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## FIFTY YEARS (MORE OR LESS) OF "FEDERAL COURTS": AN ANNIVERSARY REVIEW

*James E. Pfander\**

For some time now, legal scholars have treated doctrinal analysis in the field of Federal Courts as taking place within the "Hart & Wechsler" paradigm.<sup>1</sup> Named after the casebook that has been

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\* Prentice H. Marshall Professor of Law, University of Illinois College of Law. Many thanks to David Warrington, Director of Special Collections at the Harvard Law Library, for help both with my review of the Hart papers and with nettlesome follow-up questions. Many thanks as well for comments on an early draft of this piece to Don Doernberg, Dick Fallon, Willy Fletcher, John Jeffries, Dan Meltzer, John Oakley, Judith Resnik, Tom Rowe, David Shapiro, Suzanna Sherry, Jay Tidmarsh, Mark Tushnet, and Louise Weinberg. Much has changed since the piece first circulated, making my debt the greater and the customary absolution the more applicable. Thanks finally to the students at Notre Dame for their gracious invitation to participate and their patient tolerance of a difficult, long distance relationship.

1 For the work that defines the paradigm, see generally HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953) [hereinafter H&W I]. The book's fourth edition appeared in 1996. See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (4th ed. 1996) [hereinafter H&W IV]. Views range from the friendly criticisms of those who generally applaud the work of Professors Hart and Wechsler, and their successors, see generally Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688 (1989) (reviewing PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (3d ed. 1988) and expressing admiration for the work in general, but criticizing its failure to give greater prominence to the federal judicial role in protecting federal rights); Henry P. Monaghan, *Hart and Wechsler's The Federal Courts and the Federal System*, 87 HARV. L. REV. 889, 894-95 (1974) (book review) (suggesting that the casebook might benefit from a clearer distinction between its treatment of its two major, dissimilar subjects: the choice of state and federal law, and the enforcement of federally secured rights), to those insiders with more doubts about the relevance of the elaborate enterprise, see generally Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993 (1994) (urging professors to abandon the Hart & Wechsler textbook in favor of home-made texts); Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021 (1994) (arguing that the traditional paradigm has missed significant issues such as race and gender), to those who stand outside and question the relevance of federalism more broadly. See Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 319 n.65 (1984) (describing the course as a mindless application of the doctrine of federalism to all questions).

credited with creating the field,<sup>2</sup> the (Henry) Hart & (Herbert) Wechsler paradigm refers to a particular way of analyzing the problem of allocating decisionmaking authority within the federal system of the United States. Closely associated with the principle of institutional settlement and the Legal Process school at Harvard,<sup>3</sup> the Hart & Wechsler paradigm portrays Hart and Wechsler as proponents of a shared style of doctrinal analysis, and with some reason. Both participated in the founding of the Legal Process school: Hart as a member of the Harvard faculty, and the author with Albert Sacks of the unfinished casebook that gave Legal Process its name; Wechsler as a professor at Columbia who worked with Hart, visited Harvard during the 1950s,<sup>4</sup> and later wrote *Toward Neutral Principles of Constitutional Law*,<sup>5</sup>

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2 For reviews that characterize Hart & Wechsler as the pioneering work in the field, see Amar, *supra* note 1, at 688 (stating that the casebook was "probably the most important and influential casebook ever written"); Philip B. Kurland, Book Review, 67 HARV. L. REV. 906, 907 (1954) (describing it as the "definitive text"); Paul J. Mishkin, Book Review, 21 U. CHI. L. REV. 776, 776-77 (1954) (describing it as "a masterful contribution to the literature"); Henry P. Monaghan, Book Review, 83 HARV. L. REV. 1753, 1753 (1970) (describing it as a "monumental" work which is "universally regarded as a classic").

3 For a nice introduction to the Hart & Wechsler paradigm, emphasizing the centrality of the Legal Process thinking on its development and application, see generally Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994) (describing the paradigm as defined by Hart and Wechsler's decision to apply Legal Process methodology and its focus on the principle of institutional settlement to a range of questions that they had linked together in their casebook for the first time). See also Amar, *supra* note 1, at 693-95 (emphasizing the importance of the Legal Process school in the selection of material and methodology in Hart and Wechsler). On the Legal Process school and the pioneering work of Henry Hart and Albert Sacks in developing its principle of institutional settlement, see William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at li, lxxxiii-lxxxv, xcv-xcvi (W. Eskridge & P. Frickey eds., 1994) (suggesting that both the Hart & Wechsler casebook on Federal Courts and the Hart & Sacks manuscript on Legal Process featured the principle of institutional settlement as their defining methodology).

4 See Eskridge & Frickey, *supra* note 3, at c (describing the creation of the "Legal Philosophy Discussion Group" at Harvard, and Wechsler's participation with the group during his visit to Harvard in 1956); cf. Ruth Bader Ginsburg, *In Memory of Herbert Wechsler*, 100 COLUM. L. REV. 1359, 1359 (2000) (describing her recollection of Wechsler's visit to Harvard in 1956).

5 See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For a critique of Wechsler's connection to Legal Process, see generally Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REFORM 561 (1988) (portraying Wechsler's famous article on neutral principles as a product of Legal Process thinking, and depicting Wechsler as blind to an anti-subordination principle in *Brown* that other scholars more readily perceived).

the famous 1959 article that many regard as a founding text of the Legal Process school.

Fifty years (more or less) have now passed since the first exposure of students at Harvard, Columbia, and elsewhere to the Hart & Wechsler paradigm and to the course in Federal Courts, an occasion that invites an anniversary review. One might approach such an anniversary rumination from a variety of perspectives. Those with a numerical bent might offer citation counts<sup>6</sup> assessing the impact of the Hart & Wechsler paradigm on scholars,<sup>7</sup> judicial decisionmakers,<sup>8</sup> and the Supreme Court.<sup>9</sup> Those with an interest in intellectual history might focus on the course's close association with the principle of institutional settlement and the development by Hart and Sacks of their influential materials on the legal process.<sup>10</sup> Still others might emphasize continuity, and the debt that Professors Hart and Wechsler owed (and acknowledged) to those (like Felix Frankfurter) who had come before them.<sup>11</sup> Some may propose to reconsider the paradigm,

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6 On the use of citation counts to assess scholarly impact and productivity, see Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEG. STUD. 451, 468–70 (2000). See also Theodore Eisenberg & Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. LEG. STUD. 373, 376–85 (1998). For Hart's numerical assessment of the workload of the Supreme Court, see *infra* notes 86–95 and accompanying text.

7 The citation counts were taken on December 3, 2001. In the Westlaw "tp-all" database, the command "hart /5 wechsler" yielded 1602 citations. For purposes of comparison, consider that a search for references to the Field, Kaplan casebook on Civil Procedure, via the command "field /4 kaplan," yielded eighty-seven citations. On the use of the "tp-all" database as a measure of scholarly impact, see Eisenberg & Wells, *supra* note 6, at 380; cf. Leiter, *supra* note 6, at 468 (expressing a preference for the narrower "jlr" database).

8 In the Westlaw "allfeds" database, the same command yielded 861 lower court citations (954 less the ninety-three citations attributed to the Supreme Court). In the "allstates" database, the command yielded fifty-nine citations. The disparity suggests that Hart & Wechsler may be less influential with state judges, or it may reflect federal-state differences in habits of judging, citation practices, and selection of law clerks.

9 In the Westlaw "sct" database, the command yielded ninety-three citations.

10 See *supra* note 3 and accompanying text (linking Federal Courts scholarship to the Legal Process school).

11 Professor Frankfurter offered a course in "Federal Jurisdiction and Procedure" at Harvard Law School before his appointment to the Supreme Court of the United States. See *infra* note 25. For a revealing account of the history of federal courts, and Frankfurter's role in urging the centrality of federalism-based arguments, see generally Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism,"* 27 GA. L. REV. 697 (1993). Others still might trace the course's origins to the appearance of Professor Medina's casebook in 1926, the first to include a focused treatment of overlapping state and federal power as part of the traditional course on federal practice

considering both the range of methodologies that scholars might employ and the sorts of issues that we should include in, and omit from, our teaching and scholarship.<sup>12</sup>

In this Article, I will consider the Hart & Wechsler paradigm from the perspective of its leading figures. First, I will examine the field from the vantage point of Henry Hart himself, relying on the class notes that he made as he prepared to teach his course in "Federal Courts."<sup>13</sup> Housed with the Hart papers at Harvard, the class notes I reviewed range from the late 1940s, when Hart returned to the course at the conclusion of World War II, to the late 1960s, when he taught the course for the last time before his death in 1969. With their surprising detail, one can see how Hart's own thinking about the course evolved over time, and how he used the classroom as a proving ground for his ideas. Apart from the insights into Hart's view of the canon, the notes reveal Hart's own answers to the many questions—about substance, process, relevance, and change—that occupy the discipline today. Hart's argument in the late 1960s for the continuing relevance of federalism may look surprisingly familiar, in tone if not in

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and procedure. *See generally* HAROLD R. MEDINA, *CASES ON FEDERAL JURISDICTION AND PROCEDURE* (1926). For an account of the book in the course's development, see McManamon, *supra*, at 760–61 (noting the importance of federal-state issues in the book and Frankfurter's complaint that it failed to go far enough). Notably, when Frankfurter published his own materials four years later, the book bore almost the same name as Medina's. *See* FELIX FRANKFURTER & WILBER G. KATZ, *CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE* (1931); *cf.* FELIX FRANKFURTER & HARRY SHULMAN, *CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE* (1937).

12 In recent years, for example, scholars have called for the inclusion of such fields as immigration and Indian law in the Federal Courts canon. *See generally* Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 TEX. L. REV. 1661 (1999) (calling for analysis of immigration law from within the Federal Courts paradigm); Resnik, *supra* note 1, at 1045–46 (questioning the exclusion of federal Indian law from Hart & Wechsler); *cf.* Fallon, *supra* note 3, at 980–81 (suggesting problems of intertemporal synthesis as ripe for theoretical treatment). For an offhand dismissal of the whole business, see Eric Posner, *Strategies of Constitutional Scholarship*, 26 LAW & SOC. INQUIRY 529, 540–41 (2001) (dismissing Legal Process in a single, albeit tightly packed, paragraph).

13 I visited the special collections library in Harvard's Langdell Hall in January 2001. As of that period, the Hart papers had been divided by subject matter and assigned to particular boxes, but there were no library folders within the boxes I reviewed. Rather, the materials were loosely stacked within the boxes, and remained for the most part within their original notebooks and folders. Most of the class notes that I reviewed were housed in Paige Boxes 3 and 6. Citations to the relevant box will include the date of the notes if available; the quotations follow the original notes in underscoring words for emphasis.

all of its details, to the pitch that professors may make to students today.<sup>14</sup>

After exploring Hart's perspective, the Article considers the field of Federal Courts from the vantage point of Hart's co-author, Herb Wechsler. Despite their collaboration on the casebook, and their common ties to Legal Process thinking, Hart and Wechsler occasionally used different tools to solve problems in Federal Courts. Hart often emphasized the decided cases as the inputs in his analytical process, following a tradition of case analysis associated with Christopher Columbus Langdell.<sup>15</sup> Wechsler, in contrast, often emphasized text, history, and structure in making constitutional arguments about the role of the courts in a federal system. While we lack detailed notes with which to reconstruct his approach to classroom teaching, one can see Wechsler's approach nicely illustrated in *Neutral Principles*, which concludes with a Hart-like call for principled decisionmaking but which begins with a Wechslerian attempt to ground judicial review in the text of the Constitution.<sup>16</sup>

Rather than a single, monolithic approach, in short, the Hart & Wechsler paradigm (as originally understood) may encompass two or more different strands of analysis. The Article concludes with a brief rumination on the role of these strands in current scholarship in the field of Federal Courts. Hart's emphasis on principles derived from the decided cases continues to inform much work in the field, as scholars search for doctrinal coherence. But arguments based on text, history, and structure have gained some ground in recent years. Both approaches can fairly claim a place within the Hart & Wechsler paradigm.

## I. HENRY HART AND THE DEVELOPMENT OF THE PARADIGM

Use of the term "paradigm" to describe the analytical approach of Hart & Wechsler implies that they developed a particularly original and generative approach to the problems that make up the course in Federal Courts. Although some have questioned both the originality

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14 For a description of Hart's argument for the relevance of federalism, see *infra* Part I.C.3. One finds an echo of the faculty's concern with staying "relevant" to the restive student body of the 1960s in Albert M. Sacks, *Henry Hart*, 82 HARV. L. REV. 1593, 1593 (1969). Others may share my view that the Court's recent, federalism-inspired expansion of state sovereign immunity has made the task of defending the course's relevance to students a good deal easier today than it was a few years back.

15 ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 52 (1983).

16 See *infra* notes 143–51 and accompanying text.

and the fecundity of their approach,<sup>17</sup> a close review of Hart's teaching notes tends to support the claim that Hart and Wechsler broke new ground in their thinking about the Federal Courts. Indeed, as this Part of the Article demonstrates, each of the three elements that Professor Richard Fallon identified as the defining features of the paradigm<sup>18</sup> finds an early reflection in the teaching notes of Professor Hart.

To begin with, evidence from his teaching notes suggests that Hart worked to assemble a distinctive set of teaching materials, as compared with the materials that had made up similar courses in the past. One thus finds a more conscious decision to break with the inherited structure of prior courses than has sometimes been assumed. Moreover, the evidence suggests that Hart assembled these materials with a growing awareness of the importance of an inquiry into issues of institutional competence that we now associate with the Legal Process school. Indeed, Hart's decision to place *Marbury v. Madison*<sup>19</sup> at the center of the course's introductory section on the nature of the judicial function anticipates subsequent work on the Legal Process by several years. Finally, Hart's teaching notes reveal the degree to which the case method of doctrinal analysis informed his thinking about the problems of the federal system. Such analysis remains a controversial mainstay of the Hart & Wechsler paradigm today.

#### A. Why "*Federal Courts*"?: *Defining the Canon*

One might plausibly begin by asking whether it is fair to credit Professor(s) Hart (and Wechsler<sup>20</sup>) with teaching the first course in

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17 See *supra* note 1; *infra* notes 21–23 and accompanying text (collecting such criticisms).

18 See, e.g., Fallon, *supra* note 3, at 957–58 (identifying three elements as defining the Hart & Wechsler paradigm).

19 5 U.S. (1 Cranch) 137 (1803).

20 When I first conceived of this project, I had hoped to develop more information on the Federal Courts classroom of Hart's collaborator, Herbert Wechsler. Unfortunately, Wechsler's papers have not yet become available and my attempts to secure portraits of his early teaching came a cropper. The Hart papers doubtless include much information relevant to the development of their casebook; the index to the Hart papers refers to correspondence between Hart and Wechsler that spanned the years 1932 to 1963 (and presumably beyond). I have not attempted to include such information in this study. I also examined Wechsler's oral history, but found little relating to classroom teaching. See generally Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854 (1993). As a consequence, my assessment of Wechsler leans heavily on his published scholarship and the recollections of those who knew him.

"Federal Courts." Hart had, after all, inherited a course that Frankfurter had called "Jurisdiction and Procedure of the Federal Courts," and scholars often portray Hart's work as more or less derivative of Frankfurter's notion that issues of federal jurisdiction were best understood as presenting questions as to the proper allocation of power in our federal system.<sup>21</sup> As others have noted, moreover, Hart and Wechsler dedicated their first edition to Frankfurter as the person who first "opened our eyes to these problems."<sup>22</sup> On this account, Hart has appeared to some to be less an original thinker than a devoted son carrying on the Frankfurter tradition.<sup>23</sup>

In contrast to this claim of continuity, many have credited Hart and Wechsler (for better and worse) with creating a new way of thinking about the rule of law and the allocation of authority in a federal system.<sup>24</sup> On this account, Hart and Wechsler's use of Legal Process methodology, and their focus on institutional competence, fits tightly with their selection of the materials that make up the course. Such an account portrays Hart and Wechsler less as the heirs to an existing tradition than as the founders of a new school of thought. One suspects that the debate over how much the field owes to Hart and Wechsler will continue for some time to come. But Hart's class notes

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21 For the jurisdiction-as-power formulation of Justice Benjamin Curtis, see McManamon, *supra* note 11, at 712 n.87. For Frankfurter's frequent reliance on it, see Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 686 n.18 (1999). In February 1949, Professor Hart began his course with a recitation of "FF's favorite [jurisdiction-as-power] quotation" and then explained that a "good deal of the course" would focus on "such questions of power." Henry M. Hart, Jr., Notes on Federal Jurisdiction (Feb. 2, 1949) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 3) [hereinafter Hart, Notes (Feb. 2, 1949)]. As Hart explained, these questions included both issues of power "as between the federal courts and the other branches of the federal government" and "between the federal government and the states." *Id.* For one insider's perception of the nature of Hart's debt to Frankfurter, see Paul A. Freund, *Henry M. Hart, Jr.: In Memoriam*, 82 HARV. L. REV. 1595, 1596 (1969) (describing Hart as having "succeeded to Frankfurter's course on the Federal Courts" and as having "developed the course on the Legal Process").

22 McManamon, *supra* note 11, at 769 (quoting the dedication in H&W I, *supra* note 1, to Frankfurter, who "first opened our minds to these questions"); see also Fallon, *supra* note 3, at 964 (same).

23 See Resnik, *supra* note 1, at 1024 (picturing Hart and Wechsler as the "heirs, and specifically the sons," of Frankfurter, Landis and the jurisdiction tradition at Harvard); see also McManamon, *supra* note 11, at 701-02, 731-88 (emphasizing the influence of Frankfurter); Purcell, *supra* note 21, at 681-706 (tracing the history of federal courts into the Progressive era, and to Frankfurter's instrumental use of history to achieve judicial reform, thereby casting doubt on conventional accounts that treat the field as the creation of the Hart & Wechsler collaboration alone).

24 See *supra* note 2.



do provide some evidence of a conscious effort to assemble a distinctive collection of materials and to ask a distinctive set of questions.

For starters, and notwithstanding his acknowledged debt to the Frankfurter tradition, Hart appears to have chosen a new name for his course in "Federal Courts" to signal that the subject in his hands would differ from its treatment in the past. Records at Harvard suggest that the name change occurred as a two-step process of evolution. After having taught the course as "Jurisdiction and Procedure of the Federal Courts" from 1939 to 1948, Hart changed the course's name to "Federal Jurisdiction," dropping the reference to procedure.<sup>25</sup> Three years later in 1951–1952, Hart made another change, switching from "Federal Jurisdiction" to "Federal Courts and the Federal System."<sup>26</sup>

One can, I think, offer a fairly straightforward explanation of the first part of Hart's preferred nomenclature—his decision to drop all references to procedure. By the early 1950s, federal practice and procedure had begun to evolve into a stand-alone first-year course centered on the Federal Rules of Civil Procedure.<sup>27</sup> Hart and Wechsler made note of such courses in the preface to their first edition, explaining why they had uncoupled the study of procedure from their

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25 A brief history of instruction at Harvard appears as follows:

1937–1939: Jurisdiction and Procedure of the Federal Courts (Frankfurter)

1939–1942: Jurisdiction and Procedure of the Federal Courts (Hart)

1945–1948: Jurisdiction and Procedure of the Federal Courts (Hart)

1948–1951: Federal Jurisdiction (Hart)

1951–1954: Federal Courts and the Federal System (Hart)

1954–1955: Federal Courts and the Federal System (Sacks)

E-mail from David Warrington, Librarian for Special Collections, Harvard Law School Library, to James E. Pfander (July 18, 2001) (on file with author) (citing HARVARD UNIV., OFFICIAL REGISTER OF HARVARD UNIVERSITY: THE LAW SCHOOL, COURSES OF INSTRUCTION). The name change to "Federal Courts and the Federal System" was first officially reported in May 1951. *Id.* Despite the official appearance of the new name, Hart's own notes for September 1951 continue to refer to the course as "Federal Jurisdiction." Henry M. Hart, Jr., Notes on Federal Jurisdiction (Sept. 17, 1951) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 6) [hereinafter Hart, Notes (Sept. 17, 1951)]. One year later, in September 1952, Hart's notes reflect the switch to "Federal Courts." *See* Henry M. Hart, Jr., Notes on Federal Courts, at 1 (Sept. 19, 1952) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 6) [hereinafter Hart, Notes (Sept. 19, 1952)].

26 *See supra* note 25.

27 For an account, see Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397, 435–37 (1998) (reporting on the 1953 publication of the Field, Kaplan casebook on civil procedure, featuring the Federal Rules of Civil Procedure, and noting that the division between Federal Courts and Civil Procedure has since remained fairly constant).

inquiry into jurisdictional questions.<sup>28</sup> They also cited as an independent ground their perception that studying procedure for its own sake, as it should be studied, was "alien to the main inquiries projected by this book."<sup>29</sup> In the end, then, Hart had come to believe that the combination of jurisdiction and procedure had produced a "misalliance" that failed to serve either subject well.<sup>30</sup>

With procedure out of the course, the switch from "Federal Jurisdiction" to the "Federal Courts and the Federal System" seems less mysterious. Hart's course had come to emphasize areas of inquiry that seemed to fit somewhat awkwardly under the rubric of federal jurisdiction. The first such inquiry was that into the powers and duties of the state courts to entertain federal question claims.<sup>31</sup> One could consider such an inquiry as addressed to the jurisdiction of courts over matters of federal law, but the focus of the inquiry on the competence of the state courts makes federal jurisdiction a somewhat inapt characterization. The second awkward inquiry was that into the choice between state and federal law as the rule of decision. While jurisdiction framed such choice of law questions, it certainly did not decide them.<sup>32</sup>

As he explained in September 1952,<sup>33</sup> Hart had decided to broaden the course's name to sweep in problems other than the federal jurisdictional. In notes for his introductory lecture of that year, Hart identified three major themes in the course: that of the division

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28 See H&W I, *supra* note 1, at xii (noting the availability of courses offering "systematic instruction" in federal practice built around the Federal Rules of Civil Procedure).

29 *Id.*

30 See *id.*

31 See *id.* at xxii (collecting such cases as *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871), and *Testa v. Katt*, 330 U.S. 386 (1947), under the heading, "Federal Authority and State Court Jurisdiction").

32 Notably, such choice of law questions arose both in connection with the Supreme Court's review of state court decisions, see *id.* at 400-576, and in connection with the determination of the applicable law in the federal district courts in the wake of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). See H&W I, *supra* note 1, at 577-708. We thus find the casebook's famous comment on the "interstitial" quality of federal law in the section on review in the Supreme Court. See *id.* at 435 (describing federal law as interstitial and as rarely occupying the field to the exclusion of all participation by the legal systems of the states).

33 In explaining the content of his class in September 1952, Professor Hart explained that there were one minor and three major themes. The notes read as follows:

- A. Minor. Problems of judicial administration
  - most advanced system we know about
  - cf. New Jersey

of authority among organs of the federal government; that of the division of jurisdiction between the federal courts "and the state courts in federal matters"; and that of the choice between state and federal law.<sup>34</sup> As Hart explained, these issues were "sometimes also problems of jurisdiction, sometimes not."<sup>35</sup> He concluded by noting that this absence of fit between the major themes in the course, and the course's previous title, Federal Jurisdiction, provided the "reason for [the] change" in the course's name.<sup>36</sup> Hart's new name captured both the separation-of-powers issues ("Federal Courts," as a distinct institution of the federal government) and the broad array of federalism issues (the "Federal System") that arose from consideration of the choices that an integrated system of federal dispute resolution must make between state and federal court and between state and federal law.

Views may, of course, differ on the question of how significantly Hart and Wechsler departed from the Harvard tradition.<sup>37</sup> To some

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B. First major. The relation of the federal courts and particularly the Supreme Court to the other branches of the federal government and to the state governments.

C. Second major. The jurisdiction of the federal courts *and of the state courts in federal matters*

D. Third major. Problems of choice of state versus federal law.

- sometimes also problems of jurisdiction; sometimes not

- reason for change in name.

Hart, Notes (Sept. 19, 1952), *supra* note 25, at 3. Hart's aside about New Jersey was not the only instance of humor in his class notes. Hart often assigned grades to the work of the Justices in various opinions for the Court; he found Justice Day's opinion in *Smith v. KC Title & Trust*, 255 U.S. 180 (1921), to be "at best a C minus and probably only a D plus," whereas the Holmes dissent in that case was a "clear if a minimum A." Henry M. Hart, Jr., Notes on Federal Courts (March 22, 1958) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 6) [hereinafter Hart, Notes (March 22, 1958)]. Yet Hart often found "sunder instinct" and "better judgment" in mediocre performances such as Day's. *Id.*

34 Hart, Notes (Sept. 19, 1952), *supra* note 25, at 3.

35 *Id.*

36 *Id.*

37 We have reason to suspect that Hart himself viewed the new name as a break with the past. In past classes, Hart's introductory lecture had nodded to the course's origins at Harvard by referring explicitly to Frankfurter's dictum about jurisdiction and power. See Hart, Notes (Feb. 2, 1949), *supra* note 21 (quoting Frankfurter's favorite jurisdiction-as-power quotation). In September 1952, however, Hart dropped the reference to Frankfurter and simply offered his own account of the course's major themes, together with his explanation of the name change. See Hart, Notes (Sept. 19, 1952), *supra* note 25. Some might discern a modest assertion of independence in Hart's combined decisions to drop the Frankfurter quote and to announce a name change.

degree, the adoption of the Hart nomenclature corresponds with the widespread agreement, at least among casebook authors, that the course should focus on the allocation of decisionmaking authority among institutions of government and not on matters of federal practice and procedure. In that sense, our answer today to the question of why use the term "Federal Courts" looks quite similar to that of Professor Hart.

### B. *Marbury and the Principle of Institutional Settlement*

Apart from his selection of the course's name, Professor Hart appears to have chosen his teaching materials with the idea of institutional competence in mind, as his treatment of *Marbury v. Madison*<sup>38</sup> nicely illustrates. Unlike the Frankfurter casebook, which included a passing reference to *Marbury* in an early section on the nature of judicial power and treated it at greater length in a later section on original jurisdiction, the Hart & Wechsler casebook provided a full-length treatment of *Marbury* in its opening section.<sup>39</sup> The shift in focus suggests that Hart had come to view the case as less important for what it said about the Court's original jurisdiction than for what it revealed about the distinctive judicial function of deciding litigated disputes.<sup>40</sup> Hart's growing interest in *Marbury* for the light it sheds on the nature

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38 5 U.S. (1 Cranch) 137 (1803).

39 Compare FRANKFURTER & SHULMAN, *supra* note 11, at 39, 745 (mentioning *Marbury* in notes on the nature of judicial power; reprinting a portion of the opinion in section on original jurisdiction), with H&W I, *supra* note 1, at 86 (reprinting *Marbury* as a principal case on the nature of the judicial function). *Marbury* enjoys a bit more prominence, and displaces the *Correspondence of the Justices* as the first principal case, in the current edition of Hart & Wechsler. See H&W IV, *supra* note 1, at 67.

40 Hart typically linked his treatment of *Marbury* to an analysis of the *Correspondence of the Justices*, which appeared just before *Marbury* in the casebook. See H&W I, *supra* note 1, at 75 (reprinting the "Letter from Thomas Jefferson, Secretary of State, to Chief Justice Jay and Associate Justices"); *id.* at 86 (*Marbury*). In handling the *Correspondence*, Hart invited students to return with him to 1793 at the dawn of the federal government to consider a conference of the Justices on how best to answer the questions that Secretary Jefferson had propounded. See Henry M. Hart, Jr., Notes on Federal Courts (Sept. 26, 1952) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 3) [hereinafter Hart, Notes (Sept. 26, 1952)] (suggesting the class "fadeout" to a period "back in 1793"). Hart suggested that the Court had rightly declined Jefferson's invitation for several reasons: the legislative history of the Constitution was "squarely against it"; the Court could not decide with finality and could not bind any parties; the scope of any holding would exceed any concrete particularized dispute and would present problems of future application under the doctrine of stare decisis; it would place the Court in the awkward position of deciding a case by "fiat" instead of by "reason" and would alter the law-declaring power to one resembling legislative enactment. See *id.*

of the judicial role comes through quite clearly in the class notes that lead up to the casebook's appearance.

Notes from February 1949 help to explain what Hart had come to see in *Marbury*.<sup>41</sup> Hart posits the conflict between Section 13 and Article III,<sup>42</sup> observes that "Marshall has to decide which he will follow," and that he "decides to follow the Constitution."<sup>43</sup> Hart then asks the class what "relevance" any of this might have, either for the subject at hand (judicial power) or for the course. In other words, Hart asked his class to consider why the case "doesn't belong solely to the course in Constitutional Law?"<sup>44</sup> His answer deserves full quotation.

What gives the court power to decide whether the statute is constitutional is the presence of this case before it.

—which the Constitution and the statutes oblige it

(a) To *decide* one way or another, *and*

(b) To decide in accordance with law

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For Hart, then, the *Correspondence* and *Marbury* taught some of the same lessons about the role of courts in declaring law for the functional purpose of deciding the litigated dispute. He may have chosen to place the *Correspondence* first in the book both because it proceeds *Marbury* chronologically and because its ban on the decision of cases extra-judicially sets the stage for the connection Chief Justice Marshall would later draw between law-declaration and the obligation to resolve the particular case.

41 Hart also viewed *Marbury* as important for the light it shed on the role of the courts in reviewing actions of the administrative state. Notes for February 1949 thus explore the nature of administrative discretion and Marshall's distinction between discretionary political judgments, as to which judicial review has little application, and clear matters of legal duty, as to which courts may enforce compliance. See Henry M. Hart, Jr., Notes on Federal Jurisdiction (Feb. 12, 1949) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 3) [hereinafter Hart, Notes (Feb. 12, 1949)]. For a critical review of Hart's and Marshall's treatment of these issues, see generally Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983) (exploring *Marbury*'s significance as the foundation for judicial review of administrative action).

42 Given my own interest in the question whether the conflict between Section 13 and Article III was real or contrived, see, e.g., James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515 (2001), I found Hart's assessment of the issue quite interesting. He apparently found reason to believe that the statute actually conferred the jurisdiction in question. See Hart, Notes (Feb. 12, 1949), *supra* note 41 (noting that Marshall's finding of statutory jurisdiction "seems clear"). But Hart apparently had doubts about Marshall's claim that Article III foreclosed the exercise of the jurisdiction. See Henry M. Hart, Jr., Notes on Federal Jurisdiction (Oct. 6, 1950) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 3) (describing Marshall's constitutional reading as "highly arguable").

43 Hart, Notes (Feb. 12, 1949), *supra* note 41.

44 *Id.*

- which means finding out what law is and declaring it
  - to the extent necessary to decide this case.
- In the absence of that case and the necessity of deciding it
- the ct. has no law-declaring power
  - no general power to emit authoritative memoranda on what is lawful and what isn't
  - its law-declaring power exists only as an incident of the obligation to decide cases
  - and the law it declares is thus made as a kind of by-product of its main function<sup>45</sup>

Hart thus proposed to draw a more general lesson from *Marbury* than a simple argument in favor of judicial review. As Hart saw matters, the judicial role in finding and declaring all law (not just the constitutional) devolved on the courts as a corollary to their obligation to decide the litigated case.<sup>46</sup>

By the time his casebook was about to appear, Hart had broadened and deepened his functional understanding of the role of courts in making law to decide cases, as his notes from September 1952 make clear. At a fairly abstract level, Hart posited a functional account of the courts' role that he saw as quite general:

[T]he judicial function is the function of settling authoritatively disputes about the application of authoritative general propositions or arrangements to particular situations

-probably one should say what is intrinsic anyway[;] disputes [a]bout the application of *preexisting* authoritative general arrangements to particular situations.<sup>47</sup>

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45 *Id.*

46 One hears obvious echoes of this understanding of the law-finding and law-declaration functions of the federal courts in Hart's famous *Exercise in Dialectic*. See generally Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); see also generally James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decision-making Required of Article III Courts*, 98 COLUM. L. REV. 696, 703, 773-845 (1998) (positing a distinctive role for the federal courts in deciding a litigated case with finality, effectuality, and in accordance with all available law).

47 Hart, Notes (Sept. 26, 1952), *supra* note 40. Hart explained the universality of this functional account as follows:

[T]he function is a distinct and necessary one in every legal system -

...

-because: you can't have an organized society without a system of general arrangements ...

After eliciting agreement from the class on these general principles, Hart proposed to break the judicial function into its two constituent elements. He saw the first as what he called "the pure settling element"; it existed quite apart from the soundness of the decision, as reflected in the doctrines of finality.<sup>48</sup> He saw the second element as one of settlement "in accordance with law."<sup>49</sup> Hart explained that the law-declaring power of the courts came from this obligation of settlement in accordance with law.<sup>50</sup>

While Hart located the power of courts to declare the law in their obligation to decide in accordance with it, he acknowledged that the law-declaration function of the courts differed from that of other organs of government. Thus, he noted that law-declaration necessarily entailed lawmaking "because [the] general propositions affecting the future are intrinsically and inescapably indeterminate."<sup>51</sup> But while courts had to make law, it was law of a "special and analytically distinct kind."<sup>52</sup> Here, Hart distinguished lawmaking "by enactment" or "fiat" from lawmaking by judicial decision.<sup>53</sup> The latter sort of "interstitial[ ]" lawmaking, Hart conceived as a "process of saying that implicit in these general propositions, [and] considering their purpose . . . is this conclusion about this unclear matter."<sup>54</sup> Such lawmaking, in short, entailed a "process . . . of deriving the fair implications of previ-

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-you can't have the general arrangements without getting disputes about their application to particular situations

-and given the disputes, you can't hold the society together without tribunals to settle them authoritatively and peaceably

*Id.* Hart saw these themes at work in "our courts, colonial courts, the English courts before American independence, the courts in any legal system." *Id.*

48 *Id.* (noting that "courts make mistakes about the facts" but that "you have got to have some way of getting them settled").

49 *Id.*

50 *Id.* Hart's suggested distinction between the dispute settlement function of the federal courts and their law-declaring function appears to map in interesting ways onto Article III's distinctive treatment of the terms "cases" and "controversies." See generally Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994) (suggesting that federal-question "cases" call into play the law-declaring function, while party-based "controversies" implicate only the dispute resolution function, and that the justiciability doctrines should take account of the distinction). Hart did not emphasize this textual distinction in his treatment of the subject.

51 Henry M. Hart, Jr., Notes on Federal Courts (Sept. 27, 1952) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 3) [hereinafter Hart, Notes (Sept. 27, 1952)].

52 *Id.*

53 *Id.*

54 *Id.*

ously settled matters," that is, a "reasoned development of premises and principles."<sup>55</sup> Hart saw the "reasoned development" of judge-made law as especially valuable for its tendency to make the "settlement of disputes more acceptable" and to generate workable arrangements that will "minimize the likelihood of disputes in the future."<sup>56</sup>

One could hardly find a clearer statement of the Legal Process ideas of reasoned elaboration and institutional settlement than in this account of the judicial function, circa 1952. *Marbury* provided a home for the development of Hart's ideas, in part no doubt because of its pedigree and its tendency to underscore the universality of the judicial dispute-settlement and law-declaration functions. But *Marbury* helped for another reason. Chief Justice Marshall had emphasized the necessity of deciding the litigated case in justifying judicial review of the acts of Congress.<sup>57</sup> Hart had come to see the principle more broadly; for him, the law-declaring function of courts emerged "as an incident and as an incident only of the power to settle disputes."<sup>58</sup> Just as there was no basis for declaring the law in the absence of a case to be decided,<sup>59</sup> "given such a case power necessarily extends to all the questions of law involved."<sup>60</sup> This, according to Hart's concluding comment, was "the bearing of *Marbury v. Madison*."<sup>61</sup>

### C. *The Centrality of Doctrinal Analysis*

If his handling of *Marbury* underscores the importance of what we have come to see as Legal Process thinking in Hart's approach to the course, his reliance upon the case method of instruction helps to clarify the depth of his commitment to the decided case as the centerpiece of legal analysis. Hart was the consummate doctrinalist, and his emphasis on doctrinal developments shines through in both his approach to classroom teaching and his best-known scholarly writing. Even as it helps to define the Hart & Wechsler paradigm, however, Hart's emphasis on the elaboration of principles drawn from the decided cases has seemed to some as the paradigm's weakest point. Evidence from his class notes suggests that Hart anticipated modern

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55 *Id.*

56 *Id.*

57 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

58 Henry M. Hart, Jr., Notes on Federal Courts (Oct. 2, 1953) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 3) [hereinafter Hart, Notes (Oct. 2, 1953)].

59 See Hart, Notes (Sept. 26, 1952), *supra* note 40 (recounting Hart's general agreement with the Court's decision to refrain from providing advisory opinions).

60 Hart, Notes (Oct. 2, 1953), *supra* note 58.

61 Hart, Notes (Sept. 27, 1952), *supra* note 51.



worries about the diminishing relevance of the course's treatment of federalism.

### 1. Hart's Socratic Classroom: "Darkness at Noon"?

A biography of Henry Hart has yet to appear, and the few existing sketches permit us to say relatively little about his work in the classroom.<sup>62</sup> We can place him in Langdell Hall,<sup>63</sup> an intensely thoughtful man who was capable of passionate declamations,<sup>64</sup> pacing nervously and forcing students to think "over their heads" about the most difficult questions of our federal system.<sup>65</sup> Hart attempted to accomplish this goal by pressing his students with "irritatingly dogmatic assertion[s]," a term he apparently used to describe his habit of positing an account or synthesis of some area of law and inviting students to take issue with him.<sup>66</sup> One can only guess at the likely student response,

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62 One ambitious attempt to chart Hart's intellectual trajectory, as well as some biographic detail, appears in EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 229-57 (2000). Born in 1904 in Butte, Montana, Hart received both his undergraduate and legal education at Harvard, where he studied with Frankfurter. *Id.* at 229. After clerking with Justice Brandeis, Hart returned to Harvard to teach. *Id.* at 229-30. Hart remained at Harvard through the 1930s, aside from a brief period of government service late in the decade. *Id.* at 232-33. He served for a year with the Attorney General of the United States in 1941 and then worked from 1942-1946 with the Office of Price Administration and the Office of Economic Stabilization. *Id.* at 233. Hart returned to Harvard in 1946 and remained there until his death in 1969. *Id.* at 234, 256. He taught his last Federal Courts class in the Fall of 1968. See Freund, *supra* note 21, at 1595 (noting a positive student response to Hart's class "only a few months ago").

63 See Henry Paul Monaghan, *A Legal Giant is Dead*, 100 COLUM. L. REV. 1370, 1371 (2000) (describing Hart's class in Federal Courts as meeting on "Tuesdays, Thursdays, and Saturdays at noon . . . in Langdell Hall").

64 See Sacks, *supra* note 14, at 1594 (describing Hart as capable of thundering like Jehovah when aroused).

65 Monaghan, *supra* note 1, at 889 (quoting Kingman Brewster); see also David L. Shapiro, *Herbert Wechsler—A Remembrance*, 100 COLUM. L. REV. 1377, 1380 (2000) (contrasting Hart's classroom style of nervous pacing with Wechsler's more calm, commanding presence).

66 See Sacks, *supra* note 14, at 1594 (quoting Hart's description of his own teaching style as one of making "irritatingly dogmatic assertion[s]" meant to provoke his students to new insights). One can see an instance of this style of assertion in Hart's notes for March 1958. Recounting the events of the previous day, Hart described the class as having sat "like sheep" as he gave out "all that guff" about how "logical and exact the tests of federal question jurisdiction are." Henry M. Hart, Jr., Notes on Federal Courts 1 (Mar. 29, 1958) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 3). Hart noted that "Mr. Miller finally revolted at the very end of the hour," and he pressed Mr. Miller to "make good on his revolt." *Id.*

but one suspects that there may have been an undercurrent to the general enthusiasm.<sup>67</sup> Borrowing the title of the Arthur Koestler novel (a book that prominently features pitiless interrogation),<sup>68</sup> and building upon the fact that his class met at midday, students at Harvard called Hart's course "Darkness at Noon."<sup>69</sup> Discounting for affectionate name calling,<sup>70</sup> the appeal of such a nickname to Harvard students suggests that some may have chafed under the demands that Hart's course placed on them.

With its metaphor of penetrating interrogation, the Harvard sobriquet "Darkness at Noon" may exaggerate the demands of Hart's Socratic classroom. Hart seems to have envisioned his classroom as a kind of Langdellian laboratory, where teacher and student would work together to distill the raw materials of the decided cases into a

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To goad Miller into attempting to defend his position, Hart suggested that Miller had been "bit by the virus of the patent and copyright bar." *Id.* According to Hart, the virus makes patent specialists "ready to sacrifice the beauty and symmetry of the general law in order to promote the peculiar and extraneous interests of their own specialty." *Id.* Whether Mr. Miller rose to the bait, the notes do not record. But it may not be amiss to note that Harvard's Bruce Bromley Professor of Law, Arthur Miller, received his LL.B. from Harvard Law School in the Spring 1958 and would have been a third-year law student during the exchange in question. *See ASS'N OF AM. LAW SCH., AALS DIRECTORY OF LAW TEACHERS* 788 (West 2001). One might suppose that Mr. Miller found the exchange and the class more stimulating than disheartening.

67 Hart had inherited the course in Federal Jurisdiction and Procedure when Frankfurter left for the Supreme Court. *See supra* text accompanying notes 11, 21. On Frankfurter's popularity with students, see McManamon, *supra* note 11, at 751-57. The many former students of Hart's who went into law teaching and became his colleagues at Harvard have praised him as a gifted teacher as well. *See* Derek C. Bok, *Professor Henry Melvin Hart, Jr.*, 82 HARV. L. REV. 1591, 1591 (1969) (describing Hart as the inspiring teacher who lured students from law practice to the academy with the vision of an exciting life of study); Freund, *supra* note 21, at 1597 (noting Hart's influence on "thousands of students"); Sacks, *supra* note 14, at 1594 (describing Hart as a powerful influence on generations of students).

68 ARTHUR KOESTLER, *DARKNESS AT NOON* (1941). The novel tells the story of the imprisonment, interrogation, and eventual execution of Rubashov, a Soviet official purged for "political divergencies" from the Party line.

69 Purcell, *supra* note 21, at 730 (noting that Harvard students referred to the midday course as "Darkness at Noon," and suggesting that the reference may have reflected student distaste for the abstract and ahistorical quality of the field). Other students of Hart's have confirmed the reference to Darkness at Noon.

70 *See* Monaghan, *supra* note 63, at 1371 (describing the class as "affectionately known as Darkness at Noon"). No one can doubt that the great majority of Harvard Law students held Hart and his course in genuinely high esteem. *See* Eskridge & Frickey, *supra* note 3, at lxxxvii n.153 (noting the popularity of Hart's course in Federal Courts for "a decade's worth of law students").

more elegant and refined version of the law.<sup>71</sup> Hart openly acknowledged his debt to Langdell,<sup>72</sup> and one sees the influence of the dialogue form both in Hart's class notes and in his contributions to the literature.<sup>73</sup> In his famous *Exercise in Dialectic*,<sup>74</sup> Hart explored in dialogue form the power of Congress to regulate the jurisdiction of the state and federal courts. Hart noted that the paper was to appear in the casebook, and that it sought more to "ventilate the questions" than to "proffer final answers."<sup>75</sup> The dialogue form suited Hart's purpose well, both in teaching and in writing, because it permitted him to express a measure of ambivalence and indeterminacy that likely corresponded with his own tentative sense of his synthesis of the issues at hand.<sup>76</sup> In genuinely reflecting the probing cast of their au-

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71 On Langdell and science in the law schools, see STEVENS, *supra* note 15, at 51-57.

72 Hart described the Legal Process materials as "nothing more than an application of the method of teaching law first popularized by Christopher Columbus Langdell." See HART & SACKS, *supra* note 3, at cxxxix.

73 For a particularly good illustration of the dialogue form in class, consider Hart's treatment of the *Correspondence of the Justices* in his notes from September 1950. See Henry M. Hart, Jr., Notes on Federal Jurisdiction (Sept. 29, 1950) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 6) [hereinafter Hart, Notes (Sept. 29, 1950)]. The *Correspondence* presents the question whether the Court may and should provide extra-judicial advisory opinions in response to a series of questions of foreign and maritime policy that the Washington administration had propounded during the undeclared war between Great Britain and France during the 1790s. See FRANKFURTER & SHULMAN, *supra* note 11, at 36-37 (setting forth a sample of the questions and the reply of Chief Justice Jay). Discussion of the *Correspondence* had long been a fixture of the Harvard course in Federal Jurisdiction, having appeared in Frankfurter's casebook from the 1930s. *Id.* (noting a discussion of the *Correspondence* in a collection of Thayer's essays that appeared in 1908). Hart began by posing the problem, "[H]ow shall we answer the President?" Rhetorical questions follow:

Shall we do anything toward meeting his request?

If so, what? And how?

A. Don't we have to start by asking what business it is of ours, what authority we have in the premises?

...

Are these cases and controversies—or, if that is different, matter calling for the exercise of the judicial power?

How answer [sic] a question like that? History? Records of the convention? Analysis?

Hart, Notes (Sept. 29, 1950), *supra*.

74 See Hart, *supra* note 46.

75 *Id.* at 1363.

76 *Id.* (noting that he had taken "full advantage" of the "ambivalence of the dialogue form"). One might usefully contrast the probing quality of the *Exercise in Dialectic* with the more insistent, polemical tone of Hart's review of Crosskey's work on

thors' minds, the questions that punctuate the Hart & Wechsler casebook reveal a truth about Hart's approach to scholarship and to his exploration of ideas in the classroom.<sup>77</sup>

The image in Hart's notes of the classroom as a proving ground for ideas about the law has a broad appeal, because it portrays students, professors, and judges (however unknowingly)<sup>78</sup> as embarked on a joint quest for answers to questions of institutional responsibility. On such a conception of the classroom enterprise, students can play the role of full partners in the analytical process and professors can draw freely on the insights of the classroom as they revise and refine their own scholarly ideas.

Such a collaborative model, though, assumes a degree of commitment to the enterprise that may challenge even the most doggedly persistent members of the student ranks.<sup>79</sup> To this day, some students thrive and others wither under the conceptual demands and occasionally abstract quality of the course, just as many have struggled with the rhetorical questions that punctuate the Hart & Wechsler casebook. The richness of the material in Hart's Socratic classroom also presents at least a risk that the professor's search for answers may become an end in itself, yielding more by way of elaboration and refinement than real insights into the problems at hand. The next Section considers

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judicial review. See generally Henry M. Hart, Jr., *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456 (1954) (reviewing WILLIAM CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953)).

77 For all of his emphasis on posing questions, Hart often believed that he and his students could provide clear answers to difficult legal questions. Part of his purpose in posing questions in his casebook was to suggest an answer. His classroom practice of dogmatic assertion often reflected a formulation that he had arrived at and wished to test with his students.

78 In his discussion of jurisdiction stripping and the ultimate responsibility of the state courts to invalidate acts of Congress that unconstitutionally curtail their general jurisdiction, Hart acknowledged that the willingness of state judges to play their part might depend on some exposure to the ideas in the course, saying, "[n]ow suppose the state courts are timid about challenging Congress in this way, or else have not had the benefit of this course, and they honor the statute, and dismiss." Henry M. Hart, Jr., Notes on Federal Courts (Dec. 6, 1952) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 6). Speaking as he was before the publication of the casebook and *Exercise in Dialectic*, the possibility of state court ignorance seems to have been a real one then, and now. See *supra* note 8 (noting a surprisingly small number of references to Hart & Wechsler in state court decisions).

79 Hart obviously recognized the demands that his materials placed on students and tried to provide them with guidance through the maze. He thus contrasted Langdell's approach ("nothing but concrete problems") with his own (materials that "try to give the student a lift" on the job of working out implications of the materials in keeping with "the general softness of the age"). HART & SACKS, *supra* note 3, at cxxxix.

the tradeoffs between teaching and scholarship, and the risks associated with the application of Hart's demanding standards to doctrinal analysis in Federal Courts.

## 2. Doctrinal Teaching and Scholarship

Among the themes that punctuate discussions in law schools, one finds repeated reference to the trade-offs between teaching and writing. Richard Posner put the point some years ago with characteristic bluntness, contrasting the relatively modest scholarly output of the doctrinalists with more rapid-fire productivity of the social scientists, and suggesting that doctrinal teaching may threaten scholarly output.<sup>80</sup> Even if Posner may have exaggerated the risk, he certainly appears right to note that conscientious teaching in the law schools may interfere with a professor's ability to achieve the body counts of the social scientist.<sup>81</sup> By the standards of graduate and professional schools, law classes tend toward the large side, and tend to focus more on doctrinal development than on the projects that will advance a professor's scholarly career.<sup>82</sup> Law classes typically offer fewer opportunities for fruitful collaboration between professors and students; unlike graduate students, who seek to establish ties with a professor that may last throughout the student's academic life, law students typically expect to practice law outside a law school setting. In the end, the gulf between the scholarly interests of the professor and the practice orientation of the student may challenge the commonplace equation of good teaching and good scholarship.<sup>83</sup>

Teaching and scholarship presented at least some of these challenges to Hart, although the environment of Harvard Law School may have moderated the conflict. Hart planted himself at the center of

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80 See Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1123 n.30 (1981) (noting that the social scientist who adopts the doctrinalist's approach to law teaching risks serious injury to his career through a reduced rate of publication).

81 Posner did not focus solely on the demands that careful doctrinal teaching places on professors. Rather, he suggested that the style of writing that doctrinalists tend to produce—long on footnotes and the careful analysis of the cases—demands more in time than it offers in terms of analytical payoff. See *id.* at 1116. Notably, he included Hart & Wechsler as a classic example of doctrinal scholarship. See *id.*

82 For a classic account, see Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 638, 645 (1968) (expressing doubt that any law professor can be both a genuine academic and a trainer of Hessians and suggesting that time devoted to Hessian training makes serious scholarship impossible).

83 See Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI-KENT L. REV. 765, 807 (1998) (finding no significant relationship between excellence in law teaching and legal scholarship).

the intellectual life of the law school, working closely with the Legal Philosophy Discussion Group in the 1950s<sup>84</sup> and encouraging much student work in the field that was later published in the *Harvard Law Review*.<sup>85</sup> One senses in these opportunities for collaboration that Hart had achieved a degree of unity in his teaching and scholarship. Indeed, one senses that his engagement with the future law professors and judges among his students more closely resembled the graduate than the law school model of interaction.

Hart's last major article, *The Time Chart of the Justices*,<sup>86</sup> reveals the productive possibilities of the Socratic classroom. The article appeared in 1959, as a prestigious Foreword to the *Harvard Law Review's* annual summary of the Term just ended.<sup>87</sup> In it, Hart examined the work load of the Justices and argued that they had devoted too much of their time to the review of fact-bound FELA cases and too little to the reasoned elaboration of law in areas such as federal habeas corpus that would have benefitted from the articulation of broader principles from which the lower courts might derive surer guidance in future cases.<sup>88</sup> Part of the argument was doctrinal; Hart criticized the failure of the Court to address the real problem of federal-state relations at issue in the habeas cases.<sup>89</sup> The more creative part of the article, though, was in some sense statistical. Hart tallied up the chores that occupied the Justices—the number of certiorari petitions they must have read, oral arguments they must have attended, conferences they must have joined, and so forth—and assigned to each chore an estimated time.<sup>90</sup> He compared the totals to the hours available in any particular Term, and concluded that temporal constraints argued against use of the Court's decisional resources to achieve justice in individual cases.<sup>91</sup>

The argument in *The Time Chart* must have sounded familiar to Hart's former students. Drawing upon his experience in the Office of Price Administration, where he had worked during the war, Hart had

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84 See Eskridge & Frickey, *supra* note 3, at c-cii.

85 One finds a number of such products among Hart's papers. In addition, one finds a series of notes in the *Harvard Law Review* that appear to bear the distinctive impression of Hart's interest in Federal Courts. See Amar, *supra* note 1, at 691–92 (describing a golden age of Federal Courts scholarship in the early 1950s, and citing to a variety of student notes that take up the courses' themes).

86 See Henry M. Hart, Jr., *The Supreme Court 1958 Term: Foreword—The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

87 See *id.*

88 *Id.* at 96–101.

89 *Id.* at 101–03.

90 *Id.* at 85–94.

91 *Id.* at 96–98.

long emphasized in class notes the difficulty of overseeing the work of the administrative state.<sup>92</sup> Atop a pyramid of billions of transactions taking place in the shadow of the law sat the Court, capable of deciding only a few cases a year that might help shape the work of any particular agency. In such a complex world, and with limited resources, the Court ought in Hart's view to devote its attention to the broadest issues of principle so as to furnish guidance to the lower courts and officials charged with implementing the law.<sup>93</sup> Alongside this argument about the role of the Court atop the legal hierarchy, Hart developed a model of the time available to the Justices.<sup>94</sup> Class notes from the late 1940s and early 1950s consistently feature the model that Hart was to present in *The Time Chart*, a model he had refined in reaction to comments by Fred Rodell about the indolence of the Vinson Court.<sup>95</sup>

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92 See, e.g., Henry M. Hart, Jr., Notes on Federal Jurisdiction (Sept. 24, 1950) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 6) [hereinafter Hart, Notes (Sept. 24, 1950)].

93 Notes from September 1950, for example, use the experience of the Office of Price Administration from 1944 to demonstrate the Court's place at the top of a pyramid of federal regulation. *Id.* At the bottom of the pyramid, Hart identified billions of regulated business transactions; next came the work of volunteer and paid investigators, who handled some 300,000 cases; next came the attorneys, who commenced nearly 30,000 enforcement proceedings; the district courts disposed of 16,000 matters; forty-six decisions issued from the appellate courts; and the Supreme Court decided only four cases. *Id.* Hart emphasized the importance of seeing the "4 cases at the apex of the pyramid in relation to the billions of transactions at the base"; the Court, "obviously, is doing something besides dispensing justice to individuals." *Id.*

94 Notes from as early as September 1948 develop the model from *The Time Chart* in some detail. Hart broke down the Court's docket into its components (original, miscellaneous, and appellate) and toted up the number of matters on each. Henry M. Hart, Jr., Notes on Federal Courts (Sept. 30, 1948) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 3). Next, he calculated the number of work weeks available (thirty-six) and multiplied by sixty hours to reach a total of 2160 hours of work per Term for each Justice. *Id.* After tabulating the chores of the Justices, Hart found that little time remained for collegial activities. See *id.* He concluded that "there isn't much room for any considerable increase in cases disposed of with full consideration—without making adequate consideration of really important cases flatly impossible." *Id.* Hart included much the same demonstration in notes for September 1951, concluding that the Court cannot decide much more than the "100–150 cases" it has been deciding "with full consideration." Hart, Notes (Sept. 17, 1951), *supra* note 25.

95 See FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955, at 305–06 (1955) (criticizing the Vinson Court for its lack of industry and contrasting the publication of 200 full opinions by the Hughes Court with the failure of the Vinson Court to generate 100 such opinions in three of its four years). Hart carefully examined the Court's docket in class, using his understanding of the technical details to demonstrate that Rodell had exaggerated the work of the

One might ask how much *The Time Chart* benefitted from the decade of refinement it received in Hart's Socratic classroom. The article offers one way to understand the internal workings of the Court, and Hart's clerkship with Justice Brandeis certainly provided him with an insider's knowledge of the working life of the Justices. But the article nonetheless has a somewhat, well, refined quality; its tabulations of the various chores seem a bit too neat to capture the real world of judicial time management on a multi-member court.<sup>96</sup> Perhaps most academic of all, and one focal point of a subsequent critique by Thurman Arnold, Hart's argument rested on the premise that the Justices might develop a more penetrating, more principled decision by devoting additional time to the collegial side of judging.<sup>97</sup> Arnold argued, in contrast and likely with the example of Justice Frankfurter in mind, that further time in deliberation might produce relatively little by way

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Hughes Court and downplayed that of the Vinson Court. Hart, Notes (Sept. 17, 1951), *supra* note 25. Hart remained of the view that the Court must limit its docket to assure full consideration of its decisions.

One can see in the battle between Rodell and Hart a kind of professorial version of that between Justices Douglas and Frankfurter on the Court. Rodell and Douglas, both products of Yale and both leading Realists, had little patience for the Harvard-Frankfurter school of thought with which Hart himself was so closely identified. See Charles Alan Wright, *Goodbye to Fred Rodell*, 89 YALE L.J. 1455, 1456, 1460 (1970) (recounting Rodell's close ties with Douglas, his disdain for Frankfurter, and his dismay at the obfuscation in much of the scholarship that went on in Harvard's name). In responding to Rodell in class, Hart gave vent to some of the deep feelings that Rodell's attack on the Court must have stirred. In particular, Hart noted that the Hughes Court did not have to "cope" with the dissenting opinions of Justices Black and Douglas. See Hart, Notes (Sept. 17, 1951), *supra* note 25.

96 See Thurman Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1310 (1960).

97 *Id.* at 1310-13 (contending that some loss of principle may occur as judges on multi-member courts draft opinions to retain the support of a majority; noting that judges do not easily surrender their positions through collegial give and take). Justice Frankfurter no doubt sought to achieve such principled decisions through a barrage of collegial suggestions—in conference and through comments on circulating draft opinions—but the other Justices frequently resisted the invitation to adopt Frankfurter's principles. On Frankfurter's tendency to lecture his brethren, and their resistance to his attempts at persuasion, see Howard Ball & Philip Cooper, *Fighting Justices: Hugo L. Black and William O. Douglas and Supreme Court Conflict*, 38 AM. J. LEGAL HIST. 1, 24-25 (1994) (tracing the battle between Frankfurter and Black; quoting description of Frankfurter as a professor with an "incorrigibly academic" bent of mind); Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, 77-81 (noting the failure of Frankfurter's professorial style to persuade his equals on the Court).



of broadened consensus or deeper, more principled decisions.<sup>98</sup> Arnold seems to have suspected that the model of collaborative reason, led by a dominant figure, better describes the law school classroom than the Court's conference room.

If Hart had difficulty in finding as penetrating a critic as Arnold among students naturally inclined to identify closely with the professors who will assess their work and determine their prospects for professional advancement,<sup>99</sup> Hart's method of classroom refinement may have provided him with an outlet for intellectual engagement that substituted to some extent for published work. Hart's class notes reveal both a remarkable mind at work and a meticulousness about getting the ideas right in which one can see (with the benefit of hindsight) some potential for writer's block.<sup>100</sup> Hart's perfectionism and his consequent level of scholarly productivity appear to have been the subject of some concern at Harvard. He and Albert Sacks never brought their text on the Legal Process to a satisfactory conclusion; it remained the most famous set of unpublished teaching materials in American law until its appearance under the editorial guidance of Eskridge and Frickey.<sup>101</sup> Hart must have felt a similar sense of disappointment at his failure to publish a second edition of the *Federal Courts* book<sup>102</sup> and at his failure to find a satisfactory solution to the

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98 See Arnold, *supra* note 96, at 1313. On Douglas's impatience with Frankfurter's lectures, see Urofsky, *supra* note 97, at 80 (quoting Douglas's description of Frankfurter's "long discourses" as a "great burden"). In general, it appears that Frankfurter's lectures at conference and elsewhere had little influence on his brethren. *Id.* (noting Justice Stewart's critical reaction to them).

99 See Eskridge & Frickey, *supra* note 3, at lxxxvii (noting the tendency of Harvard law students to treat Hart and Sacks with reverence); cf. Lila A. Coleburn & Julia C. Spring, *Socrates Unbound: Perspectives on the Law School Experience*, 24 LAW & PSYCHOL. REV. 1, 11-15 (2000) (exploring the way in which students may look to a professor for help in achieving their own dreams of professional success).

100 A nice introduction to writer's block appears in RICHARD HOFSTADTER, *THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON* 116-17 (1968) (describing a "staggering variety of psychological and mechanical devices, familiar to all observers of academia," that Frederick Turner built up to stand between him and his work; including on the list the "momentary pleasures of research," the burdens of university administration, the occasional vacation, the detailed note taking on projects unfulfilled, the "needs and demands of his graduate students, always warmly and generously met," the long letters to friends and publishers, and the "irresistible lure of overteaching," which led Turner in "his last year at Harvard, to redo his notes for a course he had given many times and would never give again").

101 See Eskridge & Frickey, *supra* note 3, at lxxxvii-xci (tracing the history of the unpublished Legal Process materials at Harvard).

102 The second edition appeared in 1973, after Hart's death in 1969. See PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973).

problems that he had set for himself in his invited Holmes lecture.<sup>103</sup> Although some have applauded the intellectual honesty that led Hart to his dramatic decision to stop in the middle of his third lecture,<sup>104</sup> one has the unmistakable sense that the Dean, Erwin Griswold, would not have shared that view.<sup>105</sup>

One can find much to admire in Hart's demanding standards and in his quest for a systematic approach, particularly in light of the foundational insights that his work has produced for the fields of Federal Courts and Legal Process. But one can also find reason for caution. If the extraordinarily rich materials that Hart left behind in these fields have been the delight of generations of professors, they have been the bane of many students. Although the Legal Process materials gained adherents throughout the country, Paul Carrington (then at Wyoming) probably spoke for many in describing them as a "little rich" for his students.<sup>106</sup> Student complaints about the richness of the Hart & Wechsler casebook on Federal Courts have similarly fed a market for more teachable alternatives.

That the contributions of Hart's teaching materials have been more obvious to his colleagues in the field than to the students of his day and ours suggests a disquieting possibility. Perhaps Hart would have been wiser to devote more energy to the publication of work addressed to his professional peers and less to the preparation of the incredibly rich set of class notes that he left behind. I read Hart's notes with a sense that an opportunity for deeper insight and broader influence may have been lost in his attention to teaching details. To be sure, Hart's efforts were not wasted on his students. But as Dean Griswold noted, scholars of Hart's rank may have a duty to publish their ideas to a group broader than that sitting in the classroom.<sup>107</sup> Hart's co-author, Herbert Wechsler, had adopted a model of econo-

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103 For an account of the January 1963 Holmes lectures, see Eskridge & Frickey, *supra* note 3, at xcvi (describing Hart's confession in his third lecture that his proposed solution, on further reflection, would not work and noting the audience's "stunned" reaction).

104 See Bok, *supra* note 67, at 1592 (describing Hart's dramatic decision to stop in the middle of the third lecture as one of "sheer intellectual courage").

105 Griswold reveals that he had struggled unsuccessfully to persuade Hart (and Sacks) to commit their ideas to the printed page. See Erwin N. Griswold, *Preface to HART & SACKS*, *supra* note 3, at vii-viii; see also Eskridge & Frickey, *supra* note 3, at xcix n.209 (quoting Griswold's letter imploring Hart to deliver his Holmes lecture manuscript for publication).

106 Eskridge & Frickey, *supra* note 3, at ciii n.232.

107 See Griswold, *supra* note 105, at viii (noting the obligation of law schools to disseminate ideas about the law and his regret that the Legal Process text never went forward to formal publication).

mizing on his teaching preparation time long before Posner suggested its necessity.<sup>108</sup> The marginal improvement in his class notes from year to year may not have repaid Hart with the kind of searching criticism of his ideas that he received from publication of articles such as *The Time Chart*.<sup>109</sup>

Yet despite the temptation to reflect on what Hart might have accomplished with a different deployment of his considerable talents, those of us who have come later and who have staked our own more or less tenuous claims to the field<sup>110</sup> have "no right to try to budget his time."<sup>111</sup> Given the standards that he applied to his work, classroom teaching, and the preparation of his detailed notes may have enabled him to offer a tentative version of his ideas more freely than he felt he could in his more formal published scholarship. At least we have the first edition of *Federal Courts*, the tentative edition of the *Legal Process*, the articles, and the notes that Hart left behind. Taken as a whole, the body of work suggests that he saw teaching and scholarship as essentially a single enterprise, and any regret we feel at the articles he failed to write should not blind us to the importance of those he did.

### 3. The Relevance of Federal Courts

Doubts about the relevance of federalism to the actual decision of disputes trouble scholars as much today in the wake of *Bush v. Gore*<sup>112</sup>

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108 See Letter from Herbert Wechsler to Henry Hart (May 25, 1948) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 4) (sending along a syllabus from his course in Federal Jurisdiction, and noting that he "had adopt[ed] the device of dividing the subject matter among the students, with the class taught entirely by their presentations").

109 Hart, *supra* note 86.

110 I entered the field, essentially by adverse possession, when Victor Stone (a Columbia law graduate and student of Herb Wechsler), who had taught the course at Illinois for many years, retired in 1990.

111 HOFSTADTER, *supra* note 100, at 113 (noting, and struggling against, his own temptation to rethink the scholarly choices of the historian Frederick Turner).

112 531 U.S. 1046 (2000) (granting certiorari and staying the Florida recount). Hart's notes provide one measure of how far the decision in *Bush* takes the Court from the world of the early 1950s. Hart often began his course by reflecting on the institutions of American democracy that had enabled the country to settle ultimate questions that were capable, if unsettled, of dividing and breaking up the country. See Hart, Notes (Sept. 19, 1952), *supra* note 25; cf. Hart, Notes (Feb. 2, 1949), *supra* note 21. Hart identified those two institutions as "elections" and decisions of "the federal courts, and particularly the Supreme Court." Hart, Notes (Sept. 19, 1952), *supra* note 25. In distinguishing the electoral process from the judicial process, and in proposing to study only the latter, Hart's notes suggest that he would not have foreseen a role for the Court in the Florida election.

as when Hart was developing his system of reasoned elaboration in the face of Realist criticism.<sup>113</sup> Today, I suspect that one's sense of the field's relevance may depend as much on one's habit of mind as on more concrete matters. At the risk of speculating too crudely about Hart in particular, Hart's system of reasoned elaboration may reflect a desire to say something accepted as true by those who may have disagreed on the merits of particular questions of substantive law. Many of us in the procedural fields in general, and Federal Courts in particular, share with Hart a tendency to prefer the elegant, non-merits disposition.<sup>114</sup> I do not mean to suggest that Hart lived without conviction or failed to take stands on *Brown v. Board of Education* or the other divisive issues of his day; I simply note, as others have, that Hart failed to make such questions the focus of his considerable intellectual talents.<sup>115</sup>

Perhaps as a result of its desire to transcend substantive position-taking, Federal Courts can appear oddly inarticulate when the gravest matters of social policy come before the federal courts for decision. The salience of challenges to racial subordination in *Railroad Commis-*

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113 See Arnold, *supra* note 96, at 1310–14 (inviting Hart to abandon his proceduralist approach to the work of the Court as one unworthy of his brilliance); see also RODELL, *supra* note 95, at 271–79 (contrasting Frankfurter's narrowly academic concern with "abstract ideas and patterns of logic" with Douglas's willingness to hit the issues squarely and decisively and move on).

114 I suspect that teachers who come to Federal Courts from the procedural fields find its tendency toward elaboration less galling than those who come from substantive fields, such as Constitutional Law.

115 See, e.g., Eskridge & Frickey, *supra* note 3, at cvi–cix (noting that Hart defended the decision in *Brown* and was personally committed to civil rights and the practice of integration, and noting also the omission of such issues from the Legal Process materials on which he worked with Al Sacks); see also, e.g., Arnold, *supra* note 96, at 1320 (criticizing Hart for focusing on the Court's handling of two relatively minor questions of procedural law, for building his critique of them into an indirect attack on the Court's performance in the loyalty oath cases of the late 1950s, and for failing to come right out and say so).

Hart's decision to leave *Brown* to one side seems eminently defensible from within the Hart & Wechsler paradigm. While the course might take up enforcement and remediation issues, it might well consider the equal protection question in *Brown* as the province of the constitutional lawyers. We find in Hart's class notes some consideration of *Brown*, but it comes in connection with material on state sovereign immunity. Hart asked his students to reflect (as perhaps many of us do today) on the question why the segregation suits were not barred by the doctrine of immunity. See Henry M. Hart, Jr., Notes on the Federal Courts and the Federal System 8 (Apr. 4, 1958) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 3).

sion of *Texas v. Pullman Co.*<sup>116</sup> and to the death penalty in *Coleman v. Thompson*<sup>117</sup> make the Court's invocation of federalism in those cases sound a mite forced. Hart appears to have shared this sense of discomfort on occasion. Teaching his class in 1965, Hart apparently had prepared to criticize a recent Warren Court decision to abate criminal prosecutions in the wake of the Civil Rights Act of 1964. But after laying the groundwork for such a criticism, Hart stopped short and after a long pause noted that, sometimes, the Court just has "to do the right thing."<sup>118</sup> As Warren Court activism of the late 1950s and 1960s challenged notions of principle, and as the country divided more deeply over loyalty oaths, civil rights, and Vietnam, Hart may have sensed that the prospects for a broad agreement on principles of federalism had vanished with the storied consensus of the 1950s.

All of which makes his final argument for the course's continuing relevance one of some interest. Writing for a class in September 1968, Hart began by noting the widespread view that the federal system was "obsolescent, if not obsolete."<sup>119</sup> He then remarked upon reasons of practical necessity that helped to explain its continuing survival—such factors as the more rapid capacity for growth of local government and genuine problems of national administrative capacity.<sup>120</sup> But his real argument focused not on practical necessity but on larger issues of "political liberty."<sup>121</sup> He then ticked off a series of points that seemed to argue for the continuing relevance of the values of federalism: "disillusionment with bureaucracy"; "impatience with . . . dehumanized decisions"; and "the demand for participation in decisions seen as a value in itself and not simply as a means of securing more acceptable decisions"; and "student power, black power, community control, sub-community control, more representative political party organizations."<sup>122</sup> He concluded hopefully

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116 312 U.S. 496, 498–502 (1941) (acknowledging that the porters had tendered a substantial question of constitutional law, and refraining from deciding the question in deference to the state's interest in having an opportunity to moot the challenge through statutory interpretation).

117 *Coleman v. Thompson*, 501 U.S. 722, 728–35 (1991) (invoking "federalism" to explain its decision to refuse to reach the merits in a death penalty case).

118 Eskridge & Frickey, *supra* note 3, at cxiii (describing Hart's analysis in class of the Court's decision in *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964)).

119 Henry M. Hart, Jr., Notes on Federal Courts and the Federal System 2 (Sept. 13, 1968) (on file with Harvard Law School Library, Papers of Henry M. Hart, Jr., Paige Box 3).

120 . *Id.*

121 *Id.* at 3.

122 *Id.*

that your generation will come to this course with a far livelier sense than your predecessors of the values of federalism and a much more alert concern to understand the development of the federal system, its present working, and the ways in which it can be made to work better.<sup>123</sup>

Although Hart may well have been right about the issues that would define the future of federalism, the scholars of the generation he meant to address have generally declined to make them a part of their standard courses in Federal Courts. To be sure, arguments from federalism continue to play a central role in the course. But they often appear cartoonlike in their depiction of the importance of preserving the states as laboratories of democracy. The values that Hart identified—preserving community control, avoiding dehumanized bureaucracy, maintaining individual participation in decisionmaking—play a vital role in the work of those who study local government law.<sup>124</sup> But they do not seem particularly relevant to the choice between the often equally distant and dehumanized state and federal governments. That's why arguments from federalism in the context of Federal Courts have a hit-or-miss quality, sometimes succeeding (as in the Eleventh Amendment cases) and sometimes failing (as in the Florida ballot recount cases), and may depend as much on particular doctrinal developments as on any consistent and thoroughgoing commitment to the preservation of localism.<sup>125</sup>

## II. WECHSLER AND THE ROLE OF CONSTITUTIONAL TEXT AND STRUCTURE

Although I have been unable to review any class notes he preserved,<sup>126</sup> the combination of Wechsler's own published works and the recollections of those who knew him well suggest that he may have differed from Hart to some degree in interpretive matters. While

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123 *Id.*

124 Such issues have tended to inform the work of scholars in the field of State and Local Government Law. Today, scholars in that field seem to have a lively sense of the importance of preserving local control and a corresponding tendency to see federalism as a viable approach to government organization. See Richard Briffault, *Our Localism, Part II: Localism and Legal Theory*, 90 COLUM. L. REV. 346, 447–54 (1990); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1149–54 (1980). See generally WILLIAM D. VALENTE ET AL., CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 14–29 (5th ed. 2001) (assessing vertical distribution of power as between state and local government in light of democratic values).

125 See generally Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) (nicely summarizing the swing of the Federal Courts pendulum between nationalist and federalist outcomes in particular areas of doctrine).

126 See *supra* note 20 and accompanying text.

Hart tended to emphasize doctrinal analysis, Wechsler often placed more emphasis on text, history, and structure in the interpretation of Article III. Wechsler could, of course, parse decisional law with the best of them. But Wechsler also devoted himself to law reform, having served as the reporter of the influential *Model Penal Code* and as the director of the American Law Institute (ALI).<sup>127</sup> In both capacities, Wechsler valued clear textual statement and reportedly declined to regard decisional law as the last word in the ALI's restatement of controlling legal principles.<sup>128</sup> After sketching the role that Wechsler's own emphasis on the text played in his approach to the problems of Federal Courts, this Part explores the (possibly related) doctrinal skepticism that informed his work with law reform.

### A. *Textual Centrality in Wechsler's Work*

David Shapiro's remembrance nicely suggests one possible contrast between Hart and Wechsler on matters of doctrinal analysis.<sup>129</sup> Shapiro took the class in Federal Courts from Henry Hart in the 1950s, and recalls that Wechsler joined Hart one day to debate the power of Congress to curtail the appellate jurisdiction of the Supreme Court.<sup>130</sup> Taking on the role that Hart had assigned to "Q" in his famous article on the subject,<sup>131</sup> Wechsler defended a straightforward reading of the Exceptions and Regulations Clause of Article III as giving Congress relatively unfettered power to cut back on the Court's appellate review authority.<sup>132</sup> Hart, meanwhile, assumed the part of "A"<sup>133</sup> and argued that the deepest principles of constitutional tradition required the preservation of the Court's essential function as an

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127 See Geoffrey C. Hazard, Jr., *Tribute in Memory of Herbert Wechsler*, 100 COLUM. L. REV. 1362, 1362-65 (2000) (describing Wechsler's work as chief reporter for the *Model Penal Code* and as Director of the American Law Institute after 1963).

128 *Id.* at 1365.

129 See David L. Shapiro, *Herbert Wechsler—A Remembrance*, 100 COLUM. L. REV. 1377, 1380 (2000).

130 *Id.*

131 See Hart, *supra* note 46, at 1364 & n.13.

132 See Shapiro, *supra* note 129, at 1380. For a now somewhat dated introduction to the subject, see generally Gerald Gunther, *Congressional Power To Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984) (concluding that Article III permits congressional exceptions and regulations to the Court's appellate jurisdiction); cf. James E. Pfander, *Jurisdiction Stripping and the Supreme Court's Power To Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433 (2000) (arguing that the Court's constitutional "supremacy" requires that it remain capable of reviewing the work of "inferior" tribunals, notwithstanding the text of the Exceptions and Regulations Clause).

133 See Hart, *supra* note 46, at 1363-66.

appellate review body.<sup>134</sup> In the reported contrast between Wechsler's calm emphasis on constitutional text, and Hart's reliance on the Court's historic function, we find one possible example of a somewhat less monolithic conception of the Hart and Wechsler paradigm.

I say possible only because Shapiro reports that Hart remained uncertain about the proper resolution of the question and Wechsler refused to tip his hand that day when asked about his own view of the scope of congressional power.<sup>135</sup> But Wechsler tipped his hand some years later with the publication of *The Courts and the Constitution*.<sup>136</sup> There, Wechsler made it clear that he viewed the constitutional plan as empowering Congress to vest jurisdiction in the federal courts or to leave such matters to the state courts.<sup>137</sup> Although he acknowledged the argument that any exceptions to the Court's appellate jurisdiction must respect its essential functions, he ultimately found the argument outweighed by the force of the clear language of the Exceptions Clause.<sup>138</sup> In the end, Wechsler concluded that the Court's role in constitutional adjudication flowed, *Marbury*-like, from its obligation to decide the litigated dispute in cases otherwise within its jurisdiction and did not derive from any special function that the Constitution had vested in the Court.<sup>139</sup>

Wechsler also broke with Hart, though not explicitly, in the manner in which he proposed to justify the doctrine of judicial review. Hart's account, as we have seen, offered a functional defense of judicial review: federal courts are in the business of resolving disputes; they inevitably must find, apply, and make law in the process of doing so; and this law-declaring function applies as well to ordinary law as to the law of the Constitution.<sup>140</sup> So while the Court had no basis for lawmaking outside the context of a disputed case, the power of law-declaration in a proper case necessarily extends to "all the questions of law involved."<sup>141</sup> With its emphasis on the functional role of courts, Hart's account tends to downplay the textual arguments that favor judicial review.

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134 See Shapiro, *supra* note 129, at 1380.

135 *Id.*

136 See Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965).

137 See *id.* at 1005-06.

138 *Id.* at 1005 & n.8 (citing Leonard Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960)).

139 See Wechsler, *supra* note 136, at 1006.

140 See *supra* text accompanying notes 58-60.

141 See *supra* text accompanying note 60.



While Wechsler shared Hart's functional understanding of the importance of a case to decide, his account of the basis for judicial review in *Neutral Principles* gives greater prominence to arguments from constitutional text and structure. Building from the bottom up, Wechsler began with the Supremacy Clause, which he quoted, and noted its application to the litigation of constitutional issues before the state courts.<sup>142</sup> Wechsler next invoked the text of Article III, and the Madisonian compromise, in pointing out that Congress was free to leave constitutional matters to the state courts in the first instance or to vest their determination in lower federal courts.<sup>143</sup> Assuming state courts of first instance, Wechsler noted the grant of appellate jurisdiction to the Supreme Court (and carefully noted the Exceptions Clause).<sup>144</sup>

From these sources of textual authority, Wechsler reasoned that the Court was expected to hear appeals from the state courts in cases that implicated the state courts' compliance with the demands of the Supremacy Clause and with the other terms of the Constitution.<sup>145</sup> If the state courts were bound in the first instance to give effect to the supreme law, then surely, Wechsler reasoned, the Supreme Court would owe the same obligation on appeal.<sup>146</sup> And if both the state courts and the Supreme Court were bound by the Supremacy Clause, then surely the lower federal courts (if any) were bound as well.<sup>147</sup> Wechsler noted that history pointed toward the same conclusion, citing both Hamilton's position in *Federalist No. 78* and Hart's own scholarship.<sup>148</sup> Admittedly, Wechsler wrote in part as a response to a text-centered argument against judicial review by Judge Learned Hand,<sup>149</sup> and that may account in part for his close parsing of the relevant texts. But Wechsler also wrote for the future, and he believed that he had offered a more persuasive argument in favor of the Court's power of judicial review than one could draw from the presence of *Marbury* and its progeny in the pages of the United States Reports.<sup>150</sup>

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142 See Wechsler, *supra* note 5, at 3.

143 *Id.* at 3-4.

144 *Id.* at 4.

145 *Id.* at 4.

146 *Id.*

147 *Id.* at 4-5.

148 *Id.* at 5 & n.13.

149 *Id.* at 2-3.

150 In an oral history, Wechsler treats this section of *Neutral Principles* with an apparent fondness that suggests his continuing agreement with its claims. See Silber & Miller, *supra* note 20, at 923-31.

Wechsler's reliance upon text and structure to decide the question of judicial review demands some explanation. Much of the remainder of *Neutral Principles* and of Wechsler's other work rejects the notion that the Court must interpret provisions of the Constitution in line with their original meaning.<sup>151</sup> He was thus at pains in *Neutral Principles* to reject Hand's argument that the sweeping provisions of the Bill of Rights were too vague and open-ended to produce judicially manageable standards for decision.<sup>152</sup> And he pointedly proceeded in his discussion of the standard of judicial review to define the appropriate standard in terms of the neutrality and generality of the principle applied, and not in terms of fealty to the original meaning of the relevant provision.<sup>153</sup> Equally revealing, Wechsler considered and dismissed the notion that its omission from the work of both Hamilton and Marshall foreclosed Wechsler's textual and structural argument in favor of judicial review; Hamilton and Marshall were writing at a different time, when the "style of reasoning" that was thought "most persuasive" might well have differed from that of the late 1950s.<sup>154</sup> Despite this general rejection of originalism, Wechsler apparently believed that the text of the judiciary article might provide a somewhat surer guide to constitutional interpretation than the text and history of the Constitution's more open-ended provisions.

One might account for the different weights that Wechsler attached to arguments based on the text and history of Article III and those based on the text and history of the Bill of Rights by noting a familiar distinction between the Constitution's structural provisions and its protections of individual rights. Wechsler had a great deal of confidence in structural arguments, and he deployed them to great effect in his well-known piece, *The Political Safeguards of Federalism*.<sup>155</sup> As in *Political Safeguards*, where Wechsler argued for a diminished judicial role in protecting state interests that he viewed as adequately protected by their representation in national institutions, Wechsler deployed structural arguments in *Neutral Principles* with a view toward deriving a standard of judicial conduct. In particular, Wechsler ar-

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151 See Monaghan, *supra* note 63, at 1372 n.17 (describing Wechsler's work as decidedly non-originalist).

152 See Wechsler, *supra* note 5, at 16-19.

153 *Id.* at 15.

154 *Id.* at 5.

155 See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (noting the representation of the states in the national government, and arguing that the ability of states to influence legislation that might affect their interests diminished the need for judicial intervention to protect such interests).

gued that the power and duty of the federal courts to apply constitutional law to cases properly before them argued against any discretionary power to decline jurisdiction or to refrain from passing upon potentially divisive constitutional claims.<sup>156</sup>

With his willingness to ascribe relatively greater significance to the text in situations where the text in question provides the structural framework of constitutional institutions, Wechsler proposed a dichotomy that has appealed to subsequent scholars in the field of Federal Courts. Some of the most provocative writing on the scope of congressional control over federal jurisdiction in the past few decades, including that by Professors Akhil Reed Amar and Robert Clinton, has taken the text and history of Article III as its point of departure.<sup>157</sup> Work by then Professor (and now Ninth Circuit Judge) William Fletcher also relies heavily on the text and history of the ratification of the Eleventh Amendment.<sup>158</sup> But while Amar, Clinton, and Fletcher all treat text and history as sources of insight into the power of the federal judiciary, one suspects that none would readily align himself with the Court's leading originalists on questions of individual rights.<sup>159</sup> Wechsler's emphasis on text and history in structural matters and his more open-ended doctrinal approach to the definition of individual rights thus seem to have struck a chord with later scholars.

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156 See Wechsler, *supra* note 5, at 6-7 (noting that the courts' duty to decide the case includes an exception for disputes that implicate the political question doctrine).

157 See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984) (arguing that the text and history of Article III reveal that Congress must vest federal courts with jurisdiction over all of the cases and controversies that the provision specifies); cf. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) (deploying similar arguments from text and history, but concluding that Article III mandates federal jurisdiction over only federal question "cases"). While Amar often uses text, history and structure, he has resisted originalism, and links his own thinking about constitutional theory with the modality approach of Professor Bobbitt. See Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 FORDHAM L. REV. 1657, 1657-58 (1997). For a skeptical review, see Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990).

158 See generally William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983) (analyzing the history of the Eleventh Amendment, and discussing its modern day application and consequences).

159 See Purcell, *supra* note 21, at 695-96 (1999) (characterizing Amar's neo-federalist account of the mandatory tier of federal jurisdiction as an attempt to defend the jurisprudence of the liberal Warren Court).

*B. Doctrinal Skepticism in Wechsler's Approach to Law Reform*

If he treated text and structure with some care, at least in the interpretation of structural provisions, Wechsler also had a remarkable flair for effective law reform. His colleagues at the ALI testify to Wechsler's considerable skills as a legal analyst, draftsman, and critic; Professor Hazard thus describes Wechsler as having combined an appreciation for the intuition expressed in the decided cases with a commitment to achieve what the law "should be" without regard to the pedigree of the legal rule.<sup>160</sup> Wechsler's formulation of the ALI's role captured this notion by emphasizing the need to give appropriate, but not necessarily controlling, weight in a restatement of the law to the preponderating balance of authority. I found Wechsler's genius for effective reform nicely reflected in his paper on the revision of the Judicial Code.<sup>161</sup> Writing in 1948, well before the decision in *United Mine Workers v. Gibbs*,<sup>162</sup> and the expansion of supplemental jurisdiction it portended, Wechsler offered a brisk and surehanded sketch of the contours of an effective statutory grant of such authority that went well beyond established law and expertly anticipated future lines of doctrinal and statutory development.<sup>163</sup>

Wechsler's skeptical approach to the decided cases, accepting them as informative but not as definitive, may have helped to inform his emphasis on the text in his work in Federal Courts. In *The Courts*

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160 See Hazard, *supra* note 127, at 1365.

161 See Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 232-33 (1948).

162 383 U.S. 715 (1966). *Gibbs* proposed a less "grudging" approach to the doctrine of pendent claim jurisdiction than had been in place in the prior cases, coupling a rule of joinder of related state and federal claims with a regime under which the federal district courts were empowered to dismiss state law claims in their discretion where state law matters predominate. See *id.* at 721-29.

163 Thus, Wechsler posed the fundamental challenge as balancing the need for the efficient adjudication of related claims without shifting unsettled or controversial questions of state law into a federal court system that was ill-equipped, both before and after *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), to give them definitive answers. See Wechsler, *supra* note 161, at 232. He proposed to strike the balance by permitting the federal district courts to exercise supplemental jurisdiction over state law claims that were closely related enough to a federal claim as to satisfy the test for proper joinder in a single action. *Id.* at 233. He next suggested that the federal district courts be given discretion to dismiss state law claims, without prejudice, whenever they found that unsettled questions of state law were involved that were better suited to state court resolution. *Id.* Finally, Wechsler suggested a tolling provision to extend the statute of limitations on such state law claims. *Id.* In each instance, Wechsler anticipated provisions that would later appear in the supplemental jurisdiction statute, 28 U.S.C. § 1367 (1994). See *id.*

and the Constitution,<sup>164</sup> the 1965 lecture in which he treated the Exceptions Clause as a complete answer to arguments about the essential function of the Supreme Court, Wechsler also displayed a nonchalance about doctrinal change. In explaining his decision to focus on the work of the Court in his lecture, Wechsler drily noted that it was the Supreme Court, "above all others[, that] has the faculty of rendering decisions that accord a quality of rapid obsolescence to the learning we law professors claim to have."<sup>165</sup> One suspects the comment may have drawn laughter from his audience even as it revealed a truth about Wechsler's decision to ground his own scholarship and law reform work in a conception of law somewhat independent of the shifting sands of doctrinal currency.

Wechsler's collaborator, Henry Hart, may have found this posture of skeptical distance from the decided cases somewhat more difficult to maintain. As Judge Fletcher observed to me in a perceptive letter, Hart may have been a true Langdellian and may have treated the decided cases as his primary material for legal analysis.<sup>166</sup> Assuming the Langdellian's obligation to take the cases as scientific data points for analysis, accepted as true, the sheer multiplication of relevant decisions, many of which pointed in opposite directions, may have reduced the universe of accurate statements available to Hart. Couple this closing space with Hart's own careful analysis and one can begin to see why the flurry of Warren Court activity left him with less to say.<sup>167</sup>

Fletcher's point also suggests why the multiplication of decisions may have driven Hart to an ever more elaborate mode of doctrinal analysis. If as a Langdellian analyst, Hart felt obliged to fit each of the decisions into the pattern of the law, the task of addressing conflict in the cases could become substantial. One might choose to handle such conflict with the skepticism of a Wechsler, either by ignoring the discordant outliers or by shrugging off the pace of doctrinal change. But Hart had set for himself the task of harmonizing and reconciling, and that may have driven him further and further beneath the substantive surface of the decisions in a search for underlying patterns of consistency. While such a search may yield genuine insights, it may

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164 Wechsler, *supra* note 136.

165 *Id.* at 1001.

166 See Letter from William A. Fletcher, Circuit Judge, United States Court of Appeals for the Ninth Circuit, to James E. Pfander 2 (Dec. 31, 2001) (on file with author).

167 *Id.* (linking Hart's writer's block to his Langdellian insistence on faith to the cases and his inability to derive accurate general principles from the growing body of caselaw).

also lead to the sort of doctrinal elaboration that raises doubts about the relevance of the Hart & Wechsler paradigm.<sup>168</sup>

### CONCLUSION

Hart and Wechsler shared many ideas—about the importance of an inquiry into institutional competence, about the need for reasoned decisionmaking, and about the centrality of a concrete dispute to the legitimacy of constitutional adjudication. Consummate lawyers both, they could both argue from text, structure, history, and precedent as the occasion demanded. We should thus resist the temptation to read their differing attitude toward the decided case into the different paths their work took in the wake of their book's appearance in 1953. Hart's struggle to publish his Legal Process materials, and Wechsler's energetic shift to law reform and rise to leadership of the ALI were born of many factors other than their habits of mind.

Yet one nonetheless sees in the contrast between Hart and Wechsler—the one intensely focused on preserving the Court's essential functions and the other calmly willing to accept the lessons of an apparently unambiguous text—something of a metaphor for the productive possibilities of the paradigm that bears their names. Hart was capable of locating a measure of doctrinal coherence in the apparently discordant signals of the decided cases, but may have sometimes devoted more energy to the task of reconciliation than his materials would bear. Wechsler was capable of stepping back from the decisions, and seeing a new path for the law, either in the text of the Constitution or in the texts that he sought to polish for the ALI.

Both strands of analysis play an important role in the work of scholars today. Among doctrinalists striving for coherence in the law, Carlos Manuel Vázquez and Ann Woolhandler quickly come to mind as exemplars of the best features of the Hart tradition.<sup>169</sup> Greater reliance on Wechsler's example appears in the work of Amar, and Gerald

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168 One can see this tension between elaboration and payoff nicely encapsulated in the comments of Paul Bator, one of the co-authors of the second edition of Hart & Wechsler, see BATOR ET AL., *supra* note 102, and a professor at Harvard for many years before his switch to the University of Chicago.

169 See generally, e.g., Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927 (2000) (reviewing the state of doctrinal coherence in the wake of *Alden v. Maine*, 527 U.S. 706 (1999)); Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997) (anticipating through an exhaustive doctrinal review the possibility that the Eleventh Amendment would come to establish an immunity from liability for the states, rather than a forum-selection principle); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77 (1997) (tracing the doctrinal development of compelled

Neuman, whose recent work on non-suspension of the writ of habeas corpus draws heavily, though not exclusively, on textual and historical arguments.<sup>170</sup> Of the many talented figures in law reform, Hazard himself and Ed Cooper come to mind as scholarly lawyers in the Wechsler tradition.<sup>171</sup>

All of which suggests that it may still be possible to connect the two features of the paradigm, as in a lengthy recent piece by Liebman and Ryan.<sup>172</sup> The piece seeks to build a textual and historical foundation for Hart's famous notion that federal courts must decide cases before them in accordance with all available law, including the law of the Constitution.<sup>173</sup> While Liebman and Ryan explore the doctrinal support for their thesis, they devote much of the first half of their lengthy piece to a blow-by-blow reconstruction of the debates at Philadelphia. They do so to demonstrate a desire on the part of the framers to ensure effective judicial power in any case in which Congress authorizes the federal courts to exercise jurisdiction. By depicting Hart's functional conception of the federal courts as emerging from the original structural compromises of the delegates, Liebman and Ryan provide a Wechslerian underpinning for their story. Such an approach certainly does not exhaust the possibilities for productive work in the field, and has not necessarily won the day.<sup>174</sup> But the skillful weaving together of arguments drawn from both strands of the Hart & Wechsler paradigm can sometimes—even today—produce work of real grace and strength.

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remedies in cases coming to the Court from lower federal courts, sitting in diversity, and review of the state courts).

170 See generally, e.g., Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000).

171 Hazard serves as reporter to the ALI's current project on comparative civil procedure; Cooper worked with the ALI project on complex civil litigation in 1993 and now serves as the reporter to the Civil Rules Advisory Committee of the Judicial Conference of the United States. He also published a paper in a recent symposium issue on class action reform that deserves citation here: Edward H. Cooper, *Aggregation and the Settlement of Mass Torts*, 148 U. PA. L. REV. 1943 (2000) (sketching a creative solution to the problem of overlapping and duplicative class actions).

172 See Liebman & Ryan, *supra* note 46.

173 See *id.* at 846–851 (acknowledging the authors' intellectual debt to Henry Hart).

174 See H&W IV, *supra* note 1, at 225 (Supp. 2001) (characterizing the proposed application of Liebman & Ryan's analysis to the judicial role under the 1996 habeas reform statute as one that bristles with difficulties and failed to persuade the Supreme Court).