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## Judicial Stratification and the Reputations of the United States Courts of Appeals

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## JUDICIAL STRATIFICATION AND THE REPUTATIONS OF THE UNITED STATES COURTS OF APPEALS

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JUDICIAL STRATIFICATION AND THE  
REPUTATIONS OF THE UNITED STATES COURTS  
OF APPEALS

MICHAEL E. SOLIMINE\*

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*[A] reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask.*<sup>1</sup>

I. INTRODUCTION

Many people, it seems, are concerned throughout their lives in varying ways with how others think about or are affected by them—that is, their status, prestige, influence, or reputation.<sup>2</sup> Similar judgments are ubiquitous in our legal culture. They often guide a student’s choice of law school, a lawyer’s choice of firm, area of practice, or which judge to clerk for, or a client’s choice of attorney, to name just a few. They also often guide our views about individual judges, whether on the U.S. Supreme Court<sup>3</sup> or lower courts,<sup>4</sup> both within a particular period and across time.

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\* Donald P. Klekamp Professor of Law, University of Cincinnati College of Law. This Essay was prepared for the symposium on Empirical Measures of Judicial Performance in the *Florida State University Law Review*. Discussions at various times with a number of people, especially Mitu Gulati and Larry Lessig, have greatly aided my thinking on this topic. I am particularly grateful for early discussions with Larry Lessig that eventually culminated in our article, *see infra* note 21. This Essay benefited from the comments of participants in the University of Cincinnati College of Law Summer Scholarship series and from comments on an earlier draft by Mitu Gulati, Richard Posner, and James Walker. Any errors that remain are mine.

1. A quote of Judge Learned Hand. *Yale Elec. Corp. v. Robertson*, 26 F.2d 972, 974 (2d Cir. 1928).

2. See ALAIN DE BOTTON, *STATUS ANXIETY* (2004); MICHAEL MARMOT, *THE STATUS SYNDROME: HOW SOCIAL STANDING AFFECTS OUR HEALTH AND LONGEVITY* (2004) (discussing how social hierarchy affects health); cf. ROBERT WRIGHT, *NONZERO: THE LOGIC OF HUMAN DESTINY* 26-27 (2000) (arguing that pursuit of social status is characteristic of all human history and prehistory); Richard H. McAdams, *Relative Preferences*, 102 *YALE L.J.* 1, 3 (1992) (drawing from psychology, sociology, anthropology, and economics and asserting that “[w]hether it is termed ‘status,’ ‘prestige,’ or ‘distinction,’ people sometimes seek—as an end in itself—relative position”).

3. *E.g.*, LEADERS OF THE PACK: POLLS & CASE STUDIES OF GREAT SUPREME COURT JUSTICES (William D. Pederson & Norman W. Provizer eds., 2003).

4. *E.g.*, Mitu Gulati & Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 *IOWA L. REV.* 1141, 1143 (2002) (referring to well-known lower federal court judges Henry Friendly, Learned Hand, Richard Posner, and Frank Easterbrook).

Status and reputation also guide our view of multimember courts. For example, we often speak, if only indirectly, of differences in reputation of the U.S. courts of appeals<sup>5</sup> or of the U.S. Supreme Court at different periods in its history.<sup>6</sup> We have a sense of some courts dominating others, either in quality, importance, or by other comparative measures. Whether speaking of individual judges or the courts on which they sit, studies of quality immediately run into measurement problems. Status, reputation, and similar concepts seem largely subjective. One way to deal with the problem is to employ various types of citation analysis. Determining how often a particular judge or court has been cited by others can potentially draw more objective differences between judges and courts.

In the past decade there has been a boomlet of studies using citation analysis to gauge the reputation or influence of particular judges.<sup>7</sup> Until recently, however, there has been little systematic study of the reputation or influence of multimember courts as such. My goal in this Essay is to fill some of that gap by exploring the reputations—both historically and at the present time—of the individual U.S. courts of appeals. That is, I will compare and contrast the reputations of the thirteen (as the number stands now) courts of appeals: the First through Eleventh Circuits, the Court of Appeals for the District of Columbia Circuit, and the Federal Circuit.<sup>8</sup>

This Essay proceeds as follows. Part II addresses and disentangles the concepts of reputation, prestige, and influence, particularly as they are used in the legal community. It considers various measures of those concepts, principally, though not only, through citation analysis. I address the pros and cons of that, and other measures, and I explore problems associated with attributing reputation to collective entities, like multijudge courts. In Part III, I address efforts,

5. President Clinton, for example, when announcing the Supreme Court nomination of Judge Ruth Bader Ginsburg, of the U.S. Court of Appeals for the District of Columbia Circuit, referred to her service on “the second-highest court in our country.” *Transcript of President’s Announcement and Judge Ginsburg’s Remarks*, N.Y. TIMES, June 15, 1993, at A24. For a more recent example, see Chris Mooney, *Circuit Breaker*, AM. PROSPECT, Spring 2003, at A14 (referring to the D.C. Circuit as “the second most powerful court in the United States”).

6. See, e.g., HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 3-12 (3d ed. 1992); Jim Chen, *Judicial Epochs in Supreme Court History: Sifting Through the Fossil Record for Stitches in Time and Switches in Nine*, 47 ST. LOUIS U. L.J. 677 (2003).

7. Various types of citation analysis have been used for decades in the legal community to gauge the impact of books, law review articles, court decisions, or judges, among other things. See generally RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 411-40 (2001); Symposium, *Interpreting Legal Citations*, 29 J. LEGAL STUD. 317 (2000).

8. Officially, each of the courts I am addressing is “known as the United States Court of Appeals for the [particular] circuit.” 28 U.S.C. § 43(a) (2000). Nonetheless, in this Essay I will, for convenience, use the terms “courts of appeals” and “circuits” or “circuit courts” interchangeably.

both historical and contemporary, to measure the reputations of the courts of appeals. Initially, I consider various accounts from the popular press and other nonscholarly sources that attempt to rank the circuits. Then I turn to somewhat more objective measures, such as surveys of attorneys and federal judges, of the reputations of circuits. Finally, I consider how various studies of citation analysis of the influence of particular federal appellate judges can be brought to bear on the reputation of the circuits on which they sit.

As Part III outlines, historically and to some extent to the present day, the Second and D.C. Circuits have been regarded as enjoying the best reputation and most influence. Yet some, though not all, of the putatively objective measures of influence place the Seventh Circuit far above those two. In Part IV, I explore this apparent disconnect and conclude that a variety of factors have led, in general, to the overall homogenization of reputation among the circuits, with the notable apparent exceptions of the D.C., Second, and especially the Seventh Circuits. In the conclusion to the Essay, I briefly address whether reputation in this context remains a meaningful concept, offer suggestions for future research, and link measures of circuit reputation to the measurement of judicial performance in general.

## II. MEASURING JUDICIAL REPUTATION, PRESTIGE, AND INFLUENCE: INDIVIDUAL JUDGES AND MULTIMEMBER COURTS

There is no simple way to define the obviously related ideas of reputation, prestige, and influence.<sup>9</sup> Reputation seems to be the broadest concept. In one sense, it ties to the idea of recognition—that is, the difference in the degree to which some people or institutions are more conspicuous, or more noticed, than others. But reputation is not just recognition. A person might be well known because of a well-publicized ad campaign, but it would not necessarily follow from this that he or she also has a reputation. What reputation adds to the concept of recognition is a glimpse of some part of one's character. If someone has a reputation for honesty, that means that he or she is known for being honest. Conversely, if someone has a reputation for dishonesty, that means he or she is known for being dishonest. Reputation captures some part of an individual's character and projects that part into the future. It is a way of reckoning some part of what

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9. In the following discussion of these terms, I draw from JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 84-89 (1982); RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 58-73 (1990); Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 *POL. BEHAV.* 83, 84-85 (1983); David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 *J. LEGAL STUD.* 371, 371-72 (1999); and Rebecca L. Sandefur, *Work and Honor in the Law: Prestige and the Division of Lawyers' Labor*, 66 *AM. SOC. REV.* 382, 383-84 (2001).

some individual has been as an index of what he or she will be. It follows that reputation may be negative or positive.<sup>10</sup> And in this way, we capture the difference between reputation on the one hand, and prestige and respect, on the other. For one may have a good or bad reputation as a judge, but only if one has a good reputation does one also have prestige, or respect, as a judge. One may have prestige for reasons other than a good reputation—prestige may come from associations with prestigious institutions or people.

Further parsing of these concepts is unnecessary for present purposes. Suffice it to say that, in this context, prestige typically means “the amount of respect, regard, or esteem” a judge enjoys among other judges or interested publics.<sup>11</sup> Since not all judges are equally prestigious, the concept has an inherently comparative and hierarchical element: some judges will inevitably be regarded as more prestigious, or as enjoying a higher reputation than others.<sup>12</sup> Influence, in contrast, is “the extent to which the actions of one person have an effect on the views or behavior of others.”<sup>13</sup> An influential judge is one whose opinions, or other work product, has affected the thinking or work product of the judges or other actors in the legal community.

In a simple world, we might imagine a simple linear relationship between legal reputation, prestige, and influence. A good judge would gain, by being a respected judge, prestige. Prestige and respect would build reputation, and once established, a good reputation would translate into influence. Influential judges would be those with the best reputation, and those with the best reputation would be those that were most influential. This simple world is not the one we inhabit. For one thing, the causal arrows between these concepts can get complicated. For example, a judge with low prestige or reputation (or none at all) can come to be influential because other judges follow her lead simply due to *stare decisis* or because that judge fortuitously rendered decisions that, for good or ill, have high precedential value. More important, shot through all these notions of judgment are conceptions of value, many of which are highly contested in our legal culture. To the extent that conceptions of value differ among individuals or among groups or classes of individuals, there are differences in views about good judges, or respected judges, or courts that enjoy good reputations. In short, an element of subjectivity becomes inherent in any discussion of reputation, prestige, and even influence.

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10. POSNER, *supra* note 9, at 58.

11. Klein & Morrisroe, *supra* note 9, at 371-72.

12. Sandefur, *supra* note 9, at 383-84.

13. Klein & Morrisroe, *supra* note 9, at 372.

There is, then, no simple or uncontentious way to describe the great judge or to mark out the most respected or influential courts. But this has not stopped people from talking about great judges or speaking of influential courts. Typically, such judges served on the Supreme Court, state high courts, or the lower federal courts, and they all produced work products—published written opinions—that are more or less permanent, accessible at relatively low cost, and in effect are required (or strongly recommended) reading due to *stare decisis*.<sup>14</sup> In the past, scholars have examined attributes of what can be called the judicial craft. It can include the literary quality of opinions, the contribution the decisions make to the development of legal rules and principles, creativity, and skillful legal analysis, among other things.<sup>15</sup> Still other factors are said to affect judicial reputation, some of which are largely or completely outside the control of the judge, such as longevity, pre-court or post-court careers, the proximity in time of the judge's career to the person gauging the judge's reputation, personal integrity, and ability to persuade other judges (in a multimember court).<sup>16</sup>

Of course, many, perhaps most, of these factors would be considered by many people today as difficult to accurately or coherently measure, and hence subjective, or merely in the eye of the beholder.<sup>17</sup> In a similar vein, the correctness of decisions by the judges, in the eyes of the evaluator, might be said to determine reputation, in whole or in part.<sup>18</sup> One way around the skepticism about measuring reputation and related concepts is to look for correlative objective measures. It is no surprise, then, that citation analysis has been embraced in various contexts as the desired objective measure. In the academic community, citations can be used to measure the influence of prior published work. Professional norms require that later work build upon and, more importantly for us, refer to the earlier work. The same holds true for legal academic work and court opinions. Ci-

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14. By contrast, compare the environment for a smart and thoughtful trial judge. Not all of her decisions may be rendered by written and accessible opinions; those that are not published in official reporters bind no one and thus suffer in influence. None of this is to say that the judge cannot enjoy a high reputation; but it will likely be restricted geographically to the lawyers that practice before her, and perhaps to nearby judges.

15. Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 523-24 (1994) (book review); William G. Ross, *The Ratings Game: Factors That Influence Judicial Reputation*, 79 MARQ. L. REV. 401, 404-05, 409 (1996).

16. Ross, *supra* note 15, at 411-42 (discussing these and other factors).

17. Linda Przybyszewski, *The Dilemma of Judicial Biography or Who Cares Who Is the Great Appellate Judge? Gerald Gunther on Learned Hand*, 21 LAW & SOC. INQUIRY 135, 138-51 (1996) (book review). *But cf.* Lawrence B. Solum, *A Tournament of Virtue*, 32 FLA. ST. U. L. REV. 1365 (2005) (arguing that criteria for judicial excellence can be developed and applied in a principled manner).

18. Ross, *supra* note 15, at 405-11.

tations, then, have come to be used as a convenient proxy for reputation, prestige, and influence.<sup>19</sup> “Presumably, the best opinions will be cited more often than others.”<sup>20</sup>

Citation analysis would seem to best serve as the measure of influence since frequent citation would, of itself, not necessarily translate to prestige or reputation. Yet even in that arena, the limits of citation analysis are well documented. Some of the possible drawbacks include: most studies do not distinguish between favorable or critical citations; many citations may reflect little more than the longevity of a judge’s career or the age of an opinion; a citation may be used to bolster an already-reached result; many citations are buried in string cites or are the result of self-citation; certain “superprecedents” on long-established and well-accepted principles may cease to be cited at all; and given that legal opinions are a public good, there are no costs associated with citing more or fewer cases on a particular point, so small differences in the perceived quality of opinions may lead to disproportionate disparities in the citation of cases.<sup>21</sup>

For many of the same reasons, citation analysis is at best an imperfect measure of the reputation of the authority being cited. Simply being cited a great deal does not mean a particular decision (or the judge that authored it) enjoys a high reputation, and the reverse is true as well. On the one hand, a particular decision may be the subject of frequent citation largely because it deals with an oft-litigated topic, not because it is a particularly admirable discussion of the topic.<sup>22</sup> On the other hand, as just observed, a particular case, due to its landmark quality, may come to be so embedded in legal thought that later citation is thought to be less necessary or not necessary at all.<sup>23</sup> All of which is to say that the quantity of citations does not automatically translate into a barometer of the quality of the work being cited—though it is not unrelated either. It is difficult to believe

19. POSNER, *supra* note 7, at 421-24.

20. Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 306 (2004).

21. POSNER, *supra* note 7, at 425-28; William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 271-76 (1998).

22. A study of frequently cited U.S. courts of appeals decisions illustrates this point. See Robert Schriek, *Most-Cited U.S. Courts of Appeals Cases from 1932 Until the Late 1980s*, 83 LAW LIBR. J. 317, 322-23 (1991). Of the nineteen most-cited cases decided after 1932, the top three were decisions that, respectively, clarified the standard for deciding a directed verdict motion in a civil case; set out criteria for awarding attorney’s fees in civil rights actions; and held that decisions of the former Fifth Circuit were precedent for the then-new Eleventh Circuit. *Id.* (discussing *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); and *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981)).

23. William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 251 (1976).

that a particular decision, thought brilliant by some or many, would not undergo significant citation later.

Another reason for caution when using citation analysis, or any other measure, to study judicial reputation is the scope of the audience. Many studies are not entirely clear on whose opinion of reputation is being directly, or indirectly, studied. Within the confines of citation analysis, when examining the decisions of an intermediate appellate court, such as the U.S. courts of appeals, do we look to citations by the Supreme Court? by courts of appeals (intra- or intercircuit) themselves? by federal district courts? by legal academics? by nonlegal policymakers? All of these audiences have their own differing perceptions of the reputations of the courts of appeals.<sup>24</sup> Given the relatively low public profile that the courts of appeals as a whole, and the circuit judges in particular, have compared to, say, the Supreme Court,<sup>25</sup> probably the judges, practitioners, and academics who closely follow court of appeals decisionmaking would be the most fruitful audience to survey.

A final point is to consider whether it is meaningful to speak of the reputation of a multimember court as a whole, as opposed to the reputations of the judges who constitute that court. With rare exceptions,<sup>26</sup> the studies of legal reputation deal with a particular judge or a particular case, not with an entire court as such. One might conclude that there is no useful distinction between the two concepts. Speaking again of the U.S. courts of appeals, “one could argue that a circuit’s influence is nothing more than the average of the influence of its judges.”<sup>27</sup> Even if the circuit can be said to possess a reputation separate from the judges, “it would be difficult to disentangle it from the influence of the individual judges in the circuit.”<sup>28</sup> If one circuit follows a case from another, how do we know if the invocation is to

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24. Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 505 (1989).

25. Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 618 (2000) (observing that even “ordinary” Supreme Court Justices have much more attention in the press than “non-ordinary” lower court judges like Roger Traynor or Henry Friendly); see also William M. Landes & Richard A. Posner, *Citations, Age, Fame, and the Web*, 29 J. LEGAL STUD. 319, 329-36 (2000) (explaining that a study of references to judges and legal scholars on websites and newspapers indicates that, with the exception of Robert Bork, Supreme Court Justices are at the top of the list, with Richard Posner, Guido Calabresi, Frank Easterbrook, Jerome Frank, and Henry Friendly trailing behind).

26. The principle exception is Greg Caldeira’s intercourt citation analysis of state supreme courts. See Caldeira, *supra* note 9.

27. Landes, Lessig & Solimine, *supra* note 21, app. at 327.

28. *Id.*

acknowledge the author of the opinion or the reputation of the circuit from which it came, or both?<sup>29</sup>

Yet, there are several reasons to suggest that there are meaningful distinctions between the reputations of judges and the courts they compose. First, it is common, I think, in legal discourse to refer to the “court’s opinion” or the “court’s decision” more often than the decision of a particular judge. This may be for convenience, or it may reflect a lack of knowledge of the author of the opinion; either way it suggests that the court, as a collective entity, has a reputational existence apart from that of its members (with the reverse being true as well).

Second, there are institutional constraints in place that, at least in part, suggest that a circuit is an entity separate from the judges, and indeed from other circuits. Start with the fact that (with the exception of the Federal Circuit) the circuits have nonoverlapping geographic boundaries. All of the judges are paid equally and seniority plays little role, other than to determine who will serve as chief judge.<sup>30</sup> With regard to decisionmaking, most of the work is done via three-judge panels, subject to override by the circuit sitting en banc.<sup>31</sup> Those panels are typically constituted by random selection,<sup>32</sup> and the membership of the panels are often not revealed to counsel until shortly before oral argument.<sup>33</sup> With a few exceptions, three-judge panels must follow circuit precedent.<sup>34</sup> While non-circuit judges (that is, visiting judges from other circuits or district judges sitting by designation) are members of a significant number of three-judge panels,<sup>35</sup> their decisions still carry the authority of the circuit. Finally, most courts of appeals decisions are signed by the presumed lead author; the exceptions are unsigned short orders (often not officially

29. One way to partially deal with this problem is through the use of “invocation” studies to determine those occasions where a court gratuitously refers to the name of the judge who authors the opinion. See Part III, *infra*, for a discussion of these studies.

30. See 28 U.S.C. §§ 44(d), 45 (2000) (regarding judicial salaries and appointment of the chief judge, respectively).

31. See *id.* § 46(c) (providing for en banc procedure). For discussion of en banc process, see Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 176-80 (2001).

32. J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1069-78 (2000) (describing practices of all of the circuits).

33. *E.g.*, 5TH CIR. I.O.P. 34 (one week before oral argument); 6TH CIR. I.O.P. 34(c)(2) (two weeks before oral argument); 11TH CIR. R. 34-4, I.O.P. 7 (one week before oral argument or earlier as determined by the court). See generally Brown & Lee, *supra* note 32, at 1075-78 tbl. 1 (summarizing notification practices from all of the circuits).

34. Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 822 (1993).

35. JUDITH A. MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 38-39 (1993).

published) or per curiam opinions.<sup>36</sup> The long tradition has been for decisions to be reached and opinions to be drafted in a collegial manner, that is, they are not simply the work product of one judge.<sup>37</sup>

Third, it seems unlikely that circuits qua circuits will engage in strategic behavior when it comes to burnishing their reputation. Even if individual judges might be inclined to do this,<sup>38</sup> to imagine circuits inflating citations to other circuits, expecting increased citation in return, imagines extensive collective action. The high cost of such collective action that would be required for two or more circuits to collude makes it extremely unlikely that circuit citation practice is in any meaningful sense exaggerated.<sup>39</sup>

### III. MEASURING THE REPUTATIONS OF THE UNITED STATES COURTS OF APPEALS

In this Part, I consider various sources that, directly or indirectly, can be said to gauge the historical and contemporary reputations of the federal courts of appeals. In Part IV, I will offer explanations for some of the patterns that emerge. I focus on the courts of appeals, since there has been relatively little attention given them, as collective entities, in the emerging literature on judicial prestige and influence. And I focus on *reputation*, because it too has not been the subject of extensive inquiry. There has been a good bit of citation analysis, but as already mentioned, it is a tool that best measures *influence*. Which is again not to say that the concepts are unrelated or that statistical or other measures of influence cannot be brought to bear when thinking about prestige or reputation. They do, as will soon be demonstrated.

The history and current institutional status of the courts of appeals is familiar, and only a brief overview is necessary here. The courts of appeals, as we know them, began business in 1891. Prior to that, there were no intermediate appeals courts in the modern sense in the federal system. The 1789 Judiciary Act had established district and circuit courts. The latter had original jurisdiction over some matters and appellate authority over certain types of civil and other cases. The circuit courts, however, did not have their own judges. They were staffed

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36. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 173-74 (1996) (finding that only about six percent of opinions published in 1994 in the *Federal Reporter, Third Series*, were per curiam).

37. Whether the tradition always holds true is another matter. See generally Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003).

38. Choi & Gulati, *supra* note 20, at 308-09 (arguing that strategic behavior by judges in this regard is unlikely given the existence of frequently rotating three-judge panels and norms of cooperation).

39. Landes, Lessig & Solimine, *supra* note 21, app. at 327.

by district judges and Supreme Court Justices sitting on circuit.<sup>40</sup> There initially were three geographically distinct circuits,<sup>41</sup> but other circuits were added as the nation's territory expanded, eventually reaching nine.<sup>42</sup> Judges who specifically sat on the circuits were eventually authorized as well,<sup>43</sup> but various problems with the lack of a formal intermediate appellate court<sup>44</sup> led to their creation by the Evarts Act in 1891.<sup>45</sup> The new circuit courts of appeals had their own judges and were geographically distributed in a manner very similar to today. Formal changes since then have been few; the present Tenth Circuit was carved out of the Eighth in 1926, and the present Eleventh Circuit was carved out of the Fifth in 1980. In 1982, Congress created the Federal Circuit, which sits in Washington, D.C., but has national appellate jurisdiction over patent and various other specialized cases.<sup>46</sup>

Today, many formal aspects of the thirteen circuits are uniform, such as pay and the disposition of most cases by three-judge panels. But some things are different. The number of states and their populations differ,<sup>47</sup> as does the number of authorized active judges, which currently ranges from six (First Circuit) to twenty-eight (Ninth Circuit).<sup>48</sup> No doubt, many other things could be added to the

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40. RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 29 (5th ed. 2003) [hereinafter HART & WECHSLER].

41. *Id.*

42. *Id.* at 35.

43. *Id.* at 36.

44. *Id.* at 36-37.

45. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826. The old circuit courts remained in existence, but their appellate jurisdiction was abolished; the circuit courts themselves were entirely abolished in 1911. HART & WECHSLER, *supra* note 40, at 37 n.65.

46. HART & WECHSLER, *supra* note 40, at 42-43. For useful overviews of the history of the courts of appeals, see THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 1-13 (1994); COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: FINAL REPORT 7-28 (1998) [hereinafter COMMISSION REPORT]. A map of the current circuits is found in the Appendix, *infra*, at page 1363.

47. As of 1998, the population within each circuit ranged from 528,964 (D.C.) and 13,337,709 (1st) to 30,236,545 (6th) and 51,453,880 (9th). Five of the circuits cover three states; the Ninth Circuit covers eleven states. COMMISSION REPORT, *supra* note 46, at 27 tbl.2-9.

48. The current breakdown is as follows:

CIRCUITS	NUMBER OF JUDGES
D.C.	12
1st	6
2d	13
3d	14
4th	15
5th	17
6th	16
7th	11
8th	11
9th	28
10th	12
11th	12
Federal	12

list.<sup>49</sup> One thing that has differed, at least starting in the 1920s,<sup>50</sup> has been the reputation of the various circuits. From that time, up to the present, there is considerable, if uneven, evidence, culled from the popular press and various other sources, in which one or two circuits have had excellent reputations, above the rest, in various quarters of the legal community.

Over much of the twentieth century, the conventional wisdom has ranked the Second and District of Columbia Circuits highest with regard to prestige and influence. For example, in 1974 Washington journalist Joseph C. Goulden, in his entertaining survey of federal judges, labeled the D.C. Circuit as “the second most important court in the United States.”<sup>51</sup> According to Goulden, this was due to “the court’s jurisdiction over appeals of decisions of a host of key federal regulatory agencies” and the fact that few such cases are reviewed by the Supreme Court.<sup>52</sup> Similar comments in the modern press are not difficult to find.<sup>53</sup> During the New Deal, President Roosevelt presciently noted that the D.C. Circuit had “taken on a wholly new importance in the last few years [and] is now easily the second most important Federal Court in the country.”<sup>54</sup> Many judges on that court have been drawn from a national pool,<sup>55</sup> and over the years the D.C. Cir-

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49. See Stefanie A. Lindquist, *Bureaucratization and Balkanization in the Federal Courts of Appeals: Implications for Case Processing* (2000) (unpublished paper presented at the 2000 annual meeting of the Southern Political Science Association, on file with the author) (documenting differences among the circuits regarding caseload, docket composition, use of oral argument, opinion publication, and size of staffs, among other things).

50. Though I make no claim to have thoroughly canvassed the possible historical sources, I have found relatively few discussions in the sources consulted and cited in this Essay of the reputations of the courts of appeals from 1891 to the 1920s or, for that matter, for the circuit courts prior to 1891. I tend to think there were differing reputations, and that at least to some degree they influenced the modern reputations discussed in this Essay. For example, the distinctive reputational flavor of the modern D.C. Circuit might be traced, in part, to the unique federal trial and appellate courts that Congress has created for the District of Columbia since 1789. See CHRISTOPHER P. BANKS, *JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT 7-10* (1999) (tracing the complicated historical roots of the modern D.C. Circuit). On the other hand, perhaps the phenomenon of the appellate court reputation is closely linked to the appointment of Learned Hand to the Second Circuit in 1924. See *infra* note 60.

51. JOSEPH C. GOULDEN, *THE BENCHWARMERS: THE PRIVATE WORLD OF THE POWERFUL FEDERAL JUDGES* 252 (1974).

52. *Id.*; see also BANKS, *supra* note 50, at 2-3.

53. *E.g.*, Paul M. Barrett, *In Rare Reversal, Court Blocks Libel Suit over Book Review*, WALL ST. J., May 4, 1994, at B1; Marilyn Berger, *David Bazelon Dies at 83; Jurist Had Wide Influence*, N.Y. TIMES, Feb. 21, 1993, at 38; Katherine Marsh, *Ideology Matters: The Estrada Filibuster and the Politics of Confirmation*, LEGAL AFF., July/Aug. 2003, at 56, 56; Jeffrey Toobin, *Advice and Dissent: The Fight over the President’s Judicial Nominations*, NEW YORKER, May 26, 2003, at 42, 43.

54. Cable from President Roosevelt to Charles E. Clark (Aug. 19, 1937), *quoted in* SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 26 (1997).

55. BANKS, *supra* note 50, at 3-4; Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. 159 (1993).

cuit has been a source of jurists seriously considered by Presidents for appointment to the Supreme Court, with several actual appointments.<sup>56</sup>

Similarly, the respect historically given the Second Circuit is often attributed to the brilliance of the judges who have served on the court, as well as to the commercial and other important issues decided by that court.<sup>57</sup> These accounts were echoed by federal judges<sup>58</sup> and academic commentators.<sup>59</sup> Even more so than the D.C. Circuit, I think, the Second Circuit's reputation is closely aligned with that of the well-known judges that served on it—starting with Learned Hand, who served from 1924 to 1961,<sup>60</sup> but also including Charles Clark, Jerome Frank, Augustus Hand, and Henry Friendly, among others.<sup>61</sup>

56. BANKS, *supra* note 50, at 4 (noting that one-third of the current Court formerly sat on the D.C. Circuit (Justices Ruth Bader Ginsburg, Scalia, and Thomas) and that other judges have either been nominated (Bork) or placed on short lists (Douglas Ginsburg) for consideration). It is also worth mentioning that Chief Justices Fred Vinson and Warren Burger also served on the D.C. Circuit. *Id.* at 125.

57. *E.g.*, Margaret A. Jacobs, *Court Finds Limits on Insurance Held by Asbestos Firms*, WALL ST. J., May 18, 1994, at B7; *The Talk of the Town: George's Choice*, NEW YORKER, Jan. 18, 1993, at 31, 31 (“[T]he Second Circuit is often called the second most important court in the nation.”). Indeed, one measure of influence or reputation could be to determine the comparative coverage or mention of the circuits in the popular press, *cf.* Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66 (2000) (measuring coverage of Supreme Court decisions in *The New York Times*), or in the legal press (for example, determining how often the circuits are mentioned in *The National Law Journal* or have decisions summarized in *United States Law Week*).

58. *See* J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 142 (1981) (noting that a survey of circuit judges in the late 1960s found that they regarded the Second Circuit “as the front-runner [in prestige] for reasons of its business, its bench, and its bar” with the D.C. Circuit coming in second).

59. *Id.* at xix (referring to the Second Circuit as “the nation’s leading commercial court”); MARVIN SCHICK, LEARNED HAND’S COURT 5 (1970) (referring to the Second Circuit “as one of the top appellate courts in the history of the country”).

60. It is difficult to overstate the prestige of Judge Hand. He was the subject of a magisterial biography eleven years ago, GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994), which spawned further discussion of judicial biography in general and of Hand in particular. *See* Symposium, *National Conference on Judicial Biography*, 70 N.Y.U. L. REV. 485 (1995); Posner, *supra* note 15; Przybyszewski, *supra* note 17. Virtually every modern discussion of judge and court reputation makes some mention of Judge Hand, over four decades after his death.

61. Clark, while Dean of Yale Law School, was instrumental in drafting the Federal Rules of Civil Procedure. *See generally* Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914 (1976).

Frank was a prominent New Deal lawyer and a famed legal realist. *See* Robert Jerome Glennon, *The Role of a Circuit Judge in Shaping Constitutional Law: Jerome Frank's Influence on Supreme Court*, 1978 ARIZ. ST. L.J. 523, 524-25.

Augustus Hand was Learned's first cousin, and he was highly thought of in his own right. Augustus sat on the Second Circuit from 1927 to 1954. For further discussion of the tenure of the Hand cousins on that circuit, see Michael E. Solimine, *Nepotism in the Federal Judiciary*, 71 U. CIN. L. REV. 563, 579-80 (2002).

Yet until very recently, there had been little effort to empirically inform these assumptions, particularly, though not only, through the comparison of one circuit (or particular judge) to another.<sup>62</sup> In one study, Marvin Schick, focusing on the decades Learned Hand served on the Second Circuit, examined how often the circuits were reviewed by the Supreme Court. He found that between 1941 and 1951 the Second Circuit was reviewed the most but reversed the second least; both findings were, according to him, indicia of the circuit's prestige and influence.<sup>63</sup> In another study, J. Woodford Howard examined citation practices in three circuit courts (D.C., Second, and Fifth) from 1965 to 1967. He found, among other things, that the Ninth Circuit was cited most often by the other three circuits, while the rest of the circuits (including the Second) were cited at about the same rate by each other.<sup>64</sup> The D.C. Circuit came in last.<sup>65</sup> A more recent study examined the most-cited courts of appeals cases from mid-1932 to mid-1988.<sup>66</sup> Of the nineteen most-cited cases, six were from

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Friendly was a highly esteemed lawyer who, after his appointment, made significant contributions to, among other things, securities law. See Mitu Gulati et al., *Fraud by Hindsight*, 98 NW. U. L. REV. 773, 796-98 (2004); Margaret V. Sachs, *Judge Friendly and the Law of Securities Regulation: The Creation of a Judicial Reputation*, 50 SMU L. REV. 777 (1997). Friendly also made significant contributions to administrative law. See A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. REV. 1 (1999).

Perhaps the reputation of a circuit can be strengthened, or diminished, by the prestige of federal *district* judges who sit in the circuit. Consider, for example, district judges Edward Weinfeld and Jack Weinstein in the Second Circuit or John Sirica of Watergate fame in the D.C. Circuit. This is not to denigrate esteemed U.S. district judges in other circuits, such as Charles Wyzanski in the First and Frank Johnson in the Fifth, just to name two. Still, it is interesting that most of the famed circuit judges discussed in this Essay were *not* formerly district judges, with the Hand cousins being a notable exception to the generalization. A fuller exploration of district judge reputation and its effect on circuit reputation is beyond the scope of this Essay. For discussion, see Karen Swenson, *Federal District Court Judges and the Decision to Publish*, 25 JUST. SYS. J. 121, 136 (2004); cf. Ahmed E. Taha, *Publish or Paris? Evidence of How Judges Allocate Their Time*, 6 AM. L. & ECON. REV. 1, 14 (2004) (linking publication decisions of U.S. district courts with norms of publication of the circuits in which they sit).

62. Marvin Schick remarked on this absence in 1970. SCHICK, *supra* note 59, at 348-50.

63. *Id.* at 334-36.

64. HOWARD, *supra* note 58, at 143 tbl.5.6.

65. *Id.* For a subsequent effort to statistically measure the reputation and influence of one judge (Jerome Frank) by determining how often opinions he authored or dissented from were reviewed by the Supreme Court, see Glennon, *supra* note 61, at 528-31.

66. Schriek, *supra* note 22, at 317. Schriek began his study in 1932 because the *Federal Reporter* prior to that date was not limited to publishing courts of appeals cases. *Id.* at 317 n.1. The citing sources included, apparently, all other courts, and Schriek did not differentiate between intra- and inter-circuit citations. See *id.* at 320-22. Although the pre-1932 cases were not systematically examined, the two most-cited cases from that era were *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (Van Orsdel, J.), and *Cohan v. Commissioner*, 39 F.2d 540 (2d Cir. 1930) (L. Hand, J.).

the Second Circuit (including two authored by Learned Hand), and six were from the D.C. Circuit.<sup>67</sup>

These studies are interesting and important and, as we shall see in a moment, served as useful models for more recent work. And they largely support the conventional wisdom of the prominence of the Second and D.C. Circuits. Nonetheless, they are not definitive given their age and the limited coverage of judges, courts, or decisions canvassed. It is to the more recent studies that I now turn.

First consider the view of attorneys. One helpful source is the *Almanac of the Federal Judiciary*, which profiles each circuit and quotes attorneys who litigate before those courts.<sup>68</sup> Not unexpectedly, attorneys in the Second and D.C. Circuits gave these circuits the highest compliments.<sup>69</sup> But attorneys in almost all of the other circuits also gave their own courts the highest compliments, sometimes comparing themselves favorably to the Second and D.C. Circuits.<sup>70</sup> The weight given these remarks must be discounted by the small sample size, their anecdotal and probably parochial nature, and the

67. Schriek, *supra* note 22, at 322-30. The cases, from highest to lowest citations, were: *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (Ainsworth, J.); *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974) (Roney, J.); *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (Godbold, C.J.); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (L. Hand, J.); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) (Moore, J.); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (Waterman, J.); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958) (per curiam); *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (Seitz, C.J.); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) (Medina, J.); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (Kaufman, J.); *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) (Aldisert, J.); *Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967) (Burger, J.); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970) (Leventhal, J.); *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954) (Bazelon, J.); *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971) (Wright, J.); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir. 1975) (Rosenn, J.); *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969) (en banc) (per curiam); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (L. Hand, C.J.); and *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (McGowan, J.).

68. The *Almanac* mentions that it surveys a "cross-section" of attorneys, but it makes no claims of having made a scientific survey of lawyers, or of having polled them with the same questions. See 1 ALMANAC OF THE FEDERAL JUDICIARY, at Intro. 1 (2005).

69. For comments on the Second Circuit, see 2 *id.* at 2d Cir. 1 ("definitely one of the better circuits"; "[t]he Second Circuit is top notch, the best in the United States"; "the circuit has been a preeminent leader on business issues"). For comments on the D.C. Circuit, see 2 *id.* at D.C. Cir. 1 ("one of the best [court of appeals] in the country"; "[a]lmost all of these judges are way above the average judge"; "[t]hese judges have all developed an expertise in administrative and regulatory law"; "uniformly impressive").

70. See, e.g., 2 *id.* at 1st Cir. 1 ("very scholarly"; "outstanding intellectual body"); 2 *id.* at 5th Cir. 1 ("[O]n the whole, the Fifth Circuit is on equal level with New York and D.C. and in the top 10-percent or so."); 2 *id.* at 7th Cir. 1 ("excellent court," "one of the best courts in the country," particularly emphasizing presence of Judges Posner and Easterbrook); 2 *id.* at Federal Cir. 1 ("The court's legal ability is very good."). But see 2 *id.* at 6th Cir. 1 ("It's a solid circuit, but not scholarly."); 2 *id.* at 10th Cir. 1 ("But if the Tenth Circuit still lags behind others, such as the Seventh Circuit, we're not behind by a big margin.").

fact that many of the attorneys surveyed did not have extensive appellate experience in other circuits, thus making comparisons difficult.

Next, consider David Klein's recent study of the courts of appeals, in which he reports his interviews of twenty-four appellate judges from six circuits.<sup>71</sup> The respondents were asked whether, in deciding cases, they gave particular weight to the decisions of certain judges or other courts.<sup>72</sup> The bottom line answer is, for most judges in most cases, not much. Most of them gave weight to what positions other circuits had taken on a particular issue, how many circuits had reached the issue, and whether there was a circuit split. The identity of the circuits was typically less important.<sup>73</sup> Klein reports the following "typical" reactions to questions on whether circuits have discernable reputations:

I really don't think so. When I was young, there was the Second Circuit, with Hand, Frank, and Swan. All the circuits are bigger now with their membership constantly changing. When you get circuits that big, it's not likely that you can have star courts.<sup>74</sup>

That's a will-o'-the-wisp I wouldn't trust as far as I could throw it. When you back away and look, it's hard to say.<sup>75</sup>

No. That's a dichotomy between the public and judges. Most federal judges would feel no one circuit is better than the others. The reasons: One, composition changes rapidly. There may be good judges on it now, but bad judges may join, the good may leave. Two, the difference in the size of the circuits. Some are so big they can't have a single reputation.<sup>76</sup>

In contrast, some of the judges did react *negatively* to the reputation of the Ninth Circuit:

The Ninth Circuit, of course, though it has great individual judges, is so large and its jurisprudence is so diversified over a tremendous area that it doesn't have the same jurisprudential integrity I think we have.<sup>77</sup>

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71. DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 18-19 (2002) (outlining methodology of interviews). Ten judges were from the Sixth Circuit, five from the Third Circuit, four from the Seventh Circuit, two each from the First and Eleventh Circuits, and one from the Fourth Circuit. *Id.* at 18, 19 n.10.

72. Klein asked the judges if "there [are] any circuits today which have a reputation for general excellence or which in your view merit such a reputation," and if they would be "more inclined to adopt rules from certain courts or judges than others." *Id.* app. B at 168-69.

73. See *id.* at 57, 89-92.

74. *Id.* at 92.

75. *Id.*

76. *Id.*

77. *Id.*

I've seen a tendency on the part of judges to recoil from, reject anything from the Ninth Circuit, because they're way out there, do a lot of experimenting with the law. There are a lot of knee-jerk reactions by other judges; they tend to discount any precedent from the Ninth—consider it too liberal, activist.<sup>78</sup>

In sum, according to Klein, “Judges typically do not think of whole circuits in evaluative terms and so do not weight precedents according to the circuit they come from.”<sup>79</sup>

Klein's respondents had some different views on the authors of decisions from other circuits, as “most felt that the name on the opinion did affect their decision making at times.”<sup>80</sup> As reported by Klein, some of their reactions were as follows:

Once in a great while I feel an initial kick because it's from a great judge—say Friendly or Wisdom. But usually it's the opinion itself, if it's a thoughtful opinion.<sup>81</sup>

I guess it might matter. I wouldn't distinguish by circuit. There are certain judges I know and have a lot of respect for. If I find they said something, I might give it a little more weight. Maybe “weight” is not the right word. I think through the case myself, but if a judge I respect agreed exactly with my position, I'd feel more satisfied, while if that judge were diametrically opposed I would pause.<sup>82</sup>

Sure, the better the judge, the more seriously you take them. Some people you know personally, others just through opinions, but you form a sense of how good they are through their work.<sup>83</sup>

I think so. If it's a judge I know or who is reputed for his scholarship or legal acumen, I will probably give greater deference than if the judge is unknown or has a lesser reputation.<sup>84</sup>

Oh, yeah. There are some I think I'm more simpatico with. Also, I certainly take note of ones from Posner. I'm impressed by Kearse, Oakes, and some others on the Second Circuit. This is factored in almost unconsciously. Judge Winter is just too conservative. He's supposed to be a fine judge, but I'm not very impressed.<sup>85</sup>

Even if there isn't a definitive body of law in other circuits but there's an opinion by a judge, even a dissent—I respect some judges more than others. . . . For example, Noonan on ethics, Pos-

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78. *Id.* at 92-93.

79. *Id.* at 93.

80. *Id.* at 94.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 95.

ner on economics. I would want to pick his brain. On the Fourteenth Amendment, Bork.<sup>86</sup>

Next, consider the circuit's relationship with the Supreme Court. Marvin Schick has suggested that the relationship may be a barometer of reputation.<sup>87</sup> The number of cases reviewed from a circuit might be considered to be some indication of the importance of the cases decided by that circuit. Likewise, the higher the rate of affirmance by the Supreme Court in those cases, the more deference the Court is giving to that circuit, which might be some indication of the circuit's prestige. For short periods of time, these factors might be meaningful. Much ink has been spilled lately, for example, on the disproportionately large number of cases from the Ninth Circuit reviewed, and often reversed by, the Supreme Court.<sup>88</sup> Yet it is not clear that it has somehow lessened the reputation of that circuit. Moreover, over time, the rates of review and reversal of circuit opinions are quite similar,<sup>89</sup> which makes it difficult to differentiate circuit prestige on that basis.<sup>90</sup>

This is not to say that other aspects of the Supreme Court-circuit court relationship may not yield insights regarding circuit reputa-

86. *Id.* (omission in original).

87. See SCHICK, *supra* note 59, at 336.

88. See, e.g., POSNER, *supra* note 7, at 412-20; Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 LOY. L.A. L. REV. 1 (2003); Arthur D. Hellman, *Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 425 (2000); Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405 (1998); Stephen L. Wasby, *The Supreme Court and Courts of Appeals En Bancs*, 33 MCGEORGE L. REV. 17 (2001).

89. According to data compiled by Lee Epstein and her colleagues, the number of decisions reviewed on the merits from each circuit, from the 1946 through the 2001 Terms, ranged from 127 of the Eleventh Circuit (only operating from 1981) to 759 of the Ninth Circuit. The rates of affirmance ranged from a low of 30.9% (D.C. Circuit) to a high of 47.8% (Second Circuit). LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 697-99 tbl.7-29 (3d ed. 2003). The totals for the reviewed decisions from each circuit, with percentage affirmance rates in parentheses, are as follows:

1ST CIR.	2D CIR.	3D CIR.	4TH CIR.	5TH CIR.	6TH CIR.	7TH CIR.	8TH CIR.	9TH CIR.	10TH CIR.	11TH CIR.	D.C. CIR.
155 (46.5)	592 (47.8)	386 (44.8)	315 (42.5)	601 (36.1)	383 (36.6)	414 (37.9)	290 (38.6)	759 (33.3)	236 (41.5)	127 (41.7)	537 (30.9)

90. Even if there were meaningful differences between the circuits in this regard, it is doubtful that Supreme Court review and affirmance would be a good surrogate for reputation. The Court, no doubt, considers a host of factors when deciding whether to grant certiorari in a case. These factors can include the perceived importance of the issue presented in the case; the presence or absence of a conflict with other circuits; how far the issue may have percolated among the circuits; the need for uniformity on this issue of federal law; and the correctness of the decision below. See George & Solimine, *supra* note 31, at 174-75 (providing a brief review of scholarly literature on the certiorari process). It is not obvious how these factors, other than the first and perhaps the last, directly speak to a circuit's reputation. Indeed, the *denial* of certiorari can be regarded in some circumstances as the Court being deferential to the court below, thus reflecting well on the court or the author of the opinion. Glennon, *supra* note 61, at 534 (giving example of Justice Harlan telling Learned Hand that a denial of certiorari in a case the latter authored really meant "Judgment Affirmed"). That said, perhaps review and affirmance as indicia of reputation carried more meaning when the Court was deciding more cases, and the courts of appeals fewer, than in recent decades.

tion. As one example, Court opinions sometimes specifically refer to the author of the opinion being reviewed (or of a dissenting opinion, or the author of some other, related case), even when citing conventions do not require such a reference. This presumably reflects the greater authoritative weight that the Court wishes to give to the lower court opinion being referenced. Thus, in recent decisions, one finds specific reference in Court opinions to Judges Richard Posner, Frank Easterbrook, Robert Bork, and Harry Edwards (among living jurists), and to Judges Learned Hand and Henry Friendly (among jurists who have passed away).<sup>91</sup> Even here, though, the references are usually to *judges*, not to a three-judge panel as such.<sup>92</sup>

As another example, almost all of the clerks for Supreme Court Justices are recent law school graduates who have clerked for a court of appeals judge. Given the high prestige afforded those positions, the feeder judges (or circuits) for whom the clerks previously worked might also be afforded a high reputation. During the 1975 through 2003 Terms, the circuits supplying the most clerks were the D.C. (36.4%), Ninth (15.1%), and Second (14.9%).<sup>93</sup> No other circuit was above ten percent.<sup>94</sup>

Finally, several recent examples of citation analysis can shed light on the reputation of the circuits. The first is by William Landes, Lawrence Lessig, and myself.<sup>95</sup> We examined the citations, by other

91. From the 2003 Term alone, see *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2754, 2765 (2004) (referring to Friendly, Edwards, and Bork); *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2731 (2004) (Stevens, J., dissenting) (referring to Bork); *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2367 (2004) (citing to L. Hand); *Hibbs v. Winn*, 124 S. Ct. 2276, 2290 (2004) (referring to Easterbrook and Friendly); and *Jones v. R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836, 1842 (2004) (citing Friendly).

Judge Posner was not cited in the 2003 term, but he has been frequently cited by name before and after. See, e.g., *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453, 1460 (2005); *Wilkinson v. Dotson*, 125 S. Ct. 1242, 1250 (2005) (Scalia, J., concurring); *Commissioner v. Banks*, 125 S. Ct. 826, 833 (2005); *United States v. Booker*, 125 S. Ct. 738, 752 (2005); *Lawrence v. Texas*, 539 U.S. 558, 589 (2003) (Scalia, J., dissenting); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 396 (2002) (Thomas, J., dissenting); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002).

92. Cf. *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 480 n.2 (1999) (referring to a case with a “distinguished panel of the Second Circuit” (Frank, Clark, and L. Hand)); *Smith v. United States*, 507 U.S. 197, 216 & n.16 (1993) (Stevens, J., dissenting) (referring to the “unusually distinguished panel of Circuit Judges” who had decided a cited case (L. Hand, A. Hand, and Clark)); *United States v. Nugent*, 346 U.S. 1, 10 (1953) (Frankfurter, J., dissenting) (referring to a Second Circuit opinion of a panel made up by Swan, Frank, and Learned Hand as “so strong a court and one so strong in literary endowment”).

93. E-mail from Lawrence Baum to Michael E. Solimine (July 19, 2004) (on file with author).

94. See *id.* The circuit breakdown is as follows: D.C. (36.4%); Ninth (15.1%); Second (14.9%); Fourth (9.9%); First (5.9%); Fifth (5.3%); Seventh (5.0%); Third (3.3%); Eleventh (1.5%); Tenth (1.2%); Eighth (1.0%); Sixth (0.5%). *Id.* The information supplied by Professor Baum is a follow-up to his article, Corey Ditslear & Lawrence Baum, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J. POL. 869 (2001).

95. Landes, Lessig & Solimine, *supra* note 21.

courts of appeals, of published opinions authored by 205 appellate judges, with at least six years of service, sitting as of 1992. The database included all published opinions by those judges; the earliest was rendered in 1955, the latest in 1995.<sup>96</sup> Most pertinent for the present discussion, we ranked all of the judges by the number of citations to their opinions *outside* of their circuit. The top ten consisted solely of judges on the Seventh, First, and Second Circuits, with Judges Posner, Bruce Selya, and Easterbrook heading the list.<sup>97</sup> We also aggregated the judge-specific data by circuit, based on opinions published from 1982 to 1995.<sup>98</sup> Once again, the most pertinent data from this part of the study are citations by *other* circuits, adjusted for the number of opinions generated by the circuit being cited. On that score, the Third Circuit, followed by the Second, D.C., and Seventh Circuits had the greatest influence.<sup>99</sup>

A second citation analysis study, by David Klein and Darby Morrisroe, examined how often courts of appeals judges were cited or mentioned by name in courts of appeals opinions.<sup>100</sup> This is parallel to the earlier-described invocation studies, which examine how often circuit judges are mentioned in Supreme Court opinions. The authors examined references to a sample of 139 circuit judges sitting in the late 1980s and early 1990s.<sup>101</sup> The judges with the most references were William Wilkins (Fourth Circuit), Stephen Breyer (then of the First Circuit), Posner, and Easterbrook.<sup>102</sup> The frequent references to Judge Wilkins were “attributable largely to his service as chair of the United States Sentencing Commission.”<sup>103</sup>

Stephen Choi and Mitu Gulati provide a third use of citation analysis to gauge circuit reputation.<sup>104</sup> In the course of developing and applying criteria that seek to objectively measure the quality of a circuit judge’s opinions, Choi and Gulati studied (among other things) the citation of opinions published from 1998 to 2000 by circuit

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96. *Id.* at 276-79 (describing methodology).

97. *Id.* at 288-92 tbl.2A. The top ten were as follows: Posner (Seventh Circuit); Selya (First Circuit); Easterbrook (Seventh Circuit); Coffin (First Circuit); Campbell (First Circuit); Cudahy (Seventh Circuit); Newman (Second Circuit); Bownes (First Circuit); Flaum (Seventh Circuit); Oakes (Second Circuit).

98. To compare just the circuits, we started in 1982, since that was the year the 11th Circuit began operations and publishing opinions. *Id.* app. at 328 n.72.

99. *Id.* app. at 332.

100. Klein & Morrisroe, *supra* note 9.

101. For further discussion of methodology, see *id.* at 377-80. The 139 judges were a sample of all active or senior circuit judges at the time, limited to those who wrote majority opinions in “287 circuit court cases involving issues not previously settled by the Supreme Court.” *Id.* at 377.

102. *Id.* at 381 tbl.2.

103. *Id.* at 382.

104. Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23 (2004).

judges sitting as of June 2003.<sup>105</sup> The top five judges, ranked with regard to citations to their opinions outside of their respective circuits, were Posner and Easterbrook (Seventh Circuit); Sandra Lynch and Selya (First Circuit); and Paul Kelly (Tenth Circuit).<sup>106</sup> By partially aggregating the data by circuit and controlling for number of opinions, some of the circuits (such as the First and Third) have a high percentage of their judges with relatively high citation counts.<sup>107</sup> In contrast, the D.C. Circuit was at the bottom of the list.<sup>108</sup>

What conclusions can be drawn from these various studies? Any conclusions should be drawn with care. Reputation is a difficult subject to objectively study. Couple that with the snapshot quality of most of the studies; they usually cover a relatively short period of time or only samples of the judges who constitute a circuit. That all said, at one point there was support for the conventional wisdom that the reputation of the Second and D.C. Circuits towered over the rest. However, in the past several decades, it seems, the reputations of those circuits have fallen to a degree, or perhaps one can say that the reputations of the other circuits have risen (or both). Put another way, there seems to be a homogenization of reputations among the circuits. There are exceptions to the point. One is the First Circuit, which perhaps quietly has had a high reputation in some quarters, as reflected to a degree in the good showing of judges from that circuit in my study with Landes and Lessig.<sup>109</sup> A more notable exception is the Seventh Circuit, whose reputational stock has skyrocketed in the past two decades, related in no small way to the prestige afforded Judges Posner and Easterbrook, who joined that court in the 1980s.

#### IV. THE RISE AND FALL OF REPUTATIONS OF THE CIRCUITS

The prior Part demonstrates that the reputations of the U.S. courts of appeals are not static. In my view, the evidence shows that the prior high prestige of the Second and D.C. Circuits has, to some degree, lessened in the latter decades of the twentieth century. At the same time, the reputation of the Seventh Circuit has risen, and to varying degrees, the reputations of all of the circuits have risen. I draw these conclusions with caution; many of the studies previously discussed only focused on one court's *influence* on another, not on

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105. *Id.* at 40-41 (generally describing methodology).

106. *Id.* at 50 tbl.4. For one of their measures of opinion quality, the authors limited the study to the top twenty opinions of each judge to restrict the bias attributable to each circuit publishing differing percentages of opinions. *Id.* at 52-54. When controlling for number of opinions in this way, the order was Lynch, Easterbrook, Kelly, Posner, and Selya. *Id.* at 53 tbl.5.

107. *Id.* at 79 tbl.16.

108. *Id.*

109. See Landes, Lessig & Solimine, *supra* note 21.

reputation as such. None of the studies are longitudinal in nature, and all draw from, or are directed at, different audiences. That said, the *general* contours of circuit reputation possess enough clarity to be worthy of study and explanation. An appropriate starting point to sketch out reasons for reputational differences is to focus on attributes of the court whose reputation is being studied and on the relations between those courts and other audiences—other courts and judges, lawyers, and other observers in the legal community.<sup>110</sup>

First, consider the rise of the Seventh Circuit's reputation. That ascension can be traced almost directly to the appointments by President Reagan of Richard Posner and Frank Easterbrook to that circuit in 1981 and 1985, respectively. Prior to that time, it is worth saying, "the Seventh Circuit was long considered an unremarkable circuit in terms of its work product."<sup>111</sup> But after those appointments, the entire circuit began producing more publishable opinions,<sup>112</sup> a phenomenon that persists to the present day.<sup>113</sup> The stories of Posner and Easterbrook are, of course, familiar ones. At the time of their appointments, both were well-known academic scholars at the high-profile University of Chicago Law School, particularly associated with the law and economics movement. They remain senior lecturers at Chicago and have produced a stream of scholarly work since then.<sup>114</sup> The circuit's reputation has been further burnished by the appointment of two other law school professors (Kenneth Ripple and Diane Wood).<sup>115</sup> While the Seventh Circuit's meteoric rise in reputa-

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110. For a helpful discussion of this point, see Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 181 (1985). I am not claiming that these attributes and relational explanatory models are sharply distinct, for "most of the explanations have variants that come under both headings." *Id.*

111. Gulati & Sanchez, *supra* note 4, at 1180 (drawing on conversations with judges and academics).

112. *Id.* at 1180-81.

113. In recent years the Seventh Circuit has published, on the average, nearly half of its appeals decided on the merits, a figure rivaled only by the First Circuit. The other circuits typically publish much lower percentages. See JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS* 76-78 tbl.4 (2002) (summarizing data from the courts of appeals from 1990 to 2000). During the same period, the overall average of published opinions fell from 32% to 20%. See *id.* at 73-74.

114. A study of the legal scholars most cited in scholarship, using databases from 1956 to 1999, demonstrated that Posner and Easterbrook ranked first and twenty-first, respectively. Other courts of appeals judges in the top fifty were Guido Calabresi (tenth), Robert Bork (sixteenth), and Henry Friendly (twenty-seventh). Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 tbl.6 (2000).

115. Ripple and Wood were on the faculties of Notre Dame and the University of Chicago law schools, respectively, and were Reagan and Clinton appointees, respectively. For a general study of the appointment of legal academics to the U.S. courts of appeals, see Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9 (2001). Perhaps the Seventh Circuit's

tion is largely attributable to Posner and Easterbrook,<sup>116</sup> it is not completely so. The norm for the entire circuit (or at least many of the judges thereof) has changed to one where more high-quality, publishable opinions are produced.

Mitu Gulati has suggested that the concept of circuit reputation can be profitably analyzed through the concept of circuit norms.<sup>117</sup> Judges on multimember courts do not work in isolation. Over time, circuits appear to implicitly develop cultures that manifest themselves in various ways. These can include the ideological direction of decisions, whether oral argument is preferred, the swiftness of opinion writing and the length and style of opinions, how many are officially published, proclivity toward en banc review, and a host of other factors. No doubt, circuit norms influence judges who join the court and in turn are affected or generated by the judges themselves. Lifetime federal judges surely are concerned at some level with maintaining or increasing their own reputation (or influence) and that of their circuit.<sup>118</sup> They can do that by producing and publishing what are perceived to be high-quality opinions.<sup>119</sup> Perhaps Posner and

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reputation would be even higher if University of Chicago law professor Antonin Scalia had been appointed. According to one source,

Scalia turned down the Reagan Administration's first invitation to serve in the federal judiciary. Rather than accept the offer to sit on the U.S. Court of Appeals for the Seventh Circuit, Scalia waited patiently for an opening on the U.S. Court of Appeals for the District of Columbia, a more prestigious appellate court and one where his expertise in federal administrative law could be put to better use.

JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* 140 (1995) (emphasis added). The episode is similar to Dean Charles Clark resisting FDR's entreaties to join the D.C. Circuit. Clark eventually accepted an invitation to join the Second Circuit. GOLDMAN, *supra* note 54, at 26-27. In contrast, Frank Easterbrook was more interested in appointment to a "regional" circuit, as opposed to the D.C. Circuit, in part because "[a]dministrative law is enjoyable, but a varied diet is better." Howard Bashman, *20 Questions for Circuit Judge Frank H. Easterbrook of the U.S. Court of Appeals for the Seventh Circuit*, HOW APPEALING (Aug. 2, 2004), at [http://legalaffairs.org/howappealing/20q/2004\\_08\\_01\\_20q-appellateblog\\_archive.html](http://legalaffairs.org/howappealing/20q/2004_08_01_20q-appellateblog_archive.html).

116. George, *supra* note 115, at 57-58.

117. For further discussion of circuit norms, see Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, LAW & CONTEMP. PROBS., Summer 1998, at 157, 161; and Gulati & Sanchez, *supra* note 4, at 1180-81, 1187. For a general discussion of the concept of norms in legal thought, see ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

118. RICHARD A. POSNER, *OVERCOMING LAW* 117-19 (1995) (discussing reputation, prestige, and other utility functions that federal appellate judges seek to maximize). Similarly, circuit judges are surely aware of their collective reputation, and it would seem that many would endeavor to maintain or improve upon it. See, e.g., Marci Alboher Nusbaum, *A Court Known for Balance, Intellect*, NAT'L L.J., Apr. 2, 2001, at B9 ("Judge Hand's legacy is a powerful presence in the [Second] [C]ircuit and one that the court has proudly tried to live up to."). Perhaps some circuits, such as the First, Second, and D.C., have a greater sense of tradition and seek to maintain or inculcate it in various ways, more so than other circuits.

119. Gulati & McCauliff, *supra* note 117, at 200-01; Gulati & Sanchez, *supra* note 4, at 1180-81. There are other ways in which appellate judges can burnish their reputations. One would be contributions to scholarly, academic writing. Another might be for judges to hire excellent law clerks who, presumably, think highly of the judge and subsequently cultivate the judge's image in academia or other circles. Cf. Barry Cushman, *Clerking for*

Easterbrook, explicitly or implicitly, made efforts to change norms on the Seventh Circuit.<sup>120</sup>

Whether and to what extent such norms operate in other circuits now, or influenced judicial reputation in the past, are subjects worth exploring, but ones beyond the scope of this Essay. Nonetheless, we can highlight several factors which help explain the historical and, to some degree, continued high reputations of the Second and D.C. Circuits. Those courts share a number of characteristics which suggest why they, rather than, say, the Sixth or Tenth Circuits, are at the top in rankings of reputations. Most obviously, they sit in cities that are the major centers of attention in the United States. The D.C. Circuit is in the nation's capital and, as noted earlier, has historically been staffed by judges from across the country. The Second Circuit sits in New York City, which without overstatement can still be regarded in many ways as the commercial, communications, and cultural capital of the country. Presidents have appointed the highest percentage of law professors to those circuits, which would tend to increase reputation (at least among academics).<sup>121</sup>

Another distinguishing, unique characteristic of the Second and D.C. Circuits is comparative regionalization.<sup>122</sup> In the other circuits, judgeships are allocated by state. In the Sixth Circuit, for example, Michigan has six judgeships, Ohio has four, Kentucky has three, and

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*Scrooge*, 70 U. CHI. L. REV. 721, 738-42 (2003) (book review). Cushman discusses clerks for Supreme Court Justices, but his point would seem to apply to lower federal court judges, as well. See Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259 (2005).

Judge Posner has expressed skepticism of the ideal of judges laboring to increase the prestige of *other* judges, which might translate to a skepticism of a judge making particular efforts to increase the prestige (or reputation) of the circuit:

Apart from opposing an increase in the number of judges or a dilution of the title "judge," however, there is little an individual judge can do to enhance his judicial prestige. That prestige inheres in the whole judiciary. Free-rider problems make it unlikely that any one judge will exert himself strenuously to raise the prestige of all.

POSNER, *supra* note 118, at 118. He is in a better position to judge than I, but my sense is that most of the relatively small number of lawyers who attain what is regarded as a prestigious position will take cooperative steps to enhance their collective reputation. As one example, consider the various efforts of the Judicial Conference of the United States and of some individual judges to oppose large-scale expansions of the number of life-tenured federal judges or to convert non-Article III (that is, non-life-tenured) judges to Article III status. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 983-86 (2000). The opposition has been driven, at least in part, by the desire of federal judges that "the Article III judiciary must remain relatively small to retain the elite status that has traditionally lured first-rate lawyers to the federal bench." HART & WECHSLER, *supra* note 40, at 385.

120. Gulati & Sanchez, *supra* note 4, at 1180-81.

121. George, *supra* note 115, at 44-45 (collecting data on appointments from FDR to Clinton). Law professors constituted 22.2% and 33.3% of the appointees to the Second and D.C. Circuits, respectively. The next highest circuit was the Tenth, at 14.3%. *Id.* at 45 fig.2.

122. Thanks to Richard Posner for bringing the point to my attention.

Tennessee has three.<sup>123</sup> Within each state, tradition or senatorial prerogatives may demand that some of those judges come from specific parts of the state.<sup>124</sup> This alone narrows the field of selection. Contrast the D.C. Circuit, which is explicitly free of such constraints and indeed historically enjoys a norm of being filled by judges from across the nation. The Second Circuit has the majority (nine) of its judges from New York and has only a handful from the other states, Vermont (one) and Connecticut (three). And not coincidentally, the elite law schools in New York and Connecticut (for example, Yale) supply many of the Second Circuit jurists.<sup>125</sup>

Both circuits have also historically had a disproportionate number of what are regarded as important cases on their dockets. For many decades in the past century, the Second Circuit considered more commercial, copyright, securities, tax, and antitrust cases, as compared to other circuits.<sup>126</sup> The D.C. Circuit has long decided a disproportionate number of appeals from often complicated decisions from federal administrative agencies, including but not limited to environmental cases.<sup>127</sup> These types of cases may be thought to be more

123. Judges are usually allocated to each state within a circuit based on the cases generated by each state. There must be at least one judge designated for each state within the circuit. See 28 U.S.C. § 44(c) (2000).

124. See generally GOLDMAN, *supra* note 54, at 45-48, 89, 136-37, 177, 319-23; Carl Tobias, *Sixth Circuit Federal Judicial Selection*, 36 U.C. DAVIS L. REV. 721, 746-47 (2003).

125. Similar points could be made about the First Circuit, many of whose judges have been from Massachusetts and which can draw on the venerable legal tradition of Boston and the graduates of Harvard Law School.

126. See SCHICK, *supra* note 59, at 187-88, 309; Lawrence Baum et al., *The Evolution of Litigation in the Federal Courts of Appeals 1895-1975*, 16 LAW & SOC'Y REV. 291, 298 tbl.3 (1981-82); James H. Carter, *They Know It when They See It: Copyright and Aesthetics in the Second Circuit*, 65 ST. JOHN'S L. REV. 773, 773 (1991) ("The Second Circuit is widely recognized as the nation's most important copyright court."); Erin B. Kaheny, *Agenda Change in the U.S. Courts of Appeals, 1925-1988*, 20 JUST. SYS. J. 275, 286 tbl.6-3, 287 tbl.6-4 (1999) (documenting that the Second Circuit historically has decided more intellectual property and antitrust cases than other circuits); Posner, *supra* note 15, at 513 ("Hand's copyright opinions [are] generally considered Hand's finest opinions taken as a group . . .").

127. GOULDEN, *supra* note 51, at 252-53; HOWARD, *supra* note 58, at 32; STEFANIE A. LINDQUIST ET AL., ASSESSMENT OF CASELOAD BURDEN IN THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT: REPORT TO THE SUBCOMMITTEE ON JUDICIAL STATISTICS OF THE COMMITTEE ON JUDICIAL RESOURCES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 9-10 (1999) (on file with author) (finding that in the years 1996 and 1997, appeals from federal administrative agencies made up more than forty percent of the D.C. Circuit's docket; no other circuit exceeded ten percent); Sue Davis & Donald R. Songer, *The Changing Role of the United States Courts of Appeals: The Flow of Litigation Revisited*, 13 JUST. SYS. J. 323, 327 tbl.2 (1988-89) (reporting similar data from 1984); Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L.J. 779 (2002); see also Richard J. Pierce, Jr., *The Relationship Between the District of Columbia Circuit and Its Critics*, 67 GEO. WASH. L. REV. 797, 797 (1999) ("I suspect that the D.C. Circuit is second only to the U.S. Supreme Court with respect to the volume of critical writing its opinions elicit. That high level of critical attention is to be expected independent of the quality of the court's decisionmaking process. The court's

intellectually interesting or demanding than the typical case that appears on a circuit's docket. Some indirect support for these propositions is found in the study of Chicago lawyers by John Heinz and Edward Laumann. Seeking to examine the comparative reputation of different areas of practice, they asked a sample of lawyers and law professors to rate the prestige of fields of practice within the profession.<sup>128</sup> Both groups listed securities, tax, antitrust, patent, banking, and public utilities as the leaders in prestige.<sup>129</sup>

Yet we should not make too much of comparative docket composition. Even if historically less noticed, other circuits have in effect developed their own specialities—for example, admiralty law in the Fifth Circuit and immigration and copyright law in the Ninth Circuit.<sup>130</sup> And “[t]here is nothing particularly remarkable about the Seventh Circuit’s docket.”<sup>131</sup> More generally, it appears that, over time, the docket composition of the circuits has become relatively more uniform, although there remain pockets of variation (with the D.C. Circuit’s administrative docket being the best example).<sup>132</sup>

location in the nation’s capital, combined with its public policy laden docket, renders it a tempting target for academic lawyers and political scientists.”).

128. HEINZ & LAUMANN, *supra* note 9, at 90-103 (describing the study). The professors in the sample were from Northwestern University. *Id.* at 101-02.

129. *Id.* at 91 tbl.4.1, 103 tbl.4.3. The Heinz and Laumann study was conducted in the late 1970s, but more recent surveys of the Chicago bar have yielded very similar results. Sandefur, *supra* note 9, at 386-87 tbl.1 (reporting the results of a survey conducted in 1995).

While patent practice ranks high in prestige, citation analysis of the influence of the Federal Circuit (which has exclusively heard appeals of patent cases since 1982) shows that it ranks last among the circuits. Landes, Lessig & Solimine, *supra* note 21, at 317 tbl.5. This result is not surprising given the highly specialized nature of that court’s work product and that it publishes the fewest cases of any circuit. *Id.* at 303. For evaluations of the court, see Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 769 (2004), and R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105 (2004). At any rate, the low influence of the Federal Circuit is a good example of how influence and reputation can diverge.

130. Gulati & Sanchez, *supra* note 4, at 1175; William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 319 n.220 (1996); *see also* White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1521 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc) (“For better or worse, we [the Ninth Circuit] are the Court of Appeals for the Hollywood Circuit.”); Marilyn F. Johnson et al., *In re Silicon Graphics Inc.: Shareholder Wealth Effects Resulting from the Interpretation of the Private Securities Litigation Reform Act’s Pleading Standard*, 73 S. CAL. L. REV. 773, 776 (2000) (suggesting that Ninth Circuit decisions on securities litigation will be significant given the presence in that circuit of Silicon Valley, home to “companies commonly targeted by attorneys bringing securities fraud class actions”).

131. Gulati & Sanchez, *supra* note 4, at 1176.

132. Baum et al., *supra* note 126, at 308; *see also* DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 63 (2000) (explaining that data from 1970 to 1988 “suggest more similarities than differences in the circuits’ judicial business”); *cf.* Kaheny, *supra* note 126, at 292-94 (analyzing sample of courts of appeals cases decided between 1925 and 1998 and finding “some support” for circuit convergence thesis of Baum et al., *supra* note 126, but cautioning that considerable variations still existed among the circuits).

The simple longevity of the apparent high reputation of the Second and D.C. Circuits may also be an independent factor in their high reputation to date. In law, as in other walks of life, “[r]eputations die hard and are long in being born.”<sup>133</sup> The modern Second and D.C. Circuits may be, in part, free riding on their past reputational stock. (Incidentally, this makes the recent rise of the heretofore relatively undistinguished Seventh Circuit even more striking.) In other words, those circuits can be said to have developed a brand, or trademark, the durability of which influences subsequent snapshots of reputation.<sup>134</sup> In the past two decades, the Seventh Circuit has developed its own brand.

Nonetheless, though I concede that the point is difficult to measure, my sense is that the reputation of all of the circuits has become homogenized in the latter part of the twentieth century. To put the same point somewhat differently, it is not so much that the reputations of the circuits have risen or fallen, but the entire notion of circuit reputation has become blurred and indistinct, at least in the eyes of some observers in the legal community. To the extent I am correct about the degradation of reputation in general, it is perhaps due in part to more lawyers, and more judges, trying to keep track of more judges and more cases.

When the circuits were first established in 1891, there were nineteen authorized judgeships. Congress has incrementally added positions since then. In the 1930s, during the heyday of Learned Hand’s service on the Second Circuit, there were a total of fifty-five judgeships, with the largest circuit having five and the smallest, three. As late as 1964, there were still only eighty-eight judgeships, and the largest circuit only had nine positions. Today, there are 179 authorized judgeships, with twenty-eight sitting in the largest circuit (the Ninth) and six in the smallest (the First). The average is twelve.<sup>135</sup>

133. Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 455 (2000) (internal quotation marks omitted); see also Richard Schmalbeck, *The Durability of Law School Reputation*, 48 J. LEGAL EDUC. 568 (1998).

134. Cf. Landes, Lessig & Solimine, *supra* note 21, at 272 (discussing branding theory for individual judges).

135. For a summary of the information found in this paragraph, see the following table reproduced from the COMMISSION REPORT, *supra* note 46, at tbl.2-2:

SUMMARY OF AUTHORIZED CIRCUIT JUDGESHIPS FOR SELECTED YEARS, 1892-1990				
YEAR	LARGEST COURT	SMALLEST COURT	MODAL COURT	TOTAL JUDGESHIPS
1892	3	2	2	19
1930	5	3	4	55
1950	9	3	6	75
1964	9	3	9	88
1978	26	4	11	144
1984	28	6	12	168
1990	28	6	12	179

(These numbers are somewhat misleading, since not all authorized positions are always filled, and such positions do not reflect circuit judges on senior status who still hear cases.<sup>136</sup>) Recall the judge who said the Ninth Circuit was too big to possess an identifiable circuit identity.<sup>137</sup> Perhaps the same observation holds true for many of the other circuits.

Consider, too, the actual or perceived evolution of characteristics of judges who make up the circuits. Some part of the reputation of the Hand generation of judges was their elite background and education. Yet the differences among judges of all of the circuits has seemed to moderate over time. To be sure, the Second and D.C. Circuits historically have had a high percentage of appointees who graduated from elite law schools—but the First and Ninth Circuits had even higher percentages.<sup>138</sup> Likewise, despite recent attention focused on the subject,<sup>139</sup> the federal judicial selection process has always been, at some level, “political” in nature. This is evidenced by the vast majority of appointees having affiliation with the party of the appointing President.<sup>140</sup> There is also a perception that, especially on contentious issues like abortion, the death penalty, and civil rights, courts of appeals judges vote on a predictable, political basis—Republican appointees, conservative, Democratic appointees, lib-

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*Note:* Years 1930-1978 combine the Court of Customs and Patent Appeals and Court of Claims; 1984 and 1990 include the Court of Appeals for the Federal Circuit. COMMISSION REPORT, *supra* note 46, at 13 tbl.2-2.

Statutory authorization for judgeships in each circuit is found at 28 U.S.C. § 44 (2000). For an overview of Congressional legislation since the nineteenth century adding U.S. Courts of Appeals and U.S. District Court positions, see DEBORAH J. BARROW ET AL., *THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE* (1996).

136. For example, as of 1998, reportedly “when one includes senior judges and visiting judges, the true number of appellate judges is at least 266 (who are assisted on occasion by another 323 district judges).” Gulati & McCauliff, *supra* note 117, at 172 n.64 (citing a statement by Professor Judith Resnik to the Commission on Structural Alternatives for the Federal Courts of Appeals); *see also* Resnik, *supra* note 119, at 951 n.92.

137. *See supra* note 77 and accompanying text. *But see* Richman & Reynolds, *supra* note 130, at 301 (“[T]here is no empirical evidence that additional judgeships will reduce prestige or that reduced prestige will diminish the pool of judicial candidates.”).

138. *See* Susan Haire et al., *An Intercircuit Profile of Judges on the U.S. Courts of Appeals*, 78 JUDICATURE 101, 102 tbl.1 (1994). The authors of the study took the list of elite law schools (that is, the top twenty-five) from the familiar rankings compiled by *U.S. News & World Report*.

139. *See, e.g.*, Online Symposium, *The Judicial Confirmations Process: Selecting Federal Judges in the Twenty-First Century*, Jurist, at <http://jurist.law.pitt.edu/forum/symposium-jc/index-printer.php> (Apr. 15, 2004); Symposium, *Federal Judicial Selection in the New Millennium*, 36 U.C. DAVIS L. REV. 583 (2003); Symposium, *The Judicial Appointments Process*, 10 WM. & MARY BILL RTS. J. 1 (2001); David C. Vladeck, *Keeping Score: The Utility of Empirical Measurements in Judicial Selection*, 32 FLA. ST. U. L. REV. 1415 (2005).

140. *See* SONGER ET AL., *supra* note 132, at 29-45 (analyzing appointments to courts of appeals from Coolidge to Reagan); Sheldon Goldman et al., *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282, 308 tbl.4 (2003) (analyzing the same for Carter through the George W. Bush administrations).

eral.<sup>141</sup> The perception is supported by some evidence,<sup>142</sup> though it can easily be overstated. Most cases that come before three-judge panels are *not* highly contentious issues, and the large majority of such decisions are unanimous, no matter the ideological makeup of the panel.<sup>143</sup> While the political nature of a position might attract some,

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141. For an example from the press, see Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES, Mar. 9, 2003, § 6 (Magazine) at 38, 40 (“[T]he Fourth Circuit is considered the shrewdest, most aggressively conservative federal appeals court in the nation.”).

142. For a recent high-profile example in the academic literature, see Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) (studying published opinions from 1982 to 2002 and revealing nontrivial differences in voting in contentious cases by Republican and Democratic appointees); see also Robert A. Carp et al., *The Decision-Making Behavior of George W. Bush’s Judicial Appointees: Far-Right, Conservative, or Moderate?*, 88 JUDICATURE 20 (2004) (showing similar conclusions with respect to George W. Bush appointees); Nancy Scherer, *Blacks on the Bench*, 119 POL. SCI. Q. 655, 655 (2004-05) (finding that African-American federal judges “appear more willing than white judges to accept claims by criminal defendants of police misconduct” in search and seizure cases).

As Frank Cross has observed, federal judges routinely deny that anything other than traditional legal principles guide their decisions. Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1464-67 (2003). He further suggests, “Judges may care about their reputation with the lawyers and litigants who appear before them. Dedication to the values of the judicial craft through conscious adherence to the legal model may enhance the judge’s prestige in the legal community.” *Id.* at 1474-75 (footnote omitted). My point is that to the extent it is perceived, rightly or wrongly, that many circuit judges vote based on their ideological values, rather than legal precedent, then in the eyes of many, their reputation, individually and collectively, will suffer. In this regard, it is perhaps significant that there is some statistical evidence that there was relatively less difference in voting between Democratic and Republican appointees on the circuits in the early part of the century. SONGER ET AL., *supra* note 132, at 114-16 (analyzing data from 1925 to 1988).

143. In their recent discussion of, and contribution to, the literature on decisionmaking by lower federal court judges, Greg Sisk and Michael Heise remark:

With respect to public policy, that judicial ideology may play a role at the margins in deciding certain types of controversial court cases cannot be gainsaid. But to suggest that partisan or ideological preferences are prevalent influences in deciding most cases or are invariably powerful variables in deciding even the most controversial and open-ended of legal issues is a dubious extrapolation from the empirical evidence.

Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 746 (2005); see also Cross, *supra* note 142, at 1514-15 (indicating that in the empirical study of circuit decisionmaking, *both* legal model and judicial ideology play important roles in affecting judicial behavior); Sunstein et al., *supra* note 142, at 336 (“More often than not, Republican and Democratic appointees agree with one another, even in the most controversial cases.”).

A related point is that there is evidence that recent circuit court appointees are, at appointment, on average younger than previous appointees. Compare GOLDMAN, *supra* note 54, at 354-56 tbl.9.2 (finding that the average ages of circuit appointees of FDR, Truman, Eisenhower, Kennedy/Johnson, Nixon/Ford, Carter, and Reagan were 52.9, 55.1, 55.9, 52.7, 53.4, 51.8, and 50.0, respectively), with Goldman et al., *supra* note 140, at 308 tbl.4 (finding that the average ages of circuit appointees of George H.W. Bush, Clinton, and George W. Bush were 48.7, 51.2, and 50.6, respectively). This presumably means that these appointees may have, on average, longer judicial careers. But it also means that their prestige suffers, or is more difficult to attain, since at least traditionally older judges may be considered more distinguished than younger ones. RICHARD A. POSNER, *AGING AND OLD AGE* 181-82 (1995). Exceptions immediately come to mind (consider Richard Posner, ap-

it may repel others. Finally, it is worth stating that the earning power of circuit judges is not lavish. They currently all earn \$165,000, which is below many counterparts in the private sector, and increases in the twentieth century have only kept up with inflation.<sup>144</sup> None of these points mean that circuit judges do not enjoy a lofty status in the legal profession. They simply suggest that, in the eyes of some, that status has dissipated over the past few decades.

The decisional output of the circuits can also be a factor in reputation being more diffuse. In 1930, less than 3000 cases were filed in the courts of appeals; as late as 1960 the figure was less than 4000, but it has risen rapidly since then. By the late 1990s, over 50,000 appeals were annually being filed.<sup>145</sup> Thus, even though the number of judgeships has also risen, the average caseload for each judge has risen even faster. In 1960, for example, there were about 50 filings annually per judge, a figure that rose to 300 by the late 1990s.<sup>146</sup> To be sure, not all filings result in an argued case and a decision on the merits, much less a published opinion thereafter. But the avalanche of opinions, both published and unpublished, produced each year surely makes it more difficult than in the past for anyone to follow and evaluate the collective work product of a circuit. Practitioners (and judges and their clerks) attempt to deal with the problem by using computerized databases for legal research. But that is not necessarily a panacea. Easier research makes it easier to cite more cases in briefs or opinions. This is not necessarily a bad thing, but it might suggest that the brand of a particular circuit opinion carries less weight than before.<sup>147</sup>

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pointed at age 42 and still only 66 years old as of this writing, or Frank Easterbrook, appointed at age 37 and now 56), but they may prove the rule. Posner, *supra* note 119, at 1262 n.4.

144. POSNER, *supra* note 36, at 21-33 (discussing extensively the history and present status of federal judicial salaries); Albert Yoon, *Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: 1945-2000*, 91 CAL. L. REV. 1029, 1032-39 (2003) (same). Yoon points to evidence suggesting that recent judicial appointees are generally wealthier than before, which is perhaps a reaction to the failure of salaries to significantly rise. Yoon, *supra*, at 1056. On the other hand, federal judges enjoy significant perquisites, including control over their schedules, not needing to deal with clients or campaign contributors, the use of staff and facilities, and fairly generous retirement and pension payments. *Id.* at 1056-57.

145. See SONGER ET AL., *supra* note 132, at 15 tbl.1.2; Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 692-94 (2000-2001).

146. Cooper & Berman, *supra* note 145, at 693 n.19.

147. Judge Bruce Selya of the First Circuit has made the following argument:

Computer assisted legal research is much like laundry equipment in this respect. As cases remotely on point become even easier to find, the expectations for research rise, courts crank out more opinions, lawyers write more briefs (citing more opinions), and opinions cite more opinions. The cycle then begins anew. All too often, the judges are drained.

A related problem, in the view of some, is what has been colorfully labeled as the demise of the Learned Hand tradition. In brief, the argument runs that the overall quality of appellate opinions has diminished due in large part to the expanding-per-judge caseload, the delegation of opinion writing to law clerks or other circuit staff, and the increasing use of visiting judges to fill out many three-judge panels.<sup>148</sup> It is not always clear what the critics mean by diminished quality. Some have pointed to the increase in recent years of longer, colorless, and heavily cited or footnoted opinions.<sup>149</sup> The perception of a demise in quality of opinions surely has a negative impact on circuit reputation. There are significant exceptions to these generalizations. The D.C. Circuit, for example, typically publishes fewer opinions than other circuits<sup>150</sup> and typically uses the fewest number of visiting judges.<sup>151</sup> Nor can it be coincidence that many of the opinions of Judges Posner and Easterbrook, in particular, are considered in some quarters to be of higher quality than those of their peers.<sup>152</sup>

Finally, changes in the size and shape of the audience may impact reputation. The legal profession as a whole has grown in size over the past century, has become increasingly specialized, and has become more diverse with respect to gender and minority status.<sup>153</sup> Perhaps the typical practitioner has less need, desire, or leisure time to follow

To make matters worse, the quality of legal argumentation sometimes seems to vary in inverse proportion to the rate of citation.

Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405, 408 (1994). That said, an overload of cases may resurrect notions of reputation. Signals of prestige, such as the author of an opinion or the circuit from which it came, may be used as cues of quality, if there are so many opinions potentially to read and cite. POSNER, *supra* note 9, at 68-69.

148. *E.g.*, Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. REV. 371 (1988); Richman & Reynolds, *supra* note 130, at 275; *see also* Cooper & Berman, *supra* note 145, at 690-703.

149. POSNER, *supra* note 36, at 145-57; *see also* Gulati & Sanchez, *supra* note 4, at 1149 (“[T]he ‘best’ opinions are clear, concise, fully theorized, innovative, irreverent, placed in historical context, illustrative, and humorous. These are not the characteristics of the typical appellate court opinion.”).

150. Lindquist, *supra* note 49, at 28-29. The D.C. Circuit opinions, though, are not typically longer or more heavily footnoted than opinions from other circuits. POSNER, *supra* note 36, at 155 n.53.

151. MCKENNA, *supra* note 35, at 38-39; James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 LAW & SOC’Y REV. 565, 572 tbl.2 (2001); Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351, 367 tbl.2 (1995).

152. A market evaluation of this point is provided by the empirical study of Mitu Gulati and Veronica Sanchez, which demonstrated that the opinions of Posner and Easterbrook are disproportionately selected to appear in law school casebooks. Gulati & Sanchez, *supra* note 4, at 1155-56. The Seventh and Ninth Circuits led in opinions being utilized. *Id.* at 1155.

153. For overviews, see Robert W. Gordon, *The Legal Profession*, in LOOKING BACK AT LAW’S CENTURY 287, 289-94 (Austin Sarat et al. eds., 2002); RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 190-93 (1999).

or be concerned with the reputation of general jurisdiction courts or of the judges that comprise them. This may be true—particularly regarding cases that are outside of the practitioner’s speciality. (On the other hand, the same phenomenon might accent the reputation of circuits in specialized areas—for example, administrative or environmental law in the D.C. Circuit and securities law in the Second Circuit.) In addition, it cannot be ignored that, until the recent past, white males constituted most judges on the circuits, regardless of the circuit’s reputation. Perhaps the concept of judicial reputation carries less weight for those members of the profession who are from groups traditionally underrepresented on the federal bench as a whole or among the great judges or circuits in particular.<sup>154</sup>

## V. CONCLUSION

The reputations of judges and the courts they constitute ebb and flow, and those of the United States courts of appeals are no exception. There has been a good bit of discussion about the reputations of these courts but little effort to systematically examine them (as opposed to the burgeoning literature on the influence of one judge or court on another, often using citation analysis). I have attempted to fill some of this gap in the literature. But many questions remain, both backward-looking and forward-looking. Regarding the latter, further research could more closely examine the origins of the Second and D.C. Circuits’ high reputations, and whether such reputations were in fact commonly recognized in the pre-World War II era. Moving closer to the present, one might examine, say, the higher profile constitutional law and civil rights cases handled by the circuits since the 1950s to determine the effect on reputation. Regarding future developments, one can wonder how durable will be the reputation of the Seventh Circuit, when comes the day when Judges Posner and Easterbrook are no longer sitting. Will the much-maligned Ninth Circuit eventually have its reputation increase, perhaps (or perhaps not) at the expense of other circuits?<sup>155</sup> What are likely reputational effects of the proposed breakup of the large Ninth Circuit into two or three new circuits?<sup>156</sup> The difficulty of examining reputation will not prevent it from remaining an enduring subject for discussion.

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154. I make the point with caution, since I am unaware of any rigorous study of this point. Likewise, I do not consider changes in other potential audiences, such as federal district judges or law school professors.

155. Cf. Jeff Chorney, *9th Circuit Dominates the High Court’s Docket*, NAT’L L.J., July 5, 2004, at 6 (stating that the disproportionate number of Ninth Circuit cases reviewed by the Supreme Court may be explained by “the West [being] a cultural and economic powerhouse, a place where novel legal issues are simply more likely to come up”).

156. For a brief discussion of these proposals, see HART & WECHSLER, *supra* note 40, at 53 n.170. For further discussion, see Symposium, *Managing the Federal Courts: Will the Ninth Circuit Be a Model for Change?*, 34 U.C. DAVIS L. REV. 315 (2000); *Special Issue on*

A more basic line of inquiry should focus on the nature of reputation itself. Despite the historic preoccupation with status and prestige, perhaps those concepts are being deflated or changed, at least within some segments of our society, with regard to certain issues. Perhaps various shifts in politics, culture, business, and law have made reputation—as it was understood in the twentieth century—a less viable concept than in our century.<sup>157</sup> But these questions, too, must await further inquiry.

Studying and measuring judicial reputation can also be relevant to empirically measuring judicial performance, the subject of the symposium in which this Essay appears. Initially, the link may not be apparent. Measuring reputation statistically, as distinct from, say, measuring influence through citation analysis, may be considered so difficult that there is no way to include it as one metric of judicial performance, in a tournament of judges or otherwise. It is difficult to create precise statistical measures of judicial reputation. But that difficulty does not mean it is impossible to utilize reputation of a particular judge, or of a circuit as a whole, when considering judicial performance. Indeed, before the advent of citation analysis and other statistical measures, reputation, imprecise though it is, was the (or a) basis for gauging the performance of a judge or court. Perhaps surveys of judges and lawyers with regard to reputation could be included in measures of judicial performance.

Relatedly, scholars should consider the reputation of particular judges, and of multimember courts in general, as possible explanatory variables in judicial decisionmaking. Perhaps judges or courts that enjoy a high (or poor) reputation engage in opinion writing and decisionmaking in ways that are distinct—irrespective of statistical measures of influence as such.<sup>158</sup> With regard to multimember courts, incentives to improve or reward performance could or should be group-based—especially if appellate judge cooperation is a norm to be encouraged. In short, tournaments of judges could be court-based as well as judge-specific. In these ways, and perhaps others, judicial reputation as a distinct concept can play a useful role in the measurement of judicial performance.

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*the Commission on Structural Alternatives for the Federal Courts of Appeals*, 15 J.L. & POL. 379 (1999); and Gary Young, *More Proposals to Split the 9th*, NAT'L L.J., Aug. 23, 2004, at S1.

157. See generally NEAL GABLER, *LIFE THE MOVIE: HOW ENTERTAINMENT CONQUERED REALITY* (1998); JOHN SEABROOK, *NOBROW: THE CULTURE OF MARKETING, THE MARKETING OF CULTURE* (2000).

158. See, e.g., James J. Brudney, *Foreseeing Greatness? Measurable Performance Criteria and the Selection of Supreme Court Justices*, 32 FLA. ST. U. L. REV. 1015 (2005) (taking into account the “higher status” of the D.C. Circuit when evaluating Judge Warren Burger’s service on that court as compared to Judge Harry Blackmun’s service on the Eighth Circuit).

APPENDIX: THE THIRTEEN FEDERAL JUDICIAL CIRCUITS



