

TEACHING FEDERAL COURTS: FROM BOTTOM LINE TO MYSTERY

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INTRODUCTION

Federal Courts sounds dry. It isn't. The subject controls some of the most compelling issues of our time; the War on Terror,¹ the Terri Schiavo litigation,² and the presidential election of 2000³ are just a few of the controversies that have turned on Federal Courts issues. In just the last four years, the standing doctrine alone has spawned decisions impacting such hot-button issues as greenhouse gas emissions,⁴ corporate tax breaks,⁵ school desegregation,⁶ election financing,⁷ faith-based initiatives,⁸ and a school child's freedom to decline to recite the Pledge of Allegiance.⁹ Federal Courts cases acquaint students with a large portion of the Constitution, introduce profound debates about the optimum structure of government, and offer practical knowledge about federal litigation. Yielding even larger lessons beyond its doctrinal limits, the course renders students expert in the structure of Supreme Court opinions and initiates students in rhetorical and linguistic

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1. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

2. *See Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. 2005).

3. *See Bush v. Gore*, 531 U.S. 98 (2000).

4. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

5. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006).

6. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007).

7. *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2759 (2008).

8. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007). The Roberts Court has in fact issued many more standing opinions, but not all may be fairly characterized as implicating "hot buttons." *See, e.g.*, *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. ___, 128 S. Ct. 2531 (2008) (dispute concerning payphones).

9. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

devices useful where human interaction calls for subtlety (and perhaps even obfuscation).¹⁰

Despite these compelling reasons for taking Federal Courts,¹¹ many students run from the subject. In teaching the course, I have experimented with remedies to counteract this tendency to flee. Now, after more than a few years teaching Federal Courts, I have several reliable antidotes, which divide roughly into five categories: (1) bottom-line practicality; (2) current events; (3) storytelling; (4) taxonomy; and (5) mystery. The antidotes, which reflect progressively expanding levels of abstraction, make the course less scary and more appealing. My real design though is to harness the antidotes as vehicles to transport students to a sophisticated level of learning and understanding.

I. BOTTOM-LINE PRACTICALITY

The enormous complexity and subtle abstraction of Federal Courts doctrine inspires much student concern. Students can become disoriented as they miss the big picture (the proverbial forest) while entangled in the doctrine (the proverbial trees). One principle, however, offers steadfast support through the thicket of doctrinal details: *all Federal Courts cases, at bottom, concern whether a case can stay in federal court*. While a case may present a host of seemingly obscure legal issues, a bottom line question provides focus: can the federal court get to the merits of the plaintiff's claim? To reinforce this concept, I often supplement discussion with a graphical timeline to illustrate strands of doctrine or events in specific cases. The skeleton of this line starts on the far left with a point representing the beginnings of a case or controversy, a middle point represents filing a complaint in a United States district court, and a far right point designates ultimate review in the United States Supreme Court.¹²



10. For ideas on how to illustrate linguistic devices used in Federal Courts opinions, see Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75 (1998) (surveying use of passive voice, nominalization, subject complements, role reversal, relexicalization, verb form, and tropes in holdings of federal jurisdiction cases). See also Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 961 (1997) (observing how the Supreme Court decided 1990s federalism decisions in a “highly formalistic” manner by reasoning deductively “from largely unjustified major premises to conclusions”).

11. And I haven't even mentioned the presence of Federal Courts issues in nearly one-third of the multi-state bar examination questions on constitutional law.

12. For a more elaborate timeline, illustrating the intricacies of the *Younger* doctrine, see LAURA E. LITTLE, *FEDERAL COURTS: EXAMPLES AND EXPLANATIONS* 199 (2007).

A corollary principle explains parties' incentives: the plaintiff generally wants the case *in* federal court and the defendant generally wants the case *out* of federal court.¹³ Drawing students' attention to these incentives provides the opportunity to frame discussion in light of litigation strategy. One can, for example, discuss the structure of the original suit in *New York Times v. Sullivan*,¹⁴ explaining how the plaintiff may have joined defendants from his home state in order to defeat complete diversity and pointing out how the *Mottley*¹⁵ rule hogtied the defendant New York Times, preventing it from raising its First Amendment defense first in federal, rather than state, court. This focus on parties' strategic behavior not only injects larger context to fine threads of doctrine, but can dramatize material that does not always hold uninterrupted interest for the uninitiated.¹⁶

Concentrating on the bottom line serves as a pedagogical anchor for students and showcases an important policy issue pertaining to court access. By evaluating whether a Federal Courts opinion allows a specific class of plaintiffs to stay in federal court, students can see how a topic seemingly divorced from subject matter jurisdiction—such as complete preemption¹⁷ or pleading requirements¹⁸—directly controls whether certain plaintiffs have federal court access.

II. CURRENT EVENTS

People love an inside story and an expert understanding of a particular subject matter. Consistent with these inclinations, students respond well to discovering a news item that implicates their learning.¹⁹ The news story

13. The obvious exception, of course, being cases presented in the posture of a removal petition.

14. 376 U.S. 254 (1964). An excellent source of background drama for this case is ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

15. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908).

16. George Rutherglen also advocates focus on parties' strategic motivation in litigation as a means to add interest to a course in Civil Procedure. See George Rutherglen, *Teaching Civil Procedure: Past and Prologue*, 47 ST. LOUIS U. L.J. 13, 15–20 (2003).

17. See, e.g., *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11 (2003) (complete preemption creates federal question jurisdiction in case concerning usury claim against national bank); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 399 (1987) (complete preemption creates federal question jurisdiction where plaintiff seeks to enforce claim under collective bargaining agreement).

18. See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (pleading requirements in Sherman Act antitrust case); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (pleading requirements in § 1983 suits).

19. Although little research on the use of current events in legal education is available, studies in educational fields show the utility of news articles in the classroom. See, e.g., Kathleen Cornely, *Content and Conflict: The Use of Current Events to Teach Content in a Biochemistry Course*, 31 *BIOCHEMISTRY & MOLECULAR BIOLOGY EDUC.* 173, 175 (2003) (discussing the use

illustrates a concrete setting in which to view abstract principles learned in the classroom and delivers an “in the know” feeling that validates the hard work that went into mastering those abstract principles. Students both appreciate seeing how the doctrine plays out in real life and enjoy special insight about how legal principles animate the forces at work in the news story. I do not leave to chance the possibility that students actually discover news stories; instead I distribute electronic or hard copy versions of stories I encounter myself. And, of course, Federal Courts jurisprudence is full of news pegs. In addition to civil rights and military tribunal issues, preemption issues have most recently posed a particularly strong presence in headlines.²⁰

Interest and understanding also expand when students appreciate how technical “procedural” rules might control whether courts recognize and develop constitutional principles at the center of public debate. For example, a topic as seemingly dry and obscure as the Eleventh Amendment is crucial to whether federal courts recognize and enforce federal civil rights against state government incursion. Highlighting this observation, I introduce the Eleventh Amendment materials by observing that, if the Supreme Court had indulged suggestions to read the Amendment’s language broadly, the public would never have seen the likes of *Roe v. Wade*,²¹ *Goldberg v. Kelly*,²² *Brown v. Board of Education*,²³ or *Lawrence v. Texas*.²⁴ Likewise, students light up upon learning how a rule as apparently legalistic as *Teague v. Lane*’s²⁵ retroactivity principle can dramatically retard the development of constitutional protections for the criminally accused.

of case studies based on current events as an effective method of teaching biochemical principles and heightening student interest in the topic); Michael J. O’Sullivan, *Teaching Undergraduate Community Psychology: Integrating the Classroom and the Surrounding Community*, 20 TEACHING OF PSYCHOL. 80, 82 (1993) (reporting that students credited current events discussion with enhancing learning of community psychology concepts).

20. The connection between federal preemption and personal injury actions has recently garnered preemption issues a place on the front page. See, e.g., Adam Liptak, *Drug Label, Maimed Patient and Crucial Test for Justices*, N.Y. TIMES, Sept. 19, 2008, at A1 (discussing products liability preemption issues in the Supreme Court, October Term 2008). Perhaps more surprising to students, however, is the interplay among preemption issues, ideology, and court power in the context of business matters. For interesting sources on the connection between business and preemption see David G. Savage, *Trumping the States—Business Is Finding Success in Federal Pre-emption Cases*, A.B.A. J., May 2008, at 26 (describing pro-business benefits of United States Supreme Court’s pro-business jurisprudence); Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38 (reviewing the exceptionally pro-business orientation of the recent Supreme Court cases). For a sampling of civil rights and other headline-catching Federal Courts issues see *supra* notes 1–9 and accompanying text.

21. 410 U.S. 113 (1973).

22. 397 U.S. 254 (1970).

23. 347 U.S. 483 (1954).

24. 539 U.S. 558 (2003).

25. 489 U.S. 288 (1989).

Through understanding the implications of Federal Courts decisions in the daily lives of regular people, students learn the “dark underbelly” of procedural rules. Some react more cynically than others to the notion that decision makers might conceal the impact of legal principles within a shroud of jurisdictional rules. Nonetheless, all students benefit from knowing that their work with the complex doctrines enables them to hone their expertise on the wheels of power, including mechanisms by which a decision maker might manipulate the legal system to elude the attention of the press and public. This access to insiders’ law—one hopes—contributes to students’ sense of calling and role morality. Students may start to appreciate the importance of lawyers acting as ambassadors, translators, and opinion leaders in a world of principles impermeable to the uninitiated.

III. STORYTELLING

My invocation of ordinary people with ordinary problems is not confined to real news items or social ills that capture headlines. I also travel into the realm of imagination to develop stories exposing how rules affect citizens who are experiencing pain or hardship. While arguably trite if presented for fiction’s sake alone, the stories give contour to the legal discussion and provide grounding for students as they grapple with the specifics of the rules. For example, I begin what is perhaps the most technical and confusing unit in a Federal Courts course—habeas corpus—by asking students to imagine two competing narratives: (1) the plight of an innocent defendant who was railroaded by overzealous prosecutors and judges running for reelection and (2) the emotions of a homicide victim’s relative toward a convicted defendant who has successfully convinced a habeas court to order a new trial.

Similarly, I create for each unit at least one hypothetical problem designed with several goals in mind. First, students should enjoy a feeling of mastery after evaluating possible resolutions of the problem. Second, the problem’s facts should expose ambiguities or “soft spots” in the legal doctrine. In this way, students not only learn to identify the law’s deficiencies and to tolerate lack of certainty, but they also practice making arguments on many sides of a legal question. The problem should provide an opportunity for characterizing facts so as to support competing points of view on the law. If possible, the problem should demonstrate how unexpected consequences unfold when a legal rule developed in one context is applied in another. From this exercise, students see how doctrines can play out in litigation, reinforce their knowledge of legal rules and the dynamics of common law development, and practice rhetorical skills.

IV. TAXONOMY

Some Federal Courts students take comfort in the concrete qualities and narrative aspects of hypothetical problems and current events. Others are more attracted to the work of categorizing cases and doctrines. Those who enjoy the academic side of law school are often predisposed to this latter approach to processing new information. What law professor among us has not been teased for our analytical tendencies to sort and classify all that life hands us!

The process of creating taxonomies and categorizing data is a crucial pedagogical tool²⁶—particularly for those who are inclined to use their brainpower in such ways. In modeling (and indeed endorsing) this way of learning the material, I focus first on governmental theory. Specifically, I work with the class in identifying whether opinions express a view on the best department of government for handling the legal problem presented: State or federal governments? Executive, legislative, or judicial branches? In the process of discerning these preferences, students must focus on such matters as the constitutional language cited, implicit or explicit assumptions about parity between state and federal courts, and ideologies reflected about which department of government is most capable of handling a particular legal problem while simultaneously preserving liberty.

The work of identifying assumptions about governmental values affords an opportunity for students to get the cases into their heads, to dissect reasoning, and to appreciate how governmental values color and affect the disposition of Federal Courts cases. In addition to providing this opportunity for students to identify governmental values at play in the case law, I introduce a number of jurisprudential concepts that they can practice using to sort the cases, such as formalism, functionalism, pragmatism, legal process, and legal realism.

I hold fast to one caveat: understanding diminishes if students hold too fast to categories and classifications. For deep appreciation, students need to understand the dangers of creating an immutable grid for organizing the essence of case law. They benefit from learning to tolerate (and maybe even to celebrate) ambiguity and appreciating that many cases fail to fit perfectly into a particular paradigm.²⁷ The cases are complex and likely filled with contradiction.

26. See Thomas J. Shuell, *Phases of Meaningful Learning*, 60 REV. OF EDUC. RES. 531, 541–43 (1990) (outlining the process of attaining deeper learning through categorization of information into preexisting schemata and refinement of these schemata through application to specific cases).

27. Learning theorist Thomas Shuell explains that in the intermediate phase of learning, students form new “schemata” or matrices that provide them with greater ability to conceptualize at high levels of abstraction. *Id.* at 542. Shuell makes clear, however, that these “new structures and schemata do not yet allow the learner to function in a fully autonomous, or automatic, basis.” *Id.* I maintain that a critical understanding of the limits of schemata is crucial to the goal of

The dangers of essentializing case law are evident in all legal contexts, particularly those governed by common law, with its erratic development and dependence on the specifics of parties' disputes and litigation strategies. Several factors enhance these dangers for Federal Courts opinions. First, since Federal Courts decisions concern largely abstract phenomena divorced from boundaries in physical reality, courts enjoy more latitude in creating indeterminate and mutable doctrine in that area. In related fashion, as explored below, Federal Courts decisions seem to reflect complex unstated agendas.²⁸ For these reasons, a student's characterization of a decision may belie the decision writer's intended effect or the intention discerned by another reader. Moreover, the subject matter of Federal Courts—court power—is not one that lends itself to candor and to clarity, since the agents writing—United States Supreme Court Justices²⁹—often stand to benefit directly from the opinion.³⁰ Similarly, the institutional context of federal jurisdiction decisions may counsel the Justices to avoid “flashpoints” or “landmines” that spark the attention of other interested entities (such as administrative agencies, other courts, and Congress), inspiring those entities to look for ways to circumvent the decision's force.³¹ In light of these factors, I counsel students to be cautious in becoming wedded to their own characterizations of decisions. One student's classification of the decision may belie the Justices' intended effect for the decision or vary dramatically with another reader's rational interpretation of its words.

To sensitize students to the dangers of trying to distill an immutable essence from the Federal Courts opinions, I ask students to identify possible paradoxes or contradictions in the opinion writers' positions. I might ask, for example, why Justice Brennan—ordinarily associated with expanding federal authority—restricted federal court access in *Franchise Tax Board v. Construction Laborers Vacation Trust*,³² or why Justice O'Connor—normally associated with deference to state prerogatives—might have expanded federal

developing students' autonomous facility with legal materials. This facility includes the students' ability to see beyond orthodox paradigms for conceiving the case law.

28. For a discussion of ulterior motives and unstated agendas, see *infra* notes 39–41 and accompanying text.

29. See Little, *supra* note 10, at 120–22 (noting that Justices often use the services of ghostwriter law clerks but still maintain ultimate control of the work product).

30. See *id.* at 155 (showing how sensitive issues of judicial power may affect the manner in which opinions are written).

31. See, e.g., WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 20 (1964) (observing that opinion writers may be mindful of avoiding “imprudent judgments” that could “undermine public faith in the Justices and strengthen interest-group leaders and government officials who support policies contrary to those of the Court”).

32. 463 U.S. 1 (1983).

court power to review state decisions in *Michigan v. Long*.³³ When the Supreme Court issued several pro-business, pro-preemption decisions³⁴ during the October Term of 2007, were nearly all the Justices acting inconsistently with their usual beliefs? After all, those Justices who generally vote to restrict federal power voted to expand it through federal preemption, and those Justices who generally champion the rights of individual citizens voted instead to protect corporate assets.³⁵

Similarly, if a student offers a characterization of an opinion such as “liberal” or “conservative,” I inquire about those labels. What is the point of reference for defining these terms? Does the identity of the opinion’s author give the opinion that character? Isn’t it possible that the opinion is the product of significant compromise (and consequent irrationality), which affects how one should properly understand the opinion? How do we calibrate the concepts “liberal” and “conservative”? Should economic values, governmental values, and all other social values be considered? Should we develop a measure based on the “median Justice”³⁶ for the Supreme Court at fixed points in time?

To encourage flexibility in students’ conceptions of doctrinal categories, I offer them hypothetical fact patterns that present several routes for resolution. In this way, students see that doctrinal boundaries blur and legal problems can be characterized in myriad directions.³⁷ For example, a hypothetical presenting a possible *Pennhurst*³⁸ Eleventh Amendment question might be disposed of as a supplemental jurisdiction problem, or the state law complication in the hypothetical might be avoided if the facts are presented as an invitation to create federal common law.

33. 463 U.S. 1032 (1983).

34. See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. ___, 128 S. Ct. 2605 (2008) (pro-business); *Riegel v. Medtronic, Inc.*, 552 U.S. ___, 128 S. Ct. 999 (2008) (pro-preemption).

35. See, e.g., *Riegel*, 128 S. Ct. at 1000 (Chief Justice Roberts and Justices Scalia, Kennedy, Souter, Thomas, Breyer, and Alito joined the entire majority opinion finding federal preemption of cardiac patient’s state law tort action against the manufacturer of a balloon catheter); *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. ___, 128 S. Ct. 989, 990 (2008) (Chief Justice Roberts and Justices Breyer, Stevens, Kennedy, Souter, Thomas, Ginsburg, and Alito joined the majority opinion finding federal preemption, shielding corporate delivery services from state laws requiring them to verify buyer’s legal age before delivering goods such as cigarettes).

36. Anna Harvey, *What Makes a Judgment “Liberal”? Coding Bias in the United States Supreme Court Judicial Database* 1–2 (Working Paper Presented at the 3rd Annual Conference on Empirical Legal Studies Papers at Cornell Law School, Sept. 13, 2008), available at <http://ssrn.com/abstract=1120970> (discussing definitional problems for terms “liberal” and “conservative” as well as introducing the concept of “liberal judgment”).

37. For further discussion of characterization possibilities, see Laura E. Little, *Characterization and Legal Discourse*, 46 J. LEGAL EDUC. 372 (1996).

38. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

V. MYSTERY

One must assume that the Justices are not blind to the significant impact of jurisdictional rulings on the fortunes of litigants and on the development of substantive law.³⁹ One might also expect that these effects might influence the result and reasoning in cases. Legions of law review articles and other scholarly criticism explore and attempt to document ideological and partisan ulterior motives underlying Federal Courts decisions.⁴⁰ Yet, as a pedagogical approach, ceaseless reference to ideological agendas and ulterior motives unsettles students—leaving them with many seemingly mysterious, unanswered questions: How do I identify the true motive for a decision? Should I ignore the stated reason for a decision? Is the common law methodology of explaining factual distinctions among cases a sham?

Analysis of ideological and partisan motives can thus be disorienting for the beginning student struggling with a complex web of doctrines.⁴¹ Yet students should consider these matters in order to develop a more subtle understanding of both the specific cases governing federal jurisdiction as well as the more general question of whether ideological motivations eliminate the credibility and legitimacy of legal rules altogether. For this reason, I lead students into the mysterious territory of motivation, but do so after we are well into the course, once I get a sense that most students are proficient in deciphering Federal Courts cases.

To broach the matter of Justices' motivations, I present the following questions to students: Why does the ideology popularly known as conservatism so often get yoked to states' rights? Why does the ideology popularly known as liberalism get yoked to federal governmental strength? Is this an accident of history, or do the ideologies link analytically to a particular preference for one

39. See, e.g., Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L.J. 89, 89 (1998) (using terms “naked ideology,” “naked politics,” and “raw substance” to suggest that “jurisdictional rulings do (and should) often turn on their direct substantive implications for the litigants and the broader development of substantive law”).

40. See, e.g., Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 549 (2008) (endorsing the view that in allocating cases between state and federal court, the Supreme Court is not acting “impartially” and is instead expecting that the allocation decision will ultimately deny a constitutional guarantee); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between State and Federal Courts*, 104 COLUM. L. REV. 1211, 1226 (2004) (“[T]here is a very real concern whether jurisdictional outcomes are . . . the product of naked ideology.”); Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 319 n.65 (1984) (characterizing a traditional Federal Courts course as “the purest of contentless legalist rituals, in which all ‘policy’ arguments are grounded in funhouse mirror versions of Competence and Federalism whether they can conceivably be brought to bear on particular cases or not”).

41. See generally Shuell, *supra* note 26, at 534, 544 (arguing that learning methods and content should vary according to where students are in the learning process and that premature introduction of certain matters “may be counterproductive”).

governmental unit rather than another? For example, do smaller units such as states more ably accommodate values normally associated with conservatism?

Once we introduce and discuss these questions, I ask the students to read the remaining cases in the course with these questions in mind. I remind them of this angle on the material on the final day of the course, admonishing them to keep the questions in mind as they complete their full review of the course. My hope is that channeling their inquiry through this particular lens will encourage them to read the cases closely and empower them to think critically about the opinions without losing their grounding as they acquire the basic rules. They can never know what the Justices are truly trying to accomplish, but the questions provide a way to evaluate the verity of proffered reasoning and to comprehend profound questions about political structure.

CONCLUSION

Through the five devices of bottom-line practicality, current events, storytelling, taxonomy, and mystery, I aim to give students a toehold for understanding and insight into the richness of the material presented in Federal Courts. Some of the devices trick students into learning. For example, the advice to focus on the bottom-line effect of a rule allows students to stumble upon merits-manipulating motives behind jurisdictional principles. Likewise, the use of emotional hypothetical stories engages students unwittingly in a process of learning by doing. And urging them to create comforting taxonomies according to labels such as “conservative” and “liberal” contrives to introduce them to the contingent nature of categories as well as the categories’ connection with important political and jurisprudential theories.

The trick, however, is benign. I have found that the five angles on the material are effective stratagems for steeping students in intricacies of Federal Courts law and empowering them to assess critically larger issues of legal process. Federal Courts is an enormously rich subject, with ramifications far beyond its apparent boundaries. Whatever Federal Courts teachers can do to keep future lawyers focused on the subject in an expansive, contextualized sense is an essential contribution to the profession.