

**University of California, Hastings College of Law**

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**From the Selected Works of Scott Dodson**

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## Book Review: A History of the Eighth Circuit

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*Establishing Justice in Middle America: A History of the United States Court of Appeals for the Eighth Circuit.* By Jeffrey Brandon Morris. (Minneapolis: University of Minnesota Press, 2008. Pp. xx, 464. Foreword by William H. Webster, preface, acknowledgments, appendices, afterword, notes, index. \$39.95.)

In *Establishing Justice in Middle America*, Jeffrey Morris, a law professor at Touro Law Center, continues his pioneering work documenting the important and understudied histories of the U.S. Courts of Appeals. As with his books on the Second and D.C. Circuits, Morris's view of the Eighth Circuit is panoramic yet detailed. He provides both national and regional perspectives on the court, chronicling its administration, judges, and jurisprudence.

Morris proceeds chronologically. He begins with the story of the territory covered by the Eighth Circuit (which, for most of its tenure, spanned the states of North Dakota, South Dakota, Minnesota, Iowa, Nebraska, Missouri, and Arkansas). Even from the beginning, these states encompassed defining features of the nation's development in terms of agriculture (as the nation's breadbasket), commerce (containing the nation's central western expanse and defining north-south rivers), and civil rights (with respect to the area's original Native American inhabitants).

Prior to the creation of the U.S. Courts of Appeals in 1891, the work of the court system overseeing the area was dominated by farming and railroad matters. Its first judges included the illustrious Samuel F. Miller, a Supreme Court justice who "rode circuit," and David Brewer, who later was elevated to the Supreme Court. From the creation of the Eighth Circuit in 1891 to its division in 1929 into the Eighth and Tenth Circuits, the court supported antitrust prosecutions, restrained state regulation of railroads,

and encouraged the federal assimilation of Native Americans. From 1919 to 1959, the court heard federal criminal cases and dealt with national and regional tragedies, such as the Great Depression, World War II, and the Mississippi River floods. It was supportive of New Deal legislation.

During the Warren Court era, the Eighth Circuit focused on civil liberties, dealing with prominent desegregation cases, capital cases, cases recognizing the constitutional right of association, and litigation involving the Arkansas prison system. Harry Blackmun was a judge during this time, before being elevated to the Supreme Court. The 1970s saw an emphasis on individual rights and modest liberalism, the Eighth Circuit being a strong supporter of *Roe v. Wade* and continued commitment to desegregation.

In the 1980s and 1990s, the Eighth Circuit became moderately conservative and began to retreat from some of the positions staked out in the Warren Court era. In addition, the court heard several important cases stemming from the Whitewater investigation of President Bill Clinton and Paula Jones' lawsuit against him.

There is much in Morris's history to satisfy students of Arkansas history. The Little Rock high school desegregation cases, including *Cooper v. Aaron* (1958), play a prominent role in Eighth Circuit history, as do capital cases arising from Arkansas and Arkansas prison reform. Morris notes the influence of Judge Richard Arnold, calling him "a superb jurist," and Judge Pat Mehaffy, the first native-born Arkansan on the court, though he unfortunately pays little attention to Richard Arnold's brother, Judge Morris Sheppard Arnold, appointed to the court in 1992 (p. 197).

Morris's research runs deep, particularly with respect to the judges. He visited six of the circuit's seven states and interviewed fifteen circuit judges, including Richard Arnold, as well as several district judges. In the process, Morris has created a fact-filled history of the court and its personalities. That history is important, for although the U.S. Courts of Appeals have the final say in 98 percent of the cases they hear—only 2 percent are heard by the U.S. Supreme Court—there is a dearth of historical study of these courts. Morris's work, therefore, is informative and fills an important gap. But it is not terribly interesting. Morris concludes that the Eighth Circuit dutifully followed the mandates of the Supreme Court and largely reflected the political climate of the nation. That is both unsurprising and underwhelming. It is possible that the history of the Eighth Circuit is as plain vanilla as Morris makes it out to be. But, even so, Morris might have done three things differently.

First, he might have given more of a sense of how personalities shaped the Eighth Circuit and its opinions. That is, in fact, what he has done in his two previous histories: *Calmly to Poise the Scales of Justice: A History of*



*the Courts of the District of Columbia Circuit* (2001), in which he explained how David Bazelon and J. Skelly Wright influenced both administration and jurisprudence of the court; and *Federal Justice in the Second Circuit: A History of the United States Courts in New York, Connecticut & Vermont, 1787 to 1987* (1987), in which he detailed the influence of Learned Hand and Henry Friendly. One might argue that the Eighth Circuit never had comparable luminaries, but, even if true, that would not mean that the court was not shaped by its judges. Judge Richard Arnold, for one, was a dominant force on the court and wrote scores of important opinions, including several important voting rights opinions, which Morris fails to connect to Judge Arnold's own personality or jurisprudence. Connecting the personalities to the court's jurisprudence and administration in a more integrated way would have given life and meaning to the rote facts that Morris reports.

Second, and related to the first, Morris might have given more thought to integrating the themes of the book—regional/national developments, administration, judges, cases—in a way that facilitates holistic comprehension. It is mildly interesting to learn that Judge Harvey Johnsen was a son of a railroad worker, but, unless that affected his jurisprudence or the functioning of the Court of Appeals, it is not particularly informative. A more meaningful structure might have integrated the themes together in a more coherent whole. Morris need not even have sacrificed the little details that are not readily integrated: an appendix dedicated to the salient biographical details of each judge would have preserved them as a reference for those who wanted to know more. As it stands, *Establishing Justice* lacks even the brief appendix of judges and their tenure on the court that *Calmly to Poise* contains.

Third, Morris might have placed greater emphasis on the important cases in which the Eighth Circuit had the final say. At times, Morris focuses on significant cases that passed through the Eighth Circuit on their way to the Supreme Court, which ultimately displaced the Eighth Circuit's view with its own. These Supreme Court cases no doubt have their place—they help identify what portions of the Eighth Circuit's docket were important at the time, and they demonstrate how the Eighth Circuit dealt with certain landmark cases—but Morris's focus on them is in tension with his book's mission: to study the Eighth Circuit, not the Supreme Court. Morris might have done better by curtailing some of the more extended discussions of the cases that ultimately reached the Supreme Court (and of the Supreme Court's opinions), focusing instead on cases and issues in which the Eighth Circuit had the final say. Indeed, such a change in focus might have led to a more nuanced view of the

**Eighth Circuit as a pioneer in some areas rather than an obedient follower of Supreme Court directives.**

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