Felix Frankfurter: The Architect of "Our Federalism"

Mary Brigid McManamon

Available at: https://works.bepress.com/mary_brigid_mcmamon/4/
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 Frankfurter

On May 20, 1992, the Commonwealth of Virginia executed Roger Keith Coleman amid a storm of controversy. Not only were there the usual protests against capital punishment, but many also feared an innocent man was being put to death. 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.

* Associate Professor of Law, Widener University School of Law (Delaware Campus); B.A., 1976, Yale; J.D., 1980, Cornell. First, the author wishes to express her gratitude to Margaret V. Sachs for her advice and encouragement throughout the two years of this undertaking. Second, the author wishes to thank Charles Alan Wright, Kevin M. Clermont, Robert Justin Lipkin, Laura Krugman Ray, and Robert L. Hayman, Jr., for their helpful comments on an earlier draft of this Article. Third, the author wishes to acknowledge the superior research assistance of Sandra Franzblau, Andrew Klein, and Lisa Goodman. And last, but certainly not least, the author wishes to thank Widener University law librarians Kimberly Gordon and Enza Klotzbucher whose help made the research for this Article so much easier.


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. He then turned to the federal court system for help, filing a petition for writ of habeas corpus. The district court denied the petition, a ruling which was upheld on appeal. 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. 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." 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. The last federal hurdle to Mr. Coleman's execution was thereby jumped, 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.


9 Id. at 2552.


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. There exists contemporaneously, however, another line of Supreme Court cases that does not defer to the States, but instead restricts their right to regulate. 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. 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”—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

---


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

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.\textsuperscript{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.\textsuperscript{23} In reality, he was much more of a success than we currently realize.\textsuperscript{24} As one contemporary said about Frankfurter's ideas, "he has helped to make the times, thus achieving the ultimate success

\textsuperscript{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., \textit{The Business of the Supreme Court at October Term, 1934}, 49 HARV. L. REV. 68, 107 (1935) [hereinafter Frankfurter & Hart, 1934 Term]; Felix Frankfurter, \textit{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, \textit{Whose Federalism?}, 9 CONST. COMMENT. 75 (1992).


\textsuperscript{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, "\textit{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
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
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." The slogan "our federalism," however, relates only to the latter usage of the term. 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.

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. This notion has spawned myriad federal decisions announcing doctrines, such as the doctrine of equitable abstention formulated in Younger v. Harris, 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.


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, and the Erie doctrine, or interpreting rules, such as the Eleventh Amendment and the Anti-Injunction Act, that


"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.

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.


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.

36 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)).

37 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).

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. While the word "federalism" is supposedly neutral, 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. This increased deference has been dubbed "the new judicial federalism" and has caused lively debate among late-twentieth-century jurists. 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").

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.

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).

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

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.


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. In one camp are those who stress that the States are separate sovereigns whose autonomy must be respected (the "federalists"). 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" or "neo-federalists"). 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. 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." 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 priman-
To support this position, the federalists point to, among other things, the delegation of limited powers to the Federal Government and the Eleventh Amendment. 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." 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."

Several scholars have looked beyond our early struggling days, tracing the "ever-whirling wheels of American federalism" through both centuries of our history. 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 Deal to the Warren Court. Generally, scholars detailing the history of judicial federalism note the early-twentieth-century era of nationalism symbolized by the 1908 case, *Ex parte*...
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. Tompkins61 opinion in 1938, surprising everyone by overturning Swift v. Tyson62 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.
60 See supra notes 33-37 and accompanying text.
61 304 U.S. 64 (1938).
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

The current restrictive interpretation of the Anti-Injunction Act 71 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).


68 337 U.S. 530 (1949).


70 337 U.S. 541 (1949).


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 clearcut 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).
the 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.\textsuperscript{75}

Just two years later, the Court extended abstention in \textit{Burford v. Sun Oil Co.}\textsuperscript{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.\textsuperscript{77} This era, which saw the birth of our judicial federalism, also watched the death of political federalism.\textsuperscript{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

\textsuperscript{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, \textit{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 \textit{Pullman}. The student asserted that in \textit{Pullman}, "the court enunciated a doctrine potentially as significant as the overthrow of \textit{Swift v. Tyson}." \textit{Id.} at 1380.

\textsuperscript{76} 319 U.S. 315 (1943).

\textsuperscript{77} "Since 1937, the Supreme Court has taken a seemingly paradoxical approach to federalism." Chemerinsky, \textit{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." \textit{Id.} at 595; \textit{see supra} notes 12-14 and accompanying text (discussing paradox in Supreme Court decisions regarding deference to States).

\textsuperscript{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. \textit{Cf. supra} note 32 and accompanying text (defining judicial federalism).
the consequent growth of federal administrative agencies.  

How could the same Supreme Court be so deferential to the States in one domain while "running roughshod" over them in another? 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. 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. At the same time, Frankfurter was a prime mover in the growth of federal political power. He was known as an ardent New Dealer 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).


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 Act and the Securities Exchange Act of 1934. It is this one man's dichotomy that has become our own.

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," 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.


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

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).

state law.” At issue in *Swift* was the scope of the Rules of Decision Act, 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.” 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?

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

---

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 . . . .”
98 *Id.* at 14. The question as to consideration was whether “a pre-existing debt constitutes a valuable consideration.” *Id.* at 16.
99 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.
90 *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).
91 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).
92 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." 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."

The *Swift* doctrine was further developed in the 1864 case of *Gelpcke v. City of Dubuque*. 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." When the bona fide purchasers attempted to redeem the coupons on their bonds, however, the city refused to pay. Not surprisingly, the bondholders sued.

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. The court overruled itself, however, in 1860. Even though the bonds had been issued and put on the market before the


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.\textsuperscript{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.\textsuperscript{108} The Court, however, found this case to be "exceptional."\textsuperscript{109} It would be against "the plainest principles of justice,"\textsuperscript{110} the Court declared, to allow a change in judicial decision, especially one so sudden\textsuperscript{111} and contrary to the majority rule,\textsuperscript{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."\textsuperscript{113}

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

2. \textbf{Federal Court Interference With the States}

\textit{a. Suits Against the State.} The history of suits against the States and the Eleventh Amendment has been thoroughly detailed

\textsuperscript{107} Id. at 178.
\textsuperscript{108} Id. at 206.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} The Court noted that it was only required to follow "‘the latest settled adjudications.'" Id. at 205 (quoting \textit{Leffingwell v. Warren}, 67 U.S. (2 Black) 599, 603 (1862) (alteration in original)).
\textsuperscript{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 \textit{Fairman}, supra note 104, at 918-1116; cf. infra notes 134-138 and accompanying text (discussing impact of repudiation movement on Eleventh Amendment jurisprudence).
\textsuperscript{113} 68 U.S. (1 Wall.) at 206-07.
\textsuperscript{114} See, e.g., 1 C.L. Bates, \textit{Federal Procedure at Law} ch. 5 (1908); 3 Roger Foster, \textit{A Treatise on Federal Practice Civil and Criminal} § 477 (6th ed. 1920); John C. Rose, \textit{Jurisdiction and Procedure of the Federal Courts} ch. 18 (2d ed. 1922); id. ch. 19 (3d ed. 1926).
\textsuperscript{115} \textit{Swift} v. \textit{Tyson}, 41 U.S. (16 Pet.) 1, 19 (1842).
\textsuperscript{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.\textsuperscript{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 admiralty\textsuperscript{123} or federal question cases.\textsuperscript{124} For example, in \textit{Cohens v. Virginia},\textsuperscript{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 held\textsuperscript{126} that this action was before it under its federal question power\textsuperscript{127} 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.\textsuperscript{128}

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

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{125} 19 U.S. (6 Wheat.) 264 (1821).

\textsuperscript{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. \textit{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. \textit{See id.} at 380-90, 405-07. For an indication of how contemporaries viewed the Court's holding, see \textit{infra} note 131.

\textsuperscript{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.

\textsuperscript{128} 19 U.S. (6 Wheat.) at 412 (referring to \textit{id.} at 383). The Court also discussed the possibility of suits against a State by one of its own citizens. \textit{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, 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. Over the vociferous protests of the Ohio officials that the Eleventh Amendment barred the suit, the Supreme Court held on appeal that the federal court had jurisdiction over the claim against the

So the law regarding suits against the States stood until the late nineteenth century. 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. Louisiana136 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 Lochner140/Ex parte Young141 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 Pennoyer v. McConnaughy, 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)).
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. 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. 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. 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.

Because jurisdiction in the early American courts also attached through arrest of the defendant or seizure of defendant's property, 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." 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.
its function."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{153}

Moreover, on occasion federal comity gave way in the face of a national policy. For example, in an 1828 case,\textsuperscript{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."\textsuperscript{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."\textsuperscript{156}

\textit{(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.\textsuperscript{157} To remedy

\textsuperscript{150} Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 370 (1873).

\textsuperscript{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, \textit{supra} note 37.

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

\textsuperscript{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); \textit{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).

\textsuperscript{154} The Florenzo, 9 F. Cas. 316 (S.D.N.Y. 1828) (No. 4886).

\textsuperscript{155} \textit{Id.} at 319.

\textsuperscript{156} \textit{Id.} at 320.

\textsuperscript{157} McManamon, \textit{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


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. 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, and the federal courts in general did not allow such double bifurcation.

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,” the federal courts allowed it. For example, if the injunction was

---

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.
sought against the enforcement of a fraudulent state court judgment, the federal courts would issue the injunction. 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. 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."

(iii) The Late Nineteenth Century. In 1793, Congress had passed a statute that has since come to be called the Anti-Injunction Act. The origins of this statute are unclear, and, in any event, it was virtually unused until the last half of the nineteenth century. In 1874, the statute was codified. 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." This codification, however, was not meant to effect any change in the law as it then stood.

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).
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.\textsuperscript{178} Therefore, some federal courts issued injunctions against such state court proceedings. This practice was not uniform, however.\textsuperscript{179} So in 1867, Congress made it official: the federal courts were given explicit permission in bankruptcy suits to enjoin related state court litigation.\textsuperscript{180}

The tension between the enforcement of national policy and comity became overly strained after the passage of the Civil Rights Act in 1871,\textsuperscript{181} the grant of general federal question jurisdiction in 1875,\textsuperscript{182} and the growth of laws regulating commerce.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{185}

\textsuperscript{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.” \textit{Id.} at 342-43.

\textsuperscript{179} See \textit{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.

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

\textsuperscript{181} Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13.

\textsuperscript{182} Act of Mar. 3, 1875, ch. 137, 18 Stat., pt. 3, at 470.

\textsuperscript{183} Mayton, \textit{supra} note 37, at 347-49.

\textsuperscript{184} \textit{Id.} at 348.

\textsuperscript{185} Felix Frankfurter, \textit{Distribution of Judicial Power Between United States and State Courts}, 13 \textit{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 \textit{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* 

\(^{186}\) 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.


v. Tyson, did not exert a powerful influence upon the initiation and singular success of uniform statutory laws." 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." 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, uncoördinated state courts."

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." 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." He thus "punctured the myth of legal science and exposed the potentially arbitrary power of judges." 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.

---

192 Paxton Blair, Book Review, 45 HARV. L. REV. 945, 946 (1932).
193 Id.
195 Parrish, supra note 194, at 20.
196 Id.
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 Holmes\(^{200}\) 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 Brandeis\(^{205}\) 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)).


\(^{203}\) 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*).
Hand noted Holmes’s dissents with approval, but felt constrained to follow the Swift rule because it was “settled for the present.” These lonely voices were heard by numerous members of the academy who also began to question the Swift doctrine.

2. Injunction Cases. The doctrine of judicial restraint was “the classic Harvard approach to constitutional adjudication.” This notion has been closely identified with Harvard professor James Bradley Thayer. 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.” In turn, “[Thayer] influenced Holmes, Brandeis, the Hands, Mr. Stimson, Joseph Cotton, and so forth.” 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.

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).


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.


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,
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. Therefore, Frankfurter maintained, it is of the utmost importance to keep the workload of the Court low.

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. 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.

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

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").

"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).

"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.").

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.”

However 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.

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?"

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." Therefore, he believed, the Court should not have to waste its time on common law cases or even such matters as Federal Employers' Liability litigation.

Second, he maintained that cases involving state legislation "stir political friction inevitable to a conflict between state and national forces." 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."

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, 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. 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].


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. 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. 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.\footnote{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.\footnote{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.\footnote{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."\footnote{246} Harvard professors, however, especially those in Professor Frankfurter's day,\footnote{247} have had an even more profound impact on the development of American law than their colleagues at other

\footnote{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.

\footnote{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).

\footnote{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").

\footnote{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").

\footnote{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" or elsewhere, dominated the academic dialogue in the early twentieth century and hence did much to determine the form of the law. The teaching of law at Harvard has also had a significant effect on the development of American law. Since Dean Langdell, Harvard has virtually determined the curriculum of American law schools, and this, in turn, has controlled the progress of the law. Moreover, Harvard law students are the future judges and statesmen and, perhaps more importantly, law professors 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).
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.
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.” 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.”

a. The Scholar. Although Professor Frankfurter was not prolific enough for some of his friends, he authored an impressive collection of scholarly works devoted to the function of federal courts, particularly the Supreme Court, in “our complicated federal society.” First, with the help of his former

---

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.


264 Ch. 20, 1 Stat. 73.


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

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

---

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").


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).


cited frequently in federal opinions. 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*, and (ii) the development of general common law under *Swift v. Tyson*.

(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.

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

---


279 289 U.S. 238 (1933).


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, 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.

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. 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. 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

---

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.
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 Hurin 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 Hurin 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
originated with the 1909 case, *Siler v. Louisville & Nashville R.R.*, and termed that result "undesirable." 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." 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."

No other contemporary commentator on the *Hurn* case saw it that way. But Frankfurter's interpretation of what has since come to be called "pendent" jurisdiction is very familiar to late-twentieth-century federal courts scholars. As noted above, Frankfurter "has helped to make the times, thus achieving the ultimate success of every thinker in politics, namely to rob his ideas of novelty." 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 Id.
293 Id., at 288.
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.\textsuperscript{304} Even that statute, however, which would have been considered unnecessary even a half-century ago, codifies the Court’s anti-plaintiff bias.\textsuperscript{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.\textsuperscript{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.

\textit{(ii) Development of General Common Law under Swift.} Cornell professor Arthur John Keeffe\textsuperscript{307} asserted that the “propaganda which brought us \textit{Erie R.R. v. Tompkins} [was] the Harvard Law School party line of the days when Felix Frankfurter was a Professor.”\textsuperscript{308} That “party line” proclaimed “the viciousness of diversity of citizenship jurisdiction.”\textsuperscript{309} As mentioned above,\textsuperscript{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.”\textsuperscript{311} Thus, to persuade supporters of the \textit{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 \textit{Cornell Law Quarterly}.

Frankfurter’s study was the first attempt to evaluate the success of the \textit{Swift} doctrine in achieving national uniformity of state

\textsuperscript{305} \textit{Id.} § 1367(b).
\textsuperscript{306} McManamon, \textit{supra} note 20, at 932.
\textsuperscript{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 \textit{supra} note 257, Keeffe’s work will also be cited as his alone.
\textsuperscript{309} \textit{Id.} at 605.
\textsuperscript{310} See \textit{supra} notes 190-193 and accompanying text.
\textsuperscript{311} Cole v. Pennsylvania R.R., 43 \textit{F.2d} 953, 956 (2d Cir. 1930) (Augustus N. Hand, J.); see \textit{supra} notes 207-208 and accompanying text (discussing Judge Hand’s disapproving acquiescence to \textit{Swift} rule).
\textsuperscript{312} Frankfurter, \textit{supra} note 185.
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." He concluded that "[e]vidence is wanting that the state courts yield their own law." 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." 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."

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." 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." 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." 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* that the Iowa Supreme Court would reject the federal decision at first. 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).
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. 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]."

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." 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." 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. 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.


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. 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." 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:

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 Issenks, 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").
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."\footnote{Federal Jurisdiction examination (June 1, 1937) (Frankfurter Papers, Library of Congress).} Anyone who has studied Brandeis's opinion in \textit{Erie} will recognize what was to become the Justice's three-part attack on \textit{Swift} in this question.\footnote{See \textit{Erie R.R. v. Tompkins}, 304 U.S. 64, 71-80 (1938). The first part of the \textit{Erie} opinion attacked \textit{Swift} on historic grounds. \textit{See id.} at 71-74. The second part of the opinion focused on functional, or practical, problems with the \textit{Swift} doctrine. \textit{See id.} at 74-78. The third part of the opinion attacked \textit{Swift} on juristic, or legal, grounds. \textit{See id.} at 78-80.}

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.\footnote{Willard L. King, \textit{Mr. Justice Frankfurter Retires}, 48 A.B.A. J. 1143, 1145 (1962); Felix Frankfurter, \textit{CURRENT BIOGRAPHY} 1957, at 194, 195 [hereinafter 1957 BIOGRAPHY]; \textit{see also} Levy & Murphy, supra note 225, at 1292 (noting that Frankfurter picked Brandeis's clerks).} One biographer declared: "These selectees together with his own secretaries constitute an elite corps who will ever revere his name."\footnote{King, supra note 344, at 1145.} Furthermore, "the New Deal was staffed by his former students,"\footnote{Levy & Murphy, supra note 225, at 1301. \textit{See generally White, supra note 339 (discussing Frankfurter's recruiting of best students into public service).}} referred to as Frankfurter's "Hot Dogs."\footnote{GOODWIN, supra note 233, at 27; \textit{1941 BIOGRAPHY}, supra note 220, at 306; \textit{1957 BIOGRAPHY}, supra note 344, at 195.} 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."\footnote{Vilardo & Gutman, supra note 252, at 19; \textit{see also LASH, supra note 239, at 52-55.}}

Moreover, Frankfurter's students, Harvard's best and brightest, had notable careers. Several, such as Charles Wyzanski\footnote{A.B., 1927, LL.B., 1930, Harvard. Wyzanski was appointed U.S. district judge for the District of Massachusetts in 1941. 29 \textit{WHO'S WHO}, supra note 261, at 2858.} and Henry J. Friendly,\footnote{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 \textit{WHO'S WHO}, supra note 261, at 1078 (1962).} became judges.\footnote{Justice William Brennan—B.S., 1928, Pennsylvania; LL.B., 1931, Harvard, 29 \textit{WHO'S WHO}, supra note 261, at 305—was also one of Professor Frankfurter's students. Donald Burrill, \textit{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, \textit{The Late Professor and the Last Liberal}, \textit{LEGAL TIMES}, Mar. 16, 1992, at 24, 24.} By the time Frankfurter—
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." Thus, it should not be too surprising that the two Justices clashed frequently on issues of
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.
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.

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).


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. 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. As the academy began to involve itself in the course on federal jurisdiction, casebooks on the subject emerged. The first such casebook, edited by Professor George W. Rightmire of Ohio State University, was published in 1917. This book was soon followed by a second, 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 cooperating, 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.\textsuperscript{375}

The availability of casebooks in turn stimulated the development of courses on federal jurisdiction.\textsuperscript{376} Moreover, the new books had a hand in shaping the new courses.\textsuperscript{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.\textsuperscript{378} The course on federal jurisdiction thus retained its reputation for

\textsuperscript{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.
\textsuperscript{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, \textit{supra} note 215, at 359. In 1931, about 30 AALS member law schools offered a course in federal jurisdiction. McCormick, \textit{supra} note 257, at 474. In 1933, that number had grown to 34 schools. Waterman, \textit{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. \textit{Id.}
\textsuperscript{377} See Wechsler, \textit{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").
\textsuperscript{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, \textit{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." \textit{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?

\textsc{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?

\textit{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,
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. Frankfurter believed that instead, "federal jurisdiction ought to occupy [an important place] in the training of scholarly lawyers." 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. 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 L. REV. 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, "Obviously 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.

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").

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.

Frankfurter, supra note 384, at 1160.

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

[It 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.6. 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

---

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 viii.
395 Id. at vi, reprinted in FRANKFURTER & SHULMAN, supra note 87, at viii.
"case or controversy" and legislative courts.\textsuperscript{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."\textsuperscript{397} Thus, the majority of the book is devoted to "Federalism"\textsuperscript{398} or, as he termed it in the revised edition, "our Federalism."\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item 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"). \textit{But see} RIGHTMIRE, supra note 373, at 5-8 (discussing "case or controversy").
\item 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." \textit{Id.} at i; FRANKFURTER & SHULMAN, supra note 87, at i; see supra note 87 (addressing views of Curtis).
\item FRANKFURTER & KATZ, supra note 87, at vii, reprinted in FRANKFURTER & SHULMAN, supra note 87, at ix.
\item FRANKFURTER & SHULMAN, supra note 87, at v. This phrase was penned by Frankfurter himself. \textit{See id.} ("Note to Revised Edition" signed, "F.F."); Frankfurter's Draft of Note to Revised Edition (Frankfurter Papers, Library of Congress); \textit{see also} supra note 22 (discussing slogan).
\item FRANKFURTER & KATZ, supra note 87, at vii, reprinted in FRANKFURTER & SHULMAN, supra note 87, at ix.
\end{itemize}
every footnote . . . ."\textsuperscript{401} His "political-scientist-viewpoint"\textsuperscript{402} was, however, not at all neutral. Instead, it "unmistakably" bore "the fingerprints of [Frankfurter's] personality."\textsuperscript{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."\textsuperscript{404}

Frankfurter's book was hailed as "splendid"\textsuperscript{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."\textsuperscript{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.'"\textsuperscript{407} On the other side were those who believed that "[t]here is something pitifully
They believed instead that "it is the duty of the law school to prepare its students to actually present cases in the federal courts." They were concerned about the fear of making procedure too practical. They believed that "it is the duty of the law school to prepare its students to actually present cases in the federal courts." This debate was reflected in subsequent casebooks. Only one new book was added to the literature before World War II, which called a halt to the publication of casebooks. Its author, Dean Armistead M. Dobie of the University of Virginia, had mildly criticized Frankfurter's book for its lack of materials on procedure. 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.' After the War, Dean Charles T. McCormick of the University of Texas 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.").


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.


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 Pennsylvania published a new casebook on the federal courts. One reviewer echoed the general sentiment when he declared: "Clearly this is the best casebook in the field." Its chief benefits, however, seem to be that it was the only up-to-date book and that it was well-edited for a semester-long course. Those scholars who favored Frankfurter's book were disappointed in both of the new casebooks. 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

---


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.\textsuperscript{422}

Of course, Frankfurter could no longer participate in the debate; by now he was on the bench.\textsuperscript{423} The debate was to all intents and purposes ended in 1953, however, when Frankfurter's former student and collaborator, Henry M. Hart, Jr.,\textsuperscript{424} and friend, Herbert Wechsler,\textsuperscript{425} published the "definitive" casebook on the federal court system.\textsuperscript{426} The book, and therefore any course taught from the book,\textsuperscript{427} made no attempt to teach the student the rules of practice in the federal courts.\textsuperscript{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."\textsuperscript{429}

\textsuperscript{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.").

\textsuperscript{423} See infra note 459 and accompanying text.

\textsuperscript{424} See supra note 267 (noting relationship between Frankfurter and Hart).

\textsuperscript{425} See supra note 267 (noting relationship between Frankfurter and Hart).

\textsuperscript{426} See supra note 267 (noting relationship between Frankfurter and Hart).

\textsuperscript{427} See supra note 377 and accompanying text.

\textsuperscript{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.").

\textsuperscript{429} Joiner, supra note 428, at 722.
The Hart and Wechsler book was clearly a descendant of Frankfurter's casebook. 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.

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." 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*, should be placed in the chapter on "case or controversy" rather than in the chapter on review of state court decisions.

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.


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).

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." In the last decade, there has been only one exception: the casebook by Wayne McCormack of the University of Utah begins with an exploration of "the means of getting through the courthouse door." 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." 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.


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. 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.'" 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," the professor wrote the new Justice explaining how to write opinions. Frankfurter also maintained contacts with his former students who had become law clerks to federal judges.

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 administrations and was particularly close to Franklin Delano Roosevelt: "[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." In fact, "[i]n the summer of 1935 [Frankfurter] was for several weeks a resident guest at the White House." His relationship with the President enabled him to place his students in key government positions. 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.

Professor Frankfurter also had the ear of many congressmen. He actually drafted several pieces of federal legislation. For example, he drafted, alone or with colleagues, several bills to limit diversity jurisdiction, the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, and the Norris-LaGuardia Act. 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.\footnote{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).}

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."\footnote{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.”).}

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.\footnote{Cohen, supra note 25, at 145.} 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

\footnote{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 30.469 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

460 Freund, supra note 219, at 263; 1957 BIOGRAPHY, supra note 344, at 195; 1941 BIOGRAPHY, supra note 220, at 307.
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.
over and over\textsuperscript{465} in his twenty-three years on the bench\textsuperscript{466} so that it eventually became commonplace.\textsuperscript{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,\textsuperscript{468} would do just that, asserting that the practice dated back to the beginning of our Republic.\textsuperscript{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."\textsuperscript{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."\textsuperscript{471} Others agreed.\textsuperscript{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

\begin{footnotes}
\begin{enumerate}
\item Justice Frankfurter retired on August 28, 1962. Freund, supra note 219, at 264.
\item 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.
\item 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).
\item See supra note 16 and accompanying text (quoting Justice Black).
\item GOODWIN, supra note 233, at 32.
\item Id. at 25.
\item 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.
\end{enumerate}
\end{footnotes}
profession of the law in teaching and government." 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.

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." 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. 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. 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, 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
A. THE \textit{ERIE} DOCTRINE\footnote{A detailed discussion of the \textit{Erie} doctrine is beyond the scope of this Article. For a closer look at \textit{Erie} and its progeny, see Ely, supra note 35, and also Stephen B. Burbank, \textit{The Rules Enabling Act of 1934}, 130 U. PA. L. Rev. 1015 (1982).}

As noted above, Professor Frankfurter played an important part in bringing the \textit{Erie} doctrine to life.\footnote{See supra notes 307-327, 340-343 and accompanying text (discussing Frankfurter's part in bringing \textit{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 \textit{Swift} doctrine. \textit{See supra} note 451 and accompanying text.} 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 \textit{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.\footnote{Two different statutes control the power of federal judges to declare common law and to draft rules. \textit{Compare} Rules of Decision Act, 28 U.S.C. § 1652 (1988) \textit{with} Rules Enabling Act, \textit{id.} § 2072. Technically speaking, the \textit{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 \textit{supra} note 94; for the text of the Rules Enabling Act, see \textit{infra} note 487.} 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 \textit{Sibbach v. Wilson & Co.}\footnote{312 U.S. 1, 16-19 (1941) (Frankfurter, J., dissenting).} and his opinion for the Court in \textit{Guaranty Trust}
Co. v. York. 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, was valid. The argument against the rule was that it violated the Rules Enabling Act by modifying the substantive rights of the parties. 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

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.

488 312 U.S. at 9-11.
admitting 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

---

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*, 366 U.S. 525 (1968). Frankfurter dissented in *Byrd*. *Id.* at 551-59 (Frankfurter, J., dissenting).
the related state claim.\textsuperscript{501} However, since these suits usually sought injunction against the enforcement of allegedly unconstitutional state laws—frequently granted by the \textit{Lochner}-era federal courts—he believed that they should not be in the federal courts at all.\textsuperscript{502} In particular, Frankfurter was concerned that the federal courts were ill-equipped to interpret complex state statutory schemes\textsuperscript{503} 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”\textsuperscript{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.”\textsuperscript{505}

Professor Frankfurter praised the Supreme Court for deferring to the state court on such a matter in the 1929 case, \textit{Gilchrist v. Interborough Rapid Transit Co.}\textsuperscript{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”\textsuperscript{507} in question. The \textit{Gilchrist} case, however, “had a rapid transit through the judicial mind”,\textsuperscript{508} it was never followed by the lower federal courts.\textsuperscript{509} Moreover, just a few months after \textit{Gilchrist}, the Supreme Court refused to abstain in a similar case.\textsuperscript{510} The key difference, however, was that there was no pending state litigation in the later case and thus no alternative forum for

\textsuperscript{501} See supra notes 288-293 and accompanying text (examining Frankfurter’s position on pendent jurisdiction).
\textsuperscript{502} See supra notes 237-238 and accompanying text (explaining Frankfurter’s view that federal courts should avoid cases involving state legislation).
\textsuperscript{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.
\textsuperscript{504} Frankfurter & Landis, 1928 Term, supra note 227, at 62.
\textsuperscript{505} Id. at 61.
\textsuperscript{506} 279 U.S. 159 (1929). For Frankfurter’s comments on this case, see Frankfurter & Landis, 1928 Term, supra note 227, at 61-62.
\textsuperscript{507} Frankfurter & Landis, 1928 Term, supra note 227, at 61.
\textsuperscript{508} Note, supra note 75, at 1385.
\textsuperscript{509} Id.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{512} The order was challenged as being outside the scope of the commission's power and as violative of the Federal Constitution.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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,"\textsuperscript{516} the district court had to stay its hands pending a determination of the state issues by a state tribunal.\textsuperscript{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

\textsuperscript{511} 312 U.S. 496 (1941).
\textsuperscript{512} Id. at 497-98.
\textsuperscript{513} Id. at 498.
\textsuperscript{514} Id. at 499-500.
\textsuperscript{515} Id. at 500.
\textsuperscript{516} Id. at 501.
\textsuperscript{517} Id. at 501-02.
complicated state administrative scheme (Burford\textsuperscript{518} abstention), abstention to avoid duplicative litigation (Colorado River\textsuperscript{519} abstention), and abstention from interfering with a pending state proceeding (Younger\textsuperscript{520} abstention).\textsuperscript{521}

2. The Anti-Injunction Act. In Ex parte Young,\textsuperscript{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.\textsuperscript{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.\textsuperscript{524} Those who

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

\textsuperscript{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, \textit{see supra} note 351, who was actually an opponent of abstention. \textit{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.

\textsuperscript{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, \textit{see supra} note 468 and accompanying text, is today most closely identified with the concept "our federalism." \textit{See} supra\textsuperscript{521} note 33.

\textsuperscript{521} For a more detailed discussion of the various abstention doctrines, see sources cited \textit{supra} notes 33, 34.

\textsuperscript{522} 209 U.S. 123 (1908).

\textsuperscript{523} \textit{Id.} at 161-62.

\textsuperscript{524} \textit{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. In *Toucey v. New York Life Insurance Co.* 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." He therefore rejected the relitigation exception. More importantly, however, he did so in such sweeping language that he erased almost a century of caselaw. He announced that the Anti-Injunction Act was "part of the delicate adjustments required by our federalism" and that it must be read very strictly. He declared that "apart from Congressional authorization, only one 'exception' has been imbedded in [the act] by judicial construction, to wit, the res cases." 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

---

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.
The commentators were shocked. 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. Thus, the amendment was meant to "restore[] the basic law as generally understood and interpreted prior to the Toucey decision." 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.

Today, Frankfurter's approach is used by the current Court; the act is very strictly construed. 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. In so doing, he severely restricted a federal court's ability to use its equitable powers to effectuate national policy.

---

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.
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).
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.\(^{641}\) 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

\(^{641}\) 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 "indeterminancy" (i.e., to promote finality).

on the enforcement of civil rights in the last two decades, Frankfurter's federalism has prevented any meaningful solution to our current litigation woes. Instead, his doctrines are all major stumbling blocks to a national solution of many of today's litigation nightmares. 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. The perceived federal court need for deference to the law of fifty different states to determine the liability of national manufacturers 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. 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." As he pointed out, "[t]hat the wisdom of 1875 is the exact measure of wisdom for today is most unlikely." 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).


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


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 history\textsuperscript{550} and ignoring legislative intent,\textsuperscript{551} he carved his ideas in stone.\textsuperscript{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.

\textsuperscript{550} An example is his treatment of ancillary jurisdiction. See supra notes 281-306 and accompanying text.

\textsuperscript{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.

\textsuperscript{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).