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Review: Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power

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BOOK REVIEW

FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER. By Martin H. Redish.* New York, New York: The Bobbs-Merrill Company, Inc., 1980. Pp. xiii, 349, $24.00.

*Robert A. Sedler***

This review of Professor Redish's excellent book is written from the perspective of a "related fields" observer. I teach courses in Constitutional Law and Conflict of Laws, but do not teach Federal Jurisdiction.[1] I have also had substantial involvement as an attorney in constitutional litigation in the federal courts.[2] Like Professor Redish, I am concerned about the "tensions in the allocation of judicial power" that may exist in our federal system, and like Professor Redish, I believe that "the integrity of the Article III federal courts as the primary adjudicators of federal law must be preserved."[3] However, because I am approaching the question from a "related fields" perspective, I am perhaps less likely to see "tensions" arising from the way that judicial power is allocated in our federal system.

With regard to Professor Redish's book itself, I was familiar with Professor Redish's extensive scholarly activity and knew that the book would be a high quality work, which indeed it is. The book consists of twelve essays dealing with "the leading areas of federal jurisdiction where tensions have been most acute."[4] Each essay is well written and

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1 Thus, I cannot claim "intimate familiarity" with all of the subjects covered in the book. However, I have at least "passing familiarity" with all of them, and a great deal of interest in some of them.

2 As a result of that involvement, I have analyzed certain constitutional questions "from without and within"—as an academician who has been an attorney in litigation dealing with those questions. *See, e.g.*, Sedler, *The Summary Contempt Power and the Constitution: The View from Without and Within*, 51 N.Y.U.L. REV. 34 (1976); Sedler, *Metropolitan Desegregation in the Wake of* Milliken*—On Losing Big Battles and Winning Small Wars: The View Largely from Within*, 1975 WASH. U.L.Q. 535; Sedler, Dombrowski *in the Wake of* Younger*: The View from Without and Within*, 1972 WIS. L. REV. 1; Sedler, *The* Dombrowski*-Type Suit as an Effective Weapon for Social Change: Reflections from Without and Within*, 18 U. KAN. L. REV. 237, 269 (1970).

3 M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 1 (1980).

4 M. REDISH, *supra* note 3, at 1.

extremely well researched; the presentations are balanced and thorough. Professor Redish carefully dissects and analyzes all of the major cases in each area, and presents the different points of view on each subject, including those with which he disagrees. As a result the book is truly a compendium of Federal Jurisdiction scholarship.

Throughout the book, Professor Redish sets forth his own views very carefully and precisely, marshalling impressive arguments in their support as he develops the thesis that the federal courts should be the "primary adjudicators of federal law." At the same time, however, he is very sensitive to the legitimate interests of the states and of the state courts. As he concludes:

> If an appropriate resolution of the tensions of judicial federalism is to be achieved, a careful examination of specific state interests and the practical effect the exercise of federal judicial authority might have on each must be undertaken. Once these interests have been described, it will be necessary to determine the means for assuring their preservation that will provide the widest possible latitude for the federal courts to perform their role within the federal system.[5]

This proposition is developed very effectively in Professor Redish's book.

Although the book is very good overall, I do have two criticisms, one "substantive" and one "structural." Substantively, I am somewhat surprised that Professor Redish did not include a chapter on federal court habeas corpus review of state court criminal convictions. This is an area with the potential for acute tensions between the federal courts and the state courts, since here the federal court is in effect acting to "reverse" state court decisions in criminal cases. It would have been interesting to have the benefit of Professor Redish's views as to the existence and resolution of tensions in this area.

My "structural" criticism goes to Professor Redish's failure to include an "overview" chapter and to "tie things together" explicitly. Professor Redish states that the chapters are "linked with one another on a broader level."[6] However, while the book develops the themes that the federal courts should be the "primary adjudicators of federal law," and that there is a need for a sensitive balancing of legitimate federal and state interests, the linkage between the chapters is somewhat unclear and may be obscured by the discussion of the specific problems contained in each chapter. The lack of an "overview" chapter is thus a shortcoming of the book.

In my opinion, the "overview" chapter should have been directed to an analysis of the *significance* of the tensions that result from the allocation of judicial power in our federal system. It is this analysis that I will now undertake, relying in large part on the discussion and

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[5] *Id.* at 4.

[6] *Id.* at 1.

presentations contained in each of the chapters in Professor Redish's book. My overall conclusion, with which Professor Redish would probably disagree, is that these tensions are *not* significant and that there are not serious problems of judicial federalism resulting from the allocation of judicial power in our federal system.

First, the fact that federal courts and state courts have concurrent jurisdiction to hear cases involving federal challenges to the validity of state laws or governmental action follows from the constitutional structure and the respective roles of federal and state courts in that structure. Federal courts have the responsibility to invalidate unconstitutional state laws and governmental action when exercising the judicial power of the United States under Article III.[7] State courts have the same responsibility under the Supremacy Clause.[8] The concurrent jurisdiction of federal and state courts in this regard is designed to serve the same objective: the supremacy of the federal constitution and federal law over inconsistent state law. From the standpoint of constitutional structure, then, the exercise of concurrent jurisdiction in cases involving federal challenges to state laws or governmental action is a cooperative venture designed to maintain federal supremacy. As such it should not produce "tensions."[9]

Second, because I have had substantial involvement as an attorney in constitutional litigation in the federal courts, I operate on the "working assumption" that for the most part federal constitutional rights can be effectively vindicated in federal courts and that challenges to the validity of state laws and governmental action can be brought in federal courts rather than in state courts. The federal courts are where attorneys want to bring federal challenges,[10] and they assume, quite correctly, that limitations on the power of the federal courts to entertain the challenge are "exceptional." I have therefore approached my review of the book with the hypothesis that federal courts not only should be, but in fact are, the "primary adjudicators of federal law."

Third, as a teacher of Conflict of Laws, I am interested in the fact that state and federal courts are parallel and independent judicial systems, much in the same manner as the court systems of different states are parallel and independent judicial systems in relation to each other.[11] Just as federal courts sometimes apply state law, as in diversity

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7 Congress has authorized the full exercise of federal judicial power in this regard. 28 U.S.C. § 1343(a)(3) (1976 & Supp. III 1979).

8 U.S. CONST. art. VI, cl. 2. *See* M. REDISH, *supra* note 3, at 124.

9 "Tensions" will arise only if one judicial system is not as disposed as the other to perform its constitutionally mandated role. *See* notes 13-17 and accompanying text *infra*.

10 This was as true when attorneys for corporate interests were challenging state economic regulation, *see, e.g.*, Ex Parte Young, 209 U.S. 123 (1908), as it is at the present time when most of the challenges are to state laws interfering with individual freedom.

11 The federal court system and the court system of each state are all considered "states" for conflicts purposes. A state is defined for conflicts purposes as a geographic portion of the earth's

cases, and state courts sometimes apply federal law, as in FELA and other "federal claim" cases,[12] courts of one state sometimes apply the law of another state in a conflicts case. Conflicts thus exist between the potential or actual exercise of jurisdiction by different state courts, just as there are conflicts between the exercise of jurisdiction by state courts and federal courts. The "tensions" in these contexts are "tensions" that arise because of the existence of parallel and independent judicial systems, and when they arise between the federal and state courts, they do not necessarily implicate "judicial federalism."

Accordingly, I assert the following propositions: (1) The federal courts are, in fact, the "primary adjudicators of federal law." (2) The tensions in the allocation of judicial power between federal and state courts arise primarily because of the existence of parallel and independent judicial systems with overlapping jurisdiction and do not present serious federalism problems. (3) The legitimate interests of the states and of the state courts are fairly well protected from improper federal judicial interference. In sum, I submit that "an appropriate resolution of the tensions of judicial federalism" for the most part does exist in our federal system.

First, I submit that the federal courts are in fact the "primary adjudicators of federal law." The effect of 42 U.S.C. § 1983, is to give the federal courts original jurisdiction in all cases involving federally based challenges to "action taken under color of state law." Existing limitations on the federal courts' exercise of their jurisdiction in such cases do not significantly impair their ability to determine the constitutionality of state laws or governmental action and, given a choice, litigants will almost invariably choose the federal forum to vindicate their federal rights.

Professor Redish notes that under traditionally accepted notions of federalism, state and federal courts "have been considered largely fungible," and that, "[e]xcept in the comparatively rare instance where Congress has explicitly or by implication provided that jurisdiction is exclusively federal, state courts historically stand equal with their federal counterparts as enforcers of federal rights."[13] Yet he is critical of this notion of "parity," emphasizing that the enactment of 42 U.S.C. § 1983 indicated Congress' rejection of the "fungibility of state and fed-

surface having an independent system of law. R. CRAMTON & R. SEDLER, THE SUM AND SUBSTANCE OF CONFLICT OF LAWS § 1.1100 (1977).

12 The reference here is to cases in which state courts hear suits brought by private litigants and based on federal law. As to the obligation of the state courts to hear such suits, *see* M. REDISH, *supra* note 3, at 124-38. In certain circumstances state courts are also obligated, as a matter of full faith and credit, to hear suits presenting claims under the law of a sister state. R. CRAMTON & R. SEDLER, *supra* note 11, § 13.2100.

13 M. REDISH, *supra* note 3, at 116. The fact that federal constitutional rights can be vindicated in state courts has been relied upon to sustain the power of Congress to remove such cases from the original jurisdiction of the federal courts. *Id.* at 25-26.

eral courts for the adjudication of federal rights."[14] As he states:

> The position taken here is that the history of post-Civil War judicial federalism dictates that federal courts be presumed the more expert and able judicial system to protect federal rights.
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> Such a presumption appears consistent with the goals of modern federalism. It seems intuitively appropriate to provide *federal* courts the primary responsibility for adjudicating *federal* law, and leave as the primary function of state courts the defining and expounding of state policies and principles. State courts still retain an important role within the federal judicial system and, as a constitutional matter, provide a technically adequate forum for the adjudication of federal law. But any conclusions concerning the allocation of federal judicial power based on the interchangeable nature of state and federal courts as interpreters of federal law should be rejected.[15]

To support his position, Professor Redish reviews at length[16] all the reasons why federal judges are, as has been observed, "more enlightened concerning, more tolerant toward, and more courageous to protect, federal rights than are their state counterparts."[17]

It is precisely because federal courts are more likely to vindicate federal rights than state courts, that a litigant, given a choice of forum, will almost invariably choose the federal forum. Consequently, federal courts will *in practice* be the "primary adjudicators of federal law" unless there are significant limitations on federal courts' exercise of jurisdiction to protect federal rights and to determine the constitutionality of state law and governmental action. Such limitations, however, clearly do not exist.

The operative jurisdictional principle that insures the primacy of federal courts in questions of federal law is that a plaintiff raising a federal challenge to a state law or governmental action is ordinarily entitled to raise that challenge in a federal forum. Federal courts do not "abstain" to give state courts the first opportunity to pass on a federal challenge,[18] and a federal plaintiff is not required to "exhaust" state judicial remedies.[19] In an unbroken line of cases, even antedating *Ex Parte Young*,[20] the Supreme Court has adhered to this fundamental

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[14] *Id.* at 2.

[15] *Id.* at 3 (emphasis in original) (footnotes omitted).

[16] *Id.* at 2-3.

[17] Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Criminal Trial*, 113 U. PA. L. REV. 793, 837 n.186 (1965). *See also* Sedler, *The* Dombrowski*-Type Suit as an Effective Weapon for Social Change: Reflections from Without and Within*, 18 U. KAN. L. REV. 237, 254-55 (1970).

[18] Zwickler v. Koota, 389 U.S. 241, 254-55 (1967).

[19] This proposition, first enunciated in Monroe v. Pape, 365 U.S. 167, 183 (1961), has been reaffirmed many times. *See, e.g.*, Preiser v. Rodriguez, 411 U.S. 475, 477 (1973).

[20] 209 U.S. 123 (1908). In that case the Court held that the eleventh amendment did not prevent suits challenging the constitutionality of state laws or governmental action in the federal

principle,[21] which flows from 42 U.S.C. § 1983. As the Supreme Court has stated, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.' "[22] Since Congress has "imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims,"[23] the primacy of the federal courts in questions of federal law is structurally built into the allocation of judicial power between federal and state courts. The circumstances in which federal courts are ousted of jurisdiction in cases presenting questions of federal law are limited; the situations where a federal court will not be able to resolve a constitutional challenge to the validity of a state law or governmental action are similarly few in number.

The major limitation on federal courts' exercise of jurisdiction over cases presenting questions of federal law is that imposed by the *Younger* doctrine.[24] Under that doctrine, federal courts may not interfere in pending state court criminal proceedings—and, in all likelihood, in pending state court civil proceedings[25]—in the absence of "exceptional circumstances."[26] I have explained the *Younger* doctrine primarily in terms of remedies:[27] the federal "equity court"[28] cannot grant

courts so long as the suit was against a state officer rather than the state itself. *Id.* at 167-68. *See* M. REDISH, *supra* note 3, at 154-57.

21 *See* Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U.L. REV. 740, 753-63 (1974).

22 Mitchum v. Foster, 407 U.S. 225, 242 (1972) (quoting Ex Parte Virginia, 100 U.S. 339, 346 (1879)). Professor Redish argues that the legislative history of § 1983, relied on by the Court in *Mitchum*, "reflect[s] strong congressional distrust of the motives and competence of state courts," and thus counsels rejection of the notion of "parity" between federal and state courts with respect to the protection of federal rights. M. REDISH, *supra* note 3, at 274.

23 Zwickler v. Koota, 389 U.S. 241, 248 (1967). As the Court also noted: "Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts . . . 'to guard, enforce and protect every right granted or secured by the Constitution of the United States . . . .' " *Id.* (quoting Robb v. Connally, 111 U.S. 624, 637 (1884)).

24 Younger v. Harris, 401 U.S. 37 (1971). Professor Redish refers to the *Younger* doctrine as "Our Federalism." M. REDISH, *supra* note 3, ch. 11.

25 Although the Supreme Court has not yet held that the *Younger* doctrine applies to all pending state court civil proceedings, a number of federal circuits have so held, and in all of the cases coming before the Supreme Court, the Court has held the *Younger* doctrine applicable in the particular case. *See* M. REDISH, *supra* note 3, at 315-21; Sedler, Younger *and Its Progeny: A Variation on the Theme of Equity, Comity and Federalism*, 9 U. TOL. L. REV. 681, 705-15 (1978).

26 As to "exceptional circumstances," *see* Sedler, Dombrowski *in the Wake of* Younger*: The View from Without and Within*, 1972 WIS. L. REV. 1, 29-44.

27 Professor Redish, in contrast, has explained it primarily in terms of federalism, M. REDISH, *supra* note 3, at 298-303, as have all the other commentators. *See* authorities cited in Sedler, *supra* note 25, at 681 n.2.

28 For discussion of the position of the federal court as an "equity court" in relation to the state "law court" in this situation, *see* Sedler, *supra* note 25, at 683-86.

relief with respect to a pending state court proceeding, because in the absence of "special circumstances," the federal "equity" plaintiff has an adequate remedy by way of defense to the pending state court proceeding and therefore has no need for "equitable relief."[29]

The *Younger* doctrine does not apply where there is no pending state court proceeding and the federal plaintiff is seeking relief against the threatened enforcement of state law.[30] Nor does the doctrine prevent federal courts from issuing preliminary injunctions against the institution of state court proceedings.[31] What this means is that federalism considerations do not preclude federal court interference with state criminal law enforcement so long as remedies considerations do not militate against the granting of relief by the federal "equity court."[32] It seems to me,[33] as it does to Professor Redish,[34] that the matter of federal court interference with state criminal law enforcement should not depend on remedies considerations, and that the federal courts should have the affirmative responsibility to protect federal rights despite the existence of an "adequate remedy" in the state courts. But federal habeas corpus review of most state court criminal convictions is available, so that ultimately a federal court will pass on the constitutionality of the underlying state law[35] and on most of the other federal questions presented in the prosecution.[36] With respect to state criminal law enforcement, the *Younger* doctrine does not seriously undercut the role of federal courts as the "primary adjudicators of federal law."[37]

If applied to prevent federal court interference with state court civil proceedings,[38] the *Younger* doctrine would mean that some litigants will be unable to have their federal claim litigated in a federal court, as would the possible application of collateral estoppel involving

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29 *Id.* at 685-88.

30 Steffel v. Thompson, 415 U.S. 452, 462 (1974). I explain *Steffel* in remedies terms, Sedler, *supra* note 25, at 700-05, while Professor Redish explains it primarily in federalism terms. M. REDISH, *supra* note 3, at 307-09.

31 Doran v. Salem Inn, Inc., 422 U.S. 922, 930 (1975).

32 Sedler, *supra* note 25, at 703-05.

33 *Id.* at 725-27.

34 M. REDISH, *supra* note 3, at 398-407.

35 *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972).

36 Federal habeas corpus review is generally not available in illegal search and seizure claims, Stone v. Powell, 428 U.S. 465, 494 (1976), and may be barred by the defendant's failure to raise the federal claim in accordance with specified state procedures. Francis v. Henderson, 425 U.S. 536, 540-41 (1976).

37 Even when federal habeas corpus review is not available, review is at least potentially available in the Supreme Court. If a case presents a sufficiently important question of federal law, the Supreme Court is likely to grant review.

38 *See* note 25 *supra*.

issues litigated in a state court[39] in a subsequent federal court proceeding. But the number of cases in which this will occur is likely to be very small.[40] In the final analysis then, the *Younger* doctrine does not impair significantly the federal courts' role as the "primary adjudicators of federal law."

Another limitation on the exercise of federal jurisdiction in challenges to the validity of state law or governmental action is the abstention doctrine. This doctrine, however, does not impair the role of federal courts as the "primary adjudicators of federal law" because, as pointed out previously,[41] federal courts do not "abstain" in order to give state courts the opportunity to pass on federal challenges to state law or governmental action. As Professor Redish notes, the feature "shared by most forms of federal abstention is the presence of an uncertain or ambiguous question of *state law*."[42] The most frequent application of abstention is the "Pullman" variety, under which the exercise of federal jurisdiction is not relinquished, but is merely postponed pending determination of the state law question by the state court.[43] "Pullman" abstention is proper only when the state court's resolution of an uncertain or ambiguous issue of state law may avoid or modify the federal constitutional question.[44] Following the state court's decision on the state law question, the federal plaintiff may return to the federal court for the adjudication of the federal constitutional claim.[45] Hence, "Pullman" abstention supports the proposition that, while the state courts must determine issues of state law,[46] the federal courts are the "primary adjudicators of federal law."[47] The

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39 *See* Allen v. McCurry, 449 U.S. 90 (1980). Where, however, a federal plaintiff seeks prospective relief against the enforcement of a state law, challenged as unconstitutional, the fact that the constitutional claim could have been raised in a prior state court criminal proceeding under that law is no bar. *See* Wooley v. Maynard, 430 U.S. 705, 711 (1977). In my opinion, the result should not differ even if the federal constitutional claim actually was asserted in the prior state court proceeding. *See* Sedler, *supra* note 25, at 721-22.

40 Moreover, I should add that if a party wishes to repeat conduct punished in a completed state court proceeding, that party can bring an affirmative federal court action to prevent future prosecutions. *See* Sedler, *supra* note 25, at 719-22.

41 *See* notes 18-23 and accompanying text *supra*.

42 M. REDISH, *supra* note 3, at 233 (emphasis added).

43 Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). *See* M. REDISH, *supra* note 3, at 233-35.

44 *See* Zwickler v. Koota, 389 U.S. 241, 248-49 (1967); M. REDISH, *supra* note 3, at 236-39.

45 *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 417 (1964); M. REDISH, *supra* note 3, at 255-57.

46 Professor Redish notes that "[t]he logic of *Pullman* abstention, then, is that it is wiser to obtain a definitive construction of the state law from the state courts prior to the federal court's decision on constitutional questions." M. REDISH, *supra* note 3, at 235.

47 Professor Redish says that "the primary goal of Pullman abstention [is] the avoidance of a constitutional confrontation with the state." *Id.* But the constitutional confrontation in this context is avoided only if the state "retreats" by resolving the state law issue in such a way that the federal plaintiff prevails on the merits and thus does not need to assert the federal constitutional

other varieties of abstention involve situations where no federal constitutional question—sometimes even no question of federal law—is presented.[48]

Similarly, the anti-injunction act[49] does not interfere with the ability of the federal courts to protect federal rights from improper state governmental action, since it does not apply to causes brought under 42 U.S.C. § 1983.[50] Its only effect on the role of federal courts as the "primary adjudicators of federal law" is to prevent federal court interference with state court proceedings in some "federal claim" situations where both federal and state courts have concurrent jurisdiction.[51] Yet where the state court and the federal court have concurrent jurisdiction over the same "federal claim" case, it is difficult to see how considerations of "judicial federalism" are in any way implicated. In this situation, federal and state courts are in the same position as the courts of different states with potential jurisdiction over the same case. The requirements of federal supremacy generally preclude the state courts from interfering with the jurisdiction of the federal courts;[52] and the anti-injunction act is the statutorily imposed reciprocal counterpart designed to protect the jurisdiction of the state court in a proper case.[53]

There are thus relatively few limitations on federal courts' exercise of jurisdiction to determine federal challenges to state laws or governmental action, or to determine questions of federal law generally. Since litigants, given a choice of forum, will almost invariably choose a federal forum to vindicate their federal rights, federal courts are *in fact* the "primary adjudicators of federal law."

We may now consider the limitations imposed on federal judicial power in order to protect legitimate state interests. As Professor Redish notes, "occasions will arise when the need for federal court adjudication must give rise to the overriding interest in preserving cooperative

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claim. It seems to me, therefore, that the primary basis of Pullman abstention is the policy of avoiding unnecessary constitutional adjudication rather than the avoidance of a constitutional confrontation with the state. Similarly, Professor Redish explains the "adequate state ground" limitation on Supreme Court review of state court decisions as embodying the policy that "the Supreme Court should avoid unnecessary pronouncements of federal law, particularly when friction with state courts or state substantive policies may result." *Id.* at 217. Again, I believe that the policy behind the "adequate state ground" limitation, like the policy behind "Pullman" abstention, is to "avoid unnecessary pronouncements of federal law." A strong argument can also be made that the "adequate state ground" limitation is mandated by Article III's case or controversy requirement. *See id.*

48 *See id.* at 240-49.

49 28 U.S.C. § 2283 (1976).

50 Mitchum v. Foster, 407 U.S. 225, 242-43 (1972).

51 This is true, of course, in diversity cases as well.

52 *See* Donovan v. City of Dallas, 377 U.S. 408, 413-14 (1964).

53 Professor Redish favors a broader interpretation of the "in aid of jurisdiction" exception. He would allow federal courts to enjoin concurrent state court proceedings in cases where important issues of federal law are involved. M. REDISH, *supra* note 3, at 285-90.

federalism."[54] Professor Redish emphasizes the need for a sensitive balancing of state and federal interests as they appear in the context of the exercise of federal judicial power. He is nevertheless critical of how courts have struck the balance in a number of areas.

Professor Redish's criticism, however, cuts both ways. He disagrees with the Supreme Court's interpretation of the eleventh amendment as barring suits by in-state citizens against the state, but contends that federal courts should recognize the state's sovereign immunity in such cases unless Congress has affirmatively acted to abolish that immunity.[55] He is also very critical of federal courts' creation of "federal common law," displacing applicable state law, at least where the United States is not a party or foreign relations policies are not involved.[56] On the other hand, in the *Erie*[57] context his concern is for the "cost-avoidance" interest of the federal courts; and he would replace the modified outcome-determinative test of *Hanna*[58] with a test that balances the "cost-avoidance" interest of federal courts against the various types of policies state procedures are designed to further.[59]

I will not attempt to evaluate Professor Redish's criticisms of how the balance between legitimate federal and state interests has been struck in these areas, or delve deeply into his proposals for change. It seems to me, however, that the "tensions" in these areas are simply not that significant, and that on the whole there has been a fairly good level of accommodation. Federal courts are not trammeling legitimate state interests to any great degree, and at the same time are performing their role as the "primary adjudicators of federal law."

I submit that any controversy over the proper scope of the eleventh amendment is peripheral to concerns for "cooperative federalism." The eleventh amendment, as presently interpreted, essentially precludes federal courts from awarding damages payable from the state treasury for past constitutional or statutory violations by the state.[60] But even if the federal courts were not required to respect the state's sovereign immunity in this regard, the award of damages against the state for past constitutional or statutory violations would not significantly impair important state policies. It would increase the costs of state governmental operations by only a small amount in relation to

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54 *Id.* at 3.

55 *Id.* at 152.

56 *See generally id.* ch. 4.

57 Erie R.R. v. Tompkins, 304 U.S. 64 (1937).

58 Hanna v. Plumer, 380 U.S. 460 (1965).

59 M. REDISH, *supra* note 3, at 189-203.

60 The eleventh amendment does not prevent prospective relief that has fiscal consequences for the state, nor does it prevent the award of damages against state officers or local governmental bodies. In addition, Congress, in the exercise of its affirmative powers under § 5 of the fourteenth amendment, can impose damages liability against the state for past violations of that amendment. *See id.* at 153-59.

state governmental expenditures as a whole.[61] Any controversy over the balance struck by the eleventh amendment is therefore peripheral to concerns for "cooperative federalism."[62]

By contrast, a very significant source of interference with legitimate state interests by the federal courts and/or Congress would be the substitution of federal law for state law as the controlling substantive law in private litigation. The ability of states to provide the rule of decision in private actions is a major attribute of state sovereignty in our federal system.[63] This sovereignty was seriously eroded by the application of "federal common law" in diversity cases prior to *Erie*, and as Professor Redish notes, *Erie* represented a "dramatic reversal in the relation between the federal courts and state law."[64]

However, once *Erie* recognized that federal courts could not displace state substantive law in diversity cases, hammering out the precise contours of the *Erie* doctrine has had no serious implications for "cooperative federalism," since the process relates only to deciding which analytically "procedural" state rules must be applied by the federal courts in diversity cases. The relationship between the federal court and the state court in a diversity case has always seemed to me to be identical to the relationship between the forum court in a conflicts case, once it has decided to displace its own law,[65] and the state whose substantive law it has decided to apply for the rule of decision in the case.[66] Once the forum has chosen to displace its own law, it has necessarily concluded that it has no interest in the substantive outcome of the case; its interest is limited to controlling the conduct of the litigation before it.[67] The forum court should therefore apply all the legal rules of the other state, whether analytically "substantive" or "procedural," that will materially affect the outcome of the litigation, except where

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61 On the other side of the equation, once the eleventh amendment was interpreted as not precluding federal court adjudication of the validity of state laws or governmental action, it could not interfere with the ability of the federal courts to perform their role as the "primary adjudicators of federal law." *See* Ex Parte Young, 209 U.S. 123 (1908); M. REDISH, *supra* note 3, at 154-58.

62 The interests implicated by the eleventh amendment are those of private persons who seek to recover damages from the state treasury, and that of the state in being able to avoid the payment of such damages.

63 An independent system of substantive law determines the existence of a state for conflicts purposes. *See* note 11 *supra*.

64 M. REDISH, *supra* note 3, at 169.

65 In the *Erie* context, the Rules of Decision Act, 28 U.S.C. § 1652 (1976), requires the federal court to displace its substantive law, and directs the federal court to the substantive law of the state in which it sits, including that state's conflicts law.

66 *See* Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U.L. REV. 813, 821-22 (1962).

67 *Id.* at 822-24. This interest is a substantial one, and can be advanced by the forum, consistent with the requirements of full faith and credit. *See* Wells v. Simonds Abrasive Co., 345 U.S. 514, 516-17 (1953).

doing so will violate the forum's strong procedural policy or interfere with the efficient operation of the forum's judicial system.[68] Both the *Hanna* modified outcome test and Professor Redish's refined balancing test[69] achieve this objective. Whichever test is adopted is of no moment for "cooperative federalism."

The ability of the states to prescribe the controlling substantive law in private litigation could also be eroded by frequent creation of "federal common law" by federal courts in nondiversity cases. While Professor Redish is critical of the creation of "federal common law," he notes that "[t]he most extensive development of federal common law has come in cases which directly implicate the interests of the United States government."[70] He does not appear to dispute the propriety of a controlling federal law in these cases or in cases involving foreign relations.[71] His major criticism is of the federal courts' development of a "federal common law" of admiralty.[72] But even if this criticism is well founded, it is still state law, not federal law, that is controlling in the overwhelming majority of cases between private litigants.[73] This vital aspect of state sovereignty thus is not seriously impaired by the creation of "federal common law" by federal courts.

Federal habeas corpus review of state court criminal convictions would seemingly raise most directly the question of whether "the need for federal court adjudication must give rise to the interest in cooperative federalism."[74] As stated previously, it would have been interesting to have the benefit of Professor Redish's views in this regard. In this area, however, both the Supreme Court[75] and Congress[76] have made a studied effort to accommodate the legitimate interests of the states while preserving the role of the federal courts as the "primary adjudicators of federal law."[77] This result has been accomplished by requiring that state court remedies be exhausted as a precondition to federal habeas corpus review, by giving certain deference to the findings of the state courts,[78] and by simultaneously reserving ultimate review of fed-

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[68] I relied on the *Erie* "outcome-determinative" test of Guaranty Trust Co. v. York, 326 U.S. 99 (1945), as modifed by Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958), to formulate this test for conflicts purposes. Sedler, *supra* note 66, at 824-25.

[69] M. REDISH, *supra* note 3, at 98-202.

[70] *Id.* at 85.

[71] *Id.* at 85-93, 97.

[72] *Id.* at 97-105.

[73] For a discussion of "federal common law" in suits between state entities in the context of interstate pollution, *see id.* at 105-07.

[74] *Id.* at 3.

[75] *See* Ex Parte Royall, 117 U.S. 241 (1886).

[76] 28 U.S.C. § 2254 (1976).

[77] More precisely, an effort has been made to preserve their role in saying whether there has been a violation of federal constitutional rights in the state criminal prosecution.

[78] *See* 28 U.S.C. § 2254(d)-(e) (1976).

eral constitutional claims for the federal courts.[79]

The true effect of this scheme of review is indeed an exercise in "cooperative federalism." Since both federal courts and state courts have the constitutionally mandated responsibility to protect federal rights,[80] the redundancy of both federal and state court review "fosters greater certainty that constitutional rights will not be erroneously denied."[81] Commentators have also suggested that federal habeas corpus review of state court criminal convictions creates a dialectic between federal and state courts designed to "translat[e] those values which the [Supreme] Court has identified as significant into specific constitutional rights."[82] In any event, the requirement that the accused exhaust state remedies, while perhaps having certain undesirable consequences,[83] does serve to minimize the "tensions" between the federal and state courts, enabling both court systems to engage in the cooperative venture of protecting the federal constitutional rights of state criminal defendants.

My conclusion, therefore, is that the tensions resulting in the allocation of judicial power between federal and state courts are not significant, and that there are not serious problems of judicial federalism resulting from the allocation of judicial power in our federal system. Federal courts are in fact, the "primary adjudicators of federal law," yet the legitimate interests of the states and state courts are fairly well protected from improper federal judicial interference. In the final analysis, both the federal courts and the state courts succeed in performing their respective and sometimes overlapping functions in our constitutional scheme.

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79 As the Supreme Court has stated:

> The exhaustion-of-state remedies doctrine, now codified in the federal habeas corpus statute, reflects a policy of federal-state comity, "an accommodation of our federal system designed to give the State the initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." We have consistently adhered to this federal policy, for "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation."

Picard v. Connor, 404 U.S. 270, 275 (1971) (citations omitted) (quoting Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (per curiam) and Darr v. Buford, 339 U.S. 200, 204 (1950)).

For a discussion of circumstances where federal constitutional claims cannot be raised in habeas corpus review of state criminal convictions, *see* note 36 *supra*.

80 As the Supreme Court noted in Ex Parte Royall, 117 U.S. 241, 251 (1886), the purpose of the exhaustion doctrine is to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."

81 Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045 (1977).

82 *Id.* at 1047.

83 These undesirable consequences arise both from the standpoint of the defendant in obtaining his release, and from the standpoint of the state in providing "finality" to criminal convictions.