Federal Courts

Federal Courts

Cases and Materials on Judicial Federalism and the Lawyering Process

FIFTH EDITION

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To Diana, Jeffrey, Matthew, and Melissa, ADH

To Heather, Brandon, and Benjamin, DRS

To Cameron and Potter, RWS

To Carissa, Hattie, and Dorothy, FAH

To Emily, DTM

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Preface to the Fifth Edition

In the Preface to the First Edition (reprinted immediately following), we explained our basic approach in writing a new Federal Courts casebook. We would build on the traditional model of the Federal Courts course — a model that focuses on issues of federalism, separation of powers, and institutional competency — but would place equal emphasis on a second component: giving students the grounding they need to be effective lawyer-litigators. In this Fifth Edition, we continue that approach, but we have made a number of modest changes in implementing it.

The most significant changes in this edition are in Chapter 8, on federal common law, and Chapter 12, on removal jurisdiction. In Chapter 8, we have replaced *Minneci v. Pollard* with *Ziglar v. Abbasi* as a principal case on the availability of *Bivens* actions. *Ziglar* reverses the presumption announced in *Bivens* in favor of recognizing implied rights of action to recover damages for violations of constitutional rights. Going forward, federal courts typically should not recognize new *Bivens* actions.

In Chapter 12, we have added a new subsection, including a new principal case, on the practice that has been referred to as "snap removal." At the time of the Fourth Edition, the practice was not widely known, and no court of appeals had considered whether the statute allows it. In 2018, the Third Circuit upheld the permissibility of the stratagem; two other circuits soon followed suit. The issue is of substantial practical importance, and it also provides a pointed illustration of the conflict between "textual" and "purposive" approaches to statutory interpretation. To make room for the new subsection, we omitted the mterial on stipulations to the amount in controversy.

We have also made other, more modest changes throughout the Fifth Edition. We have revised Chapter 3 to account for the Court's change of focus in addressing justiciability. We trimmed some of the taxpayer standing coverage, and we expanded sections discussing state standing and legislator and legislative standing.

In Chapter 14, we have added a new Note on "Qualified Immunity Reform," which discusses the host of proposals in Congress—none of which has yet become law—to modify or eliminate qualified immunity by amending Section 1983. The Note also examines the most prominent criticisms of current qualified immunity doctrine, which have grown even more forceful as part of broader calls for police reform.

In Chapter 15, the discussion of the two exceptions to the retroactivity bar of *Teague v. Lane* has been updated to reflect that the Court has declared the exception

for watershed rules to be "moribund," while struggling to offer a consistent definition of the exception for substantive rules.

We have also updated Chapter 21, on non-Article III tribunals, to highlight the Supreme Court's recent decision in *Oil States Energy Servs., LLC v. Greene's Energy Group, LLC*, which extended the public-rights doctrine to patents.

The small number of new principal cases may appear surprising, but we emphasize that we have not replaced older cases simply because a new decision has come down on the same topic. When an existing case presents the issues in a way that makes for an effective classroom experience, we have kept it, even though a more recent case might add an interesting new wrinkle.

* * *

There have been three changes in the membership of the Supreme Court since publication of the Fourth Edition: In 2017, Justice Neil Gorsuch was appointed to fill the seat made vacant by the sudden death of Justice Antonin Scalia early in the 2015 Term. In 2018, Justice Anthony Kennedy retired; he was replaced by Justice Brett Kavanaugh. Finally, Justice Ruth Bader Ginsburg died shortly before the start of the 2020 Term. President Trump appointed Justice Amy Coney Barrett to fill that seat. Appendix B provides an updated table of the Justices.

* * *

There has also been a change in the authorship of the casebook. The authors of the Fourth Edition welcome Professor Derek T. Muller of the University of Iowa College of Law as a new co-author. At the same time, all of the current authors join in acknowledging the many contributions to the structure, content, and approach of the casebook made by Provost Lauren Robel (Indiana University-Bloomington), one of the two founding authors of the book (along with Professor Hellman).

* * *

In preparing this new edition, we have continued the approach followed in the four prior editions. First, we have concentrated on the main lines of doctrinal development and their implications for future disputes. In doing so, we have emphasized elements of litigation strategy and the practical application of Federal Courts doctrines and rules, as well as the underlying policy and institutional-competence issues.

Second, we have edited the cases with a relatively light hand. We have also attempted to keep the decisions readable; thus, some brackets and internal quotation marks have been omitted from quoted material within cases.

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Preface to the First Edition

This book is the product of our rethinking of what a Federal Courts course should accomplish in the twenty-first century. The traditional course focuses on issues of federalism, separation of powers, and institutional competency. That focus provides a powerful intellectual model for organizing the materials that make up the field of study, and we have built on its insights. But the traditional model falls short in giving students the grounding they need to be effective lawyer-litigators.

Lawyers are goal-oriented. From their perspective, the American system of judicial federalism is important because it sets up four possible goals: getting into federal court; staying out of federal court; gaining the benefit of federal law; or avoiding the detriment of federal law. This book concentrates on providing the doctrinal and practical education that will enable lawyers to identify and pursue these goals effectively in the service of their clients, while assuring that they understand the underlying tensions and issues that will shape the law in the future. The emphasis of the book as well as its organization flows from this principle.

Emphasis. As one would expect, there is a core of material that is common to all Federal Courts casebooks. However, there is also wide latitude for differences in emphasis. Two major themes set this book apart from others.

First, we provide a comprehensive and unified treatment of the litigation of federal questions in state courts. To appreciate the issues involved in choosing between federal and state court, a lawyer must have an understanding of how federal questions are litigated in a state judicial system. In Part Two, we give sustained and systematic attention to the role of state courts as a forum for litigation of federal issues.

Second, the book is grounded in the realities of litigation today, rather than the assumptions that prevailed during the Civil Rights Era. Of particular importance is the strong tendency of defendants in civil litigation to prefer federal over state court. As a consequence of this development, the statutory device of removal now occupies a central place in litigation strategy. It is no accident that during the last 20 years virtually all of the Supreme Court's decisions on district court jurisdiction have come in cases in which the plaintiff has challenged the defendant's removal of the suit from state to federal court. This casebook treats removal pervasively, with an emphasis on the issues that dominate litigation practice today.

Features. In many law schools, Federal Courts has a reputation as a difficult course. This is not surprising; to some degree, difficulty is inherent in the subject. But the authors believe that the law of Federal Courts can be made understandable without

sacrificing either depth or the intellectual rigor that is the hallmark of this area of study. Three features of the book promote this goal.

First, the book concentrates on the main lines of development and their implications for future disputes rather than traveling down every byway of doctrinal refinement. Major cases are set forth in full or in extended excerpts. The note material is extensive, but without a proliferation of citations to lesser cases that would only distract students from the important points. Nor is there a profusion of bibliographic references to secondary sources. In short, the book aims for depth rather than detail.

Second, to enable students to understand difficult material, it is essential that the various topics be organized into larger, well-defined units of study. The organization of a Federal Courts casebook should not simply reflect considerations of convenience; it should serve a pedagogical purpose. To that end, the organization of this book reflects a functional, *task-oriented* approach. For example, one task lawyers undertake is that of litigating federal questions in a state court. Part Two of the book presents the material relevant to that task. Another task is that of persuading a federal court to apply a rule of decision other than state law — the default law in our system of limited national government. That is the subject of Part Three. Another task is that of using federal court as a forum for challenging state official action. In Part Six, that task receives unified treatment.

Third, in addition to cases, notes, and questions, the book makes use of problems. Not all topics lend themselves to the problem method, but many do. The problems in the various chapters have been carefully designed to zero in on (a) points settled by the cases students have read; and (b) questions left unanswered or falling between precedents. Many are based on recent cases that did not go to the Supreme Court.

The best way to get a feel for the book's approach is to peruse the Table of Contents. We particularly invite attention to the sequence of topics, which has been carefully designed to reinforce learning. At the same time, the material has been subdivided into numerous smaller units to allow for maximum flexibility in choice of coverage.

Editing of cases. Cases have been edited for readability and as teaching tools; they should not be used for research purposes. Omissions are indicated by brackets or ellipses; alterations are indicated by brackets. Most footnotes have been omitted; however, footnotes in opinions and other quoted material retain their original numbers. Citations to cases other than those in the Casebook have generally been deleted. Brackets and internal quotation marks have been omitted from quoted material within cases. Lengthy paragraphs have sometimes been broken up to promote readability. References to "petitioner" and "respondent" have sometimes been replaced with party names or positions in the lower court.