Please keep in mind that these notes are fallible. They do not exhaust the contents of the course.

**Introduction.** Federal courts integrates constitutional law and civil procedure. It has both technical and theoretical aspects. Congress could change some but not all of its content.

**Major themes of the course.** The course has several major themes, including: (1) the role of the federal courts in the government of the United States; (2) the role of those courts in the federalist system; and (3) the role of the state courts in the federalist system.

**Broad questions relating to these themes.** What issues, if any, must Congress let federal courts hear and decide? On the other hand, what cases is Congress precluded from authorizing federal courts to hear? To what extent may federal courts make law, instead of simply interpreting law made by others? To what extent, if any, should we distinguish federal courts from courts in the tradition of the common law? Are federal courts a distinct species?

What’s the relationship between courts in the two systems, federal and state? What’s the relationship between federal courts and state officers? What’s the relationship between federal authority and state autonomy? What’s the scope of Section 1983? Specifically: (1) what’s the actual scope of § 1983; and (2) what’s the appropriate scope of § 1983? *(Note: We do not discuss the merits of § 1983 every year.)*

What’s the relationship between state courts and federal courts? What’s the relationship between state courts and federal officers? Must state courts be available to protect federal rights? Is there a default judiciary in the United States? If so, what is it?

**Congress’ power to limit the jurisdiction of the federal courts.** We spent our first few classes talking about Congress’ power to limit the jurisdiction of the federal courts. Your analysis in this area of doctrine could rest on many different sources of authority, including text, structure, precedent, history, policy, or some combination thereof.

**Text.** What does the third article of the Constitution say? Must Congress create lower federal courts? What was the “Madisonian Compromise”? Is there an implicit understanding in the Constitution that federal and state courts are fungible, or are they somehow different? Is the jurisdiction contemplated in the “Extending” or the “Arising Under” Clauses mandatory? Is Congress’ power to make exceptions to the Supreme Court’s appellate jurisdiction plenary or somehow limited? What does the Supremacy Clause suggest about state courts’ ability to apply federal law? What does it say about the founders’ perception of state courts?

**Structure, precedent, history, and policy.** To what extent could Congress in fact limit the jurisdiction of the inferior federal courts? To what extent could Congress in fact limit the appellate jurisdiction of the Supreme Court? Would state courts be adequate to take up the slack?
were federal courts unavailable? Would they be adequate to protect federal rights? Is there some sense in which Congress must allow the Supreme Court to perform “essential functions” in the constitutional system? If so, what are those functions? What does footnote four of *Carolene Products* have to say about all this? Due Process? Equal Protection?

Although *Ex parte McCardle* (1869) and *Lauf v. E.G. Shinner* (1938) support the proposition that Congress has plenary power to restrict the jurisdiction of the federal courts (including the appellate jurisdiction of the Supreme Court), the bottom line appears to be that federal courts will bend over backwards to find that Congress has *not* precluded judicial review of a federal constitutional claim. As long as Congress does not preclude such review, courts avoid answering a very difficult question. We saw this phenomenon in operation in *Webster v. Doe* (1988).

In connection with this, we saw the importance of context. For example, we saw that, in at least two instances, the Court has upheld a statute that limited a litigant’s ability to raise a federal constitutional argument, where that individual had foregone an earlier opportunity to present that argument to an Article III court, and where the statute was part of a wartime economic policy. See *Lockerty v. Phillips* (1943); *Yakus v. United States* (1944).

**The constitutional limits of “arising under” jurisdiction.** After talking about Congress’ power to *limit* the jurisdiction of the federal courts, we spent some time talking about Congress’ power to *enhance* that jurisdiction. Most particularly, we talked about the limits of “arising under” jurisdiction. “Arising Under” is the first head of jurisdiction in Art. III, § 2, cl. [1]. Its scope is quite broad.

In particular, we talked about the “remote federal ingredients” test of *Osborn v. Bank of the United States* (1824). Under this test, if a federal question might arise in a case, there is a constitutional basis for the exercise of federal question jurisdiction.

In *Osborn*, we saw Chief Justice Marshall’s argument about “co-extensive powers.” He said that the power of the federal courts to hear cases should extend as far as Congress’ power to enact laws and the executive’s power to enforce them. This theory has intuitive appeal. (It also has a conceptual connection to the “diversity interpretation” of the Eleventh Amendment.)

Although *Osborn* is broad, it is still good law. A recent case involving the Red Cross provides an example. By statute, Congress said that the Red Cross is a federal creature, and that any case in which it is a party presents a federal question. The Court said this was okay.

Please also bear in mind the Court’s willingness to construe so-called “capacity clauses” to confer *statutory* subject matter jurisdiction. These clauses were at issue in both *Osborn* and *American Red Cross* (1992).
After talking about Osborn, we talked about “protective jurisdiction.” This kind of jurisdiction is somewhat controversial. The question here is whether Congress may authorize federal courts to hear cases in which federal law does not provide the rule of decision, other than diversity cases, for which there is express authority in the Constitution.

This issue was potentially present in Lincoln Mills (1957), but the majority per Justice Douglas avoided it by saying that the law at issue, § 301(a) of the Labor-Management Relations Act of 1947, authorized federal courts to create and apply federal common law. The rule of decision was thus federal, and § 301(a) did not attempt to confer protective jurisdiction.

Justice Frankfurter disagreed with this analysis, and therefore could not avoid the question whether protective jurisdiction is constitutional. He argued that it is not. (As an aside, Justice Douglas’ construction of § 301(a) may not have been as radical as Justice Frankfurter suggested. Before 1957, parties had predicated actions on the predecessor to 28 U.S.C. § 1331, which presents itself as a purely jurisdictional provision.)

The Supreme Court seemed to avoid the issue again in Mesa v. California (1989). In Mesa, the Court per Justice O’Connor held that a federal officer must assert a federal defense to remove a case to federal court under the Federal Officer Removal Act, 28 U.S.C. § 1442(a)(1). The case would then “arise under” the federal defense, not the act. If the Court had not made this holding, it might have had to decide whether pure protective jurisdiction is constitutional.

Tidewater. As a related matter, we spent a class or so discussing Congress’ power to compel federal courts to hear cases sounding in a form of diversity that Article III does not recognize. In Tidewater (1949), the issue was whether Congress could authorize federal courts to hear cases between citizens of the District of Columbia and citizens of states where the rule of decision was not federal. Two justices thought the “District” was a state for purposes of Article III diversity jurisdiction, and three thought Congress could confer non-Article III business on federal courts, so long as it observed basic principles of separation of powers. (You can thus see the conceptual relation between Tidewater and such cases as Lincoln Mills and Mesa.)

Separate majorities of the Court disagreed with each of these propositions. Seven justices did not think the District was a state for purposes of Article III diversity jurisdiction, and six did not think Congress could confer non-Article III business on the federal courts, at least not here.

Tidewater is crazy. We read it for three reasons: (1) it involves the constitutionality of a certain form of federal subject-matter jurisdiction; (2) it includes an extensive discussion of why federal courts may not perform business outside Article III; and (3) it illustrates how collegial courts operate: by and large, its members vote on disposition, not issues.

The bottom lines of Tidewater are: (1) Congress may constitutionally vest some kind of jurisdiction (leaving aside what kind) on federal courts to hear cases between a citizen of the District of Columbia and a citizen of a state where the rule of decision is not federal; and (2)
Congress probably may not require federal courts to adjudicate cases outside Article III. We may also infer from *Tidewater* that Congress may confer jurisdiction on federal courts to hear cases involving citizens of territories, etc., and of states where the rule of decision is not federal.

**Adjudication by Non-Article III courts.** We spent a few classes talking about the extent to which Congress may require parties to litigate their disputes — at least in part — in courts or tribunals that are not organized in conformance to Article III.

We began this discussion by observing that the Court has permitted Congress to establish courts to adjudicate disputes in the territories, in the District of Columbia and in the military that do not conform to the dictates of Article III. See *American Ins. Co. v. Canter* (1828) (territories); *Palmore v. United States* (1973) (D.C.); *Dynes v. Hoover* (1858) (courts martial).

We went on to note that the Constitution does not require cases that involve so-called “public rights” to be heard in a conventional court. Such rights (as a historical matter) arise from discretionary acts of the government and often implicate sovereign immunity. *Murray’s Lessee v. Hoboken Land & Improvement Co.* (1856) is often cited in connection with this principle. This case involved a distress warrant that a federal official executed against real property owned by an individual (Swartwout) who had collected customs as an agent for the United States and who had not remitted his full collections to his principal.

Since *Murray’s Lessee*, the concept of “public rights” has expanded to a point where it bears little resemblance to its origins. According to one famous articulation of the principle, it now involves any relationship between a private individual and the government, outside the context of a criminal prosecution.

The cases we read in this portion of the course are not particularly revealing, at least not in the sense of yielding a single organizing principle. Some of them reflect a formalist approach, under which the Court tries to set clear boundaries. *Crowell v. Benson* (1932), *Northern Pipeline* (1982) and *Stern v. Marshall* (2011) reflect such an effort. Others, such as *Thomas v. Union Carbide* (1985) and *Commodity Futures Trading Commission v. Schor* (1986), reflect a pragmatic, factor-based approach. As Justice Breyer noted in his dissent in *Stern*, such factors can include: “(1) the nature of the claim [most particularly, whether it consists of a “private” or “public” right]; (2) the nature of the non-Article III tribunal; (3) the extent to which Article III courts exercise control over the proceeding; (4) the presence or absence of the parties’ consent; and (5) the nature and importance of the legislative purpose served by the grant of adjudicatory authority [to a non-Article III tribunal].”

Our primary vehicle for exploring this topic was *Stern v. Marshall* (2011), a case at the margins of bankruptcy. The specific issue in the case was whether a bankruptcy court — which is not an Article-III court — could hear a counter-claim of tortious interference with a prospective *inter vivos* gift by the bankrupt (originally Vickie Lynn Marshall) against someone who had filed a proof of claim in bankruptcy (originally Pierce Marshall). According to the
Court, the bankruptcy court could only resolve Vickie’s counter-claim if resolving Pierce’s proof of claim would “necessarily” — that is, unavoidably — resolve the counter-claim as well.

*Stern* is no model of clarity, but it does provide some information. First, the Court emphasizes that the concept of “public rights” has limits. What could be heard at “Westminster” (the locus of the King’s Bench) in 1789 still matters. But exactly how it matters is not fully resolved. According to the Court, because the government itself was not a party to the dispute between Vickie and Pierce, because Vickie’s rights under her counter-claim derived from the law of Texas, not a federal statutory scheme, and because the bankruptcy court’s jurisdiction was not limited to particular areas of the law, it could not resolve the counter-claim. We do not really know which of these factors, if any, was dispositive. We only know that, put together, they precluded the bankruptcy court from resolving this particular counter-claim.

The question of consent (on Pierce’s part) also arose in *Stern*, but the Court rejected this possibility on the ground that no consent could reasonably be inferred from the circumstances of the case. Another question that arose in the case was whether the bankruptcy court was serving as an “adjunct” to a district court. If so, the Constitution might tolerate the arrangement, on the ground that the district court retained plenary authority. The Court rejected this possibility, however, on the rationale that the bankruptcy court in fact had too much power to be classified as a mere adjunct.

After *Stern*, we briefly discussed *Executive Benefits Insurance Agency v. Arkison* (2014) and *Wellness International Network, Ltd. v. Sharif* (2015), two work-arounds for *Stern*. Under *Executive Benefits*, bankruptcy judges in *Stern* situations may simply submit proposed findings of fact and conclusions of law to a district judge for that judge’s approval. Under *Wellness*, bankruptcy judges may resolve disputes that fall under *Stern* with the parties’ consent. *Executive Benefits* was not controversial, given that bankruptcy judges serve in a subordinate role under its contemplated procedure. *Wellness*, however, drew a sharp dissent from Chief Justice Roberts, who argued that parties may not consent to a violation of separation of powers.

We concluded this segment of the course with a discussion of *Oil States* (2018), which ultimately turned on the status of patents as “property,” but also as a form of “franchise.” *Oil States* reflected a split among the Court’s ideological conservatives, some of whom see patents as anti-competitive and therefore somewhat suspect, and others of whom see patents as the same, conceptually, as other forms of property. Meanwhile, the Court’s ideological progressives are broadly supportive of administrative discretion.

**Statutory “arising under” jurisdiction.** We spent a few classes talking about the scope of statutory arising under jurisdiction, in contrast to the scope of constitutional arising under jurisdiction. We talked mostly about the scope of jurisdiction under 28 U.S.C. § 1331 and its analog for removal, § 1441. For starters, we saw that the scope of jurisdiction under § 1331 is not as big as the scope of jurisdiction under the Constitution, even though the two texts are essentially identical.
We discussed the well-pleaded complaint rule. A federal court may only exercise statutory arising under jurisdiction if a federal issue appears on the face of the plaintiff’s well-pleaded complaint. We saw that this is a judicial interpretation of §§ 1331 and 1441. Congress could change this if it wanted to.

We then talked about one of my favorite chestnuts, American Well Works (1916). Under Well Works, if federal law supplies the plaintiff’s cause of action, the case “arises under” the laws of the United States. We saw that Well Works is a fairly reliable test of inclusion, but not of exclusion. That is, just about anything that passes Well Works will fall within § 1331 (with the possible exception of Shoshone Mining v. Rutter (1900)), but cases that do not fall within it are not necessarily outside § 1331. For the most part, Well Works is a reliable test, and many commentators — together with Justice Thomas — have suggested that we should adopt it as the controlling test for these statutes.

After Well Works, we talked about Smith v. Kansas City Title & Trust (1921), which helps demonstrate the limits of Well Works. Under Smith, statutory “arising under” jurisdiction exists if resolution of the case depends on resolution of a federal issue. In other words, if prevailing on the federal issue is an essential element of plaintiff’s case, Smith is satisfied. (Smith is thus conceptually identical to the Well-Pleaded Complaint Rule.)

Please note that, for a federal issue to be an “essential” part of plaintiff’s case in the sense contemplated by Smith, it need not be necessary in the mathematical sense for the plaintiff to prevail. That is, if the plaintiff has two theories on which he or she might prevail, and only one of them works if and only if he or she prevails on the federal issue, Smith is satisfied. (There has been later litigation on this point, but my observation here is probably accurate.)

We also saw that many consider this test too broad. In other words, many think that although satisfying Smith is necessary to establish arising under jurisdiction, it is not sufficient to do so. The most reliable, but least mechanical, test is that of Merrell Dow (1986) and Grable & Sons (2005). Under this test, one asks about the importance of the federal issue presented. In fact, this test is referred to as the “substantial federal question” test. In applying this test, one should think about such factors as the strength of the federal interest presented, federalism, separation of powers, congressional intent, potential prejudice to the parties, and anything else that might be pertinent.

A couple of rules of thumb here seem to be that actions in tort, where federal law supplies some part of plaintiff’s complaint, and actions on a contract, where a contract incorporates federal law by reference, generally will not present a substantial federal question. See Merrell Dow (1986) (actions in tort); Skelly Oil (1950) (actions on a contract).

Interaction of the well-pleaded complaint rule and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. In theory, before declaratory judgments there were only actions for coercive relief. In an action for coercive relief, a plaintiff seeks money, or specific
performance, etc., from a defendant. The well-pleaded complaint rule fits fairly easily into this, creating few issues. But the availability of declaratory relief renders this state of affairs less certain. This is because, in a declaratory action, the plaintiff, often the defendant in a coercive action, must describe both sides’ arguments. Otherwise, there’s no case or controversy and no need for a declaration. The federal courts could have gone any of three ways with this:

First, they could have treated an action for declaratory relief like any other and held that arising under jurisdiction exists so long as there’s a federal question on the face of the well-pleaded complaint for declaratory relief. But this approach would have undermined the well-pleaded complaint rule, because any plaintiff anticipating a federal defense could, by describing the full nature of the parties’ dispute for the court, include a federal issue on the face of its complaint. The Court rejected this possibility in *Skelly Oil* (1950).

Second, the courts could have held that arising under jurisdiction exists if and only if the declaratory judgment plaintiff’s underlying well-pleaded complaint for coercive relief (assuming one exists) would include a substantial federal question. But the courts did not do this either. In some patent cases, only the declaratory judgment defendant’s underlying well-pleaded complaint for coercive relief would include a substantial federal question, yet federal courts have often heard such cases. See, e.g., *E. Edelman & Co. v. Triple-A Specialty Co.* (7th Cir. 1937).

Third, the courts could have held that arising under jurisdiction exists if either the declaratory judgment plaintiff’s or the declaratory judgment defendant’s underlying well-pleaded complaint for coercive relief (assuming one or both exist) would present a substantial federal question. The Court arguably adopted this approach in *Franchise Tax Board*, yet refused to find federal jurisdiction in that very case.

In *Franchise Tax Board*, the Board sued the Construction Laborers’ Vacation Trust in state court for, among other things, declaratory relief under California’s Declaratory Judgment Act. The Trust tried to remove the case, but the Court said the federal courts lacked jurisdiction. Had the Trust sued the Board under § 502(a)(3) of ERISA, a federal issue would have appeared on the face of the Trust’s well-pleaded complaint for coercive relief. But the case arose the other way — the Board sued the Trust for declaratory relief. If it is true that federal arising under jurisdiction exists in an action for a declaratory judgment if either the declaratory judgment plaintiff’s or the declaratory judgment defendant’s underlying well-pleaded complaint for coercive relief would present a substantial federal question along the lines of *Merrell Dow* or *Grable & Sons*, then there should have been federal jurisdiction in *Franchise Tax Board*. That’s because, had the Trust (the defendant in the case) brought an action for coercive relief under § 502(a)(3) of ERISA, a federal question would have appeared on the face of its complaint, and the complaint itself would not only have presented a federal question substantial enough for *Merrell Dow* and *Grable & Sons* but would even have satisfied *Well Works*. Yet the Court held that federal subject-matter jurisdiction was lacking.
My sense is that concerns about federalism explain the anomalous result in \textit{Franchise Tax Board}. An instrumentality of a state had gone to that state’s own courts for declaratory relief under that state’s own law, against a defendant that had chosen not to avail itself of an entrée to federal court that Congress had provided. \textit{Franchise Tax Board} may be seen as an example of the substantial federal question test on steroids. Although the Trust’s underlying claim for coercive relief would even have satisfied \textit{Well Works}, the Court refused to allow federal jurisdiction because of overwhelming respect for California’s prerogatives as a state.

As we saw, whether a federal issue appears on the face of a “well-pled” complaint can turn on highly technical rules regarding the elements of particular causes of action, which can vary greatly. For example, as a historical matter, plaintiffs have not always had to plead the “falsity” of a statement for purposes of a business defamation-type suit. Had they been required to do so, plaintiffs in such cases as \textit{Well Works} literally might have satisfied the well-pleaded complaint rule, even though they may have been suing on a cause of action created by a state.

\textbf{Complete pre-emption.} In this course, “complete pre-emption” refers to a remedy that Congress intends to be so exclusive that resort to a comparable remedy in state court under state law is deemed to invoke the federal remedy and therefore provide grounds for removal. Until recently, the general thought was that Congress not only had to intend to displace state law, as a substantive matter, but also it had to intend to make the case removable. See \textit{Avco} (1968); \textit{Taylor} (1987). But the Court modified this position in \textit{Beneficial National Bank v. Anderson} (2003), in which it simply required that Congress intend to create an exclusive federal remedy.

\textbf{Diversity jurisdiction.} We talked briefly about diversity jurisdiction. We saw that, despite the broad language of § 1332, federal courts will not exercise jurisdiction over cases involving diverse parties: (1) where the action is \textit{in rem} and the res is already in the custody of a state court; or (2) where the case is a matter of domestic relations or probate.

In this regard, we discussed \textit{Ankenbrandt v. Richards} (1992), where the Court distinguished between a case involving domestic relations \textit{per se}, where a federal court would not exercise diversity jurisdiction, and a tort action indirectly related to such a matter, over which a federal court would exercise diversity jurisdiction. The Court made similar observations in \textit{Marshall v. Marshall} (2006) with respect to the so-called “probate exception.” \textit{Marshall v. Marshall} was part of the same saga as \textit{Stern v. Marshall} (2011).

\textbf{The power and duty of state courts to hear federal cases.} Unless Congress provides otherwise, state courts generally have concurrent jurisdiction with federal courts to hear federal causes of action. (Moreover, under the Supremacy Clause, they’re bound to follow applicable federal law in the cases they hear.)

Moreover, state courts are generally \textit{obliged} to hear federal causes of action. They may, however, invoke a “valid excuse” for not hearing a federal case. For example, a state court whose jurisdiction is limited under state law may cite those limitations to justify not hearing a
federal case, if they apply. We talked about a few cases in which the Court allowed a state court to refuse to hear a federal case on the ground of *forum non conveniens*, or some similar ground, where that ground would also apply to exclude non-federal cases.

But state courts may not refuse to hear federal cases simply because they dislike federal law. For example, they may not refuse to hear an action under § 1983 against local officials simply because the officials would be entitled to immunity under analogous state laws, if they’re otherwise competent to hear the case. This would amount to “hostility” to federal law and would not be a valid excuse. State courts are not permitted to discriminate against federal causes of action.

Exactly what procedures a state court must use when hearing a federal case is not clear. Sometimes the Court will construe federal law to dictate not only the rule of decision but also procedure to some extent. In several cases involving the Federal Employers’ Liability Act, for example, we saw the Court impose federal procedures on state courts presiding over suits on that statute. The touchstone seems to be whether adherence to a particular state rule of procedure would frustrate Congress’ purposes in enacting the statute.

We talked briefly about state courts’ authority to hear suits against federal officers. Among other things, we learned that state courts may not grant writs of habeas corpus against federal officers. See *Tarble’s Case* (1872). Nor may they grant writs of mandamus against such officers. See *McClung v. Silliman* (1821). On the other hand, they may entertain actions for damages against federal officers. They may also entertain actions at law for specific relief (*i.e.*, replevin) against federal officers. It is unclear whether they may entertain actions for injunctions against federal officers. Probably not. **(Note: We do not discuss *McClung* or actions at law against federal officers in state court every year.)**

In connection with *Tarble’s Case*, we also discussed the concept of “constitutional common law,” which is arguably an oxymoron. In particular, we asked ourselves whether *Tarble’s Case* was a pure interpretation of the Constitution, such that Congress could not revise it, or whether it was a decision with some lesser juridical status, such that Congress could modify it. We noted that many ostensible doctrines of constitutional law may in fact be examples of constitutional common law, such as decisions under the Dormant Commerce Clause, the Exclusionary Rule of *Weeks* (1918) and *Mapp* (1961) and *Miranda* (1966), or even *Bivens* (1971) and its progeny.

In any case, just about any federal officer sued in state court for conduct within the scope of his or her official duties would remove the case to federal court under the Federal Officer Removal Act, 28 U.S.C. § 1442(a), provided he or she asserted a federal defense in the petition for removal. See *Mesa v. California* (1989).

State courts may not enjoin federal courts from hearing cases, see *Donovan v. Dallas* (1964), with the single exception that a state court, proceeding *in rem*, may enjoin a parallel
proceeding in rem in federal court if the res is already in the custody of the state court. Federal courts, by contrast, may occasionally enjoin actions in state court. The Anti-Injunction Act, 28 U.S.C. § 2283, has three textual exceptions and at least two non-textual exceptions. (Note: We do not discuss Donovan v. Dallas every year.)

**Federal common law.** We talked about federal common law for several classes. We saw that, despite *Erie Railroad Co. v. Tompkins* (1938), there is plenty of federal common law.

We began by discussing *Erie* itself. Was it correct? If so, on what grounds? On statutory grounds? Because of the Rules of Decisions Act? On constitutional grounds? Because of due process? Equal protection? Was *Swift v. Tyson* wrong? Was it wrong in its day? In connection with all of this, we talked at some length about the nature of law, as it was understood in the eighteenth and early nineteenth centuries, and how it subsequently came to be understood. To be specific, we talked about “natural law” and “positivism.”

Moving to federal common law in the modern sense, we noted that there are several “enclaves” of federal common law. These include: (1) the rights and duties of the United States in its proprietary relationships; (2) implied private rights of action under federal statutes; (3) enforcement of constitutional rights (i.e., direct actions on the Constitution); (4) interstate disputes; (5) admiralty; (6) international relations; and (7) interstate pollution. There are others. *Boyle v. United Technologies Corp.* (1988), for example, involved the military contractor defense. We talked specifically about the first five enclaves. (Arguably, implied rights of action under federal statutes are not a form of federal common law at all, but instead a form of statutory interpretation. The modern Court appears to take this position.)

**The rights and duties of the United States in its proprietary relationships.** Where the rights and duties of the United States or its agencies are directly at issue, federal common law governs. That is the first holding of *Clearfield Trust Co. v. United States* (1943). Then, where there is a special need for a uniform federal rule, the courts will adopt such a rule. Where there is no such need, the courts will adopt the rule of the appropriate state as the federal rule. (Remember that Congress may change any of this by statute.)

Aberrant or hostile state law will not become federal common law. See *United States v. Little Lake Misere Land Co., Inc.* (1973).

The Court took a broad view of the need for uniform federal common law in *Clearfield Trust*. It has taken a narrower view in such recent cases as *United States v. Kimball Foods* (1979). Look at the factors set forth in *Kimball Foods* for guidance.

**Implied private rights of action.** Start by thinking about the four parts of *Cort v. Ash* (1975): (1) whether the plaintiff is a member of a class the statute is intended to protect; (2) whether there’s any indication of congressional intent to create (or deny) a private right of action; (3) whether creating such a right would interfere with the statute’s operation; and (4) whether the
cause of action is one traditionally relegated to state law. Today, in theory, only the question of intent matters. See, for example, *Transamerica Mortgage Advisors, Inc. v. Lewis* (1979). But see *Thompson v. Thompson* (1988), where the Court appeared to treat the other three factors as having continuing relevance. In any case, the Court will interpret statutes enacted before *Cort v. Ash* (1975) in accordance with the practice of those days, which was to imply private rights of action almost automatically. (*J.I. Case Co. v. Borak* (1964) illustrates the approach of the “ebullient” era.) Not so for new statutes. In fact, for very new statutes, the Court might refuse to imply any private rights of action at all, given the extent to which it has put Congress on notice. *(Note: We do not discuss TAMA or *Thompson v. Thompson* every year.)*

**The interaction of implied private rights of action and § 1983.** We spent part of a class talking about how 42 U.S.C. § 1983 interacts with the concept of an implied private right of action. Federal statutes set forth thousands of rules of primary conduct, in the sense of rules that govern individual behavior. But Congress does not necessarily confer a private right of action to go along with these rules. When this happens, one question that arises is whether a court should recognize an “implied” private right of action to facilitate enforcement of that rule. This was the focus of the previous paragraph. A related issue, however, is whether an individual aggrieved by someone else’s failure to adhere to a federal rule of primary conduct may bring an action against that individual under § 1983, which authorizes suit against any “person” who acts “under color of” state law and who violates a federal rule. Does § 1983 authorize a private action for any violation of a federal rule of primary conduct where the defendant acts under color of state law? At first, the Court appeared to answer this question in the affirmative, see *Maine v. Thiboutot* (1980), but it has recently restricted this option substantially. See *City of Palos Verdes v. Abrams* (2005). Under the current approach, the Court first asks whether the statute in question (not § 1983 itself, but the statute that sets forth the rule of primary conduct) creates the kind of right that an individual could enforce, and, further, whether the plaintiff falls within the class of individuals the statute seeks to protect. (This bears close resemblance to the first factor of *Cort v. Ash.* ) If so, a rebuttable presumption arises that an action under § 1983 is available. This presumption may be defeated, however, by a showing that Congress did not intend for the rule to be enforced via § 1983, and such lack of intent is the “ordinary inference” from the creation of an alternative scheme of enforcement in the statute that sets forth the rule of primary conduct.

**Bivens actions.** *Bivens* actions will lie against federal officers absent “special factors counselling hesitation.” Remember that the courts had been hearing direct actions in equity against federal officers under the Constitution long before *Bivens* (1971) was decided.

*Bivens* was literally a direct action for damages against federal police on the Fourth Amendment. Broadly speaking, however, a *Bivens* action is a direct action for damages against a federal officer under the Constitution.

“Special factors counselling hesitation” might include the fact that a case implicates an area of unique congressional competence, such as the military or federal civil service. Also important would be the existence of an alternate remedial scheme. The alternative doesn’t have
to measure up to what would be available in a *Bivens* action. The Court has displayed an increasing tendency to find special factors and not to allow actions along the lines of *Bivens*.

**Pullman abstention.** We spent a class talking about abstention under *Railroad Commission of Texas v. Pullman Co.* (1941). This form of abstention — which really doesn’t involve “abstention” at all — arises when a federal court may not need to reach a federal constitutional issue, depending on how an unclear issue of state law is resolved. In this circumstance, the federal court will stay proceedings while the state issue is resolved in state court. While in state court, the plaintiff needs to advise the state court of the existence of the federal issue, so the state court can resolve the state issue with the federal issue in mind. If either of the parties does not want the state court to resolve the federal issue, however, it can avoid this result by not “freely and without reservation” presenting the federal issue to the state court for review, or by explicitly reserving the issue for the federal court. These are the so-called “*England* procedures,” after *England v. Louisiana State Board of Medical Examiners* (1964).

As an aside, please note that *Pullman* may be appropriate even if the unclear issue of state law is an issue of state constitutional law, but this application may be limited to cases involving idiosyncratic provisions of state constitutions, and not such broad normative provisions as state equal protection and due process clauses. Were *Pullman* applied in such instances, § 1983 would have something like an exhaustion requirement, which it is not supposed to have. See generally *Monroe v. Pape* (1961). *(Note: We did not discuss this every year.)*

Note: *Pullman* paradigmatically applies to actions in equity. See generally *Quackenbush v. Allstate Insurance Co.* (1996). But a federal court in a *Pullman*-like situation where the plaintiff seeks monetary damages might stay proceedings (or move through them slowly) pending resolution of the state issue in state court.

**Burford abstention.** We talked briefly about *Burford* abstention. This form of abstention arises when federal courts, sitting in equity, are asked to review a determination by an administrative agency of a state, in an area where the state has an acute need for coherent policy, and where the state has taken procedural steps to ensure that coherence. In *Burford* (1943) itself, this involved the Texas Railroad Commission’s determinations of who could sink wells (and where), and how much oil each person could extract from the East Texas Oil Field. Because oil, gas and water move fairly freely throughout such an underground system, because Texas had centralized administration of its policy in the Commission, and because Texas had further provided for exclusive review of the Commission’s determinations in a particular state court (the Circuit Court for Travis County, Texas), the Court held that abstention was appropriate. In theory, it should be difficult to satisfy the requirements for *Burford*, but *Burford* comes up in litigation fairly often, if only for purposes of being ruled out.

**Younger abstention.** This form of abstention paradigmatically applies to prevent federal injunctions against criminal proceedings pending in state court. There are exceptions to this general rule: (1) where great and immediate irreparable harm may occur; (2) where the
prosecution is not taken in good faith, or is part of a pattern of harassment, see *Dombrowski v. Pfister* (1965); (3) where the plaintiff in federal court will not have an adequate opportunity to raise his or her federal constitutional issues in state court; (4) where the state law at issue is patently and flagrantly wrong in every respect; and (5) where the state tribunal is subject to inherent structural bias against the federal plaintiff. These exceptions are not necessarily “discrete” in the mathematical sense. In other words, they might well overlap. In fact, the second through fifth exceptions may simply be examples of the first.

*Younger v. Harris* (1971) goes for actions for declaratory relief as well. See *Samuels v. Mackell* (1971). But a federal court will not abstain from granting a declaratory judgment where no action is pending in state court. See *Steffel v. Thompson* (1974). Of course, the case must be ripe. Under *Hicks v. Miranda* (1975), abstention is appropriate even if the federal suit comes first, provided “proceedings of substance on the merits” (“POSOTM”) have not taken place in the federal court. (Denial of a temporary restraining order does not constitute substantial action on the merits. Granting of a preliminary injunction is enough, although the preliminary injunction would preclude prosecution anyway because of the threat of contempt.)

*Younger* has some civil applications, including administrative applications, but the Court appeared to circumscribe such applications in *Sprint Communications v. Jacobs* (2013). In this case, the Court unanimously limited *Younger* to three contexts: (1) where criminal prosecutions are pending in state court; (2) where civil enforcement proceedings are pending in state court; and (3) where “orders uniquely in furtherance of the state courts’ ability to perform their judicial functions” are at issue. In *Sprint*, the Court also emphasized the kind of civil actions that would fall into the second category (above). These are instances where a state, or one of its agencies or officers, undertakes to investigate an alleged wrong, and to bring the alleged bad actor to book. Because this was not the case in *Sprint*, the Court unanimously held that *Younger* did not apply.

An important question in connection with administrative application of *Younger* is whether the federal plaintiff must be able to raise his or her federal constitutional arguments before the administrative agency, or whether being able to raise them before a reviewing court suffices. Arguably, if one cannot make one’s federal arguments at the stage where facts are found, one may be left on review with a record inadequate to support those arguments. The administrative proceeding must be “judicial in nature,” however, for *Younger* even potentially to apply. In *Middlesex County Ethics Committee v. Garden State Bar Assocation* (1982), the Court was arguably more willing to apply *Younger* for the benefit of an administrative proceeding after the Supreme Court of New Jersey announced that it would review that proceeding after it had concluded.

Please also note, in connection with *Younger*, the Court’s broad understanding of what constitutes “ability” to present federal constitutional issues in state proceedings. In *Moore v. Sims* (1979), which arose from a dispute over the custody of two children, the Court concluded that, because of the state’s liberal rules for permissive counterclaims, the federal plaintiffs could
raise their federal constitutional arguments in state court, even though those arguments were not directly implicated in the proceedings the state had initiated, and therefore Younger applied.

**Colorado River abstention.** We also talked briefly about “Colorado River abstention,” which is a catch-all form of abstention that federal courts invoke in (supposedly) rare instances to avoid exercising jurisdiction over a proceeding in personam where a parallel proceeding in personam is pending in state court. This (supposedly) exceedingly narrow exception depends on a variety of factors, which in Colorado River (1976) itself included: (1) congressional intent; (2) the amount of time the federal court had invested in the case; (3) the extent to which state law would dominate the proceeding in federal court; (4) how inconvenient litigating the case in federal court would be; and (5) how prejudicial allowing the case to proceed only in state court would be to the party that sought to preserve federal jurisdiction.

**The Anti-Injunction Act.** Know this act. There are three textual exceptions: (1) where an injunction against proceedings in state court is expressly authorized by act of Congress ("EAAC"); (2) where the injunction is necessary in aid of the federal court’s jurisdiction ("NAJ"); and (3) where the injunction is necessary to protect or effectuate the federal court’s judgment ("NPEJ"). Remember that the “authorization” need not be highly explicit to qualify for the first exception. See Mitchum v. Foster (1972) (42 U.S.C. § 1983 is an “express” exception to the Act even though it does not refer to the act or to enjoining proceedings in state court.). Also, remember that “where necessary in aid of jurisdiction” is not general authority for federal courts to enjoin parallel proceedings in personam. The third express exception articulates the so-called “relitigation exception” to the Act.

Remember too that there are at least two unwritten exceptions to the Act: (1) where the United States as such seeks an injunction against litigation in state court, see Leiter Minerals, Inc. v. United States (1957); and (2) where an agency of the United States, acting in an area where federal law is pre-emptive, seeks such an injunction, see NLRB v. Nash-Finch (1971). Please note that this interpretation of Nash-Finch is simply an attempt on my part to universalize the case.

Finally, note that 28 U.S.C. § 1738 (the federal Full Faith and Credit statute) and the Anti-Injunction Act work together in a funny way. If: (1) actions are proceeding simultaneously in federal and state court; (2) someone wins first in federal court; (3) that party moves to dismiss in state court on grounds of res judicata; and (4) the state court denies that motion; then (5) the federal court must accept the state court’s decision on res judicata as res judicata and may not enjoin the proceedings in state court. Therefore, a litigant who wins first in federal court and who does not want to risk an adverse ruling by the state court on res judicata should immediately ask the federal court to enjoin the proceedings in state court as being “necessary to protect or effectuate [the federal court’s] judgment” and not give the state court an opportunity to decide that the “res” is “not judicata.” Query which approach is more consistent with federalism and comity.
State sovereign immunity under the federal Constitution. In general, no one may sue a state (or an arm thereof) in federal court, or in state court on a federal cause of action, see *Alden v. Maine* (1999), for damages. The list of plaintiffs to whom this applies includes: (1) citizens of another state, see the Eleventh Amendment itself; (2) citizens of the state itself, see *Hans v. Louisiana* (1890); (3) citizens of other countries, see the amendment itself; (4) other countries themselves, see *Principality of Monaco v. Mississippi* (1934); (5) Indian tribes, see *Blatchford v. Native Village of Noatak* (1991); and (6) members of Indian tribes. (Note: Many of the these principles are not — and could not be — predicated on the text of the Eleventh Amendment, but instead are predicated on a “presupposition” of sovereign immunity said to be embedded in the Constitution itself.) The United States may sue a state in federal court, as can another state, provided the other state is suing on its own behalf, and not on behalf of a small group of citizens. Remember that a state may be sued in its own courts, or in the courts of another state, see *Nevada v. Hall* (1979), depending on the law of the forum. Finally, a state may be “sued” in the Supreme Court when that Court is exercising its appellate jurisdiction.

The Eleventh Amendment does not protect local government or other subdivisions of a state. See *Lincoln County v. Luning* (1890). This is largely because municipal corporations were originally indistinguishable, at least in some respects, from private corporations, and thus did not enjoy full sovereign immunity. But the line between a “subdivision” and an “arm of a state” is not always clear. To figure this out (at least in the Sixth Circuit), apply the “*Ernst* factors”:

(1) the State’s potential liability for a judgment against the entity; (2) the language by which state statutes and state courts refer to the entity and the degree of state control and veto power over the entity’s actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the entity’s functions fall within the traditional purview of state or local government. In discussing these factors, [noted the Sixth Circuit,] the [Supreme] Court has emphasized that the first factor — the liability of the State for a judgment — is the foremost factor, and that it is the state treasury’s potential legal liability for the judgment, not whether the state treasury will pay for the judgment in that case, that controls the inquiry.

*Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005) (citations omitted).

The Eleventh Amendment will not permit a suit against a state officer if the judgment will run to the state’s treasury. See *Edelman v. Jordan* (1974). The amendment will, however, permit an action in equity or for declaratory relief against a state officer in his or her official capacity to cause that officer to conform his or her behavior in the future to federal law. See *Ex parte Young* (1908). The rule that the amendment does not bar suit against officers of the state for prospective injunctive relief is true even if complying with such an order might be expensive. See *Milliken v. Bradley* (1977).
Aside: Even if one could sue a state in state court on a federal cause of action — in other words, even if *Alden v. Maine* had not been decided as it was — one still could not sue a state in state court (or any other court) under § 1983 because that statute only authorizes suit against “persons,” and the Court has held that a state is not a “person” for purposes of § 1983. This applies to arms of the state as well. See *Will v. Michigan Dep’t of State Police* (1989). But a municipality *is* a person for purposes of § 1983. See *Monell v. Dep’t of Social Servs.* (1978).

Denial of a claim of immunity under the Eleventh Amendment is immediately appealable. See *PRASA v. Metcalf & Eddy* (1993).

One cannot obtain an injunction against state officers on the basis of state law in federal court. See *Pennhurst State School and Hospital v. Halderman* (1984). The Court’s rationale for this is that the “stripping doctrine” of *Ex parte Young* is only a means of last resort, and plaintiffs do not need access to federal court to vindicate state rights.

Please note that *Pennhurst* dramatically restricts the operative scope of *Pullman* abstention. As you may recall, the plaintiffs in *Pullman* originally sought injunctive relief against the members of the Texas Railroad Commission on the ground that the Commission’s order — requiring Pullman sleeper cars to be under the constant charge of a conductor — violated both the law of Texas and the Constitution of the United States. (Specifically, the plaintiffs argued that the Commission had exceeded its statutory powers in promulgating the regulation.) The Court, per Justice Frankfurter, held that the federal court should stay its hand while the courts of Texas determined the true scope of the Commission’s power. Justice Frankfurter’s rationale was that, if the courts of the state held in the plaintiffs’ favor, the federal courts would avoid having to resolve a difficult issue of constitutional law. Because of *Pennhurst*, however, plaintiffs like those in *Pullman* could not seek injunctive relief in federal court on the basis of both state and federal law in the first place, thus precluding a lot of situations where *Pullman* might otherwise apply. Of course, plaintiffs like those in *Pullman* might today *split* their claims between state and federal court, in which case federal courts might let cases lie fallow on their dockets, in the spirit of *Pullman*. In addition, *Pennhurst* will not apply where the defendant is a municipality or an officer of a municipality. It also will not apply where the defendant is in the private sector.

**Consent and abrogation.** A state may expressly consent to suit in federal court. Constructive consent outside the context of a valid exercise of the conditional federal spending power may no longer be possible. At least to some extent, however, a state may be deemed to waive its sovereign immunity under the federal Constitution by waiving sovereign immunity in state court and then removing the case to federal court. See *Lapides v. Board of Regents* (2002).

In general, Congress may not unilaterally abrogate the sovereign immunity of the states under the original, unamended Constitution. See *Seminole Tribe of Florida v. Florida* (1996) (overruling *Pennsylvania v. Union Gas* (1989)). In *Central Virginia Community College v. Katz* (2006), however, the Court held that states consented to abrogation of their immunity in the
proposal and ratification of the original Constitution to the extent Congress exercises its power to “establish uniform Laws on the subject of Bankruptcies throughout the United States,” art. I, § 8, cl. [4], and to the extent such abrogation is “necessary to effectuate the in rem jurisdiction of the bankruptcy courts.” Congress also has a unilateral power of abrogation under the Reconstruction Amendments, particularly § 5 of the Fourteenth Amendment. See Fitzpatrick v. Bitzer (1976) (regarding Title VII of the Civil Rights Act of 1964, as amended). But Congress must explicitly and by clear language on the face of the statute evince an intent to abrogate immunity under the Eleventh Amendment in order to exercise this power. See Quern v. Jordan (1979) (no such intent shown regarding § 1983). The Court has recently displayed a tendency to limit Congress’ power under Section 5.

Please note that, to exercise the power recognized in Katz, an abundantly clear statement on Congress’ part is not required, because the states are deemed to have consented to abrogation of their immunity in this context in the proposal and ratification of the Constitution.

We also know from the “second holding” of Seminole that the device of Ex parte Young is not available if Congress establishes an elaborate procedural alternative to a direct action in equity against an officer of the state, under a rationale of expressio unius est exclusio alterius. Congress can avoid this result, of course, by stating in the statute that an action in accordance with Ex parte Young is still possible despite the new statutory procedure.

**Competing theories.** There are two grand, competing theories for interpreting and applying the Eleventh Amendment and related doctrines. One is the “immunity interpretation,” and the other is the “diversity interpretation.” Understanding them will enable you to understand many of the details in this area of the law more clearly.

Those devoted to the immunity interpretation argue that the Eleventh Amendment simply evinces, in one specific context, a broad understanding on the part of those who wrote and ratified the Constitution that states would retain immunity from suit at the hands of private individuals. These individuals explain the exception for actions predicated on the Enforcement Clauses of the Reconstruction Amendments as reflecting a distinct concept underlying these amendments, specifically an idea that the United States, in this context, was interposed between the states and their citizens. Many of these individuals also explain Ex parte Young as a necessary device to cause states to conform to federal law. This interpretation explains such decisions as Seminole and Alden. These jurists also tend to criticize Hans v. Louisiana (1890), although many of them would acknowledge that Congress had not given Hans express authority to sue his home state under any statute. (Hans sued Louisiana on the Contracts Clause and the predecessor to 28 U.S.C. § 1331, which Congress enacted in 1875.)

Those devoted to the diversity interpretation argue that the Eleventh Amendment was intended simply to preserve the decision of the relevant sovereign regarding immunity, whatever that decision might be. According to this view, the Eleventh Amendment repudiated Chisholm v. Georgia (1793) on the ground that the relevant sovereign in that case — presumably the State of
Georgia — had chosen to retain its immunity from suit in *assumpsit*. By similar reasoning, however, those who adhere to this interpretation would recognize in Congress a unilateral power to abrogate the immunity of the states when Congress enacts legislation in its sovereign capacity. According to this view, *Seminole Tribe* and *Alden* were incorrect.

**42 U.S.C. § 1983.** This is the basic vehicle for the vindication of federal civil rights over against state and local officers, as well as local governments themselves. Exhaustion of remedies under the auspices of the state is not generally necessary to sue under this statute. See *Monroe v. Pape* (1961). Further, it is generally immaterial whether the actions complained of were consonant with or contrary to the positive law of the state. Again, see *Monroe*. (Note: We do not discuss *Monroe* every year.)

Officials who are sued for damages in their individual capacities under § 1983 are often immune. Judges and prosecutors are absolutely immune from liability for damages under this statute to the extent they perform judicial or quasi-judicial functions, as are other officials when they perform such functions. As we saw, it isn’t always easy to classify the function a prosecutor is performing. Legislators at both the state and local level are absolutely immune from liability for *any form of relief* with respect to the performance of legislative functions. An official not discharging a legislative or judicial function enjoys only qualified immunity. This immunity protects officials from civil liability for damages to the extent their conduct does not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald* (1982) (involving a federal officer sued on a *Bivens* theory). A non-official legitimately sued under § 1983 enjoys no immunity whatsoever. (There must be state action, of course, for § 1983 to apply at all.)

Please keep in mind that the standard under *Harlow* is purely objective, in the sense that it depends entirely on the clarity (or lack thereof) of the asserted federal right at the time the defendant allegedly acted. Please also keep in mind that *prima facie* cases to establish violations of certain federal rights — such as the right not to be discriminated against in violation of the Equal Protection Clause, or the right not to be fired in retaliation for the exercise of a right protected by the First Amendment — include a requirement that the plaintiff establish a particular state of mind on the part of the defendant. Where this is the case, a plaintiff will be permitted to take evidence in this regard. A plaintiff will not, however, be permitted to take evidence regarding the defendant’s subjective state of mind solely with regard to a defense of qualified immunity under *Harlow* and its progeny, because such evidence would be irrelevant to that defense. See *Crawford-El v. Britton* (1998) (*dictum*).

We also discussed the policy underlying official immunity, as well as the policy against it. Holding public officials immune from liability arguably preserves their ability to act boldly and decisively in the public interest. It also protects them from the anxiety, distraction, and expense of having to defend themselves against suit. Indeed, concern about the rigors of discovery at least in part drove the Court to adopt the objective test of *Harlow*, as clarified in *dictum* in *Crawford-El*. It also explains *Ashcroft v. Iqbal* (2009). On the other hand, holding
public officials immune from liability arguably removes a deterrent against unlawful conduct and could leave a deserving plaintiff without compensation, if there is no predicate for municipal liability.

Denial of a claim of official immunity (absolute or qualified) can be appealed immediately in the federal courts. Cf. Mitchell v. Forsyth (1985) (Bivens action). This is because protection from discovery and the rigors of trial is part of what official immunity is intended to provide. Whether it can be appealed immediately in the state courts is up to the states. See Johnson v. Fankell (1997). Such an immediate appeal is not required under § 1983. Remember that this immediate appeal is available only where the dispute relates to the clarity of the law, and not where the dispute relates to unresolved facts. For example, an interlocutory appeal would be appropriate if a district judge decided that a police officer should reasonably have known that a particular search violated the Fourth Amendment, but such an appeal would not be appropriate if what actually happened during the search remained in dispute.

It is difficult to sue a state judge for injunctive relief. See the Federal Courts Improvement Act of 1996, which amended § 1983. One may only do this if one cannot obtain declaratory relief, or if declaratory relief has proved ineffective.

Municipalities can be sued under § 1983 for their policies and customs, but not on a theory of respondeat superior. See Monell v. Department of Social Services (1978). Municipalities enjoy no form of qualified immunity, however. See Owen v. City of Independence (1980). To ascertain whether an action is based on policy or custom, one should ask who the municipality’s “final policy-maker” for the relevant area of policy is under applicable state law. See Praprotnik (1988) (plurality); Dallas Ind. Sch. Dist. v. Jett (1989). What state law provides is a matter for the bench, not the jury. A pattern of delegation to someone else can constitute “custom” for purposes of § 1983. Failure to train and the like can constitute a policy or custom if it amounts to “deliberate indifference to the rights of persons with whom the police[, etc.,] come into contact.” See City of Canton v. Harris (1989). This is a fairly tough standard to meet.