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## The Function of the Civil Appeal: A Late-Century View

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# THE FUNCTION OF THE CIVIL APPEAL: A LATE-CENTURY VIEW

PAUL D. CARRINGTON\*

This event notes the approaching bicentennial of the federal courts. It is likely, however, that few present are aware that we are also approaching the centennial of the United States Courts of Appeals, an event that will occur in 1991.

One reason for our ignorance of the age of the United States Courts of Appeals is that these institutions command little public attention. However few may be the Americans who can identify their senators, their number is vast in comparison with those who can identify their local circuit judges, who are only slightly more numerous than senators.

A second reason for our ignorance is that these institutions settled quickly into such an integral role in the federal judicial structure that it is hard for us to imagine a national judicial system without such institutions. Like our more recent inventions, hot dogs and ice cream cones, we take our courts of appeals for granted. The aim of this paper is to examine the assumptions underlying these familiar institutions and their contemporary functions.

If my remarks sometimes question the present or future utility of our familiar institutions, let no one take what I say as anything but respectful of the many outstanding professionals who have served and currently serve on these courts. No professional status in our society commands greater public respect than that of a federal judge. Even if the public does not know the identity of its judges, it nonetheless esteems them and is right to do so.

## I. NINETEENTH CENTURY APPEALS

The present and future plights of the courts of appeals are,

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of course, rooted in their origins.

### A. *The Judiciary Act of 1789*

The original Act<sup>1</sup> created three levels of federal courts staffed by two ranks of judges. Each of the fifteen district courts<sup>2</sup> were staffed by one district judge. These courts exercised admiralty jurisdiction.<sup>3</sup> The same district judges and the Supreme Court Justices riding circuit, all serving part-time, staffed the three circuit courts.<sup>4</sup> These courts exercised original jurisdiction over diversity cases and appellate jurisdiction over smaller claims decided in the district courts.<sup>5</sup> Even when hearing appeals, the circuit courts were soon sitting as one-judge courts, with the circuit justice being responsible for the assignment of cases to the available judges.<sup>6</sup> Congress directed that the Supreme Court hear appeals in major admiralty cases, appeals from all cases decided by the circuit courts, and appeals from highest state courts.<sup>7</sup> Only Justices, of course, could sit on the highest Court, and that Court sat en banc with all six of its Justices hearing all of its cases.<sup>8</sup>

In the earliest years even this very broad sweep of appellate jurisdiction failed to produce much business for the highest Court; it is well known that Chief Justice Jay resigned in boredom to run for Congress. As it emerged, the jurisdiction of the Supreme Court during most of the nineteenth century consisted substantially of appeals from circuit courts in diversity cases<sup>9</sup> deemed to require the application of the federal common law.<sup>10</sup> Congress did not allow appeals from criminal convictions until

1. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

2. The original enactment actually established only thirteen districts because North Carolina and Rhode Island had not yet ratified the Constitution. Both Massachusetts and Virginia had two districts and each of the other nine states had one. *See id.* § 3, at 73-74.

3. *Id.* § 9, at 76-77.

4. *Id.* § 4, at 74-75.

5. *Id.* §§ 21-22, at 83-85.

6. Congress approved this practice in Act of Apr. 29, 1802, ch. 31, § 4, 2 Stat. 156, 157-58.

7. Judiciary Act of 1789, ch. 20, §§ 13, 15, at 80-81, 85-87.

8. *Id.* § 1, at 73.

9. F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 302 (1928).

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

1889.<sup>11</sup> The civil appellate jurisdiction was exercised at a leisurely pace; the time allowed for appeal prior to 1872 was five years, unbelievable by current standards.<sup>12</sup>

### *B. 1789-1891: Structural Problems Appear*

By 1848 the problem of appellate court congestion had made its appearance.<sup>13</sup> In 1865 the Chairman of the Senate Judiciary Committee reported that "the amount of business accumulated in the Supreme Court amounts almost to a denial of justice."<sup>14</sup> The Court was then three years behind in its work.<sup>15</sup>

Despite the undeniable accuracy of the powerful chairman's comment, nothing much was done. The pressure on the Supreme Court docket continued to grow, chiefly because of growth in the diversity jurisdiction of the lower federal courts, which resulted from the expansion of railroads and increased activity in the national economy. In 1869 Congress did relieve the Justices of their circuit riding duties. In doing so, Congress created an intermediate rank of circuit judge with a circuit judgeship for each of the circuits, which were now nine in number.<sup>16</sup> But this measure did not ease the problem of appellate case overload, and the Act of 1875,<sup>17</sup> which created the federal question jurisdiction of the district courts, apparently exacerbated the problem.

Thus, in 1880 federal circuit and district judges were exercising jurisdiction in civil cases on claims arising under federal law as well as in cases between citizens of different states. They

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11. It was possible to secure review of a conviction if the judges in the circuit certified a division of opinion on a question of law. *United States v. More*, 7 U.S. (3 Cranch) 159 (1805). Congress first established review as a matter of right in Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656. Congress, however, limited the appeal of right to capital cases until 1891. See *Evarts Act*, ch. 517, 26 Stat. 826 (1891).

12. Judiciary Act of 1789, ch. 20, § 22, at 84-85. In 1872 Congress reduced the period to two years for an appeal from a circuit court decision to the Supreme Court and to one year for an appeal from a district court decision to a circuit court. See Act of June 1, 1872, ch. CCLV, § 2, 17 Stat. 196, 196-97.

13. Congestion was, of course, in large part a consequence of the then continuing practice of circuit riding, which substantially limited the caseload capacity of the Supreme Court. See *CONG. GLOBE*, 30th Cong., 1st Sess. 350 (1848) (remarks of Rep. Bowlin).

14. *CONG. GLOBE*, 38th Cong., 2d Sess. 292 (1865) (statement of Senator Trumbull).

15. *CONG. GLOBE*, 39th Cong., 1st Sess. 1738 (1865) (remarks of Senator Hendricks).

16. See Act of Apr. 10, 1869, ch. 22, 16 Stat. 44.

17. See Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

had inherited from the Chancellors the power to issue injunctions and enforce them with the awesome power of contempt. Many of their smaller judgments were nonreviewable, as were convictions for a growing list of federal crimes. In many cases, the judges were seen as taking the side of the railroad or the eastern manufacturer against the interests of farmers, consumers, and laborers.

### C. *The Evarts Act of 1891*

In this context, we do not wonder at the shrill tone of the rhetoric of the day. One could understand the Jeffersonian fervor of Representative Culberson of Texas, who admitted to “a supreme desire to witness during [his] time in Congress the overthrow and destruction of the kingly power of district . . . judges.”<sup>18</sup>

Congressman Culberson was an advocate of the Evarts Act,<sup>19</sup> which created the courts of appeals. He advanced a proposal that had been introduced as early as 1848 by Congressman Bowlin of Missouri.<sup>20</sup> The original idea was a simple one, to confer broader appellate jurisdiction on the circuit courts and to staff each of those courts with three full-time appellate judges who would be available to control the idiosyncracies and indiscretions of the district judges.

The first and most important critics of Culberson’s proposal were persons largely of Culberson’s own populist persuasion who perceived rightly that the creation of the circuit courts of appeals would enlarge the effectiveness, and thus the role, of the mistrusted federal judiciary. Most of the representatives of the South and West preferred, and some held out for, sweeping reductions in the federal jurisdiction as a means of reducing the caseload of the Supreme Court.<sup>21</sup>

There was also strong advocacy for a quite different solution to the appellate overload problem. Senators Edmonds and Vest

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18. 21 CONG. REC. 3404 (1890); see also F. FRANKFURTER & J. LANDIS, *supra* note 9, at 80 (“The greatest despot in the land is the United States circuit judge.”).

19. Ch. 517, 26 Stat. 826 (1891).

20. CONG. GLOBE, 30th Cong., 1st Sess. 351 (1848).

21. See, e.g., 13 CONG. REC. 3791 (1882) (remarks of Senator Jones). Senator Evarts was himself a member of this group in 1882. See Phelps, Parker, Evarts & Merrick, *Minority Report on the Relief of the United States Courts*, 5 A.B.A. REP. 363 (1882).

favored a bill that would require the Supreme Court to sit in panels of three.<sup>22</sup> They argued that this device would avoid the costs and delays of extending the appellate hierarchy and would preserve the existing institutions and personnel from serious disruption and demotion. They were particularly concerned about the latter consequence of the intermediate courts proposal because such a result might impair the dignity of office and the zeal of sitting judges. We hear these concerns expressed today in response to quite different contemporary proposals. These senators lost some of their support when Senator Evarts, at the suggestion of a bar committee, agreed to preserve the existing circuit courts.<sup>23</sup> These courts were not abolished until 1911, and then over considerable sentimental objection.<sup>24</sup>

Finally, there was some support for what was perceived as the more modest solution of creating only a single seven-member court of appeals, which would be available to handle the appellate jurisdiction that was beyond the means of the Supreme Court. Unfortunately, this plan had too little support and was never developed sufficiently to reveal its strengths and weaknesses. In 1890, however, Representative Oates introduced such a bill.<sup>25</sup>

The force propelling the issue was the rising public insistence on a right to appeal a criminal conviction. In 1889 Congress created a right of appeal, but limited it to capital cases. Paradoxically, the result of this right was that only those sentenced to death were eligible to appeal their convictions.<sup>26</sup> By 1891 it was clear that the right to appeal would be extended, and that this would require substantial enlargement of the capacity of the appellate courts. The crucial compromise, which won for Senator Evarts the support of the conservative Senator Daniels, was retention of the right to appeal directly to the Supreme Court in an array of important matters.<sup>27</sup> With that compromise,

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22. See 21 CONG. REC. 8307 (1890).

23. See F. FRANKFURTER & J. LANDIS, *supra* note 9, at 99.

24. Act of Mar. 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167. For the story of the opposition to abolition, see F. FRANKFURTER & J. LANDIS, *supra* note 9, at 133.

25. 21 CONG. REC. 3407 (1890).

26. See sources cited *supra* note 11.

27. For example, Congress permitted direct appeal to the Supreme Court for persons convicted of "infamous" crimes. Congress substantially modified these provisions in Act of Jan. 20, 1897, ch. 68, 29 Stat. 492, which directed most criminal appeals to the

the Evarts proposal passed with little remaining opposition.

#### D. *The Appellate Function in 1891*

The Evarts Act was the product of a time when our nation was convalescing from great upheaval, a time described by its premier chronicler as “a search for order.”<sup>28</sup> Grant Gilmore described it as the “law’s black night.”<sup>29</sup> The issues of the Civil War still divided the country deeply, and the consequences of their resolution still caused suffering for many. Moreover, we were newly extended across a continent and, thus, barely retired from the frontier. The authority of law was an idea deeply congenial to such a nation.

The legal profession was largely untrained.<sup>30</sup> The ownership of Blackstone’s *Commentaries*<sup>31</sup> made a man a lawyer. University training was a frolic for the elite. This aggregation of amateurs was ill-suited to the perceived need of the times for a profession of authority.

The resulting jurisprudence of the time was a simple-minded formalism, which reflected an abiding faith in “the idea of law as the ultimate salvation of a free society,”<sup>32</sup> yet it required little subtlety or intellectual attainment by judges or by advocates. A chief concern of the time seems to have been a mistrust of the professionalism of the judiciary and of the capacity of individual judges to apply correctly law that was presumed clear and, thus, amenable to application. Those states most influenced by populist politics placed heavy reliance upon the institution of the civil jury.

Such a legal system required an effective appellate system for one reason: The perceived role of the appellate court was to correct the errors of the trial court in applying the law to the facts. No one thought appellate courts necessary or useful in making law or policy. Scarcely anyone perceived even the Supreme Court, as oracle of the federal common law, to be engaged in a creative activity. Certainly it was very far from the minds of

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circuit courts of appeals.

28. This is the title to the luminous work of Lawrence Wiebe published in 1967.

29. G. GILMORE, *THE AGES OF AMERICAN LAW* 41 (1977).

30. See R. STEVENS, *LAW SCHOOL* 1-10 (1983).

31. W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (A. Small ed. 1803).

32. G. GILMORE, *supra* note 29, at 41.

those who adopted the Evarts Act that the intermediate courts of the United States would ever be taken seriously as sources of federal law.<sup>33</sup>

These nineteenth-century political craftsmen proposed to constrain the exercise of the great power over the individual fates of others they had conferred on district judges who were largely untrained men. They sought to diffuse both authority and responsibility for judicial acts and to assure that judicial decisions were indeed the product of institutions and not of personalities. They apparently believed the office of trial judge to be somewhat like that of prison guard in that it can attract and reinforce the tendencies of persons given to authoritarian behavior. They may also have sought to give the best and ablest judges the moral support that comes from a ready affirmation of disputed decisions. The appeal provided assurance to litigants that the trial judge was not the autocrat so many feared, but a representative of the legal system of the United States.<sup>34</sup>

More modern theorists, and ancients as well, have distinguished this corrective, individual, or party-directed function of the appeal from the creative, rule-directed, or lawgiving function, which the late nineteenth century eschewed.<sup>35</sup> The question I mean to pose is whether the aims and concerns of these nineteenth-century draftsmen should be so neglected as they now seem to be.

## II. TWENTIETH CENTURY EVOLUTION

### A. 1891-1925: *The Changing Context of the Civil Appeal*

The creation of the courts of appeals did serve to tame sufficiently "the kingly power" of the district judges, and the levels of hostility and mistrust subsided. By stages, courts of appeals also relieved the Supreme Court. In 1893 Congress created the

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33. See 21 CONG. REC. 3407-08 (1890) (remarks of Rep. Breckinridge); *id.* at 10,221 (remarks of Senator Evarts).

34. For further discussion of this idea, see Carrington, *The Power of the District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507 (1969) [hereinafter Carrington, *The Power of the District Judges*]. But cf. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

35. See generally R. POUND, *APPELLATE PROCEDURE IN CIVIL CASES* (1941) (noting the advent of appellate power beyond a mere corrective function).



Court of Appeals for the District of Columbia to relieve the Supreme Court of jurisdiction over appeals from the courts in Washington.<sup>36</sup> In 1897 Congress largely diverted the Supreme Court's new criminal appellate jurisdiction to the courts of appeals.<sup>37</sup> In 1911 Congress abolished the old circuit courts.<sup>38</sup> This was a further sign of the acceptance of the new appellate courts.<sup>39</sup> Finally, in 1925 the Judges' Act<sup>40</sup> made much of the Supreme Court's jurisdiction discretionary and off-loaded most of the remaining work on the courts of appeals, which elevated them to peership with state supreme courts.

In the years between 1891 and 1925 much happened contemporaneously with the maturation of the courts of appeals. Our country won a new sense of confidence that perhaps first came into full flower with the completion of the Panama Canal,<sup>41</sup> but surely was established by World War I and the peace that followed.<sup>42</sup> Substantial change also had occurred in the legal profession. University law schools had become a significant influence,<sup>43</sup> at least on the elite of the Bar, and even the national law firm had emerged to take a role in the burgeoning national economy that was being shaped by such enactments as the Sherman Act,<sup>44</sup> the Food and Drug Act,<sup>45</sup> the Federal Employers' Liability Act,<sup>46</sup> the Mann Act,<sup>47</sup> the Anti-Narcotic Act,<sup>48</sup> and the sweep of laws creating the Interstate Commerce Commission and the other great agencies comprising the fourth branch of government.<sup>49</sup> Many of these modernisms created judicial busi-

36. See Act of Feb. 9, 1893, ch. 74, 27 Stat. 434.

37. See *supra* note 27.

38. See sources cited *supra* note 24.

39. See *id.*

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

41. See D. McCULLOUGH, *THE PATH BETWEEN THE SEAS* 599-615 (1977).

42. See generally W. LEUCHTENBURG, *THE PERILS OF PROSPERITY* (1958).

43. See R. STEVENS, *supra* note 30 at 96.

44. Ch. 647, 26 Stat. 209 (1890) (codified at scattered sections of 15 U.S.C.). The first case arising under the Sherman Act reached the Supreme Court in 1895. See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

45. Ch. 3915, 34 Stat. 768 (1906) (repealed 1938).

46. Ch. 148, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (1982)).

47. Ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-24 (1982)).

48. Ch. 100, 35 Stat. 614 (1909) (repealed 1970).

49. The first great agency case was *Cincinnati, New Orleans & Pacific Railway v.*

ness for the Supreme Court as well as for the lower federal courts.<sup>50</sup>

In addition to these changes in society and the profession, a substantial change in our perception of the role of appellate courts occurred. Formalism did not disappear, but a nascent realism had penetrated our shared understanding.<sup>51</sup> John Chipman Gray had published his great work celebrating the creative role of judges and decrying the false formalism that underlay *Swift v. Tyson*<sup>52</sup> and the federal common law.<sup>53</sup> Indeed, as Grant Gilmore observed, the evolution of the Supreme Court as a political institution had made the federal common law a "headless monster, marked down for destruction by all right-thinking men."<sup>54</sup> Louis Brandeis filed his historic brief in *Muller v. Oregon*<sup>55</sup> in 1908, a sure sign that he knew that the Justices were aware of the creative responsibility they bore. The Columbia University School of Law was literally boiling in the early twenties with intellectual initiatives driven by the self-assurance that the policy sciences (as we now tend to call them) being invented at that time not only would provide sound solutions to the growing list of social and political ills of which we were aware, but also would capture an audience with persons having the power to implement those solutions, to wit, the courts.<sup>56</sup> Something new was in the wind: something that profoundly reshaped the perception of the intermediate courts.

### B. 1925: *The New Role of the Supreme Court*

The courts of appeals nestled comfortably into a role defined by this jurisprudential view. This view also expressed a new role for the Supreme Court. Felix Frankfurter and James Landis reflected, if not quite expressed, the early relation between the highest court and the intermediate courts in their in-

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ICC, 162 U.S. 184 (1896).

50. See generally F. FRANKFURTER & J. LANDIS, *supra* note 9, at 146-86.

51. G. GILMORE, *supra* note 29, at 68-98.

52. 41 U.S. (16 Pet.) 1 (1842) (overruled in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)).

53. J. GRAY, *THE NATURE AND SOURCES OF LAW* (1911).

54. G. GILMORE, *supra* note 29, at 61.

55. 208 U.S. 412 (1908).

56. Currie, *The Materials of Law Study*, 3 J. LEGAL EDUC. 331 (1951).

fluent work, *The Business of the Supreme Court*,<sup>57</sup> published in 1928 as a summation of the philosophy of the 1925 Act. The authors concluded their work with a call for Supreme Court appointments of persons of intellectual “powers and *esprit* that universities alone can cultivate” and “with gifts of mind and character fit to rule nations.”<sup>58</sup>

In making their explanation of the role of the highest Court, the authors used a distinction between public and private law that strikes the contemporary reader as unrealistic, even unsophisticated. The area of public law they reserved for the Supreme Court, private law to the lesser courts. By this they seemed to have meant that matters of individual concern should be left to the lower courts, which would free the Supreme Court to resolve the great issues of the times. The courts of appeals, by implication, would perform the routine appellate work of correcting errors so that the Justices could be philosopher-kings.

Frankfurter and Landis were careful to note the temporary nature of such arrangements. They wisely noted that “great judiciary acts, unlike great poems, are not written for all times.”<sup>59</sup> Indeed, the architects of the 1925 Act apparently did not foresee developments the Act accelerated or initiated.

While my primary concern is with the intermediate courts, I should at least note the complex consequences of discretionary jurisdiction since it affects our shared sense of what the Supreme Court is about. As applied to the Court, discretionary jurisdiction generally has been received with favor. While the Justices’ continuing efforts to gain control over their docket has met occasional resistance, those efforts are nearly complete.<sup>60</sup> Absent practical alternatives in light of caseload increases, it would indeed seem ungenerous to object to the Court’s effort to divest itself of matters that are almost by definition less consequential than the matters to which it attends when it selects its cases for

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57. F. FRANKFURTER & J. LANDIS, *supra* note 9.

58. *Id.* at 317.

59. *Id.* at 107.

60. The Court’s mandatory jurisdiction supplies about one-fourth to one-third of the Court’s caseload, but surely a lesser fraction of its workload. See Coleman, *The Supreme Court of the United States: Managing Its Caseload to Achieve Its Constitutional Purposes*, 52 *FORDHAM L. REV.* 1, 24-33 (1983); Estreicher & Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 *N.Y.U. L. REV.* 681, 799 (1984).

decision. Yet, we may have been too slow to note the effect the power to decide whether to decide has upon the persons or institution making the decisions. The architects of 1925 recorded no thoughts on this matter; however, it seems apparent that it makes a difference.

An institution choosing to make a decision is a volunteer. It does not act from the moral necessity of decision, and its actions are to that extent deprived of the moral acceptance that accompanies events for which the actors could not evade responsibility. It is useful to recall Chief Justice Marshall's opinion in *Marbury v. Madison*,<sup>61</sup> which relied significantly on the necessity of judicial involvement to justify judicial review of the constitutionality of legislation.

Moreover, the process of choosing whether to decide a case on the basis of public interest celebrates the public and political importance of the most visible decisions and diminishes, even demeans, the consideration given to the individual fates of the parties. Even in cases in which the Court is exercising its discretionary jurisdiction, the Court's concern for the individual is reduced to a matter of grace. In those cases it chooses not to decide, the highest Court must express indifference to individual fates.<sup>62</sup> It is increasingly difficult to maintain the orientation of the Court to the specifics of the disputes before it. Considering a claim that seldom is heard and quite unlikely to succeed, but which has a troubling merit nonetheless, can illuminate this problem.

For example, consider a claim brought by a respondent to a successful petition for certiorari that seeks compensation for the costs of legal services attending the grant of certiorari and perhaps even for the costs of satisfying any judgments eventually rendered against him as unsuccessful respondent. He argues that he is entitled to compensation because the system imposes fortuitous costs and risks on respondents such as himself, not be-

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61. 5 U.S. (1 Cranch) 137 (1803); see also Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959).

62. See Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795 (1983); cf. *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 524-25 (1957) (Frankfurter, J., dissenting) (criticizing the Court's exercise of jurisdiction "in the name of 'doing justice' in the individual cases").

cause the favorable judgments below are incorrect, but because those judgments are vested with what the Court perceives to be a public interest. If the case is of such public interest and importance, then the public should bear the cost and consequences of the decision. Why should the individual's interests be sacrificed so fortuitously? To this respondent and his argument, one must concede that the public does insure many citizens against losses and risks that are foreseeable and, hence, less fortuitous, even when smaller public interests are at stake. Regardless of what other infirmities the claim just stated may have, its fatal defect is that it tells us more than we choose to recognize about the nonadjudicative character of events that occur when a court chooses its cases on the basis of its interest in the issues presented.

Seen in this light, the adjudicative process in the highest Court will be unlikely to maintain the long acclaimed genius of common law courts for deriving general principles from myriad applications. Also threatened perhaps are the passive virtues of decisionmakers celebrated by "legal process" thinkers from Thayer<sup>63</sup> to Bickel.<sup>64</sup> Such virtues are unnatural to an institution accustomed to selecting for itself only the most important questions.<sup>65</sup>

Furthermore, orientation away from case specifics and individual fates may threaten the distinction between the role of the Court and the role of the organs of government that are avowedly political and organized to express the public will. As the lines that separate powers blur in public perception, the relative absence of a political constituency for the political actions taken weakens the theoretical justification for the institution of judicial review. Increasingly plausible is the following question: If the Court is not seen to be engaged primarily in deciding cases but in resolving public issues, why are the Justices not selected by a more democratic process and held to higher standards of

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63. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

64. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

65. Professor Bickel confronted the inconsistency as his predecessors had not. *Id.* at 131-33. For criticism of his effort at reconciliation, see Gunther, *The Subtle Vices of the "Passive Virtues"*, 64 COLUM. L. REV. 1, 11-16 (1964), and Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 577-79 (1985).

political accountability?

Finally, reflections of this kind can contribute to a cynicism not only about the Court, but about American law in general. Indeed, in this attenuated way, the 1925 Act may have contributed to the minor jurisprudential crisis exhibited in the scholarly work of our contemporaries who argue that law in courts is merely politics in thin disguise and nothing else.<sup>66</sup> Proponents of this view may be preoccupied chiefly with law as it is used in the Supreme Court. Frequently, they seem to be persons of little experience in the practice of law or employed in government at more prosaic levels at which decisions are made because they must be made and not because they fit the intellectual agenda of the decisionmaker. Whether or not this last relation can be demonstrated, I conclude that the 1925 Act had substantial political and jurisprudential implications and consequences not understood or foreseen even by perspicuous observers of the time such as Frankfurter and Landis.

### C. *Effectiveness of Command*

A less theoretical oversight of the architects of 1925 is the lack of concern for what I will term effectiveness of command. In this context, this term is used to call attention to one similarity between judicial hierarchies and others. The architects of the 1925 Act assumed that a decision of the Supreme Court would be applied faithfully by the lower courts not only in that case but in other like cases. In the circumstances of 1925, this was a safe assumption, but the march of subsequent events may have made it less so.

In 1925, we may recall, the courts of appeals were each compact groups, usually limited to three judges. These judges were raised in the formalist traditions of an earlier time. They took pride in the work of correcting error and enjoyed the time and space that enabled them to respond to individual party interests. They could listen to arguments, carefully read transcripts, examine the precedents for themselves, hold unhurried conferences among themselves, and fully and directly explain their decisions to the interested bar. These courts, working so visibly

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66. E.g., Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

themselves, could be counted upon to accept the direction of the higher Court and to bring any idiosyncratic district judge into line as well. Not only the Supreme Court had such expectations of the courts of appeals judges, but the lawyers and district judges had such expectations as well. Those district court judges and lawyers could often accurately predict what to expect from the court of appeals in a particular case. They knew which circuit judges would decide an appeal and knew that at most times the circuit judges would have the inclination and opportunity to assure that the district court adhered to the Supreme Court's precedents, at least to the extent that the circuit judges could comprehend the Court's opinions.

The effectiveness of command may currently be in question for at least two reasons. First, the intermediate courts have tended, perhaps quite naturally, to emulate the Supreme Court by giving emphasis to their own creative roles as lawmakers (if not for the United States, then at least for their respective circuits),<sup>67</sup> and by giving diminishing attention to the seemingly less gratifying work of error correction. The Supreme Court has approved and encouraged this tendency.<sup>68</sup> Over time, the growth in caseload has had the effect of attenuating the means by which the intermediate courts have performed this role, which demanded ever more effort, and enhanced the distraction from the work of error correction. Second, the increase in caseload, combined with an effort to avoid precipitous increases in the number of judgeships, has led the intermediate courts to abandon the amenities of procedure that enabled them to assure that errors were being corrected and that individual fates were being given the attention formerly expected.<sup>69</sup> The work of correction takes

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67. See Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part 1)*, 40 N.Y.U. L. REV. 563 (1965).

68. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957); *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, 333-35 (1941). For a contemporary comment on the early manifestations of this development, see Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944).

69. See Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 554-55 (1969). P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* (1976) [hereinafter *JUSTICE ON APPEAL*] was an effort to provide guidance to appellate courts that were seeking to preserve the error-checking function. Events of the last decade have obsolesced that effort as the caseloads continued to multiply. For a recent review of the problem, see Thompson & Oakley, *From Information to Opinion in Appellate Courts: How Funny Things*

time that circuit judges no longer feel they have. And making the performance of that work visible and convincing to the bar and the public requires much more time than the judges are allowed by circumstance. Accordingly, the error correction function of courts of appeals must be less influential in the daily work of district courts where individual fates are resolved.<sup>70</sup>

Thus, viewed from the worm's eye of the law office and the trial bench, the Supreme Court may be receding as an effective authority and seen increasingly as a remote institution having limited apparent interest in, and limited capacity to control, the specific actions taken in the trial courts. Undoubtedly, the courts of appeals and the Supreme Court are scarcely vanished from sight; the very high rate of appeal attests to that. Appeal and trial, however, are more independent of one another. While the causes of this evolution are tangible, the consequence is inef-  
fable. One can say with confidence that there is now less institu-  
tionalized connection between what the Supreme Court holds and what the district courts do in the next case than would have been true a half century ago; however, one cannot with confi-  
dence measure the effect or appraise it.

### 1. *Junior Supreme Courts*

Inasmuch as this is my main point, I will elaborate. The first cause of the transformation of the courts of appeals was their emulation of the Supreme Court in assuming a substan-  
tially creative lawmaking role. The clearest manifestation of this development is the evolution of the law of the circuit and en  
banc procedure. The courts of appeals have evolved into junior  
supreme courts, each having a territory in which it is "semi-  
supreme" and for which it is the giver of temporary law.<sup>71</sup>

As late as 1938, the courts of appeals still sat only in panels of three. In that year the Ninth Circuit certified to the Supreme Court an issue of tax law that the sitting panel decided differ-

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*Happen on the Way Through the Forum*, 1986 ARIZ. ST. L.J. 1.

70. For a more benign view of this functional change, see Wright, *supra* note 34.

71. See Note, *supra* note 67; see also Wasby, *Inconsistency in the United States Courts of Appeals*, 32 VAND. L. REV. 1343 (1979). But see Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406 (1971); Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452 (1983).



ently from an earlier panel of the Ninth Circuit.<sup>72</sup> The Supreme Court answered the disputed question.<sup>73</sup> It was not long, however, before the Court directed the intermediate courts to assume responsibility for the resolution of such intracircuit conflicts by sitting en banc to express the law of the circuit.<sup>74</sup> In 1948 Congress endorsed this practice by making legislative provision for en banc procedure,<sup>75</sup> a device rejected in 1891 as unsuitable for the Supreme Court. With increasing frequency since 1948, the circuits have employed en banc procedure when they are in a lawmaking mode. This serves as a device for controlling idiosyncratic panels that might otherwise make errant decisions that do not reflect the views of a majority of the judges in the circuit. Presently, four levels to the federal judiciary exist, albeit only three ranks of judges, a situation redolent of the Judiciary Act of 1789, which called for three levels of courts but only two ranks of judges. This newest penultimate level sits judges in exceptionally large numbers infrequently to exercise discretionary appellate jurisdiction over one another. The aim of this arrangement is to facilitate regional lawgiving by the intermediate judges.<sup>76</sup>

In appraising the lawgiving function of the courts of appeals, one should be quick to credit the excellence of much of the creative work done by circuit judges. The intellectual and professional leadership of the Learned Hand court has long been acknowledged,<sup>77</sup> and in 1951 John Frank was able to call attention to the role of the Second Circuit as our leading commercial law court.<sup>78</sup> In more recent times, these courts have made notable contributions to the development of the law in many areas.<sup>79</sup> Some observers have gone so far in their enthusiasm for this lawgiving role that they have spoken of the circuits as little political laboratories which can test varying interpretations of fed-

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72. *Lang's Estate v. Commissioner*, 97 F.2d 867 (9th Cir. 1938).

73. *Lang v. Commissioner*, 304 U.S. 264 (1938).

74. *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, 333-35 (1941).

75. See 28 U.S.C. § 46(c) (1982). This was a feature of the 1948 recodification of 28 U.S.C.

76. See sources cited *supra* note 71.

77. See M. SCHICK, *LEARNED HAND'S COURT* (1970).

78. Frank, *The Top U.S. Commercial Court*, *FORTUNE*, Jan. 1951, at 92.

79. See generally H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 15-73 (1973); R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 294-314 (1985).

eral law before adoption of one by the Supreme Court.<sup>80</sup> In the same vein, commentators suggest that there is merit in having competing interpretations of federal law “percolate” in the circuits so that the Supreme Court has the benefit of extra wisdom coming from the clash in the marketplace of ideas provided by the intermediate courts.<sup>81</sup>

Nevertheless, while this development of a fourth tier serves a number of purposes, aspects of its development make a suitable balance of its costs and benefits doubtful. Thus, it is unclear how valuable the law of the circuit may be either as a guide to legal planners, who must reckon on the possibilities of reversal by the Supreme Court in a later case, or to litigation in another circuit.<sup>82</sup> It is even unclear that en banc decisions effectively direct district judges and lawyers litigating later cases in the same circuit. They must reckon on the possibility that their cases may be decided by judges selected from the minority of the en banc panel who will be able to perceive distinctions between the en banc decision and later cases, and who may not feel constrained from doing so by the remote prospect of yet another en banc proceeding to deal with what is, at worst, a routine misapplication of the general law of the circuit.

In addition, the rhetoric celebrating the circuits as little laboratories or percolators is seriously overborne. This rhetoric draws on ideas that may be very sound as applied to constitutional litigation, the arena in which these expressions were first heard. However, in the context of judicial decisions that interpret federal legislation, to speak of a need for percolation for the great bulk of these decisions greatly exaggerates both the importance and the durability of the decisions. In fact, the federal courts never resolve authoritatively many questions of interpretation of federal legislation.

If the benefits of lawgiving by circuit judges are perhaps uncertain, the costs of en banc procedure seem less so. Certainly, the fourth tier introduces an additional element of chance in the

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80. *E.g.*, Wallace, *The Nature and Extent of Intercircuit Conflict: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913, 929 (1983).

81. Estreicher & Sexton, *supra* note 60, at 717-20.

82. Marcus, *Conflicts Among the Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677 (1984), illuminates some aspects of the conflicts of laws problems.

federal appellate process because its use is entirely unpredictable by lawyers and district judges. Certainly, en banc procedure consumes disproportionately the scarce resources of the courts of appeals and even more resources of the litigants, for whom a decision may be rendered a year later. We seldom hear talk of the virtues of percolation from the litigants who must pay its bill and lawyers who must endure repetitious and dilatory proceedings.

Moreover, en banc procedure, by celebrating the creative lawgiving function of the circuit judges, may have contributed to the relative denigration of the function originally intended for the courts of appeals. As junior supreme courts, the circuits have been preoccupied increasingly with the more intellectual and political aspects of their work and diminishingly involved in the mundane work of reading transcripts, listening to arguments about the correctness of individual applications, and explaining to individual litigants why they lost.

## 2. *Loss of Visibility in Appellate Decisionmaking*

Seemingly more powerful in its effect than the attraction of circuit lawgiving has been the force of the contemporary caseload on the pace of appellate procedure. There can be no doubt that our contemporary circuit judges are under pressures of time that are inconsistent with the role envisioned for them by the draftsmen of the Evarts Act.<sup>83</sup> It is relevant to note that much of the increased caseload has come on the criminal side,<sup>84</sup> where appointed counsel are often required to make arguments that lack plausible merit for individual clients.<sup>85</sup> Under the circumstances in which they work, one cannot fault the circuit judges for abbreviating their procedures.<sup>86</sup>

If no fault is to be found, the development is nevertheless troubling. A court that functions with a substantially junior staff, whose judges have no visible contact with appellate litigants or their lawyers, who may even have little contact with one another, and whose judges often make no effort to explain their

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83. See *supra* note 69.

84. See R. POSNER, *supra* note 79, at 93.

85. See Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U. L. REV. 701 (1972).

86. See JUSTICE ON APPEAL, *supra* note 69, at 56-120.

decisions is one which gives little assurance of its willingness and ability to perform the error correction function. Professor Meador, Maurice Rosenberg, and I published a work in 1977 that undertook to state what we described as the imperatives of appellate procedure, or the minimum amenities of process that are necessary to give assurance that a court is performing the error correction function.<sup>87</sup> Too often these amenities of interaction between the appellate court and the individuals whose rights and liabilities the court controls are unavailable in the federal courts.

There is, to be sure, a close relation between the recent development of this pressure of time and the less recently discovered lawgiving function of the courts of appeals. The primary reason given for the failure to increase the number of circuit judges to absorb the growth in caseload has been a concern for their effectiveness as lawgivers.<sup>88</sup> Professor Geoffrey Hazard long ago suggested that too many appellate judges will result in a Tower of Babel,<sup>89</sup> unless new accommodations are made in the structure to prevent disarray. Certainly the present structure cannot absorb many more judges and continue even the pretense of lawgiving and of maintaining stable laws of the circuit.

However justified this concern may be, it seems clear that the present procedural practices of the courts of appeals send a message to lawyers and district judges that the humdrum work of reading transcripts and appraising the accuracy of the work done in the trial court is likely to be done by a transient junior law clerk, if it is done at all. Increased reliance is placed on the professionalism of the district judges and on incentives external to the process to provide self-restraint.

### 3. *The Right to Appeal*

This evolution has proceeded now to the point that we hear discussion of current proposals to eliminate the right of appeal in civil cases. Indeed, the suggestion is now in vogue. It is the subject of an elaborate report by a bar committee in the Ninth

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87. See *id.* at 7-12.

88. See R. POSNER, *supra* note 79, at 99.

89. Hazard, *After the Trial Court—The Realities of Appellate Review*, in *THE COURTS, THE PUBLIC AND THE LAW EXPLOSION* 60 (H. Jones ed. 1965).

Circuit.<sup>90</sup> It has been advocated in a thoughtful article in the *Yale Law Journal*.<sup>91</sup> It has been heard on the lips of the recently appointed Chief Justice.<sup>92</sup> It is certainly not so radical an idea. As is true of almost any idea that can be imagined about appellate practice, there is an American experience with it — Virginia and West Virginia have long experiences with court systems in which there is no appeal of right.<sup>93</sup>

The most candid, and perhaps the best, argument made for the elimination of the right of appeal is that of Chief Judge Donald Lay who affirms that contemporary practice makes such short shrift of many appeals that it is unrealistic to speak of appellants as having enjoyed an observation of a procedural right.<sup>94</sup> This argument has the defect, however, of calling attention to its own limitation: eliminating the appeal of right is not likely to save a great deal of the courts' energies since we presently give the right only casual respect. Unlike discretionary review in the Supreme Court, which limits the range of issues to be considered, discretionary review at the first level is not effective to foreclose any channels of argument that an appellant might make. A first-level appellant will write about as much, and sound about the same, whether the action sought is a reversal or a leave to appeal. The court cannot decide to refuse leave to appeal without in fact deciding whether the appeal has merit. The crucial difference is illustrated by the Supreme Court's legitimate practice of denying certiorari in many cases, although it knows the case is decided contrary to law. No one has or would suggest that a court of appeals should deny leave to appeal from a legally incorrect judgment of a district court.

What is under discussion, therefore, is largely a matter of cosmetics. Saying there is no right of appeal in a civil case may be more consonant with what now happens in our courts of appeals, but it will not reduce their workload or save the time and

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90. Discretionary Review in Federal Courts of Appeals, Senior Advisory Board, Ninth Circuit Judicial Council (1985) (on file with author).

91. Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985).

92. *Id.* at 62-63 n.5.

93. Lilly & Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 VA. L. REV. 3, 12-14 (1971).

94. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 SW. L.J. 1151 (1981).

money of litigants that will be spent in equal measure however the issue is framed.

Yet, the symbolism may be of some consequence. Professor Harlan Dalton contends that the appeal of right is a disparagement of the trial judge and unlikely to make that judge more attentive to direction from higher courts.<sup>95</sup> His argument rests in part on intuition and in part on the self-analysis of trial judges. My intuitions are contrary to his. The appeal does serve to incorporate the trial judge into the institutional scheme, diffusing the judge's authority and depersonalizing her responsibility.<sup>96</sup> The prospect of appellate review probably constrains judges more than they like to think, and more than we would like them to think, because even the court of appeals would not want district judges to become singlemindedly attentive to higher authority. More important in my view, however, is the signal sent to the litigants by the recognition of the right of appeal, which does shape their perception of the fairness of the proceeding and the power or prerogative of the trial judge. We send the wrong message to a litigant when we tell him that he is dependent on the reactions of a single judge whose decisions will be reviewed by higher authority only as an act of grace. The idea of law is that the individual judge is accountable for the principled exercise of power. Discretionary accountability may look to the skeptic very much like no accountability at all. Instead of enlarging public trust in the district courts, contemporary procedure consumes trust by requiring the public to repose it in the courts of appeals.

### III. APPEALS FOR THE TWENTY-FIRST CENTURY

#### A. *The Trail Ahead*

Manifestly, many knowledgeable persons grieve little about the present trend in the evolution of the federal appellate courts. Many who know and trust the judiciary suppose that we can rely upon the professionalism of the district judges to main-

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95. Dalton, *supra* note 91, at 86-93.

96. See Carrington, *The Power of the District Judges*, *supra* note 34. But cf. Wright, *supra* note 34 (questioning the increasing assumption of power over litigation by appellate courts).

tain their principled conduct with episodic scrutiny. Many appear to presume that judicial professionalism will sustain needed public trust and confidence in the integrity of the courts. Many know and accept the courts of appeals as institutions primarily given to creative making of law and policy.

If we continue on the present course, it would seem likely that the formal appeal of right in civil cases will be abandoned, even though that would be of little benefit to overcrowded appellate dockets. The courts of appeals seem likely to be forced to increase the range and depth of delegation to staff, perhaps increasingly to mature lawyers reporting to the court at large rather than individual judges. The courts of appeals seem likely to become increasingly selective about the cases in which they hear oral argument, confer, or explain themselves. In short, appellate courts are likely to become even more faceless to the lawyers and district judges. If so, their work will be increasingly disconnected from the realities of the district courts and the work of trial lawyers, who will give declining attention to the circuit courts. The utterances of the courts of appeals will be longer and more numerous, and less significant.

As the courts of appeals become less connected to the realities of the trial court, the Supreme Court must become less connected as well. Those who have proposed structural change to relieve the workload of the Supreme Court have, curiously, failed to consider the consequences of leaving the Court atop a hierarchy that it is diminishingly able to control. Neither variation of the National Court of Appeals or the Intercircuit Tribunal would serve to enhance the "effectiveness of command" within the federal judiciary. With or without the kind of help that is provided by those proposals, it would seem that the Court would be destined to write longer and broader opinions having less impact on the routine exercise of the judicial power of the United States.

One must acknowledge that this may not be a malign event. Humane and professional district judges may use their growing freedom and discretion to the greater advantage of litigants than could have been achieved through a more tightly textured judicial system that more rigorously said what it meant and meant what it said. These judges might work in the tradition of the great Chancellors.

### B. Another Road

Is there any alternative to this hope? It is surely possible that a coming generation will perceive the matter in a different light and wish to restore "effectiveness of command" to a position of priority in the system. Such a program would not be free of risk. A hierarchy that is too tightly structured may be unable to attract to judgeships the kinds of persons our hopes and expectations would require. Overreaction to this problem could depreciate the quality of the judiciary, which is a consequence not to be taken lightly. And the smallest step in the direction of a more effective hierarchy may have some of that effect.

I will discuss here only one such alternative, although doubtless many are feasible. I choose this one because knowledgeable persons advanced it and because it might work well at manageable costs. I have in mind a variation on the general idea advanced by Seth and Shirley Hufstедler in 1971,<sup>97</sup> which would insert a fifth level in the hierarchy between the district courts and the courts of appeals.

The Hufstедler proposal would not require the establishment of yet another rank of judge. District judges could staff the new tier, perhaps with occasional help from individual circuit judges working in the circuit-riding tradition. The court (or perhaps we might call it the appellate division of the district court) would sit in panels of three judges, generally those nearest at hand, but excluding the judge who tried the particular case. The right of appeal not only would be preserved, but renewed and rehabilitated by rules of court that assured oral argument, conferences of the sitting panel, and written explication of the results. The opinions would be published on biodegradable paper, perhaps a special kind developed to dissolve in ten years.

To be sure, the right of appeal to other district judges has its limitations. Trial judges are known to be tolerant of one another's quiddities. Regular participation by circuit judges might relieve this favoritism, as might the increasing familiarity of the district judges with the role of reviewer. In any event, district judges can be counted upon to take an interest in the individual fates of litigants; they know that this is their primary responsi-

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97. Hufstедler & Hufstедler, *Improving the California Appellate Pyramid*, 46 L.A. B. BULL. 275 (1971).



bility. It would be possible to reduce the restrictions, if desirable, on the scope and timing of review in such a court, close as it is to the action in the trial court. To such extent, the panel would resemble a three-judge district court, which is a familiar institution designed to serve the same general purpose of protecting the public from the idiosyncracies and indiscretions of individual district judges.

For reasons of economy, it might prove desirable to bypass this level of review in certain classes of cases deemed particularly appropriate for scrutiny by the higher appellate courts. But most cases proceeding beyond this level presumably would proceed through discretionary review limited to errors of law. While I remain quite open to other and better ideas, I would favor a reform along these lines as an acceptable means of securing at least some of the values that our predecessors sought to secure by the Evarts Act of 1891.

An interesting feature of this proposal is the light it sheds on the remaining function of the courts of appeals. Once we truly and conclusively divest those courts of the error-correcting function in this way, it becomes less clear for some observers that the courts of appeals have an important function yet to perform. They then would be indeed junior supreme courts. But such an awkward, patchwork design to perform that function! For institutions given to lawmaking, those courts are organized as poorly as can be imagined. There are too many judges, too many circuits, the panels are much too small, and the en banc fifth level is redundant. Radical surgery on the courts of appeals surely would follow adoption of the Hufstedler proposal.

### C. Conclusion

I hope that I have been careful to avoid prediction. I close now with such an indiscretion. My prediction is that the road we will take with respect to the rehabilitation of the federal appellate courts as systems of control will be a choice deeply influenced by the social and political context of the coming century. Just as the Evarts Act was a product of the nineteenth century search for order, authority, and stability, and just as our contemporary indifference to the values of the Evarts Act are the product of a time marked by our confident ambition to open society by judicial decree, so our institutions surely will be re-

shaped by a jurisprudence that reflects the mood and the temper of the times to come. Institutional forms, of necessity, will follow functions, and the future functions of the courts of appeals, no less than those of other institutions, will result from the social and political contexts in which they will perform.

