

Boston College
Political Science Department
PO 728 American Federalism: Politics and Political Economy

Michael S. Greve

Spring 2004

Time:	Monday 2-4
Office Hours:	Mondays of classes, 4-6 (McGuinn 226)
Contact:	(202) 862-4874 / mgreve@aei.org
Local contact:	Alexandre Provencher-Gravel (provenal@bc.edu)

Course Description

This graduate seminar examines federalism’s “political economy”—that is, the ways in which a federal Constitution and its central institutional arrangements shape policy and politics. The first half of the course is devoted to a theoretical examination of federalism and its institutional dynamics. The second half examines federalism “in action.” We will study a broad range of (mostly contemporary) policy issues, from Internet taxation to endangered species regulation, so as to gain a better understanding of how theoretical models apply to, and institutional arrangements play themselves out in, particular political settings.

What This Course Is And Is *Not*

While the first part of the course is devoted in large measure to a study of the *Federalist Papers*, this is *not* a course in political theory, constitutional development, or the history of ideas. Rather, we will use Publius as the surest guide to an understanding of federalism’s institutional dynamics. In addition, we will draw on modern scholarship from a broad range of theoretical perspectives. A few examples suggest the focus and flavor of the discussions:

- Modern theorists often describe federalism as a form of institutionalized competition among governments. Publius, however, does not mention state competition (except destructive “competition” in the form of tariffs and other “rival and spiteful measures”). Why is that? Further, or perhaps however: the Constitution does structure state-to-state relations in specific ways (for example, through prohibitions against duties and discrimination against sister-state citizens). To what extent do those rules establish a *competitive* federal regime?
- Virtually every modern federal constitution, including the European construct, contains a list of “protected” state functions. The U.S. Constitution does not. Is that an oversight? To what extent does the theory of enumerated powers (as explained by Publius) serve as a substitute?
- Publius explains that only two ways exist to combat centrifugal tendencies in the states: direct legal coercion over individual citizens by the central government (without the intermediation of the states), or military force. Modern federal systems (including ours), however, typically rely on a third mechanism to secure state compliance—transfer payments to the states. Publius does not mention that device. Why not? To what extent are such intergovernmental arrangements consistent with the American constitutional scheme? Are they a viable (and attractive) alternative to legal supremacy?

- One can read the *Federalist Papers* as a brief for a very limited national government. It can also be argued, however, that the authors expected state government to atrophy. Which is it? What determines the outcome? Is it possible for federal regimes to institutionalize a permanent balance of powers and division of functions? In short, can federal regimes be stable?

Prerequisites

No formal prerequisites. However, the seminar is most suitable for students who have successfully completed at least one or two of the following courses: Introduction to American Government (graduate); some course (such as American Political Theory) devoted to a study of the Federalist Papers; Constitutional Law (pre-law undergraduate); Microeconomics (undergraduate).

Requirements

One short paper (5-7 pp); term paper (20-25 pp); one oral presentation, in connection with either the short or the term paper.

The short paper will summarize and discuss one or two articles or book chapters—significant contributions to the scholarship—that are not on the list of required readings.

Due date: February 23

The term paper will research, describe, and explain the operation of federalist institutions and dynamics in the context of a specific policy debate or controversy. Students may draw the topic from a prepared list (attached) or else, propose a different topic. However, *all topics require the instructor's prior approval*.

Due dates: Topic and bibliography submitted – February 9
 5 page explanation of topic – February 16
 First draft (required) – April 5
 Final draft – May 3

Grading: Short paper – 15%
 Oral presentation – 15%
 Class participation – 20%
 Term paper – 50%

Class absences will affect your participation grade.

Readings

We will use the following edition of the *Federalist Papers* which includes the Constitution and Articles of Confederation: THE FEDERALIST (Gideon edition), edited by George W. Carey and James McClellan. Indianapolis, IN: Liberty Fund, 2001. Students are required to purchase this volume.

A course reader will be made available.

Readings noted with an asterisk are available on line (usually via Westlaw or Lexis). Links are provided in the course reader.

Schedule and Reading Assignments

Session 1 (Jan. 26): Overview

The United States Constitution (Carey/McClellan).

Thomas R. Dye, *American Federalism: Competition Among Governments* (1990). Ch. 1 (reader 1-34).

Session 2 (Feb. 2): States, Factions, and Size

Federalist Papers No. 1-10, 51, 85 (first two pp.) (Carey/McClellan).

David F. Epstein, *The Political Theory of THE FEDERALIST*. Ch. 1 (pp. 11-26); Ch. 3 (reader 35-103).

*Frank H. Easterbrook, "The State of Madison's Vision of the State: A Public Choice Perspective." 107 *Harvard Law Review* 1328 (1994) (available online through Lexis or Westlaw).

Session 3 (Feb. 12 at 2:30): Federalism and Confederacies

Term paper topic and bibliography due

Federalist Papers No. 11-16, 21-22, 39, 43 (Carey/McClellan).

Articles of Confederation (Carey/McClellan).

Keith L. Dougherty, *Collective Action Under the Articles of Confederation* (2001). Ch. 7 & 8 (reader 104-158).

Albert Breton, *Competitive Governments: An Economic Theory of Politics and Public Finance* (1998). pp. 223 – 263 (Ch. 8.3. & 9) (reader 159-200).

Session 4 (Feb. 16): Federal and State Powers and Disabilities

Five page explanation of term paper due

Federalist Papers No. 23, 27, 33, 42, 44 (Carey/McClellan).

*Richard Epstein, *The Proper Scope of the Commerce Power*. 73 Va. L. Rev. 1387 (1987) (available online through Lexis or Westlaw).

*Commerce Clause cases:

Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1 (1824).

Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935).

Wickard v. Filburn, 317 U.S. 111 (1942).

U.S. vs. Morrison 529 U.S. 598 (2000).

*Dormant Commerce Clause Cases:

Cooley v. Board of Wardens, 12 How. (53 U.S.) 299 (1852).

Camps Newfound v. Harrison, 520 U.S. 564 (1997).

Session 5 (Feb. 23): Taxing and Spending

Short paper due

Federalist Papers No. 30-32, 34-36 (Carey/McClellan).

*Geoffrey Brennan & James M. Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution* (1980). Ch. 9 (available online at <http://www.econlib.org/>).

Robert A. Musgrave, "Who Should Tax, Where and What?" In, Charles E. McLure, ed., *Tax Assignment in Federal Countries* (1983) (reader 201-219).

Edward M. Gramlich, "Intergovernmental Grants: A Review of the Empirical Literature." In, Wallace E. Oates, ed., *The Political Economy of Fiscal Federalism* (1977) (reader 220-241).

*Spending Clause cases:

U.S. v. Butler, 297 U.S. 1 (1936).

South Dakota v. Dole, 483 U.S. 203 (1987).

Session 6 (March 8): Supremacy and Courts

Federalist Papers No. 78, 80-82, 84 (Carey/McClellan).

*Larry D. Kramer, "Madison's Audience." 112 *Harvard Law Review* 611 (1999) (available online through Lexis or Westlaw).

*Stephen Gardbaum, "New Deal Constitutionalism and the Unshackling of the States." 64 *University of Chicago Law Review* 483 (1997) (available online through Lexis or Westlaw).

Session 7 (March 15): Constitutionalism and Constitutional Balance

Federalist Papers No. 17, 45, 46, 51 (re-read), 62, 63, 70, 73, 85 (remainder) (Carey/McClellan).

Peter C. Ordeshook, "Constitutional Stability." 3 *Constitutional Political Economy* 137 (1992) (reader 242-280).

Barry R. Weingast, "The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development." 11 *Journal of Law, Economics, and Organization* 1 (1995) (reader 281-296).

*Jonathan Rodden & Susan Rose-Ackerman, "Does Federalism Preserve Markets?" 83 *Virginia Law Review* 1521 (1997) (available online through Lexis or Westlaw).

Session 8 (March 22): Federalisms: Dual, Fiscal, Competitive, Cooperative

Edward S. Corwin, "The Passing of Dual Federalism." 36 *Virginia Law Review* 1 (1950) (reader 297-308).

Daniel J. Elazar, "Cooperative Federalism." In, Daphne E. Kenyon & John Kincaid, eds., *Competition Among States and Local Governments* (1991) (reader 309-331).

*Roderick M. Hills, Jr., "The Political Economy of Cooperative Federalism." 96 *University of Michigan Law Review* 813 (1998) (available online through Lexis or Westlaw).

Session 9 (March 29): Guest Speaker Pietro Nivola, Brookings Institution

Session 10 (April 5): Pietro Nivola

Session 11 (April 12): Current Federalism Issues--Antitrust

Please note: even though classes are not scheduled, we will be meeting today

**Parker v. Brown*, 317 U.S. 341 (1943).

Frank Easterbrook: "Antitrust and the Economics of Federalism." *Journal of Law and Economics* (1983) (distributed).

Michael DeBow, "State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal." (2004) (distributed).

Richard Posner, "Federalism and the Enforcement of Antitrust Laws by State Attorneys General." (2004) (distributed).

Session 12 (April 26): Current Federalism Issues—State Compacts

Felix Frankfurter and James Landis, "The Compact Clause of the Constitution: A Study in Interstate Adjustments," 34 *Yale Law Journal* 685 (1925) (distributed).

Martha Derthick, *Up in Smoke* (2002): chapters 5, 7-11.

W. Kip Viscusi, *Smoke-Filled Rooms: A Postmortem on the Tobacco Deal* (2002) (excerpts distributed)

**U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1982).

Jerry Sharpe, "State Taxation of Interstate Businesses and the Multistate Tax Compact: The Search for a Delicate Uniformity," 11 *Columbia Journal of Law and Social Problems* 231 (1975) (distributed).

*Optional: Michael Greve, "Compacts, Cartels, and Congressional Consent." 68 *Missouri Law Review* 285 (2003) (available online through Lexis or Westlaw).

Session 13 (May 3): Current Federalism Issues--Preemption

The Law of Preemption: A Report of the Appellate Judges Conference, Antitrust Section, American Bar Association (distributed).

**Medtronic v. Lohr* 518 U.S. 470 (1996).

**Geier v. Honda*, 529 US 861 (2000).

Gary Young, "FDA Strategy Would Preempt Law Suits: Does it Close off Vital Drug Data?" *National Law Journal*, March 1, 2004 (distributed).

*Optional: Michael Greve, "Federalism's Frontier." 7 *Texas Review of Law and Policy* 93 (2002) (available online through Lexis or Westlaw).

Term paper due

Suggested Term Paper Topics

Historical

The states' role in the development of cooperative federalism (from *Massachusetts v. Mellon* and *Hammer v. Dagenhart* to *Steward Machine* and *U.S. v. Darby*).

Why do securities regulation and corporate law follow radically different models of federalism?

Federal Entitlement Programs

The states' role in the design and implementation of the No Child Left Behind Act.

State drug purchases, price controls, and reimportation.

Who benefits from sovereign immunity?

Environmental Policy

State and local programs under (or in avoidance of) the Endangered Species Act.

Federal-state relations in wetlands protection

State programs and lawsuits to clean the air.

Whatever happened to the Ozone Transport Commission?

State Law Enforcement

State participation and leadership in multi-state prosecutions (Microsoft).

The allocation and distribution of fines and damages in multi-state settlements.

Coordination and conflict in federal-state law enforcement: WorldCom, mutual funds, brokerage.

Regulating Networks

Why do states get to regulate energy transmission?

State and local taxes on telephone and internet access.

Regulating insurance through state associations.

Commerce and “Lifestyle Crime”

Why has gambling spread?

States and private interests in the fight over interstate alcohol sales

Can federal regulation stabilize interstate relations? Homosexual marriage.

Politics

How will BCRA affect state parties and state control over elections?