Creating the Federal Judicial System

Second Edition

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Contents

About This Publication

The first edition of this publication was prepared as a reference work for the use of federal court personnel during the bicentennial year of the federal judicial system. We have revised and reissued it because of substantial interest from court personnel and students of American judicial history and politics.* Russell Wheeler is primarily responsible for the text. Cynthia Harrison, with the assistance of Deirdre Golash and Geoff Erwin, is primarily responsible for the maps.

The authors thank Prof. Kermit Hall, now of the University of Tulsa, for his helpful suggestions on the first edition. For assistance on the maps, the authors thank the Division of Archives and History, North Carolina Department of Cultural Resources. Population estimates are from the U.S. Census Bureau.

The maps illustrate the changing configuration of the districts and circuits of the federal courts in the states over time. They do not address the development of the federal courts in the territories, nor the judicial authority over Indian lands. Information concerning judgeships, districts, and circuits is from the *United States Statutes at Large*, 1789 to 1989; Erwin C. Surrency, *History of the Federal Courts* (New York: Oceana Publications, 1987); Surrency, *Federal District Court Judges and the History of Their Courts*, 40 F.R.D. 139 (1966); U.S. Senate Comm. on the Judiciary, 92d Cong., 2d Sess., *Legislative History of the United States Circuit Courts of Appeal and the Judges Who Served During the Period 1801 Through May 1972* (Comm. Print 1972); and Analysis and Reports Branch, Statistics Division, Administrative Office of the U.S. Courts, *History of the Authorization of Federal Judgeships Including Procedures and Standards Used in Conducting Judgeship Surveys* (February 1991). Data about county boundaries are from William Thorndale and William Dollarhide, *Map Guide to the U.S. Federal Censuses, 1790–1920* (Genealogical Publishing Co., 1987).

*A separate Center publication traces the development of the federal courts' administrative apparatus: Russell R. Wheeler, *Origins of the Elements of Federal Court Governance* (Federal Judicial Center 1992).

With the Judiciary Act of 1789,[1] Congress first implemented the constitutional provision that "[t]he judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." Although subsequent legislation altered many of the 1789 Act's specific provisions, and the 1891 Circuit Courts of Appeals Act effected a major change, the basic design established by the 1789 Act has endured: a supreme appellate court to interpret the federal Constitution and laws; a system of lower federal courts, separated geographically by state boundaries and exercising basically the same jurisdiction; and reliance on state courts to handle the bulk of adjudication in the nation. However, Article III and its implementing legislation also reveal the clash of major disagreements over the optimal extent of federal jurisdiction and the optimal federal court structure to accommodate that jurisdiction. By studying the Judiciary Act of 1789 and the subsequent legislation, we learn why the federal judicial system is the way it is today.

Moreover, the history of the federal courts reminds us that some of the current provisions and proposed changes that seem so sensible now will appear as quaint and curious to our descendants as those proposed and adopted by our ancestors appear to us today.

Establishing the Federal Judicial System

The Constitutional Convention's decisions in 1787 about the national government's court system were few but important. The framers agreed that there would be a separate federal judicial power and that to exercise it there would be a Supreme Court and there could be other federal courts. They specified the jurisdiction those courts could exercise, subject to congressional exceptions. They prescribed the appointment procedure for Supreme Court judges, and they sought to protect all federal judges from reprisals for unpopular decisions: Judges' compensation could not be reduced, and judges could not be removed from office other than by legislative impeachment and conviction.

Putting flesh on this skeleton fell to the First Congress. The same forces that contended over the writing and ratification of the Constitution in 1787 and 1788 sparred in the First Congress in 1789 over the nation's judicial system. Federalists generally supported the Constitution and the policies of President Washington's administration, and they wanted to establish a lower federal judiciary. Anti-Federalists opposed the Constitution—or at least wanted significant changes in it—and favored at best only a very limited federal judiciary. After the Constitution went into effect in 1789, outright opposition to it diminished quickly. Democratic–Republicans, or "Jeffersonians," emerged as a counter to the Federalists in power.

The Judiciary Act and the Bill of Rights

In many states, supporters of the Constitution persuaded opponents to vote for its ratification by promising to seek amendments to it as soon as the government went into operation. The change most frequently sought was an itemization of rights that would be protected from intrusion by the new national government.

But many Americans also voiced concern over the potential danger of the federal court system authorized by Article III. By one count, 19 of the 103 amendments proposed by the state ratifying conventions called for changes in Article III.[2] Indeed, Anti-Federalists sought limits on Article III for much the same reason they sought a bill of rights (especially those protections relating to judicial procedures): They feared that courts—especially courts of the new and powerful national government—could become instruments of tyranny. Elbridge Gerry, who refused to sign the Constitution, said that his principal objection was "that the judicial department will be oppressive."[3] The star chamber of British legal history lingered in some people's minds, and many more remembered how state courts issued judgments against debtors during the economic turmoil under the Articles of Confederation.[4] Charles Warren identified four main changes that opponents sought in the Constitution's judiciary provisions: guaranteeing civil as well as criminal trial juries, restricting federal appellate jurisdiction to questions of law, eliminating or radically curtailing congressional authority to establish lower federal courts, and eliminating the authorization for federal diversity jurisdiction.[5]

Many who had supported the Constitution, however, believed a federal court system was necessary but doubted the need for a bill of rights. To them, the Constitution, in Hamilton's famous phrase, "is itself, in every rational sense, and to every useful purpose, a bill of rights."[6] The Constitution as ratified contained specific limita-

tions on the national government (e.g., Article III's provision for criminal jury trials), and in a broader sense, it established an energetic national government, extending over a large republic, that would be capable of protecting people from the oppression of local factions.

Courts would also protect rights. As Chief Justice John Jay later told the grand juries of the Eastern Circuit, "nothing but a strong government of laws irresistibly bearing down [upon] arbitrary power and licentiousness can defend [liberty] against those two formidable enemies."[7] To many Federalists, state courts under the Articles of Confederation had too easily yielded to popular pressures; the Federalists believed that a separate set of federal courts was necessary to achieve "a strong government of laws."

Thus, the First Congress faced these interrelated questions: What provisions should a bill of rights contain? Should Article III's provisions governing federal judicial organization and jurisdiction be altered? How should Article III be implemented? From April to September of 1789, the First Congress addressed them all.

Early in the first session of the House of Representatives, James Madison, the principal architect of the Constitution, put together a proposed bill of rights drawn from state proposals and constitutional provisions. Madison had opposed a bill of rights a year earlier, claiming that "parchment barriers" were no protection against "the encroaching spirit of power,"[8] but he knew the importance of honoring commitments made in the ratification debates. Moreover, he told the House, if a bill of rights is incorporated into the Constitution, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."[9] Madison guided his proposed amendments through legislative revisions and around colleagues who thought they were unnecessary or unwise, and he eluded other legislators who wanted to add provisions to curtail severely the contemplated federal judicial system.

Meanwhile, the Senate quickly took up the organization and jurisdiction of the federal courts. The principal drafters of Senate Bill 1 were three lawyers: Oliver Ellsworth of Connecticut, William Paterson of New Jersey, and Caleb Strong of Massachusetts. Ellsworth and Paterson had served in the Constitutional Convention, and Ellsworth served on the committee of the Continental Congress that heard appeals in prize cases. He had a special appreciation of the role that a federal judiciary, properly constituted, might serve. (Ellsworth and Paterson went on to serve on the U.S. Supreme Court, Ellsworth as Chief Justice.)

On September 24, 1789, Washington signed "An Act to Establish the Federal Courts of the United States" and sent his nominations for the first federal judges to the Senate. On the same day, the House accepted the conference report on the proposed Bill of Rights. The Senate followed suit the next day, and twelve amendments went to the states for ratification. Ten of them became part of the Constitution in 1791.[10]

The Judiciary Act's Provisions[11]

The Judiciary Act's boldest stroke was simply to create a system of lower federal courts to exist alongside the courts already established by each state. (Indeed, more than 200 years later, few countries with federal forms of government have lower national courts to enforce the law of the national government.) There was considerable sentiment in 1789 for leaving trial adjudication to the state courts, perhaps with a small corps of federal admiralty judges.

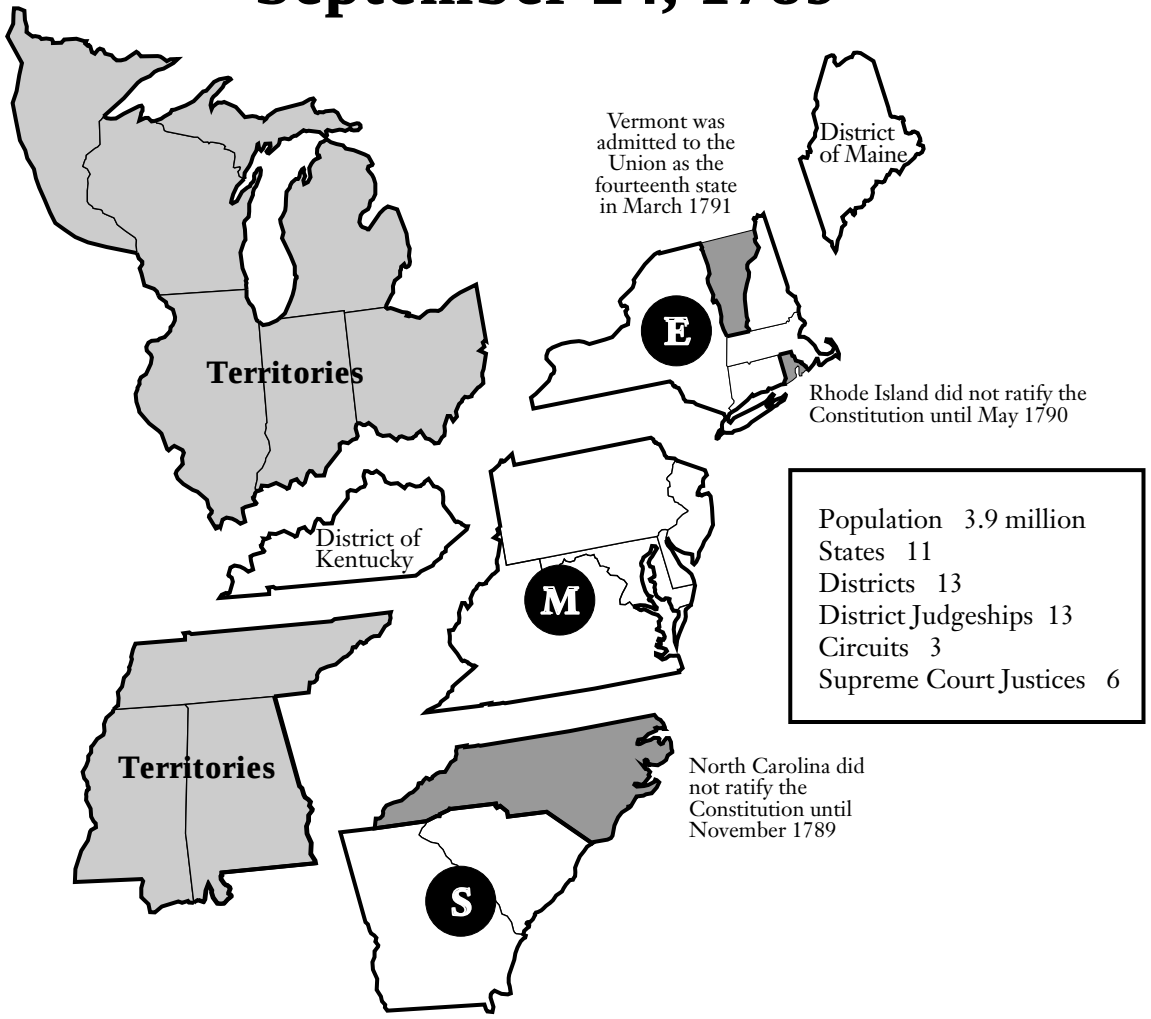
The Act provided for two types of trial courts—district courts and circuit courts—and gave the circuit courts a limited appellate jurisdiction. It made specific provision for the Supreme Court created by the Constitution. It defined federal jurisdiction. It authorized the courts to appoint clerks[12] and to prescribe their procedural rules.[13] It authorized the President to appoint marshals,[14] U.S. attorneys, and an attorney general.[15]

The Act created thirteen district courts: one for each of the eleven states that had ratified the Constitution, plus separate district courts for Maine and Kentucky, which were then parts of Massachusetts and Virginia. Each district was authorized one district judge. Section 3 of the Act directed each court to hold four sessions each year, in either one or two specified cities in each district. The district courts served mainly as courts for admiralty, for forfeitures and penalties, for petty federal crimes, and for minor U.S. plaintiff cases. Congress authorized differing salaries for the district judges to reflect the wide variations in federal caseload from one state to another. The judge in Delaware received an annual salary of $800, but his counterpart in South Carolina, with its longer coastline and presumably greater admiralty caseload, received $1,800.[16]

The Act placed each district, except Kentucky and Maine, into one of three circuits: an Eastern, a Middle, and a Southern, following the administrative divisions used in the first year of the Revolutionary War.[17] Circuit courts were to sit twice each year in either one or two specified cities of each district of the circuit. For each circuit session, the judges were to be the two Supreme Court justices assigned to that circuit and the respective district judge. These circuit courts were the nation's courts for diversity of citizenship cases (concurrent with state courts, but with a limited removal provision), major federal crimes, and larger U.S. plaintiff cases. (There was no provision for suits against the United States.) The circuit courts were also courts of appeal for some of the larger civil and admiralty cases in the district courts.[18] The Kentucky and Maine district courts exercised the jurisdiction that circuit courts exercised.

The Act established the size of the Supreme Court: a Chief Justice and five associate justices. Section 13 implemented the Court's original jurisdiction as delineated in the Constitution; it was a provision of section 13 that the Court later declared unconstitutional in *Marbury v. Madison*.[19] The Act spelled out the Court's appellate jurisdiction: review of circuit court decisions in civil cases concerning matters over $2,000 (for some sense of perspective, in 1789 the salary of the Chief Justice was $4,000).[20] The Supreme Court was not given general criminal appellate jurisdiction until the 1890s.[21] The Act's famous section 25 authorized the Court to review state supreme court decisions that invalidated federal statutes or treaties or that declared state statutes constitutional in the face of a claim to the contrary.

September 24, 1789



The First Judiciary Act created thirteen districts and placed eleven of them in three circuits: the Eastern, Middle, and Southern. Each district had a district court, a trial court with a single district judge and primarily admiralty jurisdiction. A circuit court also met in each district of the circuit and was composed of the district judge and two Supreme Court justices. The circuit courts exercised primarily diversity and criminal jurisdiction and heard appeals from the district courts in some cases. The districts of Maine and Kentucky (parts of the states of Massachusetts and Virginia, respectively) were part of no circuit; their district courts exercised both district and circuit court jurisdiction.

A Political Compromise

The Federalists made important concessions to get a federal judicial system. The Judiciary Act bowed to the Anti-Federalists in two general ways: It restricted federal jurisdiction more than the Constitution required, and it tied the federal courts to the legal and political cultures of the states.

Federal Courts' Jurisdiction

The Act limited federal trial court jurisdiction mainly to admiralty, diversity, and U.S. plaintiff cases, and to federal criminal cases.

There was little dispute about the need to create national admiralty courts. Even opponents of the Constitution recognized the importance of maritime commerce and the government's inability under the Articles of Confederation to provide an adequate judicial forum for resolving admiralty disputes. (Pursuant to an authorization in the Articles of Confederation, the Continental Congress in 1780 had established a U.S. Court of Appeals in Cases of Capture, but that court had been undermined by widespread refusal to honor its mandates.) When proposals to abolish Congress's Article III authority to establish federal courts were made in the state ratifying conventions and in the First Congress, there was usually an exception for courts of admiralty.

A major concession to the Anti-Federalists concerned jurisdiction over cases arising under the federal Constitution or laws: For the most part, unless diversity was present, such federal-question cases could be filed only in state court. The Act made some specific grants to federal courts: the admiralty jurisdiction, for example, and jurisdiction over treaty rights cases.[22] Section 14 authorized federal judges to issue writs of habeas corpus concerning the legality of federal detentions. Congress added incrementally to federal courts' federal-question jurisdiction—starting in 1790 with certain patent cases[23]—but it didn't grant federal courts a general federal-question jurisdiction until 1875. The absence of such a grant meant less in 1789 than it would mean today or in 1875 because federal statutory law was so limited in the early years.

Other provisions of the Act reflected the same fear of overbearing judicial procedures that was reflected in the Bill of Rights. For example, to alleviate fears that citizens would be dragged into court from long distances, section 3 specified places and terms of holding court in each district, and section 11 provided that civil suits must be filed in the defendant's district of residence. Sections 9 and 12 protected the right to civil and criminal juries in the district and circuit courts, as the Sixth and Seventh Amendments would later do, and section 29 shielded juror selection and qualifications from federal judicial control by directing courts to use the methods of their respective states. Sections 22 and 25 protected jury verdicts from appellate review; these sections responded to vigorous attacks on Article III's qualified grant to the Supreme Court of "appellate jurisdiction, both as to law and fact." And, as noted earlier, section 14 authorized federal judges to issue writs of habeas corpus to inquire into instances of federal detention.

A major nationalist victory in the Act was the implementation of the constitutional authorization of jurisdiction in cases "between citizens of different States" and cases involving aliens. Under section 11, the circuit courts, like the state courts, could hear suits when "an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State."[24]

Why did the Federalists want this federal diversity of citizenship jurisdiction? It was not simply—perhaps not even mainly—out of fear that state courts would be biased against out-of-state litigants. Rather, Federalists worried about the potential for control over

judges by state legislatures, which selected judges in most states and had the authority to remove them in more than half the states. Given the influence of debtor interests in state legislatures, the Federalists worried that state judges might be reluctant to enforce unpopular contracts or generally to foster the stable legal conditions necessary for commercial growth. Diversity jurisdiction was necessary to avoid a return to the conditions under the Articles of Confederation.[25]

Anti-Federalists fought the diversity of citizenship jurisdiction; they believed it "would involve the people of these States in the most ruinous and distressing law suits."[26] To quiet these fears, the Act established a jurisdictional minimum of $500, so that defendants would not have to travel long distances in relatively minor cases, and made state laws the rules of decision in the absence of applicable federal law.[27]

Federal Courts' Ties to the States

The Federalists achieved their goal of establishing a federal trial judiciary rather than leaving all trials in the state courts. But the federal courts that the Act created were not designed to be completely free of the influence of their states' politics and legal culture. The federal judiciary's fierce independence in protecting national legal rights against occasional state encroachment has been sustained by factors other than the geographic structure of the national court system.

It seems axiomatic today that no district or circuit boundary should cross a state line, because (with one minor exception[28]) none does. The 1789 Judiciary Act set this precedent, just as it required the district judges to reside in their districts.[29] These requirements create inevitable relationships between federal courts and the states in which they are located.

But state boundaries are not the only way that federal court boundaries could be defined. The creators of the federal judiciary might have established separate judicial administrative divisions that would ensure roughly equal allocation of workload and would be subject to realignment to maintain the allocation.

In 1800, a last-gasp Federalist bill to revamp the judicial system would have divided the United States into nine circuits and twenty-nine districts, each district with a distinctive name and bearing no direct relation to state boundaries. For example, in the northern part of what is now the Second Circuit there would have been the district of Champlain, and in the western part of what is now the Fourth Circuit would have been the district of Cumberland.[30] Whatever administrative sense this arrangement might have made, it ran counter to the strong preference that federal courts have ties to the states in which they are located.

Circuit Riding

To observers today, the most curious aspect of the 1789 Judiciary Act was Congress's decision to create a major federal trial court but not to create any separate judgeships for it. The Act directed the two Supreme Court justices assigned to each circuit to travel to the designated places of holding circuit court, to be joined there by the district judge. This requirement, along with a sparse Supreme Court caseload in the early period, meant that the early Supreme Court justices spent most of their time serving as trial judges.

Circuit riding was common in the states. It was attractive to Congress for three reasons. First, it saved the money a separate corps of judges would require. In 1792, the Georgia district court judge reported that Congress declined to create separate circuit judgeships partly because "the public mind was not sufficiently impressed with the importance of a steady, uniform, and prompt administration of justice," and partly because "money matters have

so strong a hold on the thoughts and personal feelings of men, that everything else seems little in comparison."[31] Second, circuit riding exposed the justices to the state laws they would interpret on the Supreme Court and to legal practices around the country—it let them "mingle in the strife of jury trials,"[32] as a defender of circuit riding said in 1864. Third, it contributed to what today we call "nation building." It would, according to Attorney General Edmund Randolph, "impress the citizens of the United States favorably toward the general government, should the most distinguished judges visit every state."[33] (In fact, they did more than visit. The justices' grand jury charges explained the new regime to prominent citizens all over the country, winning praise from the Federalist press and barbs from the Jeffersonian press.[34])

Whatever logic supported circuit riding, the justices themselves set about almost immediately to abolish it. They saw themselves as "traveling postboys."[35] They doubted, in the words of a Senate ally, "that riding rapidly from one end of this country to another is the best way to study law."[36] Furthermore, they warned President Washington, trial judges who serve also as appellate judges are sometimes required to "correct in one capacity the errors which they themselves may have committed in another . . . a distinction unfriendly to impartial justice."[37] The 1789 Act prohibited district judges from voting as circuit judges in appeals from their district court decisions[38] but placed no similar prohibition on Supreme Court justices. The justices themselves agreed to recuse themselves from appeals from their own decisions unless there was a split vote[39] (a rare occurrence). Congress's only response to their complaints was a 1793 statute reducing to one the number of justices necessary for a circuit court quorum.[40]

From the Founding to the Evarts Act

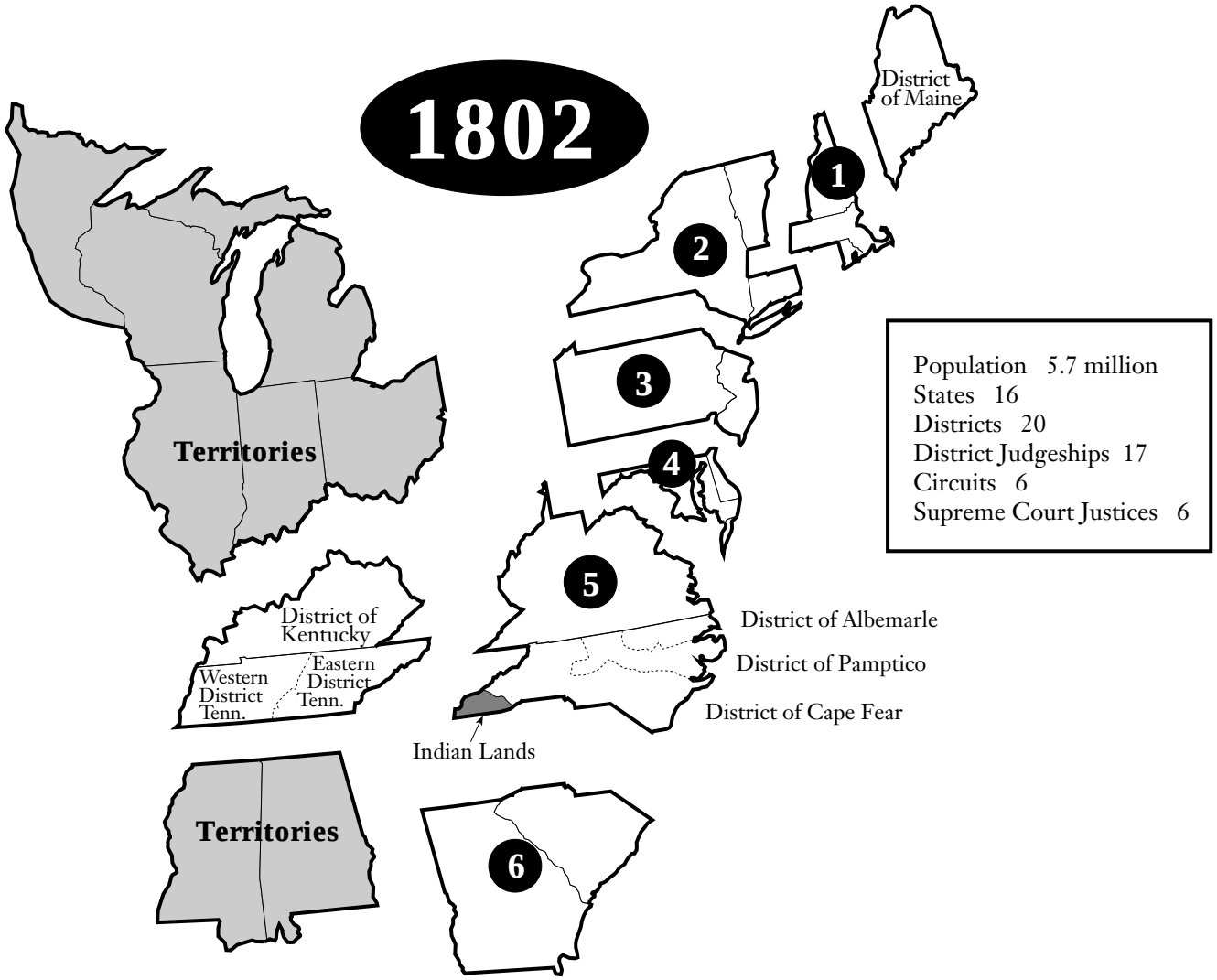
In 1801, as their era drew to a close, the Federalists brought to passage a bill that President John Adams had proposed two years earlier. It established six circuits and separate circuit court judgeships for them, and it expanded federal court jurisdiction to all categories of cases authorized by Article III.[41] The incoming Jeffersonians repealed the statute the next year,[42] abolished the judgeships it created, and then passed a new judiciary act.[43] The new act again created six circuits, but it reestablished the justices' circuit-riding responsibilities—one justice per circuit, to hold one circuit court session each year in each district within the circuit. However, because a quorum of one judge was sufficient to convene the circuit court, the justices' responsibilities for circuit riding diminished.

This slight restriction on circuit obligations brought only temporary relief. With time, the federal courts' condition deteriorated as caseloads swelled. A political stalemate over the role the federal courts should play in national life postponed until 1891 a resolution of the dispute over the proper structure of the judiciary.

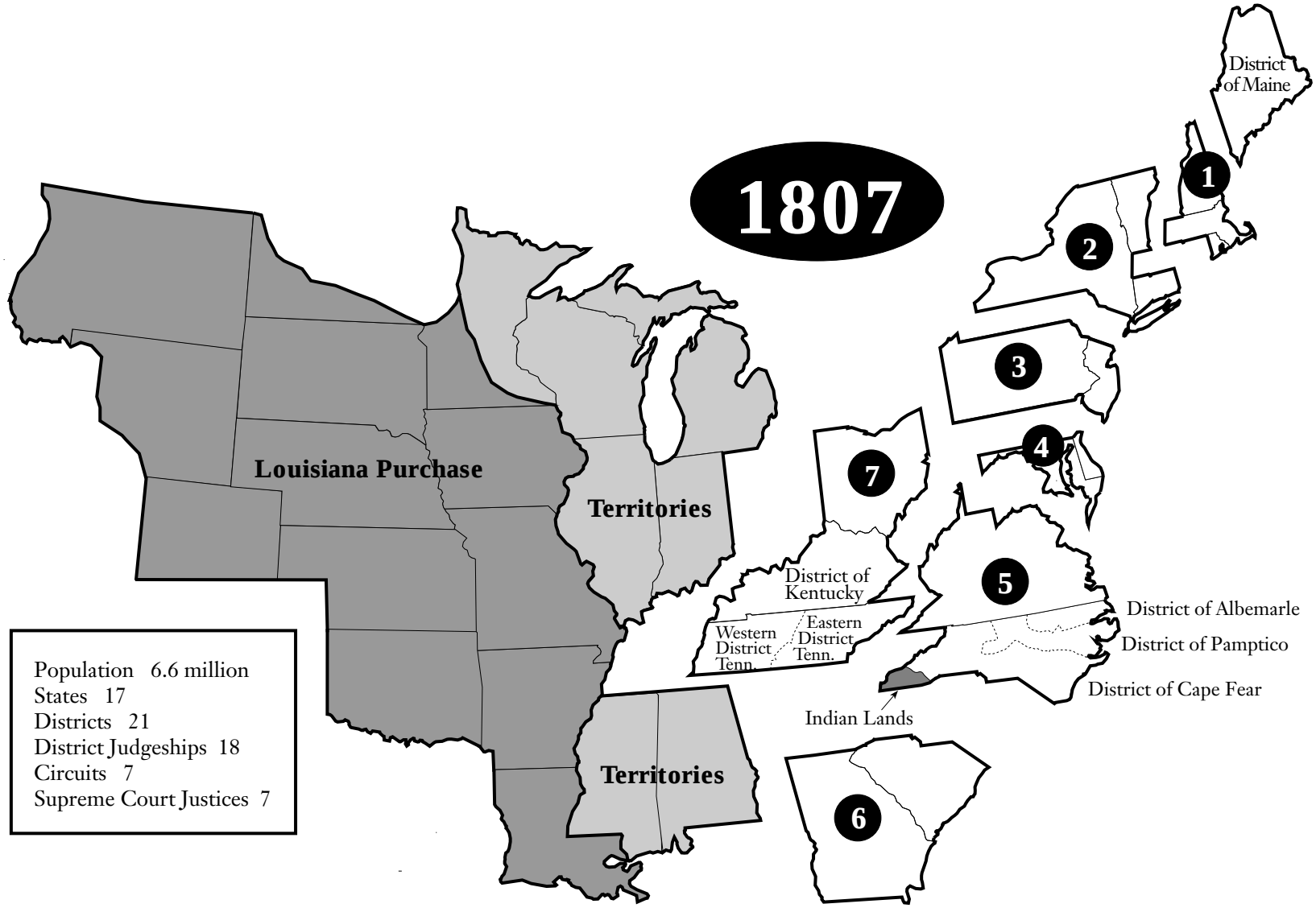
Westward Expansion

From 1789 to 1855, the number of states increased to thirty-one, and U.S. territorial possessions grew as well. The logic of the 1789 Judiciary Act dictated that new states and territories have their own district and circuit courts. The justices, however, found the travel burden of even the existing circuits to be too great. Congress thus created new circuits and gradually increased the size of the Supreme Court to provide justices for them. The expansion was not a smooth process. Creating a new seat on the Supreme Court became entwined with the politics of filling the seat. Thus, new states were often left in limbo, and the district courts exercised both district and circuit court jurisdiction. Not until the Civil War was every district within a circuit served by Supreme Court justices.

The number of circuits reached its nineteenth-century high point in 1855. To deal with a large number of land disputes in California, Congress that year created a separate, tenth, circuit, called the California Circuit, for the state's two districts and, for the first time, authorized a separate circuit judge rather than adding a tenth justice to the Supreme Court.[44] The Supreme Court reached its largest size in 1863, when Stephen Field of California took his seat on the Court as the justice for the newly created Tenth Circuit, which replaced the California Circuit and included Oregon as well as California.[45] (Although the Court had ten members, it appears that the ten never sat as a group because of the illnesses of Chief Justice Taney in 1863–1864 and of Justices Catron and Davis the next term.[46]) An 1866 statute[47] sought to reduce the Court's size by forbidding replacement nominations until the Court consisted of seven members. Although often described as an effort to restrict President Andrew Johnson's power, in fact the statute was probably designed chiefly to produce a Court of more manageable size and to make it easier for Congress to raise judicial salaries.[48] The Court had nine members after Justice Catron died in 1865, and eight members from Justice Wayne's death in 1867 until March 1870, when Justice Bradley was appointed pursuant to still another statute that raised the Court's authorized size back to nine.[49]



Upon taking control of the government, Jeffersonian Republicans repealed the 1801 Judiciary Act, a Federalist measure that had created six circuits and separate circuit judges, eliminating circuit riding for justices. The 1802 Act kept the enlarged number of circuits, but restored the Supreme Court justices' circuit-riding obligations, although in a somewhat less burdensome manner.



Congress created the Seventh Circuit, which comprised Kentucky, Tennessee, and Ohio (admitted as a new state in 1803). The number of justices on the Supreme Court was increased from six to seven, and the seventh was assigned to this new circuit.

Reorganizing the Federal Courts

From the Civil War period until 1891, the nation engaged in an extended debate over how to reorganize the federal courts. The debate took place in the context of a broader argument over the proper role of the federal judiciary in national life.

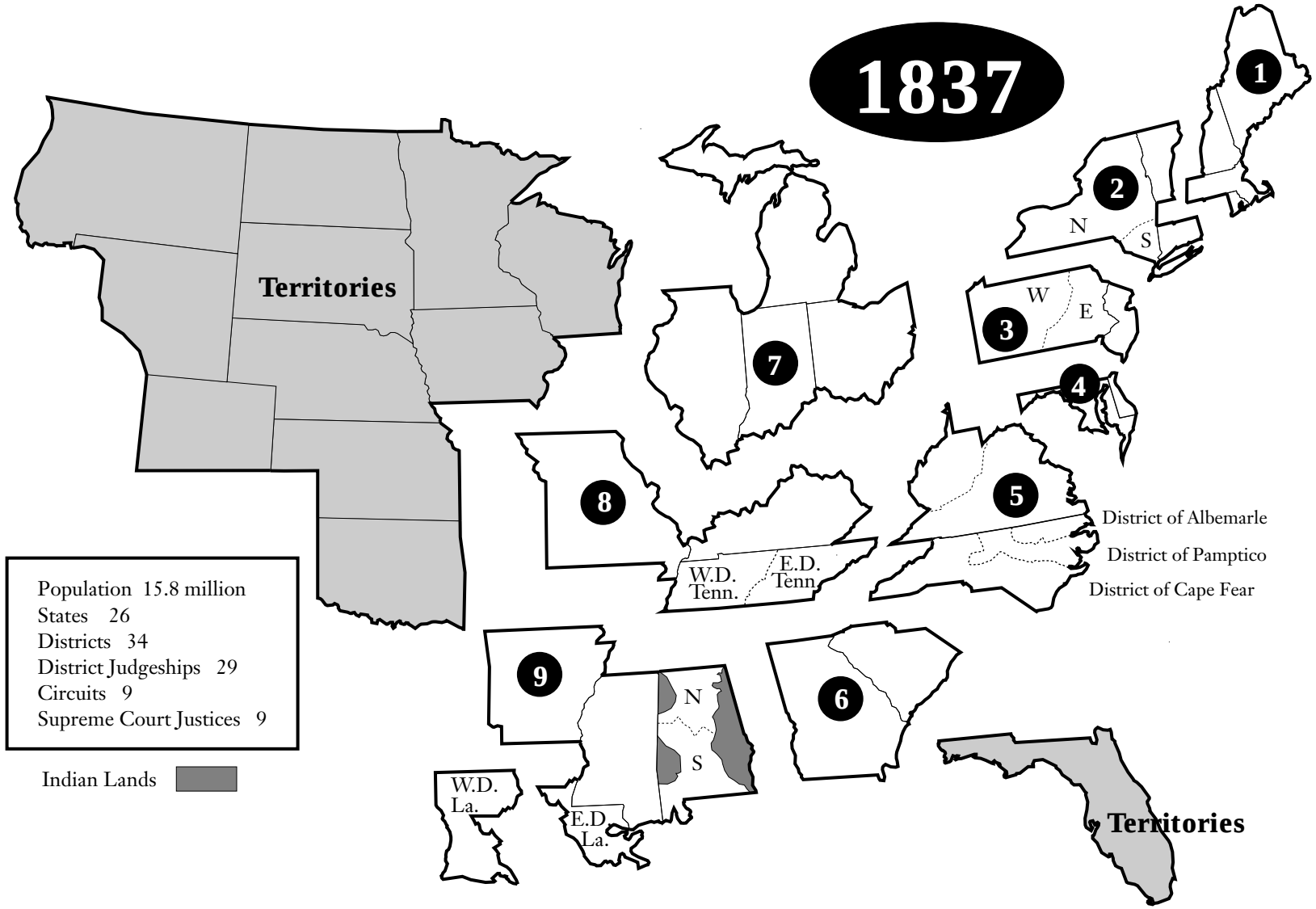
In 1861, in his first message to Congress on the state of the union, President Lincoln warned that "the country has outgrown our present judicial system."[50] The problem as he saw it was that the circuit system as established in 1789 could not accommodate the growth of the country. In 1861, eight recently admitted states had never had "circuit courts attended by supreme judges." Adding enough justices to the Supreme Court to accommodate all the circuit courts that were needed would make the Supreme Court "altogether too numerous for a judicial body of any sort." Lincoln's solution: Fix the Supreme Court at a "convenient number," irrespective of the number of circuits. Then divide the country "into circuits of convenient size," to be served either by the Supreme Court justices and as many separate circuit judges as might be necessary, or by separate circuit judges only. Or abolish the circuit courts.

Reorganizing the circuit system was not the only problem Lincoln sought to resolve. He noted also that many federal statutes "have been drawn in haste and without sufficient caution . . . as to render it very difficult for even the best informed persons to ascertain precisely what the statute law really is." Furthermore, although Lincoln did not mention it, the Supreme Court and the circuit and district courts had increasing backlogs of cases.

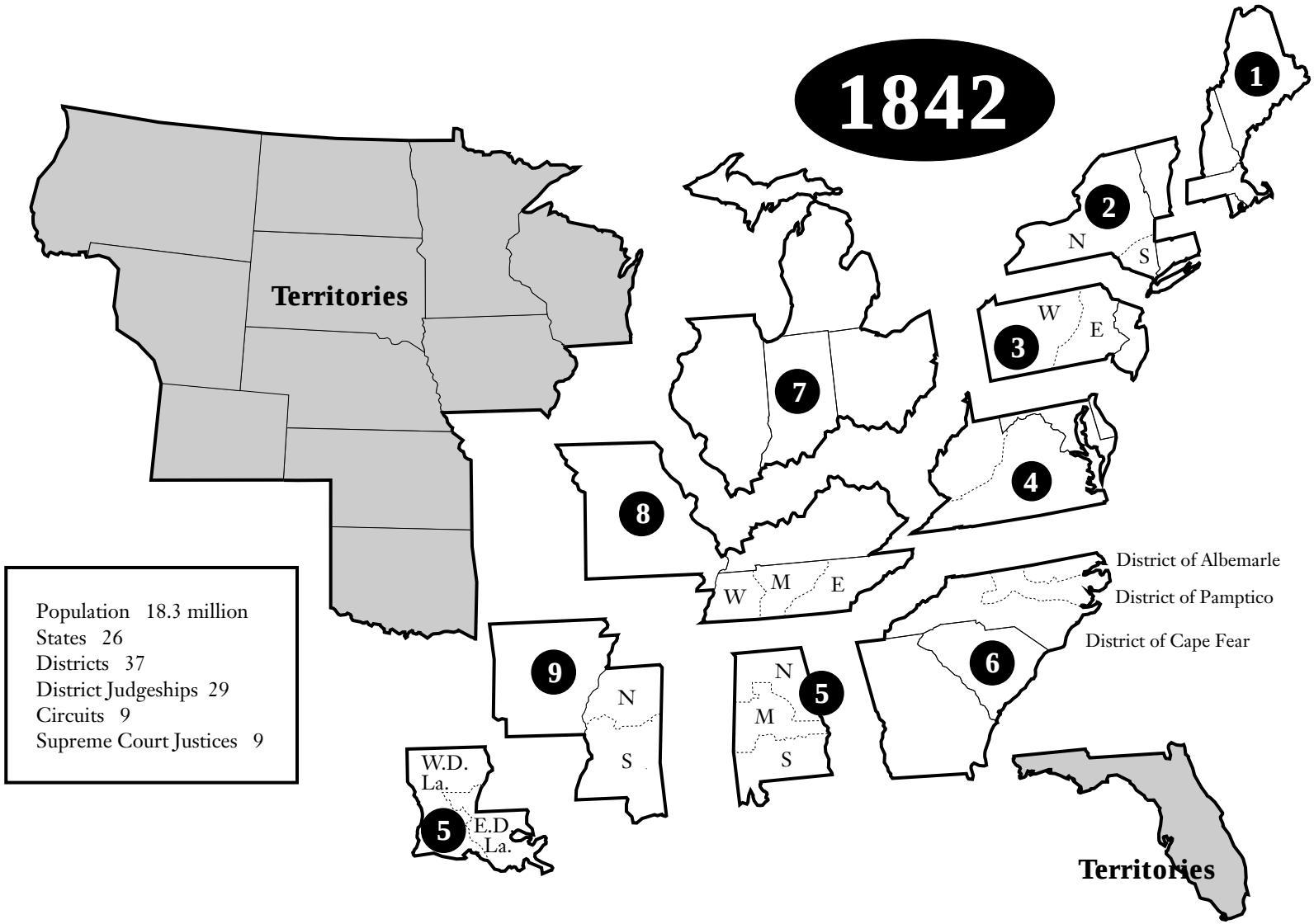
Before the Civil War, a growing economy and the emergence of the business corporation increased the federal courts' workload as their decisions created the legal conditions for growth and expansion in maritime trade and in domestic commercial activity.[51] Congress steadily expanded the Supreme Court's jurisdiction.[52] After the Civil War came statutes to promote and regulate economic growth, the enforcement of which fell to federal courts through the diversity jurisdiction or pursuant to statutory grants of jurisdiction. Other laws expanded the federal courts' jurisdiction to implement Reconstruction and to enforce the Reconstruction Amendments.[53] The budget offers one measure of the growth of federal court business. In 1850, the U.S. Treasury expended $500,000 on the federal courts; in 1875, it expended $3 million.[54]

Federal court business grew even more with the Judiciary Act of 1875,[55] which did essentially what the Federalists would have done in 1789: It established general federal-question jurisdiction in the federal trial courts for cases involving $500 or more. It was adopted on the same day as the 1875 Civil Rights Act,[56] and, as one observer has said, the two statutes together "may be seen as an ultimate expression of Republican reconstruction policies. One recognized a national obligation to confer and guarantee first-class citizenship to the freedman. The other marked an expression of the party's nationalizing impulse and complementary concern for the national market."[57] Although the 1875 Civil Rights Act was invalidated by the Supreme Court eight years later,[58] the 1875 Judiciary Act made the federal trial courts, in Frankfurter and Landis's words, "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."[59]

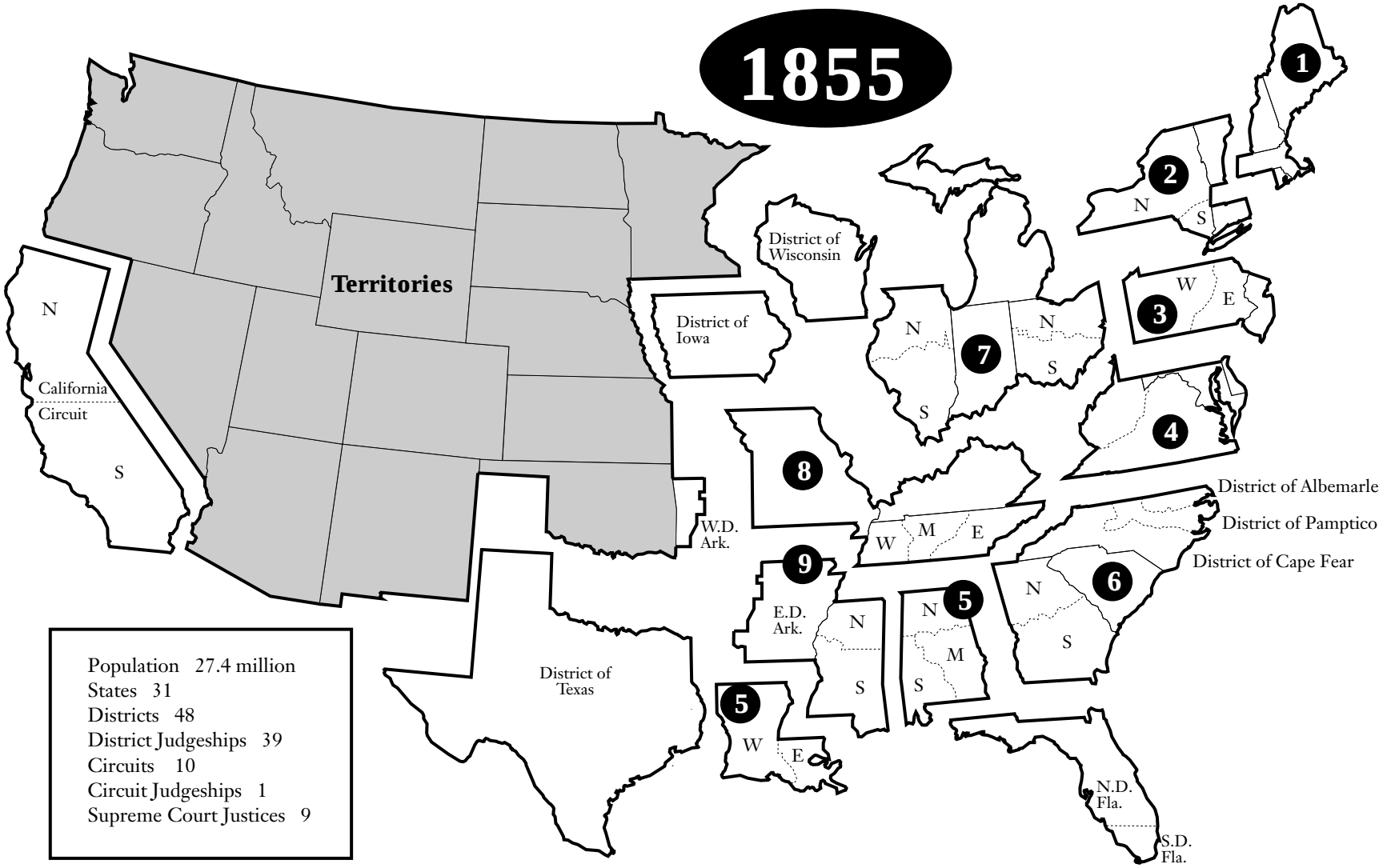
The vastly expanded federal court jurisdiction, especially that established by the 1875 Judiciary Act, had two effects. In the long term, it established the federal courts' preeminent role as protectors of constitutional and statutory rights and liberties and as interpreters of the growing mass of federal statutes and administra-



By 1837, nine new states had been admitted to the Union. Congress created two new circuits—the Eighth and the Ninth—and added two new justices to the Supreme Court to preside in them. With this change, every state in the Union was part of a circuit, although Louisiana's Western District was not; its district court exercised both district court and circuit court jurisdiction.



Congress reorganized the circuits to relieve the workload of Justice John McKinley, who covered the four states of the former Ninth Circuit. Congress reduced that circuit to the states of Arkansas and Mississippi and joined Alabama and Louisiana in the new Fifth Circuit, the only time continental states in a circuit were not contiguous.



In 1855, Congress created a separate judicial circuit, "constituted in and for the state of California, to be known as the circuit court of the United States for the districts of California," with the same jurisdiction as the numbered circuits. Rather than increasing the number of Supreme Court justices, Congress authorized a circuit judgeship for the circuit.

tive regulations. In the short term, however, these significant jurisdictional increases for a court system conceived in 1789 created serious delay in the administration of federal justice. In fact, Hart and Wechsler referred to the post-Civil War period as "the nadir of federal judicial administration."[60] Even in such a condition, however, the courts performed a "unifying function" in promoting commercial growth during the period.[61]

Numerous proposals to revamp the system led only to tinkering with the number, size, and terms of the federal courts. As a result, the nation lost much of its dwindling federal appellate capacity. Appellate review was statutorily foreclosed in many classes of cases. The decisions of the circuit courts were final in almost all criminal cases and in all civil cases involving less than $5,000.[62] Even with these limitations, the Supreme Court's docket grew steeply. In 1860, the Court had 310 cases on its docket. By 1890, it had 1,816 cases, including 623 new cases filed that year.[63]

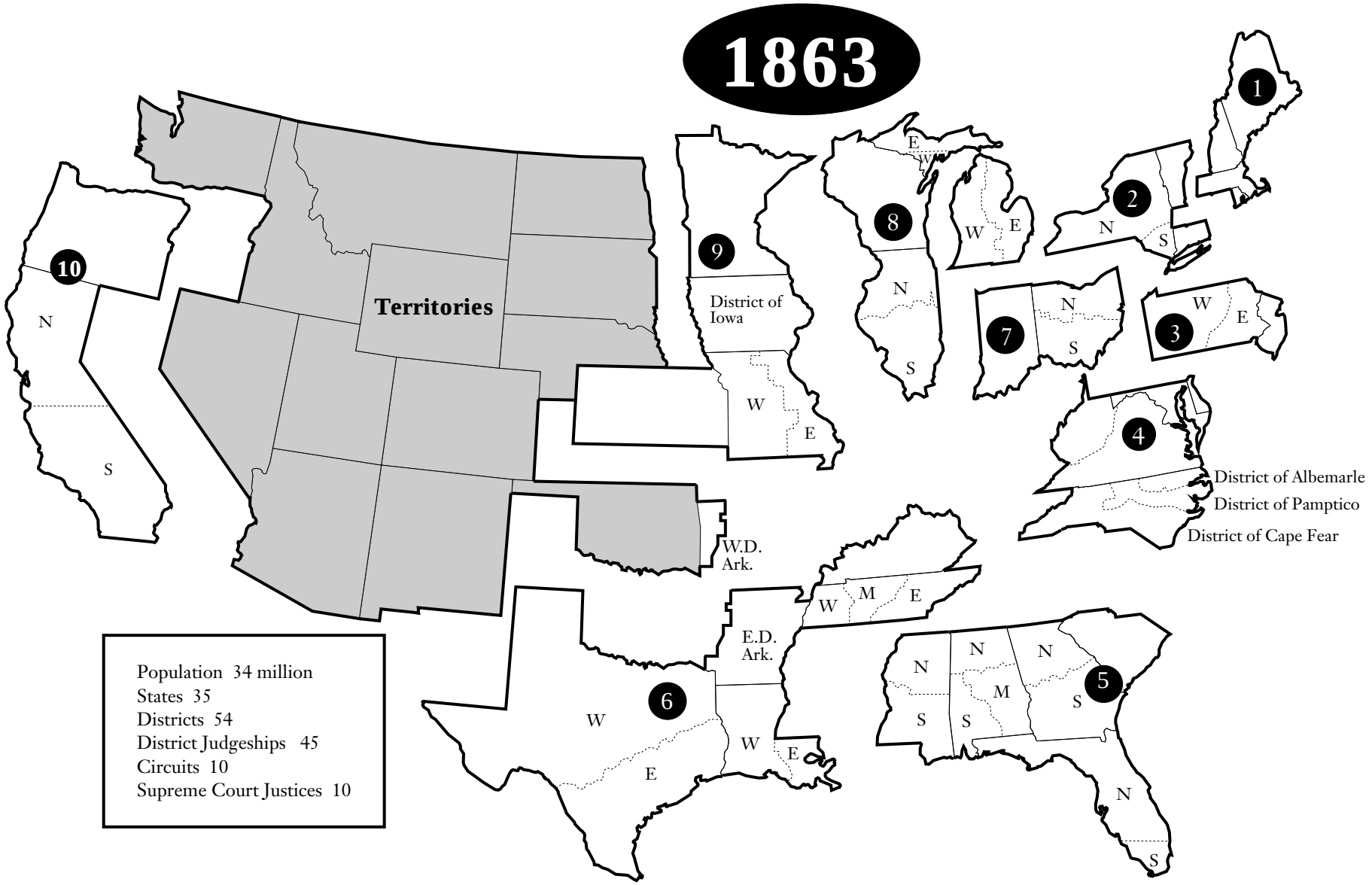
The Court was years behind in its work and, unlike the Court today, it was obliged to decide almost all the cases brought to it. Consequently, decisions of federal trial courts were, for practical purposes, almost unreviewable. Moreover, those courts had their own workload problems. Even with a partial restriction on diversity jurisdiction in 1887,[64] cases pending rose 86% from 1873 to 1890, from 29,000 to 54,000.[65] The number of district and circuit judges grew only by 11%, from 62 in 1873 to 69 in 1890.[66] In 1869, Congress had created nine circuit judgeships, realizing that the Supreme Court justices could attend but a fraction of the circuit court sessions. These nine judgeships were far too few to accommodate the increase in filings. In addition, the 1875 Act shifted some of the original jurisdiction of the circuit courts to the district courts and broadened the circuit courts' appellate jurisdiction. In the 1870s, single district judges handled about two-thirds of the circuit court caseload. In the next decade, the figure was much closer to 90%, and often the district judges were hearing appeals from their own decisions, thus making "the single district judges to a considerable extent ultimate courts of appeal."[67]

The federal courts' growing post-Civil War inability to accommodate this increased jurisdiction can be attributed in part to the inability of the bench and bar and legislators to discover an effective scheme of judicial organization. The courts needed to be reorganized so that they could accommodate this new workload while preserving such values as occasional contact between justices and the everyday judicial business of the country. Numerous proposals were offered. Some proposed an intermediate court of appeals, echoing bills introduced even before the Civil War and anticipating the reorganization of 1891. Others seem more curious today. Some proposed an eighteen-member Supreme Court, with nine judges serving on the circuits through a three-judge rotational scheme. Others suggested that the Supreme Court be divided into three panels to hear common-law, equity, and admiralty and revenue cases, and that constitutional cases go to the Court en banc.[68]

The inability to agree on a new form for the courts reflected a more basic conflict. As Frankfurter and Landis put it:

> The reorganization of the federal judiciary did not involve merely technical questions of judicial organization, nor was it the concern only of lawyers. Beneath the surface of the controversy lay passionate issues of power as between the states and the Federal Government, involving sectional differences and sectional susceptibilities. . . . Stubborn political convictions and strong interests were at stake which made the process of accommodation long and precarious. [69]

The conflicts that had pitted Federalists against Anti-Federalists in the 1790s resurfaced toward the end of the next century. One group, based mainly in the House of Representatives and drawing strength mainly from the South and the West, wanted to retain



In 1862, Congress added the states that had been admitted since 1842 to existing circuits. The following year, Congress abolished the Circuit Court for California and created the Tenth Circuit, consisting of California and Oregon. One justice was added to the Supreme Court for this circuit.

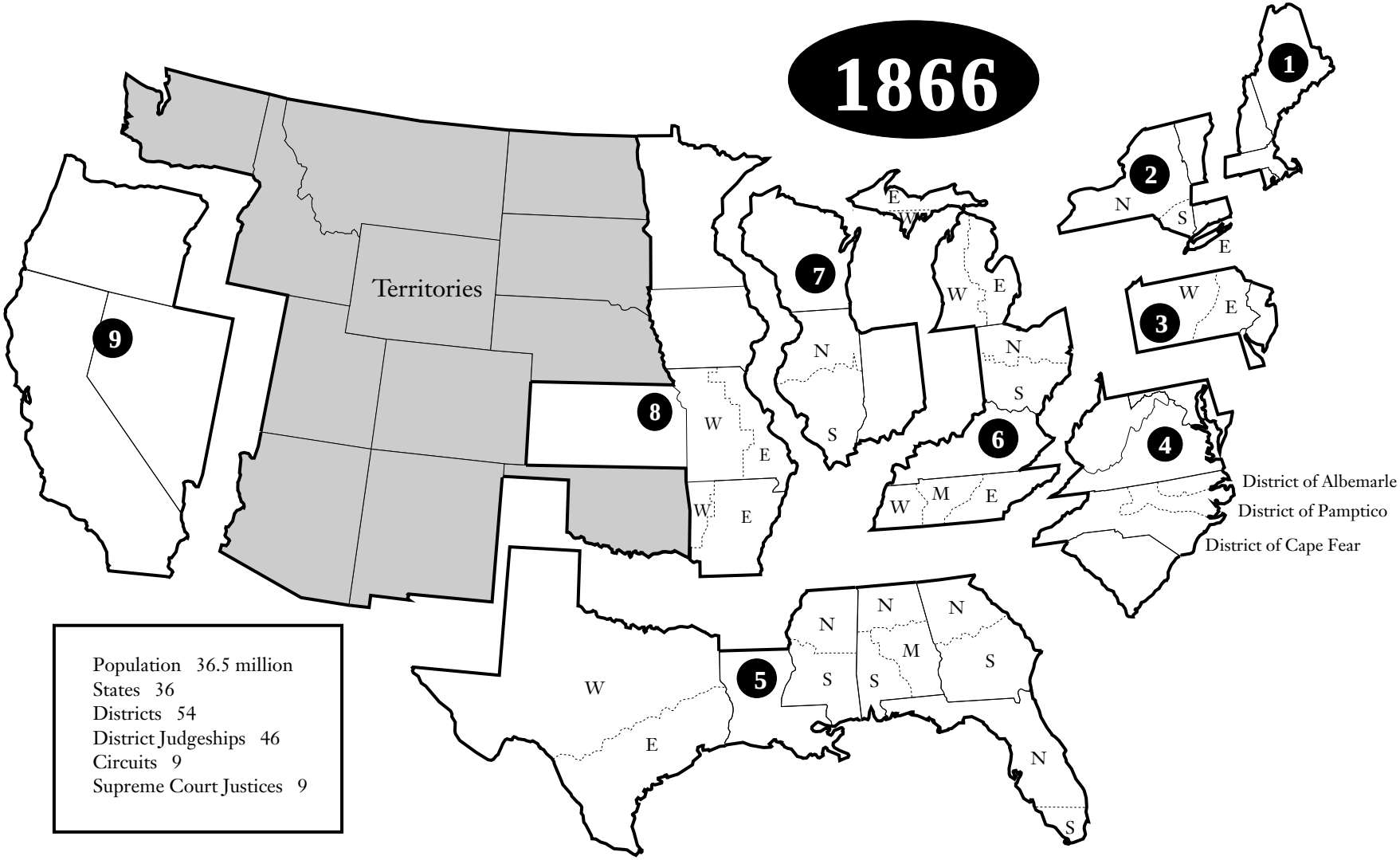
the traditional form of the federal courts but restrict their jurisdiction. This group believed, not without some evidence, that the federal courts were too sympathetic to commercial interests, too eager to frustrate state legislative efforts designed to help farmers and workers. An Illinois congressman argued that the post-Civil War "increase of . . . jurisdiction . . . grew out of the then anomalous conditions of the country and was largely influenced by the passions and prejudices of the times." To regard "Federal courts . . . [as] the safeguards of the rights of the people . . . is a great mistake and . . . lessens respect for State courts, State rights, and State protection."[70]

Another coalition, with strength in the Senate and based in the East, wanted to broaden the federal courts' capacity, so that they could exercise the expanded jurisdiction created in the wave of nationalist sentiment after the Civil War. One proponent cited "prejudice" by state courts against corporations and "in the West . . . granger laws and granger excitements that have led people to commit enormities in legislation. . . . Capital . . . will not be risked in the perils of sectional bitterness, narrow prejudices, or local indifference to integrity and honor." The solution: "Let us stand by the national courts; let us preserve their power."[71]

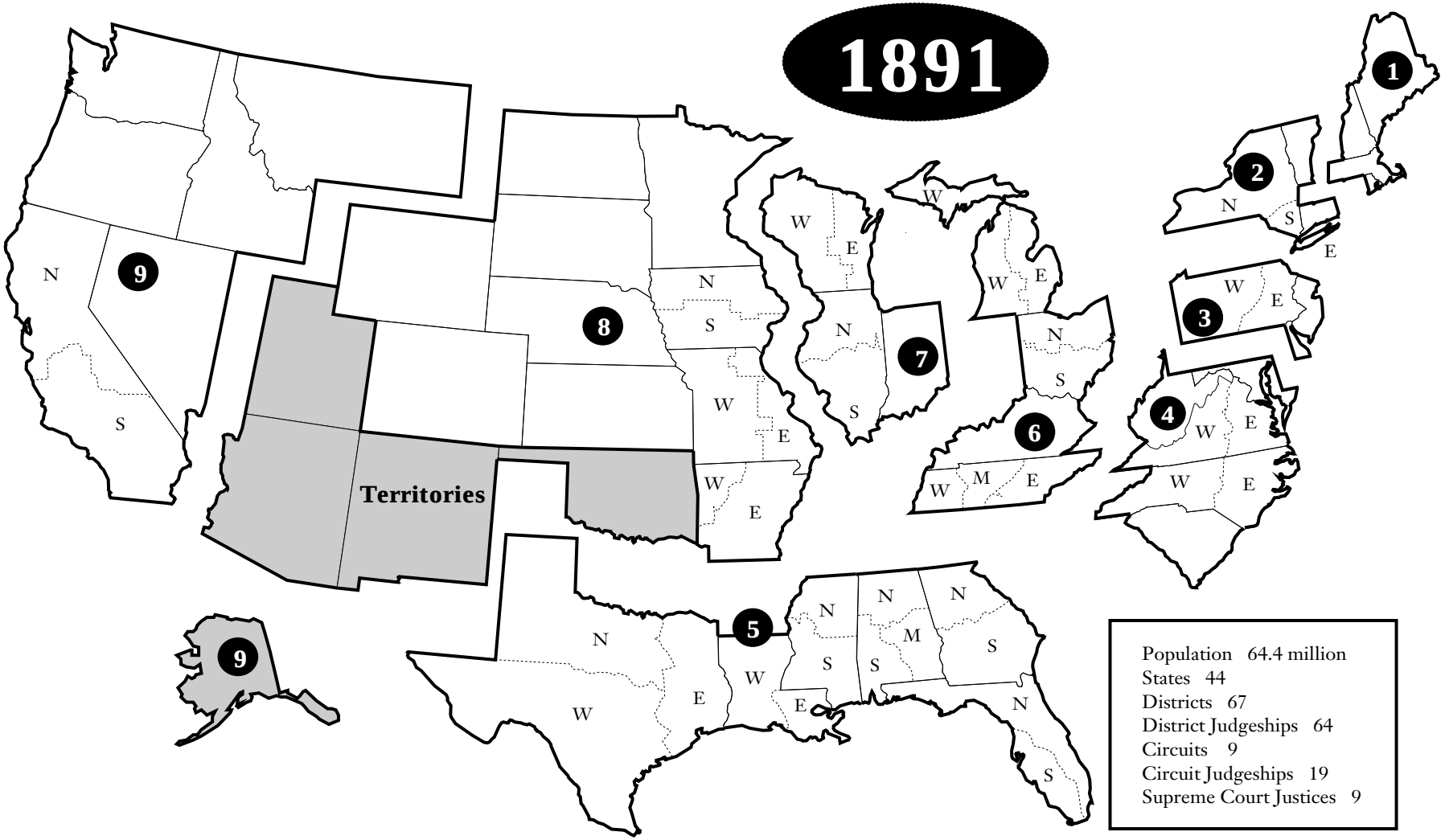
The culmination of this controversy was the Circuit Court of Appeals Act of 1891,[72] the handiwork mainly of Senate Judiciary Committee Chairman William Evarts of New York. According to Henry Adams, Evarts prided himself on his ability to do the things he didn't like to do.[73] He had resisted the idea of separate courts of appeals for a long time. In accepting the concept, Evarts fashioned legislation that resolved the crisis in favor of the nationalists, although there were modest concessions to those who favored the old form of the federal courts.

What did the Act do? Essentially, it shifted the appellate caseload burden from the Supreme Court to new courts of appeals, and, in so doing, made the federal district courts the system's primary trial courts. It created a new court, the circuit court of appeals—one for each of the nine circuits. Each court consisted of two circuit judges and a district judge. The Act provided direct Supreme Court review of right from the district courts in some categories of cases and from circuit courts of appeals in others. It routed all other district court cases—notably criminal, diversity, admiralty, and revenue and patent cases—to the courts of appeals for final disposition. The appellate court could certify questions to the Supreme Court, or the Supreme Court could grant review by certiorari. The Act's effect on the Supreme Court was immediate—filings decreased from 623 in 1890 to 379 in 1891 and 275 in 1892.[74]

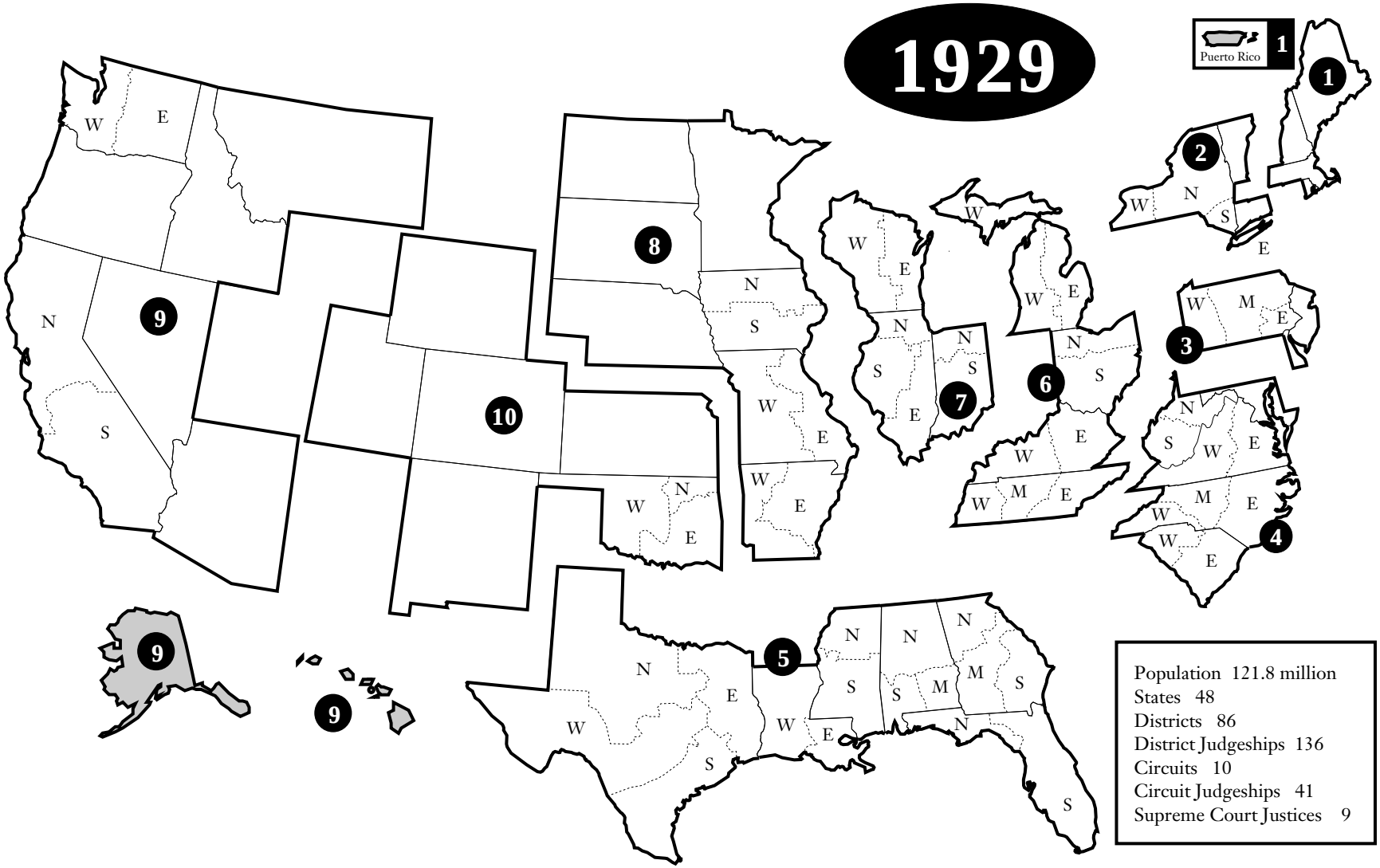
Deference to tradition temporarily spared the old circuit courts, but the Act abolished their appellate jurisdiction. Until the courts themselves were abolished in 1911,[75] the nation still had two separate federal trial courts. The Act did not abolish the justices' circuit riding, but made it optional, thus quietly burying this anachronism, also in deference to tradition. The important legacy today of justices' circuit riding is 28 U.S.C. § 42, which directs the Court to allot its members "as circuit justices," mainly to hear emergency motions from their respective circuits.



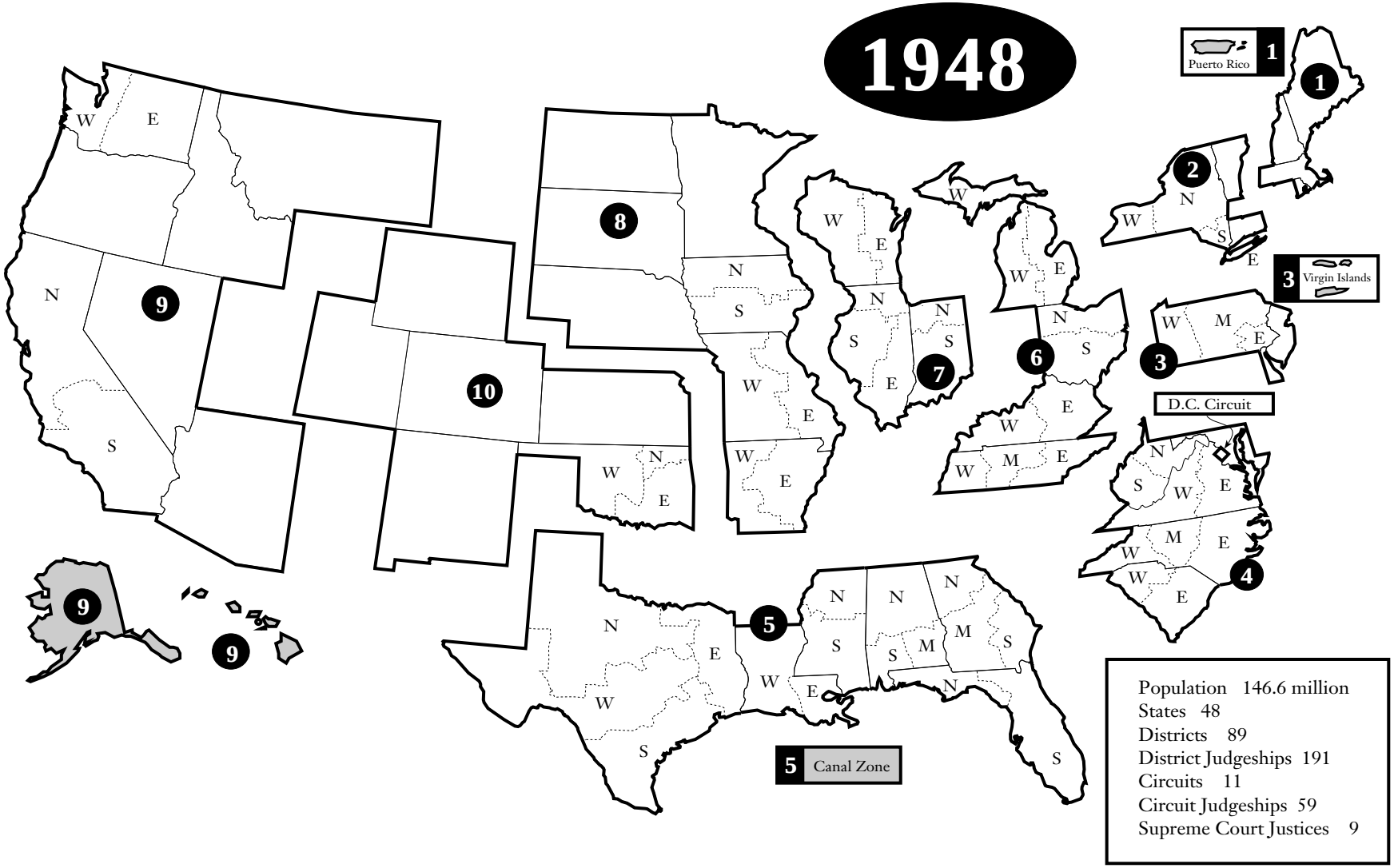
After the Civil War, Congress reduced the number of circuits to nine, adding Nevada to the new Ninth Circuit, formerly the Tenth. By law, Congress sought to limit the size of the Court by prohibiting appointments until the Court reached an authorized size of six associate justices, plus the Chief Justice. Congress restored the Supreme Court to nine justices in 1869, at the same time creating a circuit judge for each of the nine circuits "who shall reside in his circuit, and shall possess the same power and jurisdiction therein as the justice of the Supreme Court allotted to the circuit." From 1867 to 1929, newly admitted states were added to either the Eighth Circuit or the Ninth Circuit.



By the year in which Congress created the Circuit Courts of Appeals, the United States numbered forty-four. Utah, Oklahoma, Arizona, and New Mexico joined the Union within the next quarter-century, making the continental United States complete. Arizona was added to the Ninth Circuit; the other three states joined the Eighth Circuit. In 1911, Congress abolished the old circuit courts, which had exercised only trial jurisdiction since 1891, and added Hawaii to the Ninth Circuit. Puerto Rico was added to the First Circuit in 1913.



By 1929, the Eighth Circuit had grown to thirteen states. Many plans had been proposed to address the growth of the western circuits; Congress finally chose simply to divide the Eighth into two, creating a new Tenth Circuit.



The recodification of Title 28 regularized many features of the judicial system. The D.C. Circuit was formally specified (the U.S. Court of Appeals for the District of Columbia had been established in 1893). The territories of Alaska, the Virgin Islands, and the Canal Zone were officially added to specific circuits.

The Federal Courts Today

At the start of their third century, the federal courts differ strikingly in size and structure from their forerunners in 1891, and even more from those of 1789. An expanding jurisdiction has generated a growing caseload, which in turn has generated a large increase in the size of the system. Since 1891, the judiciary has grown almost tenfold, from 84 judges to 837 judgeships[76] (compared with a fivefold increase in the first century from the 19 judges originally authorized). In 1925, the federal judiciary employed about 1,200 persons, including about 180 judges—roughly one out of six.[77] Since then, the number of supporting personnel has increased much more than the number of judges. In 1992, the federal courts employed more than 27,000 persons; of those, slightly more than 1,000 were district and circuit judges, both active and retired.[78] There were also approximately 300 bankruptcy judges and 500 magistrate judges, whose terms are limited and whose positions did not even exist in 1925. The table on the following page gives some idea of the change in workload of the federal appellate and district courts in the twentieth century.

The Supreme Court's limited certiorari jurisdiction in the 1891 Act has been broadened by successive legislation, the most noteworthy being the Judiciary Act of 1925, and the most recent being a 1988 act that eliminated most remaining categories of the Court's mandatory appellate jurisdiction.[79] The number of courts of appeals increased from nine in 1891 to thirteen in 1982. The number of district courts increased from sixty-seven in 1891 to ninety-four by 1971. The old system of bankruptcy referees was transformed in 1978 and 1984 into bankruptcy courts as units of the district courts.[80] Similarly, the system of U.S. commissioners—dating back to a 1793 statute authorizing circuit courts to appoint persons to take bail—was replaced in 1968 with the U.S. magistrate system.[81] A 1925 statute[82] created a probation system for the federal courts, and a 1982 statute[83] created a permanent pretrial services system. In 1964, Congress authorized federal defenders' offices in the judicial districts.[84] Permanent staff attorneys and court executives have joined the federal courts' personnel rosters.

Since 1891, the federal courts have achieved administrative autonomy from the executive branch.[85] Congress in 1939 shifted budgetary and personnel responsibility from the Department of Justice to the newly created Administrative Office of the U.S. Courts and directed the Administrative Office to function under the supervision of the Judicial Conference of the United States. Circuit councils and conferences were also mandated in 1939.[86] These agencies and the creation of the offices of chief district judge and chief circuit judge, as a part of the 1948 recodification of Title 28, have bolstered the concept of internal federal judicial administration. In 1967, Congress created the Federal Judicial Center, an agency to provide federal court research and education, and in 1984, it created the U.S. Sentencing Commission to promulgate presumptive guidelines for the sentences of federal offenders.[87]

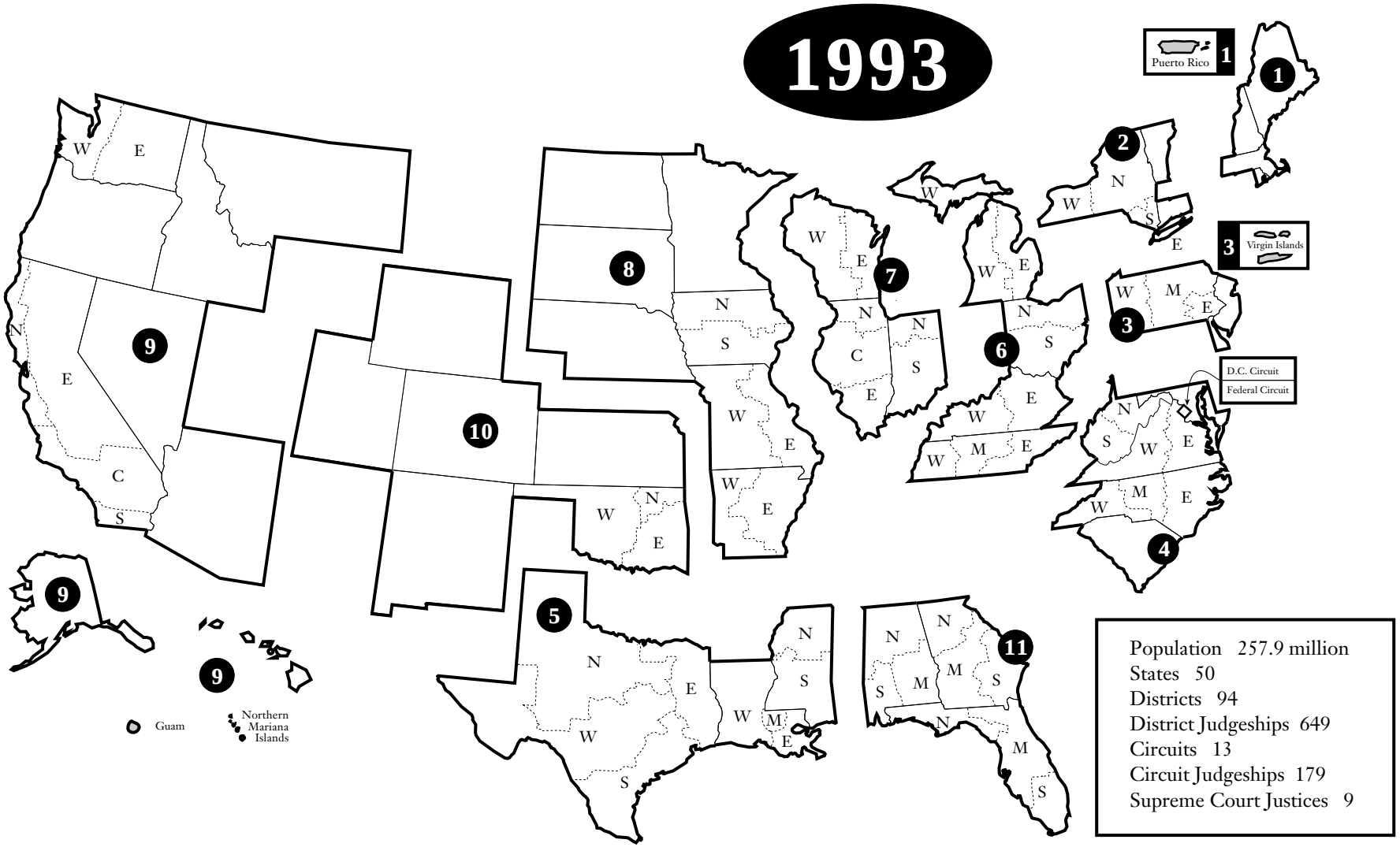
Year	Population (in millions)	District Court Judgeships	District Court Filings	Appellate Judgeships	Appeals Filed
1910	92.4	94	28,652	32	1,672
1920	106.5	100	77,696	32	1,523
1930	123.1	142	135,630	45	2,874
1940	132.5	193	68,135	57	3,446
1950	152.3	218	82,805	65	2,678
1960	180.7	245	80,891	68	3,765
1970	205.1	399	122,624	97	11,440
1980	227.8	515	196,792	132	23,155
1990	250.0	649	251,166	167	40,858

Sources: Administrative Office of the U.S. Courts, Statistics Division, Analysis and Reports Branch, History of the Authorization of Federal Judgeships Including Procedures and Standards Used in Conducting Judgeship Surveys (February 1991), Table 7: Number of Authorized Judgeships, 1789–1990. Richard A. Posner, The Federal Courts: Crisis and Reform 350–52 (Cambridge, Mass., Harvard University Press, 1985), Table B.2: Federal Court Case Filings, 1892–1983. U.S. Bureau of the Census, Statistical Abstract of the United States: 1992, at 8 (112th ed.) (Washington, D.C., 1992), Tables 1 & 2.

Conclusion

Many things that the First Judiciary Act required have been swept aside. But other features it provided are so intrinsic to our system of justice that we rarely give them a second thought: a separate set of courts for the national government, arranged geographically according to state boundaries, deciding matters of national interest.

When the Act was approaching its third year, Chief Justice John Jay, sitting as a judge of the Circuit Court for the Eastern Circuit, undertook in his charge to the grand juries of that circuit to describe something of this new system of federal courts. Those who created the federal courts faced a formidable task, he observed, because "no tribunals of the like kind and extent had heretofore existed in this country." In that environment of experimentation, Jay reminded the grand jurors—and his words could well be a charter for contemporary efforts—that "the expediency of carrying justice, as it were, to every man's door, was obvious; but how to do it in an expedient manner was far from being apparent."[88]



In 1980, Congress renamed the Customs Court as the Court of International Trade, whose nine judges enjoy the tenure and salary protection of Article III. In 1981, the Fifth Circuit was divided into the Fifth and Eleventh Circuits. In 1982, Congress created the Federal Circuit, with its own court of appeals, a jurisdictional rather than a geographic circuit, out of the Court of Claims and the Court of Customs and Patent Appeals. The Canal Zone district court closed on March 31, 1982.

Notes

1. Act of Sept. 24, 1789, 1 Stat. 73.
2. Paul M. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System 20 (3d ed. 1988) [hereinafter Hart & Wechsler].
3. *Quoted in* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 54 (1923).
4. Late eighteenth-century attitudes toward judges and lawyers ran a wide gamut, including strains of decided hostility. They are explored in Richard E. Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic, ch. 8 (1971).
5. Warren, *supra* note 3, at 56.
6. The Federalist No. 84 (Modern Lib. ed., 1937).
7. Charge to Grand Juries, *in* 3 The Public Papers and Correspondence of John Jay 387, 395 (H. Johnston ed., 1891).
8. The Federalist No. 48 (Modern Lib. ed., 1937).
9. *Quoted in* Warren, *supra* note 3, at 115.
10. The eleventh, finally ratified in 1992 as the Twenty-Seventh Amendment, states: "No law, varying the compensation for the services of Senators and Representatives shall take effect, until after an election of Representatives shall have intervened;" the twelfth, dealing with the number of representatives, has never been ratified.
11. An excellent summary of the evolution of the Judiciary Act can be found in David Eisenberg et al., *The Birth of the Federal Court System*, This Constitution, Winter 1987, at 18.
12. Act of Sept. 24, 1789, § 7, 1 Stat. 76.
13. *Id.* § 17, 1 Stat. 83.
14. *Id.* § 27, 1 Stat. 87.
15. *Id.* § 35, 1 Stat. 92–93.
16. Act of Sept. 23, 1789, § 1, 1 Stat. 72.
17. Julius Goebel, Jr., Antecedents and Beginnings to 1801, vol. 1 of The Oliver Wendell Holmes Devise, The History of the Supreme Court of the United States 472 (1971).
18. Act of Sept. 24, 1789, §§ 21, 22, 1 Stat. 83–85.
19. 1 Cranch 137 (1803).
20. Act of Sept. 23, 1789, § 1, 1 Stat. 72.
21. Felix Frankfurter & James Landis, The Business of the Supreme Court 109–13 (1928).
22. Act of Sept. 24, 1789, § 9, 1 Stat. 76–77.
23. Act of Apr. 10, 1790, § 5, 1 Stat. 109, 111.
24. Act of Sept. 24, 1789, § 11, 1 Stat. 78–79.
25. *See* Henry Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, especially at 497–99 (1928). For a somewhat different analysis, see John Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Probs. 3, 25 (1948).
26. Independent Chronicle, Boston, Sept. 16, 1790, *quoted in* Warren, *supra* note 3, at 52.
27. Act of Sept. 24, 1789, §§ 11, 34, 1 Stat. 78–79, 92.
28. The District of Wyoming, in the Tenth Circuit, reaches into Montana and Idaho, in the Ninth Circuit, in order to keep Yellowstone National Park in one judicial district. 28 U.S.C. § 131.
29. Act of Sept. 24, 1789, § 3, 1 Stat. 73–74. The successor provision is 28 U.S.C. § 134(b).
30. Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 Wm. & Mary Q. 3, 11 (1965).
31. Letter from Nathanial Pendleton to James Iredell, Mar. 19, 1792, in Griffith J. McRee, 2 The Life and Correspondence of James Iredell 344–45 (1857).
32. N.Y. Times, Dec. 24, 1865, *quoted in* Kermit Hall, *The Civil War Era as a Crucible for Nationalizing the Lower Federal Courts*, Prologue, 177, 184 (Fall 1975).
33. This was Attorney General Randolph's characterization in his 1790 report on the judicial system (p. 8); his report then rebutted the argument. *Quoted in* Frankfurter & Landis, *supra* note 21, at 19.
34. A helpful analysis of these charges is provided in Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 Sup. Ct. Rev. 127.
35. Justice Iredell, *quoted in* Charles Warren, 1 The Supreme Court in United States History 86 (rev. ed. 1926).
36. Gouverneur Morris, in 1802, *quoted in* Frankfurter & Landis, *supra* note 21, at 17.
37. Letter of Nov. 7, 1792, to Congress in 1 American State Papers (Class X) Miscellaneous 51–52.
38. Act of Sept. 24, 1789, § 4, 1 Stat. 74–75.
39. Justice Iredell explained the practice in Ware v. Hylton, 3 Dall. 199, 257 n.2 (1796).

40. Act of Mar. 2, 1793, 1 Stat. 333.
41. Act of Feb. 13, 1801, 2 Stat. 89 ("To Provide for the More Convenient Organization of the Courts of the United States").
42. Act of Mar. 5, 1802, 2 Stat. 132.
43. Act of Apr. 29, 1802, 2 Stat. 118 (1802) ("To Amend the Judicial System of the United States"). The Supreme Court upheld this act in Stuart v. Laird, 1 Cranch 299 (1803).
44. Act of Mar. 2, 1855, 10 Stat. 631 ("To Establish a Circuit Court in and for the State of California").
45. Act of March 3, 1863, 12 Stat. 794 (1863) ("To provide Circuit Courts for the Districts of California and Oregon . . . ").
46. This conclusion is based on the tables of justices and the reporter's prefatory notes in volumes 1 and 2 of Wallace's Supreme Court Reports.
47. Act of July 23, 1866, 14 Stat. 209 ("To Fix the Number of Justices of the Supreme Court of the United States, and to Change Certain Judicial Circuits").
48. Stanley Kutler, Judicial Power and Reconstruction Politics 49–63 (1968).
49. Act of Apr. 10, 1869, 16 Stat. 44. See also the front pages of volumes 3 to 9 of Wallace's Supreme Court Reports.
50. Message to Congress of Dec. 3, 1861, in 5 The Works of Abraham Lincoln 41–42 (R. Basler ed., 1953).
51. Tony Freyer, Forums of Order: The Federal Courts and Business in American History chs. 1–5 (1979); Kermit L. Hall, *Circuit Courts*, *in* 1 Encyclopedia of the American Constitution 253–54 (Leonard W. Levy et al. eds., 1986).
52. Specific provisions are in Hart & Wechsler, *supra* note 2, at 36–37.
53. *See generally* Harold Hyman & William Wiecek, Equal Justice Under Law: Constitutional Development, 1835–1875, chs. 8–11 (1982).
54. Freyer, *supra* note 51, at 125.
55. Act of Mar. 3, 1875, 18 Stat. 470.
56. 18 Stat. 335.
57. Kutler, *supra* note 48, at 159.
58. Civil Rights Cases, 109 U.S. 3 (1883).
59. Frankfurter & Landis, *supra* note 21, at 65.
60. Hart & Wechsler, *supra* note 2, at 37.
61. Freyer, *supra* note 51, at 114.
62. Act of Feb. 16, 1875.
63. Frankfurter & Landis, *supra* note 21, at 101–02.
64. Act of Mar. 3, 1887.
65. Frankfurter & Landis, *supra* note 21, at 60.
66. Richard A. Posner, The Federal Courts: Crisis and Reform at table B.3, pp. 354–55 (1985).
67. Frankfurter & Landis, *supra* note 21, at 79.
68. *Id.* at 82–83.
69. *Id.* at 85.
70. Congressman Moulton of Illinois, *quoted in id.* at 85 n.135.
71. Congressman Robinson of Massachusetts, *quoted in id.* at 91–92.
72. Act of Mar. 3, 1891, 26 Stat. 826.
73. Henry Adams, The Education of Henry Adams 30 (1918).
74. Frankfurter & Landis, *supra* note 21, at 102.
75. Act of Mar. 3, 1911, § 301, 36 Stat. 1087, 1169.
76. Posner, *supra* note 66, at Table B.3, p. 355; 28 U.S.C. §§ 1, 44, 133; Administrative Office of the U.S. Courts, Annual Report of the Director, 1992, at table 17.
77. Posner, *supra* note 66, at 27.
78. Administrative Office of the U.S. Courts, Annual Report of the Director, 1992, at table 16.
79. Pub L. No. 100-352, codified at 28 U.S.C. § 1254, 102 Stat. 662.
80. *See* 28 U.S.C. §§ 151, 152.
81. Peter McCabe, *The Federal Magistrate Act of 1979*, 16 Harv. J. on Legis. 342 (1979).
82. Act of Mar. 5, 1925.
83. Pretrial Services Act of 1982, Pub. L. No. 97-267, 18 U.S.C. § 3152, 96 Stat. 1136.
84. Criminal Justice Act of 1964, Pub. L. No. 88-455, 18 U.S.C. § 3006A, 62 Stat. 684.
85. The Administrative Office, circuit councils, and circuit conferences were all created by An Act to Provide for the Administration of the United States Courts, and for Other Purposes, 53 Stat. 1223 (1939). The Judicial Conference was created in 1922 as the Conference of Senior Circuit Judges (42 Stat. 837), a title it retained until 1948.
86. *See* Russell R. Wheeler, Origins of the Elements of Federal Court Governance (Federal Judicial Center 1992).
87. 28 U.S.C. § 991.
88. Charge to Grand Juries, *in* 3 The Public Papers and Correspondence of John Jay 387, 390–91 (H. Johnston ed., 1891).