The Keepers of the Federal Courts Canon

Author : Steve Vladeck

Date : September 22, 2015

Richard Fallon, John Manning, Daniel Meltzer, and David Shapiro, The Federal Courts and the Federal System (7th ed., 2015).

There are casebooks, and then there's Hart and Wechsler's *The Federal Courts and the Federal System*, the brand-new seventh edition of which arrived this summer. It may seem odd to focus so much attention on the latest edition of a casebook that has been around since before the Brooklyn Dodgers won their only World Series. But this newest iteration by Richard Fallon, John Manning, Daniel Meltzer, and David Shapiro is, for reasons I elaborate upon below, worthy of its own adoration—and should hopefully entice scholars who have long sought other teaching materials to return to the gold standard.

I

As Akhil Amar has explained, the first edition of "Hart and Wechsler," published in 1953, "succeeded in defining the pedagogic canon of what has come to be one of the most important fields of public law in late twentieth-century America," *i.e.*, Federal Courts. And whereas most other legal disciplines preceded the casebooks that purported to define them, Hart and Wechsler all but created not just a curriculum for Federal Courts classes, but also a far deeper sense of why such a course was worth teaching—and taking.

In the process, Hart and Wechsler did not just define the Federal Courts canon; it also served as a bible for the then-nascent legal process school and its focus on "how substantive norms governing primary conduct shape, and are in turn shaped by, organizational structure and procedural rules." Hart and Wechsler thus provoked generations of students and teachers alike to struggle with one of the most important questions in twentieth-century public law: why *federal* courts? With *Brown* (and the Warren Court) right around the corner, its timing could not have been better.

But there was a dark side. Modeled in part on Henry Hart's landmark 1953 *Harvard Law Review* article that was itself dialectic, the book was wonderful for everything except teaching. It was maddeningly rhetorical, hyper-dense, and included far too much significant material in the footnotes and the notes after cases. It also gave incredibly short shrift to any number of vital doctrines and theories that were in tension with the views of Professors Hart and Wechsler themselves and to landmark Supreme Court decisions (Martin v. Hunter's Lessee, most famously) that were difficult to reconcile with the book's broader, state-court-oriented thesis. In the same space, then, Hart and Wechsler both defined the field and made it terribly difficult to teach. In a contemporaneous review of the first edition, Edward Barrett suggested that, "From his first using of the book this reviewer learned how little he really knew about the subject. After the tenth time through the book he expects still to be learning, still to be wondering what the answers are to many of the questions posed by the authors." Barrett meant it as a compliment; generations of law students reacted somewhat less charitably.

The second and third editions, published (mostly coincidentally) at the close of the Warren and Burger Courts, respectively, brought with them remarkable substantive improvements even as the ground shifted under the Federal Courts terrain. As Amar wrote in his review of the third edition, "It is not easy to be both gracious and incisive, but the editors here pull off this combination with remarkable skill." But that graciousness and incisiveness came at the expense of teachability. The treatise-like third edition checked in at nearly 1900 dense pages—packed with notes and footnotes to cover virtually every permutation that could arise from the issues covered in the primary cases. Hart and Wechsler had become unparalleled as a desk reference—as Chief Justice Roberts highlighted at his 2003 confirmation

hearing to the D.C. Circuit—and unteachable to all but the most sado-masochistic law students. It was thus no surprise that the universe of Federal Courts casebooks began to expand at about the same time—from only a handful to over a dozen.

Perhaps because they were published more regularly (in 1996, 2003, and 2009), and perhaps because of the passing of the torch from Paul Bator and Paul Mishkin to Fallon, Meltzer, and Shapiro, the ensuing three editions paid successively more attention to teaching and teachability. Even as the canon grew to encompass novel legal questions raised by current events such as AEDPA and the government's response to 9/11, the successive editions slowly both began (1) to shrink; and (2) to replace rhetorical questions with declaratory summations of doctrinal rules. It was progress, but it was slow.

II

Against that backdrop, the seventh edition is a remarkable achievement for what it both does and does not do. As the editors explain in the Preface,

> we have worked hard to make this edition as user-friendly and teachable as possible. In a number of places, we have prefaced leading cases with brief introductory notes, to explain to students how cases and materials that they are about to read fit into an emerging historical or doctrinal picture. . . . In addition, users of prior editions will notice that although our Notes continue to probe the most challenging problems that lawyers, judges, and lawmakers confront, we have reduced the number of sentences that end in question marks. Where we think we have guidance to offer, we have more frequently stated our views explicitly. Many questions remain, but few are rhetorical or repetitive.

And lest there be any doubt, the book bears out the editors' promise. A bevy of new introductory notes helps students (to say nothing of their teachers) connect the dots from one section to the next. The editors also have trimmed still more fat (the book is now down to 1466 pages), even while adding lengthy treatments of new principal cases, such as Stern v. Marshall, and updated notes for old chestnuts, from Erie to Lincoln Mills to Sabbatino.

But what makes the seventh edition's greatly improved teachability so remarkable is that it has not come at the expense of continuity. Although the book asks fewer rhetorical questions than its predecessor editions, the same fundamental provocation—why *federal* courts—remains, alongside the same principled effort to challenge the assumptions of readers of any and all political, ideological, and/or philosophical persuasions. In an age in which judicial decisions are increasingly perceived as reflecting partisan, result-oriented reasoning, Hart and Wechsler offers a principled alternative—an enduring effort to suggest that there truly are neutral principles governing much, if not most, of the work of federal judges. One need not accept that view of the federal courts in practice to understand its normative attractiveness.

To be sure, there is still plenty of work to be done. And Meltzer's untimely passing of on the eve of the seventh edition's publication only adds to the challenge facing Fallon, Manning, and Shapiro. But perhaps the biggest challenge to the keepers of the Federal Courts canon is the underlying project: As Congress and the Supreme Court continue to constrain the scope of civil remedies available to state and federal prisoners and all others seeking to challenge alleged government misconduct, the question becomes whether Federal Courts as a project might eventually descend into nihilism—and Hart and Wechsler reduced to a work of history. All seven editions provide their own literal and figurative counterweight to that trend. One can only hope that the dramatic improvements to the latest iteration mean that more students and teachers—and, through them, more judges and policymakers—heed their lessons.

Cite as: Steve Vladeck, *The Keepers of the Federal Courts Canon*, JOTWELL (September 22, 2015) (reviewing Richard Fallon, John Manning, Daniel Meltzer, and David Shapiro, The Federal Courts and the Federal System (7th

ed., 2015)), https://courtslaw.jotwell.com/the-keepers-of-the-federal-courts-canon/.