

## Federal Courts Fall 2012

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### *Class Schedule*

Monday and Wednesday, 8:10-9:35 p.m., Room 5

### *Required Reading*

- 1) Peter W. Low, John C. Jeffries, Jr. & Curtis A. Bradley, *Federal Courts and the Law of Federal-State Relations* (7<sup>th</sup> ed. 2011) [hereinafter cited as CB];
- 2) excerpts from the 2012 casebook supplement [hereinafter cited as “CBS”], distributed separately; and
- 3) any handouts or supplemental readings attached to this syllabus or distributed throughout the semester.

### *Recommended Reading*

If you think you need to do additional reading, I recommend the following books:

Erwin Chemerinsky, *Federal Jurisdiction* (6<sup>th</sup> ed. 2012)  
Laura E. Little, *Federal Courts: Examples & Explanations* (2<sup>nd</sup> ed. 2010)  
Linda Mullenix, Martin Redish & Georgene Vairo, *Understanding Federal Courts and Jurisdiction* (1998)

### *Class Policies*

#### *Attendance and Reading*

Federal Courts is a difficult class. To get the most out of the material, you need to keep up with the readings, attend class, and participate. I am not going to take attendance, but if I will contact students who are not attending class regularly and/or will refer them to Associate Dean Spence. As for the readings, failure to do them will be harmful enough – I will not try to impose any further penalties. But, please come to class even if you have not done the reading. You will be better off. I will sometimes call on people in class, and I always welcome volunteers. From time to time, I may ask you to work on groups or to be prepared to speak in a particular class session.

#### *Internet and Cell Phone Use*

I expect you to turn your cell phone(s) off during class. If you have a good reason (such as child care, family illness, or the like) to keep it on, you must notify me. I also expect that, although

most of you will use laptops to take notes, you will not use them (either alone or in conjunction with a cell phone) to access the internet during class unless I instruct you to do so for a class-related purpose. That means no emailing, texting, facebooking, surfing, or similar activities. I reserve the right to sanction students who do not comply with this policy.

### *Grading*

Your grade will be based on a paper and a final exam, each worth 50% of your grade:

(1) The paper should be 10-15 pages, double spaced, as described in the attached Paper Assignment. The paper is due in class on the last day of class (Wednesday, Dec. 5).

(2) A final examination of essay and/or short answer questions about the topics we cover in class. The exam is limited open book, which means that you may use the casebook, any supplemental materials, your notes, and personal outlines or group outlines to which you contributed. You will have 3 hours to take the exam.

### *Instructions*

The syllabus assumes we will cover each set of readings in one class, but that may change as the semester moves on. Unless I tell you otherwise, you should always assume that your assignment for the next class will be the next set of readings on the syllabus.

Several of the reading assignments are long; you should focus on the main cases, the statements of doctrinal rules that they (sometimes) provide, and the rationales for those rules.

The U.S. Constitution is in Appendix A of the casebook. Selected U.S. Code sections are in Appendix B. *Read the relevant provisions as they come up*, whether or not they are specifically assigned.

### *Syllabus*

## **I. BACKGROUND READING**

Judicial Review, CB Appendix C, pp. c-1 to C-13

**\*\*\* this is background reading that you should finish before the first class \*\*\***

## **II. FEDERAL COURTS, FEDERAL POWER, AND SOURCES OF LAW**

We begin with the power of federal courts to choose, create, or interpret the law that they apply. All courts must determine the sources or kinds of law that they can apply, and the decision can be constrained by a variety of factors. In the case of federal courts, constitutional and statutory constraints exist. Are there others? Is there something important, for example, about federal rights? Are there other policies or values that play a role? Is there something about U.S. judicial, legal, or constitutional culture that also affects the content of doctrine?

### **A. Choice of Law**

#### **Class 1 (Sept. 5): State Law in Federal Court**

The fact that federal courts exist does not mean that only they can decide federal issues. And, because of diversity and supplemental jurisdiction, state-law claims are often brought in federal

court. Under what circumstances do state or federal courts apply each other's law? What do the terms "state law" and "federal law" really mean?

For this class, our focus is on the circumstances in which federal courts should apply state law, as well as on the meanings of "state law" and "federal law." What do the answers imply for federalism, separation of powers, and our system of justice generally?

CB 2-26 (through n. 3)

**\*\*\* this is the reading for the first class – it ought to be somewhat familiar \*\*\***

## **Class 2 (Sept. 10): Federal Law in State Court**

Now we turn to litigation in state courts, but in which a federal issue arises. This can happen in three ways: (1) A federal cause of action is brought in state court. (2) A federal substantive rule of decision governs an issue that arises in the context of a state-law cause of action. (3) A federal procedural rule arguably applies. When *may* a state court adjudicate these federal issues? When *must* a state court do so? When is a state court *precluded* from doing so?

CB 30-58, 63-78

## **C. Separation of Powers and Judicial Authority to Create or Enforce Federal Law**

### **1. Federal Common Law**

## **Class 3 (Sept. 12)**

Under what circumstances do courts have the power to fashion a federal rule of decision when no statute provides one? How does a court determine the content of its federal rule of decision? What are the conceptual and practical differences between a court applying state law of its own force and adopting state law as the federal rule? Assume that there is no federal statute controlling an issue in your case and that state law on the issue is disastrous for your client; can you convince the court to use its common-law powers to create a federal rule of decision instead?

CB 126-163 (through n.5)

### **2. Implied Rights of Action**

## **Class 4 (Sept. 17): Implied Rights of Action to Enforce Federal Statutes**

Under what circumstances, if any, do federal courts have the power to fashion a federal cause of action when a statute provides rights but no mechanism (or only limited mechanisms) for vindicating them? (Note: the Court's answer to this question has changed over the years; what is the current approach?)

CB 164-192

**\*\*\* Note that there will be no class on Wednesday, September 19 \*\*\***

### **Class 5 (Sept. 24): Implied Rights of Action to Enforce the Constitution**

Under what circumstances, if any, do courts have the power to fashion a federal cause of action to vindicate constitutional rights?

CBS 4-35 193-225 (through n.3)

### **3. The Relationship Between Federal Law and Customary International Law**

#### **Class 6 (Sept. 26)**

Along with treaties, customary international law is a leading source of international legal rules. How do these international legal rules relate to federal law? What should federal courts do if a plaintiff asserts a claim based on customary international law? Does it matter whether there is a specific cause of action available to enforce the right at issue?

CB 226-238 (through n.10), 241-265 (through n.5)

### **D. Federalism and the Application of Federal Law: The Example of 42 U.S.C. § 1983**

#### **Class 7 (Oct. 1): An Overview of 42 U.S.C. § 1983**

Section 1983 potentially gives the federal government a huge amount of power over state and local government affairs. How have federalism concerns affected the judicial interpretation of “persons” who can sue under § 1983?

CB 1132-1142, 1147-1161 (through n.5), 1185-1198

#### **Class 8 (Oct. 3): 42 U.S.C. § 1983, part 2**

How have federalism concerns affected the kinds of constitutional and statutory rights a plaintiff can vindicate under § 1983?

CB 1239-1259, 1281-1301

## **III. THE SCOPE AND LIMITS OF CONGRESSIONAL POWER OVER FEDERAL COURTS**

### **A. Jurisdiction and Rules of Decision**

#### **Class 9 (Oct. 8): Separation of Powers: Congress’s Power to Limit Federal Court Jurisdiction**

How extensive is the grant of power that Article III of the Constitution gives to the federal courts? To what extent does Article III allow Congress to limit the jurisdiction of the federal courts? If Congress declares that *no* court – state or federal – can consider your case or a particular legal issue in it, can you convince the court not to honor that prohibition?

CB 265-292 (through n.8)

### **Class 10 (Oct. 10): Congressional Power to Regulate Rules of Decision and Judgments**

Congress can often tell courts how to decide cases (this is, after all, what a statute does, isn't it?). What limits does the notion of separation of powers place on Congress's ability to do this?

CB 293-322

### **Class 11 (Oct. 15): Congressional Power to Expand Federal Jurisdiction**

Can Congress authorize federal courts to hear a case in which the parties are not diverse and in which no obvious federal question appears either in the complaint *or* as a defense, or must the complaint in such a case be dismissed for lack of subject matter jurisdiction under Article III?

CB 322-345 (though n. 5)

## **B. Federal Courts vs. Other Federal or International Tribunals**

### **Class 12 (Oct. 17): Congressional Power to Create Legislative or Article I Courts, part 1**

What, if any, portion of the "judicial power of the United States" can be exercised only by judges with Article III protections? If you find yourself with a case set for litigation before a federal judge who lacks such protections, can you force the case into an Article III (or a state) court?

CB 345-373 (through n. 2)

### **Class 13 (Oct. 22): Congressional Power to Create Legislative or Article I Courts, part 2**

What impact does the Supreme Court's recent decision in *Stern v. Marshall* have on this area of doctrine? And what impact do all of these cases have on adjudication before federal administrative agencies, magistrate judges, and military courts?

CBS 40-58; CB 373-382 (notes. 4 through 7)

### **Class 14 (Oct. 24): Separation of Powers and National Borders: The Constitution and International or Foreign Courts**

Increasing amounts of litigation take place in international tribunals of various kinds. Sometimes the United States is a party to the litigation, but often the litigants are private parties. How do federal courts interact with these tribunals? Also, U.S. nationals often litigate in other countries. Under what circumstances should those judgments be enforceable in U.S. courts?

CB 382-407

## **IV. ADJUDICATION IN THE FEDERAL TRIAL COURTS**

### **A. Statutory Grants of Subject Matter Jurisdiction**

#### **1. Federal Question Jurisdiction**

You want to bring a case in federal court. You face one of the following situations: (1) Federal law provides a cause of action (whether statutory or implied). (2) Although federal law provides

a cause of action, important rules of decision come from state law. (3) State law provides a cause of action, but important, but the important rules of decision come from federal law (either on the claim itself, or on a probable defense). When does the federal district court have jurisdiction under 28 U.S.C. § 1331?

**Class 15 (Oct. 29): When Does a Case “Arise Under” Federal Law?**

CB 546-553 (through n. 6); CBS 84-86 (n.7); CB 555-559 (through n. 2); CBS 86-88 (n. 2a); CB 561-569 (through n.1), 570-581 [note that much of this reading is descriptive as well as duplicative of material from your first year Civil Procedure class]

**Class 16 (Oct. 31): Declaratory Judgments and Preemption (and Some Notes on Diversity Jurisdiction)**

CB 570-606

**B. Should the U.S. District Court Abstain?**

**Class 17 (Nov. 5): *Younger* Abstention, Origins**

A plaintiff with standing can seek an injunction to halt state court proceedings, but only before the *Younger* doctrine kicks in. What does the plaintiff need to have standing? What series of events closes the window of opportunity for seeking an injunction in federal court?

CB 698-739

**Class 18 (Nov. 7): Limits on *Younger* Abstention, and Other Forms of Abstention**

Are there any kinds of state civil or administrative proceedings to which *Younger* abstention does not apply? What are the limits? Do the limits make sense from the perspective of federalism and separation of powers?

How do *Burford*, *Thibodaux*, and *Pullman* abstention differ from *Younger* and from one another? (Pay attention to the types of jurisdiction to which they are relevant, the other requirements for their application, and whether they result in a dismissal of the case or merely a stay.) What considerations of federalism and separation of powers argue for or against use of these abstention doctrines?

CB 739-777

[Note: there is no class on Wednesday, November 21]

**Class 19 (Nov. 12): Concurrent Litigation, International Comity, and the Anti-Injunction Act**

What considerations should govern the permissibility of concurrent litigation in state and federal courts? Which institution should determine whether concurrent litigation can continue: Congress or the courts?

CB 778-819; CBS 90-91

## V. The Eleventh Amendment and State Sovereign Immunity

\*\*\* *Focus for next 4 classes*: If Congress has created a cause of action allowing individuals or organization (other than states or the federal government) to sue a state, does this statute violate the 11th Amendment? Pay attention to the various jurisprudential theories of the 11th Amendment presented in the first set of readings, and be prepared to discuss how the development of the law might change if the Court adopted a jurisprudential approach different from the one that prevails.

### **Class 20 (Nov. 14): The Nature of the 11<sup>th</sup> Amendment Limitation**

The 11th Amendment immunity protection applies only to some kinds of lawsuits. What sorts of actions or remedies can Congress (or the courts, for that matter) authorize, in which the state is the real party in interest, without bringing the 11th Amendment into play at all?

CB 1016-1052

### **Class 21 (Nov. 19): State Consent and Congressional Abrogation**

When the 11th Amendment applies, Congress may nevertheless be able to authorize suits against a state in 2 different circumstances: if the state consents, and if Congress “abrogates” the state’s immunity. How are these circumstances different? (Be careful: especially in early cases, the Court’s use of language is sometimes confusing. Watch what the Court does, not what label it uses.) What are the requirements for each doctrine?

CB 1052-1088

\*\*\* **Note that there will be no class on Wednesday, November 21** \*\*\*

### **Class 22 (Nov. 26): Consent and Abrogation, continued**

How have changes in 14th Amendment law affected 11th Amendment doctrine? How does the “spirit” of the 11th Amendment affect a plaintiff’s ability to vindicate federal rights in state courts or administrative agencies?

CBS 105-132 (through n.4)

### **Class 23 (Nov. 28): The Persistence of *Ex parte Young* and Constitutionally Required Remedies**

How have the rules regarding *Ex parte Young* changed under the Court’s re-examination of 11th Amendment doctrines? Is *EPY* still a valid doctrine? Has the Court created any new doctrines to counter-balance the changes?

CB 1115-1131

## V. SUPREME COURT REVIEW OF LOWER COURT DECISIONS

We know that state courts must hear most federal question cases and must apply federal law when it arises in the course of state causes of action. The Supreme Court can review the way the state

court deals with federal law. But the state court decision must present a “federal question” for decision.

**\*\*\* Note that the next class covers part A and the beginning of part B \*\*\***

**A. Review of Lower Federal Court Decisions**

**B. Review of State Court Decisions**

**Class 24 (Dec. 3): Finality and Federal Questions**

You believe the state court has decided a federal question erroneously and you want the U.S. Supreme Court to review the decision. You have two possible initial problems. First, what if there are more proceedings to be had in state court. Can the Supreme Court take jurisdiction now, or must you wait? What broad interests would be served by each option?

Second, on the surface the state court does not seem to have decided any federal questions. Can you convince the Court that important federal questions lurk beneath that surface? (There are 3 types of cases that do present federal questions even though they appear not to do so: (1) “intertwined” state and federal issues; (2) “remote federal premise” cases where the state court is using federal law as “shorthand” for state law, and (3) “remote federal premise” cases where the state court is conforming state law to what it thinks is the federal requirement. Can you articulate the nature of the three categories and which cases fit in each? What broad interests would be served by the Court having jurisdiction?)

CB 696 n.9 [this is the material on review of lower federal courts]; 653-667, 78-94

**Class 25 (Dec. 5) Adequate and Independent State Grounds of Decision**

If your client has won at the state level and the case presents a federal issue, can you convince the Supreme Court that it lacks jurisdiction to take review? (Even if there is a federal question in the state case, the Supreme Court lacks jurisdiction if there is an “adequate and independent state ground” that supports the decision. This doctrine has a substantive branch and a procedural branch. What broad interests are served by denying jurisdiction?)

CB 94-125

**\*\*\* Important note about the last class: December 5 is scheduled to be a day of Friday classes. I have scheduled our last class for the same day, as a partial make up for the two cancelled classes. No upper level classes are scheduled for our class time on Fridays, so there should be no law-school related conflicts. But, if there is a reason why you cannot attend class on the 5<sup>th</sup>, please let me know and I will make a podcast available. \*\*\***