Students – past and present – have made wonderful contributions to these materials, which were prepared with the help of Joseph Blocher, Class of 2006; Marin Levy, Class of 2007; Natalie Ram, Class of 2008; Jessica Weber, Class of 2009; Adam Grogg and Elliot Morrison, Class of 2010; Ruth Anne French-Hodson and Jason Glick, Class of 2012; Chris Michel and Elizabeth Wilkins, Class of 2013; Caitlin Bellis and Aaron Littman, class of 2014; Jenné Ayers, Mark Kelley, and Devon Porter, class of 2015; John Giammatteo, Marianna Mao, and Diana Li, class of 2017; David Chen and Amit Jain, class of 2018; and Alexandra Eynon, class of 2019. Central to all our work is guidance from Michael VanderHeijden at YLS Lillian Goldman Law Library and the expert assistance of Bonnie Posick, with help from Tim Pepler. © 2017, Judith Resnik.
Note: This outline and the supplemental materials aim to provide you with a mini-horn book, plus to serve as your “round up” of recent relevant Supreme Court decisions. Only selected items will be assigned; the purpose is to enable you to see how different questions, topics, and materials fit together.

I. The Relationship Among the Branches of the Federal Government and the Concept of Jurisdiction

As previewed in the first class, a major topic, often termed “separation of powers,” is the relationship among the branches of the federal government. The central issue is who (the courts, Congress, and the Presidency) has what powers (jurisdiction, review, appointment, salaries, etc.) over whom. Our particular focus is on the authority of the Congress and the President over the federal courts — to alter the jurisdiction of the life-tenured Article III judiciary. We also examine the legality of efforts by the Congress and the Presidency to create court-like institutions in lieu of using the Article III courts and to give them jurisdiction related to territories, Indian tribes, alleged terrorists or war prisoners, the military, and administrative rights, as well as congressional authority over state court jurisdiction.

Background reading: Sometime during the first two weeks, please read the overview, provided in H & W, pp. 1-47, The Development and Structure of the Federal Judicial System, and pages 1-3 in the 2017 H & W Supplement. Some of the material contained therein will be familiar to you from your classes on Procedure and Constitutional Law, but a reminder of the history is useful. An additional resource is the volume, Federalism: A Reference Guide for the United States Constitution, by Susan Low Bloch and Vicki C. Jackson (2013), which is on reserve along with copies of the class materials and a few “hornbooks.”

A. Congressional Control over Federal Court Jurisdiction

What limits, if any, does the Constitution impose on congressional power over the jurisdiction of the federal courts? A first cut is whether and how Congress may use its constitutional authority to control the courts through selective repeals of jurisdictional grants to the Supreme Court or to the lower courts.

Note the distinct questions of whether the effort is aimed at a) retracting jurisdiction while cases are pending, b) dictating the outcomes in pending cases, and c) constraining the authority of the federal courts to order certain remedies. As you look at the case law and legislation (some proposed, such as the first day Handouts, and some enacted), consider the distinctions between addressing the appellate jurisdiction of the Supreme Court and the lower federal courts. What is the difference in the text
of Article III about the Supreme Court and the lower courts? Also consider how the evolution of the federal court system over the centuries and the reorganization of its work affect interpretations of the text of Article III. Why, were you in the legislature, might you want to alter federal court jurisdiction, and which distinctions would you draw?

What concerns, goals, and interests might animate proposals to expand, limit or abolish categories of cases, such as diversity jurisdiction? How might the responses differ when thinking about these issues in 1932 and in 2014? Do you care about maintaining federal court diversity jurisdiction? State ratemaking on utilities? Oil spills? Section 1983 (civil rights claims)? Bankruptcy? Copyright? Habeas corpus? For individuals labeled “alien enemy combatants,” held at Guantánamo or elsewhere?


**The Supreme Court’s Jurisdiction: Original and Appellate**

Given the text of the Constitution, is Congress specially constrained (or licensed) to deal with the Supreme Court’s jurisdiction? Consider whether your views vary depending on a statute’s effect on the Court’s original, as contrasted with its appellate, jurisdiction.

**Marbury v. Madison (1803)**

*Marbury v. Madison: Timeline of Events*

Notes

Part I Supp.

William Treanor, *Marbury v. Madison* FCS 29-56

**Original Jurisdiction**

The legislative grant: 28 U.S.C. §§ 1251 (a) (b) H & W 267

Introduction: the Court’s original jurisdiction H & W 267-71

The Procedure: How to file H & W 271-72


Notes 2-4 H & W 274-75

*Nebraska v. Colorado* (2017),

Justice Thomas, joined by Justice Alito, dissenting from denial of motion for leave to file a complaint Part I Supp.

The Shape of the Supreme Court’s Docket
Table A-1, Administrative Office of the U.S. Courts, 2011-2015

The Supreme Court’s Appellate Jurisdiction: the jurisdictional grants
28 U.S.C. § 1253 (three-judge courts);
28 U.S.C. § 1254 (“Courts of appeals; certiorari; certified questions”);
28 U.S.C. § 1257 (State courts);
28 U.S.C. § 1258 (Puerto Rico; certiorari);
28 U.S.C. § 1259 (Court of Military Appeals)

Proposals to Limit Appellate Jurisdiction
Review the proposed statutes from the first day handouts that aimed to limit the Supreme Court’s appellate jurisdiction, specifically Restraining the Judges on Marriage Act of 2015; We the People Act of 2011; the Sanctity of Life Act of 2011

Note on Dictionaries and Constitutional Meaning

The Doctrine, History, and Practices
Ex parte McCardle (1868) Daniel J. Meltzer, Ex parte McCardle FCS 57-86
Notes 1-4 on the Power of Congress to Limit Jurisdiction H & W 307-12
including mandatory jurisdiction/Justice Story’s position,
The commentators and the Hart Dialogue H & W 314-19

Alternative Routes: Original Writ Jurisdiction
Marbury, Bollman, Mandamus, and Habeas H & W 286-92

The Lower Federal Courts

Controlling Jurisdiction over Categories of Cases Sheldon v. Sill (1850) H & W 303-04
28 U.S.C. § 1332 (diversity jurisdiction)
Note on Congressional Powers H & W 295-303
Enlarging Jurisdiction: Class Action Fairness Act of 2005 (CAFA)
28 U.S.C. §§ 1332(d), 1453, 1711-1715

Congressional Support of the Federal Courts: Giving Judgeships Jurisdiction, Courthouses, and Support
Authorized Life-Tenured Lower Court Federal Judgeships:
1789-2015

U.S. Courthouse Buildings and Renovation: A Sampling

Historic Post Offices for Sale

Federal Court Filings: 1950-2010

Civil and Criminal Filings: 1901, 1950, 2001

Growth Rate of Federal District Court Filings, 1905-2015

FY 2016 Funding for the Judiciary

Comparing the Volume of Filings: State and Federal Courts, 2010 and State Trial Court Filings, 1976-2008

Withdrawing all Federal Jurisdiction

Constitutional Avoidance (Felker v. Turpin)  
Congressional Power to Withdraw All Jurisdiction  

B. The “Judicial Power”: Puzzles about Deciding Cases, Proscribing/Dictating Remedies, and Organizing Procedures

The Relationship between Judicial Authority, Advisory Opinions, and Finality

Hayburn’s Case and advisory opinions  

Remedial Constraints through Jurisdictional Divides and Remedial Limitations

Lockery v. Phillips (1943) and Yakus v. United States (1944)  

Supp. Lauf v. Shinner

Federal and State Courts 2017, syllabus full syllabus I-IV assigned materials Dec. 4 2017
Directing a Rule of Decision

*United States v. Klein* (1871) and notes

Amanda Tyler, *United States v. Klein*  
*Notes*  

The Prison Litigation Reform Act of 1996 (PLRA),  
18 U.S.C. § 3626


Susan Kostal, “Iran Terror Victims Receive First Payments,”  
ABA Journal, at 24, March 2017

**Directing the Sources of Law that Judges May Use**

Review the first day handout, the American Justice for American Citizens Act of 2005; American and Alabama Laws for Alabama Courts

Judith Resnik, *Constructing the ‘Foreign’: American Law’s Relationship to Non-Domestic Sources, in Courts and Comparative Law*  
(Mads Andreas and Duncan Fairgrieve, eds., 2015)

**Is Habeas Different?**

**C. The President’s Powers over Judicial Review, the Role of Congress, 9/11, and the “War” Cases**

The post-9/11 developments raised new questions and made relevant older cases that had been in the Federal Courts canon. Instead of thinking “only” about congressional control over federal court jurisdiction, the military tribunals initially created by the Executive Branch were new occasions upon which to puzzle about the role of the Executive in creating “courts” and the import of the constitutional commitment of “judicial power” to Article III courts.

One point of clarification at the outset may be helpful. The constitutionality of the creation of a “court” system for people in the U.S. military who violate its rules (with proceedings such as “courts-marshal”) needs to be distinguished from the chartering of ad hoc tribunals to decide whether people not in the military have violated laws of war or can otherwise be detained. As you read the materials below (some of which may already be familiar to you from other classes and not all of which will be assigned) consider these questions:

1. Compare the November 11th 2001 Executive Order with the text of Article III,
as well as Articles II and I. Can the President order a court into existence? Does the Order create a “court”?

2. Does Congress have the power to delegate court-making to the President? for all matters or in the role of commander-in-chief? Or has the Congress taken on that role itself? How do the MCAs of 2006 and of 2009 differ from the Courts-Martial processes of Title 10? Are the MCA tribunals “courts” for purposes of Article III? Geneva III?

3. What did the Military Commissions Act (MCA) of 2006 purport to limit? to permit? How does the Supreme Court interpret it in Boumediene? What does the 2009 MCA do in response? Has Congress created a specialized “terrorism tribunal” through it?

4. How does the evidence of the mistreatment of detainees, including the torture by waterboarding and other methods, affect your readings and conclusions about the role of courts and the import of Article III?

The Historical Background

Legislative history of Habeas since 1789
Carlos Vazquez, Ex parte Quirin
1942 Proclamation Denying Certain Enemies Access to the Courts of the United States, President Franklin D. Roosevelt
Note on the War Crime Cases
Note on Military Tribunals or Commissions

What Did Congress Authorize after 9/11?
President George W. Bush’s November 13, 2001 Order Establishing Military Commissions
The Presidential Designation of Jose Padilla as an “Enemy Combatant,” Appendix A to Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003)
The Military Commissions Act of 2006

The Constitutionality of the 9/11 Military Commissions
The Suspension Clause
D. Congressional Creation of Non-Article III Federal Courts

Military commissions provide one example of a form of judging outside of Article III; others include administrative law judges, the regular military court system, immigration judges, and territorial judges – as well as bankruptcy and magistrate judges, working within Article III but lacking Article III attributes.

Read the Problem: Article III / Article I “Courts”

“Judges” in Agencies

Crowell v. Benson (1932) H & W 345-51

Notes H & W 351-56

Mark Tushnet, Crowell v. Benson FCS 359-87


Introductory Note on “Legislative Courts” H &W 361-363

Federal Maritime Comm’n v. South Carolina


Access to Article III Judges for Constitutional Claims

Judicial Officers within Article III: Bankruptcy Judges
Bankruptcy Courts: “Units” of the Federal Courts, The Bankruptcy Amendments
28 USC §§ 151-159
Notes on Stern v. Marshall H & W 379-90
“Chief Justice is Lobbying on Bankruptcy Proposal”

Bankruptcy Filings
New Bankruptcy Fees to Take Effect June 1, 2014 Third Branch News Part I Supp.
Estimated Filing – Fee Income from Civil and Bankruptcy Cases, 2012 Part I Supp.

From “Magistrates” to “Magistrate Judges”
Review the statutory grant of authority to magistrate judges. Are any problematic? What form of review of decision making is authorized? How does it vary by the kind of decision made by magistrate judges? When can they preside at jury trials? What is the theory of an “adjunct” to a life-tenured judge?

28 U.S.C. § 636 (granting jurisdiction and powers to magistrate judges; granting authority to appoint/designate magistrates);
§§ 631-635 (determining methods of appointment, nature of the job, number and location, compensation and expenses for magistrate judges)
The Authority of Magistrate Judges; U.S. v. Raddatz H & W 390-94

The Allocation of the Work of Judging

“U.S.” Adjudication Abroad: Supranational Judicial Review,
Multinational Tribunals

Rereading Article III

Policies in the Courts, Policies of the Courts
Cameras and Sunshine in Courts
(televising the Supreme Court’s sessions)
(on sealing district court documents)
(on televising or photographing lower court proceedings)

The Development and Agendas of a Corporate Judiciary

The Chief Justice as Spokesperson

Predicting Growth and Needs
Growth Rate and Fluctuations of Total Federal Court Filings, 1905-2013 Part I Supp.

The Judiciary’s Corporate Voice
JCUS, Recommendation on FELA and Jones Act Cases Part I Supp.
Problem: When Should the JCUS Take a Position?  
Part I Supp.

Judicial Selection and Independence (likely optional)  
Elliot Slotnick, Sheldon Goldman & Sara Schiavoni, Writing the Book of Judges: Obama’s Judicial Appointments Record after Six Years, 3 J. of Law and Courts 331 (2015)  
Part I Supp.

Impeachment, Discipline, Separations of Powers, and the “Political Question” Doctrine  
Nixon v. United States (1993)  
Zivotofsky v. Clinton (2012)  
Notes  
Notes  
Part I Supp.

The Judicial Conduct and Disability Act of 1980  
Certificate of Misconduct re former Judge Mark Fuller  
From the JCUS to the Speaker of the U.S. House of Representatives, Sept. 11, 2015  
Judicial Transparency and Ethics Enhancement Act of 2015 (proposed bill to establish an inspector general for the Judiciary), S. 1418, 114th Cong.  
Part I Supp.

E. More Control by the Federal Courts of their Own Jurisdiction: Standing, Causes of Action, Ripeness, and Mootness (selectively assigned)  
Discussions about which branches of government has the capacity to decide the meaning of the word “case” and when an issue is “justiciable” have been raised in the context of advisory opinions (Hayburn’s Case) and the “political question doctrine.” Questions of justicability come through debates under other bodies of law, and the cases are legion. Depending on the familiarity that members of the class have with these issues, different subsets of the cases will be assigned.

The Interpretations of “Cases” and “Controversies”  
Standing & Causes of Action  
Note on Standing  
Injury in fact  
H & W 101-02  
117-23
Focus on *Sierra Club v. Morton*, Richardson, Summers

*Qui Tam*  
*Clapper v. Amnesty International* (2013)  
*Susan B. Anthony List v. Driehaus* (2014)  
*Wittman v. Personhabbalah* (2016)  
*Spokeo, Inc. v. Robins* (2016)  
*Commentary*  

**Prudence, Standing, and Zones of Interest in Statutes**

*Bank of America Corp. v. Miami* (2017)  

Proceeding when others do not  

Congressional Proposals to Constrain and to Authorize Plaintiffs  
Fairness in Class Actions Litigation Act of 2015  
H.R. 1927, 114th Cong.  
Restoring the 10th Amendment Act  
H.R. 1935, 113th Cong.  


**F. Congressional Control over State Court Jurisdiction**

Removal of cases from state courts (28 U.S.C. §§ 1441-1453)  
Revisit H.R. 2386 (Oil Spill Victims Redress Act)  
*Taflin v. Levitt* (1990)  
*Notes*  
*Tarble’s Case* (1872)  
*Notes*  
*Ann Woolhandler & Michael Collins, Tarble’s Case*  
*Testa v. Katt* (1947)  
*Notes (Haywood v. Drown)*  

Obligations to apply federal law: *Montgomery v. La.*  
Substance and Procedure; *Dice v. Akron* (1952)  

Federal and State Courts 2017, syllabus full syllabus I-IV assigned materials Dec. 4 2017
II. The Idea of a Federation and the Practices of Federalism(s)

The roles and powers of state and of federal courts are, in the United States, embedded in ideas about “federalism.” That word is not to be found in the United States Constitution yet, during the second half of the twentieth century, justices came to invoke “federalism” as an explanation for a variety of their judgments. This section explores some of the theoretical, empirical, and legal claims entailed in the concept and practices of federalism(s) and the relationship of the deployment of federalism doctrines to a variety of conflicts (about equality, immigration, criminal procedure, regulation of the economy, protections to be accorded workers and consumers). Given that Indian tribes predate the United States, looking at sovereignty claims through the lens of tribes along with states helps us to think about what kind of work in law the term “sovereignty” does and could do.

The questions below highlight some of the issues to explore.

1) When are states mentioned in the Constitution? How do doctrines interpreting these provisions recognize, sustain, or diminish state “sovereignty”? Look also for mention of Indians and Indian Tribes. Does the Constitution recognize their “sovereignty”? How do rulings by the federal courts affect conceptions of state and of tribal sovereignty?

2) What makes states distinct from each other and from the national government? Are there enduring “essential attributes” or a changing set of factors associated with “statehood”? Does the Constitution suggest answers to the questions of whether all states must be treated the same (“equal footing”) or whether asymmetry is permissible? Do note that asymmetry is a feature of other federations.

3) Consider the normative claims made, and how and when justices rely on federalism to override congressional statutes, or not. What are the values and claims made on behalf of federalism? What do you mean when you say – “federalism” – requires x allocation of authority? Why? Do you answers change depending on the substantive positions asserted at the national level?

4) Consider the idea of “resistance” to federal power, with the idea of “states’ rights” (now often couched in the language of federalism) asserted during different eras to different ends. When and why do you cheer or criticize states in resistance to federal power? What about tribal resistance to federal power? To state power?

5) Does affirmation of on state power stem from visions of local democratic ordering, with concepts such as voice, exit, and community affiliation playing
roles? How do trans-border state projects, entailing co-venturing, fit into this picture? What about trans-border efforts by private actors to affect outcomes in many states? What are the bases for seeking to impose “national” rules, as contrasted to deferring to local ordering?

4) Does globalization alter any of the claims? How does the movement of people and changes in technologies affect understandings of localities, regions, states, tribes, and nations?

Once again, the reminder is that not all of what follows will be assigned and this outline helps you to see how pieces, including some of what you studied in other classes related to constitutional law, fit together.

A. Sovereignty, States, and Congress

Review

U.S. CONST. art. I, §§ 8, 9, 10; art. IV, §3; art. VI; amend. X

How Can You Tell Who Is a Sovereign?

_Those Huddled Masses: Were They in New Jersey, or New York?,_ N.Y Times, April 13, 2017


_Robin Pogrebin, Funds Sought To Continue Restoration at Ellis Island, N.Y. TIMES, Apr. 7, 2010_

What factors are used to determine whether New York or New Jersey were “sovereign” over Ellis Island? What many other “sovereignties” might also have claimed to have power over the land fill? Is talking about sovereignty a useful way to answer the question?


“When Sovereign” Conflicts and Coordination: National Rights, State and Local Innovations, Autonomy, or Impermissible Deviations

_Herbert Wechsler, The Political Safeguards of Federalism, 54 Col. L. Rev. 543 (1954)_

When and why do states and municipalities go to federal court to protect them from federal government action? What are the basis for bringing such actions? The
defenses, based on arguments from the structure of the Constitution and other sources? What work does “sovereignty” and “essential attributes of sovereignty” play in these debates? Two sites of conflict – Fair Labor Standards and Immigration – will be our templates. Given the diversity of approaches, reflect on when, why, and under what constitutional theories you posit excesses of federal or of state power.

**Fair Labor Standards**


The post-*Garcia* FLSA Amendments Part II. Supp.


**Immigration**

State Efforts to Curb Immigration


*Texas v. United States*, 787 F.3d 733 (5th Cir. 2015), affirmed by an equally divided Court Part II. Supp.

Sanctuary Cities, DACA, and State/Federal Conflicts


Immigration Enforcement Tactics at State Courthouses


National Council of State Legislatures,


Relationships of Citizens to their Own and Other States:
Privileges, Immunities, and State FOIAs
Part II. Supp.

Goodwin Liu, State Constitutionalism and the Protection of Individual Rights: A Reappraisal, forthcoming Brennan Lecture, NYU L. Rev. 2017  
Part II. Supp.

Jeffrey S. Sutton, What Does-And Does Not-Ail State Constitutional Law  
Part II. Supp.

**Exit, Voice, and Loyalty**

Richard Fry, *Americans Are Moving at Historically Low Rates, In Part Because Millennials Are Staying Put*  
Part II. Supp.

Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 Vill. L. Rev. 951 (2001)  
Part II. Supp.

Part II. Supp.

Part II. Supp.

Part II. Supp.

Part II. Supp.

**Compacts and Joint Ventures**

Part II. Supp.

Tennessee Valley Authority Act of 1933, Pub. L. No. 73-17, 48 Stat. 58 (excerpt)  
Part II. Supp.

The Uniform Law Commission: Diversity of Thought, Uniformity of Law (2017)  
Part II. Supp.

**Horizontal/Diagonal/and TransFederalism**

Gillian E. Metzger, *Congressional Authority and Constitutional Default Rules in the Horizontal Federalism Context*, in Why the Local Still Matters: Federalism, Localism, and Public Interest Advocacy
Judith Resnik, Joshua Civin, and Joseph Frueh, Changing the Climate: The Role of Transnational Organizations of Government Actors (TOGAs) in American Federalism(s), In Navigating Climate Change Policy (2011)

**Commerce Clause Federalism**  [this section likely optional]

- James Madison, Veto of Federal Public Works Bill (1817)

**The Necessary and Proper Clause**

- *Bond v. United States* (2014)

**More on Federalism’s Sources, Contours, and Import**

B. The States as Specially-Situated Litigants: The Many Meanings of the Eleventh Amendment

We turn from the state as a plaintiff seeking federal courts’ protection from Congress and invoking the Commerce Clause and the Tenth Amendment to the question of whether the states are specially situated as defendants and possibly immune from lawsuits. The sources for immunity include the common law, the Constitution, and statutes (for example, interpreting the word “person” in § 1983 to include “cities” or “states” or not such that if excluded, that entity could be said to be “immune” from suit under that statute).

The idea of immunity has provided shelter to a variety of actors, including judges, prosecutors, members of Congress, state and local legislators, and executive officials, as well as entities such as state and local governments. See H & W, 994-1011, 2013 115-121.

Our focus will be on the law of the immunity of the federal and state governments. As you reflect on the Eleventh Amendment case law, review our discussion of congressional-judicial relations and consider the relationships among the Commerce Clause, the Tenth and Eleventh Amendments, the Fourteenth Amendment, structural federalism theories and Article III. Should Congress or the courts decide the scope of state immunity from suit? Why?

Suits Challenging Federal Official Action

Preliminary Note on Sovereign Immunity
United States v. Lee
Notes:
Federal legislative waivers

H & W 877-83
H & W 883-90
890-95
H & W 895
-904

Suits against States and Officers Acting on Behalf of States

Introduction
Hans v. Louisiana, and notes
Ex parte Young
Barry Friedman, Ex parte Young

H & W 905-08
H & W 908-22
H & W 922-27

FCS 247-74

Prospective and Retrospective Relief

Focus on
Milliken v. Bradley (1977) (Milliken II)
Hutto v. Finney (1978) / Attorneys’ Fees
Idaho v. Coeur d’Alene Tribe

H & W 927-35

Note on the Pennhurst Case and the Bearing of the Eleventh Amendment on Federal Court Relief for Violations of
State Law
Part II. Supp.

The Sources of Federal Power: Commerce,
The Fourteenth Amendment, and the Bankruptcy Clause
Abrogation and Waiver
Fitzpatrick v. Bitzer (1976)
Vicki Jackson & Judith Resnik, Seminole Tribe v. Florida  FCS 329-57

Abrogation after Seminole Tribe
Florida Prepaid Postsecondary Ed. Expense Bd. v. College Sav.

Congressional Authority?

In rem / Bankruptcy: The role of Article I

The Relevance of Venues
State Courts: Alden v. Maine (1999) and notes  H & W 967-81

Theories and Histories of Sovereignty, Federalism, and the Law of Immunity

Using Federal Courts for National Norm Enforcement
Civil Rights Litigation: 42 U.S.C. § 1983
Monroe v. Pape (1961), and notes up through 3  H & W 986-1005
C. Sovereignty, Tribal Courts, and Inherent Jurisdiction

Read as background:


Access to Federal Courts to Challenge Tribal Rules


The Indian Civil Rights Act of 1968,

Excerpts from the Briefs in Martinez Part II. Supp.

Catherine T. Struve, Santa Clara Pueblo v. Martinez (optional) FCS 301-27

Indemnity and Tribal Immunity:


Criminal Jurisdiction in “Indian Country”


Double Jeopardy and the Sources of Tribal Jurisdiction


Excerpts from the VAWA Reauthorization Act of 2013 Part II. Supp.


VAWA and Uncounseled Convictions,

Civil Jurisdiction and “Non-Indians”

Plains Commerce Bank v. Long Family Land
D. Comparative Federalism(s) [This segment optional and it will be available only on line]


*Counting, Consensus, and Variation*

Andreas Auer, *The Constitutional Scheme of Federalism*

Robert Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*

Roderick M. Hills, *Counting States*

John L. Murray, *Consensus: Concordance, or Hegemony of the Majority?*


E. Federalism, Multi-Culturalism, Fragmentation, and/or Reconfiguration?


III. The Relationships Between and Among Federal and State Court Systems

Many rules and doctrines work to coordinate and to enable a range of interactions between adjudication in state, federal, and tribal systems. Some are based on court-made rules, others on statutory regimes, often with judicial glosses. Note the issues of whether a case is pending or concluded, as you think about the multiple forms of interplay possible among court systems.

B. Supreme Court Review of State Courts: The Independent and Adequate State Ground Rule

The Background

Introductory Notes

Contract: What was Once an Easy Example of State Law’s Independence

Fox Film Corp. v. Muller (1935) H & W 490-91
Notes H & W 491-94
Fox Film Corp. v. Muller (Minn. 1934) Part III Supp.

The Declining Autonomy of State Contract Law

Waiving Court Access When Buying a Phone Part III Supp.

AT&T Mobility LLC v. Concepcion (2011)
(optional refresher) Part III Supp.


The Problem: When Is a Decision Independent and Adequate?

Martin v. Hunter’s Lessee (1816) H & W 464-74
Notes H & W 474-77
Murdock v. City of Memphis (1875) H & W 477-85
Notes H & W 485-88

An “Independent” State Ground

Edward Purcell, Michigan v. Long FCS 115-40
Notes H & W 501-09
Characterizing the Legal Grounds:
Bush v. Palm Beach Canvassing Bd.
Note

An “Adequate” State Ground
Ward v. Love County (1920)
Henry v. Mississippi (1965)
Notes

C. Reconsideration of Courts’ Decisions by the Lower Federal Courts
Above, we considered federal-state court interaction between decisions of state courts and the United States Supreme Court. Here, we examine the authority of lower federal courts over state court decisions.

Habeas Corpus
The Risk of Error: The Challenges of Implementing Gideon
Stephen B. Bright & Sia M. Sanneh, Fifty Years of Defiance and Resistance After Gideon v. Wainwright,
LIMAN NEWSLETTER, Fall 2013
[for an extended discussion, see 122 YALE L.J. 2150 (2013)]
Optional additional readings
Brandon Buskey, Extending the Right to Counsel to Misdemeanor Criminal Defendants, LIMAN NEWSLETTER, Fall 2013
Andrea Marsh, Rights and Reality for Indigent Defendants in Texas, LIMAN NEWSLETTER, Fall 2013
Dudley Clendinen, Race and Blind Justice Behind Mixup in Court, N.Y. TIMES, Nov. 3, 1985
State-based interventions (again likely optional)
Note on the 2014 settlement
Missouri Public Defender Comm’n v. Waters (Mo. 2012)
What role for the Federal Courts?

Post-Conviction Habeas: The Pre-1996 Federal Structure
Congressional Directions and Case law before 1996
Part III Supp.

Access and Relitigation: The Growth of Federal Criminal Rights
Brown v. Allen and notes H & W 1275-84
The cutbacks: Stone v. Powell, the Fourth Amendment and the
Relevance of Innocence H & W 1284-90

As these background materials make plain, an array of legal doctrine surrounds federal habeas corpus; the class will not explore most of it. Rather, by reading *Fay v. Noia* and contrasting it with *Wainwright v. Sykes* and *Coleman v. Thompson*, we will look at competing interpretations of the pre-1996 statute to provide insight into the possible relationships between state and federal courts and the arguments for differing rules on when federal courts (both lower and the Supreme Court) can and should revise decisions made by state courts. Such rules could be made by the courts (through doctrinal interpretations) or by Congress (through legislation), subject to any constitutional limits identified by virtue of the Suspension Clause or other parts of the Constitution.

After you read *Coleman*, think about the interplay between Supreme Court doctrine and the enactment of the 1996 habeas legislation. A number of recent decisions, a few from the casebook and others excerpted in the Part III Supplement, provide a sense of the current interpretation of the scope of Section 2254.

An Expansive Reading: Narrowing the Scope of Procedural Default
Larry Yackle, *Fay v. Noia* FCS 191-218

A Narrow Reading: Doctrinal Interpretations of State Court Power and
Procedural Defaults
Johnson v. Lee (2016)  

Note on Federal Habeas Corpus and State Court Procedural Default  

What constitutes “cause” and “prejudice”? The relevance of claims of ineffective assistance of counsel  


Note on Christeson v. Roper  

The 1996 Statutory Revisions, described in H & W Review the text of the current provisions in Title 28 §§ 2241-2255  

Evidentiary Hearings, Deference to State Courts, and §§ 2254(d), (e) “Unreasonable Interpretations” of Clearly Established Federal Law  


Deferring to States  


Treaty Obligations and Procedural Default [likely optional]  


Relitigation in the Federal Lower Courts: Res Judicata, the Obligations of Full Faith & Credit and Concepts of Preclusion  


28 U.S.C. §§ 1738A & 1738B (Child Custody and Support)  

28 U.S.C. § 1738C (The Defense of Marriage Act (DOMA))
Res Judicata and Full Faith & Credit
Notes  H & W 1384-91

The Intersection of § 1983 and Habeas Corpus [likely optional]
H & W 1399-1404

Note on exhaustion of administrative remedies:

The Federal Common Law of Preclusion
Virtual Representation: Note  H & W 1365-69

D. Doctrines of Deference: Comity, Abstention, and Immunity

Ellen A. Peters, Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System,

Deference to the States: Court-Made Doctrines of Comity and Abstention and Issues of Statutory Construction

“Pullman” Abstention
RR Comm’n of Texas v. Pullman Co. (1941)  H & W 1101-03
Excerpts from the Record in Pullman  Part III Supp.
Lauren Robel, RR Comm’n of Texas v. Pullman Co.  FCS 163-90
Notes  H & W 1103-13
Note on Procedural Aspects of Pullman Abstention
(“England Reserve”)  H & W 1115-19

Diversity, “Burford” and/or Administrative Abstention: Issues of Statutory Construction

“Burford” Abstention  H & W 1119-23
“Thibodaux” Abstention  H & W 1123-27

The “Domestic” Relations and Probate Exception
Note on Federal Jurisdiction in Matters of Domestic
### Relations

- Note on Federal Jurisdiction in Matters of Probate and Administration
    - [Note: Stern v. Marshall, Part I, is a related case]
- Hillman v. Maretta (2013) (preemption and federal family law)  
  - Part III Supp.
  - Part III Supp.
  - Part III Supp.

#### “Colorado River” Abstention

- Colorado River Water Conservation District v. United States (1976)  
  - Notes (especially Will v. Calvert and Moses Cone)
- Notes (especially Will v. Calvert and Moses Cone)  
  - H & W 1171-78
- Notes  
  - H & W 1178-81

#### Younger: “Our Federalism”

- Younger v. Harris (1971)  
  - Notes
- Steffel v. Thompson (1974)  
  - Notes
- Hicks v. Miranda (1975)  
  - Notes
  - Huffman, NOPSI
  - Sprint v. Jacobs (2013)  
  - Part III Supp.

#### The Anti-Injunction Act

- The Anti-Injunction Act, 28 U.S.C. § 2283  
- Limitation of Liability Act of 1851, 46 U.S.C. § 30511  
- Atlantic Coast R.R. Co. v. Brotherhood of Locomotive Engineers (1970)  
- Mitchum v. Foster (1972)  
  - Notes
- Smith v. Bayer (2011)  
  - Part III Supp.

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Federal and State Courts 2017, syllabus full syllabus I-IV assigned materials Dec. 4 2017
[Note on the interaction between the Class Action Fairness Act (CAFA) and the Anti-Injunction Act: If Smith filed a state court class action in 2006, what would have happened to it?]

**Problem: Alternative Statutes on Abstention, Comity, and Injunctions**

**The Statutory Context**

**Three-Judge Courts**


A Proposed New Three-Judge Court Requirement

The Special Counsel Independence Protection Act, H.R. 3654 (Aug. 15, 2017)

The Johnson Act


Rosewell v. LaSalle Nat’l Bank (1981); Fair Assessment in Real Estate v. McNary (1981)


**D. Preemption as Coordination**

[review Arizona v. United States, AT&T v. Concepcion, DIRECTV and Kindred Nursing]


**E. Mechanisms for Coordination: Ex Ante**

**Institutional Efforts**


Tribal Courts/State Courts Project Enters New Phase, 19 Nat’l Ctr. For State Court Rep. 2 (Feb. 1992)


**Individual and Collective Inventions: Joint Ventures**

**The Civil Context**


Directing Judges about “Related State and Federal Cases”
- In re Zyprexa (E.D.N.Y. 2006, 2007)


Judith Resnik, Joshua Civin, and Joseph Frueh, Changing The Climate: The Role of Transnational Organizations of Government Actors (TOGAs) in American Federalism(s), in *Navigating Climate Change Policy* (2011)

Environmental Council of the States, *Cooperative Federalism 2.0: Achieving and Maintaining a Clean Environment and Protecting Public Health* (June 2017)

Jacqueline Toth, *Nominee for EPA Enforcement Office Stresses Cooperative Federalism*, CQ Roll Call (June 14, 2017)


**The Criminal Context**


Jay F. Marks, *$2.5 Million Grant Helps Forge Partnership To End Violence: Prosecutors Joining Forces To Fight Gangs*, THE OKLAHOMAN (Oklahoma City), Mar. 16, 2008


Note on Double Jeopardy
- Department of Justice, Dual and Successive Prosecution Policy (“Petite Policy”)
F. Models of Competition, Communication, and Interdependencies: Preferences, Politics, and Time

As you read the excerpts in this section, consider: when the author is writing; how to characterize each author’s view of how federal and state judges approach particular problems (e.g., do the authors think either federal or state judges will—more often than not—be “liberal,” “conservative,” “activist,” “able,” “incompetent,” etc.); the sources for assumptions about state and federal courts (i.e., resources? élan? caseload? life tenure? etc.); the claimed differences, if any, between the state and federal courts, and their sources; and the relationship(s) that each author believes is/are proper for the federal and state courts. Imagine a conversation among the writers—and yourself.

Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (excerpts), and notes

U.S. Courts, Federal Judicial Salaries Since 1968

National Center for State Courts, Survey of Judicial Salaries (2014)


Judith Resnik, *Accommodations, Discounts, and Displacement: The Variability of Rights as a Norm of Federalism(s)*, Jus Politicum, 2017, pp 220-245
IV. “Federal” Cases in Federal and in State Courts

When does a case “arise” under federal law? Please note that the doctrinal answer is not identical for constitutional “arising under” and statutory “arising under” jurisdiction.

A. Federal Question Jurisdiction

Note on the Statutory Development of the Jurisdiction, and
Preliminary Note on the Purposes of Federal Question Jurisdiction H & W 779-84

1. The Constitutional Grant of Jurisdiction

Osborn v. Bank of the United States (1824) H & W 785-92

36 U.S.C. §§ 30901-02, 30904 (Boy Scouts of America);
36 U.S.C. §§ 80301-02, 80304 (Girl Scouts of America);
28 USC § 1349
(Corporation organized under federal law as party) Part IV Supp.

Note on the Scope of the Constitutional Grant
Bank of the United States. v. Planters’ Bank of Georgia (1824),
Mesa v. California (1989) H & W 792-796

The Idea of Protective Jurisdiction:
David Shapiro, Textile Workers v. Lincoln Mills FCS 389-414
Notes on Protective Jurisdiction
Including Verlinden and Mesa H & W 796 -806

and the Foreign Sovereign Immunities Act (FSIA),
Bolivian Republic of Venezuela v.

2. The Statutory Grant of Jurisdiction

28 U.S.C. §§ 1331, 1441, 1442
Merrill Lynch v. Manning (2016)
Lozman v. Riviera Beach (2013)
3. The Well-Pled Complaint Rule

Louisville & Nashville Railroad v. Mottley (1908) H & W 806-16
American Well Works Co. v. Layne & Bolwer Co. (1916) H & W 816-17
    Bell v. Hood (1946) H & W 818-19
Smith v. Kansas City Title & Trust Co. (1921); Merrell Dow Pharm., Inc. v. Thompson (1986) H & W 821-25
Notes H & W 831-37
Note on the America Invents Act (optional) H & W 812-14
    (summary H & W 835-36)

4. Declaratory Judgments and the Well-Pled Complaint Rule

What is the relationship between a request for declaratory relief, in which a potential defendant files the lawsuit, and the well-pleaded complaint rule?

Note on the Jurisdictional Significance of the Declaratory Judgment Act H & W 841-43
Note on Actions for Declaratory and Injunctive Relief Concerning State and Local Laws Alleged to be Preempted by Federal Law, including Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust (1983) H & W 843-49
Medtronic, Inc. v. Mirowski Family Ventures, LLC. Part IV Supp.
    Note on Medtronic H & W 842-43

5. Complete Preemption and a Well-Pled Complaint

Note on the Removal Statutes H & W 849-60

B. The Concept of a Federal “Case”: Pendent State Claims and Supplemental Jurisdiction

What is the constitutional theory for which a case arising under state law and in which the parties are not diverse can be heard by the federal courts?

Notes—“Pendent parties” and “pendent claims”
(see esp. Owen v. Kroger, Finley v. United States) H & W 865-72

C. Jurisdiction and Implied Causes of Action

Review Santa Clara Pueblo: when do courts and when should courts imply causes of action and how does that implication affect federal jurisdiction? Does the answer vary when implying (or not) constitutional as contrasted with statutory claims? And of what relevance are statutes that create express causes of action?

1. Constitutional

Review Ex Parte Young H & W 922-27

Notes (optional)

2. Statutory (optional)

Cannon v. University of Chicago (1979) H & W 724-32
Notes H & W 738-47

D. Diversity Jurisdiction (optional)

1. Qualifying as a Diversity Case

The statutory development H & W 1413-19
The current statutory scheme: 28 U.S.C. § 1332 (review)
Strawbridge v. Curtiss (1806) H & W 1422

2. Multiparty Claims and Federal Jurisdiction

Interpleader: 28 U.S.C. § 1335
E. The Law to Apply When the Cause of Action Arises Under State Law

Is *Erie* constitutionally required? Or itself an example of federal common law?


Swift v. Tyson (1842)

Erie Railroad Co. v. Tompkins (1938)

Note on the Rationale of the Erie Decision


F. Sources of Law

1. **“There is No Federal Common Law”**

   Review: Erie Railroad Co. v. Tompkins

2. **Federal Common Law**

   When and why do courts create federal common law? What constraints or authority are provided for doing so?

   Introduction

   “Commercial Interests” or “U.S. interests” or “Federal Interests”

   Clearfield Trust v. United States (1943)

   Notes

   Textile Workers Union v. Lincoln Mills (1957)

   Boyle v. United Technologies Corp. (1988)

   Preemption and Federal Common Law

   Grable & Sons Metal Prods. v. Darue Eng’g & Mfg.

   (6th Cir. 2004) [lower court opinion in Grable, U.S. 2005]

“Foreign Affairs” and Domestic Affairs: Transnational Law
Executive/Congressional and Judicial Preemption

Banco Nacional de Cuba v. Sabbatino (1964)                      H & W 702-08
Ernie Young, *Banco Nacional de Cuba v. Sabbatino*               FCS 415-44

Federal Common Law and Foreign Affairs (section optional) H & W 709-16
Alien Tort Statute (ATS), 28 U.S.C. § 1350
Note on The Alien Tort Statute and Customary
International Law (including Sosa, Garamendi)                     H &W 717-22
Sudan Accountability & Divestment Act of 2007, Pub. L. No. 110-174 (enacted Dec. 31, 2007), and presidential
signing statement                                                      Part IV Supp.


Remedies for federal constitutional rights                      H & W 755-61
Federal Equity Power: Inherent Remedial Authority:


5. **The Role of State Courts in Enforcing Federal Law**

Now, return to the questions with which we began:

1) What are the claimed distinctive qualities of the federal courts? the sources? What is your understanding of the reach of congressional control over the federal courts? of executive control? How does Article III of the United States Constitution inform your thoughts on these issues?

2) Do you care if a case is litigated in state, federal or Indian tribal court? Why? What prompts you to have a preference for one forum over another?

3) Do you have views that particular kinds of issues are ones for the federal as compared to state or tribal courts to decide? For federal as compared with state or tribal governments to decide? What are the bases for your understanding something as “federal” as compared to “state” or “tribal”? How often do you think of particular issues as ones for shared governance? If so, what kinds?

4) Is there any way to think—at a general level—about the respective realms of authority of state, tribal, or national courts? Or should consideration of the question always depend on the context (welfare laws, child support, violence against women, gun laws, reproduction rights, motor cycle helmets, and speed limits)? Does your view depend on which political party controls which government? On what you believe a decision coming from a particular level of government or a court is likely to be?

5) Do your views on issues of gender, race, and ethnicity and on which forms of government are more or less aware of and concerned about these issues affect your ideas about any of the questions above?

6) What would be the wisdom of reducing opportunities for redundancy? of merging systems?

Conclusion

“Reflections on Federalism” readings compiled on the Inside site

Andreas Auer, The Constitutional Scheme of Federalism (2005) (2 pages)


Judith Resnik, *Accommodations, Discounts, and Displacement: The Variability of Rights as a Norm of Federalism(s)*, Jus Politicum, Thinking about Federalism(s) beyond the United States, 2017 pp. 209-220

Part II. Supp./Inside

State/Federal Relations visitor materials

Biographical Sketches
Justice Goodwin Liu
Judge Jeffrey Sutton


Biographical Sketches
Chief Justice Chase T. Rogers
Justice Sheryl Gordon McCloud

State Constitutions, excerpted
Connecticut
Washington

Constitutional Interpretation and Method
Connecticut
*State v. Dickson*, 322 Conn. 410 (2016) (in-court identifications)

Washington
*State v. Gunwall*, 106 Wash.2d 54 (1986) (searches and seizures)
*City of Seattle v. Erickson*, 188 Wash.2d 721 (2017) (jury selection)
Proposed General Rule on Jury Selection (2016-17)


**State/Federal Relations**

Certification


Immigration


**Reports**


Washington Supreme Court Gender & Justice Commission, *2015-2016 Report* (table of contents and introduction)


2017 Connecticut Access to Justice Initiatives

**The Docket**

Washington: Supreme Court and Superior Court Caseloads, 2016


  Supreme Court, Movement of Case Load, July 1, 2014-June 30, 2016

  Providing services, 2015 summary