The Role of the U.S. Courts of Appeals in the Federal Judiciary

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Introduction

Supreme Court Justice Byron White said in 1984, "Each of the courts of appeals . . . is for all practical purposes the final expositor of the federal law within its geographical jurisdiction."[1] More recently, a law professor wrote, "In large measure, it is the circuit courts that create U.S. law. They represent the true iceberg, of which the Supreme Court is but the most visible tip. The circuit courts play by far the greatest legal policymaking role in the United States judicial system."[2]

When Congress established them in 1891, the U.S. circuit courts of appeals (as they were known then[3]) did not occupy such a lofty position in the federal judiciary. Created as a level of intermediate courts, their job consisted almost entirely of correcting errors made by the trial courts to relieve caseload pressure on the Supreme Court of the United States.[4] Since that time, however, the U.S. courts of appeals have undergone significant change. As caseloads continued to rise during the early twentieth century, the Supreme Court lobbied for and was granted more discretion over its docket. A growing number of federal appeals became final in the courts of appeals unless the Supreme Court elected to hear them. With the courts of appeals as the last point of appellate review for the vast majority of federal cases, they expanded upon their initial—but still crucial—function of error correction and became instrumental in expounding the law as well.

The evolution of the courts of appeals and the increasing importance of their role are important themes permeating the broad historical overview of the courts provided here. This feature is divided into ten sections: 1) The Creation of the U.S. Courts of Appeals; 2) The Judges' Bill of 1925; 3) Changing Dockets; 4) Differences Between Circuits; 5) Law of the Circuit; 6) En Banc Review; 7) Circuit Splits; 8) Implementation of Remedies; 9) Cases; and 10) Judges.

This feature is intended to expand upon the following existing resources from the FJC's History of the Federal Judiciary website:

An overview page provides a brief history of the courts of appeals and links to more specific information about the appellate court in each judicial circuit. A page on the Evarts Act of 1891 summarizes the statute that created the courts of appeals and gives the full text of the law. An essay on the appellate jurisdiction of the federal courts details the kinds of cases the appellate courts have heard throughout their history. Finally, Volume II of *Debates on the Federal Judiciary: A Documentary History* covers legislative debates concerning the establishment of the courts of appeals.[5]

1. Donald R. Songer, et al., *Continuity and Change on the U.S. Courts of Appeals* (Ann Arbor: University of Michigan Press, 2000), 132.

2. Frank B. Cross, *Decision Making in the U.S. Courts of Appeals* (Stanford: Stanford University Press, 2007), 2.

3. In 1948, Congress removed the word "circuit" from the names of the appellate courts, giving them their current form as the U.S. courts of appeals. Judicial Code of 1948, Pub. L. No. 80-773, 62 Stat. 869, 870 (1948) (codified at 28 U.S.C. § 43(a) (2018)).

4. From 1891 until 1911, the U.S. circuit courts of appeals coexisted with the U.S. circuit courts, which had been the main trial courts of the federal judiciary since 1789. In 1911, Congress abolished the U.S. circuit courts and transferred their jurisdiction to the U.S. district courts. In modern times, scholars, lawyers, judges, and others have sometimes referred to the U.S. courts of appeals as "circuit courts." To prevent confusion between the U.S. courts of appeals and the U.S. circuit courts of 1789-1911, this feature does not use that term other than as part of a quotation.

5. Daniel S. Holt, *Debates on the Federal Judiciary: A Documentary History, Volume II* (Washington, D.C.: Federal Judicial Center, 2013), 55–67.

The Creation of the U.S. Courts of Appeals

After Reconstruction, the Supreme Court was faced with a mushrooming workload. The main causes were two federal statutes: the Habeas Corpus Act of 1867,[6] which permitted prisoners in state custody to seek the writ from a federal court, and the Jurisdiction and Removal Act of 1875,[7] which provided the federal courts with federal question jurisdiction and expanded parties' ability to remove diversity of citizenship cases from state to federal court. These measures greatly extended the federal courts' reach. However, the larger caseload was not accompanied by structural reforms that would better enable the courts to shoulder the burden. The Supreme Court was hit particularly hard. Lacking the discretion over its docket that it would later obtain, the Court was required to hear most appeals from the U.S. circuit and district courts, causing its workload to spiral out of control. Supreme Court decisions regarding corporate citizenship contributed further to the crisis.[8] In *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844), for example, the Court held that corporations were citizens of their states of incorporation for purposes of federal diversity jurisdiction.[9] This and later decisions facilitated corporations' removal of lawsuits from state to federal court, eventually flooding the federal courts with railroad cases.

As the court system struggled with its workload and Supreme Court justices petitioned for relief, Congress debated possible solutions for years. In 1891, it passed the Circuit Courts of Appeals Act, commonly known as the Evarts Act after its primary sponsor, Senator William Evarts of New York.[10] The act stripped the U.S. circuit courts of their appellate jurisdiction, created nine intermediate appellate courts in the judicial circuits, and authorized the appointment of an additional judge for each circuit (adding to the one judge per circuit authorized in 1869).[11] The creation of a new layer of courts was a remedy that had been considered at various times since before the Civil War.

The Evarts Act responded effectively to the caseload crisis by reducing the number of cases that reached the Supreme Court while simultaneously reducing the percentage of those cases the Court would be required to hear.[12] The act limited the cases that could be taken to the Supreme Court as a matter of right. Prior to the act, parties could take a wide variety of cases from a U.S. circuit or district court to the Supreme Court by appeal or writ of error. The Court was required to hear appeals from the U.S. circuit courts in all civil actions, equity suits, and admiralty and maritime cases where the matter

6. Habeas Corpus Act of 1867, 14 Stat. 385 (1867).

7. Jurisdiction and Removal Act of 1875, 18 Stat. 470 (1875).

8. Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (Princeton: Princeton University Press, 2012), 173–175; Wyatt G. Sassman, "How Circuits Can Fix their Splits," *Marquette Law Review* 103, no. 4 (Summer 2020), 1414–1415.

9. 43 U.S. 497 (1844).

10. Circuit Courts of Appeals Act (Evarts Act) of 1891, 26 Stat. 826 (1891).

11. The system of numbered judicial circuits was first established by the Judiciary Act of 1801 (2 Stat 89 (1801)). When the Evarts Act was passed, there were nine circuits, which had been the case since the establishment of the Eighth and Ninth Circuits in 1837 (5 Stat. 176 (1837)). While Congress frequently changed the organization of the circuits in the early-to-mid nineteenth century, it made no such changes after 1869 beyond the creation of new circuits and the addition of new states to existing circuits. Congress split the Eighth Circuit in 1929 when it created the Tenth (Pub. L. No. 70-840, 45 Stat. 1346, 1347 (1929)) and split the Fifth in 1980 when it created the Eleventh (Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980)). Congress declared the District of Columbia to be one of the then eleven judicial circuits in 1948 (Judicial Code of 1948, 62 Stat. at 870) and established the jurisdictionally defined Federal Circuit in 1982 (Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982)). (Statutes regarding the number and composition of judicial circuits are codified at 28 U.S.C. § 41 (2018).)

12. Crowe, *supra* note 8, at 185.

in dispute exceeded $2,000,[13] and any civil or criminal case in which the judges of a circuit court certified their disagreement with one another.[14] Prize cases from the circuit and district courts in which the matter in dispute exceeded $2,000 or where the judge certified that the case was of general importance were also within the Court's mandatory jurisdiction.[15] The Evarts Act narrowed the Court's mandatory docket significantly by making several categories of cases final in the courts of appeals unless the Supreme Court elected to grant a writ of certiorari.[16] Such cases included those based on diversity of citizenship as well as those arising under patent, revenue, admiralty, and criminal laws.[17] In cases involving particularly important questions of federal law, such as those involving the construction or application of the Constitution, the constitutionality of a federal statute or treaty, or the constitutionality of a state constitution or law, the right of a direct appeal from a U.S. circuit or district court to the Supreme Court was preserved.[18] By making many cases final in the lower courts, the act began the Supreme Court's transformation into an institution primarily dedicated to resolving significant questions of constitutional and statutory interpretation.

The Judges' Bill of 1925

Despite the creation of the U.S. courts of appeals in 1891, the Supreme Court's docket continued to grow into the early twentieth century. Multiple causes were at play: among the most important were increased economic regulation; the advent of a national income tax (and with it the first prosecutions for tax evasion); and the increased federalization of criminal law, most notably via Prohibition starting in 1920.[19] The Court still heard mandatory appeals in several categories of cases: where the question of jurisdiction was at issue (in which case the Court would decide only the issue of jurisdiction); prize cases; capital crimes; cases involving the construction or application of the Constitution or the constitutionality of a federal law; and cases in which a state law was claimed to violate the Constitution.[20] Furthermore, the Evarts Act had not affected the Court's jurisdiction over cases appealed from the highest courts of the states. Congress took some action to ameliorate the crush via the Judiciary Act of 1916, which abolished appeals in certain state court cases as well as cases brought under several federal statutes—the Railroad Safety Appliance Act of 1893, the Bankruptcy Act of 1898, the Hours of Service Act of 1907, and the Federal Employers' Liability Act of 1908—so that they could be heard only by a discretionary grant of certiorari.[21] Nevertheless, by the early 1920s, many considered the Court to have a new caseload crisis on its hands. Chief Justice William H. Taft wanted to give the Court more discretion over its docket, not only to ease its caseload, but to transform it into what Taft and some other justices thought it should be. Rather than a court of last resort for ordinary cases of importance only to the litigants involved, said

13. Rev. Stat. §§ 691–692 (1878). Patent and copyright cases, actions by the United States to enforce the revenue laws, civil actions against revenue officers, cases brought on account of the deprivation of Constitutional rights, and cases brought under the Civil Rights Act of 1866 (14 Stat. 27 (1866)) were exempt from the amount in controversy requirement. Rev. Stat. § 699 (1878).

14. Rev. Stat. §§ 693, 697 (1878).

15. Rev. Stat. §§ 695–696 (1878). Prize cases are proceedings in which courts determine the distribution of proceeds after a foreign ship and its cargo are seized during hostilities and certain legal conditions have been met.

16. The Evarts Act also provided that the courts of appeals could, in any case, certify questions of law to the Supreme Court, which could issue binding instructions on those questions or have the entire case sent up for its review and decision. Evarts Act § 6, 26 Stat. at 828.

17. *Id*.

18. Evarts Act § 5, 26 Stat. at 828; Crowe, *supra* note 8, at 183.

19. *Id*. at 199.

20. Evarts Act § 5, 26 Stat. at 828.

21. Judiciary Act of 1916, Pub. L. No. 64-258, 39 Stat. 727 (1916).

Taft, the Court should be a forum for deciding major constitutional questions and other issues important to the nation.

Congress cooperated by passing the Judiciary Act of 1925, commonly known as "the Judges' Bill" because it was drafted by a committee consisting of Justices Willis Van Devanter, James McReynolds, and George Sutherland.[22] The act made most federal cases final in the courts of appeals unless the Supreme Court exercised its discretion to review the case by writ of certiorari. The lone exception was a finding by a court of appeals that a state statute was invalid because it contravened the U.S. Constitution, federal law, or a treaty. Similarly, appeals and writs of error from state courts were limited to cases in which a federal law was declared invalid, or a state law was upheld against a challenge that it contradicted the Constitution or federal law. Direct appeals from U.S. district courts to the Supreme Court were eliminated except in cases brought under a handful of federal statutes.[23] As scholar Justin Crowe stated, the 1925 act "gave the Court near-complete control over its docket for the first time in history."[24]

The 1925 legislation had the effect Taft desired, transforming the Court into an institution mainly devoted to deciding significant constitutional and statutory questions.[25] The shrinking of the Court's docket had far-ranging implications for the courts of appeals.[26] Because they were now the last point of appellate review for the vast majority of federal cases, the courts of appeals were no longer limited to correcting the errors of lower courts. While much of their work continued to consist of what may be considered routine cases, the courts of appeals were crucial interpreters of the law as well, developing and implementing legal rules to cover the many instances in which no clearly controlling Supreme Court precedent existed.[27] The courts of appeals gained distance from the Supreme Court and acquired a large measure of decisional independence, one consequence of which was the emergence of a new body of federal jurisprudence. As Justice William Rehnquist wrote shortly before his elevation to chief justice in 1986, "The roles of the courts of appeals in 1891 had been necessarily modest because they were new courts and people were not sure how they would turn out. But by 1925, when public confidence in them had been established, they were rightly given much more responsibility and much more finality in their decisions."[28]

Changing Dockets

While the Judges' Bill of 1925 gave the Supreme Court a great deal of discretion in shaping its docket, the U.S. courts of appeals have never had such discretion and must hear all appeals within their statutory

22. William H. Rehnquist, "The Changing Role of the Supreme Court," *Florida State University Law Review* 14, no. 1 (Spring 1986), 8.

23. Supreme Court review of cases in the district courts included certain antitrust and criminal cases, suits under the Three-Judge Court Act of 1910 (Pub. L. No. 61-218, 36 Stat. 557 (1910)) for injunctions to restrain state officials from enforcing allegedly unconstitutional state laws, and judgments upholding or affirming the orders of several administrative agencies. Judiciary Act of 1925 § 238, Pub. L. No. 68-415, 43 Stat. 936, 938 (1925).

24. Crowe, *supra* note 8, at 211.

25. Congress eliminated nearly all vestiges of the Supreme Court's mandatory jurisdiction in the Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988) (codified at 28 U.S.C. §§ 1254, 1257–1258, 2104 (2018)).

26. The size of the Supreme Court's docket continued on a general downward trend throughout the twentieth century, with a steady decline beginning in the 1980s. At the same time, the dockets of the courts of appeals grew dramatically, from fewer than 3,000 cases terminated in 1932 to more than 55,000 in 2016. Sassman, *supra* note 8, at 1420.

27. Some of the Supreme Court's decisions disrupt existing bodies of law, giving the judges of the courts of appeals discretion to apply those decisions with varying degrees of breadth. Some scholars have suggested that in these instances, appellate judges "enjoy discretion similar to that of Supreme Court justices." Emery G. Lee III, "Policy Windows on the U.S. Courts of Appeals," *Justice System Journal* 24, no. 3 (2003), 305.

28. Rehnquist, *supra* note 22, at 8.

jurisdiction. As a result, the business of the appellate courts has largely reflected that of the federal trial courts.[29]

Despite their prominent role in interpreting and applying U.S. law, the courts of appeals have not always received the scholarly attention they deserved. The creation in the 1990s of the Courts of Appeals Database—covering roughly 15,000 U.S. court of appeals cases between 1925 and 1988 (with another phase covering 1988–1996 and a later update for 1997–2002)—led to a marked increase in scholarship and a clearer picture of the courts' business, however.[30]

Because the Courts of Appeals Database does not contain data on cases before 1925, there is little empirical data on the earliest years of the U.S. courts of appeals. Scholars generally agree, however, that for the first quarter-century of their existence, the courts heard primarily private disputes, such as tort, contract, and property cases. A study of appellate litigation between 1895 and 1975 in the Second, Fifth, and Ninth Circuits found that criminal appeals occupied 5% or less of each circuit's docket from 1895 to 1910, when the modern trend of federalization of criminal law had not yet begun.[31] Real property cases were a significant portion of business for the Fifth and Ninth Circuits (constituting 25% of the Ninth's caseload) in these early years because the expansiveness of and abundancy of natural resources in those regions gave rise to many land-use disputes regarding railroads, mining, timber, and oil. Conversely, such cases constituted almost none of the docket in the Second Circuit, home to land-scarce New York City and other densely populated urban areas.[32] Business cases were also prevalent in these early courts of appeals, constituting 27% of the workload in the Ninth Circuit, 34% in the Second, and 46% in the Fifth. Many of these cases involved shipping contracts, which the federal courts heard pursuant to their admiralty jurisdiction.[33] The Ninth Circuit saw a high proportion of immigration cases relative to the other circuits in the late nineteenth and early twentieth centuries because California served as the main point of entry for those coming from Asia (the federal government was not yet restricting immigration from Mexico in the same manner).[34] Tort cases involving personal injury and employee injury, the latter on railroads and ships especially, were also an important driver of judicial business in the early courts of appeals.[35]

While the number of private law cases like tort claims and business disputes grew in absolute terms, these cases became a steadily declining proportion of the courts of appeals' business over the ensuing decades. Broadly speaking, the courts of appeals shifted between 1925 and the late twentieth century from handling mainly private disputes between businesses to become forums primarily for public law cases in which individuals opposed the government in economic, civil rights, civil liberties, and criminal matters.[36] Political and legal changes helped to drive this trend. For example, while prior to 1925 most

29. "Our analysis suggests that judicial business in the U.S. Courts of Appeals is related to changes in the social, political, and legal environments, but that the strength of this relationship varies. Over time, the kinds of cases decided by these courts responded to change in society, but more dramatic responses to political and legal factors were evident." Songer, *supra* note 1, at 70.

30. The Courts of Appeals Database was compiled with cases through 1996 by Professor Donald Songer of the University of South Carolina with support from the National Science Foundation. Professors Ashlyn Kuersten of Western Michigan University and Susan Haire of the University of Georgia compiled the 1997–2002 update. For more information on the database, see Mark S. Hurwitz and Ashlyn Kuersten, "Changes in the Circuits: Exploring the Courts of Appeals Databases and the Federal Appellate Courts," *Judicature* 96, no. 1 (July-August 2012), 23–35.

31. Lawrence Baum, Sheldon Goldman, and Austin Sarat, "The Evolution of Litigation in the Federal Courts of Appeals, 1895–1975," *Law & Society Review* 16, no. 2 (1981), 295.

32. *Id.* at 297.

33. *Id.* at 298–299.

34. *Id.* at 304.

35. *Id.* at 305.

36. Songer, *supra* note 1, at 100.

public law matters were patent and tax cases (the latter of which primarily involved customs duties until the creation of the U.S. Court of Customs Appeals in 1909), the New Deal era brought with it a large number of cases involving business and labor regulations.[37] These cases increasingly involved questions of statutory interpretation as the courts of appeals helped to define the scope of the rights protected by new laws such as the Wagner Act of 1935, which created the National Labor Relations Board (NLRB).[38] The administrative state, which had its origins in the Progressive Era and emerged more fully during the New Deal, was characterized by Congress' delegation of more authority to regulatory agencies like the NLRB. This development influenced federal appellate dockets as well, as the courts of appeals eventually became the sites of most appeals of administrative agency decisions and orders.[39]

The Judges' Bill also contributed to the increase in government cases. As is discussed above, cases involving the construction or application of the Constitution, the constitutionality of a federal law, or the validity of a treaty were directly appealable to the Supreme Court from the U.S. district courts prior to 1925. After passage of the Judges' Bill, such appeals generally went to the courts of appeals.[40]

Legal changes (combined with escalating crime rates) also caused a dramatic rise in criminal cases beginning in the 1960s. Such changes included the broadening of federal criminal law, funding for counsel under the Criminal Justice Reform Act of 1964 for indigent criminal defendants (whose lack of legal representation would previously have deterred them from appealing a conviction or sentence), and decisions of the Warren Court expanding due process protections for the accused. Habeas corpus cases, prisoner petitions, and civil rights matters also increased during this period.[41] The Supreme Court's landmark decision in *Monroe v. Pape* (1961)[42] breathed new life into "section 1983"[43] by establishing that a state officer could be sued civilly for violating constitutional rights while acting "under color of law" even when their actions violated state law. A few years later, a law professor remarked on the "explosion of actions" brought in federal court "under this newly spread statutory umbrella."[44] Other types of civil rights cases became more prominent in the 1970s and 1980s in large part because women, long subject to discrimination in the workplace, now had a federal remedy in Title VII of the Civil Rights Act of 1964.[45] Significantly, several circuits held in the mid-1970s that sexual harassment of an employee violated Title VII, well before the Supreme Court did so in 1986.[46] In 1972, Congress authorized the Equal Employment Opportunity Commission to bring suits in federal court, providing for a further increase in discrimination cases reaching the courts of appeals.[47]

37. Baum, *supra* note 31, at 301.

38. Songer, *supra* note 1, at 65–66.

39. *Id*. at 51.

40. The Judiciary Reform Act of 1937 (Pub. L. No. 75-352, 50 Stat. 751, 752 (1937)), however, provided for an appeal to the Supreme Court from a three-judge district court in cases where the United States or a federal official was a party and a federal law had been ruled unconstitutional. This provision was repealed in 1988. Supreme Court Case Selections Act of 1988, 102 Stat. at 662.

41. Baum, *supra* note 31, at 295–296; Songer, *supra* note 1, at 56–57.

42. 365 U.S. 167 (1961).

43. 42 U.S.C. § 1983, referred to as "section 1983" in shorthand, is based on the Ku Klux Klan Act of 1871 (17 Stat. 13 (1871)), a Reconstruction measure that was employed infrequently in the twentieth century prior to *Monroe*.

44. Marshall S. Shapo, "Constitutional Tort: *Monroe v. Pape*, and the Frontiers Beyond," *Northwestern University Law Review* 60, no. 3 (July-August 1965), 278.

45. The desegregation cases of earlier decades, despite their prominence, did not make up a significant portion of the courts of appeals' dockets compared to the employment discrimination cases that became prevalent in the 1970s. Songer, *supra* note 1, at 61.

46. *Id*.; *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Garber v. Saxon Business Products*, 552 F.2d 1032 (4th Cir. 1977); *Tompkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

47. Songer, *supra* note 1, at 61.

Another major expansion of government regulation occurred in the late 1960s and 1970s. The creation of new agencies such as the Consumer Product Safety Commission, Environmental Protection Agency, National Transportation Safety Board, and Federal Energy Regulatory Commission led to an increase in federal court cases involving consumers, the environment, transportation, and utilities.[48] While ordinary business cases continued to grow in real terms, they steadily became a smaller piece of the work of the courts of appeals and were eclipsed by other types of private litigation, such as products liability.[49] Most kinds of tort cases kept declining as a proportion of the appellate courts' dockets.[50]

As Donald Songer, the scholar responsible for the creation of the Courts of Appeals Database, has written, the period between 1925 and 1988 was "a period of maturation in which the courts evolved from a relatively obscure institution predominantly concerned with error correction in private law contests, to one in which the circuits frequently stand at the center of policy-making in public law disputes."[51] As a result, the appeals of which the U.S. courts of appeals were the final arbiter arguably increased in importance. The decisions of the appellate courts, so often interpreting statutes and administrative regulations in passing on the validity of governmental actions, became more broadly applicable than those regarding the private economic disputes that had once dominated.

Differences Between Circuits

While the thirteen U.S. courts of appeals can be studied as one tier of a coherent national judicial system, they are nevertheless distinct units. The appellate courts differ from one another not only with respect to the judges on the bench and the decisions they issue but also in terms of the composition of their caseloads. In some instances, a particular circuit became associated with a specific type of case as a result of regional differences. The Second Circuit—which includes New York City, the nation's business capital—historically heard more commercial, copyright, securities, tax, and antitrust cases than other circuits.[52] The Ninth Circuit heard more copyright cases relative to other circuits because of the Los Angeles area's status as a mecca for film and television production.[53] Immigration cases were particularly prevalent in the Ninth Circuit (involving Asian immigrants early on and those from Mexico later), as were admiralty cases in the Fifth Circuit as a consequence of its long coastline along the Gulf of Mexico.[54] Since the 1970s, the Ninth Circuit has also heard a substantial number of cases involving Indian fishing rights in the western United States.[55]

Despite these examples, legal business throughout the judicial circuits generally became more homogenous during the course of the twentieth century. While changes in particular circuits—such as the decline in land cases in the Fifth and Ninth Circuits as settlement increased and ownership disputes diminished—played a role,[56] a major cause of convergence was the increased activity of the federal gov-

48. *Id*. at 59. The deregulation trend of the 1980s did not cause a decline in appellate caseloads. The federal courts quickly began to engage in judicial review of deregulation decisions just as they had with respect to decisions to regulate. *See, e.g.*, Harry T. Edwards, "Judicial Review of Deregulation," *Northern Kentucky Law Review* 11, no. 2 (1984), 229–283; Merrick B. Garland, "Deregulation and Judicial Review," *Harvard Law Review* 98, no. 3 (January 1985), 505–591.

49. Songer, *supra* note 1, at 59.

50. Baum, *supra* note 31, at 305.

51. Songer, *supra* note 1, at 131.

52. Michael E. Solimine, "Judicial Stratification and the Reputations of the United States Courts of Appeals," *Florida State University Law Review* 32, no. 4 (Summer 2005), 1354.

53. *Id*. at 1355.

54. *Id*.

55. Stephen L. Wasby, "Intercircuit Conflicts in the Courts of Appeals," *Montana Law Review* 63, no. 1 (Winter 2002), 128.

56. Baum, *supra* note 31, at 297.

ernment, especially from the New Deal era onward. As has been addressed elsewhere, a more dynamic government led to the greater prevalence of public law cases involving federal policy. The uniformity of federal regulation meant that the legal issues coming before the courts of appeals were increasingly similar.[57] While there continued to be some differences in the composition of circuit dockets, scholars have concluded that, generally speaking, those differences followed no pattern attributable to regional variation.[58] The District of Columbia and Federal Circuits, both possessing unique characteristics, were exceptions to the pattern of homogenization.

The District of Columbia Circuit was always unique among the regional judicial circuits. Congress established the Court of Appeals of the District of Columbia in 1893, two years after the Evarts Act created the U.S. courts of appeals. The District of Columbia was initially not considered a judicial circuit and the federal appellate court operated under a unique statutory scheme providing it with local as well as federal jurisdiction until the early 1970s. In 1948, Congress renamed the court the U.S. Court of Appeals for the District of Columbia Circuit and classified it as one of the then eleven judicial circuits.

The D.C. Circuit is often referred to as the second-most powerful court in the United States, largely because of the many important appeals it hears from federal regulatory agencies such as the Securities and Exchange Commission, Federal Communications Commission, and National Labor Relations Board. These agency appeals include a number of significant environmental cases, as the circuit has exclusive jurisdiction over some appeals from the Environmental Protection Agency. The court also hears a steady stream of national security cases, especially since 2001, as the federal government frequently prosecutes cases involving foreign nationals in the U.S. District Court for the District of Columbia.

Congress created the U.S. Court of Appeals for the Federal Circuit in 1982 by merging the U.S. Court of Claims and the U.S. Court of Customs and Patent Appeals. While based in Washington, D.C., the Federal Circuit has exclusive, nationwide jurisdiction over patent appeals from U.S. district courts. Unlike the regional circuits, the Federal Circuit has jurisdiction defined entirely by subject matter and not limited to any particular geographical area. This jurisdiction includes appeals in cases arising under several federal statutes, appeals from the U.S. Court of International Trade, and appeals from several Article I courts such as the U.S. Court of Federal Claims and the U.S. Court of Appeals for Veterans Claims.

Law of the Circuit

The growth of appellate caseloads led to the expansion of the courts of appeals. The addition of new judges had a direct effect on jurisprudence. As the courts grew, maintaining uniformity in the law naturally became more difficult. To prevent inconsistent decisions, the appellate courts eventually developed a precedential doctrine known as "law of the circuit."

Each court of appeals began its existence with two judges except for the Second Circuit, which had three. The Evarts Act of 1891 assigned the existing circuit judges to sit on the courts of appeals and added one new judge to each judicial circuit.[59] In every circuit but the Second, therefore, there were not enough circuit judges to hold court in the three-judge panels the Evarts Act prescribed. Justices of the Supreme Court and U.S. district judges were authorized to sit on the courts of appeals to constitute the required panels.

57. *Id*. at 308.

58. Songer, *supra* note 1, at 64–65.

59. The Circuit Judges Act of 1869 (16 Stat. 44 (1869)) authorized one judgeship per circuit for the U.S. circuit courts. The Second Circuit gained a second judgeship in 1887 (24 Stat. 492 (1887)), so the Evarts Act increased the number of Second Circuit judges to three.

By World War II, however, most of the appellate courts had expanded significantly. By the end of the 1940s, the Second, Third, Fifth, and Sixth Circuits had six authorized judgeships, the Eighth and Ninth Circuits had seven, and the District of Columbia Circuit had nine. Further judgeship bills in the 1960s brought the Fourth and Tenth Circuits to seven, the Seventh and Eighth Circuits to eight, the Second, Third, and Sixth Circuits to nine, the Ninth Circuit to thirteen, and the Fifth Circuit to fifteen. (The First Circuit had only three judgeships until 1978.)[60]

The proliferation of courts of appeals judgeships in the mid-twentieth century created new jurisprudential issues for the courts. No longer did a panel of three judges necessarily represent the views of the court as a whole when deciding a legal issue. As the number of judgeships grew, so did the likelihood that different panels of the same court might issue conflicting decisions and disagree about which legal rules to adopt. Such schisms, often referred to as intracircuit conflicts, could leave the law in a confused state within a particular geographic area, creating uncertainty for litigants.

The potential for intracircuit conflicts became a reality as mid-twentieth-century panels increasingly overruled decisions of prior panels in the same circuit. Courts of appeals judges often treated prior panel decisions the same way they might view a decision from another circuit: as persuasive, but not binding, authority.[61] It was not uncommon, therefore, for a panel to be faced with prior circuit decisions containing irreconcilable differences with one another. Even if a panel in such a situation desired to follow circuit precedent, it was not clear what constituted circuit precedent. Especially as courts of appeals grew larger, a particular panel decision could represent views contrary to those of a large majority of the court. The Supreme Court never made a ruling requiring consistency among panel decisions within a circuit, nor did it issue guidance to the circuits on how to handle the issue. As a result, each of the courts of appeals in the mid-twentieth century began to implement the law of the circuit doctrine. Applied in different ways across the circuits, the doctrine had consistency in circuit law as its primary goal.

Law of the circuit (also known as the "prior panel rule") began to develop informally in the 1950s and 1960s, and rules limiting the discretion of panels faced with prior conflicting precedents began to solidify in the 1970s.[62] The Fifth and D.C. Circuits appear to have been the first to adopt the rule explicitly.[63] In 1957, a Fifth Circuit panel held, "the rule of stare decisis requires that we adhere to" prior panel decisions, and in 1958, a D.C. Circuit panel proclaimed itself "not free to overrule" a recent circuit decision, stating that only the court sitting en banc could do so.[64] Some circuits established the law of the circuit doctrine through court rules or internal operating procedures, while others did so through

60. One product of the growth in courts of appeals judgeships was the emergence of "state representation" on those courts, which entitled each state within a circuit to have at least one resident serving on the court. This became possible for every circuit when the First Circuit—which, along with Puerto Rico, includes the states of Maine, New Hampshire, Massachusetts, and Rhode Island—received its fourth judgeship in 1978 (Pub. L. No. 95-486, 92 Stat. 1629 (1978)). State representation was merely a custom until Congress codified the practice in 1997 (Pub. L. No. 105-119 § 307, 111 Stat. 2440, 2493 (1997) (requiring "at least one circuit judge in regular active service appointed from the residents of each state in that circuit") (codified at 28 U.S.C. 44(c) (2018)). While no statute requires the president to nominate a judge from a particular state to any particular seat on a court of appeals, vacancies are typically filled with a judge from the same state as the departing judge, even in cases where a state is represented by more than one judge. While changes in the state affiliation of seats have occurred periodically, they have become much less common since the 1960s. R. Sam Garrett, "'State Representation' in Appointments to Federal Circuit Courts," Congressional Research Service, RS22510 (2011), Summary and Table 1.

61. Sassman, *supra* note 8, at 1428.

62. Joseph W. Mead, "Stare Decisis in the Inferior Courts of the United States," *Nevada Law Journal* 12, no. 3 (Summer 2012), 795 n.58, 796.

63. *Id.* at 796 n.63

64. *Woolley v. Eastern Air Lines, Inc.*, 250 F.2d 86, 91 (5th Cir. 1957), *cert. denied*, 356 U.S. 931 (1958); *Davis v. Peerless Ins. Co.*, 255 F.2d 534, 536 (D.C. Cir. 1958).

case law.[65] A Sixth Circuit panel, for example, issued a ruling in 1978 that one panel could not overrule another, but ironically, another panel reversed that ruling a year later. Eventually, the court enacted a rule mandating that panels follow circuit precedent.[66]

All circuits eventually came to embrace a policy that generally barred the overruling of prior panel decisions. In 1963, for example, Judge Charles Edward Clark of the Second Circuit filed a concurring opinion in *Belk v. Allied Aviation Service Co.*, in which the court upheld the dismissal of the plaintiff's claim against his employer for breach of a collective bargaining agreement. Clark thought the dismissal of the claim—on the ground that the plaintiff was required first to seek redress from the union—was the wrong result, but stated, "the law of the circuit has apparently been determined to the contrary, and so I shall join in my brothers' disposition of this case."[67] Similarly, in *United States v. Fernandez* (1974), the Ninth Circuit followed prior circuit precedent on the question of whether a defendant could, without knowledge that his victim was an officer, violate a federal statute penalizing the assault of a federal law enforcement officer. Judge Shirley Hufstedler disagreed with the holding that such knowledge was not a required element of the crime but concurred in the judgment "solely under the compulsion of the law of the circuit."[68]

Not all of the circuits have administered the law of the circuit doctrine in precisely the same way. Some circuits have allowed a prior decision to be reexamined if it has been undermined by the reasoning in a new case, while others have not permitted overruling except by an en banc circuit ruling or a Supreme Court opinion. In the Seventh Circuit, a departure from precedent is permissible if the new opinion is circulated to and approved by the other members of the court.[69] In the Eighth Circuit, a panel facing conflicting precedents may choose which one to follow, while in the Ninth Circuit, a panel in such a situation is obligated to call for en banc review to resolve it.[70] Not all panel decisions necessarily constitute precedent, however. As the appellate courts' dockets became more crowded over the years, they increased their resort to unpublished opinions.[71] It is normally up to the panel deciding a case whether to designate a decision for publication or not, and unpublished decisions are typically given little, if any, precedential weight.[72]

En Banc Review

Closely related to the law of the circuit doctrine is the practice of en banc review. In certain circumstances, the courts of appeals hear cases before all active judges of the court rather than by a three-judge panel. Some circuits allow judges on senior status to participate in en banc hearings as well. A majority of the court must vote to hear a case en banc, either on the motion of a party or on its own initiative

65. Mead, *supra* note 62, at 799.

66. *Id.* at 800; *Timmreck v. United States*, 577 F.2d 372, 376 n.15 (6th Cir. 1978), *rev'd on other grounds*, 441 U.S. 780 (1979); *Spiegner v. Jago*, 603 F.2d 1208, 1212 n.4 (6th Cir. 1979), *cert. denied*, 444 U.S. 1076 (1980).

67. 315 F.2d 513, 518 (2nd Cir.) (Clark, J., concurring), *cert. denied*, 375 U.S. 847 (1963).

68. 497 F.2d 730, 740 (9th Cir. 1974) (Hufstedler, J., concurring), *cert. denied*, 420 U.S. 990 (1975).

69. Mead, *supra* note 62, at 794 n.54.

70. Michael Duvall, "Resolving Intra-Circuit Splits in the Federal Courts of Appeal," *Federal Courts Law Review* 3, no. 1 (2009), 20; *Kosteltec v. State Farm Fire & Casualty Co.*, 64 F.3d 1220, 1228 n.8 (8th Cir. 1995); *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1479 (9th Cir. 1987) (en banc).

71. Less than half of opinions in the U.S. courts of appeals were being published by the 1980s and by 1997 only a quarter of them were published. Szmer, John, et al., "The Efficiency of Federal Appellate Decisions: An Examination of Published and Unpublished Opinions," *Justice System Journal* 33, no. 3 (2012), 319. Federal Rule of Appellate Procedure 32.1, added in 2006, prohibits federal courts from disallowing the citation of unpublished opinions. A note to the rule, however, indicates that it "says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court."

72. Mead, *supra* note 62, at 799.

and may do so before or after a panel decision is rendered. The vast majority of en banc hearings are conducted to reconsider cases already decided by a panel.

Courts of appeals have heard cases en banc for three primary reasons: to maintain consistency in the law of the circuit, to correct panel error, and to address issues of particular importance. En banc review is granted only in a very small percentage of cases, and judges have expressed differing views regarding its use. A main point of disagreement is whether or not the en banc procedure is meant to ensure that panel decisions reflect the views of a majority of the court.[73] Some believe that a three-judge panel acts only as an agent of the court, so that the full court remains responsible for ensuring that the case is decided correctly. In contrast, others see the panel, for purposes of a particular case, as the court itself, so that the court's other judges should intervene only on an issue of exceptional significance.[74] As the Supreme Court's docket has shrunk over the years, it can no longer be assumed that the Court will hear all important federal law issues, adding importance to en banc hearings.[75]

The courts' authority to sit en banc was initially uncertain. In 1938, the Ninth Circuit held in *Lang's Estate v. Commissioner of Internal Revenue* that because the Evarts Act prescribed three-judge panels for the courts of appeals, "there is no method of hearing or rehearing by a larger number."[76] Two years later, however, the Third Circuit came to a different conclusion in *Commissioner of Internal Revenue v. Textile Mills Security Corp.* (1940).[77] The Supreme Court granted certiorari in the latter case to resolve the conflict and sustained the Third Circuit's position in 1941. The Court inferred that Congress, having provided for more than three judges in some circuits, must have intended that all of the judges in each circuit constitute the court of appeals. Bolstering this conclusion was a 1912 statute providing that "the circuit judges in each circuit shall be judges of the circuit court of appeals of that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law."[78] The Court further concluded that because no statute prohibited all of the judges from sitting together, an interpretation of the law allowing en banc hearings created greater harmony with the rest of the statutory scheme, which provided for various functions to be carried out by "the court." This result, the Court asserted, "makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted."[79] Congress ratified the Court's *Textile Mills* decision in 1948, providing explicit statutory authorization for en banc review.[80] The Court held in *Western Pacific Ry. Corp. v. Western Pacific Ry. Co.* (1953) that litigants should be permitted to suggest that a case was appropriate for en banc review.[81] Provisions for a petition for en banc review by a party were written into the Federal Rules of Appellate Procedure in 1979.[82]

73. Arthur D. Hellman, "Law of the Circuit Revisited: What Role for Majority Rule?" *Southern Illinois University Law Journal* 32, no. 3 (Spring 2008), 626.

74. Douglas H. Ginsburg and Donald Falk, "The Court En Banc: 1981-1990," *George Washington Law Review* 59, no. 5 (1990-1991), 1012.

75. Hellman, Law of the Circuit, *supra* note 73, at 625.

76. 97 F. 2d 867, 869 (9th Cir. 1938).

77. 117 F.2d 62 (3rd Cir. 1940), *aff'd*, 314 U.S. 326 (1941).

78. 314 U.S. at 330 (quoting Pub. L. No. 62-56, 37 Stat. 52, 53 (1912)).

79. 314 U.S. at 334–335. The U.S. Court of Appeals for the District of Columbia, operating under a different statutory scheme than the other courts of appeals, heard all of its cases en banc after its fourth and fifth judges were appointed in 1931 and did not regularly employ three-judge panels until 1938. Ginsburg, *supra* note 74, at 1011.

80. Judicial Code of 1948, 62 Stat. at 871.

81. 345 U.S. 347 (1953).

82. Fed. R. App. P. 35.

Circuit Splits

The law of the circuit doctrine and the practice of en banc review both operate to keep federal law consistent within each circuit. The emphasis on intracircuit uniformity does not ensure, however, that the law will be consistent from one circuit to another. Intercircuit conflicts, also known as circuit splits, occur with regularity in the U.S. courts of appeals. They have frequently been the subject of study by those interested in the federal courts and are a crucial factor in shaping the docket of the Supreme Court.

When justices of the Supreme Court rode circuit to preside over the U.S. circuit courts, they were often reluctant to decide cases differently than their colleagues had decided them in other circuits. In the early years of the U.S. courts of appeals, however, it was not clear how circuits would treat each other's precedent. From their inception, the courts of appeals operated independently, without a mandate from the nation's highest court to adhere to one another's case law. In *Mast, Foos & Co. v. Stover Mfg. Co.* (1900), the Supreme Court affirmed a decision of the Seventh Circuit in a patent case over the objections of the plaintiff, who argued that the court of appeals had erred by not following a precedent from the Eighth Circuit. The principle of comity, the Court explained, "persuades, but it does not command. . . . It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions."[83] For some time, most circuits nevertheless showed some degree of deference to the decisions of other courts of appeals. That deference eventually weakened, however, and by the mid-twentieth century, disagreements between circuits over legal rules became more prevalent.

Most of the circuits, at one time or another, professed to subscribe to what one scholar has termed the "controlling decision doctrine": a flexible rule requiring a court to follow an earlier decision by another court of appeals unless that decision was clearly erroneous.[84] In *Beach v. Hobbs* (1899), for example, the First Circuit announced, "as a general rule, and especially in patent cases, we should follow the decision of the circuit court of appeals of another circuit . . . if based upon substantially the same state of facts, unless it should clearly appear that there was manifest error."[85] Similarly, the Third Circuit proclaimed in a 1905 tax case that "in suits of this character uniformity in the judgments of the several Courts of Appeals is especially important, and should be maintained wherever, as in the present instance there has been no decision of the Supreme Court which precludes it."[86] The Second Circuit embraced the controlling decision doctrine as well, following decisions of other circuits in 1910 and 1911. In 1929, however, it rejected prior decisions of the Eighth and Ninth Circuits, explaining, "Much as we respect the considered decisions of other circuits, we conceive that our duty requires us to form an independent judgment in cases of first impression in our own court, and forbids us blindly to follow other circuits, when our minds are not persuaded by the arguments advanced."[87] Not every circuit announced an intent to follow the controlling decision doctrine. In its first explicit statement on the issue, the Fourth Circuit explained that other circuits' precedents might be persuasive but that it would "not be bound by the findings of another court however similar the circumstances may be."[88] Likewise, the Sixth Circuit in 1948 described a Fifth Circuit precedent as "advisory . . . rather than controlling."[89]

83. 177 U.S. 485, 488 (1900).

84. Allan D. Vestal, "Relitigation by Federal Agencies: Conflict, Concurrence, and Synthesis of Judicial Policies," *North Carolina Law Review* 55, no. 1 (September 1976), 141–160 (citing cases from each circuit regarding that circuit's application of the controlling decision doctrine).

85. 92 F. 146, 147 (1st Cir. 1899), *aff'd*, 180 U.S. 383 (1901).

86. *McCoach v. Philadelphia Trust, Safe Deposit & Ins. Co.*, 142 F. 120, 121 (3rd Cir. 1905), *cert. denied*, 205 U.S. 539 (1907).

87. *Haberle Crystal Springs Brewing Co. v. Clarke*, 30 F.2d 219, 222 (2nd Cir. 1929), *rev'd*, 280 U.S. 384 (1930).

88. *Pilot Life Ins. Co. v. Ayers*, 163 F.2d 860, 863 (4th Cir. 1947).

89. *Reo Motors, Inc. v. Commissioner of Internal Revenue*, 170 F.2d 1001, 1004 (6th Cir. 1948), *aff'd*, 388 U.S. 442 (1950).

Adherence to the controlling decision doctrine, even in circuits that embraced it strongly at first, had weakened by the mid-twentieth century. As one scholar noted, the solidification of the law of the circuit doctrine, which emerged at mid-century as the courts of appeals added more judges, was "a departure from a flexible approach to prior decisions that predominated in the circuit courts and courts of appeals through most of their history."[90] In 1964, the First Circuit accepted the argument of the IRS in contradiction to the decisions of two other circuits in tax cases presenting the same issue, and in 1970, it stated explicitly that a decision of another circuit was not controlling authority. In 1967, the Second Circuit refused to follow what appeared to be a controlling decision from the D.C. Circuit.[91] The Fifth Circuit, which had never adhered to the doctrine, rejected holdings from other circuits on several occasions during the 1950s and 1960s.[92] Significantly, the law of the circuit doctrine prioritized consistency in circuit law over uniformity in national law.[93] In 1970, the Fifth Circuit remarked that it was "bound" by prior intracircuit precedents and therefore was precluded from following a contrary decision from the District of Columbia Circuit the appellant had cited.[94]

The Supreme Court revised its rules after the Judges' Bill of 1925 made its docket primarily discretionary. Rule 35(5)(b) (later changed to Rule 10(a)), adopted that year, set forth the factors the Court would consider when deciding whether to issue a writ of certiorari to a U.S. court of appeals. The Court would be more likely to grant the writ, the rule provided, "where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter." Circuit splits became, and have continued to be, among the most prevalent sources of cases that come before the Court. In this way, courts of appeals decisions, even when they do not become the law of the land, can play a significant role in influencing which legal issues the Court will select for review. To cite one notable example, the Ninth Circuit upheld the constitutionality of the Gun Free School Zones Act under the Commerce Clause in *United States v. Edwards* (1993).[95] In doing so, the court created a conflict with the Fifth Circuit's 1993 decision in *United States v. Lopez*. The Supreme Court granted certiorari in *Lopez* to resolve the issue, upheld the Fifth Circuit's position, and then vacated the Ninth Circuit's judgment in *Edwards*.[96]

Despite the erosion of the controlling decision doctrine, judges of the courts of appeals have generally subscribed to the norm that circuit conflicts should be avoided when possible. Courts of appeals have frequently followed the decisions of other circuits (especially when those decisions all go the same way) even when a conflicting decision could reasonably be justified.[97] At times, courts of appeals have addressed perceived circuit conflicts by asserting that there is no actual conflict, explaining a discrepancy in decisions by distinguishing the potentially conflicting case on its facts.[98] Still, appellate judges often acknowledge that their decision has created an intercircuit conflict and in doing so typically explain their disagreement with the decisions of other circuits.[99] In such cases judges may support their reasoning by reference to a dissenting opinion from the circuit with which they are in conflict.[100] The

90. Sassman, *supra* note 8, at 1428.

91. *Pan American World Airways, Inc. v. CAB*, 380 F.2d 770 (2nd Cir. 1967), *aff'd by an equally divided Court sub nom. World Airways, Inc. v. Pan American World Airways, Inc.*, 391 U.S. 461 (1968).

92. Vestal, *supra* note 84, at 149–150.

93. Sassman, *supra* note 8, at 1438.

94. *Whatley v. United States*, 428 F.2d 806, 807 (5th Cir. 1970).

95. 13 F.3d 291 (9th Cir. 1993), *vacated*, 514 U.S. 1093 (1995).

96. 2 F.3d 1342 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

97. Wasby, *supra* note 55, at 146-147.

98. *Id*. at 150.

99. *Id*. at 162.

100. *Id*. at 164.

issue of intercircuit conflict is also frequently raised in discussion among members of the court after an opinion is filed, as the existence of a conflict may motivate non-panel judges to request that the panel reconsider its decision or call for a rehearing of the case en banc.[101]

In the late 1960s, the Supreme Court's capacity to handle a growing caseload once more became a matter of public concern. One consequence of an increase in denials of petitions for certiorari was that more circuit splits remained unresolved. In 1975, the Commission on Revision of the Federal Appellate System (better known as the Hruska Commission for its chair, Senator Roman Hruska of Nebraska) recommended the creation of a national court of appeals to help resolve circuit splits and ease demands on the Supreme Court. Hruska introduced bills based on the proposal in 1975 and 1976, but they failed to pass. In 1990, circuit splits were one of several problems examined by the Federal Courts Study Committee, a fifteen-member committee of judges, lawyers, and members of Congress appointed by the Chief Justice to study problems facing the federal courts. The committee did not revive the proposal for a national court of appeals but did recommend that the Federal Judicial Center conduct a study of circuit splits to determine how many "intolerable" conflicts were left unresolved by the Supreme Court. The committee was particularly concerned about four potential consequences of a lack of uniformity between the circuits: non-acquiescence by federal agencies, harm to multicircuit actors, forum shopping, and unfairness to litigants. The Federal Judicial Center contracted University of Pittsburgh law professor Arthur D. Hellman to undertake the study.[102]

In reporting the results of the study, Hellman observed that the Supreme Court "no longer stands alone as a source of precedential guidance; rather, it shares its lawmaking power with the courts of appeals for the thirteen judicial circuits."[103] Although he acknowledged that circuit splits were contradictory to the idea of national law, Hellman concluded that they "do not constitute a problem of serious magnitude in the federal judicial system." His research revealed that the vast majority of circuit splits lacked the characteristics that would make them "intolerable" as defined by the Federal Courts Study Committee's criteria.[104]

Hellman based his conclusion on several findings. One was that many conflicts simply disappeared without being resolved by the Supreme Court. Some were mooted by a change in a federal law or administrative regulations while in other instances a court of appeals overruled its own precedent that had caused the conflict. Other conflicts for which the Supreme Court initially denied certiorari were brought to the Supreme Court successfully by a subsequent petitioner. Many issues where one side of a circuit split clearly predominated ceased to generate litigation.[105]

Of issues that continued to generate litigation, many apparent conflicts did not result in divergent outcomes. Divergent precedent was sometimes not applied because a case was distinguishable on its facts, while in other instances the point of divergence was not outcome-determinative (for example, a differing standard of proof in two circuits may not produce different outcomes if the standard is satisfied in both cases). In many cases, Hellman found ambiguity as to whether differing legal rules had resulted in disparate treatment of litigants. If such ambiguity persisted, Hellman judged those conflicts to be "tolerable." Noting that the resolution of cases was so often dependent on the particular facts at hand, Hellman concluded that "it would not be surprising if instances of disparate treatment attributable to

101. *Id.* at. 179–180.

102. Arthur D. Hellman, "By Precedent Unbound: The Nature and Extent of Intercircuit Conflicts," *University of Pittsburgh Law Review* 56, no. 4 (Summer 1995), 696, 794.

103. *Id.* at 699.

104. *Id.* at 796–797.

105. *Id.* at 779–785.

unresolved intercircuit conflicts prove to be few and far between."[106] Moreover, some members of the legal community point to "percolation," i.e., the development of an issue through multiple judicial decisions over time, as a potential benefit of circuit splits. When an issue has time to percolate, the reasoning goes, the Supreme Court has more thinking on which to draw before coming to an ultimate resolution.[107]

While the Supreme Court has generally prioritized resolving circuit splits, it can resolve only a small percentage of them, and not all legal scholars have agreed with Hellman that splits do not pose serious problems. In 2012, Professor Wayne Logan of Florida State University College of Law published an empirical study of then-existing Fourth Amendment circuit splits and reached "opposite conclusions" to those of Hellman and other scholars.[108] Previous research, Logan asserted, had focused too much on statutory law and not enough on the constitutional rights of criminal defendants. This disparity resulted in part from one of the main criteria that had been used to address the tolerability of circuit splits: harm to "multicircuit actors" generally did not occur in the criminal context.[109]

Logan's study identified thirty-seven existing circuit splits across three areas of Fourth Amendment jurisprudence—search and seizure practices, exclusionary rule reach and applicability, and appellate review. He highlighted what he considered to be several serious problems with the variation he discovered, including that the scope of "'the right of the people to be secure in their persons, houses, papers, and effects' is allowed to hinge on geographical happenstance, resulting in varied protection against infringements on individuals' privacy and physical liberty."[110] To address these issues, he and other scholars recommended that Congress make it mandatory for the Supreme Court to accept certified questions of constitutional law on which the circuits have split.[111] Such a remedy, Logan concluded, "would allow for the accelerated, authoritative resolution of splits . . . and allow the Court to fulfill its institutional promise to ensure constitutional uniformity."[112]

Implementation of Remedies

The preceding sections have dealt mainly with the core function of the U.S. courts of appeals—deciding cases by applying, and sometimes extending, legal rules to particular circumstances. The appellate courts have another important role, however—to supervise the implementation of equitable (i.e., non-monetary) remedies. In many cases before the U.S. district courts, plaintiffs have sought injunctions to prohibit defendants from taking certain actions or decrees that defendants must take action to stop or repair harm for which they are responsible. District courts have sometimes crafted and enforced remedies to address unlawful practices. On some occasions, district courts have instructed defendants to submit proposed remedies for court approval. Cases involving equitable relief have come before the U.S. court of appeals when the plaintiffs or the defendants have appealed a district court's remedial order. The courts of appeals have reviewed such orders to ensure that they are fair and equitable and that they comply with applicable circuit and Supreme Court precedent. In some instances, the appellate courts have ordered that remedial decrees be modified in specific ways.

106. *Id.* at 786–787, 791–794.

107. *Id.* at 700.

108. Wayne A. Logan, "Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment," *Vanderbilt Law Review* 65, no. 5 (October 2012), 1139.

109. *Id.* at 1147.

110. *Id.* at 1151.

111. *Id.* at 1188–1189.

112. *Id.* at 1190.

The most significant historical context in which the U.S. courts of appeals have supervised the implementation of remedies arose from the Supreme Court's mandate in *Brown v. Board of Education II* (1955) that states with segregated public schools desegregate them "with all deliberate speed."[113] The result of *Brown II* was a proliferation of lawsuits filed by African American families across the South (and later in some northern cities) seeking to have the federal courts order local school boards to desegregate the schools. District court orders in such cases were frequently subject to review in the courts of appeals. Until *Green v. New Kent County School Board* (1968),[114] the Supreme Court declined to review most of these injunctive relief cases. Then-law professor and later Fourth Circuit judge J. Harvie Wilkinson III asserted in 1978, "Where during this time, one might ask, was the United States Supreme Court? And the answer, not much exaggerated, is that from 1955 to 1968 the Court abandoned the field of public school desegregation."[115] The courts of appeals in this period—in the southern Fourth and Fifth Circuits especially—were therefore the final arbiters of whether or not a desegregation remedy was appropriate. A trio of significant desegregation cases involving equitable relief from 1956–1957—*Carson v. Warlick*,[116] *Atkins v. School Board of Newport News*,[117] and *Bush v. Orleans Parish School Board*[118]—illustrates the point. The Supreme Court denied certiorari in all three cases, leaving the decisions of the Fourth and Fifth Circuits as the last word in each of them.

One appellate judge in particular made a substantial difference when it came to shaping desegregation remedies. As Wilkinson put it, Judge John Minor Wisdom of the Fifth Circuit "transformed the face of school desegregation law" between 1965 and 1966.[119] Wisdom's belief that school boards had an obligation to integrate their schools served as a counterpoint to the philosophy of Fourth Circuit judge John J. Parker, who believed that *Brown II* required only the removal of legal barriers to integration and not action by state and local officials to ensure that schools actually became racially integrated.[120] The most significant case in which Wisdom brought his views to bear was *U.S. v. Jefferson County Board of Education* (1966).[121] In deciding the federal government's consolidated appeals of suits against seven different boards of education, Wisdom entered a far-ranging and detailed remedial decree outlining positive actions the defendants would be required to undertake. The order, attached as a seven-page appendix to the opinion, was a template for district judges to use in cases throughout the Fifth Circuit, then encompassing six southern states.[122] As Wilkinson noted, *Jefferson* had a revolutionizing effect on the federal courts, turning them into "bold architects of school desegregation policy."[123] In 1968, in *Green v. New Kent County School Board*, the Supreme Court adopted Wisdom's formulation of an affirmative

113. 349 U.S. 294, 301 (1955).

114. 391 U.S. 430, 439 (1968).

115. J. Harvie Wilkinson III, "The Supreme Court and Southern School Desegregation, 1955–1970: A History and Analysis," *Virginia Law Review* 64, no. 4 (May 1978), 468.

116. 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957).

117. 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957).

118. 242 F.2d 156 (5th Cir.), *cert. denied*, 354 U.S. 921 (1957).

119. Wilkinson, *supra* note 115, at 541–542.

120. In *Briggs v. Elliott*, one of the cases that made up *Brown*, Parker wrote the opinion for the three-judge district court to which the case was remanded. In what became known as the "*Briggs* dictum," Parker wrote that the Supreme Court had decided nothing more in *Brown II* than that "a state may not deny to any person on account of race the right to attend any school that it maintains. . . . The Constitution, in other words, does not require integration. It merely forbids discrimination." 132 F. Supp. 776, 777 (E.D.S.C. 1955). In *Singleton v. Jackson Municipal Separate School District*, Wisdom criticized the *Briggs* dictum as an incorrect interpretation of the *Brown* decisions. *Brown II*, he wrote, "clearly imposes on public school authorities the duty to provide an integrated school system." 348 F.2d 729, 730 n.5 (5th Cir. 1965).

121. 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

122. 372 F.2d at 896–902.

123. Wilkinson, *supra* note 115, at 545.

duty on the part of school boards to achieve integration. *Green* firmly rejected the longstanding argument that "freedom of choice" was in and of itself sufficient to satisfy the mandate of *Brown II*.[124]

The school desegregation cases helped to usher in institutional reform litigation as a new legal paradigm involving equitable remedies. Litigation involving state and local institutions alleged to be violating constitutional rights on a large scale created a new context in which the U.S. courts of appeals had supervisory authority over the implementation of such remedies. Law professor Owen Fiss noted in 1977:

> *Brown* was accepted into the legal popular culture as legitimate, so much so that it began to function as an axiom. In the lower courts it yielded arguments of this nature: "This use of injunctive power is analogous to that of *Brown*, and *therefore* it is permissible." As a consequence federal court access was assumed for administrative decrees reaching state prisons and mental hospitals, public housing projects, and local police departments.[125]

Prior to the 1960s, federal courts had enjoined public institutions from engaging in certain actions but generally had not prescribed actions they must take. Since the 1960s, in some institutional cases, a trial verdict for the plaintiffs resulted in the district judge issuing an injunction ordering the defendants to make specific structural changes to the institution to remedy the rights violations at issue.[126] Increasingly over the past few decades, parties have resolved institutional reform cases with negotiated settlements—known as consent decrees—outlining the remedial steps the defendants would take.[127] These cases have reached the courts of appeals in several ways. A plaintiff or defendant can appeal a judgment, a party to a consent decree can appeal a district court's decision to revise or decline to revise the decree, or a non-party affected by a consent decree can—under certain circumstances—initiate a collateral attack on the decree.

Three cases—*Inmates of Suffolk Prison v. Kearney* (1978),[128] *Newman v. Alabama* (1977),[129] and *New York State Assoc. for Retarded Children v. Carey* (1983)[130]—illustrate different ways the courts of appeals have dealt with remedial orders and consent decrees in institutional litigation. In *Kearney*, the district court ordered Boston's Charles Street Jail closed because of unacceptable conditions. The First Circuit affirmed the order but held that the closure date could be postponed if the city submitted an acceptable plan to renovate the jail or, if the trial court rejected that plan, the city provided a plan to build a new facility. The court of appeals outlined in detail the elements a new facility plan would have to include. *Newman* was another prison case in which Alabama's conditions of incarceration were allegedly so harsh as to constitute cruel and unusual punishment. The district court issued an order mandating improvements and appointing a committee authorized to take "any action" to ensure the state's compliance. The Fifth Circuit held that the district court had overstepped its bounds and that the committee would unduly interfere with prison operations. Instead, the appellate court ordered the appointment of a monitor for each prison that would be empowered solely to observe and report on conditions. Lastly, *Carey* involved a consent decree that residents of New York's Willowbrook school for children with special needs be transferred to small group homes because of poor conditions at the school. State officials,

124. 391 U.S. at 440.

125. Owen M. Fiss, "Dombrowski," *Yale Law Journal* 86, no. 6 (May 1977), 1149.

126. Donald L. Horowitz, "Decreeing Organizational Change: Judicial Supervision of Public Institutions," *Duke Law Journal* 1983, no. 6 (December 1983), 1266.

127. Emily Chiang, "Reviving the Declaratory Judgment: A New Path to Structural Reform," *Buffalo Law Review* 63, no. 3 (May 2015), 567 ("The drive for injunctive relief no longer shapes the litigation, which is brought to provide the leverage needed to get defendants to the bargaining table. The goal of litigation is not an injunction, per se, but relief, typically procured in the form of negotiated change.").

128. 573 F.2d 98 (1st Cir. 1978).

129. 559 F.2d 283, 288-290 (5th Cir. 1977), *rev'd in part on other grounds sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978).

130. 706 F.2d 956, 969-972 (2nd Cir.), *cert. denied*, 464 U.S. 915 (1983).

having difficulty meeting this requirement, asked that the acceptable size of residences be increased. After the district court refused, the Second Circuit pointed out that the officials had presented substantial evidence that the change was necessary to accomplish the ultimate goal of the decree. Instead of reversing the district court, the court of appeals remanded the case for further consideration in light of new case law—setting out a standard of greater deference to the judgments of experts—that had not been available when the district court issued its denial.

While cases involving equitable relief do not constitute a large portion of the courts of appeals' workload, their emergence in the mid-twentieth century represents another stage in the evolution of those courts. These cases require appellate judges to closely scrutinize district court decisions based on complicated factual records and expert opinions, and to make decisions about the appropriateness of (and sometimes assist in crafting) specific forms of relief.

Cases

The following is a small sample of landmark cases the U.S. courts of appeals have decided without Supreme Court review. While this list represents a miniscule fraction of the cases that could have been included, it is intended to illustrate the federal appellate courts' frequent role as the last point of review for many cases of social and legal importance.

First Amendment: *United States v. One Book Called Ulysses* (Second Circuit, 1934)[131]

In 1933, the U.S. government attempted to ban importation of James Joyce's novel *Ulysses* as obscene. A U.S. district court judge in New York found the book not obscene and allowed its importation. On appeal, the Second Circuit affirmed by a two-to-one vote. The panel majority agreed with the district judge in recognizing the book's literary merit, noting that while some passages could be considered obscene, "the book as a whole is not pornographic, and . . . it does not, in our opinion, tend to promote lust. The erotic passages are submerged in the book as a whole and have little resultant effect. If these are to make the book subject to confiscation, by the same test Venus and Adonis, Hamlet, Romeo and Juliet . . . as well as many other classics, would have to be suppressed."[132] Scholars have pointed to the *Ulysses* case as a landmark in the First Amendment protection of literary expression.

First Amendment: *Collin v. Smith* (Seventh Circuit, 1978)[133]

In 1977, the National Socialist Party of America, a neo-Nazi group, announced plans to march in Skokie, Illinois, a village near Chicago with a large Jewish population. The village enacted ordinances prohibiting the march, and the party sued in federal court to enjoin their enforcement. The court of appeals affirmed the district court's grant to the plaintiffs of injunctive relief, finding the ordinances overly broad regulations of speech and therefore violative of the First Amendment. In concluding its opinion, the Seventh Circuit stated, "The preparation and issuance of this opinion has not been an easy task, or one which we have relished. . . . The result we have reached is dictated by the fundamental proposition that if these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises."[134] *Collin* and a related Supreme Court

131. 72 F.2d 705 (2nd Cir. 1934).

132. *Id.* at 707.

133. 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

134. *Id*. at 1210.

case arising from litigation in the Illinois state courts were important precedents in the protection of offensive and unpopular speech.[135]

First Amendment: *American Booksellers Association v. Hudnut* (Seventh Circuit, 1985)[136]

Hudnut was a major case regarding the ability of municipalities to regulate the sale of pornography. In 1984, the city of Indianapolis enacted an ordinance drafted by anti-pornography activists that criminalized the sale of sexually explicit materials depicting women as objects of humiliation or violence. The American Booksellers Association sued to block enforcement of the ordinance, claiming that it violated the First Amendment. The Seventh Circuit affirmed the trial court's ruling in favor of the plaintiffs. The ordinance was unconstitutional, the court of appeals held, because "it discriminates on the ground of the content of the speech. Speech treating women in the approved way . . . is lawful no matter how sexually explicit. Speech treating women in the disapproved way . . . is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents."[137]

First Amendment: *Dettmer v. Landon* (Fourth Circuit, 1986)[138]

Dettmer was a significant freedom of religion case for its expansive definition of religion entitled to constitutional protection. In that case, a prisoner at a Virginia correctional institution sought certain items (a white robe with a hood, sea salt or sulfur, candles, incense, a kitchen timer, and a small, hollow statute) he claimed were necessary for private meditation as taught by the Church of Wicca. The state asserted that the items were contraband that posed a security risk to the prison and that they had no legitimate religious purpose because the Church of Wicca was not a religion entitled to the protections of the First Amendment. The district court held that the Church of Wicca was a religion and enjoined the defendants from denying the plaintiff the requested items. On appeal, the Fourth Circuit held that the Church of Wicca held a place in its members' lives parallel to that of conventional religions and therefore must be considered a religion entitled to First Amendment protection. Nevertheless, the court found that the prison's security concerns were reasonable and not exaggerated. Because the district court had erred in holding that the prison was required under the First Amendment to regulate the plaintiff's religious practice by the least restrictive means possible, the court of appeals vacated the injunction.

First Amendment: *Smith v. Board of School Commissioners of Mobile County* (Eleventh Circuit, 1987)[139]

Smith involved an Establishment Clause challenge to schoolbooks lacking explicit religious content. The case was a continuation of complex litigation regarding prayer and the teaching of Christianity in Alabama public schools. After a federal court ruling prohibiting prayer in Alabama schools, the defendant-intervenors sought to prohibit the use of certain schoolbooks on history, social studies, and home economics, on the ground that they unconstitutionally established the religion of secular

135. *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

136. 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

137. 771 F.2d at 325.

138. 799 F.2d 929 (4th Cir. 1986), *cert. denied*, 483 U.S. 1007 (1987).

139. 827 F.2d 684 (11th Cir. 1987).

humanism. The district court found the use of forty-four of the books to violate the Establishment Clause and issued the requested injunction. On appeal, the Eleventh Circuit reversed, finding that use of the books "has the primary effect of conveying information that is essentially neutral in its religious content to the school children who utilize the books; none of these books convey a message of governmental approval of secular humanism or governmental disapproval of theism."[140] Because the court found the books to be neutral in content and purpose, it deemed it unnecessary to determine whether secular humanism was a religious belief for purposes of the Establishment Clause.

First Amendment: *Action for Children's Television v. Federal Communications Commission* (District of Columbia Circuit, 1995)[141]

In *Action for Children's Television*, the District of Columbia Circuit issued an important First Amendment decision regarding the government's ability to regulate the broadcast of material deemed indecent. In 1988, Congress instructed the FCC to enforce regulations banning indecent programming on radio and television on a twenty-four-hour basis. In 1991, the D.C. Circuit struck down the total ban on such programming as inconsistent with its holding in a previous case that the FCC must identify some reasonable period of time in which indecent material may be broadcast. The following year, Congress passed a statute requiring the FCC to ban such programming between 6 a.m. and 10 p.m. for public stations going off the air at midnight, and between 6 a.m. and midnight for all other stations. In 1995, the D.C. Circuit upheld the new, more limited, indecency regulations against a First Amendment challenge. The court found that broadcast television and radio were properly the subject of more stringent regulation than cable television because their programs were broadcast wholesale into each home rather than being selected through a subscription and because they were uniquely accessible to children. Subjecting the regulations to strict scrutiny, the court found the government's justifications of support for parental supervision of children and concern for children's well-being to be compelling and therefore sufficient to support the regulations.

First Amendment: *Rice v. Paladin Enterprises, Inc.* (Fourth Circuit, 1997)[142]

Rice was a civil lawsuit alleging that by publishing a book entitled *Hit Man: A Technical Manual for Independent Contractors* the defendants had abetted three murders committed by a man who had read and followed the book's instructions on how to kill people for money. A U.S. district court dismissed the claim on the grounds that the book was speech protected by the First Amendment. The Fourth Circuit reversed on the principle that speech constituting criminal aiding and abetting was not entitled to First Amendment protection. The court held that the landmark case of *Brandenburg v. Ohio* (1969),[143] in which the Supreme Court held that abstract advocacy of lawlessness was protected speech, did not apply to the case at hand. A jury could reasonably find, the court asserted, that the defendants "aided and abetted the murders at issue through the quintessential speech act of providing step-by-step instructions for murder (replete with photographs, diagrams, and narration) so comprehensive and detailed that it is as if the instructor were literally present with the would-be murderer not only in the preparation and planning, but in the actual commission of, and follow-up to, the murder; there is not even a hint that the aid was provided in the form of speech that might constitute abstract advocacy."[144] The plaintiffs

140. 827 F.2d at 690.

141. 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996).

142. 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

143. 395 U.S. 444 (1969).

144. *Rice*, 128 F.3d at 249.

were thus allowed to proceed with their civil suit for aiding and abetting, a tort recognized under Maryland law. The controversial case established an important exception to the *Brandenburg* doctrine within the Fourth Circuit.

Equality: *Westminster School District of Orange County v. Mendez* (Ninth Circuit, 1947)[145]

The *Mendez* case was an important precursor to *Brown v. Board of Education* (1954). The plaintiffs sued a public-school district in Southern California, claiming that its policy of segregated schools for children of Mexican descent had deprived those children of the equal protection of the laws. The plaintiffs' attorneys offered social science evidence, similar to that later proffered in *Brown*, to show that children subjected to segregation suffered negative psychological effects, such as a feeling of inferiority. The U.S. District Court for the Southern District of California found in favor of the plaintiffs and issued an injunction against enforcement of the segregation policy. The defendants appealed to the Ninth Circuit, which affirmed the district court's ruling. Future Supreme Court justice Thurgood Marshall filed an amicus brief with the appellate court, using legal reasoning akin to that he later used when representing the plaintiffs in *Brown*. The court of appeals found the local school segregation policy contrary to the law of California, which had a statewide free school system with some exceptions that were inapplicable and held that it deprived the plaintiffs of their Fourteenth Amendment right to equal protection. Two months later, California governor Earl Warren (the future author of the *Brown* decision) signed a state law prohibiting racial segregation in the state's schools, the first statute of its kind in the nation.

Equality: *Roberts v. Colorado State Board of Agriculture* (Tenth Circuit, 1993)[146]

In *Roberts*, the U.S. District Court for the District of Colorado found the state agricultural board (which served as the governing board for several educational institutions within the state) guilty of violating Title IX of the Education Amendments of 1972 by eliminating the women's softball team at Colorado State University. The court issued a permanent injunction reinstating the program. On appeal, the Tenth Circuit affirmed the district court's ruling that Title IX had been violated. Despite the board's claim that the university provided substantially proportionate athletic opportunities to men and women—which would have provided a safe harbor under Title IX—the court found that the 10.5% disparity between women's enrollment and women's athletic participation was statistically significant. The disparity would not necessarily have constituted a violation if the university could have shown that it was continually expanding women's athletic opportunities, but these opportunities had declined during the 1980s. The court of appeals agreed with the defendants that the district court had improperly burdened them with proving that they had "fully and effectively accommodated the interests and abilities of women athletes."[147] The error was not fatal to the judgment, however, because the record reflected that the plaintiffs had provided sufficient evidence at trial to meet their burden of proof. Lastly, the defendants objected to the specificity of the district court's injunctive order, arguing that it constituted micromanagement of the softball program. The court of appeals affirmed the order with the exception of the requirement that the team play a fall 1993 exhibition season, which it found to be beyond the district court's authority.

145. 161 F.2d 774 (9th Cir. 1947).

146. 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1003 (1993).

147. 998 F.2d at 831.

Equality: *Taxman v. Board of Education* (Third Circuit, 1996)[148]

Taxman was an action for racial discrimination in employment brought under Title VII of the Civil Rights Act of 1964. The Piscataway, New Jersey, school board decided to reduce by one the teaching staff of a local high school. State law provided that teachers must be laid off in reverse order of seniority. The two least senior teachers—one of whom was white and the other African American—had begun work on the same day, however. Having the choice of which teacher to lay off, the board elected to invoke the school district's affirmative action policy, which resulted in the layoff of the white teacher. In the past, ties in seniority had been resolved by a random process. The teacher who was laid off sued the school district in federal court under Title VII, alleging that she had been terminated from her employment because of her race. The district court found the school board guilty of racial discrimination, and the Third Circuit affirmed. The court of appeals noted that under a 1979 Supreme Court precedent, an affirmative action plan would be upheld if it satisfied a two-prong test: its purposes must mirror those of Title VII, and it must not "unnecessarily trammel the interests of the [non-minority] employees."[149] The Third Circuit held that to satisfy the first prong of the test, a plan must have a remedial purpose, i.e., not only to prevent future racial discrimination but also to remedy the effects of prior discrimination. Only under such circumstances might an employment decision based on race be permissible. In *Taxman*, the school board admitted that it had acted with the purpose of promoting diversity, but not to remedy the effects of past discrimination. The board conceded that African Americans were not underrepresented in Piscataway's teacher workforce. As a result, the first prong of the Supreme Court's test was not satisfied. The court also determined that the second prong was not satisfied, because the loss of employment by a tenured faculty member constituted an unnecessary burden on the plaintiff's interests. The Supreme Court accepted *Taxman* for review, but the case was settled prior to being heard by the Court.[150]

Due Process: *Dixon v. Alabama State Board of Education* (Fifth Circuit, 1961)[151]

Dixon was a landmark decision for students' rights. In 1960, African American students from Alabama State College participated in a sit-in at a segregated lunch counter in the county courthouse. They were subsequently expelled from the college for their actions. Challenging their expulsions in federal court, the students lost at trial and appealed to the Fifth Circuit. The court of appeals reversed the judgment, holding that the students had been denied due process of law because they had not been given advance notice and the opportunity for a hearing before being expelled. The court was the first to hold that students were entitled to due process prior to being expelled from a public college or university. Scholars have characterized the recognition of student rights in *Dixon* as leading to the death of the *in loco parentis* policy, which allowed institutions of higher learning to exercise tight control over their students.

148. 91 F.3d 1547 (3rd Cir. 1996), *cert. granted*, 521 U.S. 1117, *cert. dismissed*, 522 U.S. 1010 (1997).

149. *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).

150. The Piscataway Board of Education elected to pay the plaintiff the full amount of the judgement rather than continue to pursue its appeal. Several public interest organizations, not wanting to risk an adverse decision by the Supreme Court, contributed toward the settlement. "Affirmative Action Settlement; Excerpts from Statement by School Board Lawyer on Lawsuit's Settlement," *New York Times*, Nov. 22, 1997, p. B4.

151. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

Privileges and Immunities: *Alerding v. Ohio State High School Athletic Ass'n* (Sixth Circuit, 1985)[152]

Alerding presented an interpretive question regarding the Constitution's Article IV Privileges and Immunities Clause. In 1979, the Ohio State High School Athletic Association adopted a bylaw prohibiting non-residents of Ohio from participating in Ohio high school sports. The association took this action after private schools near state borders began to recruit out-of-state student-athletes, giving those schools an unfair advantage in varsity sports. Residents of northern Kentucky who attended St. Xavier High School in Cincinnati, Ohio, sued in an Ohio federal court, challenging the bylaw as violating the Privileges and Immunities Clause. The U.S. District Court for the Southern District of Ohio upheld the bylaw as constitutional, and the Sixth Circuit affirmed. The court of appeals began by noting that not all distinctions between residents and non-residents violated the clause. Only those privileges and immunities "fundamental" or "essential" to the "maintenance and vitality of the Union," were constitutionally protected. Most frequently, these were activities relating to earning a living and pursuing economic opportunities.[153] The court found the plaintiffs' interest in playing interscholastic sports insufficient to meet that standard and therefore held that the Privileges and Immunities Clause did not apply. Had the clause applied, the court would have proceeded to decide whether the state had a substantial reason for the discrimination and whether the bylaw was substantially related to that reason. However, these inquiries were unnecessary.

Economic Regulation: *United States v. Aluminum Company of America (Alcoa)* (Second Circuit, 1945)[154]

The *Alcoa* case, as it is widely known, was a highly influential antitrust decision written by Second Circuit judge Learned Hand. The panel, consisting of Hand, his cousin Augustus Hand, and Thomas Swan, all eminent judges, found Alcoa guilty under the Sherman Act of monopolizing the aluminum industry. The court determined that the company had a market share greater than ninety percent, and thus possessed monopoly power. Furthermore, the court ruled that even if Alcoa committed no "moral derelictions," but had simply prepared to meet increased demand before other companies could enter the market, it had nevertheless abused its monopoly power in an unlawful manner. The opinion, which expanded the reach of the Sherman Act and the law's ability to ensure a level playing field, engendered controversy.[155] Soon after, in *American Tobacco Company v. United States* (1946) and other cases, the Supreme Court endorsed the Second Circuit's approach, noting that monopoly power, however acquired, could be an evil in and of itself.[156]

Economic Regulation: *Battaglia v. General Motors Corp.* (Second Circuit, 1948)[157]

Battaglia arose from suits brought by workers to recover overtime pay pursuant to the Fair Labor Standards Act of 1938. While those suits were pending, Congress passed the Portal-to-Portal Act of 1947, which eliminated the employers' liability for the pay sought and stripped all federal and state courts of jurisdiction to hear claims like those the plaintiffs had brought. The district court dismissed the suits

152. 779 F.2d 315 (6th Cir. 1985).

153. *Id.* at 317.

154. 148 F.2d 416 (2nd Cir. 1945).

155. Marc Winerman and William E. Kovacic, "Learned Hand, *Alcoa*, and the Reluctant Application of the Sherman Act," *Antitrust Law Journal* 79, no. 1 (2013), 300–301.

156. 328 U.S. 781, 812–815 (1946).

157. 169 F.2d 254 (2nd Cir.), *cert. denied*, 335 U.S. 887 (1948).

accordingly and the plaintiffs appealed. The Second Circuit affirmed the dismissals, finding that the Portal-to-Portal Act had not deprived the plaintiffs of any vested constitutional rights. The opinion was most notable not for its result but for the court's novel theory that the ability of Congress to regulate the jurisdiction of the federal courts was constrained by the Fifth Amendment. "That is to say," Judge Harrie Chase wrote, "that while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation."[158] Had the plaintiffs' claims been meritorious, therefore, the Second Circuit would have held the jurisdiction-stripping provision to be unconstitutional. The Supreme Court has neither endorsed not rejected the *Battaglia* court's conception of the Fifth Amendment as an external constraint on Congress' power to strip the federal courts of jurisdiction.

Tribal Sovereignty: *Buster v. Wright* (Eighth Circuit, 1905)[159]

Between 1891 and 1907, the Eighth Circuit had jurisdiction over appeals from the U.S. Court for the Indian Territory and the U.S. Court of Appeals for the Indian Territory, successively. In *Buster*, non-Indian residents of the Indian Territory challenged the right of the Creek tribe to impose a tax on non-Indians doing business in the territory. The non-Indians had received deeds from the federal government and incorporated towns and thus could not be excluded from the territory. They argued that because the Indians' taxing power was derived from their general right to exclude non-Indians from the territory, they could not tax those, like the plaintiffs, whom they could not legally exclude. However The Eighth Circuit disagreed that the taxing power was based on the power to exclude. Instead, the court held, a sovereign did not lose "the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners."[160] The tribe's power to tax was thus based on the general powers of government to raise revenue and could be exercised to tax the plaintiffs. The case demonstrated that Indian tribal sovereignty could apply to non-members as well as members in certain contexts.

Procedure: *Sampson v. Channell* (First Circuit, 1940)[161]

Sampson was an early and important application by a U.S. court of appeals of the Supreme Court's 1938 ruling in *Erie Railroad v. Tompkins*.[162] The *Erie* doctrine held that federal courts in diversity of citizenship cases were required to apply substantive state law. In *Sampson*, the First Circuit was faced with the question of whether to apply state law regarding the burden of proof for contributory negligence and if so, which state's law to apply. The case arose from a fatal automobile accident in Maine between citizens of Maine and Massachusetts. The plaintiff, who had been injured in the accident, filed a diversity suit in Massachusetts federal court against the estate of the driver of the other car, who was killed. The executor of the estate pled contributory negligence as an affirmative defense. Massachusetts state courts classified as procedural a state law providing that the burden of proving contributory negligence was on the defendant.

158. 169 F.2d at 257.

159. 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

160. 135 F. at 952.

161. 110 F.2d 754 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940).

162. 304 U.S. 64 (1938).

The court of appeals noted, however, that the burden of proof for contributory negligence could determine the outcome of a case. This was especially true in the case at hand because the driver whose estate was defending the suit had been killed and could not testify to the plaintiffs' contributory negligence. Under the policy expressed by the *Erie* decision, wrote Judge Calvert Magruder, "it is unfair and unseemly to have the outcome of litigation substantially affected by the fortuitous existence of diversity of citizenship."[163] The court classified the law regarding the burden of proof as substantive on this basis, meaning that state law would apply.

The court then had to determine whether to apply the law of Maine, the site of the accident, or Massachusetts, the forum state, a question on which no controlling Supreme Court precedent existed. The First Circuit determined that a Massachusetts state court would, under conflict of laws principles, have applied Massachusetts law on the burden of proof issue. Under the theory that "the federal court in Massachusetts sits as a court coordinate with the Massachusetts state courts to apply the Massachusetts law in diversity of citizenship cases," the court of appeals held that it was bound to apply Massachusetts law.[164] The Supreme Court cited the *Sampson* opinion in 1945, when it noted in *Guaranty Trust Co. v. York* that the purpose of the *Erie* doctrine was that a diversity case should have substantially the same result in federal court as it would have had in state court.[165]

Torts: *United States v. Carroll Towing Co.* (Second Circuit, 1947)[166]

Carroll Towing arose from a harbor accident at a New York City pier in which a barge broke loose, collided with a Navy tanker, and sank. The trial court held that the owner of the barge could recover damages for lost cargo based on the negligence of the tug captain and his deckhand. In making this finding, the judge also held that the barge owner had not been negligent for not having someone on the barge while it was moored.[167] The Second Circuit, in an opinion by Judge Learned Hand, reversed on the issue of the barge owner's negligence. In reviewing prior cases, Hand found that there was no general rule on whether the absence of a bargee from a moored barge constituted negligence. Deriving a formula from the existing case law, Hand concluded that negligence had occurred if the burden (B) of taking a certain precaution was less than the injury (L) multiplied by the probability (P) of that injury occurring, expressed as $B < PL$.[168] In the *Carroll* case, Hand found that negligence had occurred because the burden of having a bargee on board during working hours was exceeded by the probability that a barge would break loose in a crowded harbor where barges were frequently shifted multiplied by the damage a drifting barge could do.[169] What became known as the "Hand formula" is one of the most influential doctrines in tort law. Although negligence is in most cases decided by juries (unlike in admiralty cases, which are heard without juries), appellate judges have frequently cited the Hand formula in explaining their decisions.[170]

163. *Sampson*, 110 F.2d at 756.

164. *Id.* at 761.

165. 326 U.S. 99, 109 (1945). Later Supreme Court decisions departed from the test applied in *Guaranty Trust*. *See, e.g., Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996).

166. 159 F.2d 169 (2nd Cir. 1947).

167. Patrick J. Kelley, "The *Carroll Towing Company* Case and the Teaching of Tort Law," *St. Louis University Law Journal* 45, no. 3 (Summer 2001), 736.

168. *Carroll Towing*, 159 F.2d at 173.

169. Kelley, *supra* note 167, at 739.

170. *Id*. at 753.

Fair Trial: *United States v. Dellinger* (Seventh Circuit, 1972)[171]

The *Dellinger* case, better known as the trial of the Chicago Seven, was less a legal milestone than a cultural one. The trial of seven[172] political activists charged with inciting riots outside the 1968 Democratic National Convention reflected the nation's deep political and social divisions, especially regarding the Vietnam War, youth culture, and challenges to governmental authority. *Dellinger* was a unique case from the perspective of the U.S. Court of Appeals for the Seventh Circuit. While examining the conduct of trials is a routine function of the federal appellate courts, this case stood out for the extent to which the panel was critical of the behavior of the trial judge and the prosecuting attorneys. The trial was chaotic, as the defendants engaged in disruptive behavior to challenge the legitimacy of the court and the proceedings, drawing harsh rebukes from trial judge Julius Hoffman of the U.S. District Court for the Northern District of Illinois. The jury acquitted the defendants of conspiracy but found five of them guilty of traveling across state lines with the intent to incite a riot. While the jury was deliberating, Judge Hoffman cited the defendants and their lawyers for 159 counts of criminal contempt of court and imposed prison sentences ranging from three months to more than four years. The defendants appealed, arguing that the Anti-Riot Act under which they were convicted was unconstitutional and that Hoffman's bias against them made a fair trial impossible. The Seventh Circuit reversed each of the criminal convictions, finding that Hoffman had committed reversible error in several respects. More importantly, the appellate court found that Hoffman's and the prosecutors' open hostility to the defendants would have been reason alone to overturn the convictions. The panel noted that Hoffman had made many sarcastic and denigrating remarks to the defendants throughout the trial that collectively "must have telegraphed to the jury the judge's contempt for the defense."[173] In a separate proceeding, the Seventh Circuit reversed all of the contempt convictions as well, remanding them for trial before Judge Edward Gignoux of the District of Maine.[174] While a few of the charges resulted in convictions, Judge Gignoux refused to impose jail sentences, stating that the behavior of the defendants could not be considered apart from that of the judge and prosecutors, who had contributed to the acrimonious atmosphere at trial.[175]

Whistleblowers: *Lachance v. White* (Federal Circuit, 1999)[176]

In 1989, Congress enacted the Whistleblower Protection Act (WPA) to protect federal employees reporting government misconduct or mismanagement from retaliatory personnel actions. In *Lachance*, an Air Force employee was detailed to a lower-grade position after complaining of mismanagement in the maintenance of standards for colleges and universities providing educational services on Air Force bases. The plaintiff filed a complaint, after which an administrative judge found that his disclosures were not protected by the WPA. The Merit Systems Protection Board reversed this finding, and the government appealed to the Federal Circuit, which had jurisdiction over whistleblower claims. To uphold the plaintiff's claim necessitated a finding that the plaintiff reasonably believed that his disclosures reflected gross mismanagement by government officials. The Federal Circuit articulated the appropriate test for determining whether such a belief was reasonable as follows: "could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement?"[177] The "disinterested

171. 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

172. There were originally eight defendants. Judge Julius Hoffman declared a mistrial with respect to defendant Bobby Seale.

173. *Dellinger*, 472 F.2d at 387.

174. *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972).

175. *In re Dellinger*, 370 F. Supp. 1304, 1321 (N.D. Ill. 1973), *aff'd*, 502 F.2d 813 (7th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975).

176. 174 F.3d 1378 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000).

177. 174 F.3d at 1381.

observer" test was more stringent than the one the Merit Systems Protection Board had applied, which inquired only whether the plaintiff's "belief was shared by other similarly situated employees."[178] In rejecting the Board's test, the Federal Circuit remarked that "a purely subjective perspective of an employee is not sufficient even if shared by other employees. The WPA is not a weapon in arguments over policy or a shield for insubordinate conduct."[179] Applying the new standard on remand, an administrative judge concluded that the plaintiff's belief that his disclosure reflected gross misconduct was reasonable. The Board reversed, however, and the Federal Circuit affirmed that decision.[180] Congress codified the stricter *Lachance* standard when it passed the Whistleblower Protection Enhancement Act of 2012.

Judges

More than 800 judges have served on the U.S. courts of appeals since their inception in 1891. The FJC's Biographical Directory of Article III Judges contains information about these judges as well as those who held Article III judgeships on other federal courts. While the roster of federal appellate judges appears small when one considers the courts' 130-year history, it would be difficult to profile more than a handful here. Below is a small sample of those U.S. courts of appeals judges whom scholars have recognized as especially influential. Several others might have been included. These judges are remembered for important decisions they rendered, for moral stances they took, and for their intellect, legal reasoning, and judicial philosophies. Excluded from this sample are judges who also served on the Supreme Court of the United States, about whom information is abundant, as well as living judges.

Learned Hand (Second Circuit, 1924-1961)

Learned Hand served as a federal judge for fifty-two years, the first fifteen on the U.S. District Court for the Southern District of New York and the latter thirty-seven on the U.S. Court of Appeals for the Second Circuit. He is perhaps the preeminent lower-court judge in American history and "with near unanimity his peers proclaimed him one of America's greatest judges."[181]

Hand's contributions to the federal judiciary are difficult to summarize because he issued notable opinions in so many areas of American law. As legal historian G. Edward White pointed out:

> The sources of Hand's eminence were more varied than those of most judges in comparable positions. His notable longevity on the bench gave him the opportunity to write in a number of areas and thereby tended to counteract the limited reach of his court. The crowded, varied docket of the Second Circuit, the skill of the New York City bar, and the high quality of his judicial colleagues resulted in the regular presentation of complex issues whose ramifications were thoroughly perceived and articulated. The economic and intellectual importance of the New York environment meant that his decisions on normally arcane subjects, such as patent law, could take on national significance. The originality and clarity of his writing style served to widen the audience for his opinions, and his versatility as a public speaker expanded his popular impact.[182]

178. *Id*. at 1380.

179. *Id*. at 1381.

180. *White v. Department of the Air Force*, 391 F.3d 1377 (Fed. Cir. 2004).

181. Edward A. Purcell, Jr., "The Historical Significance of Judge Learned Hand: What Endures and Why," *Arizona State Law Journal* 50, no. 3 (Fall 2018), 856.

182. G. Edward White, *The American Judicial Tradition: Portraits of Leading American Judges* (New York: Oxford University Press, 1988), 264.

One of Hand's most influential circuit opinions was in the so-called *Alcoa* case (1947), a major antitrust decision.[183] Hand's opinion in that case has been referred to as "antitrust's closest equivalent to an epic poem" as well as a case that "transformed the doctrine of monopolization and dramatically expanded the Sherman Act's capacity to address dominant firm conduct."[184] In *United States v. Carroll Towing Co.* (1947), Hand set forth the "Hand formula" of negligence, a widely-used form of economic analysis to determine whether a duty of care had been breached.[185] He issued other widely-cited opinions on such topics as compliance with custom as a defense to negligence, the "substance over form" doctrine in tax law, the immunity of public officers from tort suits, and the definition of aider and abettor.[186] Criminal and tax law were two areas in which Hand's opinions best stood the test of time.[187]

Scholars have pointed to *United States v. Dennis* (1950) as Hand's most important constitutional case while on the court of appeals.[188] In *Dennis*, Hand wrote the opinion upholding the convictions of eleven leaders of the Communist Party USA for violating the Smith Act, which prohibited the teaching or advocacy of overthrowing the United States government. The opinion, which was affirmed by the Supreme Court, was arguably inconsistent with Hand's bold speech protection in the 1917 Espionage Act case *Masses Publishing Co. v. Patten*, his most famous decision as a district court judge.[189] Some scholars have argued that the two cases are not inconsistent, however, as both reflected Hand's deference to Congress and embrace of judicial restraint. In *Masses*, Hand based his decision on what he believed to be the congressional intent behind the Espionage Act. Similarly, in *Dennis*, Hand deferred to legislative judgment in upholding the Smith Act. Historian Edward Purcell has argued that *Dennis* represented a significant change in Hand's thinking, however. According to Purcell, Hand had the opportunity to strengthen First Amendment protections in *Dennis* but instead chose a more restrictive path, based in part on his belief that the Soviet Union and the Communist Party posed grave threats to the United States.[190]

John J. Parker (Fourth Circuit, 1925-1958)

John J. Parker is perhaps best known for the Senate's narrow rejection of President Herbert Hoover's nomination of him to the Supreme Court in 1930. Opposition to his nomination came from organized labor, which viewed him as anti-union on the basis of his 1927 decision in *United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Co.*[191] Parker's affirmance in that case of an injunction against the UMWA's organizing campaign in West Virginia was widely criticized by proponents of labor rights, although some scholars have contended that casting Parker as an anti-labor judge was unfair.[192] The

183. *Alcoa*, 148 F.2d 416.

184. Winerman, *supra* note 155, at 296, 300.

185. *Carroll Towing*, 159 F.2d at 173.

186. Richard A. Posner, "The Learned Hand Biography and the Question of Judicial Greatness," *Yale Law Journal* 104, no. 2 (November 1994), 513–514; *The T.J. Hooper*, 60 F.2d 737 (2nd Cir.), *cert. denied*, 287 U.S. 662 (1932); *Helvering v. Gregory*, 69 F.2d 809 (2nd Cir. 1934), *aff'd*, 293 U.S. 465 (1935); *Gregoire v. Biddle*, 177 F.2d 579 (2nd Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); *United States v. Peoni*, 100 F.2d 401 (2nd Cir. 1938)).

187. Posner, *supra* note 186, at 514.

188. 183 F.2d 201 (2nd Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

189. 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2nd Cir. 1917). In *Masses*, Hand enjoined an order of the Postmaster General banning a radical magazine from the U.S. mail pursuant to the Espionage Act of 1917. Although the Second Circuit reversed Hand's order and the Supreme Court affirmed the court of appeals, *Masses* later came to be recognized as a landmark in First Amendment jurisprudence. Purcell, *supra* note 181, at 860–861.

190. *Id.* at 886–895.

191. 18 F.2d 839 (4th Cir.), *cert. denied*, 275 U.S. 536 (1927).

192. See, e.g., Peter Graham Fish, "*Red Jacket* Revisited: The Case that Unraveled John J. Parker's Supreme Court Appointment," *Law and History Review* 5, no. 1 (1987), 51–104.

NAACP also vigorously protested Parker's nomination as a result of a 1920 speech, made as a candidate for governor of North Carolina, in which he said that African Americans had accepted their disenfranchisement and should have no role in the political process. Upon his nomination to the Supreme Court, NAACP leader Walter White sent Parker a telegram asking him to explain himself, but Parker did not respond.[193] Several southern Democrats, who shared Parker's racial views and might have been expected to support his confirmation, voted against him based on the belief that he had been nominated to secure political gains for Hoover in North Carolina.[194]

Parker's work as an appellate judge left a significant legacy that had nothing to do with his Supreme Court nomination, however. In particular, Parker, who served as the Fourth Circuit's senior judge for twenty-six years, was known as a pioneer of judicial administration.[195] As Peter G. Fish has written, "Parker's greatest legacy . . . is judge-centered court administration which he worked to establish in the federal courts and to promote in the states through the American Bar Association. . . . For Parker that model was designed to protect the judicial function from encroachments by coordinate branches of government. Institutional autonomy was the end sought."[196]

In his quest for institutional independence, Parker sought ways to give judges more control over cases. In his work chairing the Judicial Conference Committees on Pre-Trial Procedures, Court Reporters, and Appeal from Interlocutory Orders of the District Courts, he promoted reforms that would subordinate lawyers to judges in the litigation process. These included pretrial procedures that allowed judges to control the pace of litigation, requiring trial judges to certify the need for an interlocutory appeal, and making stenographers officers of the court to reduce judicial reliance on the parties for information.[197] Parker also held judicial conferences, consisting of the circuit and district judges, for several years before Congress, inspired by his working model, established circuit councils and annual conferences for all circuits in 1939.[198] Parker interpreted broadly the stated duty of the circuit council to supervise the administration of the district courts within the circuit.[199] He was also a key advocate of the creation of the Administrative Office of the U.S. Courts in order to separate the administration of the judiciary from the Department of Justice. Parker was influential in lobbying for increased centralization of administrative authority, particularly over preparing the judiciary's budget and presenting it to Congress, and his position prevailed in the legislation that was adopted.[200] Lastly, Parker was a leading advocate of procedural reform. Having procedural rules established by judges rather than legislators, he asserted, was an important method of securing judicial independence. He favored the establishment of the Federal Rules of Civil Procedure in 1938 and later was a leading proponent of their adoption by the states.[201]

193. Elizabeth G. McCrodden, "John J. Parker's Failed Quest for a Seat on the Supreme Court," *North Carolina State Bar Journal* 7, no. 4 (Winter 2002), 13.

194. *Id*. at 16–18.

195. As the senior judge in the Fourth Circuit, Parker served on the Conference of Senior Circuit Judges from 1931 to 1948 and, after the Conference was renamed as such, the Judicial Conference of the United States from 1948 to 1958. For the latter ten years Parker was the chief judge of his court, Congress having established that position in 1948. Parker's tenure on the Conference was the longest in history. Peter G. Fish, "Guarding the Judicial Ramparts: John J. Parker and the Administration of Federal Justice," *Justice System Journal* 3, no. 2 (Winter 1977), 106.

196. *Id*. at 118–119.

197. *Id*. at 108–109.

198. *Id*. at 116.

199. *Id*. at 115–116.

200. *Id*. at 115.

201. *Id*. at 113–114.

Parker's reputation as an influential judge extended to his judicial opinions as well. One of his more notable rulings came in 1942 as a member of a three-judge U.S. district court panel in *Barnette v. West Virginia State Board of Education*.[202] Despite the Supreme Court's holding to the contrary in *Minersville School District v. Gobitis* (1940),[203] the district court held a school flag-salute requirement to violate the First Amendment rights of students who objected to the salute on religious grounds. In his opinion for the panel, Parker noted that while ordinarily the court would be constrained to follow Supreme Court precedent, there was reason to question the viability of the *Gobitis* decision. Four of the remaining seven justices from the *Gobitis* court had expressed their dissatisfaction with that decision, leading Parker to predict that it would be overruled. Turning to the merits of the case, Parker found that "The salute to the flag is an expression of the homage of the soul. To force it upon one who has conscientious scruples against it, is petty tyranny unworthy of the spirit of this Republic and forbidden, we think, by the fundamental law."[204] Parker's prediction proved correct, as the Supreme Court affirmed the district court's decision by a six-to-three vote in 1943.

Florence Ellinwood Allen (Sixth Circuit, 1934-1966)

Florence Ellinwood Allen had a distinguished career as an attorney, prosecutor, Ohio trial court judge, and Supreme Court of Ohio justice prior to being appointed to the Sixth Circuit by President Franklin D. Roosevelt in 1934. The first woman to serve on a federal appellate court (and the only one until 1968), Allen built an outstanding national reputation as a jurist and won over many critics who opposed the presence of women on the federal bench. Four different presidents—Herbert Hoover, Roosevelt, Harry Truman, and Dwight Eisenhower—considered her for twelve different vacancies on the Supreme Court of the United States.[205]

Beginning her federal judicial career during the New Deal, Allen heard several labor cases under the National Labor Relations Act of 1935 and the Fair Labor Standards Act of 1938. She harbored no ideological bias toward labor or management and was known for deciding in favor of either depending on the circumstances.[206] The Sixth Circuit also heard many patent cases during Allen's tenure because of the prevalence of industry in states such as Michigan and Ohio. While initially skeptical that a woman could handle complex patent litigation, patent attorneys soon came to see Allen as an expert on the subject.[207]

Two of Allen's most significant decisions came as a member of a three-judge U.S. district court panel, which was an occasional but important aspect of a circuit judge's service.[208] In *Walker v. Chapman* (1936), she upheld Ohio's minimum wage law for women, distinguishing it from the District of Columbia law the Supreme Court had struck down in *Adkins v. Children's Hospital* (1923) on the basis that the D.C. standard for a fair wage was vague, while Ohio's was clear and could be implemented with certainty.

202. 47 F. Supp. 251 (S.D. W. Va. 1942), *aff'd*, 319 U.S. 624 (1943).

203. 310 U.S. 586 (1940).

204. *Barnette*, 47 F. Supp. at 255.

205. Tracy A. Thomas, "The Jurisprudence of the First Woman Judge, Florence Allen: Challenging the Myth of Women Judging Differently," *William & Mary Journal of Race, Gender & Social Justice* 27, no. 2 (Winter 2021), 344.

206. *Id*. at 338.

207. *Id.* at 339–340.

208. In the Three-Judge Court Act of 1910 (36 Stat. 557), Congress provided for suits to enjoin a state official from enforcing an allegedly unconstitutional state law to be heard by a three-judge trial court with a direct appeal to the Supreme Court of the United States. Such panels occasionally included judges of the U.S. courts of appeals, particularly in judicial districts with fewer than three U.S. district judges. In 1937, Congress added a similar three-judge court provision for suits seeking to enjoin the enforcement of a federal law alleged to be unconstitutional. Judiciary Reform Act of 1937, 50 Stat. at 752.

Soon after, the Supreme Court overruled *Adkins* in *West Coast Hotel v. Parrish* (1937).[209] In her most well-known case, *Tennessee Electric Power Co. v. Tennessee Valley Authority*, she upheld the right of the federal government to create the Tennessee Valley Authority, a decision the Supreme Court affirmed in a major victory for New Deal legislation. This decision put Allen in the national spotlight and contributed to her status as a candidate for the Supreme Court.[210]

Perhaps Allen's most notable dissenting opinion, also on a three-judge district court, came in *Filburn v. Helke* (1942), a challenge to New Deal legislation penalizing farmers for overproducing wheat. The majority ruled the law unconstitutional, with Allen alone finding it to be valid based on congressional power to regulate interstate commerce. The Supreme Court reversed, agreeing with Allen's interpretation, in *Wickard v. Filburn* (1942), one of the most significant New Deal era cases expanding the regulatory power of Congress.[211]

Jerome N. Frank (Second Circuit 1941-1957)

Jerome Frank was known as one of the most brilliant and influential jurists to serve the federal courts. Prior to joining the bench, he was a respected legal philosopher and a leading advocate of the legal realist movement. His 1930 book, *Law and the Modern Mind*, written while he was an attorney in private practice, argued that certainty in the law did not and could not exist. The decisions of courts were not objective, he asserted, but rather were influenced by the individuality, experience, and psychology of judges as well as historical, social, and economic factors.

Before his 1941 appointment to the Second Circuit by President Franklin D. Roosevelt, Frank was a prominent New Dealer who served as chairman of the Securities and Exchange Commission after William O. Douglas left that position to join the Supreme Court. Once on the court of appeals, Frank developed a reputation for being able to influence the direction of Supreme Court jurisprudence. He wrote painstaking and eloquent dissenting opinions, implicitly (and sometimes explicitly) appealing to the Supreme Court to accept the case and reevaluate the majority's decision. Emphasizing splits between the circuits, when applicable, was one of his common tactics in this effort.[212] Because the Second Circuit generally did not hear cases en banc until 1956, Frank believed that lobbying the Court was the most effective way to address Second Circuit precedent with which he disagreed. On occasion, he declined to follow his court's precedent on the grounds that an intervening Supreme Court decision suggested a different result.[213]

While Frank adhered to Supreme Court precedent, he was not afraid to urge the justices to modify their position on an issue. As one scholar noted, "Jerome Frank honed to a fine edge the art of following a Supreme Court case while criticizing its doctrine and urging the Court to reexamine it."[214] Frank also enjoyed personal friendships with several Supreme Court justices, William Douglas and Felix Frankfurter in particular and to a lesser extent, Hugo Black and Robert Jackson. Frank's frequent correspondence with these justices covered a wide range of topics, only some of them doctrinal. In addition to making

209. Thomas, *supra* note 205, at 340–341 ("The final decision in *Walker* was designated per curiam, but the writing clearly reflects Allen's style, intellect, and moderated reasoning."); *Walker v. Chapman*, 17 F. Supp. 308 (S.D. Ohio 1936); *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

210. Thomas, *supra* note 205, at 341–342; 21 F. Supp. 947 (E.D. Tenn. 1938), *aff'd*, 306 U.S. 118 (1939).

211. Thomas, *supra* note 205, at 342; *Filburn v. Helke*, 43 F. Supp. 1017, 1020 (S.D. Ohio) (Allen, J., dissenting), *rev'd sub nom. Wickard v. Filburn*, 317 U.S. 111 (1942).

212. Robert J. Glennon, Jr., "Portrait of the Judge as an Activist: Jerome Frank and the Supreme Court," *Cornell Law Review* 61, no. 6 (August 1976), 954.

213. *Id*. at 955–956.

214. *Id*. at 958.

both encouraging and critical comments on Supreme Court opinions, Frank sent the justices certain of his own opinions to which he wished to call particular attention.[215] The correspondence was always friendly in nature, and Frank's commentary well-received by the justices.[216]

While it is difficult to quantify a judge's influence on the Supreme Court, there is statistical evidence to suggest that the Court was more likely to grant certiorari in cases where Frank wrote a separate concurrence or a dissent, and that the Court supported Frank's position on the merits in a high percentage of cases, nearly 70% of the time. Scholars have been careful to note that these correlations do not prove conclusively that Frank influenced the Court's behavior, but they do lend support to the thesis that he did so.[217] Studies have also shown that the Court cited Frank's opinions frequently, often placing them first in a string of citations (before uniform rules of citation dictated otherwise) and that it identified him by name (i.e., indicating "(Frank, J.)" after a citation) to an unusual degree.[218] Frank's influence on the Court, while indicative of the esteem in which he was held, can also be attributed to his ideological convergence with several members of the Court, including his advocacy of judicial activism in defense of civil liberties during the Vinson and early Warren Courts.[219]

Scholars have pointed to Frank's concurring opinion in *United States v. Roth* (1956) as particularly significant.[220] Frank concurred in finding an obscenity statute to be constitutional under existing law but wrote a detailed treatise on the vagueness problem inherent in obscenity law and urged the Supreme Court to address it. As one scholar noted, although the Court did not acquiesce in Frank's call for reversal, "subsequent developments have demonstrated Frank's prescience and some Supreme Court opinions have relied on his lower court opinion. Such reliance is a most unusual occurrence once a circuit opinion has been replaced on review by a Supreme Court opinion. . . . Though Jerome Frank's *Roth* opinion had no direct effect on the Supreme Court, through it he contributed to a climate of opinion which recognized dangers to free speech in the regulation of the sordid obscenity business."[221] Frank also contributed significantly to changes in the law of criminal procedure to expand the due process rights of the accused. He issued several dissenting opinions favoring the curbing of abusive police procedures, the reasoning of which the Supreme Court later adopted.[222]

William H. Hastie (Third Circuit, 1949-1976)

William Henry Hastie was the first African American federal judge, having served on the U.S. district court in the Virgin Islands from 1937 to 1939, and became the first African American jurist to have tenure during good behavior when President Harry Truman appointed him to the Third Circuit in 1949. Prior to joining the U.S. court of appeals, Hastie served in several other government positions: assistant solicitor of the Department of the Interior, governor of the Virgin Islands, and civilian aide to Secretary of War Henry Stimson during World War II. In addition to serving for several years as the dean of

215. *Id*. at 971–974.

216. *Id*. at 978–979.

217. Robert Jerome Glennon, "The Role of a Circuit Judge in Shaping Constitutional Law: Jerome Frank's Influence on the Supreme Court," *Arizona State Law Journal* 1978, no. 4 (1978), 529–531.

218. *Id*. at 533–538.

219. *Id*. at 540.

220. 237 F.2d 796, 801 (2nd Cir.) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1956).

221. Glennon, The Role of a Circuit Judge, *supra* note 217, at 541–542.

222. *Id*. at 548–551; *United States ex. rel. Leyra v. Denno*, 208 F.2d 605, 611 (2nd Cir. 1953) (Frank, J., dissenting), *rev'd*, 347 U.S. 556 (1954); *United States v. Delli Paoli*, 229 F.2d 319, 322 (2nd Cir. 1956) (Frank, J., dissenting), *aff'd*, 352 U.S. 232 (1957); *United States v. Grunewald*, 233 F.2d 556, 571 (2nd Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957); *United States v. Johnson*, 238 F.2d 565, 567 (2nd Cir. 1956) (Frank, J., dissenting), *vacated*, 352 U.S. 565 (1957); *United States v. Ebeling*, 146 F.2d 254, 257 (2nd Cir. 1944) (Frank, J., dissenting).

Howard University School of Law, Hastie was one of the nation's most prominent civil rights attorneys. Working alongside other leading NAACP attorneys such as Thurgood Marshall and Charles Hamilton Houston, Hastie was involved in several landmark cases, including *Smith v. Allwright* (1944), in which the Supreme Court ruled Texas's all-white Democratic primary election unconstitutional.[223]

As an appellate judge, Hastie issued many notable opinions. Some of them, on subjects such as freedom of speech, the Fourth Amendment, and the Establishment Clause, contained reasoning which the Supreme Court later adopted. In 1951, the Supreme Court upheld the convictions of communist leaders for advocating the overthrow of the U.S. government in *Dennis v. United States*.[224] In doing so, the Court arguably adopted a weakened version of Justice Oliver Wendell Holmes' "clear and present danger" test as first articulated in *Schenck v. United States* (1919).[225] A few years later, Hastie was confronted with a similar case in *United States v. Mesarosh* (1955).[226] The Third Circuit upheld the convictions, with Hastie in dissent. In his dissenting opinion, Hastie criticized the majority for effectively eliminating the "time element" of Holmes' test, as some claimed the Supreme Court had done in *Dennis*. The evidence had not shown, he asserted, that the defendants' teachings had been calculated to incite violence "as soon as feasible or within any period of time, however defined."[227] For Hastie, evaluating the immediacy of the threat was more important than balancing the nation's domestic security with the value of the speech at issue.[228] The Supreme Court soon reemphasized the proximity of the threat in another Smith Act case, *Yates v. United States* (1957), effectively overruling *Dennis* and vindicating Hastie's position in *Mesarosh*.[229]

Hastie made another significant decision, also prefiguring Supreme Court doctrine, in *Hanna v. United States* (1958), a Fourth Amendment case.[230] In 1914, the Supreme Court established the exclusionary rule, i.e., that federal courts may not admit evidence seized by federal officers in violation of the Fourth Amendment, in *Weeks v. United States*. At the same time, *Weeks* held that the restrictions of the Fourth Amendment did not apply to state officers.[231] In *Wolf v. Colorado* (1949), however, the Court applied the Fourth Amendment to state officers for the first time, incorporating the amendment through the Due Process Clause of the Fourteenth Amendment. *Wolf* did not mandate that states adopt the exclusionary rule, however, asserting that states could choose their own remedies for Fourth Amendment violations by their officers.[232] After *Wolf*, the Supreme Court acknowledged that it was an open question whether or not the *Weeks* holding that evidence seized illegally by state officers could be admitted in federal court was still good law.[233] Hastie was confronted with this question while sitting by designation on the D.C. Circuit in *Hanna*.

In *Hanna*, Hastie described the several decisions of other circuits allowing the admission of evidence seized illegally by state officials as resting on the "no longer tenable" theory that those seizures did not violate the Fourth Amendment. *Weeks* and *Wolf* considered together, he wrote, "make all evidence obtained by unconstitutional search and seizure unacceptable in federal courts." *Weeks*, he asserted, could

223. 321 U.S. 649 (1944).

224. 341 U.S. 494 (1951).

225. 249 U.S. 47 (1919).

226. 223 F.2d 449 (3rd Cir. 1955), *rev'd on other grounds*, 352 U.S. 1 (1956).

227. 223 F.2d at 464.

228. "'Just One More Vote for Frankfurter': Rethinking the Jurisprudence of Judge William Hastie," *Harvard Law Review* 117, no. 5 (March 2004), 1648.

229. *Id*.; 354 U.S. 298 (1957).

230. 260 F.2d 723 (D.C. Cir. 1958).

231. 232 U.S. 383 (1914).

232. 338 U.S. 25 (1949).

233. Just One More Vote, *supra* note 228, at 1653.

no longer be considered binding precedent on this question in light of *Wolf*.[234] The Supreme Court adopted Hastie's reasoning in *Mapp v. Ohio* (1961). Although *Mapp* dealt with a state court proceeding, the Court embraced the principle that illegally seized evidence could not be admitted in any court regardless of which authorities made the seizure.[235]

Hastie issued one of his most significant opinions in 1969 as a member of a three-judge district court in *Lemon v. Kurtzman*.[236] The court upheld a Pennsylvania statute providing state funding for secular education in private schools, including religious schools. Hastie dissented from the ruling, writing that he could not simply accept the legislature's declaration in the statute that it had passed the act for secular purposes.[237] His biggest concern with the statute was its potential for excessive intermingling of religion and politics. If state governments were permitted to fund secular activities in religious institutions, he reasoned, elected officials would have to decide whether, and to what extent, to fund these activities. If they prioritized other budgetary items above such spending, they might be characterized as enemies of religion. Just as religion might intrude on politics, the reverse could be true. States funding religious institutions would be obligated to monitor the activities of those institutions to be sure that funds were being spent appropriately. Many religious communities would find such government oversight to be obtrusive.[238] The Supreme Court reversed the district court's decision, with Chief Justice Warren Burger basing his opinion largely on identical "entanglement" grounds to those of Hastie's dissent below.[239] In barring state funding of secular education in religious schools, *Lemon* was recognized as a landmark in Establishment Clause jurisprudence.

John Minor Wisdom (Fifth Circuit, 1957-1999)

Judge Wisdom's crucial contributions to school desegregation are chronicled above (see Implementation of Remedies). Wisdom was known as a strong civil rights advocate, not only for these decisions but for others involving voting rights and the Ku Klux Klan.[240] In *United States v. Louisiana* (1963), he invalidated the state's proposed standard for voter qualification. Louisiana had used a vague constitutional interpretation test that registrars applied in a racially discriminatory manner to keep African Americans off the voter rolls. The state attempted to comply with federal civil rights statutes by replacing its test with a more objective but extremely difficult citizenship test. Wisdom wrote for a three-judge district court panel in rejecting the new test.[241] The new test was so difficult, Wisdom reasoned, it would effectively "freeze" the existing composition of the electorate in place, keeping it overwhelmingly white. New applicants for voter registration should not be required to meet a higher standard than those already registered, he held. The Supreme Court affirmed Wisdom's decision in 1965.[242]

In 1965, Wisdom again issued an important decision while sitting on a three-judge district court panel. In *United States v. Original Knights of the Ku Klux Klan*, Wisdom entered an injunction against a major klavern in Bogalusa, Louisiana.[243] In addition to ordering the group to refrain from intimidation

234. *Hanna*, 260 F.2d at 726, 727.

235. Just One More Vote, *supra* note 228, at 1655.

236. 310 F. Supp. 35, 49 (E.D. Pa. 1969) (Hastie, C.J., dissenting), *rev'd*, 403 U.S. 602 (1971).

237. 310 F. Supp. at 49–50.

238. Just One More Vote, *supra* note 228, at 1657–1658.

239. *Id*. at 1657.

240. David J. Garrow, "Visionaries of the Law: John Minor Wisdom and Frank M. Johnson, Jr." *Yale Law Journal* 109, no. 6 (2000), 1220.

241. 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

242. Garrow, *supra* note 240, at 1220.

243. 250 F. Supp. 330 (E.D. La. 1965).

and threats, Wisdom mandated that it file monthly reports with the court on its meetings and membership, a requirement that weakened the organization significantly. His opinion was most remarkable for its detailed history of the Klan and scathing denunciation of its violent tactics. There was "an absolute evil inherent in any secret order holding itself above the law," he wrote.[244]

Henry J. Friendly (Second Circuit, 1959-1986)

Henry Friendly's career on the Second Circuit has been described as "legendary in its scope, contribution, and impact." Like Learned Hand, with whom he served for two years, Friendly has consistently been identified by other jurists as "the greatest federal judge of his time."[245] His jurisprudence influenced several areas of American law, while he also made major contributions to the development of judicial administration.

As one scholar put it, several times through the years Friendly "started a train of thought that rolled down the tracks to, and through, the Supreme Court."[246] In the realm of First Amendment jurisprudence, for example, Friendly influenced the Supreme Court to expand the landmark doctrine of *New York Times v. Sullivan* (1964), which required a showing of actual malice before a public official could recover damages for libelous statements relating to their official conduct. In *Pauling v. News Syndicate Co.* (1964), Friendly reasoned, in dicta, that it made no sense to grant such protections to statements about the conduct of an officeholder but not to those about the conduct of a candidate for the same office.[247] The Supreme Court soon adopted this reasoning in *Curtis Publishing Co. v. Butts* (1967), which expanded *Sullivan* protection to statements about public figures who were not necessarily public officials.[248]

Similarly, Friendly had a significant impact on the Court's Fifth Amendment jurisprudence, particularly with respect to the application of *Miranda v. Arizona* (1966). In a subsequent case, *New York v. Quarles* (1984), Justice Sandra Day O'Connor wrote a concurring opinion which quoted from an article Friendly had written criticizing *Miranda*.[249] O'Connor drew upon a framework laid out by Friendly in recommending a bifurcated approach to the treatment of evidence collected in the absence of a *Miranda* warning. Balancing the rights of a suspect against self-incrimination with the need to protect public safety, this approach would exclude testimonial evidence but allow the admission of nontestimonial evidence, such as a gun, discovered as a result of a suspect's statements. A year later, the Supreme Court adopted this framework in *Oregon v. Elstad* (1985).[250]

J. Skelly Wright (District of Columbia Circuit, 1962-1988)

Judge Skelly Wright was widely known for his commitment to social justice. He issued several groundbreaking decisions on racial segregation while serving on the U.S. District Court for the Eastern District of Louisiana from 1950 to 1962. These decisions desegregated the law, medical, and graduate schools at Louisiana State University, ended state segregation of transit systems and sports, and invalidated schemes by the state legislature to keep African Americans from voting and to keep black students out

244. *Id.* at 335; Garrow, *supra* note 240, at 1222.

245. Tory L. Lucas, "Henry J. Friendly: Designed to be a Great Federal Judge," *Drake Law Review* 65, no. 2 (2017), 422, 423.

246. *Id*. at 458.

247. *Id*. at 450; 335 F.2d 659 (2nd Cir. 1964), *cert. denied*, 379 U.S. 968 (1965).

248. 388 U.S. 130 (1967).

249. 467 U.S. 649, 660–674 (1984) (O'Connor, J., concurring in part and dissenting in part).

250. 470 U.S. 298 (1985); Lucas, *supra* note 245, at 452–455.

of Louisiana State University's undergraduate school.[251] The most famous was *Bush v. Orleans Parish School District*, in which Wright ordered the desegregation of New Orleans public schools in 1956.[252] The decision caused Wright to be reviled by segregationists throughout the state of Louisiana.

In 1962, President John F. Kennedy appointed Wright to the U.S. Court of Appeals for the District of Columbia Circuit (southern senators would have blocked his appointment to the New Orleans-based Fifth Circuit), where Wright continued to be a highly influential jurist, issuing a number of significant opinions. As a judge in the District of Columbia, Wright again had an opportunity to rule against racial segregation. While sitting by designation on a district court in *Hobson v. Hansen* (1967), he issued a far-reaching decree that included an injunction against racial and economic discrimination in the Washington, D.C., public school system, a ban on current student assignment practices, and a prohibition against putting students on certain tracks based on standardized test scores.[253]

Wright's belief in economic and political equality in addition to racial equality led him to strongly oppose the influence of money in politics. He was part of the majority in *Buckley v. Valeo* (1975), in which the D.C. Circuit, sitting en banc, upheld the 1974 amendments to the Federal Election Campaign Act of 1971.[254] Although it is unclear precisely which portions of the court's per curium opinion Wright authored, his beliefs were known to be strongly in accord with the entire opinion. Wright is known to have penned the opinion's powerful conclusion, which read in part:

> Our democracy has moved a long way from the town hall, one man, one vote conception of the framers. . . . The corrosive influence of money blights our democratic processes. We have not been sufficiently vigilant. . . . The excesses revealed by this record—the campaign spending, the use to which the money is put in some instances, the campaign funding, the *quid pro quo* for the contributions—support the legislative judgment that the situation not only must not be allowed to deteriorate further, but that the present situation cannot be tolerated by a government that professes to be a democracy.[255]

Disappointed by the Supreme Court's reversal of most of the D.C. Circuit's judgment, Wright spoke out against the Court's campaign finance jurisprudence in a 1976 *Yale Law Journal* article and a 1982 speech at Columbia Law School.[256] In addition to his appellate work on racial segregation and campaign finance cases, Wright issued several other decisions in favor of the poor and disadvantaged, in areas such as consumer protection, housing, and access to legal services.[257]

Patricia M. Wald (District of Columbia Circuit, 1979-1999)

Patricia Wald began her legal career in 1951 as a law clerk to Judge Jerome Frank of the Second Circuit. Over the next twenty-eight years, she worked as an attorney in private practice, served on presidential and other national commissions on issues such as poverty, crime, law enforcement, violence, and civil disorder, and was the assistant attorney general for legislative affairs in the U.S. Department of Justice. In 1979, President Jimmy Carter appointed her to the District of Columbia Circuit, making her the first

251. Louis Michael Seidman, "J. Skelly Wright and the Limits of Legal Liberalism," *Loyola Law Review* 61, no. 1 (Spring 2015), 75.

252. 138 F. Supp. 337 (E.D. La. 1956), *aff'd*, 242 F.2d 156 (5th Cir.), *cert. denied*, 354 U.S. 921 (1957).

253. 269 F. Supp. 401, 517 (D.D.C. 1967).

254. 519 F.2d 821 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976).

255. 519 F.2d at 897; Carol F. Lee, "Judge J. Skelly Wright: Politics, Money, and Equality," *Loyola Law Review* 61, no. 1 (Spring 2015), 93.

256. *Id*. at 100–104.

257. *Id*. at 95.

woman to serve on that prestigious court. In 1986, she became the first woman to serve as chief judge of the D.C. Circuit.

In her twenty years as a federal judge, Wald built a strong reputation for expertly handling complex cases and writing influential opinions. Her most noted area of expertise was administrative law, a field the D.C. Circuit dominates because of its proximity to federal regulatory agencies. Of Wald's more than eight hundred judicial opinions, more than half dealt with administrative law.[258] Her most notable opinion may have been *Sierra Club v. Costle* (1981).[259] Wald upheld EPA rules regarding sulfur-dioxide emissions from coal-fired power plants as reasonable against challenges from environmentalists that the rules were too lax and from utilities that they were too rigorous and denied them due process. One of Wald's judicial colleagues later asserted that the opinion "set the gold standard for judicial review of the scientifically and technically complex administrative records that make up our court's standard fare."[260] In 1997, Wald issued a significant decision defining the scope of executive privilege, expanding it to include the communications of senior advisors to the president. Her opinion became one of the most frequently cited on executive privilege.[261] One of Wald's most notable dissenting opinions came in *Finzer v. Barry* (1986), in which the D.C. Circuit upheld an ordinance banning the display of signs hostile to a foreign government within 500 feet of its embassy and allowing police to disperse gatherings of more than three people within that range. Wald wrote that the majority's decision "gouges out an enormously important category of political speech from First Amendment protection." Two years later, the Supreme Court agreed with Wald in reversing the decision.[262]

Following her 1999 retirement from the court of appeals, Wald served for two years on the international war crimes tribunal for the former Yugoslavia at The Hague.

258. Jeffrey S. Lubbers, "Tribute to Judge Patricia Wald," *Administrative & Regulatory Law News* 44, no. 3 (2019), 16.

259. 657 F.2d 298 (D.C. Cir. 1981).

260. Lubbers, *supra* note 258, at 16.

261. *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997); Adam Bernstein, "Patricia Wald, Pathbreaking Federal Judge who Became Chief of D.C. Circuit, Dies at 90," *Washington Post*, Jan. 12, 2019.

262. 798 F.2d 1450, 1499 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. Boos v. Barry*, 485 U.S. 312 (1988).

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