Seminar

Advanced Constitutional Law

467-001

Prof. Greve

Monday 2:00 – 3:50

Spring 2016

Outline

This seminar covers constitutional questions that are inadequately covered in ConLaw I, Federal Courts, Statutory Interpretation/Legislation, and Administrative Law. Subjects include federal preemption; spending and appropriations; constitutional canons (e.g., non-delegation, avoidance) in statutory litigation; constitutional common law (e.g., the dormant Commerce Clause); and the vexing—and often ignored—interplay between these and related doctrines.

Secondarily, the seminar introduces students to (constitutional, appellate) litigation strategy, as distinct from writing skills on one side and high-level doctrine on the other. “Strategy” questions include the do’s and don’t’s of appellate litigation but also client and forum selection; coalition-building and amicus management; and certiorari issues. Some of the sessions will guest-star the lawyers who participated in the cases, providing students with an opportunity to ask pressing questions: How did you do this? What were you thinking? (Also, are you hiring?)

The seminar is structure-oriented (e.g., judicial power; separation of powers; federalism); it does not cover let’s-make-up-rights, aka ConLaw II. It is practice-oriented and doctrine-heavy; it does not cover anything that would qualify as constitutional “theory” nowadays, including “originalism” (with a twist, and olives). My own riff on how to think about ConLaw appears in a tome called The Upside-Down Constitution (Harvard UP 2012). It's not assigned reading and you’re entirely free to disagree with much or all of it. Still, rummaging around in it for a half hour or so may give you a sense of what this seminar might be like.

The seminar is suitable only for students who have done well in ConLaw I and, ideally, have taken (and again done well in) Administrative Law and/or Federal Courts. I will not re-teach this stuff; I will simply assume that you know it. If you’ve never heard of Chevron or Lincoln Mills, you’ll have to get up to speed in a real hurry.
Requirements

The seminar requires an inordinate amount of reading. The assigned readings listed in the Syllabus are a bare minimum. To profit from this seminar, you’ll want to read briefs and argument transcripts, as well as law review articles and other materials. Cutting through clutter is an indispensable legal skill; this seminar is a good opportunity to learn it.

The principal requirement is a final paper (20-30pp), on a topic selected in consultation with the instructor. The paper may take the form of a brief, judicial opinion, or law review essay. It will require initial discussion and continuing consultation thereafter. A draft/outline of your paper is due March 11; I will distribute the drafts to the class, and we will discuss them in the March 14 session. You should prepare a five minute summary and a robust defense. I will explain the details and logistics in the first session.

In addition, there is a very heavy premium on active, constructive class participation. To that end, students will be required to submit, per email (mgreve@gmu.edu), two questions about the case(s) and readings for the following session, due two days prior—Saturdays, 6:00pm—to that session. No question are due for the first class.

The final paper (including class presentation) counts for 75% of the course grade; questions submitted and class participation, 25%.

Logistics

Office Hours: Mondays, 4-5 pm; or by appointment.

Contact Info: Please use this e-mail for all communication: mgreve@gmu.edu.

Syllabus

Note: The reading assignments (except for the first session) are incomplete. In that and other respects the Syllabus is subject to frequent changes (depending on our progress; guest stars’ availability; the progress of pending litigation, and your instructor’s whim). I will attempt to provide adequate notice; however, periodic checks are highly advised.

Readings are listed under “Background,” “Assignments,” “Recommended,” and “Further Reading.” Some materials will be posted on TWEN; everything else is readily available of Westlaw, on internet sites, or in the library.
“Background” contains cases (and occasionally some other materials) with which you should be familiar. Most of the cases appear in excerpted form in ConLaw or FedCourts textbooks, and that will generally suffice for purposes of preparation. You’ll find the other cases on Westlaw; other materials will be on TWEN.

“Assignments” is the must-read stuff—the cases we will knock around in class.

“Recommended” means—well, optional.

“Further Reading” is intended primarily for students with an abiding interest in nuance and strategy. You can’t possibly read all the background stuff for these cases, so I’ve selected the pieces that are most helpful in tackling the key questions.

If you cannot handle “assigned” and “background,” you won’t get much out of this seminar. For maximum value, you’ll want to rummage through “recommended” and “further” readings; but no great harm will befall you if you don’t. If a case grabs you, read up, probe, and pursue in class discussion (this is a seminar). If it doesn’t or you don’t have the time, see what you can learn in class.

Session 1 (Jan. 11): Introduction—Constitutional Argument

I’ve chosen a tolerably straightforward case to limn the range of questions that will occupy us throughout the course: (1) forms of constitutional argument (yes, Virginia, there’s more than the text and no, that doesn’t mean it’s made up); and (2) questions of strategy.


Recommended: Stephen Smith, “Believing Like a Lawyer” (TWEN) (an all-time classic—well worth your while); Greve, The Upside-Down Constitution (“UDC”) Ch. 1.

Further Reading: Look at the principal briefs by the Heald respondents (the Starr/Sullivan brief) and by the Petitioners in the companion case (IJ’s brief): very different, no? In what respects, and why (aside from the fact that they confront different state regulatory regimes)? Then, look at or listen to the four-lawyer argument. Try to see why and how Kathleen Sullivan is really good. She makes one crucial damage control move and one (for her clients, very costly) concession, all to hold the fifth vote. Whose vote? What move and concession?

PART I: JUDICIAL POWER

We start, as we must, with Marbury. Its premises are in tension with the Supreme Court’s Benedictus of the post-New Deal order: Behold, we are the handmaid of the Congress. You’ve
encountered this tension in ConLaw I and perhaps AdLaw and/or FedCourts. We’ll explore it in three settings: constitutional avoidance canons; administrative adjudication and statutory preclusions of judicial review; and delegated powers.

**Session 2 (Jan. 25): Judicial Power (I): Avoidance Canons and Statutory Construction**

Guest Star: Ashley C. Parrish (King & Spalding)

The precept that statutes that *can* be construed in conformity with the Constitution *must* be so construed is one of several constitutional avoidance canons and techniques. In one form or another it dates back to the days of Story and Marshall. But is it right—and if so, in what form and deployment, with what limits? Why?

Put that question together with “originalist” interpretation and “facial vs. as applied” challenges: your head will spin. Step back. Instead, recognize that if you’re a private litigant (usually against the government), the canon can save you (or kill you), in several different ways. Read the assigned cases through that lens. We’ll start on *Bond*, which is manageable. *NFIB* has too many moving pieces of be teachable in a single session. Still, read it carefully. (You’ll encounter pieces of it later in the seminar; it’s assigned here for “compare and contrast” purposes.) Suppose you see the canon coming in the tax part of *NFIB*: what’s your answer?

**Background:** *Missouri v. Holland*, 252 U.S. 416 (1920); *Reid v. Covert*, 354 U.S. 1 (1957); *Bond v. United States*, 131 S. Ct. 2355 (2011)


**Recommended:** *Medellin v. Texas*, 552 U.S. 491 (2008); The Chemical Weapons Convention. (available at http://www.opcw.org/chemical-weapons-convention/articles/) (skim the Preamble and Articles)


Get a load of the government’s brief and oral argument in *Bond*: if Mrs. Bond gets off the hook, Syracuse NY will look like Syria. What makes them think and argue that way? Then, look at the Petitioner’s (Clement/Parrish) brief in *Bond*: does it articulate a coherent theory of the Treaty
Power? I didn’t think so, either. Chances are, that occurred to the authors. Why did they do it that way? The oral argument gives you a hint.

Session 3 (Feb. 1): Judicial Power (II) - Administrative Adjudication; Preclusion of Review

Something important about the Constitution gets lost between *Ex Parte Young* and *Crowell* on one side and the post-*Yakus*, post-APA regime—no? What exactly is it?

Congress can’t foreclose *all* judicial review—right? Take a look at Sec. 307(b) of the Clean Air, 42 USC 3607: is that constitutional? (It’s not an outlier: other statutes contain very similar preclusion provisions.) What sort of case would you want to argue that it’s not? Would you try to distinguish *Yakus*—or attack it outright? Would you couch your argument as an Article III attack, or due process? Both?

**Background:** *Crowell v. Benson*, 285 U.S. 22 (1932); *Ex Parte Young*, 209 U.S. 123 (1908); *Stern v. Marshall*, 131 S.Ct. 2594 (2011)


**Recommended:** James R. Conde & Michael S. Greve, “Yakus and the Administrative State” (TWEN).


Session 4 (Feb. 8): Judicial Power (III) – Delegation Doctrine

Guest Star: Douglas Cox (Gibson, Dunn & Crutcher) (invited)

Start with Justice Thomas’s opinion in Dept. of Transportation. See why, and how, he hopes to resurrect all those hoary separation of powers ideas. Re-read the cases he relies on as background. I also want to spend a fair bit of time on the often misunderstood *Schechter* case; read it in its entirety, not just snippets.

PART II: CONSTITUTIONAL COMMON LAW

On some accounts just about all ConLaw is common law. Nothing in the Constitution tells you whether the sale of insurance across state lines is “commerce”; whether corporations are “citizens”; or whether Janet Jackson’s assets fall or hold up under “freedom of the press.” And because we can’t and don’t want to wait around for Congress to tell us, courts make the rules. On another account, that’s all “interpretation,” and constitutional common law is or ought to be a null set.

Have fun with the metaphysics if you like. For present purposes “constitutional common law” means (1) judicially enforceable rules, derived from (but not literally “in”) the Constitution, that (2) are presumptive because Congress can trump them through (clear) legislation. There are quite a few such rules: state sovereign immunity (for 14th Amendment purposes); concurrent federal and state court jurisdiction; and the rule that states can’t tax or otherwise encumber federal instruments. We’ll study one such rule: the dormant Commerce Clause. It’s vastly more important in our history than the “awake” Commerce Clause; still part of the ConLaw canon in my ill-spent youth; now under assault. It’s worth knowing both in its own right and for what comes next (preemption).

Session 5 (Feb. 15): “Dormant” Commerce (1)—Discrimination and “Extraterritoriality”

You’d think that states can’t tax or regulate wholly foreign (“extraterritorial”) transactions. But that’s news to the great state of California and a matter of indifference to the Supreme Court. Suppose the Court did agree to hear an “extraterritoriality” case: would you brief/argue it as a dormant Commerce Clause case? Due process? Something else? Look carefully at how Michael McConnell handles the issue in his RMFU brief.

Could Congress authorize states to tax and regulate wholly foreign transactions? E.g., could it provide FERC with authority to approve extraterritorial state global warming laws (so long as they’re not facially discriminatory)?


Assigned: Rocky Mountain Farmers Union v. Carey, 730 F.3d 1070 (9th Cir. 2013); briefs on cert (available at http://www.scotusblog.com/case-files/cases/corey-v-rocky-mountain-farmers-union/)

Recommended: UDC Ch. 13

Session 6 (Feb. 22): “Dormant” Commerce (2)—Taxes and Regulation

Guest Star: Dominic Perella

Read Justice Thomas’s *Camps Newfound* dissent. Then, ask whether the second *M’Culloch* holding and *Gibbons* are actually right. Next, consider that the “imaginary” dormant Commerce Clause reached its apex in the heyday of legal formalism: weird, don’t you think?

Consider the *cert* grant in *Wynne*. If you’re the state, what’s your best move on the merits? If you’re representing the Wynnes, what is your biggest problem, and how do you deal with it? The Wynnes’ principal brief is good stuff. I can’t explain the feds’ brief; can you?

Dormant Commerce Clause cases teem with averments that the doctrine is a “mess,” “makes no sense,” etc. Do the assigned cases give you a clue as to why that might be (if in fact it’s true)?

**Background:** *M’Culloch v. Maryland*, 17 U.S. 316 (1819); *Gibbons v. Ogden*, 22 U.S. 1 (1824) (your ConLaw textbook version will suffice)


**Recommended:** *W. Livestock v. Bureau of Revenue*, 303 U.S. 250 (1938); *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) (both good to know but not absolutely crucial); *UDC* Ch. 4 (91-111); Eule, “Laying the Dormant Commerce Clause to Rest,” 91 Yale L. J. 425 (1982).

**Further Reading:** The *Vanderbilt Law Review En Banc* has a bunch of brief essays on the case; useful if you want to get a quick overview of the case law.

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**PART III: FEDERAL PREEMPTION**

Preemption cases often hang on arcane statutory terms of art; and because they often arise, one after another, under the same statutes (ERISA, the FDCA, SLUSA), they’re highly path-dependent. In that sense, this is for statutory dorks. Still: in hard cases there’s a lot of churn and heavy constitutional breathing. (Read Justice Thomas’s *Wyeth* concurrence, which tries to reconnect the constitutional dots.) To get this right, you have to comprehend why preemption has become federalism’s ground zero and how it fits into the rest of the post-New Deal universe: the vast expansion of the Commerce Clause, *Erie Railroad* (oh, yes); and the curious emergence of
preemptive federal common law. We’ll first sketch a roadmap and then, in two sessions, tackle some nasty problems.

**Session 7 (Feb. 29): Foundations, Canons, Presumptions**

Justice Thomas’s *Wyeth* concurrence is the counterpart to his *Camps Newfound* dissent. Read that concurrence first. Then, think through the connections between preemption and the broader constitutional universe, especially “dormant” Commerce, and federal common law. Would you describe Justice Thomas’s approach as an originalist challenge to the New Deal Constitution? As an *Erie*-based challenge to the original Constitution (not a joke question)?

The “recommended” readings are *highly* recommended. The Nelson and Gardbaum articles are the most consequential you are likely to see, should you choose to practice in this venue.


**Session 8 (Mar. 14)**

Paper (draft) discussion. Reminder: **Drafts are due March 11, 8:00pm.**

**Session 9 (Mar. 21): (Tort) Preemption in Practice**

Guest Star: Robert R. Gasaway (Kirkland & Ellis)

Our guest star has thought more carefully about this stuff than anyone else, at a very high level (see “Recommended.”) With his expert guidance we’ll dissect *Sprietsma v. Mecury Marine*, (NAM brief, decision, oral argument transcript on TWEN and assigned; other briefs—esp. the SG’s—recommended). You’ll have to understand *Geier* to understand this case.

You’ll want to push Mr. Gasaway on how the practicalities hang together with grand theory. When and why (in any given case) would you want to engage *Wyeth*-level arguments—or retreat into the statute and precedents? Do you have that choice?
**Background:** *Wyeth v. Levine*, 555 U.S. 555 (2008) (re-read)


**Further Reading:** Greve, Klick, Petrino & Sevilla, “Preemption in the Rehnquist and Roberts Court” (TWEN) (This will give you an overview of what preemption case law looks like).

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**Session 10 (Mar. 28): Preemption and Spending**

Guest Star: Dan Schweitzer (NAAG)

State enacts a law limiting Medicaid provider payments. Providers say that’s preempted because the federal statute requires higher rates. Can they sue? If not, why not? This is surprisingly nasty; you’ll have to understand a bunch of quasi-constitutional doctrines: Section 1983, private rights of action, and *Ex Parte Young.*

ConLaw theory: do we think that a *spending* statute *preempts* anything at all? Why or why not?

Strategy etc: the Chamber of Commerce brief in *Armstrong* is criminally bad, and the people who wrote it are too smart not to know it. If you were them, could you do better?

**Background:** *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)


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**PART IV: FEDERALISM**

A key federalism fact is that the federal government cannot conceivably run a large-ish country on its own; it needs state and local governments to educate you and to keep you in shoes and out of wetlands. Hence, the terms of federal-state relations and bargains matter a great deal, and you may have noticed that they’ve become very controversial.
We’ll tackle four sets of issues: “commandeering” and its corollaries; federal spending; the interplay between federalism and the administrative state; and the Supreme Court’s evident cluelessness in matters of “horizontal” federalism. The law review literature on this stuff is gargantuan; I’ve assigned a few pieces and would be happy to point you to more.

Session 11 (Apr. 4): Commandeering and Conditional Preemption

Congress may preempt states; incentivize states; but never “commandeer” them. So says New York, and so says Printz—a very sloppy opinion, but quite arguably the most important decision from Justice Scalia’s pen, ever. Let’s spend some time with it, and with the Constitution and Mr. Hamilton and Mr. Madison: you’ll see why it’s so contentious, and a ton of pieces will fall into place.

At any rate that’s what I think. Professor Manning, in contrast, thinks it’s all made up. True?

If the feds can’t “commandeer” ma they then govern by “conditional preemption,” as in: “You (state) may voluntarily do as we wish, or else we (feds) will do it for you”? Is that okay because the greater power to preempt includes the lesser power to preempt conditionally—or is it a gun to the head?

Background: Prigg v Pennsylvania, 41 U.S. 539 (1842)


Session 12 (Apr. 11): Federal Funding

It cannot possibly be the case that Congress can “spend its way around” enumerated powers limits (and that no one has standing to challenge the arrangements)—can it?

Let’s say that such intergovernmental bargains are okay: should they be subject to judicially enforceable constraints (e.g., the “clear statement” rule)?


**Session 13 (Apr. 18): Federalism and the Administrative State**

“Federalism, the Constitution, and AdLaw” is a hot topic among scholars—and for once, they’ve seized on something that’s a real problem. Gillian Metzger’s article (on of several in that volume) unleashed a torrent of literature; it’s still the best, and very much worth reading. (*Everything* Prof. Metzger writes is worth reading.)

Lately, and for obvious reasons, the debate has focused on waivers and non-enforcement. The assigned articles are the standard sources. The pending litigation in *Texas v. U.S.* has it all: standing problems (constitutional and statutory); reviewability problems; APA problems; Article II issues. (Ignore the PI/interlocutory stuff.)

The waiver stuff is hard enough. The overarching question is whether on top of that you want to lard up the AdLaw/ConLaw inquiry with “federalism” canons. You’ll encounter that question again in Session 14.


**Additional Stuff:** If you have an idle hour or two, the Fifth Circuit’s oral argument in the DPA matter is [here](http://balkin.blogspot.com/2015/04/the-canard-of-lawful-presence-status-in.html). For a defense of the government’s position on the merits ignore the made-to-order (and now partially disavowed) OLC Memo; instead, consult Marty Lederman’s posts on balkinization (you can track them back from here: [http://balkin.blogspot.com/2015/04/the-canard-of-lawful-presence-status-in.html](http://balkin.blogspot.com/2015/04/the-canard-of-lawful-presence-status-in.html))
Session 14 (Apr. 21): Horizontal Federalism.

“Horizontal” federalism—i.e., relations between and among states—was a big concern for the Founders. That’s why there all these funky clauses in Art. I Sec 10 and in Art. IV; why there’s diversity jurisdiction; etc. This stuff was the federal courts’ daily diet in the 19th century and beyond; after the New Deal, it mostly disappears.

Now and then a case comes up where the issue can’t be avoided—and the Supreme Court makes a fine mess of it, no?

Background:

Assigned: Franchise Tax Board v. Hyatt, [cite]; Franchise Tax Board v. Hyatt [pending—briefs etc available here]

Recommended: UDC Ch. ; Gerken, “The Political Safeguards of Horizontal Federalism” [TWEN]