based on assumption that procedural oversight is deliberate)

(c) Same standard as MI v. Long: we know if we have something solely on constitutional grounds if the court says so[268]

(i) Court will look if a federal ground is relevant to the decision[269]

(2) constitutional claims can be relitigated[270]

(a) exception: No relitigation of 4th amendment issues[271]

(i) no reitigation of 4th amendment claims of federal prisoners, because issue has already been handled[272] - rights have already been protected

(b) But for state prisoners the relief is only available when the determination was contrary to, or involved an unreasonable application of clearly establish federal law as determined by the SC

(3) Factual hearing is permissible for matters not raised at the state trial only if the habeas petition can show cause and prejudice[273]

(a) Criteria for retrying facts:

(i) merits of the factual dispute were not resolved, the state factual determination is not fairly supported by record as whole he fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;

(ii) Substantial allegation of newly discovered evidence material factors were not adequate developed at state-court hearing for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[274]

(b) If the appellate court goes against the state court, it must provide a written explanation[275] --

(c) Juror disqualification: offensiveness view is a question of law, existing of view is one of fact[276]

(d) Mixed questions of law and fact are not considered facts (Brown is Controlling)[277]

iii) Requirement of litigation of federal issue at state level

(1) federal claims must be fairly presented to state court[278] -- for example in the record[279] (see later)

(a) supplemental (not new) evidence permitted

(i) can be additional statistical evidence[280]

(b) Deliberate bypass of the state court by failing, either deliberately or by means of procedure to raise claim generally subject to the cause and prejudice standard[281] -- applies to failure to appeal in state court systems and failure to raise on appeal -- **must have both cause and prejudice**

(i) Logic: Cause and prejudice rule reduces sandbagging on the part of defense lawyers. State courts are not a tryout on the road[282]

(ii) definitions

(2) exhaustion: state prisoners must have exhausted all available state remedies[283] -- adequate state grounds

(a) If a state court overlooks a procedural default and decides the federal claim, the federal court on habeas have jurisdiction to teach the merits[284]

[265] Fay
[266] Fay overturned by Coleman v. Thomas
[267] Wainwright
[268] Harris v. Reed
[269] COleman
[270] Brown (Warren)
[271] Stone v. Powell
[272] Kaudman
[273] Keeney v. Tamayo
[274] Townsend and 2254d
[275] 2254d
[276] Rushen v. Spain
[277] Summer v Mata II
[278] Picard v. Conner
[279] Picard v. Conner
[280] Vasquez v. Hillery
[281] Wainwright
[282] Rhenquist in Fay v. Noia
[283] 28 USC 2254b

(i) Comity[285]
(ii) Theoretical opposition is that it is in contravention of statutory command
(iii) Strong theoretical argument that the SC shouldn't create additional federal procedural common law barriers to habeas[286] as Congress was pretty clear in its intent
1. Debate as to whether to limit habeas to people who are arguably innocent[287] v. idea that habeas is a constitutional protection[288]
2. History: Waiver and bypass are not doctrines of forfeiture: Federal Claims not raised could fnot be brought up in Habeas unless deliberately bypassed[289] -- but District court, in its discretion could look at the merits of the strategy (for example was it a grisly choice) and decide whether or not it was a deliberate bypass[290]
a. Really old rule Old rule: substantive and procedural rules were treated the same; procedural is both adequate and independent, and the case doesn't go up on direct review to the SC
b. Old rule: adequate state procedural grounds did not apply to habeas[291] as no judgement is really necessary for Habeas
i. Dissent: if there is a state court judgement (as there was in Noia) than court should look at procedural grounds[292]
c. Current rule: Adequate state ground would preclude in federal courts (and on direct review) Federal Court/SC review[293]
i. Note: this rule evolved from a recitation of principles of direct review, to an application of Habeas review of state court issues
ii. Novel claims have to be completely unavailable
iii. Three part inquiry into state procedural grounds: 1) legitimate state interest or arid ritual of meaningless form, was it served in some other way, if there is a knowing waiver than it won't be looked at
(b) Will have to assess whether one is looking at cause and prejudice or the deliberate bypass std of Noia
(i) Note: Henry v. MS (deliberate bypass) has never technically been overruled
(ii) Waynight v. Sykes definitions of Cause and Prejudice
1. cause (for failure to raise issue): this is to reduce resource drain, and force Defendant to bear risk of error unless they are their defense was constitutionally deficient [294]
a. some objective factor external to the defense impeded counsels efforts to comply with state's procedural rule[295]
i. i.e. later discovered evidence of proescutorial misconduct[296] defense: procedural default cannot act as a bar to non-compliance
ii. ineffective assistance of counsel (not error) need not be raised at trial
b. Futility of objection cannot alone constitute cause for failure to object[297] --

[284] Warden v. Hayden
[285] Ex parte Royall
[286] Reddish
[287] Friendly, and Manson v. Brathwaite
[288] Bator
[289] Fay v. Noia (Warren)
[290] Fay v. Voia
[291] Faye
[292] Noia
[293] Wayneright v. Sykes quoting Davis
[294] Murray
[295] Murray v. Carter
[296] Murray
[297]

"it cannot be said that the prisoners lacked the tools to construct a constitutional argument" – defense counsels are not expected to raise every possible claim

c. Changes in the law
   i. Old rule: Reed exception: Some legal claims may be novel so as not to be presented by counsel[298] -- but mere novelty isn't enough[299]: "the cause requirement may be satisfied under certain circumstances when a procedural faire is not attributable to an intentional decision by counsel in pursuit of his client's interests"[300]
   ii. New rule: a new rule can't be applied on Habeas, so Reed might be overruled[301] -- Teague exception "without the likelihood of an accurate conviction being seriously diminished"

2. Prejudice
   a. Results would likely have been different had the constitutional problems not have happened[302]
   b. Must show not just the possibility of prejudice but the potential that they effected the outcome of the trial
   c. Actual and substantial disadvantage and substantial likelihood of other verdict[303]
   d. Might not have been convicted[304]
   e. Reasonable probability[305]
      i. Esp. with ineffective counsel[306]
   f. Denial of assistance of counsel is **presumed prejudice** [307]

(iii) Alternative to cause (still need prejudice) is **actual innocence (but maybe truism):** in an extraordinary case, where the constitutional violation resulted in conviction of someone who is innocent, a federal habeas court may grant the write even in the absence of showing of cause for procedural default
   1. Threshold "extraordinarily high"[308]
   2. Constitutional violation "probably resulted" in conviction of one who is actually innocent[309] -- claims of innocence together with constitutional issues
      a. Standard
         i. Old: more likely than not that no reasonable juror would have convicted him[310]
         ii. New: clear and convincing evidence that but for the constitutional error, no reasonable juror would find someone guilty (or eligible for the death penalty)[311]
   3. Death penalty: convincing evidence that but for constitutional error at his sentencing juror

Facts	Question of whether it is the state that needs to prove self-defense beyond a reasonable doubt. Prisoners argued that there was no way that they could have learned of the constitutionality of the claim.
Holding	O'Conner: Although having the state prove that someone did not act in self defense is a colorable constitutional claim, the failure to bring it up based on futility is not cause.

[298] Reed v. Ross
[299] Reed v. Ross
[300] Reed
[301] Teague
[302] US v. Fradey
[303] Frady
[304] Reed
[305] Strickland
[306] Strickland
[307] Dicta in Strickland
[308] Herrera
[309] Schup v Delo
[310] Schup v Delo
[311] sawyer v. witly

no reasonable juror would have found him eligible for the death penalty[312] --

a. Reasoning behind different treatment of death penalty issues
   i. Majority seems to bar habeas claims based solely on actual innocence[313]
   ii. Scalia and Thomas say that evidence alone is not enough to demand judicial consideration of new evidence[314]
   iii. minority called standard perverse (death penalty involves both aggravating and mitigating issues)
   iv. fear on the part of O'Conner and Kennedy that denial of Habeas could execute men
b. Usually based on interference by state officials, and not inadvertence by counsel[315]
   i. Presumption against ineffective assistance by counsel[316]
   ii. But there is no need to plead ineffective assistance at counsel at trial

iv) Cannot ask for new rules
   (1) Retroactivity is a jurisdictional bar
      (a) Before Teague, on Habeas could ask for and get a new rule, which wouldn't apply to others of the same class.
      (b) After Teague, as a jurisdictional inquiry, they would decide the retroactive question first
         (i) Exceptions for actual innocence and death penalty
   (2) Petitions may only bring up rights that existed at the time of their petition[317]

[312] Sayer v. Whitley
[313] Herrera
[314] Herrera
[315] Murray v. Carrier
[316] Strickland
[317] Teague

(3) **no new rules**: Habeas petition cannot seek recognition of new principles of constitutional law[318] -- unless it is a right that is applied retroactively. Court must determine **first** whether these rules would be applied retroactively. – statutory backdrop[319]
   (a) Very few claims really have retroactive effect anyway.
   (b) Three step process[320]:Teague provides a bright line test between an old law and making a new law. We don't get to a retroactivity test unless it is a question of new law[321]
      (i) Determine final date of conviction[322]
      (ii) Whether a state court considering the claim at the time his[323] conviction became final would have felt compelled to conclude that the rule he seeks was required by the constitution[324] -- then the rule is new
         1. Court must determine for itself[325] and even if the court says "dictated by precedent" it could still be a new rule -- cannot take a court's word for it that its decision was dictated by precedent[326]
      (iii) Whether or not falls in Teague examples.[327] For example from case[328] of heretofore-unaddressed rules that can be brought up on habeas.
         1. Excluded from "new rule"
            a. Certain kinds of primary, individual conduct beyond the power of the criminal law maker[329] (including putting certain people beyond the death penalty)[330].
               i. I.e. decriminalization of abortions

[318] Teague v. Lane
[319] 28 USC 2254d1
[320] O'Dell v Netherland
[321] Teague
[322] O'Dell v Netherland
[323] O'Dell v Netherland
[324] O'Dell v Netherland
[325] Butler
[326] Scalia in Butler
[327] O'Dell v Netherland
[328] Teague
[329] Teague
[330] Penry

ii. Elimination of classes of punishment or a statute or offense (i.e. not executing retarded people)[331]
iii. Free speech
iv. Jurisdictional defects will always be included

b. Implicit concepts in the area of ordered liberty – for example watershed rules of criminal procedure[332]
i. Or future dangerousness

c. Steven's dissent test[333]
i. Determine whether the trial court violated any constitutional rights[334]
ii. Decide whether the petitioner is entitled to relief[335]
iii. Retroactivity inquiry should focus on the magnitude of unfairness[336]

2. Determining whether something is a new rule under Teague
a. The fact that a court says that its decision is "within the logical compass" or controlling is no conclusive for deciding whether or no it is a "new rule" under Teague.[337]
i. Can't rely on how this claim has been characterized by other courts. (if the other court says it is not dictated by precedent)[338]

b. If precedent doesn't dictate than it might be a new rule[339]

c. Imposes a new obligation on the government[340]

d. Outcome of the case announcing the rule was susceptible to debate among reasonable minds[341]

(c) But, there need not be a case directly on point in determine if there is a new rule[342] dissent: there is nothing new in a rule that gives capital defendant the opportunity to defend in the state's penalty phase

(d) A "novel setting" is not a new rule[343]

(4) Standard for new rules: court of appeals is relevant, but not despositive for new rules[344]

d) Validity of Repeated petitions
i) Should pursue all claims at once, and court will presume that petitioner knows enough to bring all of them, absent substantive prejudice[345]
(1) Dissent (Blackman, Marhslall, and Stevens) – should make an exception when the government wrongly withholds information[346]

ii) New law requires authorization of court of appeals[347] -- not appealable, but SC still has original jurisdiction[348]
(1) applicant must show that the claim relies on a new constitutional rule made retroactive
(2) Factors which guide the discretionary choices[349] from Common law and from the advisory committee notes
(a) If the same ground presented in the subsequent application was determine adversely to the applicant on the prior application[350]
(b) The prior determination was reached on the merits[351]
(c) The ends of justice would not be served by reaching the merits of the subsequent application[352]

iii) Factual predicate for the claim could not have been discovered though due diligence

[331] Penry
[332] Teague
[333] Stephens in Teague
[334] Stephens in Teague
[335] Stephens in Teague
[336] Stephens in Teague
[337] Butler
[338] Butler
[339] Saffle
[340] Teague
[341] Butler v. McKellar
[342] Stringer
[343] Clemons v MI
[344] Butler
[345] McLeskey v. Zant
[346] McLeskey v. Zant
[347] 28 USC 22443a
[348] Felker
[349] Sanders
[350] Sanders
[351] Sanders
[352] Sanders

(1) New information between first and second petition
iv) If the legality of the detention has been determined earlier, can't bring it up again[353]
v) Successive Habeas petition could not be brought unless there is cause for not present the issue in the first petition and prejudice to not having the successive petition heard[354]
e) Procedure
i) Habeas petition names custodian (for example Warden)
ii) One year sol -- 6 months for capital on state court issues
(1) Tolls when a petition is pending -- not tolled for periods before and after[355]
iii) State or US Atty. defends, but dismissal can be granted without hearing
iv) Venue: Every federal court does have jurisdiction[356][357]
(1) Must be filed with district that sentenced them[358]
(2) If filed in the wrong judicial can be transferred
v) Rules
(1) Judge can dismiss if there is no grounds
(2) Judge must grant leave for discovery
f) Standard of review if Habeas granted
i) New Law
(1) Parallel to official immunity doctrine -- will look at what law looked like at time of ruling by trial judge[359] from prospective of SC
(2) Two views of standard or review (dueling maxims of statutory interpretation)
(a) Codification of Teague (limiting Teague to only SC precedents)[360] -- anything else might eliminate exceptions to Teage for Retroactivity and actual innocence
(b) New statutory schema (two subviews): doesn't really touch adequate state procedural grounds doctrine
(i) Majority: no longer a de novo remedy
(ii) Habeas is a limited for of appellate review of state court decisions to make sure that state court comprehends supremacy clause obligations
1. Limited exceptions for death penalty
2. Note: unreasonable factual determinations of facts presented are based on a decision of facts presented are a basis for review under new statute
3. Objective and subjective views of application of law
a. Subjective: we need to find out what the judge could have known at the time and whether or not it was reasonable
b. Objective standard from new statute: we need to find out whether the judge actually applied the correct law to the facts -- **this is not a question of whether reasonable minds may differ**, but of the magnitude of the error[361]
i. If it was a reasonable error, then there will be no reversal
ii) Under Brown, Mere error on any federal claim is sufficiency[362] -- note: Brown's grounds for granting relief is overruled
(1) at the moment there are only 3 votes on the court willing to overturn Brown v. Allen
(a) **Important exception for fourth:** Where the state has provided an opportunity for full and fair litigation of a 4th amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that the evidence obtained in an unconstitutional search or seize was introduced at trial[363] criticized on the basis of separation of powers and legislative intent[364] (there was a question as to whether or not

[353] 2244a
[354] McLeskey v. Zant
[355] 28 USC 2244d2
[356] Braden v. 30th Judicial Circuit Court of KY
[357] Aherns
[358] 28 USC 2255
[359] 2254(d)
[360] Brian in Dissent
[361] Taylor
[362] Brown
[363] Stone v. Powell
[364] Criticisms of Stone v. Powell

Brown would survive Stone, but it seems to be limited to only 4th amendment claims)
(i) If 4th amendment issue was vetted, than it is precluded as 4th amendment issues are not "guilt related"[365]
1. 4th amendment right is not a personal constitutional right[366]
(b) Stone has not been extended, and Habeas claims have gone to jury instructions, makeup, assistance of counsel, Mirada
(2) Error/harmless error
(a) Error is harmless unless had a substantial and injurious effect or influence on jury's verdict[367] -- much better on direct review[368]
(b) Deliberate or egregious is a shoe-in[369]
(3) Structural defect requires automatic reversal [370]
(4) comparative standards of review
(a) direct review: very harsh, SC will not address a federal defense when a procedural default prevent the defendant from raising the issue in state court

Separation of Powers. Exceeded judicial rule in deciding what claims could be heard	Bator: Habeas meant only to be review of Jurisdiction Peller: Congress was distrustful of state courts No indication that Congress wanted 4th amendment claims treated differently
Parity between state and federal courts	Federal Courts are uniquely situated to give constitutional relief v. idea that state courts understand constitutional claims
Challenge of assumption that review of exclusionary rule claims serve little purpose	Idea of habeas to make sure no one is incarcerated illegally.

[365] Stone v. Powell
[366] Stone
[367] Brecht
[368] Chapman
[369] Brecht
[370] Brecht

(b) removal is for error - remedy is de novo review
(c) appellate is for error - remedy is de novo review
(5) Novelty of claim: raising an issue that didn't exist at the state court proceeding, might get around procedural default, but there is a Teague Problem -- unsure of under statute
iii) in Martin v. Hunter's lessee, if the state is actually injecting itself, we ought to give the review that handles that problem – and we ought to give the review to see if there was a full and fair hearing to that claim
g) appeal of Habeas
i) certificate of appealability required[371] -- there is no right of appeal to the state to appeal

[371] 28 USC 2253c