

# THE HANDS LECTURE

## ADJUDICATION IN THE AGE OF DISAGREEMENT

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It is a great honor to deliver the Hands Lecture on the 125th anniversary of this great court.<sup>1</sup> I would like to thank Judge Wesley for inviting me to be here; Chief Judge Katzmann for presiding over these wonderful 125th anniversary events; and all my mentors, teachers, and friends on the court, on the federal district courts, and at the bar that practices in the Second Circuit.

Let me cut to the chase. This has been a great court for a very long time—it has been a court of superlatives. I plan in fact to make this greatness the core of my remarks here today. And what else could I do in a lecture delivered here in the court’s own beautiful courtroom? And on its birthday no less! It would be churlish to pursue any other course.

This is the court of the most influential lower federal court judge of the twentieth century, Billings Learned Hand, who served on the Second Circuit from 1924 to 1961 and on the Southern District of New York bench before that.<sup>2</sup> It is the court of Hand’s respected cousin, Augustus, who served from 1927 to 1954.<sup>3</sup> For decades now, no lecture like this has been complete without the recitation of the Circuit’s basic catechism: “[Q]uote Learned, but follow Gus.”<sup>4</sup> Together, the Hands made the Second Circuit first among its peers.

This is a court of extraordinary characters. The iconoclast Jerome Frank graced this bench, almost certainly the only federal judge in history to publish a controversial Freudian interpretation of law before his confirmation.<sup>5</sup> And

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1. This lecture was given on October 26, 2016, at the Thurgood Marshall United States Courthouse as part of the Second Circuit’s 125th Anniversary celebration. For a discussion of the anniversary, see Robert A. Katzmann, *One Hundred Twenty-Five Years of the U.S. Court of Appeals for the Second Circuit: A Brief Project Overview*, 85 *FORDHAM L. REV.* 1 (2016).

2. *Hand, Learned*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/hand-learned> [<https://perma.cc/36AH-EM83>] (last visited Sept. 21, 2017).

3. *Hand, Augustus Noble*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/hand-augustus-noble> [<https://perma.cc/U637-XXKX>] (last visited Sept. 21, 2017).

4. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 558 (2011).

5. *See generally* JEROME N. FRANK, *LAW AND THE MODERN MIND* (1930).

this is the court of Henry Friendly, who sat on the bench from 1959 to 1986,<sup>6</sup> for whom the great Thurgood Marshall coined a twist on the famous homily about the Hands, “Quote Friendly, and follow Friendly!”<sup>7</sup>

Justice Marshall, who himself sat on the Second Circuit, asserted that this court “stands out among all other courts of appeals” because of its “unrivaled reputation for judicial craftsmanship.”<sup>8</sup> One observer has asserted that the Second Circuit is simply “a great appellate court” of the United States, claiming pointedly (and perhaps impolitically) that it sits “not in Washington but in New York.”<sup>9</sup> Some well-informed lawyers went so far as to say that the Second Circuit under Learned Hand was “the strongest tribunal in the English-speaking world.”<sup>10</sup>

Overkill? A little much, I am sure you will agree.

Insiders here today will note that I am skipping over at least one discordant note in the storied Second Circuit of the interwar and midcentury years. I promised the honorable conveners of today’s lecture that I would not even so much as mention Judge Martin Manton, the senior judge of the Second Circuit in the 1920s and 1930s.<sup>11</sup> I will not dwell on Judge Manton, nor on the errors that led to his bribery conviction,<sup>12</sup> nor even on the ongoing mystery of Manton’s old portrait and whether some district judge still retains it, apparently as a reminder of the fallibility of those who sit in review of district court decisions. These matters would be inappropriate for an occasion such as this.

But in truth, it is easy to pass over Manton. To praise this court is to take a path well worn for over a century now by observers who knew what they were talking about.

And that raises an interesting question. What explains all the praise for this court? What makes a tribunal strong? What role do judges play in our system of governance such that the Second Circuit’s particular virtues hold such a distinctive place in the tradition of adjudication?

In the time I have here with you today I would like to offer the beginnings of an answer. It does not lie in the distance between the court’s traditions and Manton’s conduct. That would be too easy. At base, I think the answer lies in something far more subtle and interesting: the relationship between a

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6. See *Friendly, Henry Jacob*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/friendly-henry-jacob> [<https://perma.cc/9CRD-NRGM>] (last visited Sept. 21, 2017).

7. Pierre N. Leval, *Remarks on Henry Friendly: On the Award of the Henry Friendly Medal to Justice Sandra Day O’Connor*, 15 GREEN BAG 2D 257, 259 (2012) (quoting Justice Thurgood Marshall, In Memoriam: Honorable Henry J. Friendly, Remarks at the Extraordinary Session of the Court of Appeals for the Second Circuit (June 9, 1986), in 805 F.2d LXXXI, LXXXVIII (1986)).

8. Thurgood Marshall, *Introductory Remarks: Celebrating the Second Circuit Centennial*, 65 ST. JOHN’S L. REV. 645, 645 (1991).

9. Philip B. Kurland, *Jerome N. Frank: Some Reflections and Recollections of a Law Clerk*, 24 U. CHI. L. REV. 661, 661 (1957).

10. Edward McWhinney, *A Legal Realist and a Humanist—Cross-Currents in the Legal Philosophy of Judge Jerome Frank*, 33 IND. L.J. 111, 115 (1957) (reviewing JUDGE JEROME FRANK & BARBARA FRANK, NOT GUILTY (1957)).

11. See JEFFREY B. MORRIS, FEDERAL JUSTICE IN THE SECOND CIRCUIT 131 (1987).

12. See *id.*

central tradition of the Second Circuit and one of the great questions we face as a society today. That question is how to deal with disagreement.

### I. LAW AND DISAGREEMENT

Election years are perennial occasions for disagreement. This election year, from Brexit to the American presidential campaign, the disagreements seem more substantial than usual.

For two decades after the fall of the Berlin Wall, the scope of political disagreement shrank. Triangulation was the political watchword of the day. The end of history seemed to have arrived, or at least some thought so.<sup>13</sup>

Well, history is back. It is a signal feature of our politics today that the policy space on economic and social questions seems to be growing once again. Partisan polarization is at an all-time high.<sup>14</sup> Criminal justice is once again a subject of intense disagreement. College campuses are as rife with dissent and turmoil as they have been in my lifetime. A new social movement has pushed into our public life a set of claims about racial justice—and critics have pushed back just as hard. The boundaries of the nation's identity are contested in ferocious disagreements over immigration politics. And the rise of inequality has touched off a renewed debate about the distribution of wealth.

Of course, disagreement is essential in a dynamic society like ours. We thrive off disagreement. It is the lifeblood of democratic politics. But it also poses risks. Which brings us back to the Second Circuit and its traditions.

A society in which conflict among ideals is both a sign of health and a persistent danger requires institutions capable of channeling disagreements into constructive debate and provisional solutions.

At its heart, this is what the law is. The law is a distinctive way of dealing with disagreement. The Second Circuit's reputation lies in its embodiment of a particularly important tradition in the management of social conflict.

The modern Second Circuit has its beginnings in 1891, when Congress enacted the Evarts Act and created the circuit courts of appeals.<sup>15</sup> But a different anniversary, somewhat deeper in the past, illustrates my point. Exactly five hundred years ago, the English lawyer Thomas More published

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13. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

14. See generally Jean M. Twenge et al., *More Polarized But More Independent: Political Party Identification and Ideological Self-Categorization Among U.S. Adults, College Students, and Late Adolescents, 1970–2015*, 42 *PERSONALITY & SOC. PSYCHOL. BULL.* 1364 (2016); *Partisanship and Political Animosity in 2016*, PEW RES. CTR. (June 22, 2016), <http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/> [<https://perma.cc/ZM7W-H9XM>]; *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/KW2D-BNUQ>].

15. Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891).

his great work of fiction, *Utopia*.<sup>16</sup> More had no lawyers in Utopia, where disagreements were few and far between.<sup>17</sup>

Grant Gilmore, one of the great writers and thinkers on the law in the twentieth century, captured the same idea when he wrote that “in Heaven there will be no law”; “in Hell,” by contrast, “there will be nothing but law, and due process will be meticulously observed.”<sup>18</sup>

What More and Gilmore had in mind was the idea that a perfect world does not need law at all. Law is for our fallen world with its irreducible disagreements over fact and value.

## II. ADJUDICATION IN THE AGE OF ADMINISTRATION

But law is not the only such mechanism. The special role of the law as an institution for managing disagreement comes into view when we start with a seldom-made but important observation. From the historian’s point of view, the federal courts of appeals arrive out of time.

In the era of the nation’s founding, the Judiciary Act of 1789 set in motion the iconic era of court-building in the United States.<sup>19</sup> For a century thereafter, the American state in peacetime was principally a state of courts.<sup>20</sup> Just think of the vital decisions of American statecraft in the nation’s first century. Think of *McCulloch v. Maryland*<sup>21</sup> upholding the national bank; the *Dartmouth College Case*,<sup>22</sup> which prevented the states from disrupting vested private interests; or *Charles River Bridge*,<sup>23</sup> which cut the other way and established a new pattern for nineteenth-century economic development. Think less happily of *Prigg v. Pennsylvania*,<sup>24</sup> affirming the federal government’s authority over fugitive slaves, and then the *Dred Scott*<sup>25</sup> decision, in which the U.S. Supreme Court utterly failed in its effort to resolve the problem of slavery for the nation.

The absence of powerful administrative institutions meant that in the nineteenth century, courts were the infrastructure of American governance.

The powerful courts of the nineteenth century, however, were emphatically not lower federal courts. Of the cases I have just reviewed, all but one came to the Supreme Court from the state supreme courts. The

16. George M. Logan & Robert M. Adams, *Introduction* to THOMAS MORE, *UTOPIA* xi (George M. Logan & Robert M. Adams eds., rev. ed. 2002) (“The word ‘utopia’ entered the world with the publication of More’s little book in December 1516.”).

17. MORE, *supra* note 16, at 82 (“As for lawyers, a class of men whose trade it is to manipulate cases and multiply quibbles, they exclude them entirely.”).

18. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 99 (2d ed. Yale Univ. Press 2015) (1977).

19. See, e.g., Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 *DUKE L.J.* 1421, 1478.

20. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977); STEPHEN SKOWRONIK, *BUILDING A NEW AMERICAN STATE* (1979).

21. 17 U.S. 316 (1819).

22. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

23. *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837).

24. 41 U.S. 539 (1842).

25. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

exception is *Dred Scott*, and that case probably ought to have been barred as a collateral attack on a state court's prior final judgment.<sup>26</sup>

The lower federal courts arrived as major players on the national stage only at the end of the nineteenth century. They are modern institutions, not age-old ones. Not until 1875 is there general federal question jurisdiction in the federal district courts.<sup>27</sup> And it is not until the Evarts Act of 1891 that we have the circuit courts of appeals whose founding we mark this year.<sup>28</sup>

This timing presents a paradox. In the historical sweep of American institutions, 1891 marks the advent of a new administrative way of managing social problems. New immigrant populations from eastern and southern Europe, combined with a massive transformation in the shape and scale of the economy, produced new controversies and new grounds for dissent. In response, American politics produced a new kind of institution: the bureaucratic agency.<sup>29</sup> Insurance commissions, railroad regulation bodies, and public utility commissions sprang up in state governments after the Civil War.<sup>30</sup> At the federal level, Congress created the Interstate Commerce Commission in 1887;<sup>31</sup> the Federal Reserve in 1913;<sup>32</sup> and the Federal Trade Commission in 1914.<sup>33</sup>

Congress created the Office of the Superintendent of Immigration in 1891<sup>34</sup>—the very same year it established the circuit courts of appeals. And in the subsequent decades, Congress and the President cooperated to establish an “alphabet soup” of agencies and offices.

The federal circuit courts of appeals, in short, arrived simultaneously with the dawn of the administrative state. This is a crucial fact—perhaps *the* crucial fact—for understanding the place of the Second Circuit and indeed all federal circuit courts of appeals. Administration promised to deliver technically superb decisions keeping with the cutting edge. Disputes would be resolved not in the courtroom but in offices equipped with slide rules and manned by mathematicians and engineers. As Hand's idol, Oliver Wendell Holmes Jr., said in 1897, “the man of the future” seemed to be not the judge but “the man of statistics and the master of economics.”<sup>35</sup>

26. *See id.* at 518–19 (Catron, J., dissenting); *id.* at 529–32 (McLean, J., dissenting); *see also* DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 327 (1978).

27. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470; *see also* 28 U.S.C. § 1331 (2012).

28. *See* Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891); *see also* MORRIS, *supra* note 11, at 93.

29. JERRY MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 228–31 (2012).

30. *See* THOMAS McCRAW, *PROPHETS OF REGULATION* 1–56 (1984); I. Leo Sharfman, *Commission Regulation of Public Utilities: A Survey of Legislation*, 53 *ANNALS AM. ACAD. POL. & SOC. SCI.* 1, 1–2 (1914).

31. Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383 (codified as amended in scattered sections of 47 U.S.C.).

32. Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified as amended in scattered section of 12 U.S.C.).

33. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58 (2012)).

34. Immigration Act, ch. 551, 26 Stat. 1084 (1891) (repealed 1943).

35. Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 469 (1897).

In the midst of this, Congress took the anomalous step of creating (and then repeatedly expanding) a new set of federal courts in the common law tradition set cheek by jowl with the institutions of the administrative state. The Second Circuit became a principal carrier of the distinctive claims of adjudication in the era of regulation.

What are these distinctive features of adjudication? In 1891, members of Congress aimed to create an intermediate appellate body with multimember panels in an effort to produce a particular kind of deliberative and reasoned decision. An older body of circuit courts existed and had existed since the Judiciary Act of 1789.<sup>36</sup> Those circuit courts had the power, among others, of appellate jurisdiction in cases coming out of the federal district courts.<sup>37</sup> Only in 1869 did the circuit courts get judges of their own, when Congress established one circuit judgeship for each of the nine federal judicial circuits.<sup>38</sup> Circuit judges sat in combination with the district judge from the relevant district court, the relevant circuit justice from the Supreme Court, or both.<sup>39</sup> But as Supreme Court Justices began to serve on circuit duty less frequently, critics worried that the existing circuit courts gave district court judges too much power over their cases.<sup>40</sup>

The Evarts Act took over the old circuit courts' appellate jurisdiction and added an additional circuit judge to each circuit.<sup>41</sup> The new circuit courts of appeals would be staffed by generalist judges. They would take up disagreements (we call them "cases and controversies") and decide them on the basis of general and prospective rules. Like common law courts since time immemorial, they would—for the most part—operate after the fact of disagreement, not in anticipation of it. The new courts, moreover, would decide disagreements through the articulation of reasoned decisions whose basic rationales would shape the law for subsequent cases. And they would do all this under a distinctive legitimacy imperative—namely, that they confine their decisions to those questions that needed to be decided to resolve a live dispute with real stakes.

All of this was quite radically different from the vision of the emerging administrative state. In the world of bureaucracies, expert rulemakers would rely on specialized authority to formulate rules in advance of any particular controversy. The operative logic would be the logic of the engineer or the manager or the social worker. It would be rooted not in the traditional wisdom of bar and bench but in the distinctive disciplinary claims of the new sciences of modern management. James Landis, former dean of Harvard Law School and chairman of the Securities and Exchange Commission beginning in 1934, wrote that the administrative process was his

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36. See Ch. 20, §§ 4–5, 1 Stat. 73, 74–75.

37. See *id.* at § 11, 1 Stat. at 79.

38. See Act of Apr. 10, ch. 22, § 2, 16 Stat. 44, 44–45 (1869).

39. See *id.* But see 28 U.S.C. § 42 (2012).

40. See Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 550 (1969); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 851 & n.39 (1985); see also MORRIS, *supra* note 11, at 93.

41. MORRIS, *supra* note 11, at 93.

“generation’s answer to the inadequacy of the judicial and the legislative processes.”<sup>42</sup> For Landis, judges were “jacks-of-all-trades and masters of none”;<sup>43</sup> they simply were not up to the work of managing modern social problems.

These modern, rationalized forms of management had their effects on adjudication in the Second Circuit. How could they not?

Consider a case that my students and I read just a few weeks ago, *United States v. Carroll Towing Co.*,<sup>44</sup> decided by the Second Circuit in 1947, and one of Hand’s most famous decisions. In the midst of the Second World War, New York Harbor was the busiest port in the world.<sup>45</sup> Each day, 575 tugboats directed nearly as many oceangoing merchant ships and countless barges along a waterfront of some 1800 docks, piers, and wharves.<sup>46</sup> It was said that on some of those days you could practically walk across the water to Staten Island from Manhattan, or so it seemed anyway.<sup>47</sup> And on one of those days, one of the 575 tugs made a mistake. While moving barges in the Hudson, a tug owned by the Carroll Towing Company accidentally dislodged an entire line of barges, which then began to drift in the river’s notorious currents.<sup>48</sup> One of the barges, owned by the Connors Company and carrying a load of grain belonging to the U.S. government, ran into the underwater propeller of a nearby vessel.<sup>49</sup> The barge took on water and sank.<sup>50</sup> The United States sued the Carroll Towing Company to recover the lost value of the grain, but Carroll Towing had a defense. Carroll Towing said the Connors Company ought to have had a man on board—a bargee in the language of the waterfront.<sup>51</sup> Had such a person been there on the barge, he would have been able to identify the leak and rescue the barge and its cargo, or at least so said Hand.<sup>52</sup> This was contributory negligence, and Carroll Towing insisted this meant it was not liable for the loss of the grain.<sup>53</sup>

*Carroll Towing* is the kind of case that made the Second Circuit famous. Hand’s achievement, Judge Friendly later said, arose out of “the great way in which he dealt with a multitude of little cases.”<sup>54</sup> Hand saw in the ordinary humdrum facts of *Carroll Towing* an occasion to make an important point about how we might try to administer disagreements in the modern world. Holmes once said of the law that in it one can sometimes catch a glimpse of

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42. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 46 (1938).

43. *Id.* at 31.

44. 159 F.2d 169 (2d Cir. 1947).

45. See RICHARD GOLDSTEIN, *HELLUVA TOWN: THE STORY OF NEW YORK CITY DURING WORLD WAR II* 55 (2010); see also STEVEN H. JAFFE, *NEW YORK AT WAR: FOUR CENTURIES OF COMBAT, FEAR, AND INTRIGUE IN GOTHAM* 240–41, 244 (2012).

46. GOLDSTEIN, *supra* note 45, at 55.

47. *Id.* at 58.

48. *Carroll Towing*, 159 F.2d at 170–71.

49. *Id.* at 171.

50. *Id.*

51. *Id.*

52. *Id.* at 172.

53. *Id.*

54. DAVID M. DORSEN, *HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA* 123 (2012).

the universal truth, “an echo of the infinite.”<sup>55</sup> And at the bottom of *Carroll Towing*, through the murky waters of the North River, Hand saw something deep. He saw the basic logic of a universal decision-making formula. Was Connors negligent not to have had a bargee on board? The answer, Hand reasoned, turned on a general formula of the relative costs and benefits of having a man on the barge: it would be a function of (1) the probability of loss absent the relevant precaution, (2) the gravity of any resulting injury, and (3) the burden of the precaution at issue.<sup>56</sup>

The cost-benefit analysis that Hand articulated here is a core algorithm of the modern administrative state. Hand’s formula imagines a decision-maker resolving disagreement by reference to a panoptic policy judgment. The ambition of his cost-benefit test is awesome in every sense of the word. The judge in Hand’s formula must assemble the full array of social costs of an action and compare them to the complete run of social benefits. The idea is to master the tricky currents of the New York Harbor and to make an allocation of liability that is most conducive to the management of the New York waterfront—one in which cost-justified precautions, and only cost-justified precautions, are taken. A circuit judge applying such a formula acts as a kind of heroic administrator, confident in her own expertise and capacity to account for society’s welfare. The social-welfare perspective of modern administrators becomes the measure of the dispute between the parties.

But there is a funny feature of the *Carroll Towing* decision. The opinion contains passages that are awfully hard to see as part of an administrative cost-benefit analysis. Hand notes, for example, that “the barge must not be the bargee’s prison.”<sup>57</sup> What does that mean? Surely if making the barge a prison is cost-benefit justified, then according to the formula, a prison it should be! Further, Hand says that if there was a custom about bargees on the barges, then the custom should control.<sup>58</sup> But why is that? What is it about a custom that would override the judicial administrator’s cost-benefit gaze?

There is a reason to pause here on the waterfront of the New York Harbor. When Friendly joined the court, maritime cases were at the core of the civil caseload.<sup>59</sup> Friendly bought and read the classic Black and Gilmore book on admiralty law while his confirmation was pending, and for good reason.<sup>60</sup> Eleven of his first one hundred opinions were in admiralty cases.<sup>61</sup> This was a classic field for working out the logic of adjudication in the twentieth-century Second Circuit. And if we look closely, it is clear that the caveats and qualifications that Hand attached to cost-benefit administration in his *Carroll Towing* opinion were not bugs but features. They were evidence of the ways in which adjudication, even at the high tide of enthusiasm for the

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55. Holmes, *supra* note 35, at 478.

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

57. *Id.*

58. *Id.*

59. See DORSEN, *supra* note 54, at 80–81.

60. *Id.* at 80.

61. *Id.* at 81.

administrative state, resisted the claims of administrative omnicompetence and instead elaborated a more modest, eclectic common law tradition.

Consider Friendly’s opinion in the legendary *In re Kinsman Transit Co.*<sup>62</sup> *Kinsman Transit*—and Friendly’s law clerk from the case is with us here today—offers a nuanced picture of the common law tradition. The case flowed from a freak accident on the Buffalo River in January 1959. The river was a veritable Rube Goldberg machine of ice flows, with poorly moored ships careening downriver and colliding with ill-tended drawbridges.<sup>63</sup> By the time the action was over, substantial swaths of the city of Buffalo lay under water.<sup>64</sup>

We should clear something up at the outset. Far and away the most important part of the case is that the Kinsman Transit Company, whose vessel touched off the mayhem, was owned by the Steinbrenner family, whose rising star George Steinbrenner would several years later purchase the New York Yankees.<sup>65</sup>

What this means is that the future of the world’s greatest baseball franchise was at stake.

Fatefully, an obscure admiralty doctrine limited the Steinbrenner family’s losses to the value of its vessel.<sup>66</sup> Friendly’s opinion allocated most of the losses to the City of Buffalo<sup>67</sup> and thereby made possible the modern Yankees. Billy Martin would never have been hired, fired, and rehired five times.<sup>68</sup> No Reggie Jackson, no Dave Winfield—no Ed Whitson, either. But maybe no Derek Jeter and no Mariano Rivera! Perhaps the Subway Series of 2000 would have come out the other way?<sup>69</sup> Maybe Justice Sotomayor would never have had the opportunity to save baseball!<sup>70</sup>

But we should not let these important Yankees questions distract us from another key point. The *Kinsman Transit* case presented an extraordinarily complex social problem with sharp disagreements over the proper resolution. The social policy question was who should pay. In an internal memorandum to his colleagues, Friendly wondered whether there was “any way in which the doctrine could be manipulated so as to correspond with probable

62. 338 F.2d 708 (2d Cir. 1964).

63. *Id.* at 711–13.

64. *Id.* at 713.

65. *Id.* at 714; N.Y. TIMES, NEW YORK TIMES STORY OF THE YANKEES 1903–PRESENT: 390 ARTICLES, PROFILES & ESSAYS 310 (Dave Anderson ed., 2012).

66. *Kinsman Transit*, 338 F.2d at 715–16.

67. *Id.* at 719, 725–27.

68. Michael Martinez, *Martin Is Named Yankees’ Manager for 5th Time*, N.Y. TIMES (Oct. 20, 1987), <http://www.nytimes.com/1987/10/20/sports/martin-is-named-yankees-manager-for-5th-time.html> [https://perma.cc/U5MD-ARFK].

69. Buster Olney, *BASEBALL: SUBWAY SERIES; In 5 Games, a Third Straight World Series Trophy*, N.Y. TIMES (Oct. 27, 2000), <http://www.nytimes.com/2000/10/27/sports/baseball-subway-series-in-5-games-a-third-straight-world-series-trophy.html> [https://perma.cc/P2UD-6VRL].

70. Richard Sandomir, *Sotomayor’s Baseball Ruling Lingers, 14 Years Later*, N.Y. TIMES (May 26, 2009), <http://www.nytimes.com/2009/05/27/sports/baseball/27sandomir.html> [https://perma.cc/P8L6-UP79] (quoting President Obama as saying, “Some say that Judge Sotomayor saved baseball”).

insurance.”<sup>71</sup> The goal here was to find a way to spread the losses as widely as possible.

When it came to actually resolving the question, however, Friendly did not treat it as a question of social policy at all, but as one of legal doctrine. He pointed to a U.S. Army Corps of Engineers’ regulation on drawbridges and engaged the arcane doctrine of “last clear chance.”<sup>72</sup> He observed that the requirement from the classic case of *Palsgraf v. Long Island Railroad*<sup>73</sup> had been met: the plaintiffs were foreseeable victims.<sup>74</sup> He took up the doctrine on liability for unforeseeable harm.<sup>75</sup> Ultimately, Friendly’s *Kinsman Transit* opinion bore one of the hallmarks of common law adjudication—it cabined its significance to the facts of the case.

“Other fact situations,” he wrote, “can be dealt with when they arise.”<sup>76</sup> And therein lies a distinctive feature of the common law. Not that it offers ready-made answers for all disputes that might arise. Not that it has handed down ageless principles. But that it constrains the kinds of answers judges can give, insisting on the value of restraint.

The theme that runs through these classic Second Circuit cases is a kind of moral modesty. Hand flirted with the God’s-eye view of the judge as all-seeing administrator. But he stopped short of it. And in Friendly’s approach we see a way of resolving disagreement without the pretense of access to Perfect Truth. Adjudication can resolve disputes without pretending to resolve social problems once and for all.

### III. ADJUDICATION IN THE AGE OF POLITICS

Of course, the administrative and judicial modes are not the only ones we rely on to resolve disagreements. A core feature on which our system is based is voting, something that is not hard to remember this fall.

Like administration and adjudication, voting has its own internal logic as a dispute-resolution mechanism. It adopts the headcount as the measure of its verdicts. When a headcount decides a question, it does so essentially as a matter of biomass. It need not purport to resolve arguments as a matter of principle.

Imagine for example three people debating the question whether the sun revolves around the earth or vice versa. A lonely soul righteously contends that the earth is in orbit, not the sun, and insists that if only she had time she could produce evidence to support her contention. When the remaining two cut off debate and call a vote, they may win the headcount. But the frustrated Copernican will hardly think the truth of the matter resolved.

And that points us to an unexpected virtue of voting in a free society. After a vote, the losing value is in the position of our irked follower of Copernicus.

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71. DORSEN, *supra* note 54, at 309.

72. *Kinsman Transit*, 338 F.2d at 719–21.

73. 162 N.E. 99 (N.Y. 1928).

74. *Kinsman Transit*, 338 F.2d at 721–22.

75. *Id.* at 722–26.

76. *Id.* at 726.

The argument remains intact. It has not been disrespected for its content. It has simply lost as a matter of votes. A legislature is free to reverse itself without undue embarrassment. This is what New York University Professor Jeremy Waldron calls “the dignity of legislation”—it leaves the values of members of a free society untouched.<sup>77</sup> In this sense, it respects those values, even as it (contingently) rejects them.<sup>78</sup>

Waldron insists that adjudication does otherwise—its commitment to reasoned argument and values entails a weighing of the arguments and a principled (not contingent) rejection of some arguments for others.<sup>79</sup> This, he contends, is in tension with a free society’s collective obligations of respect for the different views that go into our disagreements.<sup>80</sup>

This circuit’s midcentury maritime cases give us reason to think that Waldron’s account misapprehends one of the central virtues of the adjudicatory tradition. Adjudication in a system of law need not make value judgments on its own, at least not in the first instance. Instead, it resolves disagreements by reference not to values but to rules—not to cost-benefit analysis or loss spreading but to custom, last clear chance, foreseeability, and precedent. Rules hold out the promise of application without recourse to the underlying value conflict that produced the rule in the first place.<sup>81</sup> Law often proceeds, in other words, in the same nonevaluative fashion that Waldron ascribes to voting.

Adjudication’s narrow virtues fit the very image of the free society that Hand held dear—not one forced into a unitary common will but one open to the raucous cacophony of disagreement and debate.<sup>82</sup> The judge’s job in this approach is not to deliver a general resolution of that disagreement, at least not in the first instance. The tumult itself is a great virtue of our system.<sup>83</sup> Preserving it is essential to freedom and equality.<sup>84</sup>

Hand meant to say something like this, I think, when on a Sunday afternoon in May 1944, he spoke at a ceremony in Central Park where 150,000 newly naturalized citizens swore oaths of allegiance.<sup>85</sup> Hand’s speech was piped through loudspeakers to more than a million residents who had flocked to the park on that mild summer day.<sup>86</sup> Hand said, “What then is the spirit of liberty? I cannot define it; I can only tell you my own faith.

77. See generally JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999).

78. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1384 (2006).

79. *Id.* at 1369–1406.

80. *Id.*

81. See generally SCOTT J. SHAPIRO, *LEGALITY* (2011).

82. LEARNED HAND, *Democracy: Its Presumptions and Realities*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 90, 96–102 (Irving Dilliard ed., 3d ed. 1963); HAND, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY*, *supra*, at 155, 156–57; see also Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 *HARV. L. REV.* 370, 373 (1947). See generally Learned Hand, *Is There a Common Will*, 28 *MICH. L. REV.* 46 (1929).

83. See Cox, *supra* note 82.

84. See *id.*

85. GUNTHER, *supra* note 4, at 469.

86. *Id.*

The spirit of liberty is the spirit which is not too sure that it is right . . . .”<sup>87</sup> This speech may be among the most famous moments in the history of the Second Circuit.

But I would be remiss if I ended here. To be candid, the virtues of the adjudicatory tradition in the Second Circuit have broken down in the face of some kinds of disagreements. On one famous occasion, the methods of creative modesty failed Friendly entirely.

On June 13, 1971, the Sunday *New York Times* published a first installment of the top secret study of U.S. involvement in Vietnam that would come to be known as the Pentagon Papers.<sup>88</sup> The report and its associated documents detailed how American administrations had misled the public on the nature and purpose of U.S. involvement in Vietnam.<sup>89</sup> The Nixon administration sued to enjoin further publication.<sup>90</sup>

District Judge Murray Gurfein, later a judge on the circuit bench, refused to grant the government’s injunction.<sup>91</sup> Amazingly, it was Gurfein’s very first case after being appointed by President Nixon.<sup>92</sup> The government appealed, and Chief Judge Friendly decided that the case would be heard en banc by all eight active judges.<sup>93</sup> Some first day at work for Gurfein!

The reference to the entire court was unprecedented.<sup>94</sup> But the methods that Friendly brought to bear were a classic effort to find narrow rules of decision.

The Pentagon Papers controversy raised some of the gravest problems a constitutional democracy can confront. The executive’s rightful authority over national security seemed at loggerheads with the rights of a free press and the rights of citizens to the information that self-governance requires.

In a memo or draft opinion that seems never actually to have been circulated, Friendly tried out a view that would have reversed Gurfein and enjoined the *Times* while avoiding the biggest questions.<sup>95</sup> Friendly proposed to enjoin the *Times* on the narrow ground that it had obtained the documents unlawfully; the “grave constitutional issues,” as Friendly wrote, would not be reached.<sup>96</sup> Instead, the *Times* might be enjoined simply as a matter of the law of property and theft.<sup>97</sup> Few of Friendly’s colleagues seem to have found his creative solution appealing.<sup>98</sup> And so Friendly tried to shepherd the Second Circuit to a different disposition, one that would be

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87. HAND, *The Spirit of Liberty*, in THE SPIRIT OF LIBERTY, *supra* note 82, at 189, 190.

88. DORSEN, *supra* note 54, at 151.

89. TIM WEINER, ONE MAN AGAINST THE WORLD: THE TRAGEDY OF RICHARD NIXON 121 (2015).

90. DORSEN, *supra* note 54, at 151.

91. United States v. N.Y. Times Co., 328 F. Supp. 324, 331 (S.D.N.Y.), *aff’d per curiam*, 403 U.S. 713 (1971).

92. DORSEN, *supra* note 54, at 151.

93. *Id.* at 153.

94. *Id.*

95. *Id.* at 158.

96. *Id.*

97. *Id.*

98. *See id.* at 160–61.

narrower still.<sup>99</sup> In a split decision, the court aimed for a careful lawyer's compromise: a 5–3 per curiam order to enjoin further publication pending a determination by Gurfein, in camera, as to whether the documents posed a “grave and immediate danger” to the security of the United States.<sup>100</sup>

The order adopted an understated approach: it consisted of only a single sentence.<sup>101</sup> It asked Gurfein for a redo without identifying an error in what he had already done or specifying a new standard he ought to apply.<sup>102</sup> The order implicitly decided certain issues in favor of the *Times*.<sup>103</sup> For example, it gave no weight to the fact that the documents were classified, it omitted any discussion of the theft of the documents, and it made no mention of deference to the executive branch on matters of national security.<sup>104</sup> Even so, the order delivered the government a victory by delaying further release of the documents.<sup>105</sup>

The Pentagon Papers decision flowed from the main currents of the tradition that judges like Hand had set in motion. It was narrow and provisional and modest. In a moment of great social controversy, it called for a process rather than an outcome—a hard second look at the issues at hand. In a different moment, the strategy of process might have worked. After more time, perhaps, the Nixon administration might have relented. Some in the White House advocated releasing the documents themselves on the ground that they were embarrassing to the administrations of John F. Kennedy and Lyndon Johnson.<sup>106</sup> Extra time might have revealed some new facet of the case or allowed the elected branches to work out a solution of one sort or another.

But in 1971, the passive virtues of narrow adjudication were insufficient to the moment. Seven days after this court's order, the Supreme Court reversed it.<sup>107</sup> The Supreme Court found that the government had not met the First Amendment's “heavy presumption” against prior restraints on expression.<sup>108</sup> The *New York Times* would proceed to publish the documents.<sup>109</sup> Other papers, led by the *Washington Post*, would join in too.<sup>110</sup> Within months, men working for Nixon would break into the office of Daniel Ellsberg's psychiatrist.<sup>111</sup> Revelations of their conduct at

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99. *Id.* at 157–59.

100. *United States v. N.Y. Times Co.*, 444 F.2d 544, 544 (2d Cir.) (per curiam), *rev'd per curiam*, 403 U.S. 713 (1971).

101. *Id.*

102. *Id.*; DORSEN, *supra* note 54, at 158.

103. DORSEN, *supra* note 54, at 157–58.

104. *N.Y. Times*, 444 F.2d at 544.

105. DORSEN, *supra* note 54, at 157–58.

106. *Id.* at 155–56.

107. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

108. *Id.*

109. STEVE SHEINKIN, *MOST DANGEROUS: DANIEL ELLSBERG AND THE SECRET HISTORY OF THE VIETNAM WAR* 251 (2015).

110. *Id.*

111. WEINER, *supra* note 89, at 132.

Ellsberg's trial in 1973 would help reveal the Watergate scandal and end Nixon's presidency.<sup>112</sup>

Given the stakes, the social controversy at issue was simply too institutionally complex, with too many moving parts and too many social constituencies, for adjudication in the narrow fashion to resolve it effectively. Adjudication has virtues—distinctive virtues—as a mechanism for resolving disagreement. It also has distinctive limits.

I began with the question of what makes a tribunal strong. I have offered, I hope, a description of how, in the age of administration, the Second Circuit Court of Appeals has been a principal carrier of a delicate but vital tradition of adjudication.

The promise of adjudication as a way of resolving differences is that it relies on rules that aim to be independent of the conflict at hand. In that simple but heroic idea lies a blueprint for how we might get along with one another in an era of disagreement.

Today our society is buffeted by discord in ways that show no signs of letting up. I hope that as we look out to this uncertain horizon, we take some modest measure of comfort in the fact that we have institutions designed to weather such storms. The Second Circuit is just such an institution—a glorious one. May it flourish and thrive for another century and a quarter. We will all be the lucky beneficiaries.

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112. SHEINKIN, *supra* note 109, at 304–05.