Federal Courts
Prof. Greve
Law 226-002
Spring Semester 2015
Mon/Wed 6:00 – 7:15pm

Introduction and Overview

Federal Courts is the most difficult course you will encounter in law school. Depending on your envisioned career, it 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 and mark it up. It’s great for looking things up, and it will serve you well in later years. Also on the exam (more below).

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 highly specialized subjects, prominently including Military Tribunals and habeas jurisdiction. 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. You’ll note that the Syllabus has more sessions than are actually available during the Semester; I’ll replace (parts of) some sessions with handouts. (No, I haven’t decided which ones.) Conversely, some sessions will “run over.” When that happens, you should still read the assignment for the next class.

**Attendance, Course Participation, and Grading:** I won’t take attendance, and there’s 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(s). I will take uncommonly useful and active class participation into consideration for your course grade.

**Exam.** The exam (May 9) will be an internet-secured open-book exam (3 hours). You’ll have access to H&W, the cases on TWEN, your class notes, etc—just 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).

**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.

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, the excerpted cases are more important than the Notes.

1. **Cases and Controversies**

   1. *Marbury etc. (Yet Again)*

      pp. v-vi Preface (Part I only)
pp. 49-80

Correspondence of the Justices; Note on Advisory Opinions; Marbury v. Madison; Note on Marbury v. Madison; Note on Marbury v. Madison and the Function of Adjudication (72-80--important!)

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. Consider, for starters, four sets of doctrines: a) advisory opinions; b) standing and related jurisdictional doctrines; c) constitutional avoidance canons; d) the breadth of judicial rulings (severability; facial v. applied challenges). What does Marbury say (or suggest) about these matters? What should the rules look like?

I’ll start with a ten minute disquisition on “What is Federal Courts”? Then, we’ll sort through the models and figure out how things hang together.

2. Parties, Finality, and Collusion

pp. 80-100

Hayburn’s Case; Note on Hayburn’s Case (skim); Note on Hayburn’s Case and the Problem of Revision of Judicial Judgments (esp. B., 87-93); United States v. Johnson, Note on Feigned and Collusive Cases (skim both).

Supp. 5-6

United States v. Windsor

Take another look at 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? Why or why not? I can see at least three questions here; can you?

If there’s time left I’ll share five minutes of thought on collusive cases.

3. Standing to Sue

pp. 100-129

Fairchild v. Hughes; Allen v. Wright; Note on Standing to Sue

Supp. 7-14

Summers v. Earth Island Institute; Monsanto v. Geertson Seed Farms; Clapper v. Amnesty International; Friends of the Earth v. Laidlaw; Hein v. Freedom from Religion Foundation, Arizona Christian School Tuition Org. v. Winn [read these for the next session]; United States v. Windsor; Camreta v. Greene
If you haven’t paid attention so far, now would be a very good time. 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 the garbage 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!). Let’s start at the top:

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 the heck do “prudential” standing requirements come from? Do you think they are jurisdictional?

4. Congressionally-Created Standing [and “Special” Plaintiffs]

   pp. 129-153  
   Lujan v. Defenders of Wildlife; Note on Congressional Power to Confer Standing to Sue; Note on Standing to Challenge Federal Administrative Action; Note on the Standing of Taxpayers, Governments, etc.

   Supp. 15-17  
   Summers v. Earth Island Institute; Hollingsworth v. Perry

   pp. 259-266  
   Note on State’s Standing to Sue

   Lujan is the crucial case: the SupCt routinely cites it (and then, as often as not, does the opposite). Two questions:

   1. 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?

   2. 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?

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

   pp. 153-167  
   Craig v. Boren; Note on Asserting the Rights of Others; Yazoo; Note on As-Applied and Facial Challenges; Board of Airport Commissioners v. Jews for Jesus

   pp. 174-183  
   Note on Facial Challenges and Overbreadth
II. Congressional Control of Federal Jurisdiction

Read pp. 275-314, 320-324 as background; it’s more interesting to political scientists than to lawyers. The major issues in Sessions 6 and 7: the birth pangs and continuing afflictions of the Administrative State; Crowell and CFTC v. Schor. Session 8 is HUGE.

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

- pp. 275-305 Introductory Note on Congressional Power over the Jurisdiction of the Article III Courts; Sheldon v. Sill; Ex Parte McCardle; Note on the Power of Congress to Limit the Jurisdiction of Federal Courts
- pp. 305-314 Introductory Note on Congressional Preclusion of Both State and Federal Court Jurisdiction; Battaglia v. General Motors Corp.; Note on Preclusion of All Judicial Review
- pp. 320-324 Note on Congressional Apportionment of Jurisdiction Among Federal Courts
- pp. 324-49 Crowell v. Benson; Note on Crowell v. Benson and Administrative Adjudication; Introductory Note on Legislative Courts

Read 5(b) (pp. 282-283) and pp. 7-9; it’s important background.

Concentrate on 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?

7. Legislative Courts

- pp. 349-363 Commodity Futures Trading Comm’n v. Schor; Further Note on Legislative Courts
- Supp. 43-48 Stern v. Marshall

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. Stern is
worth reading in full for the gloss the justices on both sides put on *Northern Pipeline, Schor*, and (of all things) *Crowell*.

Are you happy with *Schor*’s five-factor test? Is Justice Scalia’s approach (Supp. p. 46) any better?

H&W say that “this area of the law remains unstable.” No kidding. See *Executive Benefits Ins. Agency v. Arkinson*.

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8. **Concurrent Jurisdiction of State Courts**

pp. 383-408

Federalist No. 82; *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 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 *Tarble’s Case* next (the order in H&W is weird). Pretend that the form of the action (here mandamus) doesn’t matter. Which of the various theories on pp. 403, 405 seems most plausible?

Doesn’t this remind you of *M’Culloch*? How is it different/similar?

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

Pay attention to the Notes on pp. 393-94: you’ll encounter this again when we talk about statutory preemption.

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

pp. 408-29


Supp. 50-51

*Haywood v. Drown*
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. 431-47  
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?

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

pp. 448-65  
*Murdock v. City of Memphis*; Note on *Murdock v. Memphis*; Introductory Note: The Interstitial Character of Federal Law; *Fox Film Corp. v. Muller*; Preliminary Note on the Adequate and Independent State Grounds Doctrine

Supp. 54-55  
*Camreta v. Greene*

pp. 465-474  
*Michigan v. Long*; Note on Review of State Decisions Upholding Claims of Federal Right

[H&W pp. 480-496, Supp. 55-56, discuss the State Incorporation of Federal Law. Skim if you wish; I’m not going to teach it.]

Discuss amongst yourselves: *Murdock* was wrong the day it was decided.

### 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. I’ll start with an overview of the
landscape—i.e., how the *Erie* issues hang together with preemption (the presentation in H&W is frankly awful); with implied private rights; and with that Constitution thingy.

H&W (Supp. ) H&W note, with an air of disbelief, that *Erie* has re-emerged as a subject of intense scholarly debate (which is like saying that Marbury has become controversial). Why might that be? For a hunch see Greve & Epstein, “*Erie Railroad at 75,*” *JLEP* 2013. The essays in this Symposium Volume are well worth your attention. Prof. Young’s article is the most sustained extant defense of the foundational *Erie* decision against the assorted nutcases (including your instructor) who have taken a whack at it.

**12. Swift and Erie/Klaxon**

pp. 533-43 Note on the Historical Development of the Statutes and Rules of Court (skim; read as background)

pp. 608-614 *United States v. Hudson & Goodwin*; Note on Federal Common Law Crimes (1), (2)

pp. 550-64 *Swift v. Tyson*; Note on *Swift v. Tyson*; *Erie Railroad Co. v. Tompkins*; Note on the Rationale of the *Erie* Decision (you’re supposed to know this already 😊)

pp. 564-569 Note on the *Klaxon* Decision and Problems of Horizontal Choice of Law in Cases Involving State-Created Rights

If you want to think seriously about this, start with the *JLEP* article by Gasaway & Parrish. Ask, first, whether they’re right. Ask, second, why prominent members of the D.C. bar—not academics, but practicing lawyers who specialize in high-stakes appellate lit—would go out on a limb like that. What do they get that you don’t (yet)?

**13. Federal Common Law; Preemption**

pp. 614-33 *Clearfield Trust Co. v. United States*; Introductory Note on the Existence, Sources, and Scope of Federal Common Law; Note on Choice of Law in Cases Involving the Legal Relations of the United States

pp. 633-50 *Boyle v. United Technologies Corp.*; Note on Choice of Law in Private Litigation that Involves Federally-Created Interests; Further Note on Federal Common Law

Supp. 72-77 *Arizona v. Inter-Tribal Council*; *PLIVA v. Mensing*; *Wyeth v. Levine*; *Arizona v. United States*

*Rice v. Santa Fe Elevator*; *AT&T Mobility v. Concepcion* (TWEN)

On preemption: forget the immigration cases. Put *Wyeth* and *PLIVA* next to each other: does that make any sense? I’ve assigned *Rice* (which makes a mess of a perfectly fine pre-New Deal statute) because it’s foundation; *Concepcion*, because you should encounter the Federal Arbitration Act at least once.

**14. Admiralty etc; Foreign Affairs Cases**
15. Private Rights of Action under Federal Statutes; Bivens Actions

As a practical matter the statutory stuff is way more important than Bivens; so we’ll spend most of our time on that.

V. Federal Question Jurisdiction

This stuff is really nasty, and the Supreme Court has made it way more complicated than it needs to be (thank you, John Paul Stevens). Unfortunately it’s also really important.

16. The Scope of the Article III Grant

17. Well-Pleaded Complaints

18. Federal Elements in State Law Causes of Action
19. **Declaratory Judgment Actions, Preemption, and Removal**

pp. 800-16 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 Concerning State and Local Laws Alleged to be Preempted by Federal Law; Note on the Removal Statutes (Part A only)

VI. **Suits Challenging Official Action**

20. **Federal Sovereign Immunity; Statutory Waivers**

pp. 841-857 Note on the Sovereign Immunity of the United States; *United States v. Lee*; Note on Sovereign Immunity in Suits Against Federal Officers


21. **State Sovereign Immunity and the Eleventh Amendment**

pp. 869-85 Introductory Note on State Sovereign Immunity and the Eleventh Amendment; *Hans v. Louisiana*; Note on the Origin, Meaning, and Scope of the Eleventh Amendment

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22. **The Ex Parte Young Doctrine**

pp. 886-900 *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

Supp. 102-04 Shapiro; *Virginia Office v. Stewart*

23. **Congressional Abrogation**

pp. 900-28 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

pp. 928-41 Note on *Alden v. Maine* and State Immunity from Suit on Federal Claims in State Court

Supp. 104-05 *Coleman v. Court of Appeals; Sossamon v. Texas*

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.*
I don’t have a whole lot of patience for Mr. Parratt and his hobby kit and may drop it entirely. *Monroe* is the key case; concentrate on that.

25. **Official Immunity**

   pp. 986-1011 *Harlow v. Fitzgerald*; Note on Officers’ Accountability in Damages for Official Misconduct; Note on the Immunity of Government Officers from Relief other than Damages

   Supp. 113-18 *Camreta v. Greene; Ashcroft v. al-Kidd; Reichle v. Howards; Safford Unified School Dist. V. Redding; Messerschmidt v. Millender; Filarsky v. Delia; Camreta yet again*

VII. Judicial Federalism and Abstention

26. **The Anti-Injunction Act**


   Supp. 119-20 *Smith v. Bayer Corp.*

27. **Pullman Abstention**

   p. 1049-50 Introductory Note

   pp. 1057-75 *Railroad Commission of Texas v. Pullman Co.;* Note on Abstention in Cases Involving a Federal Question; Note on Procedural Aspects of *Pullman* Abstention

28. **Younger Abstention; Colorado River Abstention**

   pp. 1083-1100 *Younger v. Harris;* Note on *Younger v. Harris* and the Doctrine of Equitable Restraint

   pp. 1100-28 *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 Equitable Restraint Doctrine

   pp. 1128-40 *Colorado River Water Conservation District v. United States;* Note on Federal Court Deference to Parallel State Court Proceedings