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## Book Review of Reclaiming the Federal Courts, by Larry W. Yackle.

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States. Once political parties clearly identified presidential and vice-presidential candidates, the original system raised the problem of how to make certain that one's presidential candidate received more votes than one's vice-presidential candidate, without diverting so many votes from the latter as to lose the vice presidency to the opposing party's presidential candidate, as happened in 1797.

By 1800 an even more disruptive possibility emerged. In that election the defeated Federalists considered casting their electoral votes for the Republican vice-presidential candidate, Aaron Burr, which would have made him president. They did not do so, leaving the electoral vote tied between Burr and Republican presidential candidate Thomas Jefferson. In this situation the original system called upon the House of Representatives to select between the candidates, with each delegation casting a single vote and a majority required for election. This time the Federalists did unite upon Burr, preventing Jefferson from securing the necessary majority for thirty-five ballots. With the Federalists certain to lose the election of 1804, Republicans suspected that they would cast their electoral vote for the Republican vice-presidential candidate in order to deny reelection to Jefferson. Federalist courting of dissident Republican factions, especially of Burr in New York, confirmed Republicans' fears.

Before 1800, while they had been a minority in many states, Republicans had urged direct popular election of presidential electors from individual districts. This system would be more democratic and better reflect the real divisions among the people. But the Amendment they ratified in 1804 eschewed such democratic reform in favor of the minimal one of requiring electors to designate separate votes for president and for vice president. Kuroda writes that Republicans were no longer interested in proportional representation in the electoral college now that a winner-take-all system served their interests rather than those of the Federalists. Moreover Republicans—and especially Jefferson—understood that a winner-take-all system served to concentrate votes on a single candidate, encouraging the formation of electoral majorities and avoiding the dangerous contingency of elections by the House of Representatives.

Unfortunately, Kuroda provides these insights primarily in his introduction and epilogue. The main body of the text is a superficial, overly chronological account of the presidential elections of 1789 to 1804, with special attention to debates in each state over how to select electors. Kuroda does not indicate how Federalist and Republican attitudes towards reforming the electoral college related to other elements of their political and constitutional ideologies. In sum, this book makes a modest but useful contribution to our understanding of the origins of the Twelfth Amendment, and it does not pretend to do anything more.

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Larry W. Yackle, *Reclaiming the Federal Courts*, Cambridge, Mass.: Harvard University Press, 1994. Pp. 297. \$39.95 (ISBN 0-674-75007-1).

Focusing on jurisdictional doctrines that restrict access to the national courts in cases raising federal law issues, Larry W. Yackle presents his thesis forcefully. "For twenty

years, the Supreme Court has been dominated by justices who consistently favor governmental power over the claims of ordinary citizens" (1). As part of this favoritism, the Court has "taken far too much decision-making authority away from the federal courts and given it to the courts of the states." As a result, the federal courts are no longer able adequately to check abuses of governmental power, and "for a host of reasons"—including fewer resources, lower quality, and lack of lifetime tenure for most of their judges—the state courts "cannot fill the void" (2). Moreover, Yackle insists, substantive policy goals have driven the Court's efforts. "Federal-question cases are funneled to the state courts in the expectation that relief will be denied" (41). As a result, "the fundamental framework of American government is now very much at risk" (2).

*Reclaiming the Federal Courts*, a conversational book aimed at general readers, will be of interest to legal historians primarily as a passionate articulation of a distinctively twentieth-century view of the federal judicial system and as a fond justification for Warren Court liberalism. With respect to the former, the book proclaims the centrality of "federal question" jurisdiction, assumes the primacy of the national judiciary in enforcing federal law, views the federal courts as vindicators of preferred individual rights, and places the practice of judicial review at the foundation of American government. With respect to the latter, it praises the Warren Court for adapting this twentieth-century view to the service of contemporary political "liberalism," defined loosely as a "general belief in aggressive legislative regulation of economic activity, tempered by rigorous judicial protection of personal affairs" (10).

At the center of Yackle's thesis is a decisive view of the so-called "parity" question. The "federal courts," he declares, "bring a superior competence to federal-question litigation" (13). Moreover, they are by their very nature more favorably disposed toward federal-law claims than are the state courts. The federal courts operate within a "grand tradition" of enforcing federal rights and "are institutionally situated for the very purpose of checking majoritarian governmental power and other societal pressures on those rights" (13, emphasis in original). This latter claim addresses a major question of institutional orientation that liberals currently confront. "Certainly," Yackle declares, "liberals cannot sensibly switch sides in the parity debate merely because more conservative judges, nominated by Ronald Reagan and George Bush, are in place now" (49). Rather, he insists, liberals should maintain their faith in the federal courts because they will continue to be relatively receptive to federal-law claims. The personal ideology of "individual sitting judges," he argues, is relatively unimportant compared with "the competence, perspective, and institutional location and structure of the federal courts" (50, emphasis in original).

The latter claim may, of course, contain some element of wishful thinking and, even if true, seems problematic in light of the author's assertion that the paramount fault of the conservative justices of the old pre-New Deal Court "was not that they gave content to federal rights and enforced those rights against governmental power, but that they chose the wrong [federal] rights to protect" (23). Even assuming, in other words, that the federal judicial system embodies an institutional tendency to construe federal rights generously, that does not mean that the new "conservative" judges will choose to foster the specific kinds of federal rights that "liberals" currently favor. Perhaps the new appointees will protect us vigorously by doing some of the following: guaranteeing First Amendment rights to mount aggressive protests against abortion clinics or to

use one's money for political purposes without restriction; invigorating the due process clause to protect our liberty against "judicial intrusions" mandating school desegregation or affirmative action; strengthening our ability to obtain effective federal judicial relief by making the legal system more efficient through the drastic elimination of "frivolous" suits (i.e., tort actions against favored groups and institutions); expanding federal immunities against oppressive and wasteful Civil Rights claims; or even developing a vibrant Second Amendment jurisprudence that would ensure the right of all of us to pack plenty of firepower. Nor, of course, would the idea of vigorous enforcement of federal rights by the national judiciary maintain its current "liberal" orientation in the potentially different context that could be created by sweeping new legislative programs enacted by conservative Republican Congresses aimed, say, at reforming the welfare system, enforcing a balanced federal budget, or making Americans more "competitive" and morally "responsible."

The book has many strengths. It illuminates some of the tangles of federal jurisdiction and shows with clarity why abstruse doctrines often represent little more than policy choices, however rococo their technical gilding. Further, it points to the importance of practical social barriers in defeating legal rights and highlights some of the ways in which arcane, byzantine, and manipulable doctrines serve not merely to deny *de jure* access to the national courts but also to impose practical barriers that restrict *de facto* access as well. Again, the book strikes sharply at the work of the conservative scholar Paul M. Bator, whose approach the Rehnquist Court has seemingly adopted. Yackle suggests incisively that the power of Bator's alluring theory of federal jurisdiction rests on two major faults: first, his careful elision of the fact that, in practice, "rights" are only as good as the specific courts actually available to enforce them; and, second, that Bator employed his touchstone of "a full and fair opportunity to litigate" as a question-begging abstraction contoured by ideology, not as a meaningful test of adjudicatory realities.

While the book's argument is pointed, its polemical tone and presentist orientation create some difficulties. Its historical discussion is an unsatisfactory "background" sketch. Its critique of leading "conservative" scholars—including Bator—does not do justice to the depth and complexity of their work. The book also avoids the difficulties involved in its thesis that federal jurisdiction should be designed to "provide a sympathetic forum for the enforcement of rights that genuinely *ought* to be enforced against majoritarian power" (31; emphasis in original). Although such a substantive criterion has much to recommend it, and has in fact informed a good part of the history of federal jurisdiction, it pushes to the forefront difficult and divisive disputes over the content of the "rights" to be enforced. More is required, as Yackle would surely acknowledge, than merely selecting "judges who favor the individual" (40).

In spite of its shortcomings, the book succeeds in making complex and technical jurisdictional issues intelligible to general readers and in placing them meaningfully in their contemporary political and ideological context. Yackle has written a lucid and highly readable discussion of a complex and demanding subject.

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