Federal Courts
Prof. Greve
Law 226-002
Spring Semester 2016
Mon/Wed 6:00 – 7:15pm
Hazel xxx

Introduction and Overview

Federal Courts is the most difficult course you will encounter in law school. It is beyond my poor power to impose prerequisites but I can and should issue a note of caution: if you have not yet taken ConLaw I (and done tolerably well in that class), none of this will make the remotest sense to you.

However: depending on your envisioned career, FedCourts may also be the most useful course. If you want to practice law in federal courts, in any capacity, you have to know this stuff (ideally, better than your opponents know it). We will use the standard textbook: Hart & Wechsler. I strongly suggest you buy it, mark it up in pencil, and keep it. I realize it’s expensive but it’s a worthwhile investment in your career.

Course Materials:


You must also have some compilation that includes reasonably current versions of the Federal Rules of Civil Procedure. Your collection from CivPro will do; if you’ve lost it, I recommend


Recommended but not required: ERWIN CHEMERINSKY, FEDERAL JURISDICTION (6th ed. 2011); or James F. Pfander, PRINCIPLES OF FEDERAL JURISDICTION (2d ed. 2011).

For any really difficult problems (not that that would ever happen) you should consult Professor Charles Alan Wright’s multi-volume FEDERAL PRACTICE AND PROCEDURE, in the library.

Contents: I’ll teach the conventional canon, with a few exceptions. I have omitted big chunks of stuff that (I hope and trust) you remember from CivPro (e.g., supplemental jurisdiction). Likewise, I have omitted some specialized subjects such as Military Tribunals, habeas jurisdiction, original jurisdiction (even the Supreme Court doesn’t like it), and class actions. There simply isn’t time for it; you’ll have to learn it in some other class, or not at all. The Syllabus (below) provides an overview and session-by-session
assignments. All page numbers refer to Hart & Wechsler. Additional, recommended or required readings will be posted on TWEN.

**Check the Syllabus on a regular basis.** It is subject to change, both because I’ll add (from time to time) comments and questions that may help you navigate this morass and because much will depend on our progress over the first few weeks. Some sessions will “run over.” When that happens, you should still read the assignment for the next class. I’ll replace (parts of) some sessions with handouts.

**Attendance, Course Participation, and Grading:** I’ll take attendance, though mostly to ensure that no one falls through the cracks. There’s no penalty for missing a class and no need for you to excuse any absence in advance. However, I guarantee that if you miss class too often, you’ll fall behind very, very quickly.

I’ll cold-call periodically to keep you on your feet, but I strongly prefer volunteers. Make sure to prepare conscientiously for each class, and be ready to answer questions. If for some reason you can’t prepare adequately for a particular class, send me an e-mail at least two hours prior to class time so I won’t call on you. I don’t need to know the reason; it’s an opt-out to save everyone time and embarrassment. But you shouldn’t do this too often: there is no way you can compensate for a lack of regular preparation by cramming during study week. I will take uncommonly useful and active class participation into consideration for your course grade.

**Exam:** The exam will be an internet-secured open-book exam (3 hours). You’ll have access to H&W, the materials on TWEN, your class notes, and anything else you care to bring along—but not the internet. On of the nasty things about FedCourts is that it’s not just one darn thing after another: it all hangs together, and the exam will test your skill in dealing with several moving pieces at once. It’s a very good idea to mark up the textbook accordingly, as we go along.

**Office Hours:** Monday/Wednesday 4:00 – 5:30, or by appointment (send me an e-mail). PLEASE USE THIS EMAIL FOR ALL PURPOSES: mgreve@gmu.edu.

**Syllabus**

I know what my/your course evaluation will say: “too much reading.” Answer, tough luck. Look at the syllabus: if it looks like too much, don’t take this course. Otherwise, learn to live on my planet (too much reading, too little time).

For each session, I’ve added (or will add) questions that point you in the right direction, and occasionally suggestions on the readings. As a rule, you can ignore the editors’ footnotes (though not the footnotes to the excerpted cases).

To keep the materials within tolerable bounds the editors have compressed a ton of important, often complicated cases into brief summaries. When those don’t seem to make sense do yourself a favor and go read the case. It’ll be well worth your time and effort.
I. Cases and Controversies

1. Marbury etc. (Yet Again)

   TWEN Preface to the First Edition (oddly omitted here)

   pp. 1-47 Chapter I [read for background—we won’t go through this except for a few pieces in Session 6]

   pp. 58-80 Marbury v. Madison; Note on Marbury v. Madison; Note on Marbury v. Madison and the Function of Adjudication (skim 78-80)

   I won’t teach all of Marbury again—consult your ConLaw class notes. If you can’t remember a darn thing, read van Alstyne, “Critical Guide,” 1969 Duke L.Rev. 1. Instead, we’ll spend most of the class on the two “models” of constitutional adjudication that are commonly traced to Marbury: Dispute Resolution/Departmentalism/Private Rights, versus Law Declaration/Judicial Supremacy/Public Rights. You’ll encounter the ambiguity throughout the course. So, think: what can be said for and against either model?

   I’ll start with a ten minute disquisition on “What is Federal Courts”? Then, we’ll sort through Marbury and the models.

2. Parties, Finality, and Collusion

   pp. 49-58 Correspondence of the Justices; Note on Advisory Opinions;

   pp. 81-101 Hayburn’s Case; Note on Hayburn’s Case (skim); Note on Hayburn’s Case and the Problem of Revision of Judicial Judgments (esp. B., 89-93); United States v. Johnson, Note on Feigned and Collusive Cases (skim both).

   Consider the central elements of “adjudication,” p. 55: are those constitutional or functional elements? What difference might it make?

   The critical question here is finality. Make sure you understand that piece of Hayburn’s Case. Plaut, 514 U.S. 211 (1995) is worth reading in its entirety.

   Do you think the SupCt should have declined to hear Windsor (p. 100)? Why (not)?

   If there’s time left I’ll share five minutes of thoughts on collusive cases. The authors’ presentation here is an embarrassment.

3. Standing to Sue
Government agencies raise jurisdictional defenses whether they have them or not, and they have a huge advantage over private litigants: because they see this stuff all the time, they can just open a file drawer and throw this stuff at you. (If nothing else, they make you lose valuable briefing space.) In practice, a lot depends on artful pleading, affidavits, client selection, etc. We can’t get that far into the weeds but we’ll spend a good deal of time. I assume you know the basics (if not, back to ConLaw notes or some Hornbook). We’ll spend most of the class on Allen v. Wright. As you read it think about some of the underlying questions:

1. Why is there a “standing” doctrine at all? What is it supposed to do? Why not go straight to the merits and determine whether plaintiffs have stated a claim on which relief can be granted?
2. Does it make sense to predicate a legal inquiry on an “injury in fact”? What alternative might there be?
3. Standing requirements divide into “constitutional” and “prudential.” What is the difference? Where on earth do “prudential” standing requirements come from? Do you think they are jurisdictional?
4. The SupCt has over time created special rules for certain classes of litigants: a) taxpayers, in religion cases; b) legislators; c) states (and if you want to be a total dork about it, it matters in what capacity states appear). If you think you can harmonize the rules with the rest of the standing universe, you are fit for either the Supreme Court or, more likely, a mental ward. The true holding of the cases may be something like, “if these parties can’t sue, nobody can.” Would that be bad?

4. Congressionally Created Standing

Lujan v. Defenders of Wildlife; Note on Congressional Power to Confer Standing to Sue.

Lujan is the crucial case: the SupCt routinely cites it (and then, as often as not, does the opposite). What are the limits of Congress’s power to “define legal rights, the violation of which creates an injury”? Can Congress create an injury in fact? Why should there be any limits?

5. Standing to Assert the Rights of Others; Related Issues; Mootness and Ripeness

Craig v. Boren; Note on Asserting the Rights of Others; Yazoo; Note on As-Applied and Facial Challenges

Note on Facial Challenges and Overbreadth

DeFunis v. Odegaard; Notes on Mootness (1-4)
This is Richard Fallon’s playpen, so the book has way too much stuff. I’ve spared you many pages on “overbreadth” (a First Amendment thing); on class actions (theoretically and practically interesting but too CivPro-ey for this course); and on Political Questions. We’ll use O’Shea to examine the connections between injury, jurisdiction, merits, and remedy, and we’ll spend some time on an AdLaw problem (ripeness and agency action).

II. Congressional Control of Federal Jurisdiction

The major issues here are in Sessions 6 and 7: the birth pangs and continuing afflictions of the Administrative State; Crowell and CFTC v. Schor. Session 8 is also huge. All of this is quite difficult. **Give yourself ample time to read,** especially for Session 6. If you garble this stuff you’ll have problems down the road (e.g., with Ex Parte Young).

6. Congress’s Power over the Federal Courts; Administrative Adjudication

This stuff is foundational and a million things are happening at once; we’ll spend as much time on it as it takes to get it straight. Here’s a rough road map:

The first question is whether and in what ways etc Congress may limit the (federal) courts’ jurisdiction. The two pieces you must understand here are the contours of the “Madisonian compromise” and Justice Story’s riff in Martin (308-311). It’s been rejected but it will help you understand the landscape.

The second question is whether Congress may vest “the Judicial power” (whatever that is) in bodies that are not courts. The key case is Crowell. At the time, it drove progressives nuts; over the decades, it came to be viewed (by some) as “the greatest of the cases validating administrative adjudication” (Paul Bator). Which is it, and why?

The third question is how preclusion and administrative adjudication fit together. If you put them together in a particular way, people end up in jail without ever having had a chance to contest the validity of the rule under which they were convicted. That can’t be
right, can it? Oh, yes: that’s *Yakus*. Do read the extended excerpts on TWEN. The “recommended” article is longish. It may still be worth a look: it gives you a sense of the historical context (including Henry Hart’s real-world role), and it explains how all the various pieces fit together. Don’t try to catch every nuance; just get a sense of the landscape.

7. **Legislative Courts**

- **pp. 364-390** Stern v. Marshall; Further Note on Legislative Courts
- **pp. 395-402** Note on Adjudication Before Multinational Tribunals (skim)
- **TWEN** Commodity Futures Trading Comm’n v. Schor

Just when you think you’ve had it with jurisdiction stripping, along comes an *actual* stripper (the late Anna Nicole Smith) and prompts an Article III ruckus. And, speaking of which: your editors have stripped *CFTC v. Schor* from the book; I’ve mercilessly put it back into your assignments. In fact you’ll want to read it before *Stern*.

Are you happy with *Schor*’s five-factor test? Is Justice Scalia’s approach (*Stern* concurrence) any better?

8. **Concurrent Jurisdiction of State Courts**

- **pp. 412-437** Tafflin v. Levitt; Note on Tafflin v. Levitt and Congressional Exclusion of State Court Jurisdiction; Tennessee v. Davis; Note on the Power of Congress to Provide for Removal from State to Federal Courts; Tarble’s Case; Note on Tarble’s Case and State Court Proceedings Against Federal Officials

The great Hamilton (*Federalist* 82, p. 418) makes two points. What are they, and are they right? You may want to look at *Federalist* 32—now almost forgotten, but closely studied in the 19th century—for context. Read that stuff first.

Read Tarble’s Case next (the order in H&W is weird). Doesn’t this remind you of *M’Culloch*? How is it different/similar?

_Tafflin:_ is this a case where one mistake (a probable mis-application of the dubious *Burford* doctrine—we’ll get to it) begets another? Suppose you had to write a dissent: what would it say?

Pay attention to the Notes on pp. 420-422: you’ll encounter similar problems again when we talk about statutory preemption.

9. **State Courts’ Obligation to Hear Federal Questions**

Do you think that Testa (in light of Printz etc) marks the outer limits of congressional authority to impose obligations on state courts? Can you think of a (hypothetical) statute that might transgress those limits?

III. Supreme Court Review of State Court Decisions

We’ll do this very quickly, for a splendid reason: the Supreme Court has just about given up on reviewing state court decisions. The reasons are worth thinking about, and we’ll do so in discussing Hunter’s Lessee (which is crucial, and fun besides). Otherwise pay attention if you’re planning to clerk for the Supremes: if you miss an independent state ground in a cert memo, they’ll hang you from the nearest lamp post. Metaphorically speaking.

10. Establishment of the Jurisdiction

pp. 461-477 Development of the Statutory Provisions; Martin v. Hunter’s Lessee; Note on the Attacks upon the Jurisdiction; Note on Enforcement of the Mandate

Suppose Story is right: how does this shake out in the context of diversity jurisdiction?

I’ll have a handout/crib sheet on federal review of independent state and federal claims.

11. State Court Authority over State Law; Adequate State Ground Doctrine

pp. 477-503 Murdock v. City of Memphis; Note on Murdock v. Memphis; Introductory Note; Fox Film Corp. v. Muller; Preliminary Note on the Adequate and Independent State Grounds Doctrine; Michigan v. Long; Note on Review of State Decisions Upholding Claims of Federal Right

pp. 509-524 Indiana ex rel. Anderson v. Brand; Note on Federal Protection of State-Created Rights

pp. 524-558 Procedural Requirements; Final Judgments and the Highest State Court (skim—I’m not going to teach this)

Discuss amongst yourselves: Murdock was wrong the day it was decided. And think ahead: How does Murdock hang together with Erie Railroad, which comes next?

IV. Erie (Yet Again) and Federal Common Law

When H&W burble about “institutional settlement,” what they really mean is the New Deal settlement. No case is more central to that settlement than Erie: if that case comes apart, the entire FedCourts enterprise disintegrates. So, let’s think about how and why Erie is so central to the FedCourts enterprise and how it hangs together with the rest of
the legal architecture, from federal common law to preemption and private rights of action.

12. *Swift and Erie/Klaxon*

pp. 559-573  
Note on the Historical Development of the Statutes and Rules of Court; *Sibbach v. Wilson & Co.* (skim; read as background)

pp. 636-641  
*United States v. Hudson & Goodwin*; Note on Federal Common Law Crimes (1), (2)

pp. 575-597  
*Swift v. Tyson*; Note on *Swift v. Tyson*; *Erie Railroad Co. v. Tompkins*; Note on the Rationale of the *Erie* Decision; Note on the *Klaxon* Decision and Problems of Horizontal Choice of Law in Cases Involving State-Created Rights

pp. 598-606  
*Guaranty Trust C. v. York*; Note on State Law and Federal Equity

I’m not going to turn this into a mini-CivPro rehearsal (e.g., I’m sparing you all the “twin aims of Erie” jazz—I just assume you remember it). Instead, we’ll try to get a sense of how the FedCourts enterprise hangs together. To that end it’s best to read in chronological order: *Hudson & Goodwin*, then *Swift*, then *Erie*.

13. *Federal Common Law; Preemption*

pp. 643-685  
*Clearfield Trust Co. v. United States*; Note on the Existence, Sources, and Scope of Federal Common Law; *United States v. Kimbell Foods*; Note on Choice of Law in Cases Involving the Legal Relations of the United States; *Boyle v. United Technologies Corp.*; Note on Choice of Law in Private Litigation that Involves Federally-Created Interests; Note on Federal Preemption of State Law

The “Note” on preemption is an improvement over earlier editions; but that’s not saying much. I’ll provide a bit more context and analysis. The crucial point is to see the connection between federal common law and preemption; *Boyle* is the best case to noodle over it.

14. *Admiralty etc; Foreign Affairs Cases*

pp. 686-722  

The foreign affairs stuff is what has everyone worked up; so we’ll spend most of our time on that. The other case that’s really big here is *Lincoln Mills* (700-701). You’ll encounter it more than once; make sure you understand it.

15. *Private Rights of Action under Federal Statutes; Bivens Actions*

pp. 723-747  
*Cannon v. University of Chicago*; *Alexander v. Sandoval*; Note on Implied Rights of Action

pp. 752-761 Remedies for Constitutional Violations (read as background)

pp. 762-777 *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics; Note on Bivens*

As a practical matter the statutory stuff is way more important than *Bivens*; so we’ll spend most of our time on that. It hangs together in important ways with Section 1983 actions and *Ex Parte Young* actions (see Session 22); pay attention.

V. Federal Question Jurisdiction

This stuff is really nasty. Unfortunately it’s also really important.

16. The Scope of the Article III Grant

pp. 777-806 Introduction; *Osborn v. Bank of the United States; Textile Workers Union v. Lincoln Mills; Note on the Scope of the Constitutional Grant; Note on the Validity of a Protective Jurisdiction*

Think back a few sessions: If *Osborn* is right, why isn’t *Murdock* obviously wrong?

17. Well-Pleaded Complaints

pp. 806-820 *Louisville & Nashville R. Co. v. Mottley; Note on the Mottley Case and the Well-Pleaded Complaint Rule; American Well Works Co. v. Layne & Bowler Co.; Note on “Arising Under” Jurisdiction and the Cause of Action Test*

Lots of smart people think that the Jackson Pollock canvas of judicially created rules under 1331/1441 make no sense. Do they?

18. Federal Elements in State Law Causes of Action

pp. 785-795 Introductory Note on Jurisdiction Under § 1331; *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg.; Note on the Scope of “Arising Under” Jurisdiction*

TWEN *Franchise Tax Bd v. Construction Laborers* (TWEN)

I’m giving you longer excerpts from *FTB* because it’s too much fun for words.

19. Declaratory Judgment Actions, Preemption, and Removal

pp. 837-860 Introductory Note on the Federal Declaratory Judgment Act; *Skelly Oil Co. v. Phillips Petroleum Co.; Note on the Jurisdictional Significance of the Declaratory Judgment Act; Note on Actions for Declaratory and Injunctive Relief*

TWEN *Franchise Tax Bd v. Construction Laborers* (TWEN)

I’m giving you longer excerpts from *FTB* because it’s too much fun for words.
VI. Suits Challenging Official Action

20. Federal Sovereign Immunity; Statutory Waivers

pp. 877-904

Note on the Sovereign Immunity of the United States; United States v. Lee; Note on Sovereign Immunity in Suits Against Federal Officers; Note on Statutorily Authorized Review of Federal Official Action

I suspect that we’ll be behind schedule at this point. If so I’ll replace this session with a handout and compress it into ten minutes.

21. State Sovereign Immunity and the Eleventh Amendment

pp. 905-922

Introductory Note on State Sovereign Immunity and the Eleventh Amendment; Hans v. Louisiana; Note on the Origin, Meaning, and Scope of the Eleventh Amendment.

Ten minutes overview; then, we’ll talk about Chisholm and Hans. Hans is the foundation of modern-day state sovereign immunity law; but is it right?

22. The Ex Parte Young Doctrine

pp. 922-938

Ex Parte Young; Note on Ex Parte Young and Suits Against State Officers; Note on the Pennhurst Case and the Bearing of the Eleventh Amendment on Federal Court Relief for Violations of State Law

TWEN

John Harrison, “Ex Parte Young” (recommended)

We’ll spend a great deal of time on Ex Parte Young and its true and correct meaning. It’s another opportunity to tie a bunch of pieces together.

23. Congressional Abrogation

pp. 939-981

Preliminary Note on Congressional Power to Abrogate State Immunity from Suit; Seminole Tribe of Fla. v. Florida; Note on Congressional Power to Abrogate State Immunity; Note on Alden v. Maine and State Immunity from Suit on Federal Claims in State Court

Seminole Tribe is the foundational case. The later twists and turns are things you want to remember; little mileage in thinking about them.

24. Suits Against State Officers for Unauthorized Action

pp. 942-72

Home Telephone & Telegraph Co. v. City of Los Angeles; Note on the Scope of Federal Constitutional Protection Against Unauthorized State Action; Monroe v. Pape; Note on 42 U.S.C. § 1983; Note on § 1983 as a Remedy for the Violation of a Federal Statute
I'll skip *Home Telephone*. And I don’t have much patience for Mr. Parratt and his hobby kit and may drop it entirely. *Monroe* is the key case; concentrate on that.

### 25. Official Immunity

*Harlow v. Fitzgerald*; Note on Officers’ Accountability in Damages for Official Misconduct; Note on the Immunity of Government Officers from Relief other than Damages

Not much to see or think about here. Get the black-letter rules down (they cover most of this ground), and be done.

### VII. Judicial Federalism and Abstention

### 26. The Anti-Injunction Act


Very CivPro-ey. Often difficult in practice but the hard theory questions lurk in the abstention doctrines, which come next.

### 27. Pullman Abstention

*Railroad Commission of Texas v. Pullman Co.*; Note on Abstention in Cases Involving a Federal Question; Note on Procedural Aspects of *Pullman* Abstention; Note on Burford and Thibodeaux Abstention

You'll probably never encounter *Pullman* abstention in real life. But it’s a good way to re-rehearse some major FedCourts themes, just in time for exam prep.

### 28. Younger Abstention; Colorado River Abstention

*Younger v. Harris*, Note on *Younger v. Harris* and the Doctrine of Equitable Restraint; *Steffel v. Thompson*, Note on *Steffel v. Thompson* and Anticipatory Relief; *Hicks v. Miranda*, Further Note on Enjoining State Criminal Proceedings; Note on Further Extensions of the Equitable Restraint Doctrine; *Colorado River Water Conservation District v. United States*, Note on Federal Court Deference to Parallel State Court Proceedings

*Younger* abstention is the big issue here. Consider its trajectory all the way to *Sprint*: could this be (at last!) an issue of which the Supreme Court has managed to make sense?