HART AND WECHSLER'S

THE FEDERAL COURTS AND THE FEDERAL SYSTEM

SECOND EDITION

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University Casebook Series

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Mineola, N. Y.
The Foundation Press, Inc.
1973

Library of Congress Catalog Card Number: 72-93837

Hart et al., Fed.Courts & System 2d Ed. UCB
4th Reprint—1977

PREFACE TO THE SECOND EDITION

This volume *is* a second edition; it does not purport to be a new book. In fact the three new editors joined in this project precisely because they liked and admired the first edition and were interested in helping to maintain its usefulness.

The book retains the historical depth, the organization, and much of the text of the first edition, as well as its editorial method. In addition we have made an effort to retain wherever possible the special flavor brought to the book by the style and personality of our late colleague and friend, Henry Hart. Thus we have kept intact the entire text of his celebrated "dialogue" on Congressional power to control the jurisdiction of the federal courts (using the footnotes and additional text notes to add relevant post-1953 material). To cite another example: we have preserved the text of Hart's characteristically fierce attack on the Klaxon case, although our own questions about the attack are then raised in turn.

Much of course has happened since 1953. In some instances accounts of these developments have simply been added to the existing materials. In others, subjects have been thoroughly reorganized. In a few cases it is fair to say that the treatment and organization of a given subject is virtually entirely new.

There are frequent references in the text to the American Law Institute's Study of the Division of Jurisdiction Between State and Federal Courts (cited in this volume as "ALI Study"). The statutory proposals embodied in the Study (with which three of the editors were involved) were introduced in Congress in 1971 by Senator Burdick of North Dakota. Students should have the text of these proposals before them in connection with the study of this volume and they will be included in forthcoming editions of the statutory supplement designed for use with this book.

Much of the work done on this edition was collaborative; drafts were circulated and extensively discussed among the four editors. Nevertheless, ultimate responsibility for various parts of the book was divided among the four of us, as follows:

Chapter I	– Bator
Chapter II	– Mishkin
Chapter III	– Bator
Chapter IV	–Bator
Chapter V	–Mishkin
Chapter VI	
Secs. 1–4	– Shapiro
Sec. 5	– Bator
Chapter VII	
Secs. 1–2	– Mishkin
Sec. 3(A)	– Bator
3(B)	– Mishkin
3(C)	– Bator & Shapiro
Sec. 4	– Shapiro
Chapter VIII	– Shapiro
Chapter IX	– Wechsler
Chapter X	– Bator
Chapter XI	– Shapiro

A few notes on questions of form may be in order. Although we recognize that the denial of certiorari by the Supreme Court may have some significance to persons besides the litigants themselves, we have economized on space by omitting this reference in the citation of state and lower federal court cases, except in the few instances where it had special relevance. With respect to principal cases and quotations in text, all omissions, whether of a few words, a paragraph, or several pages, are indicated by * * *. No indication of footnotes omitted from principal cases and from quotations is given; but those footnotes which have been retained carry their original numbers.

Professor Stanley Katz, of the University of Chicago Law School, served us as consultant in connection with the revision of the historical materials in Chapter I, and was of great help in enriching and bringing up to date the bibliographical materials in that chapter.

Doris Wechsler and the following law students at Columbia, Harvard, Pennsylvania and Stanford helped at various times with the research and with the preparation and checking of the manuscript or proof: John Clair; Robert C. Clark; William M. Considine; Caryn Edmunds; Charles E. Roh; Bruce G. Vanyo and Jonathan D. Varat. Their assistance is gratefully acknowledged. We are also grateful to Rhoda L. Bauch, Winifred E. Cole, Ellen V. Davis, Sally Littleton, Beverly O'Leary and Janet Saia, who did the typing, and to Meira G. Pimsleur, who prepared the index.

Permission to quote from the following is gratefully acknowledged:

Eugene Gressman, *Much Ado About Certiorari*, 52 Georgetown Law Journal 742 (1964), © 1963–1964 by the Georgetown Law Journal Association.

Hon. Henry Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. Law Review 383 (1964), © 1964 by New York University.

Hon. Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chicago Law Review 142 (1970), © 1970 by the University of Chicago.

P.M.B.
P.J.M.
D.L.S.
H.W.

November, 1972

PREFACE TO THE FIRST EDITION

I.

One of the consequences of our federalism is a legal system that derives from both the Nation and the states as separate sources of authority and is administered by state and federal judiciaries, functioning in far more subtle combination than is readily perceived. The resulting legal problems are the subject of this book. They are examined here mainly from the point of view of the federal courts and of Congress when it legislates respecting the judicial system. The frequently neglected problems posed in the administration of federal law by state courts have not, however, been ignored.

The jurisdiction of courts in a federal system is an aspect of the distribution of power between the states and the federal government. Federal jurisdiction, as our subject is usually called, would surely be a sterile topic were it not explored in this perspective. Questions of jurisdiction, however, bear commonly a subordinate or derivative relation to the distinct problem of determining the respective spheres of operation of federal and state law. It is in the effort to identify and to delineate these areas of federal and state authority that the nature of federalism and its crucial problems are, in our view, most significantly revealed. The book is concerned, therefore, with the relationship of federal and state law, both as guides to judicial decision and in everyday affairs, no less than with the jurisdiction of the federal courts and the relation of those courts to the tribunals of the states.

Problems of federal and state legislative competence are, of course, the main subject of elementary courses in constitutional law. Such courses tend, however, to deal with issues of this kind as they arise in clear-cut instances of conflict between federal and state assertions, calling for the adjudication of competing claims of power. These dramatic conflicts touch only the beginnings of the problems, as the materials in this volume should make clear. For every case in which a court is asked to invalidate a square assertion of state or federal legislative authority, there are many more in which the allocation of control does not involve questions of ultimate power; Congress has been silent with respect to the displacement of the normal state-created norms, leaving courts to face the problem as an issue of the choice of law. The book tries to suggest something of the variety of these questions and of their significance; it points to the importance of the postulates of federalism in the common run of litigation; it asks the question whether Congress cannot profitably give increased attention to these issues and attempts to show respects in which such conscious management of our federalism, on this mundane, working level, might produce important gains. Without depreciating the importance of the problems facing courts, we are concerned throughout with the issues of legislative policy that the nature of our system puts to Congress. The legislative possibilities have received less attention than they merit, though they arise throughout the field.

The book deals mainly with these problems of federal-state relationships but it also has two secondary themes. In varying contexts we pose the issue of what courts are good for—and are not good for—seeking thus to open up the whole range of questions as to the appropriate relationship between the federal courts and other organs of federal and state government. We also pose throughout problems of the organization and management of the federal courts, wishing to promote understanding of the task of federal judicial administration and of the means available for its improvement.

The study of federal jurisdiction has commonly been coupled with that of federal procedure. What has been said will make clear why it is uncoupled here. Procedural problems remain in plenty, to be sure, as they must in any study of law administration, but they are raised and dealt with only as incidents of other problems posited by the main themes. In the editors' own schools, systematic instruction in federal practice takes place in procedure courses built around the Federal Rules of Civil Procedure or in which those Rules play a central part. Independently of this, however, we are convinced that studying procedure for its own sake, as of course it should be studied, is alien to the main inquires projected by this book. The effort to combine them in law teaching serves, in our view, to produce a misalliance that accords to neither subject the attention it deserves.

II.

Though this book was planned and executed in the hope that it might be of use in practice as well as in the schools, it is primarily a teaching book, designed to lay the basis for an advanced course in public law. The course that we envisage would be offered to students who are grounded both in constitutional law and in conflicts of laws or, at the least, are studying those subjects simultaneously. In present curricula, courses suited for this purpose vary in length from two to four semester hours, and the book has been designed for accommodation to this fact, as a brief summary of its contents will disclose.

The opening chapter is intended primarily for introductory reading rather than classroom discussion. Looked at either historically or contemporaneously, the federal judicial system is an organic unity; and this chapter seeks to meet the difficulty that effective study of any part of the system necessarily presupposes some familiarity with the whole. It has also the purpose of enabling instructors in shorter courses to confine intensive work to selected aspects of the subject without undue impairment of general understanding.

Most teachers of two or three semester hour courses will probably decide to omit both the second chapter on the nature of the federal judicial function and the third chapter on the Supreme Court's original jurisdiction. The elements of the concept of a case or controversy are ordinarily considered in basic courses in constitutional law. In an advanced course, accordingly, choice lies between thorough study and either complete omission or review of only the basic principles dealt with in the introductory section of the

chapter. The practical importance of the original jurisdiction obviously does not match its theoretical interest. But if this jurisdiction is to be studied at all, the editors believe it should be studied at an early stage. It exemplifies the simplest and most basic form of federal judicial organization, and affords both an illuminating introduction to central problems of federal law and an understanding of the practical considerations which, in the United States, have compelled reliance, for the vindication of federal interests, upon the more complex devices of federal review of state court decisions and the establishment of a full-fledged hierarchy of federal trial and appellate courts. The jurisdiction is rich, too, in suggestions of the problems and possibilities of supra-national judicial organization.

The next five chapters (Chapters IV to VIII, inclusive) are the core of the book and have been conceived as providing the main substance of a two or three semester hour course.

Apart from the Supreme Court's original jurisdiction, the jurisdiction of the federal courts and of the state courts in federal matters are both subject to broad powers of congressional regulation. The fourth chapter examines the main alternatives which are open to Congress under the Constitution in the exercise of these powers. The severe compression of a two semester hour course may force an instructor to deal lightly with the relatively specialized and complex problems of partial or total denial of jurisdiction in any court, although these are among the most challenging in the whole subject. An understanding of the constitutional powers of Congress simply to distribute jurisdiction between state and federal courts, however, is an essential foundation for consideration, throughout the remainder of the course, of the issues of legislative and interpretive policy which the existence of these powers must continually pose.

The scheme of the next three chapters, broadly speaking, is to examine first of all problems of the delimitation of *issues* of federal cognizance before proceeding to the more complex problems of delimitation of *cases* of federal cognizance.

The fifth chapter accordingly begins with the study of Supreme Court review of state court decisions. The Supreme Court, of course, asserts power on occasion to reexamine the decisions of state courts on questions of state law. But these assertions are few and carefully justified in terms of the need of safeguarding federal rights against frustration or evasion. Generally, questions of jurisdiction and of identification of the applicable law are coextensive, with the qualification only that an admittedly federal issue will not be decided unless the decision will control the Court's judgment. Regarded only in terms of abstract jurisdictional doctrine, the cases on the Supreme Court's authority to review state court decisions can be reduced to a few relatively simple propositions. Regarded from the point of view of the considerations which have prompted the identification of particular issues as state or federal, however, they become a rich storehouse for the study of federalism.

Against this background, the sixth chapter turns to questions of identification of the applicable law in the district courts. Some of these questions, it will be observed, are of the same type as those encountered in the preceding chapter. Others, however, are of different types, reflecting crucial differences between an appellate and an original jurisdiction. Some of the new questions result from the peculiar difficulties of a federal jurisdiction based simply upon diversity of citizenship. Others, more significantly, reveal afresh the essentially interstitial nature of federal law and its characteristic inadequacy as a complete guide to the disposition in the first instance even of actions founded upon claims of federal right.

The next chapter (Chapter VII) explores the fundamentals of federal question and diversity jurisdiction. The important section on federal question jurisdiction builds upon the previous study of identification of federal issues, bringing in only the added complexity of distinguishing between those federal issues which serve as a basis of original federal jurisdiction and those which do not. The third section in the chapter singles out for special consideration the distinctive problems presented by actions claiming federal constitutional protection against state officials.

The eighth chapter on general aspects of district court jurisdiction is the last in the central group of basic chapters. It begins with examination of more technical, workaday questions of venue, process, and litigating capacity, jurisdictional amount, and removal jurisdiction. In the concluding sections, however, issues of federalism move again to the forefront in the consideration of special limitations upon the use of the federal courts as tribunals for the administration of state law and of problems of the conflicts of jurisdiction between federal and state courts.

The ninth and tenth chapters reflect a decision to deal in some detail with two of the federal specialties and no others. The book touches upon federal jurisdiction in admiralty and bankruptcy and in patent, trade-mark, and copyright cases only to the extent that doctrines in those fields illuminate general principles. Specialized problems in these fields had better be left to specialized courses. With respect to federal habeas corpus and federal government litigation, however, a different judgment was reached. These matters are not commonly the subject of separate law school courses. They are of high importance and, as even the severely condensed treatment in this volume shows, they have suffered too long from both scholarly and professional neglect. Instructors who are unable to reach these chapters may find it possible and profitable to supplement Chapters VII and VIII by reference to part of this material.

The concluding chapter (Chapter XI) deals with appellate review of federal decisions and with the certiorari policy. The main outlines of federal appellate jurisdiction are implicit, and often explicit, in the cases considered in the main body of the book. The function of the first two sections of this final chapter, accordingly, is one largely of summary and clarification of important technical points. The last section focuses attention on the far-reaching problems of governmental and judicial administration

raised by the Supreme Court's vast power, in the review of both federal and state decisions, not only to decide cases but also to decide what cases it is willing to decide.

III.

A word should be said about editorial method. The principal cases, less than a hundred and fifty in number, have been chosen with a view to their usefulness as the chief centers of classroom discussion. Related cases are abstracted, and related problems discussed, in the accompanying text notes. The text notes, it will be evident, raise many more questions than class discussion can hope to explore. We have proceeded here on the conviction that over-simplification is no service to advanced students and have tried to put before the reader something of the breadth of background and knowledge that an experienced teacher brings to a subject—or a teacher's manual seeks to give an inexperienced one. The general, if not invariable, rule, moreover, has been that references to variant decisions or important secondary discussions ought not to be blind. An effort has accordingly been made to tell enough about the decision or comment referred to so that the reader will not need to get the book from the shelf before he can begin to think about the problem. This relative fullness of discussion, it is hoped, will enhance the usefulness of the book to practitioners as well as to students.

Successive classes of students, using a series of temporary editions of these materials at both the Columbia and Harvard Law Schools, have made suggestions contributing inestimably to the final product. Professor Paul Mishkin of the University of Pennsylvania Law School has made helpful comments from an instructor's point of view. For assistance in preparing drafts of various notes we are particularly indebted to Sterling F. Black of the class of 1949, Columbia; Roger S. Kuhn of the class of 1951, Columbia; Stanton S. Oswald of the class of 1952, Harvard; M. Bernard Aidinoff, Jack A. Hamer and Aram Jack Kevorkian, all of the class of 1953, Harvard. We gratefully acknowledge also the labors of Mrs. Jerome Edward Feinberg of New York City and Mrs. Byron D. Coney of Seattle, Washington, in preparing the manuscript for the printer; of Aram Jack Kevorkian, in making up the index; and of George E. Shertzer of the class of 1953, Columbia; and Alan N. Cohen of the class of 1954, Columbia, in working on the proofs.

H. M. H., Jr.
H. W.

August, 1953

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TABLE OF CASES

The principal cases are in italic type. Cases cited or discussed are in roman. References are to Pages.