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Edward A. Purcell Jr.

New York Law School, edward.purcell@nyls.edu

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Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts

FELIX FRANKFURTER AND JAMES M. LANDIS. 1928. *The Business of the Supreme Court: A Study in the Federal Judicial System*. New York: MacMillan [Johnson Reprint. 1972]

Edward A. Purcell, Jr.

The past two decades have witnessed a growing interest in the history of the federal courts. Kermit Hall, who has done as much as anyone to spur that interest, rightly noted only a few years ago that “the activities of the lower federal courts in the United States have only begun to receive the attention they deserve” (Hall and Rise 1991, ix). Recently, however, dozens of works have appeared,¹ and the next decades will surely produce many more. It seems a useful time to take stock.

The basic reasons for the new interest in the history of the federal courts seem fairly obvious. As a general matter, historians across the board have turned toward varieties of social history that explore everyday life and local institutions in delimited areas,² while legal history as a specialized field

Edward A. Purcell, Jr., is professor of law at New York Law School. An earlier version of this paper was presented at the annual meeting of the American Society for Legal History in Seattle, Washington, October 1998. The author wishes to thank Robert G. Bone, Howard S. Erlanger, Daniel R. Ernst, Kermit L. Hall, Rayman L. Solomon, and Bradley B. Williams for their comments and assistance in preparing this essay.

1. For a valuable and periodically updated bibliography see Federal Judicial History Office, Federal Judicial Center, *Bibliography of Publications Related to the History of Article III Courts* (available upon request). The Federal Judicial History Office has also produced another invaluable research tool: Federal Judicial Center, *Directory of Manuscript Collections Related to Federal Judges, 1789–1997*, comp. Peter A. Wonders (Washington, D.C., 1998).

2. The interest in local social history has been stimulated by the work of scholars such as Clifford Geertz who emphasize the critical role of specific local understandings, practices, and

has enjoyed a period of remarkable growth. More particularly, intense debate over the proper role of the federal courts in the decades after *Brown v. Board of Education*, compounded by continuing debates over "structural reform" litigation generally, focused both popular and scholarly attention on the national courts as significant forces of social change.³ A powerful sense among the professional elite that exploding dockets were threatening the integrity of federal justice led to searching examinations of the lower courts and numerous proposals to alter their procedures, jurisdiction, and organization (see Baker 1994; Tobias 1997). Other factors also contributed, ranging from the increased availability of official and financial support for specific court histories to increased interest among historians and social scientists in the evolution of administrative institutions and the processes of "state building" (Suchman and Edelman 1997; Smelser and Swedberg 1994; Skocpol 1992; Wilson 1989; Evans, Rueschemeyer and Skocpol 1985; Skowronek 1982; Chandler 1977). Indeed, there is even a dawning recognition among "federal courts" scholars in the law schools that their field actually has, like all other human phenomena, a history and that it was not born, Athena-like, from the divinely conjoined heads of Henry Hart and Herbert Wechsler.

It is possible, even, that some scholars may have been induced to write histories of federal courts because the subject seemed easily identifiable and its scope readily delimited. If so, they were profoundly mistaken. Writing the history of a court presents the most daunting of scholarly challenges.

To minimize misunderstandings, let me preface my remarks by making clear that I am considering only one type of history, the study of a specific court or subsystem of courts as operating institutions over time. The genre does not, therefore, include many exceptionally valuable types of work that illuminate the history of the national judiciary, such as judicial biographies and studies of particular legal or institutional issues.⁴ More obvious, the genre does not include histories of the United States Supreme Court. That

cultures. See, e.g., Geertz 1983. The resulting literature has become vast and highly specialized. See, e.g., Bynum 1992; Edwards 1997.

3. Most dramatic, of course, was the "heroic" role that the courts of the Fifth Circuit played in desegregating the South. See, e.g., Spivak 1990; Belknap 1987; Bass 1981; Peltason 1961.

4. I am also excluding work on the history of non-Article 3 courts. Lawyers, historians, and social scientists have devoted the great bulk of their research to the more prestigious and long-established Article 3 courts, and discussions of "the federal courts" are almost invariably directed at those bodies. Non-Article 3 courts include not only specialized tribunals such as those dealing with bankruptcy and claims against the United States but also administrative agencies charged with administering federal regulatory and welfare programs. For a variety of reasons—including their specialized jurisdictions, mixed legal and administrative functions, and lower hierarchical and professional status—legal historians have not given them the attention they deserve. Political scientists and students of administrative law have done somewhat better.

For a general history of the rise of regulatory agencies, see, e.g., Keller 1990. The origins of the Securities and Exchange Commission are sketched in Parrish 1970, while the complex

subject poses special and, indeed, unique problems, and it has inspired endless floods of work examining almost every conceivable aspect of the Court's past.

While those special considerations justify excluding Supreme Court histories from the present discussion, there is also another reason—positive and highly salutary—for doing so. Our excessive focus on the Supreme Court—“the Court,” as we reverently call it—has over the years minimized and obscured large areas of American experience that should be recognized and studied as integral parts of our legal history. One of the principal benefits of studying the lower federal courts is the opportunity to recover some part of what is often ignored or, at most, squinted at dubiously as, in effect, the “low life” of the law: the complex interactions between and among principles and their attorneys, and the equally complex interactions of all those players with both relevant social conditions and the institutions, practices, and rules of the legal system. The possibility offered by histories of the lower courts, in other words, is to broaden and vitalize our legal history by making it somewhat less Kantian and somewhat more Dickensian.⁵

I. THE HISTORIOGRAPHY OF THE FEDERAL COURTS: THE INSPIRATION OF FELIX FRANKFURTER

A. Federal Courts' History and Legal Progressivism in the 1920s

An overemphasis on the Supreme Court was one of the principal characteristics of the book that helped inspire and shape much of the writing of federal courts history, Felix Frankfurter's *The Business of the Supreme Court*, a study written with his younger colleague James M. Landis and published in

and contentious history of the National Labor Relations Board is explored in three volumes by James A. Gross 1974; 1981; 1995.

For specialized courts, see, e.g., Seron (1978); Rich (1980); and Bennett, Cowen, and Nichols (1976, 1978).

5. This is not, of course, to minimize the importance of the extensive and excellent work that has been done on the history of the Supreme Court, much of which examines the Justices and the law in broad and sophisticated social, political, and cultural contexts. Many of the volumes in the Oliver Wendell Holmes, Jr. Devise History of the United States Supreme Court illustrate, in particular, the admirable breadth that such histories of the Court may attain. See, e.g., White 1988.

The point in the text is only that a focus on the Supreme Court inevitably obscures or misses many critical aspects of law, the courts, and the overall American legal system. In particular, it blinks the diverse, case-specific, nondoctrinal, and socially contingent nature of the great bulk of legal disputes and formal litigations, and it fails to deal with the overwhelming social fact that approximately 99% percent of all disputes are resolved without formal and final legal judgments. To the extent that one might argue that such informally settled disputes are nevertheless resolved according to the formal rules that the Supreme Court has laid down, the claim is at best unproven. See sections II.D and III.A below.

1928 (Frankfurter and Landis [1928] 1972).⁶ The title was somewhat misleading because the book was not so much a study of the Supreme Court as it was a general history of changes in the jurisdiction of all the federal courts from the Judiciary Act of 1789 to the Judges Act of 1925. Based on the idea that the national judiciary was a coalescing "system" of courts, the book argued that the Supreme Court existed to ensure federal judicial uniformity and to resolve "matters of national concern" and that the function of the lower courts was to serve as "intake" points for that system (Frankfurter and Landis [1928] 1972, 257, 3, 70, 144–45, 220, 242, 285–86, 290, 299–300, 308). The jurisdiction of the lower courts, it emphasized, determined for the most part the size and nature of "the inflow of Supreme Court cases" (Frankfurter and Landis [1928] 1972, 60, 242, 293, 300). To make the federal judicial system more efficient and to relieve the Supreme Court of an unnecessarily heavy docket, the book urged a series of ostensibly "technical" reforms and jurisdictional restrictions. "Hundreds of judges holding court in as many or more districts scattered over a continent," it declared, "must be subjected to oversight and responsibility as parts of an articulated system of courts" (Frankfurter and Landis [1928] 1972, 242).

The Business of the Supreme Court is deservedly a classic. It helped make the lower federal courts a subject of sophisticated historical analysis, and it created both an enduring image of their past as well as a powerful prescription for their future. "The history of the federal courts is woven into the history of the times," it announced (Frankfurter and Landis [1928] 1972, 59).⁷ The nature of their work "is determined by the nature and extent of the predominant activities of contemporary life" (Frankfurter and Landis [1928] 1972, 103).⁸ Equally important, the book taught two fundamental and interrelated lessons. The first was that "procedure is instrumental; it is the means of effectuating policy." Consequently, issues of jurisdiction and procedure "cannot be dissociated from the ends that law subserves" (Frankfurter and Landis [1928] 1972, 2). The second was that even the most arcane disputes about jurisdiction and procedure were, at bottom, disagreements about institutional power and—suggested obliquely—differential social consequences. The most "momentous political and economic issues" of American life, Frankfurter declared, lay "concealed beneath the surface technicalities governing the jurisdiction of the Federal Courts" (Frankfurter and Landis [1928] 1972, vii, 84–85, n. 132, 88–93, 124). Sev-

6. The book was based on a series of articles bearing the same title that appeared in the *Harvard Law Review* between 1925 and 1927. Subsequently, Frankfurter updated his analysis in a second series of articles published between 1929 and 1938, again bearing the same title and appearing in the same journal.

7. Frankfurter, for example, stressed both the shifting political forces that contended over the scope of federal jurisdiction and the changing social sources of the litigation that entered the national courts.

8. Frankfurter's work differed significantly from the relatively "legalistic" and formalistic legal history that was common at the time. See Nelson 1982a, 452–65.

enty years after its publication *The Business of the Supreme Court* remains an insightful analysis, a highly useful reference work, and a thoughtful consideration of many of the most basic issues that mark the history of the national judiciary. Together with Frankfurter's fame as teacher, scholar, political activist, and ultimately a Justice on the United States Supreme Court, the book's admirable qualities established it as a standard authority that is still widely read and cited.

Regardless of its continuing scholarly reputation, however, *The Business of the Supreme Court* was not simply an academic monograph. It was also a carefully designed political instrument.⁹ Failure to recognize that fact has led some to misunderstand the book.¹⁰ In fact, *The Business of the Supreme Court* used history in the same way that a long line of progressive social critics from Thorstein Veblen and Lester Ward to Jane Addams and John Dewey had used it—to denigrate the authority of tradition and replace it with the promise of science.¹¹ “The present jurisdiction of the federal courts cannot rely on tradition, for the distributions [of judicial power between courts] have always been temporary,” Frankfurter explained. “The only enduring tradition has been that of timeliness” (Frankfurter 1929, 274–75).¹² Problems of judicial organization presented practical problems of administration that were best resolved by experts capable of adapting the courts to changing social needs. “We are here in the domain of administrative effectiveness—matters not of principle, but of expediency” (Frankfurter 1929, 274).¹³ Embracing a reformist jurisprudential positivism that assumed

9. For a discussion of the general political context of Frankfurter's work and the relationship between progressivism and the federal courts, see Purcell forthcoming, chs. 1, 3, 5.

10. In part the misunderstanding was due to the fact that some historians of the lower federal courts relied on *The Business of the Supreme Court* without considering Frankfurter's other contemporaneous public writings about the federal courts or his private correspondence with Justice Louis D. Brandeis. Frankfurter amplified his position for different audiences and expanded somewhat on the implications of his work in other publications, including two contemporaneous articles addressed directly to the problems his book discussed. See Frankfurter 1928, 1929. For a variety of reasons—the book contained Frankfurter's most elaborate and systematic treatment of the jurisdictional history of the federal courts; it seemed to be an “objective” scholarly work; it was useful and substantial; and it was available in readily accessible book form—*The Business of the Supreme Court* became the dominant source of Frankfurter's influence over subsequent historians of the lower courts.

11. “Efficiency in government is not merely a new slogan; it is a new insistence. Especially true is it of the United States that alertness to administration is a very late stage in the art of government” (Frankfurter and Landis [1928] 1972, 217). Frankfurter developed the case for administrative expertise and “scientific” government more broadly two years later (Frankfurter [1930] 1964) and emphasized the same ideas in his casebook on federal jurisdiction, Frankfurter and Katz 1931, v–vi.

12. “Framers of judiciary acts are not required to be seers; and great judiciary acts, unlike great poems, are not written for all time. It is enough if the designers of new judicial machinery meet the chief needs of their generation” (Frankfurter and Landis [1928] 1972, 107; see also 13, 59–60, 281; Frankfurter 1928, 514).

13. “Not inherent reasons but practical justifications explain the past judiciary acts and must vindicate jurisdiction in the future” (Frankfurter 1929, 274–75). See Frankfurter 1928, 506.

the benevolent regulatory power of government, the book undermined the jurisdictional status quo, stressed the need for innovative problem solving, and provided ostensibly “neutral” and “professional” support for a series of progressive judicial reforms that Frankfurter hoped to see adopted. *The Business of the Supreme Court* was designed to advance an extensive political agenda that included constraining the reach of the conservative Supreme Court, limiting the ability of corporate litigants to exploit federal jurisdiction, abolishing the doctrine of *Swift v. Tyson* (1842), blocking passage of the proposed federal declaratory judgment act, expanding substantially the issues on which the lower federal courts would defer to state courts, and justifying a series of progressive legislative proposals to restrict the jurisdiction and alter the structure of the national judiciary.¹⁴

Frankfurter tried to disguise, or at least obscure, his political purposes by packaging his effort as a neutral and even scientific analysis of problems that the book characterized as largely “technical” and narrowly “professional.” First, he persistently invoked a wide variety of ostensibly “objective” standards to support his analysis. *The Business of the Supreme Court* bristled with appeals to such authoritative criteria as “disinterested scrutiny,” “scientific accountability,” “solid professional conceptions,” “disinterested wisdom,” “scientific language,” “the demands of an age of specialization,” and “scientific standards of government” (Frankfurter and Landis [1928] 1972, 223, 221, 21, 173, 285, 146, 218). Second, he went out of his way to parade his respect for the dominant antiprogressive legal establishment, which, in his heart, he deeply disdained. He quoted Elihu Root extensively and admiringly, praised both the American Bar Association and Chief Justice William Howard Taft for their efforts to improve the federal judiciary, and cited with approval Taft’s claim that the problems facing the courts could be resolved by improving the “simplicity” of judicial administration and procedure (Frankfurter and Landis [1928] 1972, 223–29, quoting Taft at 228). Third, he urged his reforms in the name of the most neutral and unexceptionable of institutional values: maintaining the high quality and elite professional status of the federal judiciary; relieving the national courts of the needless and undignified burdens of hearing local and “petty” disputes; ensuring the Supreme Court’s ability to deliberate on issues of national importance; structuring an administratively efficient system of courts; and, most fundamental, preserving the “happy relation of States to Nation” (Frankfurter and Landis [1928] 1972, 2).

In its rhetoric and design *The Business of the Supreme Court* was a symbol of transition in progressive politics. Prior to World War I, insurgency

14. “The duty of ascertaining the need for corrective legislation is the essential function of legislatures” (Frankfurter and Landis [1928] 1972, 312). Frankfurter continued his campaign two years later when he criticized the federal labor injunction and defended the pending Norris-LaGuardia anti-injunction bill, which severely restricted the jurisdiction of the lower federal courts in labor cases. See Frankfurter and Greene 1930.

had embraced a wide range of political opinions, including support for socialism and public ownership. The war fragmented the shifting reform coalitions, and the Bolshevik Revolution terrified conservatives. The consequent red scare and the cultural politics of the 1920s identified radicalism with “un-Americanism,” cast deep suspicion on ethnic minorities, brought business to a position of political dominance, and discredited many of the goals of prewar progressivism. Republican election triumphs confirmed those changes, turning the federal government staunchly against the kinds of reform proposals that had been popular before the war. Many progressive intellectuals, some of whom, like Frankfurter, were Jews, responded by rallying to the banners of science and professionalism. Before the war science and professionalism had represented a buoyant faith in the possibilities of collective social action; after the war they represented a tenable intellectual redoubt from which careful sorties could be mounted (see Purcell 1973, 26–27).¹⁵ Legal progressives looked to achieve narrow and pragmatic reforms, and their neutral professionalism gave them the cover that allowed them to address “technical” proposals to the conservative elite. That professional and scientific stance was especially crucial for Frankfurter, for he had kept his political progressivism on public display throughout the 1920s (Frankfurter [1939] 1962, 314). It was not surprising, then, that *The Business of the Supreme Court* proclaimed sweepingly that “questions of federal jurisdiction and procedure are largely matters of a technical and non-partisan nature” (Frankfurter and Landis [1928] 1972, 243, 164).¹⁶

Of course, as the book itself readily attested, Frankfurter knew better.¹⁷ It also announced, after all, that procedure was instrumental and that jurisdiction was power. “[M]y central concern and the driving motive of my interest in the field,” he wrote privately in 1932, was the fact that “under the guise of seemingly dry jurisdictional and procedural problems, majestic

15. See, e.g., Felix Frankfurter to Charles P. Howland, 21 Nov. 1927, box 68, folder 1332, Frankfurter Papers; Frankfurter to John Lord O'Brien, 19 Dec. 1929, box 155, folder 3132, Frankfurter Papers.

16. Robert Bone, in oral comments made at the 1998 annual meeting of the American Society for Legal History, has pointed out that Frankfurter distinguished between two different issues: problems involving the distribution of judicial power within the federal system and problems involving the distribution of judicial power between state and federal courts. He suggests that Frankfurter regarded the former as relatively “technical” and the latter as relatively “political.” The distinction is important, and it reflects much of Frankfurter’s approach. At the same time, however, Frankfurter did not consistently keep the two types of problems separate, and he suggested that the problem of distributing judicial power between federal and state courts was also a “technical,” “practical,” and “administrative” matter. See, e.g., Frankfurter 1929, 274.

17. Frankfurter, of course, did not claim that substantive constitutional questions were technical matters. To the contrary, he stressed that they were questions of policy and politics: “Courts are less than ever technical expounders of technical provisions of the Constitution. They are arbiters of the economic and social life of vast regions and at times of the whole country” (Frankfurter and Landis [1928] 1972, 173, 173–74). He sounded the same theme repeatedly in his subsequent work. See, e.g., Frankfurter and Katz 1931, vi–vii; Frankfurter and Hart 1935, 93–94.

and subtle issues of great moment to the political life of the country are concealed.”¹⁸ Not surprisingly, then, the “objective” standards and neutral values that Frankfurter invoked remained amorphous, and he failed to show how they could mediate among the conflicting economic and political interests that struggled—as his own historical method so clearly and powerfully illustrated—to control the structure and therefore the social consequences of federal jurisdiction. While *The Business of the Supreme Court* purported to rest on objective professional standards, it relied, in fact, on a series of covert and muted judgments of policy that were rooted in his own progressive agenda.

Perhaps of greatest significance for the historiography, as well as the theory, of the federal courts, Frankfurter linked jurisprudential positivism and political progressivism to what seemed an emerging and distinctly twentieth-century conception of the proper role of the national judiciary.¹⁹ The federal courts were essential instruments of national power and the authoritative voice of national law. “The indispensability of the federal courts to the maintenance of our federal scheme,” he declared, “may be taken as a political postulate” (Frankfurter 1929, 274). While the state courts should hear all “essentially local” matters (Frankfurter 1929, 276, 275; 1928, 516–20),²⁰ the federal courts should specialize in cases that involved interests “peculiarly in the keeping of the federal courts,” those that raised questions of national law or presented sensitive “political” controversies about the distribution of power between states and nation (Frankfurter 1929, 275, 273).

Based on that positivist structural premise, the overt policy argument of *The Business of the Supreme Court* was straightforward. The most pressing problem that the national judiciary faced was wildly growing dockets. The federal courts, especially the Supreme Court, could no longer manage their caseloads while at the same time maintaining their uniquely high professional quality. Administrative efficiency, professional craft values, and the need to maintain the federal judiciary’s small and elite status demanded an end to docket “congestion,” and they demanded equally that the national courts specialize in issues that they were professionally most competent and

18. Felix Frankfurter to Herbert Wechsler, 11 May 1932, box 110, folder 2314, Frankfurter Papers. Frankfurter repeatedly cited the statement of Justice Benjamin R. Curtis that “questions of jurisdiction were questions of power as between the United States and the several States” (e.g., Frankfurter and Landis [1928] 1972, 2). As his letter to Wechsler illustrated, Frankfurter fully realized that questions of jurisdiction involved a much broader range of political issues than merely those of federalism.

19. By *positivism* in this context I mean to emphasize in particular the identification of national institutions (Congress and the federal courts) with national lawmaking authority and state institutions with state lawmaking authority. For somewhat different usage in the context of the law of the federal courts compare Fallon 1994 with Wells 1995.

20. Frankfurter noted that in some cases the states would have to improve their judicial procedures to assume their new responsibilities (Frankfurter 1928, 516–20).

institutionally most suited to handle—issues of federal law that were of national importance.

The book thus pivoted on the twin driving themes of the growth of the federal courts and their transformation into specialists in national law (Frankfurter and Landis [1928] 1972, 69–70). It used the former to explain the occurrence and necessity—as well as the desirability—of the latter. By the second half of the twentieth century those elements of Frankfurter's prescription had become major themes in the history of the federal courts.²¹ They had also become fundamental premises of a distinctively twentieth-century jurisprudence that identified the federal courts with federal law, the enforcement of national policy, and—perhaps most important—the vindication of the fundamental federal constitutional rights of individuals (see, e.g., Federal Courts Study Committee 1990; Posner 1985; U.S., Department of Justice 1977; Friendly 1973; Hufstедler 1972; American Law Institute 1969; Kurland 1958).

The growth theme was unavoidable, of course, and its importance undeniable. The federal courts expanded dramatically after 1789, slowly and haltingly through most of the nineteenth century and then rapidly and boldly during the twentieth. The number of judges rose from a handful into the hundreds; dockets ballooned from hundreds of cases to tens and then hundreds of thousands; support personnel—clerks, secretaries, magistrates, bankruptcy judges—appeared and multiplied. Equally important, jurisdiction widened, especially in areas involving federal law issues, while increasing congressional intervention in social and economic affairs broadened widely the substantive scope of national law. Finally, new and more effective system-wide institutional mechanisms—judicial conferences, centralizing administrative structures, and the interdistrict use of federal judges, for example—were introduced to increase the ability of the judiciary to manage growing dockets and discharge its enlarged responsibilities.²²

The theme of transformation seemed equally compelling. From institutions with uncertain prospects, relatively minor social significance, narrowly limited authority over federal law, and low status compared to their established state counterparts, the federal courts evolved into pillars of American government and powerful voices of a supreme and far-reaching national law. To even find appointees who would serve as the first federal judges, a recent court history tells us, George Washington “had to cajole and coerce, often in vain” (Lewis and Schneider 1990, 5).²³ In contrast, in 1911 another one notes, the chief justice of the Washington State Supreme Court resigned his

21. The intertwined themes of growth and transformation pervade the literature. See, e.g., Baum, Goldman, and Sarat 1981–82; Hall and Rise 1991; Freyer and Dixon 1995.

22. By the late twentieth century scholars were studying the federal courts as a bureaucratic system. See Heydebrand and Seron 1990.

23. In Maryland, for example, Washington “had to make several casts before he landed a judge” (Lewis and Schneider 1990, 6). See also Tachau 1978, 7 (not until 1826 was any lower

position to accept appointment as a federal judge for his state's eastern district (Frederick 1994, 128). Entrusted with an increasingly broadened jurisdiction, federal judges came to exercise a powerful influence over American society while ascending to their prestigious twentieth-century position as the nation's judicial elite.

B. The "Transformation" of the Lower Federal Courts

Although Frankfurter's work illuminated the history of the lower federal courts, it also constrained and warped that history. First, by focusing on the role of the lower courts as "intake" points, it encouraged the continued overemphasis on the Supreme Court and its formal rules of law. The result was to minimize the role of the lower courts as independent decision makers. Second, by portraying the lower courts generally as equal units in an increasingly uniform national system, it slighted the many differences that distinguished the histories of various individual lower courts. The federal "system" was a critical normative concept for Frankfurter, and his emphasis on how "the federal judiciary articulates as an entirety" (Frankfurter and Landis [1928] 1972, 70) ignored variation and emphasized homogeneity. Third, by emphasizing the need to constrain docket growth and maintain a small federal judiciary, he helped make a particular institutional problem a central, not to say dominant, issue in the history of the federal courts. Important as it was, that issue was not as rigid nor its resolution as self-evident as Frankfurter suggested; nor, as we shall see, was it unrelated to the political goals he sought to achieve.²⁴ Fourth, *The Business of the Supreme Court* helped keep the history of the courts themselves relatively narrow and formal, focusing attention on internal issues of structure and organization while giving scant attention to broader questions of litigation dynamics and out-of-court settlement practices. Speckled with rich insights, *The Business of the Supreme Court* nevertheless remained formal and proper in its attitude toward law and the courts, in part, no doubt, to ensure that it would remain palatable to its intended elite professional audience.

federal court judge elevated to the Supreme Court, a fact that "suggests that the lower courts were not seen as useful training grounds for judicial eminence").

24. The book's premise that the federal courts should be kept small and "elite" became widely accepted and has repeatedly been invoked to limit their growth. The premise is questionable on a number of grounds. Measured by the number of federal judges relative to the nation's population, for example, the federal courts actually decreased in size between 1789 and 1986. Chemerinsky 1988, 324. Compare Wells 1991 with Posner 1985. Measured by the need to enforce the law and guarantee the rights of American citizens, the premise may seem even less substantial. In fact, the elitist Frankfurterian premise was an element in his progressive political agenda aimed at limiting the size and reach of a conservative national judiciary. It seems no surprise that in the late twentieth century political "conservatives" attacking "liberal" federal courts have learned to use the same arguments. See, e.g., *Journal of Law and Politics* 1997, 627.

Perhaps most important, *The Business of the Supreme Court* obscured the very growth and transformation of the federal courts that it so vividly heralded. Its most famous and influential—and surely most frequently quoted—passage assessed the significance of the Judiciary Act of 1875, which first conferred general federal question jurisdiction on the lower courts.²⁵ As a result of the new statute, Frankfurter wrote, the lower federal courts “ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States” (Frankfurter and Landis [1928] 1972, 65).²⁶ Though historical in form, the statement came to be taken as a far-reaching prescription that embodied the ideas that grew into a distinctive twentieth-century view of the federal courts.²⁷ As a matter of history, however, Frankfurter’s statement is simply inaccurate.²⁸ As a matter of political and constitutional theory, it is sharply contested.²⁹ Indeed, as a matter of Frankfurter’s own jurisprudence, it is profoundly misleading.³⁰

25. Congress conferred general “federal question” jurisdiction on the lower courts in the Judiciary Act of 1801 but quickly repealed it the next year. See Surrency 1987, ch 4.

26. The statement is quoted approvingly, for example, in Morris 1987, 69; Surrency 1987, 104; Hall and Rise 1991, 145; Buan 1993, 300; and Wheeler and Harrison 1989, 12. In his book, *A History of the Fifth Circuit, 1891–1981*, Harvey C. Couch calls special attention to the fact that he relied heavily on *The Business of the Supreme Court*. It was, he reports, “indispensable to what follows” (Couch 1984, 4 n. 3). The influence is apparent. See, e.g., 123.

27. Paul M. Bator correctly identified the quote as the “signature phrase” in what he termed the “rhetorical tradition” that proclaimed as a fundamental principle the proposition that federal claims should be heard in federal courts (Bator 1981, 607). Contrary to Bator’s dismissal, the phrase represents far more than a “rhetorical tradition.”

28. Congress did, of course, expand federal jurisdiction substantially during the Civil War and Reconstruction. See, e.g., Kutler 1968; Wiecek 1969.

29. Bator 1981; *Tafflin v. Levitt* (1990, 455) (O’Connor, J.) (states have inherent sovereign power to adjudicate federal law issues); *Webster v. Doe* (1988, 606, 611–12) (Scalia, J., dissenting) (Congress can prevent federal courts from hearing federal constitutional claims even if it cannot prevent state courts from hearing them subject to Supreme Court review); Antiterrorism and Effective Death Penalty Act of 1996, Pub. Law No. 104–132, 110 Stat. 1214 (1996) (severely restricting federal habeas corpus jurisdiction over petitions brought by state prisoners).

30. Frankfurter is best known to later generations of lawyers and historians for what would seem to be other elements of his progressive jurisprudence: as an advocate of comity, federalism, limits on federal judicial power, respect for the jurisdiction of state courts, and a general deference to administrative agencies and other branches of government. See, e.g., *Coleman v. Miller* (1939, 460) (Frankfurter, J.). As discussed below, section I.C, *The Business of the Supreme Court* was also intended to serve those goals. See, e.g., Frankfurter 1929, 275.

As a Justice, Frankfurter generally sought to limit the power of the federal courts unless they were acting under the direction of a congressional statute or its “legislative purpose.” See, e.g., *Board of Commissioners v. United States* (1939, 120) (Frankfurter, J.); *Scripps-Howard Radio v. Federal Communications Commission* (1942) (Frankfurter, J.); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.* (1951, 255) (Frankfurter, J., dissenting). Compare, e.g., *Railroad Commission of Texas v. Pullman Co.* (1941) (Frankfurter, J.) (finding a way to avoid recognizing a “more than substantial” constitutional claim) with *Brown v. Allen* (1953, 488) (Frankfurter, J.) (substantially expanding, on statutory grounds, federal jurisdiction to hear

As an historical proposition, Frankfurter's assertion suggests that the change in the federal courts' role took place as a result of the Judiciary Act of 1875 and that it occurred almost immediately thereafter. Neither, of course, is true.³¹ Prior to Reconstruction and its accompanying jurisdictional expansion, the lower federal courts protected national interests and enforced national law in admiralty and under special jurisdictional statutes, and they sometimes served the same goals in adjudicating cases brought under diversity jurisdiction.³² Before the Civil War, for example, the lower federal courts struggled in many northern states to enforce rights under the federal fugitive slave acts when antislavery forces tried to negate them (see, e.g., Arkin 1995; Finkelman 1993; Cover 1975), and during and immediately after the war they used diversity jurisdiction and a version of federal common law to protect municipal bondholders against repudiation (*Gelpcke v. Dubuque* [1864]; Hyman and Wiecek 1982, 365–70). More striking, after Reconstruction and well into the twentieth century, the federal courts were hardly “powerful reliances for vindicating every right” conferred by federal law. Congress remained reluctant to provide the lower courts with the resources necessary to make their formal jurisdictional reach effective, and the Supreme Court itself proved unwilling to construe jurisdictional statutes expansively or to override federalism concerns in most areas (Benedict 1978; 1974; Hall 1975, 177; Nelson 1982b, 79–81). The national courts failed to “vindicate” many federal rights, especially the rights that were most desperately in need of vindication—those of the freedmen.³³ Indeed, in the late nineteenth century the Supreme Court even barred the lower courts from vindicating some established and traditional rights of property that seemingly enjoyed constitutional protection. In the name of the Eleventh Amendment, it compelled them in a number of cases to turn their backs on bondholders who sought recourse against states that repudiated or otherwise impaired their bonds (Orth 1987, esp. ch. 5).

habeas corpus petitions from state prisoners). For an interesting discussion of Frankfurter's ambivalent position about the uses of federal judicial power, see Parrish 1993, 51–63.

31. Frankfurter did seem to qualify his position about the sweeping significance of the statute, noting that its changes “received hardly a contemporary comment” (Frankfurter and Landis [1928] 1972, 65) and emphasizing in later sections the importance of such forces as industrialism, congressional legislation, World War I, and Prohibition in causing a rapid expansion in the federal law issues that came before the national courts (Frankfurter and Landis [1928] 1972, 103–7, 203).

32. See, e.g., *Osborn v. Bank of the United States* (1824); Revenue Act of 4 February, 1815, 3 Stat. 195, reenacted, 3 Stat. 231 (allowing federal revenue officers to remove to federal courts suits brought against them in the state courts on the basis of actions taken pursuant to their official business); Act of 2 March 1833, 4 Stat. 632 (allowing removal of suits involving any right, authority, or title established by any federal revenue statute); Orth 1987, ch. 3; Woolhandler 1997; Liebman and Ryan 1998; Casto 1997, 67–69.

33. See, e.g., *Giles v. Harris* (1903); Zelden 1993, 25–27; Dargo 1993, ch. 4; Rabban 1997, chs. 1–2, esp. 15. The efforts of both the federal courts and the federal government were, of course, somewhat more effective during Reconstruction: see Kaczorowski 1985.

Moreover, as a matter of historical analysis, Frankfurter's statement had other flaws. One was that it seemed to slight the fact that United States government litigation had from the nation's beginning accounted for a large part of the cases in the federal courts.³⁴ At the end of the nineteenth century actions involving the central government constituted a majority of the cases on the federal dockets, while private diversity suits and federal question cases together accounted for considerably less than half. Most of the government suits were criminal prosecutions, but a significant and growing number were civil actions. By 1916, in fact, civil suits involving the national government accounted for approximately 20% of the entire federal docket.³⁵ A second flaw with Frankfurter's statement was that it tended to reinforce the court-centered focus that has marked so much legal scholarship.³⁶ While *The Business of the Supreme Court* pointed to the importance of industrialism, World War I, and Prohibition in expanding the federal docket, its statement about the lower courts as the "primary" vindicators of federal rights deflected attention from the role that other branches and agencies of government played in enforcing federal law.³⁷ Further, it ignored the increasingly important role that organized private interests and advocacy groups played in pressing the courts for expanded judicial protections for federal constitutional and statutory rights.³⁸ In truth, it was only a complex combination of legal, social, economic, and political factors that occurred unevenly over the long period from the Civil War to the Warren Court that truly transformed the role of the lower federal courts and eventually made Frankfurter's description relatively accurate.³⁹

But Frankfurter's statement seemed to some—and subsequently came to be widely considered—more than mere historical description. It also seemed to embody a basic prescriptive theory about the lower federal courts, that their proper role was to enforce national law and vindicate federal constitutional rights. Indeed, his assertion echoed the Supreme Court's pivotal

34. From 1789 to 1816 approximately one-third of the cases in the District for Kentucky were brought by the United States, more than 85% being civil cases. See Tachau 1978, 95. Frankfurter recognized that government litigation was an important part of the federal docket, especially the Supreme Court's. E.g., Frankfurter and Hart 1933, 271; 1934, 244.

35. For other years, see Clark 1981, e.g., at 104, 116, 122, 127, 134, 140, 146.

36. Frankfurter's work antedated the emergence of the socially oriented legal history associated with late legal realism and the "Wisconsin" school of Willard Hurst and Lawrence Friedman. See, e.g., Hurst 1960; Gordon 1975.

37. Fritz 1991, 123–32, 100–101, 215–23, emphasizes the importance of the local U.S. Attorney in determining the federal trial court's role. See generally, Landsberg 1997; Peritz 1996; Caplan 1987; Schoenbrod 1993; Kaczorowski 1985; Elliff 1971, 605; Doar 1997.

38. Frankfurter himself participated in the work of such advocacy groups. See, e.g., Parrish 1982, esp. ch. 9; Murphy 1982, esp. ch. 3. For contemporaneous examples, see Vose 1972.

The practice expanded over the years. See, e.g., Tushnet 1988; Moreno 1997; Yarnold 1992, ch. 6; Fairclough 1987.

39. The complex social and political process of selecting federal judges, for example, evolved slowly and haltingly over the nineteenth century, preventing any rapid and stark change in the attitudes and values of the federal judiciary (Hall 1980).

decisions that reoriented the role of the national courts in the years between the 1890s and World War I (see, e.g., Purcell 1994, 284–88; 1992, 262–91, 412–14, n. 165). The turn-of-the-century Court was both prophet and architect of a major transformation in the work, doctrine, image, and theory of the federal judiciary. It expanded the ability of the lower courts to supervise state actions that involved federal rights while concurrently trimming their dockets of less important private-law diversity cases (Purcell 1992b, 265–91; forthcoming, ch. 2).⁴⁰ Across a range of cases, from explosive issues of substantive constitutional law to arcane matters of jurisdiction and procedure, the turn-of-the-century Court began the process of reorienting the civil work of the lower federal judiciary from diversity to federal question jurisdiction, from issues of state law to issues of federal law, from suits between private parties to suits involving government actions, and from legal damages as the standard relief to the broader use of equitable remedies.

In the process the turn-of-the-century Court revised four basic structural propositions that had come to mark the American judicial system in its formative years.⁴¹ One was that lower federal courts—allowed but not mandated by the Constitution—were necessary to enforce certain special federal laws, particularly those involving crimes and government revenues, and to provide federal judicial protection for nonresident citizens and aliens.⁴² A second proposition was that the lower federal courts existed in large part to hear private disputes based on claims arising under nonfederal sources of law. Legal rights flowed from a variety of sources in the early Republic, but federal law was a minor one at best. The third basic proposition was that state courts were proper and even desirable forums to hear cases that raised issues of federal law. Indeed, the idea of a generally shared, or “concurrent,” jurisdiction quickly became a fundamental characteristic of the American legal system.⁴³ The last proposition was that the United

40. The turn-of-the-century Court denied “federal rights” or construed them quite narrowly in many areas. See, e.g., *Patterson v. Colorado* (1907) (First Amendment); *Giles v. Harris* (1903) (black voting rights); *United States v. Ju Toy* (1905) (due process for alleged aliens claiming citizenship). See generally Klarman 1998.

41. See, e.g., Judiciary Act of 1789, 1 Stat. 73 (1789); Rakove 1996, 162, 171–77; 1997, 1045–50, 1060–64; Marcus and Wexler 1992, 13–39; Preyer 1992, 173–195; Wood 1991, 261–65; Ellis 1971; Marcus 1992b, esp. vol. 4; White 1988, chs. 7, 8, 12. Compare *Martin v. Hunter’s Lessee* (1816) (establishing right of Supreme Court to review state court decisions involving federal law questions) with *Houston v. Moore* (1820) (establishing right of state courts to hear cases involving federal law issues arising under a congressionally established program) and *Durousseau v. United States* (1810) (upholding congressional authority to limit appellate jurisdiction of the Supreme Court).

42. In the early years there was relatively little substantive federal law. See, e.g., Casto 1997, 67–73; Zeigler 1995, 690–94, 695–701. Conversely, diversity and alienage jurisdiction were considered critical “national” matters that involved not only domestic interstate commerce but also international commerce and the foreign policy of the new federal government.

43. E.g., Zeigler 1995, 688, 709–13; *Houston v. Moore* (1820). On circuit in 1790 John Jay, an author of the *Federalist* papers and the first Chief Justice of the United States, in-

States Supreme Court, not the lower federal courts, sat to ensure as a general matter that federal law was properly and uniformly enforced across the nation. At the end of the nineteenth century, however, the Court came to recognize the impossibility of supervising the swelling flood of decisions by state courts and administrative agencies that involved issues of federal law—especially the expanding constitutional rights and limitations that the Court itself was developing. Newly concerned with enforcing its mandate, and trusting the lower federal courts far more than it did many state judiciaries, it began after the turn of the century to restructure federal procedural and jurisdictional law in order to shift the lower federal courts away from private law actions brought under diversity jurisdiction and toward cases involving government regulatory efforts brought under federal question jurisdiction. In 1913 the Court expressly rejected the idea that the state courts could be the “primary” enforcers of the Constitution, and it announced—misleadingly, at best—that “the Federal courts are charged under the Constitution” with the duty of protecting federal rights against state infringements (*Home Telephone and Telegraph Co. v. City of Los Angeles* [1913, 284–85]).⁴⁴

That pronouncement seemed to anticipate Frankfurter’s position in *The Business of the Supreme Court*. It was surely consistent with his famous statement about the impact of the Judiciary Act of 1875 and the subsequent transformation of the lower federal courts. Equally, it was consistent with his assertion that the lower federal courts had become “indispensable” to the operation of American federalism. It seemed consistent, too, with his repeated insistence that state courts should hear state law claims while the lower federal courts should specialize in cases of national importance that raised issues of federal law. It seemed consistent, finally, with Frankfurter’s insistence that the lower federal courts should be viewed as “feeders” to the

structed a federal grand jury in New York that the state and federal courts were to be “auxiliary instead of hostile to each other” (Marcus 1988, 28). Even Alexander Hamilton essentially agreed that, absent special congressional provision, the state courts would have concurrent jurisdiction over cases that arose under federal law (*Federalist*, No. 82, 1937).

44. See Purcell 1992b, 283–85. The Constitution not only failed to charge “the Federal courts” with such a duty but it failed to require that such lower courts be created for any purpose. U.S. Constitution, art. 1, sec. 8, cl. 8; art 3, sec. 1. See Marcus and Wexler 1992, 29. The Supreme Court is the only federal court that is mandated by the Constitution and therefore “charged by the Constitution” with enforcing federal law. Until 1875, of course, the lower federal courts did not have general jurisdiction over “federal questions.” Further, when the Constitution mandated that federal law be “the supreme Law of the Land” in Article 6, it provided only that “the Judges in every State shall be bound thereby.” This clause could be read to refer only to “state” judges, but even if it were read to include federal judges it still supports the proposition that state courts were to be equally responsible with the lower federal courts in maintaining the supremacy of federal law and, hence, that the federal courts were not uniquely or specially “charged by the Constitution” with enforcing federal law. That proposition received additional support from the Oath Clause in the third paragraph of Article 6, which provided that “judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation” to support the Constitution.

Supreme Court and that the Supreme Court “has ceased to be a common law court” and was “now confined in its adjudications to questions of constitutionality and like problems of essentially national importance” (Frankfurter and Landis [1928] 1972, 307, 300).

Through succeeding decades, the idea that the lower federal courts existed to deal with federal law issues and to vindicate federal rights resounded with increasing frequency and fervor. The New Deal and World War II, the broadening scope of national legislation, the massive growth of the federal government, and the continued integration of national and international markets brought escalating waves of federal law cases to the national courts. Moreover, the specter of totalitarianism, the emergence of the Cold War and McCarthyism, and the concomitant rise of civil liberties concerns after World War II gave the national courts a new role and transformed political liberals from critics of the federal judiciary to its most fervent supporters.⁴⁵ The emergence of a galvanizing civil rights movement and the Supreme Court’s sympathetic response to it confirmed and dramatized the newly ascendant idea of the federal courts’ proper role while incorporating that idea firmly into the ideology of post-New Deal “liberalism.” Finally, the pervasive spread of jurisprudential positivism made it seem only logical that federal courts should specialize in issues of federal law. By the century’s second half, those ideas had come to seem simple conclusions of institutional and constitutional common sense.⁴⁶

This twentieth-century view⁴⁷ reached its most fully developed state—accidentally, as a matter of history, and ironically, as a matter of politics—in conjunction with the flowering of the Warren Court’s centralizing liberal

45. For personal testimony about the social and political dynamic that operated, see, e.g., Liman 1998, ch. 1.

46. That evolution helped explain, for example, why the jurisprudence of *Swift v. Tyson* (1842) could seem so reasonable in the early nineteenth century and why the contrary jurisprudence of *Erie Railroad Co. v. Tompkins* (1938), which overruled *Swift*, could seem so unexceptionable in the late twentieth century.

47. The expression “twentieth-century view” is not intended to suggest that ideas about a strong national judiciary enforcing national law were wholly “new” or unique to the turn-of-the-century Court. Some in the founding generation urged the establishment of a powerful national judiciary, and during the nineteenth century others—Justice Joseph Story and some of the “Radical Republicans” of Reconstruction come most readily to mind—advocated a more expansive role for the federal courts. The point is that it was only in the twentieth century that such ideas spread widely, became broadly accepted both politically and legally, and helped bring a major reorientation in federal jurisdictional, procedural, and substantive law. The phrase is not intended to suggest universal acceptance of the view, a uniform interpretation of its scope and significance, or a history of the federal judicial system that is simple, linear, one-directional, or inevitable. Rather, the phrase is intended to suggest that for approximately the past hundred years a distinctive combination of ideas—the “twentieth-century view”—has provided the general legal, political, cultural, and constitutional framework within which debate about the role and purpose of the national judiciary has taken place. The Civil War amendments became the constitutional foundation for much of the change and served as a basis for the claim that the structure of American government had been “transformed.” E.g., *Mitchum v. Foster* (1972, 238, 242). Opponents of Warren Court centralization rejected that claim. See, e.g., *Younger v. Harris* (1971).

activism. In 1969, in an opinion that he himself would subsequently cite repeatedly in critical and divisive cases, Justice William J. Brennan Jr. drew on *The Business of the Supreme Court* to justify the Court's new constitutional and jurisdictional jurisprudence. After the Civil War and Reconstruction, Brennan quoted Frankfurter, the federal courts "became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties" of the United States. Literally, and symbolically, Brennan's contribution was, as his opinion noted, to add emphasis to the word "primary."⁴⁸ Substantively, his contribution was far broader. Brennan helped transform Frankfurter's assertion into a vibrant promise that the national judiciary would vigorously protect federal rights and turn legal guarantees existing on paper into meaningful rights enforceable in practice. The idea that the federal courts had a special obligation to enforce national law—that they were, indeed, the "primary" and dedicated "vindicators" of federal rights—captured an essential premise of Brennan's constitutional jurisprudence and a foundation stone for the Warren Court's liberal nationalism.⁴⁹

The idea of the transformation of the federal courts was thus problematic for yet another reason—because the practical significance of its implicit structural prescription depended in large part on the nature of the substantive rights that the national courts chose to vindicate. Consequently, the idea that the federal courts should be the authoritative voices of federal law and the primary vindicators of federal rights carried a profound but shifting social, political, and ideological meaning. The turn-of-the-century Court, which adumbrated and began to implement what became the twentieth-century view, was the "*Lochner*" Court, a Court associated with corporate enterprise, the protection of private property, and an abstract freedom of contract that disadvantaged the weak and unsophisticated.⁵⁰ At that time the nascent twentieth-century view was the darling of economic conservatives and the object of progressive scorn. In the second half of the twentieth century, however, when the Warren Court embraced and expanded the twentieth-century view, it gave it a radically different substantive cast. Thus, political liberals embraced it enthusiastically, while the opponents of the Warren Court's jurisprudence criticized it sharply or rejected it outright.

The spread and liberal takeover of the twentieth-century view soon reverberated in new versions of the history of the federal courts. It led law-

48. *Zwicker v. Koota* (1967, 247) (emphasis in original). See, e.g., *Preiser v. Rodriguez* (1973, 500, 515) (Brennan, J., dissenting).

49. E.g., *Monroe v. Pape* (1961); *Fay v. Noia* (1963); *England v. Louisiana State Board of Medical Examiners* (1964); *Dombrowski v. Pfister* (1965).

50. Although the turn-of-the-century Court is often identified with its decision in *Lochner v. New York*, 198 U.S. 45 (1905), that currently infamous case—and its "liberty of contract" doctrine—constituted only one strand of that Court's distinctive centralizing jurisprudence. See Purcell forthcoming, ch. 2.

yers and judges sympathetic to the Warren Court to argue, for example, that the "original purpose" of the national courts was the vindication of federal rights and the enforcement of federal legislation.⁵¹ Judge John Minor Wisdom, who played such a key role in the Fifth Circuit's desegregation efforts, not surprisingly found such a view congenial. The "federal courts," he declared, "came into existence to insure the enforcement of locally-unpopular national legislation" (as quoted in Couch 1984, 123).⁵² More striking, when the Reagan administration brought a conservative "originalism" into play in its effort to discredit the legacy of the Warren Court, liberal law professors countered with a "neo-federalist" interpretation designed to confer an historical pedigree on the Warren Court's jurisdictional jurisprudence.⁵³ Neo-federalism portrayed the founding generation, accordingly, as committed to a strong national judiciary, an expansive idea of federal judicial power, and an abiding faith in the federal courts as the enforcers of national law and the defenders of "republican" values and institutions.⁵⁴

By the latter half of the twentieth century the federal courts projected a powerful image. They represented for many Americans the essential bulwark of the nation's most cherished rights and the institutional foundation for the rule of law itself (see, e.g., Weinberg 1997; Yackle 1994). By midcentury, George Dargo writes in his *History of . . . the First Circuit*, the federal courts had become "citadels of enlightenment, progressivism, competence, and reason" (Dargo 1993, 216). To other Americans, of course, their transformation represented a severe intrusion on the rights of the states, an ominous threat to popular self-government, and even the imposition of a liberal-secularist judicial tyranny.⁵⁵

51. For many of the difficulties involved in trying to use some type of "original intent" with respect to the origins and purposes of the federal judiciary, see Wells and Larson 1995; Ritz 1990; and the sources cited in note 41 above and note 53 below.

52. Accord Miner 1993. The federal courts were seen as important instruments of national sovereignty, of course, and they were immediately used to enforce federal criminal and revenue statutes. This was only one factor in the creation of the federal judicial system, and it had little to do with "vindicating" the positive federal rights of individual citizens.

53. Recent historical scholarship on the Constitution and the First Judiciary Act suggests that those interpretations need to be seriously qualified. E.g., Freyer and Dixon 1995, 17 ("The framers of the Constitution established the federal judiciary to give nonresident private interests an impartial forum for the trial of cases"); Holt 1988 (the federal courts were established and structured as part of a political compromise over debtor-creditor conflicts in the 1780s); sources cited in notes 41 and 51, above. For a more contemporaneous view, see *Bank of the United States v. Deveaux* (1809, 87) (Constitution was based on apprehension about impartiality of state courts, and it therefore established diversity of citizenship jurisdiction to rectify the problem). With respect to the founders see Rakove 1996, 171-77 (framers relied on the state courts and ultimately the United States Supreme Court to enforce national law).

54. See, e.g., Amar 1992, 40-65; 1985; Clinton 1986; Pushaw 1996. For a general discussion of some versions of "neo-federalism" in their historical context, see Kalman 1996, 212-29.

55. See, e.g. Federalist Society Symposium 1997; Hickok and McDowell 1993; Karl 1983. For an extreme example see Bork 1996.

Illustrating the extent to which the twentieth-century view and its jurisprudential positivism triumphed, however, few judges and lawyers any longer rejected the underlying structural proposition that the federal courts should specialize in issues of federal law or that diversity jurisdiction should be curtailed or abolished. Judge Leonard I. Garth of the Third Circuit was typical. The federal courts, he declared in 1995, “should not be involved in the adjudication of disputes that essentially involve no more than state law” (Garth 1995, 1367). Evidencing the breadth of support for that view, the Judicial Conference of the United States officially adopted the position that diversity jurisdiction should be abolished or severely restricted, and the great majority of judges, lawyers, and scholars seemed to agree. The federal courts, the reigning consensus held, should focus on selected areas of federal law and on matters of the greatest national importance.⁵⁶

The breadth of the consensus was nowhere more evident than in the attitudes of many “conservatives” who rejected the jurisprudence of the Warren Court.⁵⁷ They concentrated their assaults not on the positivist structural premise of the twentieth-century view but, instead, on the related but distinct corollaries that the federal courts were distinctively the “authoritative” voice of federal law and the “primary” vindicators of federal rights.⁵⁸ Their goal, like Frankfurter’s, was to limit the scope of federal jurisdiction, weaken or defeat certain kinds of disfavored federal rights, and keep certain disfavored classes of plaintiffs and claims out of the national courts. Like Frankfurter, they heralded the values of “federalism,” warned against the evils of judicial “intrusion,” insisted that the federal courts should be kept small and their caseloads sharply curtailed, and urged that large numbers of federal law claims be consigned to the state courts.⁵⁹ Their efforts, of course,

56. See Federal Courts Study Committee 1990; Judicial Conference of the United States 1995, 30 (“The federal courts’ diversity docket constitutes a massive diversion of federal judicial power away from their principal function—adjudicating criminal and civil cases based on federal law”). Disagreement comes from a relatively small number of scholars and judges. See, e.g., Arnold 1995, 538–39. The major political opposition to the abolition or severe curtailment of diversity jurisdiction comes from prominent law firms, large national corporations, and associations of trial lawyers.

57. E.g., Rehnquist 1999. There were, of course, exceptions. Urging a sharp cut in civil rights suits under § 1983, for example, Professor Stephen G. Calabresi insisted that “any reduction in the [federal] courts’ caseload should not come out of reducing the diversity jurisdiction” (Federalist Society Symposium 1997, 662).

58. Professor Paul Bator was the most compelling academic critic of the expanded twentieth-century view. See Bator 1981, e.g. A classic statement of the position appears in Justice Antonin Scalia’s concurring opinion in *Tafflin v. Levitt* (1990, 458–59) (states have inherent sovereign power to adjudicate federal law issues). Compare the strong “liberal nationalist” position developed by a leading “neo-federalist”: “[O]nly the federal courts are vested with the judicial power of the United States—that is, the power to speak in the name of the nation, to speak definitively and finally on matters of federal law” (Amar 1992, 46) (emphasis in original).

59. Evidencing the fluidity and dynamics of American law and politics, as the federal judiciary gradually began to grow more conservative after the election of Richard M. Nixon in 1968 and, especially, after the election of Ronald Reagan in 1980, some “liberals”—led by

tended to assist different social groups than Frankfurter had favored. While the author of *The Business of the Supreme Court* sought to encourage government regulatory efforts and protect weaker parties from the impositions of the powerful and sophisticated, post-Warren Court conservatives sought to constrain such efforts and facilitate such impositions in service to their views of individual freedom, economic efficiency, and limited government.⁶⁰

Contrary to Frankfurter's famous assertion in *The Business of the Supreme Court*, then, the Judiciary Act of 1875 was little more than one step in a long, complicated, incomplete, politically volatile, and continuously contested process of institutional evolution. It was ironic that Frankfurter's rhetoric about the role of the federal courts and his idea that they sat to deal with major national issues proved far more compelling than he could have imagined.⁶¹ His theme of the transformation of the federal courts evolved into a new conventional wisdom and, through the Warren Court, into a powerful justification for a centralizing, constitutionally based, and—for a season—politically liberal federal judicial activism.

C. The Politics and Design of the Original Frankfurterian "Transformation"

As a Justice, Frankfurter witnessed much of that subsequent history and opposed much of what he saw. He dissented not because his own views had changed but because he had never intended his oft-quoted "transformation" statement to mean anything like what Brennan and others came to say it meant. Indeed, closely read, *The Business of the Supreme Court* suggests that Frankfurter thought that the 1875 jurisdictional statute was an unwise measure. It brought "a flood of totally new business" to the federal courts and became a major cause of the excessively heavy dockets that were swamping the national judiciary (Frankfurter and Landis [1928] 1972, 65).⁶² The jurisdiction of the lower courts had to be cut, he repeatedly suggested, and some of the restrictions had to come in federal question cases (Frankfurter and

none other than Justice Brennan himself—began to turn to the state courts and state constitutions as sources of protection for individual rights. See, e.g., Brennan 1977; Peters 1998; Holmes 1998, sec. 1, p. 1.

60. E.g., Carrington and Haagen 1996; Purcell 1992a; Yackle 1994; Stempel 1998; Galanter 1998. The Rehnquist Court was, of course, quite "activist" in developing the law along its chosen lines. See, e.g., Zeigler 1996.

61. "Jurisdictional problems are too technical and intricate to permit even the most skilled authorship to foresee all possibilities" (Frankfurter and Landis [1928] 1972, 281).

62. The Judiciary Act of 1875, Frankfurter emphasized a few years after the book appeared, "produced an amount of business which was beyond the physical powers of the court" (Frankfurter 1934, 478).

Landis [1928] 1972, 272, 283, 289–90, 292–93, 300).⁶³ The 1875 act was simply too broad. It was neither expedient nor wise for the federal courts to be the vindicators of “every right” conferred by federal law.

Frankfurter’s transformation statement was not historically accurate, and it was not intended to be institutionally prescriptive. It was designed, rather, to be diagnostic and strategic. It was diagnostic because it identified a major cause of the docket problems that oppressed the federal courts and pointed to substantial jurisdictional restriction as the appropriate responsive remedy. It was strategic because it served his broader, implicit, and animating political purpose—to commandeer the procedural and jurisdictional nationalism of the turn-of-the-century Court and remold it to progressive purposes.⁶⁴

First, Frankfurter sought to shift the constitutional basis of the turn-of-the-century Court’s centralizing jurisprudence. The Court had relied directly on the Constitution and its own inherent power to begin transforming the lower federal courts into the “primary” enforcers of federal law, and Frankfurter invoked instead—in typical progressive fashion—the trumping authority of Congress to establish the national courts and determine their jurisdiction. The sentence that immediately preceded his famous “transformation” statement—a sentence that subsequent writers have often overlooked—made the key point. “Congress,” Frankfurter stressed, “gave the federal courts the vast range of power which had lain dormant in the Constitution” (Frankfurter and Landis [1928] 1972, 65). It was the authority of Congress, then, not the “dormant” power of the Constitution or any inherent power of the judiciary, that properly determined the jurisdiction of the lower federal courts and the practical role they would play. Congress, he was insisting, could change that jurisdiction and role whenever it wished and in whatever way it wished.

63. In the book Frankfurter dealt only briefly and vaguely with the desirability of cutting federal question jurisdiction. Actions under the Federal Employer’s Liability Act—which were already nonremoveable and brought overwhelmingly in the state courts—constituted his major example of the kind of federal law case that should be heard in the state courts. Frankfurter and Landis [1928] 1972, 206–10. He was slightly more specific about his purposes in his other writings. See below.

64. For the turn-of-the-century Court see Purcell forthcoming, ch. 2. For Frankfurter’s technique of reshaping legal materials into purported “rules,” “canons,” and “doctrines” that served progressive purposes, see Frankfurter 1934, 475–77. He wrote a whole book to show that the progressive view of the commerce clause was the correct view (Frankfurter 1937). Frankfurter worked, of course, with a master—Justice Louis D. Brandeis. Compare Frankfurter’s views on avoiding constitutional issues with *Ashwander v. Tennessee Valley Authority* (1936, 341) (Brandeis, J., concurring). Similarly, compare the views Frankfurter expressed in “United States Supreme Court,” 1934, 481, with Brandeis’s comments in *Urofsky and Levy* 1991, 297. Finally, for the use of legal materials to identify “trends” that allegedly evidenced a “progressive” evolution in the law, compare Frankfurter and Hart 1933, 271–74 (identifying a “trend toward decreasing interference with state court judgments”) and *Skelly Oil Co. v. Phillips Petroleum Co.* (1950, 673–74) (Frankfurter, J.) (same) with Brandeis’s opinion in *Gay v. Ruff* (1934, 35) (finding in a series of congressional actions an “established trend” limiting the jurisdiction of the federal courts). See notes 65, 68, 69, 73–77.

Second, Frankfurter sought to decrease the antiprogressive social role of the federal courts by contracting their jurisdiction substantially. True, he claimed that the lower courts should specialize in cases of national importance, and he seemed to apply that principle in urging the severe restriction or wholesale abolition of diversity jurisdiction. Indeed, Frankfurter's well-known opposition to diversity and his powerful attacks on the doctrine of *Swift v. Tyson* seemed logical corollaries of the principle that federal courts should specialize in suits involving federal law. His opposition to those two doctrines, however, was not based simply on some abstract logic of federalism or a neutral commitment to jurisprudential positivism. Rather, it was based on substantive judgments about the antiprogressive social consequences that he saw in both *Swift* and diversity jurisdiction (e.g., Frankfurter 1928, 520–30; see Purcell forthcoming, ch. 3). Far more revealing were his proposals for federal question jurisdiction, which he also sought to restrict, and to restrict drastically. Frankfurter urged that state courts be used to hear large numbers of federal criminal prosecutions as well as numerous civil actions brought under federal statutes that involved what he termed “essentially local” matters. More striking, he urged general restraints on federal equity jurisdiction, worked to prevent Congress from granting the national courts authority to issue declaratory judgments even in federal question cases, sought to deny them the power to issue injunctions in labor disputes even when a claim of federal constitutional right was involved, and urged that federal law challenges to state taxation schemes and state regulatory efforts be heard in state courts (Frankfurter 1929, 275; 1928, 515–20; Frankfurter and Greene 1930).⁶⁵ Frankfurter argued, for example, that suits involving taxation and economic regulation were particularly burdensome, presented highly complex questions of fact, and often created strong and unnecessary political hostility toward the federal courts. Moreover, he repeatedly claimed, such cases usually presented—and often turned on—issues of local law and practice. “All these difficulties would be avoided,” Frankfurter concluded, “if the road to the protection of constitutional rights lay to the Supreme Court from the state courts” (Frankfurter 1928, 519).⁶⁶

65. Frankfurter, like Brandeis, opposed the idea of a federal declaratory judgment act, and he placed the best face possible on the movement in the states to authorize state courts to issue declaratory judgments (Purcell forthcoming, ch. 5). Such legislation, he wrote, “may serve to lessen the frequency of resort to the federal courts in cases involving the constitutionality of state statutes. Cases in which the existence of an adequate remedy at law forecloses the possibility of injunction may well be deflected to the state courts, where the new procedure permits attack upon the statute at an earlier point of time than would otherwise be possible.” His hopes, however, were even more buoyant. “It is conceivable, beyond this, that the availability of a declaratory judgment might itself be held such an adequate remedy at law as to defeat federal equity jurisdiction.” Not surprisingly, he also found that “recent decisions” had departed from the rule that an “adequate remedy at law” sufficient to defeat federal equity jurisdiction had to exist in the federal courts (Frankfurter and Hart 1933, 286 n. 96).

66. Frankfurter made his point repeatedly and explicitly. “The national interest in the uniform interpretation of a federal law is amply protected by the reviewing power of the

Under that procedure, local issues would, “in the first instance, be canvassed by [state] judges presumably most familiar with them” (Frankfurter 1928, 519).

While Frankfurter argued that the federal courts should concentrate on federal law issues, then, he refused to advance that proposition as either a comprehensive or inflexible normative principle. Instead, he maintained that the distribution of judicial power was a question of practical government and that a great variety of effective jurisdictional arrangements were possible. “Shall national agencies alone vindicate national law or shall the states share in their administration or shall the states alone enforce them?” Such questions, he answered, “do not yield to settlement by formula.” They were “matters not of principle but of wise expediency” and their resolution was to be sought “in the domain of administrative effectiveness” (Frankfurter 1928, 506). In many areas of federal law, Frankfurter then reasoned, it was in fact desirable to have “the states alone” responsible for enforcement. While he continued to maintain that the federal courts should handle cases that were “appropriate to a national judiciary under a federal system,” he left the exact nature of those cases vague and unspecified. In contrast, he was quite clear that responsibility for “vindicating” a substantial number of federal rights—in many particularly important, controversial, and indisputably “national” areas of law—should be placed on the courts of the states.

Those proposals directly contradicted the prescription that seemed implicit in his statement that the 1875 statute had made the lower federal courts the “primary” vindicators of “every right” given by federal law. First, Frankfurter rejected as a comprehensive normative principle the proposition that federal courts should decide federal law issues. Second, he urged that large numbers of critical federal law cases be sent to the state courts. Third, he made it clear that the possibility of Supreme Court review, however slight it might be, was generally a sufficient institutional safeguard to ensure the enforcement of federal law in the state courts.

Ensuring the federal vindication of federal rights was not nearly as important to him as guaranteeing that the federal courts would be limited to “a relatively small number of distinguished judges” (Frankfurter 1928, 530, 515–16). That hierarchy of values was hardly surprising. To a large extent, after all, he emphasized the need to keep the federal judiciary small and elite to create a neutral reason for insisting that the federal caseload should

Supreme Court through *certiorari*” (Frankfurter 1928, 517). “Deep reasons for regard for state action in matters primarily within state concern suggest that this field of jurisdiction [federal law challenges to state public utilities regulation] be entrusted to the state courts in the first instance, leaving the protection of constitutional rights to the ample reviewing power of the Supreme Court” (1928, 520).

be restricted and kept small and, consequently, that large numbers of federal question cases would have to be funneled to the state courts.⁶⁷

Finally, Frankfurter sought to counter the jurisprudence of the turn-of-the-century Court in order to limit the reach of the antiprogressive Supreme Court.⁶⁸ He argued, for example, that the Court should be "relieved" from the "needless and time-consuming" burden "of passing on issues of fact." The Court's proper function was to adapt and apply "principles" to "authenticated facts" (Frankfurter and Landis [1928] 1972, 291, 290). Thus, its power to review and find facts should be curtailed or eliminated. "In tax cases, in rate cases, in cases under the Sherman Act," he explained, singling out three particularly critical categories of federal question cases, "a needless and awkward duty is cast upon the Court in passing upon evidence, instead of requiring carefully framed findings of fact as a foundation for review" (Frankfurter and Landis [1928] 1972, 291–92). Further, he argued that the Court had evolved from a common law to a constitutional tribunal and that it was no longer so much a court of "law" as a forum for "statesmanship" (Frankfurter and Landis [1928] 1972, 307, 318, 307–18). In that new role, the Court had to recognize the nondeterminative nature of the Constitution's vague provisions, the wisdom and propriety of deferring to legislative judgments, and the unavoidable need "to gather meaning not from reading the Constitution but from reading life" (Frankfurter and Landis [1928] 1972, 310). In truth, he insisted, constitutional adjudication generally turned on the "facts of industrial life" (Frankfurter and Landis [1928] 1972, 309).⁶⁹ Indeed, "knowledge of those facts" was "the foundation of constitutional judgment" (Frankfurter and Landis [1928] 1972, 314, 315).⁷⁰ Basing consti-

67. Frankfurter believed strongly in the desirability of maintaining a small, elite, and highly professional federal judiciary. The point is that he came to that position, in some part, as a result of his political views.

68. In 1933, for example, as the New Deal was getting underway, Frankfurter's annual analysis of the Court's work grew somewhat more specific and urgent. "In view of the public implications of the current stream of Supreme Court litigation, the Court must be alert against an easy-going assumption of jurisdiction," he warned. Then, he raised the issue of "the burst of legislative activity under the second Roosevelt, more voluminous and pervasive even than that under the first." The size of the inevitably resulting tide of new cases, he advised, was dependent in significant part on the Court and its general response. "Problems incident to volume are, of course, involved in this vast new body of federal law. Much will depend on the substantive attitude which the Court takes. A restrictive interpretation of constitutional guarantees, insistence upon rigorously minute review of governmental activity, will spur litigants." Conversely, "a statesmanlike answer" to the new tide, based on "understanding and sympathy with legislative purposes," would "enormously clarify [the Court's] own problems, lighten its own labors, and make more manifest that justice which is the ideal of law" (Frankfurter and Hart 1933, 283, 295, 296, 297). See Frankfurter and Hart 1935, 107.

69. Not surprisingly, *The Business of the Supreme Court* ended with a paean to the fact-heavy "Brandeis brief" that had been used to demonstrate the "reasonableness" of progressive legislation. "Such weighty presentation of the experience which underlies challenged legislation," Frankfurter declared in his often roseate tactical manner, "has been welcomed by the Court and relied on in its adjudications" (Frankfurter and Landis [1928] 1972, 314).

70. "Only the conscious recognition of the nature of this exercise of the judicial process will protect policy from being narrowly construed as the reflex of discredited assumptions or

tutional adjudication on the "facts of industrial life" and at the same time limiting review to facts "authenticated" below would significantly limit the Court's opportunities to invalidate state regulatory actions. More important, in conjunction with his proposals to narrow the jurisdiction of the lower federal courts over cases raising challenges to state taxation and regulation, his approach would in effect limit the Court even further by making it dependent on facts that were "authenticated" by the very state courts and agencies that had aroused the deep suspicion of the turn-of-the-century Court in the first place.⁷¹

Frankfurter's proposals meant that large numbers of cases raising federal law claims would never be heard in a federal court. His proposals to limit federal question jurisdiction would obviously exclude large numbers of such cases from the lower courts. And, despite assertions to the contrary, the promise of ultimate review by the Supreme Court was essentially illusory. If the Court were to deliberate properly and fully on the cases it heard, he believed, it could "annually write not many more than two hundred opinions" (Frankfurter and Hart 1934, 277; 1933, 240; Frankfurter and Landis [1928] 1972, 295). More important, Frankfurter's whole argument was designed to limit the number of cases that the Supreme Court would review. Its docket should be sharply limited, he insisted, so that the Justices would have time for serious reflection. Indeed, the very purpose of restricting the jurisdiction of the lower federal courts was, of course, to cut the flow of cases to the Supreme Court.⁷² Precisely because they served as "feeders" (Frankfurter 1928, 505–6) to the Court, "a reexamination of the present scope of federal litigation is called for with a view to shutting off at its sources business that eventually reaches the Supreme Court" (Frankfurter and Landis [1928] 1972, 300, 293). If restricting the jurisdiction of the lower federal courts would shut cases off from the Supreme Court, that could only mean that those federal law cases diverted to the state courts would not subsequently appear on the Supreme Court's docket. Frankfurter, in other words, was arguing that large numbers of federal law cases should be heard in state courts and that the United States Supreme Court—however "ample" its appellate jurisdiction in theory—would review even fewer of them than it otherwise would if the cases had been brought originally in the fed-

the abstract formulation of unconscious bias" (Frankfurter and Landis [1928] 1972, 310). See Purcell forthcoming, chs. 1, 3, 5–7.

71. Frankfurter emphasized the growing reliability of the state courts and the concomitant declining need for federal review of their work. "Not in the last ten years have so few cases come to the Supreme Court from the state courts," he wrote in 1933. "Nor—perhaps even more significant—have so few of those which have come been reversed" (Frankfurter and Hart 1933, 271).

72. Frankfurter's emphasis on the Court's need for more time for serious deliberation implied strongly that the Court was not doing its work wisely and well (e.g., Frankfurter and Hart 1934, 280–81). Moreover, whether or not his proposal would, if implemented, lead to "better" results in individual decisions, it would definitely lead to fewer decisions by the Court. In the circumstances, he would have considered that a progressive gain.

eral courts.⁷³ He was arguing not only for a system that would send large numbers of critical federal law cases to the state courts but also one that would make it less likely—indeed, one that would make it exceedingly unlikely—that the state court decisions in those cases would ever be reviewed by the United States Supreme Court.

In 1938, in the last of the updates that he published almost annually in the *Harvard Law Review* after *The Business of the Supreme Court* appeared, Frankfurter came as close as he ever would to acknowledging publicly the political nature of his work on the history and jurisdiction of the federal courts. Formally, he restated his claim that the purpose of the “papers in this series” was technical and procedural. “The substantive doctrines of constitutional law are not under scrutiny here,” he explained. “This is a study not of product, but of form and function” (Frankfurter and Fisher 1938, 578).⁷⁴ At the same time, however, he began the article by referring to the long and “turbulent” political controversy that had raged “between the Court and other branches of government,” and he identified the Court’s critical 1935 and 1936 terms as “the culmination of a long maturing process” (Frankfurter and Fisher 1938, 577). At that point, on the article’s first page, he placed a footnote containing an excerpt from a letter that President Woodrow Wilson had written to Justice John H. Clarke, one of Wilson’s appointees who had resigned from the Court in 1922. “Like thousands of other liberals throughout the country,” Frankfurter quoted Wilson

73. Frankfurter’s subsequently published series in the *Harvard Law Review* on “The Business of the Supreme Court” advanced many of the same prescriptions, usually framed as objective requirements of federalism, efficiency, administration, or systematization. “This watchfulness of the Supreme Court extends also to close surveillance over the relations between state and federal courts. Unwarranted assumptions of federal jurisdiction, or the injection of a federal court into a controversy already in *gremio legis* of a state court will lead the Supreme Court to take jurisdiction. Alertness in the exercise of discretionary review in cases within these procedural categories tend toward the abandonment of slipshod and improper practices at *nisi prius*, and make for achieving a unified federal judicial system under the guidance and leadership of the Supreme Court” (Frankfurter and Landis 1931, 300–301). Consistent with his progressive purposes, Frankfurter urged the Supreme Court whenever possible to avoid deciding constitutional issues (Frankfurter and Landis 1930, 38–40), to show deference to state courts (Frankfurter and Hart 1933, 289–93), to construe federal jurisdictional statutes narrowly (Frankfurter and Landis 1932, 260), to encourage the lower federal courts to abstain from deciding federal issues when state courts could do so (Frankfurter and Landis 1929, 59–62); and to observe its own jurisdictional limitations in order to avoid “gratuitous friction” with the operations of government (Frankfurter and Hart 1935, 90–98, quote at 90).

74. See also Frankfurter and Hart 1935, 99. The statement that he was studying “not product” but “form and function” was, of course, inconsistent with the underlying principle he stated in *The Business of the Supreme Court* that procedure was “instrumental” in serving substantive ends. Similarly, it was inconsistent with his analysis of the labor injunction. “The labor injunction derives significance from the mode by which it has operated. What is called procedure determines results” (Frankfurter 1932, 654). Also Frankfurter and Hart 1933, 281–82 (“substance” dependent upon “supple procedure”).

I have been counting on the influence of you and Justice Brandeis to restrain the Court in some measure from the extreme reactionary course which it seems inclined to follow. . . . The most obvious and immediate danger to which we are exposed is that the courts will more and more outrage the common people's sense of justice and cause a revulsion against judicial authority which may seriously disturb the equilibrium of our institutions, and I see nothing which can save us from this danger if the Supreme Court is to repudiate liberal courses of thought and action. (Frankfurter and Fisher 1938, 577–78, n.2)

Like Justice Louis D. Brandeis—indeed, in close and methodical cooperation with Brandeis—Frankfurter had spent the preceding 15 years developing a variety of technical procedural and jurisdictional devices to try to accomplish Wilson's goals and to minimize the opportunities for the federal judiciary to restrict or invalidate progressive state actions.⁷⁵ His history of the lower federal courts was simply one more maneuver, oblique and sophisticated to be sure, in that long and carefully planned political campaign.⁷⁶

The Business of the Supreme Court is probably the most widely read and frequently cited work on the history of the federal courts. Its true lesson, however, is neither that jurisdictional issues are “largely matters of a technical and non-partisan nature” nor that the federal courts should be the primary vindicators of all federal rights. Quite the contrary. Its true message is

75. Brandeis and Frankfurter worked closely together in the 1920s and early 1930s in support of a wide range of progressive causes. Much of their effort was directed toward limiting the ability of the federal courts to restrict or invalidate various types of government regulatory actions. Brandeis was involved with *The Business of the Supreme Court* from its inception, and he urged Frankfurter to try to spread the book's ideas into other “American fields of political experience in which we are specifically interested” (Urofsky and Levy 1997, 252, 203, 292, 297, 303, 305. see generally Parrish 1982, chs. 9–13; Murphy 1982, 3–5; Baker 1984, chs. 10–15). Until the Brandeis and Frankfurter papers were opened, scholars were unaware of the full nature and extent of their cooperation. (See, e.g., Tachau 1978, 3, speculating that Frankfurter did not know of Brandeis's interest in having historical work done on the history of the lower federal courts).

76. Brandeis and Frankfurter, through their own work and their influence on such younger scholars as Henry M. Hart, Jr., Alexander M. Bickel, and Harry H. Wellington, are often identified as the inspiration for what in the 1950s would become “process jurisprudence,” an approach to law that emphasized sharp limitations on judicial power, the overriding importance of jurisdictional and procedural integrity, and the need for carefully reasoned statements of the grounds of judicial decisions. (See, e.g., Duxbury 1995, 232–41.) While the connection is real and important, it needs serious qualification. Frankfurter—like Brandeis—did not direct his principal concern to questions of abstract legal philosophy or “neutral” and ideal legal processes. Rather, he was for the most part intensely practical and highly political. While the ideas he developed in the 1920s and early 1930s can be taken as abstract legal rules or principles and put to new uses, they cannot be separated from the progressive values that inspired them or the tactical purposes they served without distorting our historical understanding and, quite likely, our legal understanding as well. This, of course, does not mean that legal ideas have no force or integrity of their own, but only that their appearance, shape, and use as historical phenomena cannot be understood absent their social and political context. Similarly, “process jurisprudence” added its own quite distinctive contributions to the Brandeis-Frankfurter legacy, and the later movement was neither as monolithic nor as “conservative” as many have claimed. See, e.g., Purcell forthcoming, ch. 9.

twofold: first, that procedure is instrumental and jurisdiction is power; and, second, that the federal courts should be kept small and limited so that they will produce high-quality work and, as a practical consequence, interfere only minimally with the actions of the states and their courts, even in many areas involving federal law and federal rights. Frankfurter conveyed that message by doing more than examining the political history of federal jurisdiction and less than explaining the implications of his position fully and explicitly. *The Business of the Supreme Court* was not intended to be “objective” history nor was it intended to advance what would become the activist twentieth-century view of the federal courts. It was designed, rather, to disarm an elite professional audience while serving progressive political and social goals. More particularly, it was designed to reorient that twentieth-century view and, ultimately, to defeat it. The illustrious “transformation” that *The Business of the Supreme Court* was subsequently portrayed as heralding was not only inaccurate as history but, in Frankfurter’s own view, undesirable as both law and politics.⁷⁷

II. MOVING BEYOND THE FRANKFURTERIAN PARADIGM: RECENT HISTORIES OF LOWER FEDERAL COURTS

If the *Business of the Supreme Court* was both inspiration and influence, recent histories of lower federal courts have moved away from many of its assumptions. They do not claim to be “scientific,” nor do they attempt to advance elaborate programs for reforming the national judiciary. They are often narrower and more descriptive, but they are also more straightforward and illuminating. Their local focus and growing numbers give us a different and far more complex picture of the federal courts—and especially of the operating federal judicial “system” itself—than Frankfurter’s book offered.

Recent histories vary widely in both scope and focus. Most concentrate on a single trial (Buan 1993; Zelden 1993; Lewis and Schneider 1990; Devitt 1989; Ashton 1988) or appellate court (Frederick 1994; Dargo 1993; Couch 1984; Solomon 1981; United States Court of Appeals for the District of Columbia Circuit 1977), though some consider broader judicial sub-

77. Brandeis, not surprisingly, held the same view. In the spring of 1927, while “*The Business of the Supreme Court*” was still appearing in article form, he urged Frankfurter to begin organizing a follow-up study specifically devoted to the “*Business of the Lower Federal Courts*,” which would focus on “reducing the jurisdiction of the District Courts.” Brandeis suggested curtailing diversity jurisdiction, eliminating federal question jurisdiction over suits brought under the Federal Employer’s Liability Act, and moving many federal criminal prosecutions to the state courts. Most important, he also suggested a far broader limitation: “largely restricting suits in which jurisdiction is dependent on federal questions” (Urofsky and Levy 1991, 292). Similarly, Brandeis also inspired another idea that Frankfurter developed at great length in *The Business of the Supreme Court*, the idea that the federal courts should be seen as a national system of courts (Purcell forthcoming, ch. 5).

systems, either all the courts in a federal appellate circuit (Morris 1987; Phillips et al. 1977; Presser 1982) or all of the federal courts in a particular state (Freyer and Dixon 1995; Hall and Rise 1991). Further, while most attempt to cover at least a substantial portion of their subject's history, some limit themselves to relatively short and distinctive periods (Fritz 1991; Tachau 1978; Schick 1970). In their ambitious and insightful *Democracy and Judicial Independence*, for example, Tony Freyer and Timothy Dixon cover the entire period from 1820 to 1994 and examine all the federal trial courts in Alabama, as well as the Fifth Circuit to the extent that it was involved with Alabama-related issues (Freyer and Dixon 1995). Adopting a narrower focus in his equally fine book, *Rugged Justice*, David C. Frederick examines a single institution, the Court of Appeals for the Ninth Circuit, and considers a shorter period of time, from the court's establishment in the Evarts Act of 1891 to the beginning of World War II (Frederick 1994). Even more tightly focused, Christian G. Fritz's perceptive book, *Federal Justice*, concentrates on a single court, the Northern District of California, and a single judge, Ogden Hoffman, who sat from 1851 to 1891 as the district's first and only judge (Fritz 1991).

Similarly, the new histories vary widely in approach. Some concentrate on the judicial institution itself, while others seek to explore more fully the court's social context and broader historical significance. The former tend to concentrate on brief serial biographies of judges, discussions of court personnel and administrative matters, summaries of docket statistics and dominant case types, and analyses of the court's opinions in major cases or prominent areas of law. The latter tend to devote more attention to the court's relationship with exogenous factors such as geography, market expansion, race and ethnicity, jurisprudential change, interest-group pressures, the growth of the administrative state, and the politics of judicial appointments. Freyer and Dixon (1995) deal with everything from the growing use of law clerks to the influence of legal theories, for example, while Charles Zelden concentrates his insightful history of the Southern District of Texas, *Justice Lies in the District* (1993), on an examination of the court's role in fostering the economy of southeast Texas.⁷⁸

Regardless of the differences, recent works have brought a new sophistication and depth to our understanding of the history of the federal courts.

78. One could, of course, explore the history of a federal court from any number of viewpoints: the traditional legal historian's analysis of substantive doctrines; the "Federal Courts" scholar's focus on specialized procedural and jurisdictional issues; the general historian's orientation toward broad issues of historical significance; the statistician's quantitative analysis of docket change over time; the law and society scholar's examination of the role played by exogenous social and cultural factors; the behavioralist's focus on judicial decision making and policy choice; and the rational-choice theorist's analysis of judicial and other incentives. Obviously, any of these approaches could prove fruitful and illuminating.

In doing so, they have revised or rejected many of Frankfurter's central themes and assumptions.

A. "Growth" and "Transformation" Reconsidered

Following the lead of *The Business of the Supreme Court*, recent histories of lower federal courts have understandably accepted both growth and transformation as central themes. They have also recognized that both need qualification. As a general matter, recent works have found far more to revise in the transformation theme than in the growth theme.

While the "growth" of the federal courts occurred in numerous ways, it was their rapidly expanding caseloads that largely compelled institutional changes and attracted most scholarly attention. Following Frankfurter's general approach, recent work has explored the relationship between social change and docket growth, and it has demonstrated that the latter is both complex and volatile. Docket growth occurs unevenly and for diverse and contingent reasons, and it is neither linear nor one-directional. The social sources of litigation change; major categories of cases expand and shrink; the mix of case types shifts; and the most bitterly controverted and socially significant issues vary from one period to another. Divisive legal questions and commonly litigated case types appear, expand, and occasionally become dominant but then decline and sometimes disappear. "The world of litigation," Mark Galanter has shown, "is composed of sub-populations of cases that seem to respond to specific conditions rather than to global changes in climate" (Galanter 1986, 8; 1988; Friedman 1965; Clark 1981).

Prohibition, for example, had a staggering impact on the national courts. Federal criminal prosecutions multiplied almost fourfold from 20,000 in 1915 to 75,000 in 1925. "When I came on the bench ten years ago," an Iowa federal judge wrote in 1924, the "position was one of dignity and honor." Prohibition and the "new" immigration, he believed, had combined to ruin the national courts.

[T]oday, if one stepped into a Federal Court during more than fifty per cent of each Session, he would think he was in a police court, swarming with Italians and Poles, and Greeks, Chinamen, "niggers," and samples of nearly all the races, with weeping wives and bawling children, bootleggers, dope fiends, dope peddlers, White Slavers, etc., etc. The work, the worry, the responsibility, are more than double what they were in 1915. (Wade 1924)

And yet, in 1933 Prohibition was terminated; the federal dockets quickly shrank; and civil cases returned to a position of prominence. In 1934 the

government initiated fewer than 35,000 criminal prosecutions, less than half the number filed a decade earlier (Clark 1981, 108, 114, 120, 126).

Recent work on the history of the federal courts has confirmed that picture and demonstrated the extent to which periodic shifts in the type and mix of cases on the dockets alter the role, significance, and workload of the federal courts. In their book *From Local Courts to National Tribunals*, a study of the federal district courts in Florida, Kermit L. Hall and Eric W. Rise show that admiralty cases played a major role in the state's Southern District, but they also show that the subject matter of admiralty litigation changed markedly over time, from private claims for wreck and salvage, to Civil War prize cases, to the enforcement of congressional statutes designed to protect seamen (Hall and Rise 1991, 21, 27, 33–36, 59). Fritz points out that habeas corpus petitions by thousands of Chinese seeking entry into the United States turned the federal courts on the West Coast into habeas “mills.” After a decade, however, the filings declined abruptly and drastically (Fritz 1991, 210). Zelden traces the life cycle of a type of action that was “[a]lmost unknown before 1940,” challenges to state workmen's compensation awards. Those suits began flooding the Southern District of Texas during World War II and soon came to account for 70 percent of its private civil docket. Then, in 1958 Congress raised the jurisdictional amount to \$10,000 and made such suits nonremovable. The measure eliminated most of the workmen's compensation actions, and the court's docket quickly dropped to 45 percent of its earlier size (Zelden 1993, 172, 198). Examples could be added endlessly, but the point seems clear.⁷⁹ Growth itself is an ever changing phenomenon; statistics by themselves tell us very little; and the meaningful history of the federal dockets lies in the specific nature and social salience of those ever-changing subpopulations of cases.

While Frankfurter and later historians stressed the social sources and changing content of federal litigation, they have left two related and promising issues largely untouched. One is the extent to which our ideas of growth have themselves been constructed by ideology and politics. Those ideas have been major factors shaping the way Americans thought about the federal courts and, more particularly, about the kinds of responsive judicial reforms that were necessary. Thus, arguments about growth involve—as Frankfurter and others have understood and sought to exploit—partisan and strategic considerations going to the anticipated social consequences of federal jurisdiction. A study of the idea of growth itself seems a potentially rich topic for future students of the federal courts.

A second issue that both Frankfurter and recent histories have largely and understandably avoided is the exceptionally difficult question of the

79. Because the state was in the process of settlement, almost a third of the cases on the docket of the District Court in Kentucky from 1789 to 1816—and almost half the cases on its private docket—involved disputes over land (Tachau 1978, 167).

consequences of growth for the processes of judicial decision making and the fate of disputants. It is not clear how changing caseloads have affected the ways in which federal actions have been litigated, settled, and decided over the past two centuries. Scholars in the law schools, of course, have explored such questions with respect to recent decades (e.g., Posner 1985; Resnik 1982). For earlier periods, however, historians have made few efforts to examine the actual processes of federal litigation, the ways those processes changed over the long term, and the impact they had on dispositions in and out of court.⁸⁰ Answers to these questions, too, would be useful additions to our understanding of the history of the federal courts.

While recent studies have largely followed Frankfurter's emphasis on growth, they have substantially revised his ideas about transformation. First, they have shown that before 1875 the federal courts were not tribunals "restricted" to private actions based on state law and, further, that such private law actions remained an important aspect of federal jurisdiction long after Reconstruction. On the former point, it seems clear that prior to 1875—and to some extent even after—the federal courts used diversity jurisdiction to enforce claims and defenses based on federal law, sometimes in suits involving state officials (Woolhandler 1997).⁸¹ Moreover, to a lesser extent the lower courts asserted federal authority and enforced national policy in exercising their admiralty jurisdiction, relatively speaking a more important jurisdiction prior to the Civil War than subsequently (Freyer and Dixon 1995, 31–36; Morris 1987, 16–18, 63–64).⁸² On the latter point, recent histories confirm that private law diversity actions continued to dominate most federal dockets until at least World War I (e.g., Zelden 1993, 60; Couch 1984, 36; Solomon 1981, 76; Hall and Rise 1991, 145; Freyer and Dixon 1995, 207) and that they remained a major category of federal litigation throughout the twentieth century (Hall and Rise 1991, 146; Zelden 1993, 193–94; Couch 1984, 108–9). Moreover, the idea of diversity jurisdiction as a broad, vibrant, and essential tool of American nationalism found one of its greatest defenders in Chief Justice William Howard Taft in the 1920s, and the idea continued to command powerful and widespread support through World War II (see generally Mason 1965; Purcell forthcoming, ch. 3). As late as 1951 the Judicial Conference of the United States accepted the report of a committee chaired by Judge John J. Parker of the Fourth Circuit—a long-

80. Illustrating the complexity of the problem are four volumes produced by the Rand Corporation attempting to evaluate the impact of the Civil Justice Reform Act of 1990. See Kakalik et al. 1996a; 1996b; 1996c; 1996d). For a statistical historical analysis of the changing federal caseload, see Clark 1981.

81. Parties with defenses or counterclaims based on federal law could not generally obtain access to a federal court on the basis of "federal question" jurisdiction. Diversity removal jurisdiction sometimes allowed them access to a federal court.

82. Hall and Rise emphasize the extent to which local considerations influenced the admiralty decisions of the Florida federal courts in the nineteenth century (Hall and Rise 1991, 21, 27–29, 144–45).

time defender of diversity (e.g., Parker 1932; 1956)—that hailed the jurisdiction as necessary to protect “the Commercial as well as the political fabric of the country.” Diversity jurisdiction, the committee declared, was “essential to the proper administration of justice under the system of dual sovereignty established by our Constitution” (Judicial Conference [1951] 1957, 11, 14).

Second, and more important, recent histories show that the transformation of the federal courts into “powerful reliances” for defending “every right” given by federal law was a stunted, belated, and quite incomplete development. The inglorious story of the federal courts with respect to race and repudiationism in the late nineteenth and early twentieth century is well known.⁸³ The Iowa federal judge who scorned the “swarming” presence of “samples of nearly all the races” was hardly unique. Even later in the twentieth century the federal courts often failed to enforce federal rights with any particular vigor (Zelden 1993, 198–208; Hall and Rise 1991, 128–39),⁸⁴ while solicitude for local interests and values continued to mark their work (e.g., Zelden 1993, 39–40, 50, 95–97; Freyer and Dixon 1995, 155–66). An attorney in the Civil Rights Division of the Department of Justice recently recalled that as late as the 1960s the division was forced in some areas “to try its cases before a largely hostile district court bench” that was “likely to rule against the government” (Landsberg 1997, 179; Doar 1997, 10).

Third, recent histories suggest a crucial ambiguity in the sweeping idea of the transformation of the national judiciary. With increasing frequency the federal courts have been asked to apply national law against individuals who asserted their own federal rights as shields against a determined national government.⁸⁵ In such cases the federal courts may have acted as the primary expositors of federal law and the primary sources of national uniformity, but they were also choosing among inconsistent propositions of federal law. Jeffrey Morris makes the point in his *Federal Justice in the Second Circuit*. “[F]ederal judges within and outside the Second Circuit, anxious to demonstrate their loyalty and to aid the war effort,” he writes, “were ‘highly immoderate’ in passing on Espionage Act cases and in imposing sentences” (Morris 1987, 115). The principle that the federal courts sit to enforce federal law and protect federal rights, in other words, is often rhetorical and self-contradictory rather than analytic and normative. “Federal law” and “federal rights” often simply conflicted. The critical question in the history

83. E.g., *Plessy v. Ferguson* (1896); *Hans v. Louisiana* (1890); Purcell 1992b, 142–47.

84. Freyer and Dixon present a somewhat more ambiguous picture (Freyer and Dixon 1995, 117–25, 162, 202–13).

85. See, e.g., Morris 1987, 28–31; Frederick 1994, 144–50; Buan 1993, 154–57. For the other side of the story see, e.g., Dargo 1993, ch. 4; Mooney 1985.

For discussions in other contexts see Gunther 1994, 151–61; Irons 1983; Irons 1989; Kutler 1982; Belknap 1977; Preston 1963.

of the national courts is obviously *which* federal rights—belonging to whom—were enforced, when, where, against whom, and under what circumstances.

Finally, recent work stresses the importance of factors other than docket changes in transforming the federal judiciary. One consideration, which Frankfurter slighted in *The Business of the Supreme Court*, is the alteration that occurred in the social and professional characteristics of those appointed to the federal bench. In spite of considerable variations by time and place, and in spite of the continued salience of local pressures and partisan politics, federal judges tended increasingly to be drawn from the upper echelons of the bar with more pronounced national orientations and stronger commitments to professionally defined norms of law and judicial behavior.⁸⁶ The result over the long period from the early nineteenth century to the late twentieth has been the establishment of a federal bench that generally reflects a more broadly national viewpoint, a high degree of professionalism and expertise, and a special sensitivity toward the enforcement of federal law.⁸⁷ The other element of the transformation, which Frankfurter discussed at length, arose from two related structural changes in the federal appellate system.⁸⁸ Between 1879 and 1911 Congress established a system for appeals in federal criminal cases, and in 1891 in the Evarts Act it created a system of intermediate appellate courts—staffed by special sets of appellate judges—to hear appeals in both criminal and civil cases. The first change remedied a major structural flaw in the federal system, that the decisions of its trial courts in criminal cases had generally been unreviewable (Surrency 1987, chs. 19–20; Arkin 1992, 521–42). The other reform remedied a second major flaw, that in civil cases judges who tried suits often sat as appellate judges hearing appeals from their own decisions. The creation of special sets of exclusively appellate courts and judges, the recognition of a broader right to appeal trial court decisions, and the guarantee of an appeal to a fresh panel of judges strengthened the federal judicial system immeasurably and improved its ability to administer justice in a regular, evenhanded, and confidence-inspiring manner.

As a general matter, then, recent histories agree that there was a “transformation” of the federal courts but that it was more limited, complex, varied, and belated than Frankfurter’s statement suggested. Almost all agree that the social roots of the docket change—the growing importance of ac-

86. See, e.g., Hall 1980; 1976; Freyer and Dixon 1995, 135–91. In the late twentieth century federal judicial appointments also tended to be more diverse in terms of race, gender, and religion. See Goldman 1997. Identifying the policy consequences of the shift is complex and difficult. See, e.g., Walker and Barrow 1985.

87. The emphasis on nationalism and the enforcement of federal rights requires qualification in light of some of the ideologically “conservative” appointments made by Presidents Ronald Reagan and George Bush.

88. Frankfurter emphasized this point in *The Business of the Supreme Court*.

tions involving the federal government or federal law issues and the relative decline in private and state law cases—lay in industrialism, the expansion of the national market, and the early efforts of Populists and progressives to regulate the new economy (Hall and Rise 1991, 143–45; Morris 1987, 91, 123; Couch 1984, 33). Almost all agree, too, that Prohibition, the New Deal, and the two world wars accelerated the process substantially (Hall and Rise 1991, 145; Frederick 1994, 216). There was a “trend from private to public law,” Rayman L. Solomon explained in his *History of the Seventh Circuit*, and the federal courts became “increasingly involved with questions concerning the scope and role of the federal government’s involvement in the political, economic, and social life of the United States” (Solomon 1981, 160). The trend, however, began only in the early twentieth century, three decades after passage of the Judiciary Act of 1875. Sampling cases every five years, Solomon found that “by 1902 the private law cases had reached a high of 96.8% of the total cases decided” by the Seventh Circuit. From that point the “percentage fell almost at a constant rate: by 1941 only 55.5 percent of the appeals were private law cases” (Solomon 1981, 160). Indeed, most of the recent histories generally agree with Freyer and Dixon that the “transformation” was a long, complex, and erratic process that spanned the entire period from the Civil War to the Warren Court and beyond.⁸⁹ Zelden argues that the critical change in the Southern District of Texas—which he identifies as the rise of public law issues and the decline of the district’s “private” agenda—did not occur until after 1960 (Zelden 1993, 210–14), while Hall and Rise seem to suggest that in the Florida federal courts the transformation was still incomplete in the 1990s (Hall and Rise 1991, 146–47).

Considering these works, it seems clear that the idea of a transformation of the federal courts needs severe qualification. As a description it is far too cumbersome because it obscures major elements of the history of the lower courts. As a prescription, it has reached a dead end because it fails more and more obviously to address the most sharply controverted issues that have arisen about the federal courts, especially during the past half century.⁹⁰ Frankfurter’s political progressivism and jurisprudential positivism naturally focused on diversity jurisdiction as a systemic aberration, but by the 1960s the political and social disputes that were pivotal to the role of

89. “Between 1865 and 1940, federal judicial power in Alabama was transformed,” they write (Freyer and Dixon 1995, 61). National influences, however, did not outweigh local ones until after World War II (1995, 191). Indeed, Freyer and Dixon point out, diversity jurisdiction remained the major source of business for the Alabama federal courts until after World War II (1995, 207). During the half century after the war, “the institutional influence of the national judicial system was becoming greater than ever.” It was not until the century’s end, however, that “Alabama’s federal judges deferred to national judicial control” (1995, 214).

90. Judge Henry J. Friendly, one of Frankfurter’s students, anticipated this issue more than a quarter of a century ago (Friendly 1973). For the most ambitious attempt to implement the twentieth-century view, see American Law Institute 1969; Purcell forthcoming, ch. 10.

the national courts involved neither diversity actions nor the choice between diversity and federal question cases. Rather, the most intense controversies swirled around the question of *which* federal claims the national courts should hear and which should be relegated to the state courts.

Frankfurter's corollary idea that state courts should hear federal claims that were "essentially local" provided little if any useful guidance.⁹¹ If we associate the federal courts with the enforcement of individual rights, as we have tended increasingly to do for the past century, we must admit that for the most part the rights enforced are often as easily categorized as "local" as they are as "national." Actions brought under the federal civil rights laws, suits involving employment discrimination, claims under the recent Violence Against Women Act,⁹² and petitions for habeas corpus by state prisoners claiming violations of federal rights—to pick four controversial examples—usually involve disputes that turn on "local" matters and that have, in themselves, little "national" resonance. At the same time, of course, they involve rights, issues, practices, and institutions that are of the greatest importance to our common life and that are central to our most fundamental national values. They are subjects of the most intense political concern, and the relative importance of access to federal courts in each area may vary substantially from state to state. Consequently, the labels "local" and "national" do little to advance our thinking about the proper relevant scope of federal jurisdiction. Thus, even with Frankfurter's corollary, the basic structural idea behind the twentieth-century view—that the federal courts should enforce federal law—fails to provide guidelines to help us choose which issues should go to federal courts and which to state courts.⁹³

The idea of transformation is also problematic, finally, because the work and role of the national courts have been subject to drastic if sometimes sporadic and unpredictable changes, and the processes of change will undoubtedly continue to work their way. Indeed, the federal courts may currently be in the early stages of another major reorientation in their role, image, and politics. Two examples will suffice.

91. Frankfurter recognized the difficulty of identifying the relative "importance" of legal issues in discussing the Supreme Court's appellate jurisdiction. See, e.g., Frankfurter and Hart 1934, 263–76. The issue was quite different, but nevertheless still difficult, with respect to the original jurisdiction of the district courts.

92. Title IV, Violent Crime Control and Law Enforcement Act of 1994, 108 Stat. 1796 (1994), codified at 42 U.S.C. §§ 13921 et seq. (private cause of action created in § 13981 (c)).

93. Frankfurter, of course, addressed the issue in part by seeking to identify "essentially local" issues of federal law, both criminal and civil, that should be excluded from federal jurisdiction. Some later commentators have adopted the same approach, though in their writings "local" often comes to mean those claims that the writers regard as relatively unimportant. For the most recent, comprehensive, coherently reasoned proposals see Commission on Structural Alternatives for the Federal Courts of Appeals 1998; Judicial Conference of the United States, Committee on Long Range Planning 1995; Federal Courts Study Committee 1990.

First, from the twentieth century's beginning, as part of an effort to strengthen the national courts and free them from the coils of state law, reformers campaigned for the establishment of a set of uniform, court-made rules of civil procedure for the federal courts in actions at law. The movement triumphed in 1934, and the nationally uniform Federal Rules of Civil Procedure were first promulgated in 1938 (e.g., Bone 1989; Subrin 1987; Burbank 1982). Strengthening the procedural side of the transformation, the new Federal Rules freed the national courts from state procedural rules and created a nationally uniform federal procedural system. They worked well for decades and, not surprisingly, were brought to their point of broadest sweep by the Warren Court in the 1960s (see, e.g., *Hanna v. Plumer* [1965]). By the 1970s, however, the rules began to lose their "uniformity" as district courts introduced *de facto* modifications in order to deal with burgeoning dockets and increasingly unwieldy "complex" litigations. Then, in 1990 Congress responded to the caseload pressures and calls for greater flexibility by expressly authorizing some formal procedural diversity among the district courts and by encouraging extensive local experimentation. At century's end, federal civil procedure was no longer either uniform or controlled exclusively by the Federal Rules (e.g., Carrington 1996; *Alabama Law Review* 1997; Walker 1997). Scholars even began to speak of the "Balkanization" of the federal courts (Tobias 1992; Sisk 1997).

Second, massive and rapid changes—including, among others, the rise of free market ideologies, an intensification of hostility toward centralized government, the emergence of a Republican political majority, and the restructuring of many basic social and economic arrangements within the United States—have continued the reshaping of American life and politics. Not surprisingly, the various branches of government have responded to the new pressures and newly powerful forces, and one result seems to be a growing tendency to limit the powers and jurisdiction of the national courts. Congress decided to limit severely their ability to issue writs of habeas corpus to protect federal constitutional rights in state criminal proceedings,⁹⁴ for example, and the Rehnquist Court moved actively and on its own to restrict the powers of the lower federal courts in a variety of areas.⁹⁵ Indeed, the twentieth-century view was built to a large extent on several doctrines associated with the turn-of-the-century Court's famous decision in *Ex parte Young* (1908) (see Purcell forthcoming, ch. 2), which ensured the ability of the lower federal courts to enjoin state officials from acting in

94. Antiterrorism and Effective Death Penalty Act of 1996, Pub. Law No. 104-132, 110 Stat. 1214 (1996).

95. See, e.g., *Touche Ross v. Redington* (1979); *Schweiker v. Chilicky* (1988); *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Lujan v. Defenders of Wildlife* (1992); *Bray v. Alexandria Women's Health Clinic* (1993). See generally Yackle 1994.

violation of federal law. Recently, some of the Justices have suggested that they hope to redesign those doctrines and weaken them substantially.⁹⁶

Where these tendencies might lead and what their impact would be are, of course, unknowable at present. They remind us, however, that the jurisdiction and role of the lower federal courts has been and will continue to be remolded by new and changing social and political forces. Thus, whatever the "transformation" that occurred in the federal courts between the Civil War and the Warren Court, it too is subject to alteration or even to another "transformation."

B. Emerging Counterthemes: Localism and Variation

While complicating the theme of growth and severely qualifying the idea of transformation, recent work in the history of the federal courts has pushed to the fore two new and related counterthemes, localism and variation. Both add depth and complexity that move us far beyond Frankfurter's image of a relatively homogeneous federal judicial system.

The theme of localism emerges unavoidably from able and incisive individual histories. Although the lower federal courts were intended to be "national" forums reflecting broader national viewpoints, recent histories show that they remained firmly embedded in their states and regions. In the early years they served to a large extent as buffers protecting local interests from national policies (e.g., Tauchau 1978; Ellis 1971; Hall 1976), but even in the late nineteenth and twentieth centuries they often adapted federal law to harmonize with local concerns as much as they "enforced" national standards.⁹⁷ Indeed, the fact that no federal judicial district crossed state lines gave the national courts an abiding state-specific identity, while the selection of area residents for federal judgeships and the influence of both local politics and senatorial courtesy on the appointment process reinforced the weight of local concerns among federal judges. Local and regional values shaped the character of those appointed, and they shaped as well the character of the local bars and professional elites with whom those judges lived

96. In *Idaho v. Coeur d'Alene Tribe* (1997), the Court construed the Eleventh Amendment to impose a significant, although apparently narrow, limit on the power of the lower courts to enjoin state officials. Two of the Justices in the "conservative" majority—Chief Justice Rehnquist and Justice Kennedy (per Kennedy)—urged a much broader interpretation of the amendment that would narrow *Ex parte Young* drastically and shrink severely the role of the federal courts in remedying unconstitutional state actions. See *id.* at 270-80. The decision came on the heels of another Eleventh Amendment decision that overruled one of the Court's prior decisions (*Pennsylvania v. Union Gas Company* [1989]), sharply limited the powers of Congress over the states, and expanded state immunity from suits in federal courts. *Seminole Tribe of Florida v. Florida* (1996).

97. E.g., Zelden 1993; Freyer and Dixon 1995. For an insightful analysis of judges and local legal culture see Konefsky 1988.

and worked.⁹⁸ Similarly, local conflicts and interests helped determine both the kinds of cases that individual courts heard and the nature of the social consequences that their decisions caused. Although an increasingly national viewpoint came to characterize the federal judiciary after the New Deal and World War II, state and regional influences remained significant at the end of the twentieth century.⁹⁹

Freyer and Dixon, for example, explore the importance of the economic rivalry between northern and southern Alabama and the development in the federal courts of a particular urban orientation that helped set them apart from the state's predominantly rural culture. In terms of the intrastate economic rivalry, they show how the geographical backgrounds and differing intrastate connections of Alabama's federal judges influenced their decisions on highly technical questions of federal law involving the Interstate Commerce Commission and its rate-setting policies (Freyer and Dixon 1995, 111–16).¹⁰⁰ In terms of the urban orientation of the federal courts, the authors repeatedly emphasize the importance of what they call the local "federal courtroom culture," the complex of assumptions, attitudes, and practices that characterized the state's elite federal bench and bar. This local courthouse culture, they argue, informally but nevertheless effectively shaped the practical role of Alabama federal courts well into the twentieth century (e.g., Freyer and Dixon 1995, 5–6, 23–31, 70–76, 80–86, 109, 136, 155–66, 186–91, 213–14).

The related theme of variation, amplifying the importance of localism and further qualifying the themes of growth and transformation, also emerges readily from the new histories. The nation's westward expansion meant that some districts and circuits had long histories before others had been established. The varied appearance and impact of such forces as urbanization, industrialization, and immigration meant that some courts had to adapt quickly and extensively to massive socioeconomic changes while others were allowed to respond more gradually or even avoid some problems altogether. Geography, too, compelled diversity, determining to a large extent the nature, timing, amount, importance, and proportion of the kinds of cases that came before various courts as well as the types of social pressures and interests that the cases generated.¹⁰¹ Districts and circuits varied signifi-

98. Freyer and Dixon emphasize the importance of such local culture factors. See, e.g., Freyer and Dixon 1995, 7–14, 62–76, and 155–66.

99. Hall and Rise, for example, stress this point. See Hall and Rise 1991, 146–47. In contrast, though they emphasize the continuing power of localism, Freyer and Dixon state that by the end of the twentieth century national influences had come to dominate the Alabama federal courts. See Freyer and Dixon 1995, 257–63.

100. Similarly, Hall and Rise 1991, emphasize the differences that marked the Northern and Southern Districts of Florida (1991, 22). The former, for example, was basically pro-New Deal, while the latter was staunchly anti-New Deal (1991, 81, 85, 92, 96).

101. See, e.g., Rowland and Carp 1996, ch. 3. In the Fifth Circuit, for example, railroad cases were of special importance in its early years; then cases from the Atlanta steel mills become common; and later tax cases occupied a significant part of the court's time (Couch

cantly, for example, in the extent to which they heard criminal prosecutions that involved immigration, smuggling, and illegal narcotics as well as the extent to which they dealt with civil actions that raised maritime issues, labor disputes, questions of Indian law, and controversies over the use of natural resources. Similarly, variations in the racial, ethnic, and religious composition of local populations meant that different courts would, at various times, be forced to address different types of social conflicts, involving varying levels of intensity, and rooted in diverse social and cultural cleavages.¹⁰² The phenomenon of race-based slavery was, by itself, a major factor that divided the experiences—and sometimes the allegiances—of the federal courts, and its shattering impact continues to resonate a century and a half after the Civil War.

In his study of the Ninth Circuit, for example, Frederick emphasizes the importance of geography. The Ninth Circuit's location in the Far West meant that it would be primarily responsible for dealing with the highly charged subject of Chinese immigration and exclusion. Indeed, in the 1990s the circuit still decides a majority of all the immigration cases in the federal courts (Ninth Circuit Gender Bias Task Force Final Report 1993, 14). Frederick shows how the challenge of Chinese immigration affected the court and how its attitude and decisions changed as a result of exclusionary legislation and the appointment of new judges who shared the surging anti-Chinese bias that animated Congress and much of the West (Frederick 1994, ch. 3).¹⁰³ Similarly, geography made the Ninth Circuit responsible for ruling on major questions concerning land grants, federal land policy, and the exploitation of the West's extensive natural resources. The circuit's critical role in western development, Frederick shrewdly notes, illustrates the broader point—which Solomon made with respect to the Seventh Circuit—that the "federalization of law" and the expanding social role of the national courts began in earnest after the turn of the twentieth century, not with the Judiciary Act of 1875 or the New Deal's massive regulatory programs in the 1930s (Frederick 1994, 6, 120–21).¹⁰⁴

1984, 23, 35, 50). See Zelden 1993, 54–59 (impact of proximity to Mexico); Dargo 1993, 10 (dominance of Massachusetts in circuit); Hall and Rise 1991, 114–17 (criminal prosecutions for drugs and smuggling); Solomon 1981, 77 (dominance of Chicago in circuit's business); Buan 1993, 251 (prosecutions of marijuana growers).

102. There was, for example, intense hostility toward the federal courts among the Mormons who settled Utah (Ashton 1988, 35). In California and Oregon the federal courts were forced to confront intense anti-Chinese pressures (Fritz 1991, ch. 7; Frederick 1994, ch. 3; Buan 1993, 104–16). In her essay "A Period of Complexity, 1950–1991" (in Buan 1993), Laurie Bennett Mapes suggests that the District Court for Oregon heard few employment discrimination cases involving race because local hostility drove blacks out of the state or dissuaded them from asserting claims (Mapes 1993, 231).

103. Frederick emphasizes the critical role that personnel changes play in a court's history (Frederick 1994, 18, 29, 169).

104. See Purcell 1992b, 262–91. The New Deal did, of course, strengthen and accelerate the trend substantially. Indeed, Frederick writes, the "New Deal transformed the work of the

The new histories show that the district and circuit courts differed at varying times and in varying ways for any number of complex and highly individualized reasons.¹⁰⁵ The time from filing to judgment and the consequent burdens of "delay" could vary widely (Purcell 1992b, 50), as could the amounts of damages that juries in different areas would award (see generally, Daniels and Martin 1986). The substantive law, too, could be interpreted differently from court to court. For reasons that remain unclear, for example, during the period from 1973 to 1990 federal courts in the West were less receptive to abortion rights than were federal courts in other regions of the country (Yarnold 1992, 67). Personnel changes, moreover, were often critical in a court's history, and generational shifts understandably occurred at different times in different courts. Between 1891 and 1939, Dargo explained in his *History of the First Circuit*, "there were essentially three First Circuit courts." Pivotal personnel changes occurred around 1913 and 1932, twice reshaping the court and its orientation (Dargo 1993, 76, 110, 112). Similar critical transitions took place in the Third Circuit in 1938–39 (Presser 1982, 187); in the Fifth Circuit in 1919, 1931, and 1957 (Couch 1984, 30, 52); in the Seventh Circuit in 1912 (Solomon 1981, 81, 139, 155); and in the Ninth Circuit in 1890 and 1925 (Frederick 1994, 67, 122). Such generational changes gave to each circuit its own individual periodization that was at least partially independent from the rhythms of broader national currents.

The emerging themes of localism and variation are helpful not only in giving us a fuller picture of the federal courts themselves but also in allowing us to develop more satisfying answers to many general historical questions. Several of the recent histories, for example, shed light on the much-controverted "subsidy" thesis, the claim that the courts in the nineteenth century applied tort rules that "subsidized" corporations by sharply limiting their liability for injuries. Vigorously supporting the thesis, Zelden (1993) finds that a local business elite dominated the Southern District of Texas, spawned its judges, and established a dual agenda—fostering the region's economic growth and protecting the social hegemony of its business class. The Southern District was "first and foremost a court for the business community," an institution devoted to "helping those who already had property" (Frederick 1994, 134). The court promised little to less fortunate groups, Zelden concludes. "Unemployed laborers or sharecroppers did not turn to the Southern District for help" (Frederick 1994, 134). Discovering a somewhat more mixed situation, Hall and Rise conclude that the two federal district courts in Florida—the Northern more noticeably than the South-

Ninth Circuit," and he notes that the process was long and complex (Frederick 1994, 216, 243).

105. In the early twentieth century the Fourth Circuit and the Seventh Circuit were regarded as particularly "pro-business," for example, while later in the century the District of Columbia Circuit and the Ninth Circuit were considered especially "liberal."

ern—tended to limit the liability of common carriers, promote economic growth, and minimize the labor costs of business (Hall and Rise 1991, 46–49, 66–68). As late as 1945, they explain, those courts “remained essentially conservative, sympathetic to moderate reforms but committed to protecting the economic interests of the state’s business community” (Hall and Rise 1991, 99). In contrast, Fritz (1991) shows that in private admiralty suits in the Northern District of California Judge Hoffman was quite willing to hold shipping companies liable to both passengers and seamen. The cases “do not suggest that the court was protective of all business interests or that resulting case law promoted entrepreneurial activity” (Hall and Rise 1991, 84). Instead, the judge was “zealous in providing remedies” to aggrieved parties, Fritz argues, and “his cases do not reveal a consistent or strong posture that could be described as probusiness” (Hall and Rise 1991, 99, 253–54).

Thus, the studies show that decisions in three of four districts lend support to the subsidy thesis, but they also illustrate the variety that existed among the lower federal courts by time, judge, location, and subject matter.¹⁰⁶ Indeed, as Hall and Rise show, two districts located in the same state and acting in the same time period nevertheless revealed somewhat different policy orientations. These histories admonish us to be wary of sweeping interpretations until we have examined many more lower courts and, further, considered their role not merely in deciding reported cases but also in influencing the overall out-of-court settlement process.¹⁰⁷

C. Complicating the Idea of a “Federal Judicial System”: The Distinctiveness and Independence of the Lower Federal Courts

One of the major contributions of the newer histories is to focus on the lower federal courts not as Frankfurterian “intake” points but as important, and often independent, decision makers in their own right. Recent work, in other words, has exploded the idea that the lower federal courts are mechanical cogs in a hierarchical system, and it has broken the automatic

106. In spite of variations, the federal courts seemed generally hostile to labor unions, and they were willing to be both flexible and creative in enjoining strike activities. See, e.g., Solomon 1981, 9–10, 34–35, 53–56.

107. In contrast, however, on another perennial issue—the dispute over “formalism” and “instrumentalism” as late-nineteenth- and early-twentieth-century “judicial styles”—studies of lower federal courts lend support to an emerging consensus. They show that federal judges generally exhibited both characteristics at varying times and on varying issues, and they suggest strongly that the two labels are far too cumbersome, misleading, and in some ways beside the point to carry us far in understanding either the opinions of judges or the decisionmaking of courts (Fritz 1991, 252–53; Mooney 1993, 67, 78, 82–88, 98–104, 116; Zelden 1993, 97, 118, 188, 132–33, 144–51; Purcell 1992b, 253–54, 394–96 nn. 13–15; Kroger 1998; Ernst 1995; Beth 1992, 268–69). There were, of course, differences in judicial style by judge, region, and time period. Compare Karsten 1997; Scheiber 1975; Freyer and Dixon 1995, 90–94, 108–10.

linkage between the rulings of the lower courts and the formal authority of the Supreme Court.¹⁰⁸

One indication of the change lies in the heightened sensitivity recent histories show to the differences between the two basic types of lower federal courts. Just as the Supreme Court is different from other federal courts, so the courts of appeals differ from the district courts.¹⁰⁹ Many of the differences are obvious; some less so. But the fact of difference means that the focus of the historian's analysis properly varies with each.

Handling claims in the first instance, district courts¹¹⁰ serve as mass processors of disputes, primary forces for inducing pretrial settlements, creators and shapers of factual records, and the local judicial representatives of federal law and the national government. Their rulings are sometimes hurried, lack broadly binding precedential authority, often deal with preliminary and highly case-specific procedural matters, result from the decisions of a single judge, and generally receive appellate review only when they are final and on the merits. District court judges, consequently, enjoy a high degree of *de facto* independence and exercise a wide range of discretion.

In contrast, the courts of appeals hear smaller numbers of cases, rely on established records, and decide issues of law. They sit to correct errors, exercise administrative control over the districts in the circuit, produce consistent federal (or at least intracircuit) law, review the actions of federal administrative agencies, and free the Supreme Court to address broad and pressing national issues.¹¹¹ Their rulings are often made with more time for reflection, carry substantial precedential authority, address significant legal issues, provide final judicial review in the overwhelming number of cases, and come from panels of three judges and, on occasion, by *en banc* courts of a dozen or more. Appellate judges and courts thus operate in a more structured and formalized environment. Though hierarchically superior to district judges, in significant ways their discretion is more circumscribed.¹¹²

The differing nature of the two types of courts suggests some of the differences that properly mark their respective histories. Most obvious, the

108. Tachau suggested this theme more than two decades ago in her pathbreaking work on the District Court of Kentucky. See Tachau 1978, 11, 124–26.

109. Common usage creates an ambiguity. Lawyers refer to both the appellate courts and their entire circuits by the same numbered phrase. The “Second Circuit,” for example, can refer to either the Court of Appeals for the Second Circuit or to all of the federal courts in the three-state Second Circuit. Historians have not always distinguished sufficiently between the two. Needless to say, the focus and scope of a work will differ drastically depending on whether the subject is the appellate court itself or an entire circuit.

110. This naturally includes any court of first instance, such as the old “circuit courts”—which were primarily trial courts—that were established in 1789 and finally abolished in 1911.

111. These generalizations should not obscure the fact that the “role” of the court of appeals, like that of any court, is itself a changing historical phenomenon. See Carrington 1987.

112. Compare, e.g., Carp and Rowland (1983), with Howard (1981).

study of district courts opens up a wide variety of practical and real-world issues concerning the practices of day-to-day dispute processing (see, e.g., Fritz 1991, 246–49, 254–56). The work of trial courts points directly to the social factors that generate, shape, and channel disputes; it highlights the creative role of attorneys and the importance of adroit tactical maneuvering; it illuminates the importance of the kinds of “preliminary” procedural decisions—involving, for example, venue, discovery, or party structure—that often induce pretrial settlements and, consequently, go unreviewed; and it reveals the gap that commonly exists between substantive rules of law and the resolution of individual disputes. Studying trial courts, in other words, offers a window on the history of the *de facto* operations of the legal system. It can illuminate the usually obscure social parameters and the often ignored strategic behaviors that determine how the legal system affects most of the people pulled into its web.¹¹³

Conversely, study of the appellate courts points toward a different focus. Here, the development of formal legal rules is of central importance, and historians have examined the complex processes of judicial lawmaking and the practices through which the courts articulated legal rules.¹¹⁴ It seems likely, too, that cases where the appellate courts rendered final judgments are in some ways more important than the relatively rare cases that go up to the Supreme Court. The decisions of the Fifth Circuit are final in approximately 98% of the cases it hears; those in the Ninth Circuit in approximately 96% (Couch 1984, 49; Frederick 1994, 98). As a general matter, moreover, the courts of appeals seem to have a relatively minor role in deciding constitutional issues; their most characteristic and important work involves construing federal statutes, supervising federal agencies, and addressing interstitial gaps in federal law (Morris 1987, 149; Solomon 1981, 69). Similarly, their growing administrative role points to their importance in attempting to centralize the judicial bureaucracy, review orders of federal administrative agencies, and ensure relative uniformity in the operations of the national court system (Hellman, ed. 1990; Federal Judicial Center 1988; Howard 1981).¹¹⁵

A second indication of the move away from the Frankfurterian idea of the lower courts as units in an integrated system is the extent to which the new histories show both the individuality of the various lower courts and the internal conflicts that often divided their judges. Two fine books dealing with the Ninth Circuit illustrate the way recent histories have uncovered the variety, complexity, and conflict that marked the history of individual federal courts.

113. For this reason, histories of trial courts should make every effort to find and use unpublished opinions and the records of cases that were settled without final judgment. If they can be located, relevant extrajudicial records are also of the greatest utility.

114. See, e.g., the comments on appellate opinion writing in Posner 1985, 226–58.

115. For an excellent general history see Fish 1973.

Fritz's (1991) study of the Northern District of California is particularly valuable in providing a revealing look at the internal operations of the lower federal courts before the Evarts Act of 1891. It examines the role of the local United States Attorney and shows how his power, discretion, and independence from the attorney general—especially before 1870—shaped *de facto* federal policy and channeled the Northern District's energy and influence (Frederick 1994, 100–101, 123–32, 215–21). Similarly, the book highlights the kinds of internal tensions and conflicts that resulted from the pre-Evarts Act structure of the national courts: the overlapping and partially hierarchical roles of district and circuit judges as well as the periodic and sometimes critical visits of the circuit's controlling Supreme Court Justice. Those periodic visits might have been more critical in the Ninth Circuit than in other circuits, of course, because the Supreme Court Justice assigned to the Ninth was Stephen J. Field who, as Fritz so clearly shows, had his own agenda in mind at all times and conflicted repeatedly with Judge Hoffman (Frederick 1994, 196–209, 226–49).¹¹⁶

Frederick's *Rugged Justice* picks up nicely where Fritz ends, with the passage of the Evarts Act and the creation of the United States Circuit Courts of Appeals. Frederick stresses the impact that increasing role specialization and sharpening political conflicts among the judges had on the appellate court's institutional and administrative structure. Between the 1890s and the 1930s district judges ceased to sit regularly on circuit panels, while circuit judges devoted themselves exclusively to appellate work. As the number of circuit judges increased from the original number of two—which had required the use of district judges to fill out appellate panels—to seven by 1937, personnel assignments came to be increasingly critical in determining the court's decisions.¹¹⁷ That awkward institutional truth was compounded by two additional factors. The Ninth Circuit faced increasingly politicized issues, and the expanding reach of federal law magnified the social import of its decisions (Frederick 1994, 5, 121, 160, 187–88, 198, 225–26). The circuit's anti-New Deal senior judge used his assignment power, Frederick shows, to ensure that he would sit on critical New Deal cases and also that he would be able to command a second vote (Frederick 1994, 204, 242). The eventual result was institutional reform designed to minimize judicial conflicts and administrative manipulation: the development of more neutral rules for selecting panels and a new procedure that allowed the entire court to hear or rehear critical cases *en banc* (Frederick 1994, 242).

116. The bitter and long-running conflict between Hoffman and Field, himself a Californian, is a major theme of the book. See, e.g., Frederick 1994, 29, 40–48.

117. The problem was not confined to the Ninth Circuit. See, e.g., Barrow and Walker 1988, 55–61.

Thus, far from being merely "units" in an "articulating" federal system, the lower courts emerge from these and other histories not only as diverse decision makers but also as dynamic and sometimes internally divided ones as well. The Ninth Circuit, like other federal courts, may in theory have been a single and coherent "court," but in practice it was a shifting and somewhat unstable institution that was shaped by a variety of constraints and driven by a range of diverse public concerns and private considerations.¹¹⁸

Compounding the sense of variety and conflict, a third indication of the move away from the Frankfurterian idea of the lower courts as "intake" points lies in the fact that recent histories have begun to explore the disjunctions that exist between the actions of the lower courts and the rulings of the Supreme Court. The studies recognize, in other words, the crucial fact that the rules of law laid down by the Supreme Court are not implemented automatically. Trial and appellate judges have their own perspectives, interests, priorities, and ideologies that may, and sometimes do, significantly affect their responses to authoritative rulings from above.¹¹⁹ Lower court judges enjoy broad discretion, and they can expand or narrow the language and holdings of Supreme Court opinions, especially when those opinions are ambiguous or the Court is shifting its position (Carp and Stidham 1996, 378; Songer 1991, 42–46; Rowland 1991, 63–65; Rowland and Carp 1983). They can also push beyond the controlling decisions of the Supreme Court and develop the law on their own.¹²⁰ "[I]t is useful to imagine social experience and legal ideology in tension," Robert Bone has reminded us, "each influencing at the same time as being influenced by the other and both together shaping legal doctrine" (Bone 1990, 229).¹²¹ Further, in limiting discovery, conducting hearings, finding "facts," and creating records, trial judges impose a specific shape on the cases they hear. Intentionally or not, they may do so under the influence of a variety of personal assumptions and values. Trial judges, moreover, may shape their cases in ways that limit the ability of appellate courts to recognize and correct their more personal imprints (Rowland and Carp 1996; Murphy 1964). Finally, lower courts may sometimes resist authoritative decisions, not only in major constitutional controversies but also in ostensibly mundane and technical cases involving

118. E.g., Lewis 1999. Recent work stresses, among other findings, the extent to which judges engage in strategic behavior when working with their colleagues. E.g., Epstein and Knight 1998; Baum 1997, esp. ch. 4.

119. E.g., Brisbin 1996, 1014 (referring to research on appellate courts); Segal, Songer, and Cameron 1995, 243; Rowland and Carp 1996; Eisenberg and Johnson 1991; Carp and Rowland 1983; Sisk, Heise, and Morriss 1998. For a recent review of much of the literature see Cross 1997.

120. E.g., Foy 1986, 548, 555–59 (lower courts developing "implied" statutory causes of action beyond Supreme Court rulings).

121. Freyer and Dixon (1995) develop this theme at length.

statutory and procedural issues.¹²² Students of judicial behavior in the social sciences even have a word for this phenomenon. They call it “shirking.”¹²³

Frederick, for example, shows how the judges on the Ninth Circuit who favored the New Deal and its early farm program sought to protect the Agricultural Adjustment Act. Even after the Supreme Court invalidated substantial parts of the act in 1936, those pro-New Deal judges continued their supportive efforts and did so with considerable success. They “soon demonstrated” that legal complexities and “their own intellectual talents in distinguishing away unfavorable rulings” enabled them to implement “a more pro-administration jurisprudence” than the controlling precedents seemed to allow (Frederick 1994, 195). Similarly, Freyer and Dixon emphasize the range of discretion that Alabama federal judges enjoyed and the extent to which they took advantage of it. One judge, they note, “apparently felt unconstrained by Supreme Court precedent” in dealing with challenges to the Social Security Act (Freyer and Dixon 1995, 130; see Frederick 1994, 257–63).

The point is not, of course, that Supreme Court pronouncements are unimportant or that federal judges habitually ignore them. It is, rather, that there is ambiguity, slippage, judicial purposefulness, and sometimes even outright “shirking.”¹²⁴ The truth is that in at least many areas we do not know what the significance of Supreme Court decisions has been—not only in the complex world of human activity but even in the lower federal courts themselves. Evidence suggests, for example, that the fundamental principle of one of the Court’s most famous and ostensibly far-reaching decisions, *Erie Railroad Co. v. Tompkins* (1938), is in practice frequently slighted or ignored in many lower courts (Thomas 1977; cf. Yonover 1989).

In any event, we do know that judges have a great deal of discretion, that most actions are resolved without final judgment, and that many substantial differences exist between circuits, districts, and individual judges. Given those considerations, lower-court histories have come increasingly to examine the *de facto* ways theoretically authoritative legal rules have been

122. See Johnson 1987; Ulmer 1983; Shapiro and Levy 1995; Cross and Tiller 1998. For historical examples see, e.g., Purcell 1992b, 96–97, 119–21; Zelden 1993, 179, 184, 191; Couch 1984, 107–8.

123. E.g., Rowland and Carp 1996, 154. A well-known journalist who covers the Supreme Court recently reported that “there is some evidence that the Supreme Court’s conservative majority views [the Ninth Circuit] as something of a rogue circuit, especially on questions of criminal law and even more particularly on the death penalty” (Greenhouse 1998, A-22). See Farris 1997. In a highly unusual opinion the Supreme Court explicitly rebuked the Fourth Circuit in *Hutto v. Davis* (1982, 374-75) (“[T]he Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. . . . [U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be”).

124. Harry N. Scheiber was surely right when he pointed out that “the federal system frequently worked differently from what a reading of decisions in the great cases would suggest.” Scheiber 1981, 343, 346.

shaped and applied in ordinary litigation. Slippage of one sort or another seems inevitable. It seems equally inevitable that such slippage should vary, among other factors, by judge, court, time period, location, and subject matter. By examining the existence, nature, and pattern of such slippage, historians have begun to identify some of the most salient and specific characteristics of the individual courts they study.

A final indication of the new emphasis on the lower courts as independent decision makers is the fact that recent histories give relatively little attention to cases that were appealed from their courts and eventually decided by the Supreme Court. Frankfurter highlighted the role of the lower courts as "feeders" to the Supreme Court, and historians have sometimes been tempted to use a connection with the Court or some "famous" case to magnify the significance of the courts they study and the histories they write. Recent work seems to recognize, however, that an emphasis on such cases is usually both irrelevant and dysfunctional.

Such discussion is irrelevant because the mere fact that a lower court heard such a case, regardless of its subsequent fame or importance, by itself means nothing. It certainly does not mean either that the case had any particular significance for the court below or that the court below contributed anything of significance to the ultimate decision. Indeed, in the lower court the case may well have been a nondescript action that, absent Supreme Court review, would have been lost among numerous comparable actions. Cases that went to the Supreme Court merit little or no discussion in histories of the lower courts unless the lower court did something that either affected significantly the Supreme Court's decision or shaped its subsequent impact.

Discussions of such cases are dysfunctional because they detract from the issues that histories of lower courts can best illuminate. Only an infinitesimal part of the nation's judicial business goes to the Supreme Court. Indeed, as we all know, most disputes never get to any court, and most claims that are filed in court are settled before final judgment (Purcell 1992b, 31–45).¹²⁵ The *de facto* character of a federal trial court—its judges, docket, jury pool, rules and practices, and geographical location—and the nature of the pretrial decisions that it makes are major factors in inducing pretrial settlements or keeping cases out of court altogether. Those *de facto* characteristics are seldom noted in judicial opinions, and pretrial rulings in "preliminary" matters normally go unreviewed. In truth, however, those factors usually shape, and sometimes determine, the nature of the out-of-court settlements that dispose of most cases. Thus, the overwhelming number of

125. The situation prior to the Civil War may well have been different. Compare Freyer and Dixon 1995, 22 (in seven different years between 1822 and 1856 the Southern District of Alabama dismissed only 50 of 808 civil and admiralty suits; 526 went to judgment and the remainder were continued).

claims are resolved on the basis of factors that may be related only tangentially, or not at all, to the authoritative pronouncements of the Supreme Court.

If we agree that the life of “the law” has not been logic but “experience” (Holmes [1881] 1963, 5), then we should agree that the life of the operational law in the federal trial courts has been “experience” at its broadest, least idealistic, and most opportunistic: variegated, pragmatic, ruthless, selfish, and artful. It has been the scrabbling—in and out of court—of narrow and purposeful human beings operating under all varieties of compelling personal motives and practical pressures. One of the most exciting promises of research into the work of the lower federal courts—especially the trial courts—is that it can cast light, however flickering, on huge tracts of American legal experience that our fascination with the Supreme Court has left in the dim twilight. Fortunately, the recent work on the history of the lower courts has begun to cast an ever more searching light into that vast and tenebrous realm.

III. MOVING FURTHER BEYOND THE PARADIGM: SUGGESTIONS FOR FUTURE WORK

Drawing on the best of the recent histories of the federal courts, as well as on insights from other related fields of scholarship, future studies can broaden and deepen our understanding even further. Among other possibilities, several broad lines of inquiry seem promising.

A. Expand the Idea of the Federal Judicial “System”

While Frankfurter helped us understand that the federal courts were “parts of a system” (Frankfurter and Landis [1928] 1972, 220), he defined that system too formally and narrowly.¹²⁶ If individual courts are parts of a federal judicial system, they are also parts of an even broader system—the operating sociolegal system of claims disposition. Considering the workings

126. Federal courts have become increasingly “bureaucratic” institutions (as judges operate with and through magistrate judges, law clerks, and other support personnel), and they have increasingly been subsumed into a national administrative structure (with local, circuit, and national judicial conferences and national administrative supervision). Historians need to explore the significance of this double bureaucratization. Moreover, for the past century, non-Article 3 decision makers (magistrates, bankruptcy judges, administrative agencies, administrative law judges) have become increasingly common and important, and historians also need to examine this critical development. Although his focus was the Article 3 courts, Frankfurter did discuss the growing importance of what he called “federal courts of specialized jurisdiction.” Frankfurter and Landis [1928] 1972, ch. 4. See, e.g., Jones 1995; Heydebrand and Seron 1990.

of the federal courts in this more comprehensive system would add substantially to our understanding of their role and significance.

Most obviously, as Frankfurter himself emphasized, the federal courts have always been "alternate" forums exercising a jurisdiction generally concurrent with that of state courts.¹²⁷ A striking flaw in most histories of federal courts, then, is their failure to give more than perfunctory attention to counterpart state judicial systems. The fundamental structural fact of concurrent jurisdiction means that, absent a meaningful consideration of the relevant state courts, we can never fully understand the role that the federal courts played nor the social impact they had.¹²⁸ Comparison is essential.¹²⁹

Federal courts acted only when parties brought their cases before them. To understand why various types of parties sought federal forums, how they tried to secure them, whether they succeeded, and what consequences followed, historians must examine the parties, their tactics, and the nature of their successes and failures. To do this, they must compare the relevant characteristics of individual federal courts to those of their local state counterparts.¹³⁰ The comparison, moreover, should include not merely formal differences in substantive and procedural law but also institutional differences in structure and personnel (see, e.g., Neuborne 1977, 1991). Further, the comparison should also consider *de facto* social differences that, at any given time and in any given situation, could have made one or the other of the alternate forums more or less appealing to different types of litigants in different types of cases.¹³¹ The comparison, in other words, should go beyond standard formal and generic characteristics and examine the actual,

127. Congress has from time to time made some statutory rights and duties enforceable only in the federal courts. E.g., 28 U.S.C. § 1338 (jurisdiction over copyright, patent, and plant variety production actions shall be exclusive in the federal courts). Such "exclusive" jurisdiction over federal law claims is exceptional (Cover 1981).

128. It is clear, for example, that the common law of the states varied considerably in important ways and that regional differences were substantial. See, e.g., Karsten 1997; Scheiber 1975. Freyer and Dixon is one of the few federal court histories that refers to the local state courts (1995, 73–76).

One of the most complex and illuminating efforts to study both federal and state courts in the same state is the work of Frank W. Munger, Jr. (1986; 1988).

129. Much of Frankfurter's analysis, of course, was premised on a set of assumptions about the improving quality of state courts and the possibilities for expanding their role in the legal system. E.g., Frankfurter 1929, 275–76; Frankfurter and Landis [1928] 1972, 293.

130. Although addressing a different legal area, Justice Robert Jackson acknowledged that different results reflected "a difference in outlook normally found between personnel comprising different courts." *Brown v. Allen* (1963, 540, 532) (Jackson, J., concurring in the result). See also Frank [1949] 1963, 146–56.

131. For differences between the substantive and procedural law applied in federal and state courts in the late nineteenth century, see, e.g., Holt 1888. Compare Freyer 1979 (federal common law in nineteenth and early twentieth centuries tends to favor business interests) with Karsten 1997 (state courts, especially in the midwest and west, develop common law rules favoring individual plaintiffs). For a consideration of certain historical patterns in state-federal forum preference and the role of *de facto* social factors, see, e.g., Purcell 1992b, chs. 1–3. It seems clear that the ability to control federal-state forum choice remains of substantial significance in contemporary litigation. See Clermont and Eisenberg 1998.

individual federal and state courts in all their specific historical characteristics.¹³²

Beyond their traditional role as forums alternate to state courts, the federal courts have increasingly become alternate forums in a new sense. They are themselves ever more commonly adopting informal methods of resolving legal disputes—that is, fostering resolutions without a final and formal adjudication by the court. Over the past half century or more the federal judiciary has increasingly pressed parties to settle disputes before trial, and more recently they have adopted formal procedures to broaden the role of mediation and arbitration in attempting to resolve pending actions without adjudication.¹³³

Since passage of the Federal Arbitration Act of 1925, for example, the Supreme Court has gradually adopted an ever more sweeping pro-arbitration policy that has expanded the scope of the statute and made arbitration a most highly favored mechanism of dispute resolution (Macneil 1992). Among other results, the policy has enabled large corporations to compel employees and customers to sign contracts requiring compulsory arbitration of disputes. Consequently, the companies have strengthened their litigation positions substantially and handicapped many individuals who sought to enforce claims or other rights against the companies. The Supreme Court, a recent analysis in the *Tort and Insurance Law Journal* noted, “now appears to broadly endorse the enforcement of adhesive predispute arbitration clauses” (Simpson et al. 1998, 338; see, e.g., Schwartz 1997; LaFree and Rack 1996; Bingham 1998).

Mediation, arbitration, and out-of-court settlements account for the resolution of well over 95% of all actions filed in the courts.¹³⁴ The federal courts play critical, if varying and often obscure, roles in those resolutions, and a major part of their social significance lies in the way they help shape them. The massive trend toward various forms of alternate dispute resolution and out-of-court settlements raises fundamental questions about the nature of the American legal system and the availability of federal justice. Most pointedly, it raises questions about the role of social factors in constraining and distorting our ideals of fairness and equality before the law.¹³⁵ Detailed historical studies of federal trial courts could help illuminate our

132. For a general comparison of federal and state courts see Stumpf 1998; Stumpf and Culver 1992.

133. Rule 16, Federal Rules of Civil Procedure, for example, requires pretrial conferences designed in significant part to enable the court to press parties toward settlement. The Supreme Court also encourages out-of-court settlements. See, e.g., *Evans v. Jeff D.* (1986). Further, the federal courts increasingly use non-Article 3 magistrates—now called “magistrate judges”—to handle substantial amounts of their business. See, e.g., Federal Magistrates Act, 28 U.S.C. 631 et seq.; *United States v. Raddatz* (1980).

134. If one includes disputes that are not filed in court, they probably account for well over 99% of all resolutions.

135. For an historical exploration in the area see Auerbach 1983; Sternlight 1999.

understanding of those critical issues, and we will not understand the operating federal judicial "system" until we understand the role the courts play in that overall process.

B. Historicize and Integrate the Internal "Law of the Federal Courts"

The federal courts, Frankfurter repeatedly insisted, were subject to internal procedural and jurisdictional rules that determined what they could do as well as when and how they could do it. Those rules, of course, constitute the subject matter of the law school course known as "Federal Courts," a complex, arcane, and convoluted field that one well-known scholar has described, not without reason, as simply "wacky" (Kelman 1984, 319 n. 65).¹³⁶ As a result of its own peculiar historical evolution, when the field emerged as a standard and prestigious law school subject after World War II, it had become strangely abstract and—notwithstanding some appearances to the contrary—almost entirely ahistorical (Purcell forthcoming, ch. 9). Indeed, the generation of Harvard Law School students who attended Henry Hart's midday "Federal Courts" class referred to it as "Darkness at Noon." For these reasons, among others, historians of federal courts have avoided the subject almost completely.

That lapse is a great misfortune, for the subject is an historical gold mine. The very striated and fractured nature of its "doctrines" is a source of vast scholarly riches, for the "law of the federal courts" has been peculiarly adaptive to historical change, highly sensitive to pragmatic considerations, and readily subject to judicial design (e.g., Wells 1998; Soifer and MacGill 1977). Indeed, Frankfurter's fine hand is observable throughout the field, helping to create it and then shaping its doctrines as both scholar and Justice.¹³⁷ The law school absorption with an ostensibly "high" and coherent "law" of the federal courts, however, has kept our eyes fixed on opinions of the Supreme Court and our minds concentrated on the purported logic of often phantasmagoric doctrines. Historical understanding has been lost.

Historians of the federal courts can make a substantial contribution in this area along at least two different lines. One is to explore the intellectual history of the field, a subject that even the best law-school scholarship often distorts. A widely cited article—insightful, highly regarded, and written by a prominent specialist—illustrates the need. Recognizing that the "law of ju-

136. The field is "the purest of contentless legalist rituals" analyzed through a "funhouse mirror" (Kelman 1984, 319 n. 65).

137. For a striking example of Frankfurter's pre-judicial efforts to shape doctrine while pretending merely to identify and explain it, see Frankfurter 1934, 475–77. For Frankfurter's early and "scientific" stance, stressing the continuities in the law of the federal courts, see Frankfurter and Katz 1931, vi–vii.

dicial federalism" is "wracked by internal contradictions," the article attempts to create analytical order by developing two ideological "models"—the "Federalist" and the "Nationalist"—and suggesting that the "law of the federal courts" oscillates between those two almost timeless paradigms (Fallon 1988).¹³⁸ Illustrating the field's tendency toward the abstract and ahistorical, the article constructs its "Federalist" model by homogenizing, among other things, the views of two of the most prominent and influential federal courts scholars of the past half century, Hart and Paul Bator (Fallon 1988, 1143, 1146, 1151 n. 29). The former was the latter's teacher and then his colleague, and the two held common views on a good many issues. At the same time, however, they were distinct products of different historical generations and different political orientations. Whatever their similarities, and whatever the theoretical utility of synthesizing their positions, as a matter of historical analysis their views cannot be equated or simply lumped together. They did not, in fact, share the same "Federalist" assumptions, and they disagreed on many fundamental issues: the "parity" between state and federal courts; the desirable range of lower court jurisdiction and law-making authority; the proper scope of federal habeas corpus; the ideal of a "juster justice" that should be available in the federal courts; and, ultimately, the proper constitutional role of the state and federal courts in the American constitutional system. In each area Hart was more a nationalist and activist than Bator.¹³⁹

The professional demands of federal courts scholarship in the law schools will likely continue to require the subordination of history to schematic and normative concerns. If so, then historians of the lower federal courts have an added obligation to include in their work a consideration of the changing and purposeful law of the federal courts. As a matter of historical—and perhaps even legal—understanding, the rewards of such an inquiry promise to be substantial.

The other area where historians can make contributions is in the history of litigation and litigation tactics. Here, we need to discover how and in what ways the jurisdictional doctrines of the federal courts affected their *de facto* dispute processing. It is, after all, in the actions of those courts, not in the opinions of the Supreme Court, where the malleable law of the federal courts reveals its practical significance.

The so-called abstention doctrines, for example, largely a product of Frankfurter and the other old progressives and New Dealers whom Franklin Roosevelt appointed to the Court, are supposedly designed to show respect for state courts and limit the intervention of the national courts in local

138. I select this article precisely because it is an excellent piece of scholarship, because it has been widely cited, and because it is representative of much "federal courts" scholarship.

139. Compare Purcell forthcoming, ch. 9 (discussing Hart) with the views expressed in Bator 1981; 1963.

affairs. Histories of lower courts could explore the extent to which the abstention doctrines achieved those goals and the extent to which they brought other undesirable results. They could explore how the lower courts actually used their discretion in applying abstentionist ideas. They could discover how such factors as the type of case and the nature of the parties affected the use of the doctrines and how those uses changed over time and varied by location. It seems probable that the abstention doctrines caused delay, confusion, increased costs, added demands on judicial resources, and the loss or compromise of legitimate constitutional claims.¹⁴⁰ It seems likely, in other words, that the doctrines served to expand the repertoire of tactical weapons that litigators could exploit for their own purposes and that they often helped defeat more important goals of the legal system. Historians could ask few questions of greater importance.

C. Explore New Issues and Problems

Writing the history of a court is an immensely complex undertaking that offers no end of possible subjects. Several relatively unexplored topics, however, seem ripe for inquiry.

One is the growth of federal equity (e.g., Hoffer 1990). More than 60 years ago Frankfurter showed why preliminary injunctions in labor disputes were effective in terminating strikes even though trial courts seldom issued final orders and appellate courts rarely reviewed their decrees (Frankfurter and Greene 1930). His insight and approach remain useful today. Not only are there gaps in our understanding of how federal equity evolved as a matter of straightforward doctrine, but even greater unknowns exist in terms of the way equity was administered where it was most commonly, creatively, effectively, and independently used—in the trial courts.

Promising areas of inquiry abound. It is quite likely that Supreme Court decisions did not reflect the practice of at least many federal judges in considering petitions for writs of habeas corpus,¹⁴¹ for example, and it seems clear that the lower courts expanded federal equity substantially and largely on their own during the 1920s and early 1930s (Purcell 1992b, 208–16). “As the history of their practice shows,” Robert Gordon has pointed out, in the late nineteenth century “federal judges presiding over [corporate] reorganizations were not at all timid about stretching their authority” (Gordon 1983, 108). Gerald Berk has argued that the lower federal courts revolutionized the practice of equity receiverships to address problems of railroad finance and reorganization. The result, he argues, was not only to restructure

140. For a contemporary analysis developing this last point see Yackle 1994.

141. See Peller 1982, 612; Arkin 1995, 23. For an example of a broad use of the writ, see Buan 1993, 112–13. For a contrasting view, see, e.g., Woolhandler 1993, 585–96.

railroad finances and protect incumbent management but also to push American railroads toward a centralized national system of organization that was neither more efficient than available alternatives nor an inevitable result of “natural” market forces (Berk 1994, esp. 53–72, 107–10).¹⁴² The history of federal equity and the creativity of the national courts in exercising their jurisdiction in the nineteenth century suggests, among other things, that the “civil rights injunction” that came to prominence after the Supreme Court’s decision in *Brown v. Board of Education* (1954) was neither as new nor as unprecedented as many of its critics maintained (Fiss 1978; Hoffer 1990).

Another major and largely untapped area is the role of race, gender, and ethnicity in the federal courts. The most basic fact is well known but nevertheless stunning in its possible implications. Until late in the twentieth century, the federal bench was an exclusively white, male domain that was also predominantly Anglo-Saxon and largely Protestant. No woman sat on an Article 3 court until 1934, and the second was not appointed until 1950 (Goldman 1997, 51, 97). No African-American sat on an Article 3 bench until 1950, and the second—Thurgood Marshall—was not appointed until 1962 (Goldman 1997, 101, 183). The pace of change picked up somewhat in the 1960s, but it was not until Jimmy Carter became president that the numbers increased significantly. Between 1977 and 1981 his administration appointed 40 women, 37 blacks, 16 Hispanics, and 2 Asians to Article 3 judgeships (Goldman 1997, 278). There was not a single female federal judge in Florida or Maryland until 1979 (Hall and Rise 1991, 114, 115; Lewis and Schneider 1990, 132), nor one in Oregon or Minnesota until 1980 (Devitt 1989, 7; Buan 1993, 283). Similarly, the first black did not sit on the federal bench in Maryland until 1979 (Lewis and Schneider 1990, 128–29) or in Alabama until 1980 (Freyer and Dixon 1995, 152). Those numbers, of course, reflect in extreme terms the relative absence of women, blacks, Hispanics, and other minorities from all positions in the judicial system, including the ranks of the bar—especially the upper echelons of the corporate bar.

The implications of those statistics go far beyond evidence of discrimination in appointment and employment matters. They raise questions about the legal work and social construction of the federal courts themselves. One such question is how the social and gendered nature of the judges and other court personnel shaped basic conceptions of the federal courts and their proper role. Another is whether and to what extent the racial and gender uniformity of the bench helped shape the rules and practices of federal adju-

142. The use of federal receivers is discussed, e.g., in Hall and Rise 1991, 46–47; Zelden 1993, 41–47; Solomon 1981, 9–10. See Martin 1974.

dication.¹⁴³ A third is whether white male dominance of the bench operated—consciously or not—to discriminate against females and minorities who came before the courts.¹⁴⁴ In 1993 the Ninth Circuit Gender Bias Task Force concluded that “a handful of judges” had been involved in instances “of overt gender bias” that appeared “on the record.” It found, further, that both focus group participants and “the case law” suggested “that more subtle forms of gender bias are widespread—and directed toward female plaintiffs, witnesses, and lawyers” (Ninth Circuit Gender Bias Task Force 1993, 123–24).¹⁴⁵ Historians of federal courts should consider more fully the social characteristics of federal court personnel and examine their significance as both reflections of the broader society and as influences on judicial behavior, practices, rules, and results. It seems scarcely accidental, for example, that the Fourth Circuit, which has grown militantly “conservative” since the early 1980s, remains the only federal appellate court that has never had a member of a racial minority group sit on its bench (Lewis 1999, A–22).

On a more specific and interpretative level, scrutiny of individual lower courts could cast light on the long-disputed dimensions of the constitutional crisis of the 1930s and identify more clearly the nature and extent of the constitutional “revolution” associated with the New Deal. Barry Cushman has recently argued that the Supreme Court had gradually stretched the constitutional powers of the national government since the early twentieth century and that it had thereby prepared the doctrinal way for much of the New Deal. The “constitutional revolution” of 1937, therefore, was not in his view the result of a “switch in time” but rather the flowering of doctrines that had been growing for more than three decades (e.g., Cushman 1992; 1994; 1998). Histories of some of the lower courts—including the First, Seventh, and Ninth Circuits—suggest that lower court judges were as sharply divided as were the Justices in Washington and that they were divided along the same political and ideological lines (Dargo 1993, 112–18; Solomon 1981, 160–68; Frederick 1994, ch. 9). If true, the parallel divisions in the lower courts would suggest that the “constitutional

143. The Third Circuit, for example, though finding relatively little evidence of overt racial or gender bias in its courts, stressed the substantial “difference in the way in which men and women, and whites and minorities perceive the justice system” (Report of the Third Circuit Task Force on Equal Treatment in the Courts 1997, 1388). Suggestive on these relatively unexplored questions are Walker and Barrow 1985; Resnik 1991.

144. Such judicial discrimination existed in earlier centuries and in race cases even in the twentieth century. E.g., Amsterdam 1965. For a classic tale see Goodman 1994. There is also evidence, however, that such discrimination persists at the end of the twentieth century (Ninth Circuit Gender Bias Task Force 1993, 13, 15, 16, 18, 21; Krauss and Schulman 1997; Rice 1998). It seems likely that from the earliest days significant numbers of female litigants were involved in the federal judicial system. E.g., Gross, Newman, and Campbell 1996.

145. The quotation referred specifically to the task force’s study of employment discrimination cases. For possible problems in other areas see Ninth Circuit Gender Bias Task Force 1993, 100, 113–14, 196–98. See Second Circuit Task Force 1997, esp. 51–52, 87–89, 168–78, 311–64; Menkel-Meadow 1998; West 1997; *University of Richmond Law Review* 1998.

revolution" was more substantial and ideological—and less doctrinally foreshadowed—than Cushman suggests. Conversely, those histories of the lower courts might have been overly influenced by the traditional interpretation that Cushman challenges. Future work could help answer these and similar questions about the nature of the New Deal's constitutional "revolution."

IV. LAST, THOUGH SCARCELY FINAL, THOUGHTS

A few concluding observations seem warranted. Three are relatively specific, and the fourth is fundamental.

The first is that we need more book-length studies that examine federal courts in the North and East and more that cover the late eighteenth and early nineteenth centuries.¹⁴⁶ In part, the relative scarcity of books on the early period is due to the fact that much recent work has focused on the courts of appeals, and those courts did not come into existence until 1891. The scarcity is the result, too, of an accident of scholarly selection—much recent work on the federal trial courts has examined southern or western states. Because many of the Article 3 courts in those areas were not established until well into the nineteenth century,¹⁴⁷ the selections have helped weigh our knowledge of the lower courts away from the early period and toward the post-Civil War era. The years from the founding to the Civil War obviously raise innumerable important questions that detailed histories of individual courts should explore.¹⁴⁸

The second general observation is that future studies can likely make more substantial contributions by focusing on individual courts and limiting their scope to relatively short and historically coherent time periods. It is

146. Tachau (1978) is unusual, covering the Kentucky federal court during the period from 1789 to 1816. There are, of course, many shorter studies of the work of federal courts in the older states during the early period. See, e.g., the essays by John D. Gordon III (discussing a federal criminal prosecution in Pennsylvania) and Kathryn Preyer (1992, 106–72, 173–95) (discussing a federal criminal prosecution in Virginia).

147. Freyer and Dixon (1995) begin their history of the Alabama federal courts in 1820; Hall and Rise (1991) begin their study of the Florida federal courts in 1821. Histories of western districts start even later. Fritz (1991) does not begin his examination of the Northern District of California until Judge Hoffman opened his court in 1851; and Zelden (1993) does not start his book, *Justice Lies in the District*, until 1902 when the Southern District of Texas was established.

148. Among such topics would be the following: the fundamental problems involved in starting a new national court system, the early impact of the federal courts on debtor-creditor relations and interstate commerce, the jurisprudential origins and practical significance of the "federal common law," the de facto enforcement of fugitive slave and personal liberty laws, the nature and consequences of the Jeffersonian and Jacksonian transitions, and the evolution of judicial attitudes about the role and authority of the new national courts.

There are, of course, more general works that deal with some of these topics. See, e.g., Freyer 1979 (federal common law); Hall 1979 (judicial appointments); Cover 1975 (federal judicial enforcement of fugitive slave and personal liberty laws).

both understandable and admirable that scholars have examined more complex judicial subsystems—those that include all the courts in a circuit or all the federal courts in a state—and that they have extended their histories over long sweeps of time. Largely because of those broad overviews, we now have a reasonably clear picture of the general history of the national courts. What we need to learn in the future—and to understand with a greater specificity and on a broader comparative basis—is the extent to which our current general picture is accurate and the extent to which it is wrong, partial, misleading, or off the point. Writing the history of any court is an exceptionally demanding enterprise, and the effort to cover multiple courts or long periods of time inevitably leads to lost opportunities, overlooked issues, and sketchy results. Advancing our understanding of federal court history in the near future requires narrower studies that examine individual courts in greater depth.

The third general observation is that, whenever possible, historians of the lower courts should supplement and extend their analyses with a more extensive use of quantitative analysis. There are some serviceable government statistics for the period after 1870; increasingly useful data for the years after World War I; and extensive compilations for the latter half of the twentieth century.¹⁴⁹ In addition, law and society scholars have produced an extensive body of research into the business of many individual courts that historians can utilize and replicate (e.g., Munger 1986, 1998; McIntosh 1990; Daniels 1984; Baum, Goldman, and Sarat 1981–82; Friedman and Percival 1976). Most important, of course, are the original court records which are available in some areas. Those records are invaluable not only as sources for statistical analysis but also as sources for an examination of the out-of-court settlement process. They are also essential in studying the federal courts during their first hundred years when official statistics are meager or nonexistent. The development of a body of comparable statistical data and analyses would allow us to make comparisons between and among individual federal courts across the nation and over time.

Finally, and of greatest importance, we should always remain alive to the fact that historians of federal courts are ultimately examining the ways in which Americans have tried to give life and substance to their ideals of law, justice, democracy, and constitutional federalism. Their ultimate challenge, then, is twofold: first, to identify the shortcomings and failures that existed in the national judicial system as well as its strengths and triumphs;

149. Beginning in 1871 the annual report of the Attorney General of the United States published basic statistical information that was gradually expanded and improved over time. The more extensive and sophisticated reports of the Administrative Office of the United States Courts began in 1939 and offered steadily expanding amounts of statistical data. Most recently, the Federal Judicial Center began developing extensive statistical materials and producing its own studies covering a wide range of issues involving the federal courts. See, e.g., Seron 1985; Clark 1981.

and, second, to explain why its flaws existed and to explore the extent to which the flaws were unavoidable or remediable. To answer those questions historians must look beyond organizational charts, docket statistics, and law reports. They must inquire into both the obscure recesses of the out-of-court claims disputing process and the vast and complex dynamics of American life and politics. If Felix Frankfurter may be faulted for many things, he at least knew that the history of the federal courts centered around our nation's most fundamental values and institutional tensions, and he set out to examine their history with that animating truth clearly in mind.

REFERENCES

- Alabama Law Review*. 1997. Symposium: Evaluation of the Civil Justice Reform Act. *Alabama Law Review* 49:1–279.
- Amar, Akhil Reed. 1985. A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction. *Boston University Law Review* 65:205–72.
- . 1992. Jurisdiction Stripping and the Judiciary Act of 1789. In Marcus 1992a.
- American Law Institute. 1969. *Study of the Division of Jurisdiction between State and Federal Courts*. Philadelphia: American Law Institute.
- Amsterdam, Anthony G. 1965. Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial. *University of Pennsylvania Law Review* 113:793–912.
- Arkin, Marc M. 1992. Rethinking the Constitutional Right to a Criminal Appeal. *UCLA Law Review* 39:503–80.
- . 1995. The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners. *Tulane Law Review* 70:1–73.
- Arnold, Richard S. 1995. The Future of the Federal Courts. *Missouri Law Review* 60:533–46.
- Ashton, Clifford L. 1988. *The Federal Judiciary in Utah*. Salt Lake City: Utah Bar Foundation.
- Auerbach, Jerold S. 1983. *Justice without Law? Resolving Disputes without Lawyers*. New York: Oxford University Press.
- Baker, Leonard. 1984. *Brandeis and Frankfurter: A Dual Biography*. New York: Harper and Row.
- Baker, Thomas E. 1994. *Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals*. St. Paul, Minn.: West Publishing Co.
- Barrow, Deborah J., and Thomas G. Walker. 1988. *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform*. New Haven, Conn.: Yale University Press.
- Bass, Jack. 1981. *Unlikely Heroes: The Dramatic Story of the Southern Judges Who Translated the Supreme Court's Brown Decision into a Revolution for Equality*. New York: Simon and Schuster.
- Bator, Paul M. 1963. Finality in Criminal Law and Federal Habeas Corpus for State Prisoners. *Harvard Law Review* 76:441–528.
- . 1981. The State Courts and Federal Constitutional Litigation. *William and Mary Law Review* 22:605–37.
- Baum, Lawrence. 1997. *The Puzzle of Judicial Behavior*. Ann Arbor: University of Michigan Press.

- Baum, Lawrence, Sheldon Goldman, and Austin Sarat. 1981-82. The Evolution of Litigation in the Federal Courts of Appeals, 1895-1975. *Law and Society Review* 16:291-309.
- Belknap, Michal R. 1977. *Cold War Political Justice: The Smith Act, the Communist Party and American Civil Liberties*. Westport, Conn.: Greenwood Press.
- . 1987. *Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-Brown South*. Athens: University of Georgia Press.
- Benedict, Les Michael. 1974. Preserving the Constitution: The Conservative Basis of Radical Reconstruction. *Journal of American History* 61:65-90.
- . 1978. Preserving Federalism: Reconstruction and the Waite Court. *Supreme Court Review*. 1978:39-79.
- Bennett, Marion T., Wilson Cowen, and Philip Nichols, Jr. 1976, 1978. *The United States Court of Claims: A History*. 2 vols. Washington, D.C.: Committee on the Bicentennial of Independence and the Constitution of the Judicial Conference of the United States.
- Berk, Gerald. 1994. *Alternative Tracks: The Constitution of American Industrial Order, 1865-1917*. Baltimore: Johns Hopkins University Press.
- Beth, Loren P. 1992. *John Marshall Harlan: The Last Whig Justice*. Lexington: University Press of Kentucky.
- Bingham, Lisa B. 1998. On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards. *McGeorge Law Review* 29:223-59.
- Bone, Robert G. 1989. Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules. *Columbia Law Review* 89:1-118.
- . 1990. Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation. *Boston University Law Review* 70:213-307.
- Bork, Robert H. 1996. *Slouching toward Gomorrah: Modern Liberalism and the American Decline*. New York: Regan Books.
- Boston University Law Review. 1991. Symposium: Federalism and Parity. *Boston University Law Review* 71:593-664.
- Brennan, William J., Jr. 1977. State Constitutions and the Protection of Individual Rights. *Harvard Law Review* 90:489-504.
- Brisbin, Richard A., Jr. 1996. Slaying the Dragon: Segal Speath and the Function of Law in Supreme Court Decisionmaking. *American Journal of Political Science* 40:1004-17.
- Buan, Carolyn M., ed. 1993. *The First Duty: A History of the U.S. District Court for Oregon*. Portland: United States District Court of Oregon Historical Society.
- Burbank, Stephen B. 1982. The Rules Enabling Act of 1934. *University of Pennsylvania Law Review* 130:1015-1197.
- Bynum, Victoria E. 1992. *Unruly Women: The Politics of Social and Sexual Control in the Old South*. Chapel Hill: University of North Carolina Press.
- Caplan, Lincoln. 1987. *The Tenth Justice: The Solicitor General and the Rule of Law*. New York: A. A. Knopf.
- Carp, Robert A., and C. K. Rowland. 1983. *Policymaking and Politics in the Federal District Courts*. Knoxville: University of Tennessee Press.
- Carp, Robert A., and Ronald Stidham. 1996. *The Judicial Process in America*. Washington, D.C.: CQ Press.
- Carrington, Paul D., 1987. The Function of the Civil Appeal: A Late-Century View. *South Carolina Law Review* 38:411-35.
- . 1996. A New Confederacy? Disunionism in the Federal Courts. *Duke Law Journal* 45:929-1007.

- Carrington, Paul D. and Paul H. Haagen. 1996. Contract and Jurisdiction. *Supreme Court Review* 1996:331–402.
- Casto, William R. 1997. *Oliver Ellsworth and the Creation of the Federal Republic*. New York: Second Circuit Committee on History and Commemorative Events.
- Chandler, Alfred D., Jr. 1977. *The Visible Hand: The Managerial Revolution in American Business*. Cambridge, Mass.: Belknap Press.
- Chemerinsky, Erwin. 1988. Parity Reconsidered: Defining a Role for the Federal Judiciary. *UCLA Law Review* 36:233–327.
- Clark, David S. 1981. Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century. *Southern California Law Review* 55:65–152.
- Clermont, Kevin M., and Theodore Eisenberg. 1998. Do Case Outcomes Really Reveal Anything about the Legal System? Win Rates and Removal Jurisdiction. *Cornell Law Review* 83:581–607.
- Clinton, Robert. 1986. A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan. *Columbia Law Review* 86:1515–1621.
- Commission on Structural Alternatives for the Federal Courts of Appeals. 1998. Report. 18 December.
- Couch, Harvey C. 1984. *A History of the Fifth Circuit: 1891–1981*. Washington, D.C.: Bicentennial Committee of the Judicial Conference of the United States.
- Cover, Robert M. 1975. *Justice Accused: Antislavery and the Judicial Process*. New Haven, Conn.: Yale University Press.
- . 1981. The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation. *William and Mary Law Review* 22:639–82.
- Cross, Frank B. 1997. Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance. *Northwestern University Law Review* 92:251–326.
- Cross, Frank B., and Emerson H. Tiller. 1998. Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals. *Yale Law Journal* 107:2155–76.
- Cushman, Barry. 1992. A Stream of Legal Consciousness: The Current of Commerce Doctrine from *Swift* to *Jones & Laughlin*. *Fordham Law Review* 61:105–60.
- . 1994. Rethinking the New Deal Court. *Virginia Law Review* 80:201–61.
- . 1998. *Rethinking the New Deal Court: The Structure of a Constitutional Revolution*. New York: Oxford University Press.
- Daniels, Stephen. 1984. Ladders and Bushers: The Problem of Caseloads and Studying Court Activities over Time. *American Bar Foundation Research Journal* 1984:751–95.
- Daniels, Stephen, and Joanne Martin. 1986. Jury Verdicts and the “Crisis” in Civil Justice. *Justice System Journal* 11:321–48.
- Dargo, George. 1993. *A History of the United States Court of Appeals for the First Circuit: Vol. 1. 1891–1960*. Boston: United States Court of Appeals for the First Circuit.
- Devitt, Edward J., ed. 1989. *History of the United States District Court for the District of Minnesota*. St. Paul, Minn.: West Publishing.
- Doar, John. 1997. The Work of the Civil Rights Division in Enforcing Voting Rights under the Civil Rights Acts of 1957 and 1960. *Florida State University Law Review* 25:1–17.
- Duxbury, Neil. 1995. *Patterns of American Jurisprudence*. New York: Oxford University Press.
- Edwards, Laura F. 1997. *Gendered Strife and Confusion: The Political Culture of Reconstruction*. Urbana: University of Illinois Press.

- Eisenberg, Theodore, and Shari Lynn Johnson. 1991. The Effects of Intent: Do We Know How Legal Standards Work? *Cornell Law Review* 76:1151-97.
- Elliff, John T. 1971. Aspects of Federal Civil Rights Enforcement: The Justice Department and the FBI, 1939-1964. In *Perspectives in American History: Law in American History*, ed. Donald Fleming and Bernard Bailyn. Vol. 6. Cambridge, Mass.: Charles Warren Center for Studies in American History.
- Ellis, Robert E. 1971. *The Jeffersonian Crisis: Courts and Politics in the Young Republic*. New York: Oxford University Press.
- Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington, D.C.: CQ Press.
- Ernst, Daniel R. 1995. *Lawyers against Labor: From Individual Rights to Corporate Liberalism*. Urbana: University of Illinois Press.
- Evans, Peter B., Dietrich Rueschemeyer, and Theda Skocpol, eds. 1985. *Bringing the State Back in*. New York: Cambridge University Press.
- Fairclough, Adam. 1987. *To Redeem the Soul of America: The Southern Christian Leadership Conference and Martin Luther King, Jr.* Athens: University of Georgia Press.
- Fallon, Richard H., Jr. 1988. The Ideologies of Federal Courts Law. *Virginia Law Review* 74:1141-1251.
- . 1994. Reflections on the Hart and Wechsler Paradigm. *Vanderbilt Law Review* 47:953-91.
- Farris, Jerome. 1997. The Ninth Circuit—Most Maligned Circuit in the Country—Fact or Fiction? *Ohio State Law Journal* 58:1465-72.
- Federal Courts Study Committee of the Judicial Conference of the United States. 1990. *Report of the Federal Courts Study Committee*. Philadelphia: Federal Courts Study Committee.
- Federal Judicial Center. 1988. *Managing Appeals in Federal Courts*. Washington, D.C.: Federal Judicial Center.
- Federalist Society Symposium. 1997. Panel Four: Relimiting Federal Judicial Power: Should Congress Play a Role? *Journal of Law and Politics* 13:627-68.
- Finkelman, Paul. 1993. Sorting Out *Prigg v. Pennsylvania*. *Rutgers Law Journal* 24:605-65.
- Fish, Peter Graham. 1973. *The Politics of Federal Judicial Administration*. Princeton, N.J.: Princeton University Press.
- Fiss, Owen M. 1978. *The Civil Rights Injunction*. Bloomington: Indiana University Press.
- Foy, H. Miles, III. 1986. Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts. *Cornell Law Review* 71:501-85.
- Frank, Jerome. [1949] 1963. *Courts on Trial: Myth and Reality in American Justice*. New York: Atheneum.
- Frankfurter, Felix. 1928. Distribution of Judicial Power between United States and State Courts. *Cornell Law Quarterly* 13:499-530.
- . 1929. The Federal Courts. *New Republic* 58:273-77.
- . 1932. Labor Injunction. *Encyclopedia of the Social Sciences* 8:653-57.
- . 1934. United States Supreme Court. *Encyclopedia of the Social Sciences* 14:474-82.
- . 1937. *The Commerce Clause under Marshall, Taney and Waite*. Chapel Hill: University of North Carolina Press.
- . [1939] 1962. Why I Shall Vote for LaFollette. *Law and Politics*, ed. E. F. Prichard Jr. and Archibald MacLeish. New York: Capricorn Books.
- . [1930] 1964. *The Public and Its Government*. Boston: Beacon Press.
- Frankfurter, Felix, and Adrian S. Fisher. 1938. The Business of the Supreme Court at the October Terms, 1935 and 1936. *Harvard Law Review* 51:577-637.

- Frankfurter, Felix, and Nathan Greene. 1930. *The Labor Injunction*. New York: Macmillan.
- Frankfurter, Felix, and Henry M. Hart, Jr. 1933. The Business of the Supreme Court at October Term, 1932. *Harvard Law Review* 47:245–97.
- . 1934. The Business of the Supreme Court at October Term, 1933. *Harvard Law Review* 48:238–81.
- . 1935. The Business of the Supreme Court at October Term, 1934. *Harvard Law Review* 49:68–107.
- Frankfurter, Felix, and Wilber G. Katz. 1931. *Cases and Other Authorities on Federal Jurisdiction and Procedure*. Chicago: Callaghan.
- Frankfurter, Felix, and James M. Landis. [1928] 1972. *The Business of the Supreme Court: A Study in the Federal Judicial System*. New York: Johnson Reprint.
- . 1929. The Business of the Supreme Court at October Term, 1928. *Harvard Law Review* 43:33–62.
- . 1930. The Business of the Supreme Court at October Term, 1929. *Harvard Law Review* 44:34–40.
- . 1931. The Business of the Supreme Court at October Term, 1930. *Harvard Law Review* 45:271–306.
- . 1932. The Business of the Supreme Court at October Term, 1931. *Harvard Law Review* 46:226–60.
- Frankfurter Papers. Washington, D.C.: Library of Congress.
- Frederick, David C. 1994. *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891–1941*. Berkeley and Los Angeles: University of California Press.
- Freyer, Tony Allan. 1979. *Forums of Order: The Federal Courts and Business in American History*. Greenwich, Conn.: JAI Press.
- Freyer, Tony, and Timothy Dixon. 1995. *Democracy and Judicial Independence: A History of the Federal Courts in Alabama, 1820–1994*. Brooklyn: Carlson.
- Friedman, Lawrence M. 1965. *Contract Law in America: A Social and Economic Case Study*. Madison: University of Wisconsin Press.
- Friedman, Lawrence, and Robert V. Percival. 1976. A Tale of Two Courts: Litigation in Alameda and San Benito Counties. *Law and Society Review* 10:267–301.
- Friendly, Henry J. 1973. *Federal Jurisdiction: A General View*. New York: Columbia University Press.
- Fritz, Christian G. 1991. *Federal Justice in California: The Court of Ogden Hoffman, 1851–1891*. Lincoln: University of Nebraska Press.
- Galanter, Marc. 1986. The Day after the Litigation Explosion. *Maryland Law Review* 46:3–39.
- . 1988. The Life and Times of the Big Six: Or, the Federal Courts since the Good Old Days. *Wisconsin Law Review* 1988:921–54.
- . 1998. An Oil Strike in Hell: Contemporary Legends About the Civil Justice System. *Arizona Law Review* 40:717–52.
- Garth, Leonard I. 1995. Views from the Federal Bench: Past, Present and Future. *Rutgers Law Review* 47:1361–70.
- Gates, John B., and Charles A. Johnson, eds. 1991. *The American Courts: A Critical Assessment*. Washington, D.C.: CQ Press.
- Geertz, Clifford. 1983. *Local Knowledge: Further Essays in Interpretative Anthropology*. New York: Basic Books.
- Goldman, Sheldon. 1997. *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan*. New Haven, Conn.: Yale University Press.
- Goodman, James. 1994. *Stories of Scottsboro*. New York: Pantheon Books.

- Gordon, Robert W. 1975. Willard Hurst and the Common Law Tradition in American Legal Historiography. *Law and Society Review* 10:9–55.
- . 1983. Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920. In *Professions and Professional Ideologies in America*, ed. Gerald L. Geison. Chapel Hill: University of North Carolina Press.
- Greenhouse, Linda. 1998. Justices, Criticizing Appeals Court, Restore a Death Sentence. *New York Times*, 30 April, A-22.
- Gross, James A. 1974. *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law*. Albany: State University of New York Press.
- . 1981. *The Reshaping of the National Labor Relations Board: National Labor Policy in Transition, 1937–1942*. Albany: State University of New York Press.
- . 1995. *Broken Promise: The Subversion of U.S. Labor Relations Policy, 1947–1994*. Philadelphia: Temple University Press.
- Gross, Karen, Marie Stefanini Newman, and Denise Campbell. 1996. Ladies in Red: Learning From America's First Female Bankrupts. *American Journal of Legal History* 40:1–40.
- Gunther, Gerald. 1994. *Learned Hand: The Man and the Judge*. New York: A. A. Knopf.
- Hall, Kermit L. 1975. The Civil War Era as a Crucible for Nationalizing the Lower Federal Courts. *Prologue* 1975 (Fall): 177–86.
- . 1976. Social Backgrounds and Judicial Recruitment: A Nineteenth-Century Perspective on the Lower Federal Judiciary. *Western Political Quarterly* 29:243–57.
- . 1979. *Politics of Justice: Lower Federal Judicial Selection and the Second Party System*. Lincoln: University of Nebraska Press.
- . 1980. The Children of the Cabins: The Lower Federal Judiciary, Modernization, and the Political Culture, 1789–1899. *Northwestern University Law Review* 75:423–71.
- Hall, Kermit L., and Eric W. Rise. 1991. *From Local Courts to National Tribunals: The Federal District Courts of Florida, 1821–1990*. Brooklyn, N.Y.: Carlson.
- Hamilton, Alexander. 1937. *The Federalist*, No. 82. Modern Library Ed. New York: Random House.
- Hellman, Arthur D., ed. 1990. *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts*. Ithaca, N.Y.: Cornell University Press.
- Heydebrand, Wolf, and Carroll Seron. 1990. *Rationalizing Justice: The Political Economy of Federal District Courts*. Albany: State University of New York Press.
- Hickok, Eugene W., and Gary L. McDowell. 1993. *Justice vs. Law: Courts and Politics in American Society*. New York: Maxwell Macmillan International.
- Hoffer, Peter Charles. 1990. *The Law's Conscience: Equitable Constitutionalism in America*. Chapel Hill: University of North Carolina Press.
- Holmes, Oliver Wendell, Jr. [1881] 1963. *The Common Law*. Boston: Little, Brown.
- Holmes, Steven A. 1998. Right to Abortion Quietly Advances in State Courts. *New York Times*, 6 December, sec. 1, p. 1.
- Holt, George C. 1888. *The Concurrent Jurisdiction of the Federal and State Courts*. New York: Baker, Voorhis.
- Holt, Wythe. 1989. "To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts. *Duke Law Journal* 1989:1421–1531.
- Howard, J. Woodford, Jr. 1981. *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits*. Princeton, N.J.: Princeton University Press.
- Hufstедler, Shirley M. 1972. Comity and the Constitution: The Changing Role of the Federal Judiciary. *New York University Law Review* 47:841–70.

- Hurst, Willard. 1960. The Law in United States History. *Proceedings of the American Philosophical Society* 104:518–26.
- Hyman, Harold M., and William M. Wiecek. 1982. *Equal Justice under Law: Constitutional Development, 1835–1875*. New York: Harper and Row.
- Irons, Peter. 1983. *Justice at War*. New York: Oxford University Press.
- . ed. 1989. *Justice Delayed: The Record of the Japanese American Internment Cases*. Middleton, Conn.: Wesleyan University Press.
- Johnson, Charles A. 1987. Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions. *Law and Society Review* 21:325–40.
- Jones, Robb M. 1995. The Future of the Federal Courts. *Judges Journal* 34 (Fall): 17–20, 44–45.
- Judicial Conference of the United States. [1951] 1957. Report of the Committee on Jurisdiction and Venue (March 12, 1951). Reprinted in *Jurisdiction of Federal Courts Concerning Diversity of Citizenship*. Hearing before Subcommittee No. 3 of the Committee on the Judiciary on H.R. 2516 and 4497. House of Representatives, 85 Cong., 1 Sess.
- Judicial Conference of the United States. Committee on Long Range Planning. 1995. *Proposed Long Range Plan for the Federal Courts (March 1995)*. Washington, D.C.: Committee on Long Range Planning, Judicial Conference of the United States.
- Kaczorowski, Robert J. 1985. *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866–1876*. Dobbs Ferry, N.Y.: Oceana Publications.
- Kakalik, James S., Nicholas M. Pace, Daniel F. McCaffrey, Terrence Dunworth, Marian Oshiro, and Laurel A. Hills. 1996a. *An Evaluation of Judicial Case Management under the Civil Justice Reform Act*. Santa Monica, Calif.: Rand.
- . 1996b. *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act*. Santa Monica, Calif.: Rand.
- . 1996c. *Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts*. Santa Monica, Calif.: Rand.
- . 1996d. *Just, Speedy and Inexpensive: An Evaluation of Judicial Case Management under the Civil Justice Reform Act*. Santa Monica, Calif.: Rand.
- Kalman, Laura. 1996. *The Strange Career of Legal Liberalism*. New Haven, Conn.: Yale University Press.
- Karl, Barry D. 1983. *The Uneasy State: The United States From 1915 to 1945*. Chicago: University of Chicago Press.
- Karsten, Peter. 1997. *Heart versus Head: Judge-Made Law in Nineteenth-Century America*. Chapel Hill: University of North Carolina Press.
- Keller, Morton. 1990. *Regulating a New Economy: Public Policy and Economic Change in America, 1900–1933*. Cambridge, Mass.: Harvard University Press.
- Kelman, Mark. 1984. Trashing. *Stanford Law Review* 36:293–348.
- Klarman, Michael J. 1998. Race and the Court in the Progressive Era. *Vanderbilt Law Review* 51:881–952.
- Konefsky, Alfred S. 1988. Law and Culture in Antebellum Boston. *Stanford Law Review* 40:1119–59.
- Krauss, Elissa, and Martha Schulman. 1997. The Myth of Black Juror Nullification: Racism Dressed up in Jurisprudential Clothing. *Cornell Journal of Law and Public Policy* 7:57–75.
- Kroger, John R. 1998. Supreme Court Equity, 1789–1835, and the History of American Judging. *Houston Law Review* 34:1425–86.

- Kurland, Philip B. 1958. The Distribution of Judicial Power between National and State Courts. *Journal of the American Judicature Society* 42:159–73.
- Kutler, Stanley I. 1968. *Judicial Power and Reconstruction Politics*. Chicago: University of Chicago Press.
- . 1982. *The American Inquisition: Justice and Injustice in the Cold War*. New York: Hill and Wang.
- LaFree, Gary, and Christine Rack. 1996. The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases. *Law and Society Review* 30:767–97.
- Landsberg, Brian K. 1997. *Enforcing Civil Rights: Race Discrimination and the Department of Justice*. Lawrence: University Press of Kansas.
- Lewis, H. H. Walker, and James F. Schneider. 1990. *A Bicentennial History of the United States District Court for the District of Maryland, 1790–1990*. Baltimore: Maryland Chapter of Federal Bar Association.
- Lewis, Neil A. 1999. A Court Becomes a Model of Conservative Pursuits. *New York Times*, 24 May, p. 1, A-22.
- Liebman, James S., and William F. Ryan. 1998. "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts. *Columbia Law Review* 98:696–887.
- Liman, Arthur L. 1998. *Lawyer: A Life of Counsel and Controversy*. New York: Public Affairs.
- Macneil, Ian R. 1992. *American Arbitration Law: Reformation—Nationalization—Internationalization*. New York: Oxford University Press.
- Mapes, Laurie Bennett. 1993. A Period of Complexity, 1950–1991. In Buan 1993.
- Marcus, Maeva, ed. 1988. *The Documentary History of the Supreme Court of the United States, 1789–1800*. Vol. 2, *The Justices on Circuit, 1790–1794*. New York: Columbia University Press.
- , ed. 1992a. *Origins of the Federal Judiciary: Essays on the Judiciary Act. Of 1789*. New York: Oxford University Press.
- , ed. 1992b. *The Documentary History of the Supreme Court of the United States, 1789–1800*. Vol. 4, *Organizing the Federal Judiciary: Legislation and Commentaries*. New York: Columbia University Press.
- Marcus, Maeva, and Natalie Wexler. 1992. The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation? In Marcus 1992a.
- Martin, Albro. 1974. Railroads and Equity Receivership: An Essay on Institutional Change. *Journal of Economic History* 34:685–709.
- Mason, Alpheus Thomas. 1965. *William Howard Taft: Chief Justice*. New York: Simon and Schuster.
- McIntosh, Wayne V. 1990. *The Appeal of Civil Law: A Political-Economic Analysis of Litigation*. Urbana: University of Illinois Press.
- Menkel-Meadow, Carrie. 1998. Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternate Dispute Resolution, Judging, Neutrality, Gender, and Process. *Loyola of Los Angeles Law Review* 31:513–49.
- Miner, Roger J. 1993. Identifying, Protecting and Preserving Individual Rights: Traditional Federal Court Functions. *Seton Hall Law Review* 23:821–43.
- Mooney, Ralph James. 1985. Matthew Deady and the Federal Judicial Response to Racism in the Early West. *Oregon Law Review* 63:561–637.
- . 1993. The Deady Years, 1859–1893. In Buan 1993.
- Moreno, Paul D. 1997. *From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933–1972*. Baton Rouge: Louisiana State University Press.

- Morris, Jeffrey B. 1987. *Federal Justice in the Second Circuit: A History of the United States Courts in New York, Connecticut and Vermont*. New York: Second Circuit Historical Committee.
- Munger, Frank W., Jr. 1986. Commercial Litigation in West Virginia State and Federal Courts, 1870–1940. *American Journal of Legal History* 30:322–49.
- . 1988. Social Change and Tort Litigation: Industrialization, Accidents, and Trial Courts in Southern West Virginia, 1872–1940. *Buffalo Law Review* 36:75–118.
- Murphy, Bruce Allen. 1982. *The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices*. New York: Oxford University Press.
- Murphy, Walter. 1964. *Elements of Judicial Strategy*. Chicago: University of Chicago Press.
- Nelson, William E. 1982a. Standards of Criticism. *Texas Law Review* 60:447–93.
- . 1982b. *The Roots of American Bureaucracy, 1830–1900*. Cambridge, Mass.: Harvard University Press.
- Neuborne, Burt. 1977. The Myth of Parity. *Harvard Law Review* 90:1105–31.
- Ninth Circuit Gender Bias Task Force. 1993. *Executive Summary: The Effects of Gender in the Federal Courts*. Seattle, Wash.: U.S. Courts, Ninth Judicial Circuit.
- Orth, John V. 1987. *The Judicial Power of the United States: The Eleventh Amendment in American History*. New York: Oxford University Press.
- Parker, John J. 1932. The Federal Jurisdiction and Recent Attacks upon It. *American Bar Association Journal* 18:433–39.
- . 1956. Dual Sovereignty and the Federal Courts. *Northwestern University Law Review* 51:407–23.
- Parrish, Michael E. 1970. *Securities Regulation and the New Deal*. New Haven, Conn.: Yale University Press.
- . 1982. *Felix Frankfurter and His Times: The Reform Years*. New York: Free Press.
- . 1993. Felix Frankfurter, the Progressive Tradition, and the Warren Court. In *The Warren Court in Historical and Political Perspective*, ed. Mark Tushnet. Charlottesville: University of Virginia.
- Peller, Gary. 1982. In Defense of Federal Habeas Corpus Relitigation. *Harvard Civil Rights/Civil Liberties Law Review* 16:579–691.
- Peltason, J.W. 1961. *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation*. Urbana: University of Illinois Press.
- Peters, Ellen A. 1998. Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System. *New York University Law Review* 73:1065–85.
- Peritz, Rudolph J. R. 1996. *Competition Policy in America, 1888–1992: History, Rhetoric, Law*. New York: Oxford University Press.
- Phillips, Harry, et al. 1977. *History of the Sixth Circuit: A Bicentennial Project*. Washington, D.C.: Bicentennial Committee of the Judicial Conference of the United States.
- Posner, Richard A. 1985. *The Federal Courts: Crisis and Reform*. Cambridge, Mass.: Harvard University Press.
- Presser, Stephen B. 1982. *Studies in the History of the United States Courts of the Third Circuit*. Washington, D.C.: Government Printing Office.
- Preston, William, Jr. 1963. *Aliens and Dissenters: Federal Suppression of Radicals, 1903–1933*. New York: Harper and Row.
- Preyer, Kathryn. 1992. *United States v. Callender: Judge and Jury in a Republican Society*. In Marcus 1992a.
- Purcell, Edward A., Jr. 1973. *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value*. Lexington: University Press of Kentucky.
- . 1992a. Geography as a Litigation Weapon: Consumers, Forum Selection Clauses, and the Rehnquist Court. *UCLA Law Review* 40:423–515.

- . 1992b. *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958*. New York: Oxford University Press.
- . 1994. Rethinking Constitutional Change. *Virginia Law Review* 80:277–90.
- . Forthcoming. *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts*. New Haven, Conn.: Yale University Press.
- Pushaw, Robert J., Jr. 1996. Justiciability and Separation of Powers: A New-Federalist Approach. *Cornell Law Review* 81:393–512.
- Rabban, David M. 1997. *Free Speech in Its Forgotten Years*. New York: Cambridge University Press.
- Rakove, Jack N. 1996. *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: A. A. Knopf.
- . 1997. The Origins of Judicial Review: A Plea for New Contexts. *Stanford Law Review* 49:1031–64.
- Rehnquist, William H. 1999. The 1998 Year-End Report of the Federal Judiciary. (1 Jan. Press Release).
- Report of the Third Circuit Task Force on Equal Treatment in the Courts. 1997. *Villanova Law Review* 42:1355–1830.
- Resnik, Judith. 1982. Managerial Judges. *Harvard Law Review* 96:374–448.
- . 1991. “Naturally” without Gender: Women, Jurisdiction, and the Federal Courts. *New York University Law Review* 66:1682–1772.
- Rice, Willy E. 1998. Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insured’s Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts’ Declaratory Judgments, 1900–1997. *American University Law Review* 47:1131–1219.
- Rich, Giles S. 1980. *A Brief History of the United States Court of Customs and Patent Appeals*. Washington, D.C.: Committee of the Bicentennial of Independence and the Constitution of the Judicial Conference of the United States.
- Ritz, Wilfred J. 1990. *Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence*. Norman: University of Oklahoma Press.
- Rowland, C. K. 1991. The Federal District Courts. In Gates and Johnson 1991.
- Rowland, C. K., and Robert A. Carp. 1983. The Relative Effects of Maturation, Time Period, and Appointing President on District Judges’ Policy Choices: A Cohort Analysis. *Political Behavior* 5:109–33.
- . 1996. *Politics and Judgment in Federal District Courts*. Lawrence: University Press of Kansas.
- Schick, Marvin. 1970. *Learned Hand’s Court*. Baltimore: Johns Hopkins Press.
- Schoenbrod, David. 1993. *Power without Responsibility: How Congress Abuses the People through Delegation*. New Haven, Conn.: Yale University Press.
- Scheiber, Harry N. 1975. Instrumentalism and Property Rights: A Reconsideration of American “Styles of Judicial Reasoning” in the Nineteenth Century. *Wisconsin Law Review* 1975:1–18.
- . 1981. American Constitutional History and the New Legal History: Complementary Themes in Two Modes. *Journal of American History* 68:337–50.
- Schwartz, David S. 1997. Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration. *Wisconsin Law Review* 1997:33–132.
- Second Circuit Task Force. 1997. Gender, Racial, and Ethnic Fairness in the Courts. *Annual Survey of American Law* 1997:1.

- Segal, Jeffrey A., Donald R. Songer, and Charles M. Cameron. 1995. Decision Making on the U.S. Courts of Appeals. In *Contemplating Courts*, ed. Lee Epstein. Washington, D.C.: CQ Press.
- Seron, Carroll. 1978. *Judicial Reorganization: The Politics of Reform in the Federal Bankruptcy Court*. Lexington, Mass.: Lexington Books.
- . 1985. *The Roles of Magistrates: Nine Case Studies*. Washington, D.C.: Federal Judicial Center.
- Shapiro, Sidney A., and Richard E. Levy. 1995. Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions. *Duke Law Journal* 44:1051–80.
- Simpson, Reagan William, David I. Thompson, Kimberly E. Winter, Garve Ivey Jr., Allison Shelley, Mark Lawson, and R. Brian McLaughlin. 1998. Recent Developments in Civil Procedure and Evidence. *Tort and Insurance Law Journal* 33:317–41.
- Sisk, Gregory C. 1997. The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits. *University of Colorado Law Review* 68:1–61.
- Sisk, Gregory C., Michael Heise, and Andrew P. Morriss. 1998. Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning. *New York University Law Review* 73:1377–1500.
- Skocpol, Theda. 1992. *Protecting Soldiers and Mothers: The Political Origins of Social Policy and the United States*. Cambridge, Mass.: Belknap Press of Harvard University Press.
- Skowronek, Stephen. 1982. *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*. New York: Cambridge University Press.
- Smelser, Neil J. and Richard Swedberg, eds. 1994. *The Handbook of Economic Sociology*. Princeton, N.J.: Princeton University Press.
- Soifer, Aviam, and H. C. Macgill. 1977. The Younger Doctrine: Reconstructing Reconstruction. *Texas Law Review* 55:1141–1215.
- Solomon, Rayman L. 1981. *History of the Seventh Circuit, 1891-1941*. Washington, D.C.: Bicentennial Committee of the Judicial Conference of the United States.
- Songer, Donald R. 1991. The Circuit Courts of Appeals. In Gates and Johnson 1991.
- Spivak, John M. 1990. *Race, Civil Rights and the United States Court of Appeals for the Fifth Judicial Circuit*. New York: Garland Publications.
- Stempel, Jeffrey W. 1998. Contracting Access to the Courts: Myth or Reality? Boon or Bane? *Arizona Law Review* 40:965–1001.
- Sternlight, Jean R. 1999. Compelling Arbitration of Claims under the Civil Rights Act of 1866: What Congress Could Not Have Intended. *University of Kansas Law Review* 47:273–332.
- Stumpf, Harry P. 1998. *American Judicial Politics*. 2d. ed. Upper Saddle River, N.J.: Prentice Hall.
- Stumpf, Harry P., and John H. Culver. 1992. *The Politics of State Courts*. New York: Longman.
- Subrin, Stephen N. 1987. How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective. *University of Pennsylvania Law Review* 135:909–1002.
- Suchman, Mark C., and Lauren B. Edelman. 1996. Legal Rational Myths: The New Institutionalism and the Law and Society Tradition. *Law and Social Inquiry* 21:903–41.
- Surrency, Erwin C. 1987. *History of the Federal Courts*. New York: Oceana Publications.
- Tachau, Mary K. Bonsteel. 1978. *Federal Courts in the Early Republic: Kentucky, 1789-1816*. Princeton, N.J.: Princeton University Press.
- Thomas, David A. 1977. The Erosion of Erie in the Federal Courts: Is State Law Losing Ground? *Brigham Young University Law Review* 3:1–43.

- Tobias, Carl. 1992. Civil Justice Reform and the Balkanization of Federal Civil Procedure. *Arizona State Law Journal* 24:1393-1427.
- . 1997. Suggestions for Studying the Federal Appellate System. *Florida Law Review* 49:189-245.
- Tushnet, Mark. 1988. *The NAACP's Legal Strategy against Segregated Education, 1925-1950*. Chapel Hill: University of North Carolina Press.
- Ulmer, S. Sidney. 1983. Conflict with Supreme Court Precedent and the Granting of Plenary Review. *Journal of Politics* 45:474-78.
- United States. Department of Justice. Committee on Revision of the Federal Judicial System. 1977. *The Needs of the Federal Courts: Report of the Department of Justice Committee on Revision of the Federal Judicial System*. Washington, D.C.: Department of Justice.
- United States Court of Appeals for the District of Columbia Circuit. 1977. *History of the United States Court of Appeals for the District of Columbia Circuit in the Country's Bicentennial Year*. Washington, D.C.: United States Court of Appeals for the District of Columbia.
- University of Richmond Law Review. 1998. Symposium: The Federal Courts. *University of Richmond Law Review* 32:603-972.
- Urofsky, Melvin I. and David W. Levy, eds. 1991. "Half Brother, Half Son": The Letters of Louis D. Brandeis to Felix Frankfurter. Norman: University of Oklahoma Press.
- Vose, Clement E. 1972. *Constitutional Change: Amendment Politics and Supreme Court Litigation Since 1900*. Lexington, Mass.: Lexington Books.
- Wade, Martin J. 1924. (S.D. Iowa) To Thomas J. Walsh, December 30, 1924. Walsh Papers. Library of Congress, Box 281, Legislation File.
- Walker, Laurens. 1997. The End of the New Deal and the Federal Rules of Civil Procedure. *Iowa Law Review* 82:1269-91.
- Walker, Thomas G., and Deborah J. Barrow. 1985. The Diversification of the Federal Bench: Policy and Process Ramifications. *Journal of Politics* 47:596-617.
- Weinberg, Louise. 1997. Holmes' Failure. *Michigan Law Review* 96:691-723.
- Wells, Michael. 1991. Against an Elite Federal Judiciary: Comments on the Report of the Federal Courts Study Committee. *Brigham Young University Law Review* 1991:923-57.
- . 1995. Positivism and Antipositivism in Federal Courts Law. *Georgia Law Review* 29:655-92.
- . 1998. Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments. *Emory Law Journal* 47:89-162.
- Wells, Michael L., and Edward J. Larson. 1995. Original Intent and Article III. *Tulane Law Review* 70:75-135.
- West, Robin. 1997. *Caring for Justice*. New York: New York University Press.
- Wheeler, Russell R., and Cynthia Harrison. 1989. *Creating the Federal Judicial System*. Washington, D.C.: Federal Judicial Center.
- White, G. Edward. 1988. *The Marshall Court and Cultural Change, 1815-1835: A History of the Supreme Court of the United States*. New York: Macmillan.
- Wiecek, William M. 1969. The Reconstruction of Federal Judicial Power, 1863-1875. *American Journal of Legal History* 13:333-59.
- Wilson, James Q. 1989. *Bureaucracy: What Government Agencies Do and Why They Do It*. New York: Basic Books.
- Wood, Gordon S. 1991. *The Radicalism of the American Revolution*. New York: A. A. Knopf.
- Woolhandler, Ann. 1993. Demodeling Habeas. *Stanford Law Review* 45:575-644.

- . 1997. The Common Law Origins of Constitutionally Compelled Remedies. *Yale Law Journal* 107:77–164.
- Yackle, Larry W. 1994. *Reclaiming the Federal Courts*. Cambridge, Mass.: Harvard University Press.
- Yarnold, Barbara M. 1992. *Politics and the Courts: Toward a General Theory of Public Law*. New York: Praeger.
- Yonover, Geri J. 1989. Ascertaining State Law: The Continuing *Erie* Dilemma. *DePaul Law Review* 38:1–42.
- Zelden, Charles L. 1993. *Justice Lies in the District: The U.S. District Court, Southern District of Texas, 1902-1960*. College Station: Texas A&M University Press.
- Ziegler, Donald H. 1995. Twins Separated at Birth: A Comparative History of the Civil and Criminal arising under Jurisdiction of the Federal Courts and Some Proposals for Change. *Vermont Law Review* 19:673–793.
- . 1996. The New Activist Court. *American Law Review* 45:1367–1401.

CASES

- Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).
- Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809).
- Board of Commissioners v. United States, 308 U.S. 343 (1939).
- Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993).
- Brown v. Allen, 344 U.S. 443 (1953).
- Brown v. Board of Education, 347 U.S. 483 (1954).
- Coleman v. Miller, 307 U.S. 433 (1939).
- Dombrowski v. Pfister, 380 U.S. 479 (1965).
- Durousseau v. United States, 10 U.S. (6 Cranch) 307 (1810).
- England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964).
- Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
- Evans v. Jeff D., 475 U.S. 717 (1986).
- Ex parte Young, 209 U.S. 123 (1908).
- Fay v. Noia, 372 U.S. 391 (1963).
- Gay v. Ruff, 292 U.S. 25 (1934).
- Gelpcke v. Dubuque, 68 U.S.(1 Wall.) 175 (1864).
- Giles v. Harris, 189 U.S. 475 (1903).
- Hanna v. Plumer, 380 U.S. 460 (1965).
- Hans v. Louisiana, 134 U.S. 1 (1890).
- Home Telephone and Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913).
- Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820).
- Hutto v. Davis, 454 U.S. 370 (1982).
- Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997).
- Lochner v. New York, 198 U.S. 45 (1905).
- Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
- Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).
- Mitchum v. Foster, 407 U.S. 225 (1972).
- Monroe v. Pape, 365 U.S. 167 (1961).
- Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951).
- Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).
- Patterson v. Colorado, 205 U.S. 454 (1907).
- Pennsylvania v. Union Gas Company, 491 U.S. 1 (1989).

- Plessy v. Ferguson, 163 U.S. 537 (1896).
Preiser v. Rodriguez, 411 U.S. 475 (1973).
Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941).
Schweiker v. Chilicky, 487 U.S. 412 (1988).
Scripps-Howard Radio, Inc. v. Federal Communications Commission, 316 U.S. 4 (1942).
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).
Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 496 (1941).
Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).
Tafflin v. Levitt, 493 U.S. 455 (1990).
Touche Ross and Co. v. Redington, 442 U.S. 560 (1979).
United States v. Ju Toy, 198 U.S. 253 (1905).
United States v. Raddatz, 447 U.S. 667 (1980).
Webster v. Doe, 486 U.S. 592, 606 (1988).
Younger v. Harris, 401 U.S. 37 (1971).
Zwickler v. Koota, 389 U.S. 241 (1967).