Federal Courts

Prof. Greve

Law 226-002

Spring Semester 2023

Tues/Thurs 6:05 – 7:30pm

Willkommen…

.., Bienvenu, Welcome, to Federal Courts. This class is intensely competitive; but it's also a chance, perhaps your last, to explore enduring themes of American constitutionalism and to argue over this stuff without some client or partner yapping at you. I love this course, and the students who show up. Let's light up this house.

Federal Courts requires a reasonably accurate recollection of CivPro; and if you have not yet taken ConLaw I and, ideally, Administrative Law and perhaps Conflicts (and done tolerably well in those courses), this won't make much sense to you. However: depending on your envisioned career, FedCourts may also be the most useful course. If you want to practice law in federal courts, in any capacity, you have to know this stuff (ideally, better than your opponents know it).

We will use the standard textbook (required):

RICHARD H. FALLON, JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (7th Ed. 2015); 2022 Supplement.

I strongly suggest you buy the book and the Supplement, mark them up, and keep the book. It's expensive but a worthwhile investment in your career. All other materials are posted on TWEN.

I've left out big chunks of this impossible-to-teach book—*e.g.*, the Supreme Court's original jurisdiction and habeas jurisdiction. There just isn't time for that in a 3-credit course.

Teaching Format

Fairly standard. I strongly encourage active class participation, and I will consider it for purposes of your grade (*see* below). I will break up the class into two sections and, from session to session, call on one group and then the next. To encourage engagement and preparation, the not-on-call group will prepare and submit questions pertaining to the readings for the upcoming class. We will work out the details of this arrangement in the first session.

If for some reason you have been unable to prepare for a class or to submit questions, send me an advance email. No harm if you do this once or twice; just don't make a habit of it. *Obviously*: even if your turn isn't up, you should still prepare for class (it'll be hard to follow the course without diligent preparation); and *obviously*, you may still volunteer questions and thoughts.

Learning Outcomes: On Learning, and Teaching, FedCourts

Here's what you are expected to take away from this course:

- Advanced understanding of the Constitution's principles, structure, and individual provisions, insofar as they pertain to federal jurisdiction, judicial review, federalism, and the separation of powers

- Basic understanding of constitutional development, federal (constitutional) common law, and "Federal Courts ideology"

- Ability to spot and analyze jurisdictional problems in (federal) litigation

- Solid understanding of interlocking problems in Constitutional Law, Administrative Law, and Civil Procedure (and some Conflicts stuff)

Some profs teach this course as Advanced CivPro. But the way Hart & Wechsler thought about it, it's a capstone course in public law. That's the way I teach it. The "Learning Outcomes" reflect that orientation.

Students tend to think that there's some secret sauce to all this; and that once you find it, all will at last be made manifest. Well, no. All there is a raft of doctrines, which you'll have to know. The best way to understand and remember them is to comprehend where they came from; why they look the way they do; and *how they hang together* (or not). That's the hard part. I'll do what I can to explain; rest is on you.

Additional Materials

Naturally, all kinds of study aids are available. Below, a selection from West (none of this is required):

- Principles of Federal Jurisdiction, by Pfander, James E. (2021): https://subscription.westacademic.com/Book/Detail?id=27621&goBackUrl=https%3A%2F%2Fsubscription.westacademic.com%2FSearch%3FsubjectFilter%3D23%26sort%3Ddocument-views. (Quite good; I've put it on library reserve.)
- Federal Civil Jurisdiction in a Nutshell, by Mulligan, Lumen N. (2019): https://subscription.westacademic.com/Book/Detail?id=26283&goBackUrl=https%3A%2F%2Fsubscription.westacademic.com%2FSearch%3FsubjectFilter%3D23%26sort%3Ddocument-views. (very CivPro-oriented).
- Law of Federal Courts, by Wright, Charles Alan / Kane, Mary Kay (2017): https://subscription.westacademic.com/Book/Detail?id=24976&q=%22federal%20courts%22&goBackUrl=https%3A%2F%2Fsubscription.westacademic.com%2Fsearch%3Fq%3D%22federal%2Bcourts%22#description-tab. (Way more than is needed for this course.)
- Gilbert Law Summaries on Federal Courts, by Fletcher, William A. / Pfander, James E. (2019): https://subscription.westacademic.com/Book/Detail?id=26386&q=%22federal%20courts%22&goBackUrl=https%3A%2F%2Fsubscription.westacademic.com%2Fsearch%3Fq%3D%22federal%2Bcourts%22.
- Black Letter Outline on Federal Courts, by Doernberg, Donald L. / Freer, Richard D. / Redish, Martin H. (2021): https://subscription.westacademic.com/Book/Detail?id=27601&q=%22federal%20courts%22&goBackUrl=https%3A%2F%2Fsubscription.westacademic.com%2Fsearch%3Fq%3D%22federal

%2Bcourts%22. From publisher, "designed to help a law student recognize and understand the basic principles and issues of law covered in a law school course."

- Federal Courts Stories, by Jackson, Vicki C. / Resnik, Judith (2010): https://subscription.westacademic.com/Book/Detail?id=1403&q=%22federal%20courts%22&goBackUrl=https%3A%2F%2Fsubscription.westacademic.com%2Fsearch%3Fq%3D%22federal%2Bcourts%22#description-tab. (Terrific stuff on selected important cases; on reserve.)
- Federal Courts in a Nutshell, by Doernberg, Donald L. (2021): https://subscription.westacademic.com/Book/Detail?id=27529&q=%22federal%20courts%22&goBackUrl=https%3A%2F%2Fsubscription.westacademic.com%2Fsearch%3Fq%3D%22federal%2Bcourts%22.

Exam, Grading, Consultation, Office Hours

The exam will be three hours; essay questions. Details to follow.

I will award a .33 upgrade for exceptional class participation, and an equivalent downgrade for failure at that front. I'll explain further mechanics in the first session.

Once your grades have been posted you will have a full opportunity to review your exam with me. I'll explain the mechanics, too, when the time comes.

It's a good idea to check on your progress during the semester (and the ABA requires it). I've experimented with mid-Terms and quizzes—only to have students rebel. Far preferable: at least one ***mandatory*** **consultation session** roughly half-way through the semester. Details, scheduling to follow.

My **Office Hours: Tues/Thurs 4:30-5:30pm**. Obviously, you may request additional consultations at any time. That is a good idea especially if this or that topic or session leaves you confounded. Please contact me, any time, at the following address (please use your gmu email):

mgreve@gmu.edu

Syllabus

Check the Syllabus on a regular basis. ***The operative version at all times is the one on TWEN***. It is subject to change, both because I'll add (from time to time) further comments and questions that may help you navigate this morass and because much will depend on our progress over the first few weeks. Some sessions will run over; because I can't know in advance which one those will be, the Syllabus permits a bit of slack. When that happens, you are required to read the assignment for the next class but still be prepared for the "left-overs."

H&W have compressed a ton of important, often complicated cases into brief summaries. When those don't seem to make sense do yourself a favor and go *read the cases*. It'll be well worth your time and effort. Conversely, you can ignore the editors' copious footnotes (though *not* the footnotes to the excerpted cases) unless I tell you otherwise.

I. Cases and Controversies

1. *Marbury* etc. (Yet Again)

TWEN — Preface to the First Edition

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

pp. 59-81 — *Marbury v. Madison*; Note on *Marbury v. Madison*; Note on *Marbury v. Madison* and the Function of Adjudication

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

I'll start with a ten-minute riff on "What is Federal Courts"? Then, we'll sort through *Marbury*. (I won't teach all of *Marbury* again, especially not the high-falutin' argument for judicial review; consult your ConLaw class notes. If you can't remember a darn thing, read van Alstyne, "Critical Guide," 1969 *Duke L. J.* 1.) Finally, we'll look at the two "models" of constitutional adjudication that are commonly traced to *Marbury*: Dispute Resolution/Departmentalism *versus* Law Declaration/Judicial Supremacy. You'll encounter the ambiguity throughout the course. What can be said for and against either model?

2. Parties, Finality, and Collusion

pp. 50-58 — Introductory Note; Correspondence of the Justices

pp. 81-101 — *Hayburn's Case*; Note on *Hayburn's Case* (skim); Note on *Hayburn's Case* and the Problem of Revision of Judicial Judgments; *United States v. Johnson*, Note on Feigned and Collusive Cases (skim both).

The critical question here is finality. Make sure you understand that piece of *Hayburn's Case*. *Plaut*, 514 U.S. 211 (1995) [pp. 91-92] is worth reading in its entirety.

Do you think the SupCt should have declined to hear *Windsor* (p. 100)? Why (not)?

Once you think about finality, it turns out to hang together with a *Marbury* problem and a problem having to do with non-Article III courts. Do you see it?

If there's time left, I'll share a few thoughts on collusive cases.

3. Standing to Sue

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

Supp pp. 10-20 Note on Standing to Sue; Note on Specialized Standing

pp. 279-286 Note on States' Standing to Sue

We'll spend two full sessions on this stuff. I assume you know the basics (if not, back to ConLaw notes or a Hornbook). As you read *Allen v. Wright* think about the underlying questions:

1. Why is there a "standing" doctrine at all? What is it supposed to do? Why not go straight to the merits and determine whether plaintiffs have stated a claim?
2. Does it make sense to predicate a *legal* inquiry on an "injury *in fact*"? What alternative might there be?
3. Standing divides into "constitutional" and "prudential." What is the difference? Where do "prudential" standing requirements come from? Are they jurisdictional?

The SupCt has over time created special rules for certain classes of litigants, especially including legislators and states. Until quite recently *no one* thought this kind of "institutional" standing even existed. But it's a brave new world out there now, and it's of great practical importance; so we'll try to clear this up.

4. Congressionally Created Standing; Further Questions

This is Richard Fallon's playpen, so H&W has way too much stuff. I've spared you *n* pages on "overbreadth" (a First Amendment thing); class actions (too CivPro-ey for this course); Mootness; Severability; and Political Questions. Still a lot to digest.

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

Supp 21-26 Note on Congressional Power to Confer Standing to Sue

Lujan is the crucial case. The SupCt routinely cites it (and then, as often as not, does the opposite). What are the limits of Congress's power to "define legal rights, the violation of which creates an injury"? Can Congress *create* an injury *in fact*? Why should there be any limits? And, note the intramural originalist sparring in *TransUnion* (Supp 18-22): are they at long last trying to re-think this enterprise?

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

Supp 28-29 Note on Asserting Rights of Others

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

pp. 217-222 *Abbott Laboratories v. Gardner*; Note on "Ripeness in Public Litigation No. 1. 2)

An AdLaw issue, for sure; but you should know the rough outlines.

pp. 227-235 *O'Shea v. Littleton*; Note on "Ripeness" and Related issues in Public Actions (No. 1-4)

Supp 43-44 Note on Ripeness (skim)

We'll re-examine the connections between injury, jurisdiction, merits, and remedy.

II. Congressional Control of Federal Jurisdiction

The most difficult issues here are in Sessions 5 and 7. A million things (federalism, the separation of powers, the birth of the administrative state) are happening at once. **Give yourself ample time to read**, especially for Session 5. If you garble this stuff you'll have problems down the road.

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

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

pp. 295-299 Introductory Note on Congressional Power over the Jurisdiction of the Article III Courts (No. 1-5)

pp. 303-322 *Sheldon v. Sill*; *Ex Parte McCardle*; Note on the Power of Congress to Limit the Jurisdiction of Federal Courts (skip No. (3), p. 322.

pp. 323-335 The *Klein* Decision; *Battaglia v. General Motors Corp.*; Note on Preclusion of All Judicial Review

Supp67-69 "Page 324"

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

Here's a rough road map, which you'll need:

The first question is whether and how Congress may limit the (federal) courts' jurisdiction. (You'll see why that way of putting the question is a bit misleading.) Make sure you understand the "Madisonian compromise" and Justice Story's riff in *Martin* (308-311). Story's position has been rejected but it will help you understand the landscape.

Next, you'll discover that Congress may do lots of things to federal courts—enough to make you nervous. Still: is there some "core" of "the Judicial Power" that Congress may *not* invade? That's *U.S. v. Klein*.

The final question is whether Congress may vest "the Judicial power" (whatever it is) in bodies that are not Article III courts—in particular, administrative tribunals, or "legislative" courts. The key case is *Crowell* (next time).

6. Administrative Adjudication

pp. 346-361 *Crowell v. Benson*; Note on *Crowell v. Benson* and Administrative Adjudication

At the time, *Crowell* drove Progressives nuts; later, it came to be viewed as "the greatest of the cases validating administrative adjudication" (Paul Bator). Which is it,

and why? Of late, the case has come under pretty heavy fire. It's an AdLaw thing; I'll explain without inflicting the cases on you.

7. Legislative Courts

pp. 361-363 Introductory Note on Legislative Courts

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

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

TWEN *Commodity Futures Trading Comm'n v. Schor*

Supp 73-77 "Page 363"; Further Note on Legislative Courts

Just when you think you've had it with jurisdiction stripping, along comes an *actual* stripper (the late Anna Nicole Smith) and prompts an Article III ruckus. And, speaking of which: Fallon & Co have stripped *CFTC v. Schor* from the book; I've mercilessly put it back into your assignments. (You'll want to read it before *Stern*.)

The serious issue here dovetails with Session 6: are there claims that *must* be heard (if at all) in Article III courts (rather than "legislative" courts or administrative tribunals)—and if so, what are they? *Oil States Energy* (Supp 68-69) is the Court's latest pronouncement; but what exactly is it saying?

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

8. Concurrent Jurisdiction of State Courts

pp. 412-437 *Tafflin v. Levitt*; Note on *Tafflin v. Levitt* and Congressional Exclusion of State Court Jurisdiction; *Tennessee v. Davis*; Note on the Power of Congress to Provide for Removal from State to Federal Courts; *Tarble's Case*; Note on *Tarble's Case* and State Court Proceedings Against Federal Officials

The great Hamilton (*Federalis*t 82, p. 418) makes two points. What are they, and are they right? You may also want to look at *Federalist* 32—now almost forgotten, but closely studied in the 19th century—for context. Read that stuff first.

Read *Tarble's Case* next (the order in H&W is weird). Doesn't this remind you of *M'Culloch*? How is it different/similar?

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

Pay attention to the Notes on pp. 420-422: you'll encounter similar problems again when we talk about statutory preemption.

9. State Courts' Obligation to Hear Federal Questions

pp. 437-460 *Testa v. Katt*; Note on the Obligation of State Courts to Enforce Federal Law; *Dice v. Akron, Canton & Youngstown R.R.*; Note on "Substance" and "Procedure" in the Enforcement of Federal Rights of Action in State Courts

Do you think that *Testa* (in light of *Printz* etc) marks the outer limits of congressional authority to impose obligations on state courts? Can you think of a (hypothetical) statute that might transgress those limits?

III. Supreme Court Review of State Court Decisions

The modern Supreme Court has just about given up on reviewing state court decisions. The reasons are worth thinking about, and we'll do so in discussing *Hunter's Lessee*. Otherwise pay attention if you're planning to clerk for the Supremes: if you miss an independent state ground in a cert memo, they'll hang you from the nearest lamp post, metaphorically speaking. I'll post a handout/crib sheet on TWEN.

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

pp. 461-477 Development of the Statutory Provisions; *Martin v. Hunter's Lessee*; Note on the Attacks upon the Jurisdiction; Note on Enforcement of the Mandate

Suppose Story is right: how does this shake out in the context of diversity jurisdiction?

pp. 477-503 *Murdock v. City of Memphis*; Note on *Murdock v. Memphis*; Introductory Note; *Fox Film Corp. v. Muller*; Preliminary Note on the Adequate and Independent State Grounds Doctrine; *Michigan v. Long*; Note on Review of State Decisions Upholding Claims of Federal Right

Supp 82-83 "Page 503"

Discuss amongst yourselves: *Murdock* was wrong the day it was decided. And think ahead: How does *Murdock* hang together with *Erie Railroad*, which comes next?

IV. *Erie* (Yet Again) and Federal Common Law

When H&W burble about "institutional settlement," what they really mean is the New Deal settlement. No case is more central to that settlement than *Erie*: if *that* case comes apart, the entire project disintegrates. The big joke is this: as the late, great Grant Gilmore noted, the case cannot possibly mean what it seems to be saying. Accordingly, the Supreme Court (and the FedCourts profession) have invented a half-dozen work-arounds. You'll have to learn all of them.

11. *Swift* and *Erie/Klaxon*

pp. 559-573 Note on the Historical Development; *Sibbach v. Wilson & Co*. (skim; read as background)

pp. 636-641 *United States v. Hudson & Goodwin*; Note on Federal Common Law Crimes (1), (2)

pp. 575-597 *Swift v. Tyson*; Note on *Swift v. Tyson*; *Erie Railroad Co. v. Tompkins*; Note on the Rationale of the *Erie* Decision; Note on the *Klaxon* Decision and Problems of Horizontal Choice of Law

pp. 598-606 *Guaranty Trust C. v. York*; Note on State Law and Federal Equity

I'm not going to turn this into a CivPro rehearsal (*e.g*., I'm sparing you all the "twin aims of *Erie*" jazz—I just assume you remember it). Instead, we'll try to get a sense of how the FedCourts enterprise hangs together. To that end it's best to read in chronological order: *Hudson & Goodwin*, then *Swift*, then *Erie*.

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

12. Federal Common Law; Preemption

pp. 643-685 *Clearfield Trust Co. v. United States*; Note on the Existence, Sources, and Scope of Federal Common Law; *United States v. Kimbell Foods*; Note on Choice of Law in Cases Involving the Legal Relations of the United States; *Boyle v. United Technologies Corp.*; Note on Choice of Law in Private Litigation that Involves Federally-Created Interests; Note on Federal Preemption of State Law

Supp 92-95 Note on Federal Preemption

While the H&W "Note" on preemption is an improvement over earlier editions, that's not saying much; I'll provide a bit more context and analysis. (I teach statutory preemption in Legislation and ConLaw.) The crucial point for this course is the connection between federal common law and preemption; *Boyle* is the best case to noodle over it. Rightly decided—or totally over the top?

13. Admiralty etc; Foreign Affairs Cases

pp. 686-722 *Chelentis v. Luckenbach S.S. Co.*; Note on Federal Common Law Implied by Jurisdictional Grants; *Banco Nacional de Cuba v. Sabbatino*; Note on Federal Common Law Relating to Foreign Affairs; Note on the Alien Tort Statute and Customary International Law

Supp 96-98 "Page 720"; "Page 722"

The foreign affairs stuff has everyone worked up. The other case that's really big here is *Lincoln Mills* (700-701). You'll encounter it more than once; make sure you understand it. (H&W give it to you in snippets; you may want to read the entire case at least once.)

14. Private Rights of Action under Federal Statutes; Bivens Actions

pp. 723-747 *Cannon v. University of Chicago*; *Alexander v. Sandoval*; Note on Implied Rights of Action

pp. 752-761 Remedies for Constitutional Violations (skim—read as background)

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

Supp 100-106 Note on *Bivens*

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

The conservative justices (most, anyhow) *obviously* think *Cannon* was wrong; and that *Bivens* was wrong. Are they right?

V. Federal Question Jurisdiction

This stuff is really nasty. Unfortunately, it's also really important.

15. The Scope of the Article III Grant; Well-Pleaded Complaints

pp. 779-800 Introduction; *Osborn v. Bank of the United States*; *Textile Workers Union v. Lincoln Mills*; Note on the Scope of the Constitutional Grant

pp. 800-806 Note on the Validity of a Protective Jurisdiction (skim)

Supp 107-108 Note on the Scope of the Constitutional Grant

pp. 806-820 *Louisville & Nashville R. Co. v. Mottley*; Note on the *Mottley* Case and the Well-Pleaded Complaint Rule; *American Well Works Co. v. Layne & Bowler Co.*; Note on "Arising Under" Jurisdiction and the Cause of Action Test

Lots of smart people think that the Jackson Pollock canvas of judicially created rules under 1331/1441 makes no sense. Do they?

Another question, or perhaps another version of the same question: you've seen that Congress can do amazing stuff by way of withholding federal jurisdiction, as a constitutional matter. And then when Congress does confer broad jurisdiction the Court says something like, you can't be serious. Does *that* make sense?

16. Federal Elements in State Law Causes of Action

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

Supp 109-111 Note on the Scope of "Arising Under" Jurisdiction

TWEN *Merrell Dow v. Thompson*

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

17. Declaratory Judgment Actions, Preemption, and Removal

pp. 837-855 Introductory Note on the Federal Declaratory Judgment Act; *Skelly Oil Co. v. Phillips Petroleum Co.*; Note on the Jurisdictional Significance of the Declaratory Judgment Act; Note on Actions for Declaratory and Injunctive Relief; Note on Removal Statutes (A., B.)

TWEN *Franchise Tax Bd v. Construction Laborers* (TWEN)

I'm giving you longer excerpts from *FTB* because it's too much fun for words. What *are* these people thinking, and why?

VI. Suits Challenging Official Action

Three things. First, if you contemplate litigating against government, you will have to know the defenses: you'll encounter them time and again. Second, *sovereign* immunity protects the *government*, as government; *official* immunities protect the *officers*. Drill that distinction into your head. Third, all of this may be completely made-up, albeit in different ways. It's the stuff of raging debates. We can't resolve that; the 1983 stuff in particular is way too much. But we'll get the basics down.

18. Federal Sovereign Immunity; Eleventh Amendment

pp. 877-882 Note on the Sovereign Immunity of the United States

pp. 883-904 *United States v. Lee*; Note on Sovereign Immunity in Suits Against Federal Officers; Note on Statutorily Authorized Review of Federal Official Action (skim)

pp. 905-922 Introductory Note on State Sovereign Immunity and the Eleventh Amendment; *Hans v. Louisiana*; Note on the Origin, Meaning, and Scope of the Eleventh Amendment.

I'll post a Handout on federal sovereign immunity on TWEN, so "skim" really means "skim." Mostly we'll talk about *Chisholm* and *Hans*. *Hans* is the foundation of modern-day state sovereign immunity law; but is it right?

19. The *Ex Parte Young* Doctrine

pp. 922-938 *Ex Parte Young*; Note on *Ex Parte Young* and Suits Against State Officers; Note on the *Pennhurst* Case and the Bearing of the Eleventh Amendment on Federal Court Relief for Violations of State Law

Supp 116-129 *Whole Woman's Health v. Jackson*; Note

TWEN John Harrison, "Ex Parte Young" (recommended)

We'll spend a great deal of time on *Ex Parte Young* and its true and correct meaning. It's another opportunity to tie a bunch of pieces together.

Prof. Harrison's piece is that rare article that's changed the intellectual landscape; I strongly recommend it. If you choose to read it: do you see *why* this would up-end the entire FedCourts enterprise?

20. Congressional Abrogation

pp. 939-981 Preliminary Note on Congressional Power to Abrogate State Immunity from Suit; *Seminole Tribe of Fla. v. Florida*; Note on Congressional Power to Abrogate State Immunity; Note on *Alden v. Maine* and State Immunity from Suit on Federal Claims in State Court

Supp 129-1133 "Page 967"; Note on *Alden v. Maine*

Seminole Tribe is the foundational case. The later twists and turns are things you want to remember; little mileage in thinking about them.

21. Suits Against State Officers for Unauthorized Action

pp. 986-1015 Federal Protection Against State Official Action; *Monroe v. Pape*; Note on 42 U.S.C. § 1983; Note on § 1983 as a Remedy for the Violation of a Federal Statute

Monroe is the key case; concentrate on that.

22. Official Immunity

pp. 1030-1060 *Harlow v. Fitzgerald*; Note on Officers' Accountability in Damages for Official Misconduct; Note on the Immunity of Government Officers from Relief other than Damages

Supp 137-138 "Page 1041"

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

VII. Judicial Federalism and Abstention

True confession: I've never comprehended any of this. Yeah: I can recite and teach the rules; and I will. But I've never understood why this made-up federalism is supposed to be "ours," *see Younger*. Maybe you'll explain it to me.

23. The Anti-Injunction Act

pp. 1061-1089 *Kline v. Burke Construction Co.*; Note on the Coordination of Overlapping State Court and Federal Court Jurisdiction; *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*; *Mitchum v. Foster*; Note on the Anti-Injunction Act (28 U.S.C. § 2283)

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

24. *Pullman* Abstention, and Such

pp. 1094-1113 Introductory Note; *Railroad Commission of Texas v. Pullman Co.*; Note on Abstention in Cases Involving a Federal Question

pp. 1119-1127 Note on *Burford* and *Thibodeaux* Abstention

pp. 1171-1181 *Colorado River Water Conservation District v. United States*; Note on Federal Court Deference to Parallel State Court Proceedings

You'll probably never encounter *Pullman* abstention in real life. (Why might that be? *Think*!) But it's a good way to re-rehearse some major FedCourts themes, just in time for exam prep.

25. *Younger* Abstention

pp. 1127-1181 *Younger v. Harris*; Note on *Younger v. Harris* and the Doctrine of Equitable Restraint; *Steffel v. Thompson*; Note on *Steffel v. Thompson* and Anticipatory Relief; *Hicks v. Miranda*; Further Note on Enjoining State Criminal Proceedings; Note on Further Extensions of the Equitable Restraint Doctrine

Younger is the most important form of abstention. Consider its trajectory all the way to *Sprint:* could this be (at last!) an issue of which the Supreme Court has managed to make sense?