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All Rise: The Prospects and Challenges of Lower Federal Judicial Biography

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APPROACHES TO FEDERAL JUDICIAL HISTORY

Approaches to Federal Judicial History

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Introduction

Gautham Rao

This volume presents recent scholarship on the history of the federal court system. It builds on the symposium "The Federal Courts in American Historiography," which convened at the Federal Judicial Center in the spring of 2016. The main historical themes of that scholarly meeting and of this volume are the practices and importance of the lower federal courts, the relationship between district and circuit courts and the Supreme Court, and the broader role of the federal court system in American economy and society.

Legal historians were not always so interested in the lower federal courts. For many decades, legal and constitutional historians focused almost exclusively on the proceedings of the United States Supreme Court, on the justices' opinions on the leading causes of the day, and on the doctrines that emerged from the nation's great cases. In contrast to these august proceedings, the first justices and their chroniclers painted a dour picture of the goings-on of the lower federal courts. In Albert J. Beveridge's well-known four-volume biography of Chief Justice Marshall, "riding circuit" is like comic relief that temporarily distracts from more weighty considerations. In Richmond Marshall dressed shabbily, ambled about town, and for entertainment took in all the "political talk" that came his way. In one instance he was mistaken "for the butcher."[1] Other early landmark works on the history of American law, such as Felix Frankfurter and James M. Landis's *Business of the Supreme Court*, continued to favor the history of the Supreme Court over that of the lower federal courts.[2]

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1. Albert J. Beveridge, *The Life of John Marshall, Volume IV: The Building of the Nation, 1815–1835* (Boston: Houghton Mifflin, 1919), 4:61, 62, 63, 64.

2. Felix Frankfurter and James M. Landis, *The Business of the Supreme Court* (New York: Macmillan, 1927). It is not coincidental that this trend occurred at a moment when heroism marked the reputation and memory of Supreme Court Justices such as Oliver Wendell Holmes, Jr. See Brad Snyder, "The House that Built Holmes," *Law and History Review* 30, no. 3 (August 2012): 661–721; and generally on the role of Supreme Court in American national memory, Michael G. Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Knopf, 1986).

It was only in the late twentieth century—some 200 years after the establishment of the federal judiciary—that the lower courts began to receive serious and sustained scholarly attention. Edward A. Purcell, Jr., believed this "growing interest" was due in part to the work of legal historian Kermit Hall, whose several works on the "lower federal judiciary" opened a line of inquiry into the nineteenth-century activities and development of the United States district and circuit courts.[3] The broader structural transformation of American historiography was an even more important reason for the sudden emergence of interest in the history of the lower federal courts. As Purcell explained, the late twentieth century saw American historians turn toward social history, "local institutions in delimited areas," and "everyday life." That turn was necessarily fueled by a rejection of the kind of normative, national developmental teleology that had informed previous celebrations of the Supreme Court's rise and influence. Instead, studying the lower federal courts as national institutions operating in local communities offered legal historians an irresistible opportunity to excavate "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" in "the legal system" writ large.[4]

The essays that appear in this volume—and indeed the very existence of the volume—suggest that Purcell had rightly identified a structural shift in the historiography of the lower federal courts. Indeed, the contributors to *Approaches to Federal Judicial History* collectively illustrate the maturity of a field that was in its infancy when Purcell penned his sage essay. They also reveal the influence of other factors that Purcell could not have identified in 1999. Foremost among these

3. Edward A. Purcell, Jr., "Reconsidering the Frankfurterian Paradigm: Reflections on History of Lower Federal Courts," *Law & Social Inquiry* 24, no. 3 (Summer 1999): 679; Kermit L. Hall, "The Civil War Era as a Crucible for Nationalizing the Lower Federal Courts," *Prologue* 7 (Fall 1975): 177–86; Kermit L. Hall, "Social Backgrounds and Judicial Recruitment: A Nineteenth-Century Perspective on the Lower Federal Judiciary," *Western Political Quarterly* 29, no. 2 (1976): 243–57; Kermit L. Hall, "The Children of the Cabins: The Lower Federal Judiciary, Modernization, and the Political Culture, 1789–1899," *Northwestern University Law Review* 75, no. 3 (1980): 423–71; Kermit L. Hall and Eric W. Rise, *From Local Courts to National Tribunals: The Federal District Courts of Florida, 1821–1990* (Brooklyn, NY: Carlson Publishing, 1991).

4. Purcell, 681. On the new social history's challenge to consensus history and developmental national teleologies, see Peter Novick, *That Noble Dream: The 'Objectivity Question' and the American Historical Profession* (New York: Cambridge University Press, 1988), 597–611. Among the leading works cited by Purcell as emblematic of this historiographic turn are J.W. Peltason, *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation* (Champaign: University of Illinois Press, 1961); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982); John M. Spivack, *Race, Civil Rights and the United States Court of Appeals for the Fifth Judicial Circuit* (New York: Garland Publications, 1990); Marc C. Suchman and Lauren B. Edelman, "Legal Rational Myths: The New Institutionalism and the Law and Society Tradition," *Law & Social Inquiry* 21, no. 1 (1996): 903–41.

is the centrality of a sociolegal approach to American legal history that is broadly associated with the pioneering scholarship of J. Willard Hurst. Hurst's intellectual world is too complex to fully explain in this brief space, but his method constituted an attempt, as William J. Novak explained, to connect "individual action, large-scale social structures, and fundamental processes of historical change." Hurst's method thus allowed legal historians to connect the procedural and doctrinal histories of courts with structures such as capitalism and conceptual frameworks such as power relations.[5] The Hurstian influence can clearly be seen in recent scholarly work on lower federal courts' handling of major problems in commerce, colonialism, slavery, and culture.[6]

Just as legal historians whose main interest is the functioning of courts and institutions have sought to establish connections with structures of power, others have found the operation of the lower federal courts to be fertile ground for writing the history of race, slavery, and the American state, to name a few. For instance, recent works on freedom suits reveal the importance of the federal courts to daily negotiations of enslaved persons with legal institutions and slaveholders alike. Likewise, the lower federal courts appear at key junctures in leading legal historian Hendrik Hartog's recent book, *The Trouble with Minna: A Case of Slavery and Emancipation in the Antebellum North*.[7] The prominence

5. William J. Novak, "Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst," *Law and History Review* 18, no. 1 (Spring 2000): 98; Barbara Young Welke, "Willard Hurst and the Archipelago of American Legal Historiography," *Law and History Review* 18, no. 1 (Spring 2000): 197–98.

6. See, for instance, Craig B. Hollander, "Against a Sea of Troubles: Slave Trade Suppressionism During the Early Republic" (PhD diss., Johns Hopkins University, 2013); Kate Elizabeth Brown, *Alexander Hamilton and the Development of American Law* (Lawrence: University Press of Kansas, 2017); Joshua M. Smith, *Borderland Smuggling: Patriots, Loyalists and Illicit Trade in the Northeast, 1783–1820* (Gainesville: University Press of Florida, 2006); Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic, Kentucky, 1789–1816* (Princeton, NJ: Princeton University Press, 1978); Kevin Arlyck, "Forged by War: The Federal Courts and Foreign Affairs in the Age of Revolution" (PhD diss., New York University, 2014); Kevin Arlyck, "Plaintiffs and Privateers: Litigation and Foreign Affairs in Federal Courts, 1816–1822," *Law and History Review* 30, no. 1 (February 2012): 245–78; Gautham Rao, *National Duties: Customhouses and the Making of the American State* (Chicago: University of Chicago Press, 2016); Paul Frymer, *Building an American Empire: The Era of Territorial and Political Expansion* (Princeton, NJ: Princeton University Press, 2017).

7. Hendrik Hartog, *The Trouble with Minna: A Case of Slavery and Emancipation in the Antebellum North* (Chapel Hill: University of North Carolina Press, 2018). For leading works on freedom suits, see, for instance, Kelly M. Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (Athens: University of Georgia Press, 2017); Loren Schweninger, *Appealing for Liberty: Freedom Suits in the South* (New York: Oxford University Press, 2018); Lea Vandervelde, *Redemption Songs: Suing for Freedom before Dred Scott* (New York: Oxford University Press, 2014); Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence, 1787–1857* (New York: Cambridge University Press, 2016).

of these themes serves as a promising response to fears articulated some years ago by Barbara Young Welke that sociolegally inspired legal history might be permanently "balkanized."[8]

Complex understanding of institutions constitutes a final theme that has become prominent in contemporary legal histories that clearly feature in the essays herein. Increasingly, legal historians have eschewed simplistic views of governmental institutions such as courts and agencies in favor of complex structures. Where scholars once were content to understand courts and agencies from the top down, they now take seriously the personalities, backgrounds, and perhaps most importantly, routine interactions with non-officeholders. Sociologist Elizabeth Clemens has offered arguably the most memorable characterization of this new understanding of governmental institutions as a "Rube Goldberg State."[9] Likewise, in William J. Novak's corrective reappraisal of the American state, pragmatic, flexible, and decentralized governmental institutions such as the federal courts come to appear as potent, if often overlooked, agents of change.[10]

These historiographical and methodological themes suffuse the essays that follow. Contributors to Part One of the volume seek primarily to "historicize" the judicial branch. Winston Bowman's introductory article, "The Indefinite Article: Historicizing the Judicial Branch," argues that the judicial branch itself must be understood on its own terms at any given moment in time. As Bowman puts it, "For much of the nation's history, however, the concept of the 'judicial branch' was abstruse, malleable, and contested." Recovering that past, concludes Bowman, is the only way to understand the historical development of the judiciary as well as the contemporary significance of the judiciary.[11]

Bowman's essay is followed by Kellen Funk's history of federal procedure in the federal courts. Despite intense historical scrutiny on federalism and federal

8. Barbara Young Welke, "Willard Hurst and the Archipelago of American Legal Historiography," *Law and History Review* 18, no. 1 (Spring 2000): 197–204.

9. Elizabeth Clemens, "Lineages of the Rube Goldberg State: Building and Blurring Public Programs, 1900–1940," in *Rethinking Political Institutions: The Art of the State*, eds. Ian Shapiro et al. (New York: New York University Press, 2006), 380–443.

10. William J. Novak, "The Myth of the Weak American State," *American Historical Review* 115, no. 3 (June 2010): 766–800. See also William J. Novak, Stephen Sawyer and James T. Sparrow, eds., *Boundaries of the State in U.S. History* (Chicago: University of Chicago Press, 2015); Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009); Gary Gerstle, *Liberty and Coercion: The Paradox of American Government from the Founding to the Present* (Princeton, NJ: Princeton University Press, 2015); Ariel Ron and Gautham Rao, "Taking Stock of the State in Nineteenth-Century America," *Journal of the Early Republic* 38, no. 1 (Spring 2018): 61–67.

11. See Bowman, infra ch. 1.

institutions, argues Funk, "works examining federal procedure in federal courts as such remain scarce, especially covering any extended time period or sites outside landmark Supreme Court cases." To remedy this lacuna, Funk offers "one possible sketch of the story of federal procedure writ large: how federal procedure morphed from being the essence of federal power to being a mere instrument of power, from the instantiation of Justice itself in the Marshall Court's telling to the mere handmaid of Justice as Charles Clark described it."[12]

The concluding essays of Part One, by Aaron Hall and Joanna Grisinger, seek to make sense of the federal judiciary's activity in two important substantive areas: slavery and administration. Hall's "Slavery and Emancipation in the Federal Courts" argues that "as long as the United States harbored slavery under law, the national judiciary managed a legal world animated by its business and populated by its victims." His survey focuses in particular on how the enslaved's mobility and fugitivity made the federal courts a privileged venue in which to understand slave resistance on one hand and the federal government's posture toward slavery until the end of the Civil War on the other hand.[13] If Hall focuses on how individuals external to the state forced themselves onto the dockets and into the courtrooms of the early republic, Grisinger's focus is rather on how governmental actors in the twentieth century necessitated the rise of an entirely new arena of federal judicial action. Grisinger points out "how the federal courts have both acted and reacted to administrative governance—that is, governance by bureaucrats in executive agencies and independent commissions."[14]

If the federal judiciary has indeed been so active and important in the broad sweep of American history, then how might scholars go about characterizing the courts' involvement? This is the central inquiry of Part Two, beginning with an introductory essay by Jake Kobrick. Kobrick emphasizes the promise of this enterprise, noting that legal history has proven itself to be adaptable to the incredibly flexible uses of governing power in American history that Novak illustrated in his 2010 "Myth of the Weak American State." Historians of the lower federal courts in particular, he concludes, would be wise to recognize that the stories they uncover are neccesarily an "integral and essential component of legal historiography."[15]

Charles Zelden's essay, "All Rise: The Prospects and Challenges of Lower Federal Judicial Biography," picks up where Kobrick concluded. Zelden laments the paucity of biographies of lower-federal-court judges, while nonetheless

12. See Funk, infra ch. 2.
13. See Hall, infra ch. 3.
14. See Grisinger, infra ch. 4.
15. See Kobrick, infra ch. 5.

appreciating the challenges that routinely face these biographers. Historically speaking, Zelden writes, lower federal judges "are generally not well known, the importance of their work is not self-evident, their papers are often scattered or fragmentary or thin, and the wider context in which they operate is not well-established." But especially because the lower federal courts are the front line of interaction between the federal judiciary and the people, Zelden believes that biographers should persist in trying to write more and better biographies of lower federal judges. This is a unique opportunity, he concludes, to weigh "the difference between law on the books and law as applied" throughout the federal judiciary.[16]

Sara Mayeux's "The Federal Courts and Criminal Justice" is the final essay of Part Two. With a particular focus on the rise of the "carceral state" in postwar twentieth-century America, Mayeux seeks to know how public opinion has influenced lower federal judicial doctrine, especially in its relation to "punitive policies." Mayeux finds that historians of the lower federal courts have overlooked these policies. However, her research suggests a web of facilitative and reformist activity in matters such as sentencing, review of state convictions, prison reform, habeas jurisdiction, and condition-of-confinement litigation.[17]

Above all, the contributions to this volume illustrate the progress that scholars have made over several decades in bringing the federal judiciary and the lower federal courts to the forefront of legal and constitutional history. Yet each essay also establishes the opportunities that future generations of researchers might enjoy in deepening our understanding of the history of the federal judiciary. The editors and authors of this volume, as well as the leadership of the Federal Judicial Center, thus hope that *Approaches to Federal Judicial History* can further the scholarly renaissance that has brought the federal judiciary and lower federal courts into the mainstream of American legal and constitutional history.

16. See Zelden, infra ch. 6.

17. See Mayeux, infra ch. 7.

Part I
Historicizing the Judicial Branch

1

The Indefinite Article

Historicizing the Judicial Branch

Winston Bowman

Introduction

This collection of essays is framed as an historiographical study of approaches to federal judicial history. Though valuable, such studies can give the impression that, while historians' approaches vary, the subject of their inquiry remains constant. There is a basic assumption that whether we talk of the federal judiciary in 1789 or 2019, we refer to the same set of institutions, albeit with superficial changes.[1] Courts reify this notion by their use of Latin, their references to long-dead judges in the first-person-plural, and their adoption of nineteenth-century dress and ritual. This apparent continuity is fortified by the way we are introduced to the federal courts from grade school to grad school: as one of three great branches of government established by the first three articles of the Constitution. These branches are supposed to have swayed with the currents of history or grown as they gained their rings, but their core identity is as solid and as venerable as a mighty oak. This impression of institutional continuity is further reinforced for modern historians by the truism that the structure of the federal courts has

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1. There are, of course, counterexamples. See Craig Green, "An Intellectual History of Judicial Activism," *Emory Law Journal* 58, no. 5 (2009): 1233 (noting that "the structure, dockets, and functions of twenty-first-century federal courts are radically different from their eighteenth-century counterparts.").

changed comparatively little over the past few generations.[2] Such changes as have occurred in living memory—circuit mitosis or the reorganization of individual courts, for example—seem little more than the fluttering of a few leaves.[3]

For much of the nation's history, however, the concept of the "judicial branch" was abstruse, malleable, and contested to an extent rivalling the executive and far exceeding the legislative branch. Our seemingly timeless notion of the federal judiciary is the result of conflict and mediation between generations of legislators, judges, and non-governmental actors. The danger of ignoring this historical fluidity becomes clearer when we contrast the modern judicial branch against its late-eighteenth-century precursor.

The seemingly natural division of labor between the Supreme Court, courts of appeals, and district courts was far from inevitable when the judiciary was created by the combination of the Constitution and the First Congress. Regional courts of appeal did not exist and, while the district courts were created by the Judiciary Act of 1789, their role was far more limited than it is today. District courts principally heard admiralty suits and minor civil and criminal cases. Circuit courts had a blend of trial and appellate jurisdiction and, accordingly, consisted of both district judges and Supreme Court justices riding circuit. There were no courts of special jurisdiction. Once these courts did begin to appear in the mid-nineteenth century, moreover, they raised serious and complex questions about the nature of judicial power that took a century or more to resolve.[4]

We have become inured to the notion that the Supreme Court permits review in only a handful of the thousands of appeals filed with it each year, and when the justices do grant a writ of certiorari, we expect the case to present important questions of national public law. In the Court's early days, by contrast, it had very little control over the cases it heard, and it frequently dealt with seemingly minor private lawsuits. Moreover, the justices had to "ride circuit," hearing trials in inferior courts around the country. None of the federal courts had freestanding federal-question jurisdiction; most of the relatively small number of federal-question cases originated in the state courts. Federal judges could not retire with salary and there was no "senior status" for judges who wished to hear a reduced

2. Judith Resnik has argued that changes over the past several decades have been more searching than this description would suggest, although she too identifies a significant "essentialist" tone to discourse about the federal courts equivalent to flawed assumptions about the immutability of race and gender. See Judith Resnik, "History, Jurisdiction and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination," *West Virginia Law Review* 98, no. 1 (1995): 171–266.

3. Cf. Justin Crowe, *Building the Federal Judiciary: Law, Courts, and the Politics of Institutional Development* (Princeton, NJ: Princeton University Press, 2012), 238–79 (describing the relative continuity of the post-World-War-II judiciary).

4. See ibid., 23–83.

caseload in the later years of their careers (by comparison, more than 40% of contemporary federal judges are on senior status).

Although the federal courts were initially divided into districts and circuits as they are today, that organizational scheme also bore almost no relation to the current regional allocation of the courts. Large territories and even fully fledged states were sometimes omitted from judicial circuits for years. There was no Judicial Conference of the United States, no Administrative Office of the U.S. Courts, and no Federal Judicial Center. Nor did early federal judges enjoy the assistance of the army of law clerks and staff attorneys who now shoulder a great deal of the courts' workload. And there were no magistrate or bankruptcy judges to act as "adjuncts" to their Article III colleagues.

Perhaps unsurprisingly, given that there had been no federal judiciary under the Articles of Confederation, there were no federal courthouses. Most of the court facilities that were constructed during the course of the nineteenth century, moreover, doubled as post offices, customhouses, or both, with those roles often predominating over judicial functions. Even the Supreme Court had to wait almost 150 years to get its own building. In short, little about the structure or presence of the early federal courts resembled anything about the modern judicial branch.[5]

Highlighting a body of scholarship reckoning with these changes, this essay aims to suggest ways historians can deploy concepts of a dynamic and contingent judiciary in future studies and indicates some of the ways the essays that follow contribute to that agenda. The scholarly stakes for this enterprise are higher than simply adding nuance to an established narrative. The broad historiographical turn to "bring the state back in" has demonstrated the ways in which the structure of an institution defines—some would say distorts—social and political forces that act as the institution's "inputs."[6] Many histories in this mold have either excluded the courts entirely or focused on their infancy, when the judiciary was among the few influential instrumentalities of the federal government.[7] However, several recent histories have "brought the courts back in," demonstrating the role the nation's judges played in the development of the modern state and documenting the ways in which courts have historically acted as vital organs of

5. See Judith Resnik, "Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren and Rehnquist," *Indiana Law Journal* 87, no. 3 (2012): 823–950.

6. See Peter B. Evans et al., eds., *Bringing the State Back In* (New York: Cambridge University Press, 1985); William J. Novak, "The Concept of the State in American History," in *Boundaries of the State in U.S. History*, eds. James T. Sparrow et al. (Chicago: University of Chicago Press, 2015), 323–49.

7. See, e.g., Stephen Skowronek, *Building a New Administrative State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982) (describing the antebellum federal courts as one of a very few truly national institutions).

that state.[8] The best of these histories, and several of the essays in this volume, account for the ways in which the courts themselves were subject to change by the very historical forces they channeled, but there remains much to be done if we are to fully explain the courts' remarkable metamorphosis.[9]

Unclear Text, Undecided Structure, and Uncertain Beginnings

Many scholars (particularly those housed in law schools rather than history departments) begin looking for a definition of the historical judicial branch by scrutinizing Article III of the Constitution. This sort of textual-historical analysis has been controversial among intellectual historians for decades.[10] Article III's text, moreover, is unusually opaque, such that the historical objections to claims of a fixed and knowable meaning of the constitutional text at the founding arguably apply with greater force to the judicial branch.[11] Indeed, as Michael Wells and Edward Larson have noted, there is substantial evidence that the text of

8. See Daniel R. Ernst, "Law and American Political Development, 1877–1938," *Reviews in American History* 26, no. 1 (1998): 205–19; Reuel Schiller, "Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970," *Vanderbilt Law Review* 53, no. 5 (2000): 1394–95 (making a call to action for this type of history).

9. See, e.g., Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America* (New York: Oxford University Press, 1992). A robust understanding of the evolution of the federal courts can also contribute to the burgeoning political science subfield of American Political Development (APD). APD scholarship shares several connections with institution-focused histories. As Paul Frymer notes, "APD scholars contend that political change does not occur independent of preexisting institutions and structures [... and that] institutions that arise out of different political moments come to coexist often in direct conflict with each other." Paul Frymer, "Law and American Political Development," *Law & Social Inquiry* 33, no. 3 (2008): 780. Frymer argues that APD and political history are intellectually distinct on the grounds that APD scholarship has a more intent focus on institutions and the influence of the internal rules that govern the "outputs" their processes produce. In contrast to their political-branch analogues, however, many of the APD studies focusing on the federal courts lose sight of the courts as "institutions" and instead emphasize textual exegesis and political and intellectual context such that they come to resemble "law office" legal histories. See ibid., 796. This lack of institutional focus can be perilous when, as with the historical federal courts, the institutions themselves are in constant flux and constituted, at least in part, by another branch of government.

10. See Gary Peller, "The Metaphysics of American Law," *California Law Review* 73, no. 4 (1985): 1151–290; William W. Fisher III, "Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History," *Stanford Law Review* 49, no. 5 (May 1997): 1065–110.

11. See, e.g., Jack N. Rakove, *Original Meanings: Politics and Ideas in the making of the Constitution* (New York: Vintage Books, 1996) (arguing that there was never a single set of widely shared understandings of the meaning or intent of most significant parts of the Constitution at the founding).

Article III was purposely equivocal.[12] For example, Gouverneur Morris, who played an instrumental role in formulating the Constitution's text, claimed that, while he prided himself on the clarity and precision of language in the rest of the document, "conflicting opinions" over the composition of the judiciary led him to choose more ambiguous "phrases which expressing my own notions would not alarm others, nor shock their selflove[.]"[13] The tendency of eighteenth-century partisans to see what they wanted to see in the constitutional design of the judiciary has arguably extended to modern historians bent on interpreting the Article's text.

Article III begins by stating that the "judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[14] However, the meaning and import of "judicial power," in contrast to the specifically enumerated powers of the other branches, is arguably unillumined by the remainder of the Article.[15] As part of the "Madisonian compromise," Article III punted the creation of the whole of the federal judicial system other than the Supreme Court to future Congresses, ensuring that the federal courts could be subject to greater legislative redefinition than the other branches. While the text apparently countenanced courts applying the judicial power to a broad range of cases, moreover, it was unclear even at the

12. See Michael L. Wells and Edward J. Larson, "Original Intent and Article III," *Tulane Law Review* 70, no. 1 (1995): 75–135. See also Alison LaCroix, *The Ideological Origins of American Federalism* (Cambridge, MA: Harvard University Press, 2010), 211 (noting that "[t]he language of Article III, combined with the Madisonian compromise, had deliberately left a lacuna in the constitutional structure."). An alternative explanation is simply that Article III was not "clearly thought through and is surely not a model of draftsmanship." Daniel J. Meltzer, "History and Structure of Article III," *University of Pennsylvania Law Review* 138, no. 6 (1990): 1610.

13. Quoted in Wells and Larson, "Original Intent and Article III," 107.

14. U.S. Const. art. III, § 1.

15. James Madison and Gouveneur Morris apparently suggested using the phrase "judicial power" to replace "The Jurisdiction of the Supreme Court" during the Constitutional Convention. While this change is consonant with the earlier acceptance of the "Madisonian Compromise" over the creation of inferior federal courts, the use of "jurisdiction" elsewhere in the Constitution arguably suggests that the "judicial power" was intended to mean something different. Laurence Claus has argued that in framing this language the founders set up a "syllogism" that Article III judges wielded the judicial power and that power consisted of the nine classes of cases listed as subjects of federal jurisdiction in the rest of the Article's text. However, this approach has never been applied with anything approaching consistency. See Laurence Claus, "The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III," *Georgetown Law Journal* 96, no. 1 (2007): 77. As Judith Resnik notes, for example, state court judges have handled cases arising under the federal constitution and statutes since the founding and were, for several decades, the only courts likely to hear such cases short of an appeal to the Supreme Court of the United States. See Judith Resnik, "Symposium: The Bicentennial Celebration of the Courts of the District of Columbia Circuit: 'Uncle Sam Modernizes his Justice': Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation," *Georgetown Law Journal* 90, no. 3 (2002): 643–44.

time of the Constitution's creation whether federal courts had to be permitted to hear all such cases, or were instead reliant on Congress to supply them with the requisite jurisdiction.[16]

Notwithstanding the Article's vague word choice and the byzantine grammar of clauses enumerating the scope of federal jurisdiction, Akhil Amar penned a series of influential articles in the 1980s and early 1990s identifying with apparent precision what he considered the correct roles of Congress and the courts under Article III and laying out a complex two-tier system of cases Congress had to allocate to Article III courts and those they could assign to other tribunals.[17] Amar's elegant construction of the meaning of the text is, however, somewhat confounded by the lack of clarity or cohesion on the part of the founders themselves.[18] It also relies on a disputed methodological approach to the interpretation of historical texts, presuming as it does both a correspondence between the text and a definite meaning and that that meaning can be understood by reference to a close reading of the rest of the constitutional text with selective reference to external historical context.[19] On this basis, the quest for a unifying textual interpretation of the Article may remain a quixotic one.

16. Robert Clinton has argued that the Constitution effectively required the first Congress to create a federal judiciary and that early political leaders understood the grants of jurisdiction to these courts to be similarly mandatory, implying a lack of power in Congress to modify or eliminate areas of federal jurisdiction. See Robert N. Clinton, "A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan," *Columbia Law Review* 86, no. 8 (1986): 1515–621. This view, however, seems to be a minority position among scholars. See infra note 38 and accompanying text.

17. See, e.g., Akhil Reed Amar, "Marbury, Section 13 and the Original Jurisdiction of the Supreme Court," *University of Chicago Law Review* 56, no. 2 (1989): 443–99; Akhil Reed Amar, "A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction," *Boston University Law Review* 65, no. 2 (1985): 205–72.

18. Cf. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1996) (documenting the relative lack of a common understanding of much of the Constitution's text between the members of the Constitutional Convention in Philadelphia and the delegates at various state ratifying conventions); Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (New York: Simon & Schuster, 2010) (describing the complex political dialogue over the Constitution's meaning at the ratification conventions). Some scholars have also critiqued Amar's formulation of the text's historical meaning on its own terms. See, e.g., Meltzer, "History and Structure."

19. Cf. William W. Fisher III, "Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History," *Stanford Law Review* 49, no. 5 (May 1997): 1065–110 (discussing various intellectual history frameworks for the interpretation of historical texts and noting the critiques of both a close textual reading predicated on a correspondence between text and external meaning and the use of ambient historical context to inform and enrich such readings). For a more detailed analysis of the work of Amar and other scholars operating in a similar vein, see Michael L. Wells and Edward J. Larson, "Original Intent and Article III," *Tulane Law Review* 70, no. 1 (1995): 75–135. For an alternative view of the role of contextualism in legal history, see William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996), 24 (explaining the constitutive force of legal language in the broader world).

Although the intellectual question of Congress's power to shape lower-court jurisdiction has remained open, Article III specifically permitted Congress to create exceptions to the Supreme Court's appellate jurisdiction (though in practice, Congress phrased this in terms of partial affirmative grants of power). A critical mass of the early members of Congress debating the Judiciary Act of 1789 treated its power to create inferior courts as including a parallel ability to frame and limit the jurisdiction of those courts, too, and both branches have operated on that assumption since.[20] The actual scope of that jurisdiction remained a subject of intense debate for more than a century, however. Moreover, in the absence of complete mandatory jurisdiction for Article III courts, it was unclear whether the Constitution required all federal judicial work to be performed by courts staffed with judges protected by Article III's appointment, tenure, and salary safeguards.[21]

Several histories have tried to make sense of the historical milieu that produced the initial answers to these questions in the years that followed ratification. As Alison LaCroix's *Ideological Origins of American Federalism* demonstrates, there was little agreement among political actors as to how, or even whether, Congress should "ordain and establish" a federal judiciary in the early republic. This was a creative tension. LaCroix highlights the ways in which the fledging judiciary became the primary site for debates over the scope and nature of federalism in

20. For roughly 85 of their first 86 years, for instance, inferior federal courts had no freestanding federal-question jurisdiction. The Judiciary Act of 1801 briefly extended this jurisdiction to the courts, but was repealed the next year and replaced with a schema that did not include federal-question jurisdiction. See 2 Stat. 89 (1801); 2 Stat. 156 (1802).

21. As noted at greater length hereinafter, as the national government expanded into new geographical and regulatory territories over the course of the nineteenth and early twentieth centuries, the use of so-called "legislative" or "Article I" courts became increasingly difficult to square with some readings of Article III. The "Article I" nomenclature may be misleading. While Article I, section 8 empowers Congress to "constitute Tribunals inferior to the supreme Court[,]" many scholars have taken that language to refer to the creation of lower courts contemplated by Article III. Moreover, territorial courts, which are often included in the "Article I" taxonomy, are created pursuant to Congress's Article IV power to "make all needful rules and regulations respecting" federal territories. James Pfander has argued that the Inferior Tribunals Clause directly authorizes the creation of non-Article III federal courts. His argument rests on the semantic difference between "tribunals" in this clause and "courts" in Article III. Though Pfander adduces some limited historical evidence from the Constitutional Convention and early jurisdictional statute that he argues implicitly acknowledge this distinction, there is also significant evidence that the two terms were routinely used in interchangeable ways throughout the period. James E. Pfander, "Article I Tribunals, Article III Courts, and the Judicial Power of the United States," *Harvard Law Review* 118, no. 2 (2004): 643–776. Indeed, the Supreme Court treated the two terms in this way as early as 1803. See *Stuart v. Laird*, 5 U.S. 299, 309 (1803) (holding that "Congress have constitutional authority to establish from time to time such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another.").

the nation's early years.[22] Particularly important is her insight that the Judiciary Act of 1801, often seen as a short-lived aberration, in fact reflected key debates about the courts' role in enhancing the cohesion of the national government. The period of apparent latency between the 1789 and 1801 acts was actually one of regular interchange on the proper scale and mission of the federal judiciary. While the contentious 1800 election may have added a partisan frisson to these debates and afforded outgoing Federalists with an opportunity to fill newly-created judicial vacancies, on LaCroix's account it was also the culmination of a broad and systematized vision of federal judicial authority for which Federalists had pressed since 1789.[23]

Justin Crowe's *Building the Federal Judiciary* similarly foregrounds contingency in the early years of the federal judiciary, though he argues the debates occurred at a less conceptual level and focused on baser political questions like the federal judiciary's potential influence over matters of public economy.[24] Thus, for example, while both Crowe and LaCroix debunk the notion of the Judiciary Act of 1801 as a cynical, last-ditch attempt on the part of Federalists attempting to stock the judiciary with partisan hacks, they emphasize different points of continuity. For LaCroix, Federalists had long emphasized a view of federalism as a unifying national force embodied by the controversial act. For Crowe, the act afforded the Federalists an opportunity to guide economic policy through the implementation of a truly national court system with a reach and institutional depth comparable to those of its state counterparts.

Both LaCroix and Crowe, however, treat the judicial branch largely as object rather than subject, with political operatives using the judiciary as a vessel (in both figurative senses) for their ideas. To be sure, this model has merits. As Crowe notes, many legal histories, particularly those focused on the federal judiciary, tend to emphasize major public law precedents to the virtual exclusion of anything else.[25] By the same token, however, case law has long proven an important tool with which judges can craft an institutional identity apart from the other two branches. The judiciary is, in effect, always a third party in every case and judges must weigh its interests as well as those of the parties appearing before them.[26] In many instances, this is a literal and avowed part of judicial decision making, as

22. LaCroix, *Ideological Origins*.

23. See ibid., 201–3.

24. See Crowe, *Building the Judiciary*, 23–83.

25. See ibid., 2–9.

26. Cf. Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 18 (noting that when "two parties must go to a third who is an officer, it is as evident to them as to the observer that they are . . . introducing a third interest: that of the government[.]").

for example, when a federal court abstains from exercising constitutionally valid jurisdiction on institutional grounds.[27] At other times, it forms a more subtle part of the judicial process.

Even so, federal judges have never operated with total autonomy. Certainly, from the first Congress forward, the national legislature assumed broad discretion to make and remake the federal courts as it saw fit, frequently in a manner that would confound any attempt to draw together an ahistorical unified field theory of the judicial branch. The Judiciary Act of 1802, for example, simply eliminated the judicial offices the previous act created in the circuit courts. This move raised a point of ambiguity on one seemingly clear part of Article III. Section 1 of the Article stated that "[j]udges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Did this text make the good behavior and salary protections for judges contingent on the continued existence of their courts and thus their offices, or were the judges entitled to keep their commissions and pay regardless of the abolition of their courts? The answer to this question, as with most raised by the structure of the judicial branch, changed dramatically over time. Though several judges and justices expressed private concerns about the constitutionality of the move, Congress adopted the position that judges' commissions could be abolished with their courts.[28] That Congresses since the late nineteenth century have reassigned (rather than removed) judges on the abolition of their courts suggests an exorable reading of the tenure and salary protections that are frequently pointed to as among the firmest distinctions between Article III judges and others.[29]

These protections, moreover, have occasionally been treated as having a near-metaphysical quality. In 1962, for instance, several justices of the Supreme Court rejected the notion that the mere extension of salary and tenure protections to judges rendered their tribunals Article III courts on the (slightly tautological) grounds that, if the court and its judges were not of the Article III variety, Congress could remove the protections at will.[30] This suggests the tantalizing, but puzzling,

27. See Randall P. Bezanson, "Abstention: The Supreme Court and Allocation of Judicial Power," *Vanderbilt Law Review* 27, no. 6 (1974): 1107–51.

28. See Bruce A. Ragsdale, ed., *Debates on the Federal Judiciary: A Documentary History, Volume I: 1787–1875* (Washington, DC: Federal Judicial Center, 2013), 107–34.

29. David Currie argued that this change reflected a broader transformation in views on the meaning of these constitutional protections, with the Supreme Court later intimating Article III judges could not be removed through the abolition of their courts. See David P. Currie, "The Constitution in Congress: The Most Endangered Branch, 1801–1805," *Wake Forest Law Review* 33, no. 2 (1998): 236.

30. *Glidden v. Zdanok*, 370 U.S. 530 (1962).

idea that Article III status subsists in some other characteristic that has never been (and perhaps can never be) fully defined.[31]

Territorial Courts and Courts of Special Jurisdiction

Virtually from the start of the constitutional order, however, Congress created courts that plainly undertook to exercise power of a federal judicial nature, yet manifestly did not conform perfectly to the Article III parameters. The Northwest Ordinance, as readopted by the first Congress operating under the new Constitution in 1789, created a court for the federal territories west of the existing states whose judges were to be appointed by the President by and with the consent of the Senate and who held their offices during good behavior.[32] While this appointment scheme seemingly comported with Article III protocols, these judges exercised legislative powers, working with the territorial legislature to adopt a legal code for the region, and exercised judicial powers over purely local matters, such as probate cases, that other federal courts eschewed.

Congress subsequently adopted a broad array of institutional arrangements for territorial courts, only one of which (the short-lived court for the District of Orleans) tracked that established for Article III courts.[33] In some instances, territorial judges were appointed by the President; in others they were selected by legislative bodies. In seven territories, judges held their posts during good behavior, but many more held limited-term positions.[34] Even those judges with "good behavior" tenure seem not to have been treated as permanent fixtures,

31. See Judith Resnik, "The Mythic Meaning of Article III Courts," *Colorado Law Review* 56, no. 4 (1985): 581–617.

32. The original Ordinance, adopted by the government established by the Articles of Confederation, had a different judicial appointment scheme. See William Wirt Blume and Elizabeth Gaspar Brown, "Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions," *Michigan Law Review* 61, no. 1 (1962–1963): 39–47.

33. The U.S. District Court for the District of Orleans was in operation from 1804 to 1812. Its only judge, Dominic Augustin Hall, was nominated to the new District of Louisiana following the court's abolition. It is notable, however, that by virtue of the practice of re-nomination (as opposed to the modern practice of reassignment), there was a brief break between the abolition of the court on April 30, 1812, and Judge Hall assuming his new post on June 1 of that year. See *History of the Federal Judiciary*, Federal Judicial Center, Washington, D.C., http://www.fjc.gov.

34. See Blume and Brown, "Territorial Courts and Law," 47.

moreover, with very few remaining federal judges after statehood.[35] As in the Northwest Territory, these courts also routinely operated as analogues to state courts as well as federal district or circuit courts. Indeed, in eight of the territories created by 1823, these judges also wielded some form of legislative power.[36]

Even in cases where the judges had none of the trappings of Article III status, however, the Supreme Court from John Marshall's time forward upheld these courts as a constitutional exercise of Congress's Article IV powers over federal territories.[37] Many advocates of a "straightforward" and unchanging historical interpretation of Article III point out that this result seems to conflict with the command that the "judicial power of the United States *shall* be vested" in the Supreme Court and inferior federal courts established according to Article III dictates.[38] And, indeed, if one seeks such an understanding of the judicial branch, early opinions on the validity of territorial courts may appear vague or circular.[39] Some scholars have attempted to square this circle by arguing that Marshall and other early-nineteenth-century legal thinkers considered legislative courts to belong in a separate legal magisterium akin to state courts, which routinely heard federal cases but derived their power from an alternative source.[40] If this view is correct, however, it remains for judicial historians to explain how and when

35. Aside from Judge Hall of the District of Orleans, see supra note 33, only two judges seem to fit this description. Ross Wilkins of Michigan became District Judge on statehood in 1837. Benjamin Parke of Indiana also received an Article III position, though the Senate did not act on his initial nomination by lame-duck President James Madison. He was confirmed following a subsequent re-nomination by President James Monroe, with the consequence that he assumed office a few days after the District of Indiana came into existence on March 3, 1817. It appears no other territorial judges appointed for good behavior continued in federal judicial office following statehood. See *History of the Federal Judiciary*, Federal Judicial Center, Washington, D.C., http://www.fjc.gov.

36. See Blume and Brown, "Territorial Courts and Law," 43.

37. See *American Insurance Co. v. Canter*, 26 U.S. 511 (1828).

38. U.S. Const. art. III, § 1 (emphasis added). For arguments along these lines, see Clinton, "A Mandatory View of Federal Court Jurisdiction"; Craig A. Stern, "What's a Constitution Among Friends?—Unbalancing Article III," *University of Pennsylvania Law Review* 146, no. 4 (1998): 1043–76. This view is sometimes described as the "simple" or "literal" interpretation of the Article's historical meaning. See Richard H. Fallon, Jr., "Of Legislative Courts, Administrative Agencies, and Article III," *Harvard Law Review* 101, no. 5 (1988): 918; Paul M. Bator, "The Constitution as Architecture: Legislative and Administrative Courts Under Article III," *Indiana Law Journal* 65, no. 2 (1990): 235.

39. Marshall's opinion in the seminal case *American Insurance Co. v. Canter* (1828) appeared to suggest that territorial or other "legislative" courts were constitutional because they did not wield the Article III judicial power and they did not do so because they were not Article III courts. *Canter*, 26 U.S. at 546.

40. See Stern, "What's a Constitution among Friends?," 1068.

such courts became accepted as constituent elements of a single entity called the "federal judiciary."[41]

As Judith Resnik has noted, the primary concern in early decisions validating the use of non-Article III territorial courts may have been the needs of a growing territorial empire, rather than the dictates of doctrine or text—a conclusion that calls to mind Justice Oliver Wendell Holmes Jr.'s famous aphorism that the "life of the law has not been logic: it has been experience."[42] The interplay between these national exigencies and the development of non-Article III courts could prove fertile ground for further historical research, offering, as it does, the potential for drawing together salient concerns of recent historiography such as the development of state apparatuses, empire building, and relationships between the center and periphery of American governance. Moreover, the subsequent extension of American power, and with it federal courts, into the Caribbean and Pacific may suggest opportunities for scholars of "America in the world" to examine the federal courts' work more closely.[43]

Beyond the territorial context, however, the distinction between "Article III courts" and "legislative courts" became a difficult one to draw as the federal judicial machinery grew in size and complexity during the nineteenth century. The arbitration of monetary claims against the government, especially during times of war, gave rise to the creation of adjudicatory bodies that blurred these lines.[44] Congress created the Court of Claims in 1855 to judge such claims.[45] Previously, Congress itself had dealt (though not always adequately) with such calls on the nation's purse. The creation of a court to complete what had previously been a legislative task was piecemeal and politically controversial.[46] Although its members held their offices during good behavior and were appointed by the

41. Federal territories have long been parts of the federal circuit system and are now administered by the Administrative Office of the United States Courts, for example.

42. See Resnik, "Mythic Meaning," 589–92; Oliver Wendell Holmes, Jr., *The Common Law* (New York: Dover Publications, 1991), 1.

43. For examples of recent scholarship doing some of this work, see Sam Erman, *Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire* (New York: Cambridge University Press, 2018); Teemu Ruskola, "Colonialism without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China," *Law and Contemporary Problems* 71, no. 3 (2008): 217–42.

44. See Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, MA: Harvard University Press, 1995); Laura Jensen, *Patriots, Settlers, and the Origins of American Social Policy* (New York: Cambridge University Press, 2003).

45. See 10 Stat. 612 (1855).

46. See generally Floyd D. Shimomura, "The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment," *Louisiana Law Review* 45, no. 3 (1985): 625–700; Wilson Cowen et al., *The United States Court of Claims: A History, Part II: Origin, Development, Jurisdiction 1855–1978* (Washington, DC: Committee on the Bicentennial of Independence, 1978).

President with the advice and consent of the Senate, the court began as a largely advisory body, suggesting outcomes and submitting orders to Congress, subject to the legislators' final say. This liminal status made the court constitutionally troubling. Even as the court gained greater independence, it remained unclear whether it could be said to exercise "the judicial power" of the United States. Yet again, however, the task of defining the "judicial" proved harder than one might anticipate. In cases decided nearly seventy years apart, the Supreme Court twice determined that the Court of Claims was not an Article III court, yet lawyers, litigants, and legislatures frequently proceeded as though it was.[47] In 1953, Congress declared the court "established under Article III of the Constitution of the United States" and a divided Supreme Court acceded to that position in 1962.[48] Twentieth-century federal trial and appellate courts dealing with customs and patent cases, which evolved out of executive bodies, endured a similarly meandering path toward recognition as Article III courts.[49] Given the circuitous path these courts took to Article III status, there is a strange teleology to legal historians' tendency to read their evolution backward and examine them under the framework of membership in that "club." Similarly, judges and courts that could well have gained Article III status, such as the U.S. Claims Court (not to be confused with the Court of Claims) and the U.S. Tax Court, are generally treated as outside the scope of review of much federal judicial history, although their status could tell us a good deal about the historical construction and redefinition of the judicial branch.[50]

47. Congress responded to the first of these cases, *Gordon v. United States*, 69 U.S. 561 (1865), by abrogating the statutory requirement that the Secretary of the Treasury approve the dispersal of funds to satisfy the court's judgments. Although this appeared to answer the concerns raised by Chief Justice Samuel Chase's opinion in *Gordon*, the subsequent publication of an earlier opinion written by Chase's predecessor, Roger Taney, shortly before his death, suggested more profound reservations based on the nature of the court's work. These concerns were arguably exacerbated by the Tucker Act, 24 Stat. 505 (1887), and subsequent legislation, which expanded the court's workload and charged it with rendering advisory opinions in some cases. Though some early decisions suggested the Supreme Court would permit such a scheme within an Article III framework, the justices again held that the court was not an Article III body in *Williams v. United States*, 289 U.S. 553 (1933).

48. See 67 Stat. 226 (1953); *Glidden*, 370 U.S. 530.

49. See generally Giles S. Rich, *A Brief History of the United States Court of Customs and Patent Appeals* (Washington, DC: Committee on the Bicentennial of Independence, 1980); Joseph E. Lombardi, *The United States Customs Court: A History of its Origin and Evolution* (Washington, DC: United States Customs Court, 1976). The Supreme Court determined that the Court of Customs and Patent Appeals was not an Article III court in *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929).

50. See generally Harold Dubroff and Brant J. Hellwig, *The United States Tax Court: An Historical Analysis*, available at https://www.ustaxcourt.gov/book/Dubroff_Hellwig.pdf

Courts and their Competitors

Federal courts are not self-generating, but the Article III judiciary does have, and has long exercised, an ability to define itself and perhaps enhance its prestige by excluding tribunals. Where threats to that power and prestige come from outside the federal judicial apparatus, however, the federal courts have found themselves bearing the impress of competing entities. Because such moments of institutional friction cause the actors involved to self-consciously define and redefine the parameters of their authority and respond to changing conditions, federal court historians have long been drawn to periods when the courts seemed most obviously to deal with competitor arbiters.

Edward Purcell's *Litigation and Inequality* is a seminal work in this regard, demonstrating the reciprocal influence of judicial and extrajudicial venues for industrial claims disputes from the Gilded Age to the years immediately following World War II.[51] Similarly, William Forbath's *Law and the Shaping of the American Labor Movement* argues that federal judges took extraordinary steps to impede the efficacy of the American labor movement in the late nineteenth and early twentieth centuries in part because the labor unions posed a threat as alternative mechanisms for evaluating and deciding workplace disputes.[52]

Perhaps the most prominent competitors to the federal judiciary in the historical literature, however, are the regulatory agencies that emerged in the late nineteenth and early twentieth centuries. Article III's "shall be vested" command raised serious issues for the legal innovations associated with the rise of the administrative state in this period.[53] Agency adjudication offered the promise of greater efficiency and specialization at a time when these qualities animated American political thought.

Several excellent monographs have analyzed the complex interplay of interests involved in the institutional politics of this transformation. In many instances, the tale these works collectively tell is a dialectic with a twist happy

51. Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958* (New York: Oxford University Press, 1992).

52. William E. Forbath, *Law and the Shaping of the American Labor Movement* (New York: Oxford University Press, 1991). See also Daniel R. Ernst, *Lawyers against Labor: From Individual Rights to Corporate Liberalism* (Champaign: University of Illinois Press, 1995).

53. Some scholars have argued that this language precludes, or at least draws into question, agency adjudication of issues that were historically the province of courts of law. Even if one were to accept a capacious understanding of the public rights exception, for example, the lines between public and private rights became increasingly blurry in an age of "new property" rights in what might previously have appeared government largesse. See, e.g., Jaime Dodge, "Reconceptualizing Non-Article III Tribunals," *Minnesota Law Review* 99, no. 3 (2015): 905–65.

ending. Peter Iron's *New Deal Lawyers*, for example, suggests the ways in which the mandarins of the burgeoning regulatory state established by the Roosevelt administration were forced to reckon with and then to appreciate and incorporate at least some judicial norms into the agency adjudication system.[54] Similarly, Daniel Ernst's *Tocqueville's Nightmare* skillfully illustrates the admixture of administrative and judicial ideals that resulted from charged debates over the validity of the administrative state in the early twentieth century. Ernst shows how a cadre of lawyers and legal thinkers invested in the orthodoxies of the English common law pointed to the potential abuses of the administrative state and the dangers of supplanting judicial with administrative power. At the same time, the political push for the efficiency and expertise offered by administrative government, especially during the early years of the New Deal, meant that the wholesale adoption of judicial norms was not a viable option. Charles Evans Hughes emerges as a central figure in this contest, recognizing the promise of agency adjudication, but also the threat of untrammeled executive discretion. Hughes's balancing of these competing interests in *Crowell v. Benson* (1932) and *Morgan v. United States* (1938) reflected something approaching a golden mean in this history, with courts granting agencies substantial deference within their areas of expertise, but permitting meaningful judicial review of essential legal questions and ensuring baseline impartiality and fair play in administrative processes.[55]

Historians and legal scholars frequently note with surprise the lack of forethought exhibited by *Crowell*'s contemporary critics, many of whom viewed it as a reactionary slap to the validity of executive adjudication.[56] As Thomas Merrill has argued, however, the problem may be less the lack of forethought on the part of those critics, and more the influence of presentism on modern scholars. As Merrill notes, what has come to be seen as the most important premise of *Crowell*—that federal courts should not engage in de novo review of facts assigned to agency determination—was relatively uncontroversial at the time; the critics took that much for granted and lambasted other aspects of the case.[57]

54. Peter H. Irons, *The New Deal Lawyers* (Princeton, NJ: Princeton University Press, 1982).

55. Daniel R. Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940* (New York: Oxford University Press, 2014); *Crowell v. Benson*, 285 U.S. 22 (1932); *Morgan v. United States*, 304 U.S. 1 (1938).

56. See, e.g., Mark Tushnet, "The Story of *Crowell*: Grounding the Administrative State," in *Federal Courts Stories*, eds. Vicki C. Jackson and Judith Resnik (New York: Foundation Press, 2010).

57. See generally Thomas W. Merrill, "Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law," *Columbia Law Review* 111, no. 5 (2011): 939–1003.

A similar teleology arguably infects much of the literature that does cover those formative decades for the creation of the administrative state and the calibration of its place with respect to the Article III courts. Because we know that the administrative state flourished during the twentieth century and that the courts and Congress were eventually able to craft a framework for judicial review of agency decisions that permitted agency adjudication without completely rejecting every judicial norm, the judges of the late nineteenth and early twentieth centuries can all too easily seem slow to catch on or, worse, in the pocket of vested interests subject to agency adjudication, rather than jurists navigating a complex reevaluation of their institutions.

Too many historians and legal scholars appear to assume that courts in the nineteenth century had de novo review over any agency action not covered by a fairly narrow set of exceptions and did not operate on any principle of deference to non-Article III adjudicators. In fact, as Aditya Bamzai has argued, nineteenth-century courts often acknowledged some form of deference to the findings of fact produced by executive bodies.[58] This work, along with Merrill's, suggests that there is a more complex history to be drawn out about the institutional relationships between nineteenth-century courts and their nonjudicial counterparts.

Joanna Grisinger's *Unwieldy American State* picks up the story where Ernst, Merrill, and Bamzai leave off by mapping the course of judicial and political responses to agency administration from the early 1940s to the 1960s. The adoption of the Administrative Procedure Act (1946) figures heavily in the early chapters of the book, but Grisinger shows that the claims of Nevada Senator Pat McCarran—that the act would serve as a "bill of rights" for the administrative state—were overblown.[59] If anything, the act ratified the existing balance of regulatory practice and Hughes-Court case law. Nonetheless, the courts took the act as a manifestation of a broader purpose to ensure the fairness of the administrative process, and ensured that the agency processes took on additional safeguards, while the judiciary itself increasingly adopted a less deferential view towards agency decisions in the 1960s.[60]

These historical interventions begin to point to part of the difficulty in defining the federal courts as historical actors. Aside from the complexities of Article III itself, the courts have defined themselves in terms of the idiosyncratic jargon and usage of the legal profession and have done so by reference to other

58. See Aditya Bamzai, "Origins of Judicial Deference to Executive Interpretation," *Yale Law Journal* 126, no. 4 (2017): 908–1001.

59. Quoted in Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal* (New York: Cambridge University Press, 2012), 60.

60. See generally ibid.

changeable and complex institutions: the state courts, political actors, unions, and agencies. These multiple variables inevitably make finding the right formula for characterizing the federal courts, either at a given point in time or as an entity that changes over time, a challenge.

Conclusion

The judiciary did not emerge fully formed in 1789. The transformation of the judicial branch over the course of American history has been as profound and far-reaching as any in the structure of the American state. Historians and legal scholars, however, have too often lapsed into traps of presentism and teleology by uncritically assuming the judiciary to which they refer is the same, seemingly timeless, institution with which we now deal.

In many ways, this tendency is understandable. Even as they sit in modern buildings and smart courtrooms, federal judges routinely refer to their eighteenth- and nineteenth-century forbearers as "we." Aside from the presence of women and persons of color, the portrait of a court in the twenty-first century is virtually indistinguishable from one from the nineteenth century. The value of precedent and the perception that judicial decisions are at least somewhat isolated from ambient political and social trends help prop up the idea that the courts, unlike every other apparatus of the state, are largely ahistorical.

As this essay has shown, however, the institutional framework of the courts has actually been among the more supple and changeable components of American government. The historical studies briefly outlined in this essay have taken seriously the challenges and opportunities presented by the bending and swaying of the judicial branch, but there is still much to be done to produce histories that take full account of the institutional plasticity of the courts.

2

The Handmaid of Justice

Power and Procedure in the Federal Courts

Kellen Funk

Summing up the history of procedure from the codification movement of the nineteenth century to the Federal Rules practice of today, Robert Bone observed, "Each generation of procedure reformers, it seems, diagnoses the malady and proposes a cure only to have the succeeding generation's diagnosis treat the cure as a cause of the malady."[1] While playfully highlighting the contingencies and unexpected consequences of procedural history, Professor Bone was not advocating a cyclical view of history, in which "cost and delay" continually recur as the bugaboos of procedural reformers who can't quite figure out how to solve the problem. Instead, Bone called on proceduralists to recognize that history mattered and moved in procedure. The cost and delay that the codifiers complained of were not the same costs and delays that mattered to the pragmatists of a later era, whether those costs involved the source of procedural law, the uniformity of rules across the national courts, or the fusion of legal and equitable remedies. Legal norms in these and other respects evolved, and Professor Bone counseled that "[t]he hope for the future lies in recognizing that procedural decisions require complex value choices no less controversial than those underlying substantive law and that those value choices in turn require the proceduralist to have thought through deeper jurisprudential questions concerning the nature of law and its relation to social life."[2]

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1. Robert G. Bone, "Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules," *Columbia Law Review* 89, no. 1 (1989): 4.

2. Ibid., 118.

Since the time Professor Bone published those lines in the *Columbia Law Review*, a history-laden "Part II" has become a staple of law review articles, and law review discussions of procedural doctrines have been no exception. But few have heeded Professor Bone's call to examine in depth the values animating procedural regimes or to consider why those regimes give way over time. A couple of notable exceptions have been Edward Purcell's *Litigation and Inequality*, a transformative study examining the moral, political, and racial stakes of seemingly mundane rules of removal and diversity jurisdiction, and Amalia D. Kessler's recent *Origins of American Exceptionalism*, a wide-ranging cultural history of the rise of adversarialism as America's dominant mode of legal procedure.[3] But while both works engage with problems of federalism and focus on federal institutions—particularly the Reconstruction Era Freedman's Bureau—works examining federal procedure in federal courts remain scarce, especially covering any extended time period or sites outside landmark Supreme Court cases.[4]

This essay provides one possible sketch of the story of federal procedure writ large: how federal procedure morphed from being the essence of federal power to being a mere instrument of power, from the instantiation of Justice itself in the Marshall Court's telling to the mere handmaid of Justice as Charles Clark described it. Along the way, I hope to do three things: 1) point out a few tantalizing gaps in our knowledge, should other researchers wish to pursue them, 2) provide a guide to the often puzzling sources of procedural law, especially across the nineteenth century, and 3) wrestle with the question of what federal jurists have thought procedure actually *is*. Despite its threshold importance to any litigation, the definition of procedure (or not-procedure) has never had a rigorous coherence. Even today, the *cause of action*—the fundamental unit of litigation—remains undefined as a matter of both rule and scholarship. And it is in that lack of definition that the politics and history of procedure have had such a wide field of play.

3. Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in America, 1870–1958* (New York: Oxford University Press, 1992); Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877* (New Haven, CT: Yale University Press, 2017). For article-length treatments of the history of various procedural doctrines and devices, see James Pfander, "Standing to Sue: Lessons from Scotland's *Actio Popularis*," *Duke Law Journal* 66, no. 7 (2017): 1493–563; Stephen Sachs, "*Pennoyer* Was Right," *Texas Law Review* 95, no. 6 (2017): 1249–327.

4. For a magisterial collection of Supreme Court case studies, see Kevin Clermont, ed., *Civil Procedure Stories*, 2nd ed. (New York: Foundation Press, 2008); Vicki Jackson and Judith Resnik, eds., *Federal Courts Stories* (New York: Foundation Press, 2009).

* * *

A few days after erecting the federal court system in the Judiciary Act of 1789, the First Congress passed what was intended to be a temporary measure "to regulate Processes in the Courts of the United States." *Processes* went undefined, but the statute listed what appeared to be several synonyms of the term. It included "[a]ll writs . . . issuing from" federal courts, thus meaning, in a basic sense, all the written paperwork and decrees of a court. Section 2 provided that unless another federal statute controlled (the Judiciary Act, for instance, required equitable examinations to be orally taken in open court, as at common law), "the modes of process and rates of fees" in suits at common law should be the same as those used by the supreme court of the state in which the federal court sat. By contrast, "the forms and modes of proceedings" in equity and admiralty "shall be according to the civil law." In this sense, *process* was a "mode" of litigating that included established forms.[5]

In 1793, Congress showed again what all could be included in *process* by empowering each federal court to make its own rules "directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default, and . . . to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings."[6] The "taking of rules" was a reference to the thirty-fourth section of the Judiciary Act, later known as the Rules Decision Act. It required that "the laws of the several states" were to be "regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[7] In sum, the nascent federal courts did not distinguish between substance and procedure, but between *rules* and *process*, including the processes for discerning the rules. And more fundamental than either of these distinctions was the entrenched distinction between law and equity, because only in common-law cases did state rules or state practices matter. Like many southern and mid-Atlantic states, the federal system distinguished between common-law and equitable jurisprudence, but unlike these states, federal law and equity were institutionally merged—the same judge presided over both systems, but maintained separate trial calendars for each "side" of the court.[8]

5. Process Act of 1789, 1 Stat. 93–94 (1789). For the Judiciary Act's regulation of equitable examinations, see 1 Stat. 73, 88–89.

6. 1 Stat. 335 (1793).

7. Ibid. The Rules of Decision Act was originally enacted at 1 Stat. 92 (1789) and is now codified at 28 U.S.C. § 1652 (1948).

8. For a recent exploration of the history of the "fusion" of law and equity around the common-law world, see John C. Goldberg, Henry E. Smith, and P.G. Turner, eds., *Equity and Law: Fusion and Fission* (New York: Cambridge University Press, 2019).

The Process Act was supposed to be a temporary measure until Congress could fill out the details of federal practice, but Congress would not take up that task for another century and a half. Instead, legislators were content to stick with the convenience of defining federal common-law process by reference to local state practice. Three years later, in the Process Act of 1792, Congress reaffirmed the principle, but with an important qualifier: "subject however to such alterations and additions as the [federal] courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe." That is, Congress delegated the power of rulemaking to each individual court, or to the general rulemaking of the Supreme Court. Tautologically, the Act required that the forms of proceeding used "in [courts] of equity and in those of admiralty" would be the "rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law." District courts were not bound to apply local rules of equitable practice as they were in common-law cases, but here too they were free to make their own rules, subject to the Supreme Court's override.[9]

It was not until 1822 that the Supreme Court promulgated Rules of Practice in Courts of Equity. Although later editions were considered a model for federal codification, in no sense could the first twelve-page collection of equity rules have been considered a code. The thirty-three rules followed no logical sequence, and indeed, most of the practices of equity were assumed rather than stated in the rules. Rule V permitted a plaintiff to amend "his bill before the defendant or his attorney or solicitor hath taken out a copy thereof, or in a small matter afterwards, without paying costs; but if he amend in a material point after such copy obtained, he shall pay the defendant all costs occasioned thereby." The distinction between attorneys and solicitors, the process for taking out a copy, the payment of costs, and the boundary between "small matters" and "material points"—none of this was elsewhere defined in the rules. Instead of any systematic elaboration of *process*, the equity rules were ad hoc policies directed to seasoned practitioners and meant to clear up disputes that had arisen over the finer points of federal equity.[10]

9. Process Act of 1792, 1 Stat. 275–79 (1792). For more detailed histories of the Process Acts, see Julius Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* (New York: Macmillan, 1971), 542–51. But see Peter C. Hoffer et al., *The Federal Courts: An Essential History* (New York: Oxford University Press, 2016), 64–65 (noting the tendency of early federal courts to follow state procedures in equity and criminal law).

10. *Rules of Practice for the Courts of Equity of the United States* (1822). A more accessible version is available at Wheaton vol. 7 (1822), https://www.loc.gov/item/usrep020rules.

On the common-law side, neither the Supreme Court nor the inferior courts made serious efforts to promulgate rules before the appearance of state procedure codes in the late 1840s. That was not to say that federal practice perfectly converged with state practice in common-law cases. Rather, there were two main sources of divergence. First—and most bizarrely—the original Process Act required federal conformity with state common-law practices "as are now used or allowed." The revised Process Act clarified that "now" meant not the literary present, but September 1789.[11] Even as states amended their court processes through legislation or court decree, the federal courts adhered to Founding Era practices. Second, court "rules" could be something other than a quasi-legislative promulgation of enumerated regulations. A general pronouncement in a litigated case that, henceforth, a court would follow a certain practice became a "rule" for purposes of the Process Act. Indeed, because the Process Acts applied by terms only to the original thirteen states, district courts in newly admitted states usually received state practices by rule in their first common-law cases. But like the Process Acts, these adoptions of state practices usually remained statically defined by practice as it was on the date of admission or reception, not practices as they evolved over time.[12]

That disparity led to one of the great crises of federal institutions under the watch of the Marshall Court. The dispute over the Process Acts in the case of *Wayman v. Southard* has long been overshadowed by the fight over the First National Bank, decided six years earlier in *McCulloch v. Maryland*. But the two controversies had a similar impetus and progress, and they were decided by the same logic of Chief Justice John Marshall.[13]

Like the battle over the National Bank, *Wayman* arose out of resentment against the federal government's ability to bully wildcat banks and control monetary values by regulating the flow of notes backed by specie. Kentucky, the westernmost state at the time and the one hit hardest by the Panic of 1819, enacted numerous relief measures for debtors, along the way becoming the first state to abolish imprisonment for debt. It reformed its civil execution statutes to forbid the foreclosure and sale of property at less than three-fourths of appraised value, effectively keeping bankrupt farmers in their mortgaged homes during bust cycles. Faced with un-imprisonable debtors and un-forecloseable land, creditors were left with two options under Kentucky law: they could either accept

11. Process Act of 1792, 1 Stat. 275–79 (1792).

12. See Charles Warren, "Federal Process and State Legislation," pts. I & II, *Virginia Law Review* 16, no. 5 (1930): 435–37. Even a federal court's ignorance of a state practice could become a "rule" that the federal court adopted. See, for instance, *Palmer v. Allen*, 7 Cranch 556 (1813).

13. *Wayman v. Southard*, 23 U.S. 1 (1825); *McCulloch v. Maryland*, 17 U.S. 316 (1819).

the value of their loans in the (near worthless) currency of state banks and collect immediately, or they could accept a bond to collect on more valuable security (whether land or specie) only after a two-year stay period had elapsed.[14]

The Kentucky system would have afforded significant protection to indebted agrarians unlucky enough to get caught up in western land speculation just before the bottom fell out of the economy—if not for the system of federal courts and federal remedies. The federal district court in Kentucky recognized none of these new state inventions, and when a federal marshal proceeded to enforce Kentucky's currency-or-stay provision, a motion to quash was swiftly certified to the Supreme Court.

The opinion in *Wayman* bears Marshall's signature mix of enthusiasm and pedantry. The first question to confront was whether the case was covered by the Process Acts. Was enforcement of a judgment part of *process*? The striking feature of Marshall's answer is that the term appeared novel to him. Congress's use of *process* was no term of art. There being no practical definition to rely on, Marshall paid close attention to the wording. "Processes" used synonymously with "writs" in Section 1 implied that process meant papers. But the singular "process" in Section 2 therefore "seems to indicate that the word was used in its more extensive sense, as denoting progressive action." Based on this, Marshall decided *process* was an expansive term meaning "the progress of a suit from its commencement to its close," and therefore included enforcement of the judgment, the final termination of a suit's progress.[15]

Alternatively, Marshall reasoned, even if process meant only the paper writs, in this case, it was the paper writs that were at issue. Execution consisted "of the language of the writ, which specifies precisely what the officer is to do. His duty is prescribed in the writ, and he has only to obey its mandate." So counsel's argument that *process* was confined to *form* was thus futile, because when it came to writs of execution, "form, in this particular . . . has much of substance in it."[16]

The next question, then, was whether Congress could legitimately delegate its power to make rules of process to the federal courts. If that delegation was unconstitutional, Kentucky's lawyers argued, federal process had no valid source, and only state law remained to fill the void. Marshall turned the delegation argument against the lawyers. If, as they contended, Congress could not delegate federal court rulemaking to the federal courts, it certainly could not empower

14. For the background to *Wayman*, see Warren, "Federal Process and State Legislation," 437–46.

15. *Wayman*, 23 U.S. at 27–29.

16. Ibid. at 27.

"the State assemblies [to] constitute a legislative body for the Union."[17] As he had in *McCulloch*, Marshall relied on the Necessary and Proper Clause to uphold Congress's delegation of rulemaking power to the federal courts. But even if that delegation were unlawful, federal courts would be confined to the barebones provisions of the Judiciary Act, not to the practices of the states. Otherwise, it would be "extravagant to maintain that the practice of the Federal Courts, and the conduct of their officers, can be indirectly regulated by the State legislatures by an act professing to regulate the proceedings of the State Courts and the conduct of the officers who execute the process of those Courts. It is a general rule that what cannot be done directly from defect of power cannot be done indirectly."[18] Here the logic of *McCulloch* shone through: Like the power to tax, the power of process was the power to destroy. If federal courts were bound to follow state law in the execution of federal remedies, federal remedies would cease to exist whenever state regulations of state court practices abrogated their enforcement. Whatever else *process* meant, it had to mean federal power over federal remedies.

The unanimous Court ruling notwithstanding, Kentucky was not done with the fight. At the time, its brightest stars were the future leaders of both national parties—Secretary of State Henry Clay of the Whigs and Senator Richard Mentor Johnson of the Van Burenite Democrats. Together, Clay, Johnson, and the rest of the state's congressional delegation marshalled a bill through Congress that reversed Marshall in *Wayman*. The revised Process Act of 1828 substantially repeated the former Process Acts, including the requirement to use 1789 practices if no federal court rule provided otherwise, but Section 3 required that "writs of execution and other final process" were to be the same "as are now used in the courts of [each] state," unless by rule the federal courts chose "to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts." That is, when it came to executions, Congress essentially took Marshall up on the offer to delegate rulemaking power to the states. Henceforth, federal courts could choose either to use the execution practices states had in place in 1828 or those later adopted by the states in which they sat. No other options were permitted.[19]

The battle over the Process Acts showed that by the 1830s, *process* in the federal courts was yet undefined in its particulars. The one thing that the Marshall Court had made clear—that process included the enforcement of remedies—the states acting in Congress had worked to obscure. The compromise worked out in 1828 was an odd one. Very few states had adopted Kentucky's full

17. Ibid. at 47–48.

18. Ibid. at 49–50 (extraneous punctuation omitted).

19. Process Act of 1828, 4 Stat. 281 (1828).

range of debtor relief, so pegging enforcement practices to 1828 really helped only the one state advocating for change. (Almost all other states still allowed imprisonment for debt in 1828, for instance.) Federal courts were not bound to keep up with future changes, but neither were they free to roll the procedural clock back to the eighteenth century. Unlike later conceptions of procedure, the Marshall Court understood process as distinct from "rules" but not from "substance." As in common-law practice generally, process inhered in writs, and writs were the fundamental unit of judicial power. Without them, the rules of property became unrecognizable and unenforceable. In that sense, nothing was more quintessentially substantive than process. But although process was power, and power over property, it was not a power the federal Congress was eager to regulate in detail or the federal courts eager to reform. As later decisions would illustrate, this reluctance may have stemmed in part from the fact that after 1820, questions of power and property were often, and also, questions of slavery.

* * *

One of only two justices whose tenure spanned the Mexican War, the Civil War, and the onset of Reconstruction, Robert Cooper Grier has nevertheless remained an obscure figure. An old Pennsylvania Democrat when he joined the Court, Grier loathed both secession and abolition with equal furor. One key to his jurisprudence appeared in an early Court opinion, when he upheld the rights of New York creditors against an insolvent Marylander, trenchantly ruling that Maryland could not "inflict her bankrupt laws on contracts and persons not within her limits." Jurisdictional lines were paramount to Grier. It was those lines that both the secessionist and the abolitionist transgressed, each trying to inflict its view of the law on the other. It was that reasoning that spurred Grier to become a pivotal Northernist vote for Chief Justice Taney's majority in *Dred Scott*. Scott owed his civil existence to Missouri, and no amount of line-crossing would change that jurisdictional fact for Grier.[20]

This jurisdictional purity summoned Grier on a crusade against reformed procedure codes increasingly adopted by states before and after the Civil War. It was not just that codes continued to spread where they did not belong, sprouting inferior civilian-style practice in formerly common-law systems where there had been no need to repeal the "wisdom of ages." The codes' purported fusion of law and equity and the abolition of the forms of action were their greatest jurisdictional sins. Reviewing his jurisprudence on code procedure in an 1857 opinion, Grier wrote

20. Frank Otto Gatell, "Robert C. Grier," in *The Justices of the Supreme Court*, eds. Leon Friedman and Fred L. Israel (New York: Chelsea House Publishing, 1997), 2:435–45; *Cook v. Moffat*, 46 U.S. 295, 308 (1847). In this regard, Grier was at odds with both sides of the constitutional conflict James Oakes describes in *Freedom National: The Destruction of Slavery in the United States, 1861–1865* (New York: W.W. Norton, 2014).

for the Court that "this attempt to abolish all species" of pleading "and establish a single genus" known as the cause of action "is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things."[21] To Grier, as to a host of common-law lawyers in his time, common-law practice was fundamentally about drawing jurisdictional lines and holding to them. The lines between law and equity, trover and assumpsit,[22] were what constrained judicial discretion over powerful remedies in a republic that refused ultimate power to any one branch. Grier's review cited two cases as perfect illustrations of the principle.

Grier's model cases were the first two opinions the Supreme Court issued dealing with state procedure codes, one written by Grier and one by Taney. They were both peculiar in that they did not arise in an actual code state. Both came up on appeal from Texas and were decided in 1850—meaning they were both originally litigated before New York's Field Code began its remarkable journey around the nation. Formerly a civil-law jurisdiction like Louisiana, Texas had almost immediately abandoned civil-law codes for American common law after annexation. The one exception was in pleading and practice. While the Texas bar did not adhere to a procedure code, it also did not import a distinction between law and equity or a requirement to plead to single issue under the common-law formulary system. The effect (and the timing of development) was more or less close to that achieved in the Field Code, albeit without a systematic set of writing rules. Pleaders stated their cases briefly and factually, and courts enjoyed broad discretion to fashion the remedy to the harm identified, drawing on a jurisprudence that derived substantive rules and rights from the case law.[23]

The other peculiar feature is that both cases involved transactions over slavery. *Randon v. Toby* was a routine debt-collection case on a promissory note issued to purchase slaves. The defendant argued that the debt was void because the slaves it

21. *McFaul v. Ramsey*, 61 U.S. 523, 525 (1857).

22. Trover was an action to recover damages for lost, stolen, damaged, or undelivered chattels (in contrast to replevin, an action to recover the chattel itself). As a leading treatise explained, "the declaration states that the plaintiff was possessed of the goods, &c. in question, that he casually lost them, that the defendant found them, and converted them to his own use. The conversion is the gist of the action, the remainder being a mere fiction." John Archbold, *A Digest of the Law Relative to Pleading and Evidence in Civil Actions*, 2nd ed. (London: Saunders and Benning, 1837), 94. Assumpsit was by the 1830s something of a catchall action for damages arising from breach of contract, either for failure to pay (in most cases) or to perform. See ibid. at 16–18.

23. See William Dorsaneo, "The History of Texas Civil Procedure," *Baylor Law Review* 65, no. 3 (2013): 713–823; for the outlines of practice under the Field Code and the political story of its spread, see Kellen Funk and Lincoln A. Mullen, "The Spine of American Law: Digital Text Analysis and U.S. Legal Practice," *American Historical Review* 123, no. 1 (2018): 132–64.

purchased had been imported from Africa in 1835, in violation of the laws banning the Atlantic slave trade. To Grier, as to any contract lawyer at the time, the defense was obviously meritless. Toby was a downstream good-faith purchaser of the slaves. Even if the original contracts importing the slaves were void, Toby's own title was protected and he therefore received valuable consideration for his debt.[24]

What concerned Grier was that under common-law pleading, the case would have ended quickly and merited no attention. The plaintiff would have pleaded assumpsit for the debt; the defendant would have answered non assumpsit and quickly lost at trial. "But unfortunately," Grier reasoned anachronistically, "the district court has adopted [in 1847!] the system of pleading and code of practice of the State courts; and the record before us exhibits a most astonishing congeries of petitions and answers, amendments, demurrers, and exceptions—a wrangle of writing extending over more than twenty pages." What was so perplexing about a case that Grier resolved easily on the record? What may have been most troubling is that the twenty pages focused on the illegality of the slaves' importation and subsequent sales. This focus was irrelevant to Grier, because "[t]he buying and selling of negroes, in a State where slavery is tolerated, and where color is prima facie evidence that such is the status of the person, cannot be said to be an illegal contract, and void on that account." But without the disciplined constraints of common-law pleading, the defendant could keep arguing that it was.[25]

In *Bennett v. Butterworth*, a Texas slaveholder actually employed the common-law forms of action, but put them to the wrong use. Bennett pleaded in trover for the loss of four slaves. All the classic elements were in the petition: he casually lost the slaves (as if they were inanimate objects dropped from his pocket), the defendant found them but refused to return them, and so forth.[26] The problem was that the jury evaluated the worth of the slaves and calculated damages for the plaintiff at $1,200—a remedy that should have come in part through an equitable action for account after the jury limited itself to deciding which party had the superior claim to title. Taney ruled that the district court's adoption of state practice could not entirely "govern the proceedings in the courts of the United States . . . as authorizing legal and equitable claims to be blended together in one suit." The Court had issued rules for equity, and they did not include jury opinions on the value of slaves, while "if any thing is settled in proceedings at law where a jury is impanelled to try the facts, it is, that the verdict must find the matter in issue between the parties"—in this case: title, not value.[27]

24. *Randon v. Toby*, 52 U.S. 493 (1850).

25. Ibid. at 517, 520.

26. See note 22 supra.

27. *Bennett v. Butterworth*, 52 U.S. 669, 674–75 (1850).

The significance of *Randon* and *Bennett* was that in the first two cases of reformed procedure to reach the Supreme Court, juries had been asked to weigh the equities of slavery, from broad equitable questions about slavery's very legality down to the particular remedies that sustained the system. In both, the future architects of *Dred Scott* held firm to the line separating law from equity. District courts might modify their common-law practices, but they could not so modify them that juries were given equitable discretion. On his own, Grier could do nothing to keep the district courts from blending or abolishing the common-law forms of action, but he could remind them of the stakes: by lessening the strictures of pleading, the Texas court had invited the parties to argue broadly about the very underpinnings of their social system. Process, that is, still had much of substance to it.

Grier was powerless over district court procedures because the Process Acts vested rulemaking authority at the district level, subject only to rules promulgated legislatively by the Supreme Court. The Court had re-issued slightly expanded Rules of Equity in 1842 along with its first set of Admiralty Rules, but although Grier got the other justices to sign on to his trenchant opinions attacking code procedure, the Court never promulgated a set of common-law practice rules contravening the state codes.[28]

Without Supreme Court rules to bind them in common-law cases, each district court exercised its own discretion under the Practice Acts. Many sided with Justice Grier, more from a shared outlook on legal practice than from any force of reasoning in his Court opinions. But as district courts published their rules in the late 1850s and again after the Civil War, examples of every imaginable arrangement could be found. In antebellum Florida, a common-law jurisdiction, the Northern District Court by rule succinctly adopted "the modes of proceeding and rules of practice which are now in use, and prevail in the State courts of Florida in common law cases." The District of Iowa, a code state, enumerated in one long rule all the sections of the state practice code in force in the federal courts, essentially adopting the Field Code in most particulars. The Northern District of Ohio, another code state, refused to implement that state's code and instead promulgated fifty-two rules establishing a modified common-law practice that retained forms for replevin and ejectment but otherwise required factual pleadings verified by oath. The Eastern District of Wisconsin likewise ignored the state's code and advised pleaders to "consider the practice of the Courts of King's Bench, and of Chancery, in England, as affording outlines for the practice of this

28. For more of Grier's grousing opinions, see *Green v. Custard*, 64 U.S. 484 (1859); *Farni v. Tesson*, 66 U.S. 309 (1861).

court." (The district courts of Michigan, a common-law state, also adopted the "English rules prior to 1840"—this, in 1871.)[29]

No practitioner or scholar has yet attempted a complete collection, much less analysis, of federal court rules before 1872, when the courts' rulemaking authority under the Practice Acts was formally abolished. The first treatise on federal practice, Benjamin Vaughan Abbott's *Treatise Upon the United States Courts*, appeared in 1869. Abbott's second volume, covering pleading and practice, appeared in 1871, just in time to become obsolete. In it, Abbott instructed lawyers to use the "general" principles of common-law pleading, being sure to check if those principles had been "modified by rule of court."[30] As this brief sketch has illustrated, each district court was different, and each set of rules told a different story. Some adapted rules from local state practice, some from the general common-law principles Abbott elaborated, and some from England limited to a definite point in that country's procedural history.

In 1872, Congress unexpectedly brought federal court rulemaking to an end by passing the Conformity Act. As its name implied, the Act required that "the practice, pleadings, and forms and modes of proceeding" in federal court common-law cases "shall conform, as near as may be," to their state counterparts. As in the Process Act of 1828, the enforcement of remedies was made to conform to state law on the date of the Act's passage. Court rulemaking was restricted only to updating enforcement procedures on a case-by-case basis as states changed their own rules.[31]

Little is known about the impetus behind the Conformity Act. As one commentator noted, "there was singularly little debate on it in Congress—a short portion of one day being devoted to it in the Senate and also in the House."[32] Newspapers did little more than reprint the text of the bill as an item of interest to local lawyers. Commenting on the legislative history in 1875, the Supreme Court opined that the spread of code practice had made conformity an obvious necessity. A generation of lawyers had arisen who no longer knew the common law well enough to bring their cases in federal court without "studying two distinct systems of remedial law, and of practising according to the wholly dissimilar requirements

29. Rules of Practice in the District Court of the United States for the Northern District of Florida (1858), Rule 12; Rules of Practice in the Federal Courts of Iowa (1871), Rule 1; Rules of Practice for the Northern District of Ohio (1859); Rules of Practice for the Eastern District of Wisconsin (1871), Rule 3; Rules for the Districts of Michigan In Cases at Law, In Equity, Admiralty, and Bankruptcy (1871), Rule 14.

30. Austin Abbott and Benjamin Vaughn Abbott, *A Treatise Upon the United States Courts, and Their Practice* (New York: Diossy, 1871), 2:52.

31. Conformity Act of 1872, 17 Stat. 196 (1872).

32. Warren, "Federal Process and State Legislation," 562.

of both."[33] The *American Law Review* mostly agreed. The *Review* hardly approved of the codes state legislatures had come up with, but "they have at least the advantage of being known to the lawyers who practise in the particular district." As for a general common-law practice at which many district courts aimed, the *Review* reasoned that "the common law has little to recommend it except its connection with substantive legal doctrines." That is, by 1872 enough lawyers had come to see the common law as a source of rules that could be extracted and divorced from the pleadings by which those rules had been made known. That extraction accomplished, the forms of the pleadings could be abandoned.[34]

Although court rulemaking came to an end, very little changed in practice under the Conformity Act. The trouble was its qualified language. Conforming "as near as may be" to state practice left a lot of room for judges to resist state-created procedures. The first Supreme Court case to construe the Act illustrates the point well. Illinois tightly regulated judicial interactions with the jury. Judges were not permitted to voice their opinion on the factual presentations of the lawyers. They could instruct the jury on the law to be applied, but the instructions had to be written, retained by the jury, and—the implication seems to be—preserved for appeal. Renée Lettow Lerner has described in detail nineteenth-century movements among state bars to "silence" judicial commentary on the evidence as lawyers gained greater control over courtroom oratory. In this way, Illinois was no different from its neighbors, but it was different from federal practice. By the late nineteenth century, federal judges still retained their discretion to comment however they liked to the jury.[35]

Nudd v. Burrows challenged this practice. The federal judge in a bankruptcy-related proceeding freely commented on his view of the evidence and refused to deliver his comments in writing, despite the mandates of the state Practice Act and the federal requirement for conformity. The Supreme Court affirmed the federal judge, dodging the clear aim of the Conformity Act by overscrutinizing its every word. "The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither practice, pleading, nor a form nor mode of proceeding within the meaning of those terms as found in the context," the Court held.[36] True enough, judicial comment was not pleading, and it was not "practice" in the sense of what lawyers did to prepare for litigation. "Mode" had no standard meaning as a term of art. But overall, it would be difficult

33. *Nudd v. Burrows*, 91 U.S. 426, 441 (1875).

34. Editor's Note, *American Law Review, 1871–1872* (Boston: Little, Brown, 1872), 6:748.

35. Renée Lettow Lerner, "The Transformation of the American Civil Trial: The Silent Judge," *William & Mary Law Review* 42, no. 1 (2000): 195–264.

36. 91 U.S. at 442.

to imagine something more procedural than the manner of a judge's instruction to the jury. By creating a category of "ministerial" conduct, the Court provided district courts an easy path to ignore state practices. State rules, if treated as trivial, merely regulated *ministerial* conduct and escaped the conformity rule. But if state rules were quite serious and fundamental, then they were *substantive* and so also escaped the conformity rule.[37]

In practice, that meant lawyers under the Conformity Act continued to practice as they had without it. Before the Act, federal practitioners had to, as Abbott advised, study the local court rules and read reports of local precedents to determine which practices applied in a given district court. Under the Act, lawyers continued to rely on case reports and treatises to inform them which parts of a state's code or common law the district court had adopted "as near as may be." By 1889, one popular treatise organized itself as a code of enumerated sections. Many sections mimicked the Field Code or copied the language of its most widespread adaptations. Each section then went state by state to explain where state practices diverged, and then court by court to explain whether the federal district courts followed those divergences.[38] Probably the personalities of the judges counted for most in many cases. Then, as now, the federal bench remained comparatively small and compact relative to state judiciaries. For decades, entire federal districts might be staffed by a single judge who was thereby the sole rulemaker of federal practice in his district. John F. Dillon later reported to the American Bar Association that all that was needed to turn the district courts of Missouri from common law to code practice was his accession to the bench.[39] Any reasonably thorough history of federal practice would require more scrutiny of specific judges in specific districts than we currently have.[40] Such studies would better enable us to assess how federal judges interacted with and policed state and local legal practices over time, and they might reveal whether Justice Grier had cause to worry about the infusion of civilian-style

37. By this time, the ruling in *Swift v. Tyson*, 41 U.S. 1 (1842), had long permitted a federal common law to supplant state law in most substantive areas, confining the Rules of Decision Act to state statutory enactments only.

38. William G. Myer, *Federal Decisions Volume XXVI: Practice* (St. Louis, MO: Gilbert Book Co., 1889).

39. Report of the Eleventh Annual Meeting of the American Bar Association (1888), 76.

40. Promising starts on federal district court histories include Harvey Bartle III, *Mortals with Tremendous Responsibilities: A History of the United States District Court for the Eastern District of Pennsylvania* (Philadelphia: St. Joseph's University Press, 2011); Mark Edward Lender, *"This Honorable Court": The United States District Court for the District of New Jersey, 1789–2000* (New Brunswick, NJ: Rutgers University Press, 2006); Wallace Hawkins, *The Case of John C. Watrous, United States Judge for Texas* (Dallas: University Press, 1950).

procedure in the federal courts, especially in its relation to nationally uniform rules protecting slavery.[41]

* * *

The move from conformity with state practices to uniformity across the federal courts is a much better-known story, thanks to tireless archival efforts by Stephen Burbank and Stephen Subrin.[42] The impetus for a uniform federal code of procedure arose within the nascent American Bar Association, headed by its then-president David Dudley Field, the prolific codifier of state law.[43] Despite personal lobbying by Field and other ABA committees over time, Congress refused to override the Conformity Act or delegate rulemaking power to an advisory board for nearly four decades. Much of the credit (or the blame) for the holdout has been laid on the populist Senator Thomas Walsh of Montana, who claimed to advocate "for the one hundred [lawyers] who stayed at home as against the one who goes abroad." That is, Walsh and others who resisted uniformity understood themselves arrayed against the nationally elite corporate bar, the only perceived beneficiaries of a specialized and nationally uniform practice.[44]

In part due to the outsize influence of President-turned-Chief Justice William Howard Taft, and in part due to the death of Senator Walsh, Congress finally granted rulemaking power to the Supreme Court, acting in conjunction with an advisory board, in the Rules Enabling Act of 1934. Four years later, the board finished its initial work by promulgating the Federal Rules of Civil Procedure that remain—with certain significant alterations—in place today. Because of their continuing relevance to practitioners, nearly every rule has had some part of its history excavated and scrutinized by scholars. Less emphasized has been the advisory board's overall view of what procedure actually consists of. Professor

41. For local studies of "freedom suits," some of which were filed in federal courts before the *Dred Scott* decision, see Kelly Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (Athens: University of Georgia Press, 2017); Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence, 1787–1857* (New York: Cambridge University Press, 2016); Lea VanderVelde, *Redemption Songs: Suing for Freedom before Dred Scott* (New York: Oxford University Press, 2014); Andrew Fede, *Roadblocks to Freedom: Slavery and Manumission in the United States South* (New Orleans: Quid Pro, 2012).

42. Stephen B. Burbank, "The Rules Enabling Act of 1934," *University of Pennsylvania Law Review* 130, no. 5 (1982): 1015–197; Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," *University of Pennsylvania Law Review* 135, no. 4 (1987): 909–1002.

43. Report of the Ninth Annual Meeting of the American Bar Association (1886), 11, 69–70, 328–29.

44. Quoted in Burbank, "Rules Enabling Act," 1063–64; see also Stephen N. Subrin, "Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns," *University of Pennsylvania Law Review* 137, no. 6 (1989): 1999–2051.

Burbank has demonstrated that the rules committee took a rather pragmatic approach to drawing a line between substance and procedure, not—as the Court has mistakenly held—in deference to state prerogatives and federalism concerns but in deference to Congress and the view that only Congress could amend the substantive law.[45]

Indeed, as of late 1937 the Federal Rules advisory committee had only a working definition of procedure that seemed to be pragmatically based only on what they could get away with under Congress's and the Court's purview. As one member candidly wrote to another: "The general policy I have acted on is that where a difficult question arose as to whether a matter was substance or procedure and I thought the proposed provision was a good one, I have voted to put it in, on the theory that if the Court adopted it, the Court would be likely to hold, if the question ever arises in litigation, that the matter is a procedural one."[46] Marshall's capacious view of procedure as the near-essence of federal power continued to live on in some members of the Court. Justice James Clark McReynolds gave as his spur-of-the-moment definition: "A method of determining and enforcing rights and liabilities which have been prescribed by law," thus including both the rules of recognition and the rules of enforcement as procedural, much as Marshall did.[47]

But the chief architects of modern federal procedure adopted a decidedly instrumentalist view of procedure. In an article titling procedure the "Handmaid of Justice," the chief draftsman of the Federal Rules and dean of the Yale Law School Charles Clark stated, "I think that the relation of rules of practice to the work of justice is intended to be that of a handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case." In his view, the new Federal Rules brought about the "due subordination of civil procedure to the ends of substantive justice."[48] Clark was by no means alone. In his famous "Causes of Popular Dissatisfaction with the Administration of Justice," the dean of Harvard Law School Roscoe Pound dismissed procedural rules as "the mere etiquette of justice."[49] The Michigan professor and architect of Federal Rules discovery procedures Edson Sunderland

45. Burbank, "Rules Enabling Act."

46. William D. Mitchell to Hon. George Wharton Pepper, December 19, 1937, quoted in Burbank, "Rules Enabling Act," 1134 n.530.

47. *Procedure in Federal Courts, Hearing on S. 2060 and S. 2061 Before a Subcomm. of the House Judiciary Comm.*, 68th Cong., 1st Sess. (1924), 56.

48. Charles E. Clark, "The Handmaid of Justice," *Washington University Law Quarterly* 23, no. 3 (1938): 297–320.

49. Report of the Twenty-Ninth Annual Meeting of the American Bar Association (1905), 395.

shared with the codifier David Dudley Field a preference for the metaphor of procedure as the "machinery of justice."[50]

Clark insisted that his code was in line "with the whole trend of modern procedural reform" ("modern" being Clark's highest term of approbation).[51] Much of his procedural scholarship declared one or another device "the most modern view."[52] But Clark defined legal modernity not through high theory but through reference to practical procedural devices. In an address to the ABA, Clark professed to articulate the "underlying philosophy" that "basic provisions" of his code shared with "all pleading reform of modern times." But instead of discussing metaphysical principles of law or legality, Clark offered as his "basic philosophy" a description of mundane procedural devices only a lawyer could love: "the generality of allegation and the free joinder of claims and parties."[53] For Clark, modernity inhered in processes, not philosophies.

In the modernist turn to procedure as a subordinated tool of substantive law, much remains to be explored. Some have located the turn in the evolution from Baconian induction to Euclidean deduction as a dominant paradigm of turn-of-the-century science.[54] It is surely no coincidence that the founder of the modern case method and the modern scientific approach to law, Christopher Columbus Langdell, was a preeminent proceduralist at Harvard.[55] No doubt another impetus was the pragmatic politics of rulemaking traced by Professor Burbank. It was undeniably easier to make the case for rulemaking by unelected commissioners if the commission were limited to a purportedly apolitical, objective, and subordinated instrumentalist procedure.[56] And of course running alongside all of these was the old hope—at least as old as the writings of Jeremy Bentham—

50. Edson Sunderland, "The Regulation of Legal Procedure," *West Virginia Law Quarterly* 35, no. 4 (1929): 305. On Field's use of the machinery metaphor, see Funk and Mullen, "Spine of American Law," 140.

51. Charles E. Clark, "The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure," *ABA Journal* 23, no. 12 (1937): 97.

52. Charles E. Clark, "Procedural Reform and the Supreme Court," *American Mercury* 8, no. 4 (Aug. 1926): 447; Charles E. Clark, "The Code Cause of Action," *Yale Law Journal* 33, no. 8 (1924): 826.

53. Clark, "The New Federal Rules of Civil Procedure," 976.

54. See Thomas C. Grey, "Langdell's Orthodoxy," in *The Philosophy of Legal Reasoning*, ed. Scott Brewer (New York: Routledge, 1998), 115–67.

55. See ibid.; Bruce A. Kimball and Pedro Reyes, "The 'First Modern Civil Procedure Course' as Taught by C.C. Langdell, 1870–78," *Journal of American Legal History* 47, no. 3 (2005): 257–303.

56. See Burbank, "Rules Enabling Act," 1132–37; Funk and Mullen, "Spine of American Law," 140–42.

that substantive justice could be done without the mediation of devices and professionals to muck it up along the way.[57]

* * *

Anyone passingly familiar with procedural history eventually comes across Sir Henry Maine's stilted yet somehow famous aphorism: "So great is the ascendancy of the Law of Actions in the infancy of the Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms."[58] Writing those lines in the 1880s, Maine was purporting to describe the evolution of legal thought from antiquity to modernity, but his words aptly describe a revolution in thought that had occurred in the United States only a few years before he wrote. Under the Marshall Court, everything, including the determination of rules for a decision and the execution of a remedy, was secreted away in the interstices of *process*. As the Taney Court recognized, federal jurisdiction and federal remedies—two domains quintessentially defined as procedural in America—could become the undoing of chattel slavery or its firmest bulwark. In the technicalities of trover lay the keys to federal power over slavery and a host of other political issues. While many fewer cases today turn on the distinction between law and equity and the common-law forms of action, new "procedural" devices such as abstention and exhaustion have arisen as tools of restraint on federal court power to remedy what are otherwise conceded to be constitutional and human rights abuses.[59] But too often, legal historians have been inclined to repeat uncritically the modernists' view of procedure as a mere "technical" machinery of the law, one that often inadvertently raised "impediments" to substantive justice. Instead, historians must do a better job of recognizing the political judgments lying behind technicality. Ultimately all mediation of law is technical—it requires some kind of technique—and any impediments are usually there by design, to advance or restrain the use of power. Rather than the handmaid of justice, as Clark would have it, or even its "mistress" as he imagined the alternative, procedure in early modern American practice reigned as queen.[60]

57. Bone, "Mapping the Boundaries of a Dispute," 88–89; see Jeremy Bentham, *Of Laws in General* (1782) (ed. H.L.A. Hart, London: Athlone Press, 1970), 158–68. See also David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (New York: Cambridge University Press, 1989), 219–40.

58. Henry Sumner Maine, *Dissertations on Early Law and Custom* (London: John Murray, 1883), 389.

59. See, for instance, Fred O. Smith Jr., "Abstention in the Time of Ferguson," *Harvard Law Review* 132, no. 8 (2018): 2283–358.

60. Clark's use of gendered language to describe procedure is intriguing but as yet unstudied. For a masterful overview of the coded masculinity of early federal courts practice, see Michael Grossberg, "Institutionalizing Masculinity: The Bar as a Man's Profession," in *Meanings for Manhood: Masculinity in Victorian America*, eds. Mark Carnes and Clyde Griffen (Chicago: University of Chicago Press, 1990), 133–51.

3

Slavery and Emancipation in the Federal Courts

Aaron Hall

As the judicial arm of a slaveholding republic, the United States federal courts participated in the business, politics, and governance of slavery during the seven decades prior to emancipation. In 1808, fifty-six Africans floated aboard a crewless slaving ship many miles off the South Carolina coast. The *Leander* had been captured by British forces en route from Gambia and brought to the West Indies, where two-thirds of its captives went free. Its American crew retook the ship at night only to be killed at sea by the Africans who remained. The U.S. District Court in South Carolina took over once the American brig *Norfolk* brought the vessel to port. Pursuant to the court's admiralty jurisdiction, a federal judge awarded one third of the value of the derelict ship and people to the *Norfolk*.[1] The human "cargo" was sold, notwithstanding the Act Prohibiting Importation of Slaves of 1807. In 1827, two enslaved men in Mississippi, Warner and John, allegedly took property from the United States mails. Arrested, imprisoned, and awaiting trial, one man escaped while the federal district court in Mississippi sentenced the other to hard labor.[2] Afterward, slaveholder D.W. Haley appealed repeatedly to Congress for compensation. Stealing from the U.S. mails posed a federal offense, and so instead of facing local punishment or state court proceedings, Warner and

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1. "Marine Intelligence," *The Times* (Charleston, South Carolina), March 23, 1808, pg. 3; *Flinn v. Leander*, 9 F. Cas. 275 (D.C.S.C. 1808).

2. David Hargrove, "Mississippi's First Federal District Court and Its Judges, 1818–1838," *Mississippi Law Journal* 84, no. 4 (2015): 1010.

John were exposed to the law and punishment of the U.S. government. Twenty-five years later in a federal district court in Missouri, African American Dred Scott claimed the status of a free man and sued his putative owner, John Sanford of New York, for damages. The U.S. Supreme Court ruling in *Scott v. Sanford* (1857) would follow; this ruling, among its many meanings, purported to close federal courts to the descendants of slaves as perpetual non-citizens of the United States.[3]

As these disparate cases suggest, enslaved people encountered the federal judiciary through specific constitutional and statutory channels. The little-known *Leander* Africans became condemned property before a federal judge applying admiralty rules; the obscure case of Warner and John arose from federal criminal provisions for postal theft; and Scott's civil suit moved forward on the basis of diversity jurisdiction to produce a notorious judicial landmark. For as long as the United States harbored slavery under law, the national judiciary managed a legal world animated by its business and populated by its victims. This essay considers established, recent, and developing scholarship on the role of the federal judiciary in the history of slavery and emancipation. It discusses how slavery entered into federal courtrooms around such issues as the slave trade, fugitive mobility, and conflicts over racial governance, and how historians have approached these subjects. After observing legal ruptures during the Civil War, it also examines how scholars have studied the judicial enforcement of freedom in federal courts during Reconstruction. Where possible, the essay seeks to draw attention to inferior courts. On occasion, it suggests where further research and analysis might travel on the governing work of courts across the era of slavery and emancipation in the United States.

When the delegates to the Federal Convention crafted a constitutional text in 1787, they danced around slavery in name only. Without writing the word "slave," the framers structured proportional representation and taxing capacity around the institution, promised slaveholders the suppression of insurrections and the right to pursue fleeing persons across state lines, and permitted congressional termination of the international slave trade only after 1808.[4] So began a tradition to which many officials of the resulting national government adhered in the ensuing decades: extensive concern with slavery fused with a concerted effort to avoid talking about it.[5] As the population of enslaved Americans increased from 694,280 in 1790 to 3,953,761 in 1860, it was often said that the subject simply

3. 60 U.S. 393 (1857).

4. Matthew Mason, "A Missed Opportunity? The Founding, Postcolonial Realities, and the Abolition of Slavery," *Slavery & Abolition* 35, no. 2 (June 2014): 199–213.

5. David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York: Hill and Wang, 2009), 18; Robin Einhorn, *American Taxation, American Slavery* (Chicago: University of Chicago Press, 2006), 111.

did not belong to the federal government. Associate Justice Joseph Story wrote for the Court in *Prigg v. Pennsylvania* (1842) that "slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws," although courts also insinuated that custom without positive enactment might make enslavement lawful.[6] William Wiecek has explained that a "federal consensus" prevailed through the 1840s in which Americans broadly agreed that "only the states could abolish or in any way regulate slavery within their jurisdictions," while the federal government lacked all power over it in states.[7] Yet that consensus still left much topical and interpretive room for dispute, and federal policies that recognized, enforced, and facilitated slavery made the institution appear increasingly national.[8] Again and again, the project of federal silence broke down—by the exertions of proslavery and antislavery voices and by enslaved people most of all. The effort to keep slavery off the national agenda was only somewhat more successful in federal courts than it was in Congress. As created by the Constitution and enabled by legislative grants of jurisdiction, the federal judiciary was at no point intended to provide a forum for administering the day-to-day relationship between slavery and law. Nonetheless, cases implicating slavery passed through courthouse doors and onto the dockets of district, circuit, and Supreme courts. They came as familiar types such as slave-trade prosecutions, and they came as exceptional appeals that sought judicial articulation of the relationship between slavery and constitutional union.

In recent years, scholars researching slavery and courts have written a remarkably rich socio-legal history of African American engagement with the law during the era of United States slavery. Detailed accounts of enslaved people as litigants and participants in local legal life have come into much greater focus.[9] At the same time, court records have undergirded scholarship carefully

6. 41 U.S. 539 (1842); Kunal Parker, *Common Law, History, and Democracy in America, 1790–1900: Legal Thought before Modernism* (New York: Cambridge University Press, 2011), 178.

7. William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (Ithaca, NY: Cornell University Press, 1977).

8. Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (New York: Oxford University Press, 2001).

9. Kimberly Welch, *Black Litigants in the Antebellum American South* (Chapel Hill: University of North Carolina Press, 2018); Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (New York: Cambridge University Press, 2018); Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009); Lea VanderVelde, *Redemption Songs: Suing for Freedom before Dred Scott* (New York: Oxford University Press, 2014); Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence, 1787–1857* (New York: Cambridge University Press, 2016); Kelly Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (Athens: University of Georgia Press, 2017).

exposing processes of gender, power, and racial construction in the courtroom, along with the granular contours of how law organized slavery in practice.[10] This historiographical movement has largely passed by the federal courts. A similar socio-legal literature has not arisen from federal court archives. There are important structural reasons for this disparity: antebellum federal judges' limited jurisdiction as well as their often physically remote locations made them unlikely forums. Comparing the dockets of antebellum federal district and state courts, Martha Jones has found that free African Americans rarely went to the former but regularly resorted to the latter. The state judiciary was likewise overwhelmingly the host forum for slaves' proximate connections with courts: in the freedom suit, the criminal case, and the contract dispute, as the petitioner, defendant, or contested property, state court systems were most present in hearing the range of issues that brought enslaved people into contact with adjudication. In short, Jones writes, the "story of race and rights before the Civil War played out, not in federal courts, but in state and local venues."[11]

Yet this institutional contrast only goes so far. In its engagement with slavery, the federal judiciary shaped peoples' lives, the boundaries of slavery, and the contours of the American state—a state marked by conflicting free and slave jurisdictions and one that criminalized foreign slave trading while facilitating domestic slaveholding. Historians of the slave trade and fugitive slave enforcement show that federal courts sat at the center of U.S. policy on slavery: they formulated and implemented the regulation of slavery as an international and interstate subject of governance. Their jurisprudence framed an architecture for managing the legalities of slavery in and through the country's federal system. This governance by federal courts extended beyond cases expressly concerning the status of enslaved people to affect decisions on federal commerce powers and state police powers implicating slavery.

While northern states remade themselves as free states during the Early Republic and slavery expanded in the South, Congress enacted a series of measures against the international slave trade. Between 1794 and 1820, legislation banned the supplying of foreign slave vessels, outlawed the trade itself in American waters, imposed ship forfeiture for violations, enabled the U.S. Navy to enforce

10. Ariela J. Gross, *What Blood Won't Tell: A History of Race on Trial in America* (Cambridge, MA: Harvard University Press, 2008); Bernie D. Jones, *Fathers of Conscience: Mixed-Race Inheritance in the Antebellum South* (Athens: University of Georgia Press, 2009); James M. Campbell, *Slavery on Trial: Race, Class, and Criminal Justice in Antebellum Richmond, Virginia* (Gainesville: University Press of Florida, 2007); Thomas D. Morris, *Southern Slavery and the Law, 1619–1860* (Chapel Hill: University of North Carolina Press, 1996).

11. Martha S. Jones, "*Hughes v. Jackson*: Race and Rights beyond Dred Scott," *North Carolina Law Review* 91, no. 5 (June 2013), 1757–83.

the ban, and deemed the trade triable as the capital crime of piracy. Although the U.S. enforcement of this suppression legislation has long been understood as very weak, recent scholarship by Craig Hollander and David Head has illuminated how federal trial courts saw a substantial prosecutorial effort aimed at slavers before the supressionist movement declined as a function of both politics and judicial rulings. The United States' slave-trade suppression must still be regarded as an overall failure, but district court files reveal many more illegal slave-trade cases than were reported or previously known. Though not the primary focus of this scholarship, the depositions and evidence collected in the process promise to reveal dimensions of the transatlantic slave trade in the nineteenth century.[12] Prosecution of Atlantic slave traders in federal court also served early national statecraft; the young country signified its capacity to enforce commitments and participate in international agreements. During the antebellum era, as policing the slave trade became associated with British abolition, the United States' growing wariness towards that multinational legal regime shaped how the country approached international law itself.[13]

For the enslaved people arriving at American ports, however, such trials were no guarantee of freedom. In a searing history of the slave ship and its captives at the heart of the Supreme Court's slaver-friendly decision in *The Antelope* (1825), Jonathan Bryant demonstrates how a thick array of legal activity mediated the seemingly straightforward reality of a ship found illegally transporting Africans.[14] When fewer than half the number of captives counted on the *Antelope* in 1820 were sent as freemen to Liberia in 1827, the missing numbers came not only from disease and death but primarily from judicial parsing of proven ownership and legal privateering. Scholars have also revisited the renowned case of *La Amistad* (1841), at the nexus of piracy law and a freedom suit in which trafficked Africans went free after overthrowing their captors at sea. With the record of arguments and testimony produced in the course of litigation, Markus Rediker has written a pungent social and political history that also reckons with how a United States

12. Craig B. Hollander, "Against a Sea of Troubles: Slave Trade Suppressionism During the Early Republic" (PhD diss., Johns Hopkins University, 2013); David Head, "Slave Smuggling by Foreign Privateers: Geopolitical Influences on the Illegal Slave Trade," *Journal of the Early Republic* 33, no. 3 (Fall 2013): 433–62; Randy J. Sparks, "Blind Justice: The United States' Failure to Curb the Illegal Slave Trade," *Law and History Review* 35, no. 1 (2017): 53–79; Dwight F. Henderson, *Congress, Courts, and Criminals: The Development of Federal Criminal Law, 1801–1829* (Westport, CT: Greenwood Press, 1985).

13. Tyson Reeder, "'Sovereign Lords' and 'Dependent Administrators': Artigan Privateers, Atlantic Borderwaters, and State Building in the Early Nineteenth Century," *Journal of American History* 103, no. 2 (September 2016), 323–46; Marco P. Basile, "The Slave Trade and the Foundations of U.S. International Legal Thought, 1808–1870" (PhD diss., Harvard University, 2016).

14. Jonathan M. Bryant, *Dark Places of the Earth: The Voyage of the Slave Ship Antelope* (New York: W.W. Norton, 2015).

populated by slaveholders engaged with internal and international legal regimes that condoned and proscribed slavery under different circumstances.[15] Benjamin Lawrance locates a formative application of expert testimony in this body of material, and he has written powerfully of the fates of the young captives from the *Amistad* that lay beyond the narratives associated with the event and case.[16]

Fugitive and travelling slaves were agents of enormous legal turmoil in the United States. In illicitly entering free states or accompanying owners outside of slave states, their presence potentially pitted the laws and residents of one state against those of another. The voluntary application of interstate comity, as Paul Finkelman has explained, could not suffice to contain the federal collisions precipitated by this mobility.[17] The cryptic constitutional promise to slaveholders that persons escaping service across state lines would not "be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due" opened far more questions over time than it resolved for lawmakers and jurists.[18]

Scholars continue to study how courts and people negotiated the interplay of common, statutory, and constitutional law, as well as extralegal forces, at this confluence of slavery and federalism. H. Robert Baker, among others, has ably shown how federal courts shaped the legal ground on which conflicts were waged.[19] They upheld the constitutionality of the 1793 and 1850 fugitive slave statutes enacted by Congress; they struck down procedural protections afforded alleged slaves; they ruled that state authorities need not implement rendition; and they sanctioned both the federal government's compulsion of citizens to aid capture and the employment of non-Article III officials to certify persons for rendition. If ensnared by this unfolding matrix of law but aided by counsel, people claimed as slaves could sometimes respond with suits and litigation that entered federal courts, such as the unreported Pennsylvania case of *Kitty v. Chittier*

15. Marcus Rediker, *The Amistad Rebellion: An Atlantic Odyssey of Slavery and Freedom* (New York: Viking, 2012).

16. Benjamin N. Lawrance, "'A Full Knowledge of the Subject of Slavery': The Amistad, Expert Testimony, and the Origins of Atlantic Studies," *Slavery & Abolition* 36, no. 2 (August 2014): 1–21; Benjamin N. Lawrance, *Amistad's Orphans: An Atlantic Story of Children, Slavery, and Smuggling* (New Haven, CT: Yale University Press, 2015).

17. Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981).

18. U.S Const. art. 4, § 2, cl. 3.

19. H. Robert Baker, *The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War* (Athens: Ohio University Press, 2006); H. Robert Baker, "The Fugitive Slave Clause and Antebellum Constitutionalism," *Law and History Review* 30, no. 4 (November 2012): 1133–74.

(1815) addressing the status of children born to fugitive parents on free soil.[20] When slavecatchers and federal marshals pursued alleged slaves into the North, especially after 1850, they could meet with violence and resistance that spilled into United States courts. Federal judges did not hear arguments over slave status and identity under the 1850 Fugitive Slave Law—that was left to a summary process under appointed federal commissioners operating outside of the judicial branch—but they oversaw the prosecutions of resistance criminalized under the Act. Prominent instances include the Christiana, Pennsylvania, "treason trial" and the indictments in the aftermath of the Anthony Burns rescue from the Boston courthouse.[21] As Steven Lubet and other authors have shown, federal courts became conspicuous centers of attention where government officials, antislavery lawyers, and judges developed extensive legal arguments about obligations to enforce slavery in ostensibly free states.[22] This history of subversion and violence in the shadow of law has an integral place in larger narratives of the antislavery movement.[23]

The intellectual history of antebellum judges belongs among the literature addressing courts' negotiation of slave fugitivity and mobility under the Constitution. From Robert Cover's landmark work on the deliberations of antislavery judges to Alfred Brophy's recent exploration of proslavery jurisprudence, scholars have probed the internal belief systems and reasoning undergirding paths of adjudication.[24] Particularly well developed biographical scholarship on Supreme Court justices Joseph Story and Roger Taney reveals deep and prolonged personal, political, and jurisprudential attention to slavery under law.[25]

The degree of choice exercised and experienced by judges in sustaining slavery remains a subject of some dispute. Earl Maltz, for instance, takes the position that federal case law sustaining slavery and the constitutionality of the

20. Richard S. Newman, "'Lucky to be born in Pennsylvania': Free Soil, Fugitive Slaves and the Making of Pennsylvania's Anti-Slavery Borderland," *Slavery & Abolition* 32, no. 3 (September 2011): 413–30.

21. Stanley Harrold, *Border War: Fighting over Slavery before the Civil War* (Chapel Hill: University of North Carolina Press, 2010); Kellie Carter Jackson, *Force & Freedom: Black Abolitionists and the Politics of Violence* (Philadelphia: University of Pennsylvania Press, 2019).

22. Steven Lubet, *Fugitive Justice: Runaways, Rescuers, and Slavery on Trial* (Cambridge, MA: Belknap Press of Harvard University Press, 2010).

23. Manisha Sinha, *The Slave's Cause: A History of Abolition* (New Haven, CT: Yale University Press, 2016).

24. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, CT: Yale University Press, 1975); Alfred L. Brophy, *University, Court, and Slave: Pro-Slavery Thought in Southern Colleges and Courts and the Coming of Civil War* (New York: Oxford University Press, 2016).

25. R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985); Timothy S. Huebner, "Roger B. Taney and the Slavery Issue: Looking beyond—and before—Dred Scott," *Journal of American History* 97, no. 1 (June 2010): 17–38.

fugitive slave act were hardly controvertible.[26] Another strand of intellectual history considers how courts developed specific narratives about the historical necessity and scope of the fugitive slave clause at the constitutional Founding.[27] Such narratives of the past possessed power in and out of courtrooms, informing the rhetoric and ideas of antebellum constitutionalism. In federal judicial proceedings and opinions, legal professionals drew upon the cultural authority of the constitutional Founding to decide matters implicating slavery and its fraught politics.[28] In his recent work on the Civil War Era, Timothy Huebner depicts a proslavery constitutional order shaped by federal court decisions amid a wider arena of public constitutionalism in which free African Americans, abolitionists, and Southern radicals advanced conflicting claims.[29] Through a mix of state and federal cases, Patricia Minter charts how strains of constitutionalism vied for ascendance to restrict or promote the geographical scope of slavery.[30]

The mobility of people of African descent was a multifaceted legal problem for an American society generally committed to white supremacy, riven by sectional tensions, and, in the South, agitated over any vulnerability in the edifice of slavery. Beyond cases of fugitivity and freedom suits arising from jurisdictional facts, courts grappled with state restrictions on the movement of people seen as black, whether enslaved or free, American or foreign. The objects of protecting slavery, sanctioning racism, and practicing federalism commingled in a jurisprudence of racial exclusion. Several scholars have recently explained the long legal struggles waged by black Americans for passports, travel permits, and the right to move between states or go abroad.[31] Judicial decisions defining states' powers over immigration preserved their governmental authority to exclude

26. Earl Maltz, *Fugitive Slave on Trial: The Anthony Burns Case and Abolitionist Outrage* (Lawrence: University Press of Kansas, 2010); but see Jeffrey Schmidt, "The Antislavery Judge Reconsidered," *Law and History Review* 29, no. 3 (August 2011): 797–834.

27. Eric Plaag, "'Let the Constitution Perish:' *Prigg v. Pennsylvania*, Joseph Story, and the Flawed Doctrine of Historical Necessity," *Slavery & Abolition* 25, no. 3 (December 2004): 76–101.

28. Aaron Hall, "'Plant Yourselves on its Primal Granite': Slavery, History and the Antebellum Roots of Originalism," *Law and History Review* 37, no. 3 (August 2019): 743–61.

29. Timothy S. Huebner, *Liberty and Union: The Civil War Era and American Constitutionalism* (Lawrence: University Press of Kansas, 2016).

30. Patricia Hagler Minter, "'The State of Slavery': *Somerset*, *The Slave*, *Grace*, and the Rise of Pro-Slavery and Anti-Slavery Constitutionalism in the Nineteenth-Century Atlantic World," *Slavery & Abolition* 36, no. 4 (June 2015): 603–17.

31. Eddie L. Wong, *Neither Fugitive nor Free: Atlantic Slavery, Freedom Suits, and the Legal Culture of Travel* (New York: New York University Press, 2009); Martha S. Jones, "Leave of Court: African American Claims-Making in the Era of *Dred Scott v. Sanford*," in *Contested Democracy: Freedom, Race, and Power in American History*, eds. Manisha Sinha and Penny Von Eschen (New York: Columbia University Press, 2007), 54–74.

people of African descent.[32] Michael Schoeppner's work on Southern states' "Negro Seamen Acts" barring or policing the presence of black sailors exposes the intricacies of this subject.[33] Such laws implicated national diplomatic interests and federal commerce powers. Although initial federal rulings invalidated certain restrictions, in practice and ultimately in law, states were empowered to treat black people virtually however they chose. The federal commerce power, in theory, permitted Congress to regulate the slave trade between states, an entanglement that haunted certain cases and that antebellum federal courts sought to avoid.[34] In *Groves v. Slaughter* (1841), which concerned an unenforced Mississippi constitutional provision that banned introducing enslaved people for sale, the Supreme Court skirted the looming issue of whether such a restriction ran afoul of Congress's exclusive authority over interstate commerce, much to the relief of nervous slave traders who funded the advocacy for this position. The Court rendered the governance of black people, whether enslaved or free, a matter of exclusive state police power—except, of course, when fugitives were involved.[35]

Beyond the slave trade and fugitive slave contestation, federal courts dealt with the institution of slavery as it was embedded in their semi-routine business. For instance, Rafael Pardo has found vast federal court involvement in the seizure and sale of enslaved people under the terms of the federal 1841 Bankruptcy Act.[36] Criminal prosecutions, admiralty cases, and commercial suits with diverse parties brought slavery to judges in the same ways that many free white Americans saw the institution and its victims: as lawful property in persons representing an enormous source of wealth. The business of slavery in federal courts bears further research, where the institution was present without posing a subject of constitutional controversy. In the recent wave of scholarship locating slavery in the history of American capitalism, financial and commercial activity figures prominently; the relationship of the federal judiciary to such private enterprise

32. Gerald Neuman, "The Lost Century of American Immigration Law (1776–1875)," *Columbia Law Review* 93, no. 8 (December 1993): 1833–901; Mary Sarah Bilder, "The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce," *Missouri Law Review* 61, no. 4 (Fall 1996): 743–824.

33. Michael A. Schoeppner, "Status Across Borders: Roger Taney, Black British Subjects, and a Diplomatic Antecedent to the Dred Scott Decision," *Journal of American History* 100, no. 1 (June 2013): 46–67; Michael A. Schoeppner, "Peculiar Quarantines: The Seamen Acts and Regulatory Authority in the Antebellum South," *Law and History Review* 31, no. 3 (August 2013): 559–86.

34. David L. Lightner, *Slavery and the Commerce Power: How the Struggle Against the Interstate Slave Trade Led to the Civil War* (New Haven, CT: Yale University Press, 2006).

35. 40 U.S. 449 (1841); Edward Baptist, *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (New York: Basic Books, 2014).

36. Rafael I. Pardo, "Bankrupted Slaves," *Vanderbilt Law Review* 71, no. 4 (2018): 1071–166.

and the ways in which courts' jurisprudence facilitating economic expansion served slavery warrants inquiry.[37]

To reach the stratum of federal judicial engagement with slavery generally omitted from national narratives, institutional histories focusing on particular lower courts are an invaluable resource. At its best, this genre illustrates on-the-ground practices and can point toward suggestive lines of inquiry. For instance, a well-crafted volume on Alabama communicates how Southern federal judges negotiated slavery and sectional contestation at the epicenter of the booming cotton plantation complex.[38] In Southern jurisdictions, enslaved persons comprised a common kind of property in lawsuits that party diversity could allow into federal court.[39] Perhaps the finest exemplar of such institutional histories is the two-volume work covering the middle-Atlantic region by Peter Graham Fish.[40] Drawing on unreported cases and holdings of the National Archives and Records Service, it shows slavery threading through court dockets on matters both commercial and criminal throughout the era. Several of these studies also illuminate operations of the territorial court system that Congress authorized to hear a broad range of cases implicating slavery in U.S. domains prior to statehood. For instance, the antislavery mission of Jonathan Walker in the American periphery of the Florida Territory fell under federal purview: when Walker attempted to pilot a boat of escaping slaves to the British West Indies, it was a U.S. court that sentenced him to branding, imprisonment, and payment of fines and fees.[41]

More broadly, the institutional development of the federal judiciary itself should not be told without accounting for slavery. As a force amplifying slaveholder representation and shaping nominations, the imperatives of slavery

37. See, e.g., Calvin Schermerhorn, *The Business of Slavery and the Rise of American Capitalism, 1815–1860* (New Haven, CT: Yale University Press, 2015); Tony Freyer, "Negotiable Instruments and the Federal Courts in Antebellum American Business," *Business History Review* 50, no. 4 (Winter 1976): 435–56.

38. Tony Freyer and Timothy Dixon, eds., *Democracy and Judicial Independence: A History of the Federal Courts of Alabama, 1820–1994* (Brooklyn, NY: Carlson Publishing, 1995); Kermit L. Hall and Eric W. Rise, *From Local Courts to National Tribunals: The Federal District Courts of Florida, 1821–1990* (Brooklyn, NY: Carlson Publishing, 1991); Steven P. Brown, *John McKinley and the Antebellum Supreme Court: Circuit Riding in the Old Southwest* (Tuscaloosa: University of Alabama Press, 2012).

39. Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky 1789–1816* (Princeton, NJ: Princeton University Press, 1978).

40. Peter Graham Fish, *Federal Justice in the Mid-Atlantic South: United States Courts from Maryland to the Carolinas, 1789–1835* (Washington, DC: Administrative Office of the U.S. Courts, 2002); *Federal Justice in the Mid-Atlantic South: United States Courts from Maryland to the Carolinas, 1836–1861* (Durham, NC: Carolina Academic Press, 2015).

41. *Trial and Imprisonment of Jonathan Walker, at Pensacola, Florida: For Aiding Slaves to Escape from Bondage: With an Appendix, Containing a Sketch of His Life* (Boston: Anti-Slavery Office, 1845).

helped to constitute a federal judiciary that in turn worked to shape slavery's legal dimensions. In a book and series of articles, Kermit Hall explored the social history of antebellum lower-court judges and the political dynamics informing their appointment.[42] Slavery as a matter of individual experience and political commitment emerges in this research—though with much less force and clarity than current scholarly approaches might yield—and the subject deserves further study. With particular focus on the Supreme Court, political scientist Justin Crowe has recently given a sophisticated analysis of how a disproportionately Southern and slaveholding cohort of judges came to dominate the federal judiciary.[43] Embedded in their states, the few-hundred-odd federal judges who served during this period were the national government's primary legal actors. They were citizens of their states, federal officers, and often slaveholders. How they managed matters of slavery in their individual and collective institutional capacity is a history of the federal judiciary that remains to be written.

The study of the federal judiciary's engagement with slavery has traditionally been conducted through analysis of major appellate cases. This tradition is nowhere more visible than in the continued work on *Dred Scott*. While a number of scholars such as Mark Graber and Austin Allen have sought to develop intellectual and jurisprudential histories that locate the case in the mainstream of antebellum constitutionalism, historians have recently looked beyond the courts to consider how African Americans and white Southerners reckoned with the Court's ruling and opinions.[44] In keeping with the growing scholarly interest in popular legal consciousness and constitutional understanding, this research also illuminates how the case belonged to its time.[45] The focus on leading appellate cases necessarily fails to register most on-the-ground legal life in state and local courts. But in the context of slavery and antebellum federalism, it is important to see that federal precedents were not disconnected from the operation of legal proceedings throughout the states.

42. Kermit L. Hall, *The Politics of Justice: Lower Federal Judicial Selection and the Second American Party System, 1829–1861* (Lincoln: University of Nebraska Press, 1979).

43. Justin Crowe, "Westward Expansion, Preappointment Politics, and the Making of the Southern Slaveholding Supreme Court," *Studies in American Political Development* 24, no. 1 (April 2010): 90–120.

44. Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (New York: Cambridge University Press, 2006); Austin Allen, *Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court, 1837–1857* (Athens: University of Georgia Press, 2006). The classic work is Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978).

45. Rachel A. Shelden, "'Obey and Yet Disbelieve': Unionism, the Missouri Compromise, and the Southern Response to the Dred Scott Decision Revisited," *Ohio Valley History* 13, no. 2 (Summer 2013): 25–47; Todd F. McDorman, "Challenging Constitutional Authority: African American Responses to *Scott v. Sandford*," *Quarterly Journal of Speech* 83, no. 2 (May 1997): 192–209.

It is telling that three of the recent works unpacking African American legal experience through state court files have included "Dred Scott" in their titles.[46] In writing about freedom suits "in the shadow of" or "before" the case, authors are not merely locating their work in time and place. Implicitly, they acknowledge how federal court decisions on slavery could structure and transform the possibilities of state courts and legislatures. For example, the viability of personal-liberty laws regulating the status of enslaved people entering a free state and the assistance of state officials and citizens with fugitive rendition hinged on Supreme Court rulings: federal cases and federal law marked epochs in states' constitutional capability to take antislavery steps.[47] After *Dred Scott*, for instance, a northern public expressed great fear that the Taney Court would push constitutional protections for slavery further into free states were it to hear an appeal in the case of *Lemmon v. New York* (1860).[48] Spurred by the legal activity of black New Yorker Louis Napoleon, the state judiciary ruled that a family of enslaved people was free by virtue of their owner's voluntary and unnecessary sojourn with them into the state. Only the Civil War disrupted an appeal that may well have produced a reversal insisting that free states must always permit slaveholders to travel freely with their property rights in persons unimpaired. The national judiciary, while not encompassing the primary sites of enslaved people's legal encounters, implemented an architecture for governing slavery across the federal system.

As the national judiciary developed this architecture, and as state judiciaries and legislatures produced rulings and laws within it, federal courts governed the United States. They elaborated a regime followed by other governmental bodies on the country's most terrible and intractable of subjects. With this observation, it is worth considering how federal courts' policies on slavery might speak to a growing body of scholarship depicting an early American state with significant governing capacity but that often operated "out of sight" of most citizens.[49] Officials governed, in part, by exercising power through indirect means and intermediaries. This literature revises a characterization of the early state as weakly composed of "courts and parties." In this older account, courts brought procedural regularity to the nation but ultimately exerted limited power—their "evanescent quality" purportedly exposed by the failure of *Dred Scott* to resolve

46. See supra note 44.

47. Thomas Morris, *Free Men All: The Personal Liberty Laws of the North, 1780–1861* (Baltimore: Johns Hopkins University Press, 1974).

48. *Lemmon v. The People*, 20 N.Y. 562 (1860). Sarah Levine Gronningsater, "'On Behalf of His Race and the Lemmon Slaves': Louis Napoleon, Northern Black Legal Culture, and the Politics of Sectional Crisis," *Journal of the Civil War Era* 7, no. 2 (June 2016): 206–41.

49. Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009).

political contestation over slavery.[50] Yet in exercising significant indirect control over the practice, experience, and scope of slavery, federal courts surely wielded a more substantial kind of power. Through the antebellum federal system, state courts and legislatures frequently and actively engaged with enslaved people and the institution of slavery in the space delimited by developing federal precedents. From this perspective, the structure of federalism itself afforded the judiciary a relative invisibility somewhat analogous in effect to other forms of mediated and shared governance. While this quality of indirect power is endemic to court rulings and federalism as a general matter, it would seem that federal courts' regulation of a subject of such enormous conflict and consequence for seven decades signifies a particular institutional capacity. Indeed, this record on slavery suggests that a revised understanding of federal courts might be brought into the new history of the American state.

Southern secession overwhelmed the legal architecture for managing slavery that had accreted since the Founding.[51] National leaders initially debated a Thirteenth Amendment that, as Michael Vorenberg explains, would have preserved the Union by guaranteeing slavery a still more privileged, permanent status within the United States' constitutional edifice.[52] These efforts foundered on the chasm between sectional expectations and the momentum of secessionist fervor. Enslaved people began freeing themselves when the crush of war arrived, crossing into Union-controlled territory and forcing the hand of Abraham Lincoln and Congress. Upon the drawing of battle lines and presumed abeyance of Fugitive Slave Act enforcement, they did not wait for legislation or adjudication to escape the Confederate States of America ("C.S.A."). In so doing, they triggered an extrajudicial crisis of legal status: the fictions of enslaved people as "contraband" and their legality under the Union's Confiscation Acts saw authorities reckon with their personhood and, as Silvana Siddali shows, a withering of their identity as property status under law.[53] In refugee camps, Chandra Manning argues, new threads of citizenship developed irregularly as formerly enslaved men and women

50. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982), 29.

51. Laura F. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York: Cambridge University Press, 2015).

52. Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (New York: Cambridge University Press, 2001).

53. Kate Masur, "'A Rare Phenomenon of Philological Vegetation': The Word 'Contraband' and the Meanings of Emancipation in the United States," *Journal of American History* 93, no. 4 (March 2007): 1050–84; Silvana R. Siddali, *From Property to Person: Slavery and the Confiscation Acts, 1861–1862* (Baton Rouge: Louisiana State University Press, 2005).

labored for the war effort.[54] The ensuing collision of the Union's employment of African American soldiers and ex-slaves with the Confederate commitment to seeing African Americans as property and unlawful combatants resulted in Confederate atrocities and reciprocal brutality under emergent laws of war.[55] The judicial history of this moment has long focused on questions of war powers, military courts, and civil liberties. But if the federal judiciary did not directly impair the chaotic spread of a new de facto freedom during the war, its legacy both informed the initial uncertainty of military commanders in responding to the appearance of "contraband" people and contributed to the sense of need for a Thirteenth Amendment to formally terminate slavery under law.

Practically, two federal judiciaries operated in United States territory for the duration of the war. Most federal Southern judges resigned office in order to occupy the Confederate bench and man the judiciary of a constitutional republic fashioned to maintain slavery in perpetuity. These courts administered policies of impressment and sequestration of property, including enslaved people, taken for use by the C.S.A. The only book-length treatment of this Confederate court system, written in 1941, virtually demands a successor with better research and sounder analysis. But more recent work by Mark Neely Jr. and Dan Hamilton has disclosed unseen features of its operations affecting free and enslaved people living within Confederate jurisdiction.[56]

Emancipation began in 1861. It proceeded piecemeal across the country by federal military authority, state action, and ultimately constitutional amendment in 1865. From managing a legal world of slavery, federal courts suddenly became charged with administering some kind of freedom. As a matter of new black-letter law, federal courts possessed an expanding jurisdiction to hear cases involving the violated rights of freedpeople. Between 1866 and 1875, Congress enacted a series of civil rights, habeas corpus, and enforcement statutes in conjunction with the ratification of the Reconstruction Amendments. These laws variously criminalized deprivations of constitutional rights, enabled the removal of cases

54. Chandra Manning, *Troubled Refuge: Struggling for Freedom in the Civil War* (New York: Knopf, 2016).

55. John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012).

56. William M. Robinson, *Justice in Grey: A History of the Judicial System of the Confederate States of America* (Cambridge, MA: Harvard University Press, 1941). Mark E. Neely, Jr., *Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism* (Charlottesville: University of Virginia Press, 1999); Daniel W. Hamilton, *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War* (Chicago: University of Chicago Press, 2007); Aaron R. Hall, "Reframing the Fathers' Constitution: The Centralized State and Centrality of Slavery in the Confederate Constitutional Order," *Journal of Southern History* 83, no. 2 (May 2017): 255–96.

to federal court, and provided for original actions in the lower federal judiciary.[57] Enforcement initially rested wholly on the Freedman's Bureau, federal attorneys, and new Department of Justice to bring prosecutions, but civilians were permitted to commence civil actions in 1871.

As a practical matter, however, federal courts were usually forums of disappointment. In adopting judicial process instead of military commissions to protect black freedom after the war, the federal government asked freedpeople to rely on a slower, weaker, dependent institution with other commitments in tension with enforcing emancipation.[58] During the postwar decade, the political struggle between a new Republican regime and the resurgent violence of Southern Democracy had a legal face in federal courts: how would rights be defined and enforced? If judges gave content to freedom through construction of these statutes and adjudication of cases arising under them, it was a narrow vision of freedom that they settled upon. A winding road led to this result for the decentralized federal judiciary.[59] Between 1873 and 1883, the Supreme Court hollowed out the privileges and immunities clause, construed Fourteenth-Amendment protections to apply only to state action and not extralegal terrorism, opened the door to vote suppression by construing the Fifteenth Amendment to require express racial discrimination, and struck down the Civil Rights Act of 1875.[60] Although the Court may have left open some avenues for Congress to enforce voting rights and counter "state neglect" of black Americans, as Pamela Brandwein argues, these avenues were not taken and soon closed.[61]

57. George A. Rutherglen, *Civil Rights in the Shadow of Slavery: The Constitution, Common Law, and the Civil Rights Act of 1866* (New York: Oxford University Press, 2012); Robert J. Kaczorowski, "'To Begin the Nation Anew': Congress, Citizenship, and Civil Rights after the Civil War," *American Historical Review* 92, no. 1 (February 1987): 45–68; William M. Wiecek, "The Reconstruction of Federal Judicial Power, 1863–1875," *American Journal of Legal History* 13, no. 4 (October 1969): 333–59.

58. Lisset M. Pino and John Fabian Witt, *The Fourteenth Amendment as an Ending: From Bayonet Justice to Paper Rights* (January 2019), Yale Law School, Public Law Research Paper No. 664; Gregory P. Downs, *After Appomattox: Military Occupation and the Ends of War* (Cambridge, MA: Harvard University Press, 2015).

59. Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866–1876* (New York: Fordham University Press, 2004 ed.); Kermit Hall, "The Civil War Era as a Crucible for Nationalizing the Lower Federal Courts," *Prologue* 7, no. 3 (Fall 1975): 177–86.

60. *Slaughter-House Cases*, 83 U.S. 36 (1873); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Reese*, 92 U.S. 214 (1876); *Civil Rights Cases*, 109 U.S. 3 (1883); Charles Lane, *The Day Freedom Died: The Colfax Massacre, The Supreme Court and the Betrayal of Reconstruction* (New York: Henry Holt & Co., 2008).

61. Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction* (New York: Cambridge University Press, 2011).

Before this hostile landscape solidified, however, lower federal courts made up the new legal order as they went along. As Donald Nieman observed, judges often took a restrictive view of civil-rights laws from the start—for example, striking down facially racist laws but finding no fault with a state's systematic refusal to prosecute white murderers of black residents.[62] Or in Kentucky, where a relatively significant prosecutorial effort occurred, the federal judge required state courts to first refuse to hear African American testimony before allowing removal of cases into his court, which let state courts strategically delay for long periods before making that exclusion.[63] Much depended on individual judicial posture, local officials' commitment, and the gravity of circumstances. With the decline and closure of the Freedmen's Bureau in 1868, an important instrument of mediation vanished. The creation of the DOJ in 1870, as much a measure of economical professionalization as an investment in ensuring federal justice, provided a limited, inconsistent agent for persecuted freedpeople.[64] As for the statutory expansion enabling private actions, the expense of litigation, inconvenience of distant courts, heightened vulnerability posed by proceeding without institutional aid, and slow pace of backlogged courts severely limited its utility.

The most prominent enforcement episode was the South Carolina Ku Klux Klan trials of the early 1870s. In the center of domestic terror against freedpeople and Republicans, the U.S. government suspended the writ of habeas corpus and indicted well over a thousand Klan members. But the court denied the prosecution's theories of the Reconstruction Amendments beyond a minimal federal capacity to protect voters, and though not without some convictions and guilty pleas, the trials ceased.[65] Aside from this singular South Carolina event, studies of judicial enforcement of civil rights and voting rights are more impressionistic.[66] A notable exception is Stephen Cresswell's reconstruction of proceedings in Northern Mississippi, which reveals a court that oversaw a relatively high conviction rate for a relatively large number of prosecutions for

62. Donald Nieman, *To Set the Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks, 1865–1868* (Millwood, NY: KTO Press, 1979).

63. J. Michael Rhyne, "We Are Mobed & Beat: Regulator Violence Against Free Black Households in Kentucky's Bluegrass Region, 1865–1867," *Ohio Valley History* 2, no. 1 (Spring 2002): 30–42.

64. Jed Shugerman, "The Creation of the Department of Justice," *Stanford Law Review* 66, no. 1 (January 2014): 121–72.

65. Lou Falkner Williams, *The Great South Carolina Ku Klux Klan Trials, 1871–1872* (Athens: University of Georgia Press, 1996).

66. Stephen J. Riegel, "The Persistent Career of Jim Crow: Lower Federal Courts and the 'Separate but Equal' Doctrine, 1865–1896," *American Journal of Legal History* 28, no. 1 (January 1984): 17–40; Everette Swinney, "Enforcing the Fifteenth Amendment, 1870–1877," *Journal of Southern History* 28, no. 2 (May 1962): 202–18; John Hope Franklin, "The Enforcement of the Civil Rights Act of 1875," *Prologue* 6 (Winter 1974): 225–35.

voting rights violations—and that imposed nominal sentences in most cases.[67] In the portraits of federal justice, the ideological cast of judges' minds and their subjective perceptions of events emerge as an exceptionally salient constraint on the measure of justice available to freedpeople. In the South Carolina trials and others across the South, skilled Democratic lawyers understood how to tell a constitutional narrative delegitimizing robust enforcement, one that the Supreme Court ultimately adopted. Michael Ross shows how former Supreme Court justice and ex-Confederate John Campbell led a sophisticated and relentless legal effort that turned the Fourteenth Amendment against freedpeople. The famous *Slaughterhouse* decision evacuating constitutional privileges and immunities of any useful meaning arose from his efforts in Louisiana.[68] Whether or not white Southern Democrats recognized the legitimacy of Reconstruction-era courts, they knew how to use them against Republicans and African Americans.

Scholarship directly addressing ground-level federal judicial enforcement of emancipation appears to have languished.[69] Robert Kaczorowski's *The Politics of Judicial Interpretation* (1985) remains the authoritative work. Studies have concentrated on the Supreme Court, doctrine, and officials—not freedpeople and lower courts. Meanwhile, recent scholarship on freedpeople's efforts to institutionalize their emancipation has illuminated their engagement with the state courts, occupying Union forces, the Freedman's Bureau, and other federal bureaucracies—and work drawing on institutional records to understand postemancipation life has flourished.[70] But scholarship bringing this perspective

67. Stephen Cresswell, "Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870–1890," *Journal of Southern History* 53, no. 3 (August 1987): 421–40.

68. Michael Ross, "Obstructing Reconstruction: John Archibald Campbell and the Legal Campaign against Louisiana's Republican Government, 1868–1873," *Civil War History* 49, no. 3 (September 2003): 235–53.

69. For an expert review of Reconstruction's legal historiography, see Michael Vorenberg, "Reconstruction as a Constitutional Crisis," in *Reconstructions: New Perspectives on the Postbellum United States*, ed. Thomas J. Brown (New York: Oxford University Press, 2006). For a post-Reconstruction account, see Timothy S. Huebner, "Emory Speer and Federal Enforcement of the Rights of African Americans, 1880–1910," *American Journal of Legal History* 55, no. 1 (January 2015): 34–63.

70. See, e.g., Giuliana Perrone, "'Back into the Days of Slavery': Freedom, Citizenship, and the Black Family in the Reconstruction-Era Courtroom," *Law and History Review* 37, no. 1 (February 2019): 125–61; Melissa Milewski, *Litigating Across the Color Line: Civil Cases Between Black and White Southerners from the End of Slavery to the Civil Rights Era* (New York: Oxford University Press, 2017); Joseph A. Ranney, *In the Wake of Slavery: Civil War, Civil Rights and the Reconstruction of Southern Law* (Westport, CT: Praeger, 2006); Paul Cimbala, *Under the Guardianship of the Nation: The Freedmen's Bureau and the Reconstruction of Georgia, 1865–1870* (Athens: University of Georgia Press, 1997); Mary Farmer-Kaiser, *Freedwomen and the Freedmen's Bureau: Race, Gender, and Public Policy in the Age of Emancipation* (New York: Fordham University Press, 2010); Dylan Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South* (Chapel Hill: University of North Carolina Press, 2003).

to the federal judiciary has remained elusive, and not for lack of cases alone—even though federal courts were not the primary site for working out the legal face of freedom. Federal reports vastly understate proceedings arising under the civil-rights legislation and Reconstruction Amendments: newspaper reports, surviving minute books, and correspondence of federal officials indicate uncounted cases over denial of voting rights, access to public accommodations and transport, assault and murder, jury exclusion, child servitude, and arrests for interracial intimacy. In thematic works, this federal judicial history surfaces at times but not in a sustained fashion. For instance, the right to marry across the color line counted among the meanings of emancipation tested in federal court. Peter Wallenstein, in a longer study of the subject, describes how an 1871 Georgia district court concluded that the Civil Rights Act and Fourteenth Amendment protected only property rights, not this ostensible social relation. The early legal struggle for access and equity in public accommodations, a claim for mobility within the locale where African Americans lived, opened another facet of emancipation to adjudication. In federal cases, scholars have observed the constitutive and reflective force of law and the play of gendered ordering in the rise of segregation.[71]

Perhaps the federal judicial history of Reconstruction has tended toward ossification because it has been written in the shadow of an enduring focus on the original intentions behind the Reconstruction Amendments and the constitutional fidelity of the Supreme Court. This line of inquiry comes loaded with important jurisprudential and political implications due to the interpretative pathways of American constitutionalism. Federal courts and the American public have long practiced a constitutional politics in which the historical memory of originating moments lends or withholds legitimacy—this is true of battles over the meaning of Reconstruction Amendments just as it is true over the constitutional Founding; it is the case in constitutional struggles over the New Deal, the Warren Court, and our present.[72] Hence generations of legal scholars have become consumers and authors of a certain kind of Reconstruction history. To name

71. Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law—An American History* (New York: Palgrave Macmillan, 2002); Kenneth W. Mack, "Law, Society, Identity and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875–1905," *Law & Social Inquiry* 24, no. 2 (April 1999): 377–409; Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920* (New York: Cambridge University Press, 2001).

72. Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham, NC: Duke University Press, 1999); Norman Spaulding, "Paradoxes of Constitutional Faith: Federalism, Emancipation, and the Original Thirteenth Amendment," *Critical Analysis of Law* 3, no. 2 (2016): 306–34; Norman Spaulding, "Constitution as Counter-Monument: Federalism, Reconstruction and the Problem of Collective Memory," *Columbia Law Review* 103, no. 8 (December 2003): 1992–2051. For recent examples see Rebecca E. Zietlow, *The Forgotten Emancipator:*

two prominent examples, Akhil Amar and Bruce Akerman have, respectively, written historically grounded works arguing that Reconstruction incorporated the Bill of Rights and represented a "constitutional moment" that transformed the structure of government.[73] While valuable for a variety of purposes, this kind of aspirational and normative history hardly bears upon the historical legal activity and experiences of freedpeople at the time. Similarly, a vast literature has developed on the relative "conservatism" of Congress, Court, and public during Reconstruction.[74] This work, which speaks to the experience of freedpeople insofar as it gives a broad explanation for their legal disappointments, establishes the unwillingness of many white Americans, particularly those in power, to accept an expansion of federal authority and to embrace constitutional change. But given the important causal force that constitutional conservatism occupies in a range of narratives, the limits of this account bear noting. Constitutional conservatism might cover all sorts of motives: from war fatigue and economic interests to white supremacy and antipathy towards policy. Indeed, even when constitutional objections may have been subjectively sincere, they may well have been conceived and understood only through specific circumstances, namely that they were compatible with white supremacy and moving on from Reconstruction. The tendency in some legal histories to search for internal doctrinal consistency, principled explanations, and good-faith rule of law norms magnifies the risk of taking constitutional conservatism at face value. Commitment to enduring federalism stands in a different light if it was cultivated in specific response to unwelcome claims by freedpeople: then it looks more like the reinvention of constitutional tradition for a reconstructed white supremacy. Perhaps scholarship that tells of freedpeople's efforts to enforce emancipation from the bottom up

James Mitchell Ashley and the Ideological Origins of Reconstruction (New York: Cambridge University Press, 2017); Gerard N. Magliocca, *American Founding Son: John Bingham and the Invention of the Fourteenth Amendment* (New York: New York University Press, 2013, 2016); Kurt Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* (New York: Cambridge University Press, 2014).

73. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 1998); Bruce Ackerman, *We the People, Vol 2: Transformations* (Cambridge, MA: Belknap Press of Harvard University Press, 1998). For a particularly well researched account, see Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, NC: Duke University Press, 1986).

74. Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863–1869* (Lawrence: University Press of Kansas, 1990); Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York: Knopf, 1973); Michael Les Benedict, *Preserving the Constitution: Essays on Politics and the Constitution in the Reconstruction Era* (New York: Fordham University Press, 2006); Phillip S. Paludan, *A Covenant With Death: The Constitution, Law, and Equality in the Civil War Era* (Champaign: University of Illinois Press, 1975); Stanley I. Kutler, *Judicial Power and Reconstruction Politics* (Chicago: University of Chicago Press, 1968).

might also reveal that constitutional conservatism was more artful construction than organic commitment.

In the long history of U.S. slavery and the troubled history of freedom that followed, federal courts were not emancipatory forums. They were instruments of governance at the heart of the American state. They operated primarily to produce order and serve populations who held power—economic, political, cultural, social, and racial. If freedpeople gained rights and found a measure of opportunity and protection in the courts, they nonetheless remained subjects of law who could not rely upon it to secure substantial freedom. Attending to the practical capacity of people to use law and courts, as Barbara Welke makes clear, tells a different story of nineteenth-century experience than one narrated through the acquisition of abstract rights.[75] Scholars of emancipation are currently "unwriting the freedom narrative," and federal judicial history belongs to this work on legacies of trauma and continuity despite change.[76] Daniel Kato's theory of "constitutional anarchy" is helpful in making sense of this world marked by both rampant extrajudicial violence and regularly operating federal courts.[77] As historians consider the developing American state in the late nineteenth century, the simultaneity of unchecked racial oppression and a robust state grounded in a liberal rights regime may be understood as a legal order that flowed not from weakness, but from choice. Slavery was constitutionally dead. But the equal rights that courts recognized did not include those that would make meaningful and available for freedpeople the freedoms fully enjoyed by law's true favorites, able white males.

75. Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (New York: Cambridge University Press, 2010).

76. Carole Emberton, "Unwriting the Freedom Narrative: A Review Essay," *Journal of Southern History* 82, no. 2 (May 2016): 377–94.

77. Daniel Kato, *Liberalizing Lynching: Building a New Racialized State* (New York: Oxford University Press, 2015).

4

Writing a Court-Centered History of Administrative Governance

Joanna L. Grisinger

What has been the relationship of the federal courts to regulatory policy and to the institutions of the administrative state? And how have historians approached this question? An aphorism attributed to the writer John Gardner, among others, holds that there are really only two stories: someone goes on a journey, or a stranger arrives in town.[1] Historians interested in the first story have traced the creation and growth of individual agencies and have detailed the development of administrative law. Others are more interested in the strangers—agencies—and focus on the institutional responses of courts, Congress, and the White House, and the individual reactions of judges, members of Congress, executive branch officials, industry representatives, and interest groups, to their arrival. Both approaches shine light on the relationship between courts and agencies, and a review of the excellent scholarship in the field demonstrates how the federal courts have both acted and reacted to administrative governance—that is, governance by bureaucrats in executive agencies and independent commissions. The courts have played multiple crucial roles in laying the foundation for, building, and

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1. http://quoteinvestigator.com/2015/05/06/two-plots/

remodeling the administrative state, while at the same time carving out their own role in administrative tasks.

First, two notes on content. This essay focuses in particular on the "modern" American administrative state, which I define as beginning in the late nineteenth century and extending to the present. As scholars including Jerry L. Mashaw, Nicholas R. Parrillo, James T. Sparrow, Stephen W. Sawyer, William J. Novak, and Gautham Rao have carefully reminded us, federal regulation began long before the creation of the Interstate Commerce Commission in 1887.[2] However, the post-Civil War years do see a distinct change in the forms, methods, and pace of administration, and scholarship focused on this period offers a wealth of opportunities to see how courts and agencies interacted with and shaped one another.

And although this essay generalizes in parts—especially regarding the courts' development of broadly applicable doctrines of administrative law—it is worth noting that there is no single or universal story of administrative development. There are, of course, some common themes of administrative development during the late nineteenth century; during the New Deal; during the health, safety, and environmental expansion of the 1960s and 1970s; during the era of deregulation in the 1970s and 1980s; and during the present moment as conservative scholars and politicians push to dismantle the administrative state.[3] However, although scholars often refer to the "administrative state" as a single conceptual entity (something I do throughout this essay as well), this term should be considered thoughtfully. The "administrative state" is a collection of agencies and commissions organized differently and created at different times; the term itself thus means something distinct at any given point in American history. Scholarship on the origins and development of the Department of Agriculture, the National Recovery Administration, the National Labor Relations Board, the Federal Communications Commission, and the Food and Drug Administration (to name just a few) demonstrates that individual agencies have much in common

2. Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven, CT: Yale University Press, 2012); Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940* (New Haven, CT: Yale University Press, 2013); James T. Sparrow, William J. Novak, and Stephen W. Sawyer, eds., *Boundaries of the State in US History* (Chicago: University of Chicago Press, 2015); Jed Handelsman Shugerman, "The Legitimacy of Administrative Law" (book review), *Tulsa Law Review* 50, no. 2 (2015): 301–16; Gautham Rao, *National Duties: Custom Houses and the Making of the American State* (Chicago: University of Chicago Press, 2016).

3. On the present moment, see Gillian E. Metzger, "1930s Redux: The Administrative State Under Siege," *Harvard Law Review* 131, no. 1 (2017): 1–95.

but can diverge even more.[4] And the case-by-case nature of the judicial process means that courts applying broad principles of administrative law encounter not an "administrative state" but rather individual agencies at different points in their own history and in the history of American political development. Thus, a court-centered history of the "administrative state" must attempt to balance breadth and specificity.

* * *

Such a history takes seriously federal courts' role in constructing and shaping the federal administrative state. William J. Novak and John Skrentny have each urged scholars to examine how courts allowed agencies and commissions to flourish.[5] The judicial influence was crucial, Reuel Schiller notes: "Throughout

4. A short list of important studies not cited elsewhere in this essay includes Philip Selznick, *TVA and the Grass Roots: A Study in the Sociology of Formal Organization* (Berkeley: University of California Press, 1949); Erik Barnouw, *The Golden Web: A History of Broadcasting in the United States, Volume II—1933 to 1953* (New York: Oxford University Press, 1968); Barnouw, *The Image Empire: A History of Broadcasting in the United States, Volume III—from 1953* (New York: Oxford University Press, 1970); James A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law, Volume I (1933–1937)* (Albany: State University of New York Press, 1974); Gross, *The Reshaping of the National Labor Relations Board: National Labor Policy in Transition, 1937–1947* (Albany: State University of New York Press, 1981); Stephen Skowronek, *Building a New Administrative State: The Expansion of National Administrative Capacities 1877–1920* (Cambridge: Cambridge University Press, 1982); James L. Baughman, *Television's Guardians: The FCC and the Politics of Programming 1958–1967* (Knoxville: University of Tennessee Press, 1985); Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (Cambridge: Cambridge University Press, 1985); Brian Balogh, *Chain Reaction: Expert Debate and Public Participation in American Commercial Nuclear Power, 1945–1975* (New York: Cambridge University Press, 1991); Kenneth Finegold and Theda Skocpol, *State and Party in America's New Deal* (Madison: University of Wisconsin Press, 1995); Richard A. Harris and Sidney M. Milkis, *The Politics of Regulatory Change: A Tale of Two Agencies*, 2nd ed. (New York: Oxford University Press, 1996); Robert C. Lieberman, *Shifting the Color Line: Race and the American Welfare State* (Cambridge, MA: Harvard University Press, 1998); Daniel Carpenter, *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA* (Princeton, NJ: Princeton University Press, 2010); Kimberley S. Johnson, "Racial Orders, Congress, and the Agricultural Welfare State, 1865–1940," *Studies in American Political Development* 25, no. 2 (2011): 143–61; Reuel Schiller, *Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism* (New York: Cambridge University Press, 2015). I describe some of this scholarship at greater length elsewhere. See Joanna L. Grisinger, "Law and the Administrative State," in *A Companion to American Legal History*, eds. Sally Hadden and Alfred L. Brophy (Chichester, UK: Wiley-Blackwell, 2013), 367–86. In addition, the Praeger Library of U.S. Government Departments and Agencies—a series of histories of individual agencies published in the 1960s and 1970s—is still a useful resource. And the Society for History in the Federal Government maintains a website (http://www.shfg.org/history-at-fedgov) with links to online federal agency historical resources.

5. William J. Novak, "The Legal Origins of the Modern American State," in *Looking Back at Law's Century*, eds. Austin Sarat, Bryant Garth, and Robert A. Kagan (Ithaca, NY: Cornell University Press, 2002); John D. Skrentny, "Law and the American State," *Annual Review of Sociology* 32 (2006): 213–44.

the twentieth century, courts imposed their own, semi-autonomous interests on the policy-making process, bending and warping policy inputs like any other state institution."[6] Federal courts adopted broad but bounded conceptions of Congress's powers; as Michelle Landis Dauber demonstrates, members of Congress were well aware what federal judges would and would not allow.[7] Courts also cautiously approved of the creation of institutions within which bureaucrats would carry out much of the federal government's work.[8] Judges nonetheless approached these unorthodox administrative entities with some distrust, and shaped agencies' internal rules through careful scrutiny of administrative decision making.[9] Daniel Ernst has described how lawyers and judges in the early twentieth century adopted and adapted judicial standards for the administrative process; when bureaucrats followed these quasi-judicial procedures, reviewing courts were willing to defer to most (although certainly not all) of their decisions.[10] As Ernst demonstrates, this compromise that legitimized the administrative process was hardly foreordained. It only happened through contested debates over specialized procedures, fact-finding rules, and judicial review standards that were really debates about whether agencies or courts would have the final say. And as my own work demonstrates, Congress in the Administrative Procedure Act of 1946 largely adopted these procedural standards already ratified by courts.[11] Once courts were satisfied that agency procedures guaranteed due process to the parties before them, they were generally deferential to agency decision making. In exchange, administrators drew on the legitimacy of courts, presenting themselves as

6. Reuel Schiller, "'Saint George and the Dragon': Courts and the Development of the Administrative State in Twentieth-Century America," *Journal of Policy History* 17, no. 1 (2005): 111.

7. Michele Landis Dauber, *The Sympathetic State: Disaster Relief and the Origins of the American Welfare State* (Chicago: University of Chicago Press, 2013).

8. Joanna Grisinger, "The (Long) Administrative Century: Progressive Models of Governance," in *The Progressives' Century: Political Reform, Constitutional Government, and the Modern American State*, eds. Stephen Skowronek, Stephen M. Engel, and Bruce Ackerman (New Haven, CT: Yale University Press, 2016).

9. Skowronek, *Building a New Administrative State*; Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995); Todd Stevens, "Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases, 1882–1924," *Law & Social Inquiry* 27, no. 2 (2002): 271–305.

10. Daniel R. Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940* (New York: Oxford University Press, 2014); see also Shugerman, "The Legitimacy of Administrative Law"; Jeremy K. Kessler, "The Struggle for Administrative Legitimacy," *Harvard Law Review* 129, no. 3 (2016): 718–73 (book review); Mark Tushnet, "*Tocqueville's Nightmare*: Institutional and Intellectual," *Harvard Law Review Forum* 129, no. 3 (2016): 122–27 (response to Kessler); G. Edward White, "The Emergence of Agency Government and the Creation of Administrative Law," in *The Constitution and the New Deal*, 94–127 (Cambridge, MA: Harvard University Press, 2000).

11. Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal* (Cambridge: Cambridge University Press, 2012).

(quasi-)neutral arbiters even as they rendered decisions based more on explicitly political factors.

Within the space carved out for them by courts, agencies had significant autonomy to develop their own networks and shape their own tasks.[12] Many officials ran with this autonomy, engaging in what scholars including Sophia Z. Lee, Gillian E. Metzger, William N. Eskridge, Jr., and John Ferejohn have labeled "administrative constitutionalism"—that is, administrators drawing on constitutional principles as they crafted rules and policies and reached decisions.[13] As Metzger explains, this includes not only "the application of established constitutional requirements by administrative agencies" but also "the elaboration of new constitutional understandings by administrative actors, as well as the construction (or 'constitution') of the administrative state through structural and substantive measures."[14] More generally, judicial deference (that is, the repeated judicial decision *not* to intervene) meant at least implicit judicial approval of the norms and policies agencies created and the private ordering they endorsed.[15] And in some cases, courts explicitly adopted standards first articulated by agencies.[16]

12. See Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton, NJ: Princeton University Press, 2001); John D. Skrentny, *The Minority Rights Revolution* (Cambridge, MA: Belknap Press of Harvard University Press, 2002); Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge, MA: Harvard University Press, 2007).

13. See Sophia Z. Lee, "Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present," *Virginia Law Review* 96, no. 4 (2010): 799–886; William N. Eskridge Jr. and John Ferejohn, *A Republic of Statutes: The New American Constitution* (New Haven, CT: Yale University Press, 2010); Gillian E. Metzger, "Administrative Constitutionalism," *Texas Law Review* 91, no. 7 (2013): 1897–935; Gillian E. Metzger, "Ordinary Administrative Law as Constitutional Common Law," *Columbia Law Review* 110, no. 2 (2010): 479–536; Jeremy K. Kessler, "The Administrative Origins of Modern Civil Liberties Law," *Columbia Law Review* 114, no. 5 (2014): 1083–166; Sophia Z. Lee, *The Workplace Constitution: From the New Deal to the New Right* (New York: Cambridge University Press, 2014); Bertrall L. Ross II, "Embracing Administrative Constitutionalism," *Boston University Law Review* 95, no. 2 (2015): 519–85; Karen M. Tani, *States of Dependency: Welfare, Rights, and American Governance, 1935–1972* (New York: Cambridge University Press, 2016); Joy Milligan, "Subsidizing Segregation," *Virginia Law Review* 104, no. 5 (2018): 847–932; Kristin A. Collins, "Bureaucracy as the Border: Administrative Law and the Citizen Family," *Duke Law Journal* 66, no. 8 (2017): 1727–69.

14. Metzger, "Administrative Constitutionalism," 1900.

15. Justin B. Richland, "Jurisdiction: Grounding Law in Language," *Annual Review of Anthropology* 42 (2013): 209–26; see also Reuel E. Schiller, "Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment," *Virginia Law Review* 86, no. 1 (2000): 1–102; Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* (Princeton, NJ: Princeton University Press, 2008); Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, NJ: Princeton University Press, 2009).

16. Anuj C. Desai, "Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy," *Stanford Law Review* 60, no. 2 (2007): 553–94; Collins, "Bureaucracy as the Border."

Even as courts deferred to agency decision making, they shaped officials' behavior. Everyone involved in the regulatory process was always aware that judicial review was never too far away, and everyone acted based on their best guesses about what a reviewing court might do in any given situation.[17] Regulated parties knew they could always go to court to challenge an adverse decision. (They might not win, but they could use the judicial process to slow things down.)[18] Agency officials, in turn, might expect deference but could not count on it. They thus generally chose a defensive posture, acting cautiously and taking few risks.

And judges did step in when they deemed it appropriate.[19] For example, in the 1960s and 1970s, agencies turned to informal rulemaking mechanisms following critiques of their slow and inefficient case-by-case decision making. As Reuel Schiller has shown, the D.C. Circuit both encouraged and closely supervised this innovation (adding its own requirements for good measure).[20] In the same era, courts, which had always been places where certain parties could engage in the administrative process, began to welcome more engagement. Public interest groups were increasingly able to participate in policy planning at the agencies via expanded rights of participation, and to challenge policy in the courts via new judge-made standing rules and new statutory citizen suit provisions. Private parties were thus invited into the regulatory process to keep the agencies on task (and were sometimes given funds to help them do so). Such provisions allowed groups without a lot of political power to (at least try to) mobilize in this new arena.[21]

At the same time, the quasi-judicial characteristics of the administrative process also affected—and sometimes thwarted—reformers' legal and political

17. See, of course, Oliver Wendell Holmes Jr., "The Path of the Law," *Harvard Law Review* 10, no. 8 (1897): 457–78; see also Metzger, "Administrative Constitutionalism"; Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, MA: Harvard University Press, 2001); Jerry L. Mashaw and David L. Harfst, *The Struggle for Auto Safety* (Cambridge, MA: Harvard University Press, 1990).

18. Morton J. Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), ch. 8.

19. Adrian Vermeule, "No," *Texas Law Review* 93, no. 6 (2015): 1547–66 (book review); Bertrall L. Ross II, "Denying Deference: Civil Rights and Judicial Resistance to Administrative Constitutionalism," *University of Chicago Legal Forum* 2014 (2014): 223–87.

20. Reuel E. Schiller, "Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970," *Vanderbilt Law Review* 53, no. 5 (2000): 1389–453; Reuel E. Schiller, "Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s," *Administrative Law Review* 53, no. 4 (2001): 1139–88.

21. David Vogel, "The Public-Interest Movement and the American Reform Tradition," *Political Science Quarterly* 95, no. 4 (Winter 1980–1981): 607–27; Paul Sabin, "Environmental Law and the End of the New Deal Order," *Law and History Review* 33, no. 4 (2015): 965–1003.

strategies. Civil rights activists in the 1960s and 1970s exhorted agencies and commissions to implement civil rights laws and develop antidiscrimination (or at least nondiscrimination) policies.[22] In some cases activists were able to use the formalism of the administrative process and the authority of reviewing courts to their advantage; in others, they found administrators willing to draw on the flexibility of administrative authority. In yet other cases, however, activists found themselves defeated by either the "quasi" aspects of administrative decision making, the "judicial" aspects, or both. As many learned, agencies were neither fish nor fowl, and each agency and commission provided a different arena for mobilization.[23]

Courts' role in the administrative process also shaped the kinds of arguments parties could make and the kinds of solutions agencies could offer. In looking to judicial processes for models, administrative officials often adopted the individualistic conceptions of rights and remedies embedded within them—what we might call administrative rights consciousness.[24] Like private-sector lawyers and federal judges, these officials (often lawyers themselves) were well versed in discussing whether parties—especially the large businesses subject to much economic regulation—had received the process that was due them. However, quasi-judicial procedures were less well suited for thinking broadly about the "public interest," or trying to solve industry-wide and nationwide public policy problems with multiple institutional and private actors. As environmental reformers began asking (and encouraging courts to ask) in the late 1960s, who *was* the public whose interests were supposedly being protected? What were their interests? And who was actually representing them?[25]

Finally, judicial deference—or the lack thereof—shaped the broader political context in which agencies (and politicians, industries, and private interest groups) operated. In the late nineteenth and early twentieth centuries, opponents were able to use agencies' non-judicial and quasi-judicial process, and courts' distrust

22. Lee, *The Workplace Constitution;* Skrentny, *The Minority Rights Revolution.*

23. Kay Mills, *Changing Channels: The Civil Rights Case That Transformed Television* (Jackson: University Press of Mississippi, 2004); Steven D. Classen, *Watching Jim Crow: The Struggles Over Mississippi TV, 1955–1969* (Durham, NC: Duke University Press, 2004); Brian Ward, *Radio and the Struggle for Civil Rights in the South* (Gainesville: University Press of Florida, 2004); Lee, *The Workplace Constitution*.

24. Here I'm drawing on Hendrik Hartog's description of constitutional rights consciousness. Hendrik Hartog, "The Constitution of Aspiration and 'The Rights That Belong to Us All,'" *Journal of American History* 74, no. 3 (1987): 1013–34.

25. Arthur F. McEvoy, "Environmental Law and the Collapse of New Deal Constitutionalism," *Akron Law Review* 46, no. 4 (2013): 881–908; Sabin, "Environmental Law and the End of the New Deal Order"; Meg Jacobs, "The Politics of Environmental Regulation: Business-Government Relations in the 1970s and Beyond," in *What's Good for Business: Business and American Politics since World War II*, eds. Kim Phillips-Fein and Julian E. Zelizer (New York: Oxford University Press, 2012), 212–32.

of that process, as both a political and legal weapon against these strangers. Regulation remained politically contested in the 1940s and 1950s (as members of Congress, White House officials, bureaucrats, and industry representatives continued to fight over New Deal policies and the agencies that administered them) but, by then, the courts had established the legal boundaries of this fight.[26] Political opponents were, however, increasingly able to complain about agencies' inefficiency—which in many cases came from the procedures that courts had demanded. In addition, such legalistic characteristics advantaged lawyers but kept the process opaque and insulated from the public. Starting in the 1950s and 1960s, they also gave rise to allegations of capture and corruption.[27]

While this essay so far has focused on the role of courts in shaping the way agencies operated (and often, as a result, the political environment in which the agencies found themselves), courts also played a crucial role in shaping the substance of the regulations themselves. As Hugh Davis Graham describes in the civil rights context, the so-called "iron triangles" of agencies, congressional committees, and interest groups that shaped policymaking became "iron quadrilaterals" when courts got involved.[28] And in a number of areas, courts in the 1960s and 1970s began demanding that agencies act more forcefully to protect the public interest, inverting the traditional division of responsibilities between courts and agencies in which the former served as a brake on the latter. Flipping on its head the idea that agencies should cloak themselves in judicial legitimacy, judges now (often after prodding by public interest lawyers) argued they knew better than agencies how to protect the public interest.[29] And as courts became more involved in administrative decision making, conservatives took the opportunity to ask judges to push *against* regulation.[30] In some cases, courts became the ones

26. Susan L. Brinson, *The Red Scare, Politics, and the Federal Communications Commission, 1941–1960* (Westport, CT: Praeger, 2004); Grisinger, *The Unwieldy American State*; Mariano-Florentino Cuéllar, "Administrative War," *George Washington Law Review* 82, no. 5 (2014): 1343–445.

27. Daniel Carpenter and David A. Moss, eds., *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (New York: Cambridge University Press, 2014).

28. Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960–1972* (New York: Oxford University Press, 1990); see also Skrentny, "Law and the American State," 222.

29. R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Washington, DC: Brookings Institution, 1983); Michael W. McCann, *Taking Reform Seriously: Perspectives on Public Interest Liberalism* (Ithaca, NY: Cornell University Press, 1986); Jacobs, "The Politics of Environmental Regulation"; McEvoy, "Environmental Law and the Collapse of New Deal Constitutionalism."

30. Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton, NJ: Princeton University Press, 2008); Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* (New York: Oxford University Press, 2015); Jefferson Decker, *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government* (New York: Oxford University Press, 2016).

committed to enforcing existing administrative policy determinations when they were challenged from within by new appointees with new political priorities.[31]

Where Congress placed authority in private litigants instead of agencies and commissions, courts also played a key role in the enforcement of certain policy goals.[32] The Civil Rights Act of 1964, for example, addressed the problem of employment discrimination through private litigation facilitated by an Equal Employment Opportunity Commission (EEOC). As Anthony Chen, David Engstrom, and others have explained, such decisions emerged from a series of congressional compromises that reflected some politicians' concern about a potentially too-powerful agency.[33] These decisions, however, have institutional and political consequences. Judges lack the purported expertise of administrators, and courts lack the policy authority of agencies. A litigation approach also means a loss of centralized planning capacity *ex ante* and of uniformity *ex post*—two of the reasons for creating federal agencies and commissions in the first place. It also places a large burden on individuals (and perhaps represents the triumph of neoliberalism within this liberal regime).

Congress's choice of one approach or another may well be a thoughtful decision about which skills are more important, but might also be influenced by political rather than institutional factors. As Sean Farhang has described, Congress's decision to embrace private litigation as a method of regulation came from partisan concerns about placing rulemaking and rule enforcement in the same hands.[34] In addition, using courts to achieve policy goals may obscure

31. Sabin, "Environmental Law and the End of the New Deal Order"; Alexander Gourse, "Restraining the Reagan Revolution: The Lawyers' War on Poverty and the Durable Liberal State, 1964–1989" (PhD diss., Northwestern University, 2015); Alison Lefkovitz, "Men in the House: Race, Welfare, and the Regulation of Men's Sexuality in the United States, 1961–1972," *Journal of the History of Sexuality* 20, no. 3 (2011): 594–614; Melnick, *Regulation and the Courts*.

32. Lynda G. Dodd, ed., *The Rights Revolution Revisited: Institutional Perspectives on the Private Enforcement of Civil Rights in the U.S.* (Cambridge: Cambridge University Press, 2018).

33. Nicholas Pedriana and Robin Stryker, "The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971," *American Journal of Sociology* 110, no. 3 (2004): 709–60; Nancy MacLean, *Freedom Is Not Enough: The Opening of the American Workplace* (Cambridge, MA: Harvard University Press, 2006); Anthony S. Chen, *The Fifth Freedom: Jobs, Politics, and Civil Rights in the United States, 1941–1972* (Princeton, NJ: Princeton University Press, 2009); Sean Farhang, "The Political Development of Job Discrimination Litigation, 1963–1976," *Studies in American Political Development* 23, no. 1 (2009): 23–60; David Freeman Engstrom, "The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972," *Stanford Law Review* 63, no. 5 (2011): 1071–143.

34. Sean Farhang, "Public Regulation and Private Lawsuits in the American Separation of Powers System," *American Journal of Political Science* 52, no. 4 (2008): 821–39; see also Sarah Staszak, "Realizing the Rights Revolution: Litigation and the American State," *Law & Social Inquiry* 38, no. 1 (2013): 222–45 (book review).

expanded regulatory authority—perhaps more politically palatable in an era hostile to big government and bureaucratic red tape. And as Sarah Staszak's research on efforts to limit access to the courts demonstrates, it also becomes easier to quietly deregulate under this model.[35] On the other hand, agencies can use courts to compensate for their own weaknesses. Quinn Mulroy's research describes how the EEOC and the Department of Housing and Urban Development's Office of Equal Opportunity designed incentives to convince private actors to sue and helped them succeed in the courts (the former more successfully).[36] Finally, in areas including prison reform and desegregation litigation, courts act like agencies themselves, making policy through court orders requiring the kind of long-term supervision and continuous oversight agencies specialized in (albeit with notably more limited authority).[37]

* * *

The discussion above demonstrates that the stories of judicial development and administrative development are inextricably linked. Telling the story of the administrative state from the perspective of courts draws our attention to the implicit and the explicit ways judges have shaped and influenced regulatory institutions and the policies they make. These stories require digging into the political and legal context of these contests and embracing specificity in narrative.

One approach for future research might borrow from political science to think through the role of courts in different areas of policymaking. Policy scholars find useful a model of the "policy cycle" in which policymaking proceeds in distinct phases of "agenda setting, policy formulation, policy adoption, implementation, evaluation, and termination."[38] Legal scholars might fruitfully examine the

35. Sarah Staszak, *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment* (New York: Oxford University Press, 2015).

36. Quinn Mulroy, "Approaches to Enforcing the Rights Revolution: Private Civil Rights Litigation and the American Bureaucracy," in *The Rights Revolution Revisited,* ed. Dodd.

37. Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89, no. 7 (1976): 1281–316; Owen M. Fiss, "Foreword: The Forms of Justice," *Harvard Law Review* 93, no. 1 (1979): 1–58; David Zaring, "National Rulemaking Through Trial Courts: The Big Case and Institutional Reform," *UCLA Law Review* 51, no. 4 (2004): 1015–78; Margo Schlanger, "Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders," *New York University Law Review* 81, no. 2 (2006): 550–630; Joshua M. Dunn, *Complex Justice: The Case of Missouri v. Jenkins* (Chapel Hill: University of North Carolina Press, 2008); Nikole Hannah-Jones, "Lack of Order: The Erosion of a Once-Great Force for Integration," *Pro Publica*, May 1, 2014, https://www.propublica.org/article/lack-of-order-the-erosion-of-a-once-great-force-for-integration.

38. Christopher M. Weible, Tanya Heikkila, Peter deLeon and Paul A. Sabatier, "Understanding and Influencing the Policy Process," *Policy Sciences* 45, no. 1 (2012): 3.

courts' role at each stage of this process, thus revealing things about both agency decision making and judicial influence.

Second, scholars should look further at the people doing the regulating. Useful work is being done that takes federal judges' role in the administrative state seriously, but I know I am not the only person hoping for a full biography of longtime D.C. Circuit Judge David L. Bazelon.[39] Biographies of judges with administrative experience—such as Judge Charles Fahy and Judge E. Barrett Prettyman—would also be welcome. Similarly, more studies are needed of agency officials like Sonia Pressman Fuentes and Newton Minow, and of the lawyers who challenged them; the biographies we have represent only a small fraction of the key figures in the American administrative state.[40]

Finally, while there has been some effort to write the histories of (relatively) famous administrative law cases, there are many more such stories remaining to be told.[41] Here scholars might usefully look to recent scholarship on the

39. See J. Skelly Wright, "A Colleague's Tribute to Judge David L. Bazelon, on the Twenty-Fifth Anniversary of His Appointment," *University of Pennsylvania Law Review* 123 (1974): 250–53. For studies of federal judges and federal courts that attend to administrative law, see Christopher P. Banks, *Judicial Politics in the D.C. Circuit Court* (Baltimore: Johns Hopkins University Press, 1999); Jeffrey Brandon Morris, *Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit* (Durham, NC: Carolina Academic Press, 2001); Daniel R. Ernst, "Dicey's Disciple on the D.C. Circuit: Judge Harold Stephens and Administrative Law Reform, 1933–1940," *Georgetown Law Journal* 90 (2002): 787–812; David M. Dorsen, *Henry Friendly: Greatest Judge of His Era* (Cambridge, MA: Belknap Press of Harvard University Press, 2012).

40. An incomplete listing of such biographical studies would include: Donald A. Ritchie, *James M. Landis: Dean of the Regulators* (Cambridge, MA: Harvard University Press, 1980); Peter H. Irons, *The New Deal Lawyers* (Princeton, NJ: Princeton University Press, 1982); Stanley I. Kutler, *The American Inquisition: Justice and Injustice in the Cold War* (New York: Hill and Wang, 1982); Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge, MA: Belknap Press of Harvard University Press, 1984); Daniel R. Ernst, "The Ideal and the Actual in the State: Willard Hurst at the Board of Economic Welfare," in *Total War and the Law: The American Home Front in World War II*, eds. Daniel R. Ernst and Victor Jew (Westport, CT: Praeger, 2002); Justin Martin, *Nader: Crusader, Spoiler, Icon* (Cambridge, MA: Perseus Publishing, 2002); Susan L. Brinson, *Personal and Public Interests: Frieda B. Hennock and the Federal Communications Commission* (Westport, CT: Praeger, 2002); Goluboff, *The Lost Promise of Civil Rights*; Karen M. Tani, "Portia's Deal," *Chicago-Kent Law Review* 87, no. 2 (2012): 549–70; Justin O'Brien, *The Triumph, Tragedy and Lost Legacy of James M. Landis: A Life on Fire* (Oxford, UK: Hart Publishing, 2014); Sabin, "Environmental Law and the End of the New Deal Order"; Marlene Trestman, *Fair Labor Lawyer: The Remarkable Life of New Deal Attorney and Supreme Court Advocate Bessie Margolin* (Baton Rouge: Louisiana State University Press, 2016); Daniel R. Ernst, "Mr. Try-It Goes to Washington: Law and Policy at the Agricultural Adjustment Administration," *Fordham Law Review* 87, no. 5 (2019): 1795–1816.

41. Peter L. Strauss, ed., *Administrative Law Stories* (New York: Foundation Press, 2006); Mills, *Changing Channels*; Classen, *Watching Jim Crow*; Ward, *Radio and the Struggle for Civil Rights in the South*; Lee, *The Workplace Constitution*.

civil rights movement that goes beyond major Supreme Court cases for a much broader understanding of conflict, rights consciousness, and local mobilization.[42] Such research—in which courts and agencies are key parts, but only parts, of the story—could offer rich stories of government institutions clashing, business interests making demands, and individual citizens and interest groups mobilizing for change. (As my own research on the Civil Aeronautics Board as a site for anti-apartheid protest demonstrates, there are many unexpected stories to be found.[43]) Many years ago, Hendrik Hartog urged constitutional historians to look beyond Supreme Court cases to "the small, everyday contests, arguments, negotiations, and understandings in which legal rights and constitutional assumptions have been constructed and exercised."[44] This is no less true in the administrative context, and I look forward to seeing where scholars go next.

42. Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (New York: Oxford University Press, 2011); Risa Goluboff, "Lawyers, Law, and the New Civil Rights History," *Harvard Law Review* 126, no. 8 (2013): 2312–35 (book review); Christopher W. Schmidt, "Legal History and the Problem of the Long Civil Rights Movement," *Law & Social Inquiry* 41, no. 4 (2016): 1081–107.

43. Joanna L. Grisinger, "'South Africa is the Mississippi of the World': Anti-Apartheid Activism Through Domestic Civil Rights Law," *Law and History Review* 38 (2020) (forthcoming).

44. Hartog, "The Constitution of Aspiration," 1033.

Part II
The Role of Lower-Court Histories

5

Ordained and Established

The Role of Lower-Court Histories

Jake Kobrick

In February 1882, Henry Clay Caldwell—a Civil War veteran whom Abraham Lincoln had appointed U.S. district judge for Arkansas in 1864 (and who in 1891 became the first judge of the U.S. Court of Appeals for the Eighth Circuit)—was at his home in Little Rock when he noticed an unknown white powder sitting on a shelf. Wishing to dispose of it, Judge Caldwell opened a window and was prepared to toss it into his yard before he realized that the substance might poison his chickens. Instead, he threw it into the fire. To his surprise, this action resulted in a minor explosion, knocking the judge backward and burning his hair, beard, and eyelashes. While in bed recuperating from his luckily minor injuries, the judge was visited by a local newspaper reporter. Their friendly chat was interrupted by the arrival of a U.S. commissioner, a district attorney, and a deputy U.S. marshal escorting a prisoner charged with counterfeiting and selling liquor without a license. From his bed, the judge asked the prisoner a few questions, set his bail at $1,000, and ordered him removed to Mississippi, where the alleged crimes had occurred, for trial. Judge Caldwell, unable to use his right hand, asked the commissioner to sign his name to the order, and the group then departed.[1]

These events, while not exceptional at the time, demonstrate a degree of informality that would be unthinkable in the federal courts of today, and hint at some of the ways the courts have changed over time. While library shelves bulge

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1. *Arkansas Democrat*, February 9, 1882, p. 4.

with work on the history of the Supreme Court of the United States, there are important stories about the nation's lower, or "inferior," federal courts, like Judge Caldwell's, that are still waiting to be told. Fortunately, possibilities abound for creative approaches to uncovering these stories and enriching our understanding of the federal judiciary.

The lower courts in particular are the sites of the law's most direct intervention with the affairs of society. The vast majority of cases filed in federal court are resolved at the trial court level. While Supreme Court precedent creates the framework within which cases are decided, trial judges must exercise substantial discretion involving the conduct of litigation and the application of legal rules. Perhaps most importantly, the trial courts are where the litigants themselves and their stories are most prominent. Histories with a greater focus on the lower federal courts can be useful in a wide variety of contexts. Legal histories on any subject—gender, race, sexuality, slavery, religion, business, labor, public health, poverty, free speech, or immigration, to name only some of the possibilities—can be written with a substantial emphasis on courts, the institutions responsible for interpreting and applying the law. The history of the lower federal courts therefore holds the promise to become an even more integral and essential component of legal historiography.

The nationalization of federal law, combined with an increasingly rationalized national judicial system, provides crucial context for lower-federal-court history. For nearly all of their first eighty-five years, the federal courts exercised only a portion of the potential jurisdiction outlined in Article III of the Constitution. In 1875, however, Congress enhanced the power and influence of the federal courts by endowing them with general federal-question jurisdiction—jurisdiction over all cases arising under the U.S. Constitution, federal law, and treaties—for the first time since the short-lived Judiciary Act of 1801. The 1875 act and other Reconstruction-era statutes also expanded the ability of parties to remove cases from state to federal courts. As the federal government grew larger throughout the twentieth century, federal law increased its reach to cover many issues that were formerly the exclusive province of state law. Federal statutes became the nation's most important source of law, and correspondingly, federal judges, who were charged with statutory interpretation, gained greater decisional authority in relation to juries. The Judiciary Act of 1925, or "Judges' Bill," gave the Supreme Court nearly total control over its docket by removing most of its remaining mandatory jurisdiction so that few cases could reach the Court unless the justices elected to grant a writ of certiorari. This legislation had the effect of giving a U.S. district court or a U.S. court of appeals the final word in the vast majority of federal cases.

While the growth and increased role of the federal courts help to highlight the importance of lower-court history, those trends are only part of the story. In 1999, historian Edward Purcell described the "Frankfurterian paradigm"—an influential mode of thinking about federal courts that arose from the 1928 publication of *The Business of the Supreme Court* by Felix Frankfurter and James Landis, then both Harvard Law School professors. Taking their cue from Frankfurter and Landis, historians writing about federal courts focused intensively for decades thereafter on the twin themes of the growth of federal court dockets and the transformation of federal courts from local tribunals to institutions dealing with questions of national importance. As Purcell pointed out, this approach had serious limitations. For one, it treated the lower courts merely as "intake points" for the Supreme Court, thereby minimizing their true significance. Moreover, the treatment of the federal courts as a "system" tended to obscure important differences between individual courts. While the themes of growth and transformation have persisted (albeit with some revisions), historians writing about lower courts began in the late twentieth century to expand their focus. These more recent histories have covered, in Purcell's words, "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."[2]

Most previous works on the federal courts have been straightforward institutional histories of a U.S. district court, a U.S. court of appeals, or the federal courts within a particular state or judicial circuit.[3] These books have been greatly illuminating with respect to how federal courts have functioned on an individual level, exploring topics such as the political considerations that affected the judicial appointment process in a particular jurisdiction; the character, judicial philosophy, and influence of the court's judges; and noteworthy cases, or categories of cases, that came before the court. Additionally, court histories have revealed how individual courts helped to shape, and were shaped by, events of national importance such as the Civil War and Reconstruction, the New Deal, and the post-World War II civil rights movement. Histories of individual courts have also grappled with explaining the interplay between centralized control and

2. Edward A. Purcell, Jr., "Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts," *Law & Social Inquiry* 24, no. 3 (Summer 1999): 687–88, 707.

3. See, e.g., Tony Allan Freyer and Timothy Dixon, *Democracy and Judicial Independence: A History of the Federal Courts of Alabama, 1820–1994* (Brooklyn, NY: Carlson Publishing, 1995); Jeffrey Brandon Morris, *Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit* (Durham, NC: Carolina Academic Press, 2001); James M. Denham, *Fifty Years of Justice: A History of the U.S. District Court for the Middle District of Florida* (Gainesville: University Press of Florida, 2015).

local influence that, while changing over time, has always been characteristic of the federal courts.

Court histories have found ways to demonstrate the unique role particular courts or sets of courts have played in American history. One such method has been to focus on the specific types of cases making up a court's docket at certain points in time. Examples include the large number of admiralty cases in New York[4] and land cases in Kentucky[5] in the early years of the Republic, the Chinese immigration cases that flooded California's federal courts in the late nineteenth century,[6] and the many racial segregation and other civil rights cases in Southern federal district courts which made their way to the U.S. Court of Appeals for the Fifth Circuit in the decades after World War II.[7] Taken together, accounts such as these paint a portrait of lower federal courts that have made consistent contributions to the development of federal law and the resolution of important national issues.

System-wide studies of how the courts have performed any one of their primary functions can show how the exercise of that function has helped to shape American society, revealing that the actions of lower federal courts in deciding individual cases have often had far-reaching implications. A system-wide study might also rely on quantitative data to examine changes over time in the methods by which lawsuits filed in federal courts have been resolved.[8] The identification of historical patterns across the judiciary that have influenced whether a case goes to trial, is dismissed on the pleadings, is settled by the parties, or is diverted to alternative dispute resolution would shed light on how the federal courts' role in the resolution of disputes has changed over time.[9] Another potential system-wide approach lies in the fact that federal district judges, particularly since *Brown v. Board of Education*, have been required to fashion extensive remedies in order

4. Matthew Taylor Raffety, *The Republic Afloat: Law, Honor, and Citizenship in Maritime America* (Chicago: University of Chicago Press, 2013).

5. Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky, 1789–1816* (Princeton, NJ: Princeton University Press, 1978).

6. Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851–1891* (Lincoln: University of Nebraska Press, 1991).

7. Deborah J. Barrow and Thomas G. Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform* (New Haven, CT: Yale University Press, 1988).

8. Christopher Beauchamp's study of nineteenth-century patent litigation in the Southern District of New York and the Eastern District of Pennsylvania would be a useful model. Beauchamp, "The First Patent Litigation Explosion," *Yale Law Journal* 125, no. 4 (February 2016): 848–944.

9. Scholars might apply to a broader time period an approach similar to Edward J. Balleisen's extensive use of archival court records in analyzing the Bankruptcy Act of 1841. Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (Chapel Hill: University of North Carolina Press, 2001).

to implement Supreme Court decisions. An analysis of the varying approaches to remedial action judges have taken in areas such as school segregation, prison and mental health reform, and police misconduct would reveal key differences between federal courts.

A system-wide approach to federal judicial history could also take a form less functional and more doctrinal, as evidenced by *Forums of Order*, Tony Freyer's portrayal of the federal judiciary's role in the growth of the American economy in the nineteenth century.[10] Freyer demonstrates how the lower federal courts helped to create a hospitable climate for national business interests, in large part through the certainty provided by their decisions in commercial disputes. This was particularly true after the Supreme Court's 1842 decision in *Swift v. Tyson*, which for almost a century allowed federal courts to choose what rules of decision to apply, independent of state law, in cases in which jurisdiction was based on diversity of citizenship. Freyer's book can serve as a model for further system-wide studies of how the lower federal courts decided particular types of cases at different points in history, especially in areas of law where some doctrinal flexibility existed.

A different approach to lower-court history would be to pose broad questions that can be answered by looking at what has happened in individual federal trial courts, while moving the courts themselves away from the center of the story. This would require integrating court history with social, cultural, and economic history more extensively than has typically been done in the past. *Laws Harsh as Tigers*, Lucy Salyer's 1995 book on U.S. immigration policy between 1891 and 1924, provides a useful model for such an approach.[11] The book is a broad social and legal history of immigration that focuses much of its attention on the two federal judicial districts where most Asian and European immigrants entered the country—the Northern District of California and the Southern District of New York, respectively. While immigrants and immigration policy occupy the center of the narrative, the courts are crucial actors; from 1891 to 1905 they served as the forums in which immigrants challenged administrative decisions to exclude or expel them from the United States. Salyer delves into both the beliefs and actions of the federal judges involved, but also examines the institutional norms that constrained their decision making. Ironically, moving the court slightly further

10. Tony Allan Freyer, *Forums of Order: The Federal Courts and Business in American History* (Greenwich, CT: JAI Press, 1979).

11. Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995). For a good example of a legal history with more of a cultural bent than Salyer's, see Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009).

from the center of the narrative can provide a richer picture of how the court, and the judiciary as a whole, helped to shape history. More work of this nature—demonstrating how trial courts have resolved issues of national importance through the use of judicial discretion—would surely be possible.

Much has been written about the interplay between federal and state courts throughout American history. From debates over the Constitution—during which Antifederalists opposed the creation of any lower federal courts at all for fear that they would swallow the courts of the states—to modern-day disagreements about the continuing need for diversity jurisdiction, the relationship between the federal and state courts has helped to establish the parameters of federalism. Historical studies of the relationships between state and federal courts in particular states or judicial districts could shed new light on how federalism was experienced on a local level and how its precise contours may have differed from place to place. Some potential avenues of inquiry are the nature and frequency of contacts between federal and state court judges; the extent to which attorneys practiced in both types of courts; the relationship between the bars of each court; and the public perception of each court, particularly as it related to plaintiffs' choice of forum when diversity of citizenship existed. A localized study of issues that generated public controversy and brought federal and state courts into conflict, such as the antebellum federal courts' use of habeas corpus to free U.S. marshals who were arrested by state authorities while attempting to capture fugitive slaves, could provide an especially rich portrait of the sometimes-fraught relationship between the nation's judicial systems.[12]

Along similar lines, community-based studies are a tantalizing possibility for lower-federal-court history. As Alison LaCroix has pointed out, Federalists such as John Marshall believed "that the inferior federal courts were and ought to be the principal physical embodiment of the national government, reaching into the otherwise highly localized space of the cities, towns, and countryside of the United States."[13] Likewise, according Mary Tachau, it was in the early republic period "doubtful whether any other branch of the federal government acted so directly upon so many people in Kentucky" as did the federal court.[14] With this in mind, examining what individual courts meant to the communities in which they were situated—exploring the court's effects on the community as well as how the court and its judges were perceived by lawyers, litigants, and the general public—can help in understanding those courts' significance to the nation as a whole.

12. See Justin J. Wert, *Habeas Corpus in America: The Politics of Individual Rights* (Lawrence: University Press of Kansas, 2011), 45–70.

13. Alison LaCroix, "Federalists, Federalism, and Federal Jurisdiction," *Law and History Review* 30, no. 1 (February 2012): 210.

14. Tachau, *Federal Courts in the Early Republic: Kentucky*, at 12.

A good model for a community-based approach can be found in *City of Courts*, Michael Willrich's study of municipal courts in Progressive Era Chicago. Willrich examines the city's courts as newly created instruments of social governance whose criminal justice policies played a significant role in shaping society. His book, therefore, contains a complex intertwining of legal and social history.[15] A similar study of a federal court—which, unlike Willrich's municipal courts, is not an entirely local institution—would have the added dimension of the tension between localism and centralization. Insight into interactions between the court and the public would be helpful in exploring how attitudes toward the federal courts changed over time and perhaps differed between communities. In a larger sense, such studies can help us to better understand the changing nature over time of federal authority and its presence on a local level. Tachau's 1978 history of Kentucky's federal courts in the early republic—which has remained a solid blueprint for a district court study—addresses this relationship, primarily with respect to the federal government's attempts to enforce revenue laws among a population that was deeply hostile to them.[16] Christian Fritz's study of the U.S. District Court for the Northern District of California during the latter half of the nineteenth century also gestures in this direction, using evidence from newspapers and correspondence to emphasize the importance of the court to the San Francisco business community and that community's continuous support for Judge Ogden Hoffman.[17] Other federal court histories touch on the subject as well, but there is an opportunity for more research along these lines.[18]

Related to community-based studies, and involving a greater integration of judicial and social history, would be an approach that focuses more intently on litigants and litigation in the federal courts. Historians of social movements in the United States have addressed such movements' use of litigation as one of several strategies for achieving their aims. This is perhaps most apparent in the historical literature on the African American civil rights movement of the

15. Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (New York: Cambridge University Press, 2003).

16. Tachau, *Federal Courts in the Early Republic: Kentucky*.

17. Fritz, *Federal Justice in California*, at 73–76, 83–84, 198–99.

18. Other studies that have attempted to root a federal government entity or policy in a particular community would be useful models for federal court histories in this vein. See, e.g., Matthew L. Downs, *Transforming the South: Federal Development in the Tennessee Valley, 1915–1960* (Baton Rouge: Louisiana State University Press, 2014) (exploring interaction between communities in northern Alabama and the Tennessee Valley Authority); Karen M. Tani, *States of Dependency: Welfare, Rights, and American Governance, 1935–1972* (New York: Cambridge University Press, 2016) (documenting resistance to federal welfare policy in Newburgh, New York); David M.P. Freund, *Colored Property: State Policy and White Racial Politics in Suburban America* (Chicago: University of Chicago Press, 2007) (examining impact of federal housing policy on residential segregation in metropolitan Detroit).

twentieth century. Mark Tushnet's *The NAACP's Legal Strategy against Segregated Education, 1925–1950*, for example, is an excellent study of litigation as a social process.[19] The relationship between social movements and the courts is a complex and interesting topic.[20] Studies like Tushnet's keep their focus almost entirely on the organization seeking social change—its internal debates and deliberations, the development of its strategy, the mobilization of its resources, and its response to the external constraints placed upon it. It would be possible, however, to shift the emphasis a bit to include the role individual courts have played in helping to bring about, or hinder, social change in their communities through litigation. Such an approach would entail an inquiry into: (1) institutional norms and practices that made litigation a more or less effective strategy for those seeking change, (2) other factors that may have made courts more or less sympathetic to litigants' goals and tactics, and (3) the extent to which the degree of hospitality of the judicial forum varied over time between movements and particular courts.

Two historians have recently taken a litigant-centered approach to the history of state courts, providing potential models for lower-federal-court history. Kimberly Welch's 2017 book, *Black Litigants in the Antebellum South*, relied on previously unused local court records to examine how free and enslaved African Americans used the courts to sue both whites and other African Americans, revealing how victims of racial oppression could nevertheless employ the legal system to their benefit. In addition to court records, Welch also used correspondence, local histories, church records, and other sources.[21] Melissa

19. Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925–1950* (Chapel Hill: University of North Carolina Press, 1987). There are many other studies of the role of litigation in achieving social change, e.g., William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA: Harvard University Press, 1989); Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge, MA: Harvard University Press, 2010); Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (Philadelphia: University of Pennsylvania Press, 1984); Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973* (New Haven, CT: Yale University Press, 1993); Gillian Thomas, *Because of Sex: One Law, Ten Cases, and Fifty Years That Changed American Women's Lives at Work* (New York: St. Martin's Press, 2016).

20. Ronald Formisano's study of the Boston busing crisis of the 1970s is in some ways a mirror image of Tushnet's book. In that instance, a social movement sought not to use the courts to achieve change, but instead to resist federal court orders regarding school desegregation. Formisano, *Boston Against Busing: Race, Class, and Ethnicity in the 1960s and 1970s* (Chapel Hill: University of North Carolina Press, 1991).

21. Kimberly M. Welch, *Black Litigants in the Antebellum South* (Chapel Hill: University of North Carolina Press, 2018). In a similar vein, there have been several studies of freedom suits in the state courts, e.g., Kelly M. Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (Athens: University of Georgia Press, 2017); Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence, 1787–1857* (New York: Cambridge University Press, 2016).

Milewski took a similar approach in her recent book, *Litigating Across the Color Line*, in which she examined civil suits brought by African Americans against white defendants that reached appellate courts in the Southern states between 1865 and 1950. By examining the types of cases brought and their outcomes, Milewski was able to draw broader conclusions about the changing nature of African Americans' legal rights over time and the varying ways in which they were able to use the courts to protect those rights.[22]

While the federal judiciary is an independent branch of the government, it is not, and has never been, an institution apart from American politics. Justin Crowe has argued persuasively that judicial power has been more the product of deliberate construction by elected officials trying to achieve certain political or policy goals than it has been the result of judicial decisions such as *Marbury v. Madison*.[23] Since establishing the first federal courts in 1789, Congress has continuously altered and expanded the structure of the judiciary by, among other things, creating and abolishing courts, changing the geographical organization of judicial circuits, authorizing new judgeships, and setting the parameters of federal-court jurisdiction. The establishment of circuit riding by the justices of the Supreme Court, the frequent reorganization of the circuits during the nineteenth century, the provision of separate circuit judgeships in 1869, the establishment of general federal-question jurisdiction in 1875, the creation of the circuit courts of appeals in 1891, and the abolition of the circuit courts in 1911 are only some of the most important congressional actions regarding the federal judiciary.[24] While these changes were made on a system-wide basis, an extension of Crowe's approach could examine both how events at the state or local level may have motivated politicians to seek changes to the judiciary and how structural changes affected individual courts, judges, and communities. David Lynch's recent book on circuit riding in the early republic proceeds in this vein, examining how the

22. Melissa Milewski, *Litigating Across the Color Line: Civil Cases Between Black and White Southerners from the End of Slavery to Civil Rights* (New York: Oxford University Press, 2018).

23. Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (Princeton, NJ: Princeton University Press, 2012). Similarly, Barry Friedman has asserted that public opinion has helped to shape even the decisions of the Supreme Court, through challenges to the Court's authority such as Franklin D. Roosevelt's 1937 "court-packing" proposal. Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009).

24. Political considerations have, of course, played a significant role in the federal judicial selection process as well. A classic work on the subject is Kermit L. Hall, *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System, 1829–1861* (Lincoln: University of Nebraska Press, 1979). As is mentioned above, individual court histories have also grappled with the issue. See, e.g., Freyer and Dixon, *Democracy and Judicial Independence*.

structure of the federal courts influenced the development of American law on a local and national level.[25]

The task of writing effective and engaging histories of lower federal courts presents both opportunities and challenges. There are many potential approaches to the subject; those mentioned here constitute only a few examples of what might be pursued. Whatever approaches are taken, lower-court histories have great potential to enlighten us. A history of one or more particular courts can serve as a piece of a much larger puzzle without necessarily having major national implications or being representative of the history of the federal judiciary as a whole. A history of immigration law, such as Salyer's, that includes the role of an individual court as one component of a larger social and legal history may teach us as much about the federal judiciary as an institutional history of that court. Studies that attempt to identify broad trends across many federal courts, acting as parts of a coherent system, may provide useful context for histories relating events from a single federal courthouse. And looking at what federal courts meant to the communities in which they were situated, and how that meaning changed over time, could be as promising as examining what happened in the nation's courtrooms. Bringing to light the untold stories of the lower federal courts offers the prospect of valuable scholarship and a fresh perspective on American legal and judicial history.

25. David Lynch, *The Role of Circuit Courts in the Formation of United States Law in the Early Republic: Following Supreme Court Justices Washington, Livingston, Story, and Thompson* (Oxford, UK: Hart Publishing, 2018).

6

All Rise

The Prospects and Challenges of Lower Federal Judicial Biography

Charles L. Zelden

In 1995, legal-constitutional historian John Phillip Reid noted the sad lack of biographies of lower-court judges. Though much had been written about Supreme Court justices, Reid grumbled, little was known about lower state and federal judges who heard the vast majority of cases. History demanded that we come to know these judges and their work; until we did, Reid contended, we would never truly understand the workings and impact of the American judicial system. Sadly, Reid concluded, this shift was unlikely to occur. Instead, the most likely outcome would be "that the next judicial biography will be of Oliver Wendell Holmes. And the one after that. Chances are, even the next one after that."[1]

In the twenty-plus years since he wrote this, Reid's call for a more balanced approach to lower-judicial biography has largely been ignored. Biographies of Supreme Court justices still dominate the literature. Since 2012 there have been five separate biographies of Justice Thurgood Marshall.[2] Justice Louis Brandeis

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1. John Phillip Reid, "Beneath the Titans," *New York University Law Review* 70, no. 3 (1995): 653–76.

2. Larry Gibson, *Young Thurgood: The Making of a Supreme Court Justice* (New York: Prometheus Books, 2012); Gilbert King, *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America* (New York: Harper, 2012); Wil Haygood, *Showdown: Thurgood Marshall and the Supreme Court Nomination That Changed America* (New York: Knopf, 2015); Glenn L. Starks and F. Erik Brooks, *Thurgood Marshall: A Biography* (Santa Barbara, CA: Greenwood Press, 2012); Charles L. Zelden, *Thurgood Marshall: Race, Rights and the Struggle for a More Perfect Union* (New York: Routledge, 2013).

has had four major biographies published in the past ten years.[3] Antonin Scalia has been the focus of three during that same period.[4] The list includes almost every modern justice and many earlier justices.

There are good reasons why biographies of Supreme Court justices dominate the field. As the court of last resort for both the federal and state court systems (when state cases raise federal questions), the Supreme Court defines the meaning, scope, and application of law in the United States. Supreme Court rulings bring order to the law and set legal and constitutional policy for the nation. These factors make the work of the Supreme Court critical to our understanding of the evolution of American law and policy—and render understanding the work and motivations of Supreme Court justices essential.

Besides, it is simply easier to write biographies of Supreme Court justices as opposed to studies of lower-federal-court judges. (This essay will not discuss biographies of state court judges, though the reader can deduce that the problems cited here for lower-federal-court judicial biography afflict state-court judicial biography as well.) In most instances, the justice's papers are fully extant and collected in a single archive—often in the same archive as that housing the papers of the justice's fellow jurists. This convenient arrangement simplifies research. The content of justices' papers is also normally richer than that found for lower-court judges. Unlike lower-court judges, who often fail to think of their work as "historically important," Supreme Court justices generally organize and retain their papers with an eye toward history.[5]

Supreme Court justices are also much more likely to write dissents, concurrences, and memoranda outlining their legal and constitutional logic. This tendency allows the biographer to construct a jurisprudential model of the target justice's thoughts and motivations, juxtaposing them with those of their

3. Jeffrey Rosen, *Louis D. Brandeis: American Prophet* (New Haven, CT: Yale University Press, 2016); Melvin Urofsky, *Louis D. Brandeis: A Life* (New York: Pantheon, 2009); Lewis J. Paper, *Brandeis: An Intimate Biography of Supreme Court Justice Louis D. Brandeis* (New York: Open Road Media, 2014); Gerald Berk, *Louis D. Brandeis and the Making of Regulated Competition, 1900–1932* (Cambridge: Cambridge University Press, 2009).

4. Ralph A. Rossum, *Antonin Scalia's Jurisprudence: Text and Tradition* (Lawrence: University Press of Kansas, 2006); Bruce Allen Murphy, *Scalia: A Court of One* (New York: Simon & Schuster, 2014); Joan Biskupic, *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia* (New York: Sarah Crichton Books, 2009).

5. This can and does have a downside, however. Knowing that history will examine their papers in great detail, some justices selectively purge their papers. At the extreme there is the case of Justice Hugo Black, who "told his son, Hugo Jr., that when the Justice retired or died, portions of his Court papers should be burned, including notes from the Justices' conferences and some exchanges of memos." Stephen Wermiel, "Using the Papers of U.S. Supreme Court Justices: A Reflection," *New York University Law Review* 57, no. 3 (2012–2013): 501.

colleagues. The result is not only a richer understanding of the target justice's motivations but a much simpler job of identifying both the person behind the robe and how that person fits into the Court (and thus into the larger stream of American jurisprudence).

The presence of other biographies of Supreme Court justices also simplifies the biographer's craft. Even when no previous biographies of the target justice exist, the availability of biographical accounts of peer justices creates an established institutional and personal context in which to set one's own biographical efforts. When other biographies do exist, they simplify the task of establishing chronology, identifying sources, and outlining narrative arcs. So too do topically oriented institutional histories of the Supreme Court (which are legion). The result is that the biographer's difficult job is made less daunting.

On more practical grounds, Supreme Court biographies are also easier to publish. The justices are known quantities, and the importance of their lives and work is implicitly (and properly) accepted by publishers, editors, and the general public. Much as with the biographies of the founders, the reading public has a reliable fascination with the lives and actions of Supreme Court justices. This interest translates into sales, which translate into further book contracts.

None of this is the case with lower-federal-court judges. These judges are generally not well known, the importance of their work is not self-evident, their papers are often scattered or fragmentary or thin, and the wider context in which they operate is not well established. A lower-federal-court biographer needs not only to tell the story of the judge's life, building it up mostly from primary sources, but also to recreate the institutional context in which the judge worked and lived—all while justifying the very need for said biography. Done right, lower-federal-court biographies are as much histories of an understudied and often overlooked institution—the lower federal courts—as they are studies of individuals. This is a lot to ask of a biographer.

However, the payoff is worth the effort. Lower-court federal judges bring to life interactions between abstract ideas of law and legal theory, on the one hand, and the human, on-the-ground factual/empirical dimension of the instant case, on the other hand. They bring into sharp focus the difference between law on the books and law as applied. Here is where law interacts with people on a personal, concrete level, and through biography we can begin to understand the motivations and causations behind these interactions.

Lower-federal-court biography emphasizes the human element in judicial history. That the subject of the biography is a lower-court federal judge requires the biographer both to understand and to present for the reader the institutional

context within which the judge as biographical subject does his or her work, and to stress how the person behind the robe shapes this institutional context. For a federal district judge, the role is a lonely one, as district judges usually decide cases on their own, only rarely serving on a panel. For a federal circuit judge, the role is still lonely, but complicated by the need to interact with colleagues, whether on a three-judge appellate panel or in an en banc hearing, requiring the participation of all the members of the court. Lonely, however, does not mean unimportant. But recognizing the loneliness of the judge's task does force the biographer to understand and to portray the personal dimension of the judge's work. The need to comprehend and to portray the personal *and* institutional settings of lower federal courts is a challenging one, especially given that so few scholars have tried to write judicial biographies on either the district or the circuit level. Without such efforts, however, our knowledge of federal justice is incomplete.

Such biographies also help us to understand better the mix of personal and professional forces that shapes the actions of the judge. Although the old saw that judicial action is shaped more by what the judge had for breakfast than by formal legal rules is a gross oversimplification of a complex, internalized process of judicial reasoning and action, the personal worldview of a judge does shape that judge's responses both to judicial rules and norms and to the specific factual context of individual cases. Context matters. Different judges facing similar cases can and do come to different legal conclusions. By understanding better the person behind the robe (as is often the goal in Supreme Court biography and should be as well in lower-court biography), we are better able not only to explain this phenomenon but also to integrate such understandings into writing the institutional history of courts.

Finally, lower federal courts matter. The vast majority of federal cases are heard at the district court level. For those cases that are appealed (around 12% of district court rulings, as of 2014), the courts of appeals are almost always the final stop. The Supreme Court only hears a relative handful of federal cases (at most eighty to one hundred) in a single year. In fact, over time the number of federal appeals decided by the Supreme Court has been shrinking, magnifying the importance of circuit court rulings. As Reid implied in 1995, until we better understand the workings of the lower federal courts—both institutionally and doctrinally—we will never truly understand the workings and impacts of the federal judicial system. Lower-federal-court biography, with its focus both on the judges who make the decisions and the institutions within which they operate, is well suited to filling this need.

Though the situation has improved since Reid wrote his 1995 essay, we still know far too little about what the lower federal courts do—and why they do it. Not that there is a lack of secondary source material on lower-federal-court histories. Most of the thirteen courts of appeals, for instance, have published institutional histories. The quality of this work, however, varies widely. The majority of the histories were written under the aegis of the Bicentennial Committee of the United States Judicial Conference from the late 1970s through the early 1990s.[6] Some are edited works with chapters of varying quality by local lawyers and judges from the court. Even monographs written by professional historians, however, tend to cover the courts' histories in a sporadic manner. Stephen Presser's very good history of the Third Circuit, for instance, consists of article-like chapters on select periods of the circuit's history (trial and appellate) with little effort to tie these topics together.[7] Jeffrey B. Morris's history of the Second Circuit and Harvey Couch's study of the Fifth Circuit Court of Appeals offer a more holistic approach to those courts' history. However, the wide period that each book covers combined with their relatively short lengths (under 200 pages) limit the depth of these works.[8] More complete in terms of both topics covered and the depth of analysis are Morris's 2007 history of the Eighth Circuit Court of Appeals and

6. George Dargo, *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, 1993); Jeffrey Brandon Morris, *Federal Justice in the Second Circuit: A History of the United States Courts in New York, Connecticut, and Vermont, 1787–1987* (New York: Second Circuit Historical Committee, 1987); Stephen B. Presser, *Studies in the History of the United States Courts of the Third Circuit, 1790–1980: A Bicentennial Project* (Washington, DC: Government Printing Office, 1982); Harvey C. Couch, *A History of the Fifth Circuit, 1891–1981* (Washington, DC: Bicentennial Commission of the U.S. Judicial Conference, 1984); Harry Phillips and Samuel S. Wilson, *History of the Sixth Circuit: A Bicentennial Project* (Washington, DC: Bicentennial Commission of the U.S. Judicial Conference, 1977); Rayman L. Solomon, *History of the Seventh Circuit, 1891–1941* (Washington, DC: Bicentennial Committee of the U.S. Judicial Conference, 1981); Theodore J. Fetter, *A History of the United States Court of Appeals for the Eighth Circuit* (Washington, DC: Government Printing Office, 1977); James K. Logan, ed., *The Federal Courts of the Tenth Circuit: A History* (Denver: United States Court of Appeals for the Tenth Circuit, 1992); *History of the United States Court of Appeals for the District of Columbia Circuit in the Country's Bicentennial Year* (Washington, DC: Government Printing Office, 1977); Jeffrey Brandon Morris, *Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit* (Durham, NC: Carolina Academic Press, 2001); Marion T. Bennett, *The United States Court of Appeals for the Federal Circuit: A History, 1982–1990* (Washington, DC: U.S. Judicial Conference Committee on the Bicentennial of the Constitution of the United States, 1991).

7. Presser, *United States Courts of the Third Circuit*.

8. Morris, *Federal Justice in the Second Circuit*; Couch, *A History of the Fifth Circuit*.

David Frederick's *Rugged Justice*, covering the first fifty years of the Ninth Circuit Court of Appeals; however, these books are the exception, not the rule.[9]

District court histories follow the same pattern. Approximately a quarter of districts either have a book-length history or are part of a combined history of an individual state's district courts. As with circuit court histories, many district court studies are self-published by the court or issued in collaboration with a local or state historical society; others are published with major academic presses. Some histories are edited works with multiple authors, many of them judges or lawyers who practice before those courts; others are single-author monographs (many adapted from dissertations) or journalistic exposés aimed at entertaining and informing the general public. All provide useful information about the courts' past, but only a few provide the depth of analysis that these courts deserve—exploring "average" cases and caseloads as opposed to simply recounting the lurid and landmark cases that came before these courts—the kind of analysis that we need to truly understand the everyday workings of lower-court history.[10]

Still, whatever the format or quality, these works are useful to the biographer of lower-federal-court judges. Most contain elements of biography. Given the importance of judges in a court's operation, it is difficult to tell a court's story without first introducing its judges. This is especially the case for single-judge courts where the judge is the court and the court is the judge. That said, in most cases the information provided is largely superficial (backgrounds, appointments, and rulings from select "major" cases); still, even biographical summaries provide a starting place and context for writing judicial biography.

9. Jeffrey Brandon Morris, *Establishing Justice in Middle America: A History of the United States Court of Appeals for the Eighth Circuit* (Minneapolis: University of Minnesota Press, 2007); David C. Frederick, *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891–1941* (Berkeley: University of California Press, 1994).

10. For books that do provide this level of detail and coverage, see Morris, *Federal Justice in the Second Circuit*; Morris, *Calmly to Poise the Scales of Justice*; Morris, *Establishing Justice in Middle America*; Frederick, *The Ninth Circuit Court of Appeals*; Presser, *United States Courts of the Third Circuit*; Charles L. Zelden, *Justice Lies in the District: The U.S. District Court, Southern District of Texas, 1902–1960* (College Station: Texas A&M University Press, 1993); Steven Harmon Wilson, *The Rise of Judicial Management in the U.S. District Court, Southern District of Texas, 1955–2000* (Athens: University of Georgia Press, 2002); Kermit Hall and Eric Rise, *From Local Courts to National Tribunals: The Federal District Courts of Florida, 1821–1990* (Brooklyn, NY: Carlson Publishing, 1991); Tony Freyer and Tim Dixon, *Democracy and Judicial Independence: A History of the Federal Courts of Alabama, 1820–1994* (Brooklyn, NY: Carlson Publishing, 1995); Roberta Sue Alexander, *A Place of Recourse: A History of the U.S. District Court for the Southern District of Ohio, 1803–2003* (Athens: Ohio University Press, 2005); Marvin Schick, *Learned Hand's Court* (Baltimore: Johns Hopkins University Press, 1970); James M. Denham, *Fifty Years of Justice: A History of the U.S. District Court for the Middle District of Florida* (Gainesville: University Press of Florida, 2015).

But how to take lower-federal-court biography beyond the vignette stage to full-blown biographical examinations of federal judges—works that do more than just summarize a life, uncritically sing a judge's praises, or merely describe a select number of a judge's rulings from the bench? One possibility lies in collective biography. Such projects undertake a detailed examination of a select number of judges linked by time, place, or events. Consider, for example, Timothy S. Huebner's *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790–1890*. Though his topic was state rather than federal judges, Huebner's book offers a useful model for how biographical chapters on different judges can be combined to draw out a wider narrative about the judges and their courts.[11] Huebner's examination of the lives of six Southern judges opens a window on the Southern legal community's struggle with issues of race and place. The result is a thoughtful exposition of the roles of judges in shaping history, and those of history in shaping the lives and works of judges.[12]

Federal judicial biographies following this model include Brent J. Aucoin's *A Rift in the Clouds: Race and the Southern Federal Judiciary, 1900–1910*, which focuses on a trio of Southern federal district judges at the turn of the 20th Century—Jacob Treiber of Arkansas, Emory Speer of Georgia, and Thomas Goode Jones of Alabama—who stood defiant in the face of the Supreme Court's constitutional acceptance of Jim Crow segregation.[13] Marvin Schick's *Learned Hand's Court* combines collective biographies of the six judges who made up the Second Circuit Court of Appeals under Hand's leadership from 1941 to 1951 with institutional analysis of the Court's work and examination of structural development within the judiciary to explore the story of the highly influential Second Circuit.[14] Jack Bass's *Unlikely Heroes* tells the collective story of the four Fifth Circuit judges—John R. Brown, Richard Rives, John Minor Wisdom, and Elbert P. Tuttle—who took the lead in forcing compliance with the Supreme Court's desegregation rulings and thus transformed the Fifth Circuit from "an institution of law" into "an agent for change."[15]

The strength of this approach to doing collective biography lies in the telling of a clean narrative on the use of judicial power by similarly situated judges. Blending biographical data with historical events and doctrinal rulings, these

11. Timothy S. Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790–1890* (Athens: University of Georgia Press, 1999).

12. Ibid.

13. Brent J. Aucoin, *A Rift in the Clouds: Race and the Southern Federal Judiciary, 1900–1910* (Fayetteville: University of Arkansas Press, 2007).

14. Schick, *Learned Hand's Court*.

15. Jack Bass, *Unlikely Heroes* (Tuscaloosa: University of Alabama Press, 1981), 16.

books make clear the connections between persons and outcomes. Consider Jack Bass's book. In building his history of civil rights litigation in the Fifth Circuit around the work and motivations of four judges, Bass makes clear the contingent nature of the evolution of civil rights litigation in the United States in the 1950s and 1960s. Had different judges been in place, the outcomes of civil rights litigation might have, and most likely would have, been different. Even if the final outcome at a meta level would have remained the same, the process by which we achieved these ends would have been different.[16]

Unfortunately, the weakness of this approach is inextricably linked to its strengths: the narrowness of focus as to time and topic inevitably limits the scope of these works. Yes, we see the judges in action. However, we don't get the depth of coverage of the person behind the bench *over time* and *across space*; the resulting narrative is therefore often incomplete in explaining in full the why and how behind the judge's actions. Using Bass's book as our example once again, we learn much about how these four judges shaped civil rights litigation through the 1960s, but what of the other important topics that came before their court during this period? And how did the judges' views on matters of race and law change over time? Did their views on matters of race change in the 1970s and 1980s when the issues within such litigation changed? We don't know, because these topics aren't the focus of Bass' book; consequently, our knowledge about these four judges and the court they served in is incomplete.[17]

William Domnarski's *Federal Judges Revealed* provides a different model for undertaking collective biography. Based on one hundred oral history interviews, Domnarski's book discusses the various stages in a lower-federal-court judge's career—from life before the judicial appointment, to the appointment process, and then to life as a federal judge. Mixing and matching different judicial experiences to tell a collective story of life as a federal judge, Domnarski can show both the breadth of backgrounds and experiences in the lower federal judiciary and the many commonalities that the judges share. In particular, by using the judge's own words and stories to construct his narrative, Domnarski emphasizes in detail the person beneath the judicial robes.[18]

J.W. Peltason's *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation* also uses the lives and actions of multiple judges to tell a biographical narrative. Based not on their own recollections but rather on their actions as judges, this collective study of Southern federal judges in the late 1950s offers an insightful examination of judges under pressure. Documenting

16. Ibid.

17. Ibid.

18. William Domnarski, *Federal Judges Revealed* (New York: Oxford University Press, 2009).

an almost impossible task—that of enforcing the Supreme Court's contradictory orders in *Brown v. Board of Education I* and *II* to desegregate Southern schools "with all deliberate speed"—Peltason's book demonstrates just how hard the job of a lower-court judge could be. Hindered by the intentional ambiguity of the Supreme Court's enforcement orders, federal judges across the South found themselves in the impossible situation of having to effect wrenching social and legal changes without clear mandates or guidelines from the highest court in the land. The result was widespread inaction, tokenism, and failure to implement desegregation fully across the South.[19]

As with the more narrowly focused collective biographical works on a small number of select judges, Domnarski's and Peltason's books are wonderful, informative studies of the actual workings of the lower federal bench. Sadly, here too the strengths of the books contain their own inevitable limitations. By choosing to provide only snippets from any one judge's life in setting out their collective narratives, Domnarski and Peltason fail to provide the level of detail—and especially the wider personal context—that lifelong individual narratives deliver. We gain a little bit of information about a lot of judges, but we lack the detail to understand better the motivations of any one judge. The result once again is a useful but constricted window that makes possible a better but still limited understanding of the work and lives of lower federal judges.[20]

Finally, there are full-length biographies. The objective of such books is to give lower federal judges the full "Supreme Court justice" treatment: to treat their lives and works as important in and of themselves, to explore in full detail the personal and professional realms that each judge inhabits, and to evaluate how these two factors interacted in shaping a life and a career—and in doing so, to offer a deeper examination of the personal dimension in shaping a court's particular history.

Over time, especially in the years since John Phillip Reid called for lower-court biographies, lawyers, political scientists, and historians have produced a number of very good full-length biographies of lower-federal-court judges. Most concentrate on judges who began their careers in the 1950s and 1960s. Many deal with judges who were intimately involved with issues of race or (to a lesser extent) commerce. Others focus on judges from influential courts such as the Second, Fifth, and Eighth Circuits or the U.S. District Court for the Southern District of New York. As with institutional court histories and collective biographies, the quality of these works varies widely. Some are very good; others are little more

19. J.W. Peltason, *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation* (Champaign: University of Illinois Press, 1961).

20. Domnarski, *Federal Judges Revealed*.

than heroic, celebratory tales of a life on the bench. Some link the personal with the institutional to produce insightful narratives; others largely ignore the technical work of a judge for more exciting descriptions of infamous cases and lurid tales.[21]

Full-length biographies of lower federal judges also come with built-in hazards and drawbacks. With its focus on a single judge, judicial biography has a tendency towards hagiography. In placing the judge at the center of the story, as is inevitable in any form of biography, it is often impossible *not* to see the judge as the hero in an important historical narrative. After all, if the judge didn't do important things as a judge, there would have been little reason to write a judicial biography in the first place. Writing the life of a boring judge who did little while on the bench would be nonsensical. The exciting judges, the active judges, draw our attention and excite our imaginations. Apropos of this problem is the large number of biographies of lower-federal-court judges who had an impact on civil rights. Judges such as Frank M. Johnson, Jr., William Wayne Justice, Elbert Parr Tuttle, and John Minor Wisdom, each of whom has at least one biography to his name, are linked by their pivotal roles in civil rights in the South. Now, these men were exceptional judges, but so too were many other judges spread out across the nation over time. Yet it is these men for whom the biographies are written. Why? It is because their lives and work help us to understand an important, ongoing, and interesting issue in American life and culture—but only that topic.

Taken too far, this focus on a single judge risks warping the historical narrative. As the collective biographies make clear, while each lower federal judge is unique, they are also part of a similarly situated group of (mostly) men with similar backgrounds facing common challenges and applying similar remedies to solve these challenges. Biographers of federal judges need to be especially careful to avoid this tendency towards exceptionalism and to keep the actions of the

21. Some of the best examples of this genre are: William E. Nelson, *In Pursuit of Right and Justice: Edward Weinfeld as Lawyer and Judge* (New York: New York University Press, 2004); Gerald Gunther, *Learned Hand: The Man and the Judge* (New York: Knopf, 1994); Frank R. Kemerer, *William Wayne Justice: A Judicial Biography* (Austin: University of Texas Press, 1991); Robert Jerome Glennon, *The Iconoclast as Reformer: Jerome Frank's Impact on American Law* (Ithaca, NY: Cornell University Press, 1985); Jack Bass, *Taming the Storm: The Life and Times of Judge Frank M. Johnson, Jr. and the South's Fight Over Civil Rights* (New York: Doubleday, 1993); David M. Dorsen, *Henry Friendly: Greatest Judge of His Era* (Cambridge, MA: Belknap Press of Harvard University Press, 2012); Joel William Friedman, *Champion of Civil Rights: Judge John Minor Wisdom* (Baton Rouge: Louisiana State University Press, 2009); Anne Emanuel, *Elbert Parr Tuttle: Chief Jurist of the Civil Rights Revolution* (Athens: University of Georgia Press, 2011); William Domnarski, *Richard Posner* (New York: Oxford University Press, 2016); Brent J. Aucoin, *Thomas Goode Jones: Race, Politics & Justice in the New South* (Tuscaloosa: University of Alabama Press, 2016); Louise Ann Fisch, *All Rise: Reynaldo G. Garza, the First Mexican American Federal Judge* (College Station: Texas A&M University Press, 1996).

judges under examination within the wider institutional context of their court and the federal judicial system.

One positive aspect of the writing of more lower federal judicial biographies is the possibility of developing a wider collective narrative in which to set one's target judge (such as exists for the Supreme Court justices). That emerging collective narrative will make the biographer's job easier. By balancing the life of one judge against that of other similarly situated judges, especially if those judges come from the same circuit or even the same court as one's target judge, the biographer can stress the target judge's uniqueness and importance without losing sight of the judge's role in a collective institutional effort. Still, for this to happen, we need more judicial biographies.

A second problem is more practical: how to tell the life of a man of the law fully and yet comprehensibly to the reader lacking legal training. Judges fill a highly specialized niche. Their work is shaped not only by their personalities but by the dictates of the law. To what extent should the law take precedence over the personal in the telling of a judicial life? Ideally, a judicial biography should both present the narrative of a life and illuminate the history of a legal institution. It is possible to achieve both goals, as various biographies of Supreme Court justices have shown.[22] But finding this perfect balance is hard; most judicial biographies fail to do so.

Take, for example, William Domnarski's excellent biography of Judge Richard Posner of the Seventh Circuit. It is informative and technically accurate; accessible and well written. Posner the thinker and jurist come through the pages of this book with a vividness that makes for good reading and furthers our understanding of the role lower-federal-court judges play in shaping our conceptions of the law. But that's all that comes through the pages of the book. Domnarski is writing about Posner the jurist and legal scholar. He is concerned with Posner's ideas and the impact that his ideas have had on the law (and, to a lesser extent, the world around us). This is useful. This is important. We need to know all this if our understanding of the role of circuit judge is to be better understood. But what is missing is Posner the man. Domnarski says little about Posner's private life. His wife is barely mentioned in the book; his son, himself an important legal thinker, is not mentioned at all. Also missing is the historical context in which Posner acted. Domnarski often displays Posner's legal debates and insights in a historical (though not jurisprudential) vacuum. The ideas are well presented, but the wider historical context in which these ideas formed is too

22. See, e.g., Biskupic, *American Original*; Rosen, *Louis D. Brandeis: American Prophet*; Urofsky, *Louis D. Brandeis: A Life*; John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.: A Biography* (New York: Fordham University Press, 1994).

often left amorphous. And even though this focus on legal doctrine and theory makes sense given Posner's life and prolific scholarly and judicial output, the result is a less-than-complete biography.[23]

The point here is not to criticize Domnarski's book. As do all authors, let alone biographers, Domnarski made strategic choices in shaping his work. He focused on what he felt were the most important parts of Posner's life and work. He is not alone in making these choices. Frank Kemerer's *William Wayne Justice: A Judicial Biography* demonstrates a similar focus on the target judge's public life. Three hundred pages of the book focus exclusively on Justice's judicial decisions in the Eastern District of Texas. Fewer than one hundred talk about Justice the man. This bias was intentional. As Kemerer explained to Judge Justice (who questioned the public interest that a biography of his mostly bland life would generate), Kemerer was intending to write a "*judicial* biography." To Kemerer, it was what a judge did that was important; the personal and contextual underpinnings that explained these actions were of less interest.[24]

Such choices, while both understandable and often necessary (where the personal record of a judge's life is thin), have consequences. If, as is argued here, one primary advantage of judicial biography over institutional or thematic history is the merging of the personal with the professional to provide a deeper understanding of a judge's (and hence, a court's) actions, then stressing the public over the private results in a less-rich narrative. In opposition, take for example my own current work—a biography of Judge Joseph C. Hutcheson, Jr., of the Southern District of Texas and the Fifth Circuit Court of Appeals.

Hutcheson's judicial philosophy, which had him defined as both a liberal and a conservative throughout his career, was a direct outgrowth of his upbringing and life experiences. Combining elements of his father's Victorian world view (that "balance" was the ultimate objective of the law) with Hutcheson's personal experiences with the practical vagaries of declared law in a real-world context as a legal scholar, lawyer, and a trial judge, Hutcheson the judge defies easy classification. A legal realist who was pro-labor in the anti-labor 1920s and was a pioneer in federal probation strategies, Hutcheson also was a fervent opponent of the Administrative State. By exploring Hutcheson the man, these seeming contradictions in his responses to the power of the state to organize, regulate, and arrange social and business relationships become explicable. In fact, *only* by exploring the man behind the robe can we explain these seeming contradictions.

23. William Domnarski, *Richard Posner* (New York: Oxford University Press, 2016).

24. Frank Kemerer, *William Wayne Justice: A Judicial Biography* (Austin: University of Texas Press, 1991).

Of course, emphasizing the man at the expense of the judge is equally problematic. Gilbert Ware's *William Hastie: Grace Under Pressure* spends only the last chapter on Hastie's time as a circuit judge, even though Hastie served in that role for twenty-two years.[25] Similarly, Hawthorne Daniel's *Judge Medina: A Biography* is two-thirds over before Medina ascends to the bench of the Southern District of New York.[26] Given that both Hastie and Medina were important judicial thinkers whose rulings on the bench helped to shape the law as applied to many important topics, this minimizing of their judicial careers does not do justice to both men's lives and careers.

Writing judicial biography is hard. Each of the above biographies are well-written books that increase our knowledge of both their subjects and the workings of the lower federal courts. Yet each only tells part of the story. Spend too much time on the law, and the man is lost; too much time on the man, and our understanding of what judges do (and why they are important) dissolves. Yet when that "sweet spot" is reached and a biography presents us with a good balance of the law and the person, the result opens an informative, even illuminating window into the work of the lower federal courts. More so than collective biographies or institutional histories of courts, well-balanced full-length biographies of judges bring the work and importance of courts alive. It makes what they do seem real. It explains both the how and the why behind the what. It makes clear why these courts are so important and how their work regularly affects our lives. For all of the pitfalls that await the lower federal judicial biographer, the potentials far outweigh the costs.

So where should the balance be for lower-federal-court biographies? If what makes such works useful is their mix of the human with the institutional, what is the proper balance between these functions? In an ideal world, the answer would be "midway" (though what counts as the actual "midway" point for a particular judge would vary depending on the individual judge's life and work). The proper focus should be on both the person *and* the judge; the personal *and* the professional; the private *and* the public. Achieving such a balance is difficult, however. In many instances, the extant record does not allow for such a balance. Digging out the personal even where the records exist (and often they don't) can be hard. Linking the personal to the public to show how the person shaped the judge is an even more difficult task. And all this depends on the biographer's desire to provide such a balanced account of the target judge's life. Still, it can be done; a good balance between the personal and the public can be reached.

25. Gilbert Ware, *William Hastie: Grace Under Pressure* (New York: Oxford University Press, 1984).

26. Hawthorne Daniel, *Judge Medina: A Biography* (New York: Wilfred Funk, 1952).

Take for example two biographies of New York judges: Gerald Gunther's *Learned Hand: The Man and the Judge* and William E. Nelson's *In Pursuit of Right and Justice: Edward Weinfeld as Lawyer and Judge*. Each biographer seeks to bridge the gap between the personal and the professional. Each book stresses how the personal experiences of the man shaped his actions as judge. In both cases, the authors intersperse chapters on the public life of the judge with examinations of his family life, friendships, and other influences on the personality of the man as both lawyer and judge. The result is that both books not only introduce the reader to the important work of the courts on which these judges served, but also offer a how and why as to origins of these actions. Both biographers present Hand and Weinfeld as driven men with clear understandings of both their roles as judge and the purposes served by their courts. Each had intellectual roots in the legal realist movement of the early twentieth century. Granted, Weinfeld's explicit focus on upholding and applying uniform legal procedures tempered his legal realist understandings of the law and the judicial function, but for Weinfeld the mix worked. Hand is seen as being more willing, even eager, to influence the shape of the law as a whole through his judicial rulings. In either case, both men's lives were shaped by a mix of personal relationships, their experiences as lawyers, and strong self-identification as men of the law.

Both biographies thus bring to life the context in which the Southern District of New York and the Second Circuit Court of Appeals operated. Both are acknowledged to be "important courts." These biographies make clear the roles that these individual judges played in making them important institutions for applying the law to real-world contexts and situations. Add the influences that these judges had in shaping the law beyond their courts, and the result is an informative and useful perspective on the application of federal law and justice across the nation.[27]

In the end, biography is like any other historical work. You pick your topic, you tell your narrative, and you hope to educate the reader about the importance and causalities of both. While biography has its pitfalls and limitations, it also offers perspectives on the past that cannot be as effectively accomplished through other methodologies. Done right, biography is both highly readable and informative. It educates readers in ways in which institutional or thematic histories are less effective—namely, mixing the personal with the public. Hence, although biography can't replace institutional or thematic history, neither can alternate methodology fully replace what biography brings to the table either.

27. William E. Nelson, *In Pursuit of Right and Justice: Edward Weinfeld as Lawyer and Judge* (New York: New York University Press, 2004); Gerald Gunther, *Learned Hand: The Man and the Judge* (New York: Knopf, 1994).

In the field of judicial biography, where the topics are highly technical, historically significant, and (for lower federal courts) underresearched, biography offers an especially useful means of understanding the role of law and courts in everyday life. Even those judicial biographies that emphasize the personal over the institutional aspects of their subjects' lives still add to our understanding of law as applied in real-world contexts. Conversely, those biographies that focus more on the institutional role of the target judge over the personal still humanize the judicial process in ways that institutional or thematic works cannot. In the end, the goal of any study of the lower federal judiciary is to expand our knowledge of how these institutions work. Judicial biography furthers this goal.

As noted above, the opportunities for lower-federal-court biography are extensive; the need for such biographies is great; and, despite the difficulties associated with the task of writing biographies of lower-federal-court judges, in the end the benefits outweigh the pitfalls. We need scholars to do more work on the history of the lower federal courts—institutionally and biographically. As important as the Supreme Court is, it is not the totality of the federal court system. It's time that the lower federal courts get their story told.

7

The Federal Courts and Criminal Justice

Sara Mayeux

Since the 1970s, the United States at all levels of government has built the world's largest penal system, in what social scientists and historians have identified as "an unprecedented event . . . in the history of liberal democracy."[1] The burdens of mass incarceration have fallen most heavily upon racial minorities, immigrants, and the poor. By 1995, one in three young black men was under some form of penal supervision.[2] In a recent article, Judge Lynn Adelman of the Eastern District of Wisconsin assigned to the federal judiciary at least some of the blame for these developments. Federal judges did not cause the punitive turn in American politics—and they oversee only a small part of the nation's criminal justice machinery—but, in Adelman's view, they have failed to respond as courageously as they might. "Reducing mass incarceration is conceptually simple," he wrote. "It means sending fewer defendants to prison for shorter periods of time"—a step that federal judges have not, thus far, demonstrated much inclination to take. Perhaps, Adelman

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1. David Garland, "Introduction: The meaning of mass imprisonment," in *Mass Imprisonment: Social Causes and Consequences*, ed. David Garland (London: SAGE Publications, 2001), 1–2; see also Heather Ann Thompson, "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History," *The Journal of American History* 97, no. 3 (December 2010): 703–34, https://doi.org/10.1093/jahist/97.3.703.

2. Marc Mauer and Tracy Huling, "Young Black Americans and the Criminal Justice System: Five Years Later," The Sentencing Project (1995) available at http://www.sentencingproject.org/publications/young-black-americans-and-the-criminal-justice-system-five-years-later/.

concluded, federal judges have "bought into, or less consciously assimilated, the punitive attitudes that have been prevalent in this country for so long."[3]

Although intended as commentary on present-day sentencing practices, Adelman's challenge to the federal judiciary also suggests important historical questions. A fast-growing and interdisciplinary literature examines the long-term roots, dynamics, and development of the twentieth-century "carceral state"—defined to encompass not only the nation's "archipelago of prisons, jails, and immigration detention centers," but also those institutions' ripple effects throughout society and politics.[4] For mass incarceration has long constituted not only a sociological fact and arguably a moral disaster, but also a major sector of the public and private economy; a significant component of ideologies of race, gender, and sexuality; and a distorting influence on electoral processes and deliberative democracy.[5] What role has the federal judiciary played in this complex history? To what extent have the federal courts reflected popular sentiments—as Adelman's account suggests? In what contexts have the federal courts served instead as a check on punitive politics? Given that most policing and punishment takes place at the local and state level, how much historical importance should be assigned to federal developments?

This essay provides a brief and necessarily selective introduction to exemplary scholarship addressing these and related questions, and seeks to encourage historians of the carceral state—even or especially those who do not define themselves primarily as legal historians—to join the conversation. Legal scholars have most directly confronted the crisis of mass incarceration with reference to the Supreme Court and high-level constitutional doctrine. For instance, the late

3. Lynn Adelman, "How Congress, the U.S. Sentencing Commission and Federal Judges Contribute to Mass Incarceration" (December 7, 2016), available at https://ssrn.com/abstract=3070489.

4. Kelly Lytle Hernández, Khalil Gibran Muhammad, and Heather Ann Thompson, "Introduction: Constructing the Carceral State," *Journal of American History* 102, no. 1 (June 1, 2015): 18–24, https://doi.org/10.1093/jahist/jav259. Examples include Kelly Lytle Hernández, *City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771–1965* (Chapel Hill: University of North Carolina Press, 2017); Julilly Kohler-Hausmann, *Getting Tough: Welfare and Imprisonment in 1970s America* (Princeton, NJ: Princeton University Press, 2017); Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge, MA: Harvard University Press, 2016); Christopher Lowen Agee, *The Streets of San Francisco: Policing and the Creation of a Cosmopolitan Liberal Politics, 1950–1972* (Chicago: University of Chicago Press, 2014). For an important cautionary argument against positing a monolithic "carceral state," see Ashley Rubin and Michelle S. Phelps, "Fracturing the Penal State: State Actors and the Role of Conflict in Penal Change," *Theoretical Criminology* 21, no. 4 (2017): 422–40.

5. For a sampling of new research spanning these themes, see the special issue of the *Journal of American History* on "Historians and the Carceral State" (June 2015), available at http://jah.oah.org/projects/special-issues/carceral/.

William Stuntz inaugurated an important debate concerning the relationship between mass incarceration and the Warren Court's expansive reinterpretations of the Bill of Rights. Writing against earlier scholarship that celebrated the Warren Court as an essentially humanitarian, liberalizing force in U.S. history, Stuntz portrayed the criminal procedure revolution as paradoxical or even perverse. Constitutionalizing criminal procedure, Stuntz argued, had channeled decades of litigation and reform energies into the realm of process and away from the questions of substantive justice that might have offered more fruitful resources for direct confrontation with a growing and discriminatory carceral regime.[6]

The legal debate, however, has thus far remained somewhat separate from the historical carceral-state literature. And that literature in turn has remained relatively quiet on the federal judiciary, especially the lower federal courts, which are more often assumed as infrastructural background conditions than analyzed as historical actors.[7] Drawing inspiration from political science, historians seeking to understand the causes and consequences of mass incarceration might benefit from more in-depth examination of the federal courts not simply as spaces in which other actors make claims and arguments, but also as policymakers themselves.[8] This essay is structured around three of the most significant ways in which the federal judiciary has historically made and enforced criminal justice

6. William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge, MA: Harvard University Press, 2011); William J. Stuntz, "The Uneasy Relationship between Criminal Procedure and Criminal Justice," *Yale Law Journal* 107, no. 1 (1997): 1–76, https://doi.org/10.2307/797276. For an illuminating overview (and critique) of the historiography of U.S. criminal justice, see Sarah Seo, "Antinomies and the Automobile: A New Approach to Criminal Justice Histories," *Law & Social Inquiry* 38, no. 4 (2013): 1020–40.

7. Historians of school desegregation have attended to the individual judges who enforced *Brown v. Board of Education* at the local level. This was true at the height of the desegregation battles, J.W. Peltason, *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation* (Champaign: University of Illinois Press, 1961), and remains true in the recent historical literature, e.g. Matthew Lassiter, *The Silent Majority: Suburban Politics in the Sunbelt South* (Princeton, NJ: Princeton University Press, 2006). Judicial biographies that touch on federal court oversight of prison systems, and might provide useful material for historians, include Jack Bass, *Taming the Storm: The Life and Times of Judge Frank M. Johnson, Jr., and the South's Fight over Civil Rights* (New York: Doubleday, 1992); Frank R. Kemerer, *William Wayne Justice: A Judicial Biography*, reprint ed. (Austin: University of Texas Press, 2008); Tinsley E. Yarbrough, *Judge Frank Johnson and Human Rights in Alabama*, paperback ed. (Tuscaloosa: University of Alabama Press, 2002). See also Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89, no. 7 (1976): 1281–316. Studies attentive to the agency and policymaking importance of federal judges, of course, need not present judges as singular heroes (or villains); to the contrary, careful histories would need to situate judges within social, political, institutional, and professional context.

8. See Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge: Cambridge University Press, 1998). See also Margo Schlanger, "Beyond the Hero Judge: Institutional Reform Litigation as Litigation," *Michigan Law Review* 97, no. 6 (1999): 1994–2036 (critiquing Feeley and Rubin's account).

policy: by adjudicating federal prosecutions; by reviewing state-court convictions via federal habeas jurisdiction; and by reforming state prisons and local jails via constitutional conditions-of-confinement litigation.[9] Though their role has waxed and waned, the federal courts have long been implicated in state and local projects of both carceral buildup and carceral reform. Knowing more about the place of the federal courts within the larger carceral state would enhance not only our understanding of the recent past, but also our ability to evaluate the promise and limitations of the federal judiciary today as activists, advocates, and at least some federal judges call upon the courts to play a part in dismantling mass incarceration.

Adjudicating Federal Criminal Cases

The first federal crime bill, enacted in 1790, listed only seventeen offenses, generally those that directly threatened national interests, such as treason and murder on federal property.[10] This restrictive approach reflected both the founders' mistrust of the "power to punish," associated with royal prerogative, and their expectation that the states would retain responsibility for day-to-day "keeping the peace."[11] Still, the outer bounds of federal criminal jurisdiction remained contested. Federalists and Jeffersonians debated whether federal judges were limited to enforcing statutory crimes or whether, in the common-law tradition, they could themselves elaborate new offenses.[12] In 1812, the Supreme Court foreclosed the possibility of federal common-law crimes, holding that the federal courts "possess no jurisdiction but what is given them by" Congress. The Court claimed that this holding reflected the consensus of "legal men," although historians have described contemporary opinion on the question as more ambiguous.[13]

9. Though not a focus of this essay, one might also examine federal oversight of local police both through federal criminal prosecutions (or lack thereof) and civil consent decrees.

10. Dwight F. Henderson, *Congress, Courts, and Criminals: The Development of Federal Criminal Law, 1801–1829* (Westport, CT: Greenwood Press, 1985), 7–8.

11. Kathryn Preyer, "Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic," *Law and History Review* 4, no. 2 (1986): 225–26, https://doi.org/10.2307/743828. On the cultural politics of punishment, see Steven Wilf, *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America* (Cambridge: Cambridge University Press, 2010). On the localism embedded within the concept of "the peace," see Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009).

12. Preyer, "Jurisdiction to Punish"; Richard H. Fallon et al., *Hart and Wechsler's The Federal Courts and the Federal System*, 7th ed. (New York: Foundation Press, 2015), 636–42.

13. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812); see also *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816). Fallon et al., *Federal Courts,* 638–39, note that *Hudson* contravened "almost uniform" lower-court precedent, although Preyer portrays judicial opinion as mixed and unsettled. Preyer, "Jurisdiction to Punish," 231–32 & n.32, 263.

Around the turn of the twentieth century Congress began to legislate more expansively, blurring the lines between federal criminal law and the states' police power.[14] A broadly worded mail-fraud statute, enacted in 1872, empowered creative federal prosecutors to charge a wide range of deception and corruption (often with only incidental connections to the mail).[15] The White Slave Traffic Act of 1910, or Mann Act, prohibited transporting women across state lines for any "immoral purpose"; prosecutors exploited this law "as a club against blacks who dated white women and defendants who espoused unpopular political beliefs."[16] The 1914 Harrison Narcotics Tax Act, the first major federal effort to regulate opiates and cocaine, and the 1919 Volstead Act, enacted to enforce the liquor prohibitions required by the Eighteenth Amendment, might be understood as predecessors of the later War on Drugs. Congress also authorized new bureaucracies to enforce the proliferation of federal proscriptions, including the Department of Justice (established 1870), the Federal Bureau of Investigation (1908, initially as the Bureau of Investigation within the DOJ), and the Federal Bureau of Prisons (1930).[17] By the 1970s, if measured by "law-on-the-books," Congress had largely erased any "conceptual distinction between federal and state crimes."[18]

Multiple historical contexts help to explain the growth of federal criminal law. The federal government's role swelled during the Civil War and Reconstruction

14. Federal criminal jurisdiction over American Indians requires separate treatment. For an overview of the modern system, which portrays the federal courts as sites of profound alienation for indigenous people, see Kevin K. Washburn, "American Indians, Crime, and the Law," *Michigan Law Review* 104, no. 4 (2006): 709–77.

15. Daniel C. Richman, Kate Stith, and William J. Stuntz, *Defining Federal Crimes* (New York: Wolters Kluwer, 2014), chap. 4.

16. David J. Langum, *Crossing Over the Line: Legislating Morality and the Mann Act* (Chicago: University of Chicago Press, 1994), 9. Langum reserves some ire for federal judges for acquiescing in these prosecutions and interpreting the statute broadly; he describes the Act as exemplifying both "the tyranny of the majority" and "the federal judiciary's failure to protect those who dissented." Ibid., 11. However, he finds that by the 1960s, "courageous District Judges simply defied precedent and refused to enforce the Act in noncommercial cases." Ibid., 14.

17. Studies of "crime control" as a priority for federal policymaking include James D. Calder, *The Origins and Development of Federal Crime Control Policy: Herbert Hoover's Initiatives* (Westport, CT: Praeger, 1993); Nancy E. Marion, *A History of Federal Crime Control Initiatives, 1960–1993* (Westport, CT: Praeger, 1994) (which, despite the title, includes a chapter on pre-1960s efforts); and, on the 1930s FBI, Claire Bond Potter, *War on Crime: Bandits, G-Men, and the Politics of Mass Culture* (New Brunswick, NJ: Rutgers University Press, 1998).

18. Richman, Stith, and Stuntz, *Defining Federal Crimes*, 7–12. The classic phrase derives from Roscoe Pound, "Law in Books and Law in Action," *American Law Review* 44 (St. Louis, MO: Review Publishing, 1910): 12–36.

and again during the Progressive Era, New Deal, and World War II.[19] Modern transportation and communications networks created national markets in goods and services—including illicit goods and services—that strained the capacity of states to police.[20] In a self-reinforcing cycle, new federal agencies generated new cultural heroes—such as the "G-man" or the FBI agent—cementing popular expectations that the federal government would play a direct role in crime control.[21] After 1937, the Supreme Court's flexible interpretation of the Commerce Clause effectively authorized Congress to legislate in response to any type of national problem, eroding the traditional bounds of federalism.[22]

Still, as measured by "law-in-action," federal criminal law remained relatively limited. Federal criminal prosecutions comprise about 5% of prosecutions nationwide; the vast majority are still brought by state-level officials and governed by state law.[23] Though eager to create new federal crimes in theory, Congress has never appropriated resources on the scale necessary to enforce federal criminal law in anything more than a selective way. Federal prosecutors therefore make choices about enforcement priorities, guided by shifting norms about the proper balance between the federal and local.[24] (As measured by the current mix of

19. The classic account of federal state-building is Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge: Cambridge University Press, 1982); but see William J. Novak, "The Myth of the 'Weak' American State," *American Historical Review* 113, no. 3 (2008): 752–72. On how Reconstruction transformed American perceptions of citizenship and government, see Laura F. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York: Cambridge University Press, 2015). On World War II-era state-building, see James T. Sparrow, *Warfare State: World War II Americans and the Age of Big Government* (New York: Oxford University Press, 2011). A recent synthesis is Gary Gerstle, *Liberty and Coercion: The Paradox of American Government from the Founding to the Present* (Princeton, NJ: Princeton University Press, 2016).

20. See Kathleen F. Brickey, "The Commerce Clause and Federalized Crime: A Tale of Two Thieves," *Annals of the American Academy of Political and Social Science* 543 (1996): 27–38.

21. Kenneth O'Reilly, "A New Deal for the FBI: The Roosevelt Administration, Crime Control, and National Security," *The Journal of American History* 69, no. 3 (1982): 638–58, https://doi.org/10.2307/1903141, points to the Lindbergh kidnapping as a formative episode. Congress responded with the Federal Kidnapping Act.

22. The 1937 "switch in time" has been exhaustively chronicled; a good introduction is Laura Kalman, "The Constitution, the Supreme Court, and the New Deal," *The American Historical Review* 110, no. 4 (2005): 1052–80, https://doi.org/10.1086/ahr.110.4.1052.

23. Richman, Stith, and Stuntz, *Defining Federal Crimes*, 7; see also Susan R. Klein and Ingrid B. Grobey, "Debunking Claims of Over-Federalization of Criminal Law," *Emory Law Journal* 62, no. 1 (2012): 1–120.

24. Daniel C. Richman, "The Changing Boundaries Between Federal and Local Enforcement," in *Criminal Justice 2000* 2: *Boundary Changes in Criminal Justice Organizations* (Washington, DC: U.S. Dept. of Justice, 2000), available at https://www.ncjrs.gov/criminal_justice2000/vol_2/02d2.pdf.

prosecutions, the priorities today are drugs and immigration.)[25] The federal prison population has ballooned in recent decades, paralleling developments in the states, but not because of the growing number of federal statutes—rather, because of high-volume enforcement of a handful of routinely used drug statutes.[26]

Although the recent history of how federal courts handled growing drug and immigration caseloads remains to be fully excavated, historians have illuminated how district judges responded to their expanding jurisdiction in the early twentieth century. Charles Zelden's case study of the Southern District of Texas traces the Houston-based court from its establishment in 1902 through 1960.[27] Zelden argues that its judges prided themselves primarily on providing an orderly forum for business litigation; they approached their public law docket more as an administrative chore. Initially, the Southern District's criminal caseload consisted largely of cattle smuggling, which judges generally dealt with quickly and leniently.[28] In the 1920s, they adopted a similar stance toward Prohibition, typically resolving liquor prosecutions in one or two *days* total from arrest through sentencing.[29]

Legal scholars have portrayed Prohibition as the crucible for modern criminal practice in the federal courts, because it generated caseload pressures that weakened the federal commitment to jury trials.[30] Plea bargaining was widespread in state courts by the 1920s, but given the traditionally limited scope of federal criminal law, the federal courts had previously lacked occasion to

25. See Klein and Grobey, 6–7. Drug and immigration crimes together comprise nearly two-thirds of federal prosecutions. U.S. Sentencing Commission, *Overview of Federal Criminal Cases Fiscal Year 2013*, August 2014, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2014/FY13_Overview_Federal_Criminal_Cases.pdf

26. See Charles Colson Task Force on Federal Corrections, "Drivers of Growth in the Federal Prison Population," March 2015, available at https://www.urban.org/research/publication/drivers-growth-federal-prison-population. On earlier efforts to combat drugs, see Kathleen J. Frydl, *The Drug Wars in America, 1940–1973* (Cambridge: Cambridge University Press, 2013). For a comprehensive study that includes quantitative data on federal prosecutions since 1940 and an appendix detailing the most frequently enforced federal statutes, see Klein and Grobey.

27. Charles L. Zelden, *Justice Lies in the District: The U.S. District Court, Southern District of Texas, 1902–1960* (College Station: Texas A&M University Press, 1993).

28. Zelden, 51–52, 72.

29. Zelden, 61–62, 68–70.

30. Kenneth M. Murchison, *Federal Criminal Law Doctrines: The Forgotten Influence of National Prohibition* (Durham, NC: Duke University Press, 1994), chap. 7; Lisa McGirr, *The War on Alcohol: Prohibition and the Rise of the American State* (New York: Norton, 2016), 205–6. For case studies, see John J. Guthrie, Jr., *Keepers of the Spirits: The Judicial Response to Prohibition Enforcement in Florida, 1885–1935* (Westport, CT: Praeger, 1998); John F. Padgett, "Plea Bargaining and Prohibition in the Federal Courts, 1908–1934," *Law & Society Review* 24, no. 2 (1990): 413–50; Rayman L. Solomon, "Regulating the Regulators: Prohibition Enforcement in the Seventh Circuit," in *Law, Alcohol, and Order: Perspectives on National Prohibition*, ed. David E. Kyvig (Westport, CT: Greenwood Press, 1985), 81–96.

develop routines for managing large numbers of petty offenses. To resolve the onslaught of Volstead Act cases, federal courts introduced "bargain days" on which defendants who pled guilty received leniency.[31]

In recent years, the "noble experiment" has received renewed attention from political historians. Supplanting Richard Hofstadter's dismissive interpretation of the Eighteenth Amendment as a trivial "pseudo-reform," Lisa McGirr emphasizes Prohibition's centrality to "the twentieth-century federal penal state."[32] McGirr also debunks the caricature of Prohibition as unenforceable—and thus unenforced. The Volstead Act and its state equivalents may have failed to stem the liquor traffic, but low-level distributors experienced a harsh enforcement regime (at the federal but also, and perhaps primarily, at the state level) that targeted immigrants, African Americans, and poor whites. McGirr persuasively argues that the logic of Prohibition remade the federal state in ways that survived repeal, setting a precedent for federal-level vice policing that continues today in the War on Drugs.

Reviewing State Criminal Convictions

Formally, the lower federal courts have no hierarchical control over the state courts.[33] Functionally, however, they came to acquire limited jurisdiction to review state-court convictions through a progressive expansion of the writ of habeas corpus.[34] In the English tradition, the "Great Writ" allowed a prisoner to demand

31. Murchison, *Federal Criminal Law Doctrines*, 160.

32. Richard Hofstadter, *The Age of Reform* (New York: Vintage Books, 1960), 289; McGirr, *War on Alcohol*, xvii. See also Robert Post, "Federalism, Positive Law, and the Emergence of the American Administrative State," *William & Mary Law Review* 48, no. 1 (2006): 1–183.

33. Moreover, judge-made doctrines of equitable restraint limit the ability of litigants to bring *civil* litigation in federal court that might interfere with an ongoing state criminal prosecution. See *Younger v. Harris*, 401 U.S. 37 (1971); but see *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

34. The legal literature on this development is vast. This summary largely follows the overview in Fallon et al., *Federal Courts*, 1193–98, the footnotes to which offer the best place to begin for a comprehensive bibliography. See also William F. Duker, *A Constitutional History of Habeas Corpus* (Westport, CT: Greenwood, 1980); Eric M. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* (New York: New York University Press, 2003); Eric M. Freedman, *Making Habeas Work: A Legal History* (New York: New York University Press, 2018); Nancy J. King and Joseph L. Hoffmann, *Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ* (Chicago: University of Chicago Press 2011); Lee Kovarsky, "A Constitutional Theory of Habeas Power," *Virginia Law Review* 99, no. 4 (2013): 754–810; Robert Searles Walker, *The Constitutional and Legal Development of Habeas Corpus as a Writ of Liberty* (Stillwater: Oklahoma State University Press, 1960).

that the Crown justify his detention.[35] In 1867, Congress expressly authorized the federal courts to hear habeas petitions from state prisoners, although for decades, this provision was little used and its scope uncertain.[36] In *Moore v. Dempsey* (1923), the Supreme Court for the first time affirmed a district court's grant of habeas relief to invalidate a state conviction, on the grounds that the mob-dominated trial violated the Fourteenth Amendment's Due Process Clause.[37] But it was not until *Brown v. Allen* (1953) that the Court broadly endorsed using federal habeas to relitigate issues previously decided in state court.[38] The Warren Court's criminal procedure revolution must be understood as inextricably intertwined

35. For a comprehensive history of the English writ that locates its roots more in sovereignty and empire than in conceptions of individual liberty, see Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA: Belknap Press of Harvard University Press, 2012); on the writ's wartime career, see Amanda L. Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* (Oxford: Oxford University Press, 2017).

36. Act of February 5, 1867, chap. 28, 14 Stat. 385; see Lewis Mayers, "The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian," *University of Chicago Law Review* 33, no. 1 (1965): 31–59. Legal scholars debate whether federal habeas jurisdiction depends upon statutory authorization or is implied constitutionally by the Suspension Clause. See Paul D. Halliday and G. Edward White, "The Suspension Clause: English Text, Imperial Contexts, and American Implications," *Virginia Law Review* 94, no. 3 (2008): 575–714. Since 1948, federal habeas jurisdiction has been codified at 28 U.S.C. §§ 2241–2255.

37. *Moore v. Dempsey*, 261 U.S. 86 (1923); for background on the case, see Richard Cortner, *A Mob Intent on Death: The NAACP and the Arkansas Riot Cases* (Middletown, CT: Wesleyan University Press, 1988); Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2004), 117–23. Eric M. Freedman, "Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions," *Alabama Law Review* 51, no. 4 (2000): 1467–540, argues that *Moore* applied the same legal standard as *Frank v. Langum*, 237 U.S. 309 (1915), although the petitioner in *Frank* had not prevailed; other scholars interpret *Moore* as overruling *Frank*. See Fallon et al., *Federal Courts*, 1274.

38. *Brown v. Allen*, 344 U.S. 443 (1953); see Fallon et al., *Federal Courts*, 1274–75. Legal scholars debate the novelty of *Brown*. Paul Bator portrayed the midcentury version of federal habeas as a dramatic expansion of the writ. Paul M. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," *Harvard Law Review* 76, no. 3 (1963): 441–528. Eric Freedman argues that *Brown* reaffirmed longstanding doctrine and the justices, based on their private notes, "did not view themselves as making new law." Eric M. Freedman, "*Brown v. Allen*: The Habeas Corpus Revolution that Wasn't," *Alabama Law Review* 51, no. 4 (2000): 1546–47. Hoffmann and King suggest that the midcentury use of habeas to discipline abusive state courts comported with an Anglo American pattern in which habeas emerges at moments of crisis to contain acute threats to liberty. Joseph L. Hoffmann and Nancy J. King, "Rethinking the Federal Role in State Criminal Justice," *New York University Law Review* 84, no. 3 (April 2009): 804. See also Clarke D. Forsythe, "Historical Origins of Broad Federal Habeas Review Reconsidered," *Notre Dame Law Review* 70, no. 5 (1999): 1079–95.

with the contemporaneous expansion of federal habeas.[39] Although many of the Court's celebrated decisions arose on direct review of state-court decisions, many others arose through habeas petitions, and habeas in turn provided a means for prisoners in recalcitrant states to enforce compliance with the new rules.[40]

Federal habeas petitions peaked in the 1970s, both as a percentage of state prisoners and as a percentage of court filings.[41] Thereafter, the conservative Burger and Rehnquist courts trimmed the scope of habeas and the discretion of the lower courts.[42] In 1996, Congress instituted further restrictions with the Antiterrorism and Effective Death Penalty Act (AEDPA), which introduced new procedural hurdles and required heightened federal court deference toward state courts.[43] Together, judge-made limitations and AEDPA's habeas-related provisions have sharply curtailed the use of federal habeas as a check on state courts, "erecting a

39. Hoffmann and King aptly conceptualize (1) the incorporation of the Bill of Rights against the states and (2) the expansion of federal habeas review as twin strategies to force state compliance with constitutional norms. Hoffmann and King, "Rethinking the Federal Role," 801. See also Robert M. Cover and T. Alexander Aleinikoff, "Dialectical Federalism: Habeas Corpus and the Court," *Yale Law Journal* 86, no. 6 (1977): 1035–102.

40. Collecting criminal procedure cases that arose on habeas, see Hoffman and King, "Rethinking the Federal Role," 802–3. Legal scholars suggest "that without the broad scope of habeas review authorized by *Brown*, the federal judiciary could not have effectively supervised the compliance by state courts (particularly in Southern states) with Supreme Court decisions recognizing new and controversial federal constitutional rights governing state criminal processes." Fallon et al., *Federal Courts*, 1275.

41. Fallon et al., 1270.

42. For example, the Court held that federal habeas generally could not be used to relitigate Fourth Amendment claims rejected in state court. *Stone v. Powell*, 428 U.S. 465 (1976). The judge-made limitations on habeas introduced by the Burger and Rehnquist Courts are summarized in John Blume et al., "In Defense of Noncapital Habeas: A Response to Hoffmann and King," *Cornell Law Review* 96, no. 3 (2011): 440–41. The Burger Court was initially viewed with relief by Warren Court acolytes, but recent accounts evaluate it as conservative, emphasizing how much it contained (if it did not overturn) Warren Court landmarks. Compare Vincent Blasi, ed., *The Burger Court: The Counter-Revolution That Wasn't* (New Haven, CT: Yale University Press, 1986), with Michael J. Graetz and Linda Greenhouse, *The Burger Court and the Rise of the Judicial Right* (New York: Simon & Schuster, 2016). For a contemporary assessment, see Louis Michael Seidman, "Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure," *Columbia Law Review* 80, no. 3 (1980): 436–503.

43. For a contemporary discussion of AEDPA, see Mark Tushnet and Larry Yackle, "Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act," *Duke Law Journal* 47, no. 1 (1997): 1–86; but see Larry Yackle, "AEDPA Mea Culpa," *Federal Sentencing Reporter* 24, no. 4 (2012): 329–33 (noting that the prediction that AEDPA would prove largely symbolic proved incorrect).

maze of requirements through which almost no petitions successfully emerge."[44] Joseph Hoffmann and Nancy King describe federal habeas as "a lottery, funded at great expense by taxpayers" but "producing almost no marginal increase in enforcement of constitutional rights."[45]

Legal scholars have exhaustively chronicled the rise and fall of federal habeas, but primarily in order to inform present-minded debates about the legitimacy or utility of contemporary practices.[46] For instance, scholars have long debated whether the innovation of using habeas for postconviction review conforms to traditional Anglo American understandings of the "Great Writ."[47] Historians might be more interested to explore how federal habeas fits into larger themes in U.S. political history, such as the proceduralist emphasis of twentieth-century liberalism.[48] Why, when midcentury lawyers set about to vanquish the state courts of racial discrimination and other injustices, did they channel their efforts into such a convoluted process as postconviction collateral review? Why did they pursue their claims in the lower federal courts, rather than in more grassroots or democratic forums? (Or were there also other paths taken, which legal scholars obsessed with the federal courts have overlooked, and what might we learn from

44. Fallon et al., *Federal Courts*, 1265. Even in the 1970s, only 3–4% of federal habeas petitioners won relief; by the 2000s, the success rate for non-capital petitions had plummeted to beneath 1%. Moreover, since habeas can only be filed by someone currently incarcerated, it offers no help to the majority of prisoners serving prison sentences shorter than the time it would take to complete the habeas process. But for an argument that AEDPA has not been as consequential as hoped or feared, see John H. Blume, "AEDPA: The 'Hype' and the 'Bite,'" *Cornell Law Review* 91 (2006): 262–301.

45. Hoffmann and King, "Rethinking the Federal Role," 793; see also Fallon et al., *Federal Courts*, 1271 (asking if habeas is "a waste of time"). But see Blume et al., "In Defense of Noncapital Habeas."

46. For a critique of this tendency, see Marc Arkin, "The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners," *Tulane Law Review* 70, no. 1 (1995): 1–73. For an overview of the debates and bibliography, see Fallon et al., *Federal Courts*, 1272–75.

47. Another axis of debate concerns whether the utility of federal habeas has changed over time. Hoffmann and King argue that federal postconviction review was needed in the 1960s to remedy flagrant injustices, but today wastes resources that could more effectively be invested in front-end improvements of indigent defense services. Hoffmann and King, "Rethinking the Federal Role"; see also King and Hoffmann, *Habeas for the Twenty-First Century*.

48. Recent works emphasizing proceduralism within American law include Agee, *The Streets of San Francisco*; Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* (New York: Oxford University Press, 2014); Stuntz, *The Collapse of American Criminal Justice*; Karen M. Tani, *States of Dependency: Welfare, Rights, and American Governance, 1935–1972* (Cambridge: Cambridge University Press, 2016). On proceduralism and its discontents within the legal aid movement, see Felice Batlan, *Women and Justice for the Poor: A History of Legal Aid, 1863–1945* (New York: Cambridge University Press, 2015). For an important reassessment of political liberalism, see Lily Geismer, *Don't Blame Us: Suburban Liberals and the Transformation of the Democratic Party* (Princeton, NJ: Princeton University Press, 2015).

them?)[49] Examining these questions would help to contextualize the limitations of federal habeas as an oversight mechanism, even at its pre-AEDPA heights. In the words of the leading "Federal Courts" textbook (a law school curricular innovation that is, itself, a legacy of midcentury proceduralism): "If state courts do not adequately protect federal rights, can habeas relief—which comes only after conviction and incarceration—undo the damage?"[50] The answer seems, obviously, to be "no"; but for historians, the more generative question might be why so many lawyers and jurists nevertheless thought at midcentury that the answer was "yes."

There is one exception to the storyline of habeas as an institution in decline. In the death penalty context, federal habeas continues to play a significant role in American legal culture, routinely delaying or preventing state executions.[51] Capital habeas litigation has developed into a macabre expertise, exemplifying what Justice Blackmun called "tinkering with the machinery of death"; its practitioners master thousands of Rube-Goldberg-like rules.[52] For various reasons, the typical habeas petition does not directly challenge the death penalty, however, but rather revolves around a long list of specific and sometimes highly minute procedural flaws alleged to have tainted the original trial, which may have occurred twenty or thirty years before a federal judge ever reviews the record. Perhaps future historians—or anthropologists—will look back upon this genre of litigation as an elaborate set of mystification rituals, the symptom of a culture unwilling to disclaim capital punishment but also increasingly reluctant to carry it out.

Reforming State Prisons and Local Jails

In 1965, an Arkansas federal court declared conditions at the Cummins Farm state prison unconstitutional, launching the modern era of prison conditions

49. Conceivably, either the Court itself, Congress, or some other entity might have developed more straightforward means of enforcing constitutional requirements against the states. See Hoffman and King, "Rethinking the Federal Role," 803 & n.35. Cover and Aleinikoff, in "Dialectical Federalism," interpreted the Warren Court's choice instead to deploy a "remedial strategy" of "redundancy and indirection" as an attempt "to mediate the pragmatic perspective of criminal administration and the idealistic vision of a secular faith."

50. Fallon et al., *Federal Courts*, 1283.

51. Between 1973 and 1995, about 40% of federal habeas petitions in capital cases resulted in some type of relief. By 2000–02, that figure had plummeted to 9%, which is still much higher than in non-capital cases. Fallon et al., 1271–72.

52. *Callins v. Collins*, 510 U.S. 1141 (1994).

litigation.[53] By 1974, prisons in twenty-five states—and, in five of these states, the entire prison system—were under some type of federal court order; by 1995, almost every state had experienced some type of judicially mandated prison reform.[54] Paralleling the structural reform injunctions used to enforce *Brown v. Board of Education*, federal district judges retained jurisdiction for years to monitor compliance with detailed orders prescribing "such details of institutional administration as the square footage of the cells, the nutritional content of the meals, the number of times each prisoner could shower, and the wattage of light bulbs in prisoners' cells."[55] In the South, these early lawsuits challenged some of the most outrageous vestiges of Jim Crow and brought an end (purportedly) to flagrant abuses of prisoners' human rights, such as, in Georgia, routine beatings and shootings.[56] This new genre of litigation also gave rise to a new legal specialty, prisoners' rights lawyering, launching new organizations including the ACLU National Prison Project, the California-based Prison Law Office, and the Georgia-based Southern Center for Human Rights.[57]

53. *Talley v. Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965). The court subsequently declared the system unconstitutional. *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

54. Feeley and Rubin, *Judicial Policy Making and the Modern State*, 13–14. Feeley and Rubin list Minnesota, New Jersey, and North Dakota as the exceptions. Case studies include Leo Carroll, *Lawful Order: A Case Study of Correctional Crisis and Reform* (New York: Routledge, 1998); Phillip J. Cooper, *Hard Judicial Choices: Federal District Court Judges and State and Local Officials* (Oxford: Oxford University Press, 1988); Ben M. Crouch and James W. Marquart, *An Appeal to Justice: Litigated Reform of Texas Prisons* (Austin: University of Texas Press, 1989); Steve J. Martin and Sheldon Ekland-Olson, *Texas Prisons: The Walls Came Tumbling Down* (Austin: Texas Monthly Press, 1987); William Banks Taylor, *Down on Parchman Farm: The Great Prison in the Mississippi Delta* (Columbus: Ohio State University Press, 1999) (a revised edition of *Brokered Justice: Race, Politics, and Mississippi Prisons, 1798–1992*); Larry W. Yackle, *Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System* (Oxford: Oxford University Press, 1989). For a more comprehensive bibliography, consult Margo Schlanger, "Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders," *New York University Law Review* 81, no. 2 (2006): 569–70 n.71.

55. Feeley and Rubin, *Judicial Policy Making and the Modern State*, 13.

56. See Bradley Stewart Chilton, *Prisons Under the Gavel: The Federal Court Takeover of Georgia Prisons* (Columbus: Ohio State University Press, 1991), 108–9. But for an important caution against reading these cases simplistically through a binary of barbaric South vs. civilized North, see Heather A. Thompson, "Blinded by a 'Barbaric' South: Prison Horrors, Inmate Abuse, and the Ironic History of American Penal Reform," in *The Myth of Southern Exceptionalism*, ed. Matthew D. Lassiter and Joseph Crespino (New York: Oxford University Press, 2009).

57. Schlanger, "Civil Rights Injunctions Over Time," 571–72. The efforts of such organizations are ripe for historical examination. For a study that looks at ACLU litigation in North Carolina to examine the tensions between civil liberties lawyering on behalf of prisoners and the organizing efforts of imprisoned activists themselves, see Amanda Hughett, "Silencing the Cell Block: The Making of Modern Prison Policy in North Carolina and the Nation" (PhD diss., Duke University, 2017). On the larger prisoners' rights movement, see Dan Berger, *Captive Nation: Black Prison Organizing in the Civil Rights Era* (Chapel Hill: University of North Carolina Press, 2014).

What prison conditions litigation did not achieve, of course, was any significant downsizing of the prison system; to the contrary, the major victories appear in retrospect to have coincided with the beginnings of mass incarceration. Initially, advocates had high hopes that constitutional litigation, and especially challenges to overcrowding, might "discredit imprisonment as an institution" and, more practically, render the costs of maintaining compliant prisons prohibitively expensive.[58] Recent studies suggest instead that litigation may have perversely expanded the states' capacity to incarcerate, insofar as states responded not by closing inhumane prisons but by renovating or building new facilities.[59] Prison officials, in fact, sometimes welcomed conditions-of-confinement litigation for the budget leverage it gave them against stingy legislatures. In one administrator's words, "We ranted and raved for decades about getting federal judges 'out of our business'; but we secretly smiled as we requested greater and great budgets to build facilities, hire staff, and upgrade equipment."[60]

While prison litigation may have paradoxically aided (or at least, not hindered) mass incarceration, "tough-on-crime" politicians did not necessarily see it that way at the time. In the 1990s, as part of Newt Gingrich's "Contract with America," Congress sought to stem the tide of prisoner lawsuits, targeting both class actions and individual grievances. Introducing what became the Prison Litigation Reform Act (PLRA), Senator Orrin Hatch described "a civil justice system overburdened" by "jailhouse lawyers with little else to do."[61] Hatch's description built on policy literature, such as a 1979 Federal Judicial Center report characterizing the majority of prisoner lawsuits as "frivolous . . . under even the narrowest definition of frivolity," as well as sensationalized anecdotes, such as the tale of a prisoner who sued over receiving creamy instead of chunky peanut butter.[62] When federal judge Jon Newman, of the Second Circuit Court of Appeals, investigated such anecdotes, he concluded that the facts were often far

58. Schlanger, "Civil Rights Injunctions Over Time," 560–61.

59. Heather Schoenfeld, "Mass Incarceration and the Paradox of Prison Conditions Litigation," *Law & Society Review* 44, no. 3–4 (2010): 731–68, https://doi.org/10.1111/j.1540-5893.2010.00421.x. Schoenfeld makes this argument using a case study of Florida. For similar insights through a case study of Chicago's Cook County Jail, see Melanie Newport, "Jail America: The Reformist Origins of the Carceral State" (PhD diss., Temple University, 2016).

60. Quoted in Schlanger, "Civil Rights Injunctions Over Time," 563.

61. Quoted in Margo Schlanger, "Inmate Litigation," *Harvard Law Review* 116, no. 6 (2003): 1565–66, https://doi.org/10.2307/1342709. Schlanger provides a narrative account of the PLRA's legislative history at 1565–69.

62. Ila Jeanne Sensenich, Federal Judicial Center, *Compendium of the Law on Prisoners' Rights* (1979), 10–11 (quoted in Schlanger, "Inmate Litigation," 1567 n.31); Schlanger, "Inmate Litigation," 1568–69.

more serious than described.[63] But other jurists concurred with Hatch that there was something unseemly about Article III judges resolving inmates' quotidian complaints. As early as 1976, Chief Justice Warren Burger had complained that most grievances, "although important to a prisoner, are so minor that any well-run institution should be able to resolve them fairly without resort to federal judges."[64]

Signed the same year as AEDPA, the PLRA imposed new filing fees, exhaustion requirements, caps on damages and attorneys' fees, and limits on judges' remedial discretion.[65] The effect was immediate and precipitous. In 1995, prisoners filed nearly 40,000 lawsuits in federal district court, comprising almost one-fifth of the federal civil docket. Just six years later, individual prisoner filings had declined 43% (to about 22,000), even as the total number of prisoners had continued to increase.[66] The PLRA also choked off (though did not eliminate) institutional reform class actions.[67] Constitutional litigation remains an important tool for prisoners' rights advocates, but the litigation is now more focused and resource-intensive, the province of specialized public interest law firms.[68] Nor did the PLRA merely weed out frivolous suits; legal scholar Margo Schlanger finds that it has dissuaded meritorious and frivolous suits alike, in "blunderbuss fashion."[69]

Despite the PLRA, prisoners continue to challenge their conditions and often it is the unsung operatives of the federal judiciary—magistrate judges, staff attorneys, and clerks—who respond.[70] Occasionally, imaginative lawyers succeed in crafting large-scale impact litigation that can pass through the narrow straits of the PLRA—most notably, the decades-long campaign against California prison overcrowding that culminated in the historic Supreme Court victory of *Brown v.*

63. Jon O. Newman, "Pro Se Prisoner Litigation: Looking for Needles in Haystacks," *Brooklyn Law Review* 62, no. 2 (1996): 519, discussed in Schlanger, "Inmate Litigation," n.45.

64. Warren E. Burger, "Chief Justice Burger Issues Yearend Report," *ABA Journal* 62, no. 2 (1976): 190, quoted in Schlanger, "Inmate Litigation," 1567 n.31.

65. Schlanger, "Inmate Litigation," 1627–33 provides a summary of the changes enacted by the PLRA as well as related, concurrent legal changes affecting prisoner litigation. For a contemporary discussion of AEDPA alongside the PLRA, see Tushnet and Yackle, "Symbolic Statutes and Real Laws."

66. Schlanger, "Inmate Litigation," 1558, 1559–60.

67. Schlanger, "Civil Rights Injunctions Over Time," 554–55.

68. Schlanger, "Civil Rights Injunctions Over Time."

69. Schlanger, "Inmate Litigation," 1626–45.

70. See Schlanger, "Inmate Litigation," 1590.

Plata.[71] The PLRA has been the subject of voluminous commentary—and intense criticism—from legal scholars, prisoners' rights advocates, and journalists.[72] As historians begin to reassess the 1990s with the benefit of newly available archives and the perspective of time, they will surely deepen our understanding of how to understand the PLRA, AEDPA, and other punitive legislation signed by President Clinton within the rise of the New Right and the Democratic Party's responsive triangulation.[73]

Conclusion

While future historians will surely reach their own conclusions, taking stock of the existing scholarship touching upon the federal courts' role in criminal justice suggests some tentative chronologies and themes. First, the long-term trendline seems clear: from the founding through the mid-twentieth century, the federal judiciary's role in the nation's overall landscape of crime and punishment grew steadily. Not only did Congress broaden the scope of federal criminal law, but Congress and the courts together crafted a new institutional role for the federal judiciary as an oversight mechanism monitoring state and local compliance with constitutional requirements. Whether celebrated or criticized, the Warren Court's criminal procedure revolution cannot be understood independently from these institutional changes in the legal and societal role of the lower federal courts. Since the 1970s, the trajectory of change has been more mixed. Federal criminal law has continued to expand. But the federal courts' oversight role over state and local criminal justice institutions has been trimmed back significantly, partly by Supreme Court decisions but primarily by Congress. In the 1990s, responding to perceptions that the federal courts had gone too far in interfering with state institutions, Congress reined in federal jurisdiction over collateral challenges

71. *Brown v. Plata*, 563 U.S. 493 (2011); see Jonathan Simon, *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America* (New York: New Press, 2014). Whether any meaningful decline in California's prison and jail population will follow remains to be seen; after initial declines post-*Brown*, rates plateaued and local jail capacity has actually grown. See Joan Petersilia and Francis T. Cullen, "Liberal But Not Stupid: Meeting the Challenge of Downsizing Prisons," *Stanford Journal of Criminal Law and Policy* 2, no. 1 (2015): 1–43.

72. For a recent example, see Rachel Poser, "Why It's Nearly Impossible for Prisoners to Sue Prisons," *The New Yorker*, May 30, 2016, https://www.newyorker.com/news/news-desk/why-its-nearly-impossible-for-prisoners-to-sue-prisons.

73. Schlanger describes the PLRA as the product of intense lobbying by state prison officials, district attorneys, and other law-and-order groups. Schlanger, "Inmate Litigation," 1558, 1566–67. For a recent political-science work that offers a scathing assessment of Clinton-era Democratic Party triangulation on crime issues, see Murakawa, *The First Civil Right*.

to state convictions and introduced new procedural hurdles for prisoners challenging their conditions of confinement in federal court.

Throughout this history, the federal courts have been shaped by complex negotiations with Congress about the proper scope of judicial authority, as well as by differences of opinion within the judiciary itself. The federal courts have sometimes resisted congressional efforts to conscript them into crime control, as during Prohibition, when judges complained about the flood of liquor cases and developed strategies for getting rid of them as summarily as possible. At some point federal judges seem generally to have made peace with the law enforcement dimension of their role—excepting a handful of outspoken critics, such as Judge Adelman—although it would be useful to know more about local judicial responses to the drug and immigration crackdowns of recent decades. At moments in the twentieth century, federal judges seemed eager to take on broad policymaking duties—such as the lower-court judges who forced significant change upon state prison systems around the country—only to be reined in by Congress, but in recent decades, an ascendant conservative legal movement has helped to revise many judges' own conceptions of their role.[74] Within the legal academy and the political sphere, debates about these developments have grown repetitive, but historians are well positioned to provide fresh insights by deploying their characteristic attention to local detail, change over time, and the balance between individual agency and structural constraint.

74. See, for instance, Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton, NJ: Princeton University Press, 2008) on how conservative scholars exposed federal judges to law and economics perspectives.

The Federal Judicial Center

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