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FELIX FRANKFURTER: THE ARCHITECT OF "OUR FEDERALISM"

Mary Brigid McManamon*

Until we have penetrating studies of the influence of [Supreme Court Justices], we shall not have an adequate history of the Supreme Court, and, therefore, of the United States.

—Felix Frankfurter¹

On May 20, 1992, the Commonwealth of Virginia executed Roger Keith Coleman² amid a storm of controversy.³ Not only were there the usual protests against capital punishment, but many also feared an innocent man was being put to death.⁴ Before the execution, Mr. Coleman and his lawyers had attempted to challenge his conviction in both the Virginia and federal court systems. Unfortunately, his arguments in the Virginia system came to a halt when he filed a notice of habeas corpus appeal in the county circuit

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¹ Quoted in ALEXANDRA K. WIGDOR, *THE PERSONAL PAPERS OF SUPREME COURT JUSTICES*, A DESCRIPTIVE GUIDE at v (Garland Reference Library of Social Science Vol. 327, 1986).

² John F. Harris, *Coleman Electrocuted as Final Appeals Fail; Supreme Court Rejects Stay in 7 to 2 Vote*, WASH. POST, May 21, 1992, at A1.

³ "[T]he governor received more than 13,000 calls and letters on Coleman's case, many from overseas, the vast majority urging clemency." *Id.* at A8.

⁴ For a discussion of the circumstantial evidence that was used to convict Mr. Coleman, see Jill Smolowe, *Must This Man Die?*, TIME, May 18, 1992, at 40.

court three days late.⁵ He then turned to the federal court system for help, filing a petition for writ of habeas corpus.⁶ The district court denied the petition, a ruling which was upheld on appeal.⁷ Mr. Coleman's fate was then in the hands of the United States Supreme Court.

On June 24, 1991, the Supreme Court announced its opinion in Mr. Coleman's case.⁸ While the issues discussed in the media were Mr. Coleman's possible innocence and his execution under those circumstances, the Supreme Court saw the case from another vantage point entirely. A majority of the Court declared: "This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus."⁹ Given this statement of the issue, the High Court not surprisingly denied habeas relief. The Court found that Mr. Coleman was denied redress in the Virginia court system due to the application of an independent and adequate state procedural rule, and, therefore, the federal courts could not look at the merits of his claim.¹⁰ The last federal hurdle to Mr. Coleman's execution was thereby jumped,¹¹ and less than one year later he was dead.

Mr. Coleman's case is just one of the latest in a series of Supreme Court opinions that are increasingly deferential to the

⁵ It is not clear that the Virginia Supreme Court dismissed Mr. Coleman's appeal because of the missed deadline. The U.S. Supreme Court, however, held that the violation of the state procedural rule was the basis for the state court's decision. *Coleman v. Thompson*, 111 S. Ct. 2546, 2559-61 (1991). For a more detailed summary of Mr. Coleman's case history, see *id.* at 2552-53.

⁶ Before filing his federal habeas corpus action, Mr. Coleman sought U.S. Supreme Court review of both his conviction and the dismissal of his state habeas corpus action. The Supreme Court denied review both times. *Coleman v. Virginia*, 465 U.S. 1109 (1984); *Coleman v. Bass*, 484 U.S. 918 (1987).

⁷ *Coleman v. Thompson*, 895 F.2d 139 (4th Cir. 1990), *aff'd*, 111 S. Ct. 2546 (1991).

⁸ *Coleman v. Thompson*, 111 S. Ct. 2546 (1991).

⁹ *Id.* at 2552.

¹⁰ *Id.* at 2553-68. For a discussion of the "independent and adequate state ground" doctrine, see ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 10.5 (1989); MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 260-79 (2d ed. 1990); CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* 745-53 (4th ed. 1983).

¹¹ The Supreme Court heard from Mr. Coleman twice more before his death. First, the Court denied a rehearing of his case. *Coleman v. Thompson*, 112 S. Ct. 27 (1991). Second, on the day of his death, the Court denied a stay of his execution. *Coleman v. Thompson*, 112 S. Ct. 1845 (1992) (per curiam).

States.¹² There exists contemporaneously, however, another line of Supreme Court cases that does not defer to the States, but instead restricts their right to regulate.¹³ A close examination of these two lines of cases shows that extreme deference to the States is required only of the federal judiciary, while wide latitude vis-à-vis the States is accorded to the federal political branches. Although recognizing this paradox, many jurists believe that judicial deference to the States is mandated for historical reasons.¹⁴ Before we plunge further down the road of judicial federalism, a road that clearly—as seen in the case of Mr. Coleman—affects more than classroom debate, we should determine the origins of this deference and its original purpose. Once we are aware of its true age and function, we can determine intelligently whether judicial federalism is an attitude that we want to keep.

So, where did this judicial sensitivity to the States—called judicial federalism or “our federalism”¹⁵—originate? In 1971, Justice Hugo L. Black asserted, “th[e] slogan, ‘Our Federalism,’ born in the early struggling days of our Union of States, occupies

¹² See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (holding State’s general waiver of sovereign immunity, subjecting it to suit in state court, did not waive Eleventh Amendment immunity); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (holding Eleventh Amendment bars federal court suit against state officials when State is real, substantial party in interest); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8, 9-10, 21 n.22 (1983) (interpreting federal question jurisdiction “with an eye to practicality and necessity,” including considerations of comity); *Rizzo v. Goode*, 423 U.S. 362 (1976) (holding that federalism considerations limit the availability of equitable relief in § 1983 actions); *Younger v. Harris*, 401 U.S. 37 (1971) (holding federal courts will abstain from enjoining pending state criminal prosecutions except under extraordinary circumstances).

¹³ For the most recent cases restricting a State’s right to regulate, see *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992) (holding State’s policy of charging high disposal fee for out-of-state waste violates Commerce Clause); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Resources*, 112 S. Ct. 2019 (1992) (holding state policy of allowing counties to restrict acceptance of out-of-state waste violates Commerce Clause); *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992) (holding federal Airline Deregulation Act of 1978 preempts States from prohibiting allegedly deceptive airline fare advertisements through their own consumer protection statutes).

¹⁴ For a discussion of currently-held beliefs about the historical origins of judicial deference, see *infra* notes 48-59 and accompanying text.

¹⁵ As used in this Article, the terms “judicial federalism” and “our federalism” connote heightened federal court sensitivity to the balance of power between Nation and States with a resulting deference to the States. For a more complete definition of these terms, see *infra* notes 29-37 and accompanying text.

a highly important place in our Nation's history and its future."¹⁶ While an accurate prophecy, the Justice's historical analysis in this case is misleading, if not inaccurate. Unfortunately, two constitutional scholars have found, "[Justice Black's] substitution of a slogan for history has dominated the Court's perception of the development of federalism ever since."¹⁷ Contrary to the perception of many modern jurists, however, judicial federalism as we know it today did not exist before the twentieth century.¹⁸ Of course, much of our Nation's constitutional history revolves around the relationship of the Federal Government to the States. But today's canon that the federal judiciary must be sensitive to the impact of a jurisdictional decision on that relationship was not universally accepted dogma before the last half-century.¹⁹ While earlier federal judges accorded state tribunals the respect due to a sister court system, those judges did not call upon "federalism" as a touchstone to define federal judicial power.²⁰ Moreover, in many early decisions involving the power of the federal judiciary, the federal courts found in favor of their own power, showing very little deference to the States.²¹

¹⁶ *Younger v. Harris*, 401 U.S. 37, 44-45 (1971).

¹⁷ Aviam Soifer & H.C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1165 n.124 (1977).

¹⁸ The author is not saying that tensions between Nation and States are of recent development. The Civil War alone is tragic testimony to the contrary. What did not exist before the twentieth century is today's transcendent notion of judicial federalism, see *supra* note 15 and *infra* note 32, which circumscribes the modern debate as to the proper role of the federal courts.

¹⁹ See discussion *infra* part II (discussing relationship of federal courts to the States before Justice Frankfurter joined Supreme Court).

²⁰ For example, modern debate as to the scope of pendent and ancillary—now called "supplemental"—jurisdiction begins with the following thesis: "The standard of [such] jurisdiction ultimately decided upon is crucial to the allocation of judicial business between state and national courts." Michael Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262, 262 (1968). That thesis was simply not a part of the jurisdictional calculus in the first century and a half of the federal courts. Mary Brigid McManamon, *Dispelling the Myths of Pendent and Ancillary Jurisdiction: The Ramifications of a Revised History*, 46 WASH. & LEE L. REV. 863, 900-02 (1989).

²¹ See, e.g., *Ex parte Young*, 209 U.S. 123 (1908) (holding federal court may enjoin state officials from enforcing unconstitutional state law); *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175 (1864) (failing to follow state court decision regarding validity of bonds under state constitution); *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (holding that the Rules of Decision Act is strictly limited to local statutes and local usages); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (holding suit against state officials does not violate

Today's concept of judicial federalism can be traced largely to the work of one man: Felix Frankfurter.²² One historian observed recently that Justice Frankfurter was a failure because much of his work on the Supreme Court has been overruled or disregarded.²³ In reality, he was much more of a success than we currently realize.²⁴ As one contemporary said about Frankfurter's ideas, "he has helped to make the times, thus achieving the ultimate success

Eleventh Amendment); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (compelling State to appear before Court in federal question action); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (holding federal courts could entertain diversity suits against States).

²² The slogan itself can also probably be traced to Felix Frankfurter. He was the first Justice to use it in a Supreme Court opinion. See *infra* notes 463-467 and accompanying text. Moreover, as Professor Frankfurter, he often invoked the slogan. See, e.g., Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 107 (1935) [hereinafter Frankfurter & Hart, 1934 Term]; Felix Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33, 79 (1931). In fact, he used the slogan to describe the theme of his casebook on federal jurisdiction. See *infra* note 399 and accompanying text. For a closer look at the origins of the slogan, see Michael G. Collins, *Whose Federalism?*, 9 CONST. COMMENT. 75 (1992). See also 17A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 2D § 4251, at 189 n.28 (1980) (noting that Justice Frankfurter was first Justice to use the phrase); Soifer & Macgill, *supra* note 17, at 1165 n.124 (same).

²³ Melvin I. Urofsky, *The Failure of Felix Frankfurter*, 26 U. RICH. L. REV. 175 (1991). This attack is not entirely new. Frankfurter's "gleaming historical reputation," Mark B. Rotenberg, *Politics, Personality and Judging: The Lessons of Brandeis and Frankfurter on Judicial Restraint*, 83 COLUM. L. REV. 1863, 1863 (1983), has been somewhat tarnished in the last decade by recent works on the Justice. See, e.g., H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981); BRUCE ALLEN MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* (1982); Mark Tushnet (with Katya Lezin), *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867 (1991).

²⁴ This Article contends that Professor Urofsky is wrong in his evaluation of Felix Frankfurter, see *supra* note 23 and accompanying text, on several levels. First, an evaluation of Frankfurter based solely on his Supreme Court opinions is flawed. One also has to study his impact through his roles as a law professor and political advisor to get a true picture of his success or failure. See *infra* part III.B. Second, while Frankfurter's opinions are certainly not the newest opinions on any given matter, they are frequently considered the seminal cases for doctrines. See *infra* note 81 and accompanying text and *infra* part IV. Finally, it is unfair to judge any Supreme Court Justice by the number of his or her opinions that are still good law; few could pass that test. As Chief Justice Rehnquist recently said, speaking for the Court, "*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne v. Tennessee*, 111 S. Ct. 2597, 2609-10 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

of every thinker in politics, namely, to rob his ideas of novelty.' ²⁵ It is in Frankfurter's version of judicial restraint²⁶ that we find the origins of our own judicial federalism. This Article is not saying that Frankfurter created all of the doctrines associated with the phrase "judicial federalism" or that he would approve of them all. Rather, he started the "snowball" of judicial federalism rolling: Professor, and later Justice, Frankfurter taught us to judge federal court power by its impact on the relationship between Nation and States. That lesson, which we learned very well, is the basis for much of the law of federal courts in the last two decades.²⁷ This Article tells the story of how Felix Frankfurter changed the course of judicial history.

Part I of the Article sets out the definitions and modern views of judicial federalism, showing that the doctrines we associate with "our federalism" date from the late 1930s. Part II discusses the federal courts' attitudes toward the States before that time. Part III introduces Felix Frankfurter's vision for the federal courts and his opportunities to make his vision reality. Part IV describes the federalism Justice Frankfurter brought to life, revealing his creation as our modern day judicial federalism in its infancy.²⁸ The Article concludes with a reflection on the wisdom of allowing one man, no matter how brilliant, to determine the course of federal jurisdiction.

²⁵ Felix S. Cohen, *Mr. Justice Frankfurter*, 101 THE NEW REPUBLIC 145, 145 (1939) (reviewing LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913-1938 (Archibald MacLeish & E.F. Prichard, Jr., eds., 1939)) (quoting Felix Frankfurter).

²⁶ It is widely acknowledged that Justice Frankfurter was "the Court's foremost advocate of judicial self-restraint in recent times." STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 286 (3d ed. 1988).

²⁷ Professor Richard H. Fallon, Jr., has addressed all the areas of federal courts law that are shaped by notions of "judicial federalism." See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988).

²⁸ The author approaches this task with some trepidation. One scholar described it as follows: "To . . . articulate, however generally, exactly what is the Justice's federalism and how it is reflected in his many hundreds of opinions, would be a formidable and perhaps foolhardy task." Louis Henkin, *Voice of a Modern Federalism*, in FELIX FRANKFURTER: THE JUDGE 68, 69 (Wallace Mendelson ed., 1964).

I. INTRODUCTION: WHAT IS "OUR FEDERALISM" AND WHERE DID IT COME FROM?

The term federalism, broadly speaking, "includes [1] interrelationships among the states and [2] [the] relationship between the states and the federal government."²⁹ The slogan "our federalism," however, relates only to the latter usage of the term.³⁰ As Justice Black described it, the slogan refers to

the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.³¹

Federalism is of course the relationship between all branches of the Federal Government and the state governments. The slogan "our federalism," however, has become synonymous with judicial federalism, the notion that federal courts must wield their power with a sensitivity to its impact on the balance of power between Nation and States.³² This notion has spawned myriad federal decisions announcing doctrines, such as the doctrine of equitable abstention formulated in *Younger v. Harris*,³³ the other abstention

²⁹ BLACK'S LAW DICTIONARY 612 (6th ed. 1990). Federalism is not limited to the United States. These relationships exist in any nation comprised of a union of states (e.g., Australia).

³⁰ The possessive "our," of course, limits the slogan to the relationship between States and Nation in the United States. See *supra* note 29.

³¹ *Younger v. Harris*, 401 U.S. 37, 44 (1971).

³² Judicial federalism is "a view that federal courts must regard their power as tempered by a keen appreciation of the essential role of the states and their judicial systems in our constitutional universe." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-28, at 196 (2d ed. 1988). Whether Congress or the Executive has usurped powers reserved to the States is thus not the issue. Cf. *infra* note 78 and accompanying text (defining political federalism).

³³ 401 U.S. 37 (1971). The Supreme Court held in *Younger* that, based on equity jurisprudence and "our federalism," "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Id.* at 45. Rather, only upon a "showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief," *id.* at 54, might such an injunction be appropriate. *But*

doctrines,³⁴ and the *Erie* doctrine,³⁵ or interpreting rules, such as the Eleventh Amendment³⁶ and the Anti-Injunction Act,³⁷ that

see Anti-Injunction Act, 28 U.S.C. § 2283 (1988) (placing additional barriers to issuance of injunction against state proceedings), *quoted infra* note 37.

"Our federalism" has been most closely identified with *Younger* and its progeny. See CHEMERINSKY, *supra* note 10, § 13.2; REDISH, *supra* note 10, ch. 11; WRIGHT, *supra* note 10, § 52A.

³⁴ The rhetoric and result of judicial federalism is perhaps best exemplified by the rather amorphous "abstention" doctrines, defining exceptions to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" by requiring them to abstain in certain cases where necessary to promote the integrity of state law and respect the autonomy of state judicial officers.

TRIBE, *supra* note 32, § 3-28, at 196 (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)) (footnote omitted).

For more detailed descriptions of the various abstention doctrines, see CHEMERINSKY, *supra* note 10, chs. 12, 14; REDISH, *supra* note 10, ch. 9; WRIGHT, *supra* note 10, § 52.

³⁵ This doctrine takes its name from the case of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), which held that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State." *Id.* at 78. This case has been described as "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems." *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring); see also John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 695 (1974) ("Erie is by no means simply a case. . . . [I]t implicates, indeed perhaps it is, the very essence of our federalism." (footnote omitted)).

³⁶ U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). As Professor Erwin Chemerinsky has noted, "[t]he persistent problem of federalism is how to preserve state sovereignty while assuring the supremacy of federal law. Nowhere is this tension more apparent than in the Supreme Court's interpretations of the Eleventh Amendment." Erwin Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment after Pennhurst v. Halderman*, 12 HASTINGS CONST. L.Q. 643, 643 (1985).

³⁷ 28 U.S.C. § 2283 (1988) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."). There is dispute as to why this statute was originally enacted. See, e.g., *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 658 (1977) (Stevens, J., dissenting) (asserting that intent was "to prevent the federal courts from exercising a sort of appellate review function in litigation in which the state and federal courts had equal competence"); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 130-32 (1941) (citing concerns about the "arduousness of the circuit duties imposed on the Supreme Court justices" and the federal courts "interfering with the judgments at law in the State courts"); William T. Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330, 331-38 (1978) (asserting that act was conceived in response to complaints of the "onerous circuit-riding duties then imposed on the Supreme Court Justices But the Act seems not at all intended to regulate a major problem of federal and state relations"); Comment, *Federal Court Stays of State Court*

govern the relationship of the federal courts to the States.

Justice Black's prophecy that the slogan would be important to our Nation's future has come true.³⁸ While the word "federalism" is supposedly neutral,³⁹ the Supreme Court has increasingly used it in the last twenty years as a basis for deferring to the States at the expense of federal jurisdiction.⁴⁰ This increased deference has been dubbed "the new judicial federalism"⁴¹ and has caused lively debate among late-twentieth-century jurists.⁴² Participants in the

Proceedings: A Re-examination of Original Congressional Intent, 38 U. CHI. L. REV. 612 (1971) (contending that original congressional intent was not to promote state court independence but to allow federal courts to determine those situations where means other than injunctions could be used to stay state proceedings); *see also infra* notes 165, 173 and accompanying text (citing concern for bifurcation that would result if action at law was pending in state court and bill seeking to establish an equitable defense was filed in federal court under court's diversity jurisdiction). However, "the modern Supreme Court . . . acclaim[s] the statute to be the pillar of 'our federalism.'" Mayton, *supra*, at 330; *see, e.g.*, *Younger v. Harris*, 401 U.S. 37, 43-45 (1971) (citing act's importance in reinforcing notion of "comity," meaning a "proper respect for state functions" and a belief that the notion will fare better if states are allowed to perform "their separate functions in their separate ways"); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970) (citing act's response to pressures to "prevent needless friction between state and federal courts").

³⁸ In the 20 years since Justice Black prophesied, the slogan has been cited in reported federal opinions over 270 times. In the more than 180 years before 1971, the slogan "our federalism" was cited only about one-third that many times. Search of WL, Allfeds database (June 25, 1991); *id.*, Allfeds-old database. Moreover, the concept of federalism has been cited in reported federal opinions approximately 4000 times in the last 20 years, while it was only cited about one-tenth that many times in the two preceding centuries. Search of LEXIS, Genfed library, Courts file (June 25, 1991); WL, Allfeds database (June 25, 1991); *id.*, Allfeds-old database.

³⁹ "The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

⁴⁰ *See supra* notes 8-14 and accompanying text (addressing recent Supreme Court usage of federalism); *see also supra* note 15 (discussing terminology).

⁴¹ It is now widely noted that a counterassault on federal judicial power has been taking place in the Supreme Court, with real casualties. Inevitably, the old institutional struggle between the nation and the states has become part of this present battle; a new judicial federalism seems to be emerging, requiring deferences to state administration and state adjudication that only yesterday were thought unnecessary or unwise.

Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1192-94 (1977) (footnotes omitted).

⁴² Numerous scholarly articles have been written about the new judicial federalism. *See, e.g.*, Weinberg, *supra* note 41; Louise Weinberg, *The New Judicial Federalism: Where We Are Now*, 19 GA. L. REV. 1075 (1985); *see also* Ronald K.L. Collins, *Foreword: The Once "New*

debate generally fall into two camps.⁴³ In one camp are those who stress that the States are separate sovereigns whose autonomy must be respected (the "federalists"⁴⁴). They therefore agree that the federal courts should accord great deference to the States. In the other camp are those who believe that the federal courts exist to vindicate national interests (the "nationalists"⁴⁵ or "neo-federalists"⁴⁶). Consequently, they believe that when those interests are at stake, notions of state sovereignty ought to give way.

This debate is circumscribed by a transcendent belief in "our federalism." In other words, both sides accept the concept of judicial federalism—sensitivity to the impact of federal jurisdiction on the federal-state balance of power. The two camps merely differ as to what that impact should be.⁴⁷ To bolster their conclusions, both sides, like Justice Black, find the origins of their view of federalism in "the early struggling days of our Union of States."⁴⁸ On the one hand, the federalists conclude that, although the framers established a national government, they "continued to view the states as important—indeed, in many ways as the prima-

Judicial Federalism" & Its Critics, 64 WASH. L. REV. 5 (1989); Michael J. Gentile, Note, *Burning Tree Club, Inc. v. Bainum—State Action, Strict Scrutiny, and the "New Judicial Federalism"*, 47 MD. L. REV. 1219 (1988). There have also been several symposia devoted to the topic. See, e.g., Symposium, *Civil Rights and Federalism*, 59 NOTRE DAME L. REV. 1063 (1984); Symposium, *Federalism: Allocating Responsibility Between the Federal and State Courts*, 19 GA. L. REV. 789 (1985); Panel Discussion, *Judicial Federalism: Don't Make a Federal Case Out of It . . . Or Should You?*, 73 JUDICATURE 146 (1989) (panel discussion at the American Judicature Society Annual Meeting, Aug. 4, 1989).

⁴³ Professor Richard H. Fallon, Jr., has done a thorough study of the judicial federalism debate. He has concluded that "[s]erious thinkers about federal courts issues frequently conclude either that the federal judicial power is very broad in nearly all cases or, alternatively, consistently reach decisions that would narrow federal judicial power relative to that of the state courts." Fallon, *supra* note 27, at 1146.

⁴⁴ For a more detailed summary of the federalists' beliefs, see *id.* at 1151-57.

⁴⁵ For a more detailed summary of the nationalists' beliefs, see *id.* at 1158-64.

⁴⁶ The term "neo-federalist" is used to indicate a relationship with the theories of the original Federalist Party, not with those of the "new federalism" camp. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 208 n.9 (1985).

⁴⁷ For an insightful discussion of the "crudely political" reasons that jurists select one camp or the other, see Michael Wells, *Rhetoric and Reality in the Law of Federal Courts: Professor Fallon's Faulty Premise*, 6 CONST. COMMENT. 367 (1989).

⁴⁸ *Younger v. Harris*, 401 U.S. 37, 44-45 (1971); see *supra* text accompanying note 16 (noting Justice Black's view of federalism).

ry—entities of government.”⁴⁹ To support this position, the federalists point to, among other things, the delegation of limited powers to the Federal Government and the Eleventh Amendment.⁵⁰ On the other hand, the nationalists or neo-federalists contend that the Constitution should be interpreted in light of the fact that “the proponents of a broad national authority prevailed in the historical debates surrounding the Constitution’s drafting and ratification.”⁵¹ Moreover, “[a]ccording to a Nationalist theory, state sovereignty—a concept of dubious analytical power even under the original Constitution—must be viewed as vastly diminished, if not eviscerated, by the Reconstruction amendments.”⁵²

Several scholars have looked beyond our early struggling days, tracing the “ever-whirling wheels of American federalism”⁵³ through both centuries of our history.⁵⁴ But even these fuller histories of “our federalism” are incomplete. There is one era whose importance is consistently overlooked: the two decades from the New Deal⁵⁵ to the Warren Court.⁵⁶ Generally, scholars detailing the history of judicial federalism note the early-twentieth-century era of nationalism symbolized by the 1908 case, *Ex parte*

⁴⁹ Fallon, *supra* note 27, at 1152-53.

⁵⁰ *Id.* at 1153, 1189-90, 1193-94 (citing, inter alia, David P. Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819, 836 (1981); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 491 (1954); Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1346-47 (1982)).

⁵¹ *Id.* at 1158; see, e.g., Powell, *supra* note 50, at 1368-70 (discussing debates); John Minor Wisdom, *Foreword: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063, 1074-76 (1984) (same).

⁵² Fallon, *supra* note 27, at 1159 (footnote omitted); see, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1451-66 (1987) (addressing Reconstruction era); Burton D. Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740, 750-51, 810-11 (1974) (same); Weinberg, *supra* note 41, at 1196-99 (same).

⁵³ This phrase is Judge John Minor Wisdom’s. See Wisdom, *supra* note 51.

⁵⁴ See, e.g., Fallon, *supra* note 27, at 1168 n.101; Wechsler, *supra* note 52, at 743-44; Weinberg, *supra* note 41, at 1196-203; see also Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 239-55 (1988) (tracing history of federal and state court relations).

⁵⁵ The beginning of the New Deal coincides roughly with the beginning of President Franklin D. Roosevelt’s first term in 1933.

⁵⁶ Earl Warren became the Chief Justice of the United States in 1953.

Young.⁵⁷ The next era of importance to these scholars is the Warren Court era.⁵⁸ Those who do look to the forgotten years in the second quarter of this century view the cases decided then as merely anomalous.⁵⁹

This omission in the history of "our federalism" is puzzling. The seminal cases that embody the bundle of doctrines supposedly prescribed by judicial federalism⁶⁰ were all decided in this forgotten era. The Supreme Court announced the *Erie Railroad v. Tompkins*⁶¹ opinion in 1938, surprising everyone by overturning *Swift v. Tyson*⁶² and nearly a century of precedent.⁶³ The Court devel-

⁵⁷ 209 U.S. 123 (1908) (holding that notwithstanding the Eleventh Amendment, federal court may enjoin state officials from enforcing unconstitutional state law).

⁵⁸ See, e.g., Fallon, *supra* note 27, at 1168 n.101 (merging *Ex parte Young* era with the second quarter of the twentieth century); Weinberg, *supra* note 41, at 1200-01 (moving from discussion of early 1900s to Warren Court era); see also Chemerinsky, *supra* note 54, at 241-42 (same). But see Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 595 (1991) [hereinafter Chemerinsky, *Parity Debate*] (noting that federal judicial deference stems from "the constitutional revolution of the mid-1930s"); Panel Discussion, *supra* note 42, at 149-51 (remarks of Erwin Chemerinsky) (noting shift in relationship between state and federal courts after 1937).

⁵⁹ See, e.g., Douglas Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636, 641-59 (1979); Wechsler, *supra* note 52, at 743, 788-833. These authors correctly characterize the caselaw decided in the 1940s as different from previous law. They do not perceive this decade, however, as the beginning of our current era. Rather, they see the cases as "sports" and believe that the modern era began 20 to 30 years later.

Some scholars have looked more closely at this era, describing it as the time when federalism died. See, e.g., Joseph Lesser, *The Course of Federalism in America—An Historical Overview*, in *FEDERALISM: THE SHIFTING BALANCE* 1, 6-8 (Janice C. Griffith ed., 1989); Wisdom, *supra* note 51, at 1068-69. These writers, however, are telling the story of political federalism rather than judicial federalism. See *infra* notes 78-79 and accompanying text (discussing political federalism). These authors do not discuss the development of judicial federalism during those years.

⁶⁰ See *supra* notes 33-37 and accompanying text.

⁶¹ 304 U.S. 64 (1938).

⁶² 41 U.S. (16 Pet.) 1 (1842).

⁶³ See, e.g., T.A. Cowan, *Constitutional Aspects of the Abolition of Federal Common Law*, 1 LA. L. REV. 161, 173 (1938) ("The *Erie* case is a monumental decision."); Jefferson B. Fordham, *Conformity of Federal Courts to State Decisions in Diversity Cases*, 4 LEGAL NOTES ON LOC. GOV'T 11, 12 (1938) ("a radical change in the law"); Benno Schmidt, *Substantive Law Applied by the Federal Courts—Effect of Erie R. Co. v. Tompkins*, 16 TEX. L. REV. 512, 525 (1938) ("landmark decision"); Charles S. Burdell, Note, 18 NEB. L. BULL. 59, 59 (1939) ("startling" opinion of "paramount importance"); Recent Decision, 7 FORDHAM L. REV. 438, 438-39 (1938) ("*Swift v. Tyson*, one of the best known and one of the most important cases ever decided by the United States Supreme Court has been liquidated by its creators." (footnotes omitted) (quoting without citation ARMISTEAD M. DOBIE, CASES ON FEDERAL

oped the fledgling *Erie* doctrine over the next decade through such cases as *Sibbach v. Wilson & Co.*⁶⁴ (1941), *Klaxon Co. v. Stentor Electric Manufacturing Co.*⁶⁵ (1941), *Guaranty Trust Co. v. York*⁶⁶ (1945), *Angel v. Bullington*⁶⁷ (1947), and the trio, *Ragan v. Merchants Transfer & Warehouse Co.*,⁶⁸ *Woods v. Interstate Realty Co.*,⁶⁹ and *Cohen v. Beneficial Industrial Loan Corp.*⁷⁰ (1949). The current restrictive interpretation of the Anti-Injunction Act⁷¹ was born in 1941 when the Supreme Court decided *Toucey v. New York Life Insurance Co.*,⁷² an opinion that shocked virtually all commentators by its disingenuous disregard of a century of precedent.⁷³ In the same year, the Court invented abstention in *Railroad Commission v. Pullman Co.*,⁷⁴ disregarding Chief Justice John Marshall's admonition that

JURISDICTION AND PROCEDURE 405 n.6 (1935)); Note, *Swift v. Tyson Overruled*, 24 VA. L. REV. 895, 895 (1938) ("a momentous decision"); see also *Cole v. Pennsylvania R.R.*, 43 F.2d 953, 957 (2d Cir. 1930) (reluctantly following *Swift v. Tyson* because the doctrine was "settled for the present"); *infra* note 185 and accompanying text (noting Felix Frankfurter's view that *Swift* was so well-recognized that it could not be overturned by judicial decision).

⁶⁴ 312 U.S. 1 (1941).

⁶⁵ 313 U.S. 487 (1941).

⁶⁶ 326 U.S. 99 (1945).

⁶⁷ 330 U.S. 183 (1947).

⁶⁸ 337 U.S. 530 (1949).

⁶⁹ 337 U.S. 535 (1949).

⁷⁰ 337 U.S. 541 (1949).

⁷¹ 28 U.S.C. § 2283 (1988), *quoted supra* note 37.

⁷² 314 U.S. 118 (1941).

⁷³ As one commentator noted, "In view of . . . the considerable authority for the exception in question, the decision in [*Toucey*] is somewhat unexpected." Recent Case Comment, 27 IOWA L. REV. 652, 656 (1942) [hereinafter IOWA Recent Case]; accord, John F. Heard, Recent Case, 20 TEX. L. REV. 621, 623-24 (1942) [hereinafter TEX. Recent Case]; Recent Case, 26 MINN. L. REV. 558, 560 (1942) [hereinafter MINN. Recent Case]; Note, 16 TUL. L. REV. 468, 471 (1942) [hereinafter TUL. Note]; Recent Case, 90 U. PA. L. REV. 857, 858-59 (1942) [hereinafter U. PA. Recent Case]. Congress shortly thereafter attempted to overrule *Toucey* with an amendment to the statute. See 28 U.S.C. § 2283 (1988) (Historical and Revision Notes). The Supreme Court, however, has continued to construe the statute very strictly. CHEMERINSKY, *supra* note 10, at 558; see, e.g., *Vendo Co. v. Lektro-Vend Corp.* 433 U.S. 623, 630 (1977) (emphasizing the "expressly authorized" requirement for an exception); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970) (finding clear-cut legislative prohibition against injunctions except for specifically defined exceptions); *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 515-16 (1955) (holding no exception for lack of subject matter jurisdiction due to preemption of field by Congress).

⁷⁴ 312 U.S. 496 (1941).

[t]he judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.⁷⁵

Just two years later, the Court extended abstention in *Burford v. Sun Oil Co.*⁷⁶

One possible reason for the failure of modern commentators to identify this era as the beginning of our judicial federalism is the seemingly contradictory message given by the Supreme Court at that time.⁷⁷ This era, which saw the birth of our judicial federalism, also watched the death of political federalism.⁷⁸ That is to say, the power of the federal legislative and executive branches increased enormously, while that of the state political branches was diminished. This change in the political balance of power was due to the Supreme Court's expansive interpretation of the Commerce Clause, application of much of the Bill of Rights to the States, and

⁷⁵ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821); *accord*, *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922); *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). The Supreme Court had previously devised ways to avoid a constitutional question. For a summary of these techniques, see Note, *The Pullman Case: A Limitation on the Business of the Federal Courts*, 54 HARV. L. REV. 1379, 1383-87 (1941). That commentator, however, noted a difference between earlier cases and the abstention doctrine born in *Pullman*. The student asserted that in *Pullman*, "the court enunciated a doctrine potentially as significant as the overthrow of *Swift v. Tyson*." *Id.* at 1380.

⁷⁶ 319 U.S. 315 (1943).

⁷⁷ "Since 1937, the Supreme Court has taken a seemingly paradoxical approach to federalism." Chemerinsky, *Parity Debate*, *supra* note 58, at 594. "This model, emphasizing federalism as a limit on the judiciary but not on Congress, continues to this day." *Id.* at 595; see *supra* notes 12-14 and accompanying text (discussing paradox in Supreme Court decisions regarding deference to States).

⁷⁸ The term "political federalism" is used in this Article in contrast to judicial federalism. Political federalism refers to the balance of power between the political branches of the Federal Government and the States. *Cf. supra* note 32 and accompanying text (defining judicial federalism).

the consequent growth of federal administrative agencies.⁷⁹

How could the same Supreme Court be so deferential to the States in one domain while "running roughshod" over them in another?⁸⁰ The answer emerges from a closer look at the cases that shaped our judicial federalism. One name stands out: Felix Frankfurter. He wrote the opinions in *Toucey*, *Pullman*, *York*, and *Angel*, while dissenting vigorously in *Sibbach* and *Burford*.⁸¹ Moreover, although he was not yet on the Court when *Erie* was decided, there are those who credit his scholarship with bringing the case about.⁸² At the same time, Frankfurter was a prime mover in the growth of federal political power. He was known as an ardent New Dealer⁸³ and had a hand in drafting such legisla-

⁷⁹ See, e.g., EDWARD S. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 1-51 (1934) (comparing federalism and nationalism in the industrial process); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950); see also Lesser, *supra* note 59, at 6-8; Wisdom, *supra* note 51, at 1068 ("[T]he Great Depression, the New Deal, and World War II increased the influence of the central government at the expense of state government.").

⁸⁰ Contemporaries noted this contradiction. See, e.g., Jeff B. Fordham, *Swift v. Tyson and the Construction of State Statutes*, 41 W. VA. L.Q. 131, 131-32 (1935) (noting in "day of unparalleled nationalism" the Supreme Court has checked judicial authority); Note, *supra* note 75, at 1380-81 (noting "trend toward limitation of the authority of the lower federal courts over matters primarily of state concern—a trend contrary to the otherwise broadening orbit of the federal government"); Thomas F. Green, Jr., Book Review, 28 TEX. L. REV. 996, 996 (1950) (contrasting expansion of powers exercised by legislative and executive branches with conservatism of judiciary).

⁸¹ Given this list of just a few of Frankfurter's opinions on the federal court system, it is odd that Professor Urofsky found "practically no Frankfurter opinions among the leading cases" in "several of the leading casebooks in . . . federal court jurisdiction," Urofsky, *supra* note 23, at 179 n.24. Many casebooks have addressed these opinions. See, e.g., PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 765, 800, 1322, 1329, 1354, 1364 (3d ed. 1988) [hereinafter HART & WECHSLER (3d ed.)]; DAVID P. CURRIE, *FEDERAL COURTS* 336, 344, 485, 497, 521 (4th ed. 1990); HOWARD P. FINK & MARK V. TUSHNET, *FEDERAL JURISDICTION: POLICY AND PRACTICE* 192, 198 (2d ed. 1987); PETER W. LOW & JOHN CALVIN JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 488, 490, 533, 564, 1139 (2d ed. 1989); CHARLES T. MCCORMICK, JAMES H. CHADBOURN & CHARLES ALAN WRIGHT, *CASES AND MATERIALS ON FEDERAL COURTS* 382, 386, 528 (9th ed. 1992) [hereinafter WRIGHT ET AL.]; MARTIN H. REDISH, *FEDERAL COURTS* 783, 801, 829 (2d ed. 1989).

⁸² See *infra* notes 308-327 and accompanying text (discussing Frankfurter's influence).

⁸³ For a discussion of Frankfurter's role in the New Deal, see *infra* notes 346-348, 445-457 and accompanying text.

tion as the Norris-LaGuardia Act⁸⁴ and the Securities Exchange Act of 1934.⁸⁵ It is this one man's dichotomy that has become our own.⁸⁶

II. THE WORLD BEFORE FELIX FRANKFURTER

A. THE NINETEENTH CENTURY

The law of federal courts was no more monolithic in the last century than it is in the present century. There were subtle and not-so-subtle differences from court to court and decade to decade. What is most difficult for the modern reader to understand, however, is that lawyers of an earlier era looked at the federal courts through a different lens from ours in the last quarter of the twentieth century. While some jurists perceived the role of the federal courts in "the dynamic struggle between the national government and the states,"⁸⁷ as late as 1923, Justice Brandeis

⁸⁴ 29 U.S.C. §§ 101-115 (1988). This act epitomizes Felix Frankfurter's dichotomy. While the Norris-LaGuardia Act prevents federal court interference in labor disputes, it declares a national labor policy and represents the first major foray into federal labor legislation. For a discussion of Frankfurter's role in the drafting and passage of this act, see *infra* note 274 and *infra* notes 455-456 and accompanying text.

⁸⁵ 15 U.S.C. §§ 78a-78ll (1988). For a discussion of Frankfurter's role in the drafting of this act, see *infra* note 453 and accompanying text.

⁸⁶ If, as Professor Wells contends, jurists' political beliefs shape their views as to the proper role of the federal courts, see *supra* note 47, the adoption of a New Dealer's vision for those courts by the Burger and Rehnquist Courts is ironic, but easily understandable. Even if we accept at face value Frankfurter's politically neutral reasons for urging a reduction in federal judicial power, see discussion *infra* part III.A, his ideas were accepted by others who abhorred the use of federal judicial power to strike down Progressive legislation during the *Lochner* era, see discussion *infra* part II.B. Thus, just as the New Deal Court, led by Justice Frankfurter, reduced federal judicial power to curb what it saw as the excesses of the *Lochner* era, so too the Burger and Rehnquist Courts have reduced federal judicial power to curb what they considered to be the excesses of the Warren Court.

⁸⁷ FELIX FRANKFURTER & WILBER G. KATZ, CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE at vii (1931), reprinted in FELIX FRANKFURTER & HARRY SHULMAN, CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE at ix (rev. ed. 1937). An example of such a jurist is Justice Benjamin R. Curtis, who in 1864 noted that "questions of jurisdiction were questions of power as between the United States and the several states." Proceedings of the U.S. Circuit Court for the First Circuit at the Time of Chief Justice Taney's Death, 30 F. Cas. 1341, 1343 (1864). Curtis did not espouse the extreme deference to the States of today's Supreme Court, however. While he cautioned against those who would "press [federal] jurisdiction out to its extremest limits, and occasionally beyond them," he also warned that "for timid men, or for those who might come

observed about his colleagues on the Court: "Few of them realize that questions of jurisdiction are really questions of power between States and Nation."⁸⁸

Brandeis's complaint is puzzling to modern federal courts scholars since we have all been taught to be sensitive to this power struggle. Perhaps an analogy will help. If one were to teach a course in New York Practice, for example, one would instruct the students in the jurisdiction and procedure of the New York court system. One would not sensitize the students to the fact that many cases filed in the New York courts could also have been filed in the New Jersey courts and that thus an extension of New York jurisdiction reduces the power of the New Jersey courts.⁸⁹ The same was formerly true of the study of federal courts: students learned what cases could or could not be brought in the federal courts, but they were not generally taught to be sensitive to the impact of federal jurisdiction on state power.⁹⁰

For the purposes of this Article, a few examples of federal judicial attitudes toward the States will suffice to show that the modern notion of judicial federalism was not the transcendental reality in the last century.

1. *Federal Court Respect for State Law.* One has only to mention the name of the famous nineteenth-century case, *Swift v. Tyson*,⁹¹ to demonstrate that twentieth-century jurisprudence "represent[s] a dramatic reversal in the relation between the federal courts and

to [the Supreme Court] with formed prejudices, the opposite danger would be imminent." *Id.*

⁸⁸ Conversation between Louis D. Brandeis and Felix Frankfurter, in Chatham, Mass. (June 28, 1923) (Frankfurter Papers, Library of Congress) (available on microfiche from Library of Congress). This observation applied even to his colleague Justice Oliver Wendell Holmes. *Id.*

⁸⁹ Before rejecting this analogy as inapt, remember that federalism applies to both the relation between the Federal Government and the States and to relations among the States themselves. See *supra* note 29 and accompanying text. Federalism is based on the notion that this country is a union of sovereign States. Thus, we should be sensitive to the relations between sister States as well.

⁹⁰ See *infra* notes 366-389 and accompanying text (describing the early courses on federal courts). Professor Frankfurter's casebook was the first one to teach this sensitivity now so familiar to modern federal courts scholars. See *infra* notes 397-409 and accompanying text (describing Frankfurter's casebook).

⁹¹ 41 U.S. (16 Pet.) 1 (1842).

state law."⁹² At issue in *Swift* was the scope of the Rules of Decision Act,⁹³ which provides that in a case not controlled by the Constitution, treaties, or statutes of the United States, a federal court should follow "the laws of the several states."⁹⁴ The question was, what was included by the term "laws"? Specifically, did it include the decisions of the local tribunals, not founded on any statute?⁹⁵

John Swift filed a diversity action against George W. Tyson to collect on a dishonored negotiable instrument.⁹⁶ The only question for the federal court was whether there had been valuable consideration for the bill of exchange.⁹⁷ To determine if the consideration Swift gave was indeed "valuable," the court had to choose between a well-established doctrine⁹⁸ and a contradictory series of New York Supreme Court opinions, without a definitive ruling by the Court of Errors.⁹⁹

⁹² Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 356 (1977).

⁹³ Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92. The direct descendant of the original Rules of Decision Act is codified at 28 U.S.C. § 1652 (1988).

⁹⁴ The original version of the act, in effect when *Swift* was decided, provided in full:

And be it further enacted, That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

⁹⁵ 41 U.S. (16 Pet.) at 18.

⁹⁶ *Id.* at 14.

⁹⁷ *Id.* at 16. "At the trial the acceptance and endorsement of the bill were admitted" *Id.* at 14. The question as to consideration was whether "a pre-existing debt constitutes a valuable consideration." *Id.* at 16.

⁹⁸ This question has been several times before this Court, and it has been uniformly held, that it makes no difference whatsoever as to the rights of the holder, whether the debt, for which the negotiable instrument is transferred to him, is a pre-existing debt, or is contracted at the time of the transfer.

Id. at 20. "In England the same doctrine has been uniformly acted upon." *Id.* "In the American Courts, so far as we have been able to trace the decisions, the same doctrine seems generally, but not universally to prevail." *Id.* at 22 (citing no contrary authority).

⁹⁹ Appeals were allowed to the Court of Errors from the Supreme Court. HENRY W. SCOTT, *THE COURTS OF THE STATE OF NEW YORK* 323 (1909). In 1846, this "appellate jurisdiction was delegated to the Court of Appeals." *Id.* at 324. See generally FRANCIS BERGAN, *THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932*, at 7-38 (1985) (discussing beginnings of court system).

For the *Swift* Court's discussion of the New York authority on the question, see *Swift*, 41

The United States Supreme Court chose to follow the well-established rule, holding that "the laws of the several states" were limited "to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."¹⁰⁰ In all cases not governed by such strictly local laws or by federal law, the federal courts were "to ascertain upon general reasoning and legal analogies, . . . what is the just rule furnished by the principles of commercial [or other general] law to govern the case."¹⁰¹

The *Swift* doctrine was further developed in the 1864 case of *Gelpcke v. City of Dubuque*.¹⁰² In *Gelpcke*, there was no question that the case was governed by strictly local laws: state statutes, state constitutional provisions, and state supreme court decisions interpreting those provisions. The city of Dubuque had issued bonds in 1857 to help finance the building of two railroads. The statute authorizing those bonds provided that "neither the city of Dubuque, nor any of the citizens, shall ever be allowed to plead that said bonds are invalid."¹⁰³ When the bona fide purchasers attempted to redeem the coupons on their bonds, however, the city refused to pay. Not surprisingly, the bondholders sued.¹⁰⁴

The federal court sitting in diversity had to determine if the statute authorizing the bonds was valid under the state constitution. The Iowa Supreme Court had held consistently between 1853 and 1859 that municipalities did have the power to issue such bonds.¹⁰⁵ The court overruled itself, however, in 1860.¹⁰⁶ Even though the bonds had been issued and put on the market before the

U.S. (16 Pet.) at 16-18.

¹⁰⁰ 41 U.S. (16 Pet.) at 18.

¹⁰¹ *Id.* at 19. The Court found the general commercial principle to be that "a pre-existing debt does constitute a valuable consideration . . . , as applicable to negotiable instruments." *Id.*

¹⁰² 68 U.S. (1 Wall.) 175 (1864).

¹⁰³ *Id.* at 203.

¹⁰⁴ For a summary of the facts, see *id.* at 177-78. For a detailed discussion of the case in historical perspective, see CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864-88 (pt. 1), at 935-44 (Oliver Wendell Holmes Devise History of the Supreme Court Vol. 6, 1971).

¹⁰⁵ For citation to these cases, see *Gelpcke*, 68 U.S. (1 Wall.) at 205.

¹⁰⁶ *Id.* (citing *Iowa v. County of Wapello*, 13 Iowa 390 (1862)).

1860 decision, the federal trial court felt constrained to follow the most recent Iowa Supreme Court opinion and found for the city.¹⁰⁷

The United States Supreme Court reiterated the rule that a federal court must follow the decisions of the state courts when interpreting state statutes and constitutions.¹⁰⁸ The Court, however, found this case to be "exceptional."¹⁰⁹ It would be against "the plainest principles of justice,"¹¹⁰ the Court declared, to allow a change in judicial decision, especially one so sudden¹¹¹ and contrary to the majority rule,¹¹² to impair already-acquired rights. The Court concluded with this statement: "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."¹¹³

As the twentieth century dawned, *Swift* and *Gelpcke* were still good law.¹¹⁴ The federal courts gave state decisional law "the most deliberate attention and respect"¹¹⁵ in cases not governed by federal law; but in many such cases, the state opinions were not considered "conclusive authority."¹¹⁶

2. Federal Court Interference With the States

a. *Suits Against the State.* The history of suits against the States and the Eleventh Amendment has been thoroughly detailed

¹⁰⁷ *Id.* at 178.

¹⁰⁸ *Id.* at 206.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ The Court noted that it was only required to follow "the latest *settled* adjudications." *Id.* at 205 (quoting *Leffingwell v. Warren*, 67 U.S. (2 Black) 599, 603 (1862) (alteration in original)).

¹¹² The earlier Iowa decisions were "in harmony with the adjudications of sixteen States of the Union," while the latest Iowa opinion stood with the cases of only one other state, "in unenviable solitude and notoriety." *Id.* at 206. Actually, Iowa's actions were at the forefront of a bond repudiation movement. See FAIRMAN, *supra* note 104, at 918-1116; cf. *infra* notes 134-138 and accompanying text (discussing impact of repudiation movement on Eleventh Amendment jurisprudence).

¹¹³ 68 U.S. (1 Wall.) at 206-07.

¹¹⁴ See, e.g., 1 C.L. BATES, *FEDERAL PROCEDURE AT LAW* ch. 5 (1908); 3 ROGER FOSTER, *A TREATISE ON FEDERAL PRACTICE CIVIL AND CRIMINAL* § 477 (6th ed. 1920); JOHN C. ROSE, *JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS* ch. 18 (2d ed. 1922); *id.* ch. 19 (3d ed. 1926).

¹¹⁵ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842).

¹¹⁶ *Id.*

elsewhere;¹¹⁷ this Article will not redo what has been so ably done before. Instead, this section will discuss several pre-twentieth-century Supreme Court holdings, which demonstrate that, whatever the feelings of the States or the states' rights activists, the federal judiciary, for most of that period, was not constrained by any notion of judicial federalism when entertaining suits against the States. The only possible exception to this lack of constraint occurred during the last quarter of the nineteenth century.

In the well-known case of *Chisholm v. Georgia*,¹¹⁸ the Supreme Court held very early in the history of the Republic that the federal courts could entertain diversity suits against the States.¹¹⁹ Shortly thereafter, Congress proposed and the state legislatures ratified the Eleventh Amendment,¹²⁰ which amended the diversity clauses of Article III¹²¹ to prohibit diversity suits in which a State

¹¹⁷ For a thorough history of the Eleventh Amendment from the beginning of the Nation through the nineteenth century, arguing convincingly that the twentieth-century view of the amendment as a major victory for states' rights activists is incorrect, see William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983). See also John E. Nowak, *The Scope of Congressional Power To Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1422-41 (1975). For a very different interpretation of the same events, see Doyle Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207 (1968) (asserting that sovereign immunity was well-defined before Constitution was ratified and that Eleventh Amendment was seen as victory for states' rights activists).

¹¹⁸ 2 U.S. (2 Dall.) 419 (1793).

¹¹⁹ The grant of jurisdiction was found in the Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80. In determining that the grant was constitutional, the Supreme Court relied on U.S. CONST. art. III, § 2, cl. 6, which provides, "The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State . . ." See also *id.* cl. 9 ("and between a State . . . and foreign States, Citizens or Subjects").

¹²⁰ *Chisholm* was decided on February 18, 1793. Gibbons, *supra* note 117, at 1926. Two days later, a Senator moved that the Senate adopt a resolution to amend the Constitution in a form very similar to what eventually became the Eleventh Amendment. *Id.* at 1926-27. Congress, however, "ended its term on March 4, 1793 without taking any action on the resolution." *Id.* at 1927. In the next Congress, on January 2, 1794, a Senator again proposed a resolution to amend the Constitution. This resolution passed and was sent to the House on January 15. *Id.* at 1932-33. The House debated the resolution on March 4 and approved it. *Id.* at 1934 & n.237. The amendment was then sent to the States, *id.* at 1934, and "[r]atification of the eleventh amendment was completed in 1798," *id.* at 1947.

¹²¹ For the text of the affected diversity clauses, see *supra* note 119.

is a defendant.¹²²

The Supreme Court determined in the early years after the amendment that it was limited to suits based solely on diversity. That is, States could still be made to appear before the federal courts in admiralty¹²³ or federal question cases.¹²⁴ For example, in *Cohens v. Virginia*,¹²⁵ the Supreme Court rejected the Commonwealth's argument, which relied on the Eleventh Amendment, that it could not be compelled to appear before the Court. The Supreme Court held¹²⁶ that this action was before it under its federal question power¹²⁷ and was not

a suit commenced or prosecuted "by a citizen of another State, or by a citizen or subject of any foreign State." It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.¹²⁸

¹²² For the text of the Eleventh Amendment, see *supra* note 36. For an explanation of why a Federalist Congress would propose such a measure, see Gibbons, *supra* note 117, at 1926-39.

¹²³ "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . ." U.S. CONST. art. III, § 2, cl. 3. Congress granted this jurisdiction to the federal courts in the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77.

¹²⁴ "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ." U.S. CONST. art. III, § 2, cl. 1. Jurisdiction over this class of cases was very limited until Congress passed a statute granting general federal question jurisdiction in 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

¹²⁵ 19 U.S. (6 Wheat.) 264 (1821).

¹²⁶ The Court held alternatively that, since the Commonwealth appeared in the Supreme Court pursuant to a writ of error and not in an original "suit," the Eleventh Amendment did not apply. See *id.* at 407-12. The Court devoted the majority of its opinion, however, to a discussion of why it was necessary to have the national tribunals hear grievances against the States and therefore why the Eleventh Amendment was only meant to affect a very narrow class of cases. See *id.* at 380-90, 405-07. For an indication of how contemporaries viewed the Court's holding, see *infra* note 131.

¹²⁷ The First Congress authorized the Supreme Court to hear, under the federal question power, appeals from final judgments of the highest court of a State by writ of error. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87.

¹²⁸ 19 U.S. (6 Wheat.) at 412 (referring to *id.* at 383). The Court also discussed the possibility of suits against a State by one of its own citizens. *Id.* at 390-92.

Moreover, in several rather dramatic cases, the Court held that the Eleventh Amendment had no role to play in cases against state officers for actions taken in their official capacity. For example, in *Osborn v. Bank of the United States*,¹²⁹ the Bank sought the aid of the federal court in a tax dispute with the State of Ohio. The trial court ruled that the Ohio tax on the Bank was illegal and ordered the state auditor and treasurer to return money already collected from the Bank. When the state treasurer ignored the order and refused to return the money, he was imprisoned, and the key to the state treasury was wrested from him.¹³⁰ Over the vociferous protests of the Ohio officials that the Eleventh Amendment barred the suit,¹³¹ the Supreme Court held on appeal that the federal court had jurisdiction over the claim against them.¹³²

So the law regarding suits against the States stood until the late nineteenth century.¹³³ After Reconstruction, for economic and political reasons, many state and local governments repudiated

¹²⁹ 22 U.S. (9 Wheat.) 738 (1824).

¹³⁰ For a more extensive summary of the facts in this case, see *McManamon*, *supra* note 20, at 916-18.

¹³¹ See 22 U.S. (9 Wheat.) at 744, 755-56, 802-04 (arguments for appellants). While Mr. Wright argued for the appellants that this suit was in reality against the State and therefore forbidden by the Eleventh Amendment, see *id.* at 802-04, Mr. Hammond proposed an alternative argument for dismissal. He, too, insisted that this case was in reality against the State, but he acknowledged the following:

According to the interpretation given to the constitution by this Court, in *Cohens v. Virginia*, a state may be made a party, before the federal Courts, wherever the case arises under the constitution, or a law of the United States; or where the controversy is between two States, or one State and a foreign State.

Id. at 757. He urged, however, that the jurisdiction in the circuit court was improper because only the Supreme Court had original jurisdiction over suits in which a State was a party. *Id.*

¹³² *Id.* at 846-59. Another dramatic encounter between the federal courts and a State resulted in a stand-off between the federal marshal with his posse of regular army soldiers and the state militia. *United States v. Peters*, 9 U.S. (5 Cranch) 115, 139-41 (1809). The dispute was whether a federal court had the power to order the treasurer of Pennsylvania to satisfy a federal admiralty judgment. Not only did the Supreme Court hold that the Eleventh Amendment was no bar to the suit against the treasurer, *id.* at 139, but a federal court tried and convicted the head of the state militia for interfering with federal judicial process, rejecting his Eleventh Amendment arguments, *United States v. Bright*, 24 F. Cas. 1232 (C.C.D. Pa. 1809) (No. 14,647). For a more extensive discussion of these cases, see Fletcher, *supra* note 117, at 1079-82; Gibbons, *supra* note 117, at 1941-45.

¹³³ "In no instance prior to 1890 did an expansive reading of the eleventh amendment provide a ground for decision." Gibbons, *supra* note 117, at 1968.

their bonds.¹³⁴ The federal courts were flooded with suits against the various governmental units. Unfortunately, "by mid-1886 the Court's reaction to the repudiation movement had produced a completely inconsistent body of doctrine."¹³⁵ Then in 1890, the Supreme Court decided *Hans v. Louisiana*¹³⁶ and, in so doing, rewrote the Eleventh Amendment. Instead of the narrow reading it had been given initially, the Court found that the Amendment was meant to restore a "pre-existing" doctrine of sovereign immunity.¹³⁷ Therefore, the Court held, a citizen of a State could not sue that State even on the basis of a federal question.¹³⁸

This decision did not sound a death knell for grievances against the States, however. In the very next year, the Court reaffirmed the *Osborn* position that one could recover against state officials acting pursuant to an unconstitutional state law.¹³⁹ As the twentieth century began, the Court was poised to enter the *Lochner*¹⁴⁰/*Ex parte Young*¹⁴¹ era in which the federal courts entertained numerous challenges to state laws.

*b. Interference With the State Judiciary.*¹⁴² The relationship between the federal and state courts in the early years of the Republic was one of ordinary comity between sister courts.¹⁴³ In

¹³⁴ For a fuller discussion of the repudiation movement, see FAIRMAN, *supra* note 104, at 918-1116; Gibbons, *supra* note 117, at 1973-78. Cf. *supra* notes 102-113 and accompanying text (discussing *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175 (1863)).

¹³⁵ Gibbons, *supra* note 117, at 1996. For a discussion of the cases decided in those years, see *id.* at 1968-98.

¹³⁶ 134 U.S. 1 (1890).

¹³⁷ See *id.* at 11 (asserting that *Chisholm* "created . . . a shock of surprise throughout the country").

¹³⁸ *Id.* at 18-21.

¹³⁹ See *Pennoy v. McConaughy*, 140 U.S. 1, 25 (1891) (stating that an unconstitutional statute "affords [state officials] no security or immunity for the acts complained of; and it cannot be said, therefore, that this is a suit against the State, within the meaning of the Eleventh Amendment"); see also *id.* at 18-19 (following *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824)).

¹⁴⁰ *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁴¹ 209 U.S. 123 (1908).

¹⁴² For a much more complete study of the relationship between the federal and state courts, see Mayton, *supra* note 37. See also Comment, *supra* note 37 (reviewing historical evidence of congressional approval of stays of state proceedings by federal courts).

¹⁴³ "There is not in our system anything so unseemly as rivalry and contention between the courts of the state and the courts of the United States." *Texas & P. Ry. v. Kuteman*, 54 F. 547, 551 (5th Cir. 1892) (quoting *Sharon v. Terry*, 36 F. 337, 363 (C.C.N.D. Cal. 1888)).

general, one court did not interfere with proceedings in another.¹⁴⁴ This comity was not unique to the American federal system. Any government that has courts with overlapping or concurrent jurisdiction must develop some way to deal with a conflict between the courts. The English courts solved this very problem centuries before the United States even existed.¹⁴⁵ In turn, early American courts followed the English solutions.

(i) *The General Principle of Comity.* One problem the English courts faced was the possibility of unseemly conflict between the courts. Jurisdiction generally attached by either the arrest of the defendant or the seizure of some of the defendant's property.¹⁴⁶ If one court arrested the defendant, for example, and then another court tried to seize him or her from the first court, there would be a danger to the orderly administration of law. Therefore, the courts developed the rule that the first court to obtain jurisdiction over the defendant or defendant's property retained it to the exclusion of all other courts.¹⁴⁷

Because jurisdiction in the early American courts also attached through arrest of the defendant or seizure of defendant's property,¹⁴⁸ the same embarrassing conflicts could occur. The Supreme Court looked to the English practice and found: "This rule is the fruit of experience and wisdom, and regulates the relations and maintains harmony among the various superior courts of law and of chancery in Great Britain."¹⁴⁹ The Court therefore chose to follow the "principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought

¹⁴⁴ See Mayton, *supra* note 37, at 338-48 (discussing early federal court practice in resolving conflicts of jurisdiction).

¹⁴⁵ For a description of the various English courts and the problems of overlapping jurisdiction they faced, see McManamon, *supra* note 20, at 876-90.

¹⁴⁶ *Id.* at 881.

¹⁴⁷ *Id.* To prevent possible unfairness to claimants, the English courts developed a corollary to this rule: the court that had arrested the defendant could dispose of all claims against him or her, even claims outside of the court's subject matter jurisdiction. *Id.* at 881-82. This notion contributed to the development of the American doctrine of ancillary, now called "supplemental," jurisdiction. See *id.* at 913-16.

¹⁴⁸ *Id.* at 914-15.

¹⁴⁹ Taylor v. Carryl, 61 U.S. (20 How.) 583, 594 (1858).

its function."¹⁵⁰

This general rule of comity had a corollary. Once a court's jurisdiction had attached, that court was permitted to protect its jurisdiction, through such devices as injunction or mandamus, from interference by another court.¹⁵¹ The federal courts used this power in a number of instances. For example, if a sheriff tried to seize property in the marshal's control, the federal court could enjoin that seizure.¹⁵² In addition, if a state court refused to acknowledge a lawful removal to federal court, the latter could order the state court to stay itself.¹⁵³

Moreover, on occasion federal comity gave way in the face of a national policy. For example, in an 1828 case,¹⁵⁴ the sheriff of the city and county of New York seized a ship in order to satisfy a New York judgment against the vessel's owner. After the sheriff's seizure, the federal marshal seized the brig pursuant to a federal law regulating sales to foreigners. The state judgment creditor naturally objected to the federal jurisdiction, contending that "the brig was in the custody of the law under the state process; [and] that jurisdiction accordingly attached to the state court."¹⁵⁵ The federal court rejected that argument, noting that to do otherwise would provide "an easy means . . . not only of evading a punitive law of the United States, but also of counteracting the national polity."¹⁵⁶

(ii) *Chancery Practice.* Chancery practice also played an important role in the relationship between American state and federal courts. Chancery developed in response to unfairness caused by the limited procedures of the law courts.¹⁵⁷ To remedy

¹⁵⁰ *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 370 (1873).

¹⁵¹ *See, e.g., Dietzsch v. Huidekoper*, 103 U.S. 494 (1881); *French v. Hay*, 89 U.S. (22 Wall.) 250 (1875). In addition, the writ of certiorari may have been available to the federal courts to order a state court to stay itself. *See generally* Comment, *supra* note 37.

¹⁵² *See, e.g., Louisville Trust Co. v. City of Cincinnati*, 76 F. 296, 318 (6th Cir. 1896); *Ex parte Chamberlain*, 55 F. 704, 708-09 (C.C.D.S.C. 1893).

¹⁵³ *See, e.g., Marshall v. Holmes*, 141 U.S. 589, 601 (1891); *Dietzsch v. Huidekoper*, 103 U.S. 494, 496-97 (1881); *French v. Hay*, 89 U.S. (22 Wall.) 250, 253 (1875); *see also Spraggins v. County Court*, 22 F. Cas. 955 (C.C.D. Tenn. 1812) (No. 13,246) (asserting that federal court may issue mandamus to enforce removal from state to federal court).

¹⁵⁴ *The Florenzo*, 9 F. Cas. 316 (S.D.N.Y. 1828) (No. 4886).

¹⁵⁵ *Id.* at 319.

¹⁵⁶ *Id.* at 320.

¹⁵⁷ *McManamon*, *supra* note 20, at 885-86.

this unfairness, under certain circumstances Chancery would enjoin the law courts from proceeding.¹⁵⁸ For example, if a judgment at law had been obtained by fraud, Chancery could enjoin its enforcement.¹⁵⁹ Moreover, if someone faced repeated, vexatious litigation over a right already established at law, he or she could bring a bill of peace, and Chancery would grant a perpetual injunction suppressing further litigation at law.¹⁶⁰

In addition to bills seeking an end to all litigation at law, Chancery could entertain a number of bills that were ancillary to or dependent on a pending action at law. For example, the common law courts did not permit equitable defenses to actions at law. A defendant with such a defense, however, could file a bill in Chancery and have the defense decided there.¹⁶¹ In addition, discovery at law was very limited. If a party to a suit at law needed certain evidence within the exclusive control of an opponent, however, he or she could file a bill of discovery in the equity court and thereby obtain the information.¹⁶² As an incident to the exercise of this "ancillary" jurisdiction, Chancery could enjoin the law court from proceeding while Chancery made its decision on the pending bill.¹⁶³

The notion that a court of equity could enjoin the parties to a suit

¹⁵⁸ See generally 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 874-904 (photo. reprint 1984) (Jairus W. Perry ed., 12th ed. 1877) (discussing injunctions by Chancery against proceedings and judgments at law).

¹⁵⁹ See, e.g., *id.* §§ 878-880.

¹⁶⁰ See, e.g., *id.* § 859; see also *id.* § 901 (noting bill in equity granted to quiet title when occupants are threatened with numerous suits).

¹⁶¹ "The term 'equitable defense' is applied to matter, such as fraud and mistake leading to reformation or cancellation of a written instrument, which is defensive in its nature, but which under the former procedure could be relied on only by affirmative bill in equity." CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 621 (2d ed. 1947). For example, the defendant in an action for breach of contract might wish to file a bill against the plaintiff seeking rescission of the contract.

¹⁶² See generally JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS §§ 311-25 (John M. Gould reviser, 10th ed. 1892) (explaining requirements and procedure for bill of discovery).

¹⁶³ See, e.g., *id.* § 315. A problem with these injunctions was that they caused bifurcated litigation. The equity courts therefore developed the practice—in situations in which it would be fair—of deciding all the legal issues in the case in order to give complete relief. See McManamon, *supra* note 20, at 885-89. This practice led to our own doctrine of ancillary, now called "supplemental," jurisdiction. See *id.* at 890-902.

at law came to the New World.¹⁶⁴ Under the new federal system, however, the bifurcation caused when a case was tried in both equity and law could be doubled. That is, not only was a case split between law and equity, but it could be split between state and federal courts as well. For example, what if the action at law was pending in state court, but the bill seeking to establish an equitable defense was filed in federal court under that court's diversity jurisdiction? Early American jurists were concerned about this added layer,¹⁶⁵ and the federal courts in general did not allow such double bifurcation.¹⁶⁶

If, however, the federal bill seeking an injunction against proceedings in a state court was "a distinct and separate cause of action, as distinguished from a merely ancillary action,"¹⁶⁷ the federal courts allowed it.¹⁶⁸ For example, if the injunction was

¹⁶⁴ *E.g.*, *Freeman v. Howe*, 65 U.S. (24 How.) 450, 460 (1861).

¹⁶⁵ Attorney General Edmund Randolph protested in 1790, "It is enough to split the same suit into one at law, and another in equity, without adding a further separation, by throwing the common-law side of the question into the State courts, and the equity side into the federal courts." EDMUND RANDOLPH, JUDICIARY SYSTEM, H.R. MISC. DOC. NO. 17 (1790), reprinted in 1 AM. STATE PAPERS, CLASS X, 26 MISCELLANEOUS 34 (1789-1809), quoted in Mayton, *supra* note 37, at 338. This concern may be the reason for the first enactment of the so-called Anti-Injunction Act, Judiciary Act of 1793, ch. 22, § 5, 1 Stat. 333, 334-35. See Mayton, *supra* note 37, at 338 (suggesting Sen. Ellsworth may have added anti-injunction provision because of Randolph's report); Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 347 (1930) (suggesting anti-injunction provision was direct result of Randolph's report). Justice Frankfurter dismissed the possibility of Randolph's influence. His only reason, however, was "the very narrow purpose of Randolph's proposal." *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 131 (1941).

¹⁶⁶ See STORY, *supra* note 158, § 400. For example, in *Diggs & Keith v. Wolcott*, 8 U.S. (4 Cranch) 179 (1807), Diggs and Keith sued Wolcott at law in state court on two promissory notes. Wolcott filed a bill raising an equitable defense and seeking cancellation of the notes. Diggs and Keith removed the equitable bill to federal court, where the notes were canceled and Diggs and Keith were enjoined from pursuing their claims at law. On appeal, the Supreme Court held that the federal circuit court could not enjoin the state court. *Id.* at 180. Double bifurcation under similar circumstances could occur, however. See, for example, REV. STAT., tit. 13, ch. 7, § 646, printed in 18 Stat., pt. 1, at 117 (2d ed. 1878), which provided as follows:

When a suit is removed for trial from a State court to a circuit court, . . . any injunction granted before the removal of the cause against the defendant applying for its removal shall continue in force until modified or dissolved by the United States court into which the cause is removed

¹⁶⁷ *Terre Haute & I.R.R. v. Peoria & P.U.R.R.*, 82 F. 943, 947 (C.C.N.D. Ill. 1897).

¹⁶⁸ *Marshall v. Holmes*, 141 U.S. 589, 597-600 (1891).

sought against the enforcement of a fraudulent state court judgment, the federal courts would issue the injunction.¹⁶⁹ In addition, the federal courts would entertain a bill of peace and issue a permanent injunction against further litigation, even in the state court system.¹⁷⁰ This distinction makes sense because the problem of spreading the same case over two court systems, present when the federal suit is ancillary to a pending state action, does not exist when the federal suit is "an original, independent suit for equitable relief."¹⁷¹

(iii) *The Late Nineteenth Century.* In 1793, Congress had passed a statute that has since come to be called the Anti-Injunction Act.¹⁷² The origins of this statute are unclear,¹⁷³ and, in any event, it was virtually unused until the last half of the nineteenth century.¹⁷⁴ In 1874, the statute was codified.¹⁷⁵ As codified, it read as a virtually absolute bar to federal injunctions against state court litigation: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."¹⁷⁶ This codification, however, was not meant to effect any change in the law as it then stood.¹⁷⁷

The last half of the nineteenth century also saw the growth of substantive federal legislation. With the addition of more areas of declared national policy, overlaps between federal and state litigation became more problematic as the chances of state interference with national policy increased. An early area in which

¹⁶⁹ *Id.*

¹⁷⁰ *See, e.g., Texas & P. Ry. v. Kuteman*, 54 F. 547, 550-52 (5th Cir. 1892).

¹⁷¹ *Marshall v. Holmes*, 141 U.S. 589, 599 (1891) (quoting *Arrowsmith v. Gleason*, 129 U.S. 86, 101 (1889)).

¹⁷² Judiciary Act of 1793, ch. 22, § 5, 1 Stat. 333, 334-35.

¹⁷³ *See supra* notes 37, 165.

¹⁷⁴ *See Mayton, supra* note 37, at 338-44.

¹⁷⁵ *Id.* at 346.

¹⁷⁶ REV. STAT., tit. 13, ch. 12, § 720, *printed in* 18 Stat., pt. 1, at 137 (2d ed. 1878). The reference to bankruptcy took into account a law that had been passed in 1867. *See infra* note 180 and accompanying text.

¹⁷⁷ Professor Mayton found that "Congressman Butler, a sponsor of revision, reported, 'We have not attempted to change the law, in a single word or letter, so as to make a different reading or different sense.' " *Mayton, supra* note 37, at 346 n.99 (quoting 2 CONG. REC. 129 (1873)).

the federal interest required that comity give way was bankruptcy. Creditors of a bankrupt could defeat the protection of the bankruptcy laws by going to state court.¹⁷⁸ Therefore, some federal courts issued injunctions against such state court proceedings. This practice was not uniform, however.¹⁷⁹ So in 1867, Congress made it official: the federal courts were given explicit permission in bankruptcy suits to enjoin related state court litigation.¹⁸⁰

The tension between the enforcement of national policy and comity became overly strained after the passage of the Civil Rights Act in 1871,¹⁸¹ the grant of general federal question jurisdiction in 1875,¹⁸² and the growth of laws regulating commerce.¹⁸³ One scholar who has studied this age averred: "The courts were confronted with situations in which an injunction of a state court proceeding seemed necessary to vindicate a right that Congress had charged them with protecting, yet the [Anti-Injunction] statute by its terms barred this remedy. Under this pressure the statute failed."¹⁸⁴

B. THE EARLY TWENTIETH CENTURY

There was no federal judicial deference to the States in the first few decades of the twentieth century; quite the contrary. The *Swift* doctrine of general federal common law was still the rule. As Professor Frankfurter noted in 1928, "[this doctrine] is now too strongly imbedded in our law for judicial self-correction."¹⁸⁵ In

¹⁷⁸ "[T]he state court might reach a judgment first and permit the creditor to satisfy such judgment from the bankrupt's assets, thereby evading the bankruptcy law's provisions that the bankrupt's creditors should share assets equally." *Id.* at 342-43.

¹⁷⁹ See *id.* at 342-46. The bankruptcy cases seem distinguishable based on the timing of the state court suit. If the state suit was filed before the federal suit, the federal court would not enjoin it; but if the state suit was filed after the federal suit, the federal court would enjoin it.

¹⁸⁰ Bankruptcy Act of 1867, ch. 176, § 21, 14 Stat. 517; cf. *supra* note 176 and accompanying text (referring to this power in Anti-Injunction Act).

¹⁸¹ Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13.

¹⁸² Act of Mar. 3, 1875, ch. 137, 18 Stat., pt. 3, at 470.

¹⁸³ Mayton, *supra* note 37, at 347-49.

¹⁸⁴ *Id.* at 348.

¹⁸⁵ Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 530 (1928). This article also appears without footnotes in 1928 N.J.B.A. 99. The language quoted in the text appears *id.* at 128. Hereinafter, citations to

addition, any reticence the Supreme Court had felt in enjoining State behavior in the late nineteenth century was gone. In the early twentieth century, the Court embarked on the infamous path now referred to as the *Lochner* era by striking down much Progressive state legislation.¹⁸⁶ One of the tools the Court used to reach these decisions was the fiction of *Ex parte Young*,¹⁸⁷ which avoided potential Eleventh Amendment problems by allowing federal litigants to sue state officials instead of the State itself.¹⁸⁸ Moreover, in 1932, two historians of the Anti-Injunction Act declared that "the statute has long been dead."¹⁸⁹ There were some critical murmurings, however, about the status quo.

1. *Common Law Cases.* In the early twentieth century, many jurists actively sought uniformity in the common law. The products of this movement include the uniform laws and the Restatement.¹⁹⁰ A number of these members of the bar and the academy believed that the federal courts aided this goal by declaring general federal common law. One study concluded, "It can hardly be seriously contended that the federal courts, operating under *Swift*

this article will only refer to the *Cornell Law Quarterly*.

¹⁸⁶ This era takes its name from the 1905 case, *Lochner v. New York*, 198 U.S. 45 (1905). During the first three decades of the twentieth century, the Supreme Court used the doctrine of substantive due process to strike down many state statutes regulating businesses, such as attempts to set maximum hours in a work week or utility rates. The Court held that these laws violated the property rights of the industries, utilities, and railroads affected. For a more detailed discussion of the *Lochner* era, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 361-68 (4th ed. 1991); TRIBE, *supra* note 32, at 567-86.

¹⁸⁷ 209 U.S. 123 (1908).

¹⁸⁸ See *supra* notes 57, 139-141 and accompanying text. *Ex parte Young* has outlived the *Lochner* era. While it was considered "the *bête noire* of liberals" in the early twentieth century, HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 3 n.7 (1973), "[t]oday it provides the basis for forcing states to desegregate their schools and reapportion their legislatures," WRIGHT, *supra* note 10, at 292 (footnotes omitted). One scholar has concluded that, although "highly controversial[,] . . . in perspective the doctrine of *Ex parte Young* seems indispensable to the establishment of constitutional government and the rule of law." *Id.*

¹⁸⁹ Edgar Noble Durfee & Robert L. Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145, 1169 (1932).

¹⁹⁰ For a history of the Restatement, see Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19 (1929); Norris Darrell & Paul A. Wolkin, *The American Law Institute*, 52 N.Y. ST. B.J. 99 (1980); N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55 (1990); Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147 (1969).

v. Tyson, did not exert a powerful influence upon the initiation and singular success of uniform statutory laws."¹⁹¹ Moreover, practitioners believed that "the power and practice of the federal courts to notice judicially the laws of other states than that in which the court is sitting . . . [was] of growing importance as our developing industries tend[ed] more and more to ignore state lines."¹⁹² These lawyers realized "what chaos and loss to investors would have attended the insolvency of the Chicago, Milwaukee & St. Paul Railroad, to take a then prominent example, had its affairs been administered by several independent, uncoordinated state courts."¹⁹³

There were others at this time, however, who believed that the federal courts had no business declaring common law for the States. Harvard professor John Chipman Gray led the way with his "heretical ideas."¹⁹⁴ Rejecting natural law, he asserted that the idea of a "common law" was not reality and that judge-made rules "changed from one jurisdiction to another without any apparent reason apart from local convenience."¹⁹⁵ He thus "punctured the myth of legal science and exposed the potentially arbitrary power of judges."¹⁹⁶ A prime example of such arbitrary power, he believed, was that wielded by the author of *Swift v. Tyson*, Justice Story. Gray described Story as follows:

[H]e was occupied at the time [of *Swift*] in writing a book on bills of exchange, which would, of itself, lead him to dogmatize on the subject; he had had great success in extending the jurisdiction of the Admiralty; he was fond of glittering generalities; and he was possessed by a restless vanity.¹⁹⁷

¹⁹¹ Arthur John Keeffe et al., *Weary Erie*, 34 CORNELL L.Q. 494, 503 (1949).

¹⁹² Paxton Blair, Book Review, 45 HARV. L. REV. 945, 946 (1932).

¹⁹³ *Id.*

¹⁹⁴ MICHAEL E. PARRISH, *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 20* (1982). Gray taught at the Harvard Law School from 1869 until his retirement in 1913. THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917, at 206, 213 (1918) [hereinafter CENTENNIAL HISTORY].

¹⁹⁵ PARRISH, *supra* note 194, at 20.

¹⁹⁶ *Id.*

¹⁹⁷ JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 253 (2d ed. 1921).

These traits, Gray contended, were the chief cause that led to the decision in *Swift*.¹⁹⁸

Former students and colleagues spread Gray's message of the evils of general federal common law.¹⁹⁹ Justice Oliver Wendell Holmes²⁰⁰ questioned the basis for the *Swift* rule in 1910, relying on the teachings of Professor Gray.²⁰¹ Holmes reiterated his position in 1928, declaring that there is no "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."²⁰² Rather, he maintained:

The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.²⁰³

The federal courts sitting in diversity, he therefore believed, should be bound by the declared law of the States and not be free to declare their own common law.²⁰⁴ He was joined in this opinion by Justice Louis Brandeis²⁰⁵ who would, a decade later, pen the decision overruling *Swift*.²⁰⁶ Moreover, in 1930, Judge Augustus

¹⁹⁸ *Id.*

¹⁹⁹ Professor Gray's attack on general federal common law was not unique. For example, the first Justice to challenge the *Swift* rule was Stephen Johnson Field, who, incidentally, neither studied nor taught at Harvard. See *Baltimore & O.R.R. v. Baugh*, 149 U.S. 368, 390-411 (1893) (Field, J., dissenting).

²⁰⁰ Justice Holmes graduated from the Harvard Law School in 1866, before Professor Gray joined the faculty. Holmes, however, later became Gray's colleague upon joining the Harvard faculty in 1882. CENTENNIAL HISTORY, *supra* note 194, at 220; *cf. supra* note 194 (noting Gray's tenure at Harvard).

²⁰¹ See *Kuhn v. Fairmount Coal Co.*, 215 U.S. 349, 370-71 (1910) (Holmes, J., dissenting) (citing GRAY, *supra* note 197, §§ 535-550 (1st ed. 1909)).

²⁰² *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

²⁰³ *Id.* at 533-34.

²⁰⁴ *Id.* at 534-35.

²⁰⁵ Justice Brandeis graduated from the Harvard Law School in 1878. CENTENNIAL HISTORY, *supra* note 194, at 379; *cf. supra* note 194 (noting Gray's tenure at Harvard).

²⁰⁶ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); see *supra* notes 61-63 and accompanying text; *infra* notes 325, 343 and accompanying text (addressing *Erie*).

Hand²⁰⁷ noted Holmes's dissents with approval, but felt constrained to follow the *Swift* rule because it was "settled for the present."²⁰⁸ These lonely voices were heard by numerous members of the academy who also began to question the *Swift* doctrine.²⁰⁹

2. *Injunction Cases.* The doctrine of judicial restraint was "the classic Harvard approach to constitutional adjudication."²¹⁰ This notion has been closely identified with Harvard professor James Bradley Thayer.²¹¹ He believed that policy was for the political branches to decide and that judges should hold a law unconstitutional only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."²¹² In turn, "[Thayer] influenced Holmes, Brandeis, the Hands, Mr. Stimson, Joseph Cotton, and so forth."²¹³ Members of the Harvard school were joined by many Progressive jurists who saw the legislation they supported being struck down by the federal courts in the name of substantive due process.²¹⁴

²⁰⁷ Judge Hand graduated from the Harvard Law School in 1894. CENTENNIAL HISTORY, *supra* note 194, at 380; *cf. supra* note 194 (noting Gray's tenure at Harvard).

²⁰⁸ *Cole v. Pennsylvania R.R.*, 43 F.2d 953, 957 (2d Cir. 1930). Judge Hand's cousin, Judge Learned Hand, who graduated from the Harvard Law School in 1896, CENTENNIAL HISTORY, *supra* note 194, at 380, concurred in the opinion.

²⁰⁹ See, e.g., George W. Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356 (1933); Armistead M. Dobie, *Seven Implications of Swift v. Tyson*, 16 VA. L. REV. 225 (1930); J.B. Fordham, *The Federal Courts and the Construction of Uniform State Laws*, 7 N.C. L. REV. 423 (1929); Raymond T. Johnson, *State Law and the Federal Courts*, 17 KY. L.J. 355 (1929); Thomas W. Shelton, *Concurrent Jurisdiction—Its Necessity and its Dangers*, 15 VA. L. REV. 137 (1928).

²¹⁰ Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 74 (1978).

²¹¹ See *id.* at 71-73. Thayer taught at the Harvard Law School from 1874 until his death in 1902. CENTENNIAL HISTORY, *supra* note 194, at 277, 283.

²¹² James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

²¹³ FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES 299 (Harlan B. Phillips interviewer, 1960) [hereinafter FRANKFURTER REMINISCES]; accord, Mendelson, *supra* note 210, at 71.

²¹⁴ See FRIENDLY, *supra* note 188, at 3 n.7 (describing *Ex parte Young* as "the bête noire of liberals in [his] law school days"); Charles T. McCormick, Book Review, 22 VA. L. REV. 368, 370 (1936) (noting that "intervention [in labor and utility rate disputes] by any court, state or Federal, is resented by a large element in the community"); see also *supra* notes 186-188 and accompanying text (addressing *Lochner* era).

This state of affairs led to an "existing discontent with our whole administration of law."²¹⁵ At that time, those who felt this discontent believed that "the whole law of Federal jurisdiction badly need[ed] radical revision."²¹⁶ They were not sanguine, however, about the possibility of congressional action.²¹⁷ The situation, some believed, called for a leader—someone who could bring about the needed reform. In the words of Judge Learned Hand, "We may pray for some Justinian *in petto*, vested at once with authority and wisdom, to take over this little empire, but we shall pray in vain."²¹⁸ Despite Judge Hand's expressed doubts, his hopes were realized by one very close to him.²¹⁹

III. ENTER JUSTINIAN *IN PETTO*

A. FELIX FRANKFURTER'S VISION

Felix Frankfurter was just the man to answer Learned Hand's prayer; Frankfurter was described as "full of self-importance and an 'irritating inner conviction of his own righteousness.'"²²⁰ As a student at the Harvard Law School, Frankfurter had absorbed the ideas of the Harvard "giants."²²¹ From John Chipman Gray,

²¹⁵ Learned Hand, Book Review, 37 YALE L.J. 130, 130 (1927); see Charles T. McCormick, Book Review, 6 N.C. L. REV. 358, 360 (1928) (expressing discontent with "that fog of technical complexity, the Federal procedural system").

²¹⁶ Hand, *supra* note 215; accord, McCormick, *supra* note 214, at 371 n.3 ("Our need for a new jurisdictional statute is almost as pressing as for new rules of procedure.").

²¹⁷ "As things usually go, it is probable that nobody will stir until the political atmosphere becomes charged with high potential, just the time when revision ought not to take place." Hand, *supra* note 215, at 131.

²¹⁸ *Id.*

²¹⁹ As an example of their close ties, Frankfurter was married in Judge Learned Hand's chambers. Paul A. Freund, *Felix Frankfurter*, in DICTIONARY OF AMERICAN BIOGRAPHY 260, 262 (Supp. 7 1981). Moreover, Frankfurter dedicated the second edition of his casebook to Judge Hand. FRANKFURTER & SHULMAN, *supra* note 87, at iii.

²²⁰ *Felix Frankfurter*, CURRENT BIOGRAPHY 1941, at 305, 307 [hereinafter 1941 BIOGRAPHY] (quoting unnamed source).

²²¹ "[John Chipman] Gray, [Oliver Wendell] Holmes, and James Bradley Thayer . . . made a deep impression upon [Frankfurter's] early conceptions of American law, legal education, and the role of the judiciary in the nation's life." PARRISH, *supra* note 194, at 20. Frankfurter said of his Harvard law professors:

Giants they were, and I revere their memory because they seem to me to represent the best products of civilization—dedication of lives of great

he learned to deride the doctrine of *Swift v. Tyson*.²²² James Bradley Thayer taught him about judicial restraint.²²³ Frankfurter also took to heart former Justice Benjamin R. Curtis's notion that all questions of jurisdiction are in fact power struggles between Nation and States.²²⁴

powers to the pursuit of truth, and nothing else, complete indifference to all the shoddiness, pettiness and silliness that occupies the concern of most people who are deemed to be important or big.

FRANKFURTER REMINISCES, *supra* note 213, at 24.

²²² Of Gray, Frankfurter said:

He was the greatest property lawyer of his day. He was the most felicitous speaker, a gifted scholar, the acknowledged master of his profession; namely, the law of property. His word, his opinion, his writings were authoritative as few men's are in any branch of law. He was a wonderful creature

FRANKFURTER REMINISCES, *supra* note 213, at 23. Frankfurter became Gray's research assistant. *Id.* at 23-24. As a professor himself, Frankfurter used Gray's description of Justice Story, *see supra* note 197 and accompanying text, when discussing the doctrine of *Swift v. Tyson*. *E.g.*, Frankfurter, *supra* note 185, at 529 n.151.

²²³ "Frankfurter referred to Thayer as 'the great master of constitutional law'" Mendelson, *supra* note 210, at 73. Even though Thayer had died shortly before Frankfurter entered the Harvard Law School, Frankfurter declared:

One brought up in the traditions of James Bradley Thayer, echoes of whom were still resounding in this very building in my student days, is committed to Thayer's statesmanlike conception of the limits within which the Supreme Court should move, and I shall try to be loyal to his admonition.

FELIX FRANKFURTER, FELIX FRANKFURTER ON THE SUPREME COURT 542 (Philip B. Kurland ed., 1970) [hereinafter FRANKFURTER ON THE SUPREME COURT]. Moreover, Frankfurter opined:

I am of the view that if I were to name one piece of writing on American Constitutional Law . . . I would pick an essay by James Bradley Thayer in the *Harvard Law Review*, . . . published in October, 1893, called "The Origin and Scope of the American Doctrine of Constitutional Law" I would pick that essay written 62 years ago. Why would I do that? Because from my point of view it's the great guide for judges and therefore, the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions.

FRANKFURTER REMINISCES, *supra* note 213, at 299-300.

²²⁴ *See supra* note 87. Then-retired Justice Curtis lectured on the federal courts at the Harvard Law School in 1872-1873. His lectures were published in 1880. George Ticknor Curtis & Benjamin R. Curtis, *Preface* to BENJAMIN R. CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES at iv (photo. reprint 1989) (1880); *see infra* notes 366-368 and accompanying text (discussing importance of lectures such as Justice Curtis's). While Frankfurter did not study under Curtis, he clearly learned Curtis's dogma, not only citing it, *e.g.*, Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1931*, 46 HARV. L. REV. 226, 260 (1932) [hereinafter

These influences are well-known, but they explain only part of Frankfurter's motivation. He had a vision of the Supreme Court as a hallowed body.²²⁵ The key to maintaining that status, Frankfurter believed, is to remember that "the prestige of the Court ultimately rests upon the persuasiveness of its opinions."²²⁶ Since, in Frankfurter's view, "serenity and leisure [are] indispensable to the best judicial work,"²²⁷ "only a very limited number of

Frankfurter & Landis, 1931 Term], but also using it as the theme of both editions of Frankfurter's casebook, see *infra* note 397. In fact, Frankfurter said, "Mr. Justice Curtis' reminder cannot be too often repeated." Frankfurter & Hart, 1934 Term, *supra* note 22, at 91 n.52.

²²⁵ "How the Justice [Frankfurter] loved the Court and worried about its work and its future." John H. Mansfield, *Felix Frankfurter*, 78 HARV. L. REV. 1529, 1532 (1965). Frankfurter shared this vision with his mentor and friend, Louis Brandeis. Some scholars who have studied the relationship between Frankfurter and Brandeis have concluded that the driving force in the pair was Brandeis and that Professor Frankfurter was little more than a conduit for the Justice. E.g., David W. Levy & Bruce A. Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1916-1933*, 78 MICH. L. REV. 1252, 1272, 1285 (1980); see also Freund, *supra* note 219, at 264.

This author believes that such a characterization of their relationship is unfair to both. Rather, a reading of their correspondence reveals that Brandeis relied on Frankfurter because the older man believed that in Frankfurter he had found someone with the intelligence and energy to equal his own. Even if one refuses to accept that viewpoint, however, it does not make Frankfurter any less the architect of "our federalism." It was, after all, Frankfurter who taught generations of Harvard law students, published countless books and articles, and drafted virtually all the opinions that gave birth to "our federalism." See discussion *infra* part III.B. He was listened to precisely because it was *he* who was speaking, not because he was the mouthpiece of Justice Brandeis. Even Professors Levy and Murphy acknowledge that "[p]robably no person in the United States was better situated to influence legal opinion than Frankfurter." Levy & Murphy, *supra*, at 1285. Thus, even if some of the ideas expressed in Frankfurter's writings actually originated with Brandeis, it was Frankfurter who gave them life.

²²⁶ Frankfurter & Landis, 1931 Term, *supra* note 224, at 229; see also Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1933*, 48 HARV. L. REV. 238, 271 (1934) [hereinafter Frankfurter & Hart, 1933 Term] ("[I]n the last analysis [the Court's] ultimate strength depends upon a permeating confidence in the impartiality and wisdom of its action . . .").

²²⁷ Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1928*, 43 HARV. L. REV. 33, 47 (1929) [hereinafter Frankfurter & Landis, 1928 Term]; see also Frankfurter & Hart, 1933 Term, *supra* note 226, at 280 ("To meet these issues with the learning, wisdom, and largeness of vision appropriate to their majesty, the Court must have that serenity and spacious feeling of detachment which an effective control over its business alone can afford."); Frankfurter, *supra* note 185, at 504 (discussing "spacious reflection so indispensable for wise judgment"); Mansfield, *supra* note 225, at 1531 (stating that Frankfurter "once spoke of 'the conditions essential for the kind of creative tasks which are involved in the effective exercise of the Court's jurisdiction, which means essentially a

opinions of distinguished quality can be written during a term by any judge howsoever gifted."²²⁸ Therefore, Frankfurter maintained, it is of the utmost importance to keep the workload of the Court low.²²⁹

As the second quarter of the twentieth century began, Frankfurter believed that it was becoming increasingly difficult to maintain the quality of the Supreme Court's work. With the growth of federal court business, the Court's caseload had swelled.²³⁰ Under Frankfurter's theory, this increase would have been a strain on the greatest judges. Unfortunately, according to his friend, Justice Brandeis, most of the Justices were mediocre at best.²³¹

feeling of serenity of mind and an absence of jostling, especially jostling due to too many problems occupying the mind at the same time.'").

²²⁸ Frankfurter & Landis, 1931 Term, *supra* note 224, at 229; see also Frankfurter & Hart, 1933 Term, *supra* note 226, at 277 (stating that Supreme Court, "no matter how distinguished its membership, can annually write not many more than two hundred opinions, if the deliberative process which precedes an opinion and the process of opinion-writing are to partake of those psychologic and intellectual conditions which alone can produce the best judicial product").

²²⁹ "The strain of an unmanageable load of business destroys the serenity of spirit essential to the painful process of hard thinking on which are dependent wise decisions embodied in closely-knit opinions." Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1932*, 47 HARV. L. REV. 245, 252 (1933) [hereinafter Frankfurter & Hart, 1932 Term].

²³⁰ "The volume of litigation of which the Court now disposes at a single term . . . would startle the shades of Marshall and Taney . . ." Frankfurter & Hart, 1934 Term, *supra* note 22, at 107; see also Frankfurter, *supra* note 185, at 504 ("Court is working under too much pressure to afford the spacious reflection so indispensable for wise judgment.").

²³¹ Frankfurter once complained to his friend as follows: "I said that what bothers me most is that [the] opinions of [the] Court [are] all incoherent—they don't hang together from week to week." Brandeis replied: "They don't—the trouble is they [the Justices] don't know enough to keep them coherent." Conversation between Louis D. Brandeis and Felix Frankfurter, in Chatham, Mass. (Tues., June 12) (Frankfurter Papers, Library of Congress). Brandeis told Frankfurter of the specific weaknesses of the various Justices:

William H. Taft: "He is a first-rate second-rate mind." *Id.* (June 28, 1923).

Joseph McKenna: "McKenna—only way of dealing with him is to appoint guardians for him. . . . Every once in a while McK really does mischief His opinions are often suppressed—they are held up and held up and he gets mad (?) [sic] and throws up the opinion and it's given to someone else." *Id.* (Aug. 11).

Oliver Wendell Holmes: "Goes off sometimes in construing statutes because he doesn't understand or appreciate facts. . . . [He] also leaves more loopholes for rehearing petitions than anyone else . . ." *Id.* (July 1).

William R. Day: In a particular line of cases, "Court had gone off, largely through Day's strong, passionate talk and loose language." *Id.* (Tues., June 12).

Willis VanDevanter: "Van Dev. knows as much about jurisdiction as anyone—more than

To make matters worse, Frankfurter believed that the Court was faced with too many cases that should not come before the highest tribunal in the land. Rather, there are a "limited number of important controversies which must engage, and ought alone to engage, [the Court's] attention."²³² He believed

[h]owever reassuring is . . . an invocation of the Fourteenth Amendment to protect outcast or unpopular minorities, it is an assertion of a power at best intermittent, remote, and adapted only to redress violations of the minimum decencies of judicial procedure. More significant by far, because more broadly founded and more directly operative, is the Court's function, as the head of the federal judicial hierarchy, of maintaining a high level of civilized administration in the federal courts.²³³

anyone. But when he wants to decide all his jurisdictional scruples go." *Id.* (June 28, 1923).

Mahlon Pitney: "Pitney had a great sense of justice affected by Presbyterianism but no imagination whatever. And then he was much influenced by his experience and he had had mighty little." *Id.* (July 3).

James C. McReynolds: "McR is the Court's problem. . . . [H]e worries the court because of his offensiveness to counsel and in his opinions Holmes now explains him as a 'savage' with all the irrational impulses of a savage. . . . [His] opinions are simply dreadful—he is lazy, stays away from Court when he doesn't feel like coming (more rearguments were ordered because McR was absent and didn't listen to arguments and called for a reargument)." *Id.* (July 3).

John H. Clarke: "He always 'dilated with a wrong emotion' . . . on the subject" *Id.* (Aug. 3).

George Sutherland: "He is a mediocre Taft." *Id.* (Thanksgiving, Nov. 30, 1922(?) [sic]).

Pierce Butler: "Pierce B. . . . has given no sign of anything except a thoroughly mediocre mind." *Id.* (Sept. 5(?) [sic]).

Edward T. Sanford: "Sanford ought never to have been above D.J. [district judge]—a dull bourgeois mind—terribly tiresome." *Id.* (June 15-16, 1926).

²³² Frankfurter & Hart, 1932 *Term*, *supra* note 229, at 253.

²³³ *Id.* at 277. One of Frankfurter's former law clerks reported the following dialogue with the Justice:

"Your difficulty, Dick, is that you don't understand democratic government. And you don't know the role of this Court."

"I do know that [it] is up to the Court to protect individual liberties," I replied.

"Wrong!" he exclaimed in sharply raised tones. "Is that what they teach you up at Harvard now?"

RICHARD N. GOODWIN, REMEMBERING AMERICA: A VOICE FROM THE SIXTIES 35 (1988).

There were two types of cases in particular that he believed should not come before the Supreme Court. First, he averred, "the Court is too aloof from adequate contact with the stuff of common law cases to make it an apt tribunal for such causes, nor can it afford the time to keep in the current of such litigation."²³⁴ Therefore, he believed, the Court should not have to waste its time on common law cases²³⁵ or even such matters as Federal Employers' Liability litigation.²³⁶ Second, he maintained that cases involving state legislation "stir political friction inevitable to a conflict between state and national forces."²³⁷ Moreover, he thought, "it is unfair to ask [the Court's] nine members to know or to ascertain the meaning concealed in the interstices of local legislation and to be aware of the localized facts which give that meaning."²³⁸

Frankfurter thought that steps should be taken to maintain, or even improve, the quality of the Supreme Court's work. He could do nothing about the men sitting on the bench,²³⁹ but the number of cases coming to the Court could be reduced. The most effective way to do that, Frankfurter asserted, was to reduce the jurisdiction of the lower federal courts.²⁴⁰ He believed that, if possible, the

²³⁴ Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 18 (1930) [hereinafter Frankfurter & Landis, 1929 Term].

²³⁵ See Frankfurter & Landis, 1928 Term, *supra* note 227, at 53; Frankfurter & Landis, 1929 Term, *supra* note 234, at 15-18; Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1930*, 45 HARV. L. REV. 271, 288 (1931) [hereinafter Frankfurter & Landis, 1930 Term]; Frankfurter & Hart, 1932 Term, *supra* note 229, at 271; Frankfurter & Hart, 1933 Term, *supra* note 226, at 270-71.

²³⁶ Frankfurter & Landis, 1928 Term, *supra* note 227, at 51; Frankfurter & Landis, 1929 Term, *supra* note 234, at 14; Frankfurter & Landis, 1931 Term, *supra* note 224, at 249-52.

²³⁷ Frankfurter & Landis, 1928 Term, *supra* note 227, at 59; see also Frankfurter & Landis, 1931 Term, *supra* note 224, at 256.

²³⁸ Frankfurter & Landis, 1928 Term, *supra* note 227, at 59; see also Frankfurter & Landis, 1929 Term, *supra* note 234, at 36-37.

²³⁹ He did, however, later advise President Franklin Roosevelt on that matter. See, e.g., JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 55-62, 239 (1975).

²⁴⁰ "Most important of all, . . . the stream of Supreme Court litigation is conditioned by its feeders. . . . If diversion from the lower federal courts of controversies which state courts can settle adequately enough would help save the Supreme Court for its more essential labors, this would be a gain of moment." Frankfurter, *supra* note 185, at 505-06; accord, Frankfurter & Landis, 1929 Term, *supra* note 234, at 35 ("By curbing undue exercise of jurisdiction by the lower federal courts . . . , the Supreme Court . . . curtails the volume of its own litigation by restricting judicial business at its source."); see also Frankfurter & Landis, 1931 Term, *supra* note 224, at 260.

Court should undertake to cure the situation itself, without waiting for clumsy legislative intervention.²⁴¹ It was just this solution that Frankfurter, Learned Hand's Justinian *in petto*, was able to achieve through his various roles as professor, advisor, and Justice. His ideas to reduce the workload of the Supreme Court gave birth to our judicial federalism.

B. FELIX FRANKFURTER'S SOAPBOXES

Felix Frankfurter had more opportunities to shape the law of federal courts than any other individual in modern history.²⁴² He was a Harvard professor, a trusted advisor to Presidents, Congressmen, and Supreme Court Justices, and, finally, a Supreme Court Justice himself. He used those opportunities to change our view of the federal courts into what it is today: a sensitivity to the judicial balance of power now permeates virtually the entire law of federal

²⁴¹ "Only by rigorously protecting itself against cases that have no claim upon the Court will there be time for adequate consideration of cases demanding the Court's judgment." Frankfurter & Landis, 1931 Term, *supra* note 224, at 236; *see also* Frankfurter & Landis, 1928 Term, *supra* note 227, at 61 (contending that Supreme Court "is not dependent on directive legislation by Congress"); Frankfurter & Landis, 1930 Term, *supra* note 235, at 278 (averring that Supreme Court "can achieve a civilized judicial administration without the aid of legislation"); Frankfurter & Hart, 1934 Term, *supra* note 22, at 107 ("Pressure of work has greatly stimulated the invention of procedural devices . . ."); Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 582 (1938) (noting "how much opportunity for creativeness in judicial administration remains even within a jurisdictional orbit defined by the legislature"); *cf.* Frankfurter & Landis, 1928 Term, *supra* note 227, at 50 (referring to congressional attempts to control jurisdiction of Supreme Court as "crude attempts at legislative correction"). Mr. Justice Frankfurter acted upon this belief. For example, when he invented abstention, he noted that "[t]his use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers." *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941).

²⁴² "Probably no person in the United States was better situated to influence legal opinion than Frankfurter [with his] . . . boundless energy, his many contacts among leading legal minds, and even the bright young students in his seminars." Levy & Murphy, *supra* note 225, at 1285; *see also* FELIX FRANKFURTER: THE JUDGE, *supra* note 28, at xi ("Posterity may or may not take our word for it that Felix Frankfurter had more influence on more lives than any man in his generation." (quoting Archibald MacLeish)).

courts.²⁴³

1. *The Harvard Professor.* Felix Frankfurter was on the Harvard Law School faculty from 1914 until his appointment to the Supreme Court in 1939.²⁴⁴ This position gave him his greatest opportunity to influence the direction of the federal court system, and this Article therefore focuses primarily on his impact as a professor.²⁴⁵

Law professors in general influence the way the legal community views the law. First, as scholars, professors may help shape legal developments by publishing their ideas. Second, as teachers, they have the opportunity to "instil qualities of 'judicial statesmanship' in the young, to lie dormant until called forth later in life."²⁴⁶ Harvard professors, however, especially those in Professor Frankfurter's day,²⁴⁷ have had an even more profound impact on the development of American law than their colleagues at other

²⁴³ "One wonders whether any American in this century—even his beloved friends, counsellors, and admirers, Holmes and Brandeis—has been more important to the development of public law than has Felix Frankfurter." Jerome A. Cohen, *Mr. Justice Frankfurter*, 50 CAL. L. REV. 591, 592 (1962); see also Dean Acheson, *Felix Frankfurter*, 76 HARV. L. REV. 14, 14 (1962) ("[T]his man has evoked in so many such passionate devotion and exercised for half a century so profound an influence. I can think of no one in our time remotely comparable to him."); Levy & Murphy, *supra* note 225, at 1301.

²⁴⁴ Levy & Murphy, *supra* note 225, at 1260. He took leaves of absence from Harvard twice during that time. "From 1917 to 1919 he was engaged in work for the government growing out of World War I. In 1933-1934 he was George Eastman Visiting Professor at Oxford University." HELEN SHIRLEY THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 12 (1960).

²⁴⁵ Thus, when Professor Urofsky declared Felix Frankfurter a "failure" because he failed to dominate the Supreme Court, see Urofsky, *supra* note 23, Urofsky missed the mark. While Frankfurter perhaps did not wield the influence on the Supreme Court that had been expected, see *id.* at 176-77, he did use his professorial talents to great effect over the course of more than twenty years in teaching. Frankfurter's traits that did not work on mature jurists were very powerful on young men in their twenties who would themselves be judges or law professors one day. Cf. Cohen, *supra* note 243, at 594 (predicting that Frankfurter's work with students, young co-authors, and law clerks "may well be the Justice's greatest long-run contribution to law reform").

²⁴⁶ J.S. Waterman, Book Review, 14 TEX. L. REV. 128, 131 (1935); accord, Paul J. Mishkin, Book Review, 21 U. CHI. L. REV. 776, 779 (1954) (noting that any law professor may have "long-range influence of his work via his students").

²⁴⁷ It may have been easier for one school to dominate the field in those days—there was much less "competition." In 1914, when Frankfurter began teaching, there were only approximately 50 member schools in the Association of American Law Schools. In 1939, when he left teaching, there were approximately 90 member schools. Today there are 158 member schools. See 1991-92 AALS DIRECTORY OF LAW TEACHERS 23-109.

schools. The American legal community has long looked to Harvard for leadership. The scholarship of the Harvard law faculty, whether in the "influential *Harvard Law Review*"²⁴⁸ or elsewhere, dominated the academic dialogue in the early twentieth century and hence did much to determine the form of the law.²⁴⁹ The teaching of law at Harvard has also had a significant effect on the development of American law. Since Dean Langdell,²⁵⁰ Harvard has virtually determined the curriculum of American law schools, and this, in turn, has controlled the progress of the law.²⁵¹ Moreover, Harvard law students are the future judges and statesmen²⁵² and, perhaps more importantly, law professors²⁵³ of America. Thus, a Harvard law professor can have an impact that will last for generations.

Professor Frankfurter was no exception to this tradition of

²⁴⁸ Levy & Murphy, *supra* note 225, at 1286.

²⁴⁹ Frankfurter's colleagues on the faculty included such men as Samuel Williston and Roscoe Pound. For more information on the faculty of the Harvard Law School, see generally CENTENNIAL HISTORY, *supra* note 194; ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD* (1967).

²⁵⁰ Christopher Columbus Langdell introduced the case method of study, "which gradually but inexorably became the dominant method of legal education by the end of the first quarter of the twentieth century and still shapes legal education today." Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI.-KENT L. REV. 429, 452 (1981). For further discussion of Langdell and the introduction of the case method, see Franklin G. Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493 (1920); Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1 (1951).

²⁵¹ For example, "certain subjects such as evidence were profoundly affected by the Harvard teaching." Charles E. Clark, Book Review, 8 FORDHAM L. REV. 293, 294 (1939). Additionally, Dean Clark of Yale, who had spent many years trying to put the Federal Rules of Civil Procedure in place, complained that "the general field of civil pleading and procedure is the one field which the Harvard Law School over the years has failed to treat in the grand manner, and . . . this omission has had profound effects in making our law administration—until recently—technical, particularistic, and backward." *Id.* at 293.

²⁵² Harvard in the twenties produced the legal thinkers of the thirties and forties. . . . The professors then were learned, prolific writers, somewhat interested in their students, but most interested in molding the legal thinking of the thirties and forties. And they did produce a generation of people who were responsible for the changes that occurred.

Lawrence J. Vilaro & Howard W. Gutman, *With Justice from One: Interview with Hon. Irving L. Goldberg*, LITIGATION, Spring 1991, at 16, 20.

²⁵³ In 1976, Harvard led all other law schools with 524 graduates in full-time legal education. Yale was a distant second with 258. Larry Tell, *Few Schools Produce Most Law Professors*, NAT'L L.J., Nov. 3, 1980, at 2. This phenomenon is not new. See CENTENNIAL HISTORY, *supra* note 194, at 384-96 (listing Harvard alumni in legal education as of 1917).

influence; "in truth, it was Frankfurter who was leading the pack."²⁵⁴ As one Harvard alumnus said: "To understand Harvard Law School in the 1920s, you have to understand Felix Frankfurter. The school had Frankfurter's influence all over it."²⁵⁵

a. *The Scholar.* Although Professor Frankfurter was not prolific enough for some of his friends,²⁵⁶ he authored²⁵⁷ an impressive collection of scholarly works devoted to the function of federal courts,²⁵⁸ particularly the Supreme Court, in "our complicated federal society."²⁵⁹ First, with the help of his former²⁶⁰

²⁵⁴ Vilardo & Gutman, *supra* note 252, at 20.

²⁵⁵ *Id.* at 19.

²⁵⁶ See PARRISH, *supra* note 194, at 159-60 (describing views of Harold Laski on Frankfurter's academic productivity).

²⁵⁷ Actually, most of Professor Frankfurter's work in the area of federal courts was co-authored. The work will be discussed in this Article as if it were written by him alone, however. The reasons for this treatment are several. First, there is a unity of theme and style among these articles despite different co-authors that implies a single unifying voice. *Cf. supra* notes 226-228, 230, 235, 241 (citing articles co-authored with different people but making same point). Since Frankfurter is the one author the publications have in common, one assumes that the voice is his. Second, contemporaries to some extent treated the works as his. For example, one reviewer of the first edition of Frankfurter's casebook suggested that certain notes "serve to reveal the senior editor's personality, like the moralizing interruptions of Captain Ahab in Melville's *Moby Dick*." Blair, *supra* note 192, at 946 n.6; see also Charles T. McCormick, Book Review, 80 U. PA. L. REV. 472, 472 (1932) (noting that casebook "bears the fingerprints of [Frankfurter's] personality"); Lowell Turrentine, Book Review, 27 CAL. L. REV. 489, 489 (1939) (stating that "first edition of this popular casebook reflected the determination of its distinguished senior editor"); Herbert Wechsler, Book Review, 32 COLUM. L. REV. 774, 774 (1932) ("The point of view of the volume is that which its distinguished senior editor has expressed for many years."). Finally, all of Frankfurter's co-authors were young men, recently or currently his students. While in later years they developed as scholars in their own right, they were often still adoring disciples of Professor Frankfurter at the time of the co-authorship. For example, at the time James M. Landis helped Frankfurter write *The Business of the Supreme Court*, see *infra* notes 260-265 and accompanying text, Landis wrote of his feelings for Frankfurter: "I suppose I'm nearing more and more each day the brink of pure idolotry [sic]." Letter from James Landis to Jean P. Smith (Aug. 2, 1925), Landis Papers, Harvard Law School, *quoted in* PARRISH, *supra* note 194, at 160. It is therefore likely that the driving force in the teams was Frankfurter.

²⁵⁸ This Article focuses on Frankfurter's major scholarly writings about the federal court system. He wrote countless other essays and editorials about the courts. See, e.g., FRANKFURTER ON THE SUPREME COURT, *supra* note 223 (collection of Frankfurter essays).

²⁵⁹ Frankfurter & Landis, 1929 Term, *supra* note 234, at 18.

²⁶⁰ Actually, Frankfurter began his collaboration with Landis before the latter had even received his LL.B., let alone his S.J.D. See Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924); cf. 37 HARV. L. REV. at 1114 (listing Landis as Case Editor).

student, James M. Landis,²⁶¹ he wrote the classic book about the federal court system, *The Business of the Supreme Court*.²⁶² This work, originally published in serial form in the *Harvard Law Review* from 1925 to 1927,²⁶³ detailed the jurisdiction and purpose of the Supreme Court, as well as the lower federal courts, from the first Judiciary Act of 1789²⁶⁴ to the Judiciary Act of 1925.²⁶⁵ Second, in 1928, he published an influential piece in the *Cornell Law Quarterly*, which explained his view of the role of the federal courts vis-à-vis the state courts.²⁶⁶ Third, Frankfurter continued his study of the Supreme Court in a series of articles in the *Harvard Law Review* through 1938,²⁶⁷ the year before he was

²⁶¹ A.B., 1921, Princeton; LL.B., 1924, S.J.D., 1925, Harvard. Landis went on to clerk for Justice Brandeis in 1925. He returned to the Harvard Law School as a faculty member, teaching there from 1926-1934. He went to Washington in 1933, where he held several government jobs, including the position of chairman of the Securities and Exchange Commission (from 1935-1937). He returned to Harvard as the dean from 1937-1946. 29 WHO'S WHO IN AMERICA 1475 (1956) [hereinafter WHO'S WHO].

For insight into Frankfurter's relationship with Landis at the time of the collaboration, see *supra* note 257.

²⁶² FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (photo. reprint 1972) (1928); see HART & WECHSLER (3d ed.), *supra* note 81, at 30 n.2 (calling Frankfurter and Landis book, "[t]he classic and indispensable account of the history of the federal judiciary acts").

²⁶³ The various chapters of the book appeared as follows: Felix Frankfurter, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System* (chs. 2-5), 39 HARV. L. REV. 35, 325, 587, 1046 (1925-1926); Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System* (chs. 1 & 6-8), 38 HARV. L. REV. 1005 (1925), 40 HARV. L. REV. 431, 834, 1110 (1927).

²⁶⁴ Ch. 20, 1 Stat. 73.

²⁶⁵ Act of Feb. 13, 1925, ch. 229, 43 Stat. 936.

²⁶⁶ Frankfurter, *supra* note 185. The text of this article was given as an address to the New Jersey Bar Association. See *supra* note 185.

²⁶⁷ Felix Frankfurter authored the following articles with the aid of James M. Landis: *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1 (1928); *1928 Term*, *supra* note 227; *1929 Term*, *supra* note 234; *1930 Term*, *supra* note 235; *1931 Term*, *supra* note 224. Landis left Harvard for a job in Washington in 1933. See *supra* note 261. Frankfurter then teamed with former pupil Henry M. Hart, Jr.—A.B., 1926, LL.B., 1930, S.J.D., 1931, Harvard, 29 WHO'S WHO, *supra* note 261, at 1111—who had just returned to Harvard after clerking for Justice Brandeis, *id.*, on the following articles: *1932 Term*, *supra* note 229; *1933 Term*, *supra* note 226; *1934 Term*, *supra* note 22. Hart was the head attorney for the Office of the U.S. Solicitor General from 1937-1938, 29 WHO'S WHO, *supra* note 261, at 1111, so Frankfurter wrote what was to become his last article in the series, Frankfurter & Fisher, *supra* note 241, with graduate student Adrian S. Fisher, see 51 HARV. L. REV. at 693. Fisher—A.B., 1934, Princeton; LL.B., 1937, Harvard—went on to become Frankfurter's first law clerk on the Supreme Court. 29 WHO'S WHO, *supra* note 261, at 845.

appointed to the bench himself.²⁶⁸

Frankfurter's publications on the federal courts "contained both a descriptive analysis and a plea for change."²⁶⁹ In each of his works, the message is the same: the Supreme Court is overburdened; the jurisdiction of the lower federal courts must be reduced; there should be a redistribution of cases between the state and federal courts; common law cases and those enjoining state behavior must be taken away from the federal courts.²⁷⁰

Frankfurter did what he could to guarantee that his work would have an impact on the law of federal courts. Not content to rely on mere publication to spread his message, he ensured that his book on the federal courts would make it into the hands of many influential people. He took an active role in the publisher's aggressive marketing campaign.²⁷¹ In addition, with the help of a benefactor, he sent complimentary copies of the book to every federal judge, many state judges, members of the House and Senate Judiciary Committees, influential government officials and lawyers, and numerous law professors.²⁷²

Frankfurter's strategy was successful. The book was very

²⁶⁸ See *infra* note 459 and accompanying text. Henry M. Hart, Jr., then took on the task. See Henry M. Hart, Jr., *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 HARV. L. REV. 579 (1940).

²⁶⁹ PARRISH, *supra* note 194, at 170.

²⁷⁰ See generally discussion *supra* part III.A (addressing Frankfurter's vision).

²⁷¹ See Letters from F.E. Andrews of the Macmillan Co. to Felix Frankfurter (Nov. 10, 1927, Dec. 3, 1927, Feb. 8, 1928, Apr. 26, 1928) (Frankfurter Papers, Library of Congress); Letters from Curtice Hitchcock of the Macmillan Co. to Felix Frankfurter (Nov. 10, 1927, Dec. 9, 1927) (Frankfurter Papers, Library of Congress); Letter from Felix Frankfurter to Curtice Hitchcock of the Macmillan Co. (Nov. 11, 1927) (Frankfurter Papers, Library of Congress).

²⁷² See Letter from Julius Rosenwald to Julian W. Mack (Dec. 14, 1927) (Frankfurter Papers, Library of Congress); Letter from Julian W. Mack to Felix Frankfurter (Dec. 16, 1927) (Frankfurter Papers, Library of Congress); Letter from Julian W. Mack to Julius Rosenwald (Dec. 16, 1927) (Frankfurter Papers, Library of Congress); Letter from Curtice Hitchcock of the Macmillan Co. to Felix Frankfurter (Jan. 11, 1928) (Frankfurter Papers, Library of Congress); Letter from M.D. Russell of the Macmillan Co. to Julian W. Mack (Mar. 29, 1928) (Frankfurter Papers, Library of Congress). See generally Correspondence files re *Business of the Supreme Court* (1927-1928) (Frankfurter Papers, Library of Congress); Levy & Murphy, *supra* note 225, at 1275-76.

popular.²⁷³ More importantly, it was influential. It helped to convince several members of Congress to support bills restricting diversity jurisdiction.²⁷⁴ Furthermore, it was well-received by the federal judiciary,²⁷⁵ who relied on it for support in numerous cases.²⁷⁶ To this day, the book remains an important sourcebook for judges deciding issues of federal courts law.²⁷⁷

The rest of Frankfurter's work on the federal courts has also been

²⁷³ See Letter from F.E. Andrews of The Macmillan Co. to Felix Frankfurter (Feb. 8, 1928) (Frankfurter Papers, Library of Congress) ("You will be pleased to hear that the mail campaign on your book has proved so successful that we are now about to start a second campaign."); *id.* (Apr. 26, 1928) (second campaign "having very favorable results").

²⁷⁴ Levy & Murphy, *supra* note 225, at 1275-76. He did not convince enough members, however. Congress never passed the bills. *Id.* at 1276-77; see *infra* notes 450-451 and accompanying text. Frankfurter had better luck with another of his projects. His 1930 book, *The Labor Injunction*, written with Nathan Greene, was instrumental in persuading Congress to enact the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1988). "Over and over again the [congressional] committees refer to his book, 'The Labor Injunction.' Obviously that book was written to promote this law." *Donnelly Garment Co. v. International Ladies' Garment Workers' Union*, 21 F. Supp. 807, 821 (W.D. Mo. 1937) (Otis, J., dissenting), *vacated*, 304 U.S. 243 (1938); *accord*, Cohen, *supra* note 243, at 592-93. For a discussion of Frankfurter's hand in writing the Norris-LaGuardia Act, see *infra* notes 455-456 and accompanying text.

²⁷⁵ See, e.g., Letter from Harlan Stone, Associate Justice, U.S. Supreme Court, to Felix Frankfurter (Dec. 6, 1927) (Frankfurter Papers, Library of Congress); Letter from George Sutherland, Associate Justice, U.S. Supreme Court, to Felix Frankfurter (Jan. 12, 1928) (Frankfurter Papers, Library of Congress); Letter from Augustus N. Hand, Circuit Judge, 2d Cir., to Louis D. Brandeis (Feb. 23, 1928) (Frankfurter Papers, Library of Congress); Letter from Martin T. Manton, Circuit Judge, 2d Cir., to Felix Frankfurter (Jan. 24, 1928) (Frankfurter Papers, Library of Congress); Letter from William W. Morrow, Circuit Judge, 9th Cir., to Felix Frankfurter & James M. Landis (Jan. 18, 1928) (Frankfurter Papers, Library of Congress); Letter from Charles F. Amidon, District Judge, D.N.D., to Felix Frankfurter (Feb. 9, 1928) (Frankfurter Papers, Library of Congress); Letter from John Clark Knox, District Judge, S.D.N.Y., to Felix Frankfurter (Jan. 21, 1928) (Frankfurter Papers, Library of Congress).

²⁷⁶ See, e.g., *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932).

²⁷⁷ See, e.g., *New York v. United States*, 112 S. Ct. 2408, 2444 n.3 (1992) (White, J., concurring in part and dissenting in part); *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 501 (1987) (Brennan, J., dissenting); *Chivas Prods. Ltd. v. Owen*, 864 F.2d 1280, 1282 (6th Cir. 1988); *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245, 1281 (9th Cir. 1988) (Wiggins, J., dissenting), *vacated sub nom. United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989); *Illinois v. Interstate Commerce Comm'n*, 751 F.2d 903, 904 (7th Cir. 1985); *Washington Int'l Ins. Co. v. United States*, 678 F. Supp. 902, 920 (Ct. Int'l Trade) (Re, J., dissenting), *rev'd*, 863 F.2d 877 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989)); see also *supra* note 262 (addressing book's influence).

cited frequently in federal opinions.²⁷⁸ Citations alone, however, do not tell the full story of the impact of his work. Frankfurter's articles did not merely recount the law of federal courts; they also interpreted the law in a new light. This new light was, not surprisingly, hostile to the exercise of federal jurisdiction. By relying on his work, the courts accepted Frankfurter's analysis and thus changed the law. Two examples of Frankfurter's view of the law now accepted as "correct" are his interpretation of (i) the 1933 case, *Hurn v. Oursler*,²⁷⁹ and (ii) the development of general common law under *Swift v. Tyson*.²⁸⁰

(i) *Hurn v. Oursler*. "Ancillary," including "pendent,"—now called "supplemental"—jurisdiction in the federal courts is as old as the courts themselves. The early federal judges recognized that with overlapping or concurrent jurisdiction with the state courts, there were bound to be some federal cases that contained nonfederal elements. When faced with such a case, the federal courts adopted the English notion of fairness to the litigants: a court with jurisdiction over a case could decide all the issues in the case, even those that were outside the court's jurisdiction.²⁸¹

With the advent in 1913 of the Federal Rules of Equity, which

²⁷⁸ See, e.g., *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 342 n.6 (1985) (Brennan, J., dissenting); *New York v. Ferber*, 458 U.S. 747, 768 n.23 (1982); *Sidle v. Majors*, 429 U.S. 945, 948 (1976) (Brennan, J., dissenting); *Zwickler v. Koota*, 389 U.S. 241, 246 n.7 (1967); *Glidden Co. v. Zdanok*, 370 U.S. 530, 551 (1962) (opinion of Harlan, J.); *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 543 (1957) (Frankfurter, J., dissenting); *Erie R.R. v. Tompkins*, 304 U.S. 64, 74 & n.6 (1938); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 nn.5 & 6, 106 (1938); *Crowell v. Benson*, 285 U.S. 22, 86 n.22, 89 n.25 (1932) (Brandeis, J., dissenting); *Railroad Comm'n of Cal. v. Los Angeles Ry.*, 280 U.S. 145, 166 n.2 (1929) (Brandeis, J., dissenting); *In re Meyerland Co.*, 910 F.2d 1257, 1260 (5th Cir. 1990), *cert. denied*, 113 S. Ct. 967 (1993); *Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 647, 657 n.21 (3d Cir. 1982), *rev'd*, 465 U.S. 89 (1984); *Dillenburg v. Kramer*, 469 F.2d 1222, 1225 (9th Cir. 1972); *McBrier v. Commissioner of Internal Revenue*, 108 F.2d 967, 967 n.1 (3d Cir. 1939); *Lewis v. Vendome Bags, Inc.*, 108 F.2d 16, 20 (2d Cir. 1939); *Thompson v. Gillen*, 491 F. Supp. 24, 26 n.1 (E.D. Va. 1980); *Dresser Indus. v. Insurance Co. of N. Am.*, 358 F. Supp. 327, 329 n.2 (N.D. Tex. 1973); *Rosenthal & Rosenthal, Inc. v. Aetna Casualty & Sur. Co.*, 259 F. Supp. 624, 627 n.3 (S.D.N.Y. 1966); *Delaware River Joint Toll Bridge Comm'n v. Miller*, 147 F. Supp. 270, 273 n.11 (E.D. Pa. 1956); *American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, 10 F. Supp. 512, 521 (S.D.N.Y. 1935); *United States v. Mayor & Council of Hoboken, N.J.*, 29 F.2d 932, 938 (D.N.J. 1928).

²⁷⁹ 289 U.S. 238 (1933).

²⁸⁰ 41 U.S. (16 Pet.) 1 (1842).

²⁸¹ For an in-depth discussion of this development, see McManamon, *supra* note 20, at 890-912. See also *supra* notes 147, 163 and accompanying text.

provided for, inter alia, easier joinder of claims and counter-claims,²⁸² the federal courts had to explore the application of the old rules of ancillary jurisdiction in the new procedural contexts. The federal courts soon decided that federal jurisdiction would attach to nonfederal claims brought under the new procedure that were analogous to claims that could have been brought under the old procedure. For example, before 1913, federal courts exercised ancillary jurisdiction over nonfederal cross bills; after 1913, jurisdiction also attached to the analogous compulsory counter-claims.²⁸³

In 1933, the Supreme Court granted certiorari in *Hurn v. Oursler* to settle a conflict that had developed in the federal courts concerning the scope of federal jurisdiction in patent and trademark cases.²⁸⁴ Specifically, the Court had to decide whether the federal courts had jurisdiction over related state law claims for unfair competition and whether they retained that jurisdiction even if the federal claim was decided adversely to the plaintiff.²⁸⁵ The Court answered both questions in the affirmative, stating:

The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground*; in the latter it may not do so upon

²⁸² See, e.g., Fed. R. Equity 26, 30, 226 U.S. 649, 655, 657 (1912).

²⁸³ For a fuller discussion of the development of ancillary jurisdiction under the Federal Rules of Equity, see McManamon, *supra* note 20, at 923-27.

²⁸⁴ 289 U.S. at 240-41.

²⁸⁵ As to the first question, the majority view, with the Second Circuit being possibly the only exception, was that the federal courts could exercise jurisdiction over the unfair competition claims. Case, 8 TUL. L. REV. 142, 142 (1933). As to the second question, whether the federal court could retain jurisdiction over the state claim after deciding the federal claim adversely to the plaintiff, the majority view was also in favor of retaining jurisdiction. *Id.* There was more of a split on this issue, however.

the non-federal *cause of action*.²⁸⁶

Most contemporary commentators on the case accepted the proposition that federal courts had the power to decide all the questions in any federal case or cause of action, including patent and trademark cases. These writers debated, however, the correctness or wisdom of the *Hurn* Court's definition of "cause of action." They were split on whether it was better to retain the old definition or to accept, as the Court seemed to have done, Yale dean Charles Clark's notion of a cause of action as "an aggregate of operative facts giving rise to a right or rights . . . which will be enforced by the courts."²⁸⁷

Professor Frankfurter saw the case in a completely different light. He believed that "[d]ecisions upon jurisdiction are important not only as affecting the volume and character of business flowing into the federal courts, but as modifying, often decisively, the distribution of power between the states and the nation."²⁸⁸ In that context, Frankfurter saw the exercise of federal jurisdiction in *Hurn* over a common law claim as something that should be limited. He therefore put his very powerful pen to work. In describing the case, he ignored over a century of law, only grudgingly acknowledging that "[i]t has commonly been said to be the rule, declared to go back to *Osborn v. Bank of the United States*, that assertion in a complaint of a colorable federal question gives the court jurisdiction to decide all questions in the case, state or federal, or even to decide the state questions only."²⁸⁹ Despite numerous earlier instances of such jurisdiction,²⁹⁰ Frankfurter implied that the jurisdiction to decide nonfederal *claims* actually

²⁸⁶ 289 U.S. at 246.

²⁸⁷ CLARK, *supra* note 161, § 19, at 127; *see* Note, 33 COLUM. L. REV. 699 (1933) (calling for rejection of concept of "cause of action" entirely); Recent Decision, 32 MICH. L. REV. 412 (1934) (suggesting that former view of concept had led to undesirable results); Recent Case, 12 TEX. L. REV. 362 (1934) (criticizing Court's use of facts to determine cause of action). One commentator focused merely on whether the federal court should retain jurisdiction over the state claim after the federal claim has been decided against the plaintiff. *See* Case, *supra* note 285.

²⁸⁸ Frankfurter & Hart, 1932 Term, *supra* note 229, at 286.

²⁸⁹ *Id.* at 287 (footnotes omitted).

²⁹⁰ *See* McManamon, *supra* note 20, at 906-08 (citing examples).

originated with the 1909 case, *Siler v. Louisville & Nashville R.R.*,²⁹¹ and termed that result "undesirable."²⁹² He further incorrectly stated that, before *Hurn*, the jurisdiction allowed over nonfederal claims had been limited to cases involving constitutional questions. That exercise of jurisdiction was tolerable to Frankfurter only because "a federal constitutional question should be decided only when it is necessary to decide it."²⁹³ Exercising jurisdiction over the nonfederal claim in *Hurn*, a mere statutory action, Frankfurter erroneously declared, was "a substantial extension of the district court's authority."²⁹⁴

No other contemporary commentator on the *Hurn* case saw it that way.²⁹⁵ But Frankfurter's interpretation of what has since come to be called "pendent" jurisdiction²⁹⁶ is very familiar to late-twentieth-century federal courts scholars. As noted above,²⁹⁷ Frankfurter "has helped to make the times, thus achieving the ultimate success of every thinker in politics, namely to rob his ideas of novelty."²⁹⁸ His views as to the origin and early scope of "pendent" jurisdiction are now our hornbook law, which declares:

The Osborn doctrine was expanded in *Siler v. Louisville & Nashville R. Co.* . . . This rule, that the federal court need not, and perhaps should not, decide the federal issues but may resolve the case entirely on state grounds is not, as the Osborn rule

²⁹¹ 213 U.S. 175 (1909); see Frankfurter & Hart, 1932 Term, *supra* note 229, at 287-88.

²⁹² Frankfurter & Hart, 1932 Term, *supra* note 229, at 288.

²⁹³ *Id.*

²⁹⁴ *Id.* at 287.

²⁹⁵ Two commentators noted that there had been a distinction between constitutional and statutory cases. One of those scholars concluded, however, that "the instant decision appears correct in extending the *Siler* doctrine to cover 'federal statute' cases, for on legal principles they seem indistinguishable from the 'constitutionality' type." Recent Case, 46 HARV. L. REV. 1339, 1340 (1933). The other scholar distinguished the two types of cases based on his or her view of the scope of a case. See Note, *supra* note 287, at 701 & n.11.

²⁹⁶ The term "pendent jurisdiction" was first used in a reported federal opinion by Judge Learned Hand in 1942. See *Pure Oil Co. v. Puritan Oil Co.*, 127 F.2d 6, 7 (2d Cir. 1942). Felix Frankfurter was the first Justice to use it in a Supreme Court opinion. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 483 (1957) (Frankfurter, J., dissenting); see also *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 380-81 (1959).

²⁹⁷ See *supra* note 25 and accompanying text.

²⁹⁸ Cohen, *supra* note 25, at 145.

was, a rule of necessity. It is, however, a useful rule. It avoids decision of constitutional questions where possible, and it permits one lawsuit, rather than two, to resolve the entire controversy.

Finally in *Hurn v. Oursler* the Court extended this rule of "pendent jurisdiction," as it is usually known, to situations where decision of state issues must be justified solely on the ground of procedural convenience.²⁹⁹

Frankfurter's rewriting of the history of "pendent" jurisdiction had a profound impact on the subsequent development of the law of supplemental jurisdiction. He convinced a generation of lawyers that supplemental jurisdiction was not an ancient doctrine of fairness, but rather a recent doctrine of convenience.³⁰⁰ Moreover, he induced modern jurists to consider the impact of this doctrine of "convenience" on "the distribution of power between the states and the nation."³⁰¹ Laboring under this misperception of the scope and history of supplemental jurisdiction, late-twentieth-century scholars and judges developed a considerable jurisprudence which questions the legitimacy of such jurisdiction.³⁰² Based on this jurisprudence, the Supreme Court in recent years severely limited the use of supplemental jurisdiction, particularly for plaintiffs.³⁰³ Congress responded to the Court's limitation of

²⁹⁹ WRIGHT, *supra* note 10, at 103-04 (footnotes omitted); see also CHEMERINSKY, *supra* note 10, at 277-78; JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 68-69 (2d ed. 1993).

³⁰⁰ E.g., WRIGHT, *supra* note 10, at 104, quoted in *supra* text accompanying note 299.

³⁰¹ Frankfurter & Hart, *1932 Term*, *supra* note 229, at 286, quoted in *supra* text accompanying note 288. For an example of modern acceptance of Frankfurter's sensitivity, see Shakman, *supra* note 20.

³⁰² E.g., David Lawyer, Comment, *Tightening the Reigns on Pendent and Ancillary Jurisdiction*, 9 U. PUGET SOUND L. REV. 207 (1985); Geoffrey P. Miller, Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 COLUM. L. REV. 127, 127-28 (1977); Note, *The Concept of Law-Tied Pendent Jurisdiction: Gibbs and Aldinger Reconsidered*, 87 YALE L.J. 627, 628 (1978); see also Sidney Shenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 NW. U. L. REV. 245, 247 (1980) ("[Recent Supreme Court] decisions indicate that the generally accepted rationale for pendent jurisdiction—judicial economy and convenience—is inadequate not only to support the extension of Gibbs to pendent party jurisdiction, but perhaps even to justify Gibbs itself.").

³⁰³ E.g., *Finley v. United States*, 490 U.S. 545 (1989); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976); see McManamon, *supra* note 20, at 929-32 (discussing Court's anti-plaintiff bias).

supplemental jurisdiction by passing a statute authorizing such jurisdiction.³⁰⁴ Even that statute, however, which would have been considered unnecessary even a half-century ago, codifies the Court's anti-plaintiff bias.³⁰⁵ In short, because Frankfurter miscast the history of supplemental jurisdiction, a doctrine that was developed out of a sense of fairness to litigants, including injured plaintiffs, has been turned on its head and now disfavors plaintiffs.³⁰⁶ While Frankfurter almost certainly would not approve of the new supplemental jurisdiction statute, it is through his influence that the statute is as limited as it is.

(ii) *Development of General Common Law under Swift.* Cornell professor Arthur John Keeffe³⁰⁷ asserted that the "propaganda which brought us *Erie R.R. v. Tompkins* [was] the Harvard Law School party line of the days when Felix Frankfurter was a Professor."³⁰⁸ That "party line" proclaimed "the viciousness of diversity of citizenship jurisdiction."³⁰⁹ As mentioned above,³¹⁰ many early-twentieth-century jurists believed that the power to declare general federal common law was useful in the movement toward uniformity. Even those who despised the practice admitted that it might be of "practical advantage" if "it in the long run tends to promote greater uniformity."³¹¹ Thus, to persuade supporters of the *Swift* doctrine to turn against it, someone had to convince them that this practical advantage was nonexistent. Professor Frankfurter did just that through, ironically, his article in the *Cornell Law Quarterly*.³¹²

Frankfurter's study was the first attempt to evaluate the success of the *Swift* doctrine in achieving national uniformity of state

³⁰⁴ 28 U.S.C.A. § 1367 (Supp. 1993).

³⁰⁵ *Id.* § 1367(b).

³⁰⁶ McManamon, *supra* note 20, at 932.

³⁰⁷ Professor Keeffe's work, like Frankfurter's, was co-authored. For similar reasons, just as Frankfurter's work was cited as his alone, *see supra* note 257, Keeffe's work will also be cited as his alone.

³⁰⁸ Arthur John Keeffe et al., *Venue and Removal Jokers in the New Federal Judicial Code*, 38 VA. L. REV. 569, 602 (1952).

³⁰⁹ *Id.* at 605.

³¹⁰ *See supra* notes 190-193 and accompanying text.

³¹¹ *Cole v. Pennsylvania R.R.*, 43 F.2d 953, 956 (2d Cir. 1930) (Augustus N. Hand, J.); *see supra* notes 207-208 and accompanying text (discussing Judge Hand's disapproving acquiescence to *Swift* rule).

³¹² Frankfurter, *supra* note 185.

common law.³¹³ After analyzing numerous state opinions in the wake of a federal declaration of general common law, Frankfurter declared: "*Swift v. Tyson* does not make for uniformity."³¹⁴ "To support his proposition, Professor Frankfurter demonstrated that in these cases the state court promptly rejected the federal rule at the first available opportunity."³¹⁵ He concluded that "[e]vidence is wanting that the state courts yield their own law."³¹⁶ For example, after the United States Supreme Court refused to follow the holding of the Alabama Supreme Court on an issue of commercial law, Frankfurter found that "[t]he Alabama courts continued to follow their own decisions."³¹⁷ Moreover, after the United States Supreme Court "refused to follow the New York decisions relative to contracts by common carriers against liability for negligence[, t]he New York Courts subsequently persisted in their holdings."³¹⁸

Professor Keeffe, however, conducted his own study of state decisional law subsequent to a pronouncement of general federal common law. He found that Frankfurter's reliance on early state rejection of federal opinions to conclude that those opinions were not followed was based on "such a narrow ground" that Frankfurter's determination was "premature."³¹⁹ Frankfurter did not take into account the fact that "it was to be expected that some state courts would be quick to resent the intrusion upon their sacred judicial power, that they would take the first available opportunity to vent their ire on the *Tyson* rationale by categorically refusing to follow the federal rule."³²⁰ Looking beyond the early, reactive state cases, Keeffe found that "the [*Swift*] rule did promote uniformity to a substantial degree—not that its effect was immediate but that it exerted a subtle, albeit inexorable, pressure upon the state court to march in harmony with its fellows."³²¹ For exam-

³¹³ Keeffe et al., *supra* note 191, at 504.

³¹⁴ Frankfurter, *supra* note 185, at 528.

³¹⁵ Keeffe et al., *supra* note 191, at 504 n.55.

³¹⁶ Frankfurter, *supra* note 185, at 528-29.

³¹⁷ *Id.* at 529 n.150.

³¹⁸ *Id.*

³¹⁹ Keeffe et al., *supra* note 191, at 504 n.55.

³²⁰ *Id.* at 505.

³²¹ *Id.* at 504.

ple, it was only natural in the politically charged atmosphere surrounding the United States Supreme Court's decision in *Gelpcke v. City of Dubuque*³²² that the Iowa Supreme Court would reject the federal decision at first.³²³ However, "[d]espite this initial condemnation of the [United States] Supreme Court's decision, the Iowa court eventually accepted the holding of that case."³²⁴

Frankfurter's conclusion, however, was accepted without question by Justice Brandeis. One of his premises in *Erie*, causing his rejection of *Swift*, was as follows: "Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity"³²⁵ Justice Brandeis's conclusion "was largely based upon Professor Frankfurter's research."³²⁶ Thus, Professor Frankfurter's scholarship led directly to one of the most dramatic changes in the law of federal courts.³²⁷

b. The Teacher.

(i) *In the Classroom.* Professor Frankfurter introduced his course on federal jurisdiction in 1924,³²⁸ and for the next fifteen years, "many of the ablest [students] scrambled for the limited seats in his third-year seminars."³²⁹ By teaching these genera-

³²² 68 U.S. (1 Wall.) 175 (1864); see *supra* notes 102-113 and accompanying text (discussing Supreme Court's failure to use state decisional law in *Gelpcke*).

³²³ See *McClure v. Owen*, 26 Iowa 243, 258 (1868) ("While such decisions [as *Gelpcke*] may, in some cases, attain the ends of justice, the probability is, they will work quite a different result, and by disturbing precedents, will have the general effect of undermining the very fabric of our system of jurisprudence.").

³²⁴ *Keeffe et al.*, *supra* note 191, at 505; see *id.* at 528 (citing Iowa cases).

³²⁵ *Erie R.R. v. Tompkins*, 304 U.S. 64, 74 (1938).

³²⁶ *Keeffe et al.*, *supra* note 191, at 504 n.55; accord, *Levy & Murphy*, *supra* note 225, at 1291; see *Erie*, 304 U.S. at 74 n.7 (citing Frankfurter's article).

³²⁷ Justice Hugo Black referred to *Erie* as "one of the most important cases at law in American legal history." Hugo Black, *Address*, 13 MO. B.J. 173, 174 (1942).

³²⁸ *Levy & Murphy*, *supra* note 225, at 1294.

³²⁹ PARRISH, *supra* note 194, at 160. Frankfurter also taught a seminar in administrative law. *Id.* The seats in the seminars were not limited simply by numbers:

In order to assure that the quality of his students was up to his standards, he had the following notice concerning his classes inserted in the catalog: "Open only to students of high standing with the consent of the instructor." This notice was unique, since he alone, of all the faculty, followed this practice.

tions of Harvard law students, Professor Frankfurter had an extraordinary opportunity to shape the law of federal courts.³³⁰ He took full advantage of his opportunities, so that one contemporary declared: "[T]he development of our national courts will long be colored by Frankfurter's decade or more of teaching in the subject [of federal jurisdiction]."³³¹

Frankfurter had a gift for cultivating people, which he recognized. When deciding whether to take a faculty position at the law school, he wrote, "at the root of any consideration of my job, is my gift of tapping people of all kinds."³³² One who knew him remarked, "Certainly no job could have made happier use of these attributes than the one he chose. As professor, Frankfurter liberated the minds and directed the energies of a generation of students seeking self-fulfillment."³³³ Our American law has been profoundly affected by the fact that over half a century ago, several generations of bright young men in their twenties, a time when they were amenable to hero worship, found their hero.³³⁴ Frankfurter shared his vision with the best and the brightest that

THOMAS, *supra* note 244, at 14. Professor Frankfurter explained:

When . . . I started a course on Federal Jurisdiction I purposely limited admission to A and B men (barring an occasional C man with exceptional claims) precisely because I wanted to conduct it on the seminar basis—the free interplay of discussion and independent inquiry by members of the class. That necessarily meant a relatively small group.

Memorandum by Felix Frankfurter entitled "Theses in Administrative Law and Federal Jurisdiction" (Mar. 28, 1932) (Frankfurter Papers, Library of Congress).

³³⁰ See *supra* notes 246-255 and accompanying text.

³³¹ McCormick, *supra* note 257, at 472.

³³² FRANKFURTER REMINISCES, *supra* note 213, at 82. One of the Justice's former law clerks remarked, "No one who knows Felix Frankfurter is the same thereafter." Andrew L. Kaufman, *The Justice and His Law Clerks*, in FELIX FRANKFURTER: THE JUDGE, *supra* note 28, at 223, 228; see also Levy & Murphy, *supra* note 225, at 1258 (discussing Frankfurter's "wonderful ability to cultivate friends").

³³³ Cohen, *supra* note 243, at 594.

³³⁴ "There were no neutrals about Felix," one [student] recalled. "You either thought the sun rose and set down his neck; or you despised him. My guess is that the vote would have gone about two-to-one in his favor." PARRISH, *supra* note 194, at 160 (quoting W. Barton Leach, *Felix*, HARV. L. SCH. BULL., Mar. 1968, at 9); see, e.g., *supra* note 257 (noting feelings of student James M. Landis toward Professor Frankfurter); Ernest J. Brown, *Professor Frankfurter*, 78 HARV. L. REV. 1523, 1523 (1965) (describing Frankfurter as "the greatest teacher I have known" and his teaching as "the transforming magic that he worked"). But see Vilardo & Gutman, *supra* note 252, at 19 (quoting former student as follows: "I should say that I am not a philo-Frankfurterite. Let me just say he is not one of my favorites.").

Harvard had to offer.³³⁵ This experience formed the students' attitudes toward the federal court system. As one contemporary professor noted, "Students who have mastered the materials [Frankfurter] presented will when they reach the bench, hardly be able to divorce their interpretation of such phrases as 'judicial power', 'cases and controversies', or 'suit against one of the United States' from the problems of statesmanship incident to preserving a balance between centripetal and centrifugal forces in a federated government."³³⁶ One former student confirmed this assessment:

[I]n the professional years after law school . . . the fruitful ideas for dealing with the kaleidoscopic problems of first a general, and then a specialized, practice, the effective habits or methods of professional thought, more often clearly came from the recollection of something that had been said, something that had been done, in [Professor Frankfurter's] course in Public Utilities than from any other ascertainable source, or indeed from the sum of other

³³⁵ Frankfurter's course description declared: "This course is concerned with the complicated issues of federalism presented by the existence of two sets of courts—state and United States courts." Course description for Federal Jurisdiction (Frankfurter Papers, Library of Congress). His casebook, which was assigned reading, *id.*, contained his "fresh and imaginative insight and attitude," which he had "brought to the study of our Federal judicial system" not only in his writings but also "in his leadership of other minds in exploration of the field." McCormick, *supra* note 257, at 472. For a discussion of the attitudes revealed in Frankfurter's casebook, see *infra* notes 391-404 and accompanying text. Moreover, his examinations disclose the material covered during the course. His Federal Jurisdiction examination of October 19-20, 1937, located in the Frankfurter Papers, Library of Congress, required his students to write on one of the following questions:

1. An extended review of the "Business," treating the book as though written by an anonymous author.
2. What changes—excisions, additions, or modifications—would you make as editor of a "New and Revised Edition" of the "Business"?
3. What light is shed on the legislative process by, and what lessons on that process are to be drawn from, the history of the Judiciary Acts, *i.e.*, Congressional legislation concerning the federal courts?
4. Discuss the relation between the scope of jurisdiction of the inferior federal courts and the Supreme Court? [sic]

Finally, his students' published seminar papers, see *infra* notes 338-339 and accompanying text, tell us much about the content of the classes.

³³⁶ McCormick, *supra* note 257, at 472.

ascertainable sources.³³⁷

Frankfurter's students in turn shared his vision with the world. He did not even have to wait until his students graduated from the law school for his impact through them to be felt. Many of his students published their seminar papers, all of which exhibited the guiding hand of the professor.³³⁸ Moreover, it has been suggested that Frankfurter had a great deal of sway over the student notes and comments published in "the influential *Harvard Law Review*."³³⁹ Finally, even his students' examination papers may have had a profound impact on the law of federal courts. "Occasionally, [Justice Brandeis] . . . scrutinized copies of Frankfurter's seminar papers and final examinations."³⁴⁰ The semester before the Supreme Court granted certiorari in *Erie*,³⁴¹ Frankfurter's Federal Jurisdiction examination contained the following question: "Write a critique of *Swift v. Tyson* in the light of historic, juristic,

³³⁷ Brown, *supra* note 334, at 1524-25.

³³⁸ Wechsler, *supra* note 257, at 776 ("[T]here has been much literature in recent years [about the Supreme Court], appearing for the most part under Professor Frankfurter's aegis."); see, e.g., Samuel Shepp Isseks, *Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials*, 40 HARV. L. REV. 969, 969 n.* (1927) (noting that paper had its origin in and was result of study under Professor Frankfurter in his federal jurisdiction course); Wilber Griffith Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894, 894 n.* (1930) (same); Welch Pogue, *State Determination of State Law and the Judicial Code*, 41 HARV. L. REV. 623, 623 n.* (1928) (same); Malcolm P. Sharp, *Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions*, 46 HARV. L. REV. 361, 361 n.* (1933) (same); Frank H. Sloss, *Mandamus in the Supreme Court Since the Judiciary Act of 1925*, 46 HARV. L. REV. 91, 91 n.* (1932) (same); see also Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 483 n.* (1928) (acknowledging help of Professor Frankfurter in suggesting topic and in providing assistance in its preparation); John E. Lockwood et al., *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426, 426 n.* (1930) (same); cf. McCormick, *supra* note 257, at 473 (noting casebook bibliography "includes a list of some hundred or more unpublished theses—presumably the fruit of Professor Frankfurter's teaching of the subject").

³³⁹ Levy & Murphy, *supra* note 225, at 1286; see *id.* at 1286 n.165, 1287 & n.167 (citing notes published in *Harvard Law Review*, presumably at Frankfurter's request); see also G. Edward White, *Felix Frankfurter, the Old Boy Network, and the New Deal: The Placement of Elite Lawyers in Public Service in the 1930s*, 39 ARK. L. REV. 631, 656 (1986) ("Felix Frankfurter was into the life of almost every Law Review student who passed through Harvard for three years" (quoting Telford Taylor, *quoted in* KATIE LOUCHHEIM, *THE MAKING OF THE NEW DEAL: THE INSIDERS SPEAK* 241 (1983))).

³⁴⁰ Levy & Murphy, *supra* note 225, at 1292.

³⁴¹ The Supreme Court granted certiorari on October 11, 1937. 302 U.S. 671 (1937).

and functional considerations.”³⁴² Anyone who has studied Brandeis’s opinion in *Erie* will recognize what was to become the Justice’s three-part attack on *Swift* in this question.³⁴³

Upon graduation, Frankfurter’s students took his teachings with them to very influential jobs. Frankfurter picked the law clerks for Justices Cardozo, Brandeis, and Holmes, and the Hand cousins.³⁴⁴ One biographer declared: “These selectees together with his own secretaries constitute an elite corps who will ever revere his name.”³⁴⁵ Furthermore, “the New Deal was staffed by his former students,”³⁴⁶ referred to as Frankfurter’s “Hot Dogs.”³⁴⁷ As one former student noted, “Frankfurter produced generations. He sent whole cadres of Harvard law graduates in the 1920s to Washington, and they rippled through the Washington scene. They changed this country.”³⁴⁸

Moreover, Frankfurter’s students, Harvard’s best and brightest, had notable careers. Several, such as Charles Wyzanski³⁴⁹ and Henry J. Friendly,³⁵⁰ became judges.³⁵¹ By the time Frankfurt-

³⁴² Federal Jurisdiction examination (June 1, 1937) (Frankfurter Papers, Library of Congress).

³⁴³ See *Erie R.R. v. Tompkins*, 304 U.S. 64, 71-80 (1938). The first part of the *Erie* opinion attacked *Swift* on historic grounds. See *id.* at 71-74. The second part of the opinion focused on functional, or practical, problems with the *Swift* doctrine. See *id.* at 74-78. The third part of the opinion attacked *Swift* on juristic, or legal, grounds. See *id.* at 78-80.

³⁴⁴ Willard L. King, *Mr. Justice Frankfurter Retires*, 48 A.B.A. J. 1143, 1145 (1962); *Felix Frankfurter*, CURRENT BIOGRAPHY 1957, at 194, 195 [hereinafter 1957 BIOGRAPHY]; see also Levy & Murphy, *supra* note 225, at 1292 (noting that Frankfurter picked Brandeis’s clerks).

³⁴⁵ King, *supra* note 344, at 1145.

³⁴⁶ Levy & Murphy, *supra* note 225, at 1301. See generally White, *supra* note 339 (discussing Frankfurter’s recruiting of best students into public service).

³⁴⁷ GOODWIN, *supra* note 233, at 27; 1941 BIOGRAPHY, *supra* note 220, at 306; 1957 BIOGRAPHY, *supra* note 344, at 195.

³⁴⁸ Vilardo & Gutman, *supra* note 252, at 19; see also LASH, *supra* note 239, at 52-55.

³⁴⁹ A.B., 1927, LL.B., 1930, Harvard. Wyzanski was appointed U.S. district judge for the District of Massachusetts in 1941. 29 WHO’S WHO, *supra* note 261, at 2858.

³⁵⁰ A.B., 1923, LL.B., 1927, Harvard. Friendly was appointed as a circuit judge for the United States Court of Appeals for the Second Circuit in 1959. 32 WHO’S WHO, *supra* note 261, at 1078 (1962).

³⁵¹ Justice William Brennan—B.S., 1928, Pennsylvania; LL.B., 1931, Harvard, 29 WHO’S WHO, *supra* note 261, at 305—was also one of Professor Frankfurter’s students. Donald Burrill, *Felix Frankfurter*, in 2 GREAT LIVES FROM HISTORY (AMERICAN SERIES) 830, 834 (Frank N. Magill ed., 1987). Brennan, however, was not within Frankfurter’s circle of protégés. In fact, when he heard Brennan had been named to the Court, “Frankfurter . . . had racked his brain in an attempt to recall a student named Brennan but could not.” Kim I. Eisler, *The Late Professor and the Last Liberal*, LEGAL TIMES, Mar. 16, 1992, at 24, 24.

er ascended the bench himself, it could be said that "[a]lready he has exerted a profound influence on the American legal structure: all over this country his former students are putting into effect, before the bench or on it, his principles of law."³⁵² In addition, from among Frankfurter's students, "[m]any . . . are the scholars who have followed his example and thus radiated his influence."³⁵³ These men include Harvard professor Paul A. Freund,³⁵⁴ Harvard professor and dean Erwin N. Griswold,³⁵⁵ Harvard professor Henry M. Hart, Jr.,³⁵⁶ Chicago professor and dean Wilber G. Katz,³⁵⁷ Harvard professor and dean James M. Landis,³⁵⁸ and Yale professor and dean Harry Shulman.³⁵⁹ These men of course developed their own ideas after law school, but much of what Frankfurter taught them lingered and was passed down to yet more generations of law students.³⁶⁰ His influence

Thus, it should not be too surprising that the two Justices clashed frequently on issues of federal jurisdiction. Compare *Baker v. Carr*, 369 U.S. 186, 187-237 (1962) (Brennan, J., for the Court) (holding that challenge to Tennessee legislative apportionment statute was not political question and was therefore justiciable) with *id.* at 266-330 (Frankfurter, J., dissenting) (declaring issue a non-justiciable political question). Brennan, however, clearly learned something from Professor Frankfurter. For example, in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), Brennan accepted Frankfurter's view of the power of federal courts to issue injunctions against state courts, see *infra* notes 529-537 and accompanying text, and then attempted to carve out an exception to Frankfurter's "rule." Cf. Laycock, *supra* note 59, at 688 (discussing *Dombrowski*); *infra* notes 478, 500, 519 (comparing Brennan's jurisprudence to Frankfurter's).

³⁵² *Mr. Justice Frankfurter*, 97 THE NEW REPUBLIC 297, 297 (1939).

³⁵³ Cohen, *supra* note 243, at 594.

³⁵⁴ A.B., 1928, Washington, St. Louis; LL.B., 1931, S.J.D., 1932, Harvard. Freund joined the Harvard faculty in 1939. 1991-92 AALS DIRECTORY OF LAW TEACHERS 371.

³⁵⁵ A.B., A.M., 1925, Oberlin; LL.B., 1928, S.J.D., 1929, Harvard. Griswold joined the Harvard faculty in 1934. He was dean there from 1946 to 1967. *Id.* at 421.

³⁵⁶ See *supra* note 267.

³⁵⁷ See *infra* note 391.

³⁵⁸ See *supra* notes 257, 260-261.

³⁵⁹ See *infra* note 392.

³⁶⁰ Perhaps the most striking example of this phenomenon is found in what many consider to be the modern "bible" on federal courts, *Hart and Wechsler's The Federal Courts and the Federal System*. Former student Henry Hart, along with co-author Herbert Wechsler, dedicated the first edition of this tome as follows: "To Felix Frankfurter who first opened our minds to these problems." HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM at ix (1953) [hereinafter HART & WECHSLER (1st ed.)], reprinted in PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM at xv (2d ed. 1973) [hereinafter HART & WECHSLER (2d ed.)], and in HART & WECHSLER (3d ed.), *supra* note 81, at xix; see also *infra* notes 424-434 and accompanying text (discussing Hart and Wechsler book).

still radiates as Frankfurter's pupils' pupils are now teaching throughout the United States.³⁶¹

(ii) *Frankfurter's Casebook*. Felix Frankfurter's influence as a teacher spread beyond the Harvard Law School in yet another way. He played a crucial role in the development of the course on federal courts now taught at virtually every American law school.³⁶² Before the 1930s, there were very few schools with a course on federal jurisdiction and procedure.³⁶³ "Cases in the lower federal courts were considered so rare in the practice of the average small town lawyer . . . that familiarity with federal procedure was hardly deemed necessary."³⁶⁴ Hours in the already overcrowded curriculum were reserved for more generally useful topics.³⁶⁵ "The subject of federal jurisdiction [w]as, as a general rule, if offered at all, . . . given by a federal judge or by a lawyer who ha[d] a great deal of practice in the federal courts; and that, too, in a series of lectures."³⁶⁶ These lectures³⁶⁷ detailed the rules of jurisdiction and procedure³⁶⁸ for those relatively few

³⁶¹ The full impact of Frankfurter's teaching can probably never be calculated. His former students went on to teach at the Nation's "elite" law schools. See *supra* notes 353-359 and accompanying text. Graduates from those schools now constitute about one-third of the full-time law professors in the United States. Tell, *supra* note 253, at 2.

³⁶² See 1991-92 AALS DIRECTORY OF LAW TEACHERS 1053-57 (listing at least one teacher of federal courts at every AALS member school). For a discussion of Felix Frankfurter's role in the development of the modern-day course, see *infra* notes 391-437 and accompanying text.

³⁶³ Even in the late 1920s, federal jurisdiction was still "a subject which [did] not usually appear in the law school curriculum." W. Lewis Roberts, Book Review, 15 KY. L.J. 168, 168 (1926).

³⁶⁴ Wayne G. Cook, Book Review, 76 U. PA. L. REV. 626, 626-27 (1928).

³⁶⁵ See R.E. Bunker, Book Review, 16 MICH. L. REV. 210, 210 (1918); Armistead M. Dobie, Book Review, 27 COLUM. L. REV. 232, 233 (1927); Roberts, *supra* note 363, at 169; George J. Thompson, Book Review, 12 CORNELL L.Q. 255, 255 (1927); Book Note, 66 U. PA. L. REV. 193, 193 (1918).

³⁶⁶ Roberts, *supra* note 363, at 168; *accord*, Bunker, *supra* note 365, at 210 (stating that subject was taught with "lectures and text-books"); Book Note, *supra* note 365, at 193 (noting that field was "covered by lectures and text-books").

³⁶⁷ Some of the lectures were published. See, e.g., CURTIS, *supra* note 224 (lectures at Harvard Law School, 1872-1873); JOSEPH R. LONG, OUTLINE OF THE JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS (1st ed. 1910, 2d ed. 1911, 3d ed. 1917) (based upon lectures at Washington and Lee University School of Law); WILLIAM A. MAURY, FEDERAL JURISDICTION AND PROCEDURE (1896) (prepared for use in the Law School of Columbian [now George Washington] University); CHARLES P. WILLIAMS, LECTURES ON FEDERAL JURISDICTION (1913) (prepared for use of Law School of Washington University, St. Louis, Mo.).

³⁶⁸ See, e.g., Curtis & Curtis, *supra* note 224, at iv.

students destined to go into federal practice.

With the twentieth century, however, had come an enormous growth in federal court business.³⁶⁹ Gradually, law faculties realized that they should acquaint all students, not just those preparing for a specialized federal practice, with the workings of the federal courts.³⁷⁰ As the academy began to involve itself in the course on federal jurisdiction, casebooks³⁷¹ on the subject emerged. The first such casebook, edited by Professor George W. Rightmire of Ohio State University,³⁷² was published in 1917.³⁷³ This book was soon followed by a second,³⁷⁴ edited by Professor

³⁶⁹ As one cynic noted, this was "an age in which the panacea for all ills is supposed to be a constitutional amendment, or at least an act of Congress." Cook, *supra* note 364, at 627; see also Frederick A. Whitney, Book Review, 1 ST. JOHN'S L. REV. 218, 218 (1927) (asserting that increased federal legislation produces more legal work in federal courts); Joseph P. McNamara, Book Note, 3 NOTRE DAME LAW. 117, 117 (1927) (declaring "lawyer of today [to be] in the Federal Courts a great deal oftener than his predecessor").

At least one astute observer noted this trend in the early 1870s. In 1872, Justice Benjamin R. Curtis told his students at the Harvard Law School that

[o]wing to the great increase in the wealth and population of our country, in its inter-state as well as its foreign commerce, in the means of locomotion, which have brought the different parts of the country so much nearer together, and in the value of patent and copy rights granted by the United States, as well as, during the last ten years, the extension of the powers of Congress over many subjects previously left to the exclusive legislation of the States, and therefore left exclusively to the judicial power of the States,—owing to these and other causes, all co-operating, the business of the courts of the United States has greatly increased; and these same causes are likely in the future to operate with increased efficiency.

CURTIS, *supra* note 224, at 2-3.

³⁷⁰ See Cook, *supra* note 364, at 627; Dobie, *supra* note 365, at 232; Roberts, *supra* note 363, at 168; Whitney, *supra* note 369, at 218; McNamara, *supra* note 369, at 117.

³⁷¹ As opposed to textbooks or collections of lectures. See *supra* notes 367-368 and accompanying text.

³⁷² Professor of Law, Ohio State University College of Law. Ph.B., 1895, M.A., 1898, part-time student in the law department, 1898-1902, Ohio State. 3 WHO WAS WHO IN AMERICA 728 (1960 [3d prtg. 1966]) [hereinafter WHO WAS WHO].

³⁷³ GEORGE W. RIGHTMIRE, CASES AND READINGS ON THE JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS (1917). Before this book was published, "[t]he traditional method of dealing with the subject ha[d] been by lectures and text book." *Id.* at v; accord Bunker, *supra* note 365, at 210; Book Note, *supra* note 365, at 193; see Waterman, *supra* note 246, at 128 n.1 (listing four casebooks published before 1935); cf. Dobie, *supra* note 365, at 232 (noting that, in 1926, reviewer knew of only three casebooks of consequence on federal jurisdiction).

³⁷⁴ CARL C. WHEATON, CASES ON FEDERAL PROCEDURE (1921).

Carl C. Wheaton of the University of Cincinnati.³⁷⁵

The availability of casebooks in turn stimulated the development of courses on federal jurisdiction.³⁷⁶ Moreover, the new books had a hand in shaping the new courses.³⁷⁷ The Rightmire and Wheaton casebooks were not much of an advance on the old textbooks and lectures, however. They were still designed simply to provide the rudiments of federal jurisdiction to the future practitioner.³⁷⁸ The course on federal jurisdiction thus retained its reputation for

³⁷⁵ Professor of Law, University of Cincinnati College of Law. A.B., 1911, Stanford; LL.B., 1915, Harvard. 1938-39 AALS DIRECTORY OF TEACHERS IN MEMBER SCHOOLS 182.

³⁷⁶ See Oliver P. Carriere, Book Review, 13 TUL. L. REV. 156, 158 (1938) [hereinafter Carriere, Frankfurter Review]; Armistead M. Dobie, Book Review, 6 S. CAL. L. REV. 81, 81 (1932); McCormick, *supra* note 215, at 359. In 1931, about 30 AALS member law schools offered a course in federal jurisdiction. McCormick, *supra* note 257, at 474. In 1933, that number had grown to 34 schools. Waterman, *supra* note 246, at 128 n.2; *accord*, Oliver P. Carriere, Book Review, 17 B.U. L. REV. 277, 277 n.1 (1937) [hereinafter Carriere, Dobie Review]. In 1935, there were 39 schools with such a course. *Id.*

³⁷⁷ See Wechsler, *supra* note 257, at 778 (declaring that "the book conditions the method which an instructor can adopt, as surely as it does the mental processes of the students who use it").

³⁷⁸ As one contemporary noted, Professor Rightmire's goal was to meet "the needs of students in acquiring the fundamentals of a knowledge of the jurisdiction and procedure of the Federal courts." Bunker, *supra* note 365, at 210. Rightmire differed from earlier teachers of the subject only in that he believed "that 'the case treatment' as he terms it, is the preferable method of leading preparatory students into a competent, working knowledge of the subject." *Id.*

Professor Wheaton clearly put together his book with the practitioner in mind. He ended his book with a "Questionnaire in Federal Procedure," a study guide which asked the questions whose answers the student was supposed to have found in the readings. Following is a sampling of his questions for the chapter on the district courts:

17. What is the salary of judges of the federal district courts?
18. How are deputy clerks of federal district courts appointed and removed?
19. Who takes the place of the clerk of a federal district court in case of his death?
20. What liabilities does such a clerk's bond cover?

WHEATON, *supra* note 374, at 672 (references to sections omitted). As to removal, he asks the following questions, *inter alia*:

176. What type of cases is removable under section 31 [of the Judicial Code]?
177. Within what time must a removal be requested?
178. What amount must be in controversy?
179. Who may obtain a removal?

Id. at 679; see Thomas E. Atkinson, Book Review, 4 MO. L. REV. 100, 100 (1939) (observing that second edition of book provides "the basic information as to how to get into, or keep out of, the federal courts and what to do when one gets there").

being "dry as dust."³⁷⁹

The third casebook on federal jurisdiction, edited by Professor Harold R. Medina of Columbia,³⁸⁰ appeared in 1926.³⁸¹ Medina's book was notably different from the previous two.³⁸² To Professor Frankfurter, who had already developed his own course on federal jurisdiction,³⁸³ the important difference was that "[t]he Medina collection . . . reveals the fascination that inheres in the unique questions of jurisdiction and procedure that underlie our dual system of courts."³⁸⁴ Other Harvard alumni³⁸⁵ agreed with

³⁷⁹ See Carriere, Dobie Review, *supra* note 376, at 277; Carriere, Frankfurter Review, *supra* note 376, at 158.

³⁸⁰ Associate Professor of Law, Columbia University School of Law. A.B., 1909, Princeton; LL.B., 1912, Columbia. 20 WHO'S WHO, *supra* note 261, at 1724 (1938).

³⁸¹ HAROLD R. MEDINA, CASES ON FEDERAL JURISDICTION AND PROCEDURE (1926).

³⁸² In general, the critics considered the Medina casebook to be "an advance upon the others in the field." Dobie, *supra* note 365, at 232; *accord*, McCormick, *supra* note 215, at 359. The Medina book was different from its predecessors in another respect. In the words of one reviewer, "the authors have emphasized questions of jurisdiction, and left the details of procedure to be picked up as occasion may require." Hand, *supra* note 215, at 130; *accord*, Cook, *supra* note 364, at 627; Dobie, *supra* note 365, at 232; McCormick, *supra* note 215, at 359; McNamara, *supra* note 369, at 117. This separation of federal jurisdiction from federal procedure only grew in subsequent treatments of the subject. Thus began the evolution which ultimately resulted in two separate courses in the curriculum of most American law schools, federal civil procedure and federal jurisdiction.

³⁸³ See *supra* notes 328-336 and accompanying text.

³⁸⁴ Felix Frankfurter, Book Review, 40 HARV. L. REV. 1160, 1161 (1927). Professor Medina noted in his preface that "[t]he purpose of the present collection of cases is to develop an understanding of the fundamental principles of federal jurisdiction, so that the reader or student may . . . appreciate those instances in which the federal or state courts function concurrently or to the exclusion of one another." MEDINA, *supra* note 381, at iii. The first three chapters of the book were devoted almost entirely to the relationship of the federal courts to the state judiciary. See *id.* at 1-157. This topic was also raised throughout the rest of the book. For example, ancillary jurisdiction was treated in the section on diversity jurisdiction, *id.* at 346-56, and state legislation to prevent removal was discussed in the chapter on removal, *id.* at 397-402.

In contrast, Professor Wheaton only allocated nine pages at the very end of his casebook to the "Rights of State and Federal Courts having concurrent jurisdiction." See WHEATON, *supra* note 374, at 432-42. Professor Rightmire gave the subject more attention, but his focus remained on the federal court system. See RIGHTMIRE, *supra* note 373, at 49-147 (section on "Relation of Federal and State Judiciary"); *cf. id.* at v (explaining author's approach to subject).

³⁸⁵ It is at the very least an interesting coincidence that the five reviewers of Medina's book who noticed his treatment of the relation between state and federal courts were Frankfurter, Frankfurter's friend Learned Hand, and three other alumni of the Harvard Law School who had received their degrees after Frankfurter had started teaching there. These three alumni were the following: Armistead M. Dobie, S.J.D., 1922, Harvard, 18 WHO'S WHO,

him.³⁸⁶

Professor Frankfurter thought that the Medina book suffered from the same deficiency as the earlier casebooks, however: its primary goal was still to instruct the practitioner.³⁸⁷ Frankfurter believed that instead, "federal jurisdiction ought to occupy [an important place] in the training of scholarly lawyers."³⁸⁸ While Professor Medina had raised some interesting issues of federalism, he had merely detailed the rules without suggesting that they should be anything but what they then were.³⁸⁹ As Frankfurter

supra note 261, at 727 (1934); George J. Thompson, LL.B., 1912, S.J.D., 1918, Thayer teaching fellow, 1918-1919, research fellow, 1933-1934, Harvard, 29 *id.* at 2566 (1956); and Frederick A. Whitney, LL.B., 1917, Harvard, 7 ST. JOHN'S L. REV. 287 (1933). For their comments on the Medina casebook's treatment of the relation between the state and federal judiciary, see *supra* note 384 and accompanying text and *infra* notes 386, 389.

Meanwhile, four of the five reviewers of Medina's book who did not note his treatment of the relationship between state and federal courts did not have a Harvard degree at the time of the review. These reviewers were as follows: Wayne G. Cook, LL.B., 1913, Iowa, 1928-29 AALS DIRECTORY OF TEACHERS IN MEMBER SCHOOLS 23; W. Lewis Roberts, J.D., 1920, Chicago, 20 WHO'S WHO, *supra* note 261, at 2115 (1938); Edson R. Sunderland, A.M., LL.B., 1901, Michigan, 3 WHO WAS WHO, *supra* note 372, at 834; and Joseph P. McNamara, a student at the Notre Dame College of Law, 3 NOTRE DAME LAW. 92 (1927). Roberts received an S.J.D. from Harvard in 1930. 20 WHO'S WHO, *supra* note 261, at 2115 (1938). For citations to the Cook, Roberts, and McNamara reviews, see *supra* notes 363, 364, 369. Professor Sunderland's review appeared at 22 ILL. L. REV. 114 (1926).

Only one Harvard alumnus, Charles T. McCormick, LL.B., 1912, Harvard, 7 N.C. L. REV. 234 (1929), did not mention Medina's treatment of the relationship between the state and federal judiciaries. For the citation to his review, see *supra* note 215. Only a few years later, however, Professor McCormick opined, "[O]bviously the most important and most distinctive procedural topic in Federal litigation is the distribution of judicial power between states and nation." McCormick, *supra* note 257, at 473.

³⁸⁶ Dobie, *supra* note 365, at 233 (stating that Medina "portrays with a sure touch the relation of the federal judicial system to the state courts"); Thompson, *supra* note 365, at 256 ("One of the features of the book is the thorough treatment of the highly technical adjustment of state and federal procedure—when federal and state courts function concurrently, or the one to the exclusion of the other."); Whitney, *supra* note 369, at 218 (stating that Medina's book illustrates "the important subject of the relation between State and Federal Courts").

³⁸⁷ Professor Medina's purpose in treating the relation between the federal and state courts was "so that [the student] may . . . be in a position to . . . weigh properly those considerations which should lead to a resort to the federal courts by original action or by removal." MEDINA, *supra* note 381, at iii.

³⁸⁸ Frankfurter, *supra* note 384, at 1160.

³⁸⁹ It is difficult for the modern reader to appreciate what message Professor Medina did or did not convey because "[t]he book conforms to the [then-]orthodox idea that a case-book must contain nothing but cases." Cook, *supra* note 364, at 627; see Roberts, *supra* note 363, at 169. The criticism, however, by Professor Frankfurter's friend, Judge Learned Hand, is

magnanimously noted, however, "Professor Medina would be the first to agree that for an intensive grappling with some of the contested issues suggested by his selected cases much more material is needed than the limits of his case-book enabled him to furnish."³⁹⁰ There was nothing left for Frankfurter to do but put together his own casebook.

Professor Frankfurter's casebook on federal jurisdiction was published in 1931,³⁹¹ with a revised edition in 1937.³⁹² It was

telling:

[I]t might have been useful to add to *Swift v. Tyson* those recent cases which show a disposition to back away from that much abused doctrine. This movement, it is true, is as yet little acknowledged, but a careful scrutiny of the present work of the court shows that it must be reckoned with, and it is of much importance, especially as indicating a reversion towards a new doctrine of States' Rights. The rule in *Gelpeke* [sic] *v. Dubuque* and its later developments is illustrated possibly beyond its importance, great though that be.

Hand, *supra* note 215, at 130. For Frankfurter's views on the *Swift v. Tyson* doctrine, see *supra* notes 222, 308-318, 341-343.

³⁹⁰ Frankfurter, *supra* note 384, at 1161.

³⁹¹ FRANKFURTER & KATZ, *supra* note 87. As usual, see *supra* note 257, Frankfurter's co-author was a young man, having received his LL.B. in 1926 from Harvard, 23 WHO'S WHO, *supra* note 261, at 1117 (1944), where he had been one of Frankfurter's students, McCormick, *supra* note 257, at 472. After a few years in private practice, *id.*, Katz returned to Harvard as a graduate student, receiving an S.J.D. in 1930, 23 WHO'S WHO, *supra* note 261, at 1117 (1944). While there as a graduate student, he again studied under Frankfurter. See Katz, *supra* note 338, at 894 n.*. Additionally, Justice Louis D. Brandeis provided a fellowship for Katz, beginning in October 1929, for the specific purpose of helping Frankfurter produce the casebook. See Levy & Murphy, *supra* note 225, at 1263, 1294; Letter from Louis D. Brandeis to Felix Frankfurter (Mar. 6, 1929), in 5 LETTERS OF LOUIS D. BRANDEIS 371, 372 (Melvin I. Urofsky & David W. Levy eds., 1978) [hereinafter BRANDEIS LETTERS]; Letter from Louis D. Brandeis to Felix Frankfurter (Sept. 20, 1929), in 5 BRANDEIS LETTERS, *supra*, at 385, 386. In 1930, Katz began teaching at the University of Chicago Law School, where he was dean from 1939 to 1962. *Id.* at 387 n.6. "He then moved to the University of Wisconsin," *id.*, where he had received his A.B. in 1923, 23 WHO'S WHO, *supra* note 261, at 1117 (1944).

³⁹² FRANKFURTER & SHULMAN, *supra* note 87. This book was not as useful as the first edition since it was published one year before the law of federal courts was dramatically changed by *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), and the promulgation of the Federal Rules of Civil Procedure. See Turrentine, *supra* note 257, at 490-91.

Katz was too busy to work on the revised edition, and he suggested that Frankfurter get Henry Hart to do it. Letter from Wilber G. Katz to Felix Frankfurter (Feb. 10, 1936) (Frankfurter Papers, Library of Congress). Hart did not work on the collaboration, possibly because he was leaving for the Solicitor General's office at the time. See *supra* note 267. Frankfurter ultimately collaborated with Harry Shulman, who was then teaching at the Yale Law School. At the time of this collaboration, Professor Shulman—A.B., 1923, Brown; LL.B., 1926, S.J.D., 1927, Harvard, 3 WHO WAS WHO, *supra* note 372, at 784—was a more mature

revolutionary. Absent was any attempt to train the practitioner. Rather, the Introduction proclaimed:

[T]he business of a university [is not] to turn out finished practising lawyers. A law school is not a law office nor a court room. In these days of overemphasis upon the immediately practical, it cannot be insisted upon too often that a university law school is part of a university. Intellectual issues are its concern[, including] . . . the continuous critique of all law-making and law-administering agencies in those aspects that are peculiarly within the competence of scholars, and the promotion through formulated reason of wise adjustments of the multitudinous and increasingly conflicting interests of modern society.³⁹³

Frankfurter did not want his students to focus on procedural niceties; those could and would be learned on the job.³⁹⁴ He wanted law students to see the federal courts in a much broader perspective. These future lawyers needed to appreciate that “[f]ederal jurisdiction is . . . an important part of the public law of the United States.”³⁹⁵ To give the students this perspective, he presented the federal courts in their constitutional dimension. For instance, his book was the first on the subject to treat the topics of

scholar than Frankfurter's other co-authors. Shulman was, however, much younger than Frankfurter and a former student and protégé. For example, Frankfurter selected him to serve as a law clerk to Justice Brandeis in 1929-1930, *see id.*; *supra* note 344 and accompanying text (noting that Frankfurter selected Brandeis's clerk each year), and Frankfurter may have been instrumental in getting Shulman his position at the Yale Law School in 1930, *see* Letter from Louis D. Brandeis to Felix Frankfurter (Oct. 13, 1929), in 5 *BRANDEIS LETTERS*, *supra* note 391, at 403, 404 & n.5. Shulman taught at the Yale Law School from 1930, and in 1954, he became dean there. 3 *WHO WAS WHO*, *supra* note 372, at 784.

³⁹³ FRANKFURTER & KATZ, *supra* note 87, at v, reprinted in FRANKFURTER & SHULMAN, *supra* note 87, at vii.

³⁹⁴ Frankfurter began his introduction with the following quotation of Judge Charles M. Hough: “It is idle for law schools to give courses in federal practice. Once they come before my court they will learn more in three weeks than a law school can possibly teach them in a year.” *Id.*, reprinted in FRANKFURTER & SHULMAN, *supra* note 87, at vii.

³⁹⁵ *Id.* at vi, reprinted in FRANKFURTER & SHULMAN, *supra* note 87, at viii.

"case or controversy" and legislative courts.³⁹⁶

Not surprisingly, Frankfurter's aim was to lead students to accept his own perspective, that is, a recognition that "problems affecting the jurisdiction of the federal courts are . . . one aspect of the great, persisting problem of harmonizing the forces of state and national life."³⁹⁷ Thus, the majority of the book is devoted to "Federalism"³⁹⁸ or, as he termed it in the revised edition, "our Federalism."³⁹⁹ In short,

legislation and adjudication affecting federal jurisdiction [are] seen and treated [in the casebook], not as dry technicalities, but in the perspective of the dynamic struggle between the national government and the states which, with the emphasis shifting now in one direction, now in the other, has been going on from the day that the Constitution was ordained.⁴⁰⁰

In order to instill in law students the notion that they could and should critique the status quo and formulate wise adjustments to it, Frankfurter selected and arranged the materials in his book "for evocation of class-room debate. . . . [T]he book bristles with controversial points in every juxtaposition of cases and in almost

³⁹⁶ Robert P. Patterson, Book Review, 41 YALE L.J. 649, 649 (1932) (describing book as "first case-book covering the field"); Turrentine, *supra* note 257, at 489-90 (noting topics "[u]nique" to first edition); Wechsler, *supra* note 257, at 774 (stating that topics are "distinct contribution of the volume"). But see RIGHTMIRE, *supra* note 373, at 5-8 (discussing "case or controversy").

³⁹⁷ FRANKFURTER & KATZ, *supra* note 87, at vii, reprinted in FRANKFURTER & SHULMAN, *supra* note 87, at ix. Frankfurter introduced this concept on the title page of both editions of his casebook by quoting Justice Benjamin R. Curtis as follows: "Let it be remembered, also,—for just now we may be in some danger of forgetting it,—that questions of jurisdiction were questions of power as between the United States and the several States." *Id.* at i; FRANKFURTER & SHULMAN, *supra* note 87, at i; see *supra* note 87 (addressing views of Curtis).

³⁹⁸ FRANKFURTER & KATZ, *supra* note 87, at vii, reprinted in FRANKFURTER & SHULMAN, *supra* note 87, at ix.

³⁹⁹ FRANKFURTER & SHULMAN, *supra* note 87, at v. This phrase was penned by Frankfurter himself. See *id.* ("Note to Revised Edition" signed, "F.F."); Frankfurter's Draft of Note to Revised Edition (Frankfurter Papers, Library of Congress); see also *supra* note 22 (discussing slogan).

⁴⁰⁰ FRANKFURTER & KATZ, *supra* note 87, at vii, reprinted in FRANKFURTER & SHULMAN, *supra* note 87, at ix.

every footnote⁴⁰¹ His “political-scientist-viewpoint”⁴⁰² was, however, not at all neutral. Instead, it “unmistakably” bore “the fingerprints of [Frankfurter’s] personality.”⁴⁰³ Thus the book “exhibit[s] a veiled hostility toward devices for extending federal jurisdiction at the expense of the jurisdiction of the state courts.”⁴⁰⁴

Frankfurter’s book was hailed as “splendid”⁴⁰⁵ and led to a “trend in the better law schools to discuss social policy, social adjustment, and social control in place of the less ‘solid material’ of procedural tactics.”⁴⁰⁶ His social-scientist-viewpoint was not immediately accepted by all, however. In fact, there was heated debate among scholars as to whether the course in federal jurisdiction should educate thinkers or train technicians. On one side of the argument were those who believed that “a course in procedure [should be] a study of social engineering rather than one in ‘the overdone legerdemain of the court room.’”⁴⁰⁷ On the other side were those who believed that “[t]here is something pitifully

⁴⁰¹ McCormick, *supra* note 257, at 472, 473.

⁴⁰² *Id.* at 472. That is, the materials in the book provide “bases for working out, from the historical, philosophical and governmental viewpoints, a synthesis of the federal judicial system.” Dobie, *supra* note 376, at 81.

⁴⁰³ McCormick, *supra* note 257, at 472; *accord*, Blair, *supra* note 192, at 946 n.6; Turrentine, *supra* note 257, at 489; Wechsler, *supra* note 257, at 774.

⁴⁰⁴ Blair, *supra* note 192, at 946; *accord*, McCormick, *supra* note 257, at 472; Wechsler, *supra* note 257, at 777. For example, Frankfurter omitted the important case of *Gelpcke v. Dubuque*, 68 U.S. (1 Wall.) 175 (1863), which extended *Swift v. Tyson*, *see supra* notes 102-113 and accompanying text (discussing *Gelpcke*), but included Holmes’s dissent in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), which criticized *Swift*. Philip M. Payne, Book Review, 18 VA. L. REV. 219, 219-20 (1931); Patterson, *supra* note 396, at 650. For other examples of how Frankfurter conveyed this hostility, *see* Blair, *supra* note 192, at 946 nn.11-12; Carriere, Frankfurter Review, *supra* note 376, at 157 & n.10.

⁴⁰⁵ McCormick, *supra* note 257, at 474; *accord*, McCormick, *supra* note 214, at 368 (“superb”); Wechsler, *supra* note 257, at 774 (“grand performance”); Herbert Wechsler, Book Review, 45 YALE L.J. 1330, 1331 (1936) (“grand manner”).

⁴⁰⁶ Waterman, *supra* note 246, at 129. The book has been referred to as a “popular casebook.” Turrentine, *supra* note 257, at 489. Unfortunately, the publisher of Frankfurter’s book, Callaghan and Co., does not have any records old enough to tell us how many schools adopted the book. Frankfurter’s own records indicate that in the first two years after the book’s publication, he received royalties for well over 500 copies. Royalty Statements from Callaghan and Co. (Frankfurter Papers, Library of Congress). That is an impressive number considering that only 30 law schools offered a course in federal jurisdiction at the time. *See supra* note 376.

⁴⁰⁷ Waterman, *supra* note 246, at 131.

professorial about the fear of making procedure too practical."⁴⁰⁸ They believed instead that "it is the duty of the law school to prepare its students to actually present cases in the federal courts."⁴⁰⁹

This debate was reflected in subsequent casebooks. Only one new book was added to the literature⁴¹⁰ before World War II called a halt to the publication of casebooks.⁴¹¹ Its author, Dean Armistead M. Dobie of the University of Virginia,⁴¹² had mildly criticized Frankfurter's book for its lack of materials on procedure.⁴¹³ Thus, it is not surprising that "[o]ne of Dobie's principal objects was to give students 'a realistic picture of the jurisdiction and actual functioning of the Federal Courts.' "⁴¹⁴ After the War, Dean Charles T. McCormick of the University of Texas⁴¹⁵ and

⁴⁰⁸ Lowell Turrentine, Book Review, 28 CAL. L. REV. 794, 796 n.13 (1940); *accord*, Carriere, Dobie Review, *supra* note 376, at 278 (chiding "social control, ideal adjustment, ephemeral minded Professors of Law"); *see also* Blair, *supra* note 192, at 945 ("[A] casebook on jurisdiction and procedure is first and foremost a sort of navigator's chart to insure safe passage along the meandering and not always placid waters of adjective law. Substantive law may be the land on which the lighthouses are built, but too frequent diversion of the attention to the scenery is not conducive to safe navigation.").

⁴⁰⁹ William W. Dawson, Book Review, 28 GEO. L.J. 157, 157 (1939).

⁴¹⁰ ARMISTEAD M. DOBIE, CASES ON FEDERAL JURISDICTION AND PROCEDURE (1935). This book was revised in 1940. ARMISTEAD M. DOBIE & MASON LADD, CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE (1940). In addition, Wheaton, now at the Saint Louis University School of Law, 1938-39 AALS DIRECTORY OF TEACHERS IN MEMBER SCHOOLS 182-83, published a second edition of his book in 1938. CARL C. WHEATON, CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE (2d ed. 1938).

⁴¹¹ William Ray Forrester, Book Review, 25 TEX. L. REV. 110, 111 (1946).

⁴¹² Dean, University of Virginia School of Law. B.A., 1901, M.A., 1902, LL.B., 1904, Virginia; S.J.D., 1922, Harvard. 18 WHO'S WHO, *supra* note 261, at 727 (1934).

⁴¹³ Dobie noted, for example, that "rather (possibly too) scant heed is given to the practical connotations of the Conformity Act amid the many procedural details in actions at law in the federal district court." Dobie, *supra* note 376, at 81. Dobie concluded, however:

[F]or students who have found their legal feet these materials, in the hands of capable instructors, could well furnish the *pabulum* for some of the most interesting courses that modern law schools can offer. This reviewer, who has taught federal procedure for more than twenty years, would highly esteem the privilege of sitting in on a course in federal procedure given by Professor Frankfurter based on the volume under review.

Id. at 82.

⁴¹⁴ John C. Knox, Book Review, 10 ST. JOHN'S L. REV. 397, 398 (1936) (quoting DOBIE, *supra* note 410, at v).

⁴¹⁵ Dean, University of Texas School of Law. A.B., 1909, Texas; LL.B., 1912, Harvard. 29 WHO'S WHO, *supra* note 261, at 1700.

Professor James H. Chadbourn of the University of Pennsylvania⁴¹⁶ published a new casebook on the federal courts.⁴¹⁷ One reviewer echoed the general sentiment when he declared: "Clearly this is the best casebook in the field."⁴¹⁸ Its chief benefits, however, seem to be that it was the only up-to-date book⁴¹⁹ and that it was well-edited for a semester-long course.⁴²⁰ Those scholars who favored Frankfurter's book were disappointed in both of the new casebooks.⁴²¹ Even if the books did not live up to the model set by Frankfurter's casebook, however, they were clearly affected by it. Both of them adopted his presentation of the federal courts as

⁴¹⁶ Professor of Law, University of Pennsylvania Law School. A.B., 1926, The Citadel; J.D., 1931, North Carolina. 29 WHO'S WHO, *supra* note 261, at 442.

⁴¹⁷ CHARLES T. MCCORMICK & JAMES H. CHADBURN, CASES AND MATERIALS ON FEDERAL COURTS (1946). In 1950, they published a second edition. In the same year, Dean Ray Forrester of Vanderbilt published FORRESTER'S EDITION OF DOBIE AND LADD'S CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE (1950). The most recent edition of that book was published in 1977. RAY FORRESTER & JOHN E. MOYE, CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE (3d ed. 1977). The McCormick and Chadbourn book, now written by Professor Charles Alan Wright of the University of Texas, is still current. WRIGHT ET AL., *supra* note 81.

⁴¹⁸ Thomas E. Atkinson, Book Review, 94 U. PA. L. REV. 346, 348 (1946); *see also* Forrester, *supra* note 411, at 112 (stating that there was "no better comprehensive source for a survey study of federal jurisdiction and procedure"); Harry Willmer Jones, Book Review, 35 CAL. L. REV. 165, 166 (1947) (stating that "the new book is distinctly superior as an instructional tool to the more comprehensive casebook of Judge Dobie and Dean Ladd"); James A. Velde, Book Review, 41 ILL. L. REV. 705, 706 (1947) (noting "obvious excellence of this book for its primary function in law school").

⁴¹⁹ *See* Atkinson, *supra* note 418, at 346; Charles E. Clark, Book Review, 55 YALE L.J. 853, 853 (1946); David Dow, Book Review, 26 NEB. L. REV. 135, 135 (1946); Forrester, *supra* note 411, at 110-11; William J. Hughes, Jr., Book Review, 46 COLUM. L. REV. 890, 891 (1946); Velde, *supra* note 418, at 705.

⁴²⁰ *See* Atkinson, *supra* note 418, at 347; Forrester, *supra* note 411, at 112; Jones, *supra* note 418, at 165-66.

⁴²¹ Several reviews noted the difference between Frankfurter's book and Dobie's book. *See, e.g.*, Thomas E. Atkinson, Book Review, 1 MO. L. REV. 291, 292 (1936); Carriere, Dobie Review, *supra* note 376, at 278-79; McCormick, *supra* note 214, at 368-69; Waterman, *supra* note 246, at 130; Wechsler, *supra* note 405, at 1331-32. Other reviews noted the difference between Frankfurter's book and the McCormick and Chadbourn book. *See, e.g.*, Paul A. Freund, Book Review, 60 HARV. L. REV. 495, 496-97 (1947) (without mentioning Frankfurter book by name); Hughes, *supra* note 419, at 891; Jones, *supra* note 418, at 166; Velde, *supra* note 418, at 706-07 (without mentioning Frankfurter book by name). When the Hart and Wechsler book appeared, *see infra* notes 424-426 and accompanying text, one reviewer noted that "there has been no really comprehensive assault on the field [of federal courts] since the work of the Frankfurter teams." Warner W. Gardner, Book Review, 54 COLUM. L. REV. 653, 653 (1954) (citing Frankfurter's casebooks).

an important part of the historical clash between Nation and States.⁴²²

Of course, Frankfurter could no longer participate in the debate; by now he was on the bench.⁴²³ The debate was to all intents and purposes ended in 1953, however, when Frankfurter's former student and collaborator, Henry M. Hart, Jr.,⁴²⁴ and friend, Herbert Wechsler,⁴²⁵ published the "definitive" casebook on the federal court system.⁴²⁶ The book, and therefore any course taught from the book,⁴²⁷ made no attempt to teach the student the rules of practice in the federal courts.⁴²⁸ One commentator stated, "More accurately, [any course taught from this book] should be referred to as an advanced course in the conflicts between the state and federal governments as indicated by the problems of the judicial system."⁴²⁹

⁴²² As to the Dobie book, see E. Spencer Walton, 11 NOTRE DAME LAW. 447, 447 (1936) ("The interrelation of state and federal courts . . . is emphasized and treated throughout the entire book."); Waterman, *supra* note 246, at 129 (noting that book "includes text material on the frictional points of conflict between state and federal courts"). As to the McCormick and Chadbourn book, see Clark, *supra* note 419, at 854 (noting that editors suggest that to rationalize federal practice "a beginning is made by the teacher who leads his class to consider the jurisdictional barriers and obstacles resulting from the constitutional division of powers between state and nation"); Dow, *supra* note 419, at 136 (noting that book contains "excellent chapter on the relationships between state and federal judicial systems"); Freund, *supra* note 421, at 496 ("Particularly welcome in the present casebook is a long chapter focusing on the processes of federalism in the judicial sphere.").

⁴²³ See *infra* note 459 and accompanying text.

⁴²⁴ See *supra* note 267 (noting relationship between Frankfurter and Hart).

⁴²⁵ Professor of Law, Columbia University School of Law. A.B., 1928, C.C.N.Y.; LL.B., 1931, Columbia. 1991-92 AALS DIRECTORY OF LAW TEACHERS 906.

⁴²⁶ HART & WECHSLER (1st ed.), *supra* note 360. A second edition of this book appeared in 1973, HART & WECHSLER (2d ed.), *supra* note 360, and a third edition in 1988, HART & WECHSLER (3d ed.), *supra* note 81. Upon its initial appearance, one reviewer declared, "It may well be said that as of this time this book is the definitive text on the subject of federal jurisdiction . . ." Philip B. Kurland, Book Review, 67 HARV. L. REV. 906, 907 (1954); see also *Teaching Law a Century Ago*, 4 CONST. COMMENT. 7, 8 (1987) (describing Hart and Wechsler book as "intellectual monument[]").

⁴²⁷ See *supra* note 377 and accompanying text.

⁴²⁸ See, e.g., Edward L. Barrett, Jr., Book Review, 42 CAL. L. REV. 202, 202 (1954) ("[T]he problems of jurisdiction, venue and process are, if anything, given too summary a treatment. Federal procedure as such is omitted entirely."); Charles W. Joiner, Book Review, 14 LA. L. REV. 722, 722 (1954) ("[T]he authors are not attempting to provide materials for a procedure course."); Mishkin, *supra* note 246, at 776 ("[F]ederal procedure is turned back to the procedure courses.").

⁴²⁹ Joiner, *supra* note 428, at 722.

The Hart and Wechsler book was clearly a descendant of Frankfurter's casebook.⁴³⁰ Not only did it eschew the practical, but in the opening lines of the book, the authors proclaimed:

One of the consequences of our federalism is a legal system that derives from both the Nation and the States as separate sources of authority and is administered by state and federal judiciaries, functioning in far more subtle combination than is readily perceived. The resulting legal problems are the subject of this book.⁴³¹

If there were any doubts about Frankfurter's influence, the dedication makes it clear: "To Felix Frankfurter who first opened our minds to these problems."⁴³² Moreover, Frankfurter had a greater influence on this book than merely as teacher or mentor. Henry Hart sent him the manuscript for comments. Frankfurter obliged. For example, Frankfurter suggested that the state taxpayer cases, such as *Frothingham v. Mellon*,⁴³³ should be placed in the chapter on "case or controversy" rather than in the chapter on review of state court decisions.⁴³⁴

Most of the modern casebooks on federal courts follow the Frankfurter-Hart and Wechsler model; they present the course as

⁴³⁰ One reviewer noted that the Hart and Wechsler materials "remind one of the course given in one of the leading law schools which students used to refer to as the 'Case-A-Month Club.'" W. Lewis Roberts, Book Review, 42 KY. L.J. 514, 515 (1954). Frankfurter's course at Harvard was referred to as the Case of the Month Club. Brown, *supra* note 334, at 1523; 1941 BIOGRAPHY, *supra* note 220, at 306.

This kinship between Frankfurter's book and the Hart and Wechsler tome is fitting. Frankfurter's original co-author, Wilber Katz, suggested that the revised edition of their book should be "Frankfurter and Hart." See *supra* note 392.

⁴³¹ HART & WECHSLER (1st ed.), *supra* note 360, at xi, reprinted in HART & WECHSLER (2d ed.), *supra* note 360, at xix, and in HART & WECHSLER (3d ed.), *supra* note 81, at xxvii.

⁴³² *Id.* at ix, reprinted in HART & WECHSLER (2d ed.), *supra* note 360, at xv, and in HART & WECHSLER (3d ed.), *supra* note 81, at xix.

⁴³³ 262 U.S. 447 (1923).

⁴³⁴ See Letter from Henry Hart to Felix Frankfurter (Feb. 20, 1952) (Frankfurter Papers, Library of Congress); cf. HART & WECHSLER (1st ed.), *supra* note 360, at 158 (placing *Frothingham* in standing section of book). Modern casebooks on the federal courts continue to follow this categorization. See CURRIE, *supra* note 81, at 52-56; FINK & TUSHNET, *supra* note 81, at 295-98; LOW & JEFFRIES, *supra* note 81, at 39-48; REDISH, *supra* note 81, at 16-18.

one about the intellectual issues presented by the federal court system, rather than simply the procedure of that system. Moreover, a central theme in these casebooks is "our federalism."⁴³⁵ In the last decade, there has been only one exception: the casebook by Wayne McCormack of the University of Utah⁴³⁶ begins with an exploration of "the means of getting through the courthouse door."⁴³⁷ This book is the exception that proves the rule, however. Today's course on federal courts is the one Frankfurter designed. All over the country, law students are being trained to look at the federal courts through the lens of "our federalism." Thus has the modern sensitivity to the impact of federal jurisdiction on the balance of power between nation and states become our transcendental reality.

2. *The Political Mentor.* In 1925, Justice Brandeis enlisted Professor Frankfurter as part of a "group of men willing to be the politico-economic thinkers, who would, in privacy, think out what it is wise to do, why & how."⁴³⁸ His thoughts would then be communicated to those in a position to act on his ideas. He probably did not need to be tapped for this job by the Justice. Frankfurter had been respected for many years by important members of the government, who sought, or at least accepted, his

⁴³⁵ Another important theme in today's casebooks is separation of powers. See, e.g., CURRIE, *supra* note 81, at xxi; FINK & TUSHNET, *supra* note 81, at vii; HART & WECHSLER (3d ed.), *supra* note 81, at xxi; LOW & JEFFRIES, *supra* note 81, at xix.

⁴³⁶ Professor of Law, University of Utah College of Law. B.A., 1966, Stanford; J.D., 1969, Texas. 1991-92 AALS DIRECTORY OF LAW TEACHERS 613.

⁴³⁷ WAYNE MCCORMACK, *FEDERAL COURTS* at v (1984). Professor McCormack explained: Traditional federal courts courses, and the books prepared for them, have leapt joyously, but with little introduction, into the fascinating and arcane problems of federalism in the judicial system. This book moves gradually into those issues by using remedies problems as an integrating framework for analysis after exploring the means of getting through the courthouse door.

Id. It is but another example of how Frankfurter "has helped to make the times," see *supra* text accompanying note 25, that the revolutionary course he designed should now be called "traditional."

⁴³⁸ Levy & Murphy, *supra* note 225, at 1273 (quoting Letter from Louis D. Brandeis to Felix Frankfurter (Jan. 1, 1925), reprinted in 5 *BRANDEIS LETTERS*, *supra* note 391, at 155-56).

advice.⁴³⁹ Indeed, "it was probably true that no Court or Cabinet member could have wielded his influence. 'A letter from this professor in the Harvard Law School carried as much weight in its own way as a letter from the Morgan office at 23 Wall Street.'"⁴⁴⁰ This influence was felt in all branches of the federal government, at all levels.

Frankfurter frequently corresponded with many federal judges, including Supreme Court Justices. He was not shy about giving advice or chiding the judges about their opinions. For example, when Justice Stone complained to Frankfurter about Justice Black's "lack of good technique,"⁴⁴¹ the professor wrote the new Justice explaining how to write opinions.⁴⁴² Frankfurter also maintained contacts with his former students who had become law clerks to federal judges.⁴⁴³

Felix Frankfurter, additionally, had a great deal of influence with the executive branch. He was an official or unofficial advisor to

⁴³⁹ Frankfurter began to form his ties with all the important people in Washington shortly after he graduated from the Harvard Law School. He left his job at a Wall Street firm after only a few months there and joined the U.S. Attorney's office in New York under Henry Stimson. In 1911, Frankfurter followed Stimson to Washington to join the War Department. There, Frankfurter lived in the famous "House of Truth," where he met everybody who was anybody. For more information on the early years of Frankfurter's career, see PARRISH, *supra* note 194; THOMAS, *supra* note 244, at 7-26; White, *supra* note 339, at 634-52.

⁴⁴⁰ 1941 BIOGRAPHY, *supra* note 220, at 306 (quoting unnamed source).

⁴⁴¹ LASH, *supra* note 239, at 67 (quoting Letter from Harlan Fiske Stone to Felix Frankfurter (1938), reprinted in ALPHEUS T. MASON, HARLAN FISKE STONE 469-70 (1956)).

⁴⁴² Frankfurter actually lectured a sitting Justice as if he were no more than a first-year law student. Frankfurter's letter was as follows:

Judges . . . cannot escape the responsibility of filling in gaps which the finitude of even the most imaginative legislation renders inevitable. . . . So the problem is not whether the judges make the law, but when and how much, Holmes put it in his highbrow way, that "they can do so only interstitially: they are confined from molar to molecular motions." I used to say to my students that legislatures make law wholesale, judges retail. In other words they cannot decide things by invoking a new major premise out of whole cloth; they must make the law that they do make out of the existing materials with due deference to the presuppositions of the legal system of which they have been made a part. Of course I know that these are not mechanical devices, and therefore not susceptible of producing automatic results. But they sufficiently indicate the limits within which judges move.

Id. at 67-68 (quoting unidentified letter from Felix Frankfurter to Hugo Black).

⁴⁴³ See PARRISH, *supra* note 194, at 161.

several administrations⁴⁴⁴ and was particularly close to Franklin Delano Roosevelt.⁴⁴⁵ "[I]n the period of 1933 and 1939, Frankfurter, as one of President Roosevelt's advisers, probably had between a third and a fourth of the Presidential ear."⁴⁴⁶ In fact, "[i]n the summer of 1935 [Frankfurter] was for several weeks a resident guest at the White House."⁴⁴⁷ His relationship with the President enabled him to place his students in key government positions.⁴⁴⁸ Moreover, he maintained his contacts with former students who staffed the New Deal; "each week the professor fired off dozens of notes and phone calls instructing, urging, encouraging, making his own suggestions and requests."⁴⁴⁹

Professor Frankfurter also had the ear of many congressmen. He actually drafted several pieces of federal legislation.⁴⁵⁰ For example, he drafted, alone or with colleagues, several bills to limit diversity jurisdiction,⁴⁵¹ the Securities Act of 1933,⁴⁵² the Securities Exchange Act of 1934,⁴⁵³ the Public Utility Holding Company Act of 1935,⁴⁵⁴ and the Norris-LaGuardia Act.⁴⁵⁵ His behind-

⁴⁴⁴ See sources cited *supra* note 439.

⁴⁴⁵ "Even the most casual observer of American politics knew that Frankfurter enjoyed a close personal relationship with the new president . . ." Levy & Murphy, *supra* note 225, at 1301.

⁴⁴⁶ 1941 BIOGRAPHY, *supra* note 220, at 306 (quoting unnamed source).

⁴⁴⁷ Freund, *supra* note 219, at 263.

⁴⁴⁸ See *supra* notes 346-348 and accompanying text.

⁴⁴⁹ Levy & Murphy, *supra* note 225, at 1301; see also 1941 BIOGRAPHY, *supra* note 220, at 306.

⁴⁵⁰ His connection with Justice Brandeis, chronicled fully elsewhere, see, e.g., MURPHY, *supra* note 23, helped in this regard. The two would discuss ideas for legislation; Frankfurter would draft it, often with suggestions from Brandeis, and then submit it to various congressmen recommended by the Justice. See Levy & Murphy, *supra* note 225, at 1271-78.

⁴⁵¹ For example, Frankfurter sent various members of Congress proposed bills that would raise the jurisdictional amount in diversity suits, eliminate the power to remove a separate controversy, and restrict diversity status for a foreign corporation with a usual place of business within the forum state. Congress never passed them, however. Levy & Murphy, *supra* note 225, at 1275-77; cf. *supra* note 274 and accompanying text (discussing Frankfurter's use of his book on Supreme Court to convince members of Congress to support his proposed legislation).

⁴⁵² 15 U.S.C. §§ 77a-77aa (1988); see 1957 BIOGRAPHY, *supra* note 344, at 195; 1941 BIOGRAPHY, *supra* note 220, at 306; see also Freund, *supra* note 219, at 263.

⁴⁵³ 15 U.S.C. §§ 78a-78ll (1988); see 1957 BIOGRAPHY, *supra* note 344, at 195; see also Freund, *supra* note 219, at 263.

⁴⁵⁴ 15 U.S.C. §§ 79 to 79z-6 (1988); see 1957 BIOGRAPHY, *supra* note 344, at 195; 1941 BIOGRAPHY, *supra* note 220, at 306; see also Freund, *supra* note 219, at 263.

the-scenes influence was recognized by contemporaries. As one judge noted:

There is more in the background [of the Norris-LaGuardia Act] than the reports of committees submitting the measure to the two houses. In that background also is the figure, sinister or saintly (the reader may take his choice), the figure of Professor Frankfurter of the Harvard Law School. From High Olympus, more than once, [this Jupiter] has moved the pawns upon the nation's chess board and, it is whispered, on occasion has even sought to check the King. In part it was he who wrote the law.⁴⁵⁶

Thus, as Frankfurter ascended the bench, it could be said, "Directly, or through the generations of his students . . . Professor Frankfurter helped to bring into being many of the laws which Mr. Justice Frankfurter will interpret."⁴⁵⁷

3. *The Supreme Court Justice.* Before President Roosevelt named Felix Frankfurter to the Supreme Court, "[w]hen asked by George Gallup to indicate their preference for a successor to Justice Cardozo, the lawyers of the country voted for Frankfurter, in the ratio of five to one."⁴⁵⁸ The President nominated Frankfurter for the Court on January 5, 1939; he sailed through the Senate hearings and was unanimously confirmed on January 17; and he

⁴⁵⁵ 29 U.S.C. §§ 101-115 (1988); see Levy & Murphy, *supra* note 225, at 1274; 1957 BIOGRAPHY, *supra* note 344, at 195; cf. *supra* note 274 (discussing Frankfurter's use of his book on labor injunction to convince members of Congress to support his proposed legislation).

⁴⁵⁶ *Donnelly Garment Co. v. International Ladies' Garment Workers' Union*, 21 F. Supp. 807, 821 (W.D. Mo. 1937) (Otis, J., dissenting), *vacated*, 304 U.S. 243 (1938); see also Levy & Murphy, *supra* note 225, at 1274 (noting that "Frankfurter was called to Washington . . . to help in the redrafting" of the Norris-LaGuardia Act); cf. 1941 BIOGRAPHY, *supra* note 220, at 306 ("In anti-New Deal circles, of course, rumors of Frankfurter's 'sinister' influence were current.").

⁴⁵⁷ Cohen, *supra* note 25, at 145.

⁴⁵⁸ Samuel J. Konefsky, *Justice Frankfurter and the Conscience of a Constitutional Judge*, 31 BROOK. L. REV. 213, 214 (1965); accord, Freund, *supra* note 219, at 263. "When Justice Cardozo died in 1938, there was widespread belief that, as he had been the rightful inheritor of the place left by Holmes, his rightful successor would be Frankfurter." *Id.*

took his seat on the High Court on January 30.⁴⁵⁹ One biographer noted that "[w]ith Frankfurter's knowledge of the Court and the Constitution, his strong analytic powers, his energy and political savvy, he was expected, and he expected himself, to dominate the 'Roosevelt Court.'"⁴⁶⁰

It did not take long for Frankfurter's influence on the Court to be felt: "According to the *United States News*, in the session ending in June 1941 he established himself as the Supreme Court's most dominant member."⁴⁶¹ In particular, he was considered an expert on the role of federal courts and "[h]is colleagues usually deferred to him on that subject."⁴⁶² Not surprisingly, he used this opportunity to codify his vision of the federal courts. Not only did he devise numerous doctrines to limit the jurisdiction of the federal courts, discussed in the next section, but he continued to teach twentieth-century lawyers that they should look at questions of federal jurisdiction as questions of power between Nation and States. In his very first opinion for the Supreme Court, he examined the jurisdictional provision at issue through his own lens and proclaimed: "That provision is an historical mechanism . . . for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts having potential jurisdiction over the same subject-matter."⁴⁶³ This case marked the first time the word "federalism" had been used in a Supreme Court opinion,⁴⁶⁴ but Frankfurter invoked the concept

⁴⁵⁹ Freund, *supra* note 219, at 263; 1957 BIOGRAPHY, *supra* note 344, at 195; 1941 BIOGRAPHY, *supra* note 220, at 307.

⁴⁶⁰ LASH, *supra* note 239, at 67.

⁴⁶¹ 1941 BIOGRAPHY, *supra* note 220, at 307. In 1941, Frankfurter invented abstention in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941); he reinterpreted the Anti-Injunction Act in *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941); and his dissent in *Sibbach v. Wilson & Co.*, 312 U.S. 1, 16-19 (1941) (Frankfurter, J., dissenting), joined by three other Justices, presaged his 1945 opinion in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

⁴⁶² King, *supra* note 344, at 1145. "[T]here is ample evidence that Justice Frankfurter was a power in the Court's conferences." *Id.* But see Urofsky, *supra* note 23.

⁴⁶³ *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 378 (1939). As a preliminary issue, the Court addressed the question whether the Anti-Injunction Act barred jurisdiction in the district court. The Court held that it did not. For more on Frankfurter's interpretation of the Anti-Injunction Act, see *infra* notes 525-537 and accompanying text.

⁴⁶⁴ Search of LEXIS, Genfed library, US file (June 6, 1991); WL, SCT-old database (June 6, 1991).

over and over⁴⁶⁵ in his twenty-three years on the bench⁴⁶⁶ so that it eventually became commonplace.⁴⁶⁷ By 1971, employing the concept of federalism to evaluate a federal court's jurisdiction had become so thoroughly accepted that Justice Hugo Black, Frankfurter's nemesis on the Court,⁴⁶⁸ would do just that, asserting that the practice dated back to the beginning of our Republic.⁴⁶⁹

One final note: as one former law clerk observed, Frankfurter's work with his clerks presented "an opportunity to continue, in microcosm, the teaching career he had abandoned for Roosevelt's appointment to the Court."⁴⁷⁰ That clerk found in Frankfurter "a mentor, whose beliefs and intensity of engagement with life would irrevocably fortify and shape my own beliefs and values."⁴⁷¹ Others agreed.⁴⁷² As with Frankfurter's students at Harvard, his clerks went on to become influential men: "[O]ver half of those who have assisted him at the Court [went on to pursue] the public

⁴⁶⁵ See, e.g., *Kesler v. Department of Pub. Safety*, 369 U.S. 153, 172 (1962), *overruled by* *Perez v. Campbell*, 402 U.S. 637 (1971); *Rogers v. Richmond*, 365 U.S. 534, 546 (1961); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959); *Staub v. City of Baxley*, 355 U.S. 313, 325-26 (1958) (Frankfurter, J., dissenting); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 555 (1950) (Frankfurter, J., dissenting); *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 660 (1948); *Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945); *Williams v. North Carolina*, 325 U.S. 226, 233 (1945); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 141 (1941); *Texas v. Florida*, 306 U.S. 398, 428 (1939) (Frankfurter, J., in a separate opinion).

⁴⁶⁶ Justice Frankfurter retired on August 28, 1962. Freund, *supra* note 219, at 264.

⁴⁶⁷ The term "federalism" has been used in approximately 4500 federal opinions since Justice Frankfurter first used it in 1939. Search of LEXIS, Genfed library, Courts file (Apr. 13, 1991); cf. *supra* note 38 (noting frequency of term since 1971). This coining of a phrase is but another example of how Frankfurter has "helped to make the times." See *supra* text accompanying note 25.

⁴⁶⁸ For an in-depth analysis of their relationship on the Court, see WALLACE MENDELSON, *JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT* (2d ed. 1966); JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* (1989).

⁴⁶⁹ See *supra* note 16 and accompanying text (quoting Justice Black).

⁴⁷⁰ GOODWIN, *supra* note 233, at 32.

⁴⁷¹ *Id.* at 25.

⁴⁷² See King, *supra* note 344, at 1145 (noting that Frankfurter's clerks "will ever revere his name"). For example, Professor Alexander M. Bickel revealed: "Friendship with Felix Frankfurter was a romance. It made everything worthier and handsomer, including the friend." Alexander M. Bickel, *Felix Frankfurter*, 78 HARV. L. REV. 1527, 1528 (1965). John H. Mansfield referred to "the golden circle of [Frankfurter's] acquaintance." Mansfield, *supra* note 225, at 1530.

profession of the law in teaching and government."⁴⁷³ Included in this group are Professors Alexander M. Bickel of Yale, David P. Currie of the University of Chicago, Louis Henkin of Columbia, and Philip B. Kurland of the University of Chicago and Dean Albert M. Sacks of Harvard.⁴⁷⁴

IV. JUSTINIAN'S CODE, OR FRANKFURTER'S FEDERALISM

Professor and Justice Frankfurter taught a nation of jurists that "problems affecting the jurisdiction of the federal courts are . . . one aspect of the great, persisting problem of harmonizing the forces of state and national life" and that such jurisdiction should be seen "in the perspective of the dynamic struggle between the national government and the states."⁴⁷⁵ That lesson we learned well. Today, the concept of federalism is invoked to define federal court power in virtually every area in which federal and state court powers intersect.⁴⁷⁶ He also taught us that the struggle should be resolved in favor of the States and against federal jurisdiction. That lesson was accepted by many, but those who believe that the federal courts serve to vindicate national policy are less sure of that message.⁴⁷⁷ To ensure that the struggle would be resolved in favor of the States, Frankfurter created several doctrines that require the federal courts to defer to the states. These doctrines have evolved since Frankfurter shaped them, sometimes in ways that he did not or probably would not approve of, but it was he who gave them life. This Article will note three of them,⁴⁷⁸ revealing

⁴⁷³ Cohen, *supra* note 243, at 594; *see also* GOODWIN, *supra* note 233, at 33 (noting Frankfurter's clerks included "men who then or later would advise the White House, serve in presidential cabinets, lawyers of national reputation, judges, and the merely successful").

⁴⁷⁴ List of Law Clerks for Mr. Justice Frankfurter (Frankfurter Papers, Library of Congress).

⁴⁷⁵ FRANKFURTER & KATZ, *supra* note 87, at vii, reprinted in FRANKFURTER & SHULMAN, *supra* note 87, at ix.

⁴⁷⁶ *See supra* note 27 and accompanying text.

⁴⁷⁷ It is at this point that the so-called "federalists" and "nationalists" diverge. *See supra* notes 43-52 and accompanying text.

⁴⁷⁸ Frankfurter's influence on the shape of federal courts jurisprudence radiates beyond these three examples. *See, for example*, Frankfurter's influence on the doctrine of supplemental jurisdiction, *supra* notes 288-306 and accompanying text. For another example, a doctrine not discussed in the text is that created by Justice Frankfurter in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). The holding of that case emasculated

Frankfurter's handiwork to the reader.⁴⁷⁹

A. THE *ERIE* DOCTRINE⁴⁸⁰

As noted above, Professor Frankfurter played an important part in bringing the *Erie* doctrine to life.⁴⁸¹ As Justice Frankfurter, he assumed the task of keeping it healthy. He did his job well, ensuring that the doctrine would live to a ripe old age. The *Erie* doctrine controls when federal judges sitting in diversity can make law, by declaring common law or even, in its broadest sense, when drafting procedural rules.⁴⁸² A simplistic formulation of the rule is that the federal courts may declare procedural law, but must defer to the States on matters of substantive law. The question arises, however, as to just what is "substantive" and what is "procedural" for the purposes of this analysis. Justice Frankfurter announced his answer to that question in his dissent in *Sibbach v. Wilson & Co.*⁴⁸³ and his opinion for the Court in *Guaranty Trust*

the federal Declaratory Judgment Act, 28 U.S.C. § 2201 (1988), because Frankfurter feared the new statute would "swell the volume of litigation in the District Courts." 339 U.S. at 673. Not only is that holding still with us, but it was recently expanded by Frankfurter's former student, Justice Brennan, *see supra* note 351, in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

⁴⁷⁹ Of course, other Justices had to concur in Frankfurter's opinions for the Court, and, in that sense, these doctrines are not his own the way his work as Professor Frankfurter was. The seeds of these doctrines, however, were planted in Professor Frankfurter's scholarship. Thus, when his scholarly work is read together with the opinions he penned, his sway over the shape of the doctrine is apparent.

⁴⁸⁰ A detailed discussion of the *Erie* doctrine is beyond the scope of this Article. For a closer look at *Erie* and its progeny, *see Ely, supra* note 35, and also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

⁴⁸¹ *See supra* notes 307-327, 340-343 and accompanying text (discussing Frankfurter's part in bringing *Erie* doctrine to life). Moreover, Frankfurter had made several attempts, albeit unsuccessfully, to have Congress restrict diversity jurisdiction and thus reduce legislatively the scope of the *Swift* doctrine. *See supra* note 451 and accompanying text.

⁴⁸² Two different statutes control the power of federal judges to declare common law and to draft rules. Compare Rules of Decision Act, 28 U.S.C. § 1652 (1988) with Rules Enabling Act, *id.* § 2072. Technically speaking, the *Erie* doctrine only applies to cases covered by the Rules of Decision Act. The differences between the two situations have often been blurred or even ignored, however, causing much confusion. A discussion of this very complicated line of cases is beyond the scope of this Article. For an excellent discussion of the distinctions under the two acts, *see Burbank, supra* note 480, and *Ely, supra* note 35, at 707-38. For the text of the Rules of Decision Act, *see supra* note 94; for the text of the Rules Enabling Act, *see infra* note 487.

⁴⁸³ 312 U.S. 1, 16-19 (1941) (Frankfurter, J., dissenting).

Co. v. York.⁴⁸⁴ Through those opinions, he assured that federal judges would be suitably deferential to state law.

In *Sibbach*, the Court was faced with the question whether Rule 35 of the Federal Rules of Civil Procedure, authorizing a district judge to order a medical examination in civil suits,⁴⁸⁵ was valid.⁴⁸⁶ The argument against the rule was that it violated the Rules Enabling Act⁴⁸⁷ by modifying the substantive rights of the parties.⁴⁸⁸ The majority of five Justices believed that the rule "really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly

⁴⁸⁴ 326 U.S. 99, 108-10 (1945) (Frankfurter, J., dissenting).

⁴⁸⁵ The version of the rule then in force was as follows:

(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

FED. R. CIV. P. 35, quoted in *Sibbach*, 312 U.S. at 8.

⁴⁸⁶ 312 U.S. at 6. Of course, *Sibbach* is a Rules Enabling Act case and not a Rules of Decision Act case. Frankfurter, however, used analysis identical to *Sibbach* in the next major Rules of Decision Act case, *York*. See *infra* notes 491-494 and accompanying text. It is probably not unfair, therefore, to lay much of the blame at his doorstep for the confusion as to the difference between the two acts. See *supra* note 482. One should not be too surprised at his attempt to limit federal judicial rulemaking power. Interestingly, just as Professor Frankfurter had despised the *Swift* interpretation of the Rules of Decision Act, he had staunchly opposed the Rules Enabling Act. He believed that it would increase the workload of the Supreme Court. He opined: "[I]n [passing the Rules Enabling Act] Congress has imposed upon the Court not only the onerous responsibility of formulating such rules; it has started the extended unfolding by judicial construction of a new code of adjective law." Frankfurter & Hart, 1933 Term, *supra* note 226, at 280.

⁴⁸⁷ The Rules Enabling Act initially provided in pertinent part as follows:

Be it enacted . . ., That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064. The second section of the original act provided for the merger of law and equity. *Id.* Today, the act is codified—with amendments not relevant here—at 28 U.S.C. § 2072 (1988).

⁴⁸⁸ 312 U.S. at 9-11.

administering remedy and redress for disregard or infraction of them.”⁴⁸⁹ The rule was therefore deemed a valid exercise of the Court’s rulemaking power. Frankfurter contended that the answer to the question was not “to be found by an analytic determination whether the power of examination here claimed is a matter of procedure or a matter of substance, even assuming that the two are mutually exclusive categories with easily ascertainable contents.”⁴⁹⁰ Thus, declaring a rule to be “procedural” did not end the matter; for a valid exercise of judicial lawmaking, one had to look further. Although Frankfurter did not describe what would be the proper test in *Sibbach*, his idea was clearly to expand the scope of matters deemed beyond the competence of a federal court to declare.

Just four years later, Frankfurter revealed his analysis. In *Guaranty Trust Co. v. York*, this time writing for the majority, he again declared that the Court must “put[] to one side abstractions regarding ‘substance’ and ‘procedure.’”⁴⁹¹ He explained that the legacy of *Erie* was to avoid disrespect for state law. Thus, he concluded, “[a] policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties.”⁴⁹² Instead, Frankfurter pronounced the rule as to the scope of federal judicial power to make law as follows: “[a federal court] cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.”⁴⁹³ In sum, a federal court sitting in diversity is “in effect, only another court of the State.”⁴⁹⁴

The first part of Frankfurter’s test was necessary for the decision in *York*. A state statute of limitations barred recovery in the state court. The Supreme Court held, therefore, that the federal court could not open its doors to the plaintiff.⁴⁹⁵ The second part of his test was pure dicta. Unfortunately, it has mired the federal courts

⁴⁸⁹ *Id.* at 14.

⁴⁹⁰ *Id.* at 17 (Frankfurter, J., dissenting).

⁴⁹¹ 326 U.S. at 109.

⁴⁹² *Id.* at 110.

⁴⁹³ *Id.* at 108-09.

⁴⁹⁴ *Id.* at 108.

⁴⁹⁵ See *id.* at 107-08, 110 (explaining that federal courts must follow state statutes that would completely bar recovery).

down by requiring them to ask whether each challenged federal rule "substantially affects" the enforcement of a state right.

Today, Frankfurter's *Erie* analysis is very much with us. While his analysis has been rejected with regard to the Supreme Court's rulemaking power,⁴⁹⁶ his test as applied to other federal judicial declarations of law in diversity cases is reflected in the most recent Supreme Court opinion on the question. In *Hanna v. Plumer*, the Court rejected the use of *York*'s "outcome determination" analysis as a "talisman."⁴⁹⁷ Instead, the Court divined the true "message of *York*":⁴⁹⁸ "the *York* test was an attempt to effectuate . . . the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."⁴⁹⁹ Reading *York* against that background, the *Hanna* Court stated, albeit in dicta, that a federal court cannot afford a remedy "where application of the state rule would wholly bar recovery Moreover, [a federal court cannot] alter[] the mode of enforcement of state-created rights in a fashion sufficiently 'substantial' to raise the sort of equal protection problems to which the *Erie* opinion alluded."⁵⁰⁰

B. THE INJUNCTION CASES

1. *Pullman Abstention*. Professor Frankfurter, as discussed above, did not believe that the federal courts should exercise "pendent" jurisdiction. He deemed "undesirable" its exercise even in constitutional cases, but accepted it if it meant that the federal court could avoid deciding a federal constitutional claim by deciding

⁴⁹⁶ *Hanna v. Plumer*, 380 U.S. 460, 469-74 (1965).

⁴⁹⁷ *Id.* at 466-67.

⁴⁹⁸ *Id.* at 467.

⁴⁹⁹ *Id.* at 467-68.

⁵⁰⁰ *Id.* at 469. This explanation of what Frankfurter *really* meant in *York* has been dubbed the "modified outcome determination" test. *E.g.*, Redish & Phillips, *supra* note 92, at 360. The *Hanna* Court, however, did not overrule any cases decided between *York* and *Hanna*. Compare *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), with *Ragan v. Merchants' Transfer & Warehouse Co.*, 337 U.S. 530 (1949).

Interestingly, the *Hanna* Court resurrected Frankfurter's *York* analysis some years after his former student, Justice Brennan, *see supra* note 351, had expressed a very different *Erie* analysis for the Court in *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958). Frankfurter dissented in *Byrd*. *Id.* at 551-59 (Frankfurter, J., dissenting).

the related state claim.⁵⁰¹ However, since these suits usually sought injunction against the enforcement of allegedly unconstitutional state laws—frequently granted by the *Lochner*-era federal courts—he believed that they should not be in the federal courts at all.⁵⁰² In particular, Frankfurter was concerned that the federal courts were ill-equipped to interpret complex state statutory schemes⁵⁰³ and that these cases typically caused friction between nation and states. Therefore, he urged that in such cases the “appropriate accommodation between state and federal courts in the vindication of constitutional claims”⁵⁰⁴ was abstention. Since these were suits in equity, the federal courts, he believed, should use the chancellor’s traditional discretion not to entertain the case. He rationalized that “[i]n the wise guidance of federal equity litigation the Supreme Court is not dependent on directive legislation by Congress.”⁵⁰⁵

Professor Frankfurter praised the Supreme Court for deferring to the state court on such a matter in the 1929 case, *Gilchrist v. Interborough Rapid Transit Co.*⁵⁰⁶ There, both federal and state court suits on the matter were pending. The Supreme Court ordered the lower federal court to postpone decision until the state court had had a chance to interpret the “maze of specialized [state] law”⁵⁰⁷ in question. The *Gilchrist* case, however, “had a rapid transit through the judicial mind”;⁵⁰⁸ it was never followed by the lower federal courts.⁵⁰⁹ Moreover, just a few months after *Gilchrist*, the Supreme Court refused to abstain in a similar case.⁵¹⁰ The key difference, however, was that there was no pending state litigation in the later case and thus no alternative forum for

⁵⁰¹ See *supra* notes 288-293 and accompanying text (examining Frankfurter’s position on pendent jurisdiction).

⁵⁰² See *supra* notes 237-238 and accompanying text (explaining Frankfurter’s view that federal courts should avoid cases involving state legislation).

⁵⁰³ Thus, the cases Frankfurter was most concerned about were those in which there was no clear, definitive interpretation of the state statutes by the highest court of the State.

⁵⁰⁴ Frankfurter & Landis, 1928 Term, *supra* note 227, at 62.

⁵⁰⁵ *Id.* at 61.

⁵⁰⁶ 279 U.S. 159 (1929). For Frankfurter’s comments on this case, see Frankfurter & Landis, 1928 Term, *supra* note 227, at 61-62.

⁵⁰⁷ Frankfurter & Landis, 1928 Term, *supra* note 227, at 61.

⁵⁰⁸ Note, *supra* note 75, at 1385.

⁵⁰⁹ *Id.*

⁵¹⁰ *Railroad Comm’n v. Los Angeles Ry.*, 280 U.S. 145 (1929).

deciding the state issues.

Not surprisingly, shortly after Frankfurter was named to the High Court, he created a way for federal courts to avoid decision on a complicated state statutory claim pendent to a federal constitutional one and—with luck—avoid decision on the federal claim as well. Justice Frankfurter resurrected *Gilchrist* and extended it in *Railroad Commission v. Pullman Co.*⁵¹¹ In *Pullman*, the federal court was asked to enjoin enforcement of a Texas Railroad Commission order that required the continuous presence of a white employee in every sleeping car operated in the State of Texas.⁵¹² The order was challenged as being outside the scope of the commission's power and as violative of the Federal Constitution.⁵¹³ Frankfurter, writing for the Court, observed that any federal declaration concerning the commission's statutory power was not definitive; the court's "forecast" of Texas law could be contradicted by a Texas decision the very next day.⁵¹⁴ He believed that "[t]he reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court."⁵¹⁵ Therefore, he held that "because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary,"⁵¹⁶ the district court had to stay its hands pending a determination of the state issues by a state tribunal.⁵¹⁷ The catch was that there was no pending state proceeding, so the plaintiff had to initiate such a proceeding for the sole purpose of addressing the state issues. If that determination did not end the matter, plaintiff could then return to federal court for a determination of the federal claim.

From this beginning, the Supreme Court has expanded the notion of abstention to avoid deciding many cases, both legal and equitable, that intersect with state law. Today, we not only have *Pullman* abstention, but there is also abstention to defer to a

⁵¹¹ 312 U.S. 496 (1941).

⁵¹² *Id.* at 497-98.

⁵¹³ *Id.* at 498.

⁵¹⁴ *Id.* at 499-500.

⁵¹⁵ *Id.* at 500.

⁵¹⁶ *Id.* at 501.

⁵¹⁷ *Id.* at 501-02.

complicated state administrative scheme (*Burford*⁵¹⁸ abstention), abstention to avoid duplicative litigation (*Colorado River*⁵¹⁹ abstention), and abstention from interfering with a pending state proceeding (*Younger*⁵²⁰ abstention).⁵²¹

2. *The Anti-Injunction Act.* In *Ex parte Young*,⁵²² the Supreme Court had faced the question whether a federal court, in the course of ruling on an allegedly unconstitutional state statute, could enjoin a state court criminal proceeding brought to enforce that statute. The Court held as follows:

When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court having first obtained jurisdiction over the subject matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed.⁵²³

This ruling, based on numerous authorities, stemmed from the ancient doctrine that a court with jurisdiction over a matter could protect that jurisdiction, by injunction if necessary.⁵²⁴ Those who

⁵¹⁸ This abstention is named after *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Frankfurter dissented vigorously in *Burford*, *id.* at 336-48 (Frankfurter, J., dissenting), but the majority relied heavily on his opinion in *Pullman* to reach the conclusion that abstention was warranted, *see id.* at 331-33.

⁵¹⁹ This abstention is named after *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). This form of abstention was devised by Frankfurter's former student, William Brennan, *see supra* note 351, who was actually an opponent of abstention. *See County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 31-44 (1959) (Brennan, J., dissenting). Although Brennan protested that the course required in *Colorado River* was not "abstention," 424 U.S. at 813-17, his distinction has not been honored.

⁵²⁰ This abstention is named after *Younger v. Harris*, 401 U.S. 37 (1971). Ironically, this case, introduced by Felix Frankfurter's frequent adversary on the Court, Hugo Black, *see supra* note 468 and accompanying text, is today most closely identified with the concept "our federalism." *See supra* note 33.

⁵²¹ For a more detailed discussion of the various abstention doctrines, *see sources cited supra* notes 33, 34.

⁵²² 209 U.S. 123 (1908).

⁵²³ *Id.* at 161-62.

⁵²⁴ *See supra* notes 151-153 and accompanying text.

disliked the *Lochner* Court's policies, however, saw this practice as a particularly effective weapon in the federal court dismantling of Progressive state legislation.

In order to destroy *Ex parte Young*, Frankfurter not only invented *Pullman* abstention, he also breathed new life into the Anti-Injunction Act.⁵²⁵ In *Toucey v. New York Life Insurance Co.*,⁵²⁶ the Court was faced with another exception to the Anti-Injunction Act, the relitigation exception. For years, the federal courts had protected and effectuated their judgments by enjoining relitigation of the claims in state court. In *Toucey*, Frankfurter, writing for the majority, classified this long line of cases as "[l]oose language and a sporadic, ill-considered decision."⁵²⁷ He therefore rejected the relitigation exception.⁵²⁸ More importantly, however, he did so in such sweeping language that he erased almost a century of caselaw.⁵²⁹ He announced that the Anti-Injunction Act was "part of the delicate adjustments required by our federalism"⁵³⁰ and that it must be read very strictly.⁵³¹ He declared that "apart from Congressional authorization, only one 'exception' has been imbedded in [the act] by judicial construction, to wit, the *res* cases."⁵³² In so doing, Frankfurter took away the federal courts' power to protect their jurisdiction except in a very narrow class of cases and set the stage for the complete repudiation of *Ex*

⁵²⁵ 28 U.S.C. § 2283 (1988) (current version); cf. *supra* notes 184, 189 and accompanying text (declaring Anti-Injunction Act dead).

⁵²⁶ 314 U.S. 118 (1941).

⁵²⁷ *Id.* at 139.

⁵²⁸ *Id.* at 140-41.

⁵²⁹ See, e.g., TEX. Recent Case, *supra* note 73, at 624 (asserting that Court "overturn[ed] what was regarded as a settled exception"); TUL. Note, *supra* note 73, at 471 (noting that relitigation exception was "supported by considerable authority, and apparently there [was] no modern authority *contra*"); IOWA Recent Case, *supra* note 73, at 656 ("In view of . . . the considerable authority for the exception in question, the decision in the principal case is somewhat unexpected."); MINN. Recent Case, *supra* note 73, at 560 ("[F]or more than half a century there has been widespread acceptance of the rule supporting the power of federal courts to prevent relitigation."); U. PA. Recent Case, *supra* note 73, at 858 (claiming that Court "overrule[d] what has been considered established law").

⁵³⁰ 314 U.S. at 141.

⁵³¹ *Id.*

⁵³² *Id.* at 139. For a description of the *res* cases, see *supra* notes 148-152 and accompanying text.

parte Young.⁵³³

The commentators were shocked.⁵³⁴ The decision actually spurred Congress to act. In 1948, the act was amended, allowing injunction of state court proceedings both to prevent relitigation and to allow the federal courts to protect their jurisdiction.⁵³⁵ Thus, the amendment was meant to "restore[] the basic law as generally understood and interpreted prior to the *Toucey* decision."⁵³⁶ Justice Frankfurter was still on the Court, however, and he maintained his rigid historical interpretation of the act in the face of clearly stated congressional intent.⁵³⁷

Today, Frankfurter's approach is used by the current Court; the act is very strictly construed.⁵³⁸ Moreover, in 1971, Justice Black relied on Frankfurter's history of the act to expand the ban on federal court interference with state courts in *Younger v. Harris*.⁵³⁹ In so doing, he severely restricted a federal court's ability to use its equitable powers to effectuate national policy.⁵⁴⁰

⁵³³ Of course, *Ex parte Young* was never completely repudiated. See *supra* note 188 (noting modern use of *Ex parte Young* doctrine).

⁵³⁴ See, e.g., authorities cited *supra* note 529. Even those commentators who approved of the result in *Toucey* recognized that it had dramatically changed the law. See J. Honoroff, Recent Decision, 20 CHI.-KENT L. REV. 272, 276 (1942) (stating that it was "obvious that the instant case overrules a doctrine, if not well established, at least recognized by our courts"); Richard E. Macey, Note, 27 CORNELL L.Q. 270, 271 (1942) (stating that "numerical weight of authority was with the dissenting justices").

⁵³⁵ For the text of the act as amended, see *supra* note 37.

⁵³⁶ 28 U.S.C. § 2283 (1988) (Historical and Revision Notes).

⁵³⁷ See, e.g., *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 515-16 (1955) (Frankfurter, J.). But see *Leiter Minerals v. United States*, 352 U.S. 220, 226 (1957) (Frankfurter, J.) (arguing that frustration of superior federal interests could not reasonably be imputed to Congress solely from general language of Anti-Injunction Act).

⁵³⁸ See *supra* note 73. One might point to *Mitchum v. Foster*, 407 U.S. 225 (1972), as a broader reading of the "expressly authorized by Congress" exception to the Anti-Injunction Act. In *Mitchum*, the Court held that a federal court hearing a § 1983 claim could enjoin state proceedings even though Congress did not specifically state in § 1983 that it was an authorized exception to the Anti-Injunction Act. *Mitchum* must be read in conjunction with *Younger*, however, which throws up an additional barrier to such injunctions, even in § 1983 cases. For an insightful discussion of the relationship between *Mitchum* and *Younger*, see CHEMERINSKY, *supra* note 10, at 626-28.

⁵³⁹ 401 U.S. 37, 43 & n.3 (1971).

⁵⁴⁰ There has been much scholarly debate concerning *Younger* abstention. See, e.g., George D. Brown, *When Federalism and Separation of Powers Collide—Rethinking Younger Abstention*, 59 GEO. WASH. L. REV. 114 (1990) (viewing court notions of comity and federalism as frequently flouting will of Congress); Anthony J. Dennis, *The Illegitimate Foundations of the Younger Abstention Doctrine*, 10 U. BRIDGEPORT L. REV. 311, 340 (1990)

V. CONCLUSION

Felix Frankfurter has taught us the lessons of judicial federalism too well. The judicial sensitivity to the balance of power between Nation and States that he preached has been taken to ridiculous extremes. In *Coleman*, the Supreme Court actually declared that this notion of federalism compelled it to give such deference to a not-uniformly-enforced state time limit for the filing of a notice of appeal—which had been missed by a mere three days—that the question of whether a man condemned to die received a fair trial could not even be reached.⁵⁴¹ One is tempted to agree with Mr. Bumble, who concluded, “The law is a ass.”⁵⁴²

In addition to the negative effect that “our federalism” has had

(asserting that “court’s gross misapplication of equitable concepts in *Younger v. Harris* can only serve to muddy the waters of American equity law”); Howard B. Stravitz, *Younger Abstention Reaches a Civil Maturity: Pennzoil Co. v. Texaco, Inc.*, 57 FORDHAM L. REV. 997 (1989) (stressing court caution in applying *Younger* doctrine to civil cases); Georgene M. Vairo, *Making Younger Civil: The Consequences of Federal Court Deference to State Court Proceedings*, 58 FORDHAM L. REV. 173 (1989) (noting expansion of abstention doctrines at expense of vindication of federal rights).

⁵⁴¹ See *supra* notes 8-10 and accompanying text. The author is aware that other political or sociological motivations may have led the Court to conclude that federalism required this result. See Wells, *supra* note 47 (arguing that raw politics underlies federal decisions). She has, however, deliberately refrained from second-guessing the motivation of the present Court. Once the myth of the ancient origin of judicial federalism is debunked, we will have to face the hard questions about when the federal courts should and can act. That analysis will have to include an examination of the underlying motivations for a refusal to use those courts to vindicate national policy.

⁵⁴² CHARLES DICKENS, *OLIVER TWIST* 354 (Oxford U. Press 1966) (1838). This temptation becomes stronger when one compares *Coleman* to *Pioneer Investment Services v. Brunswick Associates*, 113 S. Ct. 1489 (1993). One commentator noted that the juxtaposition of these two cases approaches “black comedy”:

In *Pioneer*, an attorney representing an unsecured creditor of a debtor company filing under Chapter 11, filed a claim almost a month after the date set by the bankruptcy court. Despite the apparent and pressing need for “finality” cited by the debtor and which played such an important role in *Coleman*, the court no longer found this value to be of paramount importance.

Importantly, the attorney’s tardy actions in *Pioneer* were deemed to constitute “excusable” neglect, thus entitling his client to relief. The court rejected, with apparent distaste, the concept of creating a “bright-line rule” or erecting a “rigid barrier” against late filings purely to eliminate “indeterminacy” (i.e., to promote finality).

Daniel Novak, *Liberty, Bankruptcy and Death at the High Court*, NAT’L L. J., Aug. 16, 1993, at 15.

on the enforcement of civil rights in the last two decades, Frankfurter's federalism has prevented any meaningful solution to our current litigation woes.⁵⁴³ Instead, his doctrines are all major stumbling blocks to a national solution of many of today's litigation nightmares.⁵⁴⁴ For example, class action status or even consolidation of like cases is often refused because of federal court inability to fashion a national general common law; the potential applicability of differing state laws defeats the required commonality.⁵⁴⁵ The perceived federal court need for deference to the law of fifty different states to determine the liability of national manufacturers⁵⁴⁶ is costing everyone too much in time, effort, and money. Likewise, effective disposition of cases is often prevented by the rigid interpretation given to the Anti-Injunction Act. The federal courts are prohibited from creatively settling national disputes once and for all because of the notion that they must defer to pending state actions.⁵⁴⁷ Most state judges would probably, quite frankly, be just as happy to have some of these massive cases off their dockets. But federal judges are told they must defer to these overburdened state court systems.

The impasse caused by doctrines conceived by Frankfurter is actually ironic. He believed that "[n]othing but good can come from a [periodic] re-examination of the purposes to be served by the federal courts."⁵⁴⁸ As he pointed out, "[t]hat the wisdom of 1875 is the exact measure of wisdom for today is most unlikely."⁵⁴⁹ Yet

⁵⁴³ The author has already contended that the recent attempts to reform the civil justice system, such as the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, tit. I, §§ 101-106, 104 Stat. 5089, 5089-98, are merely stopgap measures, which will not cure the current "crisis." See Mary Brigid McManamon, *Is the Recent Frenzy of Civil Justice Reform a Cure-all or a Placebo? An Examination of the Plans of Two Pilot Districts*, 11 REV. LITIG. 329, 360-66 (1992).

⁵⁴⁴ For an excellent discussion of many of the problems preventing complex litigation reform posed by "our federalism," see Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169 (1990).

⁵⁴⁵ See, e.g., FED. R. CIV. P. 20(a), 23(a)(2), 42(a).

⁵⁴⁶ See, e.g., *Chance v. E.I. DuPont DeNemours & Co.*, 371 F. Supp. 439, 443-49 (S.D.N.Y. 1974) (outlining complex factors for selecting applicable state law); see also *In re School Asbestos Litigation*, 789 F.2d 996, 1007 (3d Cir. 1986) (noting that lack of state law uniformity created difficulty in federal diversity class action case).

⁵⁴⁷ See, e.g., *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982) (vacating injunction against pending state court actions as part of class certification).

⁵⁴⁸ Frankfurter, *supra* note 185, at 499.

⁵⁴⁹ *Id.* at 503.

because he took to heart his role as Justinian *in petto*, we are stuck with his doctrines. That is, because he implemented his ideas by rewriting history⁵⁵⁰ and ignoring legislative intent,⁵⁵¹ he carved his ideas in stone.⁵⁵² Perhaps it is not too late to uncarve them. Once we see Frankfurter's ideas for what they are—one man's attempt to impose his view of the proper role of the Supreme Court on our jurisprudence—perhaps we can reevaluate their wisdom without the baggage of a belief in their ancient heritage. Additionally, we must understand that those doctrines we choose to keep are for our generation and should not be used to prevent the next from devising creative solutions to its jurisdictional problems. It is most unlikely that the wisdom of today will be the exact measure of wisdom for 2025.

⁵⁵⁰ An example is his treatment of ancillary jurisdiction. See *supra* notes 281-306 and accompanying text.

⁵⁵¹ For example, he rewrote the Anti-Injunction Act in *Toucey*. See *supra* notes 526-534 and accompanying text. Furthermore, despite Congress's attempt to overrule that decision, see *supra* note 73 and *supra* notes 535-536 and accompanying text, he continued to read the act narrowly. See *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511 (1955). He also gave a rather surprising interpretation to the Declaratory Judgment Act. See *supra* note 478.

⁵⁵² Here, too, is irony. Justice Frankfurter is considered a strong advocate of judicial restraint. That is, he contended that judges should defer to the political branches unless it is clear that they have strayed beyond their constitutional power. See *supra* notes 210-212, 223 and accompanying text. Yet he frequently declared new law, such as abstention, disregarding legislative intent, all in the name of "judicial restraint." See Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).