

Combined Syllabus

Optional Readings Highlighted

Color key:

Required

Skim

Optional

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?

Reread: U.S. Const., Article III; U.S. Const., Article II, § 2.

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.

<i>Marbury v. Madison</i> (1803)	H & W 59-67
<i>Marbury v. Madison</i> : Timeline of Events	Part I Supp.
Notes	H & W 68-72
William Treanor, <i>Marbury v. Madison</i>	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
<i>Louisiana v. Mississippi</i> (1988)	H & W 272-73
<i>Ohio v. Wyandotte Chemicals Corp.</i> (1971)	Part I
Supp.	
Notes 2-4	H & W 274-75
<i>Nebraska v. Colorado</i> (2017),	
Justice Thomas, joined by Justice Alito, dissenting	
from denial of motion for leave to file a complaint	Part I
Supp.	
Third Party Intervenors: <i>South Carolina v. North Carolina</i> (2010)	Part I

Supp.

The Shape of the Supreme Court's Docket

Table A-1, Administrative Office of the U.S. Courts,
2011-2015

Part I Supp.

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 Restrain 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

Part I Supp.

The Doctrine, History, and Practices

Ex parte McCardle (1868)

H & W 304-07

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**

Judicial Business 2016: Caseload Highlights

Part I. Supp.

Authorized Life-Tenured Lower Court Federal Judgeships: 1789-2015	Part I. Supp.
U.S. Courthouse Buildings and Renovation: A Sampling	Part I Supp.
Historic Post Offices for Sale	Part I Supp.
Federal Court Filings: 1950-2010	Part I Supp.
Civil and Criminal Filings: 1901, 1950, 2001	Part I Supp.
Growth Rate of Federal District Court Filings, 1905-2015	Part I Supp.
FY 2016 Funding for the Judiciary	Part I Supp.
Comparing the Volume of Filings: State and Federal Courts, 2010 and State Trial Court Filings, 1976-2008	Part I Supp.
Withdrawing all Federal Jurisdiction	
Constitutional Avoidance (<i>Felker v. Turpin</i>)	H & W 317-18
Congressional Power to Withdraw All Jurisdiction <i>Cuozzo Speed Technologies, LLC v. Lee</i> , 136 S. Ct. 2131 (2016)	H & W 319-22 Part I Supp.
Curtis A. Bradley & Neil S. Siegel, <i>Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers</i> , 105 Geo. L. J. 255 (2017)	Part I Supp.

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

The Relationship between Judicial Authority, Advisory Opinions, and Finality	
<i>Hayburn’s Case</i> and advisory opinions	H&W 50-58, 82-84
Remedial Constraints through Jurisdictional Divides and Remedial Limitations	
<i>Lockerty v. Phillips</i> (1943) and <i>Yakus v. United States</i> (1944)	H & W 341-45
The Norris – LaGuardia Act, 29 U.S.C. §§ 107, 108, 109	Part I Supp.
<i>Lauf v. Shinner</i>	H & W 312-14

Directing a Rule of Decision

<i>United States v. Klein</i> (1871) and notes	H & W 323-25
Amanda Tyler, <i>United States v. Klein</i>	FCS 87-113
<i>Battaglia v. GM</i> (1948)	H & W 326-29
Notes	H & W 329-35
<i>Plaut v. Spendthrift Farm</i> (1995)	Part I. Supp.
The Prison Litigation Reform Act of 1996 (PLRA), 18 U.S.C. § 3626	Part I. Supp.
<i>Miller v. French</i> (2000)	H & W 92-93
<i>Bank Markazi v. Peterson</i> , 136 S. Ct. 1310 (2016)	Part I. Supp.
Susan Kostal, “Iran Terror Victims Receive First Payments,” ABA Journal, at 24, March 2017	Part I Supp.

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) Part I. Supp.

Is Habeas Different?

H & W 335-41

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 1200	H & W 1193-
Carlos Vazquez, <i>Ex parte Quirin</i>	FCS 219-46
1942 Proclamation Denying Certain Enemies Access to the Courts of the United States, President Franklin D. Roosevelt	Part I Supp.
Note on the War Crime Cases	H & W 292-94
Note on Military Tribunals or Commissions	H & W, 402-410

What Did Congress Authorize after 9/11?

Congressional Authorization for the Use of Military Force (AUMF) (2001): Joint Resolution of Congress, Pub. L. 107-40	Part I Supp.
President George W. Bush’s November 13, 2001 Order Establishing Military Commissions	Part I Supp.
The Presidential Designation of Jose Padilla as an “Enemy Combatant,” Appendix A to <i>Padilla v. Rumsfeld</i> , 352 F.3d 695 (2d Cir. 2003)	Part I Supp.
The Graham-Levin Amendment of Nov. 14 2005 Detainee Treatment Act of 2005, a rider to FY 2006	Part I Supp.
The Military Commissions Act of 2006	Part I Supp.

The Constitutionality of the 9/11 Military Commissions

The Suspension Clause	H & W 1200-06
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<i>Hamdi v. Rumsfeld</i>	H & W 1206-20
Notes	1220-1223
<i>Boumediene v. Bush</i> (2008)	H & W 1224-36
Notes (implementation, <i>Latif</i>)	1236-40
Territoriality and the Writ	H & W 1245-49
<i>Boumediene</i> (again)	1249-58
The Military Commission Act of 2009 (excerpts)	Part I. Supp.
More on Territoriality	H & W 1258-64
The Scope of Authority: <i>Bahlul</i> (2016)	2017 H&W Supp.26
<i>Resnik, Detention, the War on Terror, and the Federal Courts</i> , 110 Colum. L. Rev. 579, 583-590, 598-618 (2010)	Part I. Supp.
Lakhdar Boumediene, <i>My Guantánamo Nightmare</i> , N.Y. TIMES, Jan. 7, 2012 (op ed); <i>After Guantánamo, Starting Anew, in Quiet Anger</i> , N.Y. TIMES, May 25, 2012	Part I. Supp.
Congressional Research Service, <i>Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court</i> (Feb. 28, 2013)	Part I Supp.

Additional reading: Jess Bravin, *The Terror Courts: Rough Justice at Guantánamo Bay* (Yale Press, 2013)

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” Part I Supp.

“Judges” in Agencies

<i>Crowell v. Benson</i> (1932)	H & W 345-51
Notes	H & W 351-56
Mark Tushnet, <i>Crowell v. Benson</i>	FCS 359-87
<i>Northern Pipeline Construction Co. v. Marathon Pipe Line Co.</i> ; <i>CFTC v. Schor</i> (1986) [H&W, 6 th ed. 342-359]	Part I Supp.
Introductory Note on “Legislative Courts”	H & W 361-363
<i>Federal Maritime Comm’n v. South Carolina State Ports Authority</i> (2002)	Part I
Supp.	

Access to Article III Judges for Constitutional Claims

<i>Elgin v. Dep’t of Treasury</i> (2012)	Part I Supp.
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Judicial Officers *within* Article III: Bankruptcy Judges

Bankruptcy Courts: “Units” of the Federal Courts, The Bankruptcy Amendments 28 USC §§ 151-159	Part I Supp.
<i>Stern v. Marshall</i> (2011)	H & W 364-79
Notes on <i>Stern v. Marshall</i>	H & W 379-90
“Chief Justice is Lobbying on Bankruptcy Proposal” (NY Times, 1982)	Part I Supp.
<i>Wellness International Network v. Sharif</i> (2015)	Part I Supp.; 2017 H & W Supp. 25

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.
Status of Bankruptcy Judgeships, 2016	Part I Supp.
U.S. Bankruptcy Courts – Judicial Business, 2016	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; <i>U.S. v. Raddatz</i>	H & W 390-94
Status of Magistrate Judges Positions and Appointments, 2016	
U.S. Magistrates Judicial Business, 2016	Part I Supp.

The Allocation of the Work of Judging

Authorized Judgeships in Federal Courts and Federal Administrative Agencies, 2001; Estimate of Evidentiary Proceedings in Article III Courthouses and in Four Federal Agencies, 2001

Part I
Supp.

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

Multinational Tribunals

H&W 395-402

Rereading Article III

- Stephen L. Vladeck, *Military Courts and Article III*,
103 Geo. L. J. 933-939 (2015) Part I. Supp.
- Judith Resnik, *Interdependent Federal Judiciaries:
Puzzling about Why & How to Value the
Independence of Which Judges* (2008) Part I Supp.

Policies *in* the Courts, Policies *of* the Courts

Cameras and Sunshine in Courts

- Cameras in the Courtroom Act, S. 780, 114th Cong. (2015)
(televising the Supreme Court's sessions) Part I. Supp.
- Sunshine in Litigation Act of 2015, H.R. 2336, 114th Cong.
(on sealing district court documents) Part I. Supp.
- Sunshine in the Courtroom Act of 2015, S. 783, 114th Cong.
(on televising or photographing lower court proceedings) Part I. Supp.

The Development and Agendas of a Corporate Judiciary

- The Congressional Charter, creating the Judicial Conference
of the United States (JCUS), 28 U.S.C. § 331 Part I Supp.
- Judith Resnik, *Constricting Remedies: The Rehnquist
Judiciary, Congress, and Federal Power*, 78 Ind. L. J. 223,
273-311 (2003) Part I Supp.
- The Chief Justice as Spokesperson
William Rehnquist, 1999 Year-End Report Part I Supp.
John Roberts, 2013 Year-End Report Part I Supp.

Predicting Growth and Needs

- Antonin Scalia, *Remarks On the Work of the
Federal Courts* (1987) Part I Supp.
- Federal Court Filings, 1950-2010 Part I Supp.
- Growth Rate and Fluctuations
of Total Federal Court Filings, 1905-2013 Part I Supp.

The Judiciary's Corporate Voice

- JCUS, Long Range Plan for the Federal Courts (1995),
reprinted in 166 F.R.D. 49 (1996) (excerpts) Part I Supp.
- Long Range Predictions (1995) Projected v. Actual,
Federal District Court Caseload: 2000, 2010 Part I Supp.
- JCUS, Strategic Plan for the Federal Judiciary (2010) Part I Supp.
- JCUS, Recommendation on FELA and Jones Act Cases Part I Supp.

Problem: When Should the JCUS Take a Position? Part I Supp.
 Judith Resnik, *Building the Federal Courts Literally and Legally: The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 Indiana L.J. 823, 823-838 (2012) Part I Supp.

Judicial Selection and Independence (likely optional)

Caperton v. A.T. Massey Coal Co. (2009) Part I Supp.
 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.
 Russell Wheeler, *Changing Backgrounds of U.S. District Judges*, 93 *Judicature* 140 (2010) Part I Supp.

Impeachment, Discipline, Separations of Powers, and the "Political Question" Doctrine

Nixon v. United States (1993) H & W 237-48
Zivotofsky v. Clinton (2012) Part I Supp.
 Notes H & W 248-56
Zivotofsky v. Kerry (2015) Part I Supp.
 Notes H & W 258-66
 The Judicial Conduct and Disability Act of 1980
 28 U.S.C. § 351 et seq. Part I Supp.
 Certificate of Misconduct re former Judge Mark Fuller
 From the JCUS to the Speaker of the U.S. House of Representatives, Sept. 11, 2015 Part I Supp.
 Supreme Court Ethics Act of 2015, S. 1072, 114th Cong. (2015) Part I Supp.
 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 justiciability 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 H & W 101-02
 Injury in fact 117-23

Focus on <i>Sierra Club v. Morton</i> , Richardson, Summers	
<i>Lujan v. Defenders of Wildlife</i> (1992)	H & W 132-44
Qui Tam	H & W 155-56
<i>Clapper v. Amnesty International</i> (2013)	Part I Supp.
<i>Susan B. Anthony List v. Driehaus</i> (2014)	Part I Supp.
<i>Arizona State Legislature v. Arizona</i>	
<i>Independent Redistricting Commission</i> (2015)	Part I Supp.
<i>Wittman v. Personhabbalah</i> (2016)	Part I Supp.
<i>Spokeo, Inc. v. Robins</i> (2016)	Part I Supp.
Commentary	2017 H&W Supp. 8-9
Prudence, Standing, and Zones of Interest in Statutes	
<i>Lexmark International, Inc. v. Static Control Corp.</i>	H & W 156-58
<i>Bank of America Corp. v. Miami</i> (2017)	Part I Supp.
 Proceeding when others do not	
<i>U.S. v. Windsor</i> (2013)	Part I Supp.
<i>Hollingsworth v. Perry</i> (2013)	H & W 158-60
 Congressional Proposals to Constrain and to Authorize Plaintiffs	
Fairness in Class Actions Litigation Act of 2015	
H.R. 1927, 114 th Cong.	Part I. Supp.
Restoring the 10 th Amendment Act	
H.R. 1935, 113 th Cong.	Part I Supp.
 State Law and Standing: Wyatt Sassman, <i>A Survey of</i> <i>Constitutional Standing in State Courts</i> , 8 Ky. J. Equine, Agric. & Nat. Resources 349, 353-354 (2015-16)	Part I
Supp.	
 F. Congressional Control over State Court Jurisdiction	
Removal of cases from state courts (28 U.S.C. §§ 1441-1453)	Part I
Supp.	
Revisit H.R. 2386 (Oil Spill Victims Redress Act)	First Day Handout
<i>Tafflin v. Levitt</i> (1990)	H & W 412-18
Notes	H & W 418-22
Tarble's Case (1872)	H & W 427-30
Notes	H & W 430-37
Ann Woolhandler & Michael Collins, <i>Tarble's Case</i>	FCS 141-62
<i>Testa v. Katt</i> (1947)	H & W 437-40
Notes (<i>Haywood v. Drown</i>)	H & W 440-49
Obligations to apply federal law: <i>Montgomery v. La.</i>	2017 H&W Supp. 26
Substance and Procedure; <i>Dice v. Akron</i> (1952)	H & W 449-53

Notes

H & W 453-60

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 your 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?

<i>Those Huddled Masses: Were They in New Jersey, or New York?</i> , N.Y Times, April 13, 2017	Part II. Supp
<i>New Jersey v. New York</i> (1998)	Part II. Supp.
Robin Pogrebin, <i>Funds Sought To Continue Restoration at Ellis Island</i> , N.Y. TIMES, Apr. 7, 2010	Part II. Supp.

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?

Joseph Blocher, *Selling State Borders*, 162 U. Pa. L. Rev. 241, 242-248, 254-267, 270-283, 300-305 (2014) Part II Supp.

“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) Part II. Supp.

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

<i>National League of Cities v. Usury</i> , 426 U.S. 833 (1976)	Part II. Supp.
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> (1985)	Part II. Supp.
The post- <i>Garcia</i> FLSA Amendments	Part II. Supp.
Andrzej Rapaczynski, <i>From Sovereignty to Process: The Jurisprudence of Federalism after Garcia</i> , 1985 Sup. Ct. Rev. 341, 341-359	Part II. Supp.

Immigration

State Efforts to Curb Immigration	
<i>Arizona v. United States</i> , 132 S. Ct. 2492 (2011)	Part II. Supp.
<i>Texas v. United States</i> , 787 F.3d 733 (5th Cir. 2015), affirmed by an equally divided Court	Part II. Supp.
Sanctuary Cities, DACA, and State/Federal Conflicts	
Executive Order: Enhancing Public Safety in the Interior of the United States, 2017 WL 359825 (Jan. 25, 2017)	Part II. Supp.
<i>County of Santa Clara v. Trump</i> (N.D. Ca. Apr. 25, 2017)	Part II. Supp.
Immigration Enforcement Tactics at State Courthouses	
Letter from California’s Chief Justice Tani G. Cantil-Sakuaye, To Attorney General Sessions and Hon. John F. Kelly (March 16, 2017)	Part II. Supp.
Reply (March 29, 2017) and op ed by Chief Justice Cantil-Sakuaye, <i>The Courthouse is Not the Place for Immigration Enforcement</i> , Wash. Post (April 19, 2017)	Part II. Supp.
<i>State of California v. U.S. Department of Homeland Security</i> , complaint filed Sept. 11, 2017	Part II. Supp.
National Council of State Legislatures, Report on State Immigration Laws (Jan.-June, 2017)	Part II. Supp.

Relationships of Citizens to their Own and Other States:

Privileges, Immunities, and State FOIAs
McBurney v. Young (2013)

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*
 (Pew Research Center, Feb. 13, 2017)

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.

Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National
 Neurosis*, 41 UCLA L. Rev. 903 (1994)

Part II. Supp.

Vicki C. Jackson, *Federalism and the Uses and Limits of Law*,
 111 Harv. L. Rev. 2180 (1998)

Part II. Supp.

Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform,
 Medicaid, and the Old-Fashioned Federalists' Gamble*,
 81 Fordham L. Rev. 1749, 1749-52 (2013)

Part II. Supp.

Judith Resnik, *Federalism(s)' s Forms and Norms:
 Contesting Rights, De-Essentializing Jurisdictional
 Divides, and Temporizing Accommodations*, in
 Federalism and Subsidiary, LV NOMOS
 363 -371, 408-409 (2014)

Part II. Supp.

Compacts and Joint Ventures

Felix Frankfurter & James M. Landis, *The Compact Clause
 of the Constitution – A Study in Interstate Adjustments*,
 34 Yale L.J. 685, 685-691, 729 (1925)

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*

(Yale Law School Liman Monograph 2010) Part II. Supp.

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) Part II. Supp.

Commerce Clause Federalism [this section likely optional]

James Madison, Veto of Federal Public Works Bill (1817) Part II. Supp.

Nat'l Federation of Independent Business v. Sebelius (2012) Part II. Supp.

United States v. Morrison (2000) Part II. Supp.

The Violence Against Women Civil Rights

Restoration Act of 2000, H.R. 5021, 106th Cong. Part II. Supp.

Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 Yale L.J. 619, (2010) (excerpt) Part II. Supp.

Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism* 63 Stan. L. Rev. 115 (2010) Part II. Supp.

The Necessary and Proper Clause

United States v. Kebodeaux (2013) Part II. Supp.

Bond v. United States (2014) Part II. Supp.

More on Federalism's Sources, Contours, and Import

Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1522-29, 1535-39 (1994) Part II. Supp.

Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. Chi. L. Rev. 483 (1997) Part II. Supp.

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	H & W 877-83
United States v. Lee	H & W 883-90
Notes:	890-95
Federal legislative waivers	H & W 895 -904

Suits against States and Officers Acting on Behalf of States

Introduction	H & W 905-08
Hans v. Louisiana, and notes	H & W 908-22
Ex parte Young	H & W 922-27
Barry Friedman, <i>Ex parte Young</i>	FCS 247-74

Prospective and Retrospective Relief

Focus on	
Edelman v. Jordan (1974)	
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	H & W 925-38
Virginia Office for Protection & Advocacy v. Stewart (2011)	Part II. Supp.
The Sources of Federal Power: Commerce, The Fourteenth Amendment, and the Bankruptcy Clause	
Abrogation and Waiver	H & W 939-40
Fitzpatrick v. Bitzer (1976)	
Pennsylvania v. Union Gas (1989)	
Seminole Tribe of Florida v. Florida (1996)	H & W 941-56
Vicki Jackson & Judith Resnik, <i>Seminole Tribe v. Florida</i>	FCS 329-57
Michigan v. Bay Mills (2014)	Part II. Supp.
Abrogation after Seminole Tribe	
Florida Prepaid Postsecondary Ed. Expense Bd. v. College Sav. Bank (1999), Nevada Dep't of Human Resources v. Hibbs (2003), Tennessee v. Lane (2004), and United States v. Georgia (2006)	H & W 957-62
Coleman v. Court of Appeals of Maryland (2012)	Part II. Supp.
Congressional Authority?	
The Intellectual Property Protection Restoration Act of 2003, S. 1191, 108th Cong., 1st Sess. (introduced June 5, 2003)	Part II. Supp.
In rem / Bankruptcy: The role of Article I	
Central Virginia Community College v. Katz (2006)	H & W 963-67
The Relevance of Venues	
State Courts: Alden v. Maine (1999) and notes	H & W 967-81
Agencies: Federal Maritime Commission v. South Carolina Ports Authority (2002) (excerpts)	Part II. Supp.
Theories and Histories of Sovereignty, Federalism, and the Law of Immunity	
Judith Resnik & Julie Suk, <i>Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty</i> , 55 Stan. L. Rev. 1921, 1921-33, 1950-54, 1960-62 (2003)	Part II. Supp.
Using Federal Courts for National Norm Enforcement	
Civil Rights Litigation: 42 U.S.C. § 1983	Part II. Supp.
Monroe v. Pape (1961), and notes up through 3	H & W 986- -1005
Brown v. Plata (2011)	Part II Supp.

C. Sovereignty, Tribal Courts, and Inherent Jurisdiction

Read as background:

- Anthony F.C. Wallace, How to Buy a Continent: *The Protocol of Indian Treaties as developed by Benjamin Franklin*, 159 Proceedings of the American Philosophical Society 251, 251-261 (2015) Part II Supp.
 Joseph William Singer, *The Indian States of America: Parallel Universes & Overlapping Sovereignty*, 38 Am. Indian L. Rev. 1, 1-4 (2014) Part II Supp.

Access to Federal Courts to Challenge Tribal Rules

- Santa Clara Pueblo v. Martinez (1978) Part II. Supp.
 The Indian Civil Rights Act of 1968,
 25 U.S.C. §§ 1301-03 Part II. Supp.
 Excerpts from the Briefs in Martinez Part II. Supp.
 Catherine T. Struve, *Santa Clara Pueblo v. Martinez* (optional) FCS 301-27
 Gregory Ablavsky, *The Savage Constitution*, 63 Duke L. J. 999,
 1001-1009, 1080-1089 (2014) Part II. Supp.
 Indemnity and Tribal Immunity:
 Lewis v. Clarke, 137 S. Ct. 1285 (2017) Part II. Supp.

Criminal Jurisdiction in “Indian Country”

- 18 U.S.C. §§ 1151, 1153, 1162, 3242 Part II. Supp.
 Oliphant v. Suquamish Indian Tribe (1978) Part II. Supp.
 Note on Duro v. Reina (1990) Part II. Supp.
 Congressional override of *Duro*: 25 U.S.C. § 1301(2),
 as amended Oct. 28, 1991 Part II. Supp.

Double Jeopardy and the Sources of Tribal Jurisdiction

- United States v. Lara (2004) Part II. Supp.
 Puerto Rico v. Sanchez Valle (2016) Part II Supp.
 Judith Resnik, *Tribes, Wars, and the Federal Courts*,
 36 Ariz. St. L.J. 77, 123-125 (2004) Part II. Supp.
 Matthew Fletcher, *A Short History of Indian Law* (2015) Part II. Supp.
 Tribal Law and Order Act of 2010 Part II. Supp.
 Optional: National Ass’n of Criminal Defense Lawyers, *Tribal Law and
 Order Act of 2010: A Primer, with Reservations* (2010) Part II. Supp.
 Excerpts from the VAWA Reauthorization Act of 2013 Part II. Supp.
 VAWA 2013 Pilot Projects Part II. Supp.

VAWA and Uncounseled Convictions,

- U.S. v. Bryant, 136 S. Ct. 1954 (2016) Part II. Supp.

Civil Jurisdiction and “Non-Indians”

- Plains Commerce Bank v. Long Family Land

- & Cattle Co. (2008) Part II. Supp.
 Dolgencorp v. Mississippi
 Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014),
 affirmed by an equally divided court,
 136 S. Ct. 2159 (2016) Part II. Supp.

D. Comparative Federalism(s) [This segment optional and it will be available only on line]

- Klaus von Beyme, *Asymmetric Federalism
 Between Globalization and Regionalization*,
 12 J. European Pub. Pol. 432 (2005) Part II. Supp.

Counting, Consensus, and Variation

(Dis)uniformity of Rights in Federations and Unions (Judith Resnik & Reva Siegel, eds., 2012) (excerpt) in *Global Constitutionalism: Law's Borders* (Judith Resnik ed., Yale Law School 2012)

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?

Part II. Supp.

- George Anderson, *Federalism: An Introduction* (2008) Part II. Supp.

Daniel Halberstam, *Federalism: Theory, Policy, Law*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Michael Rosenfeld & András Sajó eds., 2012). Part II. Supp.

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

U.N. Declaration on the

Rights of Indigenous Peoples (2007)

Part II. Supp.

Will Kymlicka, *The Internationalization of Minority*

Rights, excerpted from 6 INT'L J. CONST. L. 1 (2008)

Part II. Supp.

Jean-Marie Guéhenno, *The End of the Nation-State* (1995) (excerpts)

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	H & W 461-64, 488-89
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.
DIRECTV v. Imburgia (2015)	Part III Supp.
Kindred Nursing Centers v. Clark (2017)	Part III Supp.

The Problem: When Is a Decision Independent and Adequate?

	Part III Supp.
Martin v. Hunter's Lessee (1816)	H & W 464-74
Notes	H & W 474-77
James v. City of Boise, Idaho (2016)	Part III Supp.
Murdock v. City of Memphis (1875)	H & W 477-85
Notes	H & W 485-88

An "Independent" State Ground

Michigan v. Long (1983)	H & W 494-501
Edward Purcell, <i>Michigan v. Long</i>	FCS 115-40
Florida v. Casal (1983)	Part III Supp.
Pennsylvania v. Labron (1996)	Part III Supp.
Notes	H & W 501-09
Florida v. Powell (2010)	Part III Supp.
Kansas v. Carr (2016)	Part III Supp.

Characterizing the Legal Grounds:

Bush v. Palm Beach Canvassing Bd. H & W 265-66
 Note H & W 523-24

An “Adequate” State Ground

Ward v. Love County (1920) H & W 752-55
 Henry v. Mississippi (1965) Part III Supp.
 Notes H & W 542-43
 Robert-McG. Thomas Jr., *Aaron Henry, Civil Rights
 Leader Dies*, N.Y. TIMES, May 21, 1997 Part III Supp.
 James v. Kentucky (1984) Part III Supp.
 Review Note on the Adequacy of State Procedural
 Grounds H & W 534-46

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 Part III Supp.

[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 Part III Supp.

Andrea Marsh, *Rights and Reality for Indigent
 Defendants in Texas*, LIMAN
 NEWSLETTER, Fall 2013 Part III Supp.

Dudley Clendinen, *Race and Blind Justice
 Behind Mixup in Court*, N.Y. TIMES,
 Nov. 3, 1985 Part III Supp.

Lawyer Incompetence: *Hinton v. Alabama*, 134 S. Ct. 1081 (2014)
 Part III Supp.

State-based interventions (again likely optional)

Collective Habeas Relief and Obligations of Providing Counsel

Hurrell-Harring v. New York (N.Y. 2010)

Note on the 2014 settlement Part III Supp.

Missouri Public Defender Comm’n v. Waters (Mo. 2012)

Insufficient Resources, Ineffective Counsel, Missouri 2017
Part III Supp.

What role for the Federal Courts?

Post-Conviction Habeas: The Pre-1996 Federal Structure

Congressional Directions and Case law before 1996

28 U.S.C. §§ 2241-2255 (pre-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

U.S. ex rel. Caminito v. Murphy (2d Cir. 1955) Part III Supp.

Fay v. Noia (1963) Part III Supp.

Larry Yackle, *Fay v. Noia* FCS 191-218

Review Henry v. Mississippi (1965) Part III Supp.

A Narrow Reading: Doctrinal Interpretations of State Court Power and Procedural Defaults

Wainwright v. Sykes (1977) H & W 1326-35

Coleman v. Thompson, excerpts from the Fourth Circuit's
1990 decision and the Supreme Court's 1991 decision Part III Supp.

2017 H & W Supp. 31

Lee v. Kemna (2002) Part III Supp.

Johnson v. Lee (2016) Part III Supp.

Note on Federal Habeas Corpus and State Court Procedural Default

What constitutes “cause” and “prejudice”? H & W 1335-46

The relevance of claims of ineffective assistance
of counsel H & W 1339-41

Note on Martinez v. Ryan (2012) and Davila v. Davis Part III Supp.

Davila v. Davis (2017) Part III Supp.

Note on Christeson v. Roper 2017 H & W Supp. 81

The 1996 Statutory Revisions, described in H & W H & W 1265-75
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

Williams v. Taylor H & W 1302-13

Notes H & W 1313-19

Harrington v. Richter (2011) Part III Supp.

Cullen v. Pinholster (2011) Part III Supp.

An Unreasonable Interpretation of the IQ Standard
Brumfield v. Cain (2015) Part III Supp.

Deferring to States 2017 H & W Supp. 62-63

Samuel R. Wiseman, What Is Federal Habeas Worth,
67 FLA. L. REV. 1157, 1157-67 (2014) Part III Supp.

Treaty Obligations and Procedural Default [likely optional]

Breard v. Greene (1998); Sanchez-Llamas v. Oregon (2006);
Medellin v. Texas (2008) H & W 399-402

Leal Garcia v. Texas (2011) (per curiam and
dissent from denial of cert.) Part III Supp.

Consular Notification Compliance Act of 2011, S. 1194, 112th Cong.
Part III Supp.

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

The Constitutional Obligation: U.S. Const., Art. IV

The Statutory Regime: 28 U.S.C. § 1738

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

Allen v. McCurry (1980) H & W 1377-83
 Notes H & W 1384-91

The Intersection of § 1983 and Habeas Corpus [likely optional]

Heck v. Humphrey (1994) H & W 1392-98
 Notes, Nelson v. Campbell, Wilkinson v. Dotson, Skinner v. Switzer
 H & W 1399-1404

Note on exhaustion of administrative remedies:

Preiser v. Rodriguez (1973) H & W 1391-92
 Baker v. General Motors (1998) Part III Supp.

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*,
 73 N.Y.U. L. REV. 1065 (1998) Part III Supp.

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
 Sampling of State Certification Statutes/Rules Part III Supp.

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

Ankenbrandt v. Richards (1992) H & W 1181-87
 Note on Federal Jurisdiction in Matters of Domestic

Relations	H & W 1187-89
Note on Federal Jurisdiction in Matters of Probate and Administration	H & W 1190-92
Marshall v. Marshall (2006)	H & W 1190-91
[Note: Stern v. Marshall, Part I, is a related case]	
Hillman v. Maretta (2013) (preemption and federal family law)	Part III Supp.
Judith Resnik, “Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682 (excerpt) (1991)	Part III Supp.
Federal Marriage rights: Obergefell v. Hodges (2015)	Part III Supp. 2017 H & W Supp. 57-58

“Colorado River” Abstention

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

Younger: “Our Federalism”

Younger v. Harris (1971)	H & W 1127-35
Notes	H & W 1135-44
Steffel v. Thompson (1974)	H & W 1144-53
Notes	H & W 1153-59
Hicks v. Miranda (1975)	H & W 1158-61
Notes	H & W 1161-65
Huffman, NOPSI	H & W 1165-71
Sprint v. Jacobs (2013)	Part III Supp.

[Optional: State Actor Immunities as Deference: Official/Qualified Immunities and Federal Court Authority]

Official Immunity	H & W 1047-55
Connick v. Thompson (2011)	H & W 1002 n.14

The Anti-Injunction Act

The Anti-Injunction Act, 28 U.S.C. § 2283	
Limitation of Liability Act of 1851, 46 U.S.C. § 30511	Part III Supp.
Atlantic Coast R.R. Co. v. Brotherhood of Locomotive Engineers (1970)	H & W 1068-73
Mitchum v. Foster (1972)	H & W 1073-78
Notes	H & W 1078-89
Smith v. Bayer (2011)	Part III Supp.

[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

Part III Supp.

The Statutory Context

Three-Judge Courts	H & W 1089-90
Shapiro v. McManus (2015)	Part III Supp.
A Proposed New Three-Judge Court Requirement	
The Special Counsel Independence Protection Act,	
H.R. 3654 (Aug. 15, 2017)	Part III Supp.
The Johnson Act	H & W 1090-91
The Tax Injunction Act: 28 U.S.C. § 1341	
Rosewell v. LaSalle Nat'l Bank (1981); Fair Assessment	
in Real Estate v. McNary (1981)	H & W 1091-93
Arizona Christian School Tuition Org v. Winn (2011)	H & W 129-130
Direct Marketing Association v. Brohl (2015)	2017 H & W Supp. 53-54

D. Preemption as Coordination

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

Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 1-8 (2013)

Part III Supp.

E. Mechanisms for Coordination: Ex Ante

Institutional Efforts

Clifford Wallace, <i>Before State and Federal Courts Clash</i> ,	
24 JUDGES' J. 36 (1985)	Part III Supp.
Tribal Courts/State Courts Project Enters New Phase,	
19 NAT'L CTR. FOR STATE COURT REP. 2 (Feb. 1992)	Part III Supp.
Uniform Criminal Extradition Act, 11 U.L.A. 97 (West 1995)	Part III Supp.
Judith S. Kaye, <i>Federalism Gone Wild</i> , N.Y. TIMES, Dec. 13,	
1994	Part III Supp.

Individual and Collective Inventions: Joint Ventures

The Civil Context

Richard L. Madden, *For A Complex Case, A Singular Mediation Effort*, N.Y. TIMES, Feb. 5, 1988

Part III Supp.

- William W Schwarzer, Nancy Weiss, & Alan Hirsch, *Judicial Federalism in Action: Coordination of Parallel Litigation in the State and Federal Courts*, 5 FJC DIRECTIONS 9 (August 1993) Part III Supp.
- Directing Judges about “Related State and Federal Cases”
Manual for Complex Litigation §§ 20.31-.313 (2004) Part III Supp.
Annotated Manual for Complex Litigation § 20.32 (2011) Part III Supp.
In re Zyprexa (E.D.N.Y. 2006, 2007) Part III Supp.
- National Association of Attorneys General, Department of Justice, & Federal Trade Commission, *Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General* (1998) Part III Supp.
- 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) Part II-A Supp.
- Environmental Council of the States, *Cooperative Federalism 2.0: Achieving and Maintaining a Clean Environment and Protecting Public Health* (June 2017) Part III Supp.
- Jacqueline Toth, *Nominee for EPA Enforcement Office Stresses Cooperative Federalism*, CQ Roll Call (June 14, 2017) Part III Supp.
- Gabriel Pacyniak, *Making the Most of Cooperative Federalism: What the Clean Power Plan has Already Achieved*, 29 Georgetown Env'tl. L. Rev. 301, 301-07, 359-67 (2017) Part III Supp.
- The Criminal Context**
- Benjamin Weiser, *Two Prosecutors, State and U.S., Fight Over Plea*, N.Y. TIMES, Dec. 4, 1997 Part III Supp.
- 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 Part III Supp.
- Benjamin Weiser & Ben White, *In Crisis, Prosecutors Put Aside Turf Wars*, N.Y. TIMES, Oct. 31, 2008 Part III Supp.
- Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239 (2005) (excerpts) Part III Supp.
- Note on Double Jeopardy
Department of Justice, Dual and Successive Prosecution Policy (“Petite Policy”) Part III Supp.

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 Part III Supp.
 U.S. Courts, Federal Judicial Salaries Since 1968 Part III Supp.
 National Center for State Courts, *Survey of Judicial Salaries*
 (2014) Part III Supp.
 Review Robert Cover, *The Uses of Jurisdictional Redundancy: Interest,*
Ideology, & Innovation, 22 WM. & MARY L. REV. 639 (1981) Part II-A Supp.
 Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74
 VA. L. REV. 1141 (1988) (excerpts) Part III Supp.
 Judith Resnik, *Accommodations, Discounts, and Displacement: The Variability of*
Rights as a Norm of Federalism(s), Jus Politicum, 2017, pp 220-245
 Part III Supp.

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

Part IV Supp.

(Corporation organized under federal law as party)

Part IV Supp.

American National Red Cross v. S.G, (1992)

Part IV Supp.

Lightfoot v. Cendant Mort. Corp (2017)

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:

Textile Workers Union v. Lincoln Mills (1957)

Part IV Supp.

David Shapiro, *Textile Workers v. Lincoln Mills*

FCS 389-414

Notes on Protective Jurisdiction

Including Verlinden and Mesa

H & W 796 -806

Verlinden B.V. v. Central Bank of Nigeria (1983)

and the Foreign Sovereign Immunities Act (FSIA),

28 U.S.C. §§ 1330, 1605

Part IV Supp.

Bolivian Republic of Venezuela v.

Helmerich & Payne International (2017)

Part IV Supp.

OBB Personenverkehr AG v. Sachs (2015)

Part IV Supp.

2. The Statutory Grant of Jurisdiction

28 U.S.C. §§ 1331, 1441, 1442

Merrill Lynch v. Manning (2016)

(interpreting § 27 of the Securities and Exchange Act)

Part IV Supp.

Lozman v. Riviera Beach (2013)

(interpreting § 1333 maritime jurisdiction)

Part IV Supp.

3. The Well-Pleaded 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
Mims v. Arrow Fin. Servs. (2012)	H & W 815
Smith v. Kansas City Title & Trust Co. (1921); Merrell Dow Pharm., Inc. v. Thompson (1986)	H & W 821-25
Grable & Sons Metal Prods. v. Darue Eng'g & Mfg. (2005)	H & W 825-31
Notes	H & W 831-37
Vaden v. Discover Bank (2009) (optional)	H & W 814-15
Leahy-Smith America Invents Act (“ <i>Holmes Group Fix</i> ”), 28 U.S.C. § 1454 (enacted 2011) (optional)	Part IV Supp.
Note on the America Invents Act (optional)	H & W 812-14
Gunn v. Minton (2013) (summary H & W 835-36)	Part IV Supp.

4. Declaratory Judgments and the Well-Pleaded 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?

Skelly Oil v. Phillips Petroleum (1950)	H & W 838-41
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
<i>Medtronic, Inc. v. Mirowski Family Ventures, LLC.</i> Note on <i>Medtronic</i>	Part IV Supp. H & W 842-43

5. Complete Preemption and a Well-Pleaded Complaint

Note on the Removal Statutes	H & W 849-60
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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?

United Mine Workers v. Gibbs (1966)	H & W 861-65
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Supplemental Jurisdiction: 28 U.S.C. § 1367

Notes—“Pendent parties” and “pendent claims”
 (see esp. *Owen v. Kroger*, *Finley v. United States*) H & W 865-72
Exxon Mobil v. Allapattah Services (2005) Part IV Supp.

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
Bivens v. Six Unknown Named Agents (1971) H & W 762-69
Jim Pfander, Bivens v. Six Unknown Named Agents FCS 275-300
 Notes (see esp. *Davis v. Passman*, *Correctional Servs. Corp v. Malesko*, *Wilkie v. Robbins*) H & W 769-77
Armstrong v. Exceptional Child Care (2015) Part IV Supp.
Ziglar v. Abassi (2017) Part IV Supp.

Notes (optional)

Ashcroft v. Iqbal (2009) H & W 774, 996-97
Hui v. Castaneda (2010) H & W 772
Minneci v. Pollard (2012) H & W 774
Douglas v. Independent Living Center (2012) H & W 934-35

2. Statutory (optional)

Cannon v. University of Chicago (1979) H & W 724-32
Alexander v. Sandoval (2001) H & W 733-38
 Notes H & W 738-47
 Review the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-03; *Santa Clara Pueblo v. Martinez* (1978) Part II Supp.

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

Multiparty, Multiforum Jurisdiction: 28 U.S.C. § 1369

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?

28 U.S.C. § 1652 (Rules of Decision Act (RDA))	Part IV Supp
Swift v. Tyson (1842)	H & W 576-78
Erie Railroad Co. v. Tompkins (1938)	H & W 584-88
Note on the Rationale of the Erie Decision	H & W 588-91
Edward A. Purcell, Jr., <i>The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law</i>	Part IV Supp.

Federal Procedure in Cases based on State Causes of Action

Court procedural rules	H & W 559-69
Rules Enabling Act, 28 U.S.C. § 2071 et seq.	H & W 564-69; Part IV Supp.
Erie and the Federal Rules: Hanna v. Plumer (1965)	H & W 610-16
Current Approaches: Gasperini; Semtek (optional)	H & W 617-21
Shady Grove Orthopedic Assocs. v. Allstate (2010) (optional)	H & W 621-24

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	H & W 635-36
“Commercial Interests” or “U.S. interests” or “Federal Interests”	
Clearfield Trust v. United States (1943)	H & W 643-45
Notes	H & W 645-56
Textile Workers Union v. Lincoln Mills (1957)	H & W 700-01
Boyle v. United Technologies Corp. (1988)	H & W 666-75
Preemption and Federal Common Law	H & W 675-85
Grable & Sons Metal Prods. v. Darue Eng’g & Mfg. (6th Cir. 2004) [lower court opinion in Grable, U.S. 2005]	Part IV Supp.
Am. Elec. Power Co. v. Conn. (2011) (optional)	Part IV Supp.

- “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
Kiobel v. Royal Dutch Petroleum (2013) Part IV Supp.
 Sudan Accountability & Divestment Act of 2007, Pub. L. No.
 110-174 (enacted Dec. 31, 2007), and presidential
 signing statement Part IV Supp.
 Review the American Justice for American Citizens Act, H.R.
 1658, 109th Cong. (2005) First Day Handouts
 Judith Resnik, *Law's Migration: American Exceptionalism,
 Silent Dialogues, and Federalism's Multiple Points of
 Entry*, 115 Yale L.J. 1564 (excerpt) (2006) Part IV Supp.
- 3. The Federal Common Law of Remedies (optional)**
 Remedies for federal constitutional rights H & W 755-61
 Federal Equity Power: Inherent Remedial Authority:
 Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund,
 Inc. (1999) Part IV Supp.
 Great-West Life & Annuity Ins. Co. v. Knudson (2002) Part IV Supp.
 (optional)
 Sessions v. Morales-Santana (2017) Part IV Supp.
- 4. Borrowing State Law as Federal Common Law: the Example of Statutes
 of Limitations (optional)** H & W 747-52
- 5. The Role of State Courts in Enforcing Federal Law**
 Review from Part I: *Testa v. Katt* and *Haywood v. Drown* H & W 437-45

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

Judith Resnik & Vicki C. Jackson, *The Idea of a Jurisprudence, a Course, and a Canon: Introducing Federal Courts Stories* FCS 1-28

“Reflections on Federalism” readings compiled on the Inside site

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

Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903 (1994) (8 pages).

Vicki C. Jackson, *Federalism and the Uses and Limits of Law*, 111 Harv. L. Rev. 2180 (1998) (11 pages)

Roderick M. Hills, *Counting States* (2009) (4 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

Inside Site

Biographical Sketches

Justice Goodwin Liu
Judge Jeffrey Sutton

Goodwin Liu, “State Constitutions and the Protection of Individual Rights: A Reappraisal,” forthcoming N.Y.U. L. Rev. 2017

Jeffrey Sutton “What Does—and Does Not—Ail State Constitutional Law,” 59 U. Kansas L. Rev. 687 (2011)

Biographical Sketches

Chief Justice Chase T. Rogers
Justice Sheryl Gordon McCloud

State Constitutions, excerpted

Connecticut
Washington

Constitutional Interpretation and Method

Connecticut

Kerrigan v. Commissioner of Public Health, 289 Conn. 135 (2008)
(same-sex marriage)

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 v. Arlene's Flowers, 187 Wash.2d 804 (2017) (equal protection, free speech, and free exercise), *petition for cert. filed* (July 14, 2017)

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Certification

Munn v. Hotchkiss School, 326 Conn. 540 (2017)

Immigration

Letter from Washington Chief Justice Fairhurst to Hon. John F. Kelly (Mar. 22, 2017) and Washington Courts Press Release (Mar. 22, 2017)
 Letter from Connecticut Chief Justice Rogers to Attorney General Sessions and Hon. John F. Kelly (May 15, 2017) and Reply (Aug. 2, 2017)

Reports

Washington Supreme Court Minority & Justice Commission, *2016 Annual Report* (table of contents and introduction)

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

Chief Justice Rogers, *State of the Judiciary Report*, May 31, 2017

Chief Justice Rogers, *Brennan Lecture: Access to Justice: New Approaches to Ensure Meaningful Participation*, 90 N.Y.U. L. REV. 1447 (2015)

2017 Connecticut Access to Justice Initiatives

The Docket

Washington: Supreme Court and Superior Court Caseloads, 2016

Connecticut: Basic Facts about the Judicial Branch, 2014-2016
 Supreme Court, Movement of Case Load, July 1, 2014-June 30, 2016
 Providing services, 2015 summary

National Center for State Courts, *Examining the Work of State Courts: An Overview of 2015 State Court Caseloads* (2017) (excerpts)