

## WHY I DON'T TEACH FEDERAL COURTS ANYMORE, BUT MAYBE AM OR WILL AGAIN

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Twenty-five years ago, I taught Federal Courts for the first time. I had taken Federal Courts during my last year of law school from Professor Hugh Hansen<sup>1</sup> because I loved his teaching style, and because I knew I wanted to practice in federal courts.<sup>2</sup> I did not know the subject would be as hard to learn as it was, but I loved it.

When I taught Federal Courts the first time in 1983, I was a green, second-year law professor at my alma mater, Fordham Law School. It was much harder to figure out how to teach it than it was to ace it as a student. My first mistake was to use *Hart and Wechsler* as my text.<sup>3</sup> There was no way all of that book could be covered in a meaningful way in a three-credit course. At the time, I didn't know enough to know what to cut out. Additionally, students

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1. Hugh Hansen, Rutgers, A.B., 1968, Georgetown, J.D., 1972, Yale, LL.M. 1977, has been a professor of law at Fordham since 1978. His principal subjects now include Constitutional Law, Copyright Law, Trademark Law, EC Intellectual Property Law, International and Comparative Copyright Law. Notably absent from this list is Federal Courts.

2. There were two principal unprincipled reasons for this choice: (1) on my first visit as a law student to the state and federal courts in downtown Manhattan, I noticed how clean the federal building was, and how dirty the state court building was, and (2) during my Legal Writing course, I realized how much easier it was to cite federal cases (only one official reporter), than state court cases, which had as many as three. I had a good reason for the choice as well: I had majored in Economics in college and wanted to practice antitrust law.

3. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953). Five subsequent editions have been published. The latest version, published in 2009, was edited by Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer, and David L. Shapiro. HART AND WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (6th ed. 2009) [hereinafter *Hart and Wechsler*]. The fourth, fifth, and sixth editions have shrunk somewhat in size, in terms of page numbers and footnotes, and the current editors have tried to make the book more accessible. *Preface to the Sixth Edition of Hart and Wechsler, supra*, at v. Yet, it still weighs in at over 1500 pages and 6 pounds. For a history of the casebook's evolution from the first edition through the third edition, see Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688 (1989).

found the text extremely difficult.<sup>4</sup> So, I switched to the far more manageable *Low and Jeffries*<sup>5</sup> as my casebook after the first time I taught the course, and I began to hit my groove.

My colleague, Professor Maria Marcus,<sup>6</sup> and I always had large classes at Fordham, despite the hard reputation of the course. Around the time I hit my stride, the composition of the members of the United States Supreme Court began to evolve to the right, and Federal Courts doctrine began to change

4. There are several student reviews of *Hart and Wechsler* on Amazon.com. One, entitled "Hard Class, Horrible Book" said in part:

Federal Courts and Federal Jurisdiction is generally recognized as the hardest course in law school. After surviving the course myself, I can attest to this fact. Unfortunately, my course used this text which was useless in imparting an understanding of the material, and in fact did more to confuse my peers and me than anything else. Learning this material is already difficult enough, so it is extremely unhelpful when your text makes the subject even more mystifying. The biggest problem with this book was the utter lack of organization and its ocean of endnotes following the selected cases. The thousands of cases and articles discussed in the endnotes made organizing the material for review impossible.

Posting of Mark Greenbaum to Amazon.com, Customer Reviews, [http://www.amazon.com/Wechsler-Federal-Courts-University-Casebook/dp/158778534X/ref=cm\\_cr\\_pr\\_product\\_top](http://www.amazon.com/Wechsler-Federal-Courts-University-Casebook/dp/158778534X/ref=cm_cr_pr_product_top) (May 6, 2004).

Another, entitled "Did you read the footnotes?" ranted:

Having never actually subjected the book to scrutiny, albeit rather an exaggeration [sic], it comes as no little surprise that i [sic] discover both the writing style and the general cognitive processes of the authors, in addition to the lack of well-placed commas, to be, without equivocation n.1, the most obtuse, murky, singularly unreaable [sic] n.2 display of textual acrobatics i [sic] have ever, whether in or out of school n.3, had the distinct displeasure of having to plod through in one day - notwithstanding a few notable books I've [sic] also had to accept into my overstuffed head, lately.

n.1 This is not to say, with no reservations, that equivocation, at least in a sociological - or empirical - sense, is necessary. Pg. 45 or see supra Hallybrook Pipeline as it regards non Article III administrative, but not legislative, tribunals.

n.2 Blah Blah Blah - oh yea and the most important thing in the chapter, right f\*\*king [sic] here in the middle of a two page footnote about some sh\*\*head [sic] in the 1800s ... Blah Blah Blah

n.3 Blah Blah Blah . . . Nothing worth reading at all - like the least interesting thing in the world that probably is repeated in 40 other footnotes, but you should read it because it might be like the footnote right above - but it isn't [sic] Blah.

Posting of A. Antaramian to Amazon.com, Customer Reviews, [http://www.amazon.com/gp/cdp/member-reviews/A3MN5HAOHUHS2U/ref=cm\\_cr\\_pr\\_auth\\_rev?ie=UTF8&sort%5Fby=MostRecentReview](http://www.amazon.com/gp/cdp/member-reviews/A3MN5HAOHUHS2U/ref=cm_cr_pr_auth_rev?ie=UTF8&sort%5Fby=MostRecentReview) (Dec. 18, 2004).

5. PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* (6th ed. 2008).

6. Maria Marcus, Oberlin, B.A., 1954, Yale, J.D., 1957, is the McLaughlin Professor of Law at Fordham, and has taught there since 1978. Her principal subjects include Corporate and White Collar Crime, Criminal Justice, and Discovery. Also notably absent from this list is Federal Courts.

dramatically as well. By the time I relocated to Loyola Law School in 1995, the United States Supreme Court had essentially turned the course on its head. I knew how to teach the course, but few students had an interest in taking it. Maybe because Loyola required eight hours of Constitutional Law, in which so much of the substance of the Federal Courts course was covered, students did not see the value in taking an Article III redux course.

I kept switching casebooks to help me engage the students and fit better with my thinking about the purpose of the course and my scholarly interests. Professor Louise Weinberg's book, although it evolved out of the *Hart and Wechsler* school, worked better than *Low and Jeffries* for that reason.<sup>7</sup> Even though there was no culture at Loyola that Federal Courts was a great course to take, I had the privilege of teaching some terrific students over the years. However, a combination of the low enrollment of students, many of whom were taking the course simply because it had a good time slot, my own scholarly interests in mass torts and forum selection issues, and the changing nature of the doctrine, made teaching the Federal Courts course less fun, less relevant to my evolving interests, and less challenging. Eventually, I lost my enthusiasm for teaching it and wanted to teach other electives, such as Mass Tort Litigation, Complex Litigation, and International Litigation.

So, I stopped teaching Federal Courts several years ago. Thus, I was perplexed when I was invited to contribute a paper for this *Saint Louis University Law Journal*, *Teaching Federal Courts* issue. The last time I taught Federal Courts was during the spring term of 2004, but by then I had renamed the course Federal Courts and Complex Litigation.<sup>8</sup> I used Fink, Mullenix, Rowe & Tushnet, *Federal Courts in the 21st Century* as my casebook.<sup>9</sup> When an e-mail came around from our Associate Dean asking if anybody wanted to teach Federal Courts in the spring of 2009, or knew anybody that might, I thought about it. Meanwhile a colleague at Loyola sent an e-mail around opining that the course ought to be taught by a regular member of the faculty. For various reasons, nonetheless, I said no. But, once our Associate Dean identified an adjunct willing to teach it, I volunteered to talk to him about the course. We met, and I realized that I could fall in love with Federal Courts all over again.

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7. LOUISE WEINBERG, *FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER* (1994). See Mary Brigid McManamon, *Challenging the Hart and Wechsler Paradigm*, 27 CONN. L. REV. 833 (1995) (book review).

8. See Syllabus attached as Exhibit A.

9. HOWARD P. FINK, LINDA S. MULLENIX, THOMAS D. ROWE, JR. & MARK V. TUSHNET, *FEDERAL COURTS IN THE 21ST CENTURY: CASES AND MATERIALS* (2d ed. 2002).

## I. WHAT I LOVED ABOUT TEACHING FEDERAL COURTS AND HOW I TAUGHT IT

Perhaps I ought to begin by sharing something that may set me apart from most other law professors, especially those who joined the ranks of the tenure track over the last ten years or so. I got my job as a professor almost by accident. I had done well at Fordham. I had been recruited by a beloved Fordham alum, John Feerick,<sup>10</sup> to work at Skadden, Arps, Slate, Meagher & Flom, where I mostly practiced antitrust law. When Fordham's Dean, Joseph M. McLaughlin,<sup>11</sup> was appointed to the federal court, John and Dean McLaughlin decided I might be a good choice as his first law clerk. So, off I went to work with now Judge McLaughlin, two years after I had graduated. While in that job, I became enamored of the federal courts and the various issues that came before the court. I quickly learned that issues like sovereign immunity, national security, statutory interpretation, etc., were difficult and challenging to parse through. It was my beloved Federal Courts class at work in a way that my job at Skadden could not be.

Meanwhile, John Feerick was appointed the next Dean of Fordham Law School. He then gave me a call and asked if I would be his first faculty appointment. I was honored of course. Unfortunately, neither he nor I were aware of something called the Faculty Appointments Committee. Fordham at the time had been shying away from hiring its own graduates, opting instead for graduates of higher ranked schools—Hugh Hansen and Maria Marcus, for example, were two of those hires. I had no idea that there might be a problem, but after a long wait, I finally got the call that I would have the job.

I tell this story because it shows that I was not exactly into the academic game. Now, getting a job as a tenure track professor involves all sorts of mentoring, scholarly agendas, etc. I did not have any of that when I started teaching, and I believe it helped inform my approach to teaching Federal Courts. I was raw and intellectually unsophisticated, and many of my students at Fordham were as well. I knew, as when I started to teach math, with a Masters in Education and a degree in social studies, at a Greek Orthodox parochial school in Corona, Queens, that my students and I were in it together. I knew that I had to figure out an approach to get the students to learn something hard and somewhat alien to most of them.

*Low and Jeffries* helped. By the time I used their book, I knew what I wanted my students to get out of the course, and I could use that book to emphasize what I wanted to emphasize. What was that?

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10. John D. Feerick is the Norris Professor of Law at Fordham. He served as its Dean from 1982–2002. He practiced labor law at Skadden Arps from 1961–1982.

11. President Ronald Reagan appointed McLaughlin as a judge of the United States District Court for the Eastern District of New York. After he spent nine years as a District Judge, in 1990, President George H.W. Bush promoted him to the United States Court of Appeals for the Second Circuit.

To me, the Federal Courts course was kind of the “Best of Con. Law & Civ. Pro.” I thought about what I had learned putting Federal Courts in action while a law clerk, and I tried to get into the heads of my students to help them see what they needed to take from the course. Many of the students wanted to get jobs as law clerks themselves; and many of them would be practicing in large firms. Others would be working in public interest organizations. I wanted them to be well-versed in the work and workings of the federal court system. I wanted them to really get *Marbury v. Madison*,<sup>12</sup> what separation of powers was really about, and why federalism mattered. In other words, I wanted them to see that the course was really about politics in action. Try not to be intimidated by the cases and concepts, I would urge them. Instead, think of our constitutional system as a great ballroom with various dancers—the Executive Branch, the Legislative Branch, the judiciary, the administrative agencies, the states—all taking their turns dancing, and all taking their turns leading or following.

During the first ten years of teaching the course, I could dwell on so many classic battles between “liberal” justices such as Justices Brennan or Marshall, and “conservative” justices such as Justices Rehnquist or Burger, over doctrines such as justiciability,<sup>13</sup> or abstention,<sup>14</sup> for example. Sometimes, Justice Brennan would seem to take the side of the conservative justices.<sup>15</sup> I’d ask my students: “What is going on? Has Brennan lost his soul?” I would try to get them to see how the politics on the Court was playing out. How maybe Justice Brennan was keeping his finger in the dike to preserve as much of the vanishing Warren Court’s legacy as possible by trading support from the more conservative members for what really needed to be preserved. Whether the issue involved a battle between the Judicial Branch and the Executive Branch or federal power versus state power, I tried to get them to watch the cases unfold from a historical perspective so they could see the dance—back and forth at times; inexorably forward or back at other times. I had them read *Boyle v. United Technologies Corp.*,<sup>16</sup> instructing them to ignore who wrote

12. 5 U.S. (1 Cranch) 137 (1803).

13. See, e.g., *City of Los Angeles v. Lyon*, 461 U.S. 95 (1983) (Justice White writing for the majority; Justice Marshall writing for the dissent; holding the case was not justiciable); *Rizzo v. Goode*, 423 U.S. 362 (1976) (Justice Rehnquist writing for the majority; Justice Blackmun writing for the dissent; holding civil rights case not justiciable); *Laird v. Tatum*, 408 U.S. 1 (1972) (Chief Justice Burger writing for the majority; Justices Brennan and Douglas writing for the dissents; holding the case was not justiciable).

14. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (Justice Brennan writing for the majority; Justice Harlan writing the dissent; holding that civil rights lawsuit for injunctive relief could proceed to restrain state criminal prosecution under overbroad statute).

15. See, e.g., *Younger v. Harris*, 401 U.S. 37, 56 (1971) (Brennan, J., concurring) (agreeing with majority that “Our Federalism” precluded civil rights suit).

16. 487 U.S. 500 (1988).

the majority opinion (Justice Scalia, arguing for the application of federal common law)<sup>17</sup> and who wrote the dissent (Justice Brennan who argued against the expansion of judicial power and strict adherence to congressional intent).<sup>18</sup>

Using this approach got the students to think and talk. They saw that the course was really about politics and that they could have opinions. They saw that in *Boyle*, Justice Scalia went against his usual strict judicial approach as a way to enhance the Executive's power by opening up the door to the government contractor's defense. Justice Brennan went against his liberal judicial approach to try to protect a substantial jury verdict in favor of the family of a son killed in a Navy helicopter.<sup>19</sup>

I was always upfront with telling my students that I was a knee jerk liberal. But, I also told them that my study of Federal Courts—the cases they were reading as well as my reading of the academic literature and my own writing in the area<sup>20</sup>—had tempered some of my own ideas. The Burger, Rehnquist, and now Roberts Courts are a reaction to the Warren Court. Sometime later this century, an Obama Court will be a reaction to the Roberts Court. In other words, my teaching of Federal Courts led me to a greater understanding of the role that the judiciary should play in its relation to the other branches of the federal government and to the states. My understanding that what's good for the goose is good for the gander made me realize that when the Court gets too out in front of the popular will, there will be extreme reactions on the political fronts. Congress and the President will react to Supreme Court opinions with threats to strip the courts of jurisdiction, for example.

My students enjoyed the shtick about the dance, whether in the realm of separation of powers or federalism. They thought about their own politics. This somewhat simplistic historical-political approach showed them how the pendulum swings. It was a mere echo of the law review articles that discussed these issues on a far higher plane. But, it worked for me, and it worked for them. The course was fun for me to teach, my thinking about federal courts evolved, the material was challenging and compelling, and the students who took the course enjoyed it and learned what Federal Courts was all about.

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17. *Id.* at 502, 512.

18. *Id.* at 515–16 (Brennan, J., dissenting).

19. *See id.* at 500 (majority opinion).

20. *See* Georgene M. Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559 (2000) [hereinafter Vairo, *Federalism*]; Georgene M. Vairo, *Making Younger Civil: The Consequences of Federal Court Deference to State Court Proceedings: A Response to Professor Stravitz*, 58 FORDHAM L. REV. 173 (1989); Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 FORDHAM L. REV. 167 (1985).

## II. HOW MY LOVE AFFAIR WITH FEDERAL COURTS HIT THE SEVEN-YEAR ITCH

Actually, it was more like a fifteen-year itch. I had hit the academic equivalent of middle age, and my love affair with Federal Courts was over. I began to have an affair with something else. I recalled a colleague at Fordham once telling me that teaching got in the way of his scholarship. I was still green at the time, and never thought that would happen to me. But, it took on an element of truth for me. I was tired of keeping up with the classic *Hart and Wechsler* approach to Federal Courts. I was beginning to lose interest in the classic questions and orthodox answers to the *Hart and Wechsler* paradigm—that federal courts are courts of limited jurisdiction and all flows from that.<sup>21</sup> I wanted something new. I did not want to abandon my first love, but I needed a spark.

While preparing this paper, I came across Professor Richard Fallon's Vanderbilt article about the *Hart and Wechsler* Paradigm.<sup>22</sup> I had read it years ago. He wrote that despite whatever shortcomings existed, the *Hart and Wechsler* paradigm continued to hold promise for future scholarship, in areas such as: "(i) historical research, (ii) critical analysis of cases and doctrines, (iii) proposals for law reform, (iv) efforts to identify immanent values or purposes in light of which bodies of law might be rationalized, (v) depictions of unrecognized patterns or doctrinal failures to treat similar problems similarly, and (vi) development of clarifying models or analytically useful concepts or distinctions."<sup>23</sup> He singled out empirical and political scientific research as particularly important, and he noted that the changing face of the federal judiciary has important ramifications for our traditional conceptions of the judicial process and the appropriate allocation of decision-making power.<sup>24</sup>

This litany served to spur me to think about my evolution as a scholar. I am a doctrinal scholar. My scholarship had been focussing on complex dispute resolution<sup>25</sup> and forum selection.<sup>26</sup> The Supreme Court had taken some of the

21. See Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 957–58 (1994); see also McManamon, *supra* note 7, at 837–39.

22. Fallon, *supra* note 21.

23. *Id.* at 977–79.

24. *Id.*

25. See *supra* note 20; see also Georgene M. Vairo, *Why Me? The Role of Private Trustees in Complex Claims Resolution*, 57 STAN. L. REV. 1391 (2005); Georgene M. Vairo, *Mass Tort Bankruptcies: The Who, the Why, and the How*, 78 AM. BANKR. L.J. 93 (2004); Georgene M. Vairo, *Trends in Federalism and Their Implications for State Courts*, TRIAL, Nov. 2002, at 48; Georgene M. Vairo, *The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79 (1997); Georgene M. Vairo, Address at the Pound Civil Justice Institute 2008 Forum for State Appellate Court Judges: Symposium, Summary Judgment on the Rise: Is Justice Falling?, *Defending Against Summary Justice: The Role of the Appellate Courts* (2008), available at [www.abanet.org/jd/ncstj/docs/sixteen\\_pound.doc](http://www.abanet.org/jd/ncstj/docs/sixteen_pound.doc); Georgene M. Vairo, Address at the National Conference of Bankruptcy Judges: Global Peace for Whom?

fun out of the Federal Courts course. The answer to the question whether the federal courts had the power to do anything was no. No standing.<sup>27</sup> No implied causes of action.<sup>28</sup> No federal legislation in the face of the Eleventh Amendment.<sup>29</sup> No need to strip the federal courts of jurisdiction because it had become the most conservative branch—from my political perspective (and with apologies to Alexander Bickel), the most dangerous branch. It was more fun to teach and write about the game playing going on in the forum selection battle. I thought of myself as a procedure person, not a Federal Courts person.

I began to focus on the Class Action Fairness Act (CAFA). I wrote about it before it was enacted and after.<sup>30</sup> Designed to combat perceived abuses in class action practice, CAFA was signed into law February 18, 2005.<sup>31</sup> I had written an article about judicial versus congressional federalism that noted how the Supreme Court had revitalized the Eleventh Amendment, but that the conservative Congress was acting in a decidedly anti-federalist manner. It no longer had to worry about stripping the federal courts of jurisdiction.<sup>32</sup> By then, the federal courts were stocked with a majority of Republican appointed judges, and the Supreme Court could now be counted on, by conservatives, in most cases with a five-to-four vote. State courts were another matter—corporate defendants were complaining about judicial hellholes.

CAFA, an integral part of tort reform efforts, thwarts a crucial aspect of the forum selection battle. The essential purpose of CAFA is to provide expanded federal jurisdiction over large class actions and other complex, state-claim-based litigation in which there is minimal diversity. CAFA further contains a removal provision that allows cases filed in state court, but which fall within CAFA jurisdiction, to be removed to federal court.

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Finality and Due Process (November 2005); Georgene M. Vairo, *Class Action Fairness Act of 2005, Commentary and Analysis*, [www.lexis.com](http://www.lexis.com) (2005) [hereinafter Vairo, CAFA].

26. Columnist on forum selection problems for the *National Law Journal* since September 1998.

27. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992).

28. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

29. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996).

30. See Vairo, *Federalism*, *supra* note 20, at 1608–10 (discussing the possible enactment of the Class Action Fairness Act); Vairo, CAFA, *supra* note 25 (discussing the recently enacted statute; a revised version of this monograph which discusses the case law since February 2005 and the impact of CAFA is forthcoming).

31. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

32. See HART & WECHSLER, *supra* note 3, at 319–61 for a discussion of Congress's power to control federal court jurisdiction.



The political nature of CAFA was obvious.<sup>33</sup> The purpose of the Act is “to prevent judge shopping to States and even counties where courts and judges have a prejudicial predisposition on cases. Regrettably, the history has been that there are some States in the United States and even some counties where there is forum shopping, which means that lawyers will look to that particular State, that particular county to get an advantage.”<sup>34</sup>

Of course, the fact that the cases involved state law claims did not matter—Congress decided to provide defendants with a safe haven in federal court when plaintiffs filed class actions against them in state court. Providing corporate defendants a safe haven in federal court is a replay of events that took place as the United States became more industrialized after the Civil War and the turn of the nineteenth century. As business entities came to the forefront of the economy, Congress expanded federal jurisdiction to accommodate industry.<sup>35</sup>

CAFA therefore is more than a jurisdictional statute. It provides fodder for all kinds of Federal Courts issues. Instead of jurisdiction stripping, we have jurisdiction hogging. Important issues regarding the correct allocation of judicial power between state and federal courts are at the heart of the debate over CAFA.

Congress is channeling more and more state-claim-based litigation to the federal courts, where the presumption is that class certification generally will be denied.<sup>36</sup> Without the ability to obtain class certification in state courts, the powerful plaintiffs’ bar may lose its ability to leverage the claims of thousands of claimants to extract large settlements from deep pocket corporate defendants.

Of course, there is a role for Congress and the federal courts to play in ensuring fair play to all parties. Moreover, at first glance, there appears to be a sound constitutional basis for the legislation under Article III, Section 2.<sup>37</sup> It has long been understood that Congress may provide subject matter jurisdiction based on minimal diversity.<sup>38</sup> Having done so, the question that

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33. CAFA was co-sponsored in the House of Representatives by sixty Republicans and thirteen Democrats. *See* H.R. 516, 109th Cong. (1st Sess. 2005), LEXIS 2005 Bill Tracking H.R. 516.

34. 151 CONG. REC. S999 (daily ed. Feb. 7, 2005) (statement of Sen. Specter).

35. EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958*, at 13–27 (1992).

36. Additional examples of this trend are presented by the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1996) (codified at 15 U.S.C. §§ 77z-1, 77z-2, 78j-1, 77u-4, 77u-5 (2000)), and the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1999).

37. U.S. CONST. art. III, § 2.

38. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967) (complete diversity is not constitutionally required).

needs to be answered by monitoring the effect of CAFA over time is whether this was the right solution to perceived problems. Did legislation essentially ousting the state courts from resolving mass tort and other complex state-claim-based class action litigation violate the spirit or letter of the Supreme Court's Tenth and Eleventh Amendment federalism decisions?<sup>39</sup>

My Tenth Amendment argument is based on *United States v. Lopez*.<sup>40</sup> There, the Supreme Court held that Congress violates the Tenth Amendment when it imposes ministerial tasks on the states, such as the duty to perform background checks on handgun purchasers, because "such commandeering is an insult to the state as sovereign."<sup>41</sup> I suggest that CAFA is an equally severe insult to the states as sovereigns, because Congress passed the legislation based on its findings that "state courts cannot be trusted to resolve fairly cases brought under state law."<sup>42</sup> Specifically, Congress found that state courts were "sometimes acting in ways that demonstrate bias against out-of-State defendants" and "making judgments that impose their view of the law on other States and bind the rights of the residents of those States."<sup>43</sup> I suggest that *Lopez* stands for the proposition that the Tenth Amendment does not permit Congress to impair the dignity of the states; and, by permitting state law class actions to be removed to federal court, "the state's dignity interest is impaired just as surely as if it were made a defendant."<sup>44</sup> Moreover, CAFA illegitimately imposes a duty on the state courts to relinquish jurisdiction over cases brought as class actions, and it is therefore suspect under the Tenth Amendment.<sup>45</sup>

Beyond doctrine, was it wise to discard the wisdom and experience that might be found in fifty independent judiciaries because of a few problems that could have been solved in a simpler, more restrained fashion? These issues are front and center on the academic agenda, whether they are labeled as Federal Courts issues or not.

For example, my suggestion that Congress may have violated the Tenth and Eleventh Amendments has been criticized.<sup>46</sup> Professor Heather Scribner refutes my suggestion that CAFA may be unconstitutional. Rather, she states that "CAFA is a straightforward exercise of Congress' Article III power to

39. See Vairo, CAFA, *supra* note 25, at 12; Vairo, *Federalism*, *supra* note 20, at 1612–13.

40. 514 U.S. 549 (1995).

41. Vairo, *Federalism*, *supra* note 20, at 1612; see *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

42. Vairo, CAFA, *supra* note 25, at 12.

43. *Id.* (citing 28 U.S.C. § 171 (2000)).

44. *Id.* at 13.

45. *Id.*

46. See Heather Scribner, *Protecting Federalism Interests After the Class Action Fairness Act of 2005: A Response to Professor Vairo*, 51 WAYNE L. REV. 1417 (2005).

provide for diversity jurisdiction.”<sup>47</sup> She agrees, however, with my “concern that CAFA poses too great an imposition on the states’ ability to make and apply their own laws.”<sup>48</sup> Her article therefore proposes that “federal courts should abstain from deciding diversity cases where the applicable state law is unclear.”<sup>49</sup> She thus injects another classic Federal Courts concept—abstention—into the CAFA debate.

Separation of powers issues present themselves as well. Professor Kevin Clermont has written that, except for white, Republican males, the federal judiciary has been giving CAFA a restrictive, federalism-protecting interpretation on the myriad CAFA issues that courts have dealt with since February of 2005.<sup>50</sup> A classic *Marbury v. Madison* issue is there, too: Did Congress exceed its Article III power in enacting CAFA?<sup>51</sup> Indeed, Professor C. Douglas Floyd has argued that the interstate commerce justification for CAFA is inadequate to support its enactment.<sup>52</sup> And, Professor James Pfander has written an article that delves into the federalism implications of federal-state forum shopping.<sup>53</sup> Federalism. Separation of powers. It is all there. Even when I spend a bit of time on CAFA in my Civil Procedure class, I talk about all this. Of course, CAFA, and the Federal Courts issues it raises, is a centerpiece of my Mass Tort Litigation and Complex Litigation courses.

### III. WHY I MAY TEACH FEDERAL COURTS AGAIN, OR AM I ALREADY?

I realized that although I was no longer teaching classic Federal Courts, I was teaching Stealth Federal Courts in all my classes. These electives never became advanced Civil Procedure, focusing simply on how much judges get paid and what happens when the clerk of a court dies. While I did not spend the time on justiciability and some of the other classic issues, I used these electives to give students a second look at some of the most important separation of powers and federalism issues and talk about them in action. We did not go through all the standing cases, or abstention cases, Eleventh Amendment cases, etc. We did talk about the issues. I could never forget my first love—the love of my life—even though I was having an affair with forum selection and mass torts.

47. *Id.* at 1419–20.

48. *Id.* at 1420.

49. *Id.*; see *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 25–30 (1959).

50. Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1553 (2008).

51. See *supra* notes 37–39 and accompanying text.

52. C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487 (2006).

53. James E. Pfander, *Forum Shopping and the Infrastructure of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 355 (2008).

Preparing this article and meeting the Loyola Federal Courts adjunct made me remember why I used to love teaching Federal Courts. Maybe I will teach it again. But, if I do, I doubt that I will take the classic approach. It is more likely that I will revive the course as “Complex Litigation and Federal Courts” or vice versa. I will more than likely use something like the Fink book again. Its approach jives with my scholarly interests and the parts of Federal Courts that my academic and practical experience enable me to teach about the big issues with passion and enthusiasm. I will leave the paradigm shifting to others. I am a mature, getting-longer-in-the-tooth-each-day professor. I have reached the “Age of Anecdote.” I need to teach what I am enthusiastic about and know. My students need me to bring the real essence of Federal Courts issues alive. I cannot do that any more by making my way through the Federal Courts class the *Hart and Wechsler* way. I have to make my own way. Perhaps my history with the Federal Courts course sheds light on why there are so many Federal Courts casebooks.<sup>54</sup> We are each trying to find a book that melds with our conception of what the Federal Courts course needs to be at any point in time. And yet, there is no better time than now to revive the best of what *Hart and Wechsler* is all about—the relation of the federal branches of government and the relationship between federal and state governments.

Think about the important issues of our time: torture; Guantanamo Bay; international tribunals; endless wars. Students tended to tire of our slog through the non-Article III courts cases. But, is there a more important issue than that today? Are President Bush’s courts constitutional? Does the Supreme Court get to tell him they are not?<sup>55</sup> Even though Obama won the election on November 4, 2008, the role of the Supreme Court looms so large. We are in exciting and dangerous times. We need to have students, as well as law professors, thinking about and falling in love with the classic Federal Courts issues all over again. The orthodox answers are so much less important than those questions. So, thank you John McAnnar and Saint Louis University School of Law for inviting me to prepare this paper.

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54. See Barrister Books, <http://www.barristerbooks.com/Product/Product.asp> (last visited Jan. 27, 2009) (offering eight varieties of Federal Courts casebooks); Law Books – A New & Used Law Book Store – LawBooksForLess.com, [http://www.lawbooksforless.com/law2/front/display\\_topic.php/page/upper\\_level\\_courses/topic\\_id/56](http://www.lawbooksforless.com/law2/front/display_topic.php/page/upper_level_courses/topic_id/56) (last visited Jan. 27, 2009) (offering eleven varieties of Federal Courts casebooks); West Casebooks for Law Students, <http://west.thomson.com/store/Results.aspx?Ntx=mode+matchallpartial&Ntk=KEYWORD-SEARCH.9&Nty=1&Ntpc=1&N=4294966538&Ntt=casebook&Ne=6&Ntr=1> (last visited Jan. 27, 2009) (offering nine varieties of Federal Courts casebooks).

55. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

## Exhibit A

**FEDERAL COURTS AND COMPLEX LITIGATION**

## SYLLABUS—SPRING 2004

## PROF. GEORGENE VAIRO

The Text is Fink, Mullenix, Rowe & Tushnet, *Federal Courts in the 21st Century*. Most readings are keyed to the text.

- Week 1: The Structure of Federal Jurisdiction, pp. 1-35; Also read *Marbury v. Madison*
- Week 2: The Judicial Role: The Justiciability Doctrines, pp. 37-182
- Week 3: Congress' Power to Regulate Jurisdiction, pp. 183-214;  
The Potential Reach of Federal Jurisdiction, pp. 215-252
- Week 4: Using the Federal Courts to Regulate State Government, pp. 253-308
- Week 5: Statutory Federal Question Jurisdiction, pp. 309-345
- Week 6: Implied Causes of Action, pp. 346-373
- Week 7: Diversity and Alienage Jurisdiction, pp. 375-425
- Week 8: Supplemental Jurisdiction, pp. 427-447;  
Removal, pp. 449-480
- Week 9: Expanding & Restricting Complex Federal Litigation, pp. 705-750  
(Rules 20, 19 & 24)
- Week 10: Pp. 750-820 (Interpleader, Consolidation & Venue, FNC & MDL)
- Week 11: Pp. 820-875 (Abstention & Injunctions)
- Week 12: Pp. 875-909 (Applicable law problems in complex litigation);  
Aggregative Procedure: Class Actions, pp. 587-622
- Week 13: Class Actions, pp. 622-675

- Week 14: Class Actions, pp. 675-703;  
Interjurisdictional Preclusion, pp. 1003-1018  
Rooker-Feldman Doctrine, pp. 973-977
- Week 15: Chapter 13, Non-Article III Courts, pp. 909-956