How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891

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This case study of late-nineteenth century federal courts in the United States sheds light on two seemingly unrelated questions of general interest to political scientists: What tools are available to party leaders who seek to institutionalize their policy agendas or insulate those agendas from electoral politics? and How do we account for expansions of judicial power? Using an historical–interpretive analysis of partisan agendas, party control of national institutions, congressional initiatives relating to federal courts, the appointment of federal judges, judicial decision making, and litigation patterns, I demonstrate that the increased power, jurisdiction, and conservatism of federal courts during this period was a by-product of Republican Party efforts to promote and entrench a policy of economic nationalism during a time when that agenda was vulnerable to electoral politics. In addition to offering an innovative interpretation of these developments, I discuss the implications arising from this case study for our standard accounts of partisan politics, political development, and the determinants of judicial decision making.

> *The history of the relations between Congress and the Supreme Court during the twenty-five years following the Civil War is most telling proof that the various organs of government are not mechanically set apart from each other.... The practical workings of the Supreme Court in the scheme of our national life may be as decisively determined by the extent of appellate jurisdiction allotted to it by Congress, the issues open on review, the range of jurisdiction of the inferior courts, and the machinery available for the disposition of business, as by the learning and outlook of the Justices, the quality and the training of the bar.*
>
> Frankfurter and Landis (1928, 86)

In this article I offer a case study in American political development—the dramatic and controversial expansion of federal judicial power in the late-nineteenth century—to illuminate two seemingly unrelated questions of general interest to political scientists: What tools are available to party leaders who seek to institutionalize their substantive policy agendas or insulate them from electoral politics? and How do we account for expansions of judicial power?

Exploring the relationship between these questions requires an integration of two relatively distinct traditions of political science research. The first tradition focuses on the motives and methods behind the creation or empowerment of potentially autonomous policy-making institutions by legislators or other power-holders who have a presumptive interest in maintaining tighter control of policy. The literature on this question typically looks at the origins of bureaucratic agencies or regulatory commissions, at decisions to delegate powers to such executive or quasi-executive bodies, and at the process by which oversight or control of these institutions is maintained. Studies have attributed institutional empowerment to a variety of political motivations including a desire to shift decision-making responsibility on issues that elected officials consider politically sensitive, enhance credible commitments to favored constituencies, reduce cycling effects or decision-making costs, and protect favored policies against reversal (for an overview see Voigt and Salzberger 2002).

The second research tradition looks at expansions of judicial power (see Tate and Vallinder 1995). Many scholars who have examined this topic have tended to attribute judicial empowerment to factors other than the short-term self-interest of elected power-holders acting on the basis of conventional political agendas.[1] Many constitutional historians and law professors often take a law- or court-centered view and discuss judicial power as if it were a by-product of essentially legal choices that relatively independent judges make about the proper scope of their own authority. Other legalist interpretations suggest that nations may simply reach a point at a certain stage of their development when they begin to appreciate the systemwide advantages of the judiciary's enforcement of agreed-upon rules (Stein 1980). Some scholars who have studied the European Court of Justice (ECJ) have argued that the expanding role of the ECJ is a product of the efforts of various supranational and subnational actors pursuing their shared self-interests (e.g., Burley and Mattli 1993; Stone Sweet and Brunell 1998). Others have treated judicial empowerment as reflecting a more

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[1] This may be due to a number of questionable assumptions: that the nature and scope of judicial power are a preconstitutional decision rather than a by-product of ongoing political construction; that courts are often policy-making competitors to legislators and thus less likely to be candidates for political empowerment by those legislators; and that courts are not best conceptualized as conventional policy-making institutions, at least not in the same way as bureaucratic agencies or regulatory commissions.

general interest in promoting "rule of law" governance, dispute resolution, or consensus politics (e.g., Elster and Slagstad 1988; Stone Sweet 1999; Tsebelis 1995). Relatedly, rational choice scholars have attempted to explain expansions of judicial authority in terms of establishing efficient mechanisms for the maintenance of investor security (e.g., Olson 1993; Weingast 1997, 1993), the oversight of bureaucracy (e.g., McCubbins, Noll, and Weingast 1987), and the desire to maintain policy stability in competitive party systems (Ramseyer 1994). (For a more complete overview of this literature see Hirschl 2000, 96–102.)

Unlike most of these accounts of judicial empowerment, I argue that the expansion of federal judicial power in the late-nineteenth century is best understood as the sort of familiar partisan or programmatic entrenchment that we frequently associate with legislative delegations to executive or quasi-executive agencies. In this case, however, the institutional beneficiaries of this entrenchment were courts rather than agencies or commissions.

It is generally acknowledged that federal judicial power in the United States, and the power of the Supreme Court in particular, expanded toward the end of the nineteenth century. A system of lower federal courts that at midcentury was understaffed and underpaid, was lacking in courtroom facilities (and thus was often forced to rent space from state governments), attracted men of little prominence, and had only limited jurisdiction had become by century's end a real third branch of government, with expanded personnel, a new layer of appellate courts, and dramatically broader jurisdiction (Hall 1973, 29–87; Purcell 1999, 687). A Supreme Court that only fleetingly, and insecurely, exercised power at the beginning of the nineteenth century, and that had undermined its reputation and authority among many former supporters with the *Dred Scott* decision in 1857, began after the Civil War to strike down laws with greater regularity and to involve itself in more significant national policy disputes (Graber 1998a, 1999; Griffin 1996, 97). The Chase Court voided at least eight federal laws between 1865 and 1874; another eight were struck down by the Waite Court up through 1888. An important troika of cases by the Fuller Court in 1895—on the Sherman Anti-Trust Act, the Income Tax, and the use of labor injunction—drew critical attention in the 1896 Populist and Democratic Platforms (Westin 1953).[2] While the pre-Civil War Court struck down state laws at a rate of less than one a year (41 laws through 1864), the Chase, Waite, and Fuller Courts established a rate of about three laws a year between 1864 and 1895.[3] By the 1890s, a "muted fury" toward federal courts had already begun to build among those who felt the need to resist what had become a bastion of conservative policy making (Ross 1994). Some prominent legal scholars also felt compelled to advise federal judges of the virtues of restraint (Thayer 1893).

In accounting for this expansion it has been common for scholars to argue that judicial activism was initiated by conservative judges who objected to the regulatory policies being pursued by other branches of government, with the goal of either constraining progressive legislation or (more generally) imposing conservative values on an increasingly tumultuous industrial order. Some versions of this argument assume a class-conscious and coordinated response by the bench and bar (e.g., Jacobs 1954; Paul 1960; Twiss 1942); others focus more simply on individual judges pursuing their policy preferences (Segal and Spaeth 1993, 304–5). Either way, the explanations assume that judicial power is best seen as arising in opposition to conventional political power in a zero-sum battle of control over policy making; in other words, an expansion of judicial power is treated as inconsistent with the preferences of legislators. On the basis of this assumption some normative constitutional theorists have even depicted these late-nineteenth-century developments as the moment when the judiciary began illegitimately to assert unprecedented policy-making claims against the elected branches, thus giving birth to the modern preoccupation with "judicial supremacy" or the "countermajoritarian difficulty" (e.g., B. Friedman 1998, 2001; Haines 1932; Jackson 1941).[4]

However, there are good reasons for thinking that late-nineteenth-century developments are best viewed as "politically inspired" rather than "court-inspired" (on this distinction see Sunkin 1994). As I demonstrate, much of the expansion of power resulted from the passage of two key pieces of legislation—the Judiciary and Removal Act of 1875 and the Evarts Act of 1891—that were part of the Republican Party's efforts to restructure national institutions better to facilitate national economic development (see Bensel 2000). The more familiar parts of this political agenda involved currency policy, tariff policy, and (eventually) national bureaucratic expansion (Skowronek 1982). However, the expansion of federal administrative capacity became necessary only after economic nationalists were successful at promoting large-scale enterprise by extending more reliable legal institutions to investors and

[2] Of the 1895 cases—*U.S.* v. *E. C. Knight*, 156 U.S. 1, *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U.S. 429, and *In re Debs*, 158 U.S. 564—only *Pollock* struck down a federal law. Still, the decisions to prohibit the application of the Sherman Anti-Trust Act to intrastate production and to uphold the power of federal courts to issue injunctions against unions represented significant policy statements on the scope of national industrial policy.

[3] This information is taken from Epstein et al. (1994, 96–110, Tables 2-12, 2-13). The Fuller Court's rate of reversal of state laws increased to four a year between 1896 and 1905 (41 cases striking down laws), and the Fuller, White, and Taft courts continued this development (111 cases striking down laws from 1906 to 1915 and 123 from 1916 to 1925).

[4] The language of judicial supremacy and claims of unprecedented judical activism overstate late-nineteenth-century developments. For example, key legal doctrines used by the Supreme Court were not as unprecedented as some of these authors suggest (Gillman 1993; Rowe 1999). Also, the "restraint" associated with the antebellum Court probably had more to do with the few opportunities to exercise judicial review (especially over federal laws), and with the Jacksonian Court's more oblique approach to voiding statutes, than with a change in the justices' attitudes about the appropriateness of striking down laws (Graber 2000a, 2000b).

producers who operated within a national market.[5] Federal judges became the principal agents of this agenda after Republicans in the national government retooled the federal judiciary by changing its jurisdiction, reforming its structure, and staffing courts with judges who were reliable caretakers of this new mission.

This account is consistent with the view that judges take on those powers, responsibilities, and agendas that are assigned to them by other power-holders in the political system (Peretti 1999, 133). Moreover, given that the two key legislative initiatives leading to federal judicial empowerment were passed by lame-duck Republican Congresses immediately prior to losing control of all or part of the Congress, this argument echoes Hirschl's (2000) "hegemonic preservation thesis," which assumes that elected politicians have a motivation to empower courts when their control over policy outcomes is challenged in majoritarian decision-making arenas. This account is also broadly consistent with what De Figueiredo and Tiller (1996, 438) call a "political efficiency" argument for judicial expansion, which holds that the House and Senate have an interest in enacting legislation "expanding" federal courts when they "expect the nominating president and the confirming Senate to appoint judges who will have political preferences consistent with those of the enacting Congress."[6] However, rather than view late-nineteenth-century developments as merely an effort by Republicans to achieve short-term political advantages in the staffing of an existing institution, the account developed herein emphasizes the goal of establishing more long-term adjustments in the role or mission of the federal judiciary in American politics.[7]

Within the more familiar judicial politics literature the approach I am advocating is most closely related to research that links national court behavior to the interests of dominant coalitions and to broader changes in the political system (e.g., Dahl 1957; Graber 1993, 1998a; Klarman 1996; Gillman and Clayton, 1999). However, rather than focus on the *constraints* imposed on judicial decision making I want to highlight how the decisions of nonjudicial actors reconstructed and *empowered* the institution of the federal judiciary.[8]

THE FEDERAL JUDICIAL SYSTEM BEFORE RECONSTRUCTION

To understand the significance of postbellum developments some reminders about antebellum understandings are useful, since during this period the limited nature of federal judicial power also reflected the influence of conventional political considerations.

Early nationalists understood the relationship between strong central authority and a strong federal judiciary that was resistant to local influence—but so did opponents of strong national power, and one of their principal accomplishments in 1789 was preventing the creation of a truly nationalist judiciary (Marcus 1992). Federal judicial districts and circuits were tied to state boundaries.[9] In almost all states only one federal trial judge was assigned (Virginia and Massachusetts received two), and these district court judges had to be residents of their districts. Federal district courts had remarkably limited jurisdiction. They were essentially authorized to hear only admiralty cases plus penalties and forfeitures under the laws of the United States. Circuit courts also acted primarily as trial courts and heard mostly cases involving diversity of citizenship. Importantly, federal district courts had no authority to hear trials on "federal question" suits, which meant that

[5] Skowronek (1982) provides an exemplary account of the development of national administrative capacity; but because the judiciary was also not a focus of that analysis, he relies too much on accounts that simply stress the conservative orientation of legal elites. No effort was made to analyze the actual steps taken by Congress and the presidency to facilitate judicial power. While he mentions in one sentence the Congress's expansion of the jurisdiction of federal courts, too much of his account leaves the impression that expansion was driven by judges as a natural response to industrialization: "The expansion of federal judicial power in the late nineteenth century was the natural response of the early American state to demands for national authority in the industrial age. Gradually over the 1870s and 1880s, the federal judiciary molded its new powers into an aggressive discipline for ordering governmental affairs." Still, he is fundamentally correct that "with nationalism, the Court recognized the continental scale of the new economic order and facilitated a concentration of governing authority.... [The Court sought] to sharpen the boundaries between the public and private spheres, to provide clear and predictable standards for gauging the scope of acceptable state action, and to affirm with the certainty of fundamental law the prerogatives of property owners in the marketplace" (Skowronek 1982, 41). I would add that this agenda did not originate with the Court and would not have emerged unless it flowed out of the regime politics of the period.

[6] During the period discussed in this essay Congress expanded the size of the U.S. Circuit Courts of Appeal seven times (adding nine judges in 1869, one in 1887, nine in 1891, three in 1893, one in 1894, and one each in two separate acts in 1895), and in all but two cases (1887 and 1893) the House, Senate, and president were of the same party.

[7] See also Barrow, Zuk, and Gryski (1996) for a discussion of judicial expansion and appointment politics. For my purposes, though, their definition of "institutional change" is overly narrow. They define institutional change as "a function of three components—bench expansion, replacements created by voluntary and involuntary departures, and elevations" of lower court judges to higher courts. This makes quantitative data collection more manageable, but it does not allow for an investigation of the ways in which judicial power may expand as a result of jurisdictional changes and evolving conceptions of the role of federal courts in the political system. While they acknowledge that institutional development may be "either quantitative (increase in 'business') or qualitative (enlargement or upgrading of mission), often connoting alterations of status within the political system as well," they do not provide an assessment of qualitative "mission upgrades" that alter an institution's status in the political system (Barrow, Zuk, and Gryski 1996, 7).

[8] Also, unlike rational choice analyses of the dynamics of interinstitutional politics (Epstein and Knight 1998; Epstein and Walker 1995; Ferejohn and Weingast 1992; Gely and Spiller 1992; Knight and Epstein 1996; Maltzman, Spriggs, and Wahlbeck 2000; Spiller and Gely 1992), the emphasis here is on how state-building led to an adjustment in the judiciary's "mission" or role in the political system (Gillman 1999) rather than on mapping out short-term and discrete strategic calculations in a given case.

[9] Federalists in the early-nineteenth century tried one last time to create districts independent of state boundaries. The District of Champlain would have covered parts of New York and Vermont, and the District of Cumberland would have covered western Maryland and Virginia. But the measure was predictably defeated (Wheeler 1992, 5).

most conflicts over national policy would have to be litigated in state courts.[10] The Supreme Court was given the authority under the infamous Section 25 of the Judiciary Act to review decisions by a state's highest court in which a claim based on federal rights was denied, but it took more than a quarter-century before that power was asserted in *Martin* v. *Hunter's Lessee*, 14 U.S. 304 (1816) and that authority was immediately subjected to a prolonged siege by resistant states (Warren 1913).[11]

To mitigate further the centralizing potential of the Supreme Court the six justices were required to spend most of their time traveling in the states over which they had circuit responsibilities, where they would serve primarily as trial judges with very limited jurisdiction.[12] When they heard appeals while riding circuit they were required to participate with the local federal judge who made the original decision. Their circuit responsibilities ensured that these national officeholders would feel deep connections to their assigned states, and antebellum appointment norms solidified these connections by encouraging presidents to choose justices from the region of the country over which they would have circuit responsibilities (O'Brien 2000, 32–103). This tendency to view Supreme Court justices as representing regional interests was reinforced by the Judiciary Act of 1837, which increased the size of the Court from seven to nine while also expanding and realigning the circuits to account for Western expansion. To reinforce sectional influences no circuit contained both a free and a slave state; to ensure the protection of Southern regional interests (a goal of the second-party system) the slave states were divided into five circuits, meaning that they would enjoy a majority on the Supreme Court (Hall 1973, 18, 19, 448, 451; for a general discussion of the issues raised in the previous two paragraphs see Frankfurter and Landis 1928, 6–55, and Wheeler 1992).

There were minor adjustments in the structure before the Civil War, but they did not affect the central point: The organization of federal courts was related to larger political considerations about the limited role of the national government in American politics (see Skowronek 1982, 29). More specifically, one of the principal ways in which national power was kept in check was by ensuring that the principal agents of national law would be appointed with local or regional considerations in mind and (for good measure) would be overworked, poorly paid, and authorized to enforce only a subset of federal law (the rest of which would be filtered through state proceedings). Given that this was the goal, it is not surprising that when federal courts experienced serious caseload pressures in the decades before the Civil War, Congress felt no obligation to offer relief.[13]

These courts did do some work for the union (mostly in diversity and admiralty suits) and after *Swift* v. *Tyson*, 41 U.S. 1 (1842), they managed a small break from state influence when federal judges were freed from having to follow state law in diversity cases, thus creating a more national forum for interstate economic policy.[14] They were also able (with some difficulty) to enforce some federal policies, most significantly those relating to rights under the federal fugitive slave acts, which were enforced against antislavery forces in the North (Cover 1975). In the Compromise of 1850 Congress also vested the federal judiciary (through the action of federal commissioners) with the responsibility of deciding the status of runaway slaves; when we combine this decision with later partisan urgings to have the Supreme Court address the disintegrating slavery problem in the *Dred Scott* case, it is safe to say that there was a consensus among some party leaders that it was politically expedient to channel some aspects of national slavery policy into the federal courts (Graber 1993; Kutler 1968, 32–33). Still, the perceived utility of federal judicial power was very issue-specific, and all antebellum efforts to expand the general significance and power of federal courts in the political system were ignored or rebuffed.[15]

When the slavery interests separated from the national government at the beginning of the Civil War Republicans had their first opportunity to break Southern domination of federal judicial power. They also had their first opportunity to create a strong and effective national court system that could be the agent of Republican interests. But during this period reformers thought more in terms of reworking the traditional model to their partisan advantage rather in terms of serious institutional reconfiguration. Some influential historians of this period argue that Republican efforts in the 1860s represented a strong commitment to the expansion of judicial power to serve the ends of Reconstruction (Kutler 1968; Wiecek 1969), but it is probably

[10] As Casto (1997, 67–73) points out, there was relatively little substantive federal law in the early republic, and so this limit on the authority of federal courts may not be as remarkable as it might first appear (see also Purcell 1999, 691–93). At the same time, the decision to channel cases arising out of federal law into state courts demonstrates the level of distrust of national authority and the prevailing understanding of the relationship between federal court jurisdiction and national power.

[11] Just to complete the record, with respect to other suits, no appeals could be made to the Supreme Court when the parties in alienage or diversity suits decided to litigate in state court; moreover, an overall amount-in-controversy limitation of $2,000 was placed on diversity and alienage appeals to the Supreme Court.

[12] In 1816 Justice Story wrote a "Judge's Bill" that would have conferred on circuit courts the full sweep of judicial power conferred in the Constitution, but Congress never acted (Frankfurter and Landis 1928, 36).

[13] Hall (1973, 36) reports that in 1841 the Supreme Court had 106 cases pending but disposed of just 42; in 1842, 107 pending with 52 disposed of; in 1843, 118 and 36; in 1844, 168 and 46; and in 1845, 173 and 64. Congress debated reform in 1847 and 1848 but did not act. The situation was even worse in the lower federal courts. In 1849 the Court took matters into its own hand by limiting the amount of time litigants had to make their arguments (two hours per side).

[14] The Taney Court extended this in *The Genesee Chief* v. *Fitzhugh*, 12 Howard 443 (1852), which overturned an 1825 decision that had limited the jurisdiction of federal courts in admiralty cases to the ebb and flow of the tide. This allowed greater centralized control over commerce on American inland lakes and rivers.

[15] By the early 1850s Southern Democrats attempted to consolidate the protection of slavery by making the first real efforts since the short-lived Judiciary Act of 1801 to nationalize the federal courts and expand their staffing and jurisdiction, but these efforts were successfully resisted by the forces that became the Republic Party, led mostly by Salmon P. Chase (Hall 1973, 107–8, 118, 263, 452).

more accurate to view these early steps as constrained attempts to change marginally the bias inherent in existing structures.[16] While there were some calls from judges, prominent lawyers, and newspapers to increase the number of district courts, create an intermediate court of appeals, and eliminate circuit riding by justices, the Congress was still controlled by representatives committed to localism and regional representation on the Supreme Court (Hall 1975, 180–81). The Judiciary Act of 1862 succeeded in rearranging the circuits so that there were only three wholly Southern districts (a number that was reduced to one in 1866) and also gave Ohio and Illinois a prominent role in newly formed Northern circuits; Lincoln quickly cemented this traditional model by appointing Samuel Miller of Iowa, David Davis of Illinois, and Noah Haynes Swayne of Ohio to the Supreme Court. A year later regionalism was reinforced again when California and Oregon were brought into the system as a tenth circuit, with Stephen J. Field of California receiving an appointment. The new system ensured that the South could not dominate the federal courts and, thus, brought an end to "the judicial embodiment of Calhoun's concurrent majority," but it did nothing about circuit riding and it made no effort to assist with overburdened dockets at all levels of the federal court system (Hall 1975, 181; Kutler 1968, 16–21).

By 1865 Northern commercial and financial interests were pressuring Republicans to do something about docket overload. The bill that Lyman Trumbull introduced in late 1868 addressed the problem primarily by creating nine new circuit court judges who would have the same powers and jurisdictions as the assigned Supreme Court justice (who would still be required to attend at least one term of the circuit court during each two-year period). The decision to make these new positions circuit court, rather than district court, appointments was considered a modest way of mitigating traditional local (state-based) biases in the lower federal courts. Still, as Hall (1975, 182–85) summarized these developments, the federal judicial system "ended the decade of the 1860s in much the same condition they had begun, characterized by administrative decentralization and individuality.... At least in their institutional structure the federal courts proved resistant to the impact of the Civil War and the first years of Reconstruction. For their part, the Republicans emerged as at best reluctant nationalizers" (see also Fairman 1987; Kutler 1968, 50–63).

FROM RECONSTRUCTION TO ECONOMIC NATIONALISM

Initial and tentative efforts to expand the role of federal courts began during the War with the passage of the 1863 Habeas Corpus statute, which, for the first time since the "nullification crisis" of the 1830s,[17] authorized the "removal" of judicial proceedings from a state court into a federal court if the state proceeding appeared to a defendant's counsel to be prejudiced by reason of the defendant's status as a national officer.[18] The precedent was quickly built upon: Over the next few years Congress passed 12 removal measures extending federal court alternatives to state court defendants (especially blacks) who were not federal officials but who claimed that the protection of federal rights was being jeopardized by local prejudice. Removal also became an option in suits against all corporations (except banking) organized under a law of the United States, suits against common carriers for loss or damage to goods through the hostilities of the Civil War, and diversity suits exceeding $500 where the nonresident party could show local influence or prejudice (Frankfurter and Landis 1928, 61–63; Hyman and Wiecek 1982, 261–63; Kutler 1968, 143–60).[19]

Reconstruction politics also led Congress to engage in piecemeal expansions of the role of federal courts in promoting or protecting national policies. The Federal Enforcement Act of 1870, a.k.a. the Force Bill, reenacted the 1866 Civil Rights law through the enforcement authority of the Fourteenth and Fifteenth Amendments and also prohibited state election officials from enforcing discriminatory state laws or interfering with voting on the basis of race. While enforcement was assigned to the brand new Department of Justice, the jurisdiction of federal courts was expanded to hear prosecutions brought under the statute, and removal authority was granted to protect federal officials and rights-holders from prejudicial state court proceedings. Federal judges were also authorized to call for troops to maintain peace at elections, having become now the first line of defense—or offense—for the federal government when confronting challenges to national authority (Hyman and Wiecek 1982, 467). The following year another enforcement act was passed that was aimed primarily at Klan violence.[20]

[16] "...The revisionists' view [which correctly emphasizes that the Republican party was not hostile to judicial power] fails to emphasize sufficiently the local and regional pressures operating on a Republican party squeezed between a traditional commitment to the idea of judicial representation [of regional interests] and the need for more and better administered courts" (Hall 1975, 179).

[17] Congress enacted the first removal statute in 1815 after many New England states resisted enforcement of federal embargo and nonintercourse statutes passed during the war of 1812. Federal customs officials who searched ships and seized cargo found themselves either sued in state courts by local citizens or criminally prosecuted by state officials, and Congress responded by providing for removal to a circuit court of "any suit or prosecution...commenced in any state court, against any collector...or any other officer, civil or military...for any thing done by virtue of this act or under colour thereof" (Ziegler 1995, 719–20).

[18] Even though a case might be removed into federal court, the judge was obligated to follow the procedures of the state, except Negroes were allowed to testify even against whites and court officers (including lawyers and jurors) had to swear to their past and future loyalty to the Union (Hyman and Wiecek 1982, 261).

[19] The Supreme Court upheld such removal jurisdiction in *Mayor* v. *Cooper*, 73 U.S. 247 (1867).

[20] Later, in *United States* v. *Harris*, 106 U.S. 629 (1883), the Supreme Court struck down part of the Ku Klux Klan Act of 1871 on the grounds that the protection of individuals from private conspiracies was a state function rather than a national function. The same year the Court had also declared unconstitutional the Civil Rights Act of

However, despite a spate of activity culminating in the passage of the Civil Rights Act of 1875, by the mid-1870s the national enthusiasm for the vigorous protection of civil rights was diminishing (Keller 1977, 146; Stampp 1967). President Grant had effectively halted civil rights enforcement by 1873. Freedmen's Aid Societies in the North disbanded, racism became overt again in the North, and the language of reconciliation became more prominent. Federal patronage flowed from Grant to "respectable" Southern Democrats and convicted Klansmen were pardoned. Many Republicans attempted to kill the Civil Rights Bill, but the advocacy of a dying Charles Sumner led congressional leaders simply to put it off until after the 1874 elections. After stripping the bill of its most controversial feature (the clause requiring integrated schools), an unenthusiastic Republican party passed the bill (Foner 1988, 524–55).

In sharp contrast to their disintegrating commitment to civil rights was the party's increasingly clear focus on nationalism, and especially economic nationalism (Keller 1977, 181).[21] If Keller (1977, 285) is correct that, beyond patronage impulses, "public life in the years immediately after the Civil War was dominated by the conflict between the impulse to foster an active state and a broader national citizenship on the one hand, and deeply rooted countervalues of localism, racism, and suspicion of government on the other," then as a general rule it is fair to say that the former impulse frequently found its center of gravity in the national Republican Party leadership of the period, while the latter impulse often found expression in the resurgent Democratic Party.[22] The Republican Party's special focus on economic nationalism intensified after the violence of the Paris Commune in 1871, the rise of the Granger movement, and the Panic of 1873; according to one leading historian of the period it "marked a major turning point in the North's ideological development" as "older notions of equal rights and the dignity of labor gave way before a ... preoccupation with the defense of property" and "economic respectability" for large-scale enterprise (Foner 1988, 517, 522). Ultimately the goal of Republican Party leaders was the creation of "a political economy in which central state power could sweep aside regional and local barriers to the development of a national capitalist market and directly assist in the construction of the physical and financial infrastructure necessary for that market" (Bensel 1990, 4, 11; see also Woodward 1966, 35, and Bensel 2000, xix).

This infrastructure was made up of a variety of elements, including tariffs, monetary policy, and railroad subsidies. Republican national party platforms during this period were distinguished by their consistent support for tariff protection and the gold standard, while Democrats consistently opposed "all three legs of the Republican developmental tripod, substituting free trade for protection, silver for gold, and government regulation for market-led economic integration" (Bensel 2000, 193). However, the new business practices and social structures generated by postwar economic forces also resulted in new legal issues and disputes, for example, between partners operating across state lines, interstate corporations and local governments, railroads and farmers, and innovators of new corporate and financial structures. Given that these various issues arose piecemeal in the context of litigation, it was clear that the only way to ensure that this activity remained within the province of national control and direction would be to rethink long-standing convictions about mission and authority of federal courts in the political system.

Federal courts were thus functionally well suited to play an important role in promoting a policy of economic nationalism. The construction of this market required sympathetic supervision of individual transactions rather than general regulative or administrative capacity; federal courts were institutionally positioned to "span the divide between state and national authority" and "constitutional principles provided an effective framework for monitoring federal and state attempts to regulate corporate consolidation and interstate commercial transactions" (Bensel 2000, 9–10). There was also a political advantage to the development of a more active role for federal courts. Federal judges were politically insulated from "hostile popular sentiment," and to the extent that they would act as agents of national economic development, it would be unnecessary for state Republican Party leaders to incorporate into political platforms explicit policy positions on the construction of a national market that might put a strain on regionally specific political coalitions (Bensel 2000, 190–93; for an overview of state party platforms during this period see Bensel 2000, chap. 3).

Consequently, in the wake of the midterm elections of 1874, where Democrats regained control of the House of Representatives, Republican leaders in 1875 quickly brought up for consideration in one lame-duck legislative session a subsidy for the Texas and Pacific Railroad, a repeal of the 10% tariff reduction of 1872, a mandate that specie payment be resumed within four years, and a bill to expand the jurisdiction of federal courts.

In contrast to earlier removal legislation, which focused on beefing up enforcement of a limited set of civil rights, the main purpose of the Judiciary and Removal

1875. As I discuss momentarily, by this time the national government had lost interest in these Reconstruction-era concerns.

[21] As Frankfurter and Landis (1928, 57–58) put it, "National authority had to liquidate the institution of slavery, hitherto recognized by all the leading parties as the local concern of the states. By an easy transition other interests previously left to state action were absorbed by federal authority. The central government exerted power in fields which, in the past, would have aroused bitter opposition as encroachments upon the states. Transportation [mostly in the form of land grant aids to railroad and telegraph lines], education [mostly land grant colleges, a form of aid that had been vetoed by Buchanan in 1859 on the grounds that it was unconstitutional], commerce [homestead acts, postal expansions, harbor and canal construction, the encouragement of mining and timber exploitation], were actively promoted by the Federal Government."

[22] This nationalist-localist labeling of the parties at this time works as a general rule—especially in relation to the issue of federal judicial empowerment—but the point should not be overstated. As Bensel (2000, 101–2) puts it, "Ambitious [state] politicians constantly formed new party organizations, broke up old ones into factions, and led both into cross-party fusion agreements or coalitions."

Act of 1875 was to redirect civil litigation involving national commercial interests out of state courts and into the federal judiciary. Technically this meant granting the federal judiciary general "federal questions" jurisdiction—that is, the authority to have original jurisdiction in all civil and criminal cases "arising under" the laws of the United States—and removal jurisdiction in state civil cases that raised issues of federal law or that involved parties from different states.[23] The Act attempted to prevent obstruction of removal by authorizing federal judges to hold plaintiffs in default if a state court blocked removal; it also provided that a state court clerk who refused to effectuate a removal was guilty of a misdemeanor punishable by a year of imprisonment and a $1,000 fine (Purcell 1992, 15).

This reconfiguration of federal judicial power was finalized just as Republican Party domination of national politics was coming to an end. The recapture of the House by a more localist-oriented Democratic Party in 1875 (Keller 1977, 252–53), in combination with growing Midwestern and Western hostility to eastern financial interests and national corporations, led to various proposals to repeal or curtail newly expanded federal judicial power. However, given the partisan makeup of Congress and the presidency during this period of intensified two-party competition, these efforts at rollback were unsuccessful. For more than 10 years the pattern was for the House Judiciary Committee to report a reform bill favorably and for the Senate Judiciary Committee—now firmly in the hands of the Republican Party—to kill the proposal.[24] As long as Republicans controlled the House, the Senate, or the presidency, the new role for federal courts would remain entrenched; and given the power of "Eastern capital" in the Senate this veto point remained strong throughout the period (Frankfurter and Landis 1928, 91).[25] The most that was accomplished at the federal level by opponents of federal judicial power was an elimination of provisions that allowed plaintiffs to remove, a shortening of the time for filing removal petitions, and an increase in the jurisdictional threshold from $500 to $2,000 (Collins 1986, 738–56; Frankfurter and Landis 1928, 56–102; Purcell 1992, 15). More effective resistance took place at the state level, with some legislatures passing incorporation acts that required corporations to maintain offices in the state (thus ensuring that litigation would not be removable into federal courts under their diversity jurisdiction) or that required nonstate corporations to waive their rights to resort to federal courts (Bensel 2000, 324).

CONSOLIDATING ENTRENCHMENT THROUGH RELIABLE STAFFING AND INSTITUTIONAL RESTRUCTURING

If federal courts were going to facilitate the Republican agenda of economic nationalism it was necessary not only to expand their jurisdiction, but also to staff them with judges who were ideologically sympathetic to this new mission. Fortuitously, the appointment of federal judges did not require the cooperation of the House of Representatives, which was controlled by the Democratic Party for 10 years during the span from 1875–1891.[26] Throughout this period, until Grover Cleveland's inauguration in 1885, the Republican Party controlled the presidency, and combined with their hold on the Senate, this meant that Republicans controlled the power to appoint federal judges. Even when Republicans (temporarily) lost the White House, they found that Cleveland's agenda for the Democratic Party was perfectly consistent with their goal of economic conservatism and nationalism.

It was because of this combination of Congressionally driven structural changes and executive-driven appointment politics that a system of federal courts that had recently been considered bastions of localism within the federal government were transformed into "forums of order" for national commercial interests seeking a hearing free from the interests and perspectives that dominated state proceedings (Freyer 1978, 1979). Grant alone made a total of 41 appointments to the federal bench, which by the end of his term resulted in a lower federal judiciary where 64% of judges were Grant appointees (posted to 21 of the 37 states) and 85% were nominally Republican. After Hayes the bench was 91% Republican, with 28% being Hayes appointees (Barrow, Zuk, and Gryski 1996, 29–30).

Of special importance in fortifying this agenda was the decision making of the United States Supreme

[23] The short-lived Judicial Act of 1801 also bestowed general federal questions jurisdiction, but this last-minute Federalist measure was quickly repealed by the Jeffersonians. While Frankfurter and Landis (1928, 64–65) argued that the 1875 act granted to "federal courts the vast range of power which had lain dormant in the Constitution since 1789," Ziegler (1995, 736–40) claims that the act was perhaps slightly less bold than is suggested by this characterization, mostly because federal courts were not given general removal jurisdiction for state criminal cases where defenses implicated federal law. He speculates that Congress may not have thought that federal rights would play an important role in state criminal prosecutions and that the Supreme Court's continued appellate jurisdiction in such cases would be sufficient to address those rare cases.

[24] For 15 years before the Civil War the chairman of the Senate Judiciary Committee was a Democrat. In contrast, between 1861 and 1892, a Republican chaired the committee for every Congress except the Forty-sixth (1879–1881) (from the web site of the Federal Judicial Center, http://air.fjc.gov/history/topics/topics_congress_bdy.html [last visited May 15, 2002]).

[25] A page later Frankfurter and Landis report a speech on the floor of Congress in 1880 by George D. Robinson of Massachusetts: ". . .In the West there have been granger laws and granger excitement that have led people to commit enormities in legislation and extravagances in practice; and in the South—why, sir, history is too full for me to particularize. Capital is needed to restore the waste places of the South and to build up the undeveloped West; it must flow largely from the old States of the East and from foreign lands. But it will not be risked in the perils of sectional bitterness, narrow prejudices, or local indifference to integrity and honor. I say then, let us stand by the national courts; let us preserve their power." This position was "effectively entrenched in the Senate" by virtue of "numerous appeals to that body from manufactures, from business organizations and their lawyers" (Frankfurter and Landis 1928, 92).

[26] Democrats controlled the House during the Forty-fourth Congress (1875–77), the Forty-fifth (1877–79), the Forty-sixth (1879–81), the Forty-eight (1883–85), the Forty-ninth (1885–87), and the Fiftieth (1887–89). They regained the House during the Fifty-second and Fifty-third Congresses.

Court. The justices would not have the day-to-day responsibilities of administering this policy in individual cases, but their decisions would establish the legal and ideological framework within which these other judges would be operating. A review of the 15 justices who were appointed between 1870 and 1893 confirms that they "were selected by presidents and confirmed by senators who carefully noted both their devotion to party principles and 'soundness' on the major economic questions of the day," especially their "attitude toward regulation of interstate commerce by the individual states" (Bensel 2000, 7).[27]

- President Grant started the trend of focusing on conservative economic nationalists by appointing two railroad attorneys and directors, William Strong and Joseph P. Bradley. Two years later he appointed Ward Hunt, who was also identified with railroad interests. Grant's replacement for Chief Justice Chase, Morrison I. Waite, had no prior judicial experience and never held national office, but he had a record as a successful railroad lawyer and director and, also, enjoyed the support of the Vanderbilts.
- After appointing John Marshall Harlan and William Woods, President Hayes attempted to nominate Thomas Stanley Matthews while he was serving as Midwestern chief counsel to financier Jay Gould. The Senate took no action, but Matthews was renominated by President Garfield and finally confirmed in 1881 by a vote of 24 to 23, with opposition arising mostly because he was considered too openly associated with railroad and corporate interests.
- President Arthur had two appointments: Horace Gray, an experienced state jurist and economic conservative from Massachusetts, and Samuel Blatchford, an experienced circuit judge with connections to New York's business and political elite.
- The conservative Democrat Grover Cleveland appointed two: Lucius Lamar, another railroad director and a former professor of political economy who, as a Senator, chaired the Standing Committee on the Pacific railroads, opposed free silver, and vigorously defended Matthews during his controversial nomination (he met strong Senate opposition as the first nominee who had been active in the Confederacy and was finally confirmed by a vote of 32–28, with 16 senators not voting); and Chief Justice Melville Fuller, a corporate lawyer and sound money advocate who left the Democratic Party after Bryan was nominated on a free silver platform.
- President Harrison had four appointments: David Brewer, a conservative judge with experience in the lower federal courts and the nephew of iconic conservative Justice Stephen J. Field; Henry Brown, with almost-identical credentials as an economic conservative; George Shiras, Jr., a Pittsburgh lawyer with an influential clientele of railroad, banking, oil, coal, iron, and steel interests (and who was supported by Carnegie); and Howell Jackson, a Democratic who was a former colleague of Harrison's in the Senate and a family friend.
- Finally, Cleveland had two more nominations: Chief Justice Edward White, a senator and an economic conservative, and Rufus Peckham, a former judge, corporate counsel for New York, and "confidant of tycoons" including Morgan, Rockefeller, and Vanderbilt.

These nominees were not always of one mind on all issues relating to economic nationalism. Still, it still worth emphasizing that all of these nominees fit within a fairly narrow ideological space that supported the assigned mission of federal courts during this period.[28]

Not surprisingly, these justices did not resist Congress's invitation to have federal courts more involved in supervising litigation involving large-scale enterprise. Just a few years after passage of the 1875 statute the Court held that Congress could authorize the removal into federal courts of any case that raised an issue of federal law or that otherwise fell within the federal judiciary's Article III jurisdiction (such as diversity jurisdiction) (*Gold-Washing & Water Co.* v. *Keyes*, 96 U.S. 199 [1878]).[29] A year later, Justice Bradley wrote a concurring opinion in which he expressed the view that "no cases are more appropriate to this jurisdiction or more urgently call for its exercise than those which relate to the foreclosure and sale of railroads extending two or more states, and winding up the affairs of the companies that own them" (*Removal Cases*, 100 U.S. 457, 480, 482 [1879]). By 1880, in another railroad case, the Court declared that in cases of removal the "only inquiry" was whether the suit was one "arising under the Constitution or laws of the United States" (*Railroad Company* v. *Mississippi*, 102 U.S. 135, 136 [1880]).[30] Two years after the Court voided part of the Ku Klux Klan Act of 1871 on the grounds that the protection of individuals from private conspiracies was a state function rather than a national function (*U.S.* v. *Harris*, 106 U.S. 629 [1883]), a seven–two majority on the Court ruled, in the *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), that a suit against federally chartered corporations could be removed into a federal court

[27] The information on these 15 appointments reviewed in the following paragraphs is compiled from Abraham (1999), Bensel (2000), and Myers (1918).

[28] The failed nominees during this period were as follows: Grant's consideration of Senator George H. Williams and Caleb Cushing (another railroad lawyer) to replace Chief Justice Chase (both names were withdrawn because of opposition to their qualifications or character); Hayes's nomination of Matthews (which was successfully resubmitted by Garfield); Arthur's nomination of New York Senator Roscoe Conkling (who was confirmed by the Senate after a bitter fight but who then declined the position); and Cleveland's 1893 nominations of conservative corporate lawyers William B. Hornblower and Wheeler H. Peckham (brother of the person who was successfully nominated two years later), each of whom was unacceptable to the leader of New York's Democratic machine, Senator David Hill (Abraham 1999).

[29] In this case, however, the Court rejected the removal on the grounds that the defendants who were seeking the removal did not plead facts that demonstrated that their defense actually implicated federal law.

[30] Justice Miller dissented on the ground that removal should not be available in cases where the reliance on federal law was merely "incidental" to the defense.

even if the legal issues implicated ordinary state law claims and defenses. In other cases the Court did impose some minor jurisdictional limits,[31] but the overall record demonstrates that conservative Supreme Court justices were quite willing to support Congress's efforts to expand the control of federal courts over commercial litigation (Collins 1986, 730; Kutler 1968, 157).

Predictably, businesses flocked to these courts seeking more favorable case outcomes and legal doctrines.[32] By January 1, 1878, the federal circuit court in Chicago had 3,045 suits pending, 10 times the antebellum average. According to a House of Representatives Report in 1876, diversity cases were "the largest and most rapidly-increasing class of Federal cases," arising from rapid economic development and "the formation of numerous great corporations whose business connections extend into many States" (Purcell 1992, 20). In part this flood of litigation was motivated by reasons made explicit in the removal language of the 1875 statute, such as a desire to avoid local prejudice. But other advantages should not be overlooked, such as the control that federal judges had over juries (generally regarded as dangerously proplaintiff), which included the right to "comment" on the quality or weight of the evidence and direct or set aside verdicts. Verdicts in federal court also required unanimity among 12 jurors, and this was preferable for defendants in comparison to state rules that often allowed smaller or nonunanimous verdicts. Removal also allowed for more "forum shopping" by litigants looking for more sympathetic courthouses. This was particularly important given that the social and professional background of most Republican-appointed federal judges disposed them toward the viewpoints advocated by corporations (Fritz 1991; Hall 1976; Presser 1982, 69–127; Purcell 1992, 24–25). In a nutshell, they were "a remarkably similar, if not insular, social group" that was closely tied to "powerful political and economic actors, ... trained and experienced at the bar, steeped in the revered common law, and coming largely from the ranks of the corporate elite" (Purcell 2000, 320).

In a relatively short period of time, with the assistance of an increasingly professionalized bar that viewed itself as obligated to "supervise, direct, and promote the great business interests of the country" (Keller 1977, 350; Twiss 1942), the federal judiciary articulated legal principles that were consistent with the promotion of a more unfettered national market. Federal judges presided over corporate reorganization and addressed problems of railroad finance through the practice of equity receiverships, all with an eye toward promoting more nationalist solutions over regional approaches (Berk 1994; Gordon 1983, 108; Purcell 1999, 732–33). At the top of the hierarchy the Supreme Court increased its supervisory authority over local economic regulation by invoking the commerce clause with unprecedented frequency and interpreting it to require courts to eliminate barriers to the free flow of interstate goods and services (Bensel 2000, 325–49; Freyer 1979; McCurdy 1978). The justices interpreted the Fourteenth Amendment to make it a constitutional violation for a state to regulate a person or a corporation in a way that prevented either from earning a reasonable return on invested capital, thus expanding the supervisory responsibilities of the entire federal judiciary over state regulations of business (Bensel 2000, 334). More generally, the Supreme Court insisted that all levels of government stifle tendencies toward favoritism or prejudice and instead adopt neutral and impartial regulations that were consistent with national standards of due process and equal protection for all (Gillman 1993).[33] In all these cases, doctrines proved extremely beneficial to large-scale enterprise; in fact, by 1890, the *Commercial and Financial Chronicle* commented that "the findings of our highest court are such as to put to rest" the dangers of "Socialistic legislation" and thus mark "an epoch in the industrial and constitutional history of the country" (Bensel 2000, 335).[34]

[31] The most important limit was the "well-pleaded complaint" rule, which held that the federal question must appear in the plaintiff's cause of action (see *Louisville* v. *Mottley*, 211 U.S. 149 [1908]).

[32] Purcell (1992, 21–22) cites L. Friedman's (1987) study of litigation in Alameda County, California, between 1880 and 1900, in which he found that of 340 personal injury suits, plaintiffs initiated only 29 in the local federal court. Of the 110 personal injury suits heard in federal court, 81 were there by way of removal. This meant that plaintiffs instituted 90% of their actions in state courts, and for every one case that plaintiffs brought in federal court three ended up there by defendants on removal. A similar pattern existed for insurance suits, with companies preferring the federal forum at least five times more frequently than plaintiffs. Plaintiffs discontinued about 45% of federal cases they initiated in federal courts, but their dropout rate rose to 64% for cases that had been removed to federal court. McCurdy (1978, 632–33) reports that "instead of responding to an existing free market of continental dimensions, producers of sewing machines and dressed beef actually ignored legal barriers devised by state governments and instructed their local marketing agents to invite arrest and conviction. At that point, the companies' headquarters mobilized the substantial financial resources necessary to press the Supreme Court for relief...."

[33] Many of these doctrines were also being developed in state courts (Gillman 1993). The argument herein is not that federal judges were alone in elaborating business-friendly doctrines or that they were consistently more conservative than all state courts. Instead, the point is to explain the innovative inclination of federal courts to federalize certain kinds of precedents that promoted economic nationalism.

[34] It would be misleading to suggest that this agenda unfolded smoothly. The story of federal courts versus the Interstate Commerce Commission (ICC), created in the mid-1880s, represents what Orren and Skowronek (1994) call 'intercurrence," conflicts between or among institutions that represent different interests within historical periods. Berk (1994, 178) suggests that for a time the ICC represented a kind of "regional republican" conception of railroad regulation but that in the end "the corporate liberal alliance of federal courts and national carriers...proved more powerful," and this characterization of the motivation of federal courts is consistent with the analysis in this essay of the mission they were promoting in the years after 1875. Compare Skowronek (1982, 151): By the 1890s "both the commission and the Court posed as bastions of intellectual and professional leadership insulated from the unstable and threatening forces of democratic politics. Both the commission and the Court sought to develop principles of regulation that would protect the railroad industry and promote further industrial development. Sharing this much in interest and orientation, the Court's emasculation of the ICC takes on the added dimension of an institutional conflict between two ideologically charged instruments of economic control." The Supreme Court ruled in favor of the railroads in 15 of 16 cases it reviewed between 1887 and 1905; as early as 1897 the commission

However, the new mission of the federal judiciary was in such great demand that rising rates of litigation threatened a general collapse. Before institutional reconfiguration the Supreme Court's October Term of 1870 opened with 636 cases on the appellate docket. By comparison, the October Term of 1884 opened with 1,315 cases on the appellate docket; a year later it was 1,340; a year later, 1,396; in 1887 it was up to 1,427; in 1888 it was 1,563; in 1889 the docket was 1,635; and by 1890 the number was an astonishing 1,800 cases—an almost 300% increase in 20 years. The story in the lower courts was the same: In 1873 there were 29,013 cases pending in the circuit and district courts; by 1890 the number had risen to 54,194. One result of this caseload overload was that the traditional duty of the justices to attend circuit was practically a dead letter, since a Supreme Court term that went from October to May left only a few months to perform circuit duties that, in the belief of one contemporary, could not be performed in thrice that time (leaving that writer, Walter B. Hill, to lament that "It may well be doubted whether it is a wholesome example for Congress to pass laws relative to the highest judicial tribunal in the land which can only be intended in a Pickwickian sense") (Frankfurter and Landis 1928, 60, 86–87). Nine circuit judges (10 after 1887) were expected to hold circuit courts in 65 districts.

In these circumstances reform legislation might be considered an uncontroversial response to an obvious workload problem. However, during the antebellum period, a Congress that had little interest in promoting federal judicial power was often happy to keep federal judges overworked. Moreover, the caseload pressure of the 1880s resulted from institutional reforms that were still controversial. In fact, the preferred Democratic response to these pressures was not an improvement in the ability of federal courts to manage this workload; it was "complete elimination of all jurisdiction based on diverse citizenship" (Frankfurter and Landis 1928, 98).[35]

Given the opposing views of the two parties on the virtues of broad jurisdiction for federal courts, the caseload problem would remain uncorrected as long as divided government prevailed. It was not until 1889, with the start of the Fifty-first Congress, that Republicans once again controlled the House, the Senate, and the presidency and were thus in a position to respond as they saw fit to the pressures on federal courts. By late in 1890 Chief Justice Waite and Justices Harlan and Field each spoke out to urge Congressional action. The American Bar Association influenced President Harrison—who won the presidency with fewer popular votes than Grover Cleveland—to add a plea for an intermediate court of appeals in his annual message in December 1889.

In April 1890 a reform bill introduced by Congressman John H. Rogers came out of the House Judiciary Committee (Frankfurter and Landis 1928, 97–98). Of the 118 members voting to schedule debate on the bill, 115 were Republicans, two were Democrats (including Congressman Rogers, who in 1896 would later be appointed as a District Court judge by President Cleveland, confirmed by a Republican Senate), and one was a member of the Labor Party; every one of the 101 votes against debating the bill came from Democrats (*Congressional Record—House*, vol. 21, April 15, 1890, 3400).[36]

The bill's chief sponsor in the Senate, and the eventual namesake of the legislation, exemplifies the political and social forces that were behind judicial empowerment. William M. Evarts was a prominent New York lawyer before the Civil War with a sufficiently impressive reputation that he was retained by the national government to help argue *The Prize Cases*. In 1864 Lincoln was urged by many luminaries (including the Massachusetts governor and some Supreme Court justices) to appoint Evarts to replace Chief Justice Taney. He argued a number of cases before the Chase Court, defended Andrew Johnson in the Senate impeachment trial, and then became Johnson's attorney general. When he went back to New York he was a leader of the bar association and helped smash the Boss Tweed ring. He continued a very prosperous law practice, representing mostly railroads and other large commercial interests. He was the lead counsel for Republicans before the electoral commission looking into the disputed Hayes–Tilden election, and not long thereafter he was appointed by Hayes to be Secretary of State, as which he advised the president on (among other things) the use of federal troops to put down the Baltimore and Ohio Railroad strike of 1877. When he returned to New York he was instrumental in pushing the state's highest court to adopt due process interpretations that would prove emblematic of the so-called "Lochner era," such as the decision in *In re Jacobs*, 98 NY 98 (1885), striking down the state's Tenement House Cigar Law on the grounds that it amounted to a class-based deprivation of the freedom to labor without any reasonable public health benefit (with Evarts adding that tobacco was a useful method

itself reported to Congress that because of the justices the ICC had "ceased to be a body for the regulation of carriers" (Bensel 2000, 311–12). For an insightful discussion of how the final ICC bill incorporated Democratic Party concerns in the four swing states of the electoral college (New York, Indiana, New Jersey, and Connecticut), as well as its rural base, see James 1992.

[35] When a Republican-controlled House was finally able to force consideration of a bill establishing a new layer of federal appellate courts, Representative Richard Parks Bland (D-MO) inquired whether the bill "in any particular decreases the jurisdiction of the Federal courts and leaves to the State courts many questions that ought to be left to them.... I hope the House will deal with that point, because the best way to relieve Federal courts is to leave many of the matters with which they are now burdened to the State courts" (*Congressional Record—House*, vol. 21, April 15, 1890, 3398–99; see also 3406–8 for the remarks of Alabama Democrat William Calvin Oates, a member of the Judiciary Committee who led the opposition).

[36] Information on the party identification of those voting on the bill was obtained by searching the Biographical Directory of the United States Congress at http://bioguide.congress.gov/biosearch/biosearch.asp (last visited May 15, 2002). The other Democrat voting in favor of debating these reforms was Littleton Wilde Moore (D-TX), a former judge. The Labor Party vote came from another Arkansas representative, Lewis Porter Featherstone.

of fumigation). He was elected to the Senate the following year, just in time to lend his reputation, connections, and worldview to the cause of judicial reform (Barrows 1941).

The resulting legislation was patchwork reform rather than reinvention, but it solidified the developments of the previous decades.[37] The original bill introduced by Rogers would have fused district and circuit courts, created nine intermediate circuit courts with final decisions in cases arising solely through diversity of citizenship, and added two additional circuit judges for each circuit. Evarts's alternative, which he had first circulated for comments to the justices of the Supreme Court and selected circuit court judges (Barrows 1941, 481), formally kept both the district and the circuit courts but abolished the appellate jurisdiction of the circuit courts, thus leaving them to operate as trial courts alongside the district courts. It also identified defined classes of cases that could be appealed directly from federal trial courts to the Supreme Court and then channeled all other appeals through nine newly created circuit courts of appeal, which would have the final say in virtually all diversity suits unless the appellate judges certified that the case should be decided by the U.S. Supreme Court. The three-judges panels on these courts of appeal would be made up of one new court of appeals judge for each circuit plus available circuit or district court judges. Evarts's alternative satisfied some traditionalists who wanted to be able to say that elements of the old structure had been maintained (including circuit riding, which under this proposal would in effect be circuit visiting, since the actual work would be done by the new intermediate courts).

At conference the House yielded to the Senate's version and the Evarts Act was finally passed in March of 1891 by the lame-duck Fifty-first Congress (Frankfurter and Landis 1928, 97–102). As with the 1875 legislation, this reform came just in time for Republicans. The Fifty-second Congress that would start later that year had a House of Representatives that was dominated by 235 Democrats and contained only 88 members of the GOP.

The legislation was effective in reducing the Supreme Court's caseload. The number of cases before the justices fell from 623 in 1890 to 379 in 1891 and 275 in 1892. More importantly, the act—the first significant restructuring of the federal judiciary since the Judiciary Act of 1789—made it possible for the 1875 jurisdictional changes to persist. It also helped remove some of the traditional localizing pressures on Supreme Court justices caused by circuit riding. As a consequence, the Supreme Court could continue its development as a truly national institution, pursuing national political agendas by exercising those expanded powers and responsibilities that had been assigned to it as a result of the postwar political construction of federal judicial authority (Purcell 2000, 40).

[37] The vote in the Senate to consider the House bill was 36 to 12, with all opposition coming from Democrats and 29 favorable votes coming from Republicans (*Congressional Record—Senate*, vol. 22, September 18, 1891, 10194).

CONCLUSION

The idea of political entrenchment in the judiciary, if not yet adequately incorporated into contemporary political science treatments of partisan politics or judicial empowerment, is nevertheless familiar to students of American constitutional history. When the Federalist Party lost control of the national government in 1800, their lame-duck Congress responded by passing the Judiciary Act of 1801, which expanded the size and jurisdiction of the federal judiciary and gave outgoing President Adams the opportunity to appoint loyal Federalists to the life-tenured federal bench. Incoming president Thomas Jefferson reacted by uttering his infamous lament: "The Federalists have retired into the judiciary as a stronghold and from that battery all the works of republicanism are to be beaten down and erased." As it turned out, though, Jefferson's fears never materialized. The Judiciary Act of 1801 was quickly repealed, with the subsequent approval of a besieged U.S. Supreme Court in *Stuart* v. *Laird*, 5 U.S. 299 (1803). When Congress began targeting judges for impeachment the remaining Federalists on the bench quickly learned that to survive their political climate they had to give up on the hope of using their office as a partisan forum (Whittington 1999). Over the years, John Marshall's Supreme Court was very careful about tailoring its decisions to the evolving preferences of the dominant partisan coalitions in the national government (see Graber 1998b and Klarman 2001).

In this case study I have tried to show why the sense behind Jefferson's lament is more appropriately directed at the actions of the postbellum Republican Party. These partisans were much more successful than the Federalists at transforming the judiciary into a programmatic stronghold. Why? The principal reasons have to do with some fortuitous political circumstances and a more advantageous institutional environment. Entrenchment was made possible because the Republican Party's post-Reconstruction commitment to an agenda of conservative economic nationalism congealed just as the Party was forced to hand over the House of Representatives to a resurgent Democratic Party, which means that the federal judiciary was one lame-duck session of Congress away from remaining as relatively weak and marginal as it had been before the Civil War. Republicans were able to control the staffing of these newly empowered courts only because a resurgent Democratic Party was able to win the House but not the Senate, and because two Republican presidents (Hayes in 1876 and Harrison in 1888) were able to win the White House with fewer popular votes than their Democratic opponents. Repeal was avoided throughout this formative period because Republicans maintained a political veto over such efforts by holding onto at least one institution of the national government. The consolidation of this agenda was made possible only because of the Republican's short-term control of the entire federal government during the Fifty-first Congress.

The fragile and contested nature of the Republican Party's agenda for economic nationalism provides a

new perspective on the controversies surrounding the federal judiciary's more active commitment to conservative constitutionalism during the so-called "Lochner era"—a perspective on both why these judges adopted this agenda and why their place in American politics became increasingly controversial as they encountered emergent progressive politics in the twentieth century (B. Friedman 2001; Gillman 1993; Ross 1994). While the story of the overall development of federal judicial power in the United States does not end with the passage of the Evarts Act in 1891, the lessons of this account may help frame inquiries of later stages. The Evarts Act raised new issues that needed to be cleared up, such as unexpected increases in criminal appeals (addressed in subsequent criminal appeals acts) and the increasingly discordant position of the old (now nonappellate) circuit courts within this new system (leading to their elimination in 1911). The increasingly conspicuous role of the Supreme Court in the political system would be further advanced by the Judges' Bill of 1925 (which gave the justices more control over their decision-making agenda) and the subsequent construction of the Court's own building, the so-called "Marble Temple," in the 1930s.

At about the same time, two prominent law professors wrote an influential account of the political construction of federal judicial power as a way of advancing a different conception of the role of the federal courts in American politics, an agenda that focused on "constraining the reach of the conservative Supreme Court" (Purcell 1999, 684).[38] As one of these writers, Professor Felix Frankfurter, confessed in a letter to his friend Herbert Wechsler, "My central concern and the driving motive of my interest in the field [was the fact that] under the guise of seemingly dry jurisdictional and procedural problems, majestic and subtle issues of great moment to the political life of the country are concealed" (cited in Purcell 1999, 685–86). If we make Frankfurter's concerns our own, we might encourage students of party politics or delegation of powers to focus more attention on the ways in which executives and legislators use judges as extensions of conventional political or policy agendas. Conversely, students of law and courts might be encouraged to locate the scope and direction of judicial decision making into a broader analysis of party systems and partisan control of those institutions that are responsible for the jurisdiction and staffing of courts.

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[38] According to Purcell, this agenda involved "limiting the ability of corporate litigants to exploit federal jurisdiction, abolishing the doctrine of *Swift* v. *Tyson*, 41 U.S. 1 (1842), blocking passage of the proposed federal declaratory judgment act, expanding substantially the issues on which the lower federal courts would defer to state courts, and justifying a series of progressive legislative proposals to restrict the jurisdiction and alter the structure of the national judiciary."

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