

Winter 1986

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Recommended Citation

William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 Fla. St. U. L. Rev. 1 (1986) .
<https://ir.law.fsu.edu/lr/vol14/iss1/1>

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THE CHANGING ROLE OF THE SUPREME COURT

JUSTICE WILLIAM H. REHNQUIST*

The nation's judges, legislators, and lawyers once again are debating Chief Justice Burger's proposal for a new national appellate court that would assume part of the Supreme Court's caseload. In this Article, Justice Rehnquist argues that the Supreme Court does not command enough "decision-making capacity" for all the constitutional and statutory issues needing resolution. He traces the Court's 196-year development from the Judiciary Act of 1790, under which the Justices were primarily circuit-riding trial judges, to the modern Court's role as an almost exclusively appellate tribunal. He concludes that creation of a national appellate court to assist the Supreme Court would not be a radical change, but only the latest step in the evolution of the nation's highest court.

THE ROLE of the Supreme Court of the United States is naturally of historical interest to students of Constitutional Law and American Government. But it ought also to be of interest to the legal profession generally and also to interested members of the public because of the current proposals which call for the creation of a national court of appeals. The various questions being discussed and debated in this context all involve some concept of the proper role of the Supreme Court in our system of government. My thesis is that the function of the Supreme Court of the United States has changed rather dramatically over the nearly two hundred years of its existence, and that this is because change is the law of life in judicial systems as well as in other, more lively areas of our affairs. And if the present difficulties in which the Supreme Court finds itself require additional change from its present role, such change should be regarded not as some strange anomaly, but

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This Article was originally presented as a speech at the Florida State University College of Law on February 6, 1986.

instead as a very natural development following the path of other similar developments over a course of two centuries.

What is the Supreme Court of the United States? Your typical lawyer, editorial writer, or taxi driver may reply that it is the "highest court of the land." Indeed it is, but under the system of federal courts established by article III of the Constitution, just what should the highest court of the land *do*? Surely some light may be shed upon this question by asking just what the Supreme Court has *done* in the preceding two hundred years of our nation's history. I am talking now about the function of the Court as a tribunal of last resort for both state court systems and lower federal courts, not about the substantive decisions which it has made. If these remarks were to be classified for purposes of curriculum, I would think they would come under the heading Federal Courts rather than under Constitutional Law.

During the first few decades of its existence the Supreme Court was, as it is now, almost entirely an appellate court. But the Justices of the Supreme Court spent only a small fraction of their time being appellate judges. During the first ten years of its existence the Court decided a total of less than fifty cases, and the average length of its sessions in Washington was somewhere around three to four weeks out of the year. Even at the time of the decision in *Gibbons v. Odgen*¹ in 1824, the Court was sitting in Washington for only six weeks out of the year.

If this were all that the Justices had been required to do, the job would have been a loafer's paradise indeed. But that was not all they were required to do. The rest of the year they were required by statute to "ride circuit" within the geographical area which they represented, holding circuit courts in the various cities within their jurisdiction. These circuit courts were trial courts in which the circuit justice generally sat with a circuit judge to conduct business. The principal business of the federal trial courts when they were first created consisted largely of two classes of cases: cases arising under the courts' admiralty jurisdiction and cases based on the diversity of citizenship of the parties.

The consequences of the circuit riding of the Justices in these early days were several and important. First, the Justice had to be a practicing lawyer in one of the states of his circuit because so much of the trial work was in diversity cases where state law was applicable. I simply pulled a volume of *Wheaton's Reports* out of

1. 22 U.S. (9 Wheat.) 1 (1824).

the bookshelf to find a Supreme Court decision reviewing such a case, and I turned to a case called *Blunt's Lessee v. Smith*.² The case was decided in 1822 and involved a dispute over land title which had been tried in the United States Circuit Court of Western Tennessee. The opinion of the Court was delivered by Chief Justice Marshall and is living proof that he took on some dull and unimportant cases to write for the Court as well as the great classics of constitutional law which he authored. The opinion is devoted to whether the lower court had properly charged the jury as to the extent to which North Carolina and Tennessee law permitted a court to look beyond the patent under which the party claimed. The Court then discusses applicable North Carolina and Tennessee law and concludes that the circuit court properly charged the jury in the case.

Chief Justice Marshall's circuit included North Carolina, and perhaps that is why he wrote the opinion in the case. But if questions like this were to be decided by the Supreme Court, they required at least some knowledge of the cases of the various states on the part of all the members of the Court, and certainly on the part of the Circuit Justice who was dispatched, when the short Term of the Supreme Court ended, to the various places where court in his circuit was held.

The circuit-riding system had another important consequence: it required that the membership of the Supreme Court be expanded as the nation's territory grew and the need for new lower federal courts grew with it, regardless of whether the Supreme Court as an appellate tribunal needed any additional Justices. This was so because the existing transportation facilities at the time limited an area in which a Circuit Justice could hold court—some of them had pretty rugged schedules as it was—and it would have been impossible to assign one Justice to more than one circuit (as is done in the much different circumstances of today).

Lest you have any doubt as to the truth of this statement, let me supply some figures furnished by the early Justices themselves in response to a Senate inquiry in 1838 asking the Justices to state the miles which they traveled annually to fulfill their circuit duties.³ Chief Justice Taney reported the least travel, and when one understands that his circuit included only the states of Maryland

2. 20 U.S. (7 Wheat.) 248 (1822).

3. See F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 49 (1927).

and Delaware, it is easy to understand why. He traveled 458 miles. But when one looks at the figures of some of the other Justices and recalls that travel in those days was not by jet airplane or automobile, but instead by stage, horseback, or riverboat for the most part, we find much heavier burdens of travel. Justice Smith Thompson, who was assigned to a circuit consisting of New York, Connecticut, and Vermont, reported that he had traveled 2,590 miles. Justice John Catron, who was assigned to a circuit embracing Tennessee, Kentucky, and Missouri, reported travel of 3,464 miles. Justice John McKinley, whose circuit included Alabama, Louisiana, Mississippi, and Arkansas, stated that he traveled an even 10,000 miles, though one suspects he may have rounded off this figure. He reported to the Senate:

I have never yet been at Little Rock, the place of holding the court in Arkansas; but from the best information I can obtain, it could not be conveniently approached in the spring of the year, except by water, and by that route the distance would be greatly increased.⁴

McKinley's travels were such that on at least one occasion he missed an entire session of the Supreme Court at Washington because of his circuit-riding duties.

The circuit-riding duties of the Justices were a source of criticism and debate from their inception. The argument in their favor was that Justices needed exposure to state laws in order to decide better the cases which came to the Supreme Court for appellate review; the opposing argument was the heavy and fatiguing demands put on middle-aged or elderly judges. Gouverneur Morris, one of the members of the Philadelphia Constitutional Convention, said in the United States Senate in 1802 that: "I am not quite convinced that riding rapidly from one end of this country to another is the best way to study law. I am inclined to believe that knowledge may be more conveniently acquired in the closet than in the highroad."⁵

Responding to criticisms from the Justices themselves and from the bar, Congress in 1801 abolished the circuit-riding duties of the Justices.⁶ Unfortunately for those worthies, the law was passed by

4. SEN. DOC. NO. 50, 25th Cong., 3d Sess. 39 (1838).

5. 11 ANNALS OF CONG. 82 (1802).

6. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (*repealed by Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132*).

a Congress controlled by the Federalists one month before Thomas Jefferson would succeed John Adams as President and the Jeffersonian Republicans would take over control of Congress. Jefferson and his followers had little use for the Supreme Court, headed as it now was by Chief Justice Marshall, but what really irked them was the provision of the 1801 bill creating numerous new circuit judgeships, to which Adams dutifully appointed deserving Federalists. The Republicans dubbed this Act the "Midnight Judges Act" because of the last-minute scramble to get the new judges nominated, confirmed, and commissioned before Adams vacated the White House for Jefferson. Indeed, one of the minor judges who was nominated and confirmed, but who never received his commission, was none other than James Marbury, surely a name that all students of Constitutional Law and American Government will recognize as the plaintiff in *Marbury v. Madison*.⁷

The upshot was that the Act of 1801 was repealed the following year,⁸ and the Supreme Court Justices continued their circuit-riding duties for many years to come. But the demands upon the Supreme Court as an appellate court, and therefore upon the Supreme Court Justices in that capacity, began to increase dramatically toward the middle of the nineteenth century. In 1840 there were 92 cases docketed in the Supreme Court; in 1850 there were 253; and by 1860 there were 310.⁹ Remember, we are talking not about petitions for certiorari, which can be and usually are denied without opinion; we are talking about cases which had to be decided on the merits.

The Court itself at this time tried to husband its resources better; in 1849 it adopted a rule (by a divided vote, as you might imagine) limiting counsel in the cases before it to two hours per side.¹⁰ Before that time there had been no limits imposed on the time that counsel might take, and the case of *Gibbons v. Odgen*¹¹ had taken five full days, four hours a day, to complete the arguments. But the Court got no relief from Congress until 1869, when that body passed an Act cutting down on the circuit-riding duties of the Justices¹² over much protest and lamenting for the "good old days."

7. 5 U.S. (1 Cranch) 137 (1803).

8. Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

9. 13 CONG. REC. 3464 (1882).

10. SUP. CT. R. 53, 48 U.S. (7 How.) v (1849).

11. 22 U.S. (9 Wheat.) 1 (1824).

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

After the Civil War, Congress began passing more regulatory legislation than it previously had. It also conferred federal question jurisdiction on the lower federal courts and granted removal authority from the state courts in cases raising federal questions. As might be expected, the Supreme Court's docket continued to grow. In 1870 there were 636 cases on the docket; in 1880 there were more than 1,200 cases;¹³ in 1890 there were 1,816.¹⁴ The Supreme Court by the latter year lagged the incredible total of *three full years* between the time a case was first docketed in the Court and the time that oral argument was heard. The situation now cried out for relief, and the voices of the legal community were added to those of the Justices in demanding it. There were proposals aplenty floated publicly in and out of Congress: a system of intermediate courts of appeals, an enlarged Supreme Court which would sit in divisions like the French Court of Cassation, a national court of appeals sitting in Washington, and limits on federal jurisdiction.

Responding at last to these concerns, Congress in 1891 passed an act creating the federal courts of appeals—circuit courts of appeals, as they were then called—and substantially changing the Supreme Court's role in the federal judicial system.¹⁵ Appeals from judgments of federal trial courts where the federal jurisdiction was based on diversity of citizenship now went as of right to the courts of appeals with subsequent review by the Supreme Court only on a discretionary basis. Appeals, where jurisdiction of the lower court was based on questions of federal statutory or constitutional law, however, could still be taken directly from the federal trial courts to the Supreme Court. And appeals were allowed for the first time from federal trial courts to the Supreme Court in noncapital criminal cases; amazingly enough, before 1889 there had been for practical purposes no appeal whatever to any court from judgment of conviction in federal criminal cases.

From this point on the Supreme Court was no longer at the disposal of every losing litigant in a federal court who had the time and money to take an appeal to the "highest court in the land." In diversity of citizenship cases, which still comprised the vast bulk of the caseload of the lower federal courts, the newly created circuit courts of appeal were substituted for the Supreme Court as the

13. 13 CONG. REC. 3464 (1882).

14. 1891 ATT'Y GEN. ANN. REP. iv.

15. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

source of the one appeal as of right to which the losing litigant in a federal court was entitled. But the Supreme Court remained available to all losing litigants as a matter of right in all cases involving construction of federal statutes or of the United States Constitution. The jurisdiction of the Supreme Court to review cases coming from state courts was somewhat altered, but since the Supreme Court had never reviewed final judgments of state high courts except in cases involving a claim of federal right, this change was not very important. There were cries at the time that every litigant in the federal system ought to have a right to have his case decided by the highest court in that system; no one thought that this claim was unworthy in the abstract, but it could not be allowed at the cost of three- and four-year delays in the docket of the Supreme Court.

The Court immediately benefited by this partial shift from mandatory jurisdiction to discretionary jurisdiction over appeals from lower federal courts. In 1890 there were 623 new cases docketed in the Court;¹⁶ in 1891 there were only 379;¹⁷ and in 1892 there were only 275.¹⁸ For the next thirty years the Act of 1891 would serve to keep the federal courts, including the Supreme Court, abreast of their caseload.

But that caseload continued to increase. Congress got more and more into the regulatory field, first, in response to the Progressive movement, and then in response to Woodrow Wilson and his New Freedom program. Modest changes in the direction of substituting certiorari for appeal were made in the Judiciary Act of 1916,¹⁹ but they did not sufficiently alter the situation to prevent the Supreme Court from once again falling behind in its docket. By the early 1920's congestion and delay had again raised their ugly heads, haunting the Supreme Court and its litigants. It was not as bad as it had been thirty-five years before, but it was now taking from one to two years between the docketing of a case and oral argument in the Supreme Court. The Court again made an effort to husband its own resources, creating a "summary docket" and providing that in cases assigned to that docket only half an hour would be allowed to counsel for each side to argue the case. But such incremental changes as these could not stem the backlog resulting from the increased flow of litigation.

16. 1891 ATT'Y GEN. ANN. REP. iv.

17. 1892 ATT'Y GEN. ANN. REP. iv.

18. 1893 ATT'Y GEN. ANN. REP. iv.

19. Act of Sept. 6, 1916, ch. 448, 39 Stat. 726.

Under the leadership of Chief Justice Taft, a committee consisting of Justices Van Devanter, McReynolds, and Sutherland drafted a law called the "Judges' Bill," which was submitted to Congress in late 1921 and introduced in that body in 1922.²⁰ It did not really gain momentum until 1924, but when in that year it did, Congress acted speedily to enact what finally became the Judiciary Act of 1925.²¹

This Act made a major shift in the business of the Supreme Court: its reviewing authority over decisions of lower courts in both the state and federal system was made primarily discretionary, subject to some exceptions. The idea contained in the Act of 1891—that all questions of federal statutory and constitutional law ought to be appealable as of right to the Supreme Court—was abandoned. Direct appeals to the Supreme Court from three-judge district courts, which were then required in order to invalidate state or federal statutes on constitutional grounds, were still allowed; indeed, they were not eliminated until 1976, when most three-judge court requirements and consequent direct appeals to the Supreme Court were abolished.²²

The 1925 Act left the courts of appeals very much in the position that the Supreme Court had been in before 1890; they were the only appellate courts as a matter of right not only for diversity litigation, but for litigation involving the questions of construction of federal statutes or the United States Constitution as well. Again, there were outcries that on cases involving the latter issues—a claim of right under a federal statute or under the United States Constitution—a party ought to have appeal as of right to the "highest court in the land." Again, no one disagreed that in the best of all possible worlds this would be desirable, but cooler heads recognized that this is not the best of all possible worlds, and the Supreme Court had to once again abandon one of the functions which it had previously performed. The roles of the courts of appeals in 1891 had been necessarily modest because they were new courts and people were not sure how they would turn out. But by 1925, when public confidence in them had been established, they were rightly given much more responsibility and much more finality in their decisions.

20. H.R. 10479, 67th Cong., 2d Sess., 62 CONG. REC. 2737 (1922).

21. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (current version at 28 U.S.C. §§ 1251-1294 (1982)).

22. Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119 (codified at 28 U.S.C. § 2284 (1982)).

Looking back from the perspective of the present day, we can see that there were several distinct stages in the evolution of the role of the Supreme Court and its Justices in the federal judicial system. During the first stage, in the early decades of our country's existence, there was no full-time federal appellate tribunal; the Justices of the Supreme Court spent most of their official time holding court in their circuits and convened only for a month or so in February of each year to sit as an appellate court reviewing the judgments of lower federal courts and of state courts.

During the latter half of the nineteenth century the appellate business of the Supreme Court picked up so much that it became a full-time job for the Justices of the Court; their circuit-riding duties were secondary at best and often fell into desuetude. The Supreme Court was now a full-time appellate court, reviewing all of the decisions of the lower federal courts which were appealed to it in the same way that I understand the Florida district courts of appeal review judgments of the Florida circuit courts which are appealed to them.

But such a mission became impossible for any one court to fulfill by the end of the nineteenth century, and with the Act of 1891, the third stage in the evolution took place: a new level of appellate courts between the trial courts and the Supreme Court was created, and appeal as of right from federal trial courts and cases involving no question of construction of a federal statute or of the United States Constitution lay to these courts with only discretionary review from them to the Supreme Court. The Supreme Court had now abandoned its role of assuring error-free trial in the lower federal courts by use of its reviewing authority, and the cases which it decided on appeal now involved only issues of federal law.

For the next thirty-odd years this system worked reasonably well, but once again the growth in population of the nation and the tremendous addition to the business of the federal courts overtook it. A fourth stage in the evolution of the Supreme Court occurred when Congress passed the Certiorari Act of 1925.²³ Hereafter, in the great majority of cases decided by the federal courts of appeals, even though they involved constructions of federal statutes or of the United States Constitution, there was no appeal as of right to the Supreme Court. Review is by certiorari only in the exercise of the Court's discretion. Congress agreed with the Supreme Court that, in Chief Justice Taft's familiar phrase, "Insofar as jus-

23. Act of Feb. 13, 1925, ch. 229, 43 STAT. 936.

tice between individual litigants is concerned, two courts is enough." The Supreme Court was henceforth expected to confine itself to reviewing cases which involved broader legal questions than merely which of the two parties of the case ought to prevail.

The Supreme Court today does not have the sort of docket congestion that resulted in unacceptable delays in its decision of cases in 1890 and in 1925. Our current problem is a more systemic one. In 1935, ten years after the Certiorari Act, the Court was deciding roughly 150 cases on the merits each year;²⁴ today we continue to do that and have for the past ten years or so, although there were times during the 1950's when the Court's output was less than 100 cases per year.²⁵ But the great difference is in the percentage of cases we are able to review as compared to those which we are asked to review. In 1935, for example, there were roughly 800 petitions for certiorari,²⁶ so that by granting and hearing 150 of them we reviewed somewhere between fifteen and twenty percent of the cases we were asked to review. But for the past ten years the petitions for certiorari have numbered more than 3,500;²⁷ by granting review and deciding only 150 of those petitions, we grant review in less than five percent of the cases in which it is asked. This is simply not a large enough number of cases to enable us to address the numerous important statutory and constitutional questions which are daily being decided by the courts of appeals and by the fifty high courts of the states.

A lawyer who has to wait three years between the time his case is docketed in a court and the time it is set for oral argument is apt to be a mighty disappointed fellow and an easy recruit to the need for judicial reform in this area. A lawyer whose client has lost a case in the Court of Appeals for the Eleventh Circuit, and whose petition for certiorari to the Supreme Court is denied even though he raises important federal questions not foreclosed by any decision of our Court, may also have a similar grievance, but he is less likely to realize it. He may have been inured to the idea that only when there is a "conflict" between two courts of appeals on an important and undecided federal question ought the Supreme Court

24. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT A-7 (1972), 57 F.R.D. 573. In 1935, 187 cases were disposed of by signed opinions, of which 145 were written opinions; 803 cases were disposed of without signed opinions, of which 72 were per curiam opinions. *Id.*

25. *Id.*

26. 1936 ATT'Y GEN. ANN. REP. 12.

27. See 1979 ATT'Y GEN. ANN. REP. 8, 11; 1984 ATT'Y GEN. ANN. REP. 7, 9.

take the case and decide it. But I submit that this very mentality is a creature of a Supreme Court stretched too thin for the responsible work it ought to do. And to go further and suggest that it is actually desirable to allow important questions of federal law to "percolate" in the lower courts for a few years before the Supreme Court takes them on seems to me a very strange suggestion; at best it is making a virtue of necessity.

If we were talking about laboratory cultures or seedlings, the concept of issues "percolating" in the courts of appeals for many years before they are really ready to be decided by the Supreme Court might make some sense. But it makes very little sense in the legal world in which we live. We are not engaged in a scientific experiment or in an effort to square the circle, with respect to which endeavors, hoped for dramatic and earth-shaking success at the end of the line may justify many years of cautious preparation and experimentation. But what lawyers and litigants in our country's federal courts are seeking to know may be, for example, the meaning of a particular subsection of the Internal Revenue Code. If we were all members of a monastic order presided over by Plato or by Saint Thomas Aquinas, we might accede to the idea that there need be no rush to judgment on such a question, and that an occasional hypothetical or tentative answer proposed and thought about for a while may help us reach the ultimately "correct" solution. But there is no obviously "correct" solution to many of the problems of statutory construction which confront the federal courts; Congress may have used ambiguous language, the legislative history may shed no great light on it, and prior precedent may be of little help. What we need is not the "correct" answer in the philosophical or mathematical sense, but the "definitive" answer, and the "definitive" answer can be given under our system only by the court of last resort. It is of little solace to the litigant who lost years ago in a court of appeals decision to learn that his case was part of the "percolation" process which ultimately allowed the Supreme Court to vindicate his position.

Two thousand years ago Cicero observed that the law is not "one thing at Rome and another at Athens, one now and another in the future."²⁸ He was talking, of course, about natural law, and there have been later political philosophers who disagreed with him. But surely it is hard to dispute that, in a country with a national gov-

28. See *Wilson v. McNamee*, 102 U.S. 572, 574 (1880) (citing Cicero, *Lactantius Inst. Div.*, bk. 7, c. 8).

ernment such as ours, Congress should not be held to have laid down one rule in North Carolina and another rule in North Dakota simply because the Court of Appeals for the Fourth Circuit and the Court of Appeals for the Eighth Circuit disagree with one another on the meaning of a federal statute. In short, we need today more national decision-making capacity than the Supreme Court as presently constituted can furnish.

I venture to predict that, for the reasons I have very roughly summarized, we will in the not-too-far-distant future have another stage in the evolution of the Supreme Court. It will largely relinquish its role in run-of-the-mine statutory construction cases to a new court—whether called a national court of appeals or something else—which will function in effect as a lower chamber of the Supreme Court. The Supreme Court will continue to deal as it has in the past with questions of constitutional law and other federal questions that now come before it. Chief Justice Burger has proposed the creation of such a court on a temporary basis,²⁹ and I think the creation of such a court makes eminent good sense. Even though its structure at the outset of its existence may require that it employ sitting circuit judges, eventually it will consist of judges nominated to that court by the President and confirmed by the Senate. It will have either by practice or by statute the all-but-final say in determining in cases referred to it what an act of Congress means. Thus, it will not really constitute a fourth tier in the system of federal courts, but will be more like a lower chamber of the Supreme Court, a chamber which will take over from the Supreme Court a class of cases which the latter court will have had to give up for the same reason that it has had to give up all the other functions which it has surrendered during the history of its evolution.

Lawyers and judges as a profession are conservatives in the sense that most all of us are: we are familiar with a certain way of doing things and would prefer not to see that system change. But change has been the destiny of our federal court system since it was first brought into existence in 1789. Felix Frankfurter and James Landis, in their monumental work *The Business of the Supreme Court*, published only two years after the Certiorari Act of 1925, observed that “framers of judiciary acts are not required to be

29. See Burger, *The Time is Now for the Intercircuit Panel*, A.B.A. J. Apr. 1985, at 86, 88.

seers; and great judiciary acts, unlike great poems, are not written for all time."³⁰ They went on to say that:

The act of February 13, 1925, will be no more permanent than was its most recent predecessor, the Circuit Courts of Appeals Act. If anything, changes in the future are likely to be more rapid than they have been in the past because the accelerated business pace of the country is reflected in the pace of business of the courts.³¹

There has been much discussion engendered by the Chief Justice's proposal, and I am sure he would be the last one to suggest that every detail of his proposal was beyond criticism or revision. There has been a good deal of criticism of the Chief Justice's proposal, much of it constructive and eminently worthy of consideration. But the fact that there may be debates about the proper way to go about fulfilling a need does not diminish the necessity for ultimately accomplishing that task. Like most other measures for judicial reform, I do not expect any bill creating such a court to be enacted into law by Congress either next week or next month, perhaps not next year. The first proposal in Congress for what ultimately became the circuit courts of appeals was made in 1848,³² and the bill creating those courts was not enacted until forty-three years later.³³ As Arthur Vanderbilt once remarked, "Judicial reform is no sport for the short-winded."³⁴

But needed reform there must be, and comfort with the present situation is not itself a reason for opposing change. In Alfred Lord Tennyson's poem *Morte D'Arthur*, Sir Bedivere mourns the breakup of the Round Table, saying:

Ah! My Lord Arthur, whither shall I go?

. . .

For now I see the true old times are dead.³⁵

And Arthur replies:

The old order changeth, yielding place to new

30. F. FRANKFURTER & J. LANDIS, *supra* note 3, at 107.

31. *Id.* at 1-2.

32. 18 CONG. GLOBE 398 (1848).

33. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

34. A. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* xix (1949).

35. Tennyson, *Morte D'Arthur*, in *THE COMPLETE POETICAL WORKS OF TENNYSON* 67 (W.J. Rolfe ed. 1898).

And God fulfills himself in many ways
Lest one good custom should corrupt the world.³⁶

Two hundred years of history show that evolution has been the destiny of the Supreme Court from the time it was first created by article III of the Constitution. The present proliferation of litigation in both state and federal courts throughout the country and the tremendously increased number of undecided federal questions which this litigation raises are presently preventing the Supreme Court from adequately discharging its role as the final arbiter of questions of federal statutory and constitutional law in the United States. No one court can any longer discharge both of those functions, and I think it is the beginning of wisdom to recognize that fact and frankly concede that one or the other of these functions should be in large part transferred to a new court. Certainly, if one is to choose between the Supreme Court's active role in constitutional adjudication and its active role in statutory adjudication, no one would seriously question that it ought to retain the former function while surrendering as much of the latter as is necessary to enable it to perform the former. It is, in my opinion, time for still another in the many evolutionary steps which have marked the history of the Supreme Court of the United States.