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Office Hours: Monday 11:45-1:45 PM or
by appointment.

Seminar on Federalism Spring 2022

Course Description

This seminar will examine a variety of topics in the political economy of constitutional federalism. Issues to be covered include the advantages and disadvantages of political decentralization, competition between state and local governments, the impact of federalism on the status of minority groups, the Founding Fathers' view of federalism, and the role of the judges in enforcing federalism through judicial review. While most of the course focuses on federalism in the United States, some readings also employ a comparative perspective.

Course Time

Monday, 1:50-3:50 PM

Reading Materials

The readings for the course will be made available in a packet available from the Copy Center. In order to save money for the students, the packet will not include those readings that are from law journal articles, which can be accessed through the class TWEN site. Some other readings are available for free online at the indicated links. I will also attempt to make PDFs of all readings not available on Westlaw or online, available to students through the class TWEN site. To avoid problems, I will also e-mail the first week's reading to the class.

Many of the issues we cover in the course are closely related to events in the real world. In some cases I may e-mail the class short optional readings about current events that relate to that week's readings. You are not required to read these optional articles, but skimming them may stimulate your thinking and help you prepare for class discussion.

Grading and Assignments

Each student is expected to participate actively in class discussion and to write an original research paper on a subject related to the focus of the course. In order to participate effectively, you must be prepared to discuss each week's readings.

There is no set length for the final paper, but about 20-40 pages will be appropriate in most cases. Each student is also expected to make a presentation to the class based on his or her research for the paper. Grades will be based on a combination of the paper, presentation, and class participation. Class participation will be assessed on a combination of quantity and quality. A small seminar like this one cannot function effectively without active student participation.

The final semester grade will be determined as follows:

Final Paper: 40%

Paper Proposal (due around the middle of the semester at a time to be announced): 10%

Class Participation: 25%

Paper Presentation: 25%

Permission to Record Classes

I hereby formally permit students to use any video or audio equipment of their choice to record classes, so long as the resulting video or audio is not reproduced for commercial purposes or financial gain.

Coronavirus Contingency Plans

In the event that either state or university guidelines prevent this class from meeting in-person, it will be held online utilizing Zoom or other similar platform. Should this prove necessary, I will inform the class of relevant procedures online. But, to the extent possible, we will observe the same rules and procedures as during in-person sessions.

January 24

Introduction – Federalism and the Founders

Alexander Hamilton, Federalist 9

James Madison, Federalist 10, 39, 45

Essays of Brutus I-II, in Herbert Storing, ed., *The Anti-Federalist* (1981), pp. 108-22

Patrick Henry, Speeches in the Virginia Ratifying Convention, in Herbert Storing, ed., *The Anti-Federalist* (1981), pp. 293-97, 315-25.

January 31

The Tiebout Model and Interstate Competition

Charles Tiebout, "A Pure Theory of Local Expenditures," *Journal of Political Economy*, 1956, reprinted in William Fischel, ed., *The Tiebout Model at Fifty*, (2006), pp. xi-xxi

Wallace E. Oates, "The Many Faces of the Tiebout Model, in Fischel, ed., *Tiebout Model*, pp. 21-45.

Ilya Somin, "Foot Voting, Federalism, and Political Freedom," in *Nomos: Federalism and Subsidiarity*, (James Fleming and Jacob Levy, eds., 2014), 83-119 (text ends at 109).

David Schleicher, "Stuck! The Law and Economics of Residential Stagnation," *Yale Law Journal* (2017), 81-131 TWEN

February 7

Federalism, Markets, and Collective Action

Barry Weingast, "The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development." *Journal of Law, Economics, and Organization* (1995), pp. 1-31.

Jonathan Rodden & Susan Rose-Ackerman, "Does Federalism Preserve Markets?" *Virginia Law Review*, (1997), pp. 1521-72 TWEN

Robert D. Cooter and Neil S. Siegel, "Collective Action Federalism: A General Theory of Article I, Section 8," *Stanford Law Review* (2010), 115-120, 135-159, 170-83 TWEN

February 14

Federalism and Minority Rights

Guest Speaker:

Dean Heather Gerken, Yale Law School

Douglas Laycock, "Protecting Liberty in a Federal System: The US Experience," in Fedtke & Markesinis, eds., *Patterns of Regionalism and Federalism* (2006), pp. 119-47

William Riker, *Federalism* (1964), pp. 137-55

Heather Gerken, “A New Progressive Federalism,” *Democracy* (2012), available at <http://www.democracyjournal.org/24/a-new-progressive-federalism.php?page=all>

Michael Jonas, “Progressive Politics from the Ground Up,” *Commonwealth*, (Summer 2017), available at <https://commonwealthmagazine.org/politics/progressive-politics-from-the-ground-up/>

Ilya Somin, “How Liberals Learned to Love Federalism,” *Washington Post*, July 12, 2019, available at https://www.washingtonpost.com/outlook/how-liberals-learned-to-love-federalism/2019/07/12/babd9f52-8c5f-11e9-b162-8f6f41ec3c04_story.html

February 21

Federalism and Judicial Review

Herbert Wechsler, “The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,” *Columbia Law Review* (1954), pp. 543-61 TWEN

Lynn Baker & Ernest Young, “Federalism and the Double Standard of Judicial Review,” *Duke Law Journal* (2001), pp. 75-133 TWEN

Ilya Somin, “The Impact of Judicial Review on American Federalism: Promoting Centralization More than State Autonomy,” in *Courts in Federal Countries: Federalists or Unitarists?* (Nicholas Aroney and John Kincaid, eds., University of Toronto Press, 2017), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311400

February 28

State Constitutions

Guest Speaker: Judge Jeffrey Sutton, US Court of Appeals for the 6th Circuit

William J. Brennan, Jr., “State Constitutions and the Protection of Individual Rights,” *Harvard Law Review* (1977) TWEN.

Jeffrey Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (Oxford University Press 2018), pp. 1-41, 173-203

Goodwin Liu, “State Courts and Constitutional Structure,” *Yale Law Journal* (2019) TWEN

March 7

Fiscal Federalism

Wallace E. Oates, “An Essay on Fiscal Federalism,” *Journal of Economic Literature* (1999), pp. 1120-49.

Roderick Hills, “The Political Economy of Cooperative Federalism,” *Michigan Law Review* (1998), pp. 814-22, 855-901 TWEN

Jonathan Rodden, “Reviving Leviathan: Fiscal Federalism and the Growth of Government,” *International Organization* (2003), pp. 695-729

March 21 Federalism, the Environment, and Public Health

Jonathan H. Adler, “Judicial Federalism and the Future of Federal Environmental Regulation,” *Iowa Law Review* (2005), pp. 379-87, 452-74 TWEN

Richard Revesz, “Rehabilitating Interstate Competition: Rethinking the Race to the Bottom Rationale for Federal Environmental Regulation,” *NYU Law Review* (1992), pp. 1210-47. TWEN

Kirsten H. Engel, “State Environmental Standard-Setting: Is there a “Race” and is it “to the Bottom?”” *Hastings Law Journal* (1997), 274-332 TWEN

Michael Livermore, “The Perils of Experimentation,” *Yale Law Journal* (2017), 638-45, 676-703 TWEN

Rebecca L. Haffajee, and Michelle M. Mello, “Thinking Globally, Acting Locally — The U.S. Response to Covid-19,” *New England Journal of Medicine* (May 2020), available at <https://www.nejm.org/doi/full/10.1056/NEJMp2006740>

Nicole Huberfeld, Sarah H. Gordon, and David K. Jones, “Federalism Complicates the Response to the COVID-19 Health and Economic Crisis: What Can Be Done?,” *Journal of Health Politics, Policy and Law* (Dec. 2020), available at <https://read.dukeupress.edu/jh ppl/article/45/6/951/165290/Federalism-Complicates-the-Response-to-the-COVID>

March 28 Federalism and Local Government

Daniel Weinstock, “Cities and Federalism,” in *Nomos: Federalism and Subsidiarity*, (James Fleming and Jacob Levy, eds., 2014), 259-290

Heather K. Gerken, “Federalism All the Way Down,” *Harvard Law Review* (2010), pp. 6-25, 44-65, available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4835&context=fss_papers

National League of Cities, “Principles of Home Rule for the 21st Century,” (2020), available at <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf>, pp. 4-38

David Schleicher, “Constitutional Law for NIMBYs: A Review of ‘Principles of Home Rule for the 21st Century’ by The National League of Cities,” *Ohio State Law Journal* (2020), TWEN

Jonathan Chait, “Why the Worst Governments in America Are Local Governments,” *New York Magazine*, September 7, 2014, available at <http://nymag.com/daily/intelligencer/2014/09/ferguson-worst-governments.html>

April 4 Comparative Federalism

Brian Galligan, “Comparative Federalism,” in R.A.W. Rhodes, ed., *Handbook of Political Science*, (2006), pp. 261-80. UPDATE

Barry Weingast, “Second Generation Fiscal Federalism: Implications for Decentralized Democratic Governance and Economic Development” (2006), pp. 1-45.

Donald L. Horowitz, “The Many Uses of Federalism,” *Drake Law Review* (2007), pp. 953-66
TWEN

Daniel Treisman, “Ethnic Conflict and Secession,” in Treisman, *The Architecture of Government: Rethinking Political Decentralization* (2007), pp. 236-46

April 4

April 11 Federalism and Secession

Larry Anderson, “Exploring the Paradox of Autonomy: Federalism and Secession in North America,” *Regional and Federal Studies* (2004), pp. 89-112

James H. Read and Neal Allen, “Living, Dead, and Undead: Nullification Past and Present,” in Sanford Levinson, ed., *Nullification and Secession in Modern Constitutional Thought* (2016), pp. 91-124

Christopher Wellman, “A Defense of Secession and Political Self-Determination,” *Philosophy and Public Affairs* (1995), pp. 142-71

Allen Buchanan, "Theories of Secession," *Philosophy and Public Affairs* (1997), pp. 31-61

April 18
Student Presentations

April 25
Student Presentations