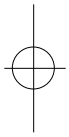
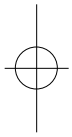
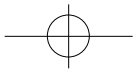
Identity Crisis







Identity Crisis

Federal Courts in a Psychological Wilderness

Donald L. Doernberg

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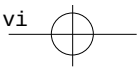
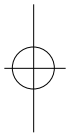
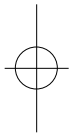
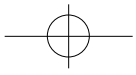
To Jeremiah S. Gutman:

Superb lawyer, indefatigable teacher, demanding taskmaster
unparalleled mentor, role model extraordinaire









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Foreword

This book is an exploration, and it has brought its share of surprises. It results in large part from having taught the Federal Courts course for many years, which constantly brings one into contact with the sheer volume of institutional doctrine that characterizes the federal courts. State court systems have far less doctrine defining their functioning. They virtually never wrestle with federalism and only rarely with separation of powers. There is no law school course dealing with the institutional functioning of state courts (as opposed simply to state court practice), and there is no need for one.

The federal courts are different. They are not simply another hierarchical system of courts, else they would not be worth separate study. In fact, the federal courts have played and continue to play a major role in defining power relationships in our society: those between states and the federal government, those between branches of the federal government and those between governments (both state and federal) and individuals. It is from that singular federal court role that so much of federal courts doctrine springs.

Studying any single part of that doctrine gives little appreciation of just how negative it is in tone. The more one considers different areas, however, the more one is struck by the almost self-deprecating nature of much of the doctrine. That perception caused me to ask some mental health professionals about such negativity, not expecting necessarily to get much of a reaction. It was interesting that the people with whom I spoke thought that the courts' choice of words and approach was quite revealing, and that caused me to begin thinking more intensely about the federal courts as self-evaluators. The result is the combination of thought experiment and analysis that is this volume.

In the course of research, I was quite surprised to discover the extent to which Congress provided in the early years what today we would recognize as federal question jurisdiction. The fact that it was done piecemeal—in individual statutes—helps to conceal from casual

view the scope of Congress's (and the nation's) acceptance of such jurisdiction. The routine creation of such jurisdiction has major implications for Federal Courts doctrine in many areas, but none more so than the Eleventh Amendment. I have not sought fully to explore all of those implications here; that is worth separate extended treatment that would have distracted the reader from the theme of this book. It is, however, a matter that deserves focused attention from the academy and the bench.

I do not for the most part suggest specific doctrinal changes; that is not the object of this book. I do suggest that the federal courts would benefit were they to evaluate their doctrine by reference to some positive sense of institutional role. A person defined only by the things that he or she is unable to do, refuses to do, or feels inhibited from doing has little depth and no discernible purpose; at least one hopes for a sense of positive purpose, though each of us may define our purposes differently. It seems unlikely that the Framers or the first Congress created the federal courts for the sole purpose of refraining from doing harm. Perhaps it is time for those courts to consider what, apart from harm avoidance, they are all about and to have their doctrine reflect that purpose.

Acknowledgments

In some ways, single-author books of this type are a myth; all of us depend mightily on colleagues, friends and family for support, suggestions and, most of all, patience. I am thankful for the thoughtful comments of Professors Patti Alleva, Eric Muller, Michael Mushlin and Michelle Simon on earlier drafts. To the extent that unpardonable errors remain, it is because I failed to listen to them sufficiently. I also gratefully acknowledge the research assistance of Kerri Dellert, Maureen Finan, Latyrus Hill and Emily Jones of the Pace Law School Class of 1998, Gerald J. Pia of the New York University Law School Class of 1999, David S. Widenor of the Cornell Law School Class of 1998, Anna Gassman-Pines of the Yale College Class of 1999, Karen A. Anderson of the Pace Law School Class of 2000, and Tamia Simonis of the Pace Law School Class of 2002. All of them have helped make the product far better than it would otherwise have been. I must call special attention to the work that Sarah Hurley of the Pace Law School Class of 2000 did with me. I think she is probably the most demanding editor with whom I have ever worked, and I say that with considerable admiration and appreciation. Her energy, interest, hard work and profound understanding of this difficult area of the law are significant constituents of this text. Finally, but most important of all, I am grateful to my wife Cynthia A. Pope for her editorial assitance and for the understanding, support, and reassurance that she gives me in every moment of our lives together.

I was fortunate to hold a Charles A. Frueauff Research Professorship of Law for the 1996-97 academic year, and I am most grateful to the Charles A. Frueauff Foundation, Inc., for its generous research support for this project.

Simply to dedicate this book to Jeremiah grossly understates his contribution to my life. I met him while I was still in law school more than three decades ago; we were both serving as counselors and trainers in a draft counseling organization. I ended up working in Jeremiah's firm for more than four years, and it was the best, most inten-

sive educational experience I have ever had, both because of his passion for excellence and his joy in teaching. That we have stayed in touch now for more than a quarter of a century since I moved on is some indication of how much I have learned from him, both professionally and personally, and it shows as well his generosity as friend, mentor and role model. My own sense of grateful indebtedness aside, there is a continuing legacy of the time we worked together and have known each other: the students who study with me benefit enormously every single day from what Jeremiah has taught and continues to teach me.