Federal Courts
Prof. Greve
Law 226-001
Spring Semester 2020
Tues/Thurs 6:05 – 7:30pm

Introduction and Overview

Federal Courts is the most difficult course you will encounter in law school. It requires a reasonably accurate recollection of CivPro; and if you have not yet taken ConLaw I and, ideally, Administrative Law and perhaps Conflicts (and done tolerably well in those courses), none of this will make much 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:


I strongly suggest you buy the book and the Supplement, mark up both in pencil and with tabs, and keep the book. I realize it’s expensive but it’s a worthwhile investment in your career.

All other materials will be posted on TWEN.

Attendance; Electronics; Course Participation

I’ll take attendance, 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, if you miss class too often, you’ll fall behind very quickly. And you are of course aware of the general attendance requirements.

I very, very, very strongly discourage the use of laptops or any comparable device in class. One, fairly robust evidence shows that physical note-taking—yes, pen and paper—enhances students’ comprehension. Two, you won’t be able to handle FedCourts with shopping or snapchat on the side.

I’ll cold-call to keep you on your feet, but I strongly prefer volunteers. 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.

Uncommonly useful and active class participation will earn you a one-third grade—e.g. from B to B+. 
Exam

The exam will be an internet-secured open-book exam (3 hours). You’ll have access to H&W and the materials on TWEN—nothing else. I’ll provide further details in class.

Office Hours

Tuesdays 4:30 – 5:30, or by appointment (send me an e-mail). PLEASE USE THIS EMAIL FOR ALL PURPOSES: mgreve@gmu.edu.

Syllabus

Check the Syllabus on a regular basis. The operative version at all times is the one on TWEN. It is subject to change, both because I’ll add (from time to time) further 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.

Too much reading? Tough luck. Look at the syllabus: if it looks like too much, don’t take this course. Otherwise, learn to live on my planet (always too much reading, never enough time).

Your 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. Conversely, you can ignore the editors’ copious footnotes (though not the footnotes to the excerpted cases).

I. Cases and Controversies

1. Marbury etc. (Yet Again)

   TWEN Preface to the First Edition

   pp. 1-47 Chapter I [skim. We won’t go through all this except for a few pieces in later Sessions; but it’s useful background reading, esp. the stuff on jurisdiction, pp 22-26.]

   pp. 49-81 Advisory Opinions; Marbury v. Madison; Note on Marbury v. Madison; Note on Marbury v. Madison and the Function of Adjudication

   The “Note” was an unholy mess in earlier editions; Prof. Fallon has cleaned it up, and it’s pretty good. Read carefully.

   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.) We’ll spend most of the class on the two “models” of constitutional adjudication that are commonly traced to Marbury: Dispute Resolution/ Departmentalism versus Law
Declaration/Judicial Supremacy. You’ll encounter the ambiguity throughout the course. 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. 81-101**  
*Hayburn’s Case*; Note on *Hayburn’s Case* (skim); Note on *Hayburn’s Case* and the Problem of Revision of Judicial Judgments; *United States v. Johnson*, Note on Feigned and Collusive Cases (skim both).


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.

3. Standing to Sue  

**pp. 101-132**  
*Fairchild v. Hughes; Allen v. Wright*; Note on Standing to Sue; Note on Specialized Standing  

**pp. 279-286**  
Note on States’ Standing to Sue

Government agencies assert jurisdictional defenses whether they have them or not, and they have a huge advantage over private litigants: because they’re repeat players, 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?
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?

The SupCt has over time created special rules for certain classes of litigants: a) taxpayers, in religion cases; b) legislators; c) states (and it matters *in what capacity* states appear). If you think you can harmonize the rules with the rest of the standing
universe, good luck. The true holding of the cases may be something like, “if these parties can’t sue over this jazz, nobody can.” Would that be bad?

4. Congressionally Created Standing: Further Questions

pp. 133-160  *Lujan v. Defenders of Wildlife*; Note on Congressional Power to Confer Standing to Sue.

Supp 14-15  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?

pp. 160-165  *Craig v. Boren*; Note on Asserting the Rights of Others (No. 1 & 2)

pp. 184-195  Note on Facial Challenges and Overbreadth (No. 1, 2, 5, 8)

pp. 217-237  *Abbott Laboratories v. Gardner*; Note on “Ripeness in Public Litigation; O’Shea v. Littleton; Note on “Ripeness” and Related issues in Public Actions (No. 1-4)

This is Richard Fallon’s playpen, so H&W has way too much stuff. I’ve spared you n pages on “overbreadth” (a First Amendment thing); class actions (theoretically and practically interesting but too CivPro-ey for this course); Mootness; and 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 most difficult issues here are in Sessions 5 and 6. A million things (federalism, the separation of powers, the birth pangs of the administrative state) are happening at once. All foundational. We’ll spend as much time as it takes to get this straight; but give yourself ample time to read, especially for Session 5. If you garble this stuff you’ll have problems down the road.

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

pp. 6-9, 13-18  The Judiciary Article; the Scope of Jurisdiction

pp. 295-326  Introductory Note on Congressional Power over the Jurisdiction of the Article III Courts (skip n. (5)); *Sheldon v. Sill; Ex Parte McCardle*; Note on the Power of Congress to Limit the Jurisdiction of Federal Courts

pp. 326-335  Introductory Note on Congressional Preclusion; the *Klein* Decision; *Battaglia v. General Motors Corp.*; Note on Preclusion of All Judicial Review

Supp 46-48  “Page 324”

pp. 341-345  Note on Congressional Apportionment of Jurisdiction Among Federal Courts

pp. 346-363  *Crowell v. Benson*; Note on *Crowell v. Benson* and Administrative Adjudication; Introductory Note on Legislative Courts

Here’s a rough road map:
The first question is whether and how Congress may limit the (federal) courts’ jurisdiction. (You’ll see why that way of putting the question is a bit misleading.) Make sure you understand 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.

You’ll find that Congress may do lots of things to federal courts—enough to make you nervous. Still: is there some “core” of “the Judicial Power” that Congress may not invade? That’s U.S. v. Klein and the cases in Supp.

The final question is whether Congress may vest “the Judicial power” (whatever it is) in bodies that are not Article III courts—in particular, administrative tribunals. 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?

6. Legislative Courts

pp. 364-390  Stern v. Marshall; Further Note on Legislative Courts

pp. 395-410  Note on Adjudication Before Multinational Tribunals; Note on Military Tribunals (recommended—skim)

TWEN  Commodity Futures Trading Comm’n v. Schor

Supp 51-53  Further Note on Legislative Courts

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: Fallon & Co have stripped CFTC v. Schor from the book; I’ve mercilessly put it back into your assignments. (You’ll want to read it before Stern.)

The serious issue here dovetails with Session 5: are there claims that must be heard (if at all) in Article III courts (rather than “legislative” courts or administrative tribunals—and if so, what are they? Oil States Energy (Supp) is the Court’s latest pronouncement; but what is it saying?

Re recommended readings: no time to cover this. But you should know these issues are out there.

7. Concurrent Jurisdiction of State Courts

pp. 412-437  Taflin v. Levitt; Note on Taflin 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 also 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.

8. State Courts’ Obligation to Hear Federal Questions


Supp 55 “Page 448”

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. I’ll have a handout/crib sheet.

9. Establishment of the Jurisdiction; State Court Authority over State Law; Adequate State Ground Doctrine

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?

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

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 project disintegrates. The big joke is this: as the late, great Grant Gilmore noted, the case cannot possibly mean what it seems to be saying. Accordingly, the Supreme Court (and the FedCourts profession) have invented a half-dozen work-arounds. You’ll have to learn all of them.

### 10. Swift and *Erie/Klaxon*

- **pp. 559-573**: Note on the Historical Development; *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
- **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*.

To the New Deal’s opponents, the sainted Judge Henry once observed, *Erie* represented “the triumph of the Harvard Law School … over the prostrate body of the Constitution.” Why might they have been thinking that?

### 11. 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
- **Supp 66-68**: Note on Federal Preemption

While the H&W “Note” on preemption is an improvement over earlier editions, that’s not saying much; I’ll provide a bit more context and analysis. The crucial point is the connection between federal common law and preemption; *Boyle* is the best case to noodle over it. Rightly decided—or totally over the top?

### 12. Admiralty etc; Foreign Affairs Cases

- **Supp 70**: “Page 720”

The foreign affairs stuff has everyone worked up. 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.
13. 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 (skim—read as background)

pp. 762-777  *Bivens v. Six Unknown Named Agents*; Note on *Bivens*

Supp 72-74  Note on Bivens

As a practical matter the statutory issues are way more important than *Bivens*; so we’ll spend most of our time on that. It hangs together with Section 1983 actions and *Ex Parte Young* actions (see Session 20); pay attention.

V. Federal Question Jurisdiction

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

14. 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?

15. 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 makes no sense. Do they?


pp. 821-837  Introductory Note on Jurisdiction Under § 1331; *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg.*; Note on the Scope of “Arising Under” Jurisdiction

Supp 76-78  Note on the Scope of “Arising Under” Jurisdiction

TWEN  
*Merrell Dow v. Thompson*

*Merrell Dow* (822-824), Prof. Martin Redish has sneered, reads like it was written by Judge Wapner. That may be a tad harsh but becomes more plausible if you read the longer excerpts (TWEN): Justice Stevens is certainly making a mess of things. How, and why is he doing this? Is *Grable* any better?
17. 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

18. 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.

19. State Sovereign Immunity and 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?

20. 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.

21. 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

Supp 83  “Page 976”

Seminole Tribe is the foundational case. The later twists and turns are things you want to remember; little mileage in thinking about them.
22. Suits Against State Officers for Unauthorized Action


pp. 1015-1030  *Parratt v. Taylor*; Note on the Parratt Doctrine (skim)

I’ll probably 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.

23. Official Immunity

pp. 1030-1060  *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 86-87  “Page 1041”

As the Supp explains, one can argue that the law of official immunity—*all* of it—is baseless. We’ll talk about it briefly. But your central mission, should you choose to accept it, is to get the black-letter rules down (they cover most of this ground).

VII. Judicial Federalism and Abstention

24. The Anti-Injunction Act


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

25. *Pullman* Abstention

p. 1094-1127  *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.

26. *Younger* Abstention; *Colorado River* Abstention

pp. 1127-1181  *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?