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Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America

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LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958. By *Edward A. Purcell, Jr.* New York: Oxford University Press. 1992. Pp. x, 446. $59.

Edward A. Purcell[1] begins his book *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America 1870-1958,* with a letter written in 1934 from a Cleveland lawyer to his new client, the Baltimore & Ohio Railroad. The railroad had hired the lawyer to defend against several pending tort suits. The lawyer and his staff then "worked up a technic which ought to assure the best possible results";[2] the "technic" was to remove the lawsuits from state court to federal court. As Purcell explains, getting into federal court provided large corporate defendants, like a railroad, with enormous procedural and extralegal advantages over individual plaintiffs.

Litigation and Inequality focuses upon these procedural and jurisdictional rules — such as removal, joinder, choice of forum, and amount in controversy — that create "a grab bag of tools that parties attempt to use . . . during private litigations" (p. viii). Purcell's book also looks behind such rules to emphasize the historical and social conditions of the parties; he writes, "to truly understand [procedural and jurisdictional rules] one must persistently ask who uses them, how they use them, and what results they achieve with them" (p. viii).

Purcell ties together these two dimensions — technical legal doctrines and the social conditions of the litigating parties — into a unitary concept that he calls a "social litigation system" (p. 3). The author defines a social litigation system as a pattern of regularly recurring legal disputes involving parties with similar social characteristics who regularly litigate the same types of issues and legal rules. Although a social litigation system may sound like an abstract concept, a look to today's highly specialized legal profession would probably identify groups of lawyers who consistently litigate certain types of claims between similar types of parties and rely over and over on certain legal rules. Purcell observes that these systems are perhaps more social than legal:

> We commonly recognize, at least implicitly, that distinct types of litigation differ as much in the social conditions that shape them as they do in the legal issues that they present. Antitrust litigation in the federal courts is profoundly different from landlord-tenant litigation in the housing courts of large cities. Securities actions have little in common with deportation proceedings, and suits involving personal injuries are quite

1. Professor of Law, New York Law School.

2. P.13 (quoting Letter from Newton D. Baker to John J. Cornwell (Nov. 28, 1934) (on file at the Library of Congress, Newton D. Baker Papers, Box 39, Folder "B&O—1934")).

> different from school desegregation cases. . . . Yet in spite of the various social differences, we generally identify such types of litigation, as I have just done, by their legal rather than their social characteristics. The former may not always and for every purpose be the most useful way to categorize, examine, and understand them. [p. 3]

Purcell's book is a history of *one* of these social litigation systems. His goal is to use the concept of a social litigation system to describe and explain a certain type of recurring historical behavior. Purcell hones in on the United States of the 1870s to the 1940s, the "Age of Industrial America," a time of rapid economic development and the rise of powerful national corporations. These social conditions led to the social litigation system that Purcell analyzes, which he calls the "system of corporate diversity litigation." Such a system consisted of two types of claims by individual plaintiffs against national corporations: (i) negligence actions against manufacturers and railroads, usually by injured employees, and (ii) contract claims against insurance companies, usually by claimants under small life, health, and disability policies.

Purcell identifies two basic "mainsprings" of the system of corporate diversity litigation. First, the individual plaintiffs and corporate defendants had drastically unequal resources, and this wealth disparity affected almost every aspect of the system. Second, the parties invariably wanted to litigate in different forums. Federal courts provided corporations with a variety of advantages, while individual plaintiffs were usually better off litigating in state courts. A third general theme runs throughout the book: the importance of *out-of-court settlement,* what Purcell calls the "informal legal process" (p. 6). In keeping with his aim of discovering "what litigants were actually doing" (p. vii), Purcell emphasizes that the parties resolved an overwhelming percentage of these disputes out of court — an informal resolution central to the system of corporate diversity litigation.

The first half of Purcell's book describes the emergence of the system of corporate diversity litigation in the 1870s and the growth of the system up to its peak around the turn of the century. The book's first three chapters explore the social and legal background that gave rise to this system. Chapter One describes the Supreme Court cases that developed the right of corporations to remove cases to federal court based on diversity jurisdiction.[3] This chapter also examines a variety of historical evidence to demonstrate the basic characteristics of the system of corporate diversity litigation. From this evidence, Purcell

3. The U.S. Constitution extends the federal judicial power to jurisdiction over claims between "Citizens of different States." U.S. CONST. art. III, § 2. In the Judiciary Act of 1789, Congress granted the lower federal courts this type of jurisdiction. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79 (current version at 28 U.S.C. § 1332 (1988)). A federal court thus has jurisdiction over a claim by an in-state plaintiff against a foreign corporation even over state law tort and contract claims. This is commonly known as "diversity" jurisdiction.

concludes that negligence actions and suits on insurance contracts, most of which were between resident plaintiffs and foreign corporations, dominated the federal courts' diversity dockets, that corporate defendants were usually the party to invoke removal, and that corporations were highly successful when they removed diversity actions.

Chapters Two and Three explain why foreign corporations routinely preferred to remove these diversity suits to federal court. Removal to federal court made litigation more difficult, complex, expensive, time-consuming, and intimidating for the individual plaintiffs. Purcell identifies three basic reasons why removal thus enabled corporations to exploit their greater economic and social power, usually to negotiate discounted settlements. First, most observers considered federal judges to be sympathetic to corporate interests. Even if this perception was false, the perception itself discouraged individual plaintiffs whose claims were removed to federal court, enabling the corporate defendants to pressure the plaintiffs into small settlements.

Second, an ordinary lawsuit in federal court was often more burdensome to the litigants than a suit in state court. The triple burdens of distance, delay, and complexity disproportionately hindered individual plaintiffs because they had fewer resources and less-experienced legal counsel than their corporate opponents. At a time when travel was extremely expensive and inconvenient, the distant locations of federal courts posed great burdens for plaintiffs.[4] This disparity meant that removal to federal court often required an individual plaintiff to endure the cost and inconvenience of traveling far from home.

Another burden was delay. Purcell observes that "[b]y the turn of the century the average length of time between commencement and termination of a federal civil action was about three and a half years" (p. 50). Although he fails to offer reliable data to generalize about the duration of state court litigation, Purcell does use scattered data and anecdotal sources to argue that many state courts were disposing of their cases more rapidly than the federal courts. Finally, Purcell argues that legal practice in federal courts was generally more complex than in state courts: the law of removal itself was complicated, the federal courts' procedural rules in diversity cases derived from a confusing hybrid of state and federal rules, and appeals in federal courts exacerbated the above-mentioned problems of distance and delay. All these burdens magnified economic and social inequalities that already existed between individual plaintiffs and corporate defendants.

The third reason corporate defendants preferred to remove diversity suits to federal courts lay in the advantages conferred by the fed-

4. Purcell explains that "almost all of [the counties in the United States] had a county seat that hosted one or more terms of a state court of general jurisdiction. In contrast, federal courts convened in fewer than one county in every ten." Pp. 46-47 (footnote omitted).

eral common law.[5] The complexity of the federal common law and uncertainty over whether it — or state law — would apply to a plaintiff's claim added to the difficulty of federal court litigation. Purcell further argues that the federal common law of industrial torts and insurance contracts provided a variety of other advantages to corporate defendants in federal diversity litigation. Purcell contends that all three of these reasons take on particular importance in the informal legal process, so that removal and the threat of removal were powerful tools to force individual plaintiffs to settle their claims unfavorably.

Because the parties desperately wanted to litigate in different courts, their lawyers developed various creative strategies in what Purcell calls "The Battle for Forum Control." Chapters Four and Five describe the two principal tactics that plaintiffs employed to keep their claims out of federal court: (i) they discounted their claims below the minimum amount-in-controversy requirement to establish federal diversity jurisdiction,[6] and (ii) they joined nondiverse parties as codefendants to defeat the federal jurisdictional requirement of complete diversity between adverse parties.[7] These chapters also describe corporate defendants' attempts to counter these devices. Chapter Six concludes the first half of the book by critically examining the rationale that most corporations offered to explain why they preferred the federal courts — namely, the possibility of local prejudice in the state courts.

The second half of the book traces the evolution, decline, and disappearance of the system of corporate diversity litigation from the turn of the century until the 1950s. Chapter Seven describes the development of a variety of factors that decreased the burdens on individual plaintiffs of litigating in federal court. These developments included improvements in transportation and federal court administration that lessened the burdens of distance and delay, as well as legislative re-

5. Rooted in the Supreme Court's 1842 decision in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), the federal common law permitted courts to fashion independently a body of common law rules in certain areas. In Erie R.R. v. Tompkins, 304 U.S. 64 (1938), however, the Supreme Court abolished the general federal common law.

6. Diversity jurisdiction only extends to cases in which the "amount in controversy," typically the amount of the plaintiff's claim, exceeds a statutorily prescribed minimum. Congress has often amended this statutory amount. For example, the Judiciary Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552, 552, raised the jurisdictional amount from $500 to $2000, and the Judicial Code of Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091, raised it again to $3000. In 1988 Congress raised the amount from $10,000 to $50,000. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201(a), 102 Stat. 4642, 4646 (1988) (codified at 28 U.S.C. § 1332(a) (1988)).

7. The Supreme Court in Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), held that diversity jurisdiction required "complete" diversity between the parties, meaning that the citizenship of each of the plaintiffs in an action could not overlap at all with the citizenship of any of the defendants. Thus an in-state plaintiff could destroy complete diversity by joining an in-state defendant to the plaintiff's claim against a foreign corporation, depriving the federal courts of jurisdiction.

forms and the rise of a specialized plaintiffs' personal injury bar to cope with the complexity of litigation in the federal courts.

Chapters Eight and Nine trace the development of new litigation strategies over the battle for forum control as the system evolved into the twentieth century. Chapter Eight focuses on a new tactical device employed by plaintiffs — interstate forum shopping. Because most state courts and legislatures considered corporations to be present in any state in which they did business (p. 181), plaintiffs started to bring their claims against corporations in distant states that offered the possibilities of more favorable law or larger jury verdicts. Corporate defendants retaliated with a variety of tactics to ensure that plaintiffs sued close to home. Chapter Nine then details the evolution in the system as insurance contract litigation became increasingly volatile in the 1920s and 1930s because of changes in federal law that increased the opportunities for insurance companies to get into federal court.

Chapter Ten describes the disintegration and disappearance of the system in the decade after 1937. Continued advancements in transportation — in particular, the widespread use of the automobile — greatly lessened the burdens of distance and travel, improvement in federal court administration reduced delay, and the election of President Franklin Delano Roosevelt changed the political image and sympathies of the federal courts. Finally, in the 1938 case of *Erie Railroad v. Tompkins*,[8] the Supreme Court abolished the general federal common law. "By the end of the 1940s," Purcell writes, "the formal law offered relatively little incentive to choose between a state and a federal forum in a diversity action" (p. 246).

In Chapter Eleven, Purcell reviews the entire history of the system of corporate diversity jurisdiction and comes to a mix of eclectic conclusions. Three in particular merit consideration.

First, Purcell casts doubt on two conventional historical assumptions about the relationship between corporations and federal courts in this time period: the corporations' oft-stated rationale for their preference for the federal courts, and the conventional wisdom that federal judges during this period harbored a procorporation class bias. Corporations ostensibly preferred to litigate in the federal courts in order to avoid local prejudice and to gain the benefits of a uniform federal common law. Purcell contends, however, that corporations actually gained powerful legal and extralegal advantages by using the federal courts. Further, he argues that the federal common law appealed to corporate defendants because of its particular substance, not because of its uniformity. Purcell is also skeptical of the idea that federal judges harbored a class bias in favor of national industry. Although he concedes that federal forums provided advantages to corporations,

8. 304 U.S. 64 (1938).

the author asserts that this was because of a mix of factors — such as distance, delay, complexity, and the substance of federal common law — and not because of the social attitudes of federal judges. In fact, Purcell notes that the Supreme Court in particular ruled in favor of corporations less often than lower courts did and often fashioned proplaintiff procedural and jurisdictional rules (p. 8).

Second, the book's final chapter reconsiders two hypotheses that scholars have offered to explain tort law in the late nineteenth and early twentieth centuries: the "subsidy thesis" and the "efficiency thesis." The subsidy thesis claims that tort law around the turn of the century imposed limited rules of liability on industry, thereby providing a de facto subsidy to young business enterprises.[9] In contrast, the efficiency thesis maintains that this same tort law allocated the costs of accidents among the various parties involved in an economically efficient manner.[10] Purcell's book casts doubt on both theses and highlights a deficiency in both — their overreliance on the substantive law. Purcell maintains that the legal system conferred a kind of de facto subsidy on business enterprise. This subsidy came, however, not through the substantive common law of tort, but in the social, procedural, and institutional factors that permitted corporations to reduce the amount individual plaintiffs would accept in out-of-court settlements. To the extent these factors permitted corporations to impose a disproportionate amount of accident costs on plaintiffs, the legal system operated inefficiently.

Finally, Purcell proposes his concept of a "social litigation system" as a useful instrument to study the interrelationship between law, history, and the social sciences as part of the search to discover how the political and social worlds "really worked."[11] By concentrating on aspects of this history beyond the substantive law, Purcell has provided a valuable reminder to the legal historian — the technical rules of procedure and jurisdiction and the social conditions and resources of the litigants often determine the outcome of a legal claim.

Litigation and Inequality has drawbacks: it is longer than necessary, and although exhaustively researched, the book fails to provide adequate evidence to support many of its most significant claims.[12] Nevertheless, in its hypothesis of a system of corporate diversity litiga-

9. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 409-27 (1973); LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND *CHIEF JUSTICE SHAW* 166 (1957); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 385 (1951). *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 63-108 (1977) (discussing the subsidization of economic growth through the legal system).

10. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

11. Purcell writes that "[f]or more than a century professional scholars in law, history, and the social sciences have sought to discover how the political and social worlds 'really worked.' " P. 248. He offers the book as a further inquiry into the dynamics of the "law in action" rather than the "law in books." P. 248.

12. For example, Purcell offers little evidence to support his claim that state courts processed

tion, the book advances a new way of thinking about a portentous era in U.S. legal history. Perhaps most prominently, the book serves as a detailed reminder of the importance to legal history of both social conditions and jurisdictional and procedural legal doctrines.[13] For those scholars still interested in finding out how the world "really worked," Purcell offers valuable insights.

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cases more rapidly than federal courts, and he acknowledges the difficulty of discovering strong evidence about the informal legal process.

13. Purcell encourages scholars to explore the richness of these doctrines, observing that

> [p]rocedure offers a particularly rewarding subject to the legal historian because it constitutes the realm of irony in the law. . . . [I]n qualifying, frustrating, or transforming the significance of substantive rules and rights, procedure can illuminate their practical human significance and spotlight the critical points where social factors impinge most sharply on the legal process.

P. 249.