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I. INTRODUCTION

The court,[1] readers, and authors must be aware of the contemporary reality that the United States Courts of Appeals sit in most cases both as the

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* This article is adapted from a chapter written by Professor Baker in *The First Decade: The U.S. Court of Appeals for the Eleventh Circuit, 1981-1991*, which was coauthored by J. Ralph Beaird and Sharon Kennedy.

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1. The generic reference "the court" will be used throughout this chapter. "The court" is the appropriate reference both to an entire court of appeals and to a particular division or panel. *See* Western Pac. R.R. Corp. v. Western Pac. R.R., 345 U.S. 247, 250, *cert. denied sub nom.* Metzger v. Western Pac. R.R., 346 U.S. 910 (1953). When relevant, the distinction will be made explicit between a three-judge panel and an en banc court.

appeal of right and as the final court of review. Justice Byron White made the point:

> The Supreme Court of the United States reviews only a small percentage of all judgments issued by the twelve courts of appeals. Each of the courts of appeals, therefore, is for all practical purposes the final expositor of the federal law within its geographical jurisdiction. This crucial fact makes each of those courts a tremendously important influence in the development of the federal law, both constitutional and statutory. Hence, it is an obviously useful and significant service to keep close track of and to publicize, particularly for the benefit of lawyers and judges, the work of the circuits.[2]

Thus, the decisions of the courts of appeals have become, if not less fallible, more final in all areas of federal law.[3] The Eleventh Circuit's decisions, like the decisions of the other courts of appeals, have great effects on the legal life of our Nation. Consequently, the commentator's task becomes more important.

Likewise, the task of commentary is difficult. The period covered here—the first decade of the Eleventh Circuit—represents, quite literally and figuratively, the formative era of the court. Indeed, the volume of decisions and their variety are qualities that ought to humble, if not intimidate, most commentators. Justice Holmes once observed that a common law court could be expected to replicate the entire corpus juris in the space of a single generation.[4] The Eleventh Circuit did this consciously between 1981 and 1991. In *Bonner v. City of Prichard*,[5] the inaugural en banc court held that the new court—just cleaved from the former Fifth Circuit—would deem itself bound by the precedents of the old court.[6] Of course, any transfused

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2. Byron R. White, Dedication, 15 TEX. TECH L. REV. ix, ix (1984) (footnote omitted); *see also* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL—THE PROBLEMS OF THE U.S. COURTS OF APPEALS 21-27 (1994).

3. *Cf.* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

4. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

> The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view. We could reconstruct the corpus from them if all that went before were burned. The use of the earlier reports is mainly historical . . . .

Id. at 458.

5. 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

6. *Id.* at 1207. *See generally* BAKER, *supra* note 2, at 52-73. For a detailed elaboration of the legislative and political history of the statute creating the Eleventh Circuit and the

precedent of the Fifth Circuit or any subsequent decision of the new Eleventh Circuit is subject to reconsideration by the en banc court.

A second reason for the difficulty in developing commentary on the Eleventh Circuit is the large volume of the court's decisions. One is reminded of Douglas Freeman's famous entreaty that a historian—presumably even lawyer/amateur court historians—"should never undertake to report the thinking of his subjects without written evidence or reliable autoptic proof."[7] The problem facing the court historian, however, is the sheer volume of the writings that describe the thinking of the circuit judges as they go about deciding so many appeals. In the first decade of the Eleventh Circuit, *Federal Reporter, Second Series* increased by almost 300 volumes, from 661 to 950 volumes. This is the principal resource for the story of the Eleventh Circuit's first decade.[8] The statistics have an almost astronomical order of magnitude to them. Although too much is too often made of the "crisis of volume" in the United States Courts of Appeals,[9] a decade worth of comparison is instructive for present purposes.[10] Let us compare these standard quantitative measures: the gross number of appeals filed; appeals filed per three-judge panel; appeals terminated; terminations per panel; and pending backlog of appeals.

> In its first year, the 1981 court year, with twelve active judges, Eleventh Circuit figures were: appeals filed—2,433; appeals filed per

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policy issues of precedent in the new court, see generally Thomas E. Baker, *A Legislative History of the Creation of the Eleventh Circuit*, 8 GA. ST. U. L. REV. 363 (1992); Thomas E. Baker, *A Postscript on Precedent in the Divided Fifth Circuit*, 36 SW. L.J. 725 (1982); Thomas E. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 SW. L.J. 687 (1981); Thomas E. Baker, *A Primer on Precedent in the Eleventh Circuit*, 34 MERCER L. REV. 1175 (1983).

The various configurations between the former Fifth Circuit and the new Eleventh Circuit are no longer relevant, except in one regard. The Supreme Court grants writs of certiorari to Unit B of the former Fifth Circuit, the administrative unit which corresponded to the new Eleventh Circuit. Both are included in this discussion.

7. STEPHEN B. PRESSER, STUDIES IN THE HISTORY OF THE UNITED STATES COURTS OF THE THIRD CIRCUIT at viii (1981).

8. *See* HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT 1891-1981, at v (1984); *see also* Thomas E. Baker, *Judges, Heal Thyselves: The Dawn of the Third Millennium of F.3d*, LEGAL TIMES, Mar. 7, 1994, at 30.

9. *See* BAKER, *supra* note 2, at 31-52; *see also* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (Apr. 2, 1990).

10. *See* John C. Godbold, *The Eleventh Circuit Court of Appeals—The First Ten Years*, 43 MERCER L. REV. 961, 972 (1992).

> panel—608; appeals terminated—2,191; terminations per panel—548; and pending cases—2,261.
>
> The statistics for 1991, ten years later, still with twelve judges authorized, are sobering: appeals filed—4,436 (up 82%); appeals filed per panel—1,109 (up 82%); appeals terminated—4,107 (up 87%); terminations per panel—1,027 (up 87%); and pending cases—4,171 (up 84%).[11]

The docket of the Eleventh Circuit is large compared to most other regional courts of appeals. In 1991, the Eleventh Circuit ranked third in appeals filed and terminated and second in cases pending.[12] The Eleventh Circuit handles approximately ten percent of all the federal appeals filed nationwide. Only the undivided Ninth Circuit and the new Fifth Circuit have larger dockets, and both of those courts have many more judgeships than the Eleventh Circuit.

The geography and demography of the Eleventh Circuit are unique and difficult to capture in a two dimensional account. Already, in its first decade, the new Eleventh Circuit has developed its own legal culture, a complex of people and places, representative of the legal issues of the day and inclusive of those perennial questions of federal court jurisdiction that have defined the republic. To select the "leading cases" is at once very difficult and highly arbitrary. No doubt many important decisions are left out of this account. Certainly, other chroniclers would choose differently. There are as many methodologies of court history as there are historians of courts.[13]

As a practical matter, it would be impossible to conduct an in-depth review of all the decisions made by the Eleventh Circuit during the court's first decade.[14] The *Mercer Law Review*, however, does perform that task in an annual symposium. The eleven issues covering the relevant period total over 3500 pages of analysis by more than ninety professional authors who are experts in their fields. The approach taken in this article is more selective; it ventures into, at least, some preliminary impressions about the contributions of the Eleventh Circuit bench to the national law. The focus

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11. *Id.*

12. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS, Table B, at 19 (Dec. 31, 1991).

13. *See, e.g.*, HISTORY OF THE EIGHTH CIRCUIT (1977); HISTORY OF THE SIXTH CIRCUIT (1976). *See generally* Helen B. Nies, *Celebrating the Tenth Anniversary of the United States Court of Appeals for the Federal Circuit*, 14 GEO. MASON U. L. REV. 505 (1992).

14. RAYMAN L. SOLOMON, HISTORY OF THE SEVENTH CIRCUIT 1891-1941, at 185 (1976).

here is on the cases decided by the Supreme Court from 1981 to 1991 which arose in the Eleventh Circuit. Only the Supreme Court has a national perspective on the federal law. The perspective from the Supreme Court thus provides some basis for identifying important cases and for venturing first decade impressions on the Eleventh Circuit.

While the vantage of this article is from the *United States Reports*, it bears emphasis that the purpose of this article is to begin to understand how the Eleventh Circuit's decisions have contributed to the national law. While there are many more assessments of the Supreme Court than there are writings about the United States Courts of Appeals,[15] an effort was made to sample the secondary literature on the intermediate court as well. The substantive discussion and citations here reflect the careful reporting and analysis provided during the surveyed period by the seventeen law reviews in the three states of the Eleventh Circuit.[16]

It also should be made explicit that the high reversal rate of the surveyed decisions does not reflect poorly on the Eleventh Circuit. The "decided propensity" of the Supreme Court, statistically speaking, is to grant a writ of certiorari in cases it intends to reverse.[17] The Eleventh Circuit's experience in this regard is consistent with the treatment afforded to all the other courts of appeals.[18] Often, the Supreme Court is called on to pick and choose between conflicting approaches taken by different courts of appeals, to resolve intercircuit conflicts. In these cases, the opinions in conflict—both the one preferred and the one rejected—contribute to the High Court's analysis. Whether the Supreme Court eventually agrees or disagrees with the Eleventh Circuit, therefore, is not as important as an appreciation

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15. *But see generally* J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS (1981); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985).

16. Alabama: *Alabama Law Review, Cumberland Law Review.* Florida: *Florida Journal of International Law, Florida Law Review, Florida State University Law Review, Nova Law Review, Stetson Law Review, University of Florida Journal of Law & Public Policy, University of Florida Law Review, University of Miami Entertainment & Sports Law Review, University of Miami Inter-American Law Review, University of Miami Law Review.* Georgia: *Emory International Law Review, Emory Law Journal, Georgia Law Review, Georgia State Law Review, Mercer Law Review.*

17. *But see* Jeffrey A. Segal & Harold J. Spaeth, *Rehnquist Court Disposition of Lower Court Decisions: Affirmation Not Reversal*, 74 JUDICATURE 84 (1990).

18. *See* Harold J. Spaeth, *Supreme Court Disposition of Federal Circuit Court Decisions*, 68 JUDICATURE 245 (1984); Gerald F. Uelmen, *The Influence of the Solicitor General upon Supreme Court Disposition of Federal Circuit Court Decisions: A Closer Look at the Ninth Circuit Record*, 69 JUDICATURE 361 (1986).

for the contribution by the Eleventh Circuit to the Supreme Court's decisions. The United States Court of Appeals for the Eleventh Circuit plays the important role of error correction and law development in every appeal decided.[19] The Supreme Court could not perform its essential role otherwise.

II. BACKGROUND AND CONTEXT

This article is a juridical account of the first decade of a court, and for the reasons just described, the discussion centers on the most visible evidence of the intermediate court: appellate decisions. There admittedly is much missing from this account. It is appropriate to spend at least a few paragraphs, before proceeding with the case commentary, to highlight what has happened in the Eleventh Circuit that does not appear in the pages of *Federal Reporter, Second Series*. Fortunately, that account has already been written by John C. Godbold, Senior Circuit Judge. His account may be relied on for background and context.[20]

Judge Godbold is the only person to have ever served as chief judge of two regional courts of appeals (the old Fifth Circuit, at the time of division, and the new Eleventh Circuit).[21] He was thus a witness to this history. In his recommended article, Judge Godbold describes many of the behind-the-scenes events of establishing a new court of appeals: renovating the Elbert P. Tuttle Courthouse in Atlanta; building up a library; hiring support staff; organizing a clerk's office; recruiting staff attorneys; establishing the Historical Society; continuing the federal judicial tradition of public service; and performing other tasks essential to the smooth operation of the institution.

Judge Godbold's extracurricular history identifies how some early traditions have already formed in the Eleventh Circuit. Following its parent circuit, the court of appeals has consciously "chose[n] to be not a mere recipient of documents but a proactive participant in assuring the prompt and orderly progress of appeals."[22] Its local rules and internal operating procedures are designed with this goal in mind. Personnel in the clerk's office and staff attorneys share the judges' commitment to differentiated case management. Improving relations between the state and federal courts

19. *See* White, *supra* note 2, at x; *see also* BAKER, *supra* note 2, at 17-21.

20. *See* Godbold, *supra* note 10.

21. Harvey Couch, *A Brief History of the Fifth Circuit Court of Appeals*, 56 TUL. L. REV. 948, 958 (1982).

22. Godbold, *supra* note 10, at 967.

in the Eleventh Circuit has been one of the new court's highest priorities. Generally, "[h]abeas corpus cases are an especially sensitive area,"[23] but the most "difficult and demanding" appeals are those brought by state prisoners sentenced to death.[24] Death sentence cases account for forty to fifty appeals each year, and almost every appeal continues through the system to the Supreme Court's docket.[25] The Eleventh Circuit has contributed much more than its share of these difficult cases. By Judge Godbold's count, nearly half of the Supreme Court's leading death penalty decisions of the last decade have involved Eleventh Circuit appeals.[26]

The most disagreeable extracurricular episode of the first decade may have been the investigation and impeachment of District Judge Alcee Hastings. Hastings was indicted in 1981 on criminal charges of bribery, conspiracy, and obstruction of justice, allegedly involving a bribe by an attorney to give lenient sentences to the attorney's clients. At separate trials, the attorney was convicted, but Hastings was acquitted. Elaborate proceedings were conducted by the Eleventh Circuit, which eventually recommended that the matter be referred to the House of Representatives. The House voted to impeach and the Senate convicted Hastings and removed him from judicial office. The episode lasted more than six years and was characterized by the most serious of charges and countercharges: by claims of racism made by Hastings which were ultimately rejected, by accompanying litigation that raised issues of constitutional dimension, and by the inevitable distraction and turmoil endemic to such serious proceedings. In the end, the Eleventh Circuit performed this difficult and distasteful task most admirably. Judge Godbold concludes:

> These lengthy and difficult proceedings reached beyond the confines of charges against Hastings. They established important principles, and a methodology, for handling within the judiciary serious misconduct charges against judicial officers. Hastings was the first federal judge to be impeached after acquittal on underlying criminal charges. The proceedings demonstrated that in a judicial conduct matter the federal judiciary had the capacity to investigate and to act in the most difficult of circumstances.[27]

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23. *Id.* at 977.
24. *Id.* at 974.
25. *Id.* at 974, 976.
26. *Id.* at 976; *see infra* text accompanying notes 236-65.
27. Godbold, *supra* note 10, at 982; *see also* Victoria Santoro, Comment, *Federal Judges' Absolute Immunity from Criminal Prosecution Prior to Impeachment*: United States v. Hastings, 7 NOVA L.J. 623 (1983).

The most tragic event of the first decade was the assassination of Circuit Judge Robert S. Vance in 1989. The heartfelt sense of loss described by Judge Godbold on behalf of himself and his colleagues is a fitting testimonial to Judge Vance,[28] but it also underscores and further justifies the high regard the Nation continues to show its federal appellate courts. The men and women who have served on the Eleventh Circuit have carried on the grand tradition of Article III of the Constitution. They have served above and beyond the call of judicial duty, often under difficult and challenging circumstances. In this regard, the Eleventh Circuit is not a court apart from the larger whole, spanning only two decades. Rather, it is part of a larger whole, with a history that spans two centuries.

III. ORGANIZATION

The United States Court of Appeals for the Eleventh Circuit, like the other courts of appeals, is best described as a "case-deciding court."[29] This is to say that the Eleventh Circuit's "day-to-day work is decisional in the common law tradition."[30]

> It considers and decides discrete controversies and, where appropriate, records in an opinion its decision and its reasoning process. A decision may do no more than decide the dispute. Or it may add by accretion to the body of law, a bit here, an explanation there. Occasionally a decision may extend the law to new territory. But ordinarily extension of the law is a consequence of decision-making, not a pursuit of law-making.[31]

The organization followed here is to collect Supreme Court decisions between 1981-1991 in which the Supreme Court granted a writ of certiorari to the Eleventh Circuit and sort them into the following common law subject areas for discussion: Administrative Law; Antitrust; Civil Procedure and Federal Jurisdiction; Constitutional Law; Criminal Law and Procedure; Evidence; Labor Law; and Taxation.

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28. Godbold, *supra* note 10, at 983-84.
29. *Id.* at 984.
30. *Id.*
31. *Id.*; *see* BAKER, *supra* note 2, at 14-17; *see also* POSNER, *supra* note 15, at 294-315.

IV. ADMINISTRATIVE LAW

It may seem odd to begin a survey of a court's contribution to the national law with what may be described as "agency law," but the average citizen likely will only see the inside of a courtroom, especially a federal courtroom, when called to jury duty. The reality is that most "Americans usually deal with their government through the administrative process."[32]

Administrative law, broadly defined, describes the legal structure of the executive branch, especially the quasi-independent agencies, along with the procedural restraints, especially judicial review, with which the government is administered. At the constitutional level, administrative law includes concerns for procedural due process and separation of powers, but the most important constraints on the federal agencies are at the level of statutory law. The first federal judicial task always is to assure that the agency is being faithful to the congressional intent in the legislation creating the particular program. Second, other more general statutes, like the Administrative Procedures Act,[33] oblige the federal courts to act as a kind of watch-dog over the agencies. Since the Roosevelt era, these agencies have grown in size, importance, and responsibility; consequently, the judicial tasks have grown apace.[34]

The generic drug industry lost an important federal regulation decision in *United States v. Generix Drug Corp.*[35] A unanimous Supreme Court held that new "drugs," as the term is used in the Federal Food, Drug, and Cosmetic Act, included generic drug products and, therefore, such products were subject to prior FDA approval, even though the active ingredients had been separately approved.[36] The drug manufacturer made a number of arguments based on legislative history and administrative practice as applied to the generic marketing of prescription and over-the-counter drugs, but to no avail. That was not the plain meaning of the term, at least the meaning

32. David King, *Administrative Law*, 18 TEX. TECH L. REV. 237, 237 (1987).

33. 5 U.S.C. §§ 551-559 (1988 & Supp. III 1991).

34. *See generally* Robert F. Vargo, *Real Estate Transactions: The Existence of a Federal Security*, 14 CUMB. L. REV. 301 (1984); Judy Bateman Shepura, Comment, *Fiduciary Duties Under ERISA: Interpretations Within the Eleventh Circuit*, 19 CUMB. L. REV. 131 (1988); Sally Clark Bowers & Linda K. Browning, Eleventh Circuit, *Rule 10b-5: The "State of the Mind" Elements in the Eleventh Circuit*, 12 CUMB. L. REV. 633 (1982); Joan M. Vecchioli, Note, *Securities Regulation: The Sale of a Closely-Held Business in Light of* Landreth Timber Co. v. Landreth, 15 STETSON L. REV. 619 (1986).

35. 460 U.S. 453 (1983).

36. *Id.* at 461.

plain to the Supreme Court, which reversed the court of appeals. The three-judge panel of the Eleventh Circuit had sided with the manufacturer to reach the common sense conclusion that the term "new drug" referred only to the active ingredient, and not to the inactive "excipients," such as coatings, binders, and capsules.[37]

Sullivan v. Hudson[38] was an important ruling to the millions of retired persons residing within the geographical jurisdiction of the Eleventh Circuit, as well as in the rest of the country.[39] After the Department of Health and Human Services denied the claimant's application for Social Security disability benefits, she sought federal court review. The district court affirmed the agency's decision, but the Eleventh Circuit reversed because the Secretary had not followed applicable regulations.[40] On remand, the claimant was awarded benefits, and subsequently sought attorneys' fees under the Equal Access to Justice Act.[41] The district court denied the fees and the claimant brought an appeal to the Eleventh Circuit, which held in her favor and directed that attorneys' fees be awarded.[42] The Supreme Court agreed with the conclusion of the Eleventh Circuit and held that it was within the district court's power under the Act to award a Social Security claimant attorneys' fees for representation provided during the administrative proceedings which were held pursuant to the district court's order remanding the action to the Secretary.[43]

The same Act was involved in a second decision in an otherwise unrelated area of administrative law that was decided differently. The Eleventh Circuit held that the Equal Access to Justice Act did not apply to deportation proceedings.[44] The Supreme Court affirmed the Eleventh Circuit decision, which held that the administrative proceedings were not

37. United States v. Generix Drug Corp., 654 F.2d 1114, 1120 (5th Cir. Unit B Sept. 1981) (Hill, J., for Markey & Clark, JJ.).

38. 490 U.S. 877 (1989).

39. *See* Bernard P. Matthews, Jr., Comment, *Social Security Continuing Disability Reviews and the Practice of Nonacquiescence*, 16 CUMB. L. REV. 111 (1985); Anthony J. Russo, Comment, *The Social Security Disability Programs: Representing Claimants Under the Changing Law*, 14 STETSON L. REV. 131 (1984).

40. Hudson v. Heckler, 755 F.2d 781, 785 (11th Cir. 1985).

41. 28 U.S.C. § 2412(d)(1)(A) (1988).

42. Hudson v. Secretary of Health and Human Servs., 839 F.2d 1453, 1460 n.9 (11th Cir. 1988) (Johnson, J., for Clark & Dumbauld, JJ.).

43. *Sullivan*, 490 U.S. at 892.

44. Ardestani v. United States Dep't of Justice, INS, 904 F.2d 1505, 1515 (11th Cir. 1990) (Fay, J., for Roney, J.; Pittman, J., dissenting).

adversary adjudications for which the government had waived sovereign immunity, and authorized the award of attorneys' fees and costs.[45]

One piece of the difficult issue of political asylum found its way through the Eleventh Circuit in a case involving Haitians. In *Ray v. United States Department of Justice, INS*,[46] some Haitians sought the names of other Haitian nationals who had been returned to Haiti, relying on the Freedom of Information Act.[47] The district court ordered the State Department to disclose the information which had been redacted from the requested documents and the Eleventh Circuit affirmed.[48] The Supreme Court, however, reversed and held that the disclosure would violate the subjects' weighty interests in privacy.[49] According to the majority, the interests of the public and those making the request were not sufficient to justify the disclosure.

The issue in *King v. St. Vincent's Hospital*[50] was whether the Veterans' Reemployment Rights Act[51] implicitly limits the length of military service after which a member of the Armed Services retains a right to civilian reemployment. The Eleventh Circuit had determined that the employee's request for a three-year leave of absence, so the employee could perform a tour of duty in the National Guard, was per se unreasonable under the Act.[52] Reading the statute as a whole, considering the Act alongside related legislation, and with an eye on the underlying congressional purpose, the Supreme Court reversed, inferring that the reemployment guarantee was unqualified and absolute.[53]

Even this small sampling of the administrative law decisions demonstrates how more and more areas of life have become "federalized" under national legislation and why the Congress has assigned the critical function of agency oversight to the courts of appeals in the administrative scheme.

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45. Ardestani v. INS, 112 S. Ct. 515, 521 (1991).

46. 908 F.2d 1549 (11th Cir. 1990) (Gibson, J., for Fay & Johnson, JJ.). *See generally* Ellen B. Gwynn, Note, *Race and National Origin Discrimination and the Haitian Detainees*---Jean v. Nelson, *105 S. Ct. 2992 (1985)*, 14 FLA. ST. U. L. REV. 333 (1986).

47. 5 U.S.C. § 552 (1988 & Supp. III 1991).

48. *Ray*, 908 F.2d at 1561.

49. United States Dep't of State v. Ray, 112 S. Ct. 541, 542 (1991).

50. 112 S. Ct. 570 (1991).

51. 38 U.S.C. § 4324(d) (1988 & Supp. III 1991).

52. St. Vincent's Hosp. v. King, 901 F.2d 1068, 1072 (11th Cir. 1990) (Tuttle, J., for Roney & Hill, JJ.).

53. *King*, 112 S. Ct. at 575.

V. ANTITRUST LAW

Antitrust law is comprised of a body of statutes, judicial decisions, administrative regulations, and enforcement activities designed to regulate market structure and competitive behavior in the national economy. The core principles of antitrust law reflect a fundamental belief in the market mechanism, i.e., the belief that economic policies are best determined by disaggregated, independent, profit seeking firms striving to satisfy consumers who themselves are seeking to maximize satisfaction through individual market choices. Beyond purely economic considerations, there is a background of political mistrust for any concentration of power in a democracy. Whether these assumptions are still valid within the modern regulatory state and how they might be transformed by the reality of a global marketplace are questions beyond the Supreme Court and this discussion.

When two rival bar review companies agreed that one of them would withdraw from the Georgia market, some former law students did what they had been taught to do; they brought suit, alleging a violation of the Sherman Act.[54] In *Palmer v. BRG of Georgia, Inc.*,[55] the Supreme Court had little trouble concluding that the students' theory of the case was sound. A market allocation agreement between competitors, who had previously competed in the Georgia market, could be an illegal restraint of trade of the state market even though the arrangement was that one company would take the Georgia market and the other would have the whole rest of the country. It only took a short per curiam opinion to explain this to the Eleventh Circuit. The three-judge panel had struggled with several procedural issues surrounding the antitrust claim and had divided on the substantive issue.[56] On appeal, the court of appeals majority seemed disposed to defer to the district court, while the dissenting circuit judge seemed less willing to do so.[57] Agreeing with the panel dissenter that there was enough to the case to get beyond summary judgment, the Supreme Court reversed.[58]

A perennial issue of antitrust law is whether the alleged bad actors are private entities subject to the antitrust laws or whether they are state actors

54. 15 U.S.C. §§ 1-36 (1988 & Supp. III 1991).

55. 498 U.S. 46 (1990).

56. Palmer v. BRG of Georgia, Inc., 874 F.2d 1417 (11th Cir. 1989).

57. *Compare id.* at 1422-28 (Hatchett, J., for Fitzpatrick, J.) *with id.* at 1430-41 (Clark, J., dissenting).

58. *Palmer*, 498 U.S. at 49.

and entitled to an immunity by virtue of the so-called "state action" doctrine.[59] The Supreme Court, as is the fashion these days, has developed a two-prong test: The challenged restraint must be one clearly articulated and affirmatively expressed as a state policy, and the state must actively supervise any private anti-competitive conduct.[60] The Supreme Court determined that this test was satisfied in *Southern Motor Carriers Rate Conference, Inc. v. United States*.[61] Thus, the United States could not bring suit against two rate bureaus composed of motor common carriers operating in four states which were expressly permitted to submit collective rate proposals to the public service commissions in each state. The case had rolled around in the court of appeals for a three-judge hearing[62] and an en banc rehearing.[63] Once again, the court of appeals dissenters had it right, at least according to the Supreme Court majority who concluded that the rate making had been expressly permitted by virtue of the state's clear intent to displace price competition.[64] The otherwise private action need not be compelled by the state to trigger immunity under the case law.

In *ICC v. American Trucking Ass'ns*,[65] the Supreme Court was called on to reconcile the Motor Carrier Act of 1980[66] with the powers of the Interstate Commerce Commission ("ICC"). Ever since the Reed-Bulwinkle Act of 1948,[67] motor carriers have enjoyed immunity from antitrust laws to enter into rate bureaus of the kind described in *Southern Motor Carriers Rate Conference, Inc.*[68] To receive this immunity, the rate bureaus themselves must make an application with the ICC describing their rate making procedures. In 1981, the ICC announced it was going to implement the Motor Carrier Act of 1980 by fashioning a new remedy for rate-bureau violations: a tariff submitted in substantial violation of a rate-bureau

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59. *See* Parker v. Brown, 317 U.S. 341 (1943).

60. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

61. 471 U.S. 48, 65-66 (1985).

62. United States v. Southern Motor Carriers Rate Conference, Inc., 672 F.2d 469 (5th Cir. Unit B 1982) (Johnson, J., for Scott, J.; Hill, J., dissenting).

63. United States v. Southern Motor Carriers Rate Conference, Inc., 702 F.2d 532 (5th Cir. Unit B 1983) (en banc).

64. *Southern Motor Carriers Rate Conference, Inc.*, 471 U.S. at 65-66.

65. 467 U.S. 354 (1984).

66. 49 U.S.C. § 10706(b)(3) (1988).

67. 49 U.S.C. app. § 5 (1988), *repealed by* Pub. L. No. 95-473, § 4(b)-(c), 92 Stat. 1466, 1470 (1978). The substance of the Reed-Bulwinkle Act of 1948 is now codified in 49 U.S.C. § 10706 (1988).

68. *See supra* notes 58-63 and accompanying text.

agreement would be rejected automatically and retroactively. The Eleventh Circuit held that the ICC lacked this authority.[69] Over dissent, the Supreme Court reversed and ruled that the ICC's newly announced policy was allowed under the agency's discretionary power to elaborate upon express statutory remedies when necessary to achieve specified statutory goals.[70]

While the Eleventh Circuit's rulings were not used as vehicles for any profound rethinking of the antitrust law, the decisions described above did contribute interstitially to the maintenance and operation of the federal law on the subject.[71] This occurred even though the beginning decade of the Eleventh Circuit overlapped with a relatively inactive period in antitrust law history.

VI. CIVIL PROCEDURE AND FEDERAL JURISDICTION

The threshold "principle of first importance [is] that the federal courts are courts of limited jurisdiction."[72] Thus, technically speaking, every federal court decision is a decision about federal jurisdiction. Ever since the beginning of the federal courts, the jurisdictional inquiry has always been two-dimensional. The scope of federal judicial power is determined first, by examining Article III of the Constitution and second, by interpreting some enabling statute of the Congress.[73] Limits on judicial power apply to exercises over the persons of the litigants as well as over the subject matter of the litigation. Once a case or controversy is deemed to belong in federal court, the suit must follow an elaborate trial routine of procedural rules and practices toward some remedy, followed by at least one appeal of right. Eleventh Circuit decisions about each of these phases found their way onto the Supreme Court's docket.

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69. American Trucking Ass'ns v. United States, 688 F.2d 1337, 1355 (11th Cir. 1982) (Godbold, C.J., for Anderson & Hoffman, JJ.).

70. *American Trucking Ass'ns*, 467 U.S. at 371.

71. *See* Richard A. Booth, *Foreword: The Seventh Circuit as a Commercial Court*, 65 CHI.-KENT L. REV. 667 (1989).

72. CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS § 7, at 27 (5th ed. 1994); *see also* Patricia T. Mandt, Note, *Application of Standing Principles in the Eleventh Circuit*: ACLU v. Rabun County Chamber of Commerce, 35 ALA. L. REV. 377 (1984); Ruth E. Todd-Chattin, Note, Save Our Dunes v. Alabama Department of Environmental Management: *Has the Voice of the Dunes Been Silenced?*, 41 ALA. L. REV. 525 (1990).

73. *See, e.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441, 442 (1850); Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807).

The mootness doctrine focuses judicial attention on "the sequence of litigation events out of a traditional and constitutional concern for the very existence of a 'case or controversy' itself."[74] If a matter earlier in controversy is somehow resolved, the judgment of the federal court has nothing to accomplish. The lack of a judicial task ends the Article III power. Justiciability must be actual and present, not merely speculative or historical. Legislation can overtake the litigation and render it moot. For example, in *Lewis v. Continental Bank Corp.*,[75] the Supreme Court declared the case moot due to amendments to a federal statute that were enacted while the case was pending. Thus, the Eleventh Circuit's judicial handiwork, analyzing rather arcane issues of federal banking law, was rendered a nullity.[76]

Alternatively, the postfiling conduct of third party nonlitigants may eliminate the need for federal court intervention, as happened in *Iron Arrow Honor Society v. Heckler*.[77] In that case, an all male honorary organization had brought suit against the Secretary of Health and Human Services, seeking injunctive and declaratory relief to prohibit the Secretary from interpreting a federal regulation to require that a private university ban the organization from campus. When the president of the university voluntarily banned the organization for as long as it continued its all male membership policy, the Supreme Court announced that the federal case was closed.[78] The majority drew an important distinction between voluntary discontinuance by a party defendant—which does not moot the controversy for the practical reason that there would be nothing to stop the defendant from going right back to the offending behavior—and the situation before the Court, which involved a voluntary, unilateral, and unequivocal action by a third party nonlitigant.[79] This brought an end to a lengthy proceeding that had gone up and down the federal courts for several years, to the relief of at least some of the Eleventh Circuit judges.[80]

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74. James C. Hill & Thomas E. Baker, *Dam Federal Jurisdiction!*, 32 EMORY L.J. 3, 18 (1983).

75. 494 U.S. 472 (1990).

76. Continental Illinois Corp. v. Lewis, 827 F.2d 1517 (11th Cir. 1987) (per curiam) (Fay, Clark, & Henderson, JJ.), *opinion clarified*, 838 F.2d 457 (11th Cir. 1988) (per curiam), *and vacated*, 494 U.S. 472 (1990).

77. 464 U.S. 67 (1983).

78. *Id.* at 73.

79. *Id.* at 71-72.

80. *See* Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549 (5th Cir. Unit B 1983) (Tuttle, J., for Anderson, J.); *id.* at 565 (Roney, J., dissenting).

The most important decision arising in the Eleventh Circuit in the area of civil procedure and federal jurisdiction was *Burger King Corp. v. Rudzewicz*,[81] decided by the Supreme Court in 1985. The issue was at once important and difficult, witnessed by the fact that the Supreme Court was revisiting the issue for the umpteenth time in the *Rudzewicz* decision itself, and since then has returned to the issue in later cases, in an as yet unsuccessful effort to "get it right."

The issue before the Supreme Court was whether the district court's exercise of jurisdiction pursuant to the Florida "long-arm statute" violated the Due Process Clause of the Fourteenth Amendment. A divided panel of the Eleventh Circuit concluded that "[j]urisdiction under the[] circumstances would offend the fundamental fairness which is the touchstone of due process."[82] The Supreme Court majority thought otherwise.[83] In a rather metaphysical discussion of the so-called "minimum contacts" line of cases, the Supreme Court basically told the Burger King Corporation to "'have it your way'. . . by allowing its Florida diversity action to proceed against a Michigan franchisee who refused to vacate the restaurant's premises after termination of his franchise."[84]

An earlier decision had made it clear that a nonresident defendant is not subject to specific jurisdiction unless he has directed acts toward the forum.[85] Thus, the *Burger King* holding clarified that not all of the defendant's contacts related to the controversy must be with the forum. In fact, the defendant-franchisee had far more controversy related contacts with Michigan than with Florida and had never actually visited Florida. The Supreme Court explained that an individual's contract with an out-of-state party, without more, does not automatically establish sufficient minimum contacts in the other party's home forum.[86] Instead, a proper due process analysis should take into account the prior negotiations and contemplated future consequences, along with the terms of the contract and both parties' course of dealings, to answer the question whether the defendant has purposely established minimum contacts with the forum and, therefore, is

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81. 471 U.S. 462 (1985).

82. Burger King Corp. v. Macshara, 724 F.2d 1505, 1513 (11th Cir. 1984) (Vance, J., for Pittman, J.; Johnson, J., dissenting).

83. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

84. Summary and Analysis, *Michigan Franchisee Subject to Florida's Long-Arm Statute*, 53 U.S.L.W. 1177, 1177 (1985); Rex R. Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in* Burger King Corp. v. Rudzewicz, 1986 ARIZ. ST. L.J. 585 (1986).

85. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

86. *Burger King*, 471 U.S. at 478-79.

subject to suit there. On the facts, the majority found a substantial and continuing relationship between the Michigan defendant-franchisee and the plaintiff's Miami headquarters. In its totality of the circumstances analysis, the High Court also made something of the fact that the defendant was an experienced and sophisticated businessman, represented by counsel, who could not point to any other factors establishing the *un*constitutionality of the assertion of personal jurisdiction.

The Supreme Court's decision seems to be something of an effort to find some theoretical accommodation between the metaphysics of due process and the contemporary business reality that controversy related contacts often occur in multiple states, each of which may have a police power regulatory interest in applying its own contract law: "[t]o recognize specific jurisdiction only in a place which is the exclusive source of related contacts would often deny [alternative] forum[states] the legitimate expression of their regulatory interests."[87] This is the underlying principle justifying jurisdiction in these cases: the forum state's traditional police power to regulate commercial activities occurring within the state.[88]

During the 1980s, the federal courts' workload reflected the fact that the Nation's economy was sputtering. Bankruptcy filing increased, and so there were more bankruptcy appeals in the pipeline. Bankruptcy jurisdiction is exclusively federal, of course, and it can be a source of federal friction with the state courts. *Owen v. Owen*[89] dealt with one such friction. In *Owen*, the Supreme Court held that a judicial lien may be avoided under the bankruptcy statute,[90] as impairing a debtor's state law exemptions, even though the state has defined exempt property in such a way as specifically to exclude property encumbered by such liens.[91] This reversed the Eleventh Circuit's reconciliation of the federal provision with the state law.[92]

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87. GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 17[C], at 73 (1989).

88. *See generally* Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987); Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); *World-Wide Volkswagen Corp.*, 444 U.S. at 286.

89. 500 U.S. 305 (1991).

90. *See* 11 U.S.C. § 522(f) (1988).

91. 500 U.S. at 313-14.

92. *In re* Owen, 877 F.2d 44, 47 (11th Cir. 1989) (Roney, C.J., for Powell & Tjoflat, JJ.).

Under the *Feres*[93] doctrine, the United States Government has no Federal Tort Claims Act[94] liability for injuries to members of the armed services when those injuries arise out of or in the course of military service.[95] The issue was analyzed at great length by the Eleventh Circuit, first by a three-judge panel[96] and then, by the divided en banc court on rehearing.[97] The Supreme Court relied on the circuit judges' debate to conclude that a service member killed during activity incident to military service could not recover under the Act.[98] More particularly, the majority ruled that the death of a Coast Guard helicopter pilot during a rescue mission at sea was activity incident to military service and his widow could not bring an action against the government under the Act.[99]

When a federal law creates a duty without expressly providing a remedy, a federal court may imply a remedy under the law. The importance of this implication is that it automatically and necessarily creates federal jurisdiction over the newly created cause of action.[100] The remedy can be implied directly under the Constitution. In *United States v. Stanley*,[101] a divided Supreme Court rejected the claim of a former serviceman against military officers and civilian researchers to recover for injuries he sustained as a result of a secret Army experiment in which LSD was administered to him.[102] The majority found support for this conclusion in its precedents cautioning against routinely implying a cause of action under the Constitution, as well as in the unique disciplinary structure found in the military, to

93. Feres v. United States, 340 U.S. 135 (1950).

94. 28 U.S.C. § 1346 (1988 & Supp. III 1991). *See generally* Norma J. Mungenast, Eleventh Circuit, *Federal Tort Claims Act: The Development and Application of the Discretionary Function Exemption*, 13 CUMB. L. REV. 535 (1983).

95. *Feres*, 340 U.S. at 146.

96. Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985) (Fay, J., for Vance & MacMahon, JJ.).

97. Johnson v. United States, 779 F.2d 1492 (11th Cir. 1986) (per curiam) (en banc) (Johnson, Roney, Tjoflat, & Hill, JJ., dissenting).

98. United States v. Johnson, 481 U.S. 681, 691-92 (1987), *rev'g* 779 F.2d 1492 (11th Cir. 1986).

99. *Id.*

100. *See* Thomas E. Baker, *Thinking About Federal Jurisdiction—of Serpents and Swallows*, 17 ST. MARY'S L.J. 239, 265-66 (1986).

101. 483 U.S. 669 (1987).

102. *Id.* at 686.

which Congress had acquiesced in various statutes.[103] This part of the Eleventh Circuit decision[104] was reversed.[105]

In a second decision, *Bush v. Lucas*,[106] the Supreme Court again disallowed a remedy directly under the Constitution, this time under the First Amendment. Suit was brought against the government by an employee alleging a retaliatory demotion and defamation in response to his public criticism of the agency for which he worked. Because the claims arose out of an employment relationship which was governed by comprehensive procedural and substantive provisions affording meaningful remedies against the United States, the majority concluded that implying a cause of action under the Free Speech Clause was unnecessary and would be inappropriate.[107] This result and reasoning followed the Fifth Circuit Court of Appeals' treatment of the case.[108]

The implied remedy can be based on some regulatory statute as well. In *Franklin v. Gwinnett County Public Schools*,[109] a decision reversing the Eleventh Circuit,[110] the Supreme Court permitted a high school student, who alleged that she was subjected to sexual harassment and abuse by her coach/teacher, to seek monetary damages in addition to other equitable relief.[111] The Court held that an individual's damage action was implied under Title IX,[112] which prohibits gender discrimination in any program receiving federal funds.[113]

The only decision of note under the *Erie* doctrine[114] involved a choice of forum clause in a freely negotiated commercial contract. In *Stewart Organization, Inc. v. Ricoh Corp.*,[115] the Supreme Court affirmed the Eleventh Circuit decision and held that federal law and not state law controlled whether to grant a motion to transfer the case to the venue

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103. *Id.* at 679 (citation omitted).

104. United States v. Stanley, 786 F.2d 1490 (11th Cir. 1986) (Hatchett, J., for Henderson & Allgood, JJ.).

105. *Stanley*, 483 U.S. at 686.

106. 462 U.S. 367 (1983).

107. *Id.* at 388-89.

108. 647 F.2d 573 (5th Cir. Unit B June 1981) (Roney, J., for Godbold & Simpson, JJ.).

109. 112 S. Ct. 1028 (1992).

110. 911 F.2d 617 (11th Cir. 1990) (Henley, J., for Hill, J.; Johnson, J., concurring).

111. 112 S. Ct. at 1038.

112. 20 U.S.C. § 1681(a) (1988).

113. *Franklin*, 112 S. Ct. at 1036.

114. Erie R.R. v. Tompkins, 304 U.S. 64 (1938); *see also* Hanna v. Plumer, 380 U.S. 460 (1965).

115. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988), *aff'g* 779 F.2d 643 (11th Cir. 1986).

approved in the written contract.[116] According to the majority, the general federal transfer of venue statute[117]—which applies to transfers for the convenience of the parties and witnesses in the interest of justice—was controlling, as that statute was annotated in federal court interpretations.[118]

Pursuant to the Seventh Amendment,[119] ratified in 1791, federal litigants enjoy the right to trial by jury, although the right is textually limited to "suits at common law." Consequently, a court deciding whether a party has a right to a jury trial must act as a historian of eighteenth century English civil procedure. In *Granfinanciera, S.A. v. Nordberg*,[120] a majority of the historians on the Supreme Court rejected the conclusions of the Eleventh Circuit[121] historians. The majority concluded that the Seventh Amendment entitles a litigant who has not submitted a claim against a bankruptcy estate to a jury trial when that party is sued by the bankruptcy trustee to recover an allegedly fraudulent money transfer.[122]

Issues involving remedies figured in several Supreme Court reviews of Eleventh Circuit decisions. In the first, *Eastern Airlines, Inc. v. Floyd*,[123] the High Court reversed the Eleventh Circuit and held that the Warsaw Convention,[124] which sets forth conditions under which an international air carrier can be held liable for injuries to passengers, does not allow for the recovery of damages for mental or psychic injuries unaccompanied by some manifestation of physical injury.[125] In the second, *INS v. Jean*,[126] the Supreme Court affirmed the Eleventh Circuit's understanding[127] that the Equal Access to Justice Act[128] allowed for an award of fees against the

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116. *Id.* at 32.

117. 28 U.S.C. § 1404(a) (1988).

118. *Stewart Org.*, 487 U.S. at 22; *see also* Sara E. Akin, Note, *Review of Intercircuit Transfer Orders Under Section 1404(a)*, 35 ALA. L. REV. 167 (1984).

119. U.S. CONST. amend. VII.

120. 492 U.S. 33 (1989).

121. *Id.* at 64-65, *rev'g sub nom. by an equally divided Court, In re* Chase & Sanborn Corp., 835 F.2d 1341 (11th Cir. 1988) (Morgan, J., for Fay & Hatchett, JJ.).

122. *Id.* at 64.

123. 499 U.S. 530 (1991), *rev'g* 872 F.2d 1462 (11th Cir. 1989) (Anderson, J., for Johnson & Atkins, JJ.).

124. 49 U.S.C. app. § 1502 (1988).

125. *Eastern Airlines*, 499 U.S. at 552-53.

126. 496 U.S. 154 (1990).

127. Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988) (Clark, J., for Eschbach, J.; Kravitch, J., concurring and dissenting in part).

128. 28 U.S.C. § 2412(d)(1)(A) (1988). *See generally* Alice M. Bradley & Bryan Essary, Comment, *The Treatment of Attorney's Fee Enhancements in Alabama and the Eleventh Circuit: Justice! The Law! My Ducats and My Daughter*, 20 CUMB. L. REV. 769

government in the fee litigation stage of a proceeding without a second finding that the fee was substantially justified.[129] In a third remedies decision, the Supreme Court affirmed an Eleventh Circuit holding that conduct by federal officials must be discretionary in nature, as well as within the scope of their employment, before the conduct can be deemed to be absolutely immune from state-law tort liability.[130]

A fourth case involving the law of remedies resulted in a reversal of the Eleventh Circuit.[131] In *Parsons Steel, Inc. v. First Alabama Bank*,[132] the Supreme Court held that the Eleventh Circuit Court of Appeals had erred by refusing to consider the possible preclusive effect, under state law, of a state court judgment which had rejected a res judicata claim based on a previous federal judgment.[133] The unanimous Court was loathe to allow the highly intrusive remedy of a federal court injunction against enforcement of the state court judgment. Instead, the Court ruled that the Full Faith and Credit Clause requires that the federal court give the state court judgment, including the resolution of the res judicata issue, the same preclusive effect it would have in another court of the same state.[134]

The last remedies decision of the period returned the Supreme Court's attention to the procedural puzzles of affirmative action or reverse discrimination.[135] White firefighters brought suit alleging that they were being denied promotions in favor of less qualified blacks under a consent decree that had been entered in a previous employment discrimination lawsuit between black firefighters and the county. The Eleventh Circuit allowed the plaintiffs to challenge the consent decree.[136] Even though they had failed to intervene in the earlier employment discrimination lawsuit, in *Martin v.*

(1990).

129. *Jean*, 496 U.S. at 165-66.

130. Westfall v. Erwin, 484 U.S. 292, 295 (1988), *aff'g* 785 F.2d 1551 (11th Cir. 1986) (per curiam) (Johnson, Hatchett, & Murphy, JJ.). *Westfall* was subsequently superseded by the Federal Employee Liability Reform and Tort Compensation Act of 1988, which is codified at 28 U.S.C. § 2679 (1988). *See generally* Robert S. Glazier, Note, *An Argument Against Judicial Immunity for Employment Decisions*, 11 NOVA L. REV. 1127 (1987).

131. Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518 (1986).

132. *Id.*

133. *Id.* at 525, *rev'g* 747 F.2d 1367 (11th Cir. 1984) (Thornberry, J., for Godbold, J.; Hill, J., dissenting).

134. *Id.*

135. *In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom.* Martin v. Wilks, 490 U.S. 755 (1989).

136. *Id.* at 1498 (Tjoflat, J., for Henderson, J.; Anderson, J., dissenting).

Wilks,[137] the Supreme Court allowed plaintiffs to challenge the employment decisions taken pursuant to the consent decree.

Finally, the Supreme Court reached two decisions on the subject of appellate procedures of a rather technical nature.[138] In one, the Supreme Court vindicated the authority of a United States court of appeals to award damages to an appellee upon determining that the underlying appeal is frivolous.[139] In the other, the Court reconciled Federal Rule of Civil Procedure 59(e) with Federal Rule of Appellate Procedure 4(a)(4) to hold that a postjudgment motion for discretionary prejudgment interest constituted a motion to alter or amend the judgment, which had the effect of nullifying a notice of appeal filed before the district court ruled on the motion.[140]

It should be neither surprising nor unexpected that the Eleventh Circuit's procedural and jurisdictional decisions are so numerous and that the Court of Appeals has already made such a telling contribution to the national law on these subjects. The main role of the intermediate courts of appeals is to supervise the district courts.[141] District courts in the Eleventh Circuit have large and diverse caseloads. Consequently, the appeals of right that are generated can be expected to present novel and difficult issues.[142]

VII. CONSTITUTIONAL LAW

American Constitutionalism represents an original contribution to political thought. Constitutional law describes the relationship between the

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137. 490 U.S. 755, 769 (1989).

138. *See generally* Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 GA. L. REV. 399 (1986); Kurt M. Saunders, *Plying the Erie Waters: Choice of Law in the Deterrence of Frivolous Appeals*, 21 GA. L. REV. 653 (1987).

139. Burlington N. R.R. v. Woods, 480 U.S. 1, 8 (1987), *rev'g* 768 F.2d 1287 (11th Cir. 1985) (per curiam) (Vance, Johnson, & Morgan, JJ.).

140. Osterneck v. Ernst & Whinney, 489 U.S. 169, 173-74 (1989), *aff'g* Osterneck v. E.T. Barwick Industries, Inc., 825 F.2d 1521 (11th Cir. 1987) (Anderson, J., for Hatchett & Tuttle, JJ.).

141. *See generally* Steven A. Childress, *Standards of Review in Eleventh Circuit Civil Appeals*, 9 NOVA L.J. 260 (1985).

142. *See generally* Joseph W. Little et al., *Section 1983 Liability of Municipalities and Private Entities Operating Under Color of Municipal Law*, 14 STETSON L. REV. 565 (1985); Randall R. Rader, *Section 1983, The Civil Rights Action: Legislative and Judicial Directions*, 15 CUMB. L. REV. 571 (1985); Jeanne Maguire, Note, *Ghost of Injunctions Past: Resurrection of Municipal Liability for Unintentional Acts*, 17 STETSON L. REV. 857 (1988) (discussing Williams v. City of Dothan, 818 F.2d 755 (11th Cir. 1987)); Christopher M. Shulman, Note, *Cave Canem—Police Department Liability and Equitable Standing Under 42 U.S.C. § 1983*, 19 STETSON L. REV. 973 (1990).

individual and the government.[143] In this relationship, there are explicit as well as implicit limitations on the power of government which guarantee individual rights. In the peculiar American version of this social compact, the judicial branch of government explicates these rights and is often called on to play the role of the guarantor of civil rights and civil liberties. The Supreme Court, of course, takes the lead in this regard, but the United States Courts of Appeals perform the role of supporting actor in this drama of democracy.[144] The Eleventh Circuit struggled with the often difficult accommodations between government power and individual liberty in important areas of constitutional law: Preemption; Procedural Due Process; Takings; Race Discrimination; Voting Rights; Privacy; Free Speech and Press; and Free Exercise of Religion.

While it is a familiar and well-established principle that the Supremacy Clause of the United States Constitution[145] invalidates all state laws that interfere with or are contrary to federal law, the course of application of that principle has taken some strange turns. In the exercise of its Commerce Clause[146] power, Congress can expressly preempt a specific form of state regulation or preclude state regulation of the subject.[147] Alternatively, the courts often find an implied congressional intent to preempt a particular area or even a whole field in which the federal interest is dominant. Two Eleventh Circuit cases "went up" to the Supreme Court under preemption holdings. In *Hillsborough County v. Automated Medical Laboratories, Inc.*,[148] the Supreme Court reversed and held that federal regulation governing collection of blood plasma from paid donors did not preempt the local ordinances which the Eleventh Circuit had thrown out.[149] In *Adams Fruit Co. v. Barrett*,[150] the High Court affirmed the Eleventh Circuit

143. *See generally* Hala Ayoub, Comment, *The State Action Doctrine in State and Federal Courts*, 11 FLA. ST. U. L. REV. 893 (1984).

144. *See, e.g.*, Douglas D. Selph, Comment, Taylor v. Ledbetter: *Vindicating the Constitutional Rights of Foster Children to Adequate Care and Protection*, 22 GA. L. REV. 1187 (1988) (analyzing Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987)).

145. U.S. CONST. art. VI, cl. 2.

146. *Id.* art. I, § 8, cl. 3.

147. *See* John-Edward Alley et al., *Local Governments and the Fair Labor Standards Act: The Impact of* Garcia v. SAMTA *and the 1985 FLSA Amendments*, 15 STETSON L. REV. 715 (1986).

148. 471 U.S. 707 (1985), *rev'g* 722 F.2d 1526 (11th Cir. 1984) (Tuttle, J., for Fay & Henderson, JJ.).

149. *Id.*

150. 494 U.S. 638 (1990), *aff'g* 867 F.2d 1305 (11th Cir. 1989) (Vance, J., for Kravitch & Henderson, JJ.).

holding that the exclusivity provisions in state workers' compensation laws did not bar migrant workers from bringing a private action under the federal Migrant and Seasonal Agricultural Worker Protection Act[151] for intentional violations of the Act.[152]

The constitutional command of procedural due process obliges the government to afford a person adequate notice and a meaningful opportunity to be heard whenever the government deprives the person of property or liberty.[153] In *Lyng v. Payne*,[154] the Court approved the notice published by the Secretary of Agriculture in the Federal Register which set out details and conditions of the particular loan program and which followed the agency's regulations. The Eleventh Circuit struggled with the issue and had thought worse of the Secretary's efforts.[155] In a second case, *Davis v. Scherer*,[156] the Supreme Court assumed, for the purposes of its decision, that a discharged state highway patrol officer had been afforded fundamentally fair process, even though the full hearing would not take place until after his termination. This decision changed the result the Eleventh Circuit had reached and consequently changed the outcome on the controlling issue of qualified immunity for state officials.[157]

The predeprivation procedure versus postdeprivation procedure distinction, and the property versus liberty distinction both came up again in *Zinermon v. Burch*,[158] when the Supreme Court affirmed the Eleventh Circuit's en banc decision.[159] This important precedent for patients' rights reasoned that when a state can feasibly provide a predeprivation hearing before taking property, it generally must do so, regardless of the adequacy of a postdeprivation state court tort remedy.[160] Postdeprivation hearings

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151. 29 U.S.C. §§ 1831-1872 (1988); *see also supra* notes 83-90 and accompanying text.

152. *Adams Fruit Co.*, 494 U.S. at 650-51.

153. *See generally* Romaine S. Scott, *Mennonite: What Does it Mean to Alabama Mortgages After* Federal Deposit Insurance Corp. v. Morrison?, 36 ALA. L. REV. 969 (1985) (analyzing FDIC v. Morrison, 747 F.2d 610 (11th Cir. 1984), *cert. denied*, 474 U.S. 1019 (1985)); Michael A. Logan, Note, *Power of Sale Foreclosure: What Process is Due?*, 36 ALA. L. REV. 1083 (1985) (discussing *Morrison*, 747 F.2d at 610).

154. 476 U.S. 926 (1986).

155. Payne v. Block, 714 F.2d 1510 (11th Cir.) (Clark, J., for Godbold & Henderson, JJ.), *modified*, 721 F.2d 741 (11th Cir. 1983), *and vacated*, 469 U.S. 807 (1984) (mem.).

156. 468 U.S. 183 (1984).

157. Scherer v. Graham, 710 F.2d 838 (11th Cir. 1983), *rev'd sub nom.* Davis v. Scherer, 468 U.S. 183 (1984).

158. 494 U.S. 113 (1990).

159. Burch v. Apalachee Community Mental Health Servs., Inc., 840 F.2d 797 (11th Cir. 1988) (en banc).

160. *Zinermon*, 494 U.S. at 138-39.

may be sufficient in situations when a predeprivation hearing would be unduly burdensome in proportion to the liberty interest at stake if the state is genuinely unable to prevent a random deprivation of some liberty interest. In *Zinermon*, the Supreme Court held that a mental patient's allegation that employees at the state institution had admitted him "voluntarily," without taking any steps to ascertain whether he was competent to consent to his own admission, stated a good cause of action for deprivation of procedural due process, even though state tort remedies were available after the fact.[161]

While the issue of takings has troubled the Supreme Court for the last decade or more, and shows no signs of receding,[162] the Eleventh Circuit contributed only one important holding during its first decade in this area.[163] In *FCC v. Florida Power Corp.*,[164] the Supreme Court reversed the Eleventh Circuit[165] and held that the Federal Pole Attachments Act,[166] which authorized the FCC to determine just and reasonable rates that utility companies could charge cable television systems for stringing cable television, does not give the cable companies any right to use the utility poles. As to the taking issue, the Court concluded that when the FCC set the rates, in the absence of parallel state regulations, the lower rates set by the FCC were not confiscatory and did not effectuate a taking of the property of the utilities under the Fifth Amendment.[167] Having thus reasoned, the Court did not reach the Eleventh Circuit's theory of the case that the Act was an unconstitutional constraint on the judicial power to determine just compensation.

Issues of race have resonated as issues of constitutional law for as long as the Republic has existed under the Constitution of 1787. Constitutional

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161. *Id.*; *see* Heller v. Doe, 113 S. Ct. 2637 (1993) (holding that mentally retarded patients can be "voluntarily" admitted by family members under a lower threshold showing than is applied in the same state's laws for the mentally ill).

162. *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); Pennell v. City of San Jose, 485 U.S. 1 (1988).

163. The Eleventh Circuit upheld the Florida Bar Interest on Trust Account Program. Cone v. State Bar of Florida, 819 F.2d 1002 (11th Cir.) (Hill, J., for Johnson & Eschbach, JJ.), *cert. denied*, 484 U.S. 917 (1987) (mem.). *See generally* Gregory A. Hearing, *Funding Legal Services for the Poor: Florida's IOTA Program—Now Is the Time to Make It Mandatory*, 16 FLA. ST. U. L. REV. 337 (1988); Rachael S. Worthington, Comment, *IOTA—Overcoming Its Current Obstacles*, 18 STETSON L. REV. 415 (1989).

164. 480 U.S. 245 (1987).

165. 772 F.2d 1537 (11th Cir. 1985) (per curiam) (Roney, Fay, & Dumbauld, JJ.).

166. 47 U.S.C. § 224 (1988).

167. *Florida Power Corp.*, 480 U.S. at 254; *see* U.S. CONST. amend. V.

compromise gave in to slavery and then gave way to apartheid and Jim Crow which later gave way, at least formally, to the civil rights movement. Four decades after *Brown v. Board of Education*,[168] issues of race continue to resonate in constitutional cases. In 1985, the Supreme Court affirmed, in the strongest terms, a holding of the Eleventh Circuit[169] that a provision in the Alabama State Constitution disenfranchising those convicted of crimes of moral turpitude was unconstitutional because it denied the plaintiffs their right to vote on the basis of race. The unanimous opinion in *Hunter v. Underwood*[170] found that the 1901 enactment,[171] although neutral on its face, was motivated by an original intent and desire to discriminate against African-Americans and had effectuated that discriminatory impact ever since.

Issues about remedies for past racial discrimination have polarized the Supreme Court in numerous cases for decades.[172] It thus comes as no surprise that two of the most important equal protection decisions arising in the first decade of the Eleventh Circuit were about remedies. In the first, a fractured Supreme Court upheld a requirement that fifty percent of the promotions in the state Department of Public Safety be awarded to African-Americans until approximately twenty-five percent of the rank was comprised of members of that race. The plurality opinion in *United States v. Paradise*[173] upheld this remedial decree first by invoking a compelling state interest to eradicate the past discriminatory exclusion and second by concluding this was a narrowly tailored solution. This decision was one of several civil rights cases Congress later overruled, in effect, with the Civil Rights Act of 1991.[174]

The second equal protection remedy decision was *Freeman v. Pitts*.[175] As one of the twin successors of the former Fifth Circuit, the Eleventh Circuit was called on to provide guidance to district courts contemplating how and when to end supervision of public school districts still operating under remedial injunctions for de jure segregation. The three-judge panel

168. 347 U.S. 483 (1954).

169. Underwood v. Hunter, 730 F.2d 614 (11th Cir. 1984) (Vance, J., for Clark & Tjoflat, JJ.).

170. 471 U.S. 222 (1985).

171. ALA. CONST. of 1901, art. VIII, § 182.

172. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

173. 480 U.S. 149 (1987).

174. *See* 42 U.S.C. §§ 1981-2000e (1988).

175. 112 S. Ct. 1430 (1992).

read Supreme Court and Eleventh Circuit precedent to require the district court to retain jurisdiction in these cases until the school district attained unitary status in six identified administrative areas for an extended period.[176] The Supreme Court was of another mind, however, and held that the district court need not retain active control over every aspect of the school district until all aspects were unified.[177] Rather, the district court had jurisdiction and discretion to relinquish control in incremental stages before full compliance was achieved in every area of school administration. Considered alongside some other contemporaneous holdings, the Supreme Court seemed to be signalling that federal district courts could not continue indefinitely to administer local public schools, even school systems that had been guilty of invidious racial segregation in the past.[178]

One of the most controversial constitutional decisions of the Eleventh Circuit's first decade involved the issue whether a state sodomy statute violated the fundamental rights of homosexuals. The *Bowers v. Hardwick*[179] case was decided by the narrowest possible margin in the Supreme Court and by a two to one vote in the Eleventh Circuit.[180] The Supreme Court concluded, over an intense dissent, that the Constitution did not protect homosexual relations, even by consenting adults, in the privacy of their own home. The case and its implications continue to swirl around the High Court and beyond, without sign of any lessening of the controversy.

In *Butterworth v. Smith*,[181] a reporter who had testified before a grand jury challenged a state statute that proscribed any disclosure of the witness's own testimony. The Eleventh Circuit held that the statute was unconstitutional and the Supreme Court agreed.[182] The statute violated the First Amendment rights of free speech and free press without sufficient justification, especially with regard to the truthful disclosure of the witness's own testimony after the grand jury's term ended.

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176. Pitts v. Freeman, 887 F.2d 1438, 1450 (11th Cir. 1989) (Hatchett, J., for Fay & Allgood, JJ.), *rev'd*, 112 S. Ct. 1430 (1992).

177. *Freeman*, 112 S. Ct. at 1450.

178. *Compare* Board of Educ. v. Dowell, 498 U.S. 237 (1991) *with* Missouri v. Jenkins, 495 U.S. 33 (1990).

179. 478 U.S. 186 (1986).

180. Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985) (Johnson, J., for Tuttle, J.; Kravitch, J., concurring and dissenting in part), *rev'd*, 478 U.S. 186 (1986).

181. 494 U.S. 624 (1990), *aff'g* 866 F.2d 1318 (11th Cir. 1989) (Vance, J., for Kravitch & Henderson, JJ.).

182. *Id.* at 636.

First Amendment rights of another kind were involved in *Forsyth County v. Nationalist Movement*.[183] An organization brought suit to challenge a county ordinance that authorized an administrator to vary the fee charged for assembling and parading to reflect estimated costs for any public expenses for police and for clean up. The Eleventh Circuit, sitting en banc, held in favor of the challengers.[184] The Supreme Court granted review and affirmed, holding that the ordinance was facially invalid under established case law.[185] Aside from the legal issues, which were relatively straightforward and simple, there was a great deal of emotion in the underlying facts of this case. The county had been the site of the largest nationally publicized civil rights rally since the 1960s, where an affiliate of the Ku Klux Klan (the Nationalist Movement) held a counter-demonstration. Shortly thereafter, the county enacted the challenged ordinance. Two and one-half years later, the ordinance was constitutionally challenged by the Nationalist Movement which sought to hold a demonstration opposing the federal holiday honoring Martin Luther King, Jr.

The last considered decision arising from the Eleventh Circuit is a reminder of the region's tradition as the "Bible belt."[186] Parents of public school children complained about a state statute that authorized a daily period of silence during the school day for meditation or silent prayer.[187] The district court dismissed the parents' challenge. The Eleventh Circuit reversed in part and affirmed in part.[188] In *Wallace v. Jaffree*,[189] the Supreme Court adhered to past precedents and affirmed the Eleventh Circuit's decision. It voided the statute because the measure served as an endorsement of religion and lacked any secular purpose and, therefore, it violated the Establishment Clause principle that government must pursue a

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183. 112 S. Ct. 2395 (1992).

184. Forsyth County v. Nationalist Movement, 934 F.2d 1482 (11th Cir. 1991) (en banc), *aff'g* 913 F.2d 885 (11th Cir. 1990). There were multiple opinions at both stages of appeal.

185. *Forsyth*, 112 S. Ct. at 2405.

186. Jaffree v. Board of Sch. Comm'rs, 554 F. Supp. 1104 (S.D. Ala. 1983); *see also* James J. Dean, Comment, *Ceremonial Invocations at Public High School Events and the Establishment Clause*, 16 FLA. ST. U. L. REV. 1001 (1989); William Turbeville, Comment, *Constitutional Law: Establishment Clause Standing Clarified*, 35 U. FLA. L. REV. 188 (1983) (discussing ACLU v. Rabun County, 678 F.2d 1379 (11th Cir. 1982)).

187. *Jaffree*, 554 F. Supp. at 1104.

188. 705 F.2d 1526 (11th Cir. 1983) (Hatchett, J., for Clark & Scott, JJ.). *See generally* James J. McAlpin, Note, Jaffree v. Board of School Commissioners: *An Interpretivist Challenge*, 34 ALA. L. REV. 657 (1983).

189. 472 U.S. 38 (1985).

course of complete neutrality in matters of religion.[190] The decision marked one of the most controversial battles over church and state jurisprudence in recent years.[191]

These decisions from the first decade of the Eleventh Circuit fully and fairly represent the constitutional law issues of the day. These are the questions that required answering for our Republic to function as a representative democracy. In these accommodations of government power and individual right, the Eleventh Circuit contributed to the Supreme Court's continuing effort to respond, for this generation of Americans, to what might be called the Madisonian dilemma: empowering the government sufficiently for its tasks, yet at the same time limiting it from overreaching the individual. The "Father of the Constitution" and the drafter and chief sponsor of the Bill of Rights once explained this perpetual dilemma:

> It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[192]

VIII. CRIMINAL LAW AND PROCEDURE

Federal criminal law and criminal procedure are inextricably intertwined.[193] The adjectival rules of procedure describe the process by which the substantive criminal law is enforced. For the Eleventh Circuit, as well as for the Supreme Court, substance and procedure have a duality of policy

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190. *Id.* at 55-56.

191. *See generally* Kenneth P. Nuger, *Judicial Responses to Religious Challenges Concerning Humanistic Public Education: The Free Exercise and Establishment Debate Continues*, 39 ALA. L. REV. 73 (1987); Rodney K. Smith, *Now is the Time for Reflection*: Wallace v. Jaffree *and Its Legislative Aftermath*, 37 ALA. L. REV. 345 (1986).

192. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

193. *See generally* Anne S. Emanuel, *The Concurrent Sentence Doctrine Dies a Quiet Death—Or Are the Reports Greatly Exaggerated?*, 16 FLA. ST. U. L. REV. 269 (1988); David M. Lazarus, Note, *Entrapment: A Review of the Principles of Law Governing This Defense as Applied by the Eleventh Circuit Court of Appeals*, 7 NOVA L.J. 611 (1983).

and constitutionality.[194] A federal criminal law first must be interpreted and then tested for constitutional validity. A federal procedure must square with the constitutional rights found in the Bill of Rights. Federal procedure, for the most part, is *constitutional* procedure; of the twenty-three individual rights identified in the first eight amendments, twelve concern criminal procedure. Federalism makes matters more complicated when a state criminal conviction is being challenged in a collateral preceding in the nature of habeas corpus in federal court.[195] A state substantive law must be interpreted in federal court in the same way a state court would interpret it, but then the federal constitutional overlay must be applied.[196] A state has no police power to violate the Constitution of the United States. State procedures, likewise, must afford at least the minimum federal procedural due process found in the Fourteenth Amendment incorporated liberties.[197]

The Eleventh Circuit's decisions considered such perennial issues as interpretation of federal criminal statutes, self-incrimination, right to counsel, speedy trial, jury, due process, double jeopardy, and the right to appeal. Issues about death penalty procedures and procedures on federal habeas corpus review also were much in evidence and proved particularly difficult.[198]

The Eleventh Circuit functioned as a common law court to interpret the Federal Bank Robbery Act.[199] In *United States v. Bell*,[200] a three-judge

194. *See generally* Deborah S. Braden, Eleventh Circuit, *Fourth Amendment Seizure: The Fifth Circuit Adopts a Restrictive Definition*, 13 CUMB. L. REV. 79 (1982); Mark T. Davis, Eleventh Circuit, *Drug Paraphernalia Laws: Clearing a Legal Haze*, 13 CUMB. L. REV. 273 (1982); W. Dennis McKinnie, Eleventh Circuit, *Use of Electronic Tracking Devices in the Fifth Circuit: Trailing the New Approach*, 13 CUMB. L. REV. 51 (1982).

195. 28 U.S.C. § 2254 (1988).

196. *See* Michigan v. Long, 463 U.S. 1032 (1983).

197. *See* Moore v. City of East Cleveland, 431 U.S. 494, 541-52 (1977) (White, J., dissenting).

198. *See generally* Charles Graddick, *Debunking the Ancient Writ: A Critical Analysis of the Law of Habeas Corpus*, 14 CUMB. L. REV. 1 (1984); Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31 (1985); Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35 (1986); Valerie Shea, Comment, *Eleventh Circuit Rejects Claim of Florida Death Row Inmates:* Ford v. Strickland, 7 NOVA L.J. 415 (1983).

199. 18 U.S.C. § 2113(b) (1988).

200. 649 F.2d 281 (5th Cir. Unit B Mar. 1981) (Tjoflat, J., for Godbold, J.; Vance, J., dissenting).

panel had reversed, but a divided en banc court affirmed the conviction.[201] A Supreme Court majority settled the issue (on which the circuits had divided much like the en banc court had) and ruled that the statute was not limited to common law larceny but also included the defendant's crime of obtaining money under false pretenses.[202]

The Supreme Court resolved another circuit conflict in *Garcia v. United States*,[203] and again sided with the Eleventh Circuit's approach,[204] to hold that the statute proscribing assault and robbery of any custodian of "mail matter or of any money or other property" of the United States[205] covered "flash money" being used by an undercover secret service agent to buy counterfeit currency. A third decision involved an interpretive issue under the Hobbs Act,[206] about which the circuits were in conflict. Again, the Supreme Court agreed with the Eleventh Circuit[207] and concluded that the affirmative act of inducement by a public official was not a necessary element of the offense of extortion under color of official right in a case styled *Evans v. United States*.[208]

Few Supreme Court decisions have had as much sustained controversy to them as has *Miranda v. Arizona*.[209] One testament to the complexity of that doctrine is that nearly thirty years later there are still difficult issues and applications which continue to divide the courts of appeals and the Supreme Court. *Wainwright v. Greenfield*[210] is one example. The majority affirmed the Eleventh Circuit decision[211] that the use of a defendant's post-arrest, post-*Miranda* warnings silence as evidence of his sanity violated due process.

The right to counsel is recognized as being central to the adversarial system of justice. First decade decisions touched on three critical questions.

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201. United States v. Bell, 678 F.2d 547 (5th Cir. Unit B 1982) (en banc) (opinions filed by Vance, Anderson, & Tjoflat, JJ.).

202. Bell v. United States, 462 U.S. 356 (1983).

203. 469 U.S. 70 (1984).

204. United States v. Garcia, 718 F.2d 1528 (11th Cir. 1983) (Atkins, J., for Fay & Kravitch, JJ.).

205. 18 U.S.C. § 2114 (1988).

206. *Id.* § 1951 (1988).

207. United States v. Evans, 910 F.2d 790 (11th Cir. 1990) (Kravitch, J. for Cox & Dyer, JJ.).

208. 112 S. Ct. 1881 (1992).

209. 384 U.S. 436 (1966).

210. 474 U.S. 284 (1986).

211. Greenfield v. Wainwright, 741 F.2d 329 (11th Cir. 1984) (Tjoflat, J., for Godbold & Henderson, JJ.).

In *Wainwright v. Torna*,[212] the Supreme Court reversed the court of appeals[213] and held that since the petitioner had no constitutional right to counsel to pursue a discretionary review in the state supreme court, he was not deprived of effective assistance of counsel as a result of his retained counsel's failure to timely file the application for review.[214]

The Supreme Court granted review of a fractured en banc decision[215] and announced the proper standard for the effective assistance of counsel in *Strickland v. Washington*.[216] The Sixth Amendment/Due Process right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any allegation of ineffectiveness must be whether, considering all the circumstances, the defense attorney's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on to have produced a just result. The defendant, in order to raise a successful challenge, must show that there is a reasonable probability that the result of the proceeding would have been different, but for the defense counsel's unprofessional errors.[217]

Reversals under a reasonableness standard reflect the reviewing court's perception of the average defense attorney, and from the run of decisions rejecting right to counsel claims, the members of the federal bench seem to have a rather low opinion of the average criminal defense attorney.[218] In *Burger v. Kemp*,[219] for example, the Supreme Court held that the defense attorney's professional partnership with the attorney representing his client's codefendant in a separate prosecution did not so infect the attorney's representation as to constitute active representation of a competing interest. The Court upheld the Eleventh Circuit's outcome[220] and went on to conclude that there was some reasonable basis for the defense attorney's

212. 455 U.S. 586 (1982).

213. 649 F.2d 290 (5th Cir. Unit B June 1981) (per curiam) (Miller, Johnson, & Clark, JJ.).

214. *Torna*, 455 U.S. at 586.

215. 693 F.2d 1243 (5th Cir. Unit B 1982) (opinions filed by Vance, Tjoflat, Clark, Johnson, Roney, & Hill, JJ.).

216. 466 U.S. 668 (1984).

217. *Id.* at 694.

218. *See* Thomas E. Baker, *Constitutional Criminal Procedure*, 34 MERCER L. REV. 1241, 1271 (1983).

219. 483 U.S. 776 (1987).

220. Burger v. Kemp, 785 F.2d 890 (11th Cir. 1986) (per curiam) (Vance & Allgood, JJ.; Johnson, J., dissenting).

failure to develop and present evidence of the defendant's troubled family background at the penalty stage of his capital prosecution.[221]

In a 1990 decision, *Doggett v. United States*,[222] the Supreme Court agreed with the Eleventh Circuit's summary of the proper analysis for a speedy trial claim,[223] but disagreed with the intermediate court's application of the rules to the facts. In a relatively rare holding, the Supreme Court concluded that the defendant was denied his Sixth Amendment right to a speedy trial by the eight-and-one-half year delay between his indictment and his arrest.[224]

The central right to a competent and unimpaired jury was involved in *Tanner v. United States*.[225] Responding to the defendants' allegations and offers of proof, the Supreme Court affirmed the Eleventh Circuit[226] and held that an evidentiary hearing was barred under Federal Rule of Evidence 606(b)'s general prohibition of juror impeachment.[227] The Court also concluded that no hearing was necessary to resolve the particular allegations of juror abuse of alcohol and drugs since there were sufficient other bases to reject the claims. The right to an impartial jury composed of jurors who are competent and unimpaired could be adequately protected by other trial procedures, such as voir dire, in-court observations by counsel, court, and other trial participants, and by the procedure, allowed by the trial court here, to conduct a post-trial evidentiary hearing to impeach the verdict by non-juror evidence of the alleged misconduct.

The Due Process Clause protects an accused against a conviction except upon proof beyond and to the exclusion of every reasonable doubt. The Supreme Court was called on to apply settled rules about burden-shifting inferences and presumptions in jury instructions in *Francis v. Franklin*.[228] The Eleventh Circuit concluded that the trial judge's instruction to the jury had impermissibly shifted the burden of proof on the issue of intent and that

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221. *Burger*, 483 U.S. at 776.

222. 112 S. Ct. 2686 (1992).

223. United States v. Doggett, 906 F.2d 573 (11th Cir. 1990) (Kravitch, J., for Atkins, J.; Clark, J., dissenting).

224. *Doggett*, 112 S. Ct. at 2686.

225. 483 U.S. 107 (1987).

226. United States v. Conover, 772 F.2d 765 (11th Cir. 1985) (Garza, J., for Hill & Anderson, JJ.).

227. *Tanner*, 483 U.S. at 107.

228. 471 U.S. 307 (1985).

the error was not harmless.[229] The Supreme Court majority agreed that there was reversible error in the charge.[230]

Double jeopardy complications arose in *Garrett v. United States*.[231] The defendant was convicted of a continuing criminal enterprise, conspiracy to possess marijuana with intent to distribute, and using a telephone to facilitate illegal drug activities. The Eleventh Circuit affirmed the conviction.[232] The Supreme Court looked first to the intent of Congress and then to the limits of the Fifth Amendment to hold: 1) Congress intended that the continuing criminal enterprise offense be a separate offense and authorized prosecution for both the predicate offense and the enterprise offense; 2) the prosecution for the continuing criminal enterprise offense after the earlier prosecution for marijuana importation did not offend principles of double jeopardy; 3) the Fifth Amendment did not bar cumulative punishments for the enterprise offense and the underlying predicate importation offense.[233]

The right to appeal was the subject of *Wasman v. United States*.[234] Following an appellate reversal of his earlier conviction, the defendant was retried and again convicted. The Supreme Court affirmed the Eleventh Circuit's second handling of the case[235] and held that after retrial and reconviction, following a successful appeal, a trial court may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred after the first sentencing. Any presumption of vindictiveness was rebutted by the trial judge's careful explanation that the second sentence was greater because of an intervening conviction; therefore, the longer second sentence was manifestly legitimate.

Every judge on the Eleventh Circuit will admit that the most difficult of all appeals, in terms of their toll on the judicial psyche, are death penalty appeals. The facts are difficult. The law is difficult. Additionally, these difficulties are made worse by the weight of responsibility for the outcome.

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229. Franklin v. Francis, 720 F.2d 1206, 1212 (11th Cir. 1983) (Tjoflat, J., for Hill & Simpson, JJ.).

230. *Francis*, 471 U.S. at 326; *see also Burger*, 483 U.S. at 781-83 (holding a similar claim of error harmless).

231. 471 U.S. 773 (1985).

232. United States v. Garrett, 727 F.2d 1003 (11th Cir. 1984) (Kravitch, J., for Fay & Atkins, JJ.); *see also* Sandra Bower Ross, Comment, *The Pattern Element of RICO Before and After* Sedima: *A Look at Both Federal and Florida RICO*, 15 FLA. ST. U. L. REV. 321 (1987).

233. *Garrett*, 471 U.S. at 773.

234. 468 U.S. 559 (1984).

235. United States v. Wasman, 700 F.2d 663 (11th Cir. 1983) (Markey, J., for Fay & Clark, JJ.).

McCleskey v. Kemp,[236] a 1987 decision, was understood at the time to represent the last, best challenge against the death penalty. The case was reviewed en banc in the Eleventh Circuit on the issue of whether proof of disparate racial impact could be the basis for a holding that a state's death penalty was unconstitutional. The en banc judges debated among themselves in lengthy opinions, but the majority concluded that the statistical showing had not been sufficient.[237] An African-American defendant was convicted in a Georgia trial court of armed robbery and the murder of a white police officer. He was tried and sentenced under state procedures which the Supreme Court had upheld in 1976.[238] To support his claim in federal court, the defendant-petitioner proffered a statistical study (the Baldus study) that purported to show a disparity in the imposition of the death sentence in Georgia based on the murder victim's race and, to a lesser extent, on the defendant's race. The exhaustive and comprehensive study of all the murder prosecutions in the state revealed that African-American defendants whose victims were white have a statistically significant greater likelihood of receiving the death penalty. The Supreme Court of the United States, by a five to four vote, rejected this argument under the incorporated Eighth Amendment and under the Equal Protection Clause of the Fourteenth Amendment.[239]

The second substantive death penalty holding came down in *Ford v. Wainwright*.[240] The Supreme Court majority reversed and remanded the Eleventh Circuit panel decision.[241] The High Court interpreted the Eighth Amendment to prohibit a state from inflicting the penalty of death upon a prisoner who is insane. The Court held that state procedures for determining the sanity of the death row inmate were not adequate to assure a full and fair hearing on the critical issue, and therefore the petitioner was entitled to an evidentiary hearing on the question in the collateral federal trial court.[242]

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236. 481 U.S. 279 (1987).

237. McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc) (opinions filed by nine judges: Roney, Tjoflat, Kravitch, Vance, Anderson, Godbold, Johnson, Hatchett, & Clark, JJ.).

238. Gregg v. Georgia, 428 U.S. 153, *stay granted*, 429 U.S. 1301, *and vacated*, 429 U.S. 875 (1976).

239. *McCleskey*, 481 U.S. at 308-13.

240. 477 U.S. 399 (1986).

241. Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985) (per curiam) (Vance & Stafford, JJ.; Clark, J., dissenting).

242. *Ford*, 477 U.S. at 418.

Jury selection in death cases must be sensitive to the constitutional interests of both the accused and the state.[243] The Supreme Court used the case of *Wainwright v. Witt*[244] to caution courts of appeals about their proper role when reviewing the factual issue of whether a prospective juror was sufficiently biased as to be excludable. The Eleventh Circuit[245] erred, according to the Supreme Court, in the panel's willingness to second guess the district court's assessment of what had happened in the state trial court. In *Darden v. Wainwright*,[246] the en banc court in the Eleventh Circuit ruled in favor of the state prisoner.[247] The Supreme Court subsequently vacated and remanded the Eleventh Circuit decision based on *Wainwright v. Witt*.[248] However, on remand, the en banc court denied relief.[249] The second time the case came before the Supreme Court, the majority definitively held that under the circumstances the particular juror had been properly excluded for indicating that he had moral, religious, or conscientious principles in opposition to the death penalty that were so strong that he would be unable to recommend a death penalty regardless of the evidence.[250]

Procedures and events at the penalty phase of capital prosecutions routinely serve as the focus of later federal habeas corpus challenges. In *Wainwright v. Goode*,[251] the Supreme Court ruled that the Eleventh Circuit[252] erred in substituting its own view for the view of the state supreme court on the issue of whether the state trial court relied on an impermissive aggravating factor.[253] The majority went on to opine that, even if the state trial judge relied on the problematic factor, the state trial did not produce a sentence so arbitrary as to violate the Constitution. In *Hitchcock v. Dugger*,[254] the Supreme Court reversed the Eleventh Circuit,

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243. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968).

244. 469 U.S. 412 (1985).

245. Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983) (Tuttle, J., for Kravitch, J.; Roney, J., specially concurring).

246. 477 U.S. 168 (1986).

247. Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984) (en banc) (opinions filed by Johnson, Tjoflat, Hill, & Fay, JJ.).

248. Wainright v. Darden, 469 U.S. 1202 (1985).

249. Darden v. Wainwright, 767 F.2d 752 (11th Cir. 1985) (en banc).

250. *Darden*, 477 U.S. at 178.

251. 464 U.S. 78 (1983).

252. Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983) (Anderson, J., for Godbold & Hoffman, JJ.).

253. *See Goode*, 464 U.S. at 83-84.

254. 481 U.S. 393 (1987).

sitting en banc,[255] and held that the advisory jury in the state trial court had been unconstitutionally "instructed not to consider, and the sentencing judge [had improperly] refused to consider, evidence of nonstatutory mitigating circumstances . . . ." that should have been considered.[256] In *Parker v. Dugger*,[257] the Supreme Court held that the state supreme court had incorrectly determined that the state trial had found no mitigating circumstances in pronouncing sentence and, consequently, had failed to follow constitutional procedures required for weighing aggravating and mitigating factors.[258]

The surveyed decisions of the Eleventh Circuit also provide a window on the arcane and convoluted procedures in federal habeas corpus proceedings. The procedural rules in these actions are more easily stated than applied, as the Eleventh Circuit learned in two decisions. In *Amadeo v. Zant*,[259] the Supreme Court reversed the Eleventh Circuit[260] and determined that the district court's finding that the petitioner had established cause for his state court procedural default was not clearly erroneous and should have been affirmed under settled principles. On the other hand, in *Dugger v. Adams*,[261] the Supreme Court did not find cause excusing the petitioner's default under the relevant case law and reversed the Eleventh Circuit.[262]

The most important first decade habeas holding came in *McCleskey v. Zant*.[263] It involved the issue of abuse of the writ, an issue that in death penalty cases can make the difference between a last minute stay or execution.[264] Again, the Supreme Court used an Eleventh Circuit decision[265] as a vehicle for national lawmaking. The majority held that when a state prisoner files a second or subsequent petition the state bears the

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255. Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) (en banc) (Roney, J., for the majority; Johnson J., dissenting).

256. *Hitchcock*, 481 U.S. at 398-99.

257. 498 U.S. 308 (1991).

258. *Id.* at 320-22.

259. 486 U.S. 214 (1988).

260. Amadeo v. Kemp, 816 F.2d 1502 (11th Cir. 1987) (per curiam) (Vance & Henderson, JJ.; Clark, J., dissenting).

261. 489 U.S. 401 (1989).

262. Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986) (Johnson, J., for Roney & Fay, JJ.).

263. 499 U.S. 467 (1991).

264. *See* Antone v. Dugger, 465 U.S. 200 (1984).

265. McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989) (Kravitch, J., for Edmondson & Roney, JJ.), *aff'd* 499 U.S. 467 (1991).

burden of pleading abuse of the writ; the burden is satisfied if the state describes prior petitions and identifies the issue raised for the first time; then the procedural burden shifts to the petitioner to show cause and actual prejudice or, alternatively, a fundamental miscarriage of justice. With this elaboration, the Supreme Court effectively narrowed the possibility that a state prisoner could succeed on any petition that followed the first federal collateral review.

Collectively, these criminal law and criminal procedure decisions demonstrate that the Eleventh Circuit has taken its place alongside the other United States Courts of Appeals. It is one of the main pipelines of these cases to the Supreme Court, but the influence flows in both directions. The court of appeals is directed toward the responsibility of correcting errors in the nine district courts under its supervision.[266] But it has a national orientation at the same time. In Alabama, Georgia, and Florida, the Eleventh Circuit is the judicial institution that has the primary federalizing responsibility for implementing the national policy on crime and, at the same time, for guaranteeing the promise of the Bill of Rights to citizens accused of crime.

What is most evident, perhaps, in the death penalty and habeas corpus decisions, is the constitutional abstraction of federalism. The three sovereign states in the Eleventh Circuit have made the criminal justice policy decision to rely on the death penalty. Consequently, the Eleventh Circuit has the macabre responsibility of being something of a death court, or more accurately, a constitutional court in these capital cases. According to one expert, of the forty-three habeas death penalty cases decided by the Supreme Court during the period being studied, nearly half of them originated in the Eleventh Circuit.[267] Many of these, as demonstrated above, have had national significance for this area of criminal law and constitutional procedure. It is safe to predict that the incorporated Eighth Amendment will continue to demand the attention of the Eleventh Circuit bench for the foreseeable future.[268]

Finally, it should be noted that the court of appeals' frequent reliance on the en banc mechanism to deal with these issues suggests a prudent exercise of collegial decision-making. These full-court efforts help assure

266. 28 U.S.C. § 133 (1988).

267. Godbold, *supra* note 10, at 976; *see also* Enmund v. Florida, 458 U.S. 782, 797 (1982) (holding that application of the death penalty to a defendant who was not a principal, but only an aider and abetter, was unconstitutional).

268. *See generally* Timothy W. Floyd, *Criminal Procedure*, 22 TEX. TECH L. REV. 493 (1991).

that the law of the circuit will be uniform and will express the judicial philosophy of the majority of the circuit judges. Through en banc hearings past panels are rehabilitated and future panels are informed. Even more important, the Supreme Court benefits from the fuller and more diverse expressions of judicial views contained in the multiple opinions that issue from full-court review.

IX. EVIDENCE LAW

The Federal Rules of Evidence have, as their express objective, "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[269] On three occasions, the Supreme Court used Eleventh Circuit appeals as a vehicle to address the law of evidence.

In *Amadeo v. Zant*,[270] a state prisoner was convicted of murder and sentenced to death. He was in federal court on a collateral challenge based on alleged equal protection violations in the selection of his petit jury.[271] The issue before the Supreme Court dealt with the relationship between a district court and a court of appeals when reviewing findings of fact.[272] On the record, the Supreme Court concluded that the factual findings upon which the district court had based its conclusion—that the petitioner had established cause for his procedural default of not objecting to the jury selection at the state criminal trial—were not clearly erroneous; therefore, the court of appeals should not have set aside the district court's grant of relief. If there are two permissible views of the same evidence, the view of the trier of fact cannot be deemed clearly erroneous. The appellate court cannot engage in fact-finding.

The Supreme Court gave the district judge a lesson in evidence law in *Beech Aircraft Corp. v. Rainey*.[273] The spouses of deceased Navy pilots brought an action against the aircraft manufacturer and the service company. The district court entered a judgment on a jury verdict in favor of the defendants and the Eleventh Circuit reversed after a rehearing en banc.[274] Having determined that a Navy investigative report was sufficiently

269. FED. R. EVID. 102.

270. 486 U.S. 214 (1988).

271. *See supra* text accompanying notes 259-61.

272. *See* FED. R. CIV. P. 52(a).

273. 488 U.S. 153 (1988).

274. Rainey v. Beech Aircraft Corp., 827 F.2d 1498 (11th Cir. 1987) (en banc) (per curiam) (Tjoflat & Johnson, JJ., specially concurring).

trustworthy to be admissible, the district court also admitted, over plaintiffs' objections, most of the report's "opinions," including a statement suggesting that pilot error was most probably the cause of the crash. The Supreme Court affirmed the district court's admission of these "opinions," under Federal Rule of Evidence 803(8)(C), and agreed that the material was not excludable as hearsay.[275] Factually based conclusions or opinions are not excludable, according to the Court's interpretation of the rule and the Advisory Committee Notes, when they appear in a public record or report, so long as the record or report otherwise satisfies the trustworthiness criterion making it admissible in the first place.

In a rather rare alternative holding, the Supreme Court held that the district court had abused its discretion in restricting the scope of cross-examination of a witness.[276] However, the Court remanded for further proceedings consistent with Federal Rule of Evidence 106. The witness, a Navy flight instructor, had testified on direct examination as an adverse witness that he had made certain statements, arguably supporting the theory of pilot error, in a detailed letter in which he also took issue with some of the other findings in the previously mentioned report. The Supreme Court held that he should have been permitted to testify on cross-examination that his letter also included statements that he believed that the crash was due to power failure, so that the jury would be presented with a complete account of his letter.[277] The Supreme Court reasoned that when one party has made use of a portion of a document and a distortion or misunderstanding can only be averted through the presentation of another portion of the document, the additional material required to be presented for the sake of completeness is ipso facto relevant and admissible.[278]

Federal Rule of Evidence 606(b) codifies the long-accepted common law rule, which the federal courts have always followed, that a jury verdict cannot be impeached with a juror's testimony as "to the effect of anything upon [his] or any other juror's mind or emotions . . . except that . . . [such testimony is admissible on the question of] whether any outside influence was improperly brought to bear upon any juror."[279] In *Tanner v. United*

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275. *Rainey*, 488 U.S. at 153. *See generally* Joel R. Brown, Comment, *The Confrontation Clause and the Hearsay Rule: A Problematic Relationship in Need of a Practical Analysis*, 14 FLA. ST. U. L. REV. 949 (1987).

276. *Rainey*, 488 U.S. at 153.

277. *Id.*

278. *See* FED. R. EVID. 401, 402.

279. *Id.* 606(b).

States,[280] the Supreme Court affirmed an Eleventh Circuit decision[281] that allegations of substance abuse by the jurors did not fall within the exception and, therefore, an evidentiary hearing was not required. This result was dictated by the text of the rule, the legislative history, and the strong public policy of ensuring full and free deliberations, in order to protect jurors from harassment by the losing party, and to preserve the community's trust in the jury system. As if to cover all bases, the majority went on, in dicta, to say that affidavits and testimony noting that jurors had consumed alcoholic beverages at lunch and that several had fallen asleep in the afternoon did not form an adequate basis for placing any mistrust on the jury verdict.

These evidence law decisions highlight several important themes.[282] The law of evidence is the domain of trial lawyers and trial judges: those who apply it and make it. The law in this area is rule-based, but the Federal Rules of Evidence are codifications and restatements of common law principles. Therefore, the rules are best understood against that background of understanding. Finally, the Eleventh Circuit seems to be respectful of the district court's role in the court system. The trial is supposed to be the main drama, while the appeal is merely the critic's review. It is at the trial where the adversarial processes work to approximate truth. The main role of the appellate court is to help insure that the trial proceeds in a fair and efficient manner as an asymptote of what happened and who did what to whom and why.[283]

X. LABOR LAW

The history of labor law in the United States contains more social history and class conflict than legal theory. The legal response to the labor

280. 483 U.S. 107 (1987).

281. United States v. Conover, 772 F.2d 765 (11th Cir. 1985) (Garza, J., for Anderson, J.; Hill, J., specially concurring); *see also supra* text accompanying notes 217-19.

282. *See generally* Robert S. Catz & Jill J. Lange, *Judicial Privilege*, 22 GA. L. REV. 89 (1987); Kenneth J. Melilli, *Exclusion of Evidence in Federal Prosecutions on the Basis of State Law*, 22 GA. L. REV. 667 (1988); William A. Schroeder, *Evidentiary Use in Criminal Cases of Collateral Crimes and Acts: A Comparison of the Federal Rules and Alabama Law*, 35 ALA. L. REV. 241 (1984); Michael D. Ermert, Comment, *Mental Disorder in Witnesses: An Overview of Competency and Credibility Issues*, 41 ALA. L. REV. 167 (1989).

283. *Compare* Paul D. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507 (1969) *with* Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

movement and the opposing movement against labor organization has largely been statutory. The primary developments have occurred in the halls of Congress, not in federal courtrooms. Nevertheless, the federal courts have had the important responsibilities of interpreting and applying the edicts of the legislative branch. The first legislative goal is to ensure "industrial peace" among the employers, the labor organizations and the individual employees.[284] In more recent years, Congress has constructed an elaborate statutory framework for protecting the rights of workers from a host of marketplace discriminations. The federal courts, including the courts of appeals, provide a forum for keeping the labor peace and for policing the labor place.

The Supreme Court affirmed the Eleventh Circuit's[285] decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council.*[286] The National Labor Relations Board[287] ("NLRB") issued an order instructing the union to stop distributing handbills, at a construction site, which urged mall customers not to shop at any of the mall's stores until the mall owner guaranteed that the building contractors would pay fair wages. The Supreme Court first held that the NLRB interpretation of the National Labor Relations Act[288] ("NLRA") was not entitled to judicial deference, particularly when the NLRB interpretation would raise serious First Amendment problems.[289] Instead, the Court rejected the argument that the union's peaceful distribution of handbills at the mall entrances violated the NLRA provision, making it an unfair labor practice to "threaten, coerce, or restrain any person" to cease doing business

284. *See* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION, AND COLLECTIVE BARGAINING 1 (1976); *see also* Sarah L. Manning, Eleventh Circuit, Wright Line: *The Burden of Proof in Dual Motive Cases Under Section 8(A)(3)*, 13 CUMB. L. REV. 239 (1982) (discussing Wright Line, Inc., 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982)); David J. Middlebrooks, Comment, *Nonmajority Bargaining Orders: Predicting the Eleventh Circuit's Vote*, 34 ALA. L. REV. 85 (1983).

285. Florida Gulf Coast Bldg. & Constr. Trades Council v. NLRB, 796 F.2d 1328 (11th Cir. 1986) (per curiam) (Hill, Anderson, & Tuttle, JJ.).

286. 485 U.S. 568 (1988).

287. *See generally* Patricia Diaz Dennis, *Principles That Guide My Decisionmaking*, 15 STETSON L. REV. 5 (1985) (the author is a member of the NLRB).

288. 29 U.S.C. § 158(b)(4) (1988).

289. *See* Hudgens v. NLRB, 424 U.S. 507 (1976).

with another.[290] Such handbilling and appeals to consumers did not fall within the scope of the congressional meaning and intent.

The Supreme Court reversed the Eleventh Circuit[291] in *Hechler v. International Brotherhood of Electrical Workers Local 759*.[292] The case required the High Court to interpret and apply the Labor Management Relations Act of 1947[293] ("LMRA"). An electrical apprentice brought suit against her union, alleging that the union had breached its duty to ascertain that she possessed essential training and skill before being assigned to perform a job at which she was injured. After the lawsuit was removed, the district court dismissed it for failure to comply with the federal statute of limitations. The Eleventh Circuit ruled in favor of the employee. However, the Supreme Court disagreed and held that the claim fell within the preemptive effect of section 301 of the LMRA. This conclusion was reinforced by the policy behind the statute to provide a uniform meaning to contract terms in collective bargaining agreements, since the lawsuit depended on the meaning to be given to the relevant agreement between the parties. Therefore, the federal, and not the state, limitations period applied. Accordingly, the only question left on remand was whether the claim was based on the union's duty of fair representation, in which case the brief federal six-month period applied, or whether the claim amounted to a third-party beneficiary suit based on the collective bargaining agreement, in which case a longer federal statute of limitations period would apply.

In a very important decision to the region's migrant workers, the Supreme Court affirmed the Eleventh Circuit,[294] holding that exclusivity provisions in state workers' compensation laws do not bar migrant workers from bringing private actions under the Federal Migrant and Seasonal Agricultural Worker Protection Act.[295] The decision in *Adams Fruit Co. v. Barrett*[296] relied on the actual language of the federal statute and depended on the Congressional history of the measure in analyzing preemption.

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290. *Florida Gulf Coast*, 485 U.S. at 578 (interpreting 29 U.S.C. § 158(b)(4)(ii)(B) (1988)).

291. Hechler v. International Bhd. of Elec. Workers Local 759, 772 F.2d 788 (11th Cir. 1985) (Clark, J., for Henderson & Tuttle, JJ.).

292. 481 U.S. 851 (1987).

293. 29 U.S.C. §§ 141-188 (1988).

294. Barrett v. Adams Fruit Co., 867 F.2d 1305 (11th Cir. 1989) (Vance, J., for Kravitch & Henderson, JJ.).

295. Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) (interpreting 29 U.S.C. §§ 1801-1872 (1988)).

296. *Id.*; *see also supra* text accompanying notes 145-47.

The Supreme Court was called on to interpret and apply the Federal Service Labor Management Relations Statute[297] in *Fort Stewart Schools v. Federal Labor Relations Authority.*[298] The Federal Labor Relations Authority ("FLRA") had ruled that the Army was required to negotiate with a union representing employees of two elementary schools located in the Fort. The Supreme Court agreed with the Eleventh Circuit[299] that the FLRA should be upheld. The union's proposals, relating to mileage reimbursements, various types of paid leave, and salary increases, fell within the statute's coverage of "conditions of employment," at least in the interpretation of the FLRA.[300] The Supreme Court found no reason to reject the agency's interpretation.

What was probably the most important Supreme Court labor law decision to come out of the Eleventh Circuit in its first decade was *Hishon v. King & Spalding.*[301] A female attorney sued one of the oldest and most prestigious law firms in the circuit. She alleged that the firm's decision not to promote her from associate to partner constituted sex-based discrimination under Title VII of the Civil Rights Act of 1964.[302] A divided panel of the Eleventh Circuit held that the Act did not apply to such partnership decision-making.[303] The Supreme Court reversed and ruled that the plaintiff had stated a cognizable claim and was entitled to her day in court. Partnership consideration was part and parcel of the employment relationship, even though making partner was not automatic or guaranteed. Partnership consideration could not be based on any of the factors prohibited by Title VII: race, color, religion, sex, or national origin. Application of the Civil Rights Act did not infringe on the firm or members' constitutional rights of expression or free association.[304]

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297. 5 U.S.C. §§ 7101-7135 (1988).

298. 495 U.S. 641 (1990).

299. Fort Stewart Schs. v. Federal Labor Relations Auth., 860 F.2d 396 (11th Cir. 1988) (Hatchett, J., for Vance & Nesbitt, JJ.).

300. *See Fort Stewart Schs.*, 495 U.S. at 644-50.

301. 467 U.S. 69 (1984); *see also* Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (employing sexual harassment analysis relied on by Supreme Court in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)).

302. 42 U.S.C. § 2000e (1988 & Supp. III 1991). *See generally* Andrea Zelman, Comment, *Civil Rights: Law Partners as Employees for Title VII Purposes*, 35 U. FLA. L. REV. 201 (1983).

303. Hischon v. King & Spalding, 678 F.2d 1022, 1030 (11th Cir. 1982) (Fay, J., for Young, J.; Tjoflat, J., dissenting).

304. *Hischon*, 467 U.S. at 73-79; *see also* Martha E. Waters, Recent Decision, *Title VII: Relief for Sexual Harassment in the Eleventh Circuit*, 35 ALA. L. REV. 193 (1984).

The Supreme Court had occasion to reverse another Eleventh Circuit holding,[305] under Title VII, in *Florida v. Long*.[306] State employees brought a class action alleging that the State of Florida's pension plan system for state employees discriminated on the basis of sex. Specifically, the Supreme Court was asked to decide the date upon which pension funds covered by Title VII were required to offer benefit structures that did not discriminate on the basis of sex, and whether persons who, in fact, retired before that date were entitled to adjusted benefits to eliminate any sex discrimination for all future benefits. This called for an interpretation of the statute and some reconciliation of earlier decisions.[307] Choosing the date of the later of its two decisions, the majority reasoned that the Court's first decision, which invalidated discriminatory pension plan contributions, did not put the state on notice that its optional pension plan, that offered sex-based benefits, was in violation of the federal law. Therefore, liability could not be imposed for Florida's conduct before the second Supreme Court decision that explicitly prohibited such discriminatory benefits. Furthermore, the legislative purposes behind Title VII would not be advanced by an inequitable award of retroactive damages against the states and local governments.

The last mentioned labor law decision to arise in the Eleventh Circuit was *School Board of Nassau County v. Arline*.[308] This case dealt with the Rehabilitation Act of 1973.[309] A school teacher, who alleged that she was fired from her job solely for the reason that she had a history and susceptibility to tuberculosis, argued that the statute protected her as a "handicapped individual" who was "otherwise qualified to teach . . . ."[310] The Eleventh Circuit held that the contagious disease constituted a statutory handicap.[311] The Supreme Court affirmed and held that the statute prohibited the school system, as a federally funded state program, from discriminating against her solely by reason of her handicap. The case was remanded for further

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305. Long v. Florida, 805 F.2d 1542 (11th Cir. 1986) (Godbold, J., for Fay & Atkins, JJ.).

306. 487 U.S. 223 (1988).

307. *See* Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983); Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

308. 480 U.S. 273 (1987) (interpreting 29 U.S.C. § 794 (1983)).

309. 29 U.S.C. §§ 701-796 (1988).

310. *Arline*, 480 U.S. at 275.

311. Arline v. School Bd. of Nassau County, 772 F.2d 759, 764 (11th Cir. 1985) (Vance, J., for Anderson & Henley, JJ.).

proceedings to determine whether the teacher, in fact, was otherwise qualified to teach, and therefore, fired improperly.

These labor law decisions demonstrate the essential "federalness" of employment law, once the issues go beyond traditional state contract law and workers' compensation statutes. Federal law is based on statute. The limited role of the judicial branch, consequently, is to divine the legislative intent and be true to the Congressional scheme. The flow of influence goes both ways: national policies are implemented in the local community through federal court enforcement and the Eleventh Circuit produces the case vehicles for deciding issues with nationally binding effects.

X. TAXATION

It has been said that "[t]he technical laws Congress has devised tend to make the comprehension of the income tax system all too absorbing in time and energy."[312] Mercifully for the author, the Eleventh Circuit has not developed a reputation as a leading tax court. Only two decisions during the first decade had to do with tax law and neither is absorbing.

In the first tax decision, *Holywell Corp. v. Smith*,[313] a bankruptcy trustee, who had been appointed under a confirmed plan to liquidate and distribute the debtors' property after the property was transferred to a trust created by the plan, sought a declaratory judgment on the question of the trustee's obligation to file income tax returns and to pay taxes upon the gain realized from the sale of real estate.[314] The plan was silent on this issue. The Bankruptcy Court decided that the trustee did not have to file or pay and the Eleventh Circuit affirmed.[315] The Supreme Court, however, disagreed. Since the trustee was an assignee of all or substantially all of the property of the corporate debtors, the trustee would have to file returns and pay taxes as if there had been no plan. As a fiduciary, the trustee had to file returns and pay the taxes due on income attributable to the individual debtor's property. The unanimous Court held that the United States' earlier failure to object to the plan, which was silent about taxes, did not preclude the government from seeking payment of taxes from the trustee.[316]

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312. MICHAEL D. ROSE & JOHN C. CHOMMIE, FEDERAL INCOME TAXATION 1 (3d ed. 1988).

313. 112 S. Ct. 1021 (1992).

314. *See* 11 U.S.C. § 1141(a) (1988); 26 U.S.C. § 6012(b)(3)-(4) (1988).

315. *In re* Holywell Corp., 911 F.2d 1539 (11th Cir. 1990) (Hatchett, J., for Henderson, J.; Cox, J., dissenting).

316. *Holywell*, 112 S. Ct. at 1021.

The only other tax case was *Dickman v. Commissioner*.[317] The Eleventh Circuit reversed a determination by the United States Tax Court which had concluded that intrafamily, interest-free demand loans did not result in taxable gifts.[318] The Supreme Court sided with the Commissioner and determined that the loans were taxable gifts of the reasonable value of the use of the money being loaned.[319] This result resolved a conflict among the circuits in favor of the approach the Eleventh Circuit had taken on direct appeal. The issue was of obvious importance to the proper functioning of the tax system.[320]

Two decisions do not constitute a sufficient sample to reach any conclusion about the status of tax law in the Eleventh Circuit. Any assessment is left for some future evaluation.

XII. CONCLUSION

It has been difficult even to attempt to account for ten years of decisions in so many different areas of the law. It is even more difficult, if not impossible, to summarize the overall significance of the Eleventh Circuit's contributions to the law of the Nation. Nevertheless, even an arbitrary selection process, as was used here, allows one to begin to appreciate the responsibility of decision-making borne by the judges of the intermediate federal court.

Federal judicial history was made with the creation of the United States Court of Appeals for the Eleventh Circuit. The judicial and legal history made in turn by the Eleventh Circuit, during its first decade, has been true to its judicial parent, the former Fifth Circuit, which aptly deserved the title of a "great court."[321] The priority of the first decade circuit judges was "characterized by the goal of achieving stability as an institution."[322]

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317. 465 U.S. 330 (1984).

318. Dickman v. Commissioner, 690 F.2d 812 (11th Cir. 1982) (Hill, J., for Godbold, J.; Fay, J., concurring) (interpreting 26 U.S.C. § 2501 (1980)).

319. *Dickman*, 465 U.S. at 337-38.

320. *See* David Vetter, Comment, *Gift Taxation: Interest-Free Demand Loans—Gift or Equivalent Exchange?*, 35 U. FLA. L. REV. 549 (1983); James L. Webster, Recent Decision, Dickman v. Commissioner: *The Supreme Court Applies the Gift Tax to Interest-Free Loans*, 35 ALA. L. REV. 553 (1984). Congress has since addressed this issue. *See* 26 U.S.C. § 7872 (1988).

321. John M. Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787, 787 (1980); *see also* BAKER, *supra* note 2, at 52-73.

322. Godbold, *supra* note 10, at 984; *see also* Michael L. Chapman, *Appellate Procedure Under the New Eleventh Circuit Rules*, 18 GA. ST. B.J. 134 (1982).

Obviously, by any account, that goal has been achieved. This newest of regional courts of appeals has already struggled with many of the most difficult issues of the day. It has sought to accommodate history and precedent with the felt needs of the present.

This first decade of the Eleventh Circuit is merely its prologue. The Eleventh Circuit Court of Appeals has established its own identity, taken its place alongside its twin, the new Fifth Circuit, and has found its own voice among the other regional courts of appeals that comprise the intermediate tier of the federal court system. It has performed thus far with a high-minded purpose and in the best traditions of the Article III judiciary.

What, in the end, are the distinctive characteristics of the Eleventh Circuit's jurisprudence? Perhaps the best conclusion is that it is too soon to answer that question, after only one completed decade. Such a post-diction must be attempted from the appropriate posture of intellectual modesty and should be understood to be fraught with the same uncertainty that characterizes predictions of the future. What the future will bring for the Eleventh Circuit one can only wait and see. For example, before World War II, who could have predicted what the civil rights cases would mean to the old Fifth Circuit, and vice versa?

What can be said with great confidence is that the Eleventh Circuit will continue to decide difficult and complex appeals in the best common law tradition. The Supreme Court will continue to look to the Eleventh Circuit for issues of national importance and for guidance on how they should be decided. In this way, the United States Court of Appeals for the Eleventh Circuit will continue to perform its assigned role of establishing precedent and administering justice under the Constitution for the citizens living within its boundary and for the rest of the Nation.[323]

323. Abram Chayes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026 (1988).