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Vicki C. Jackson and
Judith Resnik
Editors

Federal Courts Stories

"Map" by Jasper Johns, 1963

Contributors

Michael Collins
Barry Friedman
Vicki C. Jackson
Daniel J. Meltzer
James E. Pfander
Edward A. Purcell, Jr.
Judith Resnik
Lauren Robel
David L. Shapiro
Catherine T. Struve
William Michael Treanor
Mark Tushnet
Amanda L. Tyler
Carlos M. Vázquez
Ann Woolhandler
Larry Yackle
Ernest A. Young

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FEDERAL COURTS STORIES

Edited By

VICKI C. JACKSON
Carmack Waterhouse Professor of Constitutional Law
Georgetown University Law Center

and

JUDITH RESNIK
Arthur Liman Professor of Law
Yale University

FOUNDATION PRESS
2010

THOMSON REUTERS™

195 Broadway, 9th Floor
New York, NY 10007
Phone Toll Free 1–877–888–1330
Fax (212) 367–6799
foundation–press.com

Printed in the United States of America
ISBN 978–1–59941–383–9

Mat #40638973

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FEDERAL COURTS STORIES

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FEDERAL COURTS STORIES

Government Accountability

Federal Common Law, the Administrative State, and the International Community

Introduction

Judith Resnik and Vicki C. Jackson*

The Idea of a Jurisprudence, a Course, and a Canon: Introducing *Federal Courts Stories*

Today, images of "the federal courts" come readily to mind—derived either from the 1935 Supreme Court building on Capitol Hill or from the hundreds of courthouses around the country where more than sixteen hundred appellate, district, magistrate, and bankruptcy judges work.[1] But in the middle of the 1800s, fewer than forty individuals served as lower court federal judges, and they worked in offices tucked inside other buildings. Decades away were the now-familiar purpose-built federal courthouses and a body of law focused specifically on the federal courts.

As this volume reflects, the effects of the Civil War radically changed the role for the federal judiciary. In the immediate wake of the war, Congress turned repeatedly to the federal courts to enforce federal norms. As a result, between 1867 and 1875, whole new sets of claimants—state prisoners claiming violation of their constitutional rights, individuals bringing infringement of their federal civil rights, and those raising federal questions of all different sorts (if meeting the jurisdictional amount)—gained access to federal adjudication. Judgeships and buildings followed. But it was not until the twentieth century that the academic study of the growing jurisprudence of "the federal courts" took shape.

* Kellen Dwyer (Yale Law School, 2009) and Nick Pyati (Yale Law School, 2011) provided us with wonderful assistance as they helped to shepherd each of the chapters of this book to print. Special thanks for research and editorial assistance go to Nick Pyati and Elliot Morrison, whose thoughtful suggestions have improved this introduction, and to Dennis Curtis for his review of this chapter.

[1] For data, see Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 Geo. L.J. 965, 1015–16 (2007); Judith Resnik, *Interdependent Federal Judiciaries: Puzzling about Why and How to Value the Independence of Which Judges*, 137 Daedalus 28, 34–36 (2008).

Thus, the category of "Federal Courts" as a discrete arena (akin to torts, contracts, or criminal law) is a relatively recent notion, and reflection on the parameters of the field is appropriate. How does one decide what decisions are Federal Courts cases? As can be seen from the chapters in this book, a shared topic is the study of the infrastructure that operationalizes the United States Constitution: this area of law is focused on the intertwined problems of separation of powers and federalism, concepts derived from a close reading of Article III of the U.S. Constitution in relationship to Articles I and II, the Supremacy Clause, and the Eleventh and Fourteenth Amendments. In addition to constitutional interpretation, Federal Courts cases involve questions of statutory interpretation and federal common law rules that concern the allocation of adjudicatory authority over public and private disputes in the complex, multi-tiered justice system in the United States.

If that response sounds dry, the underlying issues belie that impression. To think about the role of the federal courts is necessarily to engage with a series of cases addressing criminal justice, foreign affairs, war and peace, admiralty, civil rights, gender, and race, Indian tribes, the labor movement, state regulation of public utilities, and the growth of the modern administrative state. Four of the chapters in this volume deal directly with cases related to slavery, the Civil War, and race discrimination; three address the power of police as they investigate crimes, and the workings of the criminal justice system (itself infused with questions of racial inequality); and four involve congressional or presidential powers during war. The relationship between the United States and Indian tribes on issues ranging from gender equality to gambling are key questions in two chapters, and international relations are central to another. Government regulation of the economy, labor relations and workers' rights (on land and sea), and the enforcement of private contracts are at the heart of four chapters.

The theme of government accountability—including whether government officials can be subject to mandamus and injunctive orders and whether states can be sued for damages or other judicial remedies—is recurrent, as are questions about the role for courts as contrasted with other branches of government and private actors, and the role of national authority as contrasted with state or local decisions. Indeed, much of the discussion deals with the complexity of dismantling one constitutional "compromise"—that permitted slavery—and attempting to give meaning to another—the so-called Madisonian compromise in which the details of lower court federal jurisdiction under Article III were left to congressional elaboration. When the constitutional text is read in the context of the decades of congressional lawmaking that followed the Civil War, dozens of open questions emerge. Moreover, as is clear in every chapter, decisions about separation of powers among the

branches and about the federalist relationships among states, tribes, and the national government arise from deep debates about the underlying normative rights and obligations of individuals, groups, and government officials. A central set of questions are whether "trans-substantive" Federal Courts doctrine—stemming from constitutional, statutory, or common law—can or should apply, regardless of the context of a dispute (e.g. international law, criminal justice, civil rights, labor law).

Below, we outline the history of the development of a subject matter called Federal Courts, as we introduce thematic relationships among the chapters of this volume and some of the analytic premises and puzzles that lace this arena.

A Brief History of a "Course of Study"

The publication in 1928 of *The Business of the Supreme Court: A Study in the Federal Judicial System*, written by Felix Frankfurter and James M. Landis, marks the self-conscious treatment of the Federal Courts as a discrete body of law and practices.[2] The authors argued that "scant attention" had been paid to the development of the federal judiciary's business since 1789. Given the powers that the federal judiciary exercised, Frankfurter and Landis called for more intense study of that system. A casebook and course soon followed. In 1931, Felix Frankfurter, then joined by Wilber G. Katz (and later by Harry Shulman), published teaching materials, *Cases and Other Authorities on Federal Jurisdiction and Procedure.*[3] That book argued the need for a new course, distinct from "practice" and appropriate for a "university

[2] Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (1928). Another book, also published in 1928, by Armistead M. Dobie, then a law professor at the University of Virginia Law School, was aimed at practitioners. *See* Armistead M. Dobie, *Handbook of Federal Jurisdiction and Procedure* (1928). Several earlier works on the federal courts can be found. *See, e.g.*, Alfred Conkling, whose treatise went under a variety of names including, *A Treatise on the Organization and Jurisdiction of the Supreme, Circuit and District Courts of the United States* (2d ed. 1842); Benjamin R. Curtis, *Jurisdiction, Practice and Peculiar Jurisprudence of the Courts of the United States* (1880); Stephen D. Law, *The Jurisdiction and Powers of the United States Courts* (1852).

[3] Felix Frankfurter and Wilber G. Katz, eds., *Cases and Other Authorities on Federal Jurisdiction and Procedure* (1931); Felix Frankfurter and Harry Shulman, eds., *Cases and Authorities on Federal Jurisdiction and Procedure* (rev. ed. 1937). A few others had come before. *See, e.g.*, Harold R. Medina, *Cases on Federal Jurisdiction and Procedure* (1926); George W. Rightmire, *Cases and Readings on the Jurisdiction and Procedure of the Federal Courts* (1917). For a noteworthy review of the Frankfurter and Katz materials, see Herbert Wechsler, *Cases and Other Authorities on Federal Jurisdiction and Procedure,* 32 Colum. L. Rev. 774, 774 (1932) (commenting that the "book sets a stage for a grand performance [but its] weakness [is that it] raises the vital questions but it does not attempt to answer them, nor to provide the materials for doing so").

law school."[4] Most of the topics and the organization used in 1931 are the very categories typically addressed in Federal Courts courses today: jurisdictional questions such as the meaning of "case" and "controversy"; the original and appellate jurisdiction of the United States Supreme Court; the power of federal courts to make federal common law; federal question and diversity jurisdiction; the relationship between the state and federal courts; and habeas corpus.[5]

The success of the Frankfurter/Katz intervention was immediate. In 1932, the American Association of Law Schools directory listed a course called "federal jurisdiction," and about thirty schools offered such a course.[6] Other authors wrote casebooks, and in 1953, the next chapter began with the publication of Henry Hart and Herbert Wechsler's *The Federal Courts and the Federal System,*[7] which has proved notably durable. In 1973, and then again in 1988, 1996, 2003, and 2009, new generations, Paul Bator, Paul Mishkin, David Shapiro, Daniel Meltzer, Richard Fallon, and John Manning, continued their teachers' tradition.[8]

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[4] *See* Frankfurter and Katz, *supra* note 3, at vii (distinguishing "intellectual issues" from "the immediately practical").

[5] Excluded were the " 'federal specialties'—admiralty, bankruptcy, the federal criminal law, Indian land litigation, patents" because, the authors commented, the subjects were "so intimately connected with their substantive law" that these fields were better left to "specialists." *Id.* at viii n.1. As this volume makes plain, some of those topics have now become part of the discussion.

[6] Charles T. McCormick, *Book Review,* 80 U. Pa. L. Rev. 472, 474 (1931); Association of American Law Schools, *Directory of Teachers in Member Schools* 139–69 (1931). A few other books published between 1928 and 1950, also focused on the federal courts. *See, e.g.*, Armistead Dobie and Mason Ladd, *Cases and Materials on Federal Jurisdiction and Procedure* (1940); Ray Forrester, ed., *Dobie and Ladd: Cases and Materials on Federal Jurisdiction and Procedure* (2d ed. 1950); Robert Jennings Harris, *The Judicial Power of the United States* (1940); George Foster Longsdorf, *Cyclopedia of Federal Procedure, Civil and Criminal* (1928, with supp., 1939) (8 vol. plus 1939 Supplement); Charles T. McCormick and James H. Chadbourn, *Cases and Materials on Federal Courts* (1946); W.S. Simkins and Alfred John Schweppe, *Simkins Federal Practice* (rev. ed. 1934); Mahlon E. Wilson, *Federal Courts* (1930).

[7] Henry M. Hart, Jr., and Herbert Wechsler, *The Federal Courts and the Federal System* (1953). For discussion of this and successor editions, see, for example, Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 Vand. L. Rev. 993 (1994); Akhil R. Amar, *Law Story,* 102 Harv. L. Rev. 688 (1989); Richard A. Matasar, *Treatise Writing and Federal Jurisdiction Scholarship: Does Doctrine Matter When Law Is Politics?*, 89 Mich. L. Rev. 1499 (1991); Mary B. McManamon, *Felix Frankfurter: The Architect of "Our Federalism"*, 27 Ga. L. Rev. 697, 756–70 (1993); 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); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671 (1989).

[8] *See* Paul M. Bator, Paul J. Mishkin, David L. Shapiro, and Herbert Wechsler, eds., *Hart and Wechsler's The Federal Courts and the Federal System* (2d ed. 1973); Paul M.

They were also joined by a host of other authors—including Debra Lyn Bassett, James Chadbourn, Erwin Chemerinsky, Robert Clinton, Michael Collins, David Currie, Donald Doernberg, Howard Fink, Arthur Hellman, John Jeffries, Mary Kay Kane, Peter Low, William P. Marshall, Richard Matasar, Charles McCormick, Linda Mullenix, John Oakley, Richard Posner, Martin Redish, Lauren Robel, Tom Rowe, Suzanna Sherry, Mark Tushnet, Louise Weinberg, Michael Wells, Keith Wingate, Charles Alan Wright, Larry Yackle, and Donald Ziegler, as well as others[9]—in providing case materials and treatises that have come to form the body of thought now called "the Federal Courts."

All the while, Congress was reshaping the "business" of the federal courts, as the world in which it worked was changing rapidly. New authors and new problems expanded the purview, through a focus on the import of public interest and large-scale litigation, with attention paid to the role of Indian tribes as relevant "sovereigns," along with states within the United States, and as issues of the identity of litigants—gendered, raced, classed—were brought more clearly into focus. Across casebooks and courses, however, a set of materials came to be, in Annette Kolodny's terms, those that are "already read"—familiar landmarks of a canon well known and shared.[10] In this book, we encourage a

Bator, Daniel J. Meltzer, Paul J. Mishkin, and David L. Shapiro, eds., *Hart and Wechsler's The Federal Courts and the Federal System* (3d ed. 1988); Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* (4th ed. 1996); Richard H. Fallon, Jr., Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* (5th ed. 2003); Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* (6th ed. 2009).

[9] A non-exhaustive list of such materials includes Robert N. Clinton, Richard A. Matasar, and Michael G. Collins, *Federal Courts: Theory and Practice* (1996); David P. Currie, *Federal Courts, Cases and Materials* (4th ed. 1990); Donald L. Doernberg, C. Keith Wingate, and Donald H. Ziegler, *Federal Courts, Federalism and Separation of Powers* (4th ed. 2008); Howard P. Fink, Linda S. Mullenix, Thomas D. Rowe, Jr., and Mark V. Tushnet, *Federal Jurisdiction: Policy and Practice* (3d ed. 2007); Arthur D. Hellman and Lauren K. Robel, *Federal Courts: Cases and Materials on Judicial Federalism and the Lawyering Process* (2005); Peter W. Low and John C. Jeffries, Jr., *Federal Courts and the Law of Federal–State Relations* (5th ed. 2006); Charles T. McCormick, James H. Chadbourn, and Charles Alan Wright, *Cases and Materials on Federal Courts* (6th ed. 1976); Martin H. Redish and Suzanna Sherry, *Federal Courts: Cases, Comments, and Questions* (6th ed. 2007); Louise Weinberg, *Federal Courts: Cases and Comments on Judicial Federalism and Judicial Power* (1994); Michael L. Wells, William P. Marshall, and Larry W. Yackle, *Cases and Materials on Federal Courts*, (2007); Charles Alan Wright and Mary Kay Kane, *Law of Federal Courts* (6th ed. 2002); Charles Alan Wright, John B. Oakley, and Debra Lyn Bassett, *Cases and Materials on Federal Courts* (12th ed. 2008). The treatises include Erwin Chemerinsky, *Federal Jurisdiction* (1989); Richard A. Posner, *The Federal Courts: Crisis and Reform* (1985); Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* (2d ed. 1990), Larry Yackle, *Federal Courts* (3d ed. 2009).

[10] "[W]e read well, and with pleasure, what we already know how to read; and what we know how to read is to a large extent dependent upon what we have already read (works

"rereading"—to think again about cases, consider their import as applied to new events of the last few decades, and appreciate the challenges of wise and just decision-making that each chapter presents.

The Changing Contours of "the Federal Courts": New Tiers and a Corporate Voice

While the parameters of the materials set forth between the 1930s and the 1950s endure, the context has changed substantially. The Federal Courts course came into being as both the United States economy and law schools were nationalizing. Two world wars and the Depression were powerful forces of reorganization, yet the 1953 edition of Hart and Wechsler assumed that federal law was still "interstitial"[11] and that state law provided the basic foundation and the presumptively appropriate governing legal regime. Within a year of the first edition's publication, the 1954 decision of *Brown v. Board of Education*[12] and the civil rights statutes produced a "second reconstruction" that would require rethinking the relationships between state and federal officials and their courts. Further, enactment of the 1946 Administrative Procedure Act, the multiplication of new federal regulatory schemes and agencies, and new legislation related to the authority of Indian tribes helped bring into focus the growing role of administrative adjudication and eventually a third set of sovereignty-claimants, Indian tribes.

Both the size and the dockets of the federal courts shifted accordingly. One way to see the changes is to consider that, when Hart and Wechsler choose to label their book *The Federal Courts and the Federal System*, they referred to a three-tiered system crafted at the end of the nineteenth century. Some 280 life-tenured judges then sat on the federal district, appellate, and Supreme Courts.[13] But those numbers have changed significantly. As of 2008, authorized judgeships for those positions have grown—to more than 860 life-tenured judges on the trial,

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from which we developed our expectations and our interpretative strategies)." *See* Annette Kolodny, *Dancing Through the Minefield,* in Elaine Showalter, ed., *The New Feminist Criticism: Essays on Women, Literature, and Theory* 144, 155 (1985) (essay originally published as Annette Kolodny, 6 Feminist Stud. 1 (1980)).

[11] Hart and Wechsler, *supra* note 7, at 435. *See also* Henry P. Monaghan, *Book Review*, 87 Harv. L. Rev. 889 (1974). Subsequent editions of the casebook continued to include the "interstitial" comment even as the emphasis on federal law grew. *See* Bator, Mishkin, Shapiro, and Wechsler, *supra* note 8, at 470; Bator, Meltzer, Mishkin, and Shapiro, *supra* note 8, at 533; Fallon, Meltzer, and Shapiro (1996), *supra* note 8, at 521; Fallon, Meltzer, and Shapiro (2003), *supra* note 8, at 494; Fallon, Manning, Meltzer, and Shapiro, *supra* note 8, at 458.

[12] 347 U.S. 483 (1954).

[13] United States Government Organization Manual 1953–54 (revised July 1, 1953).

appellate, and Supreme Courts. Yet the point made by Hart and Wechsler about the importance of state law remains telling. While some 260,000 civil cases and about 65,000 criminal cases are filed annually at the federal trial level, some forty million cases are dealt with annually by the state courts.[14]

But to conceive of the federal courts in the twenty-first century as three-tiered is to miss the developments of the second half of the twentieth century. Congress invented new kinds of federal judgeships—statutorily chartered magistrate and bankruptcy judges—to augment the ranks of "Article III judges," described in the Constitution as having their jobs "during good behavior" and salaries that cannot be diminished.[15] As of 2008, the combined numbers of magistrate judges and bankruptcy judges make them a statutory trial bench roughly equivalent to that of life-tenured district court judges.[16] Each year, magistrate judges preside over some 970,000 matters, including Social Security "appeals," misdemeanors, habeas petitions, evidentiary hearings, pretrial conferences, motions, and some 10,000 civil trials heard with the consent of the parties.[17] Bankruptcy judges receive more than a million petitions annually and, in some circuits, sit in lieu of district judges on "bankruptcy appellate panels" to review decisions rendered by their colleagues.[18] There are yet other judges employed by the federal system but not in the federal courts, including more than 1,140 administrative law judges in federal agencies;[19] the Social Security Administration has a yearly caseload larger than the federal courts' civil docket.[20]

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[14] National Center for State Courts, Court Statistics Project, *State Court Caseload Statistics, 2007* 106 (2008). These data count reported filings in state civil and criminal trial courts of general jurisdiction.

[15] In 1968, Congress authorized district judges to select magistrates to serve for eight-year renewable terms. Federal Magistrates Act, Pub. L. No. 90–578, § 631, 82 Stat. 1108 (1968), *codified as amended at* 28 U.S.C. § 631 (2006). *See also* Judicial Improvements Act of 1990, Pub. L. No. 101–650, § 321, 104 Stat. 5117 (changing the statutory title of the office from "magistrate" to "magistrate judge"). In 1984, Congress charged appellate judges with selecting bankruptcy judges to serve for fourteen-year renewable terms. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, § 152, 98 Stat. 336, *codified as amended at* 28 U.S.C. § 152 (2006).

[16] Administrative Office of the United States Courts, *Judicial Facts and Figures* (2007), *available at* http://www.uscourts.gov/judicialfactsfigures/2007/Table101.pdf.

[17] Administrative Office of the United States Courts, 2008 Annual Report of the Director: Judicial Business of the United States Courts 65–66 (2009).

[18] *Id.* at 16, 25–31.

[19] *See* Raymond Limon, Office of Admin. Law Judges, *The Federal Administrative Judiciary: Then and Now: A Decade of Change 1992–2002* app. C at 7 (2002).

[20] United States Social Security Administration, *Strategic Plan, Fiscal Years 2008–2013* at 9 (2007).

Structures and judgeships are not the only changes since Frankfurter, Katz, and Schulman launched an academic inquiry into the federal judicial system. The rules of litigation have been revised, first through the promulgation in 1938 of the Federal Rules of Civil Procedure, followed in 1946 by criminal rules and thereafter by federal rules for evidence and appellate practice. Before these promulgations, federal trial judges had followed the practices of the states in which they sat. In contrast, through the new federal rules, judges across the country were united by sharing a set of daily practices.

Those rules, in turn, came from committees of lawyers and judges who were brought together under the aegis of the Judicial Conference of the United States, which took its current shape after 1948 and which became the policymaking body for the federal courts.[21] Chaired by the Chief Justice of the United States, the Conference consists of the chief judges of all the circuits, joined by district court judges from each circuit. This body reviews proposed rule changes—such as revisions of class action procedures, discovery, and summary judgment—to send to the Supreme Court to promulgate. Those rules, in turn, have shaped new possibilities for lawsuits—making familiar large-scale cases ranging from school and prison reform to environmental and tort claims.[22] New rules, coupled with new statutory rights and constitutional interpretation, welcomed new claimants into the federal courts, and eventually generated self-studies about the treatment of racialized minorities and of women of all colors in the federal courts. [23]

The work of the Conference is informed by the Administrative Office (AO) of the U.S. Courts, chartered by Congress in 1939 to collect data, submit budgets, and assist the courts.[24] (The data on the federal courts' dockets comes from the AO.) As of 2008, more than 1,000 employees work in the Thurgood Marshall Judiciary Building, in Washington, D.C., where they are joined by staff of the Federal Judicial Center (FJC), an entity created in 1967 and dedicated to research and education.[25] The

[21] *See* Pub. L. No. 80–773, § 331, 62 Stat. 902, *codified as amended at* 28 U.S.C. § 331 (2006).

[22] *See* Judith Resnik, *From "Cases" to "Litigation"*, 54 Law and Contemp. Probs. 5 (1991).

[23] *See, e.g.*, Deborah Hensler, *Studying Gender Bias in the Courts: Stories and Statistics,* 45 Stan. L. Rev. 2187 (1993); Vicki C. Jackson, *What Judges Can Learn from Gender Bias Task Force Studies*, 81 Judicature 15 (1997); *Report of the Special Committee on Gender Bias to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias*, reprinted in 84 Geo. L.J. 1657 (1996); Judith Resnik, *Gender Bias: From Classes to Courts,* 45 Stan. L. Rev. 2195 (1993); *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force* (1993), reprinted in 67 S. Cal. L. Rev. 745 (1994).

[24] 28 U.S.C. §§ 601–613 (2006).

[25] 28 U.S.C. §§ 620–629 (2006).

FJC now runs "schools for judges" focused on how to function as a judge, to manage dockets, and to deal with litigants. The corporate voice of the Judicial Conference has also emerged, taking positions on proposed legislation understood as affecting the courts and, in 1995, issuing a first-ever *Long Range Plan*, providing more than ninety recommendations to Congress. Concerned about the number of filings in the federal courts, the Conference urged Congress to have a presumption against vesting new jurisdiction in federal courts, absent certain showings, and to turn instead to administrative and state adjudicators whenever permissible under the United States Constitution.[26]

Thus, the concerns in the case law studied in Federal Courts courses overlap with the agendas undertaken by the judiciary as it assumed a new policy-making role. This broadened institutional reach also raises questions about judicial authority. Has the judiciary—when taking positions on various pieces of legislation—simply responded to congressional legislation, which mandates that the Judicial Conference report on "the condition of the business in the courts" and welcomes it to submit "suggestions and recommendations" for the "expeditious conduct" of court matters?[27] Ought the judiciary understand its institutional role as an appropriate extension of the "judicial power" granted in Article III to decide cases and controversies?[28] Or are aspects of the role unwise or unwarranted for a life-tenured branch of the government, whose character and legitimacy stem from the adjudicatory processes of case-by-case litigation through which the public, adversarial testing of claims results in reasoned decisions? Further, what are the appropriate boundaries for policy-making recommendations by judicial bodies, given the need for judges to remain distinct from other government officials and able to decide claims impartially?

Judicial Selection and Judging in the Federal Courts

Another set of questions focuses on how judges are selected, a topic that has gained new salience with proposals, put forth since 2005, to change the tenure provisions of the justices of the Supreme Court.[29]

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[26] Judicial Conference of the United States, Long Range Plan for the Federal Courts 134 (1995). *See also* Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. Cal. L. Rev. 269 (2000); Judith Resnik, *Trial as Error, Jurisdiction As Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924 (2000).

[27] *See* 28 U.S.C. § 331 (2006); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 Ind. L.J. 223, 275–81 (2003).

[28] *See* Mistretta v. United States, 488 U.S. 361 (1989).

[29] *See Reforming the Court: Term Limits for Supreme Court Justices* (Roger C. Cramton and Paul D. Carrington, eds., 2006); Steven G. Calabresi and James Lindgren,

Articles II and III of the Constitution specify that the President nominates and the Senate confirms individuals then entitled to life tenure and guaranteed salaries. At the country's inception, Supreme Court justices regularly "rode circuit," sitting with judges on the lower federal courts and engaged in the full range of fact-finding proceedings. Average life spans and tenures in office were shorter, the size of the federal judiciary was small, and federal law operated in limited spheres. In contrast, by the late twentieth century, circuit riding had long disappeared, the Supreme Court had functional control over its docket through an expansion of the discretionary *certiorari* jurisdiction, and federal law had—as detailed above—grown.[30]

Life-tenured individuals may control the interpretation and affect the normative goals of the federal judicial system for decades beyond their initial appointment. Thus, twenty-first century critics have questioned the wisdom of entrenching justices for such long periods and called for change, noting that other constitutional democracies protect judicial independence while having term limits or mandatory retirement. Distinctions between the work of the lower federal courts and the role of Supreme Court justices, some argue, warrant shorter terms for members of the Court than for members of the lower courts. Other commentators, however, caution against abandoning life tenure for federal judges, especially in a federal system in which many state court judges are elected. The chapters in this volume provide a window into these debates as we consider the impact of particular jurists, the role of non-life tenured judges, and the broader historical context.

Premises and Puzzles of the Law of the Federal Courts

Powers Divided and Overlapping in the National Government: The Courts, the Congress, the Executive. How, then, does one think about the conceptual categories that "Federal Courts law" addresses, over the two centuries during which the federal court "system" gained its current contours? Efforts to operationalize the United States

Term Limits for the Supreme Court: Life Tenure Reconsidered, 29 Harv. J.L. & Pub. Pol'y 769 (2006); Judith Resnik, *Democratic Responses to the Breadth of Power of the Chief Justice*, in Cramton and Carrington, *supra*, at 181–203; Judith Resnik and Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. Pa. L. Rev. 1575 (2006). For caution or concerns about these proposals, *see, e.g.*, Jackson, *supra* note 1, at 1000–08; Ward Farnsworth, *The Case for Life Tenure*, in *Reforming the Court: Term Limits for Supreme Court Justices* 251 (Roger C. Cramton & Paul D. Carrington eds., 2006); Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. Ill. L. Rev. 407 (2005).

[30] Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 Colum. L. Rev. 1643 (2000).

Constitution drive one "story" of the federal courts, for an important task is to develop—in the context of the problems brought forth through litigation—an exegesis of the constitutional text and structure. One might call a first premise "Toward a Theory of Article III"; a central puzzle is how to read that portion of the Constitution that delineates the "judicial power of the United States" and the respective allocations of authority among the Congress, the Executive, and the federal courts.

As a consequence, several Federal Courts casebooks—and this volume—begin with *Marbury v. Madison*[31] to state a basic principle: that the government of the United States is one of "powers limited." As Chief Justice Marshall explained, the "powers of the legislature are defined and limited. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"[32] As he read the Constitution, the Supreme Court held the power to decide when other branches of the federal government had unconstitutionally "transcended" their powers.[33] Yet, as William Treanor explains in his chapter,[34] Chief Justice Marshall did not invent the precept of judicial review. State and federal courts had struck legislation before *Marbury* and the "celebrated passages" of the opinion do not constitute a "departure" from the law at the time. What Marshall did that rendered the decision so foundational was to "establish a judicial power to direct Executive compliance with the law" by insisting that mandamus was a remedy available—were jurisdiction proper—against a federal official. Treanor's essay introduces the themes of accountability and of the allocation of authority among the branches of the government (for Congress had, under Marshall's view, given the Supreme Court original jurisdiction it could not, constitutionally, enjoy). Treanor also underscores the role of facts in producing the landmarks of law. Treanor teaches us that it was happenstance that put John Marshall into the chief justiceship and into a repeated set of confrontations between the courts and the executive branch that reiterated the conflicts between Marshall and Thomas Jefferson that had begun during the Revolutionary War.

Of course, the matter of "powers limited" is much more complex, as each account of the Federal Courts' "story" quickly develops. Considering the authority of the Congress over the jurisdiction of the federal courts brings us to Daniel Meltzer's analysis of *Ex parte McCardle*.[35] In

[31] 5 U.S. (1 Cranch) 137 (1803).

[32] *Id.* at 176–77.

[33] *Id.* at 176.

[34] William Michael Treanor, *The Story of* Marbury v. Madison: *Judicial Authority and Political Struggle*, this volume.

[35] *Ex parte McCardle,* 74 U.S. (7 Wall.) 506 (1869).