

CIVIL PROCEDURE’S FIVE BIG IDEAS

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2016 MICH. ST. L. REV. 55

ABSTRACT

Civil procedure, more than any other of the basic law-school courses, conveys to students an understanding of the whole legal system. I propose that this purpose should become, more openly, the organizing theme of the course. The focus should remain, of course, on the mechanics of the judicial branch. What I champion is giving some conscious attention, albeit mainly in the background and at an introductory level, to the big ideas of the constitutional structure within which the law formulates civil procedure. Such attention would unify the doctrinal study, while enriching it for the students and revealing its true importance.

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INTRODUCTION

Civil procedure is a significant subject in its own right as an integral part of the system of justice and one that any legal practitioner or student, or for that matter any learned observer, must know to understand law. There are also many specialized reasons to study civil procedure and hence as many perspectives to emphasize in teaching it. What, then, should be the purposive theme running through a course in civil procedure?

A. Championed Theme of the Civil Procedure Course

Students will eventually restudy civil procedure when preparing for the bar examination. Likewise, lawyers must reapply themselves to civil procedure in order to become litigators. But in structuring a basic course, the teacher rightfully sets those aims aside. On the one hand, the bar examination tests details covered in the review courses that all students eventually take. For example, many bar exams test on abstention (a complex doctrine under which a federal court may decline to exercise its jurisdiction in deference to a state's interests), while few basic courses would reach that special doctrine. On the other hand, most students do not become litigators, and those who do should acquire their knowledge and polish their skills much later in their apprenticeship. Yet all U.S. students take a

basic course in civil procedure early in their studies, so something else must justify that course. The first course should be about laying a broad but solid foundation.

A teacher might view civil procedure as a key part of society's array of dispute-resolution mechanisms, along with settlement, arbitration, and the like. Courts provide their procedure as a default set of rules, one that will govern only if some other set of procedures does not trump by operation of law or by choice. Because almost all grievances conclude without judicial adjudication, the teacher could justifiably view the "alternative" procedures as numerically more important than traditional civil procedure. Thus, the course could serve as a social study of dispute resolution.

Instead, the teacher might view civil procedure as the vehicle for the great cases' reshaping of society, or view it as important mainly in the many undeniable ways that procedure affects substantive law. In some senses, of course, the social impact of public law litigation is a more important subject for study than one centered on today's ordinary court cases in private law.

The difficulty with teachers' attraction to these admirable law-and-society concerns is that such emphases fail to justify civil procedure's position as a "fundamental" course in law school, typically coming in the first year and often consuming a good number of credit hours. Understanding the efficiency and fairness of society's whole system for dispute resolution and exploring the hidden impact of procedure on society's substantive goals are both incredibly important, but little reason exists for starting law study there. Advanced courses that focus on them would be the way to go.

The initial course should be more "basic" in theme and purpose, even if it should at least touch on these more advanced ideas. What is the appropriate purposive theme for a basic course? Of course, it should expose the students to the mechanics of the judicial branch, which is the course's content least familiar to incoming students but most important when beginning law studies. But what is now quite obvious to me, even if I took decades to realize it, is that the course works mainly to orient the students in the structure of the whole legal system. That is the big picture for civil procedure!

I want to argue that the background constitutional structure should be, if it is not already, the theme of the basic course in civil procedure. That theme will unify the doctrinal study, while enriching what the students take away. More than any other course,

“constitutionally contextualized civil procedure” can convey to beginning law students an understanding of their legal system:

Civil Procedure is one of the most complicated, but most enjoyable of the first-year subjects, because it is your undeniable entrée into the world of law. In studying Civil Procedure, you learn the blueprint of the American legal system, and slowly discover how our entire system of civil justice fits together. Working through the rules to the point of mastery can be a long and extraordinarily frustrating process, but when the clouds finally do part, the elegant simplicity of the system of American civil procedure will be yours to keep.¹

It is in this principal sense that civil procedure serves the rest of the law school’s curriculum. And it is this focus on structure that makes civil procedure one of the most central of legal subjects in American academia—while in Europe, where civil procedure encompasses just the mechanics, it is considered an inferior academic subject, with the course sometimes relegated to a post-graduate practice program.

B. Sense of the Constitutional Structure

Okay, so what is this structure that the course should aim at exposing? It is the constitutional structure within which the law constructs its civil procedure. The constitutional space occupied by the architecture of civil procedure rests on a foundation of the extant constitutional powers. But the permissible bounds of the space—the compound’s floor, outer walls, and roof—emerge from the limits imposed by the Constitution. The architect has a lot of freedom in designing civil procedure within that space, but must use the existing powers strictly within those imposed limits. As the teacher and students explore and dissect the architecture of civil procedure in this particular course, they come to comprehend more generally how the rest of the legal system operates within the constitutional structure. The laws of torts, contracts, property, and crime all work the same way, but the key ideas converge and emerge in the course on civil procedure.

Now, I am not talking about constitutional doctrines that directly form part of civil procedure, such as the Seventh Amendment’s preservation of a civil jury right for federal courts. In fact, civil procedure, unlike criminal or even administrative procedure, does not contain much constitutional law of this kind in

1. ROBERT H. MILLER, *LAW SCHOOL CONFIDENTIAL* 141 (3d ed. 2011).

its foreground.² Instead, what I am talking about is the Constitution's structural role, played more in the background.

Above all, I am not suggesting that civil procedure should be a wannabe course in Constitutional Law or a stunted course on Federal Courts. The course's concern should be more structural than rights-based. It should be more focused on the political science aspects of government generally and less focused on federal subject-matter jurisdiction. In any event, the subject of the course remains civil procedure. We are studying procedure, and these themes of constitutional structure should remain very much in the background and at an introductory level. The aim is merely constitutional contextualization. Still, this contextualized study of procedure will help crystallize the students' vague pre-existing knowledge of governmental structure, and a small amount of attention given to constitutional concerns will in turn illuminate the understanding of procedure and reveal its true importance.

Procedural due process might serve as an illustration of the constitutional structure that underlies civil procedure. This doctrine, like equal protection, concerns *how* the government must act rather than *what* it can or cannot do, which the other structural doctrines treat. The Due Process Clauses dictate the minimally fair process that the government must provide when impairing a person's property or liberty interest. They require no more than a minimum. "To say that a law does not violate the due process clause, is to say the least possible good about it."³ So due process establishes only the floor, above which procedural law frames our living space. The lawmaking architects build a law of civil procedure that delivers much more "good" than mere due process. They seek thereby to achieve optimal policies and rules, within all constitutional limits.

C. Doctrinal Framework of the Course

As for the rest of the constitutional structure, I shall explain one part of it in a separate section of this Article on each of the doctrinal

2. See John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 579 (1984) ("Yet civil procedure—as important as [criminal or administrative procedure] and surely no model of perfection—has remained relatively untouched [by the Constitution], even if the Court does occasionally gnaw the familiar bone of personal jurisdiction doctrine.").

3. Elliott E. Cheatham, *Conflict of Laws: Some Developments and Some Questions*, 25 ARK. L. REV. 9, 25 (1971).

forays made during the typical course.⁴ Most courses try to break down the subject of civil procedure along the lines of an overview or survey followed by a close inspection of certain major procedural problems. The latter often includes these four: governing law, authority to adjudicate, former adjudication, and complex litigation. Such a selection of problems appropriately aims at informing students about the legal system under which they live and in which they are beginning their study of law: one in which the federal and state relation is key; one in which allocation of authority among the states is key; one in which the separation of powers between the judiciary and other branches is key; and one in which the capacity of the judiciary to adapt in handling new kinds of cases is key. Selection of these four problems is all the more appropriate because today they arise in an increasingly complex and globalized setting, and so they remain fresh and important.

- The overview of the **stages of litigation** introduces civil procedure by tracing the six steps from commencing a lawsuit in some trial court to completing the final appeal in the highest available appellate court: *forum* selection, *pretrial* practice, *settlement* process, *trial* practice, *judgment* entry, and *appeal* practice. These mechanics of litigation appear to the untutored as the totality of procedure, but in fact many proceduralists and many procedure courses are mainly devoted instead to the four major problems lurking around these mechanics. Nevertheless, surveying the mechanics at the outset serves to construct a framework for the subject of civil procedure.
- The topic of **governing law** examines a question that pervades the overview and deserves systematic treatment: When should a court choose to apply the law of some sovereign other than its own? This poses problems of interstate and international *choice of law* and also problems involving the *Erie*⁵ doctrine that concerns the choice between federal and state law.
- The topic of **authority to adjudicate** treats a major problem of civil procedure that arises at the start of the overview. There, it was probably assumed that the plaintiff had properly selected a court with authority to adjudicate. In fact, that preliminary step can be a most difficult and significant one. It involves satisfying three threshold requirements: *subject-matter*

4. See *infra* Parts I-V.

5. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

jurisdiction, territorial authority to adjudicate, and notice. Moreover, these requirements entail consideration of such subsumed matters as state and federal court systems, territorial jurisdiction, venue, and service of process.

- The topic of **former adjudication** studies a question that arises at the end of the overview: What impact does a previously rendered adjudication have in subsequent litigation? This question primarily entails problems of *res judicata*, a doctrine that pursues finality in its specification of the effects to be given a judgment, the judicial branch's end-product.
- The topic of **complex litigation** investigates the restrictions concerning which claims and parties the litigants must or may join in their lawsuit. In the opening overview or survey, it was generally assumed that a single plaintiff was suing a single defendant on a single claim. In practice, much more complex *multicclaim* and *multiparty* lawsuits enjoy ever-increasing frequency and importance.

D. Integration of Constitutional Structure with Doctrinal Framework

Each Part of this Article will deliver the “Big Idea” behind the particular topic. I shall set out the constitutional doctrine that I try to convey in essence to my students, along with a few representative applications to civil procedure. I am using the phrase of “Big Idea” not in the sense of a revolutionary insight,⁶ but rather in the sense of an important concept that can serve an organizational purpose.

Naturally, the course's big ideas are interrelated and overlapping. Each topic's big idea, while self-contained, will accordingly lead into the next topic's big idea. Thus, this Article will progress through the relations among the branches of government, the relations between the federal and state sovereigns, and the relations of state to state—whereby an image of the Constitution will emerge as a joint-venture contract among thirteen independent state sovereigns to create a federal government of limited and separated powers, with special prominence in the contract given to its choice-of-law and choice-of-forum “clauses.” This Article will then complete its progress through the big ideas by turning, in particular, to how the output of the judicial branch in the form of nationwide-

6. See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982).

respected judgments determines that branch's distinctive nature—and finally by returning to consideration of how courts perform their function by more than a minimally fair process. Let me here preview the journey.

The beginning of any civil procedure course traces the *stages of litigation*. To govern those stages, the lawmakers seek optimal procedures, acting in response to the felt needs for dispute resolution and also in pursuit of society's outcome and process values. The emergence of statutory authorization for judicial rulemaking shows that the procedural lawmakers' key first step is to resolve the proper roles of the legislature and the judiciary. For example, study of federal procedure will inevitably involve a consideration of the proper interplay of Congress and the courts, which takes place on the constitutional terrain of separation of powers.

Next, I move to *governing law*. The Framers had concerns about interstate choice of law. But over time, the more critical question has emerged as to what they had to say about the choice of law between federal and state regimes. The choice-of-law "clause" of the constitutional contract is in fact so prominent that it becomes useful to view the Constitution centrally as a choice-of-law agreement, with the states here giving such-and-such to the federal government but retaining this-and-that for state law, and so on through the document. The Constitution's preoccupation with the relation between federal and state law, as well as the subsequent development of all the subconstitutional law on the subject, justifies treating as a big idea the subject of vertical federalism.

The prior attention to interstate, or horizontal, choice of law smooths the transition to *authority to adjudicate*. Although attention is owing to federal/state and even international divisions of authority, the centerpiece here is allocation of authority among the states. When can New York handle matters of considerable concern to New Jersey? The big idea accordingly shifts to the Constitution's structure for territorial jurisdiction, built in the United States on the notion of horizontal federalism.

The next topic of *former adjudication* enmeshes the students in the essence of the judicial branch. *Res judicata* is the doctrine that defines a judgment, which is the output of the judicial branch. By its definition, a judgment decides certain things and does not decide other things. The court acts against only the parties before it and a very limited set of others. This feature gives the judicial branch its distinctive nature. By contrast, where a court has authority to speak, it speaks with real authority. And that authority is, at the least,

nationwide. That is, we enjoy the benefits of a legally unified nation thanks to the notion of full faith and credit.

Finally, the topic of *complex litigation* starts to come back to “procedure” in its strict sense. The big idea here is using the justification of adequate representation to extend the binding effects of a judgment to more nonparties. Procedural law puts severe limits on such extension, constructing a roof on its structure, because society wants to preserve the distinctive nature of adjudication.⁷ Moreover, the Constitution puts an absolute limit on how far law can extend the binding effects.⁸ To perceive that outer limit, the focus must return to procedural due process.⁹

I. SEPARATION OF POWERS

A course’s overview traces the stages of litigation. Such an overview of federal procedure will inevitably involve a consideration of the proper interplay of Congress and the federal courts. That interplay takes place on the constitutional terrain of separation of powers.¹⁰

A. Constitutional Doctrine

Separation of powers was the Framers’ great horizontal theme for the federal government. By contrast, federalism built the vertical relationship between the new federal government and the existing state sovereigns. For the separation theme, the Framers mainly drew on John Locke’s *Second Treatise of Government* (1690) and

7. See *infra* Section V.B.

8. See *infra* Section V.A; see also Kevin M. Clermont, *Res Judicata as Requisite for Justice*, 68 RUTGERS U. L. REV. (forthcoming 2016) (manuscript at 18-19), <http://ssrn.com/abstract=2614433>.

9. Another attempt to distill the big ideas of the course lies in SUZANNA SHERRY & JAY TIDMARSH, *CIVIL PROCEDURE: ESSENTIALS* (2007). This book is a novel contribution among the recent onslaught of study aids, in that it conveys the desired end-product of the course rather than a mini-treatise on the law. Its synthesis comprises a distillation of the seven great themes that the authors think should underlie a course in civil procedure: adversary system, jury trial, accuracy, procedural fairness, efficiency, transactionalism, and federalism. I think this is a good list of the ideas that would emerge from studying procedure as procedure. Although my list overlaps theirs, mine is more externally imposed than internally propagated, in that I offer my five ideas as a means to build a fruitful framework for teaching the basic course in civil procedure.

10. See generally SEPARATION OF POWERS: DOCUMENTS AND COMMENTARY (Katy J. Harriger ed., 2003).

especially Baron de Montesquieu's *The Spirit of the Laws* (1748) in implementing their theory of three offsetting branches of government, a theory previously pioneered by the states and subsequently elaborated by James Madison in *The Federalist* (1788). The Constitution does not explicitly invoke the theory, but the theory pervades the document's construction. The most obvious manifestation appears in its devoting Article I to the legislature, Article II to the executive, and Article III to the judiciary. The Framers' motivating idea was that separation would result not only in better (less arbitrary) law, but also in less law overall, than if power were concentrated.

The Constitution was far from definitive or complete on the details of the subject, however. How, then, to read the Constitution? Although the Framers' construction of the three separate Articles suggested a formalist notion of *separate* spheres of authority for the three branches, the functionalist reality has meant partially *overlapping* spheres. The case law on separation of powers has therefore turned out rather spongy. Actual applications of the doctrine depend heavily on context and time. The cases' approach seems to allow shared power unless a branch's core function is endangered or unless the Constitution's text specifically committed the particular task to one branch.

Over the course of history, the big confrontations over separation of powers have arisen between the executive and the legislature.¹¹ In the field of civil procedure, however, the interest lies more with contests between the legislature and the judiciary. So let us focus on the relevant text in that latter regard.

The separateness is exemplified by the main provisions. Article I, § 1 of the Federal Constitution provides:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.¹²

Article III, § 1 provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times,

11. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (invalidating President Truman's wartime seizure of the nation's major steel mills).

12. U.S. CONST. art. I, § 1.

receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.¹³

That last sentence giving federal judges life tenure is indicative of the general directive that each branch should stay out of another branch's business. Symmetrical provisions lie in such clauses as Article I, § 5 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.")¹⁴ and Article I, § 6 ("and for any Speech or Debate in either House, they shall not be questioned in any other Place").¹⁵

The overlap of the branches' business, however, shows up in Article I, § 8:

The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court; . . . —And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.¹⁶

So, the Constitution gives Congress the power to create lower federal courts, thus implicitly giving it plenty of authority to dictate their jurisdiction. Moreover, Article III, § 2, after laying out the categories of cases and controversies beyond which Congress cannot extend the federal courts' "judicial power," provides specifically as to the United States Supreme Court:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.¹⁷

All that provides quite an overlap between branches. The resulting tensions, which were intended to energize separation of powers, nicely emerge by a closer look at this realm of subject-matter jurisdiction.

First, it is true that courts exercise power throughout their jurisdiction. But, except for the original jurisdiction of the Supreme Court, the granting of jurisdiction is a legislative function. The courts

13. U.S. CONST. art. III, § 1.

14. U.S. CONST. art. I, § 5.

15. U.S. CONST. art. I, § 6.

16. U.S. CONST. art. I, § 8.

17. U.S. CONST. art. III, § 2.

have generally respected that assignment to Congress¹⁸—even if the Court has approved occasional wanderings, most notably in its approval of judge-created pendent and ancillary jurisdiction in the period before Congress recaptured the area by its 1990 statute bestowing supplemental jurisdiction.¹⁹

The scheme, then, is clear: Most federal-court jurisdiction does not exist until Congress bestows it. Article III's sketching of the "judicial power" represents only an outer limit on congressional power, not a grant of power itself. Congress has exercised its Article I power through a whole series of jurisdictional statutes. However, out of congressional concern for maintaining a healthy federalism, these statutes fall far short of bestowing all of the federal judicial power under the Constitution. Thus, when considering an issue of federal jurisdiction, one must refer first to the congressional enactment on jurisdiction and then to the constitutional limit on the judicial power; for such jurisdiction to exist, the particular case generally must fall within the bounds of both.

The Constitution gives Congress a fairly free hand in withholding or withdrawing from the lower federal courts original jurisdiction over the enumerated "cases" and "controversies" within the federal judicial power.²⁰ Similarly, Articles I and III appear to confide the appellate jurisdiction of the federal courts largely to congressional control. Are there any limits on the jurisdiction-stripping that Congress can inflict on the federal courts? Imagine that Congress tried to keep school-prayer cases and appeals out of those courts henceforth. Congress has not attempted much like that, so the law is uncertain, although potentially of great political import. In fact, some constitutional limitations seem to exist, based on notions of preserving the courts' essential functions under the Constitution or observing specific rights recognized elsewhere in the Constitution, but those limitations are surely vague and fairly slight.²¹

18. See, e.g., *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 4 (1825) (holding that Congress has authority to regulate the mode of executing on judgments).

19. 28 U.S.C. § 1367 (2012); see also Gene R. Shreve, *Pragmatism Without Politics—A Half Measure of Authority for Jurisdictional Common Law*, 1991 BYU L. REV. 767, 767-78.

20. See, e.g., *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 518 (1869) (upholding a congressional statute repealing a portion of habeas corpus jurisdiction).

21. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (overturning a congressional statute suspending a portion of habeas corpus jurisdiction). See generally ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 3.2, at 186 (discussing congressional control of Supreme Court's appellate jurisdiction), § 3.3, at 200

Second, moving from this example of exclusive legislative authority, we pass over the difficult question of the extent to which Congress can give Article III functions to bodies outside the judicial branch,²² and we pause on the converse question of whether Congress can authorize the courts to exercise some of the legislative power by delegation. As an example, Congress established the United States Sentencing Commission to issue guidelines for criminal sentences. Three of the seven commissioners were to be sitting federal judges, thus mingling the branches. The Court held that the legislature could delegate, and the judiciary could accept, such nonadjudicatory functions of rulemaking “that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.”²³

Third, to complete the spectrum of governmental power possessed by the legislature and the judiciary, there is some core of exclusive judicial authority out of which the legislature must stay. The example here is a congressional statute that required federal courts to reopen final judgments already rendered in certain securities actions, namely, ones dismissed under the statute of limitations after the Supreme Court had abruptly changed the limitations law. The Court ruled that this command violated separation of powers:

Article III establishes a “judicial department” with the “province and duty . . . to say what the law is” in particular cases and controversies. The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.²⁴

(discussing congressional control of lower federal courts’ jurisdiction) (6th ed. 2012); CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 10, at 41 (7th ed. 2011).

22. See *Stern v. Marshall*, 131 S. Ct. 2594, 2601 (2011) (holding that non-Article III bankruptcy judge could not hear a tort counterclaim brought by Anna Nicole Smith); WRIGHT & KANE, *supra* note 21, § 11, at 48.

23. *Mistretta v. United States*, 488 U.S. 361, 388 (1989).

24. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (citations omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); see Dustin B. Benham, *Beyond Congress’s Reach: Constitutional Aspects of Inherent Power*, 43 SETON HALL L. REV. 75, 77, 82 (2013); Jeffrey A. Parness, *State Damage Caps and Separation of Powers*, 116 PENN ST. L. REV. 145, 145-46 (2011).

How has the separation-of-powers idea worked out? Competition among the branches in the overlaps helps to ensure adequate checks and balances, and hence a more optimal division of labor that has made government more effective. The doctrine has also worked to limit government, but perhaps not as much as the Framers hoped because of the many unforeseen changes over time, such as the rise of administrative agencies and the modern prevalence of party politics.

B. Application to Stages of Litigation

1. *Spectrum of Power for Procedural Lawmaking*

To govern the stages of litigation, the lawmakers seek to develop optimal procedures. Most of the resulting law of procedure lies outside the Federal Rules of Civil Procedure, principally generated by legislatures as statutes or by courts in the course of ordinary decisionmaking, as well as by judicial exercise of the various authorizations to issue court rules.

The history of procedure shows that the lawmakers' key first step is to resolve the proper roles of the legislature and the judiciary.²⁵ Much turns on who in theory can do a better job and even more so on whom experience has shown to have done better. Legislatures and courts are certainly not equivalent lawmakers.

Legislatures are often thought of as lawmakers par excellence in modern societies. They embody the voice of the demos, constituting the supreme lawmaker within constitutional limits but answering to the people. And they are well equipped to make certain kinds of law. First, unlike courts as we traditionally know them, a legislature can set up committees and commissions to investigate social problems in depth and in breadth, preparatory to making law. Second, a legislature can act on its own initiative, and it can deal with more aspects of a social problem at one time than can a court. Third, when a court does act definitively, this will usually have a retroactive effect, whereas a legislature may better secure fairness by acting prospectively. Fourth, in general a court's decision coercively binds only the parties, whereas a legislature can speak directly to the populace as a whole. Fifth, what a court decides to do about a social

25. See, e.g., Benjamin Kaplan & Warren J. Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 235 (1952).

problem might be buried in a mass of arcane law reports, whereas a legislature can adopt methods of promulgation and publicity better designed to get the word around and thus to allow the citizenry to conform their conduct. Sixth, courts do not have all the methods and remedies for dealing with a social problem that legislatures have, including the funding of a solution. Seventh, legislatures can act without the restrictions of the theoretical expectations we traditionally impose on courts, such as drawing only principled distinctions and not working obviously major social changes.

Yet, as makers of certain other kinds of law, courts have important advantages over legislatures. First, impartially applying law to new situations is a task that legislators are distinctly unsuited to perform. Second, generating interstitial law usually cannot await the possibility of the legislature returning to the subject. Third, even as a wholly original matter, if neither legislature nor court has had much prior experience with a social problem, letting the courts wrestle with the problem on a case-by-case basis may be best, testing general propositions against the reality of concrete situations. Fourth, courts may be better suited to originate law that turns on many factors or on common sense solutions framed in terms of familiar, everyday moral concepts such as blame. Fifth, if the courts have done much of the original work in developing an area of the law, allowing them to continue the evolutionary task of clarifying and reshaping that law may be preferable. Sixth, when the issue is not one on which political parties divide, there is less reason for insisting that it be resolved in the first instance by a legislative body. Seventh, the issue may instead be one that has become a political hot potato within the gridlocked legislative body, but clearly ought not to be left that way, or one as to which the majoritarian process of legislatures would fail to protect the interests of certain small groups within society.

An alternative answer to this legislature-versus-court problem is the administrative body empowered to make governing regulations and decisions within a basic framework hewn by the legislature. In returning from the foregoing very general political-science considerations to the context of making procedural law, the analogy to administrative lawmaking lies in the modern emergence of statutory authorization for judicial rulemaking.²⁶

26. See KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* § 1.2(C)(2), at 38-56 (4th ed. 2015).

All this discussion really concerns the notion of division of labor, however. To get back to separation of powers, one should ask not who would do the job better, but who must do certain jobs by constitutional requirement. The separation of powers as to procedural lawmaking falls on the same tripartite spectrum that runs from exclusive legislative power through delegated power to exclusive court power.

The resultant pattern of procedure for the federal system is as follows: (1) The legislature has very broad power to regulate the courts' civil procedure (e.g., Federal Rules of Evidence, which was enacted as a statute by Congress). Although the courts themselves have overlapping power to regulate their own civil procedure by lawmaking, either by judicial decision or by court rulemaking, they act at the sufferance of and subject to the ultimate control of the legislature (e.g., *res judicata*),²⁷ and they must stay out of certain areas (e.g., subject-matter jurisdiction).²⁸ (2) The courts also have power to regulate their own civil procedure by rulemaking pursuant to a proper delegation of legislative power (e.g., Federal Rules of Civil Procedure, which was promulgated by the Supreme Court under the Rules Enabling Act).²⁹ (3) Finally, the courts have power to regulate their own civil procedure by lawmaking within a narrow inherent judicial power to conduct the courts' own business (e.g., discipline of individual attorneys for misconduct before the courts).³⁰

2. Outer Bounds for Legislature and Judiciary

The legislature cannot act in derogation of the judiciary's inherent power. Nor can it act otherwise in violation of the Constitution. The limitation brings to mind the most obvious of controls on the legislative branch, that being *judicial review*. Courts

27. See Kaplan & Greene, *supra* note 25, at 244-54 (arguing that the legislature has authority to override court-promulgated rules by statute, as a check on the judiciary).

28. See *supra* text accompanying notes 18-21.

29. See Michael Blasie, Note, *A Separation of Powers Defense of Federal Rulemaking Power*, 66 N.Y.U. ANN. SURV. AM. L. 593, 593-95 (2011).

30. See David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 84-89; Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 738-39 (2001).

usually can strike down legislation that transgresses constitutional limits.³¹

A symmetrical control on the judiciary is Article III's restriction of courts' activity to "case or controversy."³² This *justiciability* restriction comes up in connection with the limited authorization of declaratory judgments, which one studies against the backdrop of the constitutional requirement of ripeness and prohibition of advisory opinions. The motive behind the Constitution's telling courts to stay away from abstract questions is both to improve the judicial function and to protect the states and the other federal branches from intrusion. First, courts as we know them will perform better if they decide based on focused facts presented by interested adversaries; moreover, permitting only concrete disputes will keep many actions out of court, so allowing courts to handle their business more effectively. Second, the justiciability limitation keeps courts out of aggressive and prospective lawmaking, which is not the assigned task of the judiciary. In any event, justiciability has generated an immense body of law, which clusters under the additional doctrines of standing, mootness, and political questions.

Standing doctrine comprises a complicated mass of law, which nevertheless does important work in restraining the courts to stay within the judicial realm of adjudicating individualized disputes. Constitutional standing requires that the plaintiff complain of a personalized and direct injury in fact.³³ Courts have, also, some discretion to decline jurisdiction when the plaintiff is poorly positioned to present the action, as when the plaintiff is primarily asserting the rights of others.³⁴ This so-called prudential overlay goes beyond the requirements of Article III, but helps to ensure that the judiciary does not too actively oversee the executive function.

Mootness doctrine is a little more self-evident in meaning, although drawing the line still proves difficult in practice. It provides that there is no case or controversy once the dispute has been resolved. This is the other side of the ripeness doctrine and rests on the same reasons of fostering the judicial function and insulating the

31. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138-39 (1803) (invalidating a congressional statute granting jurisdiction beyond constitutional bounds).

32. See generally WRIGHT & KANE, *supra* note 21, §§ 12-15, at 61-95.

33. See *id.* § 13, at 68-85.

34. See *id.*

legislative function. Similarly, parties cannot collude to produce a dispute.

Finally, the political question doctrine most nicely stands as a counterpoint to judicial review. It holds that certain matters are so enmeshed in the other branches' concerns that a court will not review their acts to test for constitutionality. This does not mean that the acts are not subject to the Constitution, but only that the duties of interpreting and implementing the Constitution lie with the political branches. The leading case defined the scope of the political question doctrine in these terms:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³⁵

II. VERTICAL FEDERALISM

I now move on to governing law. The Constitution's preoccupation with the relation between federal and state law, as well as the subsequent development of all the subconstitutional law on the subject, justifies treating as a big idea the subject of federalism.³⁶

A. Constitutional Doctrine

While separation of powers was the Framers' great horizontal theme for the federal government, they hit upon federalism to build the vertical relationship between the new federal government and the existing state sovereigns. For the theory of federalism, they drew on various political experiments in the governance of the British

35. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (establishing equal voting rights, after the Court ruled that the political question doctrine did not apply).

36. See generally ANTHONY J. BELLIA JR., *FEDERALISM* (2011).

Empire. But their Constitution was the first attempt to institutionalize this system of government. “The Framers split the atom of sovereignty.”³⁷

The definition of federalism is a governmental system by which its people live under the authority of more than one sovereign. To create such a system, there must be some zone of constitutionally entrenched decentralized power, where the constitutive sovereign can act without being subject to the central sovereign’s override. That zone is what permits us to speak of there being more than one sovereign.

Distinguish the system of unitary government, adopted in countries like France or England. There, people lived under a single sovereign. Such a central authority might be partially decentralized so that certain powers are exercised by local authorities. But those local authorities are under the dictate of the central, unitary authority. Indeed, such decentralization is often a sound idea. It can deliver many of the advantages often associated with federalism—like localized governmental responsiveness, increased citizen involvement, and policy experimentation and competition.³⁸ That possibility of reaping advantages by decentralization raises the question of why the Framers instead went the federalism route.

First, federalism was their solution for meeting the states’ sovereignty demands and for reconciling multiple political identities. The states would not agree to a union without a compromise to ensure their continued existence. Citizens strongly identified with their states, probably more so than with the new nation. Today, seriously divided identity may no longer prevail, but its resolution was an original aim of federalism.

Second, another big aim of the Framers was to limit the powers of the federal government being created. Recall that their belief was that divided authority would result not only in better law, but also in less law, than if powers were concentrated. So, federalism was to work in tandem with separation of powers to restrain the federal government.

Third, at the same time, the Framers wanted to ensure that the federal government had enough power to avoid the paralyzing problems of an overly weak central government. The Constitution

37. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

38. *Cf. Jonathan Rodden, Comparative Federalism and Decentralization: On Meaning and Measurement*, 36 *COMP. POL.* 481, 482 (2004) (questioning both).

was the attempt to cure the shortcomings experienced under the Articles of Confederation. The new regime provided a federal government that was supreme in its limited sphere.

Obviously, then, federalism was born of tension to live a life of tension. Under such a system, the question will always exist as to whether the state should be left to govern a certain matter or whether the federal government could assert itself on the matter. In fact, the unresolvable tension sometimes leaves both conservatives and liberals at sea, when their views on states' rights come into conflict with their policy preferences regarding the matter.

So, how to read the Constitution? Theory evokes a notion of *separate* spheres of authority for the two levels, but again the reality is partially *overlapping* spheres.³⁹ The appropriate realms are observed through a variety of techniques, comprising not only judicially enforced prohibitions, but also political pressures protecting state interests. Indeed, federalism is largely enforced by Congress, where states are ensured representation, including equal representation in the Senate. Also, the various speed bumps in the process for making laws have a braking effect on hegemony. Furthermore, even in the absence of compulsion or impediment, the creation of subconstitutional federal law that defers to state interests and the enactment of state law that asserts state interests help to keep federalism alive and well.⁴⁰

Courts do have a role in policing the legislatures, but perform it in largely ineffectual ways. For example, courts in theory limit Congress to the spheres of enumerated powers in Article I. However, over time the Supreme Court has loosely interpreted those powers, while giving full play to the authorization to Congress to "make all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers.⁴¹ It has read "necessary" to mean convenient rather than indispensable.⁴² Thus, Congress can use any reasonable means to effectuate an enumerated power, with "reasonable" implying a balancing test that asks if a proper federal

39. See Ernest A. Young, *What Does It Take to Make a Federal System? On Constitutional Entrenchment, Separate Spheres, and Identity*, 45 TULSA L. REV. 831, 831-32 (2010) (book review).

40. See Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1996-97 (2014); Garrick B. Pursley, *Defeasible Federalism*, 63 ALA. L. REV. 801, 802-03 (2012).

41. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.2, at 246 (5th ed. 2015) (quoting U.S. CONST. art. I, § 8).

42. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411-25 (1819).

interest is wildly outweighed by state interests.⁴³ The effect, or lack of effect, of judicial policing is seen best in the incredible growth of Congress's commerce power over the course of the nation's history.⁴⁴

In search of an alternative way to police Congress, the Court has established some limits on the ways that Congress in exercising its wide powers can impinge on state sovereignty. By the anti-commandeering doctrine, the Court says that Congress cannot directly make the state executive or legislature perform governmental acts.⁴⁵ An analogous kind of limitation is state sovereign immunity, which forbids private suits for money damages against states.⁴⁶

The Tenth Amendment, acting more as a summary of constitutional structure than as an independent limitation, puts it this way:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.⁴⁷

On the other side of the federalism equation—ensuring the federal government adequate powers by restricting state powers—there is actual operative constitutional text to consult. It lies in the all-important Supremacy Clause of Article VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁴⁸

Accordingly, if Congress passes a statute within its powers, it will preempt any state law that directly collides with the statute.

Finally, how has the federalism idea worked out? The problem of dueling dual political identities has receded for modern Americans. The doctrine has worked to limit government, although perhaps not as much as the Framers hoped. It certainly has not worked to prevent a great rise of the federal authority. But there is also no denying that a very real existence of both state and federal

43. See CHEMERINSKY, *supra* note 41, § 3.3, at 248-50.

44. See *id.* § 3.4, at 250-81.

45. See *id.* § 3.10, at 336-40.

46. See *id.* § 2.10, at 187-238, § 3.7, at 298-313.

47. U.S. CONST. amend. X.

48. U.S. CONST. art. VI.

governments, along with many resulting tensions, has persisted for over two centuries. So, federalism has worked out okay.

While the advantages of federalism may be only arguable, it surely seems terribly complicated, in a way so typical of American law. However, there is nothing peculiarly American here. Federalism is today a common form of political organization around the world, with Canada and Germany being ready examples (as well as the European Union itself).⁴⁹ Some of those regimes make federalism somewhat less complicated, as by having only one hierarchy of courts. But other of federalism's complications are unavoidable. In particular, because federalism involves the people living under the authority of more than one sovereign, the problem of choosing between state and federal law is inevitably ubiquitous in any form of federalism.⁵⁰

B. Application to Governing Law

1. *Limitation on Federal Power*

Federalism concerns underlie every legal question that arises in this country. We can see this best in connection with the topic of governing law. In particular, we can ask what the limits are on the federal government in choosing to govern a matter by federal law.⁵¹

As an introductory example, think of 28 U.S.C. § 1367(d), which Congress enacted in 1990:

The period of limitations for any claim asserted under [supplemental jurisdiction] . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.⁵²

Congress thus enlarged the period that a state-law claim could be brought in state court after the claim's dismissal from federal court. Did the Constitution permit Congress so to affect the conduct of litigation in state court? Yes, according to a unanimous Supreme

49. See RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 5 (3d ed. 2008) (noting that 40% of the world's population live under federalism, broadly defined but not classifying the European Union as federalism).

50. See Kevin M. Clermont, Book Review, 57 *AM. J. COMP. L.* 258, 260 (2009).

51. See Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 *NOTRE DAME L. REV.* 987, 991-98 (2011).

52. 28 U.S.C. § 1367(d) (2012).

Court.⁵³ Congress has broad powers from Articles I and III to create and regulate federal courts. The Necessary and Proper Clause effectively broadens them further. This collateral regulation of state courts was “necessary” because it was conducive to the administration of justice and plainly adapted to that end. By § 1367(d), Congress was pursuing federal interests of (1) discouraging plaintiffs from seeking insurance by double filing in both federal and state court and (2) discouraging defendants from wastefully and unfairly delaying an objection to jurisdiction, while (3) not discouraging resort to federal courts by litigants who would otherwise fear a fatal failure to establish jurisdiction and (4) not discouraging federal judges from dismissing cases better suited for state court. Those interests were not outweighed by state interests because the strong one of providing repose from stale claims suffers little impingement, given that the federal suit still had to have been filed within the state’s limitations period.

Congress likewise could legislate on many other matters that arise in the civil procedure course. It could, for example, pass a statute to reform the territorial jurisdiction of state courts. It could found this initiative on the Due Process Clause, the Full Faith and Credit Clause, or the Commerce Clause, while buttressing its effort to cover state courts’ international litigation by reference to congressional powers over foreign relations.⁵⁴ I believe that congressional reform of the states’ territorial jurisdiction would be a good idea. However, Congress has shown next to no inclination to do anything of the kind.

If Congress were to show such an inclination, there would be some limits. For example, consider congressional authority to legislate on the operation of state courts in handling state-law cases. Congress would face no problem in regulating procedure for federal-law claims brought in state court, but it would really be stretching to enact a procedural code for all actions in state court. Wholesale displacement of state procedure by Congress would be constitutionally troubling.⁵⁵ Naturally, constitutional limits on the

53. *Jinks v. Richland Cty.*, 538 U.S. 456, 464-65 (2003).

54. See Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 110, 124-29 (1999).

55. See Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 950-51 (2001) (arguing that Congress cannot regulate state-court procedures for enforcing state-law cases); see also Anthony J. Bellia Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949 (2006) (extending the focus to congressional control of state-court jurisdiction in

other branches of the federal government would be the same or, in all theoretical likelihood, more restrictive.⁵⁶

2. *Limitation on State Power*

In contrast to the wide ineffectiveness of the formal limitations on federal power, the Supremacy Clause would appear to make the limitations on the states' power extremely effective. The doctrine of preemption guarantees as much. Congress could often knock the states out of the picture.

Yet, surprisingly, federalism has kept the federal government from capitalizing on the states' theoretical weakness. Today, states have a broad range of power, and their laws govern much of our lives. In many regulatory areas, a mixture of state and federal law governs. Federalism apparently works because the sovereigns want to make it work, rather than their being compelled to make it work.⁵⁷

The best examples lie in the operation of the *Erie* doctrine. Although Congress could make federal law into the governing law for most situations, it has not. Political and process restraints, as well as good or at least accepted policy, have worked to protect state interests. In the absence of such a congressional command, the courts have chosen to defer to state law—more broadly in state courts under the judicial approach to preemption and reverse-*Erie*, and even more broadly in federal courts, than they have to.⁵⁸

This reality of practice, which reveals deference against the background of lenient constitutional command, makes *Erie* the ideal topic for studying vertical federalism in action.

III. HORIZONTAL FEDERALISM

As we reach the middle of this Article's five "big ideas," I should emphasize that each of the big ideas shows up in connection with every topic. That is why they are *big* ideas. In the topic of

state-law cases). *But see* Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 75-90 (1998) (arguing for an intrusive role for federal law).

56. *See* CLERMONT, *supra* note 26, § 3.2(A)(1), at 182-89.

57. *See generally* ERWIN CHERMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY (2008); ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN (2011); Christopher K. Bader, *A Dynamic Defense of Cooperative Federalism*, 35 WHITTIER L. REV. 161 (2014).

58. *See* Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 5-6 (2006).

authority to adjudicate, the pervasiveness became obvious. The initial subtopic of subject-matter jurisdiction turns on both (1) separation of powers and (2) vertical federalism, the former predominant in the existence of legislative power to bestow jurisdiction on the federal courts and the latter predominant in the extent to which Congress has acted to bestow federal jurisdiction at the expense of state courts. The central subtopic of territorial authority to adjudicate pulls in (4) full faith and credit. The final subtopic of notice clearly entails the study of (5) procedural due process.

But this topic's biggest idea arises in connection with the horizontal allocation of territorial adjudicatory authority among the state sovereigns. When can New York handle matters of considerable concern to New Jersey? The big-idea focus accordingly shifts to the Constitution's structure for territorial jurisdiction, built in the United States on the notion of (3) horizontal federalism.⁵⁹

A. Constitutional Doctrine

Both vertical federalism and horizontal federalism were necessary ingredients for thirteen nation-states to get together and form a union. They needed not only to establish the new federal government of separated and limited powers coexisting with state powers, but also to regulate the horizontal relations among the states. Interstate relations had not prospered under the Articles of Confederation. Each state came into the Constitutional Convention intent on keeping the other states from inflicting more harm.

Yet the Constitution would treat the states as equals, imposing no explicit priority rule analogous to the Supremacy Clause's role in vertical federalism that would resolve conflicting states' actions.⁶⁰ Therefore, the colliding powers of multiple equals would foreseeably produce deleterious effects, with each state impinging on other states and their citizens. Horizontal federalism was the expression of the Framers' attempt to help the states to live together.

Horizontal federalism therefore differs in aim from vertical federalism. It has worked well, if one overlooks the Civil War. The years have seen a marked decrease in the psychological and legal significance of state borders.

59. See generally JOSEPH F. ZIMMERMAN, HORIZONTAL FEDERALISM: INTERSTATE RELATIONS (2011).

60. See *id.* at 5-10.

Another difference between horizontal and vertical federalism is that the constitutional mechanisms for controlling colliding state powers generally work more by prohibition than by cooperation.⁶¹ But cooperation is not totally off the table. States can negotiate their coexistence through the political process in Congress. Also, the Interstate Compact Clause in Article I, § 10 authorizes a state to enter an “Agreement or Compact with another State” given the consent of Congress.⁶²

Although their ends and means thus differ, horizontal federalism nevertheless overlaps with vertical federalism. The reason is that enablement of federal authority, together with disablement of state authority, is the major technique for restraining state power on a horizontal level. For example, the states lost their right to print their own money in 1789.⁶³

So, how precisely to define horizontal federalism? This doctrine comprises a diverse set of constitutional mechanisms for ameliorating the interstate conflicts or tensions that would inevitably result from union. The best way to convey horizontal federalism’s set of mechanisms is by giving additional examples.

The Commerce Clause empowered the federal government in economic matters. Even in its unexercised or dormant condition, the Clause was read to knock the states out of the zone of regulating interstate commerce.⁶⁴ This so-called Dormant Commerce Clause prohibits state discrimination against out-of-state goods and services. It has thereby headed off internal trade wars and created a common market for this country.

In connection with authority to adjudicate, one sees another example of how horizontal federalism protects one state from another. Subject-matter jurisdictional provisions, such as diversity

61. See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 503, 529-60 (2008); Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 62-63 (2010) (“Examples of horizontal federalism problems that can lead courts to invalidate state action on constitutional grounds include efforts by one state to tax property located in another state, to apply its substantive law to extraterritorial transactions, to regulate local commerce in a manner that affects actors or markets in other states, or to discriminate between in-state citizens and out-of-state citizens when administering government programs. In each scenario, the question is whether a state has exceeded a limit on its power that exists because of its status as only one of fifty co-equal entities that must govern within limits created by the existence of the other forty-nine.”).

62. See U.S. CONST. art. I, § 10.

63. *Id.*

64. See CHEMERINSKY, *supra* note 41, § 5.3, at 443-44.

jurisdiction, comfort each state with the knowledge that its citizens can escape sister-state courts to a neutral federal forum. Removal statutes act in the same way.

This adjudicatory example clarifies that horizontal federalism works not only on the state-to-state level but also protects sister-state citizens. States must treat out-of-state individuals equally and fairly. The anti-discrimination principle finds express statement in Article IV, § 2: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” In connection with authority to adjudicate one sees another example of how horizontal federalism protects the individual, namely, by federal enforcement of the procedural fairness principle through the Due Process Clause.

The subject that most nicely exposes the workings of horizontal federalism is interstate territorial authority to adjudicate. The preceding topic’s introduction to interstate, or horizontal, choice of law smoothed the transition to study of territorial authority to adjudicate. The next topic will continue the theme of horizontal federalism in connection with full faith and credit for judgments. But here the study is of state-court territorial jurisdiction.

B. Application to Authority to Adjudicate

1. *Evolution of Territorial Jurisdiction*

The states came into the Constitutional Convention as sovereigns. The Convention’s product left them sovereigns—except to the extent they surrendered sovereign rights in 1789 or by later constitutional amendments. Horizontal federalism embodies both these ideas of sovereignty and surrendered sovereignty.

A full sovereign can do whatever it wants, having the raw force to adjudicate any dispute when, and how, it pleases, as well as the capability to enforce its adjudication on persons and things over which it eventually acquires physical control. The need for enforcement proves that territorial boundaries sometimes matter, but otherwise anything goes. True, international law has long envisaged some limit on that raw force, such as the requirement of an adequate connection between the judgment-rendering sovereign and the target of litigation. But the only force behind international law lay in

authorizing a second sovereign's refusal to give effect to a foreign judgment that had failed to observe international standards.⁶⁵

In phase one of the American experience, the states surrendered some of their sovereignty by agreeing to the Constitution. But it was by no means clear what the Constitution's version of horizontal federalism intended as to the states' territorial jurisdiction, a topic a good deal less prominent then than it is now. No constitutional clause treated that topic. Instead, the states agreed to a Full Faith and Credit Clause regarding judgments, and Congress soon passed an implementing statute on full faith and credit, but the Clause and statute were not very clear either.⁶⁶ Perhaps states would treat sister-state judgments in the manner of domestic judgments' automatic recognition, or perhaps states would give them the scant regard owing foreign-nation judgments. In fact, the courts right after the Founding hit upon a compromise between those Federalist and Anti-Federalist positions: States were to give full effect to sister-state judgments, but they retained the right to test them for satisfaction of the international-law standard for territorial jurisdiction (or rather the standard as interpreted by American courts in their home-grown power test).⁶⁷ Thus, horizontal federalism developed a means for one state to check the jurisdictional overreaching by another state, that is, as a way to protect state sovereignty from impingement by a sister state. Exercise of this indirect control launched the doctrine of territorial jurisdiction on the road to its modern prominence.

In phase two came the Civil War—along with the Fourteenth Amendment in 1868 fundamentally altering federalism. Ten years later, *Pennoyer* recognized the seismic shift.⁶⁸ It began to move the focus of concern from state-to-state sovereignty toward the state-to-person limits on state power to infringe personal rights. That move caused the Court to invoke the Substantive Due Process Clause.⁶⁹ The Court would use that Clause to assert federal protection for fundamental private rights, although in the coming laissez-faire era the Court would invoke those rights mainly to tell government what

65. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (AM. LAW INST. 1987).

66. See *infra* Part IV.

67. See Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 260-61 (1990); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 175-209 (2004).

68. See *Pennoyer v. Neff*, 95 U.S. 714, 719-20, 734-36 (1877).

69. See *infra* Section V.A.

it *could not do*. This switch in use from full faith and credit to substantive due process meant that, while previously a state was free to invoke international-law standards to deny effect to a sister-state judgment, now the affected person could make the second state treat the judgment as invalid or even stop the first proceeding in the rendering state. Henceforth, the second state's checking of the rendering state's jurisdiction came to mean applying the jurisdictional law that was applicable in the rendering state itself.

In phase three came the New Deal—which jolted the Constitution with the realization that government action and inaction were not neutral. A decade later, *International Shoe* recognized the shift by starting the move from the power test toward a fairness test, still under the banner of the Due Process Clause.⁷⁰ The Court acted in a social-welfare spirit to explore what government *could do* to protect the individual. It perceived that the location of litigation impacted the distribution of societal resources. It stepped in to site litigation appropriately. Ironically, however, subsequent cases ended up with the view that the fairness test supplements the power test rather than replaces it, a resolution that has worked to the advantage of pro-business interests.

The complicated doctrine that resulted in cases like *Shaffer*,⁷¹ and that prevails today by the cumulative testing for power and unreasonableness, sets the stage for arguing about the law of tomorrow. Perhaps we are moving to testing solely for fairness. The courts are still at work on defining the law of territorial jurisdiction.

The lesson is that although the law of territorial jurisdiction is an important component of the nation's horizontal federalism, this component has evolved a great deal over the course of the nation's constitutional history. Studied apart from the constitutional structure, territorial jurisdiction is incomprehensible. With the proper background, however, the law in its current form actually makes sense: The federal suprasovereign arguably should ensure that states both observe the limits on their power and avoid treating individuals unreasonably. But no one should expect that this law has arrived at its destination and so will remain unchanged in the future.

70. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

71. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

2. *Extension to International Jurisdiction*

Viewing territorial jurisdiction in the context of the constitutional structure makes international jurisdiction easier to understand too. The background again is that modern sovereigns are able to do whatever they wish to do, other than enforcing their judgments abroad. International law envisages some limit on that raw force, including a requirement of adequate connection between the sovereign and the target of the action. But all that international law can do is allow the second sovereign to refuse effect to a foreign-nation judgment for failure to observe international standards. This is only an indirect control on territorial jurisdiction. In other words, the world today is in the pre-Constitution condition of clashing sovereigns. The situation is therefore one of horizontal relations rather than horizontal federalism.

Looking back on America's international experience, our courts at the time of the Founding were willing to abide by their view of international law's constraint. That is, American courts abided by their power test when asserting their own jurisdiction. Before honoring foreign-nation judgments, American courts would test the rendering court's jurisdiction by application of the power test. But, anyway, the only effect they gave to foreign-nation judgments was an evidential effect. The judgment would be admissible as sufficient or prima facie evidence, in the sense that a plaintiff seeking enforcement could introduce a foreign-nation judgment to show there was presumptively a judgment debt, but the defendant could then induce full and free reexamination of the merits of the claim to show no debt was owing.⁷²

The turning point was the decision in *Hilton v. Guyot*.⁷³ By that 1895 case, the U.S. Supreme Court shifted our approach to comity. Henceforth, based on policy-based deference rather than legal compulsion, the United States would choose in general to treat foreign-nation judgments as states treat sister-state judgments.⁷⁴ The United States retained, however, the right to test for satisfaction of basic notions of U.S. due process. The *Hilton* regime is the U.S. law of today for international litigation. Note that it essentially resembles the pre-Civil War regime among U.S. states.

72. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 608, at 829-30 (8th ed. 1883).

73. 159 U.S. 113 (1895).

74. *Id.* at 164-64.

The United States would like to induce equal treatment of U.S. judgments abroad. The much-discussed treaty possibilities would go even further.⁷⁵ The present discussion reveals the proposed treaty as an attempt to bring the international regime into closer accord with the regime prevailing today in the United States under horizontal federalism. One idea would be for the world's countries to agree on basic rules for territorial jurisdiction, as the United States achieved by imposition in 1868 of the Due Process Clause from above onto the states. The difficulty is in getting agreement on territorial jurisdiction despite the world's disagreements over the themes of power and fairness. But once achieved, that agreement would allow the countries' agreeing to respect each other's judgments, as the United States achieved by the early imposition of full faith and credit provisions from above onto the states.

The sobering note sounds upon one's recalling the many years, conflicts, and confusions required to push the United States through its constitutional and jurisdictional history. The failure to reach a treaty so far becomes much more understandable. And the barriers to eventual agreement appear much higher. But they are not insurmountable. The European Union proved as much when its member countries agreed to their own scheme of horizontal federalism.⁷⁶

IV. FULL FAITH AND CREDIT

The topic of former adjudication leads the student to consider the essence of the judicial branch. The judiciary's output is in the form of a judgment, and *res judicata* is the doctrine that defines the judgment. For its effects, one looks to the notion of full faith and credit, which yields the benefits of a legally unified nation.⁷⁷

75. See CLERMONT, *supra* note 26, § 4.2(D)(3), at 326-30.

76. See Vanessa Abballe, *Comparative Perspectives of the Articulation of Horizontal Interjurisdictional Relations in the United States and the European Union: The Federalization of Civil Justice*, 15 NEW ENG. J. INT'L & COMP. L. 1, 2 (2009).

77. See generally WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, *THE FULL FAITH AND CREDIT CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* (2005).

A. Constitutional Doctrine

The rules for recognizing and enforcing a nondomestic judgment are in considerable part obligatory on American courts when that judgment comes from another American court. When the prior judgment was rendered by a state court and the second action is brought in a court of another state, the Full Faith and Credit Clause of Article IV, § 1 of the Federal Constitution applies:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.⁷⁸

The First Congress passed implementing legislation, as the Act of May 26, 1790, ch. XI, 1 Stat. 122:

That the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.⁷⁹

The Revisers of the Judicial Code in 1948, with the intent of making no substantive change, rephrased that statute as 28 U.S.C. § 1738:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have

78. U.S. CONST. art. IV, § 1.

79. Act of May 26, 1790, ch. XI, 1 Stat. 122.

by law or usage in the courts of such State, Territory or Possession from which they are taken.⁸⁰

Courts have read Constitution and statute together to require the second court to give the same binding effect to a valid and final judgment as the courts of the rendering state would give it.

The doctrine's history is instructive, even though it lies in scanty legislative history, in meager statutory law, and in meandering case law. The Full Faith and Credit Clause, according to contested recent scholarship, originally dealt only with the evidential effect of sister-state acts, records, and judicial proceedings.⁸¹ The Clause thus meant to ensure that a judgment would serve as *evidence* in another state, broadly leaving any other *effect* of the judgment to congressional legislation. The term "full" in the Clause meant, in the prevailing parlance, that the judgment would be admissible as sufficient or *prima facie* evidence; thus, a plaintiff seeking enforcement could introduce a valid and final sister-state judgment to show there was presumptively a judgment debt, but the defendant could then induce full and free reexamination of the merits of the claim to show no debt was owing; this approach accorded with the treatment then given to foreign-nation judgments. In short, the Clause's intention was that congressional implementation of the constitutional provision would be necessary to impose a binding effect, as opposed to this merely evidential effect.

Congress therefore has broad discretion as to the effects of sister-state acts, records, and judicial proceedings.⁸² Although it has not exercised its power often, it did so almost immediately, seemingly giving the states' *judgments* conclusive effect by means of the last sentence in the 1790 statute.⁸³ The Supreme Court so read the statute in 1813.⁸⁴ Courts came to view the statute as requiring the same effect as the judgment had in the rendering state.

80. 28 U.S.C. § 1738 (2012).

81. See David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1587-88 (2009). *But see* Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 487-88 (2013).

82. See Brainerd Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89, 90.

83. See Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1231-40 (2009).

84. *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485 (1813). Francis Scott Key, as counsel, contended plausibly that full faith and credit required only that the judgment be weighed along with the evidence, but the Court held that at least the implementing statute required giving the judgment a binding effect. *Id.* at 481-82, 485.

Starting in the later 1800s, however, “intellectual slippage” as to the difference between the Clause and the statute led to a considerable power grab by the judiciary at the expense of legislative discretion.⁸⁵ Without realizing what it was doing, the Court came to read the Full Faith and Credit Clause as itself dictating conclusive effect of judgments, leaving to the legislature a power to create exceptions and extensions.⁸⁶ And that view prevails in the courts of today.

This history helps to explain the coverage of the doctrine today. The Clause’s reference to “public Acts, Records, and judicial Proceedings” comprises judgments and all other state governmental records, including most notably the state’s statutory and decisional law.⁸⁷ The sister state must give “Full Faith and Credit” in its courts and in all its other offices.

The preceding paragraph does not mean, however, that all acts, records, and judicial proceedings enjoy the same treatment. By virtue of the history, *courts* must give *judgments* the same conclusive effect they have where rendered. This is a strong command. But the courts need only accept as evidence all those other records from another state; likewise, state offices other than courts must accept as evidence all those governmental records of another state. This is a weak command.

The most important consequence of this formulation’s bifurcation is the lenient constraint from full faith and credit on *choice of law*. The Supreme Court has interpreted the Federal Constitution in a way that gives American courts a very free hand in choosing the governing law and, in particular, in choosing to apply their own law to nonlocal events.⁸⁸ Courts continue to recognize this basic distinction between respect for judgments and choice of law: a strong command as to the former and a weak one as to the latter.⁸⁹

85. Engdahl, *supra* note 81, at 1588-89.

86. *See, e.g.,* Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 462, 465 (1873).

87. U.S. CONST. art. IV, § 1.

88. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) (plurality opinion); Home Ins. Co. v. Dick, 281 U.S. 397, 410-12 (1930).

89. Note that they can manage to do so only by ignoring the fact that the last sentence of § 1738 today carelessly lumps together the treatment of records of “judicial proceedings” and of “Acts.” 28 U.S.C. § 1738 (2012).

There is no general obligation to give conclusive effect to nondomestic nonjudgments.⁹⁰ In describing the doctrine's coverage, then, I should not skip over the threshold question of what "judgments" means.⁹¹ The word includes court judgments, of course.

It does not include arbitration awards, unless a court has confirmed the award. That is, neither the Clause nor the statute compels the forum court to respect a bare arbitral decision. As to administrative agency adjudications, other than those upheld via a court judgment, they are outside the language of § 1738, which reaches only "court" judgments.⁹² One could still argue that administrative adjudications fall within the broader language of the constitutional Clause.⁹³ Or one could take the view that they, not being "judicial proceedings," do not come within the Clause's command concerning judgments.⁹⁴ Unfortunately, the Court's messy cases on point leave the matter open: It is possible that the Clause reaches some quasi-judicial proceedings of court-like administrative tribunals.⁹⁵

Nevertheless, judicially unconfirmed arbitration awards and judicially unreviewed administrative determinations often get respect in the courts of a different jurisdiction.⁹⁶ Recall that when full faith and credit does not compel recognition or enforcement, the second court can, unless prohibited by some federal statute, still choose as a matter of comity to give the same effect to a valid and final judgment as the rendering state would.⁹⁷ Such recognition and enforcement flow usually from the second sovereign's conflict of laws doctrine.⁹⁸

The special interest here, however, is the constitutional doctrine's demand for judicial recognition and enforcement of

90. Cf. 18 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* §§ 130.60-.66 (3d ed. 2011) (discussing, inter alia, the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

91. See Elizabeth Redpath, Comment, *Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records*, 62 EMORY L.J. 639, 650 (2013).

92. 28 U.S.C. § 1738 (2012).

93. See *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 798-99 (1986) (suggesting that some state administrative findings might fall within the Full Faith and Credit Clause, although not within § 1738).

94. See REYNOLDS & RICHMAN, *supra* note 77, at 56.

95. See ROBERT L. FELIX & RALPH U. WHITTEN, *AMERICAN CONFLICTS LAW* § 48, at 147-48 (6th ed. 2011).

96. See ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE* 208-10 (2001).

97. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 98, 109 cmt. c, at 323 (AM. LAW INST. 1971) (amended 1988).

98. See *id.* § 102, at 306, § 103, at 312-13.

judgments. It is indeed a strong demand. Let us consider separately recognition and enforcement.

A state court will recognize, or in other words give effect under the doctrine of *res judicata* to, a sister-state judgment that is valid and final. When the second court faces the question of whether the prior judgment is valid and final, it should apply the law of the sister state (which of course is subject to any applicable external restraints, such as due process and other federal provisions imposed on and becoming part of the sister-state's law).⁹⁹ When the second court faces a question of the extent or reach of *res judicata* based on the prior judgment, it should apply the *res judicata* law that the rendering court would apply (including any applicable external restraints).¹⁰⁰

The doctrine also requires enforcement of a judgment entitled to recognition. A local sheriff will not enforce a judgment issued by another sovereign, and a local judge cannot directly enforce a judgment that is not a matter of record in that jurisdiction. Instead, the second sovereign will provide some other enforcement procedure that converts the nondomestic judgment into a domestic record.¹⁰¹ With respect to the method of enforcement, the second court applies its own law, subject to the proviso that the method should not be so complex or expensive as to burden unduly the enforcement of nondomestic judgments.¹⁰² A usual method of enforcement of nondomestic judgments is for the plaintiff to initiate in the second jurisdiction an action upon the prior judgment and thus obtain a regularly enforceable domestic judgment.¹⁰³

Nonetheless, there are exceptions to the literal import of Clause and statute, ways to escape the obligation to recognize and enforce. For example, the forum court can allow a challenge to the jurisdiction of the rendering court. There are also narrow exceptions

99. See *id.* § 92, at 272-73, § 93, at 278, § 107, at 320; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481(1), at 581, § 482, at 604 (AM. LAW INST. 1987).

100. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 94-97, at 279-93 (AM. LAW INST. 1971) (amended 1988); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481(1) cmt. c (AM. LAW INST. 1987).

101. See *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 325 (1839).

102. See *id.* at 328 (holding "that the statute of limitations of Georgia can be pleaded to an action in that state, founded upon a judgment rendered in the state of South Carolina"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 99-102, at 303-07 (AM. LAW INST. 1971); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481(2), at 594 (AM. LAW INST. 1987).

103. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 100 cmt. b, at 305 (AM. LAW INST. 1971).

where some or all of the dictates of full faith and credit do not apply, such as where recognition or enforcement would so grossly and improperly interfere with the second state's important interests as to create a national interest against such recognition or enforcement. One must distinguish this national interest against recognition or enforcement from the second state's local distaste for the nature of the underlying claim. That is, there is no general exception based on the second state's public policy,¹⁰⁴ and indeed specific examples of a national interest recognized by the courts are rare.¹⁰⁵ Yet the Clause expressly authorizes congressional exceptions.¹⁰⁶ Thus, in narrow circumstances grounded on strong federal substantive or procedural policies, federal law may provide against (or conceivably may augment by statute) recognition or enforcement.

One question that expresses itself more intensely than when one first read about these rules is whether a state court, when within the Clause and the statute, can go beyond giving the *same* effect and instead give *more* effect than the rendering state would give to its own judgments. For example, could the forum state apply its own, more expansive res judicata law to a sister-state's judgment?

Certainly, the Clause and statute require F-2 to accord to a valid and final F-1 judgment "at least the res judicata effect" that it has in F-1.¹⁰⁷ No one contends that F-2 can give less effect to an F-1 judgment than it has in F-1. But whether F-2 can, if its policy permits, give more effect to an F-1 judgment than it has in F-1 is a question that has not yet received a definitive answer. Some have suggested that F-2 could do so.¹⁰⁸ But most authorities have asserted, to the contrary, that recognition of a judgment for full faith and credit

104. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222 (1998). Thus, the fact that the underlying claim is contrary to the second state's public policy—for example, a claim on a gambling transaction—is not a valid ground for denying recognition or enforcement to a sister-state judgment on that claim. See *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908).

105. Exceptions apply when the rendering state has purported directly to transfer title to land in the second state, see *Fall v. Eastin*, 215 U.S. 1, 13-14 (1909); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 cmt. d, at 308 (AM. LAW INST. 1971), or has enjoined litigation in the second state's courts, see *James v. Grand Trunk W.R.R. Co.*, 152 N.E.2d 858, 867 (Ill. 1958); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103, at 312-33 (AM. LAW INST. 1971) (amended 1988).

106. See, e.g., 28 U.S.C. § 1738C (2012).

107. *Durfee v. Duke*, 375 U.S. 106, 109 (1963).

108. See Robert C. Casad, *Intersystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510, 521-23 (1981).

purposes means giving the judgment “the same effect that it has in the state where it was rendered.”¹⁰⁹

On the one hand, the argument in favor of giving more effect runs like this. Assume that the F-1 judgment is valid and final, that the F-1 res judicata rule in the situation under discussion would permit relitigation of the claim or issue, that the F-2 rule would not permit relitigation, and that the F-2 res judicata rule does not exceed due process or other such constitutional limitations when applied to F-2 judgments. If F-2 has a significant connection to the parties or to the events involved in the F-1 litigation, and if the relitigation is to take place in F-2’s court, F-2 is presumably free to conduct the litigation in accordance with its applicable substantive as well as procedural law. If F-2 has sufficient connection with the litigation to permit the application of its substantive law to the claims or issues without violating the Due Process Clause or the Full Faith and Credit Clause, it would seem to have sufficient connection to apply its res judicata law to claims or issues relevant in the F-2 action that were previously litigated in F-1. Thus, application of F-2’s broader preclusion rules is arguably permissible. And, of course, F-2 has interests in avoiding the burden of relitigation.

On the other hand, if F-2 accords claim preclusion or issue preclusion effects to the F-1 judgment, the result will be a new judgment that will then be entitled to full faith and credit, and hence res judicata effects, in every other state—even in F-1. The effect of F-2’s last-in-time application of its own broader res judicata standards could significantly change the future effects of the F-1 adjudication.¹¹⁰ For instance, if F-2 held that the F-1 judgment was a bar to a later suit on the claim, the F-2 judgment would then prevent relitigation of the claim even in F-1, under whose rules the first judgment had not been a bar. Similar permanent effects can result for issues that had not been regarded as conclusively determined under the res judicata rules of F-1, if F-2’s judgment precludes relitigation of the issues under F-2’s rules. These oddities necessarily result from the full-faith-and-credit fact that F-1 does not have the symmetrical

109. RESTATEMENT (SECOND) OF CONFLICT OF LAWS intro. note to ch. 5, topic 2, at 277 (1971); *see id.* § 93 cmt. b, at 278; *Farmland Dairies v. Barber*, 478 N.E.2d 1314, 1317 (N.Y. 1985); Barbara Ann Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59, 69 n.54 (1982).

110. *See Roche v. McDonald*, 275 U.S. 449, 454-55 (1928) (allowing suit back in F-1 on F-2’s judgment rendered in an action upon an F-1 judgment, even though F-1’s original judgment was unenforceable).

power to give F-2's judgment less effect than it has in F-2. So, F-2's application of its own broader *res judicata* law has an unavoidable impact on F-1. Surely, F-1 has significant substantive and procedural interests in specifying the effects of its own judgments. Arguably, then, F-2's interest in avoiding relitigation is insufficient to justify such an impingement on F-1's interests.

The outcome is not a toss-up, however, because more is at stake than balancing the two states' interests. The way to resolve this question is to return to the purpose of the Full Faith and Credit Clause. It meant to give us the benefits of a judicially unified nation. A judgment of F-1 should mean the same thing everywhere within the nation, regardless of whether a person manages to sue subsequently in a broad or narrow *res judicata* state. It should further be noted that 28 U.S.C. § 1738, substantially similar to the statute passed in 1790 to implement the Full Faith and Credit Clause, provides for the effect to be the "same" as the judgment has in the court from which it is taken.¹¹¹

Additionally, fairness argues that the parties litigating in F-1 should know *then* what is at stake and what any judgment will mean anywhere in the nation.¹¹² A person should know the detrimental effect of a potential judgment. Moreover, the effect should not change with the particular F-2 in which the opponent later chooses, perhaps surprisingly, to invoke it.

Even more basically, *res judicata* is the law that specifies what a judgment decides and what it does not decide, the law that defines the boundaries of the judgment. What the judgment does not decide is just as important as what it decides. The boundaries are an intrinsic part of the judgment. To respect a judgment requires respecting its boundaries. For F-2 to give more effect to the content of F-1's judgment than F-1 would give—rather than the same effect—necessarily implies that F-2 is giving less effect to the judgment's boundaries. In short, this whole question disappears with the realization that no meaningful distinction exists between *more* and *less* effect. Consequently, full faith and credit must require the second court to give the *same* effect to the judgment's content and its boundaries as would the rendering state.

111. 28 U.S.C. § 1738 (2012).

112. See *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 462-63 (2000) (discussing similar due process concerns).

B. Application to Former Adjudication

1. *Meaning of Res Judicata Within the Same Jurisdiction*

Before turning to the direct implications for civil procedure of the constitutional doctrine, one should think about that simple but elusive lesson coming indirectly from study of full faith and credit: Res judicata is nothing more or less than the body of law that defines a “judgment.” After all, a judgment is not merely a concrete embodiment of a court decision. By necessity, a judgment decides certain things and does not decide other things. Res judicata performs the job of delineating that real content of a judgment, by specifying the effects and noneffects of the decision.

Res judicata dictates whether decided matters are subject to reopening, as well as which actually undecided matters nevertheless fall within the bounds of a judgment and so receive treatment as if decided. It also dictates what lies outside the boundaries of the judgment. Although res judicata law may appear to be a jumble of arcane rules, it essentially has this straightforward but profound mission of defining the scope of a prior adjudication. It is good to remember that res judicata literally means the thing, or matter, adjudged.

Therefore, this doctrine is of universal importance both practical and systemic. It proves critical in interpreting any judgment. Accordingly, res judicata is a major and critical topic in the basic law-school course on civil procedure.

Moreover, res judicata is the doctrine that defines the output of the judicial branch. Unlike the legislature or the administration, which can act on all citizens, the court acts with respect to certain matters concerning only the parties before it and a very limited set of others. Strangers have their right to a day in court. This feature helps to give the judicial branch its distinctive nature: individualized application of the substantive law before a neutral decisionmaker in accordance with predetermined procedures, and with limited future effects but with finality as to those effects.

Let’s get more specific:

(1) Because a judgment, as delineated by res judicata law, is the primary objective of most adjudicative proceedings, a knowing eye trained on res judicata will greatly affect the litigant’s implementation of *procedure*, both way before and way after judgment. From composing pleadings in the initial lawsuit to settling

or otherwise ending that case and then to attacking the judgment in a second lawsuit, the litigant must bear *res judicata* in mind.

(2) *Res judicata* shores up *separation of powers* by setting the boundaries on the output of the judicial branch of government. It is the law that restrains the applicability of judicial decisions to nonparties and the retroactivity of later legal change to already adjudicated matters. Because *res judicata* so determines how a judgment differs from legislation and administration, the doctrine is of basic importance in understanding the governmental system.

(3) At a more profound level, *res judicata* does much more. It is essential to *judicial operation*, to the orderly working of the judicial branch. If disputants could just reopen their adjudicated disputes, there would be no end to the case, nor any beginning of judicial authority. Finality is not just an efficient policy, it is a necessary condition for the existence of a judiciary.

Given that *res judicata* plays a key role in procedure, separation of powers, and judicial operation, it is naturally a difficult subject. Moreover, like any policy, it has its costs as well as its benefits. As to obvious costs, one readily perceives that litigating about whether to relitigate is expensive, and some applications of the doctrine do seem outrageously unfair. Often, frustrated students and other victims of *res judicata*, after realizing its difficulties and lamenting its costs, ask whether we would be better off without *res judicata*. Yet they should acknowledge that this question is nonsensical in itself. Our legal system could not exist without *res judicata*. Sure, the system could lop off some extensions and some details of *res judicata*. But the essence of *res judicata*—its mission of giving an adjudication basic binding effects—is nonoptional. A version of it must apply to every judgment ever rendered.

This realization informs all sorts of comparative and historical inquiries. Each legal system generates a *res judicata* law. “The doctrine of *res judicata* is a principle of universal jurisprudence forming part of the legal systems of all civilized nations.”¹¹³ The basic message of *res judicata* is that at some point the pursuit of truth must and should cease: Justice demands that there be an end to litigation. In order for any nascent judicial system to operate, a decision must have at least some minimal bindingness. Consequently, around the world, every legal system, from its

113. 2 A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 627, at 1321 (5th ed. 1925).

beginnings, has generated a common core of res judicata law to make adjudications final.

2. *Treatment of Judgments from Other Jurisdictions*

As already suggested, the American res judicata rules are obligatory on this country's courts when the judgment comes from another American court. The Framers perceived the need for certainty and uniformity as to the treatment of state judgments, and therefore required respectful treatment via constitutional clause. That command helps us to realize the benefits of a unified nation:

The full faith and credit clause is one of the foundation stones upon which our federal system is constructed. Its obvious purpose is to make available some of the benefits of a centralized nation by altering "the status of the several states as independent foreign sovereignties . . . and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right. . . ."¹¹⁴

Moreover, the individual's rights embodied in the Full Faith and Credit Clause are of obvious importance to the citizens of a federation:

It was placed foremost among those measures [such as the Privileges and Immunities Clause] which would guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence, but without aggrandizement of federal power at the expense of the states.¹¹⁵

Thus, a judgment for \$20 million from a Massachusetts court should be worth that same amount in California, for reasons of fairness as well as for political and economic reasons.

114. Willis L.M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 178 (1949) (quoting *Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935)); see also *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) ("The animating purpose of the full faith and credit command . . . 'was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.'" (quoting *Milwaukee Cty.*, 296 U.S. at 277)).

115. Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 17 (1945) (footnote omitted); see also *id.* at 33 ("The Federal Government stands to gain little at the expense of the states through any application of it. Anything taken from a state by way of freedom to deny faith and credit to law of others is thereby added to the state by way of a right to exact faith and credit for its own.").

The very same reasons are at play in the interjurisdictional contexts other than a state court's treatment of a sister-state judgment. The basic approach to all judgments therefore is retroverse, in the sense of turning backward to look at the rendering court's view of its own judgment. The second court lets the first court's law decide what it conclusively adjudicated.¹¹⁶

Again, the more specific implications merit consideration:

(1) *Res judicata* implies at least some respect for prior adjudication across legal systems linked by *federalism, vertical as well as horizontal*. Without such respect, the more powerful courts would inevitably extinguish their competitors. If disputants could reopen their disputes in the superior court, they would come to skip over the inferior court. The royal courts in England prevailed over the local courts in part because of their willingness to allow litigation anew.¹¹⁷ Contrariwise, the continued thriving of federal and state courts in the United States is owing to a healthy doctrine of *res judicata*.

(2) On the level of *international law*, *res judicata* might not be absolutely necessary. The law of the jungle might work, because each nation has a zone of autonomous operation. But especially today, with ever-increasing globalization, a sensible international order requires an international law on the application of *res judicata*. The United States should and does respect most of the judgments of France, and vice versa one would hope.

(3) Any steps toward establishing any such regime of full faith and credit for nondomestic judgments depends on providing assurance that the rendering court's legal system is worthy of respect. A guarantee of *due process* in the rendering court would do the trick.

Within the American system, the applicability of the Due Process Clause now performs the necessary work of ensuring respect-worthy judgments. With peace of mind, an American F-2 can give full faith and credit to an American F-1's judgment, because F-2 knows that the parties could ensure that F-1 delivered due process, both substantively and procedurally: F-1 did not overreach in exercising territorial jurisdiction, and F-1 employed fundamentally

116. See RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 4, at 10-11 (AM. LAW INST. 2006); Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 70-76 (1984).

117. See J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 22-27 (4th ed. 2002).

fair procedures—otherwise, the U.S. Supreme Court would have been empowered to step in.

On the international stage, things are trickier. There might be no supreme court, or there might be no due process clause that is applicable internationally. So comity is the best approach we can follow currently. To establish a more demanding system of respect for judgments, there would have to be agreement on respect-worthy proceedings: at least a treaty mechanism to restrict exorbitant jurisdiction, if not also to create some assurance of fundamental fairness.

The principal European countries appear to have taken such steps on the treatment of some foreign judgments. The European Union concluded a treaty that is now an EU regulation called the Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.¹¹⁸ By it, the member states agreed to provide virtually automatic recognition and enforcement of the judgments of the other member states. This provision was like the full faith and credit provisions in the United States. In order to make this agreement acceptable, the Convention was a “double convention” that also defined the bases of territorial jurisdiction.¹¹⁹ The agreement on jurisdiction worked as the due process provisions do in the United States. The European member states could give respect to the others’ judgments because they knew that the Convention restricted the others to appropriately limited jurisdictional reach. Today, there is in effect a supreme court too. The European Court of Justice, in Luxembourg, exercises supranational authority, overseeing the national courts, to decide questions under the Brussels Regulation.¹²⁰ All this makes the current times exciting in Europe, as the ECJ actively works out the details, much as the Marshall Court united the American judicial systems two centuries ago.

118. See JIE HUANG, INTERREGIONAL RECOGNITION AND ENFORCEMENT OF CIVIL AND COMMERCIAL JUDGMENTS: LESSONS FOR CHINA FROM US AND EU LAW 1-2 (2014).

119. See Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable Worldwide: Can the Hague Conference Project Succeed?*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 281, 286-89 (John J. Barceló III & Kevin M. Clermont eds., 2002).

120. See ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 48 (2004).

Americans, however, are being whipsawed by the European approach. Not only are they still subject (in theory) to the far-reaching jurisdiction of European courts and the wide recognition and enforceability of the resulting European judgments, but also U.S. judgments tend (in practice) to receive short shrift in European courts. The overall international situation, as exacerbated by the Brussels Regulation, is untenable in the long run for the United States. Therefore, in 1992 the United States initiated a push to conclude a worldwide convention on respect for judgments, acting through the Hague Conference on Private International Law.¹²¹ Pragmatically speaking, jurisdiction is the doctrine that would serve almost alone in ensuring adjudicative restraint. Drafting and agreeing to such a multilateral convention on jurisdiction and judgments could yield great returns for the United States. But so far the negotiators have not had great success in hammering out a worldwide understanding on due process and full faith and credit.¹²²

V. PROCEDURAL DUE PROCESS

The study of complex litigation brings us back partway to procedure in the strict sense of the mechanics of the civil process. The big idea here concerns procedures that use the justification of adequate representation to extend the binding effects of a judgment to persons largely playing the role of nonparties. Although procedural law puts severe limits on such extension, the Constitution puts an absolute but distant limit on how far law can extend the binding effects. To perceive that outer limit, the focus must shift to procedural due process.¹²³

A. Constitutional Doctrine

In the Constitution, due process of law is guaranteed by the Fifth Amendment, applicable to the federal government, and by the Fourteenth Amendment, applicable to state governments. These guarantees say that the federal and state governments cannot deprive

121. See Kevin M. Clermont, *An Introduction to the Hague Convention*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 3, 5-6 (John J. Barceló III & Kevin M. Clermont eds., 2002).

122. See Clermont, *supra* note 54, at 94-97.

123. See generally RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION (2004).

any person “of life, liberty, or property, without due process of law.”¹²⁴

The sparsely worded Due Process Clauses have been interpreted to contain substantive as well as procedural components. Substantive due process protects from governmental infringement the fundamental rights “implicit in ordered liberty,” including those such as privacy that are not covered by some other constitutional provision like the Equal Protection Clause. Procedural due process embodies the notion of “fundamental fairness.” Substantive due process limits *what* the government can do, while procedural due process establishes a floor for *how* it must proceed when depriving someone of life, liberty, or property.¹²⁵

Substantive due process has a sorry history of judicial overstepping that has made it controversial and leaves it rather restricted today. The most prominent appearance of substantive due process in connection with civil procedure is the constitutional law of territorial jurisdiction. Much of that law about the limits on a state’s adjudicating with respect to out-of-staters rests on the substantive part of the Due Process Clause. Procedural due process is much more prominent in civil procedure because it aims to assure a basically fair procedure when the government acts. For example, to authorize governmental action significantly impairing a person’s protected interest, procedural due process normally requires adequate notification and the opportunity to be heard at proceedings before a neutral decisionmaker.¹²⁶

Another way to categorize rights is to distinguish those that are more or less absolute as a formal matter from those that are subject to balancing against countervailing considerations including direct

124. U.S. CONST. amend. V & XIV.

125. The dividing line is vague. Cf. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 419 (2010) (“an interpretation of the Due Process Clauses can be classified as ‘substantive due process’ if, and only if, it would prohibit governmental actors, in at least some circumstances, from depriving individuals of life, liberty, or property even if those individuals receive an adjudication in which ‘even the fairest possible procedure[s]’ are observed” (quoting *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting))).

126. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) (holding that notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action,” and the “means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it”); *Roller v. Holly*, 176 U.S. 398, 414 (1900) (treating opportunity to be heard); RESTATEMENT (SECOND) OF JUDGMENTS § 2 (AM. LAW INST.1982).

costs.¹²⁷ Most rights protected by substantive due process tend to be spoken of as absolute rights, ones that trump most other considerations.¹²⁸ But much of the protection of procedural due process is definitely subject to being balanced away.¹²⁹

The judicial approach to procedural due process is to ascertain first that an interest in life, liberty, or property is at stake. More than mere expectations or other unprotected interests must be at stake to trigger a right to any process at all.¹³⁰ Then, if the interest is a protected one, the court must determine what process is due. The way to answer this second question is to ask if the requested safeguard is essential to fairness, all things considered. The result is a constitutional test that is vague, but at least realistic and reasonable.

In the second step of deciding whether to require any other procedural safeguard—say, defining exactly what kind of hearing the Constitution requires in a lawsuit—the Supreme Court has come to use a cost-benefit analysis that accommodates the competing concerns.¹³¹ The Court dictates consideration of (1) the value, or importance, of the interest at stake; (2) the probability of an erroneous deprivation if the procedural safeguard in question is not provided; and (3) the cost of, or the burden imposed by, that safeguard. Upon combining and balancing those three concerns, good policy would require the safeguard when the risk of harm without the safeguard exceeds the safeguard's cost.

However, I am speaking here of a constitutional requirement. The Due Process Clauses dictate the *minimally* fair process that the government must provide when impairing a person's property or liberty interest. By contrast, the lawmaking architects build a law of civil procedure that delivers much more "good" than mere due process. They seek thereby to achieve optimal policies and rules

127. See Robert G. Bone, *The Story of Connecticut v. Doehr: Balancing Costs and Benefits in Defining Procedural Rights*, in CIVIL PROCEDURE STORIES 159, 189-97 (Kevin M. Clermont ed., 2d ed. 2008).

128. See *id.* at 196-97.

129. See *id.* at 189-96.

130. See *Lehr v. Robertson*, 463 U.S. 248, 265 (1983) (holding that a known putative father who had never established any relationship with his child was not entitled to any notice of adoption proceedings).

131. See *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (holding that an evidentiary hearing need not precede termination of social security disability benefits). For criticism of the Court's approach, see Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

above the constitutional floor. The Constitution requires no more than a minimum. Thus, the risk of harm would have to considerably exceed the cost before amounting to a constitutional violation, rather than merely bad policy. Such deference seems especially appropriate in this setting where courts are weighing the largely unmeasurable and incommensurable in order to second-guess the legislature or its delegatee. Therefore, procedural due process will require the safeguard only when the risk of harm without the safeguard *substantially exceeds* the safeguard's cost.

An economist would rephrase the Court's approach by comparing the expected error cost (the product of the probability of error without the safeguard, P_e , times the cost of error if it occurs, C_e) with the direct cost of the government's providing the safeguard, C_d . To sum up, procedural due process requires the safeguard if and only if:

$$P_e C_e \gg C_d$$

This economic approach is less opaque and more rigorous than the Court's. Also, the economic approach opens the door to defining costs more inclusively, so that process-based concerns, such as fostering participation by parties to serve the ultimate goal of process legitimacy, can count. Still, both approaches remain controversial. Trying to define "due process" requires some hubris, and all the more so to put it in terms of costs and benefits.

Nonetheless, employing a balancing test does not imply that every procedural due process question ends up being addressed ad hoc on a case-by-case basis. By balancing, prior cases could have generated a "rule" that applies in a particular context across a range of cases. For example, there is a rule of procedural due process against constructive notice of a lawsuit to the parties, so that mailed notice of a hearing must be sent to anyone significantly affected whose identity and whereabouts are reasonably knowable.¹³²

B. Application to Complex Litigation

1. *Privity*

The conclusory label of privity describes people who were nonparties to an action but who in certain circumstances are nevertheless subjected to generally the same rules of *res judicata* as

132. See *Menonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983).

are the former parties.¹³³ Procedural due process is concerned with the substance of fundamental fairness: the full and fair day in court. Does that mean that due process forbids binding by judgment persons other than parties?

The answer, of course, is no. Due process is not violated merely because a nonparty is held bound. Actually, such preclusion is common. For instance, a beneficiary may be bound on issues litigated by the trustee or executor.¹³⁴ Or, once an issue relating to an interest in real property has been fully litigated between the title owner and another party, the issue is settled against later purchasers or devisees as well.¹³⁵ Thus, any constitutionally required opportunity to be heard may come via devices other than the formal joinder of every person to be affected by the judgment, now or forever.

The way to explain the reality of nonparty preclusion passes first through the recognition that the question is not one of substantive due process, whereby the claim to a day in court or to litigant autonomy could morph into an absolute right. Only a much more serious inroad than nonparty preclusion would raise a concern of substantive due process. Instead, the question is a matter of procedural due process, which makes the appropriate approach a balancing test. Taking the whole range of outcome-based and process-based interests into account, that test protects an opportunity to be heard as an essential safeguard of adjudicatory procedure, but not the opportunity to be heard *in person*. The opportunity can come through representation by a party, if that task is performed adequately well.¹³⁶

Another way to phrase the test of procedural due process is that it will allow binding of nonparties unless the costs substantially outweigh the benefits. This balance has worked out in this context to generate the “rule” that due process guarantees only a full and fair day in court enjoyed in person or through a decent representative.

Accordingly, nonparty preclusion therefore does not contravene the Constitution when some sort of representational relationship existed between a former party and the nonparty. After all, the demands of due process are loose enough to allow the legislature and administrators to bind people and their property, when those people have received representation only in a weak

133. See CASAD & CLERMONT, *supra* note 96, at 149-65.

134. See RESTATEMENT (SECOND) OF JUDGMENTS §§ 41-42 (AM. LAW INST. 1982).

135. See *id.* §§ 43-44.

136. See *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940).

sense. Analogously, a court's judgment would be constitutionally capable of binding, among others, all similarly situated persons whose interests received "adequate representation," binding them not only through the flexible doctrine of *stare decisis* as it already does but also through the strictures of *res judicata* as it could.

True, many judges and commentators utter broad statements to the effect that due process forbids binding nonparties. The more careful among them admit that their statement is subject to exceptions. My contrary suggestion is that the exceptions prove that due process commands no such thing.

In sum, all that due process guarantees is a full and fair day in court enjoyed in person *or through an adequate representative*. Without that qualification, the right to a "day in court" is but a misleading slogan.¹³⁷ With that qualification, it becomes apparent that due process would allow binding many more nonparties than most persons assume.

Instead, it is subconstitutional law that normally requires a day in court before binding nonparties, thereby creating the illusion of due process's day-in-court rule. Society has indeed chosen, as expressed in its *res judicata* law, to bind far fewer nonparties by judgment than it constitutionally could. Mere representation of the nonparty's interests, however adequate, does not suffice for the subconstitutional lawmakers. It is their restraint that helps sharply to distinguish adjudication from the rest of governmental decisionmaking and to preserve its distinctive nature.

So the task undertaken by the maker of subconstitutional law is to specify which nonparties to consider privies for purposes of *res judicata*. To induce that specification, some substantial reasons in policy must exist to bind a nonparty, and those reasons must outweigh the social costs of binding a nonparty.

Then, for the various kinds of nonparties who thereby become potential candidates for binding, the law tries to draw a set of clear, simple, and rigid rules that together approximate that balancing of benefits and costs.¹³⁸ The constitutional test turns on the adequacy of the former party's representation of the nonparty, calibrated in a way appropriate to the adjudicatory context of individualized application

137. See Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 288 (1992).

138. See *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) ("Preclusion doctrine, it should be recalled, is intended to reduce the burden of litigation on courts and parties. 'In this area of the law,' we agree, "'crisp rules with sharp corners" are preferable to a round-about doctrine of opaque standards.'" (citations omitted)).

of the substantive law, and so it will remain a vague standard. But we can avoid that vagueness if the subconstitutional rules draw the line above the constitutional floor and try to do so clearly.

The resulting *res judicata* law binds only those nonparties rather closely related to the representative party.¹³⁹ There must be representation *plus something else*. That something might be a special procedural relationship ensuring alignment and protection of interests (or some sort of affirmative conduct signifying consent to representation) or a sufficient substantive relationship implying at least some sort of representational role. Worth noting yet again is that this current law represents how far we as a society have chosen to go, not how far we could go.¹⁴⁰

2. Class Action

Privies include persons who were *actually* represented in the litigation by a party, thus including class-action members represented by their class representative pursuant to the pertinent procedural rule, be it Federal Rule 23 or a state provision.¹⁴¹ Thus, at the back end, *res judicata* is the law that gives binding effect to valid class-action judgments.¹⁴² Similar considerations govern the front end, affecting how the Constitution and the lawmakers control the joinder device itself. The class-action device can pursue society's efficiency and substantive goals consistently with the fairness notion of having one's day in court, as long as the essential due process requirement of adequate representation is met. For constitutional adequacy in the class-action context, the represented person need only have been in actual agreement, generally although not necessarily as to all details, with the objectives on the merits of some party, who vigorously and competently pursued those objectives consciously as a representative.¹⁴³ Indeed, because the adequacy standard will vary with the particular context, it might demand less in the cohesive

139. See RESTATEMENT (SECOND) OF JUDGMENTS §§ 39-63 (AM. LAW INST. 1982).

140. See *Tice v. Am. Airlines*, 162 F.3d 966, 971-73 (7th Cir. 1998) (holding that adequate representation is not enough to constitute privity).

141. FED. R. CIV. P. 23.

142. See RESTATEMENT (SECOND) OF JUDGMENTS §§ 41-42 (AM. LAW INST. 1982).

143. See *Hansberry v. Lee*, 311 U.S. 32, 41 (1940); see also *Martin v. Wilks*, 490 U.S. 755, 758 (1989); *Richards v. Jefferson Cty.*, 517 U.S. 793, 800-01 (1996).

actions fitting within Rule 23(b)(1) or (2) than in the merely efficient class actions under Rule 23(b)(3).¹⁴⁴

Nonetheless, society has chosen, as expressed in its class-action provisions, not to go nearly as far in binding nonparties by judgment than it constitutionally could. That is, society tolerates only certain class actions. The helpful image here is of a due process hurdle that is quite low. Above it, in Rule 23(a) and (b), the rulemakers have built a screen for the federal courts that allows through only a select set of cases that satisfy society's policy desires. That is, Rule 23 and its related case law attempt to create a pragmatic screening device, which lets through all the cases most clearly appropriate for class-action treatment—those cases that generously realize the goal of efficiency or the rulemakers' rather limited substantive goals and that also amply satisfy fairness concerns—but only those cases.

First, the law goes further than procedural due process, trying to comfortably ensure adequacy of representation at the outset of a class action by the scrutiny of a demanding class-certification process under Rule 23. Second, society has chosen to allow class actions to include only those designated nonparties who are related to the representative party in certain ways: The extra relationship required by Rule 23 is either that the absentees share common and thus aligned substantive interests with their representatives or that the former somehow consented to representation by the latter. Third, Rule 23 also imposes other management limits and protections to alleviate the obvious dangers of overwhelming the court and the parties and of disadvantaging the absent class members. This current law so represents how far we as a society have chosen to go, not how far we could go.

The front end and the back end interconnect. When the class-action judgment is invoked in subsequent litigation as *res judicata*, it is subject to attack on the usual limited grounds of jurisdiction and the like. But an absent class member should also be able to attack its binding effect on him by raising the constitutional question of inadequate representation of his interests. Although the absentee should not be able to collaterally attack on the ground of erroneous class-certification in violation of Rule 23, the ground of constitutionally inadequate representation falls literally under the heading of procedural due process as a permissible ground for attack,

144. FED. R. CIV. P. 23(b)(1)-(3).

as well as within the spirit of later undoing fundamental defects in fairness but only those defects.¹⁴⁵

The lesson here is that although procedural due process may demand less than many people assume, it still may demand more than some would wish. Many pressures push toward aggregate treatment of today's massive cases.¹⁴⁶ But due process does, and should, put a limit on how far the would-be reformers can go in their pursuit of efficient disposition.¹⁴⁷

CONCLUSION

If the teacher puts these big ideas together, the student will understand the legal system and also the law of civil procedure. Conveying a vision of a procedural architecture erected within the constitutional structure can serve as an exceedingly effective organizational theme for the subject. Without that vision, a prominent place for civil procedure in the law-school curriculum is hard to justify.

My focus on the law of, and the course in, civil procedure may have sounded awfully parochial. It was the United States this, and the United States that, when I tried to show how five big ideas, which relate to one another as shown in the following diagram, underlie the field. But those five ideas are not unique to the United States. They in fact address near-universal concerns, which work out

145. See *Dow Chem. Co. v. Stephenson*, 539 U.S. 111, 112 (2003) (4-4 decision) (affirming Second Circuit); *Gonzales v. Cassidy*, 474 F.2d 67, 72-73 (5th Cir. 1973); Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 U. KAN. L. REV. 917, 951-56 (2010); Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 593-601 (1974). But compare *Epstein v. MCA, Inc.*, 179 F.3d 641, 649-50 (9th Cir. 1999) (foreclosing attack on judgment even for a constitutional defect, at least if the due process point was fully and fairly litigated in the course of the settled class action), with RESTATEMENT (SECOND) OF JUDGMENTS § 42 (AM. LAW INST. 1982) (reflecting other case law that sometimes allows attack on broader ground of failure to comply with the class-action rule).

146. See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 2.07, 3.14 (AM. LAW INST. 2010) (arguing for limiting collateral attack on the ground of constitutionally inadequate representation).

147. See Debra Lyn Bassett, *Constructing Class Action Reality*, 2006 BYU L. REV. 1415, 1467-68 (arguing that the shift from a "representative" metaphor to an "aggregate" metaphor represents a shift from fairness to efficiency, or an abandonment of the justificatory prerequisite for class actions in favor of an undue emphasis on claim disposal and deference to defendants); Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. REV. 1079, 1080-81.

similarly in most legal systems. I try to suggest this fact by adding the corresponding terminology to the diagram that is in more common usage in other countries. Therefore, I think, my championing of a prominent place and unifying theme for civil procedure applies to law-school curricula near and far.

