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OVERVIEW: THE FEDERAL COURT SYSTEM—1886, 1986, AND 2086

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In a symposium entitled “The Federal Courts: The Next 100 Years,” it may seem very odd that I am going to talk to you about the federal courts, among other things, in 1886. This may seem to be a new proof of what Fred Rodell wrote many years ago in his book, *Woe Unto You, Lawyers!*: “The Law is the killy-loo bird of the sciences.”¹ The killy-loo bird, you may recall, is the bird that flies backwards because it does not care where it is going, but is mightily interested in where it has been. There is some truth, I think, in that analogy as a description of our profession. We are a conservative profession. We do look at what we have done in the past. We depend very mightily on precedent. My real reason for looking backward, however, is that I think by looking back a hundred years and seeing the differences between the federal courts in 1886 and 1986, we have at least some glimmer of the kind of dramatic change that our grandchildren and great-grandchildren will experience.

Before I talk about the federal courts in 1886, I want to go back even further. If Professor Howard can quote to us a talented English writer talking about an English eccentric, perhaps it is permissible for me to do the same thing. In 1889 Lord Chief Justice Coleridge gave a talk to a group of law students on the changes that he had seen in his forty-two years at the bar. He entitled it, “The Law in 1847 and the Law in 1889.” During that discourse, he described an interesting figure in English law, one whom I am afraid is unknown to today’s generation of lawyers and law students. When I was a law student, we heard about Baron Parke. It was a name to scare young law students because he was associated with the notorious Hilary Rules, the rules of

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1. F. RODELL, *WOE UNTO YOU, LAWYERS!* 23 (1939).

special pleading. Today, no one knows anything about pleading, much less about historical figures involved in pleading.² In any event, Coleridge had known Parke, and I have always greatly enjoyed what Lord Chief Justice Coleridge had to say about Baron Parke. Baron Parke was, of course, one of the judges of the Court of Exchequer. Coleridge said:

The ruling power in the Courts in 1847 was Baron Parke, a man of great and wide legal learning, an admirable scholar, a kind-hearted and amiable man, and of remarkable force of mind. These great qualities he devoted to heightening all the absurdities, and contracting to the very utmost the narrowness, of the system of special pleading. The client was unthought of. . . . "I have aided in building up sixteen volumes of Meeson & Wellsby," said he proudly to Charles Austin, "and that is a great thing for any man to say." "I dare say it is," said Austin; "but in the Palace of Truth, Baron, do you think it would have made the slightest difference to mankind, or even to England, if all the cases in all the volumes of Meeson & Wellsby had been decided the other way?" He repeated his boast to Sir William Erle. "It's a lucky thing," said Sir William, as he told me himself, "that there was not a seventeenth volume, for if there had been the Common Law itself would have disappeared altogether, amidst the jeers and hisses of mankind;" "and," he added, "Parke didn't seem to like it."

Peace be with him. He was a great lawyer, a man of high character and powerful intellect. No smaller man could have produced such results. If he ever were to revisit the glimpses of the moon one shudders to think of his disquiet. No *absque hoc*, no *et non*, no colour, express or implied, given to trespass, no new assignment, belief in the great doctrine of the negative pregnant no longer necessary to legal salvation, and the very nice question, as Baron Parke is reported to have thought, whether you could reply *de injuria* to a plea of deviation in an action on a marine policy not only still unsolved, but actually considered not worth solution!³

2. I may have been too pessimistic. In an opinion that came down a few months before this Symposium, which I did not see until afterward, Judge Richard Arnold said, "To read this complaint as not alleging the presence of the res within the district would exalt technicality to a level seldom attained since the days of Baron Parke." *United States v. Beechcraft Queen Airplane Serial No. LD-24*, 789 F.2d 627, 631 (8th Cir. 1986).

3. Coleridge, *The Law in 1847 and the Law in 1889*, 57 CONTEMP. REV. 797, 799-801 (1890).

That much change in a very conservative nineteenth century.

What has happened in the last one hundred years, between 1886 and 1986? Consider what the federal courts were like in 1886.⁴ First, that great court upon which Jay Wilkinson, Clement Haynsworth, and Donald Russell sit did not exist. There were no courts of appeals. They did not come until 1891 with the Evarts Act.⁵ Instead, there were two courts of original jurisdiction, the circuit courts and the district courts, and the Supreme Court sitting in review of them. Supreme Court Justices still rode circuit. They did not do it often, but the statute still required them to sit with the circuit court once every two years in each district within their circuit. There were no three-judge courts. That was a device that was not invented until the twentieth century. There were no United States magistrates. There were (and some may think it a great blessing) no law clerks. There was no Judicial Code. At that time in order to find out how the federal courts were governed, one had to hunt out scattered provisions in the revised statutes of 1875, many of them still unchanged from that great statute whose 197th birthday we will celebrate next Wednesday, the Judiciary Act of 1789.

The kinds of litigation that the courts heard in 1886 were far different from what we have today. There was no FEOLA, no securities laws, no antitrust laws, no consumer protection laws, no black lung cases, no products liability cases. The categories of federal crime were very narrow. There was no Mann Act, no Controlled Substances Act, no RICO. There were, in theory, civil rights cases, but very few of them in actuality. The statute that is now title 42, section 1983 of the United States Code⁶ was passed in 1871, but in the first sixty-five years of its existence there are only nineteen reported decisions in which the statute was involved. In 1961, the year the Supreme Court gave new life to section 1983 by reconstruing it in *Monroe v. Pape*,⁷ the total number of civil rights cases that were filed was only 296. This

4. The best way to follow the changes in the federal courts, and to see what they were like at any given point in the past, is in the classic study of the history of the federal judiciary, somewhat misleadingly titled, F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928). See also Frank, *Historical Bases of the Federal Judicial System*, 13 *LAW & CONTEMP. PROBS.* 3 (1948).

5. Ch. 517, 26 Stat. 826 (1891) (codified at scattered titles of U.S.C.).

6. Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982).

7. 365 U.S. 167 (1961).

figure does not contemplate habeas corpus or collateral attacks on criminal convictions, but simply straight-out civil rights cases. That was one-half of one percent of all the civil cases in the federal courts. In 1985 there were nearly 40,000 civil rights cases filed, more than one-seventh of all civil cases.

The rules on jurisdiction were different. The amount in controversy then was \$500. It applied both to diversity and to federal question cases. Currently, the diversity jurisdictional amount is \$10,000, but nothing in federal question cases. The rule then may have been far ahead of its time. In 1886 the defendant could remove a case on the basis of a federal defense. In 1969 an American Law Institute study recommended that the statutes be changed to restore that right,⁸ but nothing has happened. A unanimous Supreme Court decision three years ago noted with great approval the ALI proposal,⁹ but Congress has done nothing.

Venue was different; there was none. One could sue a defendant in any district in which he could be served with process. The first venue statute was not enacted until 1887.

Pleading did not resemble at all what we have today. At that time, and indeed until 1938, the federal courts still maintained the separation of law and equity although they were administered by the same court. On the law side, there was a Conformity Act.¹⁰ The federal court was required to conform to whatever the rules of procedure were in the state in which it was sitting. Therefore, in South Carolina, in the federal district court, you would have had code pleading because South Carolina had adopted the Field Code in 1870. At that time, however, in roughly half the states, the federal courts would still have had to apply the rules of common-law pleading, the rules that Baron Parke had developed.

We are accustomed today to great breadth of joinder of parties and claims. That was quite unknown to our forefathers in 1886. All kinds of joinder were very narrow. There was such a thing as a class action, but hardly anybody ever really saw one.

8. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1312(a), at 25, 188-200 (1969).

9. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10 n.9 (1983).

10. Practice Conformity Act, ch. 255, 17 Stat. 197 (1872).

Indeed, long before the present rule 23 was adopted in 1966, a very great scholar, Zechariah Chafee, Jr., said about the original rule 23 as it was adopted in 1938: "This tribute to the memory of Wesley Hohfeld would be more suitable in a law review article than in an enactment which is to guide the actions of practical men day in and day out."¹¹ He added, "The situation is so tangled and bewildering that I sometimes wonder whether the world would be any the worse off if the class-suit device had been left buried in the learned obscurity of Calvert on *Parties to Suits in Equity*."¹² I hate to think what Professor Chafee would have thought of today's class actions in which all matter of claims that simply would not have been cognizable before 1966 are being litigated. Many people in this room will remember my late colleague and dear friend, Bernie Ward. He often spoke at Fourth Circuit Judicial Conferences. I can remember Bernie remarking many times on how wrong it was that on June 30, 1966, there was no possibility that the Hilton Hotels could be sued because they overcharge each patron a dollar for telephones, and on July 1, 1966, there suddenly is a procedural device that lets them be sued. Consequently, out of self-defense, the hotels have to settle for many millions of dollars. All of this, said Bernie, accomplished under a statute that allows one to make rules of procedure that are not to abridge, alter, or enlarge substantive rights. We did this and we have lived with it for 20 years.

Other procedural devices that are commonplace to us were unknown in 1886. There was effectively no discovery, no pretrial conference, no summary judgment, and no declaratory judgment. Relations between the state and federal courts were far different then than they are now. In 1886 *Swift v. Tyson*¹³ still reigned so the federal courts were free to adopt their own notions of common law in diversity litigation unless a state statute or constitutional provision was on point. At that time, one could not have sued in federal court to challenge the constitutionality of a state statute. The eleventh amendment was still thought to bar suits against states, and the fiction of *Ex parte Young*,¹⁴ by

11. Z. CHAFEE, SOME PROBLEMS OF EQUITY 246 (1950).

12. *Id.* at 200.

13. 41 U.S. (16 Pet.) 1 (1842) (overruled in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)).

14. 209 U.S. 123 (1908).

which we now allow that kind of challenge, did not come until 1908. Because there were no suits challenging state legislation, there was no need for such things as abstention, which was not invented until 1941,¹⁵ or of the doctrine of “Our Federalism,” which was not invented until 1971.¹⁶

Appellate review was considerably different. The Supreme Court had appellate jurisdiction over the circuit courts in civil cases when the amount in controversy exceeded \$2000. If your case was less than \$2000, there was no appeal at all. If you were a criminal defendant and were convicted, there was no appeal at all. The only time the Supreme Court could hear criminal cases in 1886 was if the judges of the circuit court were divided on a question of law. Appeal from a final judgment of conviction first came in a limited way in an act in 1889. Review by the Supreme Court, when it existed, was of right. The notion that the Supreme Court should control its own docket and have discretion about which cases it would hear, and the use of certiorari to implement that control, came with the Judges’ Bill of 1925.¹⁷ There was no review at all of interlocutory orders, no matter how important. Even though a temporary injunction was granted, or the temporary injunction was denied and the defendant was going to come over tomorrow and cut down your ornamental shade trees, there was no way you could go to any appellate court for review. The year 1891 marked the first tentative step into the waters of interlocutory review.

When you finally got a judgment, its effect was very different than it is now. Indeed, the changes in this regard are so dramatic that we have a new terminology. It would be as unfashionable today for anyone to utter the words *res judicata* as it would be to drive a car with fins. Instead, we have to talk about claim preclusion and issue preclusion. The content of the rules has changed, as well. Most dramatically, we no longer require mutuality; we allow nonmutual preclusion. Perhaps most important, the attitude toward preclusion is dramatically different today from what it was in an earlier time. I had the very great fortune the year after I graduated from law school to clerk for Judge

15. See *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496 (1941).

16. See *Younger v. Harris*, 401 U.S. 37 (1971).

17. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (codified as amended at 17 U.S.C. §§ 47-48 (1982); 48 U.S.C. § 864 (1982); and at scattered sections of 28 U.S.C.).

Charles E. Clark of the Second Circuit, former Dean of the Yale Law School and a giant in the field of procedure. In an opinion a few years before I clerked for him, he said, "The defense of res judicata is universally respected, but actually not very well liked."¹⁸ That was the attitude at that time. Only when they were actually forced to it would courts say, "No, you have had your day in court." Today, with the pressures that we have on dockets, we have seen remarkable new enthusiasm about preclusion. Today's attitude was well captured by Justice Rehnquist in an opinion for the Court in 1981. The Ninth Circuit had held that under the circumstances of a particular case, simple justice would not allow one plaintiff to be barred while two similarly situated plaintiffs got the wind.¹⁹ Justice Rehnquist and the Court not only reversed, but they indicated that they did not like the Ninth Circuit's attitude. What he said was the following:

[W]e do not see the grave injustice which would be done by the application of accepted principles of res judicata. "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case.²⁰

If you add up all the changes between 1886 and 1986 that I have described, it is quite obvious that the work of the federal courts today and how they perform that work bears hardly any resemblance to what it was a hundred years ago; and it seems to me that a hundred years from now, it will surely be as different from today as today is from one hundred years in the past. Professor Howard spoke of our litigious society and of the forces that are leading to an increase in litigation.²¹ The extent of this increase is hard to predict. There is a familiar paragraph of John Barton, Professor of Law at Stanford. In 1976 he wrote:

The United States is presently experiencing a legal explosion. As implausible as it may appear, exponential extrapolation of increases over the last decade suggests that by the early 21st

18. *Riordan v. Ferguson*, 147 F.2d 983, 988 (2d Cir. 1945).

19. *See Moitie v. Federated Dep't Stores, Inc.*, 611 F.2d 1267 (9th Cir. 1980).

20. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981).

21. *See Howard, supra* pp. 368-72.

century the federal appellate courts alone will decide approximately 1 million cases each year. That bench would include over 5,000 active judges, and the Federal Reporter would expand by more than 1,000 volumes each year.²²

There has been a lot of controversy about that prediction, and I am glad to say that I do not think that horrifying prediction is about to come true. In fact, it seems to me we really do not know much in terms of predicting future trends in volume of litigation.

At least I do know where we have come in the ten years since Professor Barton wrote. In fiscal year 1984, the courts of appeals terminated 31,000 cases.²³ I really doubt if it is going to jump from 31,000 to 1,000,000 between now and the end of the century. There are now 186 authorized judgeships, rather than the 5000 that Professor Barton feared. I have not counted the volumes of Federal Reporter that come to my office each year, but I am sure it is not yet one thousand per year. I do not know what the volume is going to be, but it seems obvious to everyone that the amount of litigation is on the increase, it is on the increase more rapidly in federal courts than in state courts, and that this is going to require new ways of looking at the role of courts and how courts should go about doing their work.

One rather small point was called to my attention by the Director of Research at the Federal Judicial Center, William B. Eldridge. It seems to be a very telling point on why we never catch up with the caseload. He pointed out to me that on June 30, 1978, there were seventeen vacancies among the district courts and courts of appeals. That was just before the legislation in October of that year that added a great many new judgeships. The Center recommended that change because it was agreed that we did not have enough judges to handle all the work. Congress finally said, "Yes, you are right, we need more judges." Congress authorized those in October 1978, but no matter which administration it is, it is a time-consuming process to fill all the new judgeships authorized by Congress. By June 30, 1979, ten months after the Judgeship Bill had passed, there were 157 vacancies on the courts. There continued to be a substantial num-

22. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567 (1975).

23. 1984 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 106, table 2 [hereinafter ADMIN. OFF. REP. preceded by year].

ber of vacancies, and it was not until 1984, six years after the Judgeship Bill and only a couple of months before the next Judgeship Bill, that the number of vacancies fell below twenty, where it had been back in 1978.²⁴ Mr. Eldridge notes:

It is a system fraught with outrageous overloads on judges, accompanied by desperate efforts to stay abreast, followed by a large infusion of new judges who must be assimilated into the judicial community. The potential problems of assimilating 117 new trial judges and 35 appellate judges are actually never realized because the pace of filling appointments spreads the entries out. But remember, we were in serious trouble before these new positions were created, so we avoid assimilation problems only by perpetuating the overload problem. This is not a one-time, or even unusual, occurrence. It is the system we use for staffing the federal bench.²⁵

Another point can be gleaned from looking at these numbers. In 1978, just before the bill increasing the number of judges was passed, the number of cases commenced in the district courts was 348 per judgeship. This was thought to justify a twenty-five percent increase in the number of judges. Because the judgeships were not actually filled, the caseload for each actual judgeship did not drop. If, however, you measure in terms of authorized judgeships in 1979, there were only 300 cases filed per authorized judgeship rather than the 348. By 1981 the number of cases per authorized judgeship was up to 350, more than it had been in 1978. By 1984, when we got the next Judgeship Bill, the caseload was 508. The same number of judges in 1984 that we had in 1979 terminated 100,000 more cases.²⁶ This statistic suggests that either the judges are all working much harder, that they all have become much more efficient, or that they are not giving the attention to each case that they gave when there was less pressure on the docket.

One other statistic deserves attention, and this will be the last. Ten years ago, thirty-eight percent of all civil cases were terminated without any court action because of a voluntary dismissal by the parties, presumably settlement. Last year, it was forty-eight percent. It has gone up from thirty-eight percent to

24. *Id.* at 4, table 3.

25. Letter from William B. Eldridge to Charles Alan Wright (June 30, 1986).

26. 1984 ADMIN. OFF. REP. at 4, table 4.

forty-eight percent in the course of a decade.²⁷ Perhaps this means that there are more frivolous cases being filed today and, therefore, people realize the frivolity of their own litigation and withdraw. On the other hand, it may mean that we now have sufficient delays in the system and other factors connected with the number of cases that we have that there is more pressure on parties to settle rather than to wait and see what kind of a disposition they can get from the court.²⁸

I do not know what the future is going to bring. If I had spoken to you in 1886 when there were nine circuit judges and eighty-three district judges, I could not have foreseen a system with 186 circuit judges and 575 district judges. I think an increased number of judges is going to be a part of the answer. I do not see how that can be avoided. The proportion of cases receiving attention by a judge may shrink. I think that there is a great likelihood of a larger role for magistrates and similar personnel. There is likely to be increased use of alternative dispute resolution devices as institutional filters so that parties will not get to a judge until they have tried arbitration or whatever alternative dispute device turns out to be popular. I wish I could think that there was a possibility that one of Professor Howard's suggestions would come to pass and that Congress would pass clearer laws; however, I am afraid I have no hope whatsoever for such a solution. Rather, I would think that we are going to do away with the tradition of appeal as a right. We surely are going to do that, although we are too late in doing it in terms of the Supreme Court. The Court ought to have a wholly discretionary docket. It would not surprise me at all if the courts of appeals were to be hearing cases on a discretionary basis rather than an appeal of right. I think we will almost surely have a fourth tier of federal courts, although I do not know what form it will take.

Strange and wonderful things are going to happen to the

27. 1985 ADMIN. OFF. REP. at 158, table 29.

28. This figure is less significant than I had thought at the time of this Symposium. The Administrative Office includes within the category of "no court action" cases in which a default judgment is entered by the clerk of court pursuant to FED. R. CIV. P. 55(b)(1). The increase in cases terminated with no court action is attributable to a single category of civil cases—actions by the United States to recover on defaulted student loans and overpayment of veterans' educational benefits. See Letter from David L. Cook, Chief Statistical Analysis and Reports Division, Administrative Office of the United States Courts, to Charles Alan Wright (Oct. 8, 1986).

federal courts in the years to come as we strive to meet the challenges that the future is going to bring. It seems to me that the University of South Carolina School of Law has made a fine contribution to the Bicentennial Celebration by bringing together the very talented people who are on either side of me to explore ways by which the federal courts may meet the challenges of the future.

