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Book Review: Mapping Legal History's Middle Ground

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BOOK REVIEW

MAPPING LEGAL HISTORY'S "MIDDLE GROUND"

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. $59.00.

Reviewed by RICHARD B. BERNSTEIN**

INTRODUCTION

In 1991, Richard White published *The Middle Ground*,[1] a path-breaking work of ethnohistory that explores the relations between Indians and Europeans—first, colonists and officials of the British and French colonial empires, then settlers and officials from the independent United States—in the Great Lakes region of North America between 1650 and 1815.[2] Central to White's project is his concept of "the middle ground,"[3] the term he uses to describe the sphere of interaction between groups with different values, cultures, and objectives who nonetheless had to coexist and cooperate with one another. According to White, the

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I dedicate this Review to Professor Arthur R. Miller of Harvard Law School, who taught me not only the nuts and bolts of federal procedure but also its enduring fascination and importance.

Although I am a colleague of Ed Purcell, and although he graciously—but inexplicably—acknowledges me as one of the members of the New York University Legal History Colloquium (to whom he presented earlier versions of this book), I made no substantive, procedural, bibliographical, or other contribution to his project.

[1] Richard White, The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815 (1991).

[2] *The Middle Ground* won numerous historical awards, including the Francis Parkman Prize of the Society of American Historians and the Frederick Jackson Turner Prize of the Organization of American Historians.

[3] R. White, supra note 1, at ix-x, 50-93.

"middle ground depended on the inability of both sides to gain their ends through force."[4] Refraining from violence in favor of cooperation, those who chose to occupy the middle ground were compelled "to attempt to understand the world and the reasoning of others and to assimilate enough of that reasoning to put it to their own purposes."[5]

Nowhere did Indians and Europeans use the middle ground more innovatively than in diplomatic councils, where new demands and challenges produced novel approaches to dissolve or abate old tensions. White's organizing concept of the middle ground is valuable precisely because it enables him to avoid one of the most common faults of histories of relations between Europeans and Indians—the historian's tendency to address both groups from only one group's perspective and to consider their relations solely in terms of one group's adaptation to the values, behavior, and power of the other. For example, White moves beyond the familiar themes of the "Europeanizing" of the Indians, or the "Americanizing" or "going native" of the European settlers.[6]

In 1992, Edward A. Purcell, Jr., published *Litigation and Inequality*,[7] a similarly innovative and magisterial work of legal history whose organizing concept—the "social litigation system"[8]—corresponds to White's "middle ground." Rather than presenting an abstract, historical-doctrinal analysis of federal diversity jurisdiction, or a social history of the approaches to litigation by various kinds of plaintiffs and defendants within the context of diversity jurisdiction, Purcell analyzes the shared world of litigation strategies, institutional powers and constraints, and doctrinal possibilities and limitations within which the various groups composing the social litigation system operated.

Purcell's social litigation system thus performs many of the same functions as White's middle ground. Even though the groups whom Purcell chronicles—individual plaintiffs and corporate defendants, plaintiffs' and defense attorneys, federal and state lawmakers, federal and state judges, and legal scholars—did not differ from one another to the extent that White's Indians and Europeans diverged culturally, they *did* use well-defined strategies in the pursuit of distinct interests. They therefore operated according to differing and even clashing conceptions of the purposes of suing on or settling disputed claims, of substantive and proce-

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[4] Id. at 52.

[5] Id.

[6] Id. at 50; see also id. at 50-93 (developing idea of middle ground between two cultures that must coexist).

[7] Edward A. Purcell, Jr., Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958 (1992).

[8] See id. at 3-4 (presenting Purcell's definition of this term). For a discussion of the concept and Purcell's use of it in *Litigation and Inequality*, see Part II infra.

dural law, and of litigation strategy—always within the confines of the social litigation system Purcell delineates. Within that system, they carried out the "sociological process of disputing, settling, and litigating claims."[9] Just as White's Indians and Europeans had done, Purcell's litigants, lawyers, judges, lawmakers, and scholars "had, of necessity, to attempt to understand the world and the reasoning of others and to assimilate enough of that reasoning to put it to their own purposes."[10] Again, as in White's middle ground, the social litigation system was (in White's words) "a realm of constant invention, which was just as constantly presented as convention. Under the new conventions, new purposes arose, and so the cycle continued."[11]

Embodying a decade of research and writing, *Litigation and Inequality* is an ambitious and difficult book, written in a dense though lucid style that at times requires careful re-reading. Part I of this Review explains the boundaries that Purcell establishes to guide his analysis. Turning to the substance of his argument and the conclusions he draws from his investigation, Part II focuses on the core of Purcell's interpretative structure. By examining the specific example of a social litigation system—"the system of corporate diversity litigation"[12]—presented in *Litigation and Inequality*, it seeks to assess the utility of the social litigation system as an organizing concept for legal history. This Review concludes that the success of Purcell's history underscores the continuing need for work in legal history that delineates *reciprocal* influences of technical legal doctrines and the evolution of actual legal behavior in both formal and informal legal processes.[13]

I

BOUNDARIES

The focus of Purcell's interpretative enterprise is federal diversity litigation—"the jurisdiction of the federal courts to hear suits between citizens of different states"[14]—in the period 1870-1958. Purcell limits his

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[9] E. Purcell, supra note 7, at vii.

[10] R. White, supra note 1, at 52.

[11] Id.

[12] E. Purcell, supra note 7, at 4; see notes 32-36 and accompanying text infra.

[13] For a discussion of Purcell's concept of the "informal legal process," see notes 48-59 and accompanying text infra.

[14] E. Purcell, supra note 7, at 4. For the authoritative professional discussion of diversity jurisdiction, see 13B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure §§ 3601-3630 (2d ed. 1984 & Supp. 1993); 14 id. §§ 3631-3642 (2d ed. 1985 & Supp. 1993). For the authoritative discussion of related issues addressed by Purcell (such as removal jurisdiction and amount-in-controversy requirements), see 14A id.

One minor flaw in *Litigation and Inequality* is Purcell's failure, in his brief discussion of the origins and pre-1870 history of diversity jurisdiction, at 14-16, to cite recent scholarship on

inquiry in three distinct ways: by time, by type of litigation, and by jurisdictional category.

Purcell adopted a chronological framework for two reasons. First, "litigation strategies and patterns, like other social phenomena, are historically specific."[15] Focusing on the decades between Reconstruction and the mid-twentieth century, Purcell delineates the "emergence, spread, and decline of an identifiable combination of such strategies and patterns."[16] Second, Purcell emphasizes the utility of studying federal diversity litigation in the age of industrial America. From the 1870s through the 1940s, he notes, the United States experienced its most significant industrial development. Not only did these years witness the emergence of national corporations, they also "produced an essentially new social type of legal dispute, one between aggrieved individuals and national corporations, and it generated literally millions of such disputes."[17]

In addition to these temporal boundaries, Purcell limits the substantive scope of his inquiry to two kinds of legal disputes that pit individual plaintiffs against national corporate defendants: "contract claims for insurance benefits and tort claims for personal injuries."[18] He chooses these categories for two reasons: first, because they made up the major part of the caseload of the federal courts; second, because they had great and increasing importance for ordinary Americans who brought these claims to court.[19]

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the origins of the federal court system and the early years of diversity jurisdiction. See, e.g., Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789 (Wythe Holt & L. H. LaRue eds., 1990); Wythe Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 Duke L.J. 1421.

15 E. Purcell, supra note 7, at vii.

16 Id.; see also id. ("The social significance of 'technical' procedural and jurisdictional rules, in other words, is as historically contingent as is any other aspect of law or society."). The "identifiable combination" of "litigation strategies and patterns" is another way of describing the social litigation system of corporate diversity litigation. See Part II infra.

17 E. Purcell, supra note 7, at 4.

18 Id.

19 Purcell acknowledges the presence on federal diversity dockets of a host of other categories of cases—including "equity receiverships, suits involving commercial transactions, and disputes over real property and corporate governance"—each of which, as he notes, "merits its own examination, and . . . is likely part of one or more other social litigation systems." Id. at 294 n.3. However, the statistics presented, for example, by the report of the National Commission on Law Observance and Enforcement on its study of thirteen federal judicial districts for the period 1929-1930 suggest the soundness of Purcell's decision to focus on these two categories of cases:

> [A]pproximately 70 percent of all diversity cases (1,816) and 86 percent of all diversity actions at law (1,493) were tort or contract disputes. Insurance contract cases made up 13 percent of the law docket, and negligence actions 52 percent. Foreign corporations were defendants in well over half of the cases, and residents of the forum state were plaintiffs in almost 60 percent. Of all actions brought by resident plaintiffs, 86 percent

Finally, Purcell selects federal diversity jurisdiction as both a focus of historical inquiry and a core element of the social litigation system that is the subject of his book.[20] The justifications for his choices are not hard to find or to articulate. Historians agree that the Civil War and Reconstruction transformed the nature both of American constitutional federalism and of individual citizens' relationships with their nation and their state,[21] and that the experience of the war fostered the continuing integration of a national economic system.[22] In the years following Reconstruction, the development of ever more rapid, efficient, and reliable systems of interstate transportation and communication combined with the corresponding rise in the number and variety of interstate economic transactions to produce a dramatic growth in the volume and types of diversity litigation. As early as 1876, a House of Representatives report identified diversity suits as "the largest and most rapidly-increasing class of Federal cases"; in 1896, another House report concurred.[23]

Purcell does not study the whole range of diversity lawsuits.[24] Rather, emphasizing the last half of his subtitle ("Federal Diversity Jurisdiction *in Industrial America*"), he focuses on two types of cases: "negligence actions brought against manufacturing and railroad companies, particularly by injured employees; and contract actions brought against insurance companies, generally though not exclusively by claim-

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were against foreign corporations, and of all actions brought against foreign corporations, almost 93 percent were brought by resident plaintiffs.

Id. at 21 (citing American Law Inst., A Study of the Business of the Federal Courts: Part II Civil Cases 56, 99-100 (1934)).

[20] Oddly, Purcell seems to assume as self-evident the importance of federal diversity jurisdiction both as a focus of historical inquiry and as a key element of the social litigation system under examination. Nowhere in *Litigation and Inequality* does he provide an explicit justification for these interpretative decisions. In this discussion I try to make explicit the implicit assumptions and generalizations underlying Purcell's choice to focus on diversity jurisdiction. See also William A. Braverman, Note, Janus Was Not a God of Justice: Realignment of Parties in Diversity Jurisdiction, 68 N.Y.U. L. Rev. (forthcoming 1994).

[21] See generally, e.g., Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877 (1988) (analyzing revolutionary goals and fragmentary achievements of Reconstruction's architects); James M. McPherson, Abraham Lincoln and the Second American Revolution (1991) (emphasizing revolutionary character of the Civil War and Reconstruction); William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine (1988) (analyzing nature and limits of the revision of constitutional federalism by framing and adoption of fourteenth amendment); Robert Penn Warren, The Legacy of the Civil War: Meditations on the Centennial (1961) (assessing Civil War's effects on wide variety of national political, social, economic, cultural, sectional, racial, and philosophical issues).

[22] See J. McPherson, supra note 21, at 37-40 (citing Leonard P. Curry, Blueprint for Modern America: Nonmilitary Legislation of the First Civil War Congress (1968), Barrington Moore, Jr., Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World (1966), and G.S. Boritt, Lincoln and the Economics of the American Dream (1978)).

[23] See E. Purcell, supra note 7, at 20.

[24] See note 19 supra.

ants under relatively small personal life, health, and disability policies."[25] These two types of lawsuits, Purcell maintains, are distinctive products of the pivotal era of American industrial growth.

Purcell presents copious, dramatic evidence of the increases both of tortious injuries and insurance business, and of litigation arising from those transactions, during the decades between 1880 and 1920. Purcell identifies the nation's railroads as "the paramount sources of danger"[26] and provides sobering statistics tracing the steep rise in human fatalities and injuries during that period. Between 1890 and 1900, about 2,000 railroad workers were killed and 25,000 to 35,000 more were injured each year. From 1900 to 1920, the rate of fatalities per year doubled (3,000 to 4,000 killed), and the yearly rate of injuries nearly quadrupled (100,000 injured).[27] Nonemployees ("[p]assengers, shippers, bystanders, trespassers, and employees of third parties") were injured less frequently but ran a much greater risk of death; in the 1890s, 15,000 nonemployees suffered injuries in railroad accidents per year, one-third of them resulting in death, and in the period from 1900 to 1920, the fatality rate was twenty to thirty percent of the 15,000 to 35,000 nonemployees injured.[28] Purcell also documents the growing economic importance of the interstate insurance business. For example, insurance companies' assets increased by 12,000 percent in the last five decades of the nineteenth century, with a growth in "so-called industrial insurance" (covering workers' medical expenses and burial costs) from $13 million in 1880 to nearly $1 billion by 1897.[29]

It was not merely the growth of diversity litigation but the particular shape that growth took that launched the social litigation system at the core of *Litigation and Inequality*. As a geographical fact and as a body of constitutional doctrine, federalism was a principal constraint on prospective litigants' decisions to bring or defend suits in federal court.[30] The resulting availability, in suits pitting individual plaintiffs against national corporations, of the power to select a federal *or* a state court—and the real and perceived differences between the two court systems in legal

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[25] E. Purcell, supra note 7, at 4; see also id. at 20-22 (describing corporate diversity litigation system and concluding that "diversity docket was dominated by negligence actions and by suits on insurance contracts, most of which were between resident plaintiffs and foreign corporations").

[26] Id. at 19. Purcell also notes such seemingly trivial phenomena as the increase in late nineteenth-century Boston's trolley-car accidents: "[T]rolley car accidents rose from 200 in 1889 to more than 1,700 by 1900, and the number of resulting tort suits jumped from fewer than 20 in 1880 to more than 1,400 only twenty years later." Id.

[27] Id.

[28] Id.

[29] Id. at 20.

[30] See Part II infra.

ability, professionalism, and bias or prejudice—presented these litigants and their attorneys with a choice between more and less sympathetic (or more and less hostile) forums for their lawsuits.[31] The procedural complexities attending the availability of federal diversity jurisdiction (a result of the historic tendency to impose limits on the scope of authority of federal courts) afforded lawyers on both sides a wide range of opportunities to secure strategic and tactical advantages in diversity litigation. *Litigation and Inequality* implicitly asserts and demonstrates the centrality of such seemingly mundane considerations to the history of federalism and of American law.

II

THE CONCEPT OF THE SOCIAL LITIGATION SYSTEM

The boundaries that Purcell sets for his scholarly enterprise—of period, type of lawsuits, and jurisdiction—frame his delineation of the rise, development, and extinction of one social litigation system: the system of corporate diversity litigation. After a brief discussion of Purcell's definition of the general concept of a social litigation system, this Part focuses on his study of the life-cycle of the system of corporate diversity litigation. It concludes by assessing both the utility of the general concept and the specific application Purcell demonstrates in *Litigation and Inequality*.

A. Unpacking the Definition

Purcell defines a social litigation system as "a coherent and dynamic set of patterns of claims-disputing behavior that arises from an identifiable combination of social and legal factors."[32] Justifying the necessity and utility of this concept, he points out that:

> historical conditions regularly lead certain types of parties to dispute a relatively limited number of issues against one another in certain consistent ways and that most of the legally-related activity in any given period can be broken down into some number of different behavioral patterns that are recognizably "legal" and at the same time markedly

[31] Throughout *Litigation and Inequality*, Purcell rightly distinguishes between what his historical actors believed or presumed about the relative quality and impartiality of state and federal courts and what the historical evidence, such as it is, actually shows about differences between the two court systems. He implies correctly that later historians have tended to accept such assumptions by contemporaries at face value without testing them against the available evidence. But he also notes, equally correctly, that these assumptions *did* guide litigants' behavior, whether or not they turn out to be empirically correct. See, e.g., Purcell's sensitive and perceptive discussion of "[t]he [c]orporate [p]reference for the [f]ederal [c]ourts," E. Purcell, supra note 7, at 22-27.

[32] Id. at 3.

different.[33]

How do we recognize a given social litigation system? Although Purcell does not provide examples beyond that at the core of *Litigation and Inequality*,[34] he notes as the defining characteristics of a social litigation system the "prevailing historical conditions, the social characteristics of the parties, the types of issues that the parties are led regularly to dispute, and the special subsets of legal rules—both substantive and procedural—that are particularly relevant and useful to their litigation strategies."[35]

Instead of presenting a typology of social litigation systems or listing a series of historical social litigation systems for future historians to explore, Purcell illustrates the utility of the social litigation system as an historian's analytical tool by presenting a close historical analysis of a single example. *Litigation and Inequality* is not a history of social litiga-

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[33] Id.

[34] Although Purcell does not give examples of other social litigation systems, see notes 167-68 and accompanying text infra, his criteria, see text accompanying note 33 supra (quoting E. Purcell, supra note 7, at 3), suggest that the ongoing civil rights litigation of the 1940s, 1950s, and 1960s might well qualify. The following paragraphs sketch one possible application of Purcell's criteria:

(i) *"historical conditions"*: The "historical conditions" giving rise to civil rights litigation grow out of 250 years of slavery, followed by more than a century of post-slavery racial discrimination under the color of law, both of which are built upon a foundation of over 300 years of racial prejudice.

(ii) *"certain types of parties"*: Two types of parties regularly oppose one another in civil rights litigation—(a) individuals who are members of racial minorities seeking to assert or vindicate claims to fundamental rights denied on the basis of race, or claims to equal protection of the laws, against race-based governmental or private policies versus (b) government officials or institutions seeking to defend the policies at issue or private individuals or organizations seeking to defend their practices at issue.

(iii) *"a relatively limited number of issues"*: Because of the pervasiveness of racial prejudice in American society—and consequently in American law—issues disputed in civil rights litigation represent virtually the whole spectrum of public and private law, and civil and criminal law. However, the reliance of these claims on constitutional guarantees of equal protection and due process and the constitutional prohibition of slavery and its badges and incidents serves to limit the number of issues presented by civil rights litigation.

(iv) *"in certain consistent ways"*: While a tribute to the ingenuity of civil rights lawyers, the range of civil rights litigation strategies still retains internal consistency in both constitutional and legal foundations, intellectual structure, and doctrinal direction. See generally, e.g., Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987) (discussing civil rights movement and litigation); Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism (1992) (same); Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black American Struggle for Equality (1976) (history of civil rights litigation culminating in *Brown*); J. Harvie Wilkinson, III, From Brown to Bakke: The Supreme Court and School Integration: 1954-1978 (1979) (same, focusing on judicial response to litigation).

Professor William E. Nelson of the New York University School of Law is now at work on a full-length study of litigation in twentieth-century New York that, when completed, will present a series of case studies of social litigation systems. See note 178 infra.

[35] E. Purcell, supra note 7, at 3.

tion systems as such, nor does it examine the entire set of social litigation systems that made up the full range of federal diversity litigation in his chosen period. Rather, Purcell scrutinizes the rise, development, and fall of one social litigation system with an identifiable set of participants, cluster of origins, and course of development.

B. Tracing the Life-Cycle of a Social Litigation System

Litigation and Inequality[36] presents a tightly reasoned and formidably documented account of the origins, maturation, decline, and disintegration of the system of corporate diversity litigation.[37] Purcell unerringly focuses on the legal "middle ground" where all participants in the system of corporate diversity litigation met to seek their own ends, and on the ways that the system expanded, contracted, and evolved until its final dissolution and replacement.

In Purcell's account, the rise and fall of the system of corporate di-

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[36] Purcell's title addresses the inequalities—in resources available for litigation and ability to bring or defend lawsuits in the federal courts—between individual plaintiffs and corporate defendants *without* presenting a simplistic caricature of "good-guy" individual plaintiffs versus "bad-guy" corporate defendants. As he writes,

> This book looks at the patterns of claim disputing and litigation between those two unequal groups of litigants that developed around federal diversity jurisdiction, the jurisdiction of the federal courts to hear suits between citizens of different states. It focuses on the problems that relatively ordinary individuals faced when they were forced to dispute claims against national corporations that were capable of invoking the jurisdiction of the federal courts.

Id. at 4. For a fair-minded discussion of the "paramount fact" of "inequality between the parties" in "disputes between individuals and national corporations," see also id. at 28-31. Throughout *Litigation and Inequality* Purcell pursues the nature and degree of changes in the relative inequalities between individual plaintiffs and corporate defendants.

[37] Although the bulk of *Litigation and Inequality* presents this story, the opening section of Chapter 11 presents an admirable summary. See id. at 244-48. *Litigation and Inequality* is, despite some close analysis of statistics of court caseloads, predominantly a sensitive and historically-informed synthesis of the statistical findings of other scholars. Purcell combines this statistical portrait with close and attentive analyses of doctrine in the hands of judges and practical litigation strategies as described in legal treatises and commentaries, law review articles, and practice manuals and as exemplified by specific cases. Purcell explains:

> [T]here is sufficient evidence to identify the nature of the patterns and to chart the ways in which they changed. Statistical data, though spotty, establish the system's outlines with clarity, and congressional reports and hearings fill in much of the detail. Case reports reveal both the persistent reappearance of critical fact situations and the repeated use of specific litigation tactics and countertactics. Statements by judges, lawyers, litigants, and legal writers further delineate the system's scope and operation. Political evidence—though only touched on here—is confirmatory, showing that national corporations and their attorneys consistently defended the legal rules that allowed them access to the national courts, whereas populists, progressives, New Dealers, and plaintiffs' attorneys criticized those elements repeatedly.

Id. at 5. One point about Purcell's use of primary sources deserves mention here: Purcell makes excellent use of the statistics of court caseloads prepared by congressional staffs and committees throughout this period, suggesting the enduring utility of such statistical work for purposes beyond those driving the original compilation of these studies.

versity litigation had three complex, occasionally overlapping stages: (1) its coalescence from the 1870s to the 1880s; (2) its dominance from the 1880s through the 1910s; and (3-a) its contraction and further maturation from the 1910s into the 1940s, leading to (3-b) its disintegration, from the late 1930s through the mid-1950s.

1. Coalescence, 1870s-1890s

Beginning in the 1870s and continuing to the early 1890s, "distinctive forms and patterns of litigation coalesced into a recognizable system."[38] In this first stage of the system's life, a growing number of individual plaintiffs were able to bring suit against corporate defendants outside the defendants' chartering states, thanks to a combination of statutory rules and Supreme Court decisions fostering such litigation.

Purcell identifies the origins of the system of corporate diversity litigation[39] in the confluence of two distinct historical phenomena—the development and evolution of federal diversity jurisdiction[40] and the rise of national business corporations operating in a newly integrated national economy.[41] The story of the rise of the system of corporate diversity litigation in the last decades of the nineteenth century is a complex—and at times appalling—story of how individual plaintiffs, corporate defendants, and their attorneys learned to use a bewildering variety of litigation strategies in disputing, litigating, and trying to force settlement of claims.

A series of decisions by the Supreme Court spurred the synergistic relationship between the realities of federalism and the increasing strategic and tactical sophistication of diversity litigation that resulted in the system of corporate diversity litigation.[42] Purcell identifies two Court decisions in this period as the critical first and second steps in the system's birth: *Railroad Co. v. Harris*[43] authorized federal courts to hear lawsuits involving corporations chartered outside the state in which the federal court sat, and *Ex parte Schollenberger*[44] expanded the jurisdiction of federal courts to include suits that foreign corporations had removed from state courts. *Harris* and *Schollenberger* appeared to stand only for the general goal of assisting individuals who wanted to sue foreign corporations in federal courts.

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38 Id. at 244.

39 See id. at 13-27.

40 See id. at 14-16.

41 See id. at 16-20. Purcell observes: "The changing economic system thus generated significant new classes of cases that repeatedly pitted injured or aggrieved individuals against national corporations." Id. at 20.

42 See id. at 17-18.

43 79 U.S. (12 Wall.) 65 (1870).

44 96 U.S. 369 (1878).

Nearly twenty years after *Harris* and *Schollenberger*, *St. Louis & San Francisco Railway Co. v. James*[45] took the third and final step in the creation of this social litigation system. *James* held that states could not enact statutes to transform out-of-state corporations into citizens of states where they did business. The result was that corporations could limit their citizenship to the state in which they were incorporated, leaving themselves eligible to invoke federal diversity jurisdiction in every other state in the Union.[46] *James* thus transformed the doctrinal world that *Harris* and *Schollenberger* had established. With all three jurisprudential steps in place, and with the development of state statutory methods by which a corporation could secure an out-of-state charter or transform its in-state charter to an out-of-state charter, "[l]arge national corporations had the legal sophistication, economic resources, and doctrinal opportunities," in addition to the "powerful incentives" that the growing numbers of interstate torts and insurance claims provided, to use federal diversity jurisdiction.[47]

In this transformed world of interstate diversity litigation, national corporate defendants and their attorneys had to respond to a flood of lawsuits by individual plaintiffs seeking to use the system as then constituted. The pressure of diversity litigation forced corporate defendants to devise creative litigation strategies that would turn the social and practical conditions of diversity litigation—distance and delay—to their advantage. In the process of devising defense strategies based on procedural complexities, corporate defendants learned how to shift the burdens of interstate diversity litigation to individual plaintiffs who could sustain them only with great difficulty or not at all.

Purcell cites several noteworthy examples of national corporations' defensive strategies and tactics. One, rooted in what Purcell terms the nexus between "the social structure of party inequality and the informal legal process,"[48] was corporate defendants' increasingly skillful practice of inducing individual plaintiffs to discontinue or to settle their claims.[49] The pursuit of discontinuances or settlements depended on a corporate defendant's awareness of the federal system's twin problems of distance and delay; unlike a national corporation, which could muster the resources and the patience to defend a lawsuit from great distances and for

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45 161 U.S. 545 (1896).

46 See E. Purcell, supra note 7, at 18.

47 Id. at 19.

48 Id. at 28 (this phrase is the title of Chapter Two). See also Purcell's comment about how the development of federal common law doctrines favoring national corporations "undoubtedly help[ed] discourage, discount, or defeat far more claims than ever reached final legal judgment or appeared in the law reports." Id. at 86.

49 See id. at 28-58.

long periods of time, individual plaintiffs often lacked the financial capacity or patience to outlast or outfight their corporate adversaries. As a lawsuit dragged on, a corporate defendant could expect a discouraged plaintiff to find a settlement offer increasingly attractive. If the corporate defendant decided not to propose settlement but to continue to defend the lawsuit, mounting costs and delays would force all but the most determined individual plaintiffs to drop their suits.[50]

Here and throughout *Litigation and Inequality*, the ways that disputing parties chose to settle or discontinue litigation are at least as important as the litigation strategies they pursued, either when they ruled out the possibility of settlement or when they failed to achieve it. Noting that "formal processes . . . accounted for the resolution of only a small percentage of claims against corporations,"[51] Purcell makes a valuable distinction between formal and informal legal processes.

In his discussion of discontinuance and settlement, as elsewhere in his book, Purcell avoids the easy path of demonizing corporate defendants. Rejecting the view that corporations adopted a Scrooge-like view of workers' claims, he notes that corporate officials "often showed considerable sympathy for the plight of individual claimants . . . , exhibit[ing] special concern for badly injured workers, particularly for workers known to be reliable and who had been victimized by forces beyond their control."[52] These officials "often made special efforts to provide some relief for such people, and they did not purposely try to deprive them of what they regarded as 'just' compensation."[53] Even so, "corporate officials were caught up in the effort to manage large-scale operations, to impose general rules of policy, and, above all, to minimize their costs of operations."[54] Furthermore, their "cultural world view," rooted as it was in the experience and expectations of "a relatively successful but new and insecure bureaucratizing business class . . . filtered out the kinds of consideration that could impair their chances of success."[55] Corporate officials tended to assume that "industrial injuries were overwhelmingly the result of some kind of 'fault'—ignorance, carelessness, recklessness, stupidity, drunkenness, or even defiant wilfulness—on the part of workers."[56] Assumptions like these bred a willingness on the part of corporate officials to avail themselves of "the

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[50] See id. at 28-29.

[51] Id. at 5. "Most of those claims, in fact, were never brought to the courts, and a majority of those that did become lawsuits were discontinued before final judgment." Id.

[52] Id. at 28.

[53] Id. (citation omitted).

[54] Id.

[55] Id.

[56] Id.

institutional advantages that corporations enjoyed in claim disputes."[57]

Either a plaintiff's decision to discontinue his lawsuit or a plaintiff's acceptance of a settlement offer would serve the corporate defendant's interests. While discontinuances meant that corporate defendants only had to spend money on legal representation, settlements allowed corporate defendants to limit their liability to a fraction of what might result from a full trial on the merits followed by a bench or jury verdict. Further, the existence and manipulability of litigation strategies often defined the manner in which parties chose to settle or discontinue lawsuits. For example, as Purcell notes,[58] the amount-in-controversy requirement of $500 set by statute in the 1870s tended to induce local railroad officials to settle claims for under $500 as a matter of course without consulting their supervisors. The amount-in-controversy requirement thus became "a partial but nevertheless effective limitation on corporate liability . . . [and] a distributive economic force that impinged seriously on individual plaintiffs."[59]

If a case could not be disposed of by forcing a discontinuance or negotiating a settlement, corporate defendants wielded such technical doctrines as federal removal jurisdiction to their procedural and substantive advantage. In the procedural context, removal enabled an out-of-state corporate defendant to transfer a case brought in the plaintiff's home state from a presumably hostile state court to a presumably more impartial or friendlier federal district court.[60] With respect to the legal substance of diversity litigation, removal would secure for the out-of-state corporate defendant the arguable benefits of a more benign federal common law and would dissipate the threat posed by a harsher state common law.[61]

The pride of place that *Erie Railroad Co. v. Tompkins*[62] has in civil procedure courses has made a truism of the idea that, for nearly a century prior to that decision,[63] litigants in diversity cases could choose be-

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[57] Id. at 29.

[58] See id. at 97-103.

[59] Id. at 97. Purcell follows these observations with a cautious but persuasive series of observations designed to gauge the scope of the impact of the jurisdictional amount. See id. at 97-103.

[60] See id. at 88-90, 127-47.

[61] See id. at 59-86.

[62] 304 U.S. 64 (1938) (reinterpreting § 34 of Judiciary Act of 1789 to require that, in a lawsuit based on federal diversity jurisdiction, a federal district court must determine the rule of decision of the case by following common law precedents of the state where it sits, or of the state whose law governs the lawsuit before it, rather than following "federal common law"). For a discussion of *Erie*, see E. Purcell, supra note 7, at 224-30.

[63] *Erie* ended the 96-year-long era of federal common law that began in 1842 with the Supreme Court's decision in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). See generally Tony Freyer, Harmony & Dissonance: The *Swift* and *Erie* Cases in American Federalism (1981).

tween state courts interpreting and applying their home state's common law and federal courts in the same state interpreting and applying a frequently divergent federal common law rule. Purcell's chapter on the federal common law[64] sets the longstanding historical and legal controversies about the development and purposes of federal common law doctrine within the context of their actual use by individual plaintiffs and corporate defendants. He emphasizes how, in the period between Reconstruction and the turn of the century, the federal common law developed in three ways "fundamental to the operation of the system of corporate diversity litigation. The scope of the federal common law expanded; its disagreements with the common law rules enforced in the state courts multiplied; and some of its basic rules came increasingly to favor the interests of national corporations."[65] Focusing on the federal common law of insurance contracts,[66] industrial torts,[67] and tortious and contractual liability of common carriers,[68] Purcell's lucid analysis of the complex windings of federal common law doctrine makes clear why federal courts became "forums that innumerable private plaintiffs wished to avoid."[69]

Purcell's analysis of removal jurisdiction is also noteworthy for its subtlety and suggestiveness. He tests the conventional justification for removal jurisdiction—that removal protects the nonresident party from local prejudice—by reference to three perspectives. First, Purcell demonstrates that the law governing the availability of removal jurisdiction evolved in pace with the Supreme Court's general pattern of managing diversity jurisdiction as a series of "calculated and changing responses to the system of corporate diversity litigation"[70]: from the 1870s to the 1890s, narrowly, to limit removal; from the 1890s to 1905, broadly, to increase the availability of removal; and after 1905, narrowing "drastically" the availability of removal.[71] Second, he suggests that corporations may have exaggerated the dangers of local prejudice and that, when pressed to prove their contentions of outcome-determinative prejudice, they could not do so.[72] Third, Purcell juxtaposes the experience of removal outside the system of corporate diversity litigation (specifically, under the 1866 Civil Rights Act) with that within the system, demonstrating in the process that the federal courts were by no means consis-

64 E. Purcell, supra note 7, at 59-86.
65 Id. at 61.
66 See id. at 64-72.
67 See id. at 72-82.
68 See id. at 82-86.
69 Id. at 86.
70 Id. at 129.
71 Id. at 128; see also id. at 129-37.
72 See id. at 129, 137-42.

tent in their concern for guarding against unfairness traceable to local prejudice.[73]

Reeling from the successes garnered by astute corporate defense attorneys, individual plaintiffs developed litigation tactics and procedural weapons of their own. For example, in what Purcell calls the tactic of "delayed upward amendment,"[74] individual plaintiffs defeated federal jurisdiction by manipulating the amount-in-controversy requirement for claims allowable in federal court. Plaintiffs deliberately set the damages they claimed below the jurisdictional minimum, so that the out-of-state corporate defendant could not remove the case. Later in the lawsuit, the plaintiff would amend the complaint to boost the amount of damages sought, timing this delayed upward amendment both to avoid removal to a presumably less sympathetic federal court *and* to secure the benefit of an increased potential recovery of damages in the state trial court.[75]

Statutory changes in the amount-in-controversy requirement afforded plaintiffs greater opportunities to develop this tactic of delayed upward amendment. For example, in the 1870s, the minimum amount-in-controversy was set at $500. To narrow the jurisdiction of the federal courts to stem the judiciary's burgeoning workload, the Judiciary Act of 1887 abruptly raised the jurisdictional amount from $500 to $2,000. This quadrupling of the amount-in-controversy made it far more attractive for plaintiffs to discount their claims to avoid federal removal jurisdiction, for they would be losing far less than they had under the pre-1887 limit.[76]

Plaintiffs' manipulation of the amount-in-controversy requirement had its greatest impact on the nation's state courts, which heard over ninety percent of the cases brought in the United States.[77] Purcell rejects the traditional view that plaintiffs typically brought their cases to state court because their claims were small. Rather, he argues, plaintiffs set their claims low precisely to defeat federal removal jurisdiction. He substantiates his case by carefully juxtaposing[78] an examination of state and federal claims litigated over time with an analysis of changing economic conditions, specifically the wages of railroad workers and average annual earnings of nonfarm labor. The ratio of the jurisdictional amount to a claimant's average annual income (which measures the often steep claims-discounting that plaintiffs had to accept in order to defeat removal) "provides a rough measure of the human meaning of the jurisdic-

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[73] See id. at 129, 142-47.
[74] Id. at 90-97, 112-14.
[75] See id. at 90-97.
[76] See id. at 91.
[77] See id. at 97.
[78] See id. at 98-103.

tional amount in the context of the system of corporate diversity litigation."[79]

Purcell concludes his discussion of the amount-in-controversy rule by pointing out that "[t]here is little or no necessary correspondence between the doctrinal prominence of a rule and its social significance or, more importantly, between its theoretical complexity or intellectual magnetism and its practical impact."[80] Despite the seeming "insignifican[ce] and uninteresting[ness]" of the amount-in-controversy rule, he concludes that "for half a century it may have been one of the most effective, if indirect, distributive rules in the American legal system."[81]

In a more doctrinally complex procedural strategy, an individual plaintiff could use the federal joinder rules to defeat removal. The plaintiff would bring parties into the lawsuit, "either small local companies that had some legal or business relation with the foreign corporation or, by far the more common, resident employees of the corporation who had some involvement with the injury,"[82] whose presence would produce incomplete diversity of citizenship. This tactic would thus preclude the out-of-state corporate defendant's bid to remove the case from the state court to a federal court.[83] As Purcell points out, this procedural device

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[79] Id. at 98-99. Purcell reports:

> [T]he average annual earnings of nonfarm labor rose from around $300 before the Civil War to near $500 in the early 1870s, dropped back to around $425 in the later 1870s, and then rebounded to approximately $500 in the late 1880s. The 1890s forced a drop to around $450, but a slow climb began from about $470 in 1897 to $574 in 1910, and then to $633 in 1915. World War I forced up average wages rapidly, and they surged above $1,400 in 1920. After falling slightly in the brief postwar recession, they stayed in the $1,400 to $1,500 range for the rest of the decade, before dropping in the 1930s to a Depression low of just above $1,000 in 1933.

Id. Thus, for example, in the 1870s and most of the 1880s the federal jurisdictional amount-in-controversy was $500. The upward pressure of average annual income in that period limited an injured railroad worker who wanted to avoid removal of his suit to federal court to seeking damages of less than one year's wages. The quadrupling of the jurisdictional amount-in-controversy by Congress in 1887, see text accompanying note 76 supra, made it possible for the same injured worker to seek damages equal to more than three years' salary in a state-court lawsuit without fear that the railroad could seek removal to federal court. A similar analysis comparing the jurisdictional amount to the compensation available under workmen's compensation statutes produces similar results. See id. at 99-100.

[80] Id. at 103.

[81] Id. The rule not only made federal courts unavailable to plaintiffs seeking small monetary damages, but also, as Purcell explains, "transformed into 'small' cases untold numbers of claims that were crucial to aggrieved individuals and whose proper value was by no means small. In the system of corporate diversity litigation, the jurisdictional amount did not just reroute small claims, it created them." Id.

[82] Id. at 107.

[83] See id. at 104; see also id. at 105-26. The requirement of complete diversity was first established by the Supreme Court in Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). See 2 George L. Haskins & Herbert A. Johnson, The Oliver Wendell Holmes Devise History of the Supreme Court of the United States—Foundations of Power: John Marshall, 1801-15, at 616-18 (1981). Before *Strawbridge*, federal courts operated on the principle of minimum diver-

was far more attractive to plaintiffs, because it permitted them with one stroke to defeat defendants' attempts to remove to federal court while preserving plaintiffs' abilities to assert large claims.[84] A corporate defendant could defeat a plaintiff's aggressive use of joinder by demonstrating either that the joinder was a sham (that is, that the plaintiff had joined the nondiverse defendant solely to defeat diversity jurisdiction) or that the controversy between the plaintiff and the nondiverse defendant was separable from the case between the plaintiff and the nonresident corporation. As Purcell notes, corporate defendants fought plaintiffs' use of joinder rules with "tenacity and determination," apparently in the hope that such vigorous opposition would increase plaintiffs' costs sufficiently to make manipulative joinder an unattractive option.[85] Some of the sharpest and most contentious lawyering within the system of corporate diversity litigation pitted individual plaintiffs' aggressive use of joinder to defeat removal against corporate defendants' equally determined battles to expose the joinders as shams or to declare the disputes between the plaintiffs and the nondiverse defendants separable controversies.

2. *Dominance, 1880s-1910s*

In the decades bridging the nineteenth and the twentieth centuries, the legal and procedural determinants of the system of corporate diversity litigation shifted decisively in favor of corporate defendants and against individual plaintiffs. Decisions of the Supreme Court either limited or abolished (as in the case of the "delayed upward amendment" tactic) many of the individual plaintiffs' most useful litigation weapons, while strengthening those techniques and substantive federal common law rules[86] favoring corporate defendants who wished to remove lawsuits from state to federal courts.

For example, the distance between two decisions of the Supreme Court on the "delayed upward amendment" tactic is a notable demonstration of the shift in favor of corporate defendants.[87] In *Northern Pacific Railroad Co. v. Austin*,[88] a lawsuit by a plaintiff based on fire damage caused by the railroad's locomotive, the plaintiff sought damages just below the statutory minimum for federal jurisdiction, precluding the railroad from removing to federal court. Then, just before trial, but too late

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sity—that is, as long as any one plaintiff was from a different state from any one defendant, diversity jurisdiction would be available. See id. at 616-18.

[84] See E. Purcell, supra note 7, at 104.

[85] Id. See generally id. at 104-26.

[86] See id. at 64-86, 245.

[87] See id. at 95-96, 113-14, 245. On the origins of this tactic, see notes 74-81 and accompanying text supra.

[88] 135 U.S. 315 (1890).

under the statute to permit removal, the plaintiff amended his complaint and raised the amount sought above the jurisdictional minimum. The Court let stand the judgment for the plaintiff despite the railroad's angry the assertion that the plaintiff had deliberately manipulated the rules to preclude timely removal.[89]

By contrast, in *Powers v. Chesapeake & Ohio Railway Co.*,[90] the Justices held that whenever a case that was initially nonremovable became removable because of a plaintiff's voluntary action (in that case, a plaintiff's dismissal of resident defendants before trial),[91] a defendant could still remove to federal court. Although the Court did not specifically address the "delayed upward amendment" controversy, the decision in *Powers* left little doubt that the Justices were ready to discard the rule in *Austin*. Subsequent decisions on amount-in-controversy questions continued the process of burying the *Austin* rule.[92]

Similarly, in *Warax v. Cincinnati, New Orleans & Texas Pacific Railway Co.*,[93] federal circuit judges choked off plaintiffs' other tactic of joining resident nondiverse defendants to defeat federal removal jurisdiction. *Warax* was particularly noteworthy because one of the circuit judges who decided it was future President and Chief Justice William Howard Taft.[94] Warax had filed suit in state court, but immediately dismissed when the railroad removed the case. He then refiled, adding a resident employee as a second defendant. Taft held for the court that the resident employee might be liable on the grounds of personal negligence, and that the railroad defendant would be liable only under the "public policy" doctrine of respondeat superior. However, because there was no joint cause of action linking the railroad corporate defendant and the resident employee defendant, Taft concluded that "[l]iabilities created on two such wholly different grounds cannot and ought not to be joint."[95] Therefore, the *Warax* court held, the plaintiff's motion to remand to state trial court was denied. Despite other federal judges' qualms about *Warax*, "[b]y the late 1890s [it] had established itself as a leading if con-

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89 See id. at 317-18.

90 169 U.S. 92 (1898).

91 See id. at 101. On plaintiffs' joinder tactics to defeat removal, see text accompanying notes 82-85 supra.

92 See E. Purcell, supra note 7, at 113-14.

93 72 F. 637 (C.C.D. Ky. undated, circa 1896).

94 As President, Taft appointed the other judge in *Warax*, Horace Lurton, to the Supreme Court in 1909. Ironically, Taft also had decided the lower-court version of *Powers*; whereas the Supreme Court upheld Taft's denial of the plaintiff's motion to remand, it did not follow the aggressively pro-defendant reasoning, based on challenging plaintiff's manipulations as fraudulent, that Taft had outlined in his opinion in *Powers*. See E. Purcell, supra note 7, at 109-10, 112-14.

95 *Warax*, 72 F. at 643.

troversial federal authority that negated the joinder tactic."[96]

Even when the Justices had chances in the years after *Warax* to confront the case directly, and thus to resolve "the most critical procedural question in the system,"[97] they tended to pass them up. For example, in *Powers*, the Justices ruled narrowly, holding that the plaintiff could not use joinder to defeat removal, but only if he voluntarily dismissed the resident defendant before trial.[98] The Court also allowed the joinder tactic in *Chesapeake & Ohio Railway Co. v. Dixon*.[99] Mrs. Dixon sued the railroad and two of its resident employees after her husband had been killed at a street crossing. The railroad asserted that Mrs. Dixon's suit against it was separable from her suit against the resident employees for the same reasons that the *Warax* decision had articulated. But the Justices were reluctant to confront *Warax*. Although the Court permitted the state court to refuse to order removal, it did so not by rejecting *Warax* but simply by stating that: "[I]t cannot properly be held that it appeared on the face of this pleading, as a matter of law, that the cause of action was not entire."[100] Although plaintiffs' attorneys read *Dixon* as encouraging the use of joinder to defeat removal, corporate defense attorneys disagreed; *Dixon* simply had ducked the complex tangle of legal issues as to when a joint cause of action existed.[101]

Not until 1906, when the Court decided *Alabama Great Southern Railway v. Thompson*,[102] did the Justices resolve the outstanding issues posed by *Warax* and *Dixon*. When a plaintiff sued a railroad together with resident defendant operating employees, the only allegation of negligence was against the employees and the only theory for corporate liability was respondeat superior; therefore there was no separable controversy, and the case could not be removed from state court to federal court.[103] Even in *Thompson*, however, the Justices refused to inter *Warax*.

Two additional loose threads remained as well. First, what law, federal or state, determined whether a joint cause of action existed? In *Thompson*, the Justices seemingly resolved the case based on statements contained in the pleadings. But in a companion case to *Thompson*, *Cincinnati, New Orleans & Texas Pacific Railway Co. v. Bohon*,[104] the Court upheld a state court's denial of the defendant's petition to remove. It did

96 E. Purcell, supra note 7, at 112.
97 Id. at 114.
98 Powers v. Chesapeake & O. Ry. Co., 169 U.S. 92, 101-02 (1898).
99 179 U.S. 131 (1900).
100 Id. at 140.
101 See E. Purcell, supra note 7, at 115.
102 200 U.S. 206 (1906).
103 See id. at 218, 220.
104 200 U.S. 221 (1906).

so on the ground that state law defined the plaintiff's claim as a joint cause of action which could not be defeated by invoking the "separable controversy" rule of removal jurisdiction.[105] Second, there was the issue of fraudulent joinder. The Justices were silent as to whether and how federal courts could go beyond assertions by the plaintiff that the joinder of resident defendants was legitimate.

Over the next several years, the Justices began to tie off the loose ends left by *Thompson*. In *Wecker v. National Enameling & Stamping Co.*,[106] the Court resolved the issue of fraud by reviewing affidavits submitted in support of the plaintiff's motion to remand to state court.[107] When a plaintiff knew that the resident defendant had no connection with the injury and no duties related to it, or when a plaintiff "willfully closes his eyes to information within his reach," the fraud would permit a corporate defendant to demand removal.[108] In several subsequent cases, the Justices also clarified the cloudy holding in *Thompson* as to when and how state law established the existence of a joint cause of action so linking the corporate defendant and the resident defendant as to defeat removal.[109] Even though federal judges chipped away at these cases with constricted readings and limiting interpretations,[110] this trio of cases—*Thompson*, *Bohon*, and *Wecker*—defended the plaintiffs' joinder tactic from federal removal jurisdiction.[111]

3-a. Contraction and Evolution, 1910s-1940s

From the 1910s through the mid-1940s, a complex set of social and technological changes, enactments of new federal and state legislation,

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105 Id. at 226.

106 204 U.S. 176 (1907).

107 See id. at 184.

108 Id. at 185.

109 See Illinois Cent. R.R. v. Sheegog, 215 U.S. 308, 316 (1909) (holding insufficient mere allegation of fraudulent joinder of defendant on sole ground that joinder would prevent removal); Southern Ry. v. Miller, 217 U.S. 209, 216 (1910) (holding that *Thompson* rule prevents removal when state statute defining criminal negligence would make both individual defendant employee and corporate defendant employer jointly liable); Chicago, R.I. & Pac. Ry. v. Schwyhart, 227 U.S. 184, 193 (1913) (citing *Miller*, holding that issue of joint liability precluding removal is matter of state law determined by highest court of state before which question could come); Chicago, R.I. & Pac. Ry. v. Dowell, 229 U.S. 102, 111, 112-13 (1913) (following *Thompson*, *Sheegog*, and *Miller* in holding that "mere epithet 'fraudulent' " must be "backed up by some other charge or statement of fact"); Chesapeake & O. Ry. v. Cockrell, 232 U.S. 146, 152 (1914) (holding that showing of fraud sufficient to defeat removal "must consist of a statement of facts rightly engendering that conclusion. . . . [and] must be such . . . that the joinder is without right and made in bad faith"); see also Chicago, B. & Q. Ry. v. Willard, 220 U.S. 413, 427 (1911) (holding that even where plaintiff does not move to remand, removal jurisdiction is lacking where cause of action pleaded is joint under state law); E. Purcell, supra note 7, at 118-19.

110 See E. Purcell, supra note 7, at 119-22.

111 See id. at 119.

and developments within the legal profession resulted in the contraction and evolution of the system of corporate diversity litigation.

First, societal, demographic, and technological factors eased the burdens of distance and delay that previously had impaired the utility of the federal courts to individual litigants. Increasing urbanization concentrated more Americans—and thus more potential individual plaintiffs—in the nation's cities and towns; thus, potential plaintiffs found themselves getting ever closer both to the federal courts that sat in those cities and to major railroad and road systems that in turn permitted easier access to those cities where the courts sat.[112] Second, improvements in the technology of transportation—the development of automobiles and roads to carry them—and communication—the spread of interstate telephone networks and faster, more reliable delivery of mail by rail and air—steadily eroded the burdens of distance and delay in federal litigation.[113] Third, the popularization of the automobile "probably had the widest impact on reducing the burden of distance"[114]—although, as Purcell notes, the impact of the automobile was significantly boosted by the boom in road and highway construction.[115]

Moreover, Congress expanded the number of locations and the terms during which federal district courts sat. It likewise expanded the federal appellate court system by dividing the Eighth Circuit and expanding the number of locations where the new Eighth and Tenth Circuit Courts would sit.[116] Such institutional and systemic changes responded both to the social and demographic conditions described above and to the perceived need to ease the delays and caseload burden that oppressed the federal court system.[117] The culmination of this effort was the Judiciary Act of 1925, nicknamed the "Judges' Bill" because of the central role played in its creation and enactment by Chief Justice William Howard Taft and his colleagues on the Supreme Court and lower federal courts.

Further, federal and state legislation began to constrict the scope of the federal common law and to restrict the jurisdiction of the federal courts. State legislatures began tentatively to limit by statute such employers' defenses as the fellow-servant rule, and three states statutorily limited contributory negligence.[118] Moreover, with the tacit encourage-

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[112] See id. at 155.

[113] See id. at 154-57.

[114] Id. at 156. See generally James J. Flink, The Automobile Age (1990) (history of influence of automobile on American society and culture).

[115] See E. Purcell, supra note 7, at 156-57.

[116] See id. at 154-55.

[117] See id. at 157-58.

[118] See id. at 161. The states were Georgia, Florida, and Maryland. For a discussion of the statutes and their effects, see Lester P. Schoene & Frank Watson, Workmen's Compensation

ment of the Supreme Court, states began to enact statutes that defined employers' liability, regulated hazardous business activities, and protected railroad workers.[119] At the same time, Purcell notes, the business culture was beginning to turn from its former belief that most industrial accidents could be traced to the worker's fault or negligence to the view that "industrial injuries should be considered an unavoidable part of the productive process and that compensation should be awarded automatically as a normal cost of doing business."[120]

The key statutory, administrative, and juridical developments were the rise of the workmen's compensation movement in the years following 1910,[121] and the series of workmen's compensation cases decided by the Supreme Court between 1915 and 1919 upholding a wide range of workmen's compensation statutes against a variety of constitutional challenges.[122] Congress, too, enacted such statutes as the Safety Appliance Act of 1893,[123] the Hours of Service Act of 1907,[124] and the Boiler Inspection Act of 1911.[125] By far the most important federal statute, however, was the Federal Employers' Liability Act (FELA), first enacted in 1906[126] and replaced in 1908 after the initial statute was struck down by the Court.[127] FELA collided with the system of corporate diversity litigation in both substantive and procedural ways. In particular, the federal law limited substantive defenses available to employers; it also granted employees "a broad choice of venue and an absolute choice between state and federal forums"[128] without the risk of removal, and gave employees other important procedural advantages as well.[129] Purcell concludes that all these federal and state statutes combined to divert large numbers of prospective plaintiffs from the system of corporate diversity litigation.

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on Interstate Railways, 47 Harv. L. Rev. 389, 392 n.14 (1934).

119 See E. Purcell, supra note 7, at 161-62.

120 Id. at 162.

121 See id. at 357 n.88.

122 See id. at 163. The cases were: Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571 (1915) (equal protection); Hawkins v. Bleakly, 243 U.S. 210 (1917) (due process and equal protection); New York Cent. R.R. v. White, 243 U.S. 188 (1917) (same); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) (seventh amendment trial by jury); Arizona Employers' Liability Cases, 250 U.S. 400 (1919) (due process and equal protection).

123 Act of Mar. 2, 1893, ch. 196, 27 Stat. 531, amended by Act of Apr. 1, 1896, ch. 87, 29 Stat. 85, expanded by Act of Apr. 14, 1910, ch. 160, 36 Stat. 298.

124 Act of Mar. 14, 1907, ch. 2339, at 1, 34 Stat. 1415.

125 Act of Feb. 11, 1911, ch. 103, 36 Stat. 913, amended by Act of Mar. 4, 1915, ch. 169, 38 Stat. 1192.

126 Act of June 11, 1906, ch. 3073, 34 Stat. 232.

127 Employers Liability Cases, 207 U.S. 463 (1908). The new statute is Act of Apr. 22, 1908, ch. 149, at 1, 35 Stat. 65. See E. Purcell, supra note 7, at 165-66.

128 E. Purcell, supra note 7, at 165-66.

129 See id. at 167.

"As the system contracted, however, it also evolved."[130] Purcell describes the growing professionalization of "a resourceful and specialized plaintiffs' personal injury bar" whose members expanded the range of tactical options open to plaintiffs.[131] Under the pressure of the plaintiffs' personal injury bar, corporate litigation became more sophisticated and more varied. If its tort litigation declined in relative importance, its insurance litigation expanded.[132]

Finally, the federal courts, led by the Supreme Court, continued their efforts to oversee the development of the system of corporate diversity litigation. In seeking to enforce and apply FELA, the courts had to police the boundaries of the statute, determining which cases fell within its purview and which did not. Indeed, litigants soon seized on the statute's partial coverage of railroad employees and its murky "interstate commerce" requirement[133] as a new resource in crafting their litigation strategies. Moreover, although the federal courts tried in the first decades of the new century to accommodate most of the new federal and state legislation, they also began to fashion constitutional doctrines—notably the doctrine of substantive due process—that they hoped would preserve their institutional independence from the rising tide of federal and state legislation.[134]

As plaintiffs' and defendants' lawyers developed doctrinal and tactical sophistication, they made the battle for forum control a focal point of the system of corporate diversity litigation. In their search for litigation advantages, they manipulated choice-of-law rules and the often porous distinction between matters of legal substance and matters of legal procedure.[135] Federal courts continued to struggle with the problem of forum shopping, and attempted a series of inconclusive experiments with constitutional interpretation and statutory construction to limit the practice.[136] Because of the vigor with which litigants sought to control which court (federal or state) would decide their cases, forum shopping became a primary preoccupation of judges, administrative officials, legal scholars, and lawyers in this period.[137] Indeed, a principal fallout from the operations

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130 Id. at 245-46.

131 Id. at 150-54.

132 See id. at 200-16 (analyzing tactical escalation in litigation battles between individual plaintiffs and national corporate defendants (insurance companies)).

133 Id. at 167-70.

134 See id. at 172-73.

135 See id. at 178-83.

136 See id. at 190-99.

137 See id. at 177-99. One particularly dramatic example was the attempt by the Director General of Railroads during the First World War to issue orders suspending FELA's venue provisions and requiring that lawsuits against common carriers under federal control be heard in districts where the claim arose or where the plaintiff resided. This first order had to be amended after only nine days; the second order further limited venue in suits brought in the

of the system of corporate diversity litigation was the drumbeat of demands by the elite corporate defendants that bar associations combat "ambulance chasing" and "soliciting business," which they identified as leading causes of forum shopping.[138]

3-b. Decline and Disintegration, 1937-1958

The massive changes that the system of corporate diversity litigation experienced from the 1910s to the 1940s left it badly weakened and vulnerable to assault and destruction. From the beginning of the Roosevelt Court in 1937[139] through the enactment of the Revised Judicial Code in 1948[140] and further congressional revision of the statute in 1958,[141] the system declined and ultimately disintegrated. Purcell traces the dissolution of the system to a combination of factors.

First, he emphasizes the importance of both the New Deal and President Franklin D. Roosevelt's transformative series of appointments to the federal bench.[142] Whatever their later disagreements,[143] the Justices of the Roosevelt Court "were in substantial agreement on the social and economic issues that animated the New Deal,"[144] and the lower federal courts followed suit. Of course, the single most important decision of the Supreme Court with respect to the system of corporate diversity litigation was *Erie Railroad Co. v. Tompkins*.[145] Again, although the story of *Erie* is largely familiar to any law school graduate, Purcell provides a fresh perspective by analyzing *Erie*'s consequences for corporate diversity litigation. *Erie* significantly undermined the tactical assumptions that undergirded the system of corporate diversity litigation. Further,

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plaintiff's district of residence only "where the plaintiff resided at the time of the accrual of the cause of action." Id. at 184.

138 See id. at 186, 187; see also id. at 187-90.

139 Roosevelt made his first appointment to the Court (Justice Hugo L. Black) in 1937. See generally C. Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947 (1948) (leading history of Roosevelt Court); James F. Simon, The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America (1989) (comparative biography of two of Roosevelt's most important appointees to the Court, in context of development and decline of Roosevelt Court on civil liberties and judicial activism issues); Robert D. Harrison, The Breakup of the Roosevelt Supreme Court: The Contribution of History and Biography, 2 Law & Hist. Rev. 165 (1984) (analysis of historiography of Roosevelt Court).

140 Act of June 25, 1948, ch. 646, 62 Stat. 869.

141 See E. Purcell, supra note 7, at 237-43. The 1958 revision is Pub. L. No. 85-554, at 4, 72 Stat. 415 (1958).

142 See E. Purcell, supra note 7, at 219-20.

143 See, e.g., J. Simon, supra note 139, passim (describing conflict between Black's judicial activism in protecting individual liberties and Frankfurter's judicial deference to actions of democratically elected legislatures and executives).

144 E. Purcell, supra note 7, at 219.

145 304 U.S. 64 (1938); see text accompanying notes 62-69 supra; see also T. Freyer, supra note 63, passim.

both *Erie*'s overturning of *Swift* and the federal courts' hospitable stance toward FELA lawsuits[146] discredited the conventional wisdom that the federal courts were pro-defendant and pro-business whereas the state courts were pro-plaintiff and anti-business.[147] Another consequence of the federal courts' accommodation of FELA and workmen's compensation systems was the loss of one of the principal categories of cases within the social litigation system.[148] As a result of these developments, corporate defendants became considerably less eager to remove cases from state to federal court.[149]

Purcell also notes that the enactment of the Rules Enabling Act[150] in 1934 and the subsequent framing and adoption of the Federal Rules of Civil Procedure in 1938 "symbolized and accelerated the changes that the twentieth century was bringing to litigation practice."[151] As Purcell points out, the new rules "freed the national courts from state procedural rules, confirmed implicitly the higher professional status of federal practice, and facilitated the development by large urban law firms of a national practice in support of the nationwide operations of their corporate clients."[152]

Purcell notes other, mainly technological changes in the larger society that undercut the assumptions at the base of the system of corporate diversity litigation. The explosion of public enthusiasm for the automobile and the construction during and after the Second World War of interstate highways and superhighways "had brought the overwhelming majority of litigants within easy reach of the federal courts."[153] Court expansion and court reforms had eroded the problem of delay in federal litigation: indeed, state courts, not federal courts, were widely reproached for their inefficiency and backlogs.[154]

In 1948, and again ten years later, Congress reconsidered and revised the federal statutes that structured the federal judiciary, defined its jurisdiction and procedure, and established its powers. Purcell concludes that these statutory revisions confirmed the death of the system of corporate diversity litigation. In particular, the 1958 revision of the standard for determining a corporation's citizenship for jurisdictional purposes "had lost contact with the social history" of this often disputed legal

146 See E. Purcell, supra note 7, at 221-24.
147 See id. at 230.
148 See id. at 231.
149 See id. at 220.
150 48 Stat. 1064 (1934).
151 E. Purcell, supra note 7, at 227.
152 Id.
153 Id. at 231.
154 See id.

issue.[155] By the 1950s, a new legal world reigned.[156] "Although inequality, tactical maneuvering, and the informal legal process all continued to exist—as did removal, diversity jurisdiction, and the doctrine of corporate citizenship—the patterns and dynamics of their use had changed profoundly."[157]

C. *The Concept's Utility*

It is difficult to do justice to Purcell's sure-footed examination of the strategies and tactics pursued by the plaintiff and corporate-defendant bars, and of the shifting responses of adjudicators, legal scholars, and lawmakers to new patterns of diversity litigation. The success of *Litigation and Inequality* suggests the utility of its organizing concept—the idea of the social litigation system—for future legal historians.[158] Purcell bridges the gap separating doctrinal legal history from behavioral legal history,[159] and demonstrates that examining the evolution of legal doctrine alongside the development of formal and informal litigation strategies enriches both historical inquiries. Within the subset of legal history that focuses on the study of litigation patterns, Purcell's work illustrates the need to study the history of litigation with an eye to the much broader—and more elusive—phenomena of settling and discontinuing lawsuits. Finally, Purcell does a superb job of relating the evolution of legal ideas and behavior to what "mainstream" historians would deem "larger" social, demographic, and technological developments.[160]

In this connection, Purcell also addresses two popular theses proposed by legal scholars to assess the economic impact of the legal system.[161] The "subsidy thesis"[162] maintains that negligence law in the

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155 Id. at 239.

156 See id. at 247; see also id. at 230-43. In a telling illustration, Purcell cites a 1960 law-review note that identified a growing tendency on the part of plaintiffs to present inflated claims to satisfy the federal amount-in-controversy requirements. This is a far cry from practices of the late nineteenth century, when plaintiffs had deliberately understated the amount at issue in order to defeat corporate defendants' attempts to remove to federal court. See id. at 243, 393 n.147 (citing Note, Federal Jurisdiction Amount: Determination of the Matter in Controversy, 73 Harv. L. Rev. 1369 (1960)). Compare this with id. at 87-103 (discussing plaintiff's "delayed upward amendment" technique of manipulating federal amount-in-controversy requirement to bar federal removal jurisdiction).

157 Id. at 246.

158 For further reflections on the various ways in which Purcell's study will be of use to legal and constitutional historians, see text accompanying notes 174-85 infra.

159 See text accompanying notes 174-85 infra.

160 An excellent example is Purcell's analysis of the factors that diminished the twin forces of distance and delay that had shaped the development of the system of corporate diversity litigation. See text accompanying notes 112-15, 153 supra.

161 See E. Purcell, supra note 7, at 256-62.

162 Purcell cites the following scholarly expositions of the subsidy thesis: Lawrence M. Friedman, A History of American Law 409-27 (1973); Morton J. Horwitz, The Transforma-

nineteenth century provided a de facto subsidy to business enterprises by decreasing their potential liabilities and permitting them to evade much of the cost of industrial accidents. Purcell points out that while the social litigation system he chronicles did have this effect, that effect did not arise simply from formal rules of law or from the bench's pro-business sympathies. Rather, it came from the complex web of social, procedural, and institutional advantages that allowed corporate defendants to impose steep discounts on the amounts they had to pay individual claimants to induce them to settle out of court or to discontinue their lawsuits altogether.[163]

As to the "economic efficiency" thesis most closely associated with Professor (now Judge) Richard Posner,[164] Purcell carefully traces the limits of Posner's arguments that negligence law actually fostered economic efficiency. Concluding that the history of the corporate litigation system "highlights the abstract nature of Posner's economic theory, its thin and formal empirical base, and the exceptionally narrow scope of its applicability,"[165] Purcell notes several significant flaws in Posner's analysis. First, he declares, Posner overlooks the vital role played by the informal legal process in settling and discouraging potential claims against corporations. Second, because Posner so narrowly focuses on formal legal doctrine, he overlooks the nondoctrinal forces that operated both in the informal and the formal legal processes. Third, Purcell disputes Posner's economic analysis of the results of formal adjudication, noting that Posner's reliance on appellate records unduly skewed his assessment of the total operation of negligence litigation. Purcell concludes that the social litigation system did not impose the "true" costs of accidents on corporate enterprises. Thus, it failed to bring about an economically efficient degree of accident prevention.[166]

At the close of *Litigation and Inequality*, it is ironic that Purcell reads the funeral service for the system of corporate diversity litigation, disclosing its life and its tomb thirty-five years after its interment. *Litiga-*

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tion of American Law, 1780-1860, at 63-108 (1977); 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, 382 (1951). But see the following scholarly critiques of the subsidy thesis also cited by Purcell: Robert L. Rabin, The Historical Development of the Fault Principle: A Reinterpretation, 15 Ga. L. Rev. 925 (1981); Gary T. Schwartz, The Character of Early American Tort Law, 36 U.C.L.A. L. Rev. 641 (1989); Gary T. Schwartz, Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation, 90 Yale L.J. 1717 (1981).

163 See E. Purcell, supra note 7, at 256-57.

164 Purcell focuses on Richard A. Posner, A Theory of Negligence, 1 J. Legal Stud. 29 (1972) (examining American negligence law during period between 1875 and 1905). He points out that Posner "directly challenges the subsidy thesis." E. Purcell, supra note 7, at 258.

165 E. Purcell, supra note 7, at 259.

166 See id. at 257-62.

tion and Inequality traces the life-cycle of an "organism" that nobody at the time perceived. The ever-present danger for a historian who attempts such an ambitious enterprise as this is that he might forget that he created the intellectual construct that drives the project. Terms of art coined as useful expository devices may take on a life of their own. Historians run the risk of blurring or even losing the distinction between their own handiwork and the past they seek to interpret. To Purcell's considerable credit, *Litigation and Inequality* avoids this trap. At all times, Purcell makes clear that the social litigation system is a useful analytic device for organizing and investigating the vast amount of statistical, doctrinal, and historical data that are the raw material of his project.

Two major questions remain with respect to the methodology of the social litigation system, however. These unresolved issues define the agenda for future legal historians seeking to use Purcell's analytic device.

(1) *Will we know a social litigation system when we see one?*[167] How do historians determine the nature, makeup, limits, and life-cycles of other social litigation systems? As noted above,[168] Purcell offers only the most general guidelines by which a historian might identify social litigation systems. It is regrettable that Purcell did not apply the same rigor and depth of analysis with which he chronicles the system of corporate diversity litigation to even a tentative identification of other social litigation systems for the benefit of future historians.

(2) *How do social litigation systems fit together and interact?* The success of *Litigation and Inequality* should inspire other historians to define and study other social litigation systems as they develop over time. However, Purcell is silent as to what, if any, relationships exist between different social litigation systems coexisting in time and within the same geographic area. *Litigation and Inequality* examines only one such system, without considering the possibility that it might have interacted with or been affected by others.[169] To be sure, the criteria that Purcell

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[167] Cf. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating that "hard-core pornography" is difficult to define, "[b]ut I know it when I see it")

[168] See text accompanying notes 32-35 supra; see also note 34 supra (suggesting that civil-rights litigation of 1940s, 1950s, and 1960s may well be another instance of a social litigation system); note 178 infra (citing to published work and work-in-progress by Professor William E. Nelson that can be read as defining a set of other social litigation systems within state and federal litigation of twentieth-century New York).

[169] But see E. Purcell, supra note 7, at 90-103, discussed in text accompanying notes 74-81 supra. In this section of the book, Purcell notes the effects of the federal jurisdictional amount-in-controversy requirement, commenting that "for half a century it may have been one of the most effective, if indirect, *distributive* rules in the American legal system." E. Purcell, supra note 7, at 103 (emphasis added). The implication here is that the amount-in-controversy statute directed some cases into the system of corporate diversity litigation, whose locus was the federal courts, and many other cases into parallel social litigation systems existing within state

assigns for determining what constitutes a social litigation system might well insulate a given system—whether doctrinally, socially, tactically, or geographically—from the operation of other systems. In addition, the immense labors that Purcell carried out to define the history and operation of one social litigation system may deter historians from studying the interaction between or among social litigation systems. Historians may have to replicate Purcell's achievement for a range of social litigation systems—in time, in space, and by substantive or jurisdictional sphere—before we can expect useful studies of the relationships among social litigation systems to emerge.[170]

CONCLUSION

For nearly four decades, the writing of American legal history has displayed a deep and growing divide between two strategies of research and interpretation.[171] One category of scholarship employs the rigorous—and at times, ideologically driven—analysis of legal doctrine as it changes or resists change over time. Although many historians who pursue this approach study the work of courts,[172] most focus on the ways that doctrines evolve or persist in the writings of legal scholars.[173] The other category of scholarship stresses the detailed, often highly quantified, study of the actual behavior of those who use law—whether judges, lawyers, or litigating parties.[174] Scholars who pursue the latter form of legal history characterize their work either as contributions to social his-

courts.

[170] But see generally Richard B. Morris, Studies in the History of American Law (1930) (providing ambitious, influential, and reliable analysis of "American law" in seventeenth and eighteenth centuries despite lack of detailed, colony-by-colony investigations that law-school-based legal historians insisted had to be done before synthesis of colonial American law could be attempted). See William E. Nelson, Standards of Criticism, 60 Tex. L. Rev. 447, 457-60, 472-73, 482-83 (1982) (discussing historiographical conflict between Morris and his law-school-based critics).

[171] This paragraph is based on a review of leading works in American legal history since the early 1960s, as aided by William E. Nelson & John P. Reid, The Literature of American Legal History (1985). It also derives insight from James T. Kloppenberg, The Theory and Practice of American Legal History, 106 Harv. L. Rev. 1332 (1993) (reviewing Morton J. Horwitz, The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy (1992)).

[172] See, e.g., M. Horwitz, supra note 162; William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 (1975).

[173] See, e.g., Morton J. Horwitz, The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy (1992). Early reviews of this book, a successor to Horwitz's 1977 Bancroft Prize-winning study, The Transformation of American Law, 1780-1860, supra note 162, have noted the significant differences between it and its predecessor in the use of evidence and analytic methodology. On the differences between the two books, see, e.g., Kloppenberg, supra note 171, at 1337-39; Eben Moglen, Book Review, 93 Colum. L. Rev. 1042 (1993).

[174] Leading examples of this school include, e.g., Lawrence M. Friedman, Contract Law in America (1965); James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (1956).

tory based on legal evidence[175] or as contributions to studies in the social history of law.[176] The gulf separating these disparate approaches to the writing of American legal history has threatened to become irreparable, as scholars toss imprecations back and forth across the divide.[177]

Viewing Purcell's scholarly enterprise through the lens formed by Richard White's concept of the middle ground is illuminating from a historiographical perspective, just as the comparison between the middle ground and the social litigation system is useful from a methodological perspective.[178] Purcell's idea of the social litigation system occupies the vital but often-neglected middle ground between two kinds of conventional legal history—that focusing on the internal workings of legal institutions[179] and that emphasizing the behavior of parties seeking to have their claims resolved by the legal system.[180]

The social litigation system enables us to juxtapose these separate spheres of historical inquiry, emphasizing how formal institutions and actual legal behavior interact with and influence one another. As Purcell demonstrates, courts rarely function in an abstract doctrinal or institutional void; they must take account of the expectations of those who come to them seeking redress. Similarly, litigants and their attorneys regularly must consider the probable judicial responses to the claims they seek to litigate, the arguments they present in order to pursue those claims, and the probable reactions of other legal actors—notably legislators having power to reshape substantive law and judicial procedure—to

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175 See, e.g., Suzanne Lebsock, The Free Women of Petersburg (1984) (social history of women in antebellum Petersburg, Va., based on intensive study of court records).

176 See, e.g., Lawrence M. Friedman & Robert V. Percival, The Roots of Justice (1981) (intensive study of criminal court records of Alameda County, Calif., 1870-1910).

177 See, e.g., Lawrence M. Friedman, Heart Against Head: Perry Miller and the Legal Mind, 77 Yale L.J. 1244 (1968) (reviewing Perry Miller, The Life of the Mind in America (1965)), cited and discussed in Kloppenberg, supra note 171, at 1332-33; see also Cass R. Sunstein, Where Politics Ends, New Republic, Aug. 3, 1992, at 38, 39-41 (reviewing M. Horwitz, supra note 173), cited and discussed in Kloppenberg, supra note 171, at 1333.

178 See notes 1-11 and accompanying text supra. For an assessment of the concept's methodological utility, see text accompanying notes 158-70 supra. For the work of another legal historian who seeks to derive conclusions about the relationship between social, cultural, economic, and technological forces, on the one hand, and the development of legal doctrine from the close and extensive study (both quantified and doctrinal) of court decisions on the other, see William E. Nelson, Contract Litigation and the Elite Bar in New York City, 1960-1980, 39 Emory L.J. 413 (1990) [hereinafter Nelson, Contract Litigation]; William E. Nelson, Criminality and Sexual Morality in New York, 1920-1980, 5 Yale J.L. & Hum. 265, 265-341 (1993) [hereinafter Nelson, Criminality] (historical analysis of changes in New York law dealing with rape, prostitution, pornography, homosexuality, and gender-related violence).

179 See, e.g., 1-7, 9 The Oliver Wendell Holmes Devise History of the Supreme Court of the United States (Paul A. Freund & Stanley N. Katz eds., 1971-1991) (massive, unfinished institutional history of U.S. Supreme Court).

180 See, e.g., L. Friedman & R. Percival, supra note 176.

squelch too-successful uses of litigation strategies.[181] Thus, although useful work has been done on the structure and operations of court systems over time[182] and on historical patterns of litigation,[183] Purcell establishes that historians must study the points of intersection and interaction between these historical phenomena as well. Such innovative historical research will cast new light not only on the historiographical "middle ground" itself but on the fields of historical investigation whose interaction helps to define that middle ground.

Throughout *Litigation and Inequality*, Purcell stresses the historical—and historically contingent—character of his project and findings. This historical perspective is especially welcome in a field where most ostensibly historical analyses aim solely to elucidate the modern meaning or significance of procedural rules, distorting factual accounts of these rules' development to serve utilitarian purposes.[184]

By defining a methodological "middle ground," Purcell's *Litigation and Inequality* offers the hope of bringing together these distinct though complementary methodologies for understanding legal history.[185] Both as an exposition of an important period of American litigation, and as a methodological breakthrough, *Litigation and Inequality* is one of the most important works of American legal history to appear in our time.

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[181] See, e.g., the 1958 revision to the Judicial Code, discussed in text accompanying notes 155-57 supra, which (among other things) imposed a comparatively narrow and precise definition of corporate citizenship for jurisdictional purposes.

[182] See, e.g., Felix Frankfurter & James M. Landis, The Business of the Supreme Court (1928) (quasi-historical analysis of Supreme Court's business and its development over time); see also, e.g., Samuel Estreicher & John Sexton, Redefining the Supreme Court's Role (1986) (critical analysis of Supreme Court's alleged "workload crisis"); New York University Supreme Court Project, 59 N.Y.U. L. Rev. 677 (1984) (same).

[183] See, e.g., W. Nelson, supra note 172 (history of legal change in colonial and revolutionary Massachusetts based on intensive study of court records); William E. Nelson, Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725-1825 (1981) (intensive study of changing patterns of dispute and conflict resolution based on Plymouth County, Mass., court records, 1725-1825); Nelson, Contract Litigation, supra note 178; Nelson, Criminality, supra note 178.

[184] See, e.g., the publications in the 1970s and early 1980s focusing on the Supreme Court's alleged "workload crisis" and the demand for a new level of federal courts to shoulder this burden, discussed and refuted in S. Estreicher & J. Sexton, supra note 182, passim. Purcell recognizes the seductive appeal of such uses of historical research. See E. Purcell, supra note 7, at viii-ix. He also has written on modern consequences of developments described in *Litigation and Inequality*. See Edward A. Purcell, Jr., Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court, 40 U.C.L.A. L. Rev. 423 (1992).

[185] For a call for a comparable effort to reunite the fragmented field of constitutional discourse, see Richard B. Bernstein, Review Essay: Charting the Bicentennial, 87 Colum. L. Rev. 1565, 1568-69, 1622-24 (1987).