ANN WOOLHANDLER

Illuminating the Federal Courts

After graduating from law school in 1978, Ann Woolhandler moved back to her home state of Louisiana, practicing civil rights law in a small office with only two other lawyers. She admits it was a bit of a shock at first, noting "'overhead' was not a word I had heard much at Harvard." Nevertheless, she stayed for almost a decade, working on school desegregation, voting rights, first amendment, and employment discrimination cases as well as criminal appeals and developing the substantive interests that have guided her academic career. Woolhandler began teaching law at the University of Cincinnati College of Law before moving back to New Orleans to teach at Tulane. After visits at Virginia, Harvard, and Boston University Law Schools, she joined the Virginia faculty last year.

Woolhandler's practice involved traditional federal courts issues regarding the availability of federal jurisdiction and the amenability of government and its officers to suit, which reinforced the interest in federal courts she first developed as a law student and maintains in her scholarship. Her first article, "Patterns of Official Immunity and Accountability," 37 *Case W. Res. L. Rev.* 396 (1987), explored the history of governmental officers' common-law

immunities from lawsuits. Although writing about issues that had been central to her prior career, Woolhandler managed to avoid the partisan advocacy that is a constant temptation for scholars newly arrived from the world of practice. The article noted that the modern law of officer immunity represents an intermediate position between two strands of thought that had each, at different times, been dominant. The first focused principally on the harm to the citizen and the legality of the officer's action, and supported broad official liability. The second focused on the "chilling effect" that liability has on official decision-making, and supported broad official immunity. Woolhandler argued that modern good faith immunity serves as a compromise of these two extremes.

Woolhandler has continued throughout her academic career to explore the history of key doctrinal features of the law of federal courts. For example, she provided an interesting reconsideration of the standard understanding of the history of administrative law in "Judicial Deference to Administrative Action—A Revisionist History," 43 *Ad. L. Rev.* 197 (1991). The article challenged the received wisdom that 19th-century federal courts deferred heavily to the actions of federal agencies, noting that the style and intrusiveness of review varied over time as theories of judicial review changed.

Woolhandler then turned to the history of the writ of habeas corpus in the Supreme Court in an article titled "Demodeling Habeas," 45 *Stan. L. Rev.* 575 (1993). At the time she wrote the article, there were two polar views of the historical record. Professor Paul Bator had argued that prior to the modern era, federal habeas relief had been limited to claims of jurisdiction, with some softening to allow for claims of conviction under unconstitutional statutes. The opposing view, reflected in the writings of Professor Gary Peller, was that habeas had traditionally been available for all types of fundamental legal error. The courts used these contrasting readings of history to support either restrictions or expansions of habeas review. Woolhandler's research indicated that contrary to the Peller view, the Court saw habeas as much more restricted than ordinary review for error. On the other hand, the review for unconstitutionality of statutes had much more significance for the scope of habeas than Bator seemed to give it. The concept of a constitutional violation during much of the 19th-century involved a claim

of statutory invalidity. As the concept of a constitutional violation expanded to include more official acts, the availability of habeas expanded as well. This analysis tended to suggest the propriety of fairly robust review of constitutional issues on habeas.

A more recent article, "The Common Law Origins of Constitutionally Compelled Remedies," 107 *Yale L.J.* 77 (1997), uses the history of federal jurisdiction to support a vigorous role for the federal courts in protecting not only typical federal civil rights claimants, but also out-of-state individuals and commercial entities from the local favoritism and redistributive tendencies of many state courts.

One pervasive view of the historical record is that the federal courts were relatively inactive in enforcing federal rights for much of the 19th-century. For example, because Congress did not grant the federal courts general federal-question jurisdiction until the waning days of Reconstruction, it is often assumed that federal trial courts must have had little to do with enforcing federal rights before then. In accordance with this view, Felix Frankfurter and James Landis wrote that with the 1875 grant of general federal-question jurisdiction, the federal courts "ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws and treaties of the United States."

Woolhandler interprets the history differently. Even without federal question jurisdiction, the federal courts were strong enforcers of federal rights from the outset. The federal rights at issue happened to be those no longer in the forefront of our concept of federal rights enforcement—for example, rights under the Contracts Clause and rights to avoid confiscations under treaties. Diversity jurisdiction was the principal vehicle for federal rights enforcement, and the framers and the Court saw diversity as intended to protect such rights. Indeed, even after the advent of general federal question jurisdiction in 1875, litigants continued to rely on diversity to raise constitutional issues, such as the due process issues surrounding business regulation that displaced Contracts Clause questions as the focus of constitutional litigation late in the 19th-century. These general law constitutional cases brought in diversity would eventually transform into modern fed-

eral question implied rights of action. The diversity tradition for raising constitutional rights remains important today, for it reminds us that the "activist" role of the federal courts in enforcing federal rights was fairly consistent. Unfortunately, Woolhandler argues, this tradition has been obscured by the tendency to separate modern civil rights from the more traditional concerns of the federal courts that involved protecting property and contract rights.

Woolhandler expanded the scope of this inquiry to federal court scrutiny of state administrative agency action in an article co-authored with Professor Michael Collins, "Judicial Federalism and the Administrative States," 87 *Cal. L. Rev.* 613 (1999). They find that historically, federal courts routinely reviewed state administrative action, even as to questions of state law. A similar examination of the federal courts in protecting federal rights led to another article with Collins, "The Article III Jury," 87 *Va. L. Rev.* 587 (2001), concerning federal judicial control of juries. It is commonly assumed that juries have lost power vis a vis federal judges over time, given the expansion of devices such as summary judgment. This assumption of broad jury discretion, however, seems inconsistent with federal courts' concern for protecting federal rights claimants. For example, there would be little use in the federal courts' protecting the right of out-of-state commercial interests to bring their contracts cases in federal courts if the courts merely handed over power to juries. In fact, Woolhandler and Collins found that early federal judicial control of juries, through elaboration of law, direction of verdicts, and liberal use of commentary on the evidence, likely exceeded the overall level of modern judicial control. This history has modern significance in that it indicates that enhanced judicial control of juries would be consistent with the Seventh Amendment.

Woolhandler continues to pursue her interests in the historical roots of modern federal courts doctrines. She is currently researching predecessors of modern standing doctrine, focusing in particular on early attempts by private parties to enforce public rights and public entities to enforce private rights. She hopes to provide a corrective to the view that standing only emerged as a constitutional concern in the early 20th-century.

EXCERPT FROM:

The Article III Jury

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III. Judicial Policing of Jury Rationality

A. The Article III Jury

1. The Centrality of the Article III Judge

The Court's federalization of the availability of jury trials, as well as their incidents, through elaborations of law, directed verdicts, and commentary on the evidence, manifested a concept of Seventh Amendment rights in which the supervising Article III judge was a central part. As the Court eventually put it, the constitutional right to jury trial, was "a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts."[263] Although this judge-centered version of the jury trial may have originally manifested a Federalist conception of the jury, the centrality of the Article III judge as part of the right to trial by jury did not alter significantly with changing personnel on the Court. Under Chief Justice Taney, Marshall's successor, the Court fostered the growth of equity and admiralty where jury trials were unavailable, and it promoted the use of jury control devices such as directed verdicts in actions at law. Despite the Jacksonian tenor of some of its decisions,[264] the Taney Court shared with earlier and later Courts the view that the federal courts' role was to protect property and the interstate flow of capital and that the federal judge was central to that role.[265] It therefore maintained an overall robust Contracts Clause jurisprudence[266] and deployed the general

common law for commercial transactions[267] and suits against officers,[268] in addition to maintaining firm control of juries. Even beyond the Taney era, enhanced jury control continued to distinguish the federal courts from state courts well into the twentieth century.[269] In short, there was substantial continuity until the modern era in the federal courts' treatment of judge-jury relations.

The centrality of the Article III judge to federal jury trial rights[270] carried with it connotations of the role of the federal courts in reining in a host of alternative decision-makers. Protections of common-law interests in contract and property against unfair abrogation or confiscation—whether at the instance of state or federal legislatures, juries or state judges—inhered in this concept of the Article III judge. Rather than flowing from an explicit due process jurisprudence, these protections initially derived from the grant of a diversity forum, with its concomitant federal court determinations of federal law and the general common law, as well as use of federal procedures and the federal jury. Indeed, Article III's provision for diversity jurisdiction was occasionally referred to as a "constitutional right"[271] of nonresidents to a forum for the protection of common law and related constitutional interests.[272]

Throughout the nineteenth century and well into the twentieth, juries without supervision were seen as a threat to this protection of common-law interests in property and contract. Rather than offering encomiums to the abilities of juries, the Court alluded to their tendency toward irrationality. It was less inclined to extol the virtues of juries than of jury control.[273] Justice Samuel Miller observed in an 1887 article that without sufficient judicial instructions of law, the jury trial "is but little better than a popular trial before a town meeting,"[274] and that jury evaluation of fact as well as law was in need of guidance.[275]

The Court itself had noted that judicial comment on the evidence, including on credibility, was necessary to enable juries to discharge their function and to avoid "chance, mistake, or caprice."[276] The analogy to a town meeting implied that juries were bodies whose decisions partook more of the "will" of the legislature as opposed to the "reason" of the judiciary—at least when they operated without sufficient judicial guidance.[277] And

while some scholars have doubted whether functional considerations as to whether judges or juries were better at deciding certain fact issues played much of a role in determining the scope of jury trial rights,[278] the inherent limitations of juries were sometimes cited as reasons for extensions of equity.[279]

Under this conception of the jury, rationality was thought to inhere not in the jury, but in the judge,[280] and particularly in the federal judge.[281] The federal judge supplied a law of reason by way of the general common law, and later, by way of substantive due process. This law reflected a notion of rationality that did not look to a balancing of competing interests[282] or some vaguer, more common sense notion within the knowledge of laypersons. Instead, it was one that took as its baseline the protection of property from transfer without fault, from regulation without public purpose, and from official invasions unjustified by statutory and constitutional authority.

It was the understood duty of the federal judiciary, moreover, to expand the realm of reason by expanding the realm of law, specifying its particular applications, and narrowing the more chaotic realm of fact. In the latter part of the century, for example, Oliver Wendell Holmes[283] and others[284] stated that it was the business of the courts to make law ever more specific. Otherwise, the courts would have to "confess their inability to state a very large part of the law which they required the defendant to know" and would leave the jury "without rudder or compass."[285] The sphere in which a judge should be able to rule without taking the opinion of the jury, therefore, "should be continually growing."[286] Judicial duties not only extended to providing ever-increasing guidance as to the law, but also to questions of fact through commentary on the evidence. Such guidance of juries in the interpretation of evidence to prevent capricious findings was, said the Court, among "certain powers inherent in the judicial office"—powers with which it was unclear that Congress could interfere.[287]

FOOTNOTES

263 *Capital Traction Co. v. Hof,* 174 U.S. 1, 13–14 (1899); see also *Crowell v. Benson,* 285 U.S. 22, 61 (1932) (quoting Hof); *Herron v. S. Pac. Co.*, 283 U.S. 91, 95 (1931) (same).

264 See, e.g., *Charles River Bridge v. Warren Bridge,* 36 U.S. (11 Pet.) 420 (1837) (indicating that monopolies would not be implied in state-granted charters); Horwitz, supra note 4, at 130–39 (discussing Charles River Bridge); Hovenkamp, supra note 63, at 2319 (characterizing the Jacksonian agenda as elimination of state-created privileges for entrepreneurial enterprises such as tax relief and monopolies).

265 See Tony Allan Freyer, *Forums of Order: The Federal Courts and Business in American History* 47–48, 82, 86–88 (1979) (noting that the Taney Court extended federal judicial power in favor of developing interstate business).

266 That is, apart from the Charles River Bridge line of cases, referred to supra note 264. See Wright, supra note 42, at 62–63 (characterizing the Taney period as one of consolidation rather than retrenchment under the Contracts Clause); cf. Hovenkamp, supra note 42, at 24–25 (noting that the Taney Court strictly construed grants of privileges in corporate charters, but had a high regard for the sanctity of private contracts); Stephen A. Siegel, "Understanding the Nineteenth Century Contracts Clause: The Role of the Property-Privilege Distinction and 'Takings' Clause Jurisprudence," 60 S. *Cal. L. Rev.* 1, 22 (1986) (observing that Jacksonian appointees did not undermine Federalist jurisprudence protecting ordinary contracts from debtor relief laws).

267 See, e.g., *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842) (applying "the general principles and doctrines of commercial jurisprudence" rather than decisions of the state tribunal in a case involving a negotiable instrument).

268 See, e.g., *Deshler v. Dodge*, 57 U.S. (16 How.) 622, 634 (1853) (Catron, J., dissenting) (complaining that the majority, in allowing a suit against a state officer, had ignored state law requirements for replevin).

269 See Leon Green, *Judge and Jury* 379 (1930). "With few exceptions, practically every change in trial procedure in America during the nineteenth century meant more and more domination by the jury and less and less control by the trial judge; and in so far as trial courts in most states are concerned it probably is still true that juries exercise a dominant power in those cases in which they participate except in so far as trial judges exercise power by the grace of appellate courts. The contrast between state and federal courts in dealing with juries is so marked that attempts are constantly being made to reduce the trial judges of our federal courts to the same low state as the trial judges of our state courts, and this although federal trial judges themselves are by no means as unrestricted as were English common law judges." Id. Green, however, believed that appellate judges had absorbed a great deal of power over jury trials. See id. At 390–91; see also Max Radin, *Handbook of Anglo-American Legal History* 217 (1936) (contrasting the federal courts to the state courts, where the position of judge vis a vis jury declined); Wigmore, supra note 172, at 473 (noting the abolition of comment on evidence except in a few states and in federal courts). Obviously, some states exceeded the federal judiciary in jury control devices, as indicated by the fact that the federal courts sometimes rejected state jury control devices. See, e.g., *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 376–77 (1913), discussed supra Section II.B.2.c; see also supra note 106.

270 See, e.g., *Capital Traction Co. v. Hof,* 174 U.S. 1, 13–14 (1899).

271 See, e.g., *Cowles v. Mercer County,* 74 U.S. (7 Wall.) 118, 122 (1868).

272 See, e.g., *Reagan v. Farmers Loan & Trust Co.*, 154 U.S. 362, 391–92 (1894) (indicating that a diverse bond trustee had a federally protected right to file suit in federal court to contest the reasonableness of rates (which was not yet clearly a federal question) despite an attempt by the state to restrict review actions to courts of the state, and observing that "[a] State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts"); *Dodge v. Woolsey,* 59 U.S. (18 How.) 331, 356 (1855) (recognizing diversity jurisdiction in a shareholder action to challenge a state tax as violative of the Contracts Clause, reasoning that the case was appropriate for federal jurisdiction because it was brought by "[a] citizen of the United States, residing in Connecticut, having a large pecuniary interest in a bank in Ohio"); see also *Smyth v. Ames*, 169 U.S. 466, 516–17 (1898) (citing Reagan in rejecting an argument that a state could limit rate regulation challenges to its own courts).

273 See, e.g., Samuel F. Miller, "The System of Trial by Jury," 21 *Am. L. Rev.* 859, 862 (1887) (indicating the necessity of judicial supervision of juries); cf. Holmes, supra note 247, at 88–89 (noting that different results in jury cases

owing to different feelings of juries merely show that the law did not perfectly accomplish its ends of providing standards of general application).

274 Miller, supra note 273, at 862.

275 Miller thought that "the judge should clearly and decisively state the law, which is his peculiar province, and point out to the jury with equal precision the disputed questions of fact arising upon the evidence." Id. at 863. The judge should grant a new trial if the jury disregarded the law or in cases of gross disregard of the weight of the evidence. Id.

276 *Nudd v. Burrows*, 91 U.S. 426, 439 (1875), discussed supra text accompanying notes 245–46.

277 Analogizing juries to political branches in a sense comported with the Anti-Federalist view of juries as democratizing institutions of self-government. See supra note 39.

278 See Moses, supra note 2, at 239 (stating that functional considerations have never been a part of Seventh Amendment jurisprudence); see also Arnold, supra note 1, at 838 (claiming that no case of the early American period indicated that the chancellor was willing to assume jurisdiction due to a matter's being unsuitable for a jury); James, supra note 1, at 661 (stating that the line between law and equity had not been "altogether—or even largely—the product of a rational choice" of issues best suited to either). But cf. Arnold, supra note 1, at 838 (noting that nineteenth century courts sometimes said accountings were impracticable for juries); James, supra note 1, at 663 (noting that it would be a mistake "to suppose that chancellors were never concerned with the jury trial problem in taking or refusing jurisdiction").

279 See, e.g., Ex parte Young, 209 U.S. 123, 164 (1908) (justifying the exercise of equity jurisdiction in part because a jury "could not intelligently pass upon the matter"); James S. Campbell & Nicholas Le Poidevin, "Complex Cases and Jury Trials: A Reply to Professor Arnold," 128 *U. Pa. L. Rev.* 965 (1980) (arguing that there was historical support for an exception to jury trial rights in complex cases); cf. John Choon Yoo, "Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts," 84 *Cal. L. Rev.* 1121, 1158 (1996) (noting Federalist writings to the effect that equity jurisdiction was necessary for matters too difficult for the jury); Note, "The Right to a Nonjury Trial," 74 *Harv. L. Rev.* 1176, 1190 (1961) (suggesting that many order-of-trial problems in mixed law and equity cases should be resolved based on relative competency).

280 See Thayer, supra note 172, at 212, 249 (indicating that judges, not juries, had the responsibility for securing the observance of law and of "the rule of right reason"); cf. Holmes, supra note 247, at 95–96 (noting that the distinction between gross and mere negligence was meaningful when applied by a judge, but for a jury, "the word 'gross' is only a vituperative epithet").

281 See White, supra note 47 at 87, 145 (describing how commentators such as Peter DePonceau and Justice Joseph Story saw a rational or scientific approach to law as requiring familiarity with general jurisprudence and a nationalist orientation); Miller, supra note 273, at 862 (noting that due to popular and frequent elections and insufficient salaries, state judges in the courts in which he had practiced "were neither very competent as to their learning, nor sufficiently assured of their position," to exercise sufficient control over juries); cf. Wigmore, supra note 172, at 473–74 (arguing for the restoration of the practice of comment on the evidence, but noting that opposition to such commentary arose "partly because of the Bar's frequent lack nof respect for the opinion of a Bench that is too often occupied by the crude or mediocre nominees of local political committees").

282 See White, supra note 17, at 100–01 & n.35 (noting that the review of legislation for reasonableness in Justice Peckham's opinion in *Lochner v. New York,* 198 U.S. 45 (1905), did not involve balancing, but rather application of the anticlass principle, informed by the "free labor" theory); see also T. Alexander Aleinikoff, "Constitutional Law in the Age of Balancing," 96 *Yale L.J.* 943, 949 (1987) (noting that Justices Marshall, Story, and Taney recognized clashes of interest but resolved them in a categorical fashion); Kennedy, supra note 17, at 7 (noting that the judiciary had a concept of policeable boundaries).

283 See Holmes, supra note 247, at 89 (referring to tort law).

284 See Thayer, supra note 172, at 207–08 ("In the exercise of their never-questioned jurisdiction of declaring the common law… there has arisen constant occasion for specifying the reach of definite legal rules, and so of covering more and more the domain of hitherto unregulated fact."); see also id. at 208 n.3 (noting judicial development of new doctrines of law to keep the jury within the bounds of reason); Thayer, supra note 259, at 172 (arguing that the growth of law at the hands of judges is a desirable and necessary

feature of our judicial system).

285 Holmes, supra note 247, at 89; see also *Balt. & Ohio R.R. Co. v. Goodman,* 275 U.S. 66, 70 (1927) (Holmes, J.) (holding that there was contributory negligence as a matter of law where the injured party did not get out and check to assure that there was no train coming when the view was obstructed); *S. Pac. Co. v. Berkshire,* 254 U.S. 415, 417 (1921) (Holmes, J.) (stating that the court should determine whether there was negligence as a matter of law where the conduct concerned a permanent condition at various places); G. Edward White, *Tort Law in America: An Intellectual History* 58 & n.239 (1980) (noting that Holmes as a judge "enjoyed taking negligence cases away from juries," and citing Goodman).

286 Holmes, supra note 247, at 99; see Horwitz, supra note 191, at 129–30 (observing that Holmes, in *The Common Law*, manifested the view that law proceeded according to functional rationality, but that he later saw law as the product of social struggle).

287 *Nudd v. Burrows*, 91 U.S. 426, 442 (1875).

WOOLHANDLER BIBLIOGRAPHY

"Treaties, Self-Execution, and the Public Law Model of Litigation," 42 *Va. J. Int'l L.* 757 (2002).

"The Article III Jury" (with M. Collins), 87 *Va. L. Rev*. 101 (2001).

"Old Property, New Property and Sovereign Immunity," 75 *Notre Dame L. Rev*. 919 (2000).

"Judicial Federalism and the Administrative States" (with M. Collins), 87 *Cal. L. Rev.* 613 (1999).

"The Common Law Origins of Constitutionally Compelled Remedies," 107 *Yale L.J.* 77 (1997).

"State Standing" (with M. Collins), 81 *Va. L. Rev*. 387 (1995).

"Demodeling Habeaus Corpus," 45 *Stan. L. Rev.* 575 (1993).

"Judicial Deference to Administrative Action—A Revisionist History," 43 *Admin. L. Rev.* 197 (1991).

"Rethinking the Judicial Reception of Legislative Facts," 41 *Vand. L. Rev.* 111 (1988).

"Patterns of Official Immunity and Accountability," 37 *Case W. Res. L. Rev.* 396 (1987).