FEDERAL COURTS

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Third Edition

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For Jeanette

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For Jeanette

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For Clark Byse

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Foreword

A good deal has happened in this field since the first edition of this book. Congress has enacted new statutes, the Executive Branch has asserted novel powers, the Supreme Court has rendered new decisions, and academics have published additional commentaries. Along the way, the federal courts have changed, both as a consequence of these developments and in response to the famous fluidity of public affairs in the United States. I think federal courts can and do move the world. Not much, not often, and not always for the good. But it is their great capacity—their great promise—that makes them exciting. Then again, the world the federal courts inhabit moves of itself, and the federal courts move with it.

My goals nonetheless remain constant—just as I described them nearly a decade ago. I mean in this book to offer a concise introductory account of the constitutional, statutory, and judge-made law governing the tribunals that exercise the judicial power of the United States. I will chiefly be concerned with the federal courts' authority to adjudicate questions of federal law, especially questions touching individual constitutional rights. I will guide readers along the path a litigant must follow, and over the hurdles a litigant must clear, to obtain a federal court decision on the merits of a federal claim. In that sense, I will investigate and explicate matters of genuine operational meaning in the world. Still, my goal is not to brief students and lawyers on the procedures that govern federal legal practice. I want to examine the federal courts as institutions, functioning alongside other centers of governmental power within an overarching constitutional framework.

I lean heavily and shamelessly on the prodigious research and insightful analysis that others have displayed in course materials prepared for law school classes. Inasmuch as those materials form the basis of university education regarding the federal courts, they have *become*, in effect, the corpus of this field. I mean this book to be a supplemental text that helps students work their way through the course books they are asked to master. Accordingly, I often track the subject headings, principal decisions, and commentaries that the authors of law school course books employ.[1]

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1. The first great course book, The Federal Courts and the Federal System, is now in its fifth edition. Previous editors (Henry M. Hart, Jr., Herbert Wechsler, Paul J. Mishkin, and Paul M. Bator) set a standard of excellence that the current editors (Richard H. Fallon, Jr., Daniel J. Meltzer, and David L. Shapiro) have somehow managed to maintain. Other excellent course books also organize and analyze masses of materials: Federal Courts: Theory and Practice (Robert N. Clinton, Richard A. Matasar & Michael G. Collins eds.); Federal Jurisdiction: Policy and Practice (Howard P. Fink, Linda S. Mullenix, Thomas D. Rowe, Jr. & Mark V. Tushnet eds.); Federal Courts: Cases, Comments, and Questions (Martin H. Redish & Susanna Sherry eds.); Federal Courts and the Law of Federal-State Relations (Peter W. Low & John C. Jeffries, Jr. eds.); Federal Courts, Federalism and Separation of Powers: Cases and Materials (Donald L. Doernberg & C. Keith Wingate eds.); Federal Courts: Cases and Comments on Judicial Federalism and Judicial Power (Louise Weinberg ed.); and Federal Courts: Cases and Materials (Charles A. Wright & John B. Oakley eds.). I am a co-editor of yet another book, Federal Courts, Cases and Materials (Michael L. Wells, William P. Marshall & Larry Yackle eds.). Professor Baker

I do not promise to answer all the questions that may arise. Neither my own discussion nor my references to the work of others can hope to be exhaustive or anything like it. I do believe, however, that what I have to say about the federal courts will be of help to readers who wish to consult a text that organizes and elucidates basic ideas. In aid of brevity and coherence, I will deliberately sacrifice some scope. I will give only piecemeal attention to the federal courts' jurisdiction in "diversity" cases to enforce state law claims in disputes between citizens of different states and very little attention to the rules under which cases are processed. I will address state courts only insofar as they relate to questions touching federal courts, and, I am sorry to say, I will neglect tribal courts entirely. I will tailor my account to the typical academic course on the subject, which shares little in common with civil procedure and often spills over into constitutional law and theory.

Federal courts are the product of history, politics, and shifting and developing theoretical understandings of law and legal institutions in the modern world. Small wonder they defy easy description and may at first appear curious, even incomprehensible. To understand them, it is essential to appreciate both their relationship to the Legislative and Executive Branches of the national government and their intercourse with the states and state courts. Accordingly, I will devote substantial space to the authority that Congress enjoys to establish federal courts in the first instance and to prescribe their purview, to the authority that state courts retain to adjudicate federal questions, and to the structural arrangements the resulting allocation of power both reflects and fortifies. I will dedicate even more space to the role federal courts play in protecting individual federal rights against encroachments by the states. The operative constitutional themes are everywhere apparent: the separation of powers, federalism, individual liberty, and the unique form of democracy that has developed in this country.

My approach is descriptive, not prescriptive.[2] That will be apparent from the manner in which I try to weave materials together in pursuit of a coherent whole. I scarcely expect many readers to devour this book from start to finish. Some will take it a chapter at a time, perhaps with some backing and filling. Others will dip into it for guidance on particular points. Yet over the years, I have become convinced that these ideas can best be digested in the order I adopt here. I mean, then, to offer a linear treatment, which builds on itself as the manuscript progresses. The law in this field is not a seamless web. I will do my best to present an organized treatment without imposing discipline where the materials themselves resist.

Having stated my expository objectives, I hasten to say that the really important and interesting aspects of this subject invariably lurk beneath the surface. Decision-makers commonly wrestle with delicate questions of substance indirectly, by contesting what appears to be only the procedural question whether an issue is subject to judicial resolution and, if so, whether a federal court or some alternative tribunal (typically a state court) should bear the adjudicatory responsibility.

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has prepared a valuable (though now dated) collection of other books and articles. Thomas E. Baker, *Federal Court Practice and Procedure: A Third Branch Bibliography*, 30 Tex. Tech. L. Rev. 909 (1999).

2. I collected my personal views on selected issues in Reclaiming the Federal Courts (1994). Readers should be aware that I served as counsel in one of the cases I discuss in this book: *Triestman v. United States*. In other cases, I wrote *amicus curiae* briefs in the Supreme Court on behalf of the American Civil Liberties Union: *Beard v. Banks*, *Bell v. Cone*, *Bousley v. United States*, *Brecht v. Abrahamson*, *Danforth v. Minnesota*, *Gilmore v. Taylor*, *Hohn v. United States*, *McFarland v. Scott*, *Miller v. Fenton*, *Murray v. Carrier*, *O'Neal v. McAninch*, *Sawyer v. Whitley*, *Stewart v. Martinez-Villareal*, *Michael Williams v. Taylor*, *Terry Williams v. Taylor*, and *Withrow v. Williams*. In *Wright v. West*, I filed an *amicus* brief on behalf of an *ad hoc* group of law teachers. I consulted with the attorneys in many other cases.

To put the point bluntly, the doctrines I will examine in this book are not always the value-neutral administrative devices they seem to be. They often reflect ideological perspectives on what the American governmental structure should be and how it should function. And in some instances at least, they are instruments for advancing or discouraging the claims in issue. When a citizen asks a federal court for help regarding a federal claim, the judge charged to say whether the court's doors are open cannot be (and in the real world is not) indifferent to the possibility that the answer may determine whether the claim is vindicated at all.

The law touching federal courts bears profound significance for the very nature and character of the American order of things. Certainly, this body of law adjusts the distribution of power within the national government and between the national government and the states. Behind those structural arrangements lie other sensitive questions—about governmental incursions on individual liberty, governmental laxity in the enforcement of federal law, and private indifference to the public interest. I will not attempt to resolve the ideological controversies these materials evoke. Yet I will certainly identify and explore them. To do otherwise would be to miss half the picture (and nearly all the fun).

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