

Constituting Federalism

The ideas denoted by the term "federalism" have been central to the American constitutional order, and federalism as a political form plays an increasingly important role around the world. This seminar will focus on the United States constitutional experiences with federalism, a term not mentioned in the U.S. Constitution, but one that has, since the second half of the twentieth-century, become frequently invoked in constitutional discourse. Federalism is proffered as an explanation when justices approach questions of whether to override congressional judgments about the deployment of national powers or to preclude states from regulating particular arenas. Beneath the mix of interpretations of the Constitution and the sometimes dry discussions of jurisdictional rules and doctrines of comity lie conflicts about equality, immigration, criminal procedure, regulation of the economy, protections to be accorded workers and consumers, and the authority of states, Indian tribes, and localities. These will be the subjects of discussion at the seminar.

The seminar meets Friday afternoons, 2:00–5:00 p.m., February 7, 14, and 21, and 28 at the New-York Historical Society, 170 Central Park West, New York City.

FACULTY

Judith Resnik is the Arthur Liman Professor of Law at Yale Law School where she teaches about federalism, procedure, courts, equality, and citizenship. Her books include *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (with Dennis Curtis, 2011); *Migrations and Mobilities: Citizenship, Borders, and Gender* (co-edited with Seyla Benhabib), *Federal Courts Stories* (co-edited with Vicki C. Jackson, 2010). Recent essays include "Federalism(s) Forms and Norms" (forthcoming in *NOMOS, Federalism and Subsidiary*, 2014).

Michael Graetz is the Wilbur H. Friedman Professor of Tax Law at Columbia Law School, a faculty he joined after many years at Yale Law School. His books include *The End of Energy: The Unmaking of America's Environment, Security and Independence* (2011); *Death by a Thousand Cuts: The Fight Over Taxing Inherited Wealth*, with Ian Shapiro, 2005), and the forthcoming volume, *Unequal Protections*, co-authored with Linda Greenhouse, which addresses the legacies of the Burger Court.

Linda Greenhouse is the Joseph Goldstein Lecturer in Law at Yale Law School, where she has taught since 2009. Before then she covered the United States Supreme Court for thirty years for the *New York Times*. She is the author of *Before Roe v. Wade* (with Reva Siegel, 2010), *Becoming Justice Blackmun* (2005), *The U.S. Supreme Court: A Very Short Introduction* (2012), and the forthcoming volume, *Unequal Protections*, co-authored by Michael Graetz.

Vicki C. Jackson is the Thurgood Marshall Professor of Law at Harvard Law School and the author of *Federalism: A Reference Guide to the U.S. Constitution* (with Susan Low Bloch, coauthor) (2013); *Comparative Constitutional Law* (with Mark Tushnet, coauthor), (3d ed

forthcoming 2014); *Constitutional Engagement in a Transnational Era* (2010); *Federal Courts Stories* (coedited with Judith Resnik) (2010).

Charles W. McCurdy is Professor of History and Professor of Law at the University of Virginia, where he has taught since 1975. His scholarship has won many recognitions, including the Order of the Coif Triennial Book Award (Association of American Law Schools). McCurdy's books include *The Anti-Rent Era in New York Law and Politics, 1839-1865* (2001).

RECOMMENDED BOOKS

Susan Low Bloch and Vicki C. Jackson, *Federalism: A Reference Guide to the U.S. Constitution* (Praeger, 2013)
 Vicki C. Jackson and Judith Resnik, *Federal Court Stories* (Foundation Press, paperback 2010)

READINGS

All assigned readings will be uploaded on the website. Many of the readings are excerpted from cases and articles; only the excerpts will be posted online, and you are always welcome to read more. The sessions also include some questions to preview the discussion and help to focus your engagement with the materials.

First session, Feb. 7, 2014: Federalisms' Forms and Origins: The Roles of the U.S. Supreme Court and of Congress Vicki Jackson and Judith Resnik

An overview

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

A. Structuring the National Government: U.S. Federalism's Origins

Lawyers often focus discussions about federalism on what courts have to say about it. Yet the ways in which legislative and executive authority is structured is a central feature of federal systems, as is the question of democratically representation. Thus, we begin by reflecting on whether and how concerns of the founding period for the structure of the U.S. federal system remain salient today.

JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (Vintage Books 1997) (1996), pp. 26-27, 44-45, 54-55, 58, 60-70, 75, 78-79, 92.

Recommended background reading

Early Supreme Court Approaches to Enduring Questions of Federalism
Block & Jackson, *Federalism*, Chapter 1 (pages 1-35) (2013)

B. The Authority of Federal and of State Courts

Consider how the Supreme Court draws lines between its authority and that of state courts, the effort to push back, *see Martin v. Hunter's Lessee*, and the explanation provided by the Court of why it is has authority over the highest decisions of state courts. What are the sources for such a view? Then turn to the post-Civil War ruling – *Murdock* – about what power Congress did or did not give the Court to review “state” as well as “federal” issues when deciding cases coming from the state courts. Again, what are the sources for the judgment? What if the case had come out the other way?

Next reflect on *Erie*, and once again, consider its sources and why federal courts ought to, or not to, provide rules of decisions in cases based on state causes of action. Throughout, consider what understandings of law, states, sovereignty, and the national government are in view? Consider also the dates and political contexts of each of the cases, as you think about how their rules and approaches ought to be used in the eras thereafter.

Martin v. Hunter's Lessee, 14 U.S. 304 (1816)
Murdock v. Memphis, 87 U.S. 590 (1875)
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)

Recommended additional reading:

William Wiecek, *Murdock v. Memphis: Section 25 of the 1789 Judiciary Act and Judicial Federalism*, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789* (Maeva Marcus, ed., 1992)

Consider next the effort to resist federal authority in *Cooper v. Aaron*, and the way in which the concurrence in *Bush v. Gore* argues that state law cannot control determination of the authority of state organs of government.

Note on *Cooper v. Aaron* and on *Bush v. Gore* (including Chief Justice Rehnquist's discussion of the role of state law)

Judith Resnik and Vicki Jackson, *The Idea of a Jurisprudence, a Course, and a Canon*, in *FEDERAL COURTS STORIES* (Judith Resnik & Vicki Jackson, eds., 2010), pp. 1-10, 13-23

Richard H. Fallon, *Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988)

Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981)

Judith Resnik, *Building the Federal Judiciary, (Literally and Legally): The Monuments of*

Chief Justices Taft, Warren, and Rehnquist, 87 INDIANA L. REV. 823 (2012)

C. The Relationship between National Legislature and the States through the lens of the Commerce Clause: Founding Period to New Deal to Health Care

What purposes are served by the “federalist” division of legislative powers implied (on conventional understandings), by the enumeration of powers to the federal government, and the provisions of the Tenth Amendment? Have those purposes changed since the founding period? If so, should courts consider those changes in interpreting the Constitution? Is it inevitable that they will do so?

In the excerpts below, the focus is on courts, responding to claims that Congress lacks authority to legislate in particular areas. Throughout the weeks to come, we will consider the intersections and interactions between ideas about federalism and about separation of powers. What arguments exist for a robust role for courts in mediating state/congressional relations? For a more limited role?

Is Federalist 10 convincing on the merits of a larger republic? How have the predictions of Federalist 46 about balance of federal and state power held up? Does Federalist 46 itself contemplate the legitimacy of shifts in power towards the national government?

In the cases, should we see *Jones & Laughlin* as a significant break from precedent? What about *NFIB*? Or *Carter v. Carter Coal*? Are such “breaks” of concern or an expected part of a dynamic constitutional order?

Federalist 10; Federalist 46
 McCulloch v Maryland, 17 U.S. 316 (1819)
 Carter v. Carter Coal, 298 U.S. 238 (1936)
 N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)
 NFIB v. Sebelius, 132 S. Ct. 2566 (2012)

Robert D. Cooter & Niel S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STANFORD L. REV. 115 (2010)

Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of Government*, 64 U. CHI. L. REV. 483 (1997).

Recommended background reading:

Bloch and Jackson, *Federalism*, pp. 50-56 (Commerce Clause in late 19th); 80-93 (Commerce clause and econ regulation in early 20th); 121-22, 129-33 (commerce clause, federal and state regulation, in New Deal-Warren Court period); 186-92 (commerce clause in Roberts Court).

The Role of the Dormant Commerce Clause

Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851)

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977)

Consider how this line of cases relates to the “collective action” theory of federalism articulated by Cooter & Siegel. Consider the workability of a U.S. federalism that proceeded without some doctrine imposing limits on state power to effect national economic interests.

D. Rights and “Incorporation”: The Warren Court Era

Some law schools divide the study of “individual rights” from the study of federalism. Yet the two are inextricably interdependent: When nationally-binding individual rights rules are articulated, the arena for state autonomy is circumscribed. Some critics of the Warren Court argued that its expansion of judicially enforceable rights undermined states. What room and role for states are in view in the materials excerpted below?

Roth v. United States, 354 U.S. 476, 496 (1957) (Harlan, J., concurring in the judgment in part and dissenting in part)

Hope Metcalf & Judith Resnik, *Gideon at Guantánamo: Democratic and Despotic Detention*, 122 YALE L.J. 2504 (2013)

Recommended readings:

Bloch & Jackson, Federalism, 146-52

Second Session, Feb. 14, 2014: Shifting Contours: The Burger Court and Federalism Michael Graetz, Linda Greenhouse with Judith Resnik

A. Crime

Larry Yackle, *The Story of Fay v. Noia: Another Case About Federalism in FEDERAL COURT STORIES* (Vicki Jackson & Judith Resnik, eds., 2010), pp. 191 - 218

Stone v. Powell, 428 U.S. 465 (1976)

How did the Warren Court justices' views on race inform their views on habeas corpus?
What changed in the Burger Court era?

B. The Schools — race, poverty, and immigration status

Milliken v. Bradley, 418 U.S. 717 (1974)

As the school desegregation cases moved North, the Burger Court was presented with a choice with enormous social and political consequences. How persuasive is the expressed rationale for the choice it made? What rationales might have been unexpressed, and with what significance?

Michael Heise, *The Story of San Antonio Independent School District v. Rodriguez: School Finance, Local Control, and Constitutional Limits*, in *EDUCATION LAW STORIES* (Michael A. Olivas & Ronna Greff Schneider, eds., 2008), pp. 51-82

Consider the counter-factuals: What if Rodriguez had reached the Court just a bit sooner? What might have been the consequences had the case come out the other way?

Linda Greenhouse, *What Would Justice Powell Do? The 'Alien Children' Case and the Meaning of Equal Protection*, 25 *CONST. COMM.* 29 (2008)

C. Abortion

Harris v. McRae, 448 U.S. 297 (1980)

We have placed this case under the "abortion" label - but viewed through the lens of federalism, what's it really about?

D. The States and Constitutional Torts

Paul v. Davis, 424 U.S. 693 (1976)

E. Shifting Contours — Salvation From the States?

William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 *HARV. L. REV.* 489 (1977)

Justice Brennan's impassioned dissent from Justice Rehnquist's majority opinion in *Paul v. Davis* declares that the decision "must surely be a short-lived aberration." His law review article, on the other hand, suggests that he wasn't so sure about that prediction. The article invites a dialogue that has long outlived his own tenure and remains highly relevant today. Has "federalism" served to protect individual rights, as Justice Brennan desperately hoped, or undermine them, as he feared?

**Third Session, Feb. 21, 2014: The Rehnquist and Roberts' Courts:
Responses to Legislative Innovations and
the Puzzles of Deference and Preemption
Vicki Jackson and Judith Resnik**

For some, the Rehnquist and Roberts Courts are notable for the revival of federalism -based limits on national power. And as you will see, federalism- based limits have indeed been revived in some cases through overruling of earlier precedents. But in the application of doctrines of deference and preemption, other patterns seem to emerge, in which federal law displaces state policy choices. In this segment, we also bring Indian tribes into focus, as debates about their sovereignty have parallels in the discussions of state/ federal relations and in the roles played by the three branches of the federal government.

Limiting Congressional Innovations and Insulating the States from Judicial Oversight

A. Legislative Competencies

Gregory v. Ashcroft, 501 U.S. 452 (1991)
Printz v. United States, 521 U.S. 898 (1997)
United States v. Lopez, 514 U.S. 549 (1995)
United States v. Morrison, 529 U.S. 598 (2000)

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

Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111
HARV. L. REV. 2180 (1998)

Rubin & Feeley argue that federalism serves no real purpose; that the only reason to constitutionally entrench a federal system would be to provide areas of autonomy for distinctive groups living in territorially discrete areas, which the U.S. no longer has. The cases from this period, however, insist on the many values of federalism and on the clarity of categorical lines drawn by the Constitution to limit national power. What reasons motivate such judicial decisions? If Rubin & Feeley were followed and courts did not invalidate federal law on federalism grounds, what impact might that posture have on Congress and the federal system?

B. Insulating States from Effective Enforcement of Federal Norms: Eleventh Amendment Immunity

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)

Vicki C. Jackson & Judith Resnik, *Sovereignties—Federal, State and Tribal: The Story of Seminole Tribe of Florida v. Florida*, FEDERAL COURT STORIES (Vicki Jackson & Judith Resnik, eds., 2010), pp. 329-58

Excerpts, Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989)

Immunities and the FMLA

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003)

Coleman v. Court of Appeals of Maryland, 132 S.Ct. 1327 (2012)

Judith Resnik, *Federalism(s)'s Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, in NOMOS LV: FEDERALISM AND SUBSIDIARITY (James Fleming, ed., 2014) (forthcoming)

It was famously said by Justice Holmes that the court's power to invalidate national laws was not essential but that its power to invalidate state laws was, to American federalism. The Eleventh Amendment cases are not about the reach of legislative power but about the ability to enforce valid federal laws. What are the grounds for the Court's choices, in the last few decades, to develop from the narrow language of the Eleventh Amendment a substantial body of law protecting states from certain kinds of civil actions? What are the metrics for assessing this response to the growth of federal power? Why circumscribe private enforcement of federal rights? Why object?

C. National Supremacy, Preemption, and Deference

The narrative that emerges from the 11th Amendment expansion is a vision of federalism in which states play an important role. However, in the preemption cases, the Court appears instead to put state interests behind the Court's understanding of the need for federal law to govern. What are the sources and differences among the kinds of preemption exemplified below? Are there ways to resolve the tensions in these approaches?

AT&T v. Concepcion, 131 S. Ct. 1740 (2011)

Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011)

Gade v National Solid Wastes Management Ass'n, 505 U.S. 88 (1992)

American Insurance Ass'n v. Garamendi, 539 U.S. 396 (2000)

Arizona v. United States, 132 S. Ct. 2492 (2012)

Medellín v. Texas, 552 U.S. 491 (2008)

Fourth Session, Feb. 28, 2014: Federalism and Judicial Review, 1930-1990, and Reflections on Federalism, Circa 2014 Charles McCurdy, with Judith Resnik

Edward S. Corwin, *The Passing of Dual Federalism*, 36 VIRGINIA L. REV. 1 (1950)

Did the dual federalism that had “pass[ed]” by 1950 ever make any sense? What was its underlying logic and policy?

Herbert Wechsler, *The Political Safeguards of Federalism*, 54 COLUMBIA L. REV. 543 (1954).

Here we have a justification in constitutional theory, not merely in constitutional law, for the passing of dual federalism. Try to think 1954, not 2014, as you read it. Seem persuasive from that perspective? How about now?

Charles McCurdy, “Federalism and the Legal Mind in 20th-Century America: Origins of the ‘Political Safeguards’ Thesis, 1934-1954” (Unpublished lecture).

Is this little piece perfect in every way?

National League of Cities v. Usery, 426 U.S. 833 (1976)

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), as excerpted in Paul Brest & Sanford Levinson, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING*, 411-20 (3d ed. 1992)

Can you imagine *National League of Cities* coming down a decade earlier? Why not? Were there cultural and political preconditions for the 1976 decision? Should *National League of Cities* be understood as a revival of dual federalism? What seems to have happened between 1976 and 1985?

Lewis B. Kaden, *Politics, Money, and the Judicial Role*, 79 COLUMBIA L. REV. 847 (1979), as excerpted in John H. Garvey and T. Alexander Aleinikoff, *MODERN CONSTITUTIONAL THEORY: A READER* 232-39 (3d ed. 1994).

Well, one thing that happened between 1976 and 1985 was publication of a batch of law review articles like this one. What did Kaden’s piece add, if anything, to the argument laid out by Justice Rehnquist in *National League of Cities*? Does the case against the Wechsler thesis seem stronger in 1985 than it did in 1976?

Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 Vanderbilt L. Rev. 1623 (1994).

So what ever happened to the Wechsler thesis?

Looking Back/Looking Forward:

Judith Resnik, Andrew Sternlight, & Jason Bertoldi, *The Federal Courts in Decline? The Last Century of Filing and Growth Rates* (draft, 2014)

Additional readings for the last hour will be posted after the semester begins, and we can determine as a group about which areas of contemporary federalism debates will be the closing hour's focus.