

# ESSAY

## LEGITIMACY LAUNDERING

*Fred O. Smith, Jr. \**

*Federal jurisdictional doctrines have served as instruments of racial subjugation, territorial dispossession, and sanctioned violence. Yet this pattern is absent from how Federal Courts doctrine is taught. Leading casebooks exclude cases like the Chinese Exclusion Case, Lone Wolf v. Hitchcock, and Giles v. Harris from the political question canon. Reconstruction-era cases are taught without the Lost Cause narratives that imbue them, while Jim Crow exceptionalism wrongly implies that state-sanctioned racial oppression was uniquely Southern and historical rather than endemic and ongoing.*

*This Essay develops “legitimacy laundering” to describe how such erasures enhance doctrinal and institutional authority. Like money laundering, legitimacy laundering operates through placement (separating doctrines from problematic origins), layering (creating citational distance through complex applications), and integration (incorporating sanitized principles into mainstream jurisprudence as neutral precedent). And like evidence laundering, in which one officer passes tainted evidence to another to obscure its origins, doctrines get passed along without acknowledging their source.*

*Federal Courts’ distinctive features, its origins and persistent claims of neutrality, are especially conducive to this process. The field’s*

---

\* Professor of Law, Stanford University. For comments and helpful discussions on this work—or related papers that gave rise to the ideas presented herein—thanks are due to Gregory Ablavsky, Bruce Ackerman, Payvand Ahdout, Alexander Arnold, William Baude, Monica Bell, Maggie Blackhawk, Curtis Bradley, Andrew Bradt, Sam Bray, Emily Buss, Josh Chafetz, Zachary Clopton, Andrew Crespo, Adam Davidson, Debbie Dinner, Justin Driver, Mary Dudziak, David Fagundes, David Fontana, Kellen Funk, Owen Fiss, Maggie Gardner, Abbe Gluck, Ariela Gross, Darren Hutchinson, Bert Huang, Tonja Jacobi, Andrew Jennings, Alec Karakatsanis, Allison Larsen, Marin Levy, Kay Levine, Jonathan Masur, Tracey Meares, Darrell Miller, Melissa Murray, Douglas NeJaime, Peter O’Neill, Lisa Ouellette, Jim Pfander, Robert Post, Richard Re, Elizabeth Reese, Matt Sag, Sarath Sanga, Tom Schmidt, Jonathan Seymour, Jane Schacter, Brenden Shucart, Shirin Sinnar, Reva Siegel, Mila Sohoni, Norm Spaulding, David Strauss, John Witt, Diego Zambrano, and Alex Zhang. Thanks are also due to participants of the Faculty Workshop at UC Davis School of Law, the Legal History Workshop at UCLA School of Law, the Public Law Workshop at the University of Chicago, the Civil Procedure Colloquium at Cornell Law School, the Judicial Process Roundtable at Duke University School of Law, the Faculty Workshop at Loyola Law School, the Faculty Workshop at Stanford Law School, and the Faculty Workshop at Yale Law School. I am grateful to Stanford Law School’s librarians and to my research assistant, John Cooke. I also offer heartfelt gratitude to the late Richard Fallon for his generous dialogue as the core theory of this paper was constructed.

architects, including Felix Frankfurter and Alexander Bickel, crafted jurisdictional doctrines to avoid “sensitive” racial questions like school integration and interracial marriage.

*This Essay concludes with diagnostics for identifying harmful pedagogical omissions: whether they perpetuate false narratives, conceal doctrine’s capacity for democratic exclusion, replicate designed subordination, or inflict posthumous harm. It argues that recovering erased voices, those whose resistance to injustice helped construct the jurisdictional tools we inherit, illuminates doctrine’s harmful capacities and its transformative possibilities.*

|                                                                                |      |
|--------------------------------------------------------------------------------|------|
| INTRODUCTION.....                                                              | 1371 |
| I. LEGITIMACY LAUNDERING .....                                                 | 1378 |
| A. Laundering Analogy.....                                                     | 1378 |
| 1. Money Laundering .....                                                      | 1378 |
| 2. Evidence Laundering .....                                                   | 1381 |
| B. Collective Memory.....                                                      | 1382 |
| C. Legitimacy as Capital.....                                                  | 1387 |
| D. The Moral Economy of Authority .....                                        | 1394 |
| 1. Methodology .....                                                           | 1395 |
| 2. Doctrines .....                                                             | 1396 |
| a. Substantive Due Process and the Shadow of <i>Dred</i><br><i>Scott</i> ..... | 1396 |
| b. Unanimous Juries and the <i>Ramos</i> Template.....                         | 1397 |
| 3. Cases .....                                                                 | 1399 |
| E. Narratives, Identity, and Legitimacy.....                                   | 1402 |
| II. A PEDAGOGY OF ERASURE.....                                                 | 1404 |
| A. The Missing Cases.....                                                      | 1405 |
| 1. <i>Chae Chan Ping v. United States</i> .....                                | 1407 |
| 2. <i>Lone Wolf v. Hitchcock</i> .....                                         | 1414 |
| 3. <i>Giles v. Harris</i> .....                                                | 1417 |
| B. The Missing Context .....                                                   | 1422 |
| 1. Lost Cause Narratives .....                                                 | 1422 |
| 2. Jim Crow Exceptionalism .....                                               | 1426 |
| 3. Neutrality Narrative and “Comity” .....                                     | 1429 |
| III. THE ROLE OF FEDERAL JURISDICTION.....                                     | 1432 |
| A. Origins and Racial Avoidance.....                                           | 1432 |
| B. Neutrality .....                                                            | 1439 |
| IV. DIAGNOSING THE HARM.....                                                   | 1443 |
| A. Narrative-Driven Distortion .....                                           | 1446 |
| B. Capacity for Harm .....                                                     | 1448 |

|                                     |      |
|-------------------------------------|------|
| C. Propensity and Design .....      | 1450 |
| D. Dignity and Legacy .....         | 1453 |
| CONCLUSION.....                     | 1458 |
| APPENDIX A: THE CASEBOOK STUDY..... | 1459 |

## INTRODUCTION<sup>1</sup>

Law's authority rests, in part, on what it has learned not to say. When doctrines are taught and discussed without their historical origins, certain legal practices seem more acceptable or justified than a more complete accounting would yield.<sup>2</sup> A recent article, *The Forgotten Face of "Our Federalism,"* introduced the term "legitimacy laundering" to describe this phenomenon.<sup>3</sup> Erasure facilitates acceptance by legal actors and the public.<sup>4</sup> And acceptance legitimates authority.<sup>5</sup> This Essay develops that

---

1. This Essay is largely addressed to the legal academy and concerns Federal Courts pedagogy and scholarship. As such, it refers to numerous scholars (including law professors) throughout by first and last name without titles.

2. See Fred O. Smith, Jr. & Peter O'Neill, *The Forgotten Face of "Our Federalism,"* 135 *Yale L.J.* 17, 26 (2025) [hereinafter Smith & O'Neill, *Forgotten Face*] ("Legitimacy laundering refers to circumstances in which the substantive content and ramifications of a case are veiled in ways that contribute to a doctrine or institution's acceptance."); see also Shirin Sinnar, *The Lost Story of Iqbal*, 105 *Geo. L.J.* 379, 384 (2017) ("When a procedural decision such as *Iqbal* is disseminated without sufficient critique of its substance, the decision can affect broader understanding of the legitimacy of the state practices at issue."). Shirin Sinnar's groundbreaking analysis focuses on how procedure legitimated the substantive practices challenged in *Iqbal*; the United States government was alleged to have detained individuals based on religion and race. *Id.* at 385. *Forgotten Face* "highlights the inverse relationship: how procedural doctrines themselves are legitimized through the erasure of their troubling contexts and consequences." Smith & O'Neill, *Forgotten Face*, *supra*, at 95 n.554.

3. Smith & O'Neill, *Forgotten Face*, *supra* note 2, at 94–100. As observed there, "[c]ulpability for this kind of laundering can rest with courts, commentators, or both, and it can occur intentionally or negligently." *Id.* at 26.

4. See Mary L. Dudziak, *The Case of "Death for a Dollar Ninety-Five": Miscarriages of Justice and Constructions of American Identity*, in *When Law Fails: Making Sense of Miscarriages of Justice* 25, 26 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009) (writing that "the erasure of the person from the law is more than a hole" but also "aids in the forward-looking construction of ideas about the nature of American justice"); Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 *S. Cal. L. Rev.* 2599, 2688 (1992) (interrogating "structured absences"); see also Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 4–10 (1983) [hereinafter Cover, *Nomos and Narrative*] (providing a seminal discussion of the relationship between norms, narratives, and acceptance).

5. See Jack M. Balkin, *Memory and Authority: The Uses of History in Constitutional Interpretation* 24–26, 116 (2024) [hereinafter Balkin, *Memory and Authority*] (describing "[a]uthority-constructing" uses of history that "employ history to construct claims of legal authority"). For development of a similar concept in the context of Australian public art and monuments, see Odette Kelada & Dianne Jones, *Mass Exposure: Memory Laundering, Racial Literacy and the Art of Truth-Telling*, in *Art and Memorialisation: Truth-Telling*

framework, bringing it to bear on Federal Courts pedagogy. The earlier article introduced legitimacy laundering through a single case, the buried origins of *Younger v. Harris*, recovering the racialized history of surveillance, censorship, and police violence that had washed away from the canon.<sup>6</sup> But while a single case can establish the phenomenon, it cannot show whether laundering is the idiosyncrasy of one celebrated decision or a recurring feature of how an entire field reproduces and justifies itself. This Essay supplies the larger canvas. It traces the phenomenon across the Federal Courts canon and, in the process, lifts legitimacy laundering from the reconstruction of one case's buried origins into a general theory of both how legal knowledge is sanitized and how to guard against the resultant harm.

Erasure shapes doctrinal authority through two mechanisms. First, the cleansing of institutional memory aligns doctrine with prevailing norms. When we encounter a legal principle divorced from the harms it enabled, we lose crucial information about that doctrine's capacity—and perhaps even propensity—for harm. Second, cleansed memory entrenches new norms; practices outside the sanitized narratives may appear aberrant or outside the boundaries of the nation's tradition-laden ethos.<sup>7</sup> Recovering doctrines' genealogies, then, can disrupt these two mechanisms by inviting critical scrutiny instead of rote acceptance.

Yet in the field of Federal Courts, the legal academy's pedagogical choices systematically deny students and practitioners this knowledge. Through missing cases and context, federal jurisdiction pedagogy erases past harms, perpetuating legitimacy laundering. Casebooks and treatises systematically omit cases rooted in historical atrocities,<sup>8</sup> while key doctrines are taught without acknowledging how they enabled injustice. Starkly, the political question doctrine is presented without examining how judicial deference facilitated broken treaties with Native Nations,<sup>9</sup> race-based

---

Through Creative Practice in Settler Colonial Australia 101, 101–02 (Genevieve Grieves & Amy Spiers eds., 2024) (contending that reverence in the public sphere for purveyors of horror is akin to dirty money).

6. See Smith & O'Neill, *Forgotten Face*, supra note 2, at 30–69.

7. See Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *Fordham L. Rev.* 641, 672 (2013) (“Arguments from tradition claim that our traditions constitute our political life and offer normative direction to our endeavors. Arguments from national ethos claim that a constitutional interpretation that betrays the deepest meanings of America’s values and political traditions cannot be correct.”); Dudziak, supra note 4, at 26 (concluding that “narratives of justice and the rule of law aid conceptions of American identity”); Darrell A. H. Miller, *Falsifying Tradition*, 75 *Duke L.J.* 1311, 1334 (2026) (describing ways that tradition is used as a means of establishing national identity).

8. See infra section II.A.

9. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (holding that legislative actions altering or breaking treaties with Native Nations are political questions and thus exempt from judicial review); see also infra section II.A.2.

exclusion of Chinese individuals from the United States,<sup>10</sup> and Black voter disenfranchisement.<sup>11</sup>

Moreover, when canonical cases with racialized origins are taught, we have often traditionally stripped them of context.<sup>12</sup> And importantly, some of these contextual absences reflect broader patterns of neglected sociopolitical context in the field's canonical narratives about both Reconstruction and Jim Crow. Lost Cause narratives persist with insufficient critical reflection, while Jim Crow exceptionalism creates the misleading impression that federal jurisdictional limitations adequately protect against systemic rights abuses.

These narratives are further reinforced by a jurisprudential tradition that treats comity—the preservation of harmonious federal–state relations—as a paramount neutral virtue, privileging institutional harmony between governments while dismissing the disharmony experienced by those left without meaningful remedies. Together, these narratives bolster the legal and sociological legitimacy of those doctrines and of the federal judiciary itself.

Beyond identifying erasure as pervasive in the field of Federal Courts, this Essay argues that two distinctive features of the field aid in institutional forgetting and resultant legitimacy building. First is the field's origin story. Federal Courts emerged during a period of significant public anxiety about the expanding role of the federal judiciary in American life, particularly on matters of race. Some of the early debates about justiciability, abstention, and the political question doctrine centered on

---

10. See *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) (holding that complaints about the Chinese Exclusion Act “must be made to the political department of our government”); see also *infra* section II.A.1.

11. See *Giles v. Harris*, 189 U.S. 475, 488 (1903) (holding that relief from a political wrong must come from “the legislative and political department”); see also *infra* section II.A.3.

12. See Charquia Fegins, *The Untold History of Ex Parte McCordle* 40–42 (Apr. 1, 2026) (unpublished manuscript) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5272790](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5272790) [<https://perma.cc/QLA8-X8YT>] (contextualizing canonical Reconstruction-era cases by exposing their relationship to violent voter suppression); Helen Hershkoff & Fred Smith, Jr., *Reconstructing Klein*, 90 U. Chi. L. Rev. 2101, 2172 (2023) (urging that *United States v. Klein* be understood in its Reconstruction context and observing that jurisdictional doctrine's “purported neutrality” can sustain racial stratification); Sinnar, *supra* note 2, at 384 (showing how *Iqbal*'s dissemination as neutral procedure legitimated the substantive detention practices it insulated); Smith & O'Neill, *Forgotten Face*, *supra* note 2, at 20–25 (resurfacing the racialized context of *Younger v. Harris*); see also Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and “Federal Courts”*, 81 N.C. L. Rev. 1927, 1934 (2003) (recovering *Hans v. Louisiana*'s origins in Louisiana's repudiated Reconstruction bond debt and the era's racial politics); Lauren Robel, *Riding the Color Line: The Story of Railroad Commission of Texas v. Pullman Co.*, in *Federal Courts Stories* 163, 183–89 (Vicki C. Jackson & Judith Resnik eds., 2010) (offering a detailed historical account of the racial dimensions of *Pullman*). See generally Erwin Chemerinsky, Seth Davis, Fred O. Smith, Jr. & Norman W. Spaulding, *Federal Courts in Context* (2023) (situating cases and doctrines in their historical context).

the propriety of avoiding contentious questions like the legality of racial segregation and bans on interracial marriage.<sup>13</sup>

Second, jurisdiction's reputation for neutrality masks its substantive choices.<sup>14</sup> Cheryl Harris argued in *Whiteness as Property* that law "masks what is chosen as natural" and "obscures the consequences of social selection as inevitable," rendering "existing inequities . . . nearly invisible."<sup>15</sup> Federal jurisdiction exemplifies this phenomenon. Its rules rely on unacknowledged value choices. While concepts like comity and judicial independence are framed as neutral, values like antistatutoryism are labeled substantive—despite all being contested constitutional principles. Just as Harris observed that an unequal "existing state of affairs" becomes "part of the natural order of things that cannot legitimately be disturbed,"<sup>16</sup> jurisdictional rules naturalize their substantive choices through claims of neutrality.

This Essay engages diverse bodies of scholarship to examine the harm that attends forgetting and ways to avoid that harm. It draws on memory studies scholarship showing that collective memory survives through institutional repetition,<sup>17</sup> philosophical literature demonstrating that ignorance is often actively produced rather than passively accumulated,<sup>18</sup> and constitutional theory tracing the strategic deployment of history in legal interpretation.<sup>19</sup> The analysis also builds on a growing body of legal

13. See *infra* section III.A.

14. See Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 Mich. L. Rev. 1, 52 (2023) ("[I]t is precisely this false sense of apolitical neutrality that has aided the emergence of the oligarchic courthouse."); see also Felix Frankfurter & James M. Landis, *The Business of the Supreme Court* 2 (1928) ("So-called jurisdictional questions treated in isolation from the purposes of the legal system to which they relate become barren pedantry. After all, procedure is instrumental; it is the means of effectuating policy. Particularly true is this of the federal courts.").

15. Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707, 1777 (1993).

16. *Id.* at 1777–78.

17. *Kultur und Gedächtnis* 9–19 (Jan Assmann & Tonio Hölscher eds., 1988), translated in Jan Assmann, *Collective Memory and Cultural Identity*, 65 *New German Critique* 125, 126 (John Czaplicka trans., 1995) (defining cultural memory as knowledge that directs a society's behavior and is maintained through "repeated societal practice and initiation"); see also Maurice Halbwachs, *The Collective Memory* 1–19 (Francis J. Ditter, Jr. & Vida Yazdi Ditter trans., 1st ed. 1980); Saidiya Hartman, *Venus in Two Acts*, 12 *Small Axe* 1, 11 (2008) (confronting the erasure of enslaved lives in historical archives and proposing "critical fabulation" as a responsive method).

18. See Charles W. Mills, *White Ignorance*, in *Race and Epistemologies of Ignorance* 13, 20–23 (Shannon Sullivan & Nancy Tuana eds., 2007) (introducing "white ignorance" as a socially produced, structural form of non-knowing rather than a passive absence of knowledge).

19. See, e.g., Balkin, *Memory and Authority*, *supra* note 5, at 242 ("All legal theories beat the past into shape; they simply do it in different ways and for different ends."); Reva B. Siegel, *The Politics of Constitutional Memory*, 20 *Geo. J.L. & Pub. Pol'y* 19, 21–23 (2022) [hereinafter Siegel, *The Politics of Constitutional Memory*] (arguing that interpreters

pedagogy scholarship that has exposed patterns of erasure across the curriculum—from Criminal Law’s elision of mass incarceration<sup>20</sup> to Property’s disappearance of conquest<sup>21</sup> to Contract’s sanitization of slavery.<sup>22</sup> In recent years, this scholarship additionally examines how entire legal systems and peoples vanish from view<sup>23</sup> and how doctrinal categories mask exploitation.<sup>24</sup>

Before continuing, the nomenclature used in this Essay merits explanation. Why “legitimacy laundering” rather than, say, “memory laundering,”<sup>25</sup> given that institutional memory is what is being erased? The term “legitimacy laundering” captures a specific transactional process: Dirty origins are cleansed in ways that produce clean authority. Memory serves as the medium through which this transaction occurs, but

---

continuously produce constitutional memory that “often excludes history, sometimes intentionally” and that memory is employed to legitimate authority).

20. See Shaun Ossei-Owusu, Criminal Legal Education, 58 Am. Crim. L. Rev. 413, 413 (2021) (identifying legal education as an overlooked input in the reproduction of the penal state’s brutality); Alice Ristroph, The Curriculum of the Carceral State, 120 Colum. L. Rev. 1631, 1689 (2020) (“[T]eachers and scholars have depicted criminal law as an exception to a general norm . . . . Exceptionalism is important to the story of how mass incarceration thinks, first because it inoculates criminal institutions from certain lines of critique, and second because it limits the scope of reform proposals.”).

21. K-Sue Park, The History Wars and Property Law: Conquest and Slavery as Foundational to the Field, 131 Yale L.J. 1062, 1067–70 (2022) (demonstrating that conquest and slavery built the core institutions of American property law even as the field suppressed those histories).

22. Brittany Farr, Warranting Violence, 78 Stan. L. Rev. 533, 537–41 (2026) [hereinafter Farr, Warranting Violence] (illustrating how contract doctrine regarding warranties of enslaved persons’ “soundness” obscured and reshaped the violence of slavery); Dylan C. Penningroth, Race in Contract Law, 170 U. Pa. L. Rev. 1199, 1202–11 (2022) (recovering the hidden presence of race and Black litigants across contract law’s development from the 1870s onward); Justin Simard, Citing Slavery, 72 Stan. L. Rev. 79, 88–89 (2020) (showing how nineteenth-century law schools and treatises absorbed slave cases into neutral common law categories, treating them as ordinary property and commercial disputes); see also Brittany Farr, The Race Case in Contracts, 100 N.Y.U. L. Rev. 1070, 1073–75 (2025) [hereinafter Farr, The Race Case] (analyzing 129 Contracts casebooks to show how racialized “cultural scripts” have framed *Williams v. Walker-Thomas Furniture Co.*).

23. Maggie Blackhawk, Federal Indian Law as Paradigm Within Public Law, 132 Harv. L. Rev. 1787, 1791–94 (2019) (arguing that public law’s slavery-and-segregation paradigm has obscured colonialism and Native Nations as constitutional subjects); Elizabeth A. Reese, The Other American Law, 73 Stan. L. Rev. 555, 560 (2021) (observing that the law of 574 federally recognized tribal governments is excluded from what counts as “American law”).

24. See, e.g., Janet Halley, What Is Family Law?: A Genealogy Part I, 23 Yale J.L. & Humans. 1, 2–5 (2011) (tracing how “family law exceptionalism” severed the household from market ordering and recast domestic labor as sentiment rather than economics (internal quotation marks omitted)); cf. Etienne C. Toussaint, The Purpose of Legal Education, 111 Calif. L. Rev. 1, 9 (2023) (“[T]he study of the way legal systems and political institutions further racism, economic oppression, or social injustice must be viewed as endemic to the purpose of legal education.”).

25. See Kelada & Jones, *supra* note 5, at 102 (creating the phrase “memory laundering” to describe how commemorative historical practices erase colonial violence and sanitize historical figures (internal quotation marks omitted)).

legitimacy constitutes the asset being generated and accumulated. Just as money laundering transforms illicit funds into apparently legitimate capital, legitimacy laundering transforms troubling historical foundations into doctrinal authority that faces less scrutiny than it otherwise might. What emerges from this process is a manufactured sense that these doctrines deserve deference facilitated, in part, through their untainted appearance.

In this model, legitimacy operates not as a binary—legitimate or illegitimate—but as a spectrum of acceptance and deference. Legal doctrines accumulate or shed legitimacy through ongoing processes of justification, application, and memory-making. A doctrine need not be wholly legitimate to command authority; it need only possess sufficient legitimacy to escape serious challenge.<sup>26</sup> This understanding reveals why legitimacy laundering proves so effective: Even partial cleansing can shift a doctrine along the spectrum from contested to accepted, from provisional to permanent, from political choice to neutral principle.

To be sure, legal doctrine's legitimacy depends on multiple variables, including contemporary consequences, internal coherence, and administrability.<sup>27</sup> But it also depends on alignment with current values, and—this Essay's focus—institutional memory of the doctrine's historical origins.

Pedagogical omissions inflict concrete harms by perpetuating false narratives about doctrinal development, concealing jurisdiction's capacity to facilitate democratic exclusion, obscuring when doctrines continue serving original subordinating functions, and violating dignity interests of those whose struggles undergird inherited frameworks. By exposing how institutional memory operates as an essential legitimacy variable, this Essay reveals how selective forgetting prevents the informed assessment that doctrinal legitimacy should require.

Part I develops the theoretical framework of "legitimacy laundering" to describe how jurisdictional doctrines increase legitimacy and gain authority by obscuring their troubling origins. The framework rests on two analogies that capture two distinct mechanisms. First, drawing an analogy to money laundering, this Part demonstrates how legal principles undergo placement (separation from problematic contexts), layering (creation of distance through successive applications), and integration (absorption into mainstream jurisprudence as neutral precedent). This analogy best describes the laundering of a case that remains in the canon. The decision stays in view, taught and cited, while the context that would compromise it

---

26. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 *Harv. L. Rev.* 1787, 1792 (2005) [hereinafter Fallon, *Legitimacy and the Constitution*] ("[T]he Constitution qualifies as legitimate only under what I shall describe as 'minimal' (rather than 'ideal') theories of moral legitimacy.").

27. See Richard H. Fallon, Jr., *Law and Legitimacy in the Supreme Court* 127–32, 142–48 (2018) [hereinafter Fallon, *Law and Legitimacy*] (describing a range of variables that contribute to legal legitimacy).

is washed away until the holding reads as neutral. The second analogy is “evidence laundering” in policing, in which a tainted source is concealed by passing its product through a cleaner officer. Here the originating case drops out of the canon altogether, and the principle it produced is carried forward through later, more neutral citations, until it reaches contemporary doctrine with its source out of view.

Part I further examines how legal and sociological legitimacy sustains the authoritative power of legal doctrines. Part I then examines the moral economy of authority—showing how a case’s incompatibility with evolving normative values can transform it from influential to notorious, diminishing its precedential capital even as its doctrinal innovations persist through other channels. The analysis reveals how jurisdictional doctrines can maintain authority even when their originating cases become too morally tainted to cite directly, with their principles laundered through intermediate cases that obscure the problematic source.

Part II documents the systematic exclusion of race-salient cases from Federal Courts pedagogy, examining what gets taught, what gets omitted, and the narratives that frame what remains. Through analysis of leading casebooks, this Part reveals striking patterns: Landmark cases involving racial subordination like the *Chinese Exclusion Case*,<sup>28</sup> *Lone Wolf v. Hitchcock*,<sup>29</sup> and *Giles v. Harris*<sup>30</sup> are routinely excluded from discussions of the very doctrines they helped establish and construct. And when Reconstruction-era cases appear, they are often presented through Lost Cause narratives that obscure their role in dismantling civil rights protections.<sup>31</sup> The Part further critiques “Jim Crow exceptionalism”—the tendency to treat state-sanctioned racial oppression as uniquely Southern and historical rather than endemic and ongoing—showing how this framing enables contemporary erasures.

Part III examines why federal jurisdiction proves especially susceptible to legitimacy laundering, analyzing two distinctive features of the field that facilitate erasure. First, the field’s origins in an era of explicit racial avoidance—when architects like Felix Frankfurter and Alexander Bickel consciously crafted doctrines to sidestep “sensitive” racial questions—established foundational norms that persist in contemporary practice. Second, the field’s persistent claims to procedural neutrality mask substantive choices about whose rights deserve protection and whose harmony counts when courts invoke “comity” to decline jurisdiction.

Part IV develops diagnostic principles for identifying when pedagogical omission becomes harmful legitimacy laundering. Guided throughout by Charles Mills’s insight that in societies structured by

---

28. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

29. 187 U.S. 553 (1903).

30. 189 U.S. 475 (1903).

31. See *infra* section II.B.1.

domination, manufactured ignorance is an “active deed” in facilitating that domination,<sup>32</sup> it offers four considerations. These are whether exclusions perpetuate false narratives shaping doctrinal development; whether they conceal doctrine’s capacity for facilitating democratic exclusion; whether the doctrines enable the subordination they were designed to serve; and whether they amount to complicity in dishonoring the dignity and legacy of individuals who experienced and resisted atrocity and erasure. Drawing on parallel patterns of strategic erasure identified in Criminal Law, Property, and Contracts scholarship, this Part provides a framework for distinguishing when curatorial choices are most apt to cause harm.

### I. LEGITIMACY LAUNDERING

Sanitization through selective erasure can enhance the authority of legal doctrines. When doctrine is stripped of its role in facilitating racial subjugation, colonialism, and state violence, what remains appears neutral, technical, and benign. This process transforms doctrines that enabled oppression into respected pillars of jurisprudence. Just as money laundering cleanses illicit funds through placement, layering, and integration until they circulate in the economy as clean capital, legitimacy laundering strips away a case’s compromising context in ways that help the case circulate in the legal system as authoritative precedent. And just as evidence laundering allows a constitutional taint to disappear when one officer hands illegally obtained evidence to another who can then claim clean discovery, legitimacy laundering occurs when the principle from a troubling originating case is carried forward through intermediate, more neutral cases, opening degrees of separation between contemporary doctrine and its compromising source. In this latter analogy, the originating case drops from view. This systemic cleansing helps construct narratives about who “we” are as a nation. These paradigms themselves become sources of powerful authority.

#### A. *Laundering Analogy*

1. *Money Laundering*. — Legitimacy laundering—the cleansing process by which troubling legal doctrines, cases, and institutions gain unearned authority—often resembles the three-stage process of money laundering. Money laundering is widely understood to encompass three phases.<sup>33</sup> In the first phase, “placement,” illicit funds are distanced from

---

32. Mills, *supra* note 18, at 29 (internal quotation marks omitted) (quoting Adam Hochschild, *King Leopold’s Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* 295 (1998)).

33. See Scott Sultzer, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 Tenn. L. Rev. 143, 148 (1995) (explaining that money laundering “usually requires three steps: placement, layering, and integration”).

their criminal origins.<sup>34</sup> In the second phase, “layering,” complex transaction sequences obscure the money trail.<sup>35</sup> In the third phase, “integration,” the now-processed funds appear in legitimate financial channels, having undergone enough transformative transactions that they appear disconnected from their illicit origins, thus creating a facade of legitimacy that enables unimpeded access and spending.<sup>36</sup> The net result: Illegitimate capital with illicit origins is viewed, and spent, as if it were legitimate—at least until the illicit origins and processes of concealment come to light.<sup>37</sup>

This three-part process best describes the laundering of a case that stays in the canon: The case remains in view, taught and cited, while transactions strip context that would compromise its legal and sociological legitimacy. The work is the legal field’s collective enterprise, perhaps above all the work of those who shape what is taught. First, placement. Just as launderers distance illicit funds from their criminal origins, courts and scholars separate a case from its compromising history. For example, as described in greater detail in Part II, *Hans v. Louisiana*<sup>38</sup> announced its rule of state sovereign immunity in 1890, after the close of Reconstruction, as part of what Edward Purcell describes as the Court’s broader “abandonment of southern blacks.”<sup>39</sup> The Rehnquist Court lifted the immunity principle clear of that origin and returned it to circulation as a structural feature of federalism.<sup>40</sup> The case was never excised.<sup>41</sup> What was taken away was the racial and economic compromise from which the rule grew.

---

34. See The Bank Secrecy Act and the USA Patriot Act: Hearing Before the H. Comm. on Int’l Rels., 108th Cong. (2004) (statement of Herbert A. Biern, Senior Assoc. Dir., Div. of Banking Supervision & Regul., Fed. Rsv. Bd.), 2004 WL 2618794, at \*2 (describing the “placement” stage of money laundering as “the ‘placement’ of the unlawful proceeds into the financial system in an effort to avoid attracting the attention of law enforcement”).

35. See *United States v. Pizano*, 421 F.3d 707, 726–27 (8th Cir. 2005) (discussing “layering” and transactions “intended to appear legitimate” under the sophisticated-laundering enhancement in the U.S. Sentencing Guidelines (internal quotation marks omitted) (quoting U.S. Sent’g Guidelines Manual § 2S1.1, cmt. n.5(A) (U.S. Sent’g Comm’n 2003))); *United States v. Fish*, 731 F.3d 277, 281 (3d Cir. 2013) (describing layering); *United States v. Charon*, 442 F.3d 881, 891–92 (5th Cir. 2006) (same); *United States v. Miles*, 360 F.3d 472, 482 (5th Cir. 2004) (same).

36. Sultzer, *supra* note 33, at 151 (describing “integration”).

37. *Id.*

38. 134 U.S. 1 (1890).

39. Purcell, *supra* note 12, at 2035 n.499.

40. See *id.* at 1938 (“[T]he Rehnquist Court . . . seized on the potential in *Hans*’s elastic paratextual principle and transformed the decision into an ever more expansive justification for limiting federal power and carving out ever larger realms of state immunity.”); see also *infra* notes 384–389 and accompanying text.

41. See Purcell, *supra* note 12, at 1932 (explaining how the Rehnquist Court used *Hans* in its decisions “insulat[ing] the states from federal power” (citing *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 267–68 (1997))).

Second, layering. The detached case is applied and reapplied, each invocation citing the last rather than the circumstances of 1890, until a line of seemingly neutral authorities stands between the doctrine and its foundations. Each new sovereign immunity case adds another coat of ordinariness, and the further the rule travels from *Hans*'s origin, the more settled and apolitical it appears.

Third, integration. The case settles into the system as a shorthand for a neutral, technical rule. As readers will see in Part II, by the time the Rehnquist Court treated *Hans* as a settled presupposition of state sovereignty,<sup>42</sup> its origin had dropped from view.

Jurisdictional doctrines exemplify this endpoint: A historically contingent, politically charged rule comes to look like a timeless principle of federal jurisdiction. The case has become "clean" legitimacy capital, which courts can spend without the taint of its origins.

What makes this laundering process especially potent is its distributed responsibility across the entire legal ecosystem. While courts may well sometimes initiate the process through selective citation and historical erasure, the legal academy, casebook authors, and teachers of law perpetuate it through pedagogical choices that replicate these omissions. This pedagogy of erasure operates through both what is taught and what is omitted.

To be sure, a critical limitation of the money-laundering analogy is scienter. The crime of money laundering requires intent. The contention is not that the missing cases and missing context further described in Part II are all intentional. The omissions do follow a striking pattern, but that circumstantial evidence falls far short of a damning charge of intent. The widely shared responsibility—myself included—makes locating intent even more difficult.

At the same time, lesser modes of culpability are arguably present here. With notice of the pattern, with a pedagogical duty not to mislead our students, and with an ethical duty not to become complicit in perpetuating the moral crimes of this nation's past,<sup>43</sup> legal academics' failing to dedicate meaningful attention to cases' origins and contexts is, at a minimum, unreasonable. It may well be reckless. Moreover, when educators and scholars do possess knowledge of problematic contexts yet

---

42. See, e.g., *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (treating *Hans* as confirming a "presupposition of our constitutional structure" of state sovereign immunity); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); see also *infra* notes 384–386 and accompanying text.

43. For prior work elaborating on this theory of complicity, see generally Fred O. Smith, Jr., *On Time, (In)equality, and Death*, 120 Mich. L. Rev. 195 (2021) [hereinafter Smith, *On Time*] (exploring how legal discourse shapes cultural norms and consciousness surrounding the remains and burial sites of enslaved persons and other victims of mass atrocities); Fred O. Smith, Jr., *The Other Ordinary Persons*, 78 Wash. & Lee L. Rev. 1071 (2021) [hereinafter Smith, *Ordinary Persons*] (positing that legal scholarship should focus on marginalized voices and on the effects of judicial inclusion of those voices).

continue to present sanitized versions of doctrines, they engage in an even less defensible form of recklessness that perpetuates the laundering cycle. This complicity makes the legal academy an active participant in legitimacy laundering.

Further, a more basic response to the scienter objection is that while the crime of money laundering is perhaps the most visible part of the regime, it is not the only part that matters here. Anti-money-laundering law works, in part, through regulatory prophylaxis: The Bank Secrecy Act and the rules built on it impose reporting, recordkeeping, and customer-diligence duties on financial intermediaries before any wrongdoing and without regard to whether any particular person intends to launder anything.<sup>44</sup> This regime provides an apt analogy for the diagnostic prescriptions this Essay later develops in Part IV. They are prophylactic tools. Like anti-money-laundering rules, they reach the field's intermediaries—its casebook editors, presses, and Federal Courts professors—by virtue of their structural position rather than their culpability. The focus here, then, is how to recognize and prevent harmful laundering.

2. *Evidence Laundering.* — The concept of “evidence laundering” in criminal procedure contexts provides another apt analogy for understanding how jurisdictional doctrines shed their troubling origins through sequential citation. In criminal procedure, evidence laundering occurs when “one police officer makes a constitutional mistake when gathering evidence and then passes that evidence along to a second officer, who develops it further and then delivers it to prosecutors for use in a criminal case.”<sup>45</sup> “When courts admit the evidence based on the good faith of the second officer, the original constitutional taint disappears; the second law enforcement agent’s limited knowledge of the original violation effectively launders the evidence.”<sup>46</sup> Courts have explicitly condemned this practice, noting that “[p]olice officers cannot launder their prior unconstitutional behavior by presenting the fruits of it to a magistrate.”<sup>47</sup> In jurisdictional doctrine, a similar handoff process occurs through citation chains that progressively distance principles from their originating cases. While money laundering cleans a doctrine whose case remains on the page, evidence laundering carries a principle forward from a case that has dropped from the page. *Chae Chan Ping*, also developed in Part II, is a clear instance. The *Chinese Exclusion Case* has all but vanished

---

44. See Bank Secrecy Act, 31 U.S.C. § 5311 (describing the purpose of the money laundering statute, including facilitation of “risk assessments,” “prevent[ion]” of the funding of terrorism, and “protect[ion]” of the financial system). Thanks are due to Shayak Sarkar for pointing me in the direction of this statute and regime.

45. Kay L. Levine, Jenia I. Turner & Ronald F. Wright, Evidence Laundering in a Post-*Herring* World, 106 J. Crim. L. & Criminology 627, 629 (2016).

46. *Id.*

47. *Id.* at 642 n.80 (alteration in original) (quoting *State v. Hicks*, 707 P.2d 331, 333 (Ariz. Ct. App. 1985), *aff’d* on other grounds, 480 U.S. 321 (1987)).

from the Federal Courts canon, yet the near-plenary power over exclusion it announced survives by citation. By the time the principle reached *Trump v. Hawaii*,<sup>48</sup> the Court could sustain the exclusion of nationals from several Muslim-majority countries without citing *Chae Chan Ping* at all, instead invoking cases that had relied on it.<sup>49</sup> The originating opinion is gone, and the principle arrives in clean hands. The same pattern reveals itself in greater detail in Part II, which takes up three cases nearly absent from the Federal Courts canon even as the law they made remains in force. Alongside *Chae Chan Ping* stand *Lone Wolf v. Hitchcock*, which extended Congress's asserted plenary power to treaty-guaranteed tribal land and declared its exercise unreviewable,<sup>50</sup> and *Giles v. Harris*, which furnished the template for a federal judiciary that declines to remedy disenfranchisement and certain other seemingly intractable systemic harms.<sup>51</sup> In each, the principle traveled forward to courts that never had to answer for the case that produced it.

### B. *Collective Memory*

Collective cultural memory, as Jan Assmann explains, operates distinctly from history. It is "a collective concept for all knowledge that directs behavior and experience in the interactive framework of a society and one that obtains through generations in repeated societal practice and initiation."<sup>52</sup> Unlike formal history, which aspires to accuracy and complexity, collective memory operates through repetition and simplification, "crystalliz[ing]" in "figures of memory" such as monuments, rites, texts, and institutions that maintain group identity across generations.<sup>53</sup> This process of memory formation extends far beyond abstract theory into the concrete struggles over education and public space. Battles over primary school curricula, for example, reveal how fiercely groups compete to control dominant national narratives early in one's development. Since 2021, over 250 state bills have restricted teaching about race and inequality, with thousands of books banned from schools.<sup>54</sup>

---

48. See 585 U.S. 667, 702–03 (2018) (grounding "more than a century" of deference in *Fiallo* and *Mandel* while never citing *Chae Chan Ping*).

49. *Id.*; see, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Mezei*'s "fundamental sovereign attribute" formulation and string-citing a line of authority including the *Chinese Exclusion Case*); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (citing *Chae Chan Ping* for the "fundamental sovereign attribute" principle).

50. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

51. *Giles v. Harris*, 189 U.S. 475 (1903).

52. Assmann, *supra* note 17, at 126. For the pioneering work on the subject, see generally Halbwachs, *supra* note 17 (establishing the foundational account of memory as socially framed and sustained by groups).

53. Assmann, *supra* note 17, at 129.

54. Alicia Hawkins, Lawmakers Introduced 563 Anti-Critical Race Theory Measures in 2021 and 2022, UCLA L. (Apr. 6, 2023), <https://law.ucla.edu/news/lawmakers-introduced-563-anti-critical-race-theory-measures-2021-and-2022> [<https://perma.cc/B4SM-5UX2>]; Gloria Oladipo, US Public Schools Banned 10,000 Books in Most Recent Academic

These laws restrict any instruction that causes students to feel discomfort about historical actions by members of their race.<sup>55</sup> Florida, for instance, bars instruction that a student “must feel guilt, anguish, or other forms of psychological distress” for past actions of others sharing his or her race or sex.<sup>56</sup> Tennessee law bans any instruction stating that members of a sex or racial group are “inherently privileged.”<sup>57</sup> And a number of states now require professors to post syllabi online for monitoring of divisive concepts.<sup>58</sup> Consider also the monument wars. Since 2020, states have removed over two hundred Confederate monuments, prompting fierce backlash and executive orders.<sup>59</sup> This backlash led to the recent reinstallation of the Albert Pike statue in Washington, D.C.—the capital’s only outdoor monument to a Confederate general.<sup>60</sup> Toppled during the 2020 Black Lives Matter protests, the statue was quietly restored and reinstalled by the National Park Service in October 2025, justified through “federal responsibilities under historic preservation law” and “recent executive orders.”<sup>61</sup> The plaque at its base makes no mention of Pike’s Confederate service, instead celebrating him as an “author, poet, scholar, soldier, jurist, orator, philanthropist and philosopher”—a selective memory that, as Delegate Eleanor Holmes Norton observes, represents

---

Year, *The Guardian* (Sep. 23, 2024), <https://www.theguardian.com/us-news/2024/sep/23/pen-book-bans> [<https://perma.cc/HHT7-T7VM>].

55. See, e.g., Fla. Stat. § 1000.05 (2026); Okla. Stat. tit. 70, § 24-157 (2026); Tenn. Code Ann. § 49-6-1019 (2026).

56. Fla. Stat. § 1003.42(3)(f) (2026).

57. Tenn. Code Ann. § 49-6-1019 (2026).

58. See, e.g., Tennessee Higher Education Freedom of Expression and Transparency Act, 2023 Tenn. Pub. Acts ch. 268; see also David Weisenfeld, Does Requiring Professors to Post Their Syllabi Threaten Free Speech?, *Higher Ed. Dive* (Mar. 17, 2026), <https://www.highereddive.com/news/public-syllabus-policies-free-speech/814843/> [<https://perma.cc/7X9P-PJ2J>] (“Amid the changing climate in academia, at least seven states, including Texas, Florida and Ohio, have laws or university system policies requiring public colleges to make their syllabi public.”).

59. SPLC, *Whose Heritage? Public Symbols of the Confederacy* 8 (3d ed. 2022), <https://www.splcenter.org/wp-content/uploads/2024/12/whose-heritage-report-third-edition.pdf> [<https://perma.cc/4QM9-WJ7T>]; see also Exec. Order No. 14,253, 90 Fed. Reg. 14,563 (Mar. 27, 2025) (purporting “to restore Federal sites dedicated to history, including parks and museums, to solemn and uplifting public monuments that remind Americans of our extraordinary heritage, consistent progress toward becoming a more perfect Union, and unmatched record of advancing liberty, prosperity, and human flourishing”).

60. Anastasia Tsioulcas, A Confederate Statue Toppled in Washington, D.C., in 2020 Has Been Reinstalled, *NPR* (Oct. 27, 2025), <https://www.npr.org/2025/10/27/nx-s1-5587824/confederate-statue-albert-pike-trump> [<https://perma.cc/4ME7-TUS9>].

61. Press Release, Nat’l Park Serv., National Park Service to Restore and Reinstall Albert Pike Statue (Aug. 4, 2025), <https://www.nps.gov/nama/learn/news/pike.htm> [<https://perma.cc/U6HZ-GQQJ>] (stating that the restoration “aligns with federal responsibilities under historic preservation law as well as recent executive orders to beautify the nation’s capital and re-instate pre-existing statues” and that the statue “honors Pike’s leadership in Freemasonry,” rather than his Confederate service).

“an affront to the mostly Black and Brown residents of the District of Columbia.”<sup>62</sup>

Further from home, Odette Kelada and Dianne Jones have written about the role of erasure in representation of figures who colonized Australia. Calling this “memory laundering,”<sup>63</sup> they describe “a correlation between the laundering of *dirty money* and the morphing of historic figures through a sequence of erasures to enable them to emerge sanitised and *white-washed*.”<sup>64</sup> Through “commemorative practices from statues to place names[] and public symbolism,” they write, “these figures emerge as elevated and revered fixtures foundational to a sacralised national landscape and imaginary.”<sup>65</sup>

As philosopher Charles Mills observes, “memory is necessarily selective—out of the infinite sequence of events, some trivial, some momentous, we extract what we see as the crucial ones and organize them into an overall narrative.”<sup>66</sup> But in societies structured by domination, this selection process becomes a site of contestation: “[T]he socially recollecting ‘we’ will be divided, and the selection will be guided by different identities, with one group suppressing precisely what another wishes to commemorate.”<sup>67</sup> Thus there emerge “both official and counter-memory, with conflicting judgments about what is important in the past and what is unimportant, what happened and does matter, what happened and does not matter, and what did not happen at all.”<sup>68</sup> This systematic forgetting in the dominant narrative—what Mills refers to as “deliberate forgetting,”<sup>69</sup> “collective amnesia,”<sup>70</sup> and an “active deed”<sup>71</sup>—enables the kind of sanitization and contestation we see in monument wars.

Battles over physical monuments mirror struggles over constitutional monumentalism—a form of historical consciousness that exalts certain principles while, in some cases, systematically diminishing inconvenient

---

62. Tsioulcas, *supra* note 60 (internal quotation marks omitted) (quoting Press Release, Del. Eleanor Holmes Norton, Norton Statement on Return of Statue of Confederate General Albert Pike to Judiciary Square (Oct. 27, 2025), <https://norton.house.gov/media/press-releases/norton-statement-return-statue-confederate-general-albert-pike-judiciary> [<https://perma.cc/U487-9EUK>]).

63. Kelada & Jones, *supra* note 5, at 102 (internal quotation marks omitted).

64. Kelada and Jones contend that reverence in the public sphere to purveyors of horrors is akin to dirty money. *Id.*

65. *Id.*

66. Mills, *supra* note 18, at 29.

67. *Id.*

68. *Id.*

69. *Id.* (internal quotation marks omitted) (quoting Adam Hochschild, *King Leopold’s Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* 295 (1998)).

70. *Id.*

71. *Id.* (internal quotation marks omitted) (quoting Adam Hochschild, *King Leopold’s Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* 295 (1998)).

truths.<sup>72</sup> The Rehnquist Court's federalism jurisprudence, Norman Spaulding once argued, exemplified this "chillingly amnesic" approach, reviving robust antebellum federalism principles while suppressing the structural significance of the Civil War and Reconstruction Amendments.<sup>73</sup> Just as the Pike statue's plaque omits his Confederate service, the Court's monumentalist memory work treats the Reconstruction Amendments as minor adjustments rather than what Spaulding terms "counter-monuments"—texts written against the very antebellum principles the Court seeks to revive.<sup>74</sup>

On this account, constitutional interpretation itself functions as a system of both memorials and monuments, together shaping collective memory.<sup>75</sup> Certain cases stand as solemn memorials warning against paths not to be retaken—*Korematsu*,<sup>76</sup> *Buck v. Bell*,<sup>77</sup> *Dred Scott*<sup>78</sup>—while others like *Brown v. Board of Education*<sup>79</sup> serve as monuments to our highest ideals.

---

72. See Norman W. Spaulding, Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory, 103 Colum. L. Rev. 1992, 2001 (2003) ("Memory here confronts . . . the insatiable temptation for a nation to elide its grave misdeeds *in the very act of remembrance*. . . . [T]his temptation— . . . the logic or desire of monumental history—has dominated judicial interpretation of the Reconstruction Amendments.").

73. *Id.* at 2036.

74. *Id.* at 2001.

75. See Fred O. Smith, Jr., Constitutional Monument and Memorial, 79 Stan. L. Rev. (forthcoming 2027) (manuscript at 2–3) (on file with the *Columbia Law Review*) [hereinafter Smith, Constitutional Monument] (describing how identical historical traditions can be framed as monuments to which to aspire or memorials that warn); Fred O. Smith, Jr., *Younger and Older Abstention*, 123 Mich. L. Rev. 1449, 1517–18 (2025) [hereinafter Smith, *Younger Abstention*] (describing "constitutional narratives of *memorial* and *monument* in American jurisprudence").

76. *Korematsu v. United States*, 323 U.S. 214 (1944).

77. 274 U.S. 200 (1927).

78. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

79. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

“Constitutional memory,”<sup>80</sup> “collective constitutional memory,”<sup>81</sup> and “collective legal memory”<sup>82</sup> all describe shared American narratives that legal actors deploy.<sup>83</sup> The construction of constitutional memory proves particularly crucial in what Assmann calls “the concretion of identity”—how groups base “consciousness of unity and specificity upon this knowledge and derive[] formative and normative impulses from it.”<sup>84</sup> When the Rehnquist Court revived antebellum federalism while minimizing Reconstruction’s transformative impact, for example, it was actively shaping collective memory about the nature of American federalism.<sup>85</sup>

Federal Courts classrooms serve as but one vehicle for transmitting constitutional memory. The mythology surrounding this course—once nicknamed “Darkness at Noon,”<sup>86</sup> written about as historically “the very pinnacle of elite scholarship,”<sup>87</sup> and sometimes called “the hardest course . . . in law school”<sup>88</sup>—reinforces its role as one of the gatekeepers to constitutional memory in an American law school. Shrouded by this elite mythology, the course attracts future clerks and other top students who go on to play outsized roles in diffusing the narratives they learn—

---

80. See Justin Collings, *The Supreme Court and the Memory of Evil*, 71 *Stan. L. Rev.* 265, 268 (2019) (“Constitutional judges around the world have bolstered their decisions by frequent appeal to constitutional memory.”); Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 *Stan. L. Rev.* 1337, 1348 (1990) (utilizing the term “American constitutional memory” in a discussion of the American flag as a symbol of nationhood); Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 *UCLA L. Rev.* 1728, 1764 (2017) (discussing “constitutional memory” in the context of societal debates over constitutional culture).

81. See Richard A. Primus, *Judicial Power and Mobilizable History*, 65 *Md. L. Rev.* 171, 194 (2006) (“To the extent that our concerns and values differ from those of the victors in earlier constitutional struggles, limiting the collective constitutional memory to accounts of what was decided by those who prevailed might impede rather than foster a sense of continuity with the constitutional past.”).

82. See Kara W. Swanson, *Race and Selective Legal Memory: Reflections on *Invention of a Slave**, 120 *Colum. L. Rev.* 1077, 1081 (2020) (explaining that African American activists’ reflections on legal decisions have been excluded from the “collective legal memory”).

83. See Hershkoff & Smith, *supra* note 12, at 2168 (“Scholars have invoked the concepts of ‘constitutional memory,’ ‘collective constitutional memory,’ and ‘collective legal memory’ to describe shared American historical narratives that legal actors invoke.” (footnotes omitted)).

84. Assmann, *supra* note 17, at 128 (internal quotation marks omitted).

85. See Spaulding, *supra* note 72, at 2001 (“I canvas cases reflecting the Court’s new federalism jurisprudence and argue that the significance of the Reconstruction Amendments is systematically obscured by the Court’s method of constitutional interpretation.”).

86. Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What *The Dialogue* (Still) Has to Teach Us*, 69 *Duke L.J.* 1, 5 n.19 (2019).

87. Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 *Vand. L. Rev.* 993, 997 (1994) (paraphrasing a prominent D.C. Circuit judge).

88. Eric J. Segall, *Twenty Questions (Or the Hardest Course in Law School)*, 18 *Ga. St. U. L. Rev.* 497, 497 (2001).

especially graduates of elite law schools.<sup>89</sup> Beyond doctrine alone, these students learn which precedents to elevate, which memories to preserve, and which inconvenient truths to minimize.

### C. *Legitimacy as Capital*

In this model, legitimacy operates as a form of institutional capital that can be earned, spent, and accumulated over time. While legitimacy is sometimes cast in binary terms (asking whether a doctrine is simply legitimate or illegitimate), it is more helpful to conceptualize it as existing along a spectrum from minimal to ideal legitimacy, with institutions and doctrines occupying various points along this continuum.<sup>90</sup> The position on this spectrum matters: More legitimacy translates to more capital, while less legitimacy means less capital.<sup>91</sup> “Legitimacy . . . operates on a spectrum[,] . . . with doctrines and institutions moving closer to or further from the ideal based on various factors, including their perceived alignment with normative touchstones.”<sup>92</sup> Locating a doctrine on this continuum, and naming the forces that pull it toward one pole or the other, gives us a way to study how courts accumulate and preserve their authority.<sup>93</sup>

At first glance, it might seem counterintuitive to conceive of federal courts’ jurisdictional rules—many of which are cast as doctrines of jurisdictional restraint—as forms of capital or power. They are, after all, sometimes categorized as the opposite—as limitations on judicial authority.<sup>94</sup> But since the days of *Marbury*, opinions labeled as exercises of restraint have often been sources of power.<sup>95</sup> Indeed, doctrines of restraint

---

89. See Paul MacMahon, Proceduralism, Civil Justice, and American Legal Thought, 34 U. Pa. J. Int’l L. 545, 567–68 (2013) (“Only a minority of students take a Federal Courts class, but those who do go on to exert a disproportionate influence on the legal system.”).

90. Fred O. Smith, Jr., Abstention in the Time of Ferguson, 131 Harv. L. Rev. 2283, 2355 (2018) [hereinafter Smith, Abstention in the Time of Ferguson].

91. See Smith & O’Neill, *Forgotten Face*, supra note 2, at 94 (“Like financial capital, . . . legitimacy can be ‘earned[,]’ . . . ‘spent[,]’ . . . and even ‘laundered’ . . . . Understanding where doctrines’ or institutions’ legitimacy lies along the spectrum offers a framework for analyzing how courts build and maintain their authority.”).

92. *Id.*

93. See supra note 90 and accompanying text.

94. See, e.g., Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 206 (2d ed. 1986) [hereinafter Bickel, *The Least Dangerous Branch*] (“The passive devices are thus justified as lesser rational alternatives to an otherwise unavoidable principled judgment . . . . The devices are lesser ones because they work relatively no binding interference with the democratic process.”).

95. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 178 (1803) (purporting to lack jurisdiction, while claiming the power of judicial review); see also Fred O. Smith, Jr., *Undemocratic Restraint*, 70 Vand. L. Rev. 845, 850 (2017) [hereinafter Smith, *Undemocratic Restraint*] (describing how constitutionalizing previously prudential doctrines of restraint undermines democracy).

are power in at least three ways.<sup>96</sup> First, they can constitute horizontal power, substituting a court's judgment about causes of action and jurisdiction for Congress's own.<sup>97</sup> How else do we understand, say, qualified immunity in relation to the language "every person" in § 1983?<sup>98</sup> Second, they can constitute vertical power, sapping district courts of discretion. Doctrines of abstention that outpace historical equity fall into this category, as does *Trump v. CASA*, which recently limited district courts' ability to issue national injunctions, restraint that actually empowers the appellate court that creates (or announces) the restraint.<sup>99</sup> Third, it could be said that when an appellate court has mandatory jurisdiction and refuses to exercise it to stop an ongoing constitutional violation, it not only usurps Congress's role but also becomes complicit in the violation—akin to an officer who stands by when they have a duty to stop another officer from committing a violation.<sup>100</sup> As Gerald Gunther once put it on the

---

96. For earlier discussions about judicial restraint as power, see Fred O. Smith, Jr., *Judicial Bystanding*, 72 *UCLA L. Rev.* 1540, 1545–53 (2026) [hereinafter Smith, *Judicial Bystanding*] (describing “mechanisms through which jurisdictional declination manifests as judicial power”); Fred O. Smith, Jr., *Remediating Resistance*, 71 *Ala. L. Rev.* 641, 649–50 (2020) (theorizing that judicial restraint is a source, and not merely a preserver, of institutional capital).

97. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (“It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should.”); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *Yale L.J.* 71, 77 (1984) (“In either repealing or modifying the legislation, the court would be altering a legislative scheme because of disagreement with the social policy choices that the scheme manifests.”); see also *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989) (“Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred.”); *Willcox v. Consol. Gas Co. of N.Y.*, 212 U.S. 19, 40 (1909) (“When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . .” (citing *Cohens*, 19 U.S. (6 Wheat.) at 404)); *Chicot Cnty. v. Sherwood*, 148 U.S. 529, 534 (1893) (“[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.” (quoting *Hyde v. Stone*, 61 U.S. (20 How.) 170, 175 (1857))).

98. For a textualist critique of the gap between the statute's language and history on the one hand and its expansive restrictions on liability on the other, see William Baude, *Is Qualified Immunity Unlawful?*, 106 *Calif. L. Rev.* 45, 77–79 (2018) (arguing that qualified immunity is not an appropriate defense to § 1983 suits); see also Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 *Notre Dame L. Rev.* 2093, 2096–103 (2018) (observing that textualism and qualified immunity are, at minimum, in severe tension).

99. *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2548 (2025). For a compelling discussion of the reach and limits of the decision, see generally Mila Sohoni, *In CASA You Missed It*, 78 *Stan. L. Rev.* 1499 (2026).

100. Smith, *Judicial Bystanding*, *supra* note 96, at 1542.

pages of this law review, “a virulent variety of free-wheeling interventionism lies at the core of [some] devices of restraint.”<sup>101</sup>

With characteristic insight and clarity, Richard Fallon once provided a helpful typology of distinctive forms of legitimacy. Legal legitimacy—the acceptance of legal principles among informed communities of lawyers, judges, and scholars—represents a particularly potent form of capital.<sup>102</sup> This form of legitimacy determines a case’s degree of “authority”—its power when invoked.<sup>103</sup> A doctrine with high legal legitimacy becomes a powerful tool in legal argumentation; one with low legitimacy may be mentioned only to be distinguished or criticized.<sup>104</sup> The spectrum of legal legitimacy shapes the power of individual opinions, doctrines, and ultimately the judiciary itself.

For individual opinions or doctrines, one powerful form of authority at the high end of the legitimacy scale is canon, or what we might call here “lodestar” authority. As Jack Balkin and Sanford Levinson have observed, canonical cases become benchmarks against which subsequent decisions are measured; they set the standard that future courts are expected to meet.<sup>105</sup> These cases form the foundation of legal education and practice, appearing repeatedly in casebooks, treatises, and briefs.<sup>106</sup> For these cases, the term “precedential authority” does not fully capture their value. They stand for not just their holding, or even their reasoning, but a broad metaprinciple or narrative to which future cases are expected to conform.<sup>107</sup>

Below the canonical or lodestar cases, there exists a vast middle range of opinions that gain their power by virtue of being reliable precedents that can be cited for specific propositions. These workmanlike opinions

---

101. Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1, 25 (1964).

102. See Fallon, *Legitimacy and the Constitution*, supra note 26, at 1789–94 (offering an influential account of legal legitimacy).

103. See Frederick Schauer, *Authority and Authorities*, 94 Va. L. Rev. 1931, 1940–52 (2008) (discussing variables that make an authority merely persuasive versus those that make it binding).

104. *Id.* at 1940. For further elaboration as to the role of moral assessments in the accumulation of legitimacy, see *infra* section I.D.

105. See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 964, 997–1000 (1998) (discussing the degree to which *Brown* has taken on this quality); Cass R. Sunstein, *In Defense of Liberal Education*, 43 J. Legal Educ. 22, 23, 26 (1993) (same). Balkin and Levinson also discuss a kind of canonical narrative that reminisces “about a moment when the Constitution was properly understood, a benchmark from which later courts and politicians have repeatedly strayed.” Balkin & Levinson, *supra*, at 990.

106. For recent scholarship engaging in a deep analysis of textbooks to better understand erasure in legal academic fields, see generally Farr, *The Race Case*, supra note 22; see also Melissa Murray, *Legitimizing Illegitimacy in Constitutional Law*, 99 Wash. U. L. Rev. 2063, 2096–2100 (2022) (examining nonmarital children’s absence in constitutional law pedagogy).

107. See supra note 105 and accompanying text.

may lack the grandeur of canonical cases, but they possess sufficient legitimacy to serve as building blocks in legal arguments.<sup>108</sup> Moreover, at the bottom end of this range are what Curtis Bradley and Tara Grove have called “disfavored precedent[s].”<sup>109</sup> The Court has signaled that these cases would not have been decided the same way today or that their opinions should be interpreted narrowly.<sup>110</sup>

In the third band of the spectrum lie opinions that have lost all persuasive power—cases like *Buck v. Bell*, which upheld forced sterilization.<sup>111</sup> To borrow from scholars including Richard Primus and Jamal Greene, such cases have become “anti-canonical.”<sup>112</sup> They are memorials that serve as solemn cautionary tales of judicial error rather than as positive authority.<sup>113</sup>

Sociological legitimacy, by contrast, refers to broader public acceptance of legal institutions and their decisions.<sup>114</sup> As Barry Friedman has documented, public opinion shapes and constrains judicial

---

108. Many of these opinions may have what Fred Schauer called “content-independent” authority. That is, these opinions carry weight because of who announced them, not what they say. See Schauer, *supra* note 103, at 1935–36.

109. Curtis Bradley & Tara Leigh Grove, *Disfavored Supreme Court Precedent in the Lower Federal Courts*, 111 Va. L. Rev. 1353, 1356 (2025).

110. While cases like *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), fall into this range because of the Court’s methodological commitments, there is little reason to think that an opinion could not meet this fate by way of moral opprobrium.

111. 274 U.S. 200, 200–01, 207 (1927).

112. Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 Duke L.J. 243, 245 (1998); Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 475 (2011) [hereinafter Greene, *The Anticanon*]; see also Jack M. Balkin, “Wrong the Day It Was Decided”: *Lochner* and Constitutional Historicism, 85 B.U. L. Rev. 677, 681–82 (2005) (explaining that legal anti-canon exemplifies judicial failures in constitutional interpretation); Balkin & Levinson, *supra* note 105, at 1017–19 (“One offers a counter-canon . . . to rediscover cases and materials and parts of the constitutional text that have been neglected, that point in opposite directions, or that are embarrassing to currently fashionable academic theories created to explain the existing canon.”); Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy*, 18 Wm. & Mary Bill Rts. J. 327, 329 (2009).

113. See Smith, *Constitutional Monument*, *supra* note 75 (manuscript at 2–3) (developing the concept of “constitutional memorialism”).

114. See Fallon, *Legitimacy and the Constitution*, *supra* note 26, at 1795 (“When legitimacy is measured in sociological terms, a constitutional regime, governmental institution, or official decision possesses legitimacy in a strong sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.” (emphasis omitted)); see also Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & Pol. 239, 240–41 (2011) (“Today, there is an almost total consensus among American scholars that because the Court lacks direct control over either the ‘sword or the purse,’ sociological legitimacy is instead necessary for the Court’s proper function.” (quoting *The Federalist* No. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961))); Michael L. Wells, “Sociological Legitimacy” in *Supreme Court Opinions*, 64 Wash. & Lee L. Rev. 1011, 1014 (2007) (“Sociological legitimacy is achieved by an opinion that secures public acceptance of the Court’s rulings.”).

decisionmaking, creating a feedback loop between sociological legitimacy and judicial authority.<sup>115</sup> This form of legitimacy is indispensable because, as Alexander Hamilton famously observed in Federalist No. 78, the judiciary possesses neither the power of the sword nor the purse.<sup>116</sup> It depends entirely on public acceptance for the enforcement of its judgments. Without sociological legitimacy, courts become mere advisory bodies whose pronouncements carry no practical weight.

The Justices themselves recognize this dependency on legitimacy. Justice Sonia Sotomayor's question during oral argument in *Dobbs*—"Will this institution survive the stench that this creates in the public perception . . . ?"<sup>117</sup>—implicitly acknowledged what Alexander Hamilton long ago observed: Lacking force or will, the judiciary depends on public acceptance for its authority.<sup>118</sup> Chief Justice John Roberts expressed parallel concerns during oral argument in *Gill v. Whitford*, cautioning that if the Court regularly arbitrates partisan disputes, "that is going to cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country."<sup>119</sup>

Part of why sociological legitimacy proves so valuable is because it determines, in the aggregate, whom the public trusts in moments of institutional conflict. When different branches of government assert competing claims to authority, sociological legitimacy may determine which institution prevails. The branch with greater public trust can more effectively mobilize popular support for its position, while an institution lacking sociological legitimacy may find its pronouncements ignored or actively resisted. This dynamic extends beyond public opinion polls to actual compliance—even the most legally sound constitutional

---

115. See Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 367–68 (2009) ("Over time, through dialogue with the justices, the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values.").

116. The Federalist No. 78, at 522–23 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

117. Oral Argument at 13:40, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392), <https://www.c-span.org/program/public-affairs-event/dobbs-v-jackson-womens-health-organization-oral-argument/605396> (on file with the *Columbia Law Review*).

118. See The Federalist No. 78, *supra* note 116, at 522–23 ("[T]he judiciary is beyond comparison the weakest of the three departments of power; . . . it can never attack with success either of the other two [branches]; and that all possible care is requisite to enable it to defend itself against their attacks.").

119. Transcript of Oral Argument at 37–38, *Gill v. Whitford*, 585 U.S. 48 (2018) (No. 16-1161), 2017 WL 4882789. For discussion, see Linda Greenhouse, *Will Politics Tarnish the Supreme Court's Legitimacy?*, N.Y. Times (Oct. 26, 2017), <https://www.nytimes.com/2017/10/26/opinion/politics-supreme-court-legitimacy.html> (on file with the *Columbia Law Review*) (musing that a recent poll showing that more Americans believe the Court is too conservative could be the result of the "public[']s knowledge that Republicans control two branches of government and seem to be in a position to exert heavy influence on the third").

interpretation becomes meaningless if the President refuses to implement it or rebalances the Court's power in ways that shift that body's interpretations.<sup>120</sup>

The 1937 court-packing crisis illustrates how decisive that public standing can be. By the time President Franklin D. Roosevelt proposed enlarging the Court, its decisions striking down New Deal legislation had eroded public confidence in that institution.<sup>121</sup> In the weeks that followed, the plan found an increasingly receptive audience among the American public, with some data showing the public slightly favoring the plan.<sup>122</sup> The crisis eased only after the Court changed course. When Justice Owen Roberts supplied a fifth vote to uphold a minimum wage law in *West Coast Hotel Co. v. Parrish*,<sup>123</sup> the Court began sustaining the popular economic regulation it had previously struck down, and public trust in the institution revived as support for the packing plan fell away.<sup>124</sup> As Aaron Tang has argued, the episode suggests that the Court preserves its legitimacy in part by deferring to laws that burden powerful interests.<sup>125</sup> The lesson is not a simple one, however. Friedman locates the Court's survival less in the switch than in the public's attachment to an independent judiciary, and Tara Leigh Grove questions whether such strategic retreats can claim legal legitimacy at all, warning that a Court straining to read public sentiment may abandon sound judgments in the "wrong" cases.<sup>126</sup> What the episode

---

120. See Curtis A. Bradley & Neil S. Siegel, *The Supreme Court Under Threat: Early Lessons in Judicial Self-Protection*, 139 Harv. L. Rev. 1769, 1770 (2026) (noting that the judiciary does not have the power to enforce its judgments and relies on the enforcement of the executive).

121. See Leon Julius Biela, *How to Avoid Dictatorship: The Public Debate Over Franklin D. Roosevelt's Court-Packing Plan and Its International Context*, 49 J. Sup. Ct. Hist. 26, 29 (2024) (describing public backlash against the Supreme Court following decisions weakening or striking down the Agricultural Adjustment Act, pensions for railroad workers, regulations for the coal industry, and minimum wage).

122. See *id.* at 29–30 (documenting that anti-New Deal rulings turned workers and farmers against the Court and that support for the court expansion increased significantly between 1935 and 1937 such that “for a brief period in March the public was even leaning slightly in favor” of it); Laura Kalman, *FDR's Gambit: The Court Packing Fight and the Rise of Legal Liberalism* 92–94 (2022) (describing how support for the plan in winter 1937 increased in relation to earlier polling).

123. 300 U.S. 379, 400 (1937); see also Kalman, *supra* note 122, at 167–70 (“Roberts’s flip created a new majority in *Parrish* and enabled the [C]ourt to uphold a state minimum wage law . . .”).

124. See Biela, *supra* note 121, at 38 (“With this shift toward more labor-friendly jurisprudence the immediate reason for unions to support the [court-packing plan] was gone.”).

125. Aaron Tang, *Rethinking Political Power in Judicial Review*, 106 Calif. L. Rev. 1755, 1804 (2018) (arguing that the Court “seems to preserve its legitimacy when it defers to laws burdening powerful groups” and noting that support for the court-packing plan declined once the Court began upholding the popular laws it had previously struck down (emphasis omitted)).

126. See Barry Friedman, *The Politics of Judicial Review*, 84 Tex. L. Rev. 257, 324–25 & n.378 (2006) (“[P]opular sentiment for the independent judiciary likely saved [the Court]

does show, with unusual clarity, is that the Court's authority turned on its sociological legitimacy, a resource it had nearly exhausted and then rebuilt to survive.

These two forms of legitimacy do not exist in isolation but rather interact in complex ways. Elite legal actors—judges, lawyers, and scholars—often serve as intermediaries between legal institutions and the broader public. As political communication scholar John R. Zaller posited in his now-classic work, *The Nature and Origins of Mass Opinion*, information that filters through elites and mass media shapes public opinion.<sup>127</sup> If that theory has merit, legal elites' expressions of confidence in the judiciary may percolate into broader public understanding.<sup>128</sup> Conversely, when legal elites question the legitimacy of certain doctrines or decisions, public skepticism may follow. As such, high legal legitimacy can, over time, generate sociological legitimacy as legal principles become embedded in public consciousness through education, media coverage, and cultural transmission. Moreover, doctrines that lose sociological legitimacy may eventually see their legal legitimacy erode as well, as judges become reluctant to rely on principles that lack public support.

As with other forms of capital, the judiciary can accumulate legitimacy through consistent, principled decisionmaking,<sup>129</sup> spend it to achieve

---

in the face of the politicians' attack in 1937.”); Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 Harv. L. Rev. 2240, 2267–68 (2019) (reviewing Fallon, *Law and Legitimacy*, supra note 27). In an important critique, Grove raised powerful questions about the legitimacy and wisdom of courts ruling against their well-grounded legal judgment due to perceived public pressure. Grove argues that such strategic behavior raises serious concerns about legal legitimacy, noting that “at least under existing constitutional theory, there are strong reasons to doubt the legal legitimacy of ‘switches.’” Grove, supra, at 2267. Beyond constitutional theory, she identifies a crucial prudential problem: Justices may lack the competence to accurately gauge public sentiment, leading them to “vote against conscience in the ‘wrong’ cases.” Id. at 2268. Grove warns that a justice “may tend to overestimate the likelihood of political backlash, particularly if she is worried about the future of her institution,” potentially causing courts to retreat from legally sound but unpopular decisions. Id. She suggests this dynamic “could have led the Court to rule differently on one person, one vote; prayer in public school; desegregation remedies; and even *Brown v. Board of Education* itself.” Id. (footnotes omitted).

127. See John R. Zaller, *The Nature and Origins of Mass Opinion* 6–12 (1992) (describing the role of cues from partisan elite discourse, as filtered through media, in shaping political attitudes).

128. Consider, for example, the argument cautioning legal actors against publicly inquiring about the Court's sociological legitimacy, since the question might itself delegitimize the Court's position in society. See Kannon K. Shanmugam, Remarks at Duke Law School: The Legitimacy of the Supreme Court 3 (Sep. 16, 2024), [https://prod-i.a.dj.com/public/resources/documents/Kannon\\_Shanmugam\\_Duke\\_2024\\_speechfin.pdf](https://prod-i.a.dj.com/public/resources/documents/Kannon_Shanmugam_Duke_2024_speechfin.pdf) [<https://perma.cc/2K8M-KWV8>] (“I believe that attacks on the Court's legitimacy are dangerous—undermining public confidence in the Court and imperiling the rule of law. Finally, I believe that critics of the current Court would be better served engaging with the Court's work on the merits.”).

129. See Grove, supra note 126, at 2247 (“[Under Richard Fallon's definition of legal legitimacy], an interpretive approach is legally (and morally) legitimate as long as the Justice adopts a reliable and consistent method for dealing with historical evidence, makes

outcomes; and squander it by publicly departing from accepted norms. This conceptualization helps explain why courts often appear to husband their legitimacy carefully, avoiding decisions that might deplete this resource even when such decisions might be doctrinally justified.<sup>130</sup>

#### D. *The Moral Economy of Authority*

Normative appraisals play a central role in both legal and sociological legitimacy, with judgments about the moral justifiability of legal principles shaping perceptions of their authoritative power.<sup>131</sup> Moreover, our normative appraisals can, in turn, be influenced by material omissions.<sup>132</sup> What we collectively forget or never learn can shape normative judgments as powerfully as what we remember. When historical injustices, human consequences, and problematic contexts fade from view through systematic omission, what remains appears more benign, conferring enhanced legitimacy on both the doctrines or case and the institutions that deploy them.<sup>133</sup>

Comportment with the “republic’s prevailing moral intuitions” is an important dimension of a doctrine or institution’s legitimacy.<sup>134</sup> Consider *Brown v. Board of Education*,<sup>135</sup> which Pam Karlan has called “the most revered opinion in the Court’s history.”<sup>136</sup> Karlan has observed that “[a] constitutional theory that cannot produce the result reached in *Brown*—the condemnation of de jure Jim Crow—is a constitutional theory without traction.”<sup>137</sup> Indeed, Melissa Murray has argued that the Court has invoked

---

reasonable moral judgments, and applies her approach consistently and in good faith across a range of cases . . .” (citing Fallon, *Law and Legitimacy*, supra note 27, at 129–32, 142–48)).

130. See Smith, *Undemocratic Restraint*, supra note 95, at 885–88 (describing the Court’s strategic avoidance of highly charged cases).

131. See Cover, *Nomos and Narrative*, supra note 4, at 7 (“If there existed two legal orders with identical legal precepts and identical, predictable patterns of public force, they would nonetheless differ essentially in meaning if, in one of the orders, the precepts were universally venerated while in the other they were regarded by many as fundamentally unjust.”).

132. See Thomas, supra note 4, at 2703–04 (“Legal argument may thus be understood as ‘a struggle for the privilege of recounting the past. To the victor goes the right to infuse a constitutional clause, or a statute, or a series of prior decisions with the meaning that it will henceforth bear . . .’” (quoting David Luban, *Difference Made Legal: The Court and Dr. King*, 87 Mich. L. Rev. 2152, 2152 (1989))); see also Dudziak, supra note 4, at 26 (“When legal principle is detached from human person, American justice is measured through the march of principle.”).

133. Cf. Sinnar, supra note 2, at 384 (observing how these omissions also confer legitimacy on the underlying substantive practice).

134. Smith & O’Neill, *Forgotten Face*, supra note 2, at 94–95.

135. 347 U.S. 483 (1954).

136. Pamela S. Karlan, *What Can Brown® Do for You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 Duke L.J. 1049, 1049 (2009).

137. *Id.* at 1060.

that narrative as a means of connecting current cases to that “nobler past.”<sup>138</sup> At the other end of the spectrum:

[S]taggering human tragedy surely informs how people view anticanonical cases like *Korematsu* or *Dred Scott*. In the absence of its tragic context, one might unironically and uncritically cite *Korematsu* for the proposition that national security is a compelling governmental interest. One might cite *Dred Scott* for propositions on originalism, substantive due process, or diversity jurisdiction.<sup>139</sup>

As the following examples show, moral assessments affect the authority that is accorded to interpretive methodologies, doctrines, and cases.

1. *Methodology*. — In the late 1980s, the power of *Brown* as a legitimacy test for interpretive methodology became clear during the Robert Bork confirmation hearings. Originalism faced a crisis of authority. Although Judge Bork’s ascension to the Supreme Court was likely hindered by his role in firing the special prosecutor in the Watergate investigation during the infamous Saturday Night Massacre in the previous decade,<sup>140</sup> “one of the most potent weapons of Judge Bork’s adversaries was to claim that his originalist approach to constitutional interpretation would have forced the Court to approve of racially segregated schools in 1954.”<sup>141</sup> An “impressive array of academic authorities” had concluded that originalism could not produce *Brown*, with some greeting “this as proof that originalism is morally bankrupt.”<sup>142</sup> But Michael McConnell offered an important intervention, demonstrating through recovered memory of the 1870–1875 debates that “[l]arge majorities of both houses of Congress,

---

138. Melissa Murray, Making History, 133 Yale L.J. Forum 990, 992 (2024). Murray recently observed that an annual report by Chief Justice Roberts referred to post-*Brown* mass resistance whilst defending the Court’s independence. *Id.* Her resultant insight:

Without doubt, the Chief Justice’s invocation of the post-*Brown* history of Massive Resistance was an effort to bring the Supreme Court and its recent (and controversial) decisions in line with a nobler past. More particularly, it was an effort to elaborate and entrench the narratives that *Dobbs* was *Brown*’s juridical heir and the Roberts Court, like the Warren Court before it, possessed the backbone and moral clarity to stand firm in the face of public criticism of, and backlash against, its decisions. Further, the reference to this searing episode of Warren Court history likely was intended to dignify—and indemnify—the Roberts Court, while painting its critics as the descendants of the lawless rabble who, a generation ago, resisted calls for integration.

*Id.*

139. Smith & O’Neill, *Forgotten Face*, *supra* note 2, at 95 (footnote omitted).

140. Kenneth B. Noble, Bork Irked by Emphasis on His Role in Watergate, N.Y. Times, July 2, 1987, at A22, <https://www.nytimes.com/1987/07/02/us/bork-irked-by-emphasis-on-his-role-in-watergate.html> (on file with the *Columbia Law Review*).

141. Michael W. McConnell, The Originalist Case for *Brown v. Board of Education*, 19 Harv. J.L. & Pub. Pol’y 457, 457 (1996).

142. *Id.*

and even larger majorities of supporters of the Fourteenth Amendment, concluded that it forbade de jure segregation of public schools.”<sup>143</sup> This work aimed to show that originalism could align with the republic’s moral touchstone.<sup>144</sup> And if McConnell’s oft-cited claim is right—that “[s]uch is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited”<sup>145</sup>—this move served an important function beyond historical clarification. It was legitimacy repair. By recovering the memory of the Reconstruction Congresses, McConnell supplied originalism with the credential the Bork hearings had exposed as missing: *Brown*’s blessing.

2. *Doctrines.* — Courts and commentators deploy a doctrine’s problematic origins as grounds for its reconsideration or rejection. This strategy excavates troubling histories to undermine doctrinal authority, transforming historical genealogy into constitutional argument. Two examples illuminate this phenomenon: the persistent invocation of *Dred Scott*<sup>146</sup> to attack substantive due process,<sup>147</sup> and the Supreme Court’s use of Jim Crow origins to overturn precedent in *Ramos v. Louisiana*.<sup>148</sup>

a. *Substantive Due Process and the Shadow of Dred Scott.* — The invocation of *Dred Scott v. Sandford*<sup>149</sup> has long been a recurring weapon in attacks on substantive due process doctrine. Chief Justice Roberts deployed this strategy prominently in his *Obergefell v. Hodges* dissent, warning that “[t]he Court first applied substantive due process to strike

---

143. *Id.* at 458, 464.

144. See Jamal Greene, *Selling Originalism*, 97 *Geo. L.J.* 657, 678–81 (2009) (describing the relationship between perceptions of originalism and *Brown* in the 1980s); Peter J. Smith, *Originalism and Level of Generality*, 51 *Ga. L. Rev.* 485, 496–507 (2017) (describing how McConnell demonstrated that originalism could align with *Brown*); see also William Baude, *Is Originalism Our Law?*, 115 *Colum. L. Rev.* 2349, 2380 (2015) (“If *Brown* does repudiate the original meaning of the Fourteenth Amendment, that is a big problem for the positive-law theory of originalism.”); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 *Va. L. Rev.* 947, 952–53 (1995) [hereinafter McConnell, *Originalism and the Desegregation Decisions*] (offering an originalist defense of *Brown* and acknowledging that “[s]uch is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited”); cf. Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 *Tex. L. Rev.* 221, 292–303 (2023) (describing how justices invoke moral considerations in determining when to selectively deploy originalism).

145. McConnell, *Originalism and the Desegregation Decisions*, *supra* note 144, at 952.

146. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857) (enslaved party) (“[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory . . . and who had committed no offence against the laws, could hardly be . . . due process of law.”), superseded by constitutional amendment, U.S. Const. amend. XIV.

147. *Bert Co. v. Turk*, 298 A.3d 44, 87 n.16 (Pa. 2023) (Wecht, J., concurring) (“Critics of the doctrine often contend that the first ‘substantive due process’ decision was the infamous *Dred Scott v. Sandford* . . .”).

148. 140 S. Ct. 1390, 1394 (2020).

149. 60 U.S. 393.

down a statute in *Dred Scott v. Sandford*.<sup>150</sup> This genealogical claim links modern fundamental rights jurisprudence to the Court's most reviled decision, suggesting the doctrine carries within it the original sin of slavery's constitutionalization. Robert Bork distilled this logic to its essence: "Who says *Roe* must say . . . *Scott*."<sup>151</sup> Justice Antonin Scalia wielded Bork's logic strategically in *Casey*, asserting that *Dred Scott* was "very possibly the first application of substantive due process in the Supreme Court, the original precedent for *Lochner v. New York* and *Roe v. Wade*."<sup>152</sup> The implication is clear: Substantive due process bears an indelible stain from its origin in protecting slavery as property.

This genealogical attack continues, as illustrated by a recent exchange between Judges Kevin Newsom and Robin Rosenbaum in *Littlejohn v. School Board of Leon County*.<sup>153</sup> In that case, a middle school student's parents relied on substantive due process to argue that school officials violated their parental rights when they used the student's requested pronouns without informing the parents.<sup>154</sup> While the claim was rejected, the judges disagreed about the relative legitimacy of the doctrine itself. Judge Newsom contended that substantive due process "is tainted by ignominious precedents like *Dred Scott* and *Lochner*."<sup>155</sup> In contrast, Judge Rosenbaum vigorously challenged both the historical accuracy and the logical implications of this claim: "*Dred Scott* has little relation to our fundamental-rights jurisprudence," she argued, insisting that "the travesty of *Dred Scott* does not come from its reliance on substantive due process" but rather from "its holding that *people* are property."<sup>156</sup>

This debate reveals how the invocation of *Dred Scott* functions as a form of constitutional contamination argument. Put starkly, the strategy assumes that revealing a doctrine's morally problematic genesis undermines its current legitimacy.

b. *Unanimous Juries and the Ramos Template*. — The 2020 case of *Ramos v. Louisiana* illuminates how racial history can transform from

---

150. *Obergefell v. Hodges*, 576 U.S. 644, 695 (2015) (Roberts, C.J., dissenting).

151. Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 Const. Comment. 37, 38 (1993) (quoting Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 32 (1990)).

152. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (internal quotation marks omitted) (quoting David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888*, at 271 (1985)) ("Both *Dred Scott* and one line of the cases resisting the New Deal rested upon the concept of 'substantive due process' that the Court praises and employs today. Indeed, *Dred Scott* was 'very possibly the first application of substantive due process in the Supreme Court.'" (quoting David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888*, at 271 (1985))), overruled by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

153. 132 F.4th 1232 (11th Cir. 2025).

154. *Id.* at 1237.

155. *Id.* at 1280 (Newsom, J., concurring).

156. *Id.* at 1275–76 (Rosenbaum, J., concurring).

background context to dispositive constitutional fact. The *Ramos* Court confronted Louisiana's nonunanimous jury rule—a facially neutral provision with unmistakably racist origins.<sup>157</sup> At issue was whether to overturn *Apodaca v. Oregon*, a 1972 decision that had permitted states to convict criminal defendants with nonunanimous jury verdicts, even though federal courts required unanimity.<sup>158</sup> For nearly fifty years, *Apodaca* had allowed Louisiana and Oregon to maintain their nonunanimous jury rules.<sup>159</sup>

Ramos made the rule's Jim Crow provenance constitutionally salient. Justice Neil Gorsuch emphasized that *Apodaca*'s precedential value was diminished because “the plurality spent almost no time grappling with . . . the racist origins of Louisiana's and Oregon's laws.”<sup>160</sup> Justice Sotomayor declared that “the racially biased origins of the Louisiana and Oregon laws uniquely matter here.”<sup>161</sup> Justice Brett Kavanaugh was most explicit: The rule's Jim Crow origins “should matter and should count heavily in favor of overruling.”<sup>162</sup>

In an article exploring Justice Clarence Thomas's parallel move—tying reproductive autonomy to eugenics—Melissa Murray powerfully argued that part of what distinguished *Ramos* was both its elevation of racial origins to a decisive “tipping point” in the stare decisis calculus<sup>163</sup> and its “roadmap” for how historical racial taint can be used opportunistically.<sup>164</sup> Her argument is a reminder to treat with care any simplistic claim that a doctrine's origins, standing alone, should doom that doctrine.

This Essay's claim is narrower: Moral evaluations of historical origins are an important—though not exclusive—component of how legal elites and the public assess authority. But that descriptive point carries a normative edge. Because such evaluations are material to how legitimacy is conferred, omitting origins withholds what an audience would weigh, and in that sense misleads. And it misleads in ways that perpetuate harmful

---

157. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020).

158. *Apodaca v. Oregon*, 406 U.S. 404, 405–06 (1972); *Ramos*, 140 S. Ct. at 1399–402.

159. See *Ramos*, 140 S. Ct. at 1397.

160. *Id.* at 1405.

161. *Id.* at 1408 (Sotomayor, J., concurring in part).

162. *Id.* at 1418 (Kavanaugh, J., concurring in part).

163. Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 Harv. L. Rev. 2025, 2086 (2021) [hereinafter Murray, *Race-ing Roe*] (“In this regard, race was not the reason for overruling *Apodaca*, but rather the tipping point militating in favor of overruling.”).

164. *Id.* at 2030. Murray powerfully illustrates how this blueprint was used in amicus briefs and beyond to assert a tenuous connection between abortion rights and eugenics as a means of undermining the right that protected Americans from the government forcing them to give birth against their will. *Id.* at 2085–86. She observes similarity between the reasoning and Justice Thomas's concurrence in *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1784–85 (2019) (Thomas, J., concurring), which made this link. Murray, *Race-ing Roe*, supra note 163, at 2083–84, 2086–87.

false narratives, uncritically carry forward harmful practices, and undermine both the dignity and memory of past victims of subjugation.<sup>165</sup> The wrong of laundering, on this account, is that concealment forecloses the very evaluation legitimacy depends upon.

3. *Cases.* — The transformation of *Prigg v. Pennsylvania*<sup>166</sup> from precedent to pariah further illustrates how shifts in moral consciousness can drain a case of its legitimacy capital. At the center of *Prigg* was Margaret Morgan, a Black woman who had lived as free in Pennsylvania with her husband and children.<sup>167</sup> Edward Prigg and three other men kidnapped Morgan and her children. Prigg had obtained a warrant for Morgan's arrest, but Pennsylvania law required more before a person could be carried from the state as a fugitive: a certificate of removal.<sup>168</sup> When the magistrate who had issued the warrant refused to take further cognizance of the case, Prigg transported Morgan and her children to Maryland without one.<sup>169</sup> Among them was a child born in Pennsylvania more than a year after Morgan's alleged escape, a child who was a fugitive from nowhere.<sup>170</sup> After Prigg's conviction under Pennsylvania's anti-kidnapping statute, the Supreme Court reversed, holding the state law unconstitutional as conflicting with the Fugitive Slave Clause and Act.<sup>171</sup>

---

165. See Smith & O'Neill, *Forgotten Face*, supra note 2, at 100–03 (describing how omissions invite a doctrine's uncritical sprawl). See generally infra Part IV.

166. 41 U.S. (16 Pet.) 539 (1842).

167. See H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 *Law & Hist. Rev.* 1133, 1156 (2012) [hereinafter Baker, *Fugitive Slave Clause*]; Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 *Rutgers L.J.* 605, 610–11 (1993) [hereinafter Finkelman, *Sorting Out Prigg*]; Jeffery M. Schmitt, *Courts, Backlash, and Social Change: Learning from the History of Prigg v. Pennsylvania*, 123 *Penn St. L. Rev.* 103, 114 & n.60 (2018) (citing H. Robert Baker, *Prigg v. Pennsylvania: Slavery, the Supreme Court, and the Ambivalent Constitution* 102–03 (2012)) (noting that Morgan, though never formally manumitted, had lived openly in freedom with her free husband for roughly five years); see also Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 *Sup. Ct. Rev.* 247, 248–49, 251 [hereinafter Finkelman, *Story Telling*] (describing Story's *Prigg* opinion as “intellectually dishonest, based on inaccurate historical analysis,” and observing that Story “shaped both constitutional history and the ‘facts’ to compel the result he wrote”).

168. *Prigg*, 41 U.S. (16 Pet.) at 556–57 (recounting the warrant issued by Justice of the Peace Thomas Henderson and executed by a constable); id. at 550–54 (quoting the certificate-of-removal procedure of Pennsylvania's personal liberty law of 1826); Schmitt, supra note 167, at 114–15 (recounting Prigg's indictment for removing Morgan without a certificate of removal from a court of record); Baker, *Fugitive Slave Clause*, supra note 167, at 1156 (same).

169. *Prigg*, 41 U.S. (16 Pet.) at 557 (stating that Henderson “refused to take further cognizance of said case” and that Prigg thereafter removed Morgan and her children to Maryland without complying with the 1826 act); Baker, *Fugitive Slave Clause*, supra note 167, at 1156–57.

170. *Prigg*, 41 U.S. (16 Pet.) at 539, 557.

171. Id. at 558, 625–26; see also Schmitt, supra note 167, at 119–20 (explaining how the Supreme Court held “that the states could not interfere with fugitive rendition through the guise of anti-kidnapping legislation passed under a state's police powers”).

The Court rejected the argument that state law was compatible with federal law, even though it created a mechanism for enslaved people to be captured and trafficked out of state. The Court reasoned that Congress could not compel state officials to enforce federal law, and that one could not presume state courts would follow federal law when enforcing such mechanisms.<sup>172</sup> While today state courts cannot obstruct or discriminate against federal claims, the core principle—that states cannot be compelled to enforce federal law—still echoes through American federalism.<sup>173</sup>

For over a century after the Civil War, *Prigg* circulated as ordinary precedent, stripped of its horrific consequences. In the landmark case *Monell v. Department of Social Services*, for example, in which the Court allowed suits against cities under § 1983 but rejected respondeat superior liability, the Court extensively cited *Prigg* as foundational authority on federal–state relations.<sup>174</sup> The majority opinion invoked *Prigg* repeatedly to explain why Congress in 1871 believed it lacked power to impose duties on state instrumentalities. To be sure, the Court acknowledged the legal issue at stake in *Prigg*—whether Pennsylvania’s ban on kidnapping suspected slaves without adequate process violated the Fugitive Slave Clause.<sup>175</sup> At the same time, however, the opinion treated *Prigg* as doctrinally equivalent to any other federalism precedent, with no acknowledgment of Margaret Morgan or her children’s fate, or the horror the case inflicted on men and women in states like Pennsylvania who, because of the opinion, could be trafficked to other states for forced labor.

The pattern recurred and hardened in *Jett v. Dallas Independent School District*.<sup>176</sup> While *Monell* had invoked *Prigg* largely to reconstruct the 1871 Congress’s beliefs about its own powers, the *Jett* plurality treated *Prigg*’s holding as live authority, describing *Prigg*’s “complementary holding that federal duties could not be imposed on state instrumentalities by rendering them vicariously liable for the violations of others” as direct

---

172. *Prigg*, 41 U.S. (16 Pet.) at 615–16.

173. See, e.g., *Murphy v. NCAA*, 584 U.S. 453, 473–74 (2018) (holding that Congress may not ban state legislatures from regulating unless the federal government has itself regulated on that subject matter); *Printz v. United States*, 521 U.S. 898, 926 (1997) (holding that the federal government may not require state and local executive officials to carry out federal objectives). A rare example of a post-1990 case treating *Prigg* as an ordinary authority is Justice Thomas’s dissenting opinion in *Haywood v. Drown*, 556 U.S. 729, 764 n.8 (2009) (Thomas, J., dissenting) (citing to secondary sources and to *Prigg* to observe contestation about Congress’s ability to require state courts to entertain cases).

174. 436 U.S. 658, 675, 690–91 (1978) (unpacking how legislators would have understood *Prigg* in drafting § 1983).

175. *Id.* at 672.

176. 491 U.S. 701 (1989). Part II of Justice O’Connor’s opinion—which contains the discussion of *Prigg* and the Reconstruction-era constitutional backdrop—was joined only by Chief Justice Rehnquist and Justices White and Kennedy and thus states the views of a four-Justice plurality. *Id.* at 705, 728–29. Justice Scalia concurred in the judgment but expressly declined to join any portion of the opinion resting on legislative history. See *id.* at 738–39 (Scalia, J., concurring in part and concurring in the judgment).

support for the rule against respondeat superior and extending that principle from § 1983 to § 1981.<sup>177</sup> Indeed, the plurality singled *Prigg* out as “perhaps the most famous and most oft cited of this line of cases”—celebrating the citation’s pedigree in the same breath it omitted any mention of Margaret Morgan or the family the decision consigned to slavery.<sup>178</sup> The fact that the no-vicarious-liability rule still governs municipal civil rights litigation today<sup>179</sup> only underscores the point: A doctrine of continuing consequence rests, in part, on authority the Court could invoke by name while erasing what the name once meant.

By the 1990s, however, *Prigg*’s legitimacy began to erode. Critical scholarship, particularly work by Paul Finkelman, restored Margaret Morgan to the narrative.<sup>180</sup> Finkelman detailed how Morgan’s parents had lived as free, how Margaret married Jerry Morgan, a free Black man, and how their children were born in Pennsylvania. He described the kidnapping, the family’s sale to slave traders, and their disappearance into Southern slavery.<sup>181</sup> This scholarship made it impossible to discuss *Prigg* without confronting its human cost.

The transformation is evident in how *Prigg* disappeared from Supreme Court jurisprudence. While *Monell* in 1978 had cited *Prigg* extensively as foundational precedent for understanding Congress’s views

---

177. *Id.* at 729 (plurality opinion). The plurality relied on the constitutional backdrop of *Prigg*, together with *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), and *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871), to conclude that Congress did not silently impose vicarious liability on municipalities under section 1 of the 1866 Act, just as *Monell* had held it did not under section 1 of the 1871 Act. *Id.* at 728–29; *Monell*, 436 U.S. at 691.

178. See *Jett*, 491 U.S. at 728 (plurality opinion). Even in dissent, *Prigg* was treated purely as a federalism precedent. Justice Brennan invoked the decision to distinguish the Sherman Amendment’s compelled prevention of third-party violence from a municipality’s liability for its own discriminatory act, without reference to the decision’s human toll. See *id.* at 752 (Brennan, J., dissenting).

179. *Connick v. Thompson*, 563 U.S. 51, 60–62 (2011) (reaffirming that a local government may not be held liable for its omissions absent a showing of a final policymaker’s deliberate indifference).

180. See Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* 46–69 (1981) (offering a human-centered exposition of *Prigg*); Finkelman, *Sorting Out Prigg*, *supra* note 167, at 609–12 (laying out in detail the facts of *Prigg*); Finkelman, *Story Telling*, *supra* note 167, at 252–56 (same); see also Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 *Cornell L. Rev.* 1086, 1122–24 (1993) (demonstrating the effect of Finkelman’s writing on *Prigg*’s legitimacy); James Boyd White, *Constructing a Constitution: “Original Intention” in the Slave Cases*, 47 *Md. L. Rev.* 239, 242, 252, 270 (1987) (same). For an earlier analysis, see William M. Wiecek, *Slavery and Abolition Before the United States Supreme Court, 1820–1860*, 65 *J. Am. Hist.* 34, 44 (1978) (explaining the erosion of *Prigg*’s legitimacy prior to Finkelman’s work). But see Mark V. Tushnet, *Translation as Argument*, 32 *Wm. & Mary L. Rev.* 105, 117–18 (1990) (reviewing James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (1990)) (speculating whether Justice Story might have believed that an opinion keeping the nation together might have provided the best prospect for the end of the institution of chattel slavery in the United States).

181. Finkelman, *Sorting out Prigg*, *supra* note 167, at 610–12.

on federal power over state instrumentalities, later cases addressing municipal liability avoid the case entirely. *Bryan County v. Brown*<sup>182</sup> and *Connick v. Thompson*<sup>183</sup> both address municipal liability under § 1983, but neither mentions *Prigg*.

Today, when *Prigg* does appear in federal jurisprudence, it comes with warning labels. In a recent concurrence, Judge Rosenbaum rightly called the opinion “notorious.”<sup>184</sup> This is a description befitting of a case that Jamal Greene persuasively argued in 2011 is “the worst Supreme Court decision ever issued”<sup>185</sup> and that Sandy Levinson called “worse than *Dred Scott*.”<sup>186</sup> This transformation occurred through exposure. Once Margaret Morgan’s story became inseparable from the case’s doctrine, *Prigg* could no longer circulate as neutral precedent. The case demonstrates how legitimacy depends on selective memory and how restoration of erased contexts can destroy that legitimacy.

To be sure, *Prigg*’s disappearance from view while its doctrines remain good law is itself a form of legitimacy laundering. As observed, anticommandeering and other principles from *Prigg* thrive in modern jurisprudence,<sup>187</sup> even as we lose sight of their origins in a case about returning enslaved people to bondage. This is why it is important to be attentive to both cases cleansed of context *and* doctrines stripped of originating cases. The point here is not that *Prigg*’s decline in authority deserves applause but rather that moral assessments shape the gravitational pull of methodologies, doctrines, and cases themselves.

#### E. Narratives, Identity, and Legitimacy

An additional observation about the relationship between collective memory and legitimacy: Memory not only helps legal actors and the public assess the compatibility of doctrines and institutions with dominant norms and values, but it also helps construct and calcify those norms. Memory

---

182. Bd. of Cnty. Comm’rs v. Brown, 520 U.S. 397, 400 (1997) (“[I]n enacting § 1983, Congress did not intend to impose liability on a municipality unless *deliberate* action attributable to the municipality itself is the ‘moving force’ behind the plaintiff’s deprivation of federal rights.” (quoting *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 694 (1978))).

183. *Connick*, 563 U.S. at 60 (“Plaintiffs who seek to impose liability on local governments under § 1983 must prove that ‘action pursuant to official municipal policy’ caused their injury.” (quoting *Monell*, 436 U.S. at 691)).

184. *United States v. Leahy*, 152 F.4th 1356, 1383 (11th Cir. 2025) (Rosenbaum, J., concurring).

185. Greene, *The Anticanon*, *supra* note 112, at 428.

186. Sanford Levinson, *Is Dred Scott Really the Worst Opinion of All Time? Why Prigg Is Worse Than Dred Scott (but Is Likely to Stay Out of the “Anticanon”)*, 125 Harv. L. Rev. Forum 23, 23 (2011), [https://harvardlawreview.org/wp-content/uploads/2012/01/forvol125\\_levinson\\_greene.pdf](https://harvardlawreview.org/wp-content/uploads/2012/01/forvol125_levinson_greene.pdf) [<https://perma.cc/L6T7-SLAF>].

187. See *supra* notes 172–174 and accompanying text.

helps in the production of dominant historical narratives,<sup>188</sup> a resource that determines which claims carry presumptive legitimacy and which appear as departures from American tradition.<sup>189</sup> This capital operates through a simple but powerful logic. What aligns with national character appears natural and right; what contradicts it seems aberrant and wrong; what falls outside it remains invisible, lacking even the power to be rejected. As Mary Dudziak observes, the erasure of certain people and experiences from law “aids in the forward-looking construction of ideas about the nature of American justice,” making systemic injustices appear as isolated aberrations rather than central features of American life.<sup>190</sup>

This selective memory occurs through what Reva Siegel has described as “memory games” shaping constitutional interpretation by determining what requires justification and what appears self-evident.<sup>191</sup> When courts treat certain traditions as deeply rooted in national identity while ignoring others, they create hierarchies of constitutional legitimacy. For example, women’s equality appears as modern innovation requiring special justification; male authority seems timelessly American, requiring none.<sup>192</sup>

---

188. Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About “the Woman Question” in the Discourse of Sex Discrimination*, in *History, Memory, and the Law* 131, 134 (Austin Sarat & Thomas R. Kearns eds., 2002) (“[N]arratives about the genesis of social arrangements help constitute social groups as collective subjects and, in so doing, construct their commonsense intuitions about the actual and proper organization of social relations. Scholars call this narrative matrix ‘collective’ or ‘social’ memory.”).

189. See Cover, *Nomos and Narrative*, supra note 4, at 5 (“In this normative world, law and narrative are inseparably related.”); Steven D. Fraade, *Nomos and Narrative Before Nomos and Narrative*, 17 *Yale J.L. & Humans* 81, 95 (2005) (“[T]his dynamic interrelation is one in which law does not simply ‘demand’ its supporting narrative of ‘history and destiny,’ but becomes itself a narrative of possible worlds of ends and means . . .”).

190. Dudziak, supra note 4, at 26; see also Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 *UCLA L. Rev.* 1747, 1774–75 (2000) (describing how courts’ selective, euphemistic historical narratives can erase the sources of past subordination and portray a present in which its effects have dissipated, rendering remedial measures legally suspect).

191. See Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—And Some Pathways for Resistance*, 101 *Tex. L. Rev.* 1127, 1200–04 (2023) (“[T]aking back the Constitution from the Court . . . requires us to begin to reconstruct and to relocate our own understanding of our history and traditions—to remember the many ways that the Constitution emanates from the people themselves.”).

192. See *id.* at 1200–03 (arguing that originalist constitutional memory renders some traditions self-evidently rooted while forcing others to justify their place and urging recovery of “excluded voices” such as nineteenth-century women’s demands for “self-ownership” to “democratize the sources of constitutional memory” (internal quotation marks omitted) (first quoting James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 *Ala. L. Rev.* 675, 681 (2016); then quoting Siegel, *The Politics of Constitutional Memory*, supra note 19, at 38)); Siegel, *The Politics of Constitutional Memory*, supra note 19, at 23–27 (arguing that constitutional memory’s systematic silences legitimate authority by generating an appearance of consent to contested status relations and observing that two centuries of women’s constitutional challenges to male authority left no trace in constitutional law).

Communities with connections to dominant national narratives can invoke their history as self-evident proof of constitutional violation. Communities lacking such capital must first prove they belong in the constitutional story at all. They must argue not just that they have been wronged but that their wrongs matter to American identity.

Consistent with this view, Elizabeth Reese has described ways that national identity and racist narratives othered citizens of Native Nations. In her powerful article, *The Other American Law*, she observes the degree to which the laws of Native Nations have been pushed to the periphery and othered in American legal education.<sup>193</sup> This, she explains, is an output of historical narratives steeped in a national identity of exclusion: “The United States has both created its identity and justified its existence in contrast to the Indians it has displaced. The primitive, lawless, or vanishing Indian was a fictitious but politically necessary construct.”<sup>194</sup> By defining tribal law as “other” rather than American, the nation denies Indigenous people a role in the national identity that would make their claims presumptively legitimate.

\* \* \*

Part II will elaborate further about narratives that selective erasures perpetuate in Federal Courts. Part I has aimed to explain the model. If legitimacy functions as capital that can be accumulated, spent, and lost, then courts and legal institutions have been operating with borrowed authority—legitimacy extracted from sanitized narratives rather than earned through principled action. The question facing contemporary jurisdictional doctrine is what narratives can survive such an accounting, or which instead depend on perpetual amnesia about the human costs it has enabled.

## II. A PEDAGOGY OF ERASURE

Having theorized how erasures of collective memory can confer unearned legitimacy, this Part documents its manifestation in Federal Courts pedagogy. Consistent with the model described in Part I, the teaching of federal jurisdiction employs two distinct but complementary laundering mechanisms. First, through complete omission of cases, the field engages in the equivalent of evidence laundering: The originating decision drops out of the books while the principle it produced circulates onward, passed from one court and casebook to the next with clean hands and no acknowledgment of its source. Second, through progressive decontextualization, the field engages in the equivalent of money

---

193. See Reese, *supra* note 23, at 560 (“[T]ribal governments undoubtedly remain outside of our shared conception of American law, largely absent from seminal works on the subject, Restatements, and our law school classrooms.” (footnotes omitted)).

194. *Id.* at 560–61.

laundering: The case itself stays in plain view, taught and cited, while the troubling history around it is stripped away until the holding reads as neutral and can be spent as clean legitimacy capital.

#### A. *The Missing Cases*

Methodologically, this Part analyzes both the inclusion and exclusion of significant cases across contemporary Federal Courts casebooks in legal education. The conclusions are informed by an examination of sixty-nine editions across ten major Federal Courts casebook series, from Felix Frankfurter and Wilber Katz's 1931 *Cases on Federal Jurisdiction and Procedure*, Frankfurter and Harry Shulman's 1937 edition, and Charles McCormick and James Chadbourne's 1946 *Cases and Materials on Federal Courts*, to Henry Hart and Herbert Wechsler's foundational 1953 textbook and more recent publications. For each edition, this examination tracked the inclusion, exclusion, and treatment of significant political question cases, paying particular attention to how cases are presented—whether as principal cases with extended excerpts, multiparagraph discussions, note cases, brief mentions in footnotes, or references within other cases' discussions.

This analysis revealed that in the most recent editions of the ten Federal Courts textbooks in use when this analysis was conducted,<sup>195</sup> the

---

195. This study was conducted between September and December 2025. These ten books comprise, to the author's knowledge, all casebooks in print in a current edition and marketed for the Federal Courts course by the principal law school casebook publishers at the time of this study: West Academic/Foundation Press, Aspen Publishing, and Carolina Academic Press. See Federal Courts, West Academic, <https://www.westacademic.com/casebooks-category/subject/Federal-Courts> [<https://perma.cc/KE9J-L9JM>] (last visited Aug. 24, 2026); Federal Jurisdiction, Aspen Publishing, <https://aspenpublishing.com/collections/study-aids-federal-jurisdiction> [<https://perma.cc/8CA8-DTBP>] (last visited Aug. 24, 2026); Federal Courts, Carolina Academic Press, <https://cap-press.com/ms/70/Courts-Law> (on file with the *Columbia Law Review*) (last visited Aug. 20, 2026). The analysis reflects the following editions and does not reflect new editions since the analysis was completed: William Baude, Jack Goldsmith, John F. Manning, James E. Pfander & Amanda L. Tyler, Hart and Wechsler's *The Federal Courts and the Federal System* (8th ed. 2025); Martin H. Redish, Suzanna Sherry, James E. Pfander, Steven S. Gensler & Adam N. Steinman, *Federal Courts: Cases, Comments and Questions* (9th ed. 2021); Charles Alan Wright, John B. Oakley & Debra Lyn Bassett, *Federal Courts: Cases and Materials* (15th ed. 2023); Curtis A. Bradley, Tara L. Grove, John C. Jeffries, Jr. & Peter W. Low, *Low and Jeffries' Federal Courts and the Law of Federal-State Relations* (10th ed. 2022); Chemerinsky et al., *supra* note 12; Jonathan R. Siegel, *Federal Courts: Cases and Materials* (3d ed. 2023); Donald L. Doernberg, Evan Tsen Lee & Celestine Richards McConville, *Federal Courts: A Contemporary Approach* (6th ed. 2021); Michael L. Wells, William P. Marshall & Gene R. Nichol, *Cases and Materials on Federal Courts* (5th ed. 2024); Arthur D. Hellman, David R. Stras, Ryan W. Scott, F. Andrew Hessick & Derek T. Muller, *Federal Courts: Cases and Materials on Judicial Federalism and the Lawyering Process* (5th ed. 2022); Michael Finch, Caprice L. Roberts & Michael P. Allen, *Federal Courts: Context, Cases, and Problems* (4th ed. 2024). In the interest of full disclosure, the author of this Essay is a coauthor of *Federal Courts in Context*, which was designed, in part, to address these omissions. See Chemerinsky et al., *supra* note 12.

most frequently centered cases were: *Rucho v. Common Cause*<sup>196</sup>; *Nixon v. United States*<sup>197</sup>; and *Baker v. Carr*.<sup>198</sup> These cases appeared in all ten editions, with *Rucho* and *Nixon* most often appearing as full-case excerpts. Those three cases were closely followed in frequency by *Zivotofsky v. Clinton*,<sup>199</sup> which appeared in eight of the ten Federal Courts textbooks in current use.<sup>200</sup> In three of those books, the case appeared as a full-case excerpt.<sup>201</sup> In the way of frequency, *Zivotofsky* was matched by *Luther v. Borden*,<sup>202</sup> which was also referenced in eight of the ten.<sup>203</sup> Although the case did not appear as a full-case excerpt in any of these books, it received multiparagraph length discussions in four.<sup>204</sup> Finally, *Powell v. McCormack*<sup>205</sup> appeared in seven of the ten: as a full-length excerpt in one text and receiving multiparagraph discussion in two others.<sup>206</sup>

At least as important as which cases do appear, however, are those that do not. There is a pattern of systematic exclusion of cases in which jurisdictional mechanisms have functioned to enable, rather than constrain, institutional power—particularly power deployed along axes of race, nationality, and Indigenous status. Notably, many of these exclusions specifically involve judicial responses to episodes characterized by extreme ethnonationalism, colonization, and subordination. Three such cases, in particular, were central to the trajectory of American democracy: *Chae Chan Ping v. United States*, *Lone Wolf v. Hitchcock*, and *Giles v. Harris*. In some instances, these cases historically appeared in leading textbooks and, over time, faded from view.

This Essay focuses on these three cases because each was central to the development of federal jurisdictional doctrine and each carried

---

196. 139 S. Ct. 2484, 2506–07 (2019) (holding that partisan gerrymandering is a nonjusticiable political question).

197. 506 U.S. 224, 226 (1993) (holding that the question of whether the Senate’s trial procedures for judicial impeachment hearings violated the Impeachment Trial Clause was nonjusticiable).

198. 369 U.S. 186, 209 (1962) (holding that federal courts may assess whether legislative reapportionment runs afoul of the Equal Protection Clause’s one-person one-vote requirement).

199. 566 U.S. 189, 191 (2012) (holding that federal courts may consider the constitutionality and enforceability of a federal statute granting a right to parents to have Israel listed as the country of birth for American children born in Jerusalem).

200. See *infra* Appendix A, Table A-2.

201. *Infra* Appendix A, Table A-2.

202. 48 U.S. (7 How.) 1, 40 (1849) (holding that federal courts were jurisdictionally ill-suited to decide which competing government in Rhode Island comported with the Constitution’s republican-form-of-government mandate).

203. See *infra* Appendix A, Table A-2.

204. *Infra* Appendix A, Table A-2.

205. 395 U.S. 486, 489 (1969) (holding that federal courts could permissibly determine whether the House of Representatives ran afoul of the Elections Clause when, on a majority vote, it prohibited a member from voting based on criteria beyond those outlined in the Constitution).

206. See *infra* Appendix A, Table A-2.

consequences far beyond its parties, shaping the Nation's law of race, nationality, and Indigenous sovereignty. The set is illustrative; other decisions could be added to it. A shared pattern places these three in the laundering framework and separates them from cases that have simply dated or fallen out of fashion. In each, the jurisdictional principle the case produced remains operative and is still taught, even as the case itself, together with the racial subordination from which the principle grew, has been excised. A doctrine that outlives the memory of its own dirty origins is a signature of laundering.

1. *Chae Chan Ping v. United States*. — A particularly telling example of this omission is the landmark case *Chae Chan Ping*, often called the *Chinese Exclusion Case*.<sup>207</sup> At the center of the case were two congressional acts. The Chinese Exclusion Act of 1882, for the first time, barred migration into the United States on account of one's nationality.<sup>208</sup> The Scott Act of 1888 then made it unlawful for Chinese individuals with legal documentation to return to the United States if they visited their homeland.<sup>209</sup> These laws clashed with the Burlingame–Seward Treaty of 1868, which allowed citizens of both the United States and China to freely travel, immigrate, and reside in either country.<sup>210</sup> And among the many affected by this breach was Chae Chan Ping, a laborer of Chinese descent who had lived in the United States for twelve years and obtained a certificate of return from federal authorities before temporarily leaving the country.<sup>211</sup> During Chae Chan Ping's absence, Congress invalidated his certificate of return by passing the Scott Act.<sup>212</sup> In turn, he filed a federal lawsuit.

When Chae Chan Ping's case reached the Supreme Court, the Justices explicitly declined to intervene on the grounds that the decision should be left to political actors. According to the court, if the politically accountable actors “consider[] the presence of foreigners of a different race in this country . . . to be dangerous to its peace and security, their

---

207. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889).

208. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943); see also Erika Lee, *At America's Gates: Chinese Immigration During the Exclusion Era, 1882–1943*, at 224 (2003) (“Just as they were the first to be excluded on the basis of their race and class, Chinese immigrants also became the first group to be classified as deportable.”).

209. Scott Act, ch. 1064, 25 Stat. 504 (1888) (repealed 1943).

210. *The Columbia Documentary History of the Asian American Experience* 32 (Franklin Odo ed., 2002).

211. Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 Case W. Rsv. L. Rev. 1183, 1186–87 (2018).

212. *Id.* at 1187 (“Though his certificate was valid when issued, and valid when he left Hong Kong, while the steamship *Belgic* was making its way across the Pacific Ocean, President Grover Cleveland signed the Scott Act of 1888 on October 1, which canceled all previously issued ‘certificates of return.’” (quoting Scott Act § 2, 25 Stat. at 504)).

exclusion is not to be stayed” by judicial intervention.<sup>213</sup> The Court emphasized that such determinations are “conclusive upon the judiciary,” and if a foreign government is “dissatisfied with this action[,] it can make complaint to the executive head of our government” because “there lies its only remedy.”<sup>214</sup> Moreover, the Court reasoned, “[i]f there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject.”<sup>215</sup>

The Supreme Court’s refusal to intervene in the enforcement of the Chinese Exclusion Act was accompanied by racist and dehumanizing language. In the opinion, Justice Stephen Field characterized Chinese immigration as approaching “the character of an Oriental invasion” and described it as “a menace to our civilization.”<sup>216</sup> The Court perpetuated harmful stereotypes by claiming Chinese immigrants “remained strangers in the land.”<sup>217</sup> Further inflammatory language asserted that Chinese laborers had a “baneful effect upon the material interests of the State, and upon public morals,” while dismissing their communities as settlements “without any interest in our country or its institutions.”<sup>218</sup> The Court framed the exclusion as necessary protection against “vast hordes” of people “crowding in upon us” and justifying discrimination based on the supposed danger posed by “foreigners of a different race in this country, who will not assimilate with us.”<sup>219</sup>

This judicial abdication occurred within a broader context of economic anxiety, racial animus, and political calculation. Following the California Gold Rush and amid post-Civil War economic decline, Chinese immigrants became scapegoats for depressed wages as labor unions and politicians stoked fears that they posed a threat to American workers and society.<sup>220</sup> The close 1876 election transformed Chinese immigration into

---

213. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889); see also Gabriel J. Chin, *Chae Chan Ping* and *Fong Yue Ting*: The Origins of Plenary Power, in *Immigration Stories* 7, 7–29 (David A. Martin & Peter H. Schuck eds., 2005) (recounting how the Court upheld openly race-based Chinese exclusion and registration laws and observing that the resultant plenary power doctrine has had a lasting impact in American immigration law).

214. *Chae Chan Ping*, 130 U.S. at 606.

215. *Id.* at 609.

216. *Id.* at 595.

217. *Id.*

218. *Id.* at 595–96.

219. *Id.* at 606.

220. See Ana M. Rodriguez, *Mother of Exiles: Hospitality & Comprehensive Immigration Reform*, 43 *J. Nat’l Ass’n Admin. L. Judiciary* 232, 248–49, 254 (2023) (“Anti-Chinese sentiment portrayed Chinese foreigners as a threat to public morality; Chinese women were depicted as prostitutes, and a sexual threat to white Americans.” (citing Pooja R. Dadhania, *Deporting Undesirable Women*, 9 *U.C. Irvine L. Rev.* 53, 59 (2018))). See generally Dominique Marangoni-Simonsen, *A Forgotten History: How the Asian American Workforce Cultivated Monterey County’s Agricultural Industry, Despite National Anti-Asian*

a national issue, as both parties sought Western votes.<sup>221</sup> Newspapers inflamed tensions with headlines like “The Chinese invasion! They are Coming, 900,000 STRONG!”<sup>222</sup>

During this period, mobs perpetrated violent racial purges against Chinese immigrants.<sup>223</sup> For example, on September 2, 1885, in Rock Springs, Wyoming Territory, approximately 150 white coal miners employed by a Union Pacific Railroad coal company launched a violent attack against their Chinese coworkers.<sup>224</sup> The assault resulted in the deaths of twenty-eight Chinese laborers and left fifteen others wounded.<sup>225</sup> The mob then proceeded to forcibly expel several hundred more Chinese residents from the town, effectively driving out the entire Chinese community.<sup>226</sup> Mirroring this horror, in late May 1887, Hells Canyon, Oregon, became the site of the deadliest attack against Chinese immigrants in American history. There, a group of Chinese gold miners were brutally murdered along the Snake River.<sup>227</sup>

Despite the profound constitutional implications of the *Chinese Exclusion Case* and the devastating historical context in which it occurred, this landmark ruling—which explicitly invoked political actors’ discretion to justify judicial abstention in the face of racially motivated exclusionary laws<sup>228</sup>—remains conspicuously absent from mainstream Federal Courts pedagogy.<sup>229</sup> What could account for this? A tempting answer might be that it is not a political question case but instead one about Congress’s plenary power over immigration. This explanation falters, however, on several counts.

---

Rhetoric, 27 Hastings Env’t L.J. 229, 229–37 (2021) (examining anti-Chinese and anti-Japanese exclusionary laws from 1880 to 1940).

221. Andrew Gyory, Closing the Gate: Race, Politics, and the Chinese Exclusion Act 76–91 (1998) (chronicling how the 1876 presidential campaign nationalized the Chinese immigration issue, with both parties adopting anti-Chinese platform planks to court Pacific Coast votes).

222. Meirong Liu, Navoun Lee, Zhanjie Si & Olivia Aquino, The History of Anti-Asian Racism and Violence in the United States, in *Addressing Anti-Asian Racism with Social Work, Advocacy, and Action* 3, 11 (Meirong Liu & Keith T. Liu eds., 2024).

223. Robert L. Tsai, Racial Purges, 118 Mich. L. Rev. 1127, 1127–30 (2020) (reviewing Beth Lew-Williams, *The Chinese Must Go: Violence, Exclusion, and the Making of the Alien in America* (2018)).

224. Craig Storti, Incident at Bitter Creek: The Story of the Rock Springs Chinese Massacre 108–21 (1991).

225. Id.

226. Id.

227. R. Gregory Nokes, Massacred for Gold: The Chinese in Hells Canyon 17–25 (2009); see also R. Gregory Nokes, “A Most Daring Outrage”: Murders at Chinese Massacre Cove, 1887, 107 Or. Hist. Q. 326, 326–27 (2006) (describing the gang of seven horse thieves who killed the miners in “one or more attacks” and noting that no one was ever held accountable).

228. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889).

229. See *infra* Appendix A, Table A-2.

First, the *Chinese Exclusion Case* exemplifies core aspects of the political question doctrine under both its major theoretical formulations. Our contemporary understanding of the political question doctrine is an amalgamation of two sets of views. These range from narrow, constitutionally anchored conceptions to broader, discretionary approaches that recognize the role of judicial prudence in shaping when courts should decline to decide legal matters. The constitutionally rooted view, often associated with the writing of Melville Fuller Weston<sup>230</sup> and later, more famously, Herbert Wechsler, holds that political questions arise solely from constitutional delegation of decisionmaking authority to other branches.<sup>231</sup> Under this view, courts must merely interpret whether the Constitution has “committed to another agency of government the autonomous determination of the issue raised.”<sup>232</sup> In contrast, the prudential view, championed by Maurice Finkelstein and later, more famously, by Alexander Bickel, contends that the doctrine reflects courts’ discretionary judgments about when adjudication would be “impolitic or inexpedient.”<sup>233</sup> Bickel famously characterized the doctrine as stemming from the Court’s “sense of lack of capacity” and the “inner vulnerability . . . of an institution which is electorally irresponsible.”<sup>234</sup> While this latter more flexible, prudential conception of the doctrine continues to face considerable scholarly scrutiny, there is little doubt it continues to play a role in the way that federal courts deploy the doctrine.

The reasoning in the *Chinese Exclusion Case* reflects various interpretations of the political question doctrine, aligning with the Fuller–Wechsler conception while incorporating elements of Bickelian prudential considerations. Consistent with the first conception, the Court ruled that the issue was constitutionally committed to the politically accountable branches of government.<sup>235</sup> Consistent with the Bickelian approach, the Court opined that other branches are “alone competent” to make the determination at issue.<sup>236</sup> Moreover, when the Court distinguished the Chinese Exclusion Act from the Alien and Sedition Acts, it observed that the earlier act was passed during a time of great “political excitement” and “zeal.”<sup>237</sup> Setting aside the questionable implication that the Chinese Exclusion Act was not passed during a moment of “political

---

230. See Melville Fuller Weston, *Political Questions*, 38 Harv. L. Rev. 296, 333 (1925).

231. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 7–8 (1959).

232. *Id.*

233. Maurice Finkelstein, *Judicial Self-Limitation*, 37 Harv. L. Rev. 338, 344 (1924) (“[The political question doctrine] applies to all those matters of which the court . . . will be of the opinion that it is impolitic or inexpedient to take jurisdiction.”); Bickel, *The Least Dangerous Branch*, *supra* note 94, at 125–26.

234. Bickel, *The Least Dangerous Branch*, *supra* note 94, at 184.

235. See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 608–09 (1889).

236. *Id.* at 609.

237. *Id.* at 610–11.

excitement,” this language shows that the sociopolitical conditions of the Act’s passage played a role in the Court’s reasoning.<sup>238</sup>

Second, the 1953 first edition of Hart and Wechsler—the book widely understood as spurring the field of Federal Courts as we know it today<sup>239</sup>—included the case as an example of a political question case. In its section on political questions, the textbook described the case this way:

In reply to a claim that an act of Congress restricting Chinese immigration was in violation of treaties between the United States and the Emperor of China, the Court held that it was within the power of Congress to abrogate the treaties. “The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts.” 130 U.S. at 602.<sup>240</sup>

If it was a political question case when the field was founded, it is not apparent why it would not be understood as one when it was excluded from discussions of the political question doctrine in the second edition of Hart and Wechsler in 1973,<sup>241</sup> or why it would not be considered one today.

Third, outside of textbooks, contemporary leading scholars do sometimes conceptualize the case as a political question doctrine case. A recent article by Curtis Bradley and Eric Posner cited the case for the proposition that “[t]hroughout the nineteenth and early twentieth centuries, the Supreme Court declared a variety of issues to be political and thus inappropriate for judicial resolution.”<sup>242</sup> John Harrison’s genealogy of what he terms the political question “doctrines” supplies a subtler but revealing connection. Harrison mentions *Chae Chan Ping* only in passing: Tracing the nineteenth-century treaty cases that Justice William Brennan invoked in *Baker v. Carr* as involving “discretion demonstrably committed to the executive or legislature,” he observes that one of them, *Taylor v. Morton*, “anticipat[ed]” *Chae Chan Ping*’s treatment of conflicts between treaties and later statutes.<sup>243</sup> When *Chae Chan Ping* declared that “[t]he question whether our government is justified in disregarding its

---

238. Id. at 610.

239. See *infra* note 391 and accompanying text.

240. Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* 194 (1st ed. 1953).

241. Paul M. Bator, Paul J. Mishkin, David L. Shapiro & Herbert Wechsler, *Hart and Wechsler’s The Federal Courts and the Federal System* 350 (2d ed. 1973).

242. Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 *Stan. L. Rev.* 1031, 1036 (2023). For an excellent discussion of the political question’s broader relationship to international law and ways that political question discussions often overlook historical foreign affairs cases, see generally Curtis A. Bradley, *The Political Question Doctrine and International Law*, 91 *Geo. Wash. L. Rev.* 1555 (2023). This could help explain the exclusion of *Chae Chan Ping* from the contemporary pattern.

243. John Harrison, *The Political Question Doctrines*, 67 *Am. U. L. Rev.* 457, 497–98, 500–01 & n.225 (2017) (internal quotation marks omitted) (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

engagements with another nation is not one for the determination of the courts,” in the very passage the first edition of Hart and Wechsler excerpted,<sup>244</sup> it did so by expressly adopting Justice Benjamin Curtis’s reasoning in *Taylor v. Morton*.<sup>245</sup> *Baker* would later canonize that same reasoning as the political question doctrine, citing *Taylor* while never mentioning *Chae Chan Ping*.<sup>246</sup> The issue is not, then, that the case is alien to the political question tradition; its reasoning is woven into the tradition’s canonical sources. The issue is that this connection has not found its way into our field’s dominant pedagogy.

Nor can the case’s absence be attributed to its lack of importance. In contemporary times, despite *Chae Chan Ping* being understood as an “embarrassment” and a “relic from a different era,”<sup>247</sup> scholars have observed that the logic of the opinion continues to inform the judiciary’s approach to political branches’ decisions on immigration.<sup>248</sup> Indeed, the case commonly is the first case taught in immigration courses in American law schools today.<sup>249</sup>

One could argue that if the case is taught in immigration courses, it need not be taught in Federal Courts or Constitutional Law. But this argument misses how a single case can belong to several canons at once, taught in different courses for different purposes. *Lujan v. Defenders of Wildlife*<sup>250</sup> anchors the standing materials in Administrative Law casebooks<sup>251</sup> while remaining a fixture of Federal Courts books.<sup>252</sup> The *Chinese Exclusion Case* is, at bottom, both a case about entry into the United

---

244. Hart & Wechsler, *supra* note 240, at 194.

245. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 602 (1889) (“This subject was fully considered by Mr. Justice Curtis, while sitting at the circuit, in *Taylor v. Morton* . . .”).

246. *Baker v. Carr*, 369 U.S. 186, 211 & n.32 (citing *Taylor*, 67 U.S. 481); see also Harrison, *supra* note 243, at 501 n.225.

247. Louis Henkin, The Constitution and United States Sovereignty: A Century of *Chinese Exclusion* and Its Progeny, 100 Harv. L. Rev. 853, 862–63 (1987) (internal quotation marks omitted) (quoting *Reid v. Covert*, 354 U.S. 1, 12 (1957)).

248. See Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs, 81 Tex. L. Rev. 1, 72, 136–37, 141–46, 224–25, 250–56 (2002) (engaging in a close reading of *Chae Chan Ping* and noting other cases citing to or relying on *Chae Chan Ping* to find issues related to immigration); Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 Yale L.J. 545, 550–60 (1990) (tracing the origins of plenary power in immigration to *Chae Chan Ping*).

249. Jan C. Ting, “Other Than a Chinaman”: How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration, 4 Temp. Pol. & C.R. L. Rev. 301, 304 (1995).

250. 504 U.S. 555 (1992).

251. See, e.g., Jerry L. Mashaw, Peter M. Shane, Aditya Bamzai, Emily S. Bremer, Margaret B. Kwoka & Nicholas R. Parrillo, *Administrative Law: The American Public Law System, Cases and Materials* 1163 (9th ed. 2025); Richard Seamon, *Administrative Law: A Context and Practice Casebook* 646 (3d ed. 2026).

252. See, e.g., Baude et al., *supra* note 195, at 166; Chemerinsky et al., *supra* note 12, at 182.

States and a case about the scope of federal jurisdiction. The immigration curriculum teaches the first.<sup>253</sup> The Federal Courts canon appears to have largely dropped the second, even though a holding about the limits of federal judicial power is Federal Courts material wherever it arose.

Others have followed the citation chains that follow *Chae Chan Ping*, including its silent role in the Supreme Court's holding in *Trump v. Hawaii*<sup>254</sup> that President Trump could ban individuals from a list of primarily majority-Muslim countries after he promised "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."<sup>255</sup> That case does not cite the *Chinese Exclusion Case*, but the precedents it invokes rest on it.<sup>256</sup> To be sure, the doctrinal differences between the two cases are real. *Chae Chan Ping* upheld Congress's exclusion of Chinese laborers as an exercise of inherent sovereign power beyond the reach of the courts,<sup>257</sup> while *Trump v. Hawaii* sustained a presidential proclamation issued under authority Congress had delegated by statute.<sup>258</sup> *Chae Chan Ping* deals with Congress, while *Trump* deals with presidential power. Yet the deference the Court extended in 2018 descends by an unbroken citation chain from the principle *Chae Chan Ping* announced, that the political branches' power to exclude noncitizens is, in the phrase the cases keep repeating, "largely immune from judicial control."<sup>259</sup> In a particularly compelling discussion of this erasure, Robert Chang has shown how the DOJ's briefs defending the ban quoted that very formulation and then appended a "(citation omitted)" parenthetical, dropping the visible trail that runs from *Fiallo*

---

253. See Ting, *supra* note 249, at 304.

254. 585 U.S. 667 (2018).

255. Jessica Taylor, Trump Calls for 'Total and Complete Shutdown of Muslims Entering' U.S., NPR (Dec. 7, 2015), <https://www.npr.org/2015/12/07/458836388/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s> [https://perma.cc/6FMU-7CAF] (internal quotation marks omitted) (quoting then-presidential candidate Donald J. Trump); see also Chang, *supra* note 211, at 1185–86, 1213–19; Avidan Y. Cover, Quieting the Court: Lessons From *The Muslim Ban Case*, 23 J. Gender Race & Just. 1, 64–66 (2020); Shalini Bhargava Ray, Plenary Power and Animus in Immigration Law, 80 Ohio St. L.J. 13, 28, 34–38 (2019).

256. See Ahilan T. Arulanantham, Reversing Racist Precedent, 112 Geo. L.J. 439, 494–97 (2024) (tracing the authorities on which *Trump v. Hawaii* rested its deference, including *Fiallo v. Bell*, *Mathews v. Diaz*, and *Kleindienst v. Mandel*, to *Chae Chan Ping* and *Fong Yue Ting*); *supra* notes 48–50 and accompanying text; see Arulanantham, *supra* at 484 (sharing Gabriel Chin's observation that "even decisions that do not cite them must rely on cases that do" (quoting Gabriel J. Chin, Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration, 46 UCLA L. Rev. 1, 15 (1998))).

257. See *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 603–06, 609 (1889) (describing the exclusion power as "an incident of sovereignty" whose exercise, when the political departments deem foreigners dangerous to peace and security, "is conclusive upon the judiciary").

258. *Trump v. Hawaii*, 585 U.S. at 683–86 (upholding Proclamation No. 9645 as a lawful exercise of the President's "broad discretion" under 8 U.S.C. § 1182(f)).

259. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)) (citing to a string of cases that deploy this phrase).

through *Mezei* back to the *Chinese Exclusion Case*.<sup>260</sup> The laundering required only a parenthetical. Moreover, the statute carries the same inheritance. The delegation the President invoked traces to the Immigration Act of 1907, whose nearly identical language let Theodore Roosevelt bar Japanese and Korean laborers.<sup>261</sup> Whether the power is called sovereign or statutory, and whether it rests with Congress or the President, the posture of nonreview descends from the same case.<sup>262</sup>

Examining the spectrum of highly consequential political question cases—particularly those that gave rise to foundational doctrines still operative today—enables us to evaluate both the doctrine’s normative value and its legitimacy. This examination may also prompt us to reconceptualize how the doctrine could or should function differently. Even if the doctrine ultimately remains intact after we weigh competing values, there is merit in ensuring these considerations inform the analysis. This approach helps prevent treating the doctrine as fixed or inevitable.

2. *Lone Wolf v. Hitchcock*. — The pattern of exclusion extends beyond immigration to include cases concerning Native American rights, sovereignty, and self-governance, as illustrated by *Lone Wolf v. Hitchcock*.<sup>263</sup> That case centered on treaty rights of several Native Nations: Kiowa, Comanche, and Apache.<sup>264</sup> The treaty at issue emerged in the years just after the Civil War. In the fall of 1867, representatives of the United States gathered with several Plains tribes at Medicine Lodge Creek in Kansas to forge new agreements.<sup>265</sup> These treaties offered a bargained-for exchange; the tribes would receive guarantees of peace and safeguards against encroachment by white settlers if they agreed to maintain peaceful relations and relocate to designated reservations in the western portion of Indian Territory.<sup>266</sup> The United States Senate formally approved and ratified these treaties in July 1868.<sup>267</sup>

---

260. For the Justice Department’s “(citation omitted)” parenthetical and the statutory lineage described in the text, see Chang, *supra* note 211, at 1215–20.

261. See *id.* at 1219–21 (explaining how the legacy of *Chae Chan Ping* and subsequent cases influenced and provided the foundation for modern immigration legislation and *Trump v. Hawaii*).

262. See *Trump v. Hawaii*, 585 U.S. at 683–85 (sustaining the proclamation under 8 U.S.C. § 1182(f)).

263. 187 U.S. 553 (1903).

264. *Id.* at 560.

265. See Treaty Between the United States of America and the Cheyenne and Arapahoe Tribes of Indians, Oct. 28, 1867, 15 Stat. 593; Treaty Between the United States of America and the Kiowa and Comanche Tribes of Indians, Oct. 21, 1867, 15 Stat. 581; Treaty Between the United States of America and the Kiowa, Comanche, and Apache Tribes of Indians, Oct. 21, 1867, 15 Stat. 589 [hereinafter collectively cited as “Medicine Lodge Treaty”].

266. Carla F. Fredericks & Jesse D. Heibel, *Standing Rock, the Sioux Treaties, and the Limits of the Supremacy Clause*, 89 U. Colo. L. Rev. 477, 490 n.73 (2018).

267. See Medicine Lodge Treaty, *supra* note 265.

By the end of the nineteenth century, however, United States policy goals for Native Nations decidedly clashed with these earlier agreements in at least two major ways. The first was the policy of allotment, implemented primarily through the General Allotment Act of 1887 (“the Dawes Act”).<sup>268</sup> The policy involved breaking up communally held tribal reservations into individual parcels or “allotments” of land—typically 40, 80, or 160 acres—that were assigned to individual Native American family heads and others.<sup>269</sup> Second, and relatedly, the federal government wished to open “surplus” Native land to non-Native settlement. These policies proved devastating.<sup>270</sup> They resulted in a “checkerboard” pattern of land ownership on reservations.<sup>271</sup> More importantly, Native-held lands fell from 138 million acres before allotment to 48 million acres by 1934, when the policy was officially ended by the Indian Reorganization Act.<sup>272</sup>

In 1892, many members of the Kiowa, Comanche, and Apache entered into an “agreement” to surrender tribal rights to the reservation.<sup>273</sup> That agreement dramatically decreased the amount of land owned by the Native Nations, allotted parcels to individual tribal members, and opened surplus lands for white settlement.<sup>274</sup> The tribes claimed, however, that the agreement was obtained through misrepresentations.<sup>275</sup> They also claimed that, in contravention of the 1867 treaty, less than three-fourths of adult male members had signed it.<sup>276</sup> Despite objections from tribal leadership, Congress ratified the agreement in 1900.<sup>277</sup>

The Native Nations then turned to the courts. Lone Wolf, Chief of the Kiowa Nation, filed suit, contending that the agreement was incompatible with the 1867 treaty. He sought an injunction barring the Secretary of the Interior and other officials from implementing the 1900 Act by allotting the reservation, laying out townsites, and opening some two million acres

---

268. See General Allotment Act (Dawes Act) of 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C. §§ 331–357 (1994)) (repealed 2000).

269. Richard J. Ansson, Jr., Book Note, American Indian Legal History and the American Indian Woman, 21 Am. Indian L. Rev. 205, 208 & n.6 (1997) (reviewing Karen Anderson, *Changing Woman* (1996)).

270. Charlene Koski, Comment, The Legacy of *Solem v. Bartlett*: How Courts Have Used Demographics to Bypass Congress and Erode the Basic Principles of Indian Law, 84 Wash. L. Rev. 723, 730 (2009).

271. See *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962) (describing the “impractical pattern of checkerboard jurisdiction” that results when authority turns on parcel-by-parcel land status); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 478–79 (1976); *Solem v. Bartlett*, 465 U.S. 463, 471 n.12 (1984).

272. See Koski, *supra* note 270.

273. Act of June 6, 1900, ch. 813, 31 Stat. 672–73, 676; Fredericks & Heibel, *supra* note 266, at 490; see also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903) (referring to “the agreement of October 6, 1892”).

274. See Ansson, *supra* note 269, at 250.

275. Fredericks & Heibel, *supra* note 266, at 490 & n.75.

276. *Id.* at 490.

277. *Id.*; Act of June 6, 1900, ch. 813, § 6, 31 Stat. 672, 676.

to white settlement.<sup>278</sup> The D.C. Court of Appeals rejected the tribes' due process claim as "a political as distinguished from a judicial subject of inquiry," reiterated in overruling a motion for reargument that this was a "political question," and expressed hope that the Supreme Court would "find a way for affording a remedy for what is alleged to be a grievous wrong."<sup>279</sup> But the Supreme Court rejected his suit as well, in part on political question grounds. It reasoned that Native Nations were "wards of the nation" in a dependent status,<sup>280</sup> that Congress possessed "plenary authority" over tribal relations,<sup>281</sup> that this power was considered "political,"<sup>282</sup> and that Congress's power to abrogate the treaty—together with its judgment about the cession and allegations that the agreement was procured by fraud and lacked the required consent—was conclusive upon the courts, leaving the tribes to seek redress from Congress.<sup>283</sup> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning," the Court added, "and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."<sup>284</sup>

This was a political question holding in the sense that term carried at the time. As Tara Leigh Grove has shown, the traditional doctrine required courts to accept the political branches' determination of certain questions, Indian affairs prominent among them, as conclusive, and then to decide the case on that footing.<sup>285</sup> This conception is reflected in *Lone Wolf*. The Court reached and rejected the tribes' Fifth Amendment claim. But it took as settled Congress's judgment that the cession had been validly procured and represented "a mere change in the form of investment," declaring the tribes' contrary allegations "solely within the domain of the legislative authority, and its action is conclusive upon the courts."<sup>286</sup> By mid-century,

---

278. *Lone Wolf*, 187 U.S. at 560–62.

279. *Lone Wolf v. Hitchcock*, 19 App. D.C. 315, 330–31 (1902) (reasoning that because "[t]he power and control over the subject-matter is vested in Congress," the tribes' due process claim was not a subject of judicial inquiry), *aff'd*, 187 U.S. 553 (1903); *id.* at 332 (overruling motion for reargument and describing the due process question as "a political question for the determination by Congress").

280. *Lone Wolf*, 187 U.S. at 567–68 (internal quotation marks omitted) (quoting *United States v. Kagama*, 118 U.S. 375, 383 (1886)).

281. *Id.* at 565.

282. *Id.*

283. *Id.* at 565–68.

284. *Id.* at 565.

285. On the traditional doctrine, see Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. Rev. 1908, 1916–24 (2015) (showing that courts in the nineteenth and early-twentieth centuries treated the political branches' determinations of certain questions, including the status of Native tribes, as binding rules of decision while independently resolving the remaining legal and constitutional issues in the case); *id.* at 1939–40 (dating the emergence of the modern nonjusticiability paradigm to *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912)).

286. *Lone Wolf*, 187 U.S. at 568.

*Lone Wolf* was the authority cited for the broader proposition that the regulation of tribes was a political question beyond the courts' concern.<sup>287</sup>

Teaching *Lone Wolf* would help students understand this important chapter in the history of America's tragic subjugation of Native peoples and governments. The case also offers a portal into the United States Supreme Court's role in that subjugation. The broad deference the decision afforded to Congress facilitated many other opinions in which federal courts did nothing when the United States dishonored its commitments to Native Nations, or otherwise undermined Native sovereignty in illegal ways.<sup>288</sup> At a minimum, we as Federal Courts instructors should think critically about whether the cases we do tend to teach—like *Nixon v. United States*<sup>289</sup>—are more important than *Lone Wolf*.<sup>290</sup>

3. *Giles v. Harris*. — A third case that does not tend to grace the pages of Federal Courts books is *Giles v. Harris*.<sup>291</sup> That case came on the heels of a new Alabama Constitution that, in effect, prevented Black citizens in the



287. Cf. Comment, Indian Tribes and Civil Rights, 7 Stan. L. Rev. 285, 291–92 & n.38 (1955) (citing *Lone Wolf*, 187 U.S. at 565, as “judicial authority for the proposition that the regulation of Indian tribes is a ‘political question’ and therefore the exclusive concern of the executive and legislative branches,” and suggesting that, even if tribal action were federal action, “the Court might choose not to take jurisdiction”); id. at 291 n.38 (citing Charles Gordon Post, The Supreme Court and Political Questions 112 (1936), as a “complete discussion of Indian tribes and political questions”).

288. See M. Henry Ishitani & Alexandra Fay, Revising the Indian Plenary Power Doctrine, 29 Mich. J. Race & L. 1, 2 (2024) (explaining that *Lone Wolf*'s plenary power doctrine “has facilitated dispossession, the horrific Indian boarding school system, and Tribal termination” (footnotes omitted)).

289. See *infra* Appendix A, Table A-2.

290. Exposing students to *Lone Wolf* outside the context of an American Indian Law course also disrupts a narrative that has “othered” and implicitly delegitimated the role of Native Nations in the construction of our legal life. See Reese, *supra* note 23 (explaining that America “still treats Indian tribes and their people like outsiders”). I am grateful to my colleague Gregory Ablavsky, who observed that the rule that a later statute may override an Indian treaty did not originate in *Lone Wolf*, which cited *Cherokee Tobacco* for that proposition. See 187 U.S. at 566 (citing *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871)). Three decades earlier, *Cherokee Tobacco* had held that a federal revenue statute displaced a tax immunity secured by an 1866 Cherokee treaty. It reasoned that Indian treaties have “no higher sanctity” than treaties with foreign nations and that the consequences of abrogation are “beyond the sphere of judicial cognizance,” leaving redress to Congress. 78 U.S. (11 Wall.) at 621. *Lone Wolf* likewise drew its wardship rationale from *Kagama*. *Lone Wolf*, 187 U.S. at 566–67 (quoting *United States v. Kagama*, 118 U.S. 375, 382–84 (1886)).

291. 189 U.S. 475 (1903); see also *infra* Appendix A, Table A-2.

state from voting.<sup>292</sup> “The Putrid Sore of Negro Suffrage Is Severed From the Body Politic of the Commonwealth,” read the front page of Montgomery’s leading newspaper on November 12, 1901.<sup>293</sup>

Consistent with the new state constitution, in defiance of the Fifteenth Amendment, “[w]hite registrars accused Black veterans trying to register under the military provisions of the constitution of forging their discharge papers.”<sup>294</sup> Some Black applicants were confronted with questions like “what are the differences of Jeffersonian democracy and the Calhoun principles as compared to the Monroe Doctrine?”<sup>295</sup> Still others, including postal worker Jackson Giles, faced demands that they bring declarations from white Alabamans confirming their “good character.”<sup>296</sup>

When the case reached the United States Supreme Court, Justice Oliver Wendell Holmes Jr., writing for a 6-3 majority, held that it was “impossible to grant the equitable relief which is asked.”<sup>297</sup> The Court did not deny its own jurisdiction, and it expressly declined to say whether Alabama’s scheme was constitutional.<sup>298</sup> Instead, Holmes identified two “difficulties.”<sup>299</sup> The first was a trap of the Court’s own construction: Because Giles alleged that the registration scheme was “a fraud upon the Constitution of the United States,” the Court could not “make the court a party to the unlawful scheme” by ordering his name added “to its fraudulent lists.”<sup>300</sup> The second difficulty was rooted in judicial power and competence. In some respects, it reads as a neutral application of equity’s traditional refusal to enforce “political rights.”<sup>301</sup> But a careful read makes clear the Court’s concern that equity would be no match for the ways white Alabamans would defy a federal judicial order and continue to prevent Black Alabamans from voting. Giles’s allegations showed “that the great mass of the white population intends to keep the blacks from voting,” and

---

292. Ala. Const. of 1901, art. VIII (including a poll tax, literacy test, grandfather clause, and other racialized voting restrictions) (amended several times in different years and superseded in 2022).

293. Brian Lyman, *The Defeated: A Brief History of Alabama’s First 200 Years*, *Montgomery Advertiser* (Dec. 6, 2019), <https://www.montgomeryadvertiser.com/story/news/2019/12/06/defeated-brief-history-alabamas-first-200-years-bicentennial/2586942001/> [<https://perma.cc/U3FN-EGBD>] (last updated Dec. 7, 2019).

294. Brian Lyman, *The Journey of Jackson Giles*, *Montgomery Advertiser* (Jan. 27, 2022), <https://www.montgomeryadvertiser.com/in-depth/news/2022/01/27/jim-crow-alabama-jackson-giles-supreme-court/7995760002/> [<https://perma.cc/9UJ4-67PX>] (last updated Feb. 7, 2022).

295. *Id.*

296. *Id.*

297. *Giles v. Harris*, 189 U.S. 475, 486 (1903).

298. *Id.* at 486–88 (“We express no opinion as to the alleged fact of [the registration requirements] unconstitutionality . . .”).

299. *Id.* at 486.

300. *Id.*

301. *Id.* at 487.

against such an intent, “something more than ordering the plaintiff’s name to be inscribed upon the lists of 1902 will be needed.”<sup>302</sup>

Further, the Court reasoned that:

Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.<sup>303</sup>

The Court’s refusal of equitable relief was thus expressly tied to the scale of racist determination and fervor. The more comprehensive the conspiracy, the less equity would attempt. Apart from a suit for damages, which the Court left open in principle, relief would have to come from the state accused of the wrong, or from the national political branches.<sup>304</sup>

The absence of this case from predominant Federal Courts pedagogy defies easy explanation. To be sure, the case is limited, by its terms, to prospective relief. But that is not an uncommon feature of political question cases throughout history, a point that John Harrison has well illustrated.<sup>305</sup> Further, as the Court itself implied by its earlier citation in *Giles* to *Hans v. Louisiana*, a damages remedy against the state was no doubt every bit as elusive in light of sovereign immunity.<sup>306</sup>

Nor could its absence be explained by a lack of importance. Richard Pildes has called *Giles* “probably the most momentous ignored decision in the history of the Supreme Court”: Every law student knows *Plessy v. Ferguson*, he observes, while virtually none know *Giles*, even though *Giles* carved “political rights” out of the Fourteenth and Fifteenth Amendments and held them judicially unenforceable, a holding that stood until *Baker v. Carr* sixty years later.<sup>307</sup> The stakes were arguably no smaller than *Plessy*’s. Once the Court blessed the disfranchising constitutions, the constricted electorates they created remained “locked into place at the constitutional level” until federal intervention in 1965. This stripped Black southerners in states like North Carolina of the political power that they had used to

---

302. Id. at 488.

303. Id.

304. Id.

305. See Harrison, *supra* note 243, at 460 (explaining that in political question cases, political actors are most often “accorded the finality that the courts’ judgments enjoy”).

306. See *Giles*, 189 U.S. at 487–88 (stating that a state cannot be made the subject of a federal judicial suit under the Eleventh Amendment) (citing *Hans v. Louisiana*, 134 U.S. 1, 21 (1890)).

307. See Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 Const. Comment. 295, 297, 298, 317 (2000) (“*Giles* has been airbrushed out of the constitutional canon. It is . . . one of the most momentous decisions in United States Supreme Court history and one of the most revealing. Yet, as far as I can tell, it receives nary a mention in four of the leading Constitutional Law casebooks.”).

elect Black aldermen, school committeemen, and county commissioners only years before.<sup>308</sup>

Other constitutional law scholars have explored the question of why *Giles* is not more centrally a part of our collective legal consciousness. Samuel Brenner has offered the potential explanation that the case is “procedurally messy.”<sup>309</sup> Jamal Greene has offered a more complex set of potential explanations: “its authorship, its cynicism, and its terseness.”<sup>310</sup> On authorship, he observes that the opinion was written by Justice Holmes, “a canonized Justice.”<sup>311</sup> On cynicism, Greene notes that the “acidly cynical reasoning” is in tension with the kind of reasoned legal analysis that accompanies “serious debates of today.”<sup>312</sup> And on terseness, the opinion is so short that “anyone wishing to understand it and to incorporate its rejection into a broad theory has real work to do.”<sup>313</sup>

None of this is sufficient reason to avoid the case in a Federal Courts classroom. While a “procedurally messy” case might be difficult to teach in a first-year Constitutional Law setting, Federal Courts classes are not known for shying away from such cases.<sup>314</sup> In the context of teaching advanced procedural classes, deliberate messiness can sometimes serve as a valuable teaching tool rather than a hindrance. Moreover, the opinion’s cynical reasoning could serve as an effective point of comparison to Federal Courts cases in recent times that refuse to address deeply harmful constitutional violations for fear of involving federal courts too deeply in state governance.<sup>315</sup>

---

308. *Id.* at 313–14.

309. Samuel Brenner, Note, “Airbrushed Out of the Constitutional Canon”: The Evolving Understanding of *Giles v. Harris*, 1903–1925, 107 Mich. L. Rev. 853, 872 (2009).

310. Greene, *The Anticanon*, *supra* note 112, at 465.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* (internal quotation marks omitted) (quoting Brenner, *supra* note 309, at 872).

315. See *O’Shea v. Littleton*, 414 U.S. 488, 501 (1974) (citing “comity” as reason for caution when considering an injunction that required monitoring of ongoing illegalities in a state court system); Emily Chiang, Institutional Reform Shaming, 120 Penn St. L. Rev. 53, 61–62 (2015) (“There is no question that the bench is more hostile to structural reform claims now than it has been in the past, but the legal, political, and social culture is also increasingly skeptical of wholesale court-driven reform efforts.” (footnote omitted)); Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev. 1015, 1017–18 (2004) (describing the skepticism with which structural injunctions have sometimes been met). Defenses of these injunctions have sometimes been cautious and nuanced. See William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 637 (1982) (encouraging caution to ensure compatibility between structural injunctions and democratic principles); Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 589, 674–79 (1983) (arguing that weighing competing considerations, including potential resistance, should sometimes override injunctions that only maximize rights considerations); cf. Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284 (1976) (describing distinctions between traditional private law litigation and public law litigation); Owen M.

And while the opinion is terse, it drew powerful dissents from Justice John Marshall Harlan<sup>316</sup> (a canonical justice in his own right<sup>317</sup>) and Justice David Brewer.<sup>318</sup>

The omission of *Giles v. Harris* from Federal Courts textbooks represents a powerful form of legitimacy laundering—in which both the case and its explicit holding disappear, but its underlying logic persists. Today, when federal courts decline to address partisan gerrymandering or structural failures in states’ systems, they echo *Giles*’s logic about institutional incapacity and political questions, but through such thoroughly laundered channels that the connection to racial disenfranchisement remains invisible. The case that most explicitly announced federal courts’ abandonment of Black citizens has been laundered so completely that its very existence is unknown to most students of federal jurisdiction.

To concretize the point, consider *O’Shea v. Littleton*.<sup>319</sup> When *O’Shea* articulates limits on equitable relief, explaining that courts “have withheld relief in equity even when recognizing that comparable facts would create a cause of action for damages” and maintaining that courts should “sustain ‘[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law,’”<sup>320</sup> it references *Giles* among its authorities.<sup>321</sup> More significant than the citation itself is the parallel: *O’Shea* employs reasoning structurally similar to *Giles*—framing limits on equitable relief as neutral principles of judicial restraint.<sup>322</sup> Some students encounter *O’Shea*’s rhetorical limits on judicial capacity to correct systemic wrongs<sup>323</sup> through equitable remedies without learning how similar logic operated in *Giles* to deny relief for racial disenfranchisement. If they learn where such reasoning has led, they may be less inclined to embrace it reflexively when it appears in later doctrinal contexts.<sup>324</sup>

---

Fiss, *The Civil Rights Injunction* 6 (1978) (arguing for “context-specific evaluation of the advantages and disadvantages of each form of relief,” taking into account its “technical advantages and the system of power allocation that it implies”).

316. *Giles v. Harris*, 189 U.S. 475, 493 (1903).

317. Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 Rutgers L. Rev. 781, 801 (2000) (“The elevation of the *Plessy* dissent . . . gave rise to the apotheosis of another canonical dissenter, Justice John Marshall Harlan the Elder. Although Harlan had been disliked for most of his tenure on the Court, the events of the 1960s transformed him into a judicial saint.” (footnote omitted)).

318. *Giles*, 189 U.S. at 488.

319. 414 U.S. 488 (1974).

320. *Id.* at 500, 501 n.5 (alteration in original) (quoting *Stefanelli v. Minard*, 342 U.S. 117, 122 (1951)).

321. *Id.* at 501 n.5.

322. *Id.* at 499.

323. See Chemerinsky et al., *supra* note 12, at 290–95; Bradley et al., *supra* note 195, at 311.

324. The laundering chain then continues into the present. In 2023, the Fifth Circuit in *Daves v. Dallas County* relied on *O’Shea*, 414 U.S. at 488, as “closely on point” to overturn

B. *The Missing Context*

Even when troubling cases remain in our pedagogy, they often appear stripped of the contexts that would help reveal their significance. The erasure extends beyond wholesale omission to selective presentation, thereby transforming cases about racial violence and constitutional abandonment into bloodless exercises in doctrinal mechanics. Three phenomena exemplify this erasure: first, the incorporation of Lost Cause narratives that cast federal intervention in Reconstruction as overreach rather than an attempt to secure racial equality; second, the “Jim Crow paradigm,” which treats Southern racial oppression during a specific historical period as exceptional rather than emblematic of broader patterns of state-sanctioned racial subordination; third, a myth of jurisdictional neutrality.

1. *Lost Cause Narratives.* — The Lost Cause was a systematic campaign to seize control of collective memory and, through it, to redefine national identity and legitimacy.<sup>325</sup> This intentional mass effort minimized the brutality of chattel slavery, glorified those who fought to preserve it, and cast violent insurrectionists as valorous victims while recasting federal efforts to secure Black citizenship as tyrannical overreach. The United Daughters of the Confederacy, which swelled to forty-five thousand members by 1912, helped secure not just the 1,700 Confederate monuments that still stand today but also shaped curricula that presented sanitized narratives of slavery.<sup>326</sup> Through these efforts, the Lost Cause sought to transform traitors into heroes, terrorism into resistance, and racial equality into oppression.

This ideology infiltrated legal doctrine through the systematic decontextualization of jurisdictional cases during Reconstruction and in the decades after its demise. As Edward Purcell observed in writing about an 1890 sovereign immunity case, “What is called the ‘law of federal courts’ has been established through a process that filters, purifies, redesigns, and largely erases decisive historical phenomena—social conflict, politics, racism, sexism, and, of course, change itself.”<sup>327</sup> When we teach these filtered cases without their racial context, we become propagandists for

---

an injunction against wealth-based pretrial detention—a system that jailed indigent defendants solely for inability to pay. 64 F.4th 616, 626 (5th Cir. 2023). Through this multigenerational laundering—from *Giles* to *O’Shea* to *Daves*—a precedent born from capitulation to white supremacy produced logic that today perpetuates wealth-based incarceration.

325. See David W. Blight, *Race and Reunion: The Civil War in American Memory* 1–5 (2001) (framing the postwar period as a struggle among competing memories in which the Lost Cause ideology worked to control the meaning of the war and shape national reunion on white supremacist terms); Smith, *On Time*, supra note 43, at 249–50 (outlining intentional campaigns to corrupt American collective memory).

326. Smith, *On Time*, supra note 43, at 249–50.

327. Purcell, supra note 12, at 1929.

the Lost Cause, transmitting its narrative of federal overreach rather than revealing federal efforts to combat racial terrorism.

Consider *Ex parte McCardle*, taught as a canonical example of Congress's power to control federal court jurisdiction.<sup>328</sup> The traditional telling presents William McCardle as a newspaper publisher jailed by a military commander, whose habeas petition led Congress to strip the Supreme Court's jurisdiction.<sup>329</sup> What this sanitized account minimizes, as Charquia Fegins's research reveals, is that McCardle explicitly told white voters in Vicksburg, Mississippi, to "STAY AWAY FROM THE POLLS" during a Reconstruction-related election, threatened to publish photographs of those who voted as part of a "rogues' gallery," and promised that tax collectors attempting to enforce collection "will be shot down like dogs."<sup>330</sup> Roughly seventeen months later, Edward Yerger—a fellow newspaper editor who, like McCardle, was active in the Democratic White Man's Party—killed Jackson's military-appointed mayor, Colonel Joseph G. Crane, after Crane seized property to satisfy a tax debt.<sup>331</sup> Yerger's own habeas petition became *Ex parte Yerger*, the case the canon pairs with *McCardle* to mark the limits of jurisdiction stripping—and one that casebooks present as a second newspaper editor's challenge to Military Reconstruction.<sup>332</sup> Yerger's killing of Crane was concerning

---

328. See Stephen I. Vladeck, Deconstructing *Hirota*: Habeas Corpus, Citizenship, and Article III, 95 Geo. L.J. 1497, 1549 (2007) (identifying *McCardle* as among "the cases at the core of the federal courts canon"); Don R. Willett, Supreme Stalemates: Chalice, Jack-O'-Lanterns, and Other State High Court Tiebreakers, 169 U. Pa. L. Rev. 441, 459 (2021) (describing *Ex parte McCardle* as "the canonical case"); see also *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869) ("We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.").

329. William W. Van Alstyne, A Critical Guide to *Ex Parte McCardle*, 15 Ariz. L. Rev. 229, 236–41 (1973).

330. Fegins, *supra* note 12, 15–17 (internal quotation marks omitted) (first quoting Transcript of Record at 11–12, *Ex parte McCardle*, 74 U.S. 506 (1869) (No. 380); then quoting William McCardle, The Dogs Are Hungry, Vicksburg Daily Times, Jan. 21, 1868, at 2 (on file with the *Columbia Law Review*)).

331. Fegins, *supra* note 12, 31–32 (describing Yerger's June 8, 1869, killing of Crane after Crane seized Yerger's wife's piano to satisfy a tax debt); *id.* at 36 (reproducing the January 28, 1868, issue of the *Vicksburg Daily Times* listing Yerger on the Executive Central Committee of the Democratic White Man's Party); William McCardle, Democratic State Convention, Vicksburg Daily Times, Feb. 22, 1868, at 2 (on file with the *Columbia Law Review*) (listing McCardle as an alternate delegate to the "Democratic, or White Men's Party"); see also The Tragedy in Jackson: The Murder of Colonel Joseph G. Crane, Mayor of the City by Colonel Yerger, N.Y. Times, June 15, 1869, at 1 (on file with the *Columbia Law Review*).

332. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869). On the casebook treatment of *Yerger*, see Fegins, *supra* note 12, at Appendix A (collecting Constitutional Law and Federal Courts casebooks and their descriptions of *McCardle* and *Yerger*). But see Chemerinsky et al., *supra* note 12, at 427 (noting that Yerger was detained for the killing of Colonel Crane).

enough that it surfaced in the congressional Klan hearings of 1871 to 1872.<sup>333</sup>

Although Hart and Wechsler's foundational text acknowledges that the 1867 Habeas Act was designed to protect "newly freed African-Americans, their supporters and federal officials" from "harassment and baseless arrests in southern states," it presents McCardle himself in sanitized terms as "the editor of the *Vicksburg Times*" whose "charges against him, based solely on editorials published in his newspaper included disturbing the peace, libel, incitement to insurrection, and impeding reconstruction."<sup>334</sup> This description—"based solely on editorials"—obscures what those editorials actually contained: explicit and thinly veiled death threats against federal officials and voters.<sup>335</sup> A case arising from an effort to suppress racial terrorism has turned into an abstract lesson about aggressive congressional power.

*United States v. Klein*<sup>336</sup> presents a highly complementary example of how Lost Cause ideology persists through decontextualized precedent. Often hailed as a triumph of judicial independence,<sup>337</sup> the decision actually was one of a series of opinions that restored the antebellum power structure by enabling President Johnson's pardon policy to return confiscated land to former Confederates.<sup>338</sup> That policy destroyed the Freedmen's Bureau's primary revenue source and ended programs distributing land to freedpeople.<sup>339</sup> Moreover, the Court's opinion contains a revealing passage equating the denial of compensation to pardoned rebels with the abandonment of freedpeople, declaring that refusing to restore property would be a breach of faith "not less 'cruel and astounding' than to abandon the freed people whom the Executive had promised to maintain in their freedom."<sup>340</sup> This false equivalence—placing the economic interests of pardoned rebels alongside the fundamental liberty of four million freedpeople—exposes the Court's priorities.

333. Fegins, *supra* note 12, at 34–35 (citing Joint Select Comm. on the Condition of Affs. in the Late Insurrectionary States, Testimony Taken by the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States: Mississippi, H.R. Rep. No. 42-22, pt. 11, at 520–21 (1872) (testimony of Hampton L. Jarnagin)).

334. *Id.* at 27 n.118 (citing Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 304 (7th ed. 2015)); Fallon et al., *supra*, at 304–05.

335. See Fegins, *supra* note 12, at 15 n.52; *supra* notes 330–333 and accompanying text.

336. 80 U.S. (13 Wall.) 128 (1872).

337. Hershkoff & Smith, *supra* note 12, at 2115 ("By the 1950s, *Klein* acquired its singular status as a victory for judicial independence and the inviolability of property rights; Legal Process scholars erected the case as a pillar in arguments about institutional settlement and race-neutral concepts of Article III jurisdiction.").

338. See *id.* at 2102–46 (recontextualizing *Klein*).

339. *Id.* at 2112.

340. *Klein*, 80 U.S. (13 Wall.) at 142 (quoting Abraham Lincoln, Third Annual Message to Congress, reprinted in Cong. Globe, 38th Cong., 1st Sess. app. 3 (1863)).

Through legal education that strips away this context, these precedents become cleansed of their origins. In turn, leading judges trained on sanitized accounts then reproduce Lost Cause narratives in contemporary opinions. Chief Justice Roberts, dissenting in *Patchak v. Zinke*, described *Klein* as the Court's response "when the Radical Republican Congress passed a law targeting suits by pardoned Confederates."<sup>341</sup> In doing so, he activated and transmitted Lost Cause ideology, casting congressional efforts during Reconstruction as radical overreach.

This reading of Chief Justice Roberts's dissent is bolstered by his treatment of *McCardle*. He acknowledges that "[t]he Court's decision in *McCardle* has been alternatively described as 'caving to the political dominance' of the Radical Republicans or 'acceding to Congress's effort to silence the Court.'"<sup>342</sup> He then notes that "[r]ead for all it is worth, the decision is also inconsistent with the approach the Court took just three years later in *Klein*, where Chief Justice Chase (a dominant character in this drama) stressed that '[i]t is of vital importance' that the legislative and judicial powers 'be kept distinct.'"<sup>343</sup> This framing presents the Radical Republicans as either political bullies who dominated and silenced the Court, or constitutional violators attempting to breach the separation of powers. It does not acknowledge that *McCardle* was threatening voters and federal officials with violence, or that a political ally of his went on to kill a federal officer in the circumstances *McCardle* had described—the killing that produced the companion case, *Ex parte Yerger*.<sup>344</sup> The opinion decidedly does not cast these architects of the Reconstruction Amendments as framers of the Second Founding, who sought to prevent former Confederates from using federal courts to undermine Reconstruction.<sup>345</sup>

This is how Lost Cause ideology persists. As Jack Balkin observes, constitutional memory "shapes and organizes people's views about what the law means and why people have authority."<sup>346</sup> "[T]he selectivity and erasure of constitutional memory can have ideological effects, and can bestow on constitutional claims a legitimacy that they do not always

---

341. *Patchak v. Zinke*, 583 U.S. 244, 268 (2018) (Roberts, C.J., dissenting).

342. *Id.* at 277 (quoting Daniel Meltzer, *The Story of Ex Parte McCardle*, in *Federal Courts Stories* 57, 73 (Vicki C. Jackson & Judith Resnik eds., 2010)).

343. *Id.* (quoting *Klein*, 80 U.S. (13 Wall.) at 147).

344. See *supra* notes 331–333 and accompanying text.

345. For exposition of the "Second Founding" framing of Reconstruction, see generally Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (2019) (conceptualizing Reconstruction as a second founding of the nation); *Trump v. Barbara*, 146 S. Ct. 2438, 2458 (2026) (Jackson, J., concurring) (calling the "Second Founding . . . an anticaste, antisubordination reset for the Nation, not a mere spot treatment for the dark stain of slavery").

346. Balkin, *Memory and Authority*, *supra* note 5, at 192.

deserve.”<sup>347</sup> When *Ex parte McCordle* appears as neutral precedent about jurisdiction rather than as a case about whether the Court would obstruct the legislation Congress enacted to protect Black citizens and their allies from racial terror, the Lost Cause version of Reconstruction becomes embedded in our constitutional memory.

I count myself among those who have perpetuated this erasure. Though I recently coauthored a work about the need for contextualizing *Klein*,<sup>348</sup> I have taught Federal Courts for over a decade without sufficient attention to these fuller contexts. This is not a statement of blame but an invitation to recognize how even those committed to excavating jurisdictional doctrine’s troubling foundations can replicate the very omissions we seek to expose. The pedagogical choices we make—the cases we emphasize, the contexts we provide or withhold—all shape what future generations will understand about power, justice, and the role of federal courts.

2. *Jim Crow Exceptionalism*. — While the Lost Cause narrative operates by recasting Reconstruction’s federal intervention as tyranny, a related but distinct pattern shapes how we understand the federal courts’ role in addressing racial injustice: the Jim Crow paradigm.<sup>349</sup> This framework treats the federal judiciary’s eventual intervention against Southern segregation during the Civil Rights Era as both redemptive and exceptional. The paradigm allows federal courts to claim moral authority from their role in dismantling Jim Crow while simultaneously treating that intervention as extraordinary rather than exemplary. The result is a jurisprudence that celebrates *Brown v. Board of Education* as canonical while routinely abstaining from addressing racial injustice that falls outside the narrow confines of de jure segregation in the mid-twentieth-century South.

As scholars have observed, by centering a constitutional paradigm that treats Black–white relations as the primary axis of racial injustice, other experiences are rendered constitutionally invisible. Maggie Blackhawk has argued, for example, that the paradigm excludes past (and present) horrors against groups like Native Americans, making their claims for justice appear peripheral rather than central to constitutional meaning.<sup>350</sup> Juan Perea has similarly shown how this paradigm erases Latinos from constitutional development, creating what he calls the “normal science” of American racial thought.<sup>351</sup> Or as Richard Delgado has ex-

---

347. *Id.* at 7.

348. Hershkoff & Smith, *supra* note 12.

349. See Blackhawk, *supra* note 23, at 1792 (“Across a range of constitutional questions, slavery and Jim Crow segregation take center stage in defining the history, principles, doctrine, and the constitutional values at stake around the distribution and limitation of government power under our Constitution.”).

350. *Id.* at 1793 (“Although there is much to learn from this Nation’s tragic history with slavery and Jim Crow segregation, resting our public law on a single paradigm case that is defined by the black/white racial binary has led to incomplete models and theories.”).

351. See Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 Calif. L. Rev. 1213, 1214–15, 1218 (1997).

plained, “[b]inary thinking can easily allow one to believe that America made only one historical mistake—for example, slavery.”<sup>352</sup> When national identity acknowledges only one form of racial injustice, other communities cannot access the moral and legal capital that flows from recognized horrors.

Indeed, even remedies for wrongs against Black Americans fall outside of the Jim Crow paradigm by taking place outside a specific place (the South) and time (the post-Reconstruction era). By casting Jim Crow as an aberration—a uniquely Southern pathology from a bygone era—rather than one manifestation of systemic racial subordination, the paradigm obscures how jurisdictional doctrines continue to facilitate racial injustice outside those specific temporal and geographic boundaries. Randall Kennedy observed in his analysis of *Walker v. City of Birmingham*<sup>353</sup> that by 1967 “civil rights fatigue had started to emerge” along with “a feeling that the mission of deploying law against racism had proceeded about as far as it could prudently be pushed.”<sup>354</sup>

In the field of Federal Courts, *Younger v. Harris*<sup>355</sup> exemplifies how this paradigm operates through selective memory. In *Younger*, the Supreme Court held that federal courts should generally abstain from enjoining ongoing state criminal prosecutions, creating what is now known as *Younger* abstention.<sup>356</sup> Yet as I have documented elsewhere, the field of Federal Courts has omitted the role of race and police brutality from its telling.<sup>357</sup> Instead, the case is typically characterized in sanitized terms as one about criminal syndicalism,<sup>358</sup> free-speech rights,<sup>359</sup> literature distribution,<sup>360</sup> or

---

352. Richard Delgado, Derrick Bell’s Toolkit—Fit to Dismantle That Famous House?, 75 N.Y.U. L. Rev. 283, 297 (2000).

353. 388 U.S. 307 (1967).

354. Randall Kennedy, *Walker v. City of Birmingham* Revisited, 2017 Sup. Ct. Rev. 313, 331 (2017).

355. 401 U.S. 37 (1971).

356. See *id.* at 41.

357. See Smith & O’Neill, *Forgotten Face*, *supra* note 2, at 22–23 & nn.14–17 (noting that academic descriptions of *Younger* lack references to race and rather simplify the case into a different story).

358. *Id.* at 22 n.14 (first citing 17B Wright & Miller’s Federal Practice & Procedure § 4251 (3d ed. 1998); then citing Dustin E. Buehler, Jurisdiction, Abstention, and Finality: Articulating a Unique Role for the *Rooker–Feldman* Doctrine, 42 Seton Hall L. Rev. 553, 569 (2012); and then citing Richard H. Fallon, Jr., The Ideologies of Federal Courts Law, 74 Va. L. Rev. 1141, 1236 (1988)).

359. *Id.* at 22 n.15 (first citing Leonard Birdsong, Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be with Us—Get Over It!, 36 Creighton L. Rev. 375, 381–82 (2003); then citing Daniel A. Braun, Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism, 20 Am. J. Crim. L. 1, 55 (1992); and then citing Anne Rachel Traum, Distributed Federalism: The Transformation of *Younger*, 106 Cornell L. Rev. 1759, 1768 (2021)).

360. *Id.* at 22 n.16 (first citing Bryce M. Baird, Comment, Federal Court Abstention in Civil Rights Cases: Chief Justice Rehnquist and the New Doctrine of Civil Rights Abstention, 42 Buff. L. Rev. 501, 518 (1994); then citing Benjamin Kaplan, The Great Civil Rights Case of

workers' rights.<sup>361</sup>

What unites these characterizations is what they omit: race. John Harris, Jr., a former Student Nonviolent Coordinating Committee (SNCC) organizer, was indicted for distributing literature at protests against the police killing of Leonard Deadwyler, an unarmed Black man shot while driving his pregnant wife to the hospital.<sup>362</sup> The pamphlets "called for abolishing the police and argued that '[t]he cops and the system they served must be replaced.'"<sup>363</sup> Harris's 1964 and 1965 arrests in Mississippi and his 1966 arrest in Los Angeles shared fundamental similarities—both involved the surveillance and prosecution of Black activists challenging systemic racism.<sup>364</sup>

The erasure of racial context helped enable the Supreme Court to distinguish Harris's case from *Dombrowski v. Pfister*, in which the Court did intervene to stop Louisiana's prosecution of civil rights workers.<sup>365</sup> The Court characterized *Dombrowski* as involving harassment of those "attempting to vindicate the constitutional rights of Negro citizens of Louisiana" while treating Harris's prosecution as routine.<sup>366</sup> Once Harris is reduced to an abstract distributor of leftist pamphlets—rather than a Black activist protesting police brutality—his case appears fundamentally different from *Dombrowski*. In the years following *Younger*, commentators took up and amplified that distinction, with one observing that enjoining Harris's prosecution was not "as attractive as the cases of the *Dombrowski* era, which involved black civil rights struggles against Southern injustice."<sup>367</sup>

This distinction serves a vital institutional function. It preserves the narrative that federal courts' abstention doctrines contain sufficient safety valves to prevent their use against genuine civil rights violations. The Court can maintain that it would intervene in cases of real racial persecution

---

*Hague v. CIO*: Notes of a Survivor, 25 Suffolk U. L. Rev. 913, 934–35 (1991); then citing Aviam Soifer & H. C. Macgill, The *Younger* Doctrine: Reconstructing Reconstruction, 55 Tex. L. Rev. 1141, 1144 (1977); and then citing Smith, Abstention in the Time of Ferguson, *supra* note 90, at 2294).

361. *Id.* at 23 n.17 (citing John Harland Giammatteo, The New Comity Abstention, 111 Calif. L. Rev. 1705, 1712 (2023)).

362. *Id.* at 20, 37 n.106.

363. *Id.* at 23–24 (quoting John Harris, Flyer 3, reprinted in Spark: W. Voice for Revolution, Nov.–Dec. 1996, at 5 (on file with the *Columbia Law Review*)).

364. *Id.* at 23–24 & n.25, 41–48.

365. See 380 U.S. 479, 487–90 (1965) (explaining "the chilling effect on free expression of prosecutions initiated and threatened" by Louisiana).

366. *Younger v. Harris*, 401 U.S. 37, 48 (1971) (internal quotation marks omitted) (quoting *Dombrowski*, 380 U.S. at 482).

367. Note, Federal Courts—Injunctions—The Civil Rights Act of 1871 Constitutes an Express Statutory Exception to the Anti-Injunction Statute, 50 Tex. L. Rev. 170, 182 (1971). For fuller discussion of this commentary, see Smith & O'Neill, Forgotten Face, *supra* note 2, at 97 ("*Dombrowski*, then, was a case about the harassment of plaintiffs seeking to vindicate racial justice. *Younger* . . . was not.").

(like *Dombrowski*) while abstaining in routine cases (like *Younger*)—a distinction that only holds if we ignore that Harris, too, was a victim of racialized state persecution.<sup>368</sup> The paradigm, and the legitimacy laundering that undergirds it, thus facilitates the accumulation of unearned moral and legal authority.<sup>369</sup> The Court’s civil rights hero narrative remains intact in part because cases like *Younger* are stripped of their racial context.

3. *Neutrality Narrative and “Comity”*. — Without context, highly normative principles appear neutral, even natural. Context exposes the normative choices, inviting us to consider whether those choices align with contemporary values. One such norm-laden concept is comity—the principle of federal courts deferring to state proceedings that appears to promote institutional harmony and respect.<sup>370</sup> This is starkly evident in *Younger* itself. At the time, Harris compared Black Americans seeking justice in American courts to “George Washington seeking redress in King George’s colonial courts.”<sup>371</sup> Harris himself had no faith in the federal forum, telling a leftist newsletter that “no justice should be expected from the courts.”<sup>372</sup> And when the Court ultimately declined to shield him, another plaintiff cast the result as both a “disappointment” and an “irony”: A suit brought to widen civil liberties had instead supplied a means of using “jurisdiction as a means of undercutting the very foundations of . . . protections for civil liberties and civil rights.”<sup>373</sup>

It might be tempting to dismiss Harris’s words as the cynicism of one disappointed plaintiff. But there is more to see here. Monica Bell’s work on “legal estrangement” offers a framework for understanding Harris’s prescient skepticism as a clear-eyed window into how many feel the law actually operates for their communities.<sup>374</sup> While traditional accounts of procedural fairness focus on how fair procedures build legitimacy and

---

368. See Smith & O’Neill, *Forgotten Face*, supra note 2, at 53 (“Harris found himself at the center of two areas heavily monitored by local governmental officials: communist activity and Black radicalism.”).

369. See *id.* at 93–97 (analyzing how the *Younger* Court’s omission of Harris’s racialized persecution from the facts legitimized *Younger* abstention).

370. See *Younger*, 401 U.S. at 44 (grounding the decision in “the notion of ‘comity,’ that is, a proper respect for state functions”).

371. Smith & O’Neill, *Forgotten Face*, supra note 2, at 21–22.

372. “Cop Still Wanted for Murder,” Harris Case to Federal Court, Spark: W. Voice for Revolution, no. 2, Apr. 1967, at 3 (on file with the *Columbia Law Review*).

373. Telephone Interview with Farrel Broslawsky, Former Professor, L.A. Valley Coll. (June 21, 2024) (on file with the *Columbia Law Review*); accord Smith & O’Neill, *Forgotten Face*, supra note 2, at 22.

374. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 Yale L.J. 2054, 2080 (2017) (“[The police legitimacy approach’s] two core ideas . . . are marked deviations from the prevailing wisdom about policing that preceded legitimacy theory.”).

foster compliance,<sup>375</sup> Bell demonstrates that for poor Black Americans, repeated treatment as subjects rather than citizens creates a profound sense of statelessness—both subjective cynicism about government and the objective injustices that provoke it.<sup>376</sup> This estrangement manifests viscerally in moments of crisis. When Michael Brown's body lay uncovered on a Ferguson street for hours in the summer heat, resident Alexis Torregrossa articulated this alienation: "They shot a black man, and they left his body in the street to let you all know this could be you."<sup>377</sup> Her invocation of a distant "they"—rather than "our" police or "the" officer—reveals a perspective wholly foreign to the assumption that police and government act as agents of all citizens.<sup>378</sup>

"Comity," then, is not a neutral form of institutional harmony but a choice about whose peace matters. When federal courts defer to state proceedings in the name of comity, they privilege the state's interest in unimpeded prosecution over the citizen's access to federal protection.<sup>379</sup> For communities experiencing legal estrangement, this "comity" feels less like respectful coordination between governmental branches and more like coordinated abandonment by a system that was never designed to protect them. The principle appears neutral only to those who trust state institutions—those who see police as "our" officers rather than "theirs."

The supposedly neutral application of legal principles to mask choices about whose interests matter has deep roots in federal jurisdiction. *Klein*, discussed previously, now appears in Federal Courts casebooks as a separation of powers victory that prevents Congress from manipulating jurisdiction to dictate case outcomes.<sup>380</sup> Students encounter it as doctrine

---

375. See, e.g., Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *Crime & Just.* 283, 349–51 (2003) (focusing on the relationship between perceived fairness and compliance).

376. Bell, *supra* note 374, at 2057–58, 2066–67.

377. Fred O. Smith, Jr., *The Constitution After Death*, 120 *Colum. L. Rev.* 1471, 1529 (2020) [hereinafter Smith, *Constitution After Death*] (quoting David Hunn & Kim Bell, *Why Was Michael Brown's Body Left There for Hours?*, *St. Louis Post-Dispatch* (Sep. 14, 2014), [https://www.stltoday.com/news/local/crime-and-courts/why-was-michael-brown-s-body-left-there-for-hours/article\\_0b73ec58-c6a1-516e-882f-74d18a4246e0.html](https://www.stltoday.com/news/local/crime-and-courts/why-was-michael-brown-s-body-left-there-for-hours/article_0b73ec58-c6a1-516e-882f-74d18a4246e0.html) [https://perma.cc/YE2F-37A5] (on file with the *Columbia Law Review*)).

378. *Id.* at 1529–30.

379. See Yuvraj Joshi, *Weaponizing Peace*, 123 *Colum. L. Rev.* 1411, 1412 (2023) ("American racial justice opponents regularly wield a purported desire for peace, stability, and harmony as a weapon to hinder movement toward racial equality. In this weaponized form, peace maintains structural inequalities . . .").

380. See Hershkoff & Smith, *supra* note 12, at 2104 (explaining that "*Klein* is a staple of many Federal Courts casebooks, offered as a virtually unique example (beyond habeas corpus) of limits on Congress's power to regulate the Article III jurisdiction" (citing Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 *Geo. L.J.* 2445, 2450 (1998))).

about institutional boundaries, learning nothing about the property it restored, the funding it destroyed, or the freedpeople it abandoned.<sup>381</sup>

Another stark example—in which compromise was disguised as basic application of legal principles—is *Hans v. Louisiana*. As Edward Purcell demonstrates, *Hans* exemplifies how purportedly neutral jurisdictional principles can mask deeply political and racial compromises.<sup>382</sup> The 1890 decision, which held that the Eleventh Amendment bars citizens from suing their own states for money owed on bonds,<sup>383</sup> is now treated as establishing a fundamental principle of state sovereign immunity rooted in the constitutional structure itself.<sup>384</sup>

Yet Purcell’s excavation cast doubt on the notion that *Hans* was a principled interpretation of constitutional text or original understanding. Instead, the case was an exercise in what he calls “jurisdictional instrumentalism”—the manipulation of jurisdictional doctrine to achieve expedient political ends.<sup>385</sup> The decision emerged from and served the post-Reconstruction settlement, allowing Southern states to repudiate debts (many owed to Black citizens and Reconstruction governments) while maintaining the fiction of legal neutrality.<sup>386</sup> As Purcell explains, the Court’s policy in *Hans* was:

[T]o accept and legitimate an informal but comprehensive and well-understood national settlement in which the North in general and the Supreme Court in particular—animated in significant part by racist pressures and motives—abandoned the goals of Reconstruction, indulged the South in a special independence, and acquiesced in the region’s efforts both to repudiate its bonds and to establish oppressive, white supremacist regimes.<sup>387</sup>

The transformation of *Hans* from an instrument of racial and economic subordination into a cornerstone of federalism doctrine illustrates the power of the neutrality narrative. As Purcell notes, the

381. See *id.* at 2108 (arguing for “reassessing *Klein*’s canonical status in light of its racialized context”).

382. Purcell, *supra* note 12, at 1954–75 (explaining that the Court “fully understood both the instrumental nature of federal jurisdiction and its institutional ability to direct that jurisdiction toward its own selected purposes”).

383. See *Hans v. Louisiana*, 134 U.S. 1, 16 (1890) (finding that “[t]he suability of a State without its consent was a thing unknown to law”).

384. See Purcell, *supra* note 12, at 1931–32 (explaining that “the Rehnquist majority has repeatedly invoked a fundamental constitutional ‘presupposition’ that it attributes to *Hans*”).

385. See *id.* at 1956–62 (“[A]cross a wide range of jurisdictional areas, the Court worked to remold federal jurisdiction to serve its shifting policy goals.”).

386. See *id.* at 1975–2001 (“[The post-Reconstruction settlement] allowed the South to manage its racial relations as it wished, subject only to the tacit condition that the states not act officially to deprive blacks, in a direct and express manner, of certain constitutional rights that the Court would not overtly deny.”).

387. *Id.* at 1933–34.

Rehnquist Court invoked *Hans* as establishing a “presupposition” about state sovereignty that was “first observed over a century ago,” treating it as a timeless constitutional principle rather than a contingent political compromise.<sup>388</sup> This laundering process—stripping *Hans* of its origins in post-Reconstruction racism and recasting it as neutral constitutional interpretation—has enabled modern courts to expand state sovereign immunity far beyond the Constitution’s words, all while claiming fidelity to founding principles.<sup>389</sup>

\* \* \*

Cases too toxic to include are laundered out entirely, their principles flowing through cleaner channels. Cases too important to exclude are laundered through sequential handoffs, each iteration removing another layer of troubling context until only doctrine remains. Continued participation in these patterns raises questions of negligence and even recklessness. Each generation of Federal Courts teachers faces a choice: perpetuate the laundering by passing on sanitized accounts or break the cycle by restoring the missing cases, context, and consequences.

### III. THE ROLE OF FEDERAL JURISDICTION

Federal jurisdiction proves particularly susceptible to legitimacy laundering due to two distinctive features of the field: its origins in deliberate racial avoidance and its persistent claims to neutrality. These characteristics reinforce one another, creating a self-perpetuating system that obscures the field’s substantive commitments while maintaining an appearance of technical inevitability.

#### A. *Origins and Racial Avoidance*

Some of the leading architects of the field promoted forms of abstention and judicial restraint that were designed to minimize the role of federal courts in sensitive social matters—matters that included racial integration. These architects included Felix Frankfurter.<sup>390</sup> Although the origins of the course are often attributed to Henry M. Hart and Herbert Wechsler’s 1953 casebook, *The Federal Courts and the Federal System*,<sup>391</sup>

---

388. *Id.* at 1931–32 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996)).

389. *See id.* at 2056–58 (“[The Rehnquist Court’s] majority Justices seized upon *Hans* and inflated its significance because it was useful in their efforts to check federal power, preserve the institutional autonomy of the states, and limit a wide range of disfavored federal statutes and rights.”).

390. *See infra* notes 392–416 and accompanying text.

391. *See* Akhil Reed Amar, *Law Story*, 102 Harv. L. Rev. 688, 688, 691 (1989) (reviewing Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin & David L. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* (3rd ed. 1988)) (calling the first edition of the book “beautiful and brilliant,” “probably the most important and influential casebook ever written,” and “a monumental landmark”); Althouse, *supra* note 87, at 998 (“Instead of the

Frankfurter's influence predated that landmark text by more than two decades.<sup>392</sup> In 1931, Frankfurter and Katz published *Cases and Other Authorities on Federal Jurisdiction and Procedure*, a casebook that transformed what had been a technical course on federal practice into "a course on the federal judicial role in American political structure, viewed from an Olympian systemic perspective."<sup>393</sup> The casebook's introduction made this ambition explicit, declaring that the "historic experience subsumed under the phrase 'federal jurisdiction and procedure' is not merely an account of the technical regulation of the business of administering law through the courts" but rather concerns how the "federal judiciary is one of the most powerful means for achieving the adjustments upon which the success of a federated nation rests."<sup>394</sup>

For Frankfurter, this reconceptualization demanded that federal judges and scholars approach jurisdictional questions as opportunities for "statesman[ship]."<sup>395</sup> Unlike other courts, he argued, the federal judiciary "serves a special political purpose."<sup>396</sup> Navigating the "interaction between the political power of the states and central government"—often conveyed "through nice questions of judicial competence and procedure"—required "the statesman's gift of imagination as well as the disciplined training of the lawyer."<sup>397</sup> This was no mere rhetorical flourish; Frankfurter emphatically contended that federal jurisdiction served as the medium through which judges could harmonize "the forces of state and national life" in what he recognized as an eternal "dynamic struggle" between competing sovereignties.<sup>398</sup>

His vision cast federal courts as architects of comity, using jurisdictional doctrines as tools to maintain equilibrium in a federal system in which the emphasis would shift "now in one direction, now in the other."<sup>399</sup> Frankfurter's understanding of judicial power as fundamentally

---

intellectual leaders of our generation—like Henry Hart and Herbert Wechsler—we seem like the few surviving adherents to the cult they founded."); Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 *Vand. L. Rev.* 953, 954–55 (1994) [hereinafter Fallon, *Reflections*] ("[W]e have been doing largely the same thing for more than forty years—asking much the same questions formulated by Henry Hart and Herbert Wechsler in the first edition of *The Federal Courts and the Federal System* and trying to answer them with roughly the same techniques.") (footnote omitted).

392. See Evan Tsen Lee, *Federal Jurisdiction According to Professor Frankfurter*, 53 *St. Louis U. L.J.* 779, 783 (2009) (describing how Frankfurter and Wilber G. Katz published a casebook in 1931 that pioneered a view of federal practice "from the standpoint of a statesman or social engineer, prodding the reader to think about how the federal courts could best contribute to the advancement of the polity").

393. *Id.*

394. Felix Frankfurter & Wilber G. Katz, *Cases and Other Authorities on Federal Jurisdiction and Procedure*, at vi (1931).

395. *Id.*

396. *Id.*

397. *Id.* at viii–ix.

398. *Id.* at ix.

399. *Id.*

about managing federal-state relations—rather than simply deciding cases—may well have led to his espousal of judicial restraint as an expression of this imaginative statesmanship. If federal judges were to serve their special political purpose as mediators in the delicate balance of federalism, they must exercise their considerable power with corresponding humility, recognizing when abstention itself became a creative act of judicial imagination.

Frankfurter's commitment to judicial restraint emerged from decades of intellectual formation and political experience. At Harvard Law School, he absorbed John Chipman Gray's skepticism toward natural rights jurisprudence and his pragmatic understanding that legal rules arose from evolving social conditions and judicial responses to changing circumstances.<sup>400</sup> More profoundly, Frankfurter internalized James Bradley Thayer's teachings on constitutional interpretation, particularly his stringent clear error standard that would become foundational to Frankfurter's judicial philosophy.<sup>401</sup> While Thayer died the same year as Frankfurter's arrival at Harvard, his influence proved enduring.<sup>402</sup> Indeed, Frankfurter studied Thayer's seminal article on constitutional law so intensively "that he could recite whole passages from memory."<sup>403</sup> For Frankfurter, judicial restraint transcended abstract principle to become a form of judicial statesmanship; the imagination he championed in federal jurisdiction meant recognizing when not to act—when to defer to other institutional actors in the federal system.

This commitment required personal sacrifice. As Joseph P. Lash documented, Frankfurter subordinated his deep personal convictions about civil liberties and social justice to his belief that judges must defer to democratically elected branches.<sup>404</sup> By the time Frankfurter joined the Supreme Court, he had become "the most effective proponent—indeed almost the symbol—of judicial self-restraint."<sup>405</sup>

But Frankfurter's doctrine of judicial restraint was animated by more than philosophical principle.<sup>406</sup> It served instrumental ends in an era when federal courts stood as obstacles to Progressive reform.<sup>407</sup> The 1923 decision *Adkins v. Children's Hospital*, which struck down minimum wage

---

400. See Lee, *supra* note 392, at 781 (explaining that Frankfurter was Gray's research assistant, and he "undoubtedly read" Gray's work that "rejected the jurisprudence of natural rights").

401. *Id.*

402. *Id.*

403. *Id.* (internal quotation marks omitted) (quoting Michael E. Parrish, *Felix Frankfurter and His Times: The Reform Years* 21 (1982)).

404. See Albert J. Rosenthal, *Book Review*, 76 *Colum. L. Rev.* 892, 893 (1976) (reviewing *From the Diaries of Felix Frankfurter* (Joseph P. Lash ed., 1975)).

405. *Id.* at 894.

406. See Lee, *supra* note 392, at 781.

407. See *id.* at 781–82.

legislation for women,<sup>408</sup> particularly galled him.<sup>409</sup> Having successfully defended hours legislation in cases like *Bunting v. Oregon*,<sup>410</sup> Frankfurter was unpleasantly surprised when Justice George Sutherland's *Adkins* decision distinguished wage laws and quoted wholesale from *Lochner*.<sup>411</sup> "The whole thing we thought gained in 1912 is now thrown overboard," Frankfurter wrote to Learned Hand, "and we are just where we were."<sup>412</sup> "Frankfurter's zeal for judicial restraint grew out of the combination of deep professional indoctrination and longstanding political frustration."<sup>413</sup> He believed the Constitution "permitted vigorous, effective government and social experimentation," and he wanted courts to stay out of the way.<sup>414</sup>

It was this philosophy—federal courts as imaginative architects of federalist harmony—that Frankfurter carried onto the Supreme Court and applied to the most sensitive matters of his era, including questions of racial segregation. In *Railroad Commission of Texas v. Pullman Co.*, Frankfurter authored the opinion creating what is now known as *Pullman* abstention, allowing federal courts to sidestep federal constitutional issues when unclear questions of state law exist.<sup>415</sup> The case presented a stark test of Frankfurter's vision: Texas had ordered that only white "conductors," not Black "porters" performing identical duties, could operate sleeping railcars.<sup>416</sup> The racist motivation was explicit—the Commission cited Texans' supposed resentment at receiving "instructions from a negro man or from a negro porter."<sup>417</sup> When a railroad company and Black porters challenged this order as violating equal protection, Frankfurter saw an opportunity to exercise the judicial imagination he had long championed.

But here the limits and choices embedded in Frankfurter's vision become clear. His opinion characterized racial segregation as a "sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open"<sup>418</sup>—transforming systematic racial subordination into merely another delicate matter

---

408. *Adkins v. Child's Hosp. of D.C.*, 261 U.S. 525, 561–62 (1923), overruled by *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

409. Lee, *supra* note 392, at 782 (citing Michael E. Parrish, Felix Frankfurter and His Times: The Reform Years 165 (1982)).

410. 243 U.S. 426, 438–39 (1917).

411. Lee, *supra* note 392, at 782.

412. *Id.* (internal quotation marks omitted) (quoting Michael E. Parrish, Felix Frankfurter and His Times: The Reform Years 165 (1982)).

413. *Id.*

414. See *id.* (internal quotation marks omitted) (quoting Michael E. Parrish, Felix Frankfurter and His Times: The Reform Years 167 (1982)).

415. See 312 U.S. 496, 498–501 (1941) (holding that district courts should abstain to allow "the issue of state law [to] be settled by appropriate action on the part of the State").

416. *Id.* at 497.

417. *Robel*, *supra* note 12, at 169 (internal quotation marks omitted) (quoting Transcript of Record at 44–47, *Pullman*, 312 U.S. 496 (No. 283)).

418. *Pullman*, 312 U.S. at 498.

requiring federal–state harmony. The “imagination” Frankfurter deployed served to harmonize relations between federal and state courts, not to vindicate the constitutional rights of Black porters facing explicit discrimination.<sup>419</sup> His conception of comity prioritized institutional relationships over individual dignity. The “adjustments” and “harmony”<sup>420</sup> he sought were between governments, not between the Constitution’s promises and the lived experiences of Black citizens. In choosing abstention, Frankfurter revealed whose disruption counted as disorder and whose suffering could be tolerated in service of federalist equilibrium. This was a choice about which forms of conflict deserved judicial resolution and which could be indefinitely deferred through procedural imagination.

Racial avoidance at the Court continued after *Pullman*, albeit sometimes with less transparency. In *Jackson v. State*, Linnie Jackson, a Black woman, was sentenced to five years in the penitentiary for marrying a white man in Alabama—a crime that carried a penalty of two to seven years.<sup>421</sup> After unsuccessful state court appeals, Jackson sought relief from the Supreme Court in 1954, but the Court refused to hear the case, denying certiorari because the Justices “feared that overturning the Alabama miscegenation statute would place unbearable political pressure on the Court and on *Brown*.”<sup>422</sup> This avoidance strategy extended even to the Court’s mandatory jurisdiction in the more famous *Naim v. Naim*, in which the Court dismissed Virginia’s interracial marriage ban case as “devoid of a properly presented federal question”—a dismissal that legal historian Gregory Michael Dorr has shown was a calculated choice not to reach the merits of this racially charged issue.<sup>423</sup>

The early architects of the field as we now know it were not unaware of this dodge; nor were they silent. Some openly supported it. Alexander Bickel, writing in 1962, explicitly defended the Court’s avoidance of *Naim v. Naim* as an example of proper judicial statesmanship.<sup>424</sup> In his framework of “passive virtues,” the Court was right to avoid deciding *Naim*

---

419. See *supra* notes 399–416 and accompanying text.

420. See *supra* notes 399–419 and accompanying text.

421. 72 So. 2d 114, 114 (Ala. Ct. App. 1954), cert. denied, 72 So. 2d 116 (Ala. 1954), cert. denied, 348 U.S. 888 (1954); see also Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 Yale L.J. 1423, 1475 (1994) (explaining that certiorari was denied by the Alabama Supreme Court and the U.S. Supreme Court, which left Jackson to “serve out her term”).

422. Dickson, *supra* note 421, at 1475.

423. Gregory Michael Dorr, *Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court*, 42 Am. J. Legal Hist. 120, 145–55 (1998) (drawing on archival records to assess the unstated reasons behind the dismissal). As a memo contemporaneously drafted by one clerk explained, “In view of the difficulties engendered by the segregation cases it would be wise judicial policy to duck this question for a time.” *Id.* at 149 (internal quotation marks omitted).

424. See Bickel, *The Least Dangerous Branch*, *supra* note 94, at 174.

because the circumstances were not ripe for such a decision.<sup>425</sup> The Court needed time for the segregation principle announced in *Brown* to develop and gain acceptance before extending it to the even more explosive issue of interracial marriage. Bickel argued that the Court operates in a “Lincolonian tension between principle and expediency,”<sup>426</sup> and that it properly has three options: strike down legislation, legitimate it, or “do neither” by avoiding decision through procedural devices to give political processes time to work and to force political responsibility back onto the elected branches.<sup>427</sup> Far from viewing *Naim* as a failure of judicial duty, Bickel saw it as the Court exercising the “passive virtues” essential to its role in constitutional democracy.

In Bickel’s view, forcing the issue prematurely could have damaged both the developing principle of racial equality and the Court’s institutional capacity to effectuate change. On the matter of miscegenation specifically, Bickel wrote that while “a judgment legitimating such statutes would have been unthinkable, given the principle of the *School Segregation Cases*,”<sup>428</sup> nevertheless, to declare “that the states may not prohibit racial intermarriage” would not have been “wise” at a time when the Court “was subject to scurrilous attack by men who predicted that integration of the schools would lead directly to ‘mongrelization of the race.’”<sup>429</sup>

To be sure, this was not a one-sided debate among the field’s architects. Herbert Wechsler took a fundamentally different view of judicial duty. In his famous 1959 Oliver Wendell Holmes Lecture, Wechsler insisted that “the power of the courts is grounded in the language of the Constitution” and that “for anyone who finds the judicial power anchored in the Constitution, there is no such escape from the judicial obligation; the duty cannot be attenuated in this way.”<sup>430</sup> He quoted Chief Justice John Marshall’s declaration in *Cohens v. Virginia* that courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”<sup>431</sup> While Wechsler himself struggled to articulate neutral principles that would justify the *Brown* decision—famously (and perhaps infamously) writing that he had “not yet written the opinion” reconciling

---

425. *Id.* at 111. For discussion and critique, see Gunther, *supra* note 101, at 3 (“There indeed lies the novelty and vulnerability of the Bickel thesis: the emphasis on principle as the highest Court duty, but only in a limited sphere of Court actions; the 100% insistence on principle, 20% of the time.”).

426. Bickel, *The Least Dangerous Branch*, *supra* note 94, at 68.

427. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 *Harv. L. Rev.* 40, 50 (1961) [hereinafter Bickel, *Passive Virtues*].

428. Bickel, *The Least Dangerous Branch*, *supra* note 94, at 174.

429. *Id.* For discussion and critique, see Gunther, *supra* note 101, at 24 (critiquing Bickel’s application of passive virtues in the face of racial classifications).

430. Wechsler, *supra* note 231, at 3, 6.

431. *Id.* at 10 (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

the freedom of association claims on both sides of the segregation question—he never suggested that avoidance was the solution.<sup>432</sup> For Wechsler, the duty to decide was paramount when a case properly came before the Court, even when the principles were difficult to articulate.

A far more forceful opponent of the Bickelian approach was Gerald Gunther, who mounted a devastating 1964 critique of Bickel's thesis in a *Columbia Law Review* article titled *The Subtle Vices of the "Passive Virtues"*.<sup>433</sup> Gunther argued that Bickel's sophisticated defense of avoidance techniques was "profoundly disturbing" and "ultimately subversive of the very values it professes to serve."<sup>434</sup> He accused Bickel of suffering from the "neo-Brandeisian fallacy"—invoking Brandeis's well-known rules for avoiding constitutional questions within a case to assert "an amorphous authority to withhold adjudication altogether—a power far broader than any suggested by the examples given by Brandeis, a discretion far wider than any that can be independently justified."<sup>435</sup>

Gunther was particularly scathing about Bickel's treatment of *Naim*. He noted that the dismissal had, as Wechsler stated, procedural grounds that were "wholly without basis in the law,"<sup>436</sup> and observed that Bickel's approval of this "achievement" assumed it "was possible without 'abandoning principle.'"<sup>437</sup> But Gunther asked pointedly: "Where, then, is the legal basis for the discretion Bickel would condone and indeed advocate in this and similar cases within the appeal jurisdiction?"<sup>438</sup> He emphasized that appellate jurisdiction "has a 'content of its own'"<sup>439</sup> rooted in congressional regulation under Article III. The 1925 Judiciary Act<sup>440</sup> made Supreme Court review mandatory in certain cases, including *Naim*, in which a state's highest court had upheld a state statute against a federal constitutional challenge.<sup>441</sup> For Gunther, Bickel's disregard of this

---

432. *Id.* at 34.

433. Gunther, *supra* note 101, at 1 (declaring Bickel's thesis to be "vulnerable and dangerous").

434. *Id.* at 9.

435. *Id.* at 10.

436. *Id.* at 12 (citing Wechsler, *supra* note 231, at 3, 47).

437. *Id.* at 11.

438. *Id.* at 12.

439. *Id.* at 10.

440. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936.

441. Gunther, *supra* note 101, at 12. For thoughtful discussions of the Act, see Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 *Colum. L. Rev.* 793, 799 (2022) (discussing the 1925 Act but emphasizing ways it also facilitated case selection); Robert C. Post, *The Taft Court: Making Law for a Divided Nation, 1921–1930*, at 373–593 (2024) (detailing Taft's role in advancing the act); Thomas P. Schmidt, *Orders Without Law*, 122 *Mich. L. Rev.* 1003, 1003 (2024) ("Though that change may sound like the staid stuff of federal jurisdiction, in practice, the law—known as the Judges' Bill—marked a radical rethinking of the Supreme Court's role in the constitutional order." (citing Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 *Colum. L. Rev.* 1643, 1730–37 (2000))).

statutory command was “difficult to reconcile with his ambition to preserve the integrity of constitutional principles.”<sup>442</sup>

Gunther noted that Bickel himself insisted that “race is not an allowable criterion for legislative classification” and that this was “of transcendent importance.”<sup>443</sup> He went on: “[E]ven here, when the question is not postponement of the crystallization of principle but application of existing principle, Bickel shrinks from the consequences and invokes the ‘passive virtues.’”<sup>444</sup> The result was that Bickel “inevitably compromises the very principle—the impermissibility of racial classifications—that he purports to protect” and “asks that the disregard continue.”<sup>445</sup> Gunther concluded that while Bickel’s “passive virtues” were “seductively attractive,” they amounted to “a virulent variety of free-wheeling interventionism” disguised as “devices of restraint.”<sup>446</sup>

Yet despite this forceful opposition from Wechsler and Gunther, Bickel’s and Frankfurter’s approaches have had profound influence on the field. The jurisdictional strategies we see in Federal Courts today—the strategic use of justiciability doctrines, judge-made abstention doctrines like *Pullman* abstention—were openly crafted and defended as tools to avoid charged (and sometimes racialized) topics without engaging the substantive merits. The merit of these doctrines is beyond the scope of this Essay. My point is more modest: Given this history, it simply should not surprise us that these doctrines continue to avoid, obscure, and wash away race.

#### B. *Neutrality*

The racial avoidance that shaped the field’s origins evolved into something more subtle: procedural neutrality that masks substantive choices about power and access. As Duncan Kennedy observed, we can become “victims of our own reification,” accepting as natural what are actually “historical artifact[s].”<sup>447</sup> Federal Courts doctrine exemplifies this: Stripped of racial context, jurisdictional rules forged to block civil rights enforcement appear as inherent default principles.

The field’s association with neutrality was consciously theorized by its founding figures. When Wechsler articulated his vision of “neutral principles” in 1959<sup>448</sup>—in what would become one of the most cited law

---

442. Gunther, *supra* note 101, at 12.

443. *Id.* at 23 (internal quotation marks omitted) (quoting Bickel, *The Least Dangerous Branch*, *supra* note 94, at 69).

444. *Id.* at 24.

445. *Id.*

446. *Id.* at 24–25.

447. Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 *Buff. L. Rev.* 205, 221 (1979).

448. Wechsler, *supra* note 231, at 1.

review articles ever written<sup>449</sup>—he was not writing in a vacuum. As coauthor with Henry Hart of the field-defining federal jurisdiction casebook and a founding father of the Legal Process School, Wechsler brought to his neutrality framework the same institutional concerns that animated federal jurisdiction doctrine: the proper allocation of decisionmaking authority, the legitimacy of judicial review, and the relationship between procedure and substance.<sup>450</sup> As Richard Fallon once put it: “Hart and Wechsler defined the field as we now know it, and, what is more, . . . their definition links the subject matter of Federal Courts inquiries almost inextricably to the Legal Process methodology that they likewise pioneered.”<sup>451</sup> A tenet of the Hart and Wechsler paradigm, Fallon further explained, is that courts “should decline to impose substantive judicial judgments on disputes not capable of resolution through the application of neutral principles to sharply defined sets of facts.”<sup>452</sup>

Wechsler’s call for courts to decide cases based on principles that transcend the immediate result resonated powerfully. Yet as Wechsler’s critics would later observe, his framework did not provide criteria for isolating which principles to select—a limitation that equally afflicts jurisdictional doctrine.<sup>453</sup> Wechsler did not deem “nonsubordination” a neutral principle, as Karlan has critically noted.<sup>454</sup> The neutral principles framework thus provides intellectual scaffolding for choices about judicial power, federal–state relations, and access to courts as matters of principle rather than politics, even as these choices inevitably reflect particular values about whose interests deserve protection.

This tradition of cloaking substantive choices in the language of neutral principle continues to shape contemporary jurisdictional doctrine. The Supreme Court’s recent decision in *Franchise Tax Board of California v. Hyatt* exemplifies how claims of constitutional neutrality are encoded in jurisdictional doctrine.<sup>455</sup> In an opinion by Justice Thomas, the

---

449. Fred R. Shapiro & Michelle Pearse, The Most-Cited Law Review Articles of All Time, 110 Mich. L. Rev. 1483, 1489 (2012).

450. See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). The book was published posthumously; the unpublished manuscript had already proven highly influential. See Kent Greenawalt, The Enduring Significance of Neutral Principles, 78 Colum. L. Rev. 982, 982–84 (1978) (describing Wechsler’s influence by way of the concept of neutral principles); G. Edward White, The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change, 59 Va. L. Rev. 279, 280–91 (1973) (describing Hart and Sacks’s influence).

451. See Fallon, *Reflections*, supra note 391, at 956.

452. *Id.* at 966.

453. See Karlan, supra note 136, at 1057–58 (outlining the logical inconsistencies she finds in Wechsler’s narrow focus on neutral principles).

454. *Id.* at 1057–59.

455. See *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019) (holding that state immunity is a “fundamental aspect” of constitutional sovereignty (quoting *Alden v. Maine*, 527 U.S. 706, 713 (1999))).

Court held that State A may not be sued in the courts of State B<sup>456</sup>—a holding that is simply not commanded by the text of the Constitution.<sup>457</sup> The decision is one in a long line of cases in which sovereign immunity doctrine far outpaces the Eleventh Amendment’s text, extending to federal claims in state court,<sup>458</sup> suits by foreign nations,<sup>459</sup> and suits by Native Nations.<sup>460</sup> The text of the Constitution notwithstanding, Justice Thomas rejects “ahistorical literalism,”<sup>461</sup> turning instead to structure and narrative. He contends that preratification immunity from private suits was “[a]n integral component’ of the States’ sovereignty.”<sup>462</sup>

This is not the only conclusion that one could draw from the structure of the document or important narratives in our collective constitutional memory. Most pointedly, the nation’s charter begins with the words “We the People,” and is, fundamentally, a document that protects representative government and *popular* sovereignty.<sup>463</sup> The Constitution never calls states sovereign. Yet when a citizen seeks to vindicate human dignity by suing a state for a legal wrong, state dignity prevails.<sup>464</sup> This fact bears note not to relitigate this precept, but to surface that this area of federal jurisdiction turns on substantive choices.

Yet Justice Thomas presents *Hyatt* and earlier atextual expansions as discovering what the Constitution always required.<sup>465</sup> The opinion’s language reinforces this inevitability: The Constitution “embeds” interstate sovereign immunity, and it “implicitly strips” states’ power to

456. *Id.* at 1490 (“This case, now before us for the third time, requires us to decide whether the Constitution permits a State to be sued by a private party without its consent in the courts of a different State. We hold that it does not and overrule our decision to the contrary in [*Nevada v. Hall*, 440 U.S. 410 (1979)].”).

457. See *id.* The text of the Eleventh Amendment reads: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.” U.S. Const. amend. XI.

458. See *Alden*, 527 U.S. at 712.

459. See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934).

460. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996).

461. See *Hyatt*, 139 S. Ct. at 1498 (quoting *Alden*, 527 U.S. at 730).

462. *Id.* at 1493 (quoting *Fed. Mar. Comm’n v. S.C. Ports Auth.*, 535 U.S. 743, 751–52 (2002)).

463. U.S. Const. pmb.; see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1449–66 (1987) (advancing a conception of federalism predicated on popular sovereignty); Fred O. Smith, Jr., *Awakening the People’s Giant: Sovereign Immunity and the Constitution’s Republican Commitment*, 80 Fordham L. Rev. 1941, 1954 (2012) (emphasizing the tension between popular sovereignty and sovereign immunity).

464. See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 Stan. L. Rev. 1921, 1926 (2003) (“Given the nesting of dignity in personhood, the Supreme Court’s insistence on attributing dignity to states is seen by some as either obnoxious or disingenuous.”). See generally Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 Annals Am. Acad. Pol. & Soc. Sci. 81 (2001) (arguing that expressive harms undergird the state dignity jurisprudence).

465. *Hyatt*, 139 S. Ct. at 1493, 1497.

subject each other to suit.<sup>466</sup> This grammatical sleight of hand transforms an active judicial choice about federalism and state dignity into a neutral constitutional command.

This faith in neutrality through trans-substantive rules found parallel expression in the closely related field of civil procedure. From the first decades of the Federal Rules' existence, Luke Norris explains, "the view of civil process being independent of substance became a cornerstone of rulemaking," an idea rooted in New Deal-era confidence in expert, technical rulemaking.<sup>467</sup> The cornerstone then endured in part because the moment demanded so little of it: It "is becoming a commonplace in LPE [law and political economy] scholarship," Norris observes, "that the perceived economic stability and prosperity of the post-World War II order diminished focus among policymakers, lawyers, and other elites on questions of socioeconomic inequality, power, and distribution."<sup>468</sup> Yet as David Marcus has demonstrated, this claimed neutrality in the context of procedure was always tenuous, sustained by the postwar liberal consensus, a period when "American elites believed in and advocated for universal agreement on political, economic, and social fundamentals."<sup>469</sup> Meaningful procedural change could appear substantively neutral because "everyone—or everyone who matter[ed]—agree[d] fundamentally on the substance."<sup>470</sup> As that consensus dissolved, a wider range of actors have come to appreciate that procedure embodies contested value choices about access, equality, and the distribution of power.

In understanding critiques of neutrality claims, it is important not to conflate two distinct questions. Undoubtedly, procedural rules should apply neutrally in the sense that like cases should be treated alike. That is a fundamental principle of equal treatment under law.<sup>471</sup> But acknowledging that principle does not render the rules themselves neutral or value-free. The choice of which cases count as "alike," which interests deserve protection, and which values should guide adjudication all reflect contestable normative commitments.

This is not to suggest that concerns like state autonomy and institutional competence have no place in jurisdictional doctrine. Rather, it is to insist that characterizing contested value choices as neutral serves to entrench and protect those choices from scrutiny. When we call a rule

---

466. *Id.* at 1497–98.

467. Luke P. Norris, *Procedural Political Economy*, 66 *Wm. & Mary L. Rev.* 1455, 1494 (2025).

468. *Id.* at 1493.

469. David Marcus, *The Collapse of the Federal Rules System*, 169 *U. Pa. L. Rev.* 2485, 2487 (2021).

470. *Id.* at 2494.

471. See *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005) (describing "the basic principle of justice that like cases should be decided alike"); H.L.A. Hart, *The Concept of Law* 159 (2d ed. 1994) (identifying "[t]reat like cases alike" as the central precept of justice (internal quotation marks omitted)).

“neutral,” we often mean that it protects settled expectations and existing distributions of power.<sup>472</sup> But as Cheryl Harris warned, recognizing these rules as “part of the natural order” makes them appear immune from legitimate disturbance, even when they perpetuate profound injustice.<sup>473</sup>

\* \* \*

The features of federal jurisdiction examined in this Part—the field’s racially charged origins and claims of neutrality—do not operate in isolation. They interact and reinforce one another, creating conditions especially conducive to legitimacy laundering. The field’s birth in an era of racial avoidance established foundational norms that continue to shape pedagogy. Claims of neutrality render the substantive choices embedded in these doctrines invisible to critique. Understanding these mechanisms does not dictate specific normative conclusions about jurisdictional doctrine, but it does demand that we confront what has been systematically obscured.

#### IV. DIAGNOSING THE HARM

A map works because it omits.<sup>474</sup> No one expects a road map to mark every tree, every mailbox, every crack in the pavement. Cartographic utility depends on the mapmaker’s judgment about what travelers need to reach their destinations safely. But what if a map omitted bridges rather than trees? What if it failed to mark the roads that dead-end at cliffs? What if the most dangerous passages appeared as the safest routes? At some point, selective curation becomes misdirection.<sup>475</sup> At some point, omission becomes a form of violence.

A casebook works because it omits. No one expects any casebook to reproduce every opinion, every jurisdictional skirmish, every statutory amendment in the field’s history. Pedagogical utility depends on the

---

472. See Cass R. Sunstein, *Lochner’s Legacy*, 87 Colum. L. Rev. 873, 874–75, 882–83 (1987) (arguing that claims of governmental neutrality characteristically take the “existing distribution of wealth and entitlements” as a natural, prepolitical “baseline,” so that preserving the status quo registers as inaction while disturbing it registers as intervention); see also Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470, 472 (1923) (“In protecting property the government is doing something quite apart from merely keeping the peace. It is exerting coercion wherever that is necessary to protect each owner, not merely from violence, but also from peaceful infringement of his sole right to enjoy the thing owned.”).

473. Harris, *supra* note 15, at 1778.

474. Conversations with writer Brenden Shucart were helpful in developing this analogy.

475. This “curation” metaphor is borrowed from Karen M. Tani’s recent foreword. See Karen M. Tani, *The Supreme Court, 2023 Term—Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 Harv. L. Rev. 1, 5–6, 42–43 (2024) (describing how the Court’s case-selection decisions and historical selectivity shape legal narratives).

editor's judgment about what students need to understand federal jurisdiction's operation. But what if a casebook omits cases that reveal jurisdiction's role in fundamental democratic exclusion? What if it failed to mark the doctrines that facilitated racial terror? What if the most compromised origins appeared as the most neutral principles? Where is the line between necessary curation and something more troubling?

Deeply complicating this assessment, rules forged in blood and bondage can transform into instruments of peace and possibility. Dylan C. Penningroth has documented how formerly enslaved African Americans deployed contract law—a body of doctrine steeped in cases that treated humans as chattel<sup>476</sup>—as an instrument of liberation.<sup>477</sup> They transformed the master's tools, if not to dismantle the master's house, then at least to build their own. This paradox suggests that the harm in legitimacy laundering may not inherently lie in the cleansing of cases.

In confronting the fact that harmful cases can be marshaled to pursue justice in the courts, it is tempting to distinguish litigation from education. Litigators, after all, bear duties to their clients, whose concrete harms demand translation into legally cognizable forms in an adversarial system. Educators, by contrast, bear a primary obligation to truth-seeking and intellectual candor that should supersede strategic considerations. Yet this distinction proves too thin. Educators in Federal Courts classrooms play an active role in constructing constitutional memory,<sup>478</sup> and the narratives embedded within that memory carry profound consequences, including in litigation. If this is so, then the capacity of “laundered” cases to advance justice raises fundamental questions about the precise nature of the harm that attends the deployment of precedents marked by unearned legitimacy. If doctrines with tainted origins can be deployed to build a more egalitarian democracy—if dirty capital can fund clean projects—we must ask whether the provenance of our legal tools ultimately matters less than the ends they serve.

What, here, is the *harm*?

The answer to this question is important far beyond the realm of Federal Courts, given that scholars across legal education have identified parallel patterns of strategic erasure. In the Criminal Law curriculum, Alice Ristroph has documented how teaching homicide as a paradigm

---

476. See Simard, *supra* note 22, at 90–96 (surfacing the role of cases that treat enslaved persons as “property” played in the development of contract law, including contemporary doctrines).

477. Penningroth, *supra* note 22, at 1199–1301 (describing cases in which Black plaintiffs in the nineteenth century availed themselves of contract law that had been built atop their suffering). Conversations with Darrell Miller were helpful in thinking through this complication.

478. See MacMahon, *supra* note 89 (“Only a minority of students take a Federal Courts class, but those who do go on to exert a disproportionate influence on the legal system.”).

obscures the offenses that actually fill prisons,<sup>479</sup> while Shaun Ossei-Owusu has critiqued systematic omissions of race, poverty, and gender throughout criminal justice courses.<sup>480</sup> The first-year Property and Contracts courses carry their own silences: K-Sue Park has examined how conquest and enslavement disappear from the law of property.<sup>481</sup> Justin Simard has traced how modern doctrine was shaped by cases in which the enslaved were “property” in dispute.<sup>482</sup> And Brittany Farr has exposed how “warranty” helped legalize brutality<sup>483</sup> and interrogated the limited way race is discussed in first-year Contracts courses.<sup>484</sup> Upper-level courses reveal similar patterns. In a now classic article, Janet Halley has shown how Family Law’s separation of “family” from “market” renders economic exploitation invisible.<sup>485</sup> And in the field of Evidence, Jasmine Gonzales Rose has revealed ways that pedagogy can combat racial bias<sup>486</sup> while David Sklansky has uncovered the racialized origins of hearsay doctrine.<sup>487</sup> Further, other scholars remind us of how sovereigns and peoples have been erased from the entire law school curriculum. Maggie Blackhawk demonstrates how colonialism becomes a “tiny backwater” rather than

---

479. Ristroph, *supra* note 20, at 1664 (explaining that emphasis on homicide propagates a view of criminal law focused on interpersonal violence and “obscures the many ways in which criminal law operates to subordinate individuals who have not inflicted great harm upon others”).

480. Ossei-Owusu, *supra* note 20, at 414 (“Longstanding and recent critiques of law school’s inattention to race, poverty, and gender reinforce this Essay’s argument about criminal legal education’s inequality-producing character.”).

481. See Park, *supra* note 21, at 1062–1153 (canvassing pedagogy in property and analyzing the erasure of conquest and race in the construction of the field).

482. Simard, *supra* note 22, at 82–83 (“Courts routinely cite these cases without acknowledging that they may no longer be, in a formal sense, good law. More important, courts rarely consider the ways in which a case’s slave context makes it less persuasive authority.”).

483. See Farr, *Warranting Violence*, *supra* note 22, at 539–40 (“[W]arranties of soundness were more than just a commonly used contract. Their use and their doctrine were also ways for law to regulate slavery’s violence.”).

484. See Farr, *The Race Case*, *supra* note 22, at 1081 (“[T]here is little scholarship on race’s relevance to Contracts’ doctrinal development. . . . In the absence of such scholarship, it can be difficult for law students, lawyers, and scholars to see the connections between race and Contracts.”).

485. Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 *Yale J.L. & Human.* 189, 226 (2011).

486. See Jasmine B. Gonzales Rose, *Teaching Antiracism in Evidence Law*, in *Integrating Doctrine and Diversity: Beyond the First Year* 301–08 (Nicole P. Dyszlewski, Raquel J. Gabriel, Suzanne Harrington-Steppen, Anna Russell & Genevieve B. Tung eds., 2024).

487. David Alan Sklansky, *The Neglected Origins of the Hearsay Rule in American Slavery: Recovering Queen v. Hepburn*, 2022 *Sup. Ct. Rev.* 413, 413–14 (2023) (recovering *Queen v. Hepburn* as the decision that hardened the modern hearsay rule while “closing off one of the few legal avenues through which people in bondage could seek their freedom,” yet which “does not appear in any of the widely used evidence casebooks”).

constitutive of American sovereignty,<sup>488</sup> while Elizabeth Reese critiques the absence of Tribal court common law from teaching.<sup>489</sup>

Drawing in part from scholarship on erasure and corrupted collective memory—within the legal academy and beyond—this Part offers four principles for identifying when pedagogical omission crosses into harmful legitimacy laundering. These four diagnostic considerations examine whether pedagogical omissions (1) perpetuate false narratives that shape how doctrine develops; (2) conceal exclusion by hiding how doctrines have been used as tools of exclusion and systemic harm; (3) continue replicating subordination they were designed to enable; and (4) inflict ongoing harms on the dignity and legacy of people who, in life, experienced violent erasure. Guiding each tool is Charles Mills’s insistence that when domination structures a society, it also structures the dominant collective memory. Manufacturing “ignorance” becomes an “active deed.”<sup>490</sup> What a dominant memory suppresses shapes narratives, material outcomes, whose dignity is honored, and whose legacy is remembered.

While developed for the field of Federal Courts, these principles borrow from insights outside that narrow field and may prove useful for recognizing similar patterns across legal education. They are not offered as rigid rules. They are instead diagnostic tools, ways of asking whether curatorial choices clarify or obscure, educate or misdirect.

#### A. *Narrative-Driven Distortion*

Cultural historians teach that collective memory does its work through repetition and simplification, crystallizing the past into “figures of memory” a group can carry across generations.<sup>491</sup> The first diagnostic asks whether that repetition and simplification distort collective memory. Omissions can allow a story to be compressed in valuable ways, but they can also invert a story. Three observations guide this inquiry.

First, false narratives can render important harms legally unintelligible. Maggie Blackhawk demonstrates this powerfully:

---

488. Blackhawk, *supra* note 23, at 1794 (internal quotation marks omitted) (quoting Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 383 (1993)).

489. Reese, *supra* note 23, at 624 (“Tribal law opinions . . . could provide interesting contrasts with the case law in our existing curriculum, or they could simply complement established case law . . . . An easy way to introduce students . . . would . . . be to include similar tribal court opinions alongside state common law opinions in the first-year curriculum.”). And even more broadly, scholars ranging from the late great Lani Guinier to Etienne Toussaint have asked educators to consider whether they are living up to the purpose of legal education. See Lani Guinier, *Of Gentlemen and Role Models*, 6 Berkeley Women’s L.J. 93, 93–94 (1990) (discussing the exclusion of marginalized groups occurring from the “traditional values of legal education to train detached, neutral problem-solvers”); Toussaint, *supra* note 24, at 7 (proposing a law school curriculum “founded on challenging the underlying neoliberal assumptions of modern U.S. law and political economy”).

490. Mills, *supra* note 18, at 29.

491. See Assmann, *supra* note 17, at 129 (explaining “figures of memory”).

Constitutional law's exclusive reliance on slavery and Jim Crow as its paradigm case—while treating colonialism as a “tiny backwater”—fundamentally limits what questions get asked, what precedents seem relevant, and what remedies appear possible.<sup>492</sup> When we organize constitutional thought exclusively around the Black/white binary and Southern apartheid, we cannot see how westward expansion shaped federal power doctrines or how tribal sovereignty offers alternative models for governmental authority. As observed in Part II, the Jim Crow paradigm produces an inability to recognize harm outside the South, outside a specific historical period, and to those other than Black Americans.<sup>493</sup> The narrative itself, maintained through strategic exclusion, makes entire categories of legal argument unrecognizable.

Second, selective curation naturalizes certain harms. Alice Ristroph demonstrates how Criminal Law casebooks perpetuate pro-carceral messages through curation. Casebooks, she argues, “serve[] to buttress support for criminal legal interventions” by presenting criminal law as a necessary response to grave moral wrongs while suggesting the system operates with careful restraint.<sup>494</sup> The excluded material—such as drug possession and quality-of-life prosecutions—would reveal arbitrary enforcement, racial disparities, and criminalized poverty.<sup>495</sup> By naturalizing the most sympathetic cases for punishment like homicide, while obscuring routine application, the curriculum makes mass incarceration feel inevitable rather than a policy choice about social control.

Applying these lessons to Federal Courts, the pedagogical choices we make shape which narratives appear natural. Was Reconstruction tragic federal overreach or expansion of fundamental rights? The answer determines whether we read the Reconstruction Amendments narrowly or broadly and whether federal judicial power appears as interference or

---

492. Blackhawk, *supra* note 23, at 1793–95 (citing Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 *Harv. L. Rev.* 381, 383 (1993)). Some scholars in the field of federal jurisdiction and procedure are also confronting absences. See, e.g., Harris, *supra* note 15, at 1749 (“[T]he Court’s opinion amounted to a wholesale evasion of the argument that . . . Plessy’s assignment to a railway car for Blacks, in the absence of a clear standard defining who was white, was an arbitrary and unauthorized taking of the valuable asset of being regarded as white.”); Portia Pedro, *Resistance Proceduralism: A Prologue to Theorizing Procedural Subordination*, 80 *Wash. & Lee L. Rev.* 2039, 2045–46, 2054–75 (2024) (examining how enslaved litigants and their descendants deployed procedural mechanisms in freedom suits as a form of “resistance proceduralism” to challenge subordination and increase access to justice).

493. See Smith & O’Neill, *Forgotten Face*, *supra* note 2, at 94–103 (explaining how federal courts employed selective memory by distinguishing *Dombrowski* and *Younger*).

494. Ristroph, *supra* note 20, at 1668.

495. See Kaaryn Gustafson, *The Criminalization of Poverty*, 99 *J. Crim. L. & Criminology* 643, 644 (2009) (“While states have approached the policing of welfare fraud with varying levels of zeal, there is a clear trend toward toughness on welfare recipients who run afoul of regulations or who fail to comply with welfare rules.”).

protection. Does Jim Crow represent state-level aberration or systematic federal failure? The framing shapes whether jurisdictional restraint appears as principled federalism or complicity in terror. Is comity neutral respect between sovereigns or a doctrine prioritizing institutional convenience over individual rights? How one answers determines whether abstention appears as wise restraint or constitutional abdication. Further, the cases that are taught, and what is taught about them, can inform answers to these questions.

Third, consequences aside, accuracy is a fundamental academic obligation. We are educators, not advocates. Major narratives and paradigms shape doctrine in unpredictable ways, determining which arguments appear plausible, which remedies seem available, and which constitutional arrangements remain unthinkable.<sup>496</sup> Our job is to present these narratives truthfully. This commitment to accuracy exists independent of any consequentialist calculation about harm.

#### B. *Capacity for Harm*

A second diagnostic consideration: Does the omission conceal how doctrines have served as vehicles for democratic exclusion or subordination?

The nature of procedural and jurisdictional devices of “restraint” is that they reveal themselves through what they *enable*. When we exclude cases demonstrating jurisdiction’s deployment to deny political participation, we hide this capacity from students who will inherit and wield these same tools. *Giles v. Harris*<sup>497</sup> exemplifies this principle.<sup>498</sup> Holmes’s conclusion that equity could not remedy the fundamental political wrongs at issue reveals jurisdiction’s availability as an instrument of abandonment.<sup>499</sup> Regardless of whether one takes the view that the political question doctrine *caused* the continued disenfranchisement of Black Alabamians, it provided the legal mechanism through which federal courts could make abandonment appear principled rather than craven. When this case disappears from Federal Courts courses, students learn the political question doctrine as an abstract limitation on judicial power without understanding its proven capacity to facilitate democratic exclusion.

Aided by the “active deed” of forgetting, this capacity persists. Abstention, refined through cases avoiding civil rights enforcement, carries forward its capacity to abandon individuals experiencing grave,

---

496. See Miller, *supra* note 7, at 1361–62 (“Legal systems that come to occupy their own, separate factual universes can issue edicts, but they cannot dispense justice.”).

497. 189 U.S. 475 (1903).

498. See *supra* section II.A.3.

499. *Giles*, 189 U.S. at 482, 485.

immediate, irreparable harm at the hands of their states.<sup>500</sup> The doctrines themselves are vehicles—neutral in appearance, but with demonstrated capacity for particular uses. Students who do not know this history are less equipped to recognize when contemporary applications activate these exclusionary capacities.

None of this understates important counterarguments: What if students, learning how federal courts avoided protecting democratic participation in *Giles*, conclude courts were right about their institutional limitations? Given the Redeemers' terrifying power, perhaps no judicial intervention could have succeeded.<sup>501</sup> Or what if students conclude that racism, not doctrine, determined these outcomes?<sup>502</sup> But these objections reinforce why understanding capacity matters. Even if external forces would have overwhelmed different doctrinal choices, students need to know that jurisdiction proved capable of serving as exclusion's instrument. Moreover, these competing interpretations could generate essential debates about whether *Giles* represents institutional wisdom or moral cowardice. Students cannot develop sophisticated understanding of doctrine's relationship to power if they never learn about jurisdiction's exclusionary deployments.

Some casebooks have recognized this principle's importance, if incompletely. The Hart and Wechsler textbook, for example, connects the political question doctrine to the Supreme Court's abandonment of Japanese Americans during their racist internment, calling this abandonment "infamous[]." <sup>503</sup> Acknowledgments of this sort have the power to generate discussions about jurisdiction's exclusionary capacity. But seeds need cultivation to grow.

This principle does not mandate particular cases or require extensive historical excavation. It asks whether our curatorial choices reveal or conceal what jurisdictional doctrines have proven capable of doing. When we hide their capacity for democratic exclusion, we send lawyers into the world unaware of the tools they are wielding—like teaching surgery without explaining that scalpels can cut arteries as easily as tumors.

---

500. See Smith, *Abstention in the Time of Ferguson*, *supra* note 90, at 2287–88 (arguing that federal courts' use of an exception to the *Younger* abstention doctrine should extend to cases challenging the criminalization of poverty); Smith, *Younger Abstention*, *supra* note 75, at 1453 ("Recent arguments for expanding criminal abstention threaten to fundamentally reshape federal courts' role in correcting illegalities in state criminal proceedings.").

501. See Anthony Michael Kreis, *The New Redeemers*, 55 Ga. L. Rev. 1483, 1487–89 (2021) (describing the Redeemers who battered the democratic gains of Reconstruction and comparing them to forces that gave rise to the coup attempt on January 6, 2021).

502. Thanks are due to William Baude for helping me think through this set of counterarguments.

503. Baude et al., *supra* note 195, at 322.

C. *Propensity and Design*

A third diagnostic consideration asks whether a doctrine's operative core retains functional continuity with a subordinating origin, such that the doctrine continues to perform the exclusion it was built to perform even as its stated justifications change. This presents perhaps the strongest case for including historical context, because here the past is not merely a backdrop to the present doctrine; it is the present doctrine's blueprint.

W. Kerrel Murray's account of "discriminatory taint" supplies helpful mechanics.<sup>504</sup> Murray shows that taint can persist despite "pure-hearted T2 decisionmakers" wherever there is "formal and functional continuity of temporally separated policies."<sup>505</sup> "The persistence of an older policy's operative core," he explains, "can manifest a 'discriminatory taint' that alone should impugn an otherwise facially legitimate policy."<sup>506</sup> Notably, Murray employs the very metaphor this Essay presses: He distinguishes the "genuine purging" of taint from its "laundering," recognizing that "policy change over time can cloak precisely that behavior" when context is manipulated in bad faith.<sup>507</sup> His is a two-stage inquiry. First, does sufficient continuity exist between the earlier and later policies?<sup>508</sup> Second, can the state "show that the contemporary policy has eliminated any meaningful disparate impact"?<sup>509</sup> A "decision rule focused on specific intent is uniquely inapt[.]" he argues, when structural continuity carries the harm forward.<sup>510</sup>

Translating Murray from policies to doctrines requires naming what an "operative core" is for a doctrine of restraint. It is the withdrawal itself—the jurisdictional or remedial mechanism by which the federal courts decline to act—as distinct from the rationales (comity, federalism, equitable prudence, the neutral principle) that dress the withdrawal in each era. This distinction matters because, as Part III argued, the doctrines that constitute Federal Courts are withdrawal mechanisms at their core, and a withdrawal mechanism does not change character with its target. The refusal to act performs the function of removing the federal forum from a subordinated litigant's reach, whether that refusal is pointed at freedpeople in 1890 or at noncitizens in 2018.

Consider the plenary power doctrine. Its operative core is the insulation of political-branch decisions over immigration from meaningful judicial review, and that core was forged, in *Chae Chan Ping*, expressly to

---

504. W. Kerrel Murray, *Discriminatory Taint*, 135 Harv. L. Rev. 1190, 1261–70 (2022).

505. *Id.* at 1194–97 (defining T2 as the contemporary action or policy occurring in the second instance).

506. *Id.* at 1194–95.

507. *Id.* at 1194–97 (emphasis omitted).

508. *Id.* at 1196.

509. *Id.* at 1197.

510. *Id.*

sustain the exclusion of Chinese laborers on frankly racial grounds.<sup>511</sup> More than a century later, the Court could disavow the doctrine's most notorious application—declaring that *Korematsu* “has no place in law”<sup>512</sup>—while in the same breath deploying plenary power's operative core to uphold an entry ban under a posture of extreme deference.<sup>513</sup> The rationale had been laundered from racial exclusion into national security and executive prerogative; the mechanism of nonreviewability crossed from T1 to T2 intact. Irrespective of the motives of the current Justices in the majority, the doctrine's function remains. And the doctrine thrives on forgetting. A laundered rationale is more persuasive if the original one has been forgotten.

A second example is a principle from *Giles v. Harris*. There, as discussed in Part II, the Court declined to order Jackson Giles onto Alabama's voter rolls, reasoning that equity could not superintend a fraudulent electoral scheme.<sup>514</sup> The relevant operative core is the doctrine's skepticism of the prospective, structural remedy—its readiness to withhold the injunction while leaving the backward-looking damages action intact. Indeed, decades later, in *Lane v. Wilson*, the Court permitted a damages action for the same species of discriminatory disenfranchisement.<sup>515</sup>

The Court has at times paired *Giles* with *Lane* to justify withholding an injunction on federalism grounds even where damages might lie. In *Stefanelli v. Minard*, explaining how it keeps the Civil Rights Act of 1871 from being “used to centralize power so as to upset the federal system[,]”<sup>516</sup> the Court described discretionary refusal of equitable relief as “one of the devices we have sanctioned for preserving this balance” and paired *Giles* with *Lane* to illustrate that it would withhold relief in equity

511. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889) (“[If] the United States [government] . . . considers the presence of foreigners of a different race in this country . . . to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.”).

512. *Trump v. Hawaii*, 585 U.S. 667, 710 (2018) (internal quotation marks omitted) (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

513. *Id.* at 704–08 (upholding the entry restrictions under rational basis review). Ahilan Arulanantham has argued that the Constitution's prohibition on invidious race discrimination binds federal courts through the Fifth Amendment. On that view, decisions motivated by racial animus should be denied precedential force, and therefore, *Trump v. Hawaii* should not have treated the deference it inherited from the Chinese Exclusion cases as binding. See Arulanantham, *supra* note 256, at 439–40, 467–68, 497. He also addresses “second-generation” cases that re-adopt a tainted rule without repeating its reasoning, arguing that such cases “partake[] too much of the infirmity” of the original. *Id.* at 475–78 (internal quotation marks omitted) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). The efficacy of that intriguing remedy is beyond the scope of this Essay.

514. *Giles v. Harris*, 189 U.S. 475, 486–88 (1903).

515. 307 U.S. 268, 275–77 (1939).

516. 342 U.S. 117, 121 (1951) (internal quotation marks omitted) (quoting *Collins v. Hardyman*, 341 U.S. 651, 658 (1951)).

“even when recognizing that comparable facts would create a cause of action for damages.”<sup>517</sup> This asymmetry is not neutral. Damages compensate an individual and leave the subordinating structure standing; the injunction is the remedy that would dismantle it.<sup>518</sup> A doctrine that reliably grants the first and withholds the second embodies a design, one the Court itself articulated as the preservation of a particular federal balance.

That design choice returned in *O’Shea v. Littleton*, in which the Court refused injunctive relief against discriminatory bond-setting and sentencing as “a major continuing intrusion” barred by principles of equitable restraint.<sup>519</sup> And *O’Shea* lives. Recently, for example, in *Daves v. Dallas County*, the en banc Fifth Circuit invoked *O’Shea* to compel abstention from a class action brought by pretrial detainees jailed for nothing but their inability to pay bail, recasting the structural relief they sought as an impermissible “ongoing federal audit of state criminal proceedings.”<sup>520</sup> The operative core of *Giles* arrived at a present terminus. The doctrine that denied Jackson Giles an injunction in 1903 now denies one to the indigent accused in 2023. The rationale has been updated from Holmes’s equitable fatalism to the comity of *O’Shea*, while the function— withholding the single remedy capable of dismantling the machinery— remains.

This is provided as an example of “propensity” because its force comes from continuity across time and from the Court’s own account of the remedial choice as a balance-preserving device. But nothing in the argument requires the reader to accept the design characterization to feel its weight. Even a reader who sees only remedial prudence in the *Giles–Stefanelli–O’Shea* line would hopefully concede the *capacity* the prior principle describes: A doctrine structured to withhold precisely the remedy that disrupts ongoing subordination is, at a minimum, a doctrine with the capacity to entrench it.<sup>521</sup>

The same diagnostic likely travels across disciplines. In criminal law, Dorothy Roberts traces the carceral state’s genealogy from slavery through convict leasing to mass incarceration as continuation rather than

---

517. *Id.* at 121–22.

518. For discussion of distinctions between injunctive relief and damages in civil rights litigation, see John C. Jeffries, Jr., *The Right–Remedy Gap in Constitutional Law*, 109 *Yale L.J.* 87, 110 (1999) (“[Injunctions] direct societal resources toward investments in future growth and development, not toward cash outlays for past harms.”).

519. 414 U.S. 488, 499–502 (1974).

520. *Daves v. Dallas Cnty.*, 64 F.4th 616, 626 (5th Cir. 2023) (en banc) (internal quotation marks omitted) (quoting *O’Shea*, 414 U.S. at 500) (holding that *Younger* and *O’Shea* require federal courts to abstain from a challenge to the county’s money-bail system). For a fuller treatment, see Smith, *Younger* Abstention, *supra* note 75, at 1454 (reading *Daves* as exemplary of contemporary abstention’s expansion against structural challenges to pretrial detention).

521. See *supra* section IV.B.

aberration,<sup>522</sup> and Paul Butler argues that the system delivers to poor defendants precisely what it was built to deliver.<sup>523</sup> And parallel questions arise when a field teaches doctrines of subordinating origin, such as property law's treatment of conquest and enslavement.<sup>524</sup>

A limit of this model bears noting. Murray's inquiry has two stages, and this Essay is chiefly pressing the first: the demonstration of continuity between a subordinating origin and a persisting core. His second stage—whether the contemporary application has eliminated any meaningful disparate impact—resists the clean proof against a diffuse doctrine that it would permit against a discrete statute, since a doctrine's effects are scattered across the many cases in which it is invoked. These examples are therefore offered as demonstrations of continuity, rather than completed proofs of present impact.

Translated to pedagogy, the principle asks whether the weight of the doctrinal record suggests that what professors teach as neutral restraint retains, in its operative core, the function it was built to serve. To exclude that history when the answer may be “yes” is to hand students the blueprint's cover sheet and ask them to evaluate, and eventually to build upon, a structure whose foundations are kept out of view.

#### D. *Dignity and Legacy*

A fourth diagnostic consideration ventures into less conventional territory, examining whether exclusions perpetuate two distinct forms of posthumous harm: degradation of dignity and subversion of human pursuits. This consideration draws from philosophical traditions that may feel foreign to legal analysis yet offers insights particularly relevant to fields like Federal Courts in which professors routinely teach cases built on human suffering.

From Grotius to Kant, philosophers have long contended that respect for human dignity must extend beyond the living.<sup>525</sup> Echoing these insights in legal scholarship, Justin Simard has argued that teaching cases where humans were property—without acknowledging this reality—

---

522. Dorothy E. Roberts, Foreword: Abolition Constitutionalism, 133 Harv. L. Rev. 1, 34 (2019) (“The explosion in imprisonment of African Americans at the end of the twentieth century represents the continuation of trends that originated even before the century's start.”).

523. See Paul D. Butler, Poor People Lose: *Gideon* and the Critique of Rights, 122 Yale L.J. 2176, 2178 (2013) (“Poor people lose, most of the time, because in American criminal justice, poor people are losers. Prison is designed for them.”).

524. See Park, *supra* note 21, at 1062 (arguing that conquest and slavery are foundational to American property law); Simard, *supra* note 22, at 83 (discussing the harms of ignoring the context where slavery-related cases shaped doctrines).

525. See Hugo Grotius, *The Rights of War and Peace* 215 (A.C. Campbell trans., M. Walter Dunne 1901) (1625) (rooting the obligation of burial customs in the “dignity of man”); Immanuel Kant, *The Metaphysics of Morals* 83 (Lara Denis ed., Mary Gregor trans., Cambridge Univ. Press 2017) (1797).

undermines the dignity of those who were enslaved.<sup>526</sup> He contends that judges who cite cases featuring enslavement while “ignoring the broader context within which this doctrinal history developed” impose “dignitary harms” on those subjected to legal subjugation.<sup>527</sup> When courts treat cases involving enslaved people as ordinary precedent, they normalize brutal realities. Consider *McArthur v. Carrie’s Administrator*, in which an enslaved woman named Fanny and her four children were seized and jailed as disputed property, sold to purchase cattle, and moved three hundred miles from their community.<sup>528</sup> As Simard observes, “citation to this case normalizes the treatment she and her family endured as legally defined property.”<sup>529</sup>

This dignitary concern has weight in Federal Courts as well. Consider *Governor of Georgia v. Madrazo*, in which the question was whether a Spanish man could sue the governor of the state of Georgia for enslaved people that he argued properly belonged to him, not Georgia.<sup>530</sup> The case furnished the seeds of later cases like *Edelman v. Jordan*, which held that nominally equitable suits that require monetary payments from the treasury run afoul of sovereign immunity.<sup>531</sup> That case does not fit neatly into the diagnostic principles this Essay has offered about capacity or propensity for harm because either holding from the Court would have left the captured men and women as enslaved persons. Still, teaching it without acknowledging that human beings were the “property” in dispute perpetuates a particular form of harm: treating as abstract legal principle what was lived brutality.

But posthumous harm extends that specific dignitary concern. Joel Feinberg, George Pitcher, Martha Nussbaum, and others have argued that systematic legacy denial on account of one’s identity—erasing people’s contributions to building the world we inhabit—constitutes a form of ongoing harm.<sup>532</sup> If interrupted pursuits can harm the dead, then identity-

---

526. Simard, *supra* note 22, at 83–84.

527. *Id.*

528. 32 Ala. 75, 79–86 (1858).

529. Simard, *supra* note 22, at 102.

530. 26 U.S. (1 Pet.) 110, 123 (1828).

531. 415 U.S. 651, 668 (1974).

532. See, e.g., Bernard Williams, *The Makropulos Case: Reflections on the Tedium of Immortality*, in *Problems of the Self: Philosophical Papers, 1956–1972*, at 82, 83–85 (1973); Thomas Nagel, *Mortal Questions* 4–6 (1979); see also 1 Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* 10–12, 26 (1984) (developing the harm principle and explaining that a theory of harmfulness requires an account of what counts as harm); Martha C. Nussbaum, *The Damage of Death: Incomplete Arguments and False Consolations*, in *The Metaphysics and Ethics of Death: New Essays*, 25, 30–36 (discussing death’s capacity to interrupt valuable projects and posthumous events’ effects on lives); James Warren, *The Harm of Death in Cicero’s First Tusculan Disputation*, in *The Metaphysics and Ethics of Death: New Essays*, *supra*, at 44, 45 n.1 (listing recent analyses of Roman thanatology); George Pitcher, *The Misfortunes of the Dead*, 21 *Am. Phil. Q.* 183,

based denial of their role in shaping our democracy should trouble us.<sup>533</sup> We should avoid complicity in this erasure.<sup>534</sup>

This principle, however, points in a different direction than simply highlighting past injustices. It encourages us to recover moments of contribution despite attempts at erasure—to include voices from below who helped construct the jurisdictional tools we still use. This might mean going beyond traditional legal sources to newspaper accounts, letters, community records that preserve names, and stories judicial opinions omitted.

Consider what this principle reveals about our trio of erased cases. Teaching *Chae Chan Ping* is not just about revealing plenary power's racist origins but about recognizing Chinese immigrants who challenged exclusion and, through their resistance, helped define the boundaries of judicial review. These moments could reasonably be paired with cases in which Chinese residents successfully deployed federal jurisdiction against local subjugation—like *In re Lee Sing*, in which Judge Sawyer invalidated San Francisco's racial zoning ordinance that would have confiscated Chinese homes and businesses without due process,<sup>535</sup> or *Wong Wai v. Williamson*, in which twenty-five thousand Chinese residents successfully enjoined the city from forcibly injecting them with the dangerous and ineffective Haffkine Prophylactic solely based on their race.<sup>536</sup> Ho Ah Kow's challenge to the Queue Ordinance—which required Chinese prisoners to have their hair cut to within an inch of the scalp, attacking a practice central to cultural and religious identity<sup>537</sup>—likewise shows how those targeted by discriminatory criminal laws helped construct equal protection jurisprudence that would eventually dismantle Jim Crow. These victories complicate narratives of federal court abdication and reveal how marginalized communities, even while facing exclusion, simultaneously used federal jurisdiction to resist local terror.

Teaching *Giles v. Harris* could mean acknowledging the thousands of Black Alabamians who persisted in seeking federal protection even after the Court abandoned them. They were agents of freedom, not just objects of harm. Jackson Giles himself brought multiple actions—first seeking equitable relief to compel his registration, then filing for mandamus, and finally pursuing damages against the Montgomery County registrars.<sup>538</sup> Though the Court dismissed that claim too, on adequate and independent state law grounds, the persistence shows that these were active litigants who

---

183–84, 187 (1984) (arguing that events after death can harm living people by frustrating their interests).

533. Smith, Ordinary Persons, *supra* note 43, at 1078–79.

534. Smith, On Time, *supra* note 43, at 247, 263.

535. 43 F. 359, 361 (C.C.N.D. Cal. 1890).

536. 103 F. 1, 8, 10 (C.C.N.D. Cal. 1900).

537. Ho Ah Kow v. Nunan, 12 F. Cas. 252, 253–55 (C.C.D. Cal. 1879).

538. See Giles v. Harris, 189 U.S. 475, 482 (1903); Giles v. Teasley, 193 U.S. 146, 149 (1904).

exhausted procedural avenues in efforts to make federal jurisdiction meaningful.

This resilience shaped doctrine even in defeat. *Giles v. Harris* itself foreshadowed that an action at law could be maintained, planting the seed that would bloom in *Lane v. Wilson* decades later. Iverson W. Lane, another Black citizen denied registration, succeeded where Giles had failed, with Justice Frankfurter acknowledging in 1939 that the Fifteenth Amendment must reach “sophisticated as well as simple-minded modes of discrimination.”<sup>539</sup> Lane’s victory vindicated not just his own rights but the legal theory that thousands before him had advanced—that federal courts could provide damages for discriminatory denial of voting rights even when they would not order equitable relief. The jurisdictional tools that eventually dismantled Jim Crow were forged in these defeats, by plaintiffs whose names rarely appear in our casebooks but whose struggles created the precedential foundations we still rely upon.

Teaching *Lone Wolf* could also mean acknowledging how Kiowa, Comanche, and Apache leaders persisted in seeking just compensation for sixty years after Congress took their lands through the Act of June 6, 1900, which implemented an “agreement” signed by fewer than the required three-fourths of adult males, in direct violation of the Medicine Lodge Treaty.<sup>540</sup> Through decades of lobbying Congress, maintaining tribal organizations, and pursuing litigation, they finally secured per capita payments in 1960, though many original claimants had died fighting for compensation that was rightfully theirs.<sup>541</sup>

The damage the *Lone Wolf* case inflicted—its holding that Congress’s taking of tribal lands was “a political one, not subject to be controlled by the judicial department”—might have been even worse but for how the Supreme Court later cabined this doctrine.<sup>542</sup> In *United States v. Sioux Nation*, the Court confronted a similar pattern: The 1877 Act taking the Black Hills from the Sioux Nation implemented an “agreement” signed by only ten percent of adult males despite the Fort Laramie Treaty’s requirement of three-fourths consent.<sup>543</sup> But while *Lone Wolf* had treated Congress’s good faith as conclusive,<sup>544</sup> *Sioux Nation* rejected any presumption that “Congress acted in perfect good faith in the dealings with the Indians,” requiring instead “a thoroughgoing and impartial

---

539. *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

540. See *supra* notes 265–278 and accompanying text.

541. Berlin B. Chapman, *The Day in Court for the Kiowa, Comanche and Apache Tribes*, 2 *Great Plains J.* 1, 1 (1962).

542. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

543. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 382 (1980).

544. *Lone Wolf*, 187 U.S. at 565.

examination of the historical record” to determine whether Congress had effectuated a compensable taking.<sup>545</sup>

The Sioux litigation—spanning from 1923 to 1980, with Congress waiving *res judicata* to permit relitigation after adverse decisions<sup>546</sup>—demonstrates how Indigenous persistence across generations could eventually transform doctrines that could have placed tribal dispossession beyond judicial review. Teaching *Lone Wolf* alongside *Sioux Nation* reveals both the violence of the political question doctrine and its partial retreat through decades of Indigenous legal resistance that kept these claims alive long enough for the doctrinal landscape to shift.

One challenge of attempting to lift the voices of people who were intentionally excluded from lawmaking is their absence from the archive. For every Jackson Giles or Wong Wai, there are many more whose resistance itself was erased. On this score, legal scholars might consult what Saidiya Hartman calls “critical fabulation”—the imaginative work of reconstructing lives that power meant to erase.<sup>547</sup> Law, with its emphasis on authoritative text, might seem an odd place to deploy this concept. Yet this reconstructive work already happens in constitutional interpretation. When we ask what an ordinary member of the public would have understood at the Founding, we necessarily engage in imaginative reconstruction, looking to available sources like dictionaries to gain insight into a broader understanding. The question is who we imagine.

Constitutional Law courses can expand the traditional interpretive circle. Enslaved people were almost certainly in Independence Hall, their labor enabling the deliberations we venerate. What process might they have believed they were due? What constituted liberty for those who were denied it? What was cruel to those who experienced sanctioned brutality? The answers shift depending on whose voices we consult and which ones we exclude from our conception of the public.

The diagnostic question is whether our pedagogical choices perpetuate or interrupt this erasure. “[W]e must resist the temptation to transform jurisdictional principles into pristine marble axioms, stripped of their origins in human suffering, colonialism, and American apartheid, washed of their blood.”<sup>548</sup> When teachers include cases and context, holdings and humans, we honor posthumous interests in how struggles are remembered. This does not require extensive historical excavation in every class session. Sometimes it is as simple as naming names, acknowledging that behind every jurisdictional dispute were people whose efforts to secure justice, successful or not, built the legal framework we inherit.

---

545. *Sioux Nation*, 448 U.S. at 373, 416 (internal quotation marks omitted) (quoting *Lone Wolf*, 187 U.S. at 568).

546. *Id.* at 384, 389.

547. Hartman, *supra* note 17, at 11–12.

548. Smith & O’Neill, *Forgotten Face*, *supra* note 2, at 106.

## CONCLUSION

Through systematic exclusion and progressive decontextualization, the field transforms doctrines forged in subjugation into seemingly neutral principles of constitutional architecture. This legitimacy laundering generates authority for doctrines that might otherwise face searching scrutiny. When jurisdictional rules appear as technical inevitabilities rather than contingent choices about whose harmony counts and whose citizenship deserves protection, they accumulate the kind of unquestioned legitimacy that shapes both legal education and legal possibility itself.

Yet this Essay's diagnostic framework reveals a paradox that resists simple resolution. The capacity for harm embedded in jurisdictional doctrines—their proven ability to facilitate democratic exclusion—coexists with their transformative potential. The same federal courts that deployed the political question doctrine to abandon Black voters and Chinese immigrants later became instruments, however imperfect, for dismantling Jim Crow. The contract law steeped in slavery's logic became, in the hands of formerly enslaved people, a tool for claiming freedom and property. This duality suggests that the harm in legitimacy laundering lies not in the doctrines themselves but in our collective forgetting—in how erasure prevents us from recognizing when contemporary applications activate these exclusionary capacities. Students who never learn how “comity” privileged institutional harmony over Black citizens' lives cannot recognize when similar choices masquerade as neutral principles today. Lawyers who encounter abstention without understanding its origins in racial avoidance cannot fully grasp what values these doctrines embed and whose interests they systematically subordinate.

Teaching with this fuller history does not require choosing between doctrinal sophistication and historical honesty. But if we teach technical mastery without contextual understanding, we send lawyers into the world with powerful tools but no knowledge of what those tools have built and destroyed, whom they have protected and abandoned, what possibilities they have opened and foreclosed. The legitimacy of our jurisdictional doctrines, and of the federal courts themselves, should rest on honest reckoning with how doctrines have failed and, at times, transcended their origins. As stewards of legal knowledge, we must sometimes take active steps to be teachers of difficult truths rather than curators of comfortable myths.

## APPENDIX A: THE CASEBOOK STUDY

This Appendix presents the data underlying the casebook study described in Part II. The study coded sixty-nine editions of ten Federal Courts casebook series published between 1931 and 2025. For each edition, the author recorded whether each surveyed case appears in the textbook's treatment of the political question doctrine and the nature of its treatment. The unit of observation is the casebook–case pair. When a surveyed case was cited within a casebook's edited excerpt of another opinion, the citation was recorded only if the excerpt's discussion of that case was substantial; passing citations within edited opinions were not coded as appearances. Table A-1 lists the ten casebooks in print in current editions when the study was conducted, which is the set to which the Essay's in-text counts refer. Table A-2 reports each surveyed case's treatment in each of those ten editions. The complete dataset, including all sixty-nine historical editions, is on file with the author and the *Columbia Law Review*.

*Treatment codes:* P = principal case (lead full excerpt); E = full case excerpt; M = multiparagraph discussion; N = note case or discussion in notes; F = footnote reference; C = brief citation; — = case does not appear. Combined codes indicate multiple forms of treatment.

## TABLE A-1. THE STUDY SET

- [1] William Baude, Jack Goldsmith, John F. Manning, James E. Pfander & Amanda L. Tyler, *Hart and Wechsler's The Federal Courts and the Federal System* (8th ed. 2025).
- [2] Martin H. Redish, Suzanna Sherry, James E. Pfander, Steven S. Gensler & Adam N. Steinman, *Federal Courts: Cases, Comments and Questions* (9th ed. 2021).
- [3] Charles Alan Wright, John B. Oakley & Debra Lyn Bassett, *Federal Courts: Cases and Materials* (15th ed. 2023).
- [4] Jonathan R. Siegel, *Federal Courts: Cases and Materials* (3d ed. 2023).
- [5] Curtis A. Bradley, Tara Leigh Grove, John C. Jeffries, Jr. & Peter W. Low, *Low and Jeffries' Federal Courts and the Law of Federal-State Relations* (10th ed. 2022).
- [6] Donald L. Doernberg, Evan Tsen Lee & Celestine Richards McConville, *Federal Courts: A Contemporary Approach* (6th ed. 2021).
- [7] Michael L. Wells, William P. Marshall & Gene R. Nichol, *Cases and Materials on Federal Courts* (5th ed. 2024).
- [8] Arthur D. Hellman, David R. Stras, Ryan W. Scott, F. Andrew Hessick & Derek T. Muller, *Federal Courts: Cases and Materials on Judicial Federalism and the Lawyering Process* (5th ed. 2022).
- [9] Michael Finch, Caprice L. Roberts & Michael P. Allen, *Federal Courts: Context, Cases, and Problems* (4th ed. 2024).
- [10] Erwin Chemerinsky, Seth Davis, Fred O. Smith, Jr., & Norman W. Spaulding, *Federal Courts in Context* (2023).

TABLE A-2. TREATMENT OF SURVEYED CASES IN THE STUDY SET

Column numbers correspond to the casebooks listed in Table A-1.

| Case                                                         | 1 | 2 | 3   | 4 | 5 | 6 | 7 | 8 | 9 | 10 | Books (of 10) |
|--------------------------------------------------------------|---|---|-----|---|---|---|---|---|---|----|---------------|
| <i>Baker v. Carr</i> (1962)                                  | M | N | P   | P | M | M | N | M | M | N  | 10            |
| <i>Nixon v. United States</i> (1993)                         | P | E | F,C | E | M | N | N | P | P | P  | 10            |
| <i>Rucho v. Common Cause</i> (2019)                          | M | E | E   | E | E | M | P | M | M | E  | 10            |
| <i>Zivotofsky v. Clinton</i> (2012)                          | M | M | E   | — | E | P | M | N | — | E  | 8             |
| <i>Luther v. Borden</i> (1849)                               | M | — | —   | M | M | N | N | N | F | M  | 8             |
| <i>Powell v. McCormack</i> (1969)                            | M | P | F   | — | M | C | — | N | F | —  | 7             |
| <i>Goldwater v. Carter</i> (1979)                            | M | — | —   | — | M | N | — | N | F | E  | 6             |
| <i>Coleman v. Miller</i> (1939)                              | M | — | —   | — | M | N | — | N | F | —  | 5             |
| <i>Bush v. Gore</i> (2000)                                   | M | M | F   | — | — | M | — | — | N | —  | 5             |
| <i>Gilligan v. Morgan</i> (1973)                             | C | — | F   | — | M | — | — | N | F | —  | 5             |
| Vietnam-era war powers cases (grouped)                       | N | N | —   | — | N | — | — | N | — | —  | 4             |
| <i>Colegrove v. Green</i> (1946)                             | N | C | —   | — | N | N | — | — | — | —  | 4             |
| <i>Vieth v. Jubelirer</i> (2004)                             | F | N | F   | — | — | — | — | N | — | —  | 4             |
| <i>Japan Whaling Ass'n v. American Cetacean Soc'y</i> (1986) | N | — | —   | — | N | N | — | — | — | —  | 3             |
| <i>Davis v. Bandemer</i> (1986)                              | F | N | —   | — | — | — | — | N | — | —  | 3             |
| <i>Pacific States Tel. &amp; Tel. Co. v. Oregon</i> (1912)   | N | — | —   | M | C | — | — | — | — | —  | 3             |

[illegible]