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Sixty-eight years ago, Felix Frankfurter and James M. Landis published **The Business of the Supreme Court: A Study in the Federal Judicial System.** Its eight chapters originally appeared as articles in the *Harvard Law Review*, the first in June of 1925, and the last in April of 1927. When the work afterward emerged as a book, its authors dedicated it to Oliver Wendell Holmes, Jr., acknowledging his twenty-five Terms as a member of the Supreme Court of the United States.

My copy of **The Business of the Supreme Court** has been ill used by time, as have both the validity of its basic assumption and the design of its research. My copy is thickened by a swollen binding; its curved covers close like a clamshell around pages brown with age and stiff with decay. At some time since its binding, it has been left to the damp; now it is stained, and it smells of mildew. When this book first appeared, as a history of legislation it epitomized the latest trend in legal scholarship; now, the narrowness of its focus best illustrates its datedness. When first published, its underlying assumption that the Supreme Court's workload was beyond the Court's control went unquestioned; now, that assumption is regularly questioned. The book is dated and myopic. It is, nevertheless, a classic in the strictest sense. It is elegantly composed and presented. It superbly models a wider-ranging scholarship of which its authors were recognized pioneers. As the early work of scholar-reformers influential in the reshaping of American legal culture, it ought to be of enduring interest to students of social as well as legal history.

Felix Frankfurter's name is surely familiar, but that of James McCauley Landis, his coauthor, is likely less so. When they wrote the book, Frankfurter had been for eleven years a member of the faculty of the Harvard Law School, and Landis, his former student, had returned after graduation to act as Professor Frankfurter's research assistant and pursue Harvard's brand-new degree, Doctor of Juridical Science. Frankfurter would make his historical mark as the protégé of the Progressive leader Justice Louis Brandeis, as advisor to both Roosevelt Presidents, and eventually, as an often-dissenting Justice in the Supreme Court of the United States, most notably during Chief Justice Earl Warren's stewardship.[1] James McCauley Landis, while perhaps not as famous as his coauthor, played key leadership roles in the New Deal, both in reviving the Federal Trade Commission and in launching the Securities and Exchange Commission. At the tender age of thirty-six, Landis became dean of the Harvard Law School. Eventually, he would end a distinguished career of public service as a close advisor to President John F. Kennedy.[2]

The Business of the Supreme Court was well received at its publication. Harold Lasswell wrote in *The American Journal of Sociology*:

> That such a book as this should issue from the most famous law school in the United States is nothing less than

> an epochal event. It evidences the broadening of research interests on the part of the instructional staff, and this is presumably not without effect upon the actual routine of law training. In view of the peculiar dependence of American polity upon the lawyer, this is truly a matter of national concern.[3]

From Princeton, John Dickinson wrote that one of the outstanding values of this book was the light it shined on the processes and quality of American legislation.

> The thoroughness and detail of this account disclose, as would a similar account of the history of any other important branch of legislation, the enormous slowness of our legislative process, and the character of the obstacles it must overcome.[4]

Edward S. Corwin, never a generous critic, found the work ". . . based on wide research, . . . well arranged and pleasingly written. It suffers, if anything, from the excess of its virtues."[5] W.P.M. Kennedy, writing for the *English Historical Review*, was lavish in his praise:

> The history of the nation seems to pass before us, as we follow the details of the "business" of the Supreme Court in interpreting the Constitution . . . Nowhere else is it possible to study in such a fine setting the interaction of political, economic, and legal forces in the jurisprudence of a modern state.[6]

In **The Business of the Supreme Court,** Frankfurter and Landis confronted a recurring problem for the Supreme Court, a docket overcrowded with requests for appellate review. Attributing this oversupply in the Highest Court to growth in the business of courts below, the authors traced, from the first judiciary act in 1789 to the so-called "Judges' Bill" of 1925, a long line of congressional reactions to perceived needs or faults in federal jurisdiction. For the most part, the authors concentrated on three major changes in their chronicle of jurisdictional evolution:

Frankfurter's coauthor, James McCauley Landis, became dean of Harvard Law School at age thirty-six after having helped establish several New Deal agencies, including the Securities and Exchange Commission.

elimination of circuit riding by Supreme Court Justices, establishment of intermediate federal courts of appeal, and gradual replacement of statutory rights of appeal in the Supreme Court with forms of appellate review affording the Court the power to refuse a hearing. In passing, Frankfurter and Landis made note of lesser jurisdictional modifications, such as changes to the way decisions of the Court of Claims and territorial courts are reviewed, and the brief life of the Commerce Court. Some of these topics, like circuit riding, may seem of interest today only to historians of the Court, but others touch on matters of modern as well as historical relevance. For example, the account by Frankfurter and Landis of bills in both houses of the forty-fourth Congress to withhold federal jurisdiction in cases arising from the actions of corporations outside the state of their incorporation[7] certainly seems relevant to recent discussions of the continued importance of diversity jurisdiction. The book's contrast of the relative success of a court entertaining nothing but appeals from administration of the tariff laws with the short life of the court established to review nothing but orders of the Interstate Commerce Commission provides

a useful background to contemporary debate concerning new courts for other subjects now deemed more or less specialized. Only in 1988 would occur the apparently final step in congressional substitution for appeals to the Supreme Court as a matter of right of appellate forms affording the Court the power to refuse review.[8]

Even the long and detailed account (with which Professor Corwin expressed impatience) of the process by which circuit riding by the Justices was ultimately abandoned offers some intriguing food for contemporary thought. Most students of the Court's history are probably familiar with the practical difficulties confronting early Justices attempting to fulfill their circuit riding duties, especially those assigned to the frontier circuits. Most are also likely to recall that an appreciation of these difficulties led the last Congress controlled by Federalists to dispense with such requirements after little more than a decade. It is conventional wisdom that partisan retaliation by congressional members of Jefferson's Republican Party prompted legislation the following year, frustrating that salutary reform. Not so widely known, perhaps, is why circuit riding by Supreme Court Justices remained a requirement long after the Federalists among the national judiciary were outnumbered by Jeffersonian Republicans. In 1838, for example, Justice John McKinley traveled 10,000 miles and faced a docket of nearly two thirds of all the cases then pending in a federal circuit court.[9] Justice Peter V. Daniel in 1851 covered 7,000 miles in two months.[10] Both men were nominated to the Supreme Court by President Martin Van Buren, a Jefferson disciple, and confirmed by Congresses controlled by his party's successor. Frankfurter and Landis reveal that apparently influential members of several Congresses regarded circuit riding by individual Justices as necessary for an adequate appreciation by the Court collectively of the subtleties of state and local law. Congressional satisfaction with circuit riding sufficient to prevent reform therefore persisted, even when the requirement gored judicial oxen of the same party, and even as territorial expansion added appeals in ever-increasing numbers to the Supreme Court's docket, so that a Justice's collegial duties to the national tribunal came in ever-sharper conflict with his duties to his circuit.

Frankfurter and Landis attributed a second phase of growth in judicial review demand to "vast extensions of federal jurisdiction" following the Civil War. They pointed to not only the familiar example of the Judiciary Act of 1875, for the first time opening federal as well as state courts to most cases involving federal law, but also to a host of enactments permitting defendants to shift cases from state to federal court in more or less specific circumstances. The authors' sage observation regarding this "revolution" bears repeating:

> The history of the federal courts is woven into the history of the times. The factors in our national life which came in with reconstruction are the same factors which increased the business of the federal courts, enlarged their jurisdiction, modified and expanded their structure. The problems, to be sure, are the recurring problems which began with the First Judiciary Act and are active today; they are the enduring problems of the relation of states to nation. But their incidence and intensity have varied, as they are bound to vary at different epochs. For law and courts are instruments of adjustment, and the compromises by which the general problems of federalism are successively met determine the contemporaneous structure of the federal courts and the range of their authority.[11]

Ironically, in light of its title, **The Business of the Supreme Court** is much less concerned with judicial than with legislative history. The book is virtually devoid of the stuff of what then constituted conventional Supreme Court scholarship, doctrine and biography. Inside its covers, the influence of events, theory, and personality on the decisional work of the Court is simply left unaddressed. Perhaps the authors considered Charles Warren's recent work to have occupied any wider field of institutional scholarship.[12] Moreover, as legislative history, **The Business of the Supreme Court** is limited, in the main, to materials found in formal and open sources, such as congressional records, official collections, and legal periodicals. The authors made few references to the larger political and

social forces influencing Congress's inclination to tinker with federal jurisdiction. Missing, for example, is how the federal courts' admiralty jurisdiction was extended in the early nineteenth century to inland waters as the nation embraced the Mississippi's watershed and the Great Lakes. The architect of this enlargement of federal judicial power was unquestionably Justice Story, both from the Bench of the Supreme Court and behind the scenes in Congress. Because Justice Story penned an anomalous opinion for the Court in *The Thomas Jefferson*[13] to the contrary, it is surely of interest that the steamboat in that case was owned by brothers of Senator Johnson of Tennessee, sponsor of an ultimately unsuccessful bill to limit federal maritime jurisdiction to cases involving tidal waters.[14]

The preoccupation of the authors with legislation as the remedy for an overworked Supreme Court must have made the book especially curious to contemporary readers conversant with trends in legal scholarship. Frankfurter and Landis presented the history of Supreme Court appellate jurisdiction as one of more or less timely congressional development in response to observed superabundance of requests for Supreme Court review. The authors said practically nothing about the Court's own efforts to manage more efficiently its crowded dockets and minimize delay in its judgments. In the formative period of which Frankfurter and Landis wrote, when most review by the Court belonged to the litigant losing in a lower court by right, the workload of the Supreme Court was surely affected by several of its own decisions. Examples include: the decision in *Barron v. Baltimore*[15] that the Bill of Rights did not bind states; the decision in *Ex parte McCardle*[16] that Congress could strip the Court of jurisdiction to issue a writ of habeas corpus (even in a case in which oral argument had already been heard); the decision in *The Civil Rights Cases*[17] that the Fourteenth Amendment did not reach acts of private racism; and the Court's uncontestable presumption announced three years later in *Santa Clara County v. Southern Pacific Railroad Co.*[18]

Felix Frankfurter answered questions at his confirmation hearings in 1939 with the coaching of Dean Acheson, his advisor (sitting to his right). Perhaps no other nominee has been so familiar with the Court and its workings: Frankfurter had written extensively about the institution during his illustrious teaching career at Harvard Law School. Acheson, an attorney in private practice, had been a clerk to Justice Louis D. Brandeis.

that corporations were persons enjoying rights under the Fourteenth Amendment. These decisions regarding the reach of the Constitution set the outer limits of jurisdiction, and thus influenced the dockets of all courts charged with its enforcement. Among the courts so affected was the Supreme Court itself, which had, in *Martin v. Hunter's Lessee,*[19] laid claim to the power to dispose of appeals that the highest court of a state had erred in its interpretation of the national charter. Frankfurter and Landis made brief mention only of congressional reaction to *McCardle*[20] and referred to *Martin v. Hunter's Lessee* only for Justice Story's dictum regarding the obligation of Congress to confer on the lower federal courts all jurisdiction permitted by Article III.[21] No mention of *Barron v. Baltimore*, *The Civil Rights Cases*, or *Santa Clara County* appears in **The Business of the Supreme Court** at all.

If judgments of the Court respecting jurisdiction under Article III of the Constitution are conspicuous by their general absence from **The Business of the Supreme Court,** other steps by the Court both tending to and intended to move cases more rapidly to decision were noted by Frankfurter and Landis, albeit in passing. One such step was the imposition of limits on oral argument. In a footnote, they recounted how, in 1812, the Court announced a rule of practice for the first time limiting to two the number of counsel permitted to argue for each side in a cause. In three sentences, they present the Court's establishment in 1849 of limits on how long each counsel could hold forth. As Chief Justice Rehnquist tells the same story elsewhere,

> Originally there was no limit set on the time a lawyer might devote to arguing his case in the Court. Indeed, the Court had so little to do in its first few years that it would have had no good reason to place time limits on counsels' arguments . . . But as the Supreme Court's docket grew more crowded, this sort of expenditure of time in a very important case [five full Court days in *Gibbons v. Ogden*] proved to be a luxury. In the middle of the nineteenth century the Court placed a limit of two hours on the time to be taken by counsel for each side.[22]

No mention was made in **The Business of the Supreme Court** of another 1849 innovation by the Court, a rule that, when a case has been called for argument in two successive Terms, and neither party is prepared to argue it, the case shall be dismissed.[23] Finally, there was no mention of the Court's development of the practice of dismissing summarily appeals of right for want of a substantial federal question, or when the decision of a state court is sustainable on state law grounds, although the former has been traced to a decision in 1868,[24] and the latter to a decision seven years later.[25]

Frankfurter and Landis offered a picture of appellate jurisdiction evolving in response to strains on the Court's capacity for judicial review. If that picture is less than comprehensive because it concentrates on legislative changes to the exclusion of the Court's doctrinal and procedural home remedies, it is nevertheless trend-setting scholarship, all the more noteworthy because its Harvard-trained authors eschewed study of Supreme Court case law in favor of study of federal legislation. Frankfurter and Landis wrote from Harvard less than fifty years after Christopher Columbus Langdell had revolutionized the study of law by promoting the critical interpretation of judicial opinions and persuading legal scholars that a science of law could be induced from the utterances of judges administering the common law. This revolution began at the Harvard Law School, where Langdell became dean in 1870, but soon spread nationwide, as Langdell's disciples migrated to other schools.[26] Preoccupied with the common law, Langdell's new science discounted the contribution of legislation, and its examination was consequently discouraged.

While law professors in the late nineteenth and early twentieth centuries were confining their students to analyzing judicial opinions, frustration in the greater world beyond law school with the lawmaking of judges was prompting more frequent resort to legislation for dealing with emergent social and economic challenges. At the same time the initiative shifted from courthouse to legislature, the rate of lawmaking accelerated, in response to the rapidity of change in an industrial age. There dawned what Dean Calabresi has aptly named the Age of Statutes.[27] Legal education and scholarship could lag only so far behind, and to Langdell's fixation with

the common law, there inevitably arose a reaction. The early leaders of this reaction, James Bradley Thayer, Holmes, and Roscoe Pound, all influenced Frankfurter, inculcating a skepticism about doctrine and a recognition of law's wider antecedents. Indeed, Dean Pound, the broker of the modern marriage of law and sociology, brought Frankfurter to the Harvard faculty, as Frankfurter subsequently brought Landis. In the year following publication of **The Business of the Supreme Court**, Harvard named Landis its first research professor of legislation. Taking note of this appointment, *The Nation* found it illustrative of "The New Legal Education." In its own way this reaction to Langdellian method and jurisprudence was a revolution, and **The Business of the Supreme Court** one of the clearest trumpet calls.

When **The Business of the Supreme Court** was published, its greatest strength was its attention to legislation as a primary source of law. Audaciously, the authors demonstrated legislation's importance to jurisdiction, the very law that regulates judicial power. That approach presented a bold challenge to the presumption that case analysis alone constituted legal scholarship. Ironically, that approach has, over time, mutated into the book's greatest weakness, as scholars have continued to recognize and explore additional facets of lawmaking. That the book is now obsolete ought not justify that it is now neglected, but it explains it.

Endnotes

1. *See generally* Michael E. Parrish, **Felix Frankfurter and His Times** (New York: The Free Press, 1982) and Melvin I. Urofsky, **Felix Frankfurter: Judicial Restraint and Individual Liberties** (Boston: Twayne Publishers, 1991).
2. *See generally,* Donald A. Ritchie, **James M. Landis, Dean of the Regulators** (Cambridge, MA: Harvard University Press, 1980)
3. 34 *Am. J. Soc.* 230 (1928)
4. 22 *Amer. Pol. Sci. Rev.* 463, 465-66 (1928).
5. 43 *Pol. Sci. Q.* 272 (1928).
6. 44 *Eng. Hist. Rev.* 327, 328 (1929).
7. Felix Frankfurter and James M. Landis, **The Business of the Supreme Court: A Study in the Federal Judicial System** (1927), 89 and note 146.
8. Law of June 27, 1988, Pub.L. 100-352, 102 Stat. 662. *See* 28 U.S.C. §§ 1254, 1257 (1993 Suppl.)
9. Elizabeth Brand Monroe, "John McKinley," in **The Supreme Court Justices: A Biographical Dictionary** 29 (Melvin I. Urofsky, ed. (New York: Garland Publishing Inc., 1994).
10. John P. Frank, **Justice Daniel Dissenting**, 277-81 (Cambridge MA: Harvard University Press, 1964).
11. **Business,** 59-60.
12. Charles Warren, **The Supreme Court in United States History** (Boston: Little Brown, 1922).
13. 23 U.S. (10 Wheat.) 428 (1825).
14. David W. Robertson, **Admiralty and Federalism** (Mineola, NY: Foundation Press, 1970) repeating what an anonymous student author first published in "From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century," 67 *Harv. L. Rev.* 1214 (1954).
15. 32 U.S.(7 Pet.) 243 (1833).
16. 74 U.S.(7 Wall.) 506 (1869).
17. 109 U.S. 3 (1883).
18. 118 U.S. 394 (1886).
19. 14 U.S. (1 Wheat.) 304 (1816).
20. **Business,** 73.
21. **Business**, 68 at note 43.
22. William H. Rehnquist, **Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson**, (New York: Morrow, 1992) 70-71.
23. Philip Phillips, **The Statutory Jurisdiction and Practice of the Supreme Court of the United States,** 2d ed., 340 (Washington: W.H. & O.H. Morrison, 1872).
24. *Millingar v. Hartupee*, 73 U.S. (6 Wall.) 258 (1968). *See* Francis J. Ulman & Frank H. Spears, "'Dismissed for Want of a Substantial Federal Question:' A Study in the Practice of the Supreme Court in Deciding Appeals from State Courts," 20 *B. U. L. Rev.* 501 (1940).
25. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875). *See* Ulman and Spears, "Dismissed," *supra* note 24, 505 at n. 20.
26. *See* Lawrence M. Friedman, **A History of American Law,** 2d ed., 606-20 (New York: Simon & Schuster, 1984)
27. Guido Calabresi, **A Common Law for the Age of Statutes** (Cambridge, MA: Harvard University Press,1982).