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Is There a Law of Federal Courts

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IS THERE A LAW OF FEDERAL COURTS?

GENE R. NICHOL*

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I. INTRODUCTION

I and others have argued recently that a United States Supreme Court decision from the 1991-92 Term, Lujan v. Defenders of Wildlife,1 is a major departure from traditional understandings of the law of federal courts.2 Although an act of Congress appeared to grant standing to the plaintiffs in Defenders, the Court ruled that the statutory provision, as applied, would violate Article III of the Constitution. Accordingly, the extraordinarily vague and judicially constructed contours of the case or controversy requirement were employed to thwart the apparent authority of the United States Congress. This effort was accomplished, quite surprisingly, under an umbrella of alleged judicial restraint.3

* Dean and Professor, University of Colorado School of Law. A version of this essay was delivered in March, 1993 as the Edward G. Donley Lecture at the West Virginia University College of Law. I would like to thank my former colleagues in Morgantown for their helpful comments on the manuscript.
3. See generally Nichol, Public Law Litigation, supra note 2, at 1148-69.
I would like, in this essay, however, to make quite a different point. As a single case, *Defenders* may well be a significant departure from the patterns of federal courts jurisprudence. But, in a different sense, *Defenders* fits most comfortably within our traditions. There is little that is more predictable in the law of federal courts than that the Supreme Court will be unpredictable. Those familiar with federal courts jurisprudence would likely agree that it is, in fact, hardly uncommon for the justices to go their own way in this murky field—which lies somewhere between the civil procedure of real lawyers and old fashioned law professors, and the constitutional law of semi-professional political scientists and completely unprofessional post-modernists. But there are, in my view, some frequently ignored reasons for federal courts laws' malleability and indecipherability. We have failed to answer the most fundamental questions of the law of federal courts. We have ignored them, we have created fictions to avoid them, and most frequently, we have failed to realize that the questions are even before us—reappearing like persistent but unsatisfied old companions. This is the lot faced by federal courts practitioners and scholars; suggesting the need for heavy doses of both patience and cynicism, and perhaps an ability to carry on, like Sisyphus, in the face of hopelessness and fatigue.

But I'm getting ahead of myself. I'd like to try to paint the picture I'm interested in by going a bit back in time, about thirty years. I then will compare, in the most general terms, two bodies of federal public law, namely federal courts law and constitutional law. The points that I am interested in will, then, become more apparent. So I begin with some familiar history.

II. CONSTITUTIONAL REVOLUTIONS

From 1954 until the early 1970's the United States Supreme Court revolutionized both American constitutional law and the law of federal courts. On the constitutional side, schools were ordered desegregated, the Bill of Rights was made enforceable against the states, First

Amendment guarantees were bolstered, a right to privacy was "discovered," criminal procedure protections were strengthened, and orchestrated school prayer was made illegal. Landmark Warren Court decisions like Brown v. Board of Education, Reynolds v. Sims, Miranda v. Arizona, Engel v. Vital, and Gideon v. Wainwright recast our constitutional landscape in a remarkable way. The majestic generalities of the Bill of Rights and the Fourteenth Amendment were employed to foster a vision of equal dignity and human worth.

During this period, not only was a cascade of new substantive rights produced, the Justices also installed a variety of procedural mechanisms to ensure that the guarantee of those rights would be actually realized. The jurisdiction of the federal courts was expanded across a variety of fronts. Standing law was marked by Flast v. Cohen and Baker v. Carr—opening the door to public constitutional actions in ways that statutory jurisdiction had been expanded previously. New criminal procedure safeguards were accompanied by major liberalizations of the writ of habeas corpus—the decision in Fay v. Noia being the stoutest example. Not only would the writ be applied to all constitutional violations, but state procedural defaults would not defeat federal supervision, and the factual undergirdings of constitutional claims could be reexamined in federal tribunals. The Court expanded First Amendment procedural forms by providing a federal forum, in Dombrowski v. Pfister, even when the remedy sought was direct-

ed against a pending state judicial proceeding.\textsuperscript{20} The all but moribund civil rights cause of action under 42 U.S.C. § 1983 was also dusted off in \textit{Monroe v. Pape}\textsuperscript{21} in order to help assure the existence of an independent federal judicial mechanism of constitutional accountability.\textsuperscript{22} As a result of this pointed barrage, the exercises of federal judicial power made commonplace by 1970 would have been literally unrecognizable to an expert steeped in the substance and the practice of merely a decade and a half before.\textsuperscript{23}

This Warren Court "revolution," as may be recalled, was not greeted with uniform enthusiasm. Many citizens, and the political leaders elected to represent them, came to see the Warren legacy as one of usurpation. Much of the new constitutional law was regarded as mere social policy-making, inflicted by unelected judges on an unwilling populace. And the truism that in a democracy, "policy" is to be made by the legislatures, not the courts was often stated by the critics of the Warren Court. Thus, presidents promised to change the direction of the federal judiciary. Judges would be appointed who would "strictly construe" the constitution, and who would interpret the laws, not make them up.\textsuperscript{24}

Republican executives would eventually have their say. Presidents Nixon, Ford, Reagan, and Bush appointed ten new justices to our highest court; and even though Justices sometimes surprise their benefactors, they do not invariably do so. Twenty five years of the appointment power does make a difference. With the advent of the Burger and Rehnquist Courts, pundits predicted a counter-revolution in American constitutional law. Obviously, the adventurous steps of the Warren Court would be reversed. The cornerstones of its legacy would

\begin{itemize}
\item \textsuperscript{20} \textit{Id.} at 485.
\item \textsuperscript{21} 365 U.S. 167 (1961), \textit{overruled by} Monell v. Dep't. of Social Servs., 436 U.S. 658 (1978).
\item \textsuperscript{22} \textit{Id.} at 180.
\item \textsuperscript{23} \textit{See} Gene R. Nichol, Jr., \textit{Federalism, State Courts and Section 1983}, 73 VA. L. REV. 959 (1987) [hereinafter Nichol, \textit{Federalism}]
\item \textsuperscript{24} I should add, parenthetically, that President Nixon eventually changed his views on the need for a strictly construed constitution. \textit{See} United States v. Nixon, 418 U.S. 683 (1974).
\end{itemize}
be dismantled. The federal courts would again become passive and majoritarian institutions.

The anticipated "counter-revolution" in substantive constitutional law did not actually take place; or at least it did not take place in any dramatic fashion. State-ordered segregation remains illegal, public school prayer remains prohibited. Legislatures must meet the strictures of one-person, one-vote. Fourth, Fifth, and Sixth Amendment guarantees remain basically in place, even if less aggressively applied, and sometimes laced with exceptions.

The Burger Court even found new arenas for judicial activism. The call for equal protection of the laws was ruled to embrace the discrimination claims of women, and the nation's abortion laws were unceremoniously scrapped in Roe v. Wade. Professor Vince Blasi would even edit an excellent book in 1983 entitled "The Burger Court: The Counter-Revolution That Wasn't." There is room to argue around the edges, of course, particularly in areas like criminal procedure, state action, and procedural due process. But if we keep in mind what the presidents and the pundits seem to have envisioned for the United States Supreme Court, relatively speaking, Blasi was surely right. The substantive constitutional regime of the Warren Court may have changed trajectories, but it was not replaced.

III. CHANGING THE LANDSCAPE IN FEDERAL COURTS LAW

It is not hard to make the case, however, that a counter-revolution of real dimension has taken place in the last two decades in the law of federal courts. While in the arenas of substantive constitutional law the Court has tended to hedge, curb, and solidify, but not to retreat or to destroy, the procedural authorities of the federal courts have

28. Id. at 90.
been far more directly altered. In area after area of federal courts jurisprudence, the law of the mid-seventies, eighties, and now, the nineties, has been directly aimed at dismantling the Warren Court's procedural revolution.

I will quickly try to illustrate that point by turning to a variety of federal courts topics. But I ask the reader to suspend normal skepticism on this point, at least momentarily. I do so for two reasons. First, in my own view, there is no serious doubt that a counter-revolution has been successfully carried out in the law of federal jurisdiction. Second, and more practically, I want to concentrate my efforts here on why this strong change in direction has taken place. As a preview, it seems to me that the altered course has not only to do with politics and the obvious changes in judicial personnel, but, with the nature of federal courts law itself. That is the heart of what I want to explore.

First, has there been a sea of change in federal courts law—unlike the staggering and meandering that has occurred in substantive constitutional law? Consider a few examples. A logical place to begin is with the law of standing and Article III. The Warren Court had strongly opened access to the federal courts on two fronts. Generalized, intangible constitutional claims had been ruled acceptable in at least some particulars: reapportionment cases like Baker v. Carr\(^{30}\) and separation of church and state decisions like Flast v. Cohen\(^{31}\) being strong illustrations. More importantly, in its waning days, the Court junked the traditional common law method of determining standing in favor of an overtly liberalizing injury-in-fact test in Data Processing Service v. Camp.\(^{32}\)

The Burger Court responded in the mid-1970's by completely cutting off any new turn to public constitutional actions and, perhaps more significantly, by reworking Data Processing's\(^{33}\) injury standard. No longer would mere harm—economic, aesthetic, spiritual, or environmental—be sufficient. Injury must be "distinct and palpable," clear-

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33. Id.
ly caused by the challenged acts of the defendant, and likely to be redressed by a favorable decree. These tightened hurdles were applied with vigor, written into the Constitution, and made the fundamental bedrock of Article III. This move toward constitutionalization embraced the ripeness and mootness doctrines at about the same time. Thus, the doctrinal formulations employed by the Warren Court to augment access and to free jurisdictional analysis from the sway of the claim on the merits, were used by the Court's successors to constitutionalize new barriers to the developing public litigation model. Next, in cases like Allen v. Wright and City of Los Angeles v. Lyons, the Supreme Court changed the focus of the standing determination, away from the plaintiff's stake in the outcome of the dispute, to a broader, even more amorphous inquiry including the appropriate separation of powers and a strong concern for federalism. This increasingly restrictive regime was eventually enforced even against the apparent will of Congress.

An even greater about face has occurred in the law of habeas corpus. What had been rendered a constitutionally encompassing, highly interventionist, and intentionally redundant writ has been altered dramatically. Fay v. Noia gave to habeas petitioners the ability to present constitutional objections which were erroneously not pursued by trial counsel. The recent decision in Coleman v. Thompson, as well as Wainwright v. Sykes, clearly removed Fay's legacy. Stone v. Powell closed the door to Fourth Amendment claims on habeas

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in direct contravention of the statute. *Teague v. Lane* has limited the scope of the writ further; embracing only established constitutional violations and forbidding the enforcement of new rules on collateral attack. At least some members of the Court have also set their sights on Fifth and Fourteenth Amendment claims. Despite the welcoming language of the statute and habeas rules, in *McClesky v. Zant*, the justices went well down the road to allowing federal habeas petitioners only one bite at the apple. Taken as a package, then, the United States Supreme Court has done virtually everything possible to restrict the Great Writ—which I suppose should now be officially called the Puny Writ. The Court has, in fact, done all it could, short of repealing the habeas statute, to eliminate federal habeas corpus. On occasion, it has even taken shots at the statute itself.

Track records perhaps less dramatic, but almost equally uni-directional, can be discovered across a broad panoply of federal courts areas. The door opened to possible federal intervention in unconstitutional state court process in cases like *Dombrowski v. Pfister* and *Mitchum v. Foster*—a door which emphasized the “role of the Federal Government as a guarantor of basic federal rights against state power”—was closed firmly by the effective extension of the *Younger* doctrine to all civil cases. *Younger’s* march has been relentless, without regard for the time sequence of filing, the unconstitutional-


49. 380 U.S. 479 (1965).


52. See Howard B. Stravitiz, *Younger Abstention Reaches a Civil Maturity*, 57 FORD. L. REV. 997, 1032 (1989) (“After *Pennzoil* there is no principled basis to limit *Younger* abstention to criminal, quasi-criminal, and civil enforcement cases.”).

53. See Hicks v. Miranda, 422 U.S. 332 (1975) (demanding abstention in favor of a
ty of the statutory scheme involved,\textsuperscript{54} or the actual availability of a meaningful state forum for the presentation of constitutional claims.\textsuperscript{55} The only consistent pattern of the Younger rulings has been the demand for a closed federal door.\textsuperscript{56}

The federal forum was also diminished by a series of supplemental jurisdiction decisions dating from the mid-1970's. While the Warren Court had expanded the ability of proper federal plaintiffs to attach related state law claims and causes of actions in \textit{United Mineworkers of America v. Gibbs;}\textsuperscript{57} the Burger and Rehnquist Courts answered with \textit{Aldinger v. Howard;}\textsuperscript{58} \textit{Owen Equipment & Erection Co. v. Kroger,}\textsuperscript{59} \textit{Merrell Dowell Pharmaceuticals, Inc. v. Thompson;}\textsuperscript{60} and \textit{Finley v. United States,}\textsuperscript{61} each presuming heavily against the availability of the federal tribunal and against the convenience of federal plaintiffs. Congress has had the final say here with the enactment of the Supplemental Jurisdiction Act of 1990.\textsuperscript{62} However, if this statute gets the same warm treatment that the justices have offered the habeas corpus act, Congress' final word may not be final after all.

The Eleventh Amendment has received new life as well. The constitutional accountability achieved through \textit{Ex parte Young,}\textsuperscript{63} was limited in \textit{Edelman v. Jordan.}\textsuperscript{64} \textit{Pennhurst State School & Hospital v.}

\begin{itemize}
\item \textsuperscript{54} See \textit{Trainor v. Hernandez}, 431 U.S. 434 (1977) (requiring abstention in case involving clearly unconstitutional state statute).
\item \textsuperscript{55} See \textit{Pennzoil Co. v. Texaco}, 481 U.S. 1 (1987).
\item \textsuperscript{56} See \textit{Nichol, Federalism, supra} note 23.
\item \textsuperscript{57} 383 U.S. 715 (1966).
\item \textsuperscript{58} 427 U.S. 1 (1976) (limiting pendent party jurisdiction).
\item \textsuperscript{59} 437 U.S. 365 (1978) (limiting ancillary jurisdiction).
\item \textsuperscript{60} 478 U.S. 804 (1986) (arguably limiting federal question jurisdiction under 28 U.S.C. § 1331).
\item \textsuperscript{61} 490 U.S. 545 (1989) (limiting pendent party jurisdiction in exclusive jurisdiction case).
\item \textsuperscript{63} 209 U.S. 123 (1908). \textit{Ex parte Young}, obviously, was not a Warren Court decision. But \textit{Young}'s theory was used constantly by the Warren Court, even in ways inconsistent with \textit{Edelman}. See, e.g., \textit{Shapiro v. Thompson}, 394 U.S. 618 (1969) (overruling recognized by \textit{Payne v. Tennessee}, 111 S. Ct. 2597 (1991)).
\item \textsuperscript{64} 415 U.S. 651 (1974).
\end{itemize}
Halderman\(^6\) raised a curious constitutional barrier to state causes of action. The plain statement rule allowing congressional override of state sovereign immunity has been interpreted with remarkable rigidity, and replaced waiver concepts that had been accepted for generations.\(^6\)

Similar stories could be told about the law of res judicata,\(^7\) the Anti-Injunction Act,\(^8\) and the rules governing implied statutory and constitutional causes of action.\(^7\) This is, in short, almost the entire subject matter of the typical federal courts casebook. There is the occasional exception, of course, like the Court's ruling expanding federal review power in Michigan v. Long, dealing with the adequate and independent state grounds doctrine.\(^7\) But even here the opinion follows the pattern because the Supreme Court's appellate review doctrine springs into place most frequently when a state court has dared to read federal constitutional guarantees too broadly. The message seems to be that the Court will reduce federal oversight authority unless state tribunals are too protective of constitutional rights. In that event, the Court will ensure access in order to achieve reversal.

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But whether I am right as to the motivations for *Michigan v. Long*, it is clear that the decision is an exception to the very strong winds that blow in federal courts jurisprudence. If the United States Supreme Court rulings in constitutional law over the past twenty years have nibbled at the Warren Court legacy, but chosen, nonetheless, to leave the framework intact, the Court’s federal courts decisions have been more bold, more single-minded, less ambivalent, and easier encapsulated in a single vision of federal judicial power. Perhaps it goes without saying, the rulings have been less constrained by existing precedent. The body of decisions taken as a whole is revolutionary in the sense that it embraces major and repeated departures in seemingly settled jurisprudence. It is “counter,” or reactive, in the sense that the opinions cases seem primarily designed to demolish or debilitate the rulings of the Warren era.

IV. THE AGENDAS OF FEDERAL COURT LAW

Why that might be so? Why has there been an about face in federal courts jurisprudence of far more significance, and far less ambivalence, than has taken place in substantive constitutional law? One answer is probably obvious. Federal courts decisions are less visible, less apt to stir public controversy than the frequently headline-grabbing rulings of constitutional law. If the Burger and Rehnquist Courts had chosen to overtly dismantle the Warren Court’s legacy, scrapping one person, one vote, *Brown v. Board of Education*, *Miranda*, the school prayer decisions, the incorporation cases and the like, several things would have likely happened. There may well have been strong public outcries about the retrenchment. Even if that did not occur, the undeniably political nature of the Court’s rulings, as well as those of its predecessor, would have been impossible to deny. The Court, no doubt, would have suffered significantly as an institution. The public nature of constitutional decisions perhaps explains why the Court came closest to a counter-revolution in the area of criminal procedure. The

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72. *Id.*
73. 347 U.S. 483 (1954).
justices have had to worry precious little that there would be a public outcry over efforts to restrict the rights of criminal defendants. The television lineup is full of shows about police and district attorneys. One notices very little fretting over the rights of criminal defendants.

But this same public character is usually missing from federal courts rulings. Even landmark federal courts determinations like *Fay v. Noia*\(^7\) and *Flast v. Cohen*\(^7\) go unnoticed in the popular press. The public may believe that the decisions have little to do with our principles of constitutional accountability and the way that we choose to govern ourselves. They are thought to be technical, the mere bickerings of lawyers. As a result, it is quite possible to set a completely different course of judicial authority on the federal courts side without dramatically stirring the pot. And, whether conscious or not, the United States Supreme Court, in the past two decades, has accomplished such a countermove almost without notice. *Younger v. Harris*,\(^7\) *Pennhurst v. Halderman*,\(^7\) *Warth v. Seldin*,\(^7\) and *Teague v. Lane*\(^8\) have hardly troubled the public mind. Maybe the strongest proof of that reality is that when Professor Blasi wrote of the failed counter-revolution in 1983, he devoted no chapter to the Supreme Court's federal courts rulings.\(^8\) Accordingly, the change in directions was largely invisible and could be accomplished without the apparent institutional harms likely to result from a direct overthrow of the Warren Court legacy. But, it should be recalled, the Warren Court justices thought it necessary that substantive constitutional changes be accompanied by procedural reforms designed to make the guarantees meaningful. That conjunction no longer exists in American judicial review. This is a change of no small dimension.

There may be a second reason that federal courts law has seen a stronger legacy of manipulation. Federal courts rulings, measuring as they do, the breadth of federal judicial power, are a curious mix of

\(^{76}\) 392 U.S. 83 (1968).
\(^{77}\) 401 U.S. 37 (1971).
\(^{79}\) 422 U.S. 490 (1975).
\(^{81}\) See BURGER COURT, supra note 27.
substantive and procedural law. They are usually less visible and less publicly controversial than constitutional law decisions, but they are also more overtly value-laden than many strictly procedural determinations. When a court measures the standing requirement, or asks whether a federal tribunal may interfere with state judicial process, or asks whether state officers can be sued, or whether a state criminal conviction can be overturned, as is typical in federal courts law, the justices understandably anticipate—with either enthusiasm or apprehension—opening the doors of the federal courthouse to a fairly predictable set of future lawsuits. State officers will be made to toe the constitutional mark, federal administrative actors will be subject to increased supervision, government decision-makers will be plagued by chilling damages actions, etc. The avenues and opportunities opened or closed by extending a statute of limitations or by limiting discovery disputes or allowing sanctions against counsel are far less predictable. No matter how impartial the judicial temperament, therefore, the tendency for the perceived desirability of various sorts of claims on the merits to significantly affect the determination of federal courts disputes is likely inevitable.

V. THE NATURE OF FEDERAL COURTS LAW

But these realities of federal courts jurisprudence seem fairly obvious. I am more interested in a difference which comes, in my view, from the nature of federal courts law itself. To our good fortune, there has been a good deal of first rate overarchig work in federal courts scholarship in the last five years. Richard Fallon, in a wide-ranging critique of federal courts jurisprudence entitled "The Ideologies of the Federal Courts," 82 characterizes the field's scholarship as dominated by two conflicting ideological models: the Federalist Model under which "states emerge as sovereign entities against which federal courts should exercise only limited powers," 83 and the "Nationalist Model," which "minimizes the significance of state sovereignty in comparison

83. Id. at 1143.
with national interests and that posits a constitutional and statutory preference for federal over state courts as the guarantors of federal rights."\(^84\) There are points to quarrel with on Fallon's thesis. But surely his broader claim is a good one—that answers to federal courts dilemmas will be stronger if they are derived from the examination of particular contexts rather than these broad predispositions.

Professor Michael Wells has argued, on the other hand, that the helter skelter pattern of federal courts rulings is more accurately attributed to overt judicial manipulation designed to achieve certain goals on the merits than any shifting battle between national and federalist perspectives.\(^85\) Wells claims "that a crudely political view of judicial motivation yields a more plausible and more powerful account of most judges' behavior than Fallon's thesis."\(^86\) He adds that "one cannot fully and accurately explain the contemporary law of federal courts, or argue persuasively about what the rules should be and why, without acknowledging the systematic disparity between federal and state judges and the importance of substantive considerations in the resolution of jurisdictional issues."\(^87\)

Martin Redish, however, thinks that both Fallon and Wells are wrong. For Redish, the best understanding of federal courts jurisprudence is derived through what he calls the "institutionalist perspective."\(^88\) The normative ideal of federal courts law emphasizes that, in Redish's words, "issues not controlled by the Constitution are to be resolved on the basis of judicial policy assessment only to the extent the representative branches have not already made that policy choice through legislative action."\(^89\) An appropriate recognition of both constitutional and statutory power will, in Redish's view, solve most of the work of a confused federal courts jurisprudence.

\(^{84}\) Id. at 1144.
\(^{86}\) Id.
\(^{87}\) Id.
\(^{88}\) Id.
\(^{89}\) Id.
These broad efforts, as well as Barry Friedman's recent dialogic approach to the analysis of federal judicial power,\textsuperscript{90} capture major strands of the last three decades of federal courts law and scholarship. I agree with a good deal of each of their respective emphases. But as I read their overarching examinations of the field of federal courts, I am left with the feeling that they, in each instance, underemphasize one of the most persistent dynamics of federal courts decision making. That dynamic, in my view, helps to explain why federal courts law has weathered the political storms of the past three decades so poorly, and why there has been so little there to constrain judges of differing political philosophies.

My own sense of it is that the most persistent, perplexing, and unanswered questions of federal courts jurisprudence deal with the appropriate relationship between a tradition of extant common law forms which provide the framework for federal litigation on the one hand, and the consistent tug of new demands of constitutional accountability on the other. That sounds, no doubt, hopelessly vague and lacking in content. Or perhaps like an obvious truism. Let me, therefore, provide a few examples of what I mean.

Start at the beginning, at least the beginning in some sense, with Marbury v. Madison.\textsuperscript{91} Marbury presented a question of judicial power—one supposes the question of judicial power. Was the Judiciary Act of 1789, as misinterpreted by Chief Justice Marshall,\textsuperscript{92} inconsistent with Article III of the Constitution? The demands of the enforceability of a new written constitution seemed to call out for the power of judicial review. But, although Marshall surely did not emphasize the point, the common law traditions of litigation hardly reflected a power in the justices to regard an act of Congress as void. English practices, as well as the great bulk of colonial processes, embraced no such authority. Still, Marshall reasoned his way to a conclusion accepting (hardly against his will, of course) the power of judicial review in order to avoid rendering the constitution, in his judgment, a meaning-


\textsuperscript{91} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{92} See Akhil Reed Amar, \textit{Marbury, Section 13, and the Original Jurisdiction of the Supreme Court}, 56 U. Chi. L. Rev. 443, 465 (1989).
less scrap of paper. The forms of common law practice, without textual mandate, gave way to a trumping demand for constitutional accountability.

This is hardly new learning. But this same process of rejecting old wineskins is repeated continuously in federal courts jurisprudence. Again, the law of standing is a good example. To the great surprise of all but the most cynical, after over 200 years we still have no real idea what the term "case or controversy" means. In *Lujan v. Defenders of Wildlife*, Justice Scalia simply defined it through "common understandings" that he seemingly made up as he went along.

Has it always been thus? Perhaps. In *Osborn v. Bank of United States*, the great Chief Justice Marshall suggested that in order to be a case, a suit must "assume such a form that the judicial power is capable of acting upon" it. This, of course, is no more helpful than Madison's circular definition of the case or controversy requirement as limiting the courts to matters "of a judiciary nature." Adding to the confusion, in *Osborn* itself the Court very decidedly changed the judicial forms available to federal litigants by authorizing enforcement of the remediless provisions of the constitutional charter by injunctive decree. So Marshall really seemed to be saying that you have a case if its like what we have done before, or what we choose to do now.

The law of standing, particularly in the 1950's, 1960's and early 1970's, repeatedly cast off the forms of the common law to assure greater constitutional and statutory accountability. There were limits to this accountability, of course, as cases like *Valley Forge*. 

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97. *Id.*
98. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand, ed., 1911).
101. *Valley Forge Christian College v. Americans United For Separation of Church &
proved. The Court would not hear a constitutional objection alone, unaccompanied by consequential harm. But there is no answer provided in standing law to the question, "How much of our litigation tradition will be rejected in favor of constitutional accountability?" The most that can be said is that we have gone this far, and no farther. And it is difficult to tell even where "this far" is.

Consider as well the Eleventh Amendment. It is another notoriously contrived, nonsensical, and inconsistent aspect of federal courts jurisprudence. A suit is a case against the state if one sues a state official in his public capacity seeking damages, but not if an injunction under federal law is sought. The state sovereignty reflected in the Eleventh Amendment can bar federal suit unless Congress is very clear that it seeks to make states judicially accountable.

This means states enjoy a profound protection as against the federal government unless the federal government really wants to take the right away. One can imagine John Calhoun's reaction to that. A law suit which completely bars a sovereign state from enforcing some of its laws is not, after all, a suit against the state so long as the plaintiff merely remembers to name the governor or attorney general as defendant. This conclusion, I have always thought, should give fledgling lawyers hope—recognizing that there is no argument too absurd to make its way into a United States Supreme Court opinion. These notorious Eleventh Amendment dodges have taken place because we have refused to face squarely the tension between the sovereign immunity traditions of our common law process and the demands of constitutional accountability. Rather than face these beasts head-on, we have created fictions to guide and undergird all major constitutional decision making in the federal courts. We have not looked good in the process.

To provide yet another example, the constitutional damage claim cases are very similar. Until 1971 it was not possible to state a claim for damages against a federal official based directly on the Constitution. The theory, not unrelated to the concept of sovereign immu-

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nity, was that such damages claims against government officials at common law had to be created by the legislature. But how could that square with our growing demands of constitutional enforcement? We had long said that the Constitution could be enforced by injunctive decree. Why not through the use of damages claims, especially in circumstances under which, in real terms, relief is either money or nothing?

Again we chose not to answer directly. As Justice Stevens put it in *Bush v. Lucas*, 105 in constitutional damages cases "we might . . . hold that it is the province of the judiciary to fashion an adequate remedy for every wrong," 106 sounding, of course, in the constitutional accountability side of federal courts jurisprudence. Or, he admitted, we might have said that federal courts are tribunals "of limited jurisdiction whose remedial powers do not extend beyond the granting of relief expressly authorized by Congress." 107 Our cases, Stevens wrote, "have unequivocally rejected both extremes." 108 We have, in other words, taken our half from the middle and constructed a body of decisions which can make no sense to anyone. As a result, these damages actions are based directly on the Constitution, suggesting that they are indeed exercises in constitutional interpretation. Still, though, relief will be denied if "special factors" exist or if Congress seems to be opposed to it. 109 These are strange conclusions for exercises in constitutional interpretation.

I offer one final example, though more could be found. The Fourteenth Amendment prohibits state actors from depriving persons of due process or equal protection of the laws. Title 42, section 1983 of the United States Code 110 grants a cause of action in law or in equity against any person who subjects one to a deprivation of federal rights. State judges are persons subject to the strictures of both the Fourteenth Amendment and section 1983. Can, therefore, a federal court prevent a

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106. Id. at 373.
107. Id.
108. Id.
state court from depriving a federal plaintiff of a constitutional right in a state tribunal?

In *Mitchum v. Foster* we seemed to answer that question affirmatively, drawing upon the rigors of constitutional enforcement and the history and power of section 1983.\(^{111}\) In *Younger v. Harris* and its now extensive progeny, though, we have concluded that the demands of "Our Federalism," rooted at least in part in the practices of the courts of equity, prevent federal interference.\(^{112}\) The Supreme Court has felt no compulsion to explain the inconsistencies, behaving as if the cases were distant relatives unlikely ever to appear in the same locale. Similar results can be found in the section 1983 immunity cases which measure constitutional accountability and common law protections from suit as if they were cut from the same cloth rather than polar opposites.\(^{113}\)

We have, in short, a system of litigation forms and practices which not infrequently fails to provide meaningful recourse for constitutional noncompliance. Over and over in our jurisprudential history, we have changed our practices in order to assure constitutional compliance. However, at the same time, we have been too timid—perhaps reasonably too timid—to make constitutional accountability, rather than the traditions of practice, the touchstone of federal judicial authority.\(^{114}\) The resulting jurisprudence of federal courts, therefore, is primarily only a pattern of movement—a battleground, as Arnold put it, reflecting only the lines "where ignorant armies clash by night."\(^{115}\) Neither theory nor doctrine can long prevail here, and the judges tug and retreat before extraneous forces only barely concealed.

\(^{111}\) 407 U.S. 225 (1972).


\(^{114}\) Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227 (1990) (Professor Bandes argues in effect that we should have made the leap to constitutional accountability).

VI. CONCLUSION

If a shred of this is true, what might it have to do with my original set of questions? Why has there been a counter-revolution in federal courts law that apparently did not take place in substantive constitutional law? If my description of the nature of much federal courts law is accurate, it stands to reason that the predilections of the Justices would have strongest play in an area like federal courts law where, in short, there is no traditional notion of doctrine or law to constrain them. In fact, it is not difficult to imagine that in moving again back and forth between the poles of common law process and constitutional accountability, the Justices do not regard themselves as exercising a freewheeling discretion or breaking new ground at all.

What is surprising, in my view, is how little honest, straightforward, old-fashioned, explanation-giving is ever attempted. The standing doctrine is described as "more than an intuition, but less than a rigorous theory." The linchpin of the Court's Eleventh Amendment jurisprudence is openly described as a "fiction"—without more, as if the concession alone lets the justices off of the hook. Inconsistent versions of history and traditional practice are rolled out without apparent embarrassment in Younger and in section 1983 cases in order to sustain divergent results. Mootness principles cannot be squared with other Article III standards. The habeas decisions frequently seem to forget that the cause of action is governed by statute.

The law of federal courts looks then to be the law of power, the law of the moment, and the law of trends and trepidations. Like life itself, it is not tidy. It speaks poorly, now that I think of it, of anyone

119. See Nichol, Federalism, supra note 23.
120. Nichol, Moot Cases, supra note 35.
121. See supra text accompanying notes 39-46.
seriously interested in its study. It is not the business of clear thinkers and relentless minds. True theoreticians eventually abandon the field with disdain, scoffing at the pedantry of their former colleagues. Federal courts law is the domain of lawyers, Supreme Court Justices, politicians, unfancy law professors, and other rogues. May we all feel at home.