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Litigation & Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958

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Litigation and Inequality

Federal Diversity Jurisdiction in Industrial America, 1870–1958

EDWARD A. PURCELL, JR.

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Preface

This study began as an effort to write a political and intellectual history of the civil jurisdiction of the federal courts since the Civil War. In the process of reading congressional debates and academic writings, I grew increasingly curious about what was actually going on in the federal courts and how the political and doctrinal debates of the time related to what litigants were actually doing. At some point in my research, prompted in part no doubt by the fact that I was then no longer a practicing historian but a practicing litigator, I found myself trying to answer the latter question rather than the ones with which I had started.

This book is the result. It is neither a political nor an intellectual history, and it touches only minimally on those areas. It is not, at least directly, a study of legal institutions or, in its emphasis on litigation behavior, an examination of legal doctrines as such. Nor is it primarily a study of the United States Supreme Court, though in some part it inevitably became one. Finally, it is not a study of the desirability of maintaining or abolishing federal diversity jurisdiction.

The principal subject, instead, is the sociolegal process of disputing, settling, and litigating claims. In particular, the book focuses on the litigation process involving disputes between individual plaintiffs and national corporations over contract claims for insurance benefits and tort claims for personal injuries, and its analysis concentrates on the three-quarters of a century from the 1870s to the 1940s. The periodization results from the fact that litigation strategies and patterns, like other social phenomena, are historically specific. The period from Reconstruction to the mid-twentieth century witnessed the emergence, spread, and decline of an identifiable combination of such strategies and patterns.

A basic argument of the book is that the strategic uses and social significance of jurisdictional and procedural rules shift over time as a result of changes in the characteristics of the adversarial parties, relevant legal rules and institutions, and prevailing social, economic, and political conditions. Thus, the book argues that however much certain issues may constitute "perennial" or "classic" problems of jurisdiction and procedure, however much they may be constantly present or regularly recurring as formal legal issues, their social meaning and practical import may differ substantially at different times and places. The social significance of "technical" procedural and jurisdictional rules, in other words, is as historically contingent as is any other aspect of law or society.

The book examines some of the ways in which litigants and their attorneys attempted to use the resources available to them in order to prevail in claim disputes, and it explores the ways in which courts, legislatures, and the legal profession helped shape and in turn responded to those efforts. Its focus on
litigation and the tactical utility of legal doctrines means, among other things, that legal philosophy, legislative proposals, and arguments of social policy are relatively peripheral. Conversely, existing common and statutory law, the structure of the judicial system, the practical problems of conducting a litigation, the relationship and relative resources of the parties, and the effort to gain tactical advantage over the adversary are central. The book views the law not only as something that establishes norms, adapts to social change, and responds to internal pressures toward rational consistency, but also as a grab bag of tools that parties attempt to use if they can or when they must during private litigations that are often of the greatest importance to one if not both of the participants.

Two preliminary matters should be noted. First, a word about the book’s expected audience seems appropriate. My goal was to make the discussion accessible and useful to a variety of readers. In particular, I had in mind at least four different groups: general American historians, especially those interested in the late nineteenth and twentieth centuries or in the social and political role of the Supreme Court; specialists in legal and constitutional history; scholars from a variety of disciplinary and intellectual perspectives who are interested in studying the relationship between law and society or law and economics; and law professors who specialize in either procedural issues or the problems of the federal judicial system. With those diverse groups in mind, I have tried both to provide sufficient background information to make the discussion intelligible without going into elaborate detail and also to highlight the issues that are central to my argument without exploring all of the ramifications that one or another of those groups might find desirable. The book seeks to bring relatively technical legal subjects more fully into the realm of history and society or, stated from the opposite viewpoint, to bring the study of historical change and contingency more deeply into the realm of technical legal analysis. In doing so, I hope to offer to diverse groups of scholars the advantages of integration and synthesis.

Second, it seems appropriate to emphasize that this is a work of history, not of current legal commentary. There are, of course, numerous ways in which the discussion inevitably implicates contemporary debates that revolve around the federal courts. Examples come readily to mind. On a methodological level the book suggests that the social impact of procedural and jurisdictional rules changes over time and that to truly understand them one must persistently ask who uses them, how they use them, and what results they achieve with them in the litigation process and, even more important, in the out-of-court process of claims disputing and settlement. On a doctrinal level the book suggests that any effort to advance a historically based concept of “federalism” as an unchanging or specific normative standard is unsupportable. On a practical level the book illustrates how and why parties have so frequently struggled to gain the forum of their choice, and that fact points, among many other things, to the immense and unfair disadvantages that forum-selection clauses inserted in standard retail sales contracts often impose on individual consumers. Finally, in terms of the connections between legal doctrines and social results, the book shows that use by the courts of jurisdictional and procedural devices to favor or disfavor identifiable classes of litigants is anything but new, just as it shows that use by litigants of available pretrial procedural tactics to gain advantages and impose burdens on their adversaries is also a time-worn if not time-honored practice. The former suggests that the goal of “trimming the federal caseload” does not justify any specific action but provides at most a mere starting point for analysis. The latter underscores the importance of studying jurisdictional and procedural rules not only as rational methods for allocating judicial business or for achieving just and efficient results at trial but also as tactical devices that allow parties to impose different types and degrees of risks, costs, fears, burdens, and uncertainties on their adversaries and thereby to pressure them to accept relatively unfavorable out-of-court settlements. In spite of such obvious points of contemporary resonance, however, this book is no place to explore such issues. It is and was designed to be historical, not contemporary, analysis.

It is both appropriate and deeply gratifying to thank the many individuals who contributed to the completion of this book. I relied heavily on a vast and illuminating secondary literature, and I am particularly in the debt of those scholars who have begun the extremely burdensome and often frustrating task of subjecting the work and caseloads of the courts to quantitative analysis. I have also profited greatly from the comments and criticisms of friends and colleagues who contributed immeasurably to sharpening and strengthening the final manuscript. In particular, I would like to thank Richard Bernstein, Robert G. Bone, Erwin Chemerinsky, William W. Fisher, III, Lawrence M. Friedman, Alon Harel, Sneed Hearn, Jon Heller, Peter Charles Hoffer, David A. Hollinger, Morton J. Horwitz, Randolph N. Jonakait, Robert J. Kaczmorski, Alfred S. Konesky, William P. LaPiana, David W. Levy, Park McGinty, Martha Minow, Eben Moglen, William E. Nelson, Robert C. Post, John Phillip Reid, Judith Resnik, Edward B. Samuels, John Henry Schlegel, Henry Steiner, G. Edward White, and William M. Wieck. The members of the New York University Legal History Colloquium, numerous and changing over the years, deserve a special collective thanks for reading and commenting on two separate early drafts. I am grateful to Celis Whyte, Stephen Douglas, Gemma Jacobs, Kathleen Moore, and Andrew Young for their consistent care and cooperation in printing innumerable drafts of the manuscript. Finally, I would like to thank my research assistants, Geri Schaeffer, Mary Jane Oltarzewski, Rachel Rabinowitz, and Kenneth Shuster, whose work has been consistently reliable and helpful in preparing the final version for publication.

In addition to friends and scholars, a number of schools and organizations have also assisted me in completing this book, and I want to express to them my deep appreciation. Early research efforts were supported by grants from the American Philosophical Society, the Social Science Research Council, the Harvard Law School, and the University of Missouri. The law firm where I practiced, Paul, Weiss, Rifkind, Wharton & Garrison, allowed me long periods of time off and provided much needed secretarial assistance. A fellowship from the National Endowment for the Humanities enabled me to complete a first draft, and another from the American Council of Learned Societies allowed me to see that the first draft really contained two separate books and to complete a draft of one of them. Finally, assistance from the New York University Law School, where I was a Gollub Fellow in 1988–89, and from New York Law School, where I began teaching in 1989, allowed me to complete the book.

My biggest thanks, of course, must go to my family. My wife, Rachel Vorspan,
offered steady support and encouragement, and she gave the manuscript the invaluable benefit of her professional skills as both lawyer and historian. My in-laws, Max and Sandy Vorspan, repeatedly furnished an exceptionally pleasant place to work on vacations and provided me with every possible comfort. My son, Dan, and my daughter, Jess, consistently showed patience and understanding when work called me away from them, and they continually delighted me with their love and companionship.

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Introduction

This is a study of what I call a social litigation system, by which I mean a coherent and dynamic set of patterns of claims-disputing behavior that arises from an identifiable combination of social and legal factors. The idea assumes that historical conditions regularly lead certain types of parties to dispute a relatively limited number of issues against one another in certain consistent ways and that most of the legally-related activity in any given period can be broken down into some number of different behavioral patterns that are recognizably “legal” and at the same time markedly different. Social litigation systems are defined by prevailing historical conditions, the social characteristics of the parties, the types of issues that the parties are led regularly to dispute, and the special subsets of legal rules—both substantive and procedural—that are particularly relevant and useful to their litigation strategies.

The concept of a social litigation system offers a way to think about the complex relationships that exist at any given time between the variety of elements we subsume under the misleadingly simple labels of “law” and “society.” It represents an attempt to bridge the gap between the broadly social and the technically legal, between quantitative studies of caseloads and the doctrinal analysis of cases, between the tumultuous and changing sources of disputes on the one hand and the rules and institutions available to channel formal litigations on the other. Its purpose is to integrate a consideration of changing social and political conditions with the study of technical legal issues into a synthesis that illuminates their complex and dynamic interactions without minimizing or losing sight of the particular significance of either.

We commonly recognize, at least implicitly, that distinct types of litigation differ as much in the social conditions that shape them as they do in the legal issues that they present. Antitrust litigation in the federal courts is profoundly different from landlord-tenant litigation in the housing courts of large cities. Securities actions have little in common with deportation proceedings, and suits involving personal injuries are quite different from school desegregation cases. Even within such a relatively narrow category as corporate litigation, the distinctively social differences that mark various types of cases may be particularly significant: Contract disputes, for example, contrast sharply with hostile tender offers. Yet in spite of the various social differences, we generally identify such types of litigation, as I have just done, by their legal rather than their social characteristics. The former may not always and for every purpose be the most useful way to categorize, examine, and understand them. Indeed, litigation involving a wide range of diverse substantive or procedural legal issues may in many
cases be far more profitably studied together as aspects of social conflict centering on race, class, gender, ethnicity, inequality, sexual preference, or economic competition than as compartmentalized illustrations of anything narrowly "legal."

The concept of a social litigation system is thus not primarily legal but rather historical and synthetic. It examines legal doctrines and categories but attempts to root them in a distinctively social—historical analysis. The focus is not doctrine as such but the social factors and group conflicts—and especially the available legal and practical opportunities for strategic maneuvering—that generate and channel claims disputing in general and formal litigation in particular. The concept of a social litigation system encourages exploration of the legal aspects of those relations and conflicts free from the power of legal categories to delimit the subject matter and foreordain the criteria of relevance.

Although the focus of the book is litigation, it is not on litigation in the abstract or in general. It concentrates, instead, on litigation that occurred in a specific historical period, essentially the age of industrial America. The roughly three-quarters of a century from the 1870s through the 1940s constituted a period of rapid and massive industrialization that helped transform social and economic relations in the United States. The period also witnessed the emergence of large national corporations and their rise to positions of social and economic power. That complex historical development, in turn, produced an essentially new social type of legal dispute, one between aggrieved individuals and national corporations, and it generated literally millions of such disputes.

This book looks at the patterns of claims disputing and litigation between those two unequal groups of litigants that developed around federal diversity jurisdiction, the jurisdiction of the federal courts to hear suits between citizens of different states. It focuses on the problems that relatively ordinary individuals faced when they were forced to dispute claims against national corporations that were capable of invoking the jurisdiction of the federal courts. In terms of substantive law issues, it considers two types of disputes that became particularly common and important to ordinary Americans in the late nineteenth and early twentieth centuries: negligence actions brought against manufacturing and railroad companies, particularly by injured employees; and contract actions brought against insurance companies, generally though not exclusively by claimants under relatively small personal life, health, and disability policies.

Two related facts combined to create the mainspring of this social litigation system as it emerged after 1870. First, the adverse parties were drastically unequal in the social resources they brought to their disputes, and second, their forum preferences tended to be conflicting. Individual plaintiffs generally wanted their suits tried in the courts of their states, whereas national corporations favored the federal courts. Those two basic social conditions provided much of the dynamism that created and shaped the system. Although the legal categories of negligence and contract determined the substantive rules that were relevant to the system, the persistent attempts of the companies to have their cases heard in the federal courts—and the resolute efforts of their adversaries to avoid that result—determined which procedural rules would be critical. Not surprisingly, the procedural rules often proved to be far more important than the substantive ones. For convenience, the book refers to this social litigation system as "the system of corporate diversity litigation" or, more briefly, "the system."

Two qualifications are in order. First, the concept of a social litigation system implies the existence and persistence over time of relatively large scale and regular behavior patterns, and detailed quantitative evidence is not available to measure those patterns with exactitude. In spite of the difficulties, however, there is sufficient evidence to identify the nature of the patterns and to chart the ways in which they changed. Statistical data, though spotty, establish the system's outlines with clarity, and congressional reports and hearings fill in much of the detail. Case reports reveal both the persistent reappearance of critical fact situations and the repeated use of specific litigation tactics and counter-tactics. Statements by judges, lawyers, litigants, and legal writers further delineate the system's scope and operation. Political evidence—though only touched on here—is confirmatory, showing that national corporations and their attorneys consistently defended the legal rules that allowed them access to the national courts, whereas populists, progressives, New Dealers, and plaintiffs' attorneys criticized those elements repeatedly.

Second, it is important to emphasize that the general patterns the book identifies were subject to considerable variation. Of greatest importance, each of the states and federal judicial districts probably presented a somewhat different pattern, depending on any number of specific local factors. Economic organization, ethnic composition, political culture, the nature of the local bench and bar, the particular state substantive and procedural rules in force, and the nature of the federal judge or judges who sat in the local federal court could combine to create numerous diverse and divergent subpatterns. As a general matter, too, it is clear that the system operated most pervasively in the states of the South, Midwest, and West. It is equally clear that the system changed over time. It operated most broadly in the decades around the turn of the century, and the advantages that corporate defendants enjoyed in the system began to shrink about 1910. It is also clear that the system developed differently in tort suits than it did in insurance actions. The strategic considerations and tactical opportunities in the two types of cases were different, and their litigation patterns accordingly diverged. Tort litigation in the system reached its most intense phase during the quarter-century from 1885 to 1910. Insurance litigation, in contrast, was relatively staid through World War I but suddenly escalated in intensity during the 1920s and 1930s. In spite of variation and change, however, certain dominant patterns did emerge in the late nineteenth century and for more than half a century characterized the dynamics of litigation practice in both tort and insurance actions between individuals and national corporations.

In analyzing the operation of the system of corporate diversity litigation the book emphasizes the importance of claims disputes and settlements that occurred outside the formal legal process. As important as the formal processes were, they accounted for the resolution of only a small percentage of claims against corporations. Most of those claims, in fact, were never brought to the courts, and a majority of those that did become lawsuits were discontinued before final judgment. Studies of injured workers, for example, show that only a small percentage, probably no more than 5 to 10 percent, converted their potential claims for redress into formal legal actions. Similarly, of the relatively small number of disputes that did give rise to formal actions, well over half were dismissed or discontinued without judgment.

The practices involved in negotiating and settling claims outside the courts I
refer to as “the informal legal process.” Although the adjective “informal” seems appropriate for fairly obvious and generally accepted reasons, it may seem less clear why the process should also be termed “legal.” I use that characterization for three reasons. First, the informal process disposed of claims that were or at least purported to be legal claims recognized and established by the formal law. Although defendants denied their validity, they nevertheless often paid to settle them and required formal written documents to attest to the fact that the claims had been extinguished according to the forms prescribed by law. Second, the process impinged directly on the formal law by drawing actions out of the legal system before the courts had found the relevant facts and applied the controlling law. The process was a substantial and regular supplement to the formal law, and the formal law recognized it obliquely and even relied on its existence and encouraged its use in numerous ways.

I also use the adjective “legal” for a third reason, one meant to reflect a central thesis of the book. The informal process of claims disposition was in practice an integral and essential part of the overall system of corporate diversity litigation. Without gaining some understanding of the relevant informal process, we cannot begin to understand how the formal process actually operated or what its general social significance was. Because the relation of the informal to the formal process was so integral, it seemed appropriate to denominate it as legal.

Many scholars, of course, have analyzed and illuminated aspects of the informal legal process, and several have referred to it with the phrase “bargaining in the shadow of the law.”¹ I prefer the term “informal legal process” because I am concerned with the extent to which the claims disposition process is removed from the process of formal adjudication and the extent to which the relevant bargaining factors may be extralegal and purposely hidden from public view. The phrase “bargaining in the shadow of the law” might be taken to imply that rules of law generally shape or “influence” the outcomes of private negotiations, even though the parties might sometimes distort or ignore them. I believe, instead, that in many disputes the formal law is largely or wholly irrelevant, especially in those cases where parties have a prior relationship, where they are substantially unequal, where one of them is not represented by counsel, where social or cultural factors restrict the ability of one of the parties to enforce his or her legal rights, or where a lawsuit would impose on one of the parties disproportionate personal, social, or economic burdens.² This is not to deny that the law may have a vague but real influence on negotiations, does cast a “shadow,” and does give “regulatory endowments.”³ Nor, of course, is it to deny that in some types of negotiations the relevant legal rules may have a major or even controlling influence. It is merely to say that the nature of the influence, the shape of the shadow, and the size of the endowments depend in each case and in the first instance on extralegal factors such as the character of the disputing parties, their relative bargaining positions, and the social context in which their dispute occurs.

The effort to explore the informal legal process poses particularly difficult evidentiary problems. The ways in which parties settled, discontinued, or simply abandoned their claims took place, for the most part, beyond the purview of the law reports and outside the pages of the public written record. Further, parties able to use social pressures to impose unfavorable settlements on their adversaries had every incentive to obscure their negotiating practices and to keep them out of the public view. Thus, it is difficult to obtain evidence on out-of-court settlements, let alone evidence that is detailed and comprehensive. The massive and obviously critical role played by the informal legal process, however, requires an effort to identify and study its significance to the fullest extent possible. Fortunately, in spite of the difficulties, a range of sources—docket statistics, congressional reports, judicial opinions, and the testimony of individual litigants and their attorneys—bring the private process of negotiation and settlement into view, even if somewhat indistinctly. The evidence seems sufficient to establish the pervasive importance of the informal legal process and, further, to identify fairly specifically its role in the system of corporate diversity litigation.

By examining the litigation and out-of-court settlement patterns that characterized the system of corporate diversity litigation, this study attempts to cast light on a number of issues. Most broadly, it tries to explore the difficult and complex question of the practical significance that law and the legal system had in the lives of ordinary individuals. Focusing on the relationship between the formal and informal legal processes, it identifies some of the powerful extralegal forces that shaped the ways in which parties used the legal options open to them and suggests that the formal law determined the results in only a relatively small percentage of claim disputes.

More particularly, the book argues that the dominant patterns of litigation behavior and claims disposition had an adverse economic impact on individual litigants, and it reconsiders both the so-called subsidy thesis and the more recent efficiency thesis that scholars have used to explain tort law in the late nineteenth and early twentieth centuries.⁴ The book argues that the legal system did confer a kind of de facto subsidy on business enterprise, but it also suggests that the economic advantages that corporations enjoyed did not arise for the most part from the formal rules of tort law or from the alleged social biases of the judiciary. Rather, it maintains that the advantages arose primarily from a variety of social, procedural, and institutional factors that allowed corporations to impose steep discounts on the amounts that they had to pay individual claimants to induce them to settle out of court.⁵ With respect to the efficiency thesis, the book illustrates some of the ways that those social, procedural, and institutional constraints combined to hold down the amount and frequency of claimants' recoveries. By identifying the extent to which common law tort rules failed to determine the aggregate costs of accidents, the book shows that those rules failed to impose the “true” costs of accidents on corporate enterprise and, consequently, failed to bring about an economically efficient level of accident prevention.

The book also examines the impact that changing litigation tactics had on the operation of the legal system itself. By identifying some of the ways that parties used jurisdictional and procedural rules to gain great and sometimes compelling advantages in their disputes, it shows how the patterned use of certain litigation tactics repeatedly helped induce both Congress and the Supreme Court to alter federal law in response. The pressures of a dynamic and escalating litigation practice, in fact, became a major factor in forcing them to restructure various parts of the national judicial system.

Further, the book questions the standard assumption that corporations used federal diversity jurisdiction primarily or exclusively to protect themselves against local prejudice and to secure the benefits of a uniform federal common law. It
suggested that the identification of local "prejudice" is a complex and problematic matter, that prejudice against corporations may have had much less influence on the state courts than has often been assumed, and that corporations may have benefited from various prejudicial factors as much as they suffered from them. More important, the book demonstrates that, regardless of the presence or absence of any operative local prejudice, corporations gained powerful legal and extralegal advantages by using the federal courts. It argues in addition that the independent federal common law was probably less significant to corporate defendants than were extralegal factors in leading them to prefer federal forums and that, insofar as the federal common law did attract corporate litigants, it was its favorable substantive nature rather than its national uniformity that accounted for its appeal.

The book also addresses the long-disputed question of whether and to what extent the federal judiciary favored business and corporate interests, and it qualifies and refines ideas about the social role of the national courts in the late nineteenth and early twentieth centuries. It explores striking and previously unrecognized ways in which the federal courts, and especially the Supreme Court, both assisted corporate litigants and disfavored them as well. Moreover, it argues that although the federal courts were generally favorable forums for business interests, the reasons why they were favorable were largely independent of the social attitudes and values of federal judges. The book suggests, too, that the Supreme Court was often relatively less favorable toward corporate enterprise than were many of the lower federal courts and that on critical procedural issues the Court often adopted rules that worked to the advantage of plaintiffs who sued national corporations. Those procedural rulings, it also contends, were often of far greater practical importance than were the Court's substantive common law rulings.

Finally, the book identifies the decades that bracketed the turn of the century as a pivotal period in the evolution of the federal judicial system. It highlights the tumultuous years from approximately 1892 to 1908 when the Supreme Court twice reversed its course in shaping the scope of federal jurisdiction. From the late 1880s to the early 1890s, the Court began methodically and broadly to restrict access to the national courts, including the access of corporate litigants who sought to invoke federal diversity jurisdiction. Beginning in approximately 1892, however, it changed course and made conscious efforts to expand corporate access to the federal courts. Then, after 1900 it again reversed course and suddenly began to limit that access. The book shows how the Court's abrupt and repeated reversals in dealing with ostensibly technical procedural and jurisdictional rules represented complex responses to changing social conditions and to the tactical battles that marked the system of corporate diversity litigation. It argues, too, that the second reversal between 1900 and 1908 effected a major reorientation in federal law that helped shape the national judicial system for the remainder of the twentieth century.

Because this book ranges back and forth from the broadly social to the narrowly doctrinal over a period of some three-quarters of a century, an outline of its structure seems useful. In broadest terms, its story falls into two parts. The first six chapters examine the emergence and growth of the system of corporate diversity litigation from its formative period in the 1870s and 1880s to its most expansive and most socially divisive phase in the two decades around the turn of the century. The next four chapters explore the system's third stage, its evolution and decline after 1910 to its disintegration in the 1940s and disappearance in the 1950s. Finally, Chapter 11 considers the overall significance of the system.

More specifically, Chapter 1 discusses the legal and social background that gave rise to the system of corporate diversity litigation, describes the system's basic characteristics, and explains why it was particularly advantageous for national corporations to litigate in the federal courts. Chapters 2 and 3 look at the two most important general advantages the federal courts offered to corporations: the de facto ability to impose severe practical burdens on plaintiffs and thereby to pressure them to discount or drop their claims; and the availability in the national courts after the 1880s of a "federal common law" that was, on critical issues, distinctly more favorable to corporations than was the common law of many states.

Chapters 4 and 5 focus on "The Battle for Forum Control," the parties' efforts to use available procedural tools to ensure that their disputes would be heard in the court that would, in their view, give them the greatest leverage possible over their adversaries. For the reasons discussed in the first three chapters, plaintiffs understandably sought to bring their suits in the state courts, and equally understandably, corporations sought to "remove" those suits to the local federal courts. These chapters analyze the two principal tactical devices that plaintiffs used to defeat federal jurisdiction and thereby avoid the federal courts. One was discounting claims below the minimum required for federal suits, and the other was "joining" parties whose presence in the action would destroy the requisite "complete" diversity of citizenship between the adversary parties. Chapters 4 and 5 also explore the ways in which corporations tried to counter those efforts and the economic consequences of the general systemwide struggle for forum control. In addition, the two chapters begin consideration of the ways in which the United States Supreme Court responded to the developing tactics in the system, identifying the changes that occurred in the decades around the turn of the century when the Court first restricted, then expanded, and then again restricted the opportunities that corporations had to remove suits to the federal courts.

Chapter 6 concludes the first half of the book by considering the role that local prejudice played in the system. Using two special removal statutes that dealt specifically with that problem, the chapter develops three arguments. First, extending the analysis in Chapter 5, it concludes that the Supreme Court's treatment of the right of corporations to remove was the result not of doctrine or logic but of the Court's efforts to deal with the intense social conflicts that arose in the system of corporate diversity litigation. Second, considering the claim that corporations preferred the federal courts because they feared "local prejudice" in the state courts, the chapter suggests that the danger of local prejudice has been inflated and that it was probably only a relatively minor threat in the state courts. Third, showing that the concern about local prejudice in the federal judicial system was itself biased and highly selective, the chapter concludes that—regardless of the presence or absence of local prejudice—the right to remove gave national corporations a procedural advantage that was both exceptional and unnecessary.

Chapter 7 begins the story of the system's contraction and evolution after 1910. It shows how legislative reforms, the rise of a plaintiffs' personal injury bar,
and improvements in transportation and court administration combined to lessen the burdens that federal litigation imposed on plaintiffs and consequently to ameliorate the system's harshness. The Supreme Court contributed to the process by upholding most reform legislation and by moderating parts of the federal common law. In other areas, however, the Court extended its own lawmaking powers and in minor areas even expanded the scope of the system itself.

Chapters 8 and 9 return to the battle for forum control, analyzing the ways in which the new social and legal conditions of the early twentieth century helped spur an escalation in litigation tactics on the part of both individuals and corporations. Sizable numbers of plaintiffs began to bring their suits in distant states that offered relatively favorable laws and the lure of larger jury verdicts, a practice known as "interstate forum shopping." For their part, defendants countered with a variety of tactics designed to ensure that plaintiffs sued near their homes. In addition, changes in federal law created new opportunities for insurance companies to use the federal courts, and during the 1920s and 1930s, insurance litigation became increasingly innovative, volatile, and complex. For the first time, federal equity became a major force in the system, and the Supreme Court struggled throughout the two decades to control the new volatility and limit the sharply escalating tactics. Chapters 8 and 9 also establish the breadth of the pattern of restriction-expansion-restriction that marked the Court's removal decisions in the decades around the turn of the century by identifying two additional doctrinal areas in which the same familiar pattern recurred.

Chapter 10 traces the disintegration and disappearance of the system from the late 1930s through the 1950s. The new Roosevelt Court abolished the federal common law in 1938, and during the following decade the New Deal transformed the political orientation and image of the entire federal judiciary. In combination with continued improvements in transportation and court administration, those changes meant that by mid-century individual plaintiffs no longer had any general incentive to avoid the federal courts. The chapter concludes by showing how in the decades after 1937 Congress and the Supreme Court restricted both interstate forum shopping and the corporate use of federal equity.

Finally, Chapter 11 reflects on the long history of the system of corporate diversity litigation. Providing an overview of the system's evolution, the chapter considers the concept of a social litigation system and some of the ways an understanding of the system helps illuminate a number of issues in American legal history in the late nineteenth and early twentieth centuries. It focuses on the utility of the local prejudice rationale of diversity jurisdiction, the merits of the "efficiency" thesis, and the political orientation of the federal courts in the long period from Reconstruction to the New Deal. It ends by stressing the pivotal importance of the Court's decisions from 1905 to 1908 in shaping the social role of the national judiciary in the twentieth century.

One last comment seems in order. The book gives relatively little attention to individual judges, litigants, and lawyers and to the influence of politics, ideas, and culture. I regret that lack and by no means intend to detract from the importance of any of those factors. I hope, in fact, to explore their significance in another work. The focus of this study, however, is intentionally and necessarily on the structure and operation of the system of corporate diversity litigation itself—its social and legal preconditions, its characteristic patterns of behavior, its social and institutional consequences, and its rise, evolution, and disintegration over a period of some three-quarters of a century.

By itself that story seems sufficiently complex for one book. Indeed, the story involves in one way or another a wide range of legal issues and most of the major events that marked American life from Reconstruction to the Cold War. And in spite of the emphasis on general patterns of behavior and the relative absence of individuals, the reader should nonetheless get some sense of the underlying human conflict, vitality, and creativity that continuously fed the litigation process and ultimately helped shape the twentieth-century American judicial system.