

REVIEW SECTION

Book Reviews

The Rise of Judicial Management in the U.S. District Court, Southern District of Texas, 1955-2000, by Steve Harmon Wilson. Athens: University of Georgia Press, 2002. 559 pp.

reviewed by *Laura Moyer*

In *The Rise of Judicial Management*, part of Studies in the Legal History of the South, historian Steven Harmon Wilson sets his sights on the often-understudied federal district courts and attempts to position his research on the Southern District of Texas at the intersection of legal history and social scientific analysis. These are certainly laudable goals; even a cursory glance at the political science and history literature reveals both a bias toward the higher federal courts and little or no cross-disciplinary communication, with frequent duplication of efforts. However, I begin with a quick forewarning to potential readers: *The Rise of Judicial Management* is first and foremost a narrative, historical account of the judges and cases before the courts of the Southern District of Texas that offers little in the way of critical analysis, social scientific evidence, or generalizable assertions on judicial management. That said, readers of *Justice System Journal* may best appreciate the book as a case study on the difficulties of judicial prioritization and implementation.

Wilson argues in his introduction that changes in the quantity and substance of litigation from 1955 to 2000, coupled with federal directives, necessarily changed the operation of the Southern District court and led to the rise of judicial management. Wilson distinguishes among three varieties of judicial management: docket management (maintaining efficient and orderly caseload), case management (guiding complex litigation through the courts), and public-law litigation (using judicial power outside the courtroom to achieve broad social reform). Wilson gives the most attention to the third of these, public-law litigation, and relies upon the definition of litigation coined by Abram Chayes in which the judge is both “the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge’s continuing involvement in administration and implementation” (p. 7).

The eight chapters are grouped chronologically and by subject matter. This organizing strategy probably does the least justice to the two chapters dealing with public-school desegregation and integration efforts, separating them by 140 pages. Chapter 1 focuses upon challenges in the first decade after *Brown v. Board of Education* (1954), while chapter 5 picks up the story in the late 1960s and early 1970s. The judicial responses to segregation in the Southern District can be broadly characterized as incremental in nature, and as increasingly less tolerant of the school districts’ proclivity to stall. Wilson provides a good description of judges’ tactics in

developing remedies, including injunctions, advisory panels, hearings, and adoption of federal guidelines fashioned by the Department of Health, Education, and Welfare (HEW).

Because of southern Texas's large Hispanic population, which was considered to be legally "white," desegregation there posed a number of unusual problems for district judges and litigants. Although the legal barriers erected for African-Americans did not apply to Hispanics, there was much *de facto* discrimination against Mexican-Americans with respect to linguistic segregation and school districts' reliance upon "neighborhood schools." The distinction between *de jure* and *de facto* discrimination is borne out in several desegregation cases that Wilson follows in great detail. In *Ross v. Houston Independent School District* (1957, 1960) plaintiff African-American parents relied on the Supreme Court's opinion in *Brown*, whereas in *Hernandez v. Driscoll Consolidated Independent School District* (1957), the plaintiff Mexican-American parents chose not to rely on *Brown's* reasoning. Because at that time the Court had not clarified whether *Brown* applied to nonblack racial minorities, African-Americans argued that their segregation violated the Equal Protection Clause, while Mexican-Americans, not eager to give up their "white" legal status, based their legal arguments on the Due Process Clause.

While the differences between African-Americans' and Mexican-Americans' legal struggles are intriguing, the way in which Wilson frames these differences tends to minimize them. A more explicitly comparative analysis would be useful in tracing the history from the formation of plaintiffs' legal strategies to the judges' initial remedies and on to the continuing oversight of implementation of remedies. The comparison—in chapter 5—of judicial management in *Ross v. Houston Independent School District* (1957, 1960) with *Cisneros v. Corpus Christi Independent School District* (1970) is the one of the few places where Wilson synthesizes his findings concisely and clearly. He concludes that African-Americans were largely successful in resorting to the courts, but Hispanic victories in the 1950s and 1960s had "very limited effect in terms of ending discrimination" (p. 39). The author should not have left unexplored an observation such as this, particularly when a large body of political-science literature addresses the role of courts as policy makers and their efficacy (or lack thereof) in implementation. The fact that Wilson fails to discuss Gerald Rosenberg's *The Hollow Hope* and subsequent critical responses to it indicates that Wilson remains almost exclusively situated in legal history rather than in social science.

In chapter 2, Wilson draws attention to rising caseloads from 1950 to 1960, although the chart used to illustrate these increases actually shows the growth in civil cases to be relatively flat over the period. There is a good discussion of the movement to increase the size of the federal judiciary in the 1960s and the evolution of the political environment that allowed for the creation of more district judgeships under Kennedy in 1961 and Johnson in 1966. The remainder of the chapter is devoted to problems of legal distinction and statutory definition in maritime law and land-based workers' claims.

Chapters 3 and 6 are dedicated to criminal cases before the Southern District, particularly immigration violations and narcotics smuggling, where again, the Southern District's proximity to the U.S.-Mexico border played a prominent role in the challenges the district judges faced. Surges in immigration and narcotics cases reflected national policy emphases on strong border justice as well as the emerging primacy of the prosecutor over the judge. Wilson observes that the increasing number of federal prosecutions in the Southern District "was an accurate reflection of the increase in the number of crimes being committed on the border" (p. 118), not a result of more aggressive law enforcement. But while the district's judicial personnel may have believed or hoped this to be true, Wilson fails to provide any support for this contention and does not reconcile his statement with examples he gives elsewhere of enforcement officials' abuse of their role.

In response to the similarity of cases in their dockets in the 1960s, judges in the district's divisions near the border developed a number of managerial strategies; these included assembly-line docket management, "collective" trials of undocumented immigrants, and a plea-bargaining "template" for narcotics offenders. The "collective" trials, in particular, represent an early response to managing the tension between the values of equity and efficiency in administering justice. In response to the need to clear both dockets and jail cells for more serious crimes, the border-division judges periodically called in dozens of undocumented immigrants waiting for indictment, who then waived their right to counsel, entered guilty pleas, and received suspended sentences before (usually) being repatriated to Mexico. Wilson explores how the Southern District interpreted the Speedy Trial Act of 1974 into formal operating rules and, on the civil side, held a "blitz" docket call in 1977 to clear out hundreds of old, unresolved cases. There is a brief mention here about the introduction of a case-weighting system in the Southern District, although more attention is paid to the division of labor among judges as a means to cope with workload demands. Readers wanting more in-depth discussion of court management, as it is broadly understood, will likely be frustrated by Wilson's making only passing mentions of it.

Chapter 4 deals with the implications of federalism for what Wilson calls "structural reform litigation." In the 1960s, traditional federal-state distinctions and the judicial principles of comity and abstention were challenged by civil-rights cases, as the Supreme Court's decisions in *Monroe v. Pape* (1961) and *Dombrowski v. Pfister* (1963) created exceptions to the abstention doctrine and triggered increases in federal civil-rights suits under section 1983 of the Civil Rights Act. However, when the Burger Court, in *Younger v. Harris* (1971), advised federal district judges to refrain from enjoining state laws if a criminal prosecution was already underway, save for evidence of bad faith or official harassment, many civil-rights questions were to be left to the state courts for resolution. Within this shifting environment, the Southern District grappled to find a workable interpretation of federalism to resolve section 1983 cases. Here, Wilson looks beyond the impact on judges to include the ways that the federalism debate affected the legal strategy of the Mexican-American communi-

ty in fighting discrimination. This chapter also describes Southern District judges' differing responses to First Amendment challenges and state morals enforcement, which Wilson attributes to divergent understandings of the role of federal courts.

The book's final two chapters promise to describe the increased role of judicial adjuncts, including clerks, staff attorneys, and magistrate judges. However, chapter 7 primarily focuses on judicial oversight of two major corporate misconduct cases decided in the district, which provide examples of an increased emphasis on settlement and, in one, on the use of a special master. Most of Wilson's discussion, however, continues in the vein of early chapters on judicial oversight.

The final chapter focuses on prison-reform litigation in the 1980s, when the influx of prisoner civil-rights cases required the district's judges to delegate some oversight responsibilities to special masters and magistrate judges. Wilson offers a solid comparison of the handling of two prison-overcrowding cases, *Alberti v. Sheriff of Harris County* (1975) and *Ruiz v. Estelle* (1980), and illuminates the district's pilot program for managing prisoner civil-rights cases, which relied heavily upon magistrate judges. He then jumps back to the war on drugs, with a relatively brief overview of changes in the district under the Reagan and Clinton administrations. The concluding chapter, a mere three pages, again emphasizes the increasing discretionary power of the prosecutor relative to the judge and the flood of narcotics prosecutions, in the absence of adequate judicial personnel to process the rising caseloads. Wilson closes with a rather pessimistic quote from a former Southern District court clerk, Jesse E. Clark, who likens the district's unfilled judgeships and overburdened dockets to a traffic jam: "There are too many cars and too little cement" (p. 358).

Overall, *The Rise of Judicial Management* is a dense, richly detailed description of the competing interests at work in the Southern District of Texas during the last half of the twentieth century. This richness of detail stems from the author's copious use of court documents (case files, published opinions, memos, and the like), judicial biography, and oral history to flesh out the district judges' perspectives. A notable contribution of the volume is Wilson's attention to the Southern District's unique environment, particularly in terms of its dealings with tri-ethnic integration, border justice, and federalism's impact on civil-rights litigation and narcotics policy. By selecting a district so close to Mexico, Wilson presents a new angle to the often-studied areas of school desegregation and the emergence of drug cases in federal criminal justice. The attention paid to the messiness of implementing judicial decrees, frequently glossed over by legal scholars but captured well throughout this book, also is commendable. Wilson errs on the side of being over-inclusive in his choice of subject matter; coupled with his use of thick description, this makes the narrative seem unfocused.

Wilson falls short, however, in his attempt to meld historical research with social science. The book lacks an overarching analytical framework, nor does the author cite any of the relevant empirical political-science literature on judicial implementation or federal district judges. This further obscures the major theme laid out in the introduction and the book's title: the rise of judicial management. It might be more accurate

to say that this book is a chronological account of a federal district court rather than an analysis of judicial responses to the changing nature of litigation. Practitioners seeking insights on judicial management, although they may find much of the subject matter interesting, will likely learn nothing new here. For social scientists, this book has potential to inform understanding of how a trial court actually operates, particularly in lengthy and complex litigation, but the lack of framework hinders its usefulness for them. Certainly, Wilson's work is timely for the contemporary debate about "activist judges" and the proper role of the judiciary in resolving contentious social problems, but readers are left to draw their own conclusions about whether the federal district courts were the best-situated institution to tackle challenges like desegregation.

Case Citations

Alberti v. Sheriff of Harris County, 406 F. Supp. 649 (S.D. Tex., 1975).

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

Cisneros v. Corpus Christi Independent School District, 324 F. Supp. 599 (S.D. Tex., 1970).

Dombrowski v. Pfister, 380 U.S. 479 (1963).

Hernandez v. Driscoll Consolidated Independent School District (S.D. Tex., 1957, cited in Wilson, p. 39).

Houston Independent School District v. Ross, 364 U.S. 803 (1960).

Monroe v. Pape, 365 U.S. 167 (1961).

Ross v. Rogers, 2 Race Rel. L. Rptr. 1114 (S.D. Tex., 1957).

Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex., 1980).

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

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The American Jury System, by Randolph N. Jonakait. New Haven: Yale University Press, 2003. 346 pp.

reviewed by G. Thomas Munsterman

Professor Jonakait of the New York Law School has written a serious examination, or perhaps I should call it an exploration, of *The American Jury System*. An educated lay audience is the book's audience, although a non-layperson will find a great deal of interest in it. The content of the twenty chapters is quite detailed. We find, for instance, an entire chapter on peremptory challenges followed by another chapter on challenges for cause. There is one chapter on vicinage, another on jury instructions, and still another on nullification. A student interested in these topics would do well to use these chapters to get a serious introduction and then head to the Internet and other sources to dig more deeply.

Before we ever get to the details, the first nine chapters examine the role and position of the jury in our society. Here are chapters on the jury checking abuses of power and community values linked with chapters on jury unanimity and diversity—two characteristics that give the jury its power and jury verdicts their acceptability. These early chapters are enriched with many quotes from the often-ignored first-person literature about jurors. Hearing what actual jurors say is always interesting, whether in texts, on panels, or from neighbors, perhaps because we just do not like hearsay.

The author is very supportive of the jury system and does not adopt any reform position except to consider those methods that help jurors understand the evidence. This is a difficult position to oppose. All reforms discussed are presented in a well-balanced fashion, but the author is speaking as an in-court advocate ever concerned with preserving the verdict. References to legal systems, and especially to jury systems, in other countries are made in a contemporary sense, to provide more than a historical perspective to our nation's use of the jury. In support of the jury system, Jonakait briefly examines how so many countries do without juries. I wish he had included a discussion of those countries, such as Spain and Russia, that are now once again using the jury system and their movement from a civil-law toward a common-law forum.

I was pleased to see the author get into some of the unsavory aspects of jury service, such as pretrial investigations of prospective jurors. Although the author does not discuss more recent developments like "Googling," perhaps because of the publication date of 2003 (which means the work was probably completed before 2002), Internet searches of jurors are now generally acceptable. The issue is not so much privacy as whether the source of pretrial investigation of jurors is private or public, with the latter being primarily state and federal criminal databases.

The author also provides a chapter on "scientific" jury selection, placing the term in quotes. He proposes a reduction in peremptory challenges as a compromise between those opposed to trial consultants and those who favor their use. As a reduction in peremptory challenges is not a popular position, I do not give this idea much hope, although pre-Batson jury standards called for more modest numbers of challenges to reduce the possibility of mischief.

Somewhere I have read that a good book teaches us about ourselves as well as about the subject. In this regard, I was taken with how much we in the court administration field have done with the jury system, which we have not made known to the rest of the justice or legal communities. The author is a legal practitioner whose previous writings have been about forensic science and its impact in the courtroom, as well as about criminal procedure and evidence. He did his research well in the law reviews and caselaw but he did not go beyond them; little if any of the work from within the courts or organized bar is mentioned, even though many of these works are major publications. There is nothing about the American Bar Association, whose Criminal Justice and Litigation sections and Judicial Administration Division have all published jury standards.

In the last chapter, on reforms, there is no mention of the work undertaken in many states. Most surprising is the lack of any acknowledgment of the 1994 report of the New York Jury Project and the many reforms that were in place when this book was written; likewise, there is no mention of the 1994 Arizona study or the 1996 California Blue Ribbon Commission report. These studies offered recommendations that would fall into the areas of discussion found in the book. Permitting jurors to take notes, to submit questions to witnesses, and to discuss evidence before deliberation are mentioned in the text, but the references are to a few law review articles, not to the state reports, which are the sources of innovation on these matters. To bring these changes in court administration to the legal community, should we publish more in law reviews and bar journals?

Another self-realization came as to the excellent research on the jury system now being carried out and also how little exists for an institution as old and honorable as the jury. For instance, when I read the chapter on peremptory challenges and on the reactions of jurors to be challenged, I looked forward to discussion of the work by Mary Rose, now of the University of Texas. Although that work was published in 2001, there is no mention of it. The thought that one paper from one research project would be so necessary and illuminating points out how fragile our present knowledge is of the jury process.

I must admit that I had not heard of the author until I became acquainted with this book. When that happens, I ask myself what prompts a person to launch an effort as major as a book of this depth and length. Granted that the author was a former public defender in New York who has taught and written about evidentiary issues, but why this book at an advanced point in his life? In fact, when I read of his New York background, I was worried we would have a recitation of the invincibility of New York's criminal justice system. This is not the case at all. The answer as to the source of the author's intense interest is one I have seen before: Jonakait was a student of the late and obviously great team of Harry Kalven and Hans Zeisel at the University of Chicago. Just as their landmark study of the 1960s, *The American Jury*, has given many of us the solid belief and understanding of the jury that few other areas of the American justice system have ever enjoyed, they were obviously great inspirational teachers as well, and this had helped the author give a fine introduction to a very large topic.

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Oral Arguments and Decision Making on the United States Supreme Court, by Timothy R. Johnson. Albany: State University of New York Press, 2004. 180 pp.

reviewed by Barbara Palmer

Aside from the announcement of final written opinions, oral argument is the only part of the U.S. Supreme Court's decision-making process that is public. Every other part of the process, from selecting cases for review to negotiating the final lan-

guage in the opinion that will be released, is done behind closed doors. With a few exceptions, however, very little research has been done on oral argument. In fact, the conventional wisdom among courtwatchers and academics has been that oral arguments matter very little. Even Justice Scalia once commented that oral argument was just a “dog and pony show.” In *Oral Arguments and Decision Making on the United States Supreme Court*, part of the SUNY Press series in American Constitutionalism, political scientist Timothy Johnson provides one of the few in-depth analyses of U.S. Supreme Court oral arguments and shows that the conventional wisdom is, quite simply, wrong.

Johnson’s general thesis is that “Supreme Court justices use oral arguments as an information-gathering tool to help them make substantive legal and policy decisions as close as possible to their preferred outcomes” (p. 2). Grounding his work in a strategic model of decision making, he points out that the justices face a “biased information problem.” Their primary source of information is litigant and amicus-curiae briefs that reflect the policy positions and goals of parties and interest groups. It is information that outside actors want the Court to have, not necessarily information that the justices want to have to achieve their policy positions and goals. Johnson then proposes that oral argument is an opportunity for the justices to overcome this biased information problem.

What he finds is that justices do, in fact, use oral argument to go beyond the information presented in the briefs. In fact, over three-fourths of the questions asked by the justices during oral argument involved issues that were not presented by the parties or amici in their briefs. Moreover, questions brought up during oral argument are an integral part of the justices’ discussion during conference and in the memos exchanged during the opinion-drafting process. Most telling is that in the final majority opinion on the merits, almost one-third of the major legal points decided by the Court originated in oral argument, not the briefs submitted in a case. All of this suggests not only that justices use oral argument to go beyond the written record and gather additional information, but also that oral argument promotes issue expansion in the final decision on the merits. Professor Johnson provides substantial evidence that Supreme Court oral argument not only matters, but has a profound impact on the justices’ decision making.

The statistical analyses are relatively sophisticated, but accessible. The reference list is extensive and a useful resource in and of itself. Johnson examines a random sample of seventy-five cases from 1972 to 1986 and uses a variety of original data sources, including litigant and amicus briefs, oral argument transcripts, memos from the private papers of several justices, and the final decision on the merits. One of the major challenges in studying oral arguments is, in fact, creating usable and reliable quantitative data. The Court provides only reel-to-reel tapes; cassette tapes have only recently been made available by the National Archives at their new facility in Maryland. Transcripts are public information and more widely disseminated, but they do not identify the justices; when someone on the bench speaks, he or she is only identified as “the Court.”

In spite of these challenges, Johnson creates an impressive wealth of data that allows him to tie oral arguments to all other stages of the decision-making process. He augments oral-argument transcripts with information from the personal papers of several justices, including those of Justice Powell, who took extensive notes during oral arguments. Johnson develops a reliable coding scheme that allows him to compare the issues brought up in the litigant and amicus briefs, the conference records and case memoranda exchanged between the justices during the drafting of opinions, and the final written opinions. He complements his statistical analysis with substantive examples from cases throughout the monograph.

Each substantive chapter is based on a step in the decision-making process. Chapter 2 provides the “baseline” analysis, in which the issues raised by the parties and amici in their briefs are compared with issues raised by the justices in their oral-argument questions. As it turns out, amici do not actually provide much additional information that is different from what the litigants offer. As expected, both the litigants and amici tend to focus their briefs overwhelmingly on constitutional questions, policy issues, and the application of precedent. Johnson found, however, that during oral arguments, the justices have much different priorities: the vast majority of their questions (nearly 80 percent) focused on policy issues and the preferences or possible reactions of external actors, such as Congress, the president, the bureaucracy, or even public opinion. Moreover, a substantial number of the justices’ questions about policy issues or external actors involved issues that were not addressed in the litigant or amicus briefs.

Chapters 3 and 4 focus on the role of oral argument in coalition formation and opinion drafting, providing evidence for similar conclusions. Shortly after oral argument, justices meet in conference to take an initial vote on the merits. Based on the notes taken by Justices Powell, Douglas, and Brennan, Johnson found that during conference, justices rarely discussed issues that were not raised during oral arguments. In fact, almost half of the issues brought up during conferences were unique to oral argument and had not appeared in the written record. After conference, opinion drafts are circulated, and justices ask for changes in the language, or engage in “negotiation and accommodation,” through the exchange of written memoranda. Once again, Johnson’s analysis shows that issues raised in oral argument are the subject of the memoranda the justices exchanged; about one-third of the issues from oral argument that appear in the memoranda were never raised by the litigants. Thus, oral arguments play a key role in the internal deliberations of the Court.

Chapter 5 explores the relationship between the issues discussed during oral argument and those the Court ultimately decides in written opinions. Johnson finds that the largest category of issues decided in a case are those that were discussed in both the briefs and at oral argument, but almost one-third originate during oral argument. The latter most frequently involve policy considerations. Johnson then attempts to address when the Court will make specific reference to oral arguments in its written opinions. Here, in perhaps the weakest part of the monograph, he uses a

different data set from a different time period (1946-68) with different coding rules. He develops eight possible hypotheses, many of which do not appear to be drawn from his general theory regarding strategy, and his conclusions are not as clear as in the rest of the monograph. He finds less evidence for the impact of oral argument, but he still concludes that justices make specific references to oral argument in the final decision on the merits, most often when the outcome of the case is in doubt.

Johnson's work is a substantial contribution to our understanding of the process of Supreme Court decision making. Perhaps what is most astonishing about this study is that, given how often Johnson finds the Court strays from the litigant and amicus briefs during oral argument, nobody really noticed this until now. Granted, researching the Supreme Court, especially oral arguments, is not easy. As researchers, we face our own "biased information problem," because, for the most part, we only have access to information the justices want us to have. In spite of these difficulties, Johnson presents compelling evidence for his central thesis: during oral argument, justices seek additional information and expand the legal issues decided. More important, these expanded issues often become part of the final opinion on the merits. The justices decide the issues they want to decide. This book will be of great use to academics who study the Supreme Court and to practitioners. **jsj**