BOOK REVIEWS

TEACHING FEDERAL COURTS FROM A LITTLE RED BOOK

FEDERAL JURISDICTION: POLICY AND PRACTICE. By Howard Fink* and Mark V. Tushnet.** The Michie Co., Charlottesville, Va., 1984. Pp. xx, 907. $32.50.

Reviewed by Thomas D. Rowe, Jr.†

If I were Mark Tushnet and felt the urge that sometimes overcomes him,[1] I could do quite a job on the new federal courts casebook of which he is co-author.[2] I could say that the book suffered from too much sloppiness; that its organization was at times unhelpful and unclear; that its extensive notes occasionally were turgid and opaque; that the quality of its discussion problems was uneven; and that the authors did not always rise above tendentiousness. For each of these criticisms, there would be good foundation.

Yet to say all that, however accurate, without saying more would do a grave injustice to a commendable book. *Federal Jurisdiction: Policy and Practice,* by Professors Howard Fink and Mark Tushnet, is an up-to-date, comprehensive set of materials especially well geared for the classroom. The book is provocative and insightful, with thorough principal case coverage, valuable background explanations, and detailed notes, in a compact 880 pages of text. With rare exceptions, it is inclusive enough to permit some selectivity without making it necessary to forage through reams to pluck out pages worth having students read. Whatever problems exist with it now,[3] it already belongs in the first rank of federal

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1. *See, e.g.,* Tushnet, *Dia-Tribe,* 78 MICH. L. REV. 694 (1980).

2. H. FINK & M. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE (1984) [hereinafter cited by page reference alone].

3. I understand that the publisher plans a second printing of the present edition, which could eliminate many of the minor errors that mar the first printing. The authors decided, helpfully for those using the book the first semester it was in print, to adopt a late cutoff date of April 20, 1984 (see p. viii), yet they made their hardbound volume available in time for classes beginning in late

courts casebooks.

I taught using the Fink and Tushnet volume during the fall semester of 1984, and one aim of this review is to reflect that classroom experience for the benefit of those who might consider adopting the book.[4] To give a sense of how the book is put together and what makes it distinctive, the review discusses its coverage, unique introductory chapters, and overall organization; considers some problems the book presents to teachers and students; and deals with the question whether the involvement of Mark Tushnet, prominent as a controversialist on the left of legal academe, has made for a tendentious set of teaching materials.

To begin with, the jurisdictional emphasis in the book's title could mislead. The authors do include all the major areas of federal court jurisdiction: congressional authority to regulate and restrict, justiciability, federal question and diversity jurisdiction, ancillary and pendent jurisdictional issues, and appellate jurisdiction. Those sections account, however, for roughly half the volume. The remainder covers other significant federalism problems treated in most federal courts books, such as implied rights of action, the eleventh amendment, *Erie,* civil rights enforcement, "Our Federalism," and habeas corpus. In every major area I wanted to teach, the book had ample material.

It begins with four chapters that both cover important specific topics and introduce broad recurring themes. The short first chapter outlines the history and present structure of the federal court system and raises themes of "localism" versus "centralism" and the issue of "parity" between state and federal courts. It presents no cases in detail, relying on text and extracts from commentary. The second chapter takes up the constitutional limits on federal judicial authority, primarily illustrated by

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August, with coverage extending through most of the Supreme Court's 1983-84 Term. The speed did exact its price in a moderately high number of small typographical and editing errors, many of which should not survive a new printing.

Some sloppinesses of a slightly larger nature and seemingly not attributable to last-minute proofreading difficulties, however, crept in as well. Several times the first full mention of a case or other authority has been edited out of an opinion, but a later shorthand reference, now cryptic and confusing, remains. One note (p. 522 n.4) refers to a possible compulsory counterclaim on the part of a defendant with no independent claim against anyone. A later note (p. 576 n.1) referring to the same case speaks of the still-living first wife of a decedent as the second wife's sister; even in the unlikely event that this were so, it is confusingly beside the point that the note makes about a proeedural issue in the case. (With admirable impartiality, the authors mis-cite one of Professor Fink's own articles—Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19,* 74 YALE L.J. 403 (1965), cited at p. 586 to volume 79.) Fortunately, such errors are not common, but those mentioned are not the only ones and unnecessarily mar a generally well-edited book.

4. Because I have only looked through rather than taught from other federal courts casebooks, the emphasis in this review will be on the Fink and Tushnet book itself without attempts at speeific comparisons.

Osborn v. Bank of the United States[5] (p. 23) and *Martin v. Hunter's Lessee*[6] (p. 40). The third chapter introduces the theme of the relationship between Court and Congress, exemplified by implied constitutional and statutory rights of action in such cases as *Bivens*[7] (p. 57) and *Cort v. Ash*[8] (note at p. 76). The fourth chapter closes a circle by returning to concerns raised at the beginning, treating the tension between federal and state court authority in enforcing federal rights, primarily in cases under section 1983.[9]

These introductory chapters, which account for about an eighth of the book, proceed on two main levels and require some professorial explicitness to keep students from missing the forest for the trees. Thrown into rather complex problems on a first level—the differences between congressional authority over constitutional and statutory rights of action, for instance—students can readily overlook the broader theme of Court-Congress tensions which Fink and Tushnet are introducing at the same time on a second level and for which the implied rights problem serves as an example. The complexity of the authors' presentation in these early chapters illustrates a point that holds for the work as a whole: this is not a book for teachers who want only the cases, without distraction from theoretical concerns at or near the surface in their materials. But I like what the authors do in their introductory section, and several times later in the course students spontaneously invoked the general themes from the early chapters in connection with issues that arose as we proceeded. Fink and Tushnet provide the basis for considerable richness in the study and presentation of the material, although in ways that demand the attention and imagination of students and professors alike.

Following the introductory section, the next two chapters pursue further the theme of federal-state tensions in two quite distinct areas—the eleventh amendment and the *Erie* doctrine. The logic of the authors' organization here seems to be on their higher, thematic level, rather than in terms of any apparent relationship of the specific subject matter. Their themes are evident enough from the previous chapters, though, and some

5. 22 U.S. (9 Wheat.) 738 (1824) (defining article III judicial power broadly to include any case in which federal question "forms an ingredient of the original cause").

6. 14 U.S. (1 Wheat.) 304 (1816) (United States Supreme Court's appellate jurisdiction includes power over cases from state courts).

7. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (violation of fourth amendment ban on unreasonable searches and seizures by federal agent gives rise to cause of action for damages despite lack of specific federal statute addressing issue).

8. 422 U.S. 66 (1975) (enunciating criteria for judicial implication of right of action based on federal statute not specifically creating private cause of action).

9. 42 U.S.C. § 1983 (1982) (authorizing federal cause of action for deprivation of federal rights under color of state law).

professors might want to teach these next two in different sequence—the eleventh amendment with other immunities, and *Erie* with diversity jurisdiction or with other aspects of the law applicable once federal jurisdiction has been properly invoked. The subtlety of the authors' underlying ideas at points such as this suggests a need for a teachers' manual; although I thought a good deal about their themes and interconnections and tried to bring these out in class, at times the authors' logic escaped me. In the book itself these larger connections are, perhaps appropriately, only sporadically drawn in such explicit fashion. Their complexity, however, underscores the need for a manual to disclose the hidden ball.

After the first six chapters, about a fourth of the volume, the overall organization becomes more conventional. The book proceeds through Court-Congress issues (political questions, congressional delegation of article III matters to non-article III federal tribunals, and congressional power over jurisdiction); justiciability; diversity and federal question jurisdiction, including removal, multiparty joinder and ancillary jurisdiction, and federal-state res judicata; federal-state court interface ("Our Federalism," structural injunctions, abstention, civil rights damages, and habeas corpus); and appellate jurisdiction of both the Supreme Court and the federal courts of appeals. The authors generally maintain a high standard of intelligent case selection, with a particularly good mix of old classics and modern leading cases; inclusiveness without excessive detail; and extensive, thoughtful notes that usually are not overwhelming. A few types of problems do recur often enough to warrant discussion here. To make the teaching go smoothly, however, the book requires at most some modest reorganization and trimming for class study, supplementation with one or two key omitted cases, and explicit mention to the class of occasional problems with the text.

Because the authors' organization sometimes is questionable, someone teaching from this book for the first time would do well to stay a few jumps ahead of the class and think about the exact order in which to assign materials within chapters. The political question doctrine, for example, has a good deal in common with, and is often treated alongside, the other justiciability doctrines of standing, ripeness, and mootness. It thus seems unhelpful for it to come at the beginning of Chapter 7, separated from the remainder of the justiciability material (in Chapter 8) by the *Northern Pipeline*[10] (p. 229) and *Tidewater*[11] (note at p. 256)

10. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (partially invalidating Congressional assignment of federal bankruptcy jurisdiction to non-article III bankruptcy judges).

problems and a section on congressional control over federal court jurisdiction.

Similarly, in their *jus tertii* section the authors begin with a leading case (*Broadrick,*[12] at p. 335) on overbreadth, shift to notes and a case on general *jus tertii* doctrine (which might better have come first), and then conclude with notes on overbreadth. This is tough enough stuff for most students without the added burden of going from pillar to post and back again to bring related material together. Here, as elsewhere, it could be that I am missing some insight that explains the authors' decision to arrange the materials as they did. I don't think my perspectives are so idiosyncratic, though, that all other teachers would escape the same problem. Again, if the authors have something subtle in mind, it would help if they put their thoughts into a manual.

One other illustration of internal organization problems should suffice. The second principal case, and the first really major one, in the multiple-claims-and-parties section is *Field v. Volkswagenwerk, AG*[13] (p. 514), a complex party joinder/ancillary jurisdiction case that divided a panel of the Third Circuit. *Field* is a splendid case—and, in my judgment, a perfectly dreadful one to *lead* with. It may be only a matter of style, but to me it seems far preferable to bring students along through easier basics of joinder and pendent and ancillary jurisdiction (claim joinder, *Gibbs,*[14] permissive party joinder, *Aldinger,*[15] impleader, and *Owen Equipment*[16]) before giving them anything as complex as *Field.* Students definitely should study the case or something like it, but the authors' organization unnecessarily risks having many students drown early in deep water for want of reviewing (or learning) some basic strokes first.[17]

These problems with internal organization are not the only reason why teachers using this book might find it more important than usual to

11. National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949) (upholding, without majority opinion, inclusion of District of Columbia citizens within definition of "state" citizens for purposes of diversity jurisdiction, despite argument that article III judicial power was thereby exceeded).

12. Broadrick v. Oklahoma, 413 U.S. 601 (1973) (upholding the facial constitutionality of Oklahoma statute regulating political activities of state workers where statute was not substantially overbroad and appellant's activity fell within areas which the state had power to regulate).

13. 626 F.2d 293 (3d Cir. 1980).

14. United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (pendent jurisdiction over related state law claim in federal question case).

15. Aldinger v. Howard, 427 U.S. 1 (1976) (no "pendent party" jurisdiction over related state law claim against county in suit under 42 U.S.C. § 1983 (1982) against county official).

16. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1977) (no ancillary jurisdiction in diversity case over plaintiff's claim against nondiverse third-party defendant).

17. Moreover, though *Field* turns crucially on the distinction between Federal Rules 19 and 20, the authors unhelpfully quote only Rule 19 with the case (p. 514), saving the text of Rule 20 for several pages later (p. 528) without any cross-reference in connection with *Field.*

stay more than one class ahead of the students and think about exactly what to assign. Although generally I was pleased with case selection and textual notes, at times case choice is puzzling, and occasionally the notes' sheer length obscures their main points and poses the risk of student tuneout if they are assigned in full. Moreover, the problems included for discussion are irregular in quality and usefulness.

The class actions portion of the book's multiparty section illustrates two types of problems that sometimes crop up with case selection: simple slighting of important cases, and slipping from a focus on federalism problems to one on straight procedure. The subsection starts with the Supreme Court's 1921 *Ben-Hur* decision (p. 549),[18] which has continuing, if limited, significance for federal court jurisdiction over diversity class actions. Fine. But the book has next to nothing on the crucial modern jurisdictional decisions of *Snyder v. Harris*[19] (note at p. 570) and *Zahn v. International Paper Co.*[20] (note at p. 570). Moreover, after *Ben-Hur* it wanders off with two longish and not particularly significant federal district court cases that seem to do little but illustrate the *application* of the criteria of Federal Rule 23 (pp. 555, 561). Since state court systems widely follow the federal civil rules, such problems of application have little special relevance for a federal courts course, unlike the almost uniquely federal issues in *Snyder* and *Zahn*. Short discussion of rule application problems in a note could be useful as background and refresher, but they hardly seem worth four-fifths of the pages devoted to class actions in a book on federal jurisdiction and should be left primarily to basic or intermediate procedure courses.[21] I skipped the book's entire class actions subsection, distributed extracts from *Zahn* with some detail

18. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (to determine whether complete diversity is present, citizenship of named class representatives only and not that of unnamed class members is to be taken into account).

19. 394 U.S. 332 (1969) (class members' claims normally may not be aggregated to meet applicable jurisdictional amount requirement).

20. 414 U.S. 291 (1973) (even when some class members' claims satisfy jurisdictional amount requirement, there is no ancillary jurisdiction over related below-limit claims of other class members).

21. If the authors had sought to write a book on federal jurisdiction *and* procedure in general, the criticism offered here would be beside the point, or at least would have to be made on a different level. The book's focus, however, seems very much on what has come to be widely regarded as the stuff of a "federal courts" course, excluding, for instance, virtually all mention of pleading and discovery. Departures from the emphasis on specifically federal issues thus seem to require a justification that is not apparent in this instance.

Another, and lesser, illustration of wandering from a focus on specifically federal matters is the inclusion of Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), as a principal case (p. 598) even though its main effect is simply to adopt for the federal courts the general modern rule on offensive collateral estoppel. One trouble with such lengthy treatment of peripheral matters is that it makes it difficult to give the class necessary background for the later, specifically *federalist* problems without spending too much time on topics that are more germane to other courses.

on *Ben-Hur* and *Snyder,* and based class discussion on those cases instead.

A professor who followed the time-honored method of assigning the next twenty or so pages for every class, whatever they contained, would likely face mutiny from the students when they came to some of the notes in this book. For the most part the notes are excellent and to the point; but several times the authors get carried away, going on and on in seemingly endless pages of fine print. In these stretches I was selective in making assignments and found much that was valuable, but the notes could be so overwhelming at these few places that more selectivity by the authors—or, again, a teachers' manual emphasizing their main points—would have been welcome. Seven pages (pp. 391-97) of notes after *Lyons*[22] (p. 377), seven (pp. 470-76) on the fine points of federal question jurisdiction right after the essential but fiendishly difficult *Franchise Tax Board*[23] opinion (p. 459), nine (pp. 630-38) with sixteen numbered notes after *Steffel v. Thompson*[24] (p. 627), and four (pp. 783-86) of long lower court extracts on one issue arising out of *Stone v. Powell*[25] (p.763)—these make pretty indigestible lumps.

Selectivity seems in order as well in assigning the problems the authors have included. Such problems can often be valuable foci for class discussion, but their quality in this book is uneven. Some, like the one in the habeas corpus section (p. 716), are accessible yet rigorous and valuable. Others, such as that in the *Erie* chapter asking the student to act as a State Department legal adviser working on a fundamental law for an Israeli-Jordanian-Palestinian federation (p. 163), seem strained and puzzling. Again, a teachers' manual sharing the authors' vision might help.

I have saved for last a question that some will have wondered about from the appearance of Mark Tushnet's name on a federal courts casebook: whether the work is infected with tendentiousness.[26] The

22. City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (victim of police "choke hold" practice who has standing to sue for damages has no standing to seek injunction against practice).

23. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) (reaffirming "well-pleaded complaint" rule for federal question jurisdiction in case involving attempted removal to federal court of state declaratory judgment action in which complaint mentioned federal issue).

24. 415 U.S. 452 (1974) (when no state proceeding is pending, ordinary prerequisites for declaratory relief apply in federal action for declaration of unconstitutionality of state criminal law).

25. 428 U.S. 465 (1976) (fourth amendment exclusionary rule claim not cognizable in federal habeas corpus proceeding by state prisoner who had opportunity for full and fair litigation of claim in state courts).

26. Because intellectual honesty is monopolized by no part of the political spectrum, Professor Tushnet's Marxism and prominent identification with the Critical Legal Studies movement ideally should cause no more automatic concern about tendentiousness in a casebook bearing his name than, say, Paul Bator's judicial conservatism. The discussion in the text is prompted by a hunch that many in the legal teaching profession will approach a casebook co-authored by Tushnet with more

large majority of the book, I think, is not; to the contrary, for the most part the authors have been admirably fair-minded.[27] The book does contain some frank criticism of "conservative" Supreme Court opinions and occasionally suggests alternative approaches. Yet it presents the views of judicial conservatives extensively in their own words and sometimes offers possible rationales for "conservative" trends not developed by the Justices themselves. It suggests, for example (pp. 744, 810), that the habeas corpus statute is so general that it might properly be viewed as a "delegation" to the Supreme Court of authority to define (and, presumably, narrow) the scope of the writ. And at one point it refers to a dissent by Justice Rehnquist as "powerful" and "sensibl[e]" (p. 268).

The book handles controversial areas, in other words, with much balance. I do not mind when the authors express a well-argued view of their own and include enough for students to grasp the choices being presented. At its worst, this is usually a very good book to teach against—in the highly complimentary sense that its controvertible viewpoints are not simply knee-jerk assertions but thoughtful arguments that can provoke further insight and provide a basis for fruitful class discussion.

I do mind, however, an occasional tendentiousness of characterization that can obstruct accurate understanding of cases. It needlessly confuses students as to what the Supreme Court actually held in *Bell v. Hood*[28] (p. 53) (precious little) to identify as its "principle" that "general grants of jurisdiction should be construed to authorize effective remedies for the invasion of legal rights" (p. 55). Apart from some dictum of uncertain sweep *Bell* was quite agnostic on that issue, and the later *Bivens* decision[29] lends itself far better to the interpretation the authors suggest. Similarly, when the book refers unqualifiedly and in bold type to the "demise" (p. 304) of *Flast v. Cohen*[30] (p. 276), it is predictable that many students will get the impression that the case has actually been overruled.

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suspicion than works by other academics, especially since they are likely to feel, from the tone of some of his earlier writings, *see, e.g.*, Tushnet, *supra* note 1, that he has asked for it.

As for Tushnet's co-author Howard Fink, from the portions of the book for which he was responsible (primarily *Erie*, the federal courts' statutory jurisdiction, and the material on multiple claims and parties), I feel unable to hazard any guess as to his politics.

27. A few students did think they detected some signs of bias, and I once noticed the volume referred to as "Tushnet's Little Red Book."

28. 327 U.S. 678 (1946) (nonfrivolous legal claim of deprivation of federal right should be dismissed, if at all, only for failure to state claim upon which relief can be granted and not for want of federal jurisdiction).

29. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (*see supra* note 7).

30. 392 U.S. 83 (1968) (taxpayer had standing to challenge federal expenditures as violating establishment clause).

Thus far, however, it has suffered no worse fate than being sharply (and quite arbitrarily) limited to its facts.[31] This sort of twist, though, is minor and infrequent enough that it would be hard to see anything but a reverse tendentiousness in an effort to make a great deal of it.

Some might, finally, take exception to an explicit view that underlies much of the authors' presentation. As they make plain in their preface (p. vii), for Fink and Tushnet the study of federal jurisdiction does not properly involve the search for some historical "true meaning" of the words of article III and the basic jurisdictional statutes. They see instead a series of compromises between conflicting ideas and interests, especially between "centralism" and "localism" and over the separation of powers, that continue both to influence and to afford a range of choice for legislation and judicial decisionmaking today. This perspective shares some elements with Tushnet's efforts elsewhere to demonstrate the indeterminacy of much legal reasoning, which he uses as a point of departure for attacking liberal theory as lacking in coherence.[32] One might, therefore, wonder if Tushnet is trying to slip a larger hidden agenda into the minds of his unsuspecting readers.

Analyzing Tushnet's motives in this connection, or resolving the substantive issues raised by the authors' perspective, is beyond the scope of this review. In any event, a good deal of the agenda is not at all hidden but stated openly. In many of its applications, moreover, the idea of no historical "true meaning" should be quite noncontroversial.[33] Though the federal courts have constructed a working if sometimes creaky system on the basis of the well-settled complete diversity requirement,[34] for example, it is not at all hard to conceive of *Strawbridge v. Curtiss* coming out either way and a coherent scheme being built upon a minimal diversity rule.

Fink and Tushnet may leave themselves open here to being read as saying more than they intend. Presumably, they do not mean to imply that when the struggle of conflicting strains results in a victory or compromise written into positive law, it settles nothing and judges have the

31. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) (distinguishing but not overruling *Flast* in denying standing to taxpayers seeking to challenge below-market transfer of federal property to church group as establishment clause violation).

32. *See, e.g.*, Tushnet, *supra* note 1; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (arguing that interpretivism and neutral principles were produced by liberal theory to constrain the judiciary, but rest on premises inconsistent with liberalism).

33. *Cf., e.g.*, Smith v. Wade, 461 U.S. 30, 93 (1983) (O'Connor, J., dissenting) (in case about standards for punitive damage awards in civil rights actions, "[t]he battle of the string citations [to Reconstruction legislative history] can have no winner").

34. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1803).

same range of choices as before. If it is fair to add this qualification to their view, then within their overall perspective some matters will be determinate at least in the sense that one or more conceivable positions will have been excluded from the range of possible judicial—or, in the case of constitutional provisions, legislative—choice. Similarly, I do not take them to be implying that we can *never* discern the purposes of the victors in legislative battle well enough to find persuasive support for one among contending interpretations.[35] With these qualifications their "no true meaning" perspective seems fairly unexceptionable, and their emphasis on themes influencing legislative and judicial lawmaking adds helpful elucidation.

As the foregoing pages suggest, this admirable book may not be for everyone. If your preference is to have just the cases, thank you, this is not your book. If you are sensitive to a more than minimal, though not serious, level of editing errors, you will find cause for complaint. If you are unlikely to be able to stay a few classes ahead of your students the first time through in order to think about occasional cutting, supplementing, and rearranging, you could find it troublesome. And I am not sure I would recommend it for very new teachers, who might lack the depth of background needed to conceive of some useful adjustments. But if you want a rich and demanding book from which you can learn a great deal as you teach, and if you can afford some time and patience when you first use it, I commend it highly. I had to work hard teaching from this book, sometimes rather harder than should have been necessary; but thanks to all that Professors Fink and Tushnet put into it, I felt my efforts were well rewarded. I will use the book again with enthusiasm and without hesitation.

35. The authors themselves sometimes seem to take quite seriously constitutional history and its implications for present interpretations. They refer (p. 108), for example, to Reconstruction as effecting a "substantial reworking of traditional assumptions about the relations among individuals, state governments, and the national government" and (*id.*) to recent scholarship as indicating that "Justice Frankfurter was wrong" in a key premise of his dissent on the interpretation of section 1983 in Monroe v. Pape, 365 U.S. 167, 202 (1961).