THE JUDICIARY ACT OF 1925: ESSENTIAL CHANGE FOR THE SUPREME COURT AND THE UNITED STATES COURTS OF APPEALS

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INTRODUCTION

Federal court litigants usually get two bites at the apple: one in a United States District Court and one in a United States Court of Appeals. With the Supreme Court deciding fewer than seventy cases a year, only the rare court of appeals judgment is overturned by the Supreme Court. That rarity stems from the Judiciary Act of 1925.[1]

Sometimes called the "Judges' Bill,"[2] the 1925 Act empowered the Supreme Court to choose which cases it wanted to hear. The Court's new authority displaced the status quo described by Chief Justice Marshall over a century before: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."[3] Consistent with Chief Justice Marshall's dictum, litigants disappointed with the judgments of the circuit courts had a right to Supreme Court review before the 1925 Act.[4] Since then, the "jurisdiction

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1 Judiciary Act of 1925, ch. 229, 43 Stat. 936.

2 *See, e.g.*, Justin Crowe, *The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft*, 69 J. POL. 73, 74 n.3 (2007).

3 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

4 The same was true for litigants disappointed with the decisions of state supreme courts. For the past twenty years those decisions have taken up between seven percent and twenty percent of the Supreme Court's docket. *See* Adam Feldman, *Empirical SCOTUS: The Importance of State Court Cases Before the Supreme Court*, SCOTUSBLOG (Sept. 4, 2020, 12:00 AM), https://www.scotusblog.com/2020/09/empirical-scotus-the-importance-of-state-court-cases-before-scotus/ [https://perma.cc/9THE-3YXP]. Because this Article focuses

which is given" to the Supreme Court by Congress has become almost completely discretionary.[5] So for the past century, litigants defeated in the United States Courts of Appeals have been subject to the discretion of the Justices, hoping that four of them[6] will vote to issue a writ of certiorari.[7] Because the writs issue in just a tiny percentage of federal cases, the judgments of the United States Courts of Appeals are final more than ninety-nine percent of the time.[8]

By making them the de facto courts of last resort, the Judiciary Act of 1925 amplified the importance of the courts of appeals. This devolution of power was well within Congress's Article I authority to create "such inferior Courts . . . from time to time."[9] But perhaps counterintuitively, the devolution did not happen because the Supreme Court lost a power struggle with Congress. As has been well chronicled, Chief Justice Taft—a little over a decade after he finished his term as the twenty-seventh President of the United States—was the prime mover behind the passage of the Judiciary Act of 1925.[10] Subsequent Chief

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on the effect of the Judiciary Act of 1925 on the U.S. Courts of Appeals and the Supreme Court, it refers to state courts only incidentally.

5 *Cohens*, 19 U.S. (6 Wheat.) at 404.

6 The "rule of four" is a convention of the Supreme Court, not mandated by statute or rule. *See* Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 527–29 (1957) (Frankfurter, J., dissenting) (discussing the "rule of four"). Such conventions are akin to what U.S. Courts of Appeals call internal operating procedures. *See, e.g.*, INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (2023). Though not required by law, such practices and procedures are essential to the work of a collegial court.

7 The United States federal courts were granted the authority to issue writs by the All Writs Act, 28 U.S.C. § 1651 (2018). However, the new Federal Rules of Civil Procedure in 1938 governing the civil procedures in the district courts abolished some of the writs which had been inherited from English law. *See* FED. R. CIV. P. 60(e).

8 During the October 2023 Term, the Supreme Court reversed twenty-one cases and vacated twenty-three cases. *See Supreme Court Cases, October Term 2023–2024*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_cases,_October_term_2023-2024 [https://perma.cc/23VX-JT2A] (last visited Jan. 18, 2026). During the October 2022 Term, the Court reversed twenty-three cases and vacated eighteen cases. *See Supreme Court Cases, October Term 2022–2023*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_cases,_October_term_2022-2023 [https://perma.cc/8DCW-E9VN] (last visited Jan. 18, 2026). During the October 2021 Term, the Court reversed forty-three cases and vacated seven cases. *See Supreme Court Cases, October Term 2021–2022*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_cases,_October_term_2021-2022 [https://perma.cc/FT5S-NG2T] (last visited Jan. 18, 2026). Meanwhile, the U.S. Courts of Appeals decided 40,326 cases in 2023, 41,908 cases in 2022, 47,322 cases in 2021, and 47,210 cases in 2020. *Federal Judicial Caseload Statistics 2025*, U.S. CTS. https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2025 [https://perma.cc/L46J-DYFB] (last visited Jan. 18, 2026).

9 U.S. CONST. art. III, § 1.

10 *See, e.g.*, Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 JUST. SYS. J. 1 (2003); 10 ROBERT C. POST, THE

Justices and Associate Justices lauded the Court's newfound discretion.[11] Before I examine the 1925 Act's impact on the courts of appeals, a brief history of the intermediate federal courts is necessary to contextualize matters.

I. THE INTERMEDIATE APPELLATE COURTS

Just months after the Constitution became effective on March 4, 1789, the First Congress passed the Judiciary Act.[12] That law established one Supreme Court[13] and thirteen district courts.[14] There were no "circuit courts" per se, but to handle appeals, the country was divided into three regions. The eastern circuit included the districts of New Hampshire, Massachusetts, Connecticut, and New York.[15] The middle circuit consisted of the districts of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia.[16] The districts of South Carolina and Georgia rounded out the southern circuit.[17]

Each year, all eleven districts were to hold two "Circuit Courts."[18] Unlike the intermediate appellate courts today, those circuit courts presided over trials as well as appeals.[19] And the twenty-two courts sat in three-judge panels composed of two Supreme Court Justices "riding Circuit"[20] along with the local district judge. This arrangement raised

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OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 476–501 (Maeva Marcus ed., 2024); Crowe, *supra* note 2, at 73–87.

11 *See, e.g.*, Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1 (1928); Fred M. Vinson, *The Business of Judicial Administration: Suggestions to the Conference of Chief Justices*, 35 A.B.A. J. 893 (1949); Willis Van Devanter, *The Supreme Court of the United States*, 5 IND. L.J. 553, 560 (1930).

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

13 The Supreme Court was composed of six jurists—a Chief Justice and five Associate Justices. Four of the six Justices constituted a quorum. *Id.* § 1.

14 The thirteen district courts corresponded to the eleven states that ratified the Constitution: Connecticut, Delaware, Georgia, Maryland, New Hampshire, New Jersey, New York, Pennsylvania, South Carolina, Virginia, and Massachusetts. The two additional districts were Maine (which was part of Massachusetts) and Kentucky (which was part of Virginia). *Id.* § 2.

15 *Id.* § 4.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.* § 5.

20 Kathy Shurtleff, *Please No, Don't Make Us Go: Petitioning the President to End Circuit Riding Duties*, SUP. CT. HIST. SOC'Y (Aug. 5, 2022), https://supremecourthistory.org/scotus-scoops/petitioning-president-to-end-circuit-riding-duties/ [https://perma.cc/AS57-AVAS]. The 1789 Act required Supreme Court Justices to hold court twice a year in each of the eleven districts. Judiciary Act of 1789 § 4. Just three years later, "on August 9, 1792, the . . . Court sent a letter to President George Washington" requesting that Congress "relieve the Justices from the burden of 'riding Circuit.'" Shurtleff, *supra.* In 1793, Congress reduced the number of Justices comprising a circuit court from two to one. *Id.* Circuit

a concern from the start. Since each district had just one judge, whenever the circuit court heard an appeal, the district judge on the panel was often the same person who had decided the case at the trial level.[21] The Judiciary Act of 1789 mitigated this problem somewhat by prohibiting the district judge from casting a vote in a case on appeal from his own decision.[22] Yet the district judge was allowed to "assign the reasons of such his decision."[23] Though not directly implicating the venerable Roman Law principle that "no man should be a judge in his own case,"[24] the arrangement was short lived, presumably because it raised an appearance of partiality by the panel.[25]

The three circuits just described remained in force until the Federalist Congress passed, and President John Adams signed, the Judiciary Act of 1801. That law, known as the "Midnight Judges Act," created six circuits to account for the growth of the fledgling Republic.[26] It also relieved Justices of circuit-riding duties,[27] but that respite was fleeting.

The 1801 Act was repealed a year later by Jeffersonian Republicans who had just taken control of Congress.[28] The Judiciary Act of 1802 eliminated the sixteen new judgeships created by the Federalists but retained the six circuits.[29] From 1802 until 1869, Supreme Court Justices continued to ride circuit, joining forces with local district

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riding was onerous and hazardous to the Justices for several reasons. *Id.* They had to travel great distances by horse or horse-drawn coach, lodging at inns along the way was communal and incommodious, roads were poor, and waterways lacked bridges. *Id.* For instance, Justice Iredell rode 1,900 miles in 1790, suffered a severe leg injury, and was robbed while riding circuit. *Id.* He was too sick to take the bench in February of 1794, and he died of poor health in 1799 at age forty-eight. *Id.*

21 *See* Judiciary Act of 1789 § 4.

22 *Id.*

23 *Id.*

24 *See* CODE THEOD. 2.3.1 ("[*n*]*eminem prorsus in sua causa iudicem esse posse*"—no one ought to be judge of oneself); CODE JUST. 3.5.1 (Valens, Gratian & Valentinian 376) ("*neminem sibi esse iudicem vel ius sibi dicere debere*"—no one ought to be judge of oneself or declare the law for oneself); *see also* 2 EDWARD COKE, INSTITUTES *141 ("*[a]liquis non debet esse judex in propria causa*"—no man shall be a judge in his own case).

25 *See* Act of Mar. 2, 1793, ch. 22, § 1, 1 Stat. 333, 333–34.

26 Midnight Judges Act, ch. 4, § 6, 2 Stat. 89, 90 (1801). The circuits included the following districts: First, Maine, New Hampshire, Massachusetts, and Rhode Island. Second, Connecticut, Vermont, Albany, and New York. Third, New Jersey, Eastern and Western Pennsylvania, and Delaware. Fourth, Maryland, Eastern and Western Virginia. Fifth, North Carolina, South Carolina, and Georgia. Sixth, East Tennessee, West Tennessee, Kentucky, and Ohio. *Id.*

27 *See id.* § 7.

28 Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132; Peter Onuf, *Thomas Jefferson: Domestic Affairs*, MILLER CTR., https://millercenter.org/president/jefferson/domestic-affairs [https://perma.cc/GV8A-H6T5] (last visited Feb. 28, 2025).

29 *See* Act of Mar. 8 § 1.

judges to form three-judge panels. That changed in 1869 with the passage of the Circuit Judges Act, which created a new judgeship for each of the nine circuits in existence at that time.[30]

A few years later, Congress passed the Jurisdiction and Removal Act of 1875, which transformed the role of the federal courts by drastically expanding federal court jurisdiction.[31] Among other things, the law granted circuit courts jurisdiction to hear all civil suits arising under the Constitution and laws of the United States, as long as the amount in controversy was more than $500.[32] And it allowed for the removal of cases from state courts to federal courts when they involved parties from different states.[33]

The landmark legislation that created the system essentially now in place came in 1891, when Congress passed the Evarts Act.[34] That law made two major changes: it ended the appellate jurisdiction of the circuit courts and it created nine United States Circuit Courts of Appeals to correspond with the nine circuits then in existence.[35] By diverting direct appeals from district courts to the courts of appeals, the Act had the desired effect of reducing the Supreme Court's caseload.[36] It also benefited the Justices in a more personal way: it alleviated their

30 Circuit Judges Act, ch. 22, § 2, 16 Stat. 44, 44–45 (1869). There were nine circuits by then since the Seventh Circuit was created in 1807 and the Eighth and Ninth Circuits were created in 1837. Act of Feb. 24, 1807, ch. 16, § 2, 2 Stat. 420, 420; Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176, 176–77.

31 *See* Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470, 470.

32 *Id.* § 2.

33 *Id.*

34 Evarts Act, ch. 517, 26 Stat. 826 (1891). The sponsor of the bill was Senator William M. Evarts of New York, who served just one term from 1885 until 1891. *Biographies of the Secretaries of State: William Maxwell Evarts (1818–1901)*, U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, https://history.state.gov/departmenthistory/people/evarts-william-maxwell [https://perma.cc/QF37-M8CK] (last visited Feb. 12, 2025); *Landmark Legislation: U.S. Circuit Courts of Appeals*, FED. JUD. CTR., https://www.fjc.gov/history/legislation/landmark-legislation-us-circuit-courts-appeals [https://perma.cc/4NUU-SQAR] (last visited Feb. 28, 2025). Though his Senate tenure was brief, he came to the job with substantial bona fides as not only a distinguished trial lawyer, but also as a former U.S. Attorney General and Secretary of State. DEP'T OF STATE, *supra*.

35 *See* Evarts Act § 2.

36 *Id.* § 6; William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 1–2 (1925). The Court's caseload had nearly quadrupled between 1860 and 1880. *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 60 (1928). By 1890, the backlog exceeded 1,800 cases. *See id.* at 86. In addition to capital cases, the 1891 Act contained six categories of cases in which second review as a matter of right could still be had in the Supreme Court. Evarts Act § 5.

circuit-riding duties by increasing the number of circuit judges and making district judges eligible to sit on three-judge circuit panels.[37]

More than thirty years later, Congress enacted the Judiciary Act of 1925, which dramatically reshaped the Supreme Court's docket by curtailing the Court's mandatory appellate jurisdiction and expanding its certiorari jurisdiction.[38] After the 1925 Act, two more laws relevant to this article were passed. The Federal Judicial Code of 1948 modernized procedures and created the position of "Chief Judge" for each circuit and district court.[39] It also changed the name of the intermediate appellate courts from United States "[C]ircuit [C]ourts of [A]ppeals"[40] to "United States Court[s] of Appeals."[41] Forty years later, Congress passed the Supreme Court Case Selections Act of 1988.[42] That law virtually eliminated what was left of the Supreme Court's mandatory appellate jurisdiction.[43] Since then, in addition to the rare cases arising under its original jurisdiction,[44] the Supreme Court must hear appeals only from three-judge district courts that adjudicate select issues such as the legality of a state's federal legislative apportionment.[45]

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37 *See* Evarts Act §§ 2–3. The United States circuit courts continued to serve as trial courts until January 1, 1912, when they were abolished through the Judicial Code of 1911. *See* Act of Mar. 3, 1911, ch. 231, §§ 289, 301, 36 Stat. 1087, 1167, 1169.

38 *See infra* text accompanying notes 50–55.

39 Act of June 25, 1948, ch. 646, §§ 45, 136, 62 Stat. 869, 871, 897 (codified as amended at 28 U.S.C. §§ 45, 136 (2018)).

40 Evarts Act § 1.

41 Act of June 25, 1948 § 43.

42 Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662.

43 *See id.* §§ 1–4.

44 *See* U.S. CONST. art. III, § 2; 28 U.S.C. § 1251 (2018); *see also* Texas v. California, 141 S. Ct. 1469, 1470 (2021) (Alito, J., dissenting from order denying leave to file a bill of complaint) (criticizing the majority of the Court for treating the Supreme Court's original jurisdiction as though it were discretionary).

45 *See* 28 U.S.C. §§ 1253, 2284 (2018); *see also, e.g.*, Brown v. Plata, 563 U.S. 493, 510 (2011) (lawsuits seeking the release of prisoners due to overcrowding); Citizens United v. FEC, 558 U.S. 310, 319 (2010) (campaign finance). In addition, since the ratification of the Constitution, the Supreme Court has had original and exclusive jurisdiction over disputes between states. U.S. CONST. art. III, § 2, cl. 2. Also worthy of brief mention are the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, which established the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Federal Claims; and the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1838, 2017–18, which created the United States Sentencing Commission and required judges to report on their caseloads.

II. IMPACT OF THE 1925 ACT ON THE SUPREME COURT AND THE COURTS OF APPEALS

The impetus for the 1925 Act was the growing chorus—lawyers, judges, and legislators alike—who were concerned with the mounting backlog of cases on the Supreme Court's docket.[46] The Evarts Act had shrunk the Court's docket by paring back its mandatory appellate jurisdiction, but the relief was only temporary. By the early 1920s, the number of unresolved Supreme Court cases exceeded 500,[47] nearly seventy-five percent of which fell within its mandatory jurisdiction.[48] And the Supreme Court's caseload increased from 713 new appeals in 1923 to 854 in 1924.[49]

The 1925 Act's solution to this problem was to reduce the Court's mandatory appellate jurisdiction to a bare minimum while radically expanding its certiorari jurisdiction. Aside from five narrow categories of cases, the Court could review courts of appeals' decisions only by writ of certiorari or certified question.[50]

The Judiciary Act of 1925 accomplished its mission very quickly. Within two years, the number of pending cases on the Court's docket was more than halved.[51] By 1937, the Court had only 78 unresolved cases.[52] Besides solving the Court's backlog problem, the 1925 Act altered the makeup of the cases the Court adjudicated. Instead of hearing every run-of-the-mill case,[53] the Act gave the Court free rein to

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46 *See generally* 10 POST, *supra* note 10, at 476–501 (discussing the legislative history of the 1925 Act).

47 *Supreme Court Caseloads, 1880–2015*, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/supreme-court-caseloads-1880-2015 [https://perma.cc/DSG3-VTPE] (last visited Mar. 1, 2025).

48 Stephen C. Halpern & Kenneth N. Vines, *Institutional Disunity, The Judges' Bill and the Role of the U.S. Supreme Court*, 30 W. POL. Q. 471, 475 (1977).

49 PETER CHARLES HOFFER, WILLIAMJAMES HULL HOFFER & N.E.H. HULL, THE FEDERAL COURTS: AN ESSENTIAL HISTORY 265 (2016).

50 The categories of cases that remained part of the Court's mandatory appellate jurisdiction were (1) courts of appeals' decisions invalidating a state law under the Constitution/treaty/laws of United States; (2) antitrust and interstate commerce law cases; (3) criminal cases in which the decision was adverse to the United States, jeopardy had not attached, and the defendant had not been acquitted; (4) suits to enjoin enforcement of a state statute administrative action, as long as the case had been heard by a special three-judge panel containing a circuit judge; and (5) suits to enjoin orders of the Interstate Commerce Commission, only when heard by a special three-judge panel. Act of Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936, 938–39; *see also* Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1, 12 (2008).

51 FED. JUD. CTR., *supra* note 47.

52 *Id.*

53 *See, e.g.*, Brown v. Barry, 3 U.S. (3 Dall.) 365 (1797) (summarily rejecting five exceptions in a debt collection case); Finley v. Lynn, 10 U.S. (6 Cranch) 238 (1810) (partnership dispute involving a hardware store and a jewelry store); Ins. Co. v. Mosley, 75 U.S. (8

choose the ones it wanted to hear. That power allowed the Court to focus on disputes arising under the United States Constitution or other momentous matters, such as decisions from the state supreme courts that raised questions under the Constitution or other federal law.[54] And because it empowered the Court to choose which federal questions to review within a particular case, the Court no longer had to review the entire decision below.[55] This power, perhaps more than any other, exemplifies a critical difference between the highest court in the land and the inferior appellate courts: the Supreme Court decides questions of law through the vehicle of cases, while the courts of appeals decide cases that incidentally require them to answer questions of law.

The 1925 Act's effect on the courts of appeals was more subtle than its immediate and pronounced effect on the Supreme Court. But it was no less fundamental. Not because of caseload—the rate of increase in the number of cases in the courts of appeals changed little in the decades following the Act's passage, as Figure 1 shows.[56] Yet by granting the Supreme Court virtually unfettered discretion to take or leave appeals as it saw fit, the 1925 Act transformed the courts of appeals from intermediate appellate courts into de facto courts of last resort.[57]

Wall.) 397 (1869) (review of a $5,000 judgment on a life insurance claim); N.J. Steamboat Co. v. Brockett, 121 U.S. 637 (1887) (affirming jury verdict of $5,500 in favor of a steamboat passenger assaulted for sleeping on "bales of hops," *id.* at 647, while his ticket was limited to the deck area); United States v. Ninety-Five Barrels, More or Less, Alleged Apple Cider Vinegar, 265 U.S. 438 (1924) (deciding whether packing company had mislabeled barrels of apple cider vinegar).

54 *See, e.g.*, William H. Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3, 18 (1916) (insisting that the Court needed "absolute and arbitrary discretion with respect to all business but constitutional business"); Crowe, *supra* note 2, at 82.

55 *See* Taft, *supra* note 36, at 5.

56 *Court of Appeals Caseloads, 1892–2016*, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/court-appeals-caseloads-1892-2016 [https://perma.cc/J6SZ-C266] (last visited Mar. 30, 2025).

57 *See id.*

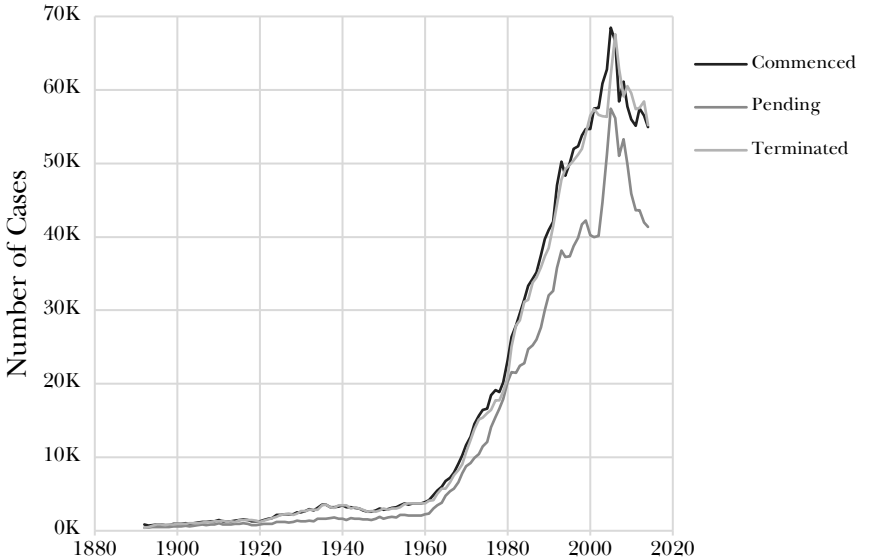

Figure 1. Courts of Appeals Caseload, 1892–2016

As Figure 1 shows, the steep increase in the caseload of the courts of appeals began in 1960 and continued unabated until 2003. The insignificant growth in the caseload between 1926 and 1960 shows that the Judiciary Act did not increase filings in the courts of appeals. Instead, the growth occurred because of the proliferation of federal laws and regulations.[58]

In the 1960s, the caseload increased because of *Monroe v. Pape*, the Civil Rights Act of 1964, and criminal prosecutions involving drugs and firearms. During the 1970s and 1980s, indigent criminal defendants, armed with a new right to free counsel, were now able to file appeals (and they did so in droves). Likewise, prisoners appealed district court orders denying their petitions for writs of habeas corpus. Congress responded in 1996, by passing the Antiterrorism and Effective Death Penalty Act (AEDPA). About a decade later, the appellate caseload soared after the passage of the REAL ID Act, which transferred immigration cases from the federal district courts and required that nearly all challenges to removal orders be made via petitions for review in the courts of appeals. I discuss these categories of cases below.

58 *See, e.g.*, Lawrence Baum, Sheldon Goldman & Austin Sarat, *The Evolution of Litigation in the Federal Courts of Appeals*, 1895–1975, 16 LAW & SOC'Y REV. 291, 295–96 (1981); DONALD R. SONGER, REGINALD S. SHEEHAN & SUSAN B. HAIRE, CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 56–57 (2000); *see also* Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape*, and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 278 (1965).

III. *MONROE V. PAPE* AND THE CIVIL RIGHTS ACT OF 1964

A. Section 1983

As Figure 1 indicates, the caseload of the United States Courts of Appeals increased only modestly between 1925 and 1960.[59] The steep increase in cases during the 1960s was attributable to several factors, but an important one was the Supreme Court's 1961 decision in *Monroe v. Pape*.[60]

In *Monroe*, police officers searched James Monroe's residence and detained him without a warrant.[61] Monroe sued the officers and the city of Chicago under 42 U.S.C. § 1983, an 1871 civil rights law passed by Congress to bring equality to Black Americans, especially freed slaves.[62] Section 1983 creates a cause of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage" of state law "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[63]

Despite the breadth of that language, there were few federal complaints brought under the statute because the Supreme Court had narrowly interpreted state action and the Fourteenth Amendment following its adoption.[64] In 1960, the year before *Monroe v. Pape* was decided, there were only 280 federal cases brought under § 1983.[65] But in *Monroe*, the Supreme Court read § 1983 more broadly, holding that it creates a cause of action against individuals—but not municipalities—who violate constitutional rights while "clothed with the authority of state law."[66] Within a decade, the caseloads of the district courts and the

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59 *See supra* Figure 1.

60 Monroe v. Pape, 365 U.S. 167 (1961), *overruled by* Monell v. Dep't of Soc. Servs. of the City of N.Y., 436 U.S. 658 (1978).

61 *Id.* at 169–70.

62 *See id.* at 174–83 (discussing the legislative history).

63 42 U.S.C. § 1983 (2018).

64 *See* United States v. Cruikshank, 92 U.S. 542, 554, 552–54 (1876) (stating that the Fourteenth Amendment "adds nothing to the rights of one citizen as against another" and holding that the First Amendment right to assembly and the Second Amendment right to bear arms did not apply to states, *id.* at 554); *Monroe*, 365 U.S. at 240 n.68 (Frankfurter, J., dissenting) ("Most courts have refused to convert what would otherwise be ordinary state-law claims for false imprisonment or malicious prosecution or assault and battery into civil rights cases on the basis of conclusory allegations of constitutional violation.").

65 Ruggero J. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557, 563.

66 *Monroe*, 365 U.S. at 184, 187–88 (citing United States v. Classic, 313 U.S. 299, 326 (1941)).

courts of appeals each tripled.[67] By 1970, there were 3,586 cases filed under § 1983—almost thirteen times more than in 1960.[68]

This trend continued apace after the Supreme Court decided *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* in 1971.[69] Before *Bivens*, the Supreme Court "assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose."[70] So "as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself."[71] Against this background, the *Bivens* Court recognized an implied cause of action to sue a federal officer who violated the Fourth Amendment, thereby enabling more federal court litigation.[72] But the rising caseload did not go unnoticed. In his dissent, Justice Black lamented:

> We sit at the top of a judicial system accused by some of nearing the point of collapse. Many criminal defendants do not receive speedy trials and neither society nor the accused are assured of justice when inordinate delays occur. Citizens must wait years to litigate their private civil suits.[73]

In 1978, the Supreme Court expanded the scope of § 1983 litigation once again in *Monell v. Department of Social Services of the City of New York*.[74] There, the Court overruled *Monroe* in part and held that municipalities are "persons" under § 1983 and thus could be sued when their employees act pursuant to a policy or custom.[75] By the time *Monell* was decided in 1978, the courts of appeals already were managing more than five times as many cases as they were when *Monroe v. Pape* was decided in 1961.[76] With the increasing number of § 1983 cases, the federal courts had, in then-Justice Rehnquist's view, "articulated new and previously unforeseeable interpretations of the Fourteenth Amendment."[77]

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67 *See supra* Figure 1.

68 Aldisert, *supra* note 65, at 563.

69 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

70 Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017) (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)).

71 *Id.* (first citing *J.I. Case Co.*, 377 U.S. at 430–432; then citing Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969); and then citing Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969)).

72 *See Bivens*, 403 U.S. at 397.

73 *Id.* at 429 (Black, J., dissenting).

74 Monell v. Dep't of Soc. Servs. of the City of N.Y., 436 U.S. 658 (1978).

75 *Id.* at 663, 694.

76 *See supra* Figure 1.

77 *Monell*, 436 U.S. at 724.

Taken together, *Monroe*, *Bivens*, and *Monell* show how the variability of appellate (and district) caseloads have been dictated by the Supreme Court. While that expansionist trend continued for decades, the Supreme Court made things harder for civil rights plaintiffs by recognizing immunities.

Shortly after *Monroe* was decided, the Supreme Court's immunity jurisprudence began to take shape.[78] Although § 1983 "creates a species of tort liability that on its face admits of no immunities," the Supreme Court, looking to the common law, has recognized absolute and qualified immunity.[79] Select government officials, such as legislators, prosecutors, and judges are entitled to absolute immunity when performing certain functions.[80] The Supreme Court has also recognized that individuals, but not municipalities,[81] are entitled to qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[82] With these immunities, the Supreme Court has curtailed the reach of § 1983 by making it more difficult for plaintiffs to prevail.[83] And the looming specter of qualified immunity may prevent some civil rights cases from ever seeing the light of day.[84]

The Supreme Court has also restricted the availability of suits under *Bivens*. Only twice has the Court upheld the availability of a Bivens claim, first under the Fifth Amendment's Due Process Clause[85] and a year later under the Eighth Amendment.[86] The Court's 1980 ruling in *Carlson v. Green* is significant because the Court recognized that a

78 *See* Pierson v. Ray, 386 U.S. 547, 556–57 (1967) (holding that "the defense of good faith and probable cause," which was "available to the officers in the common-law action for false arrest and imprisonment, is also available" under § 1983), *overruled by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

79 Imbler v. Pachtman, 424 U.S. 409, 417 (1976).

80 *See* Tenney v. Brandhove, 341 U.S. 367, 376–79 (1951) (legislative immunity); *Imbler*, 424 U.S. at 429 (prosecutorial immunity); Stump v. Sparkman, 435 U.S. 349, 359 (1978) (judicial immunity).

81 Owen v. City of Independence, 445 U.S. 622, 657 (1980).

82 *Harlow*, 457 U.S. at 818 (first citing Procunier v. Navarette, 434 U.S. 555, 565 (1978); and then citing Wood v. Strickland, 420 U.S. 308, 322 (1975)); *see also* Scheuer v. Rhodes, 416 U.S. 232, 247 (1974), *overruled by* Davis v. Scherer, 468 U.S. 183 (1984).

83 *See* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 651–58 (2013) (discussing the challenges for a plaintiff to overcome a qualified immunity defense). *But see* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 2, 39 (2017) (analyzing over one thousand cases and observing that qualified immunity was granted about fourteen percent of the time).

84 *See* Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 491–95 (2011) (arguing that qualified immunity may play a substantial role in how lawyers screen cases).

85 Davis v. Passman, 442 U.S. 228, 248–49 (1979).

86 Carlson v. Green, 446 U.S. 14, 19 (1980).

prisoner could bring a claim against federal prison officials, which increased the number of lawsuits filed by prisoners.[87] But in a steady stream of cases since 1980, the Court consistently declined to extend *Bivens*.[88] Most recently, in *Egbert v. Boule*, the Supreme Court further constrained *Bivens* by instructing lower courts to ask "whether there is any reason to think that Congress might be better equipped to create a damages remedy" before recognizing a *Bivens* claim.[89]

In sum, the Supreme Court giveth and the Supreme Court taketh. Its decisions on § 1983 and *Bivens* first expanded, but later contracted, the caseloads of the appellate and district courts, depending on the Court's interpretations of federal law. A similar trend exists regarding the Civil Rights Act of 1964 and related statutes.[90]

B. The Civil Rights Act of 1964

The Civil Rights Act of 1964 also contributed to the rising caseload during the 1960s and beyond. That law addresses, among other things: discriminatory voting tactics,[91] discrimination in service or access to commercial establishments,[92] the desegregation of public facilities[93] and schools,[94] discrimination in employment,[95] and race discrimination in federally funded programs.[96] Title VII of the Civil Rights Act of 1964, which prohibits discrimination by covered employers on the basis of race, color, religion, sex, or national origin, also created the U.S. Equal Employment Opportunity Commission (EEOC).[97] In order to bring a private lawsuit, individuals must file a timely complaint of discrimination with the EEOC.[98] After the Civil Rights Act of 1964 was enacted, the EEOC received 8,852 charges, over four times as many as

87 *See id.* at 18–23; Gregory P. Williams, Comment, Carlson v. Green*: The Inference of a Constitutional Cause of Action Despite the Availability of a Federal Tort Claims Act Remedy*, 22 WM. & MARY L. REV. 561, 571 (1981).

88 *See, e.g.*, Bush v. Lucas, 462 U.S. 367, 368 (1983); Wilkie v. Robbins, 551 U.S. 537, 541 (2007); Ziglar v. Abbasi, 137 S. Ct. 1843, 1863 (2017); Hernandez v. Mesa, 140 S. Ct. 735, 739 (2020).

89 Egbert v. Boule, 142 S. Ct. 1793, 1803 (2022).

90 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

91 *Id.* § 101 (codified as amended at 52 U.S.C. § 10101 (2018)).

92 *Id.* §§ 201–207 (codified as amended at 42 U.S.C. §§ 2000a–2000a-6 (2018)).

93 *Id.* § 301 (codified as amended at 42 U.S.C. § 2000b (2018)).

94 *Id.* §§ 401–410 (codified as amended at 42 U.S.C. §§ 2000c–2000c-9 (2018)).

95 *Id.* §§ 701–704 (codified as amended at 42 U.S.C. §§ 2000e–2000e-4 (2018)).

96 *Id.* §§ 601–605 (codified as amended at 42 U.S.C. §§ 2000d–2000d-4 (2018)).

97 *Id.* §§ 701–705 (codified as amended at 42 U.S.C. §§ 2000e–2000e4 (2018)).

98 *See id.* § 706(c)–(e) (codified as amended at 42 U.S.C. § 2000e-5(e)(1) (2018)).

anticipated.[99] And during the 1960s, only a few thousand civil rights cases were filed in federal courts.[100] In 1972, Congress amended the Civil Rights Act of 1964 by enacting the Equal Employment Opportunity Act of 1972.[101] That law authorized the EEOC to bring enforcement actions and expanded the number of employers covered by the 1964 Act.[102] It then experienced an increasing caseload and faced a backlog of up to 100,000 discrimination charges.[103] At the same time, more and more civil rights cases were being filed in federal court each year, reaching about 10,000 cases in 1975 and about 20,000 cases in 1985.[104]

As with § 1983 and *Bivens*, in the late 1980s the Supreme Court began interpreting Title VII more narrowly.[105] For instance, the Court made it more difficult for plaintiffs to prevail in disparate-impact cases using statistical evidence on the race of workers.[106] In response, Congress passed the Civil Rights Act of 1991, which amended Title VII and made it easier for plaintiffs to prevail.[107] Combined with the enactment of the Americans with Disabilities Act of 1990,[108] this amendment

99 *EEOC History: 1964–1969*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-1964-1969 [https://perma.cc/6AA4-32E8] (last visited Jan. 31, 2025).

100 U.S. CTS., CIVIL RIGHTS CASES FILED FROM 1963–2013 (2013).

101 Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

102 *See id.* §§ 2, 4 (amending the Civil Rights Act of 1964's definition of employer to cover those with fifteen or more employees).

103 *EEOC History: 1970–1979*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-1970-1979 [https://perma.cc/4VT6-6RHE] (last visited Jan. 31, 2025).

104 U.S. CTS., *supra* note 100.

105 *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 655 (1989) (addressing disparate-impact cases); Price Waterhouse v. Hopkins, 490 U.S. 228, 249–50 (1989) (plurality opinion) (holding that a plaintiff may demonstrate that discrimination was a motivating factor in the defendant's decision and that the defendant may defeat liability by showing that he or she would have made the same decision even if it had not taken the plaintiff's protected trait into account), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075.

106 *Wards Cove Packing*, 490 U.S. at 650–51 (holding that a comparison "between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs . . . forms the proper basis for the initial inquiry in a disparate-impact case" and that the plaintiffs could not solely rely upon "statistics showing a high percentage of nonwhite workers in the cannery jobs and a low percentage of such workers in the noncannery positions").

107 *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ("[T]he decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio* has weakened the scope and effectiveness of Federal civil rights protections . . . ." *Id.* § 2(2), 105 Stat. at 1071 (citation omitted)); *id.* § 105, 105 Stat. at 1074.

108 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 (2018) et seq.).

contributed to an increase in the number of civil rights cases filed in federal court from about 20,000 in 1991 to 43,278 in 1997.[109]

IV. THE FEDERALIZATION OF CRIME

The great increase in the number of cases in the lower federal courts was not limited to civil actions. During the same time, Congress increasingly federalized criminal offenses that previously had been prosecuted in state courts.[110] The provenance of that movement can be traced all the way back to Prohibition. From 1920 to 1933, the federal government brought over 650,000 prosecutions under the Volstead Act.[111] And during the New Deal era, Congress took a broad view of its power under the Commerce Clause to regulate labor. After the Supreme Court endorsed that expansion, Congress had essentially free rein to enact federal criminal legislation.[112] So it targeted areas of criminal law that states had traditionally penalized.[113] This trend continued throughout the rest of the century with notable accelerations

109 *See* U.S. CTS., *supra* note 100.

110 *Jurisdiction: Criminal*, FED. JUD. CTR., https://www.fjc.gov/history/work-courts/jurisdiction-criminal [https://perma.cc/JP3A-NPFQ] (last visited Feb. 20, 2025); *see also* William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, 11 FED. SENT'G REP. 134, 135 (1998) ("Congress has contributed significantly to the rising caseload by continuing to federalize crimes already covered by state laws."). For a criticism of this effect, see Sam J. Ervin, III, *The Federalization of State Crimes: Some Observations and Reflections*, 98 W. VA. L. REV. 761, 761 (1996) (arguing that Congress's trend toward federalizing crime could "drastically alter the traditional role of the federal courts in our nation"); and Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1165 (1995) (arguing that increased criminal caseload has created an "impending crisis in the federal justice system"). *But see* Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 915–16 (2000) (arguing that the increase in criminal caseload in the second half of the twentieth century was less a result of "the federalization of state crime and more [to do] with the resources Congress has allocated to federal law enforcement agencies and to federal prosecutors").

111 *See* Edward Rubin, *A Statistical Study of Federal Criminal Prosecutions*, 1 LAW & CONTEMP. PROBS. 494, 497 (1934).

112 In 1937, the Supreme Court expansively interpreted the Commerce Clause to permit Congress to regulate intrastate activities that had "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937). Until the Gun-Free School Zones Act in *United States v. Lopez*, 514 U.S. 549 (1995), no federal criminal law was struck down for exceeding Congress's Commerce Clause Power. For a thoughtful critique of this trend, see Robert E. Cowen, *Federalization of State Law Questions: Upheaval Ahead*, 47 RUTGERS L. REV. 1371, 1385 (1995).

113 FED. JUD. CTR., *supra* note 110; *see, e.g.*, Hobbs Act, ch. 645, 62 Stat. 683, 793 (1948) (codified as amended at 18 U.S.C. § 1951 (2018)) (extortion); Act of July 16, 1952, ch. 879, § 18(a), 66 Stat. 711, 722 (codified as amended at 18 U.S.C. § 1343 (2018)) (wire fraud); Act of July 14, 1956, ch. 595, 70 Stat. 538, (codified as amended at 18 U.S.C. § 32 (2018)) (aircraft and aircraft facility sabotage).

during the 1960s (Johnson's "War on Crime") and the 1970s and 80s (Nixon's and Reagan's "War on Drugs"). Those eras sharply increased federal penalties for narcotics and firearms offenses.

For example, the Omnibus Crime Control and Safe Streets Act of 1968[114] created several new federal firearms offenses.[115] The Act penalized, among other things, the unlicensed sale or shipment of firearms; possession of a stolen firearm; possession of a firearm with an obliterated serial number; and possession of a firearm after being convicted of a felony.[116] Other firearms laws included the Firearms Owners' Protection Act of 1986,[117] the Undetectable Firearms Act of 1988,[118] the Crime Control Act of 1990,[119] and the Violent Crime Control and Law Enforcement Act of 1994.[120]

Other legislation targeted drug trafficking and use. Congress passed the Comprehensive Drug Abuse Prevention and Control Act in 1970,[121] which, among other things, enhanced penalties for leaders of drug-trafficking organizations and created new offense and penalty categories.[122] That sweeping legislation was followed by Anti-Drug Abuse Acts in 1986[123] and 1988.[124]

These laws increased the federal courts' criminal caseload in the latter part of the twentieth century. There were roughly 30,000 criminal cases in 1960 but almost 50,000 in 1972.[125] After a brief taper during the 1970s, criminal caseloads grew by seventy percent between

114 Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended in scattered sections of 18 and 34 U.S.C. (2018)).

115 *See id.* § 902 (codified as amended at 18 U.S.C. §§ 921–28 (2018)).

116 *Id.* § 902 (codified as amended at 18 U.S.C. §§ 922–928 (2018)).

117 Firearms Owners' Protection Act, Pub. L. No. 99-308, §§ 102(9), 104(a)(2), 100 Stat. 449, 452–53, 456–57 (1986) (codified at 18 U.S.C. §§ 922(c), (o) (2018)) (possession of machine gun or any firearm in furtherance of crime of violence or drug trafficking crime).

118 Undetectable Firearms Act of 1988, Pub. L. No. 100-649, § (2)(a), 102 Stat. 3816 (codified at 18 U.S.C. § 922(p) (2018)) (possession of firearm altered to evade detection by metal detector or x-ray machine).

119 Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended at scattered sections of U.S.C.).

120 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 102(a), 110, 108 Stat. 1796, 1996–97 (codified at 18 U.S.C. § 922(v) (2018)) (possession of semiautomatic assault weapon).

121 Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C. (2018)).

122 *Id.* §§ 408–409.

123 Anti-Drug Abuse Acts of 1986, Pub L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 18 and 21 U.S.C. (2018)).

124 Anti-Drug Abuse Acts of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of U.S.C.).

125 FED. JUD. CTR., *supra* note 110.

1980 and 1992.[126] In particular, the number of drug cases in this period went from 3,130 to 12,833.[127] Firearms cases also skyrocketed from 931 prosecutions in 1980 to 3,917 in 1992[128] to more than 14,200 in 2020.[129]

A. Pro Se Prisoner Cases

Another reason for the sharp increase in the courts of appeals' caseload in the mid-to-late twentieth century was the rise in prisoners' pro se filings. Beginning in the 1910s, the Supreme Court began to expand the availability of habeas corpus relief to state prisoners,[130] but the biggest change came in 1942, when the Court held that the writ was no longer limited to cases where the trial court lacked jurisdiction.[131] Rather, "[i]t extend[ed] also to those exceptional cases where the conviction ha[d] been in disregard of the constitutional rights of the accused, and where the writ [was] the only effective means of preserving his rights."[132] The effect of that decision on the federal district courts' caseload soon became apparent. As one federal judge observed, "abuse[s] of the right to the writ" became "legion."[133] Despite the increase in habeas petitions that would come, however, the courts of appeals' caseload did not begin to spike until the 1960s.[134]

The most common abuse was the filing of successive petitions, particularly in districts that contained federal and state prisons.[135] For example, courts were asked to order wardens to "allow petitioners to receive newspapers, to send for law books, to circularize Congressmen, to keep birds, to change lavatory facilities, [and] to cease censoring prisoner's correspondence."[136] The burden caused by the drastic increase in habeas petitions did not stop with district courts and the

126 *Id.*

127 *Id.*

128 *Id.*

129 Press Release, U.S. Dep't of Just., Justice Department Charges More than 14,200 Defendants with Firearms-Related Crimes in FY20 (Oct. 13, 2020), https://www.justice.gov/archives/opa/pr/justice-department-charges-more-14200-defendants-firearms-related-crimes-fy20 [https://perma.cc/E8VV-632T].

130 *See, e.g.*, Frank v. Mangum, 237 U.S. 309 (1915); Moore v. Dempsey, 261 U.S. 86 (1923); Mooney v. Holohan, 294 U.S. 103 (1935) (per curiam); Johnson v. Zerbst, 304 U.S. 458 (1938).

131 Waley v. Johnston, 316 U.S. 101, 104–05 (1942) (per curiam).

132 *Id.* at 105.

133 Louis E. Goodman, Use and Abuse of the Writ of Habeas Corpus, 7 F.R.D. 313, 314 (1948); *see also* CHARLES DOYLE, CONG. RSCH. SERV., RL33391, FEDERAL HABEAS CORPUS: A LEGAL OVERVIEW 5 (2024).

134 *See supra* Figure 1.

135 Goodman, *supra* note 133, at 315.

136 *Id.* at 316.

courts of appeals; the Supreme Court was similarly "plagued."[137] "Hardly a decision day of that court passe[d] without the denial of innumerable petitions for certiorari in habeas corpus cases, many of them carrying the same names month after month."[138]

These changes were amplified by the Supreme Court's increasingly expansive interpretations of the Fourth, Fifth, Sixth, and Eighth Amendments and their incorporation against the States through the Fourteenth Amendment.[139] In response, Congress enacted major revisions to the federal habeas statute in 1948 for the first time since 1867.[140] Five years later, the Supreme Court followed with its seminal decision in *Brown v. Allen*.[141]

The Court in *Brown* concluded that its denial of certiorari did not preclude inferior federal courts from reconsidering those issues in later habeas proceedings.[142] Judge Friendly attributed this decision to the Supreme Court's "consciousness that, with the growth of the country and the attendant increase in the Court's business, it could no longer perform its historic function of correcting constitutional error in criminal cases by review of judgments of state courts and had to summon the inferior federal judges to its aid."[143] His view was shared by Judge Wright and other commentators.[144]

Subsequent Supreme Court decisions increased the availability of habeas relief throughout the 1960s.[145] But by the 1970s, as the federal

137 *Id.* at 315.

138 *Id.*

139 *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 155–56 (1970).

140 28 U.S.C. §§ 2241–2255 (Supp. III 1949); DOYLE, *supra* note 133, at 5.

141 Brown v. Allen, 344 U.S. 443 (1953).

142 *Id.* at 457–58; *see* DOYLE *supra* note 133, at 6.

143 Friendly, *supra* note 139, at 154–55.

144 *See* J. Skelly Wright & Abraham D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 897–98 (1966); Geagan v. Gavin, 181 F. Supp. 466, 469 (D. Mass. 1960) (Wyzanski, J.); DOYLE, *supra* note 133, at 6 n.34. *But see, e.g.*, Teague v. Lane, 489 U.S. 288, 306–16 (1989) (plurality opinion) (concluding that collateral review through the writ of habeas corpus is not a substitute for direct appellate review); Fay v. Noia, 372 U.S. 391, 399 (1963) (allowing collateral review where a direct appeal was not taken), *overruled by* Wainwright v. Sykes, 433 U.S. 72 (1977).

145 *See, e.g.*, *Noia*, 372 U.S. at 399; Townsend v. Sain, 372 U.S. 293 (1963), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

courts' caseload mounted,[146] the Supreme Court began to pare back the Warren Court's expansion of the writ.[147]

Federal lawmakers also sought to curb the number of habeas petitions filed in federal court. In 1996, Congress enacted AEDPA, which required habeas petitioners who lost in the district court to obtain a certificate of appealability from that court before taking an appeal.[148] One scholar estimated in 2012 that more than ninety-two percent of applications for a certificate of appealability were denied.[149] She estimated that prisoners seeking habeas relief appealed adverse judgments thirty-eight percent of the time and fewer than two percent obtained any sort of remand.[150]

The meteoric rise in habeas petitions during the mid-twentieth century came with a comparable flood of pro se prisoner claims brought under 42 U.S.C. § 1983.[151] Concerned that "[t]he crushing burden of . . . frivolous suits" was making it "difficult for the courts to consider meritorious claims," [152] Congress enacted the Prison

146 In 1972, Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, warned that "[t]he current flood of petitions for post-conviction relief already threatens—because of sheer volume—to submerge meritorious claims and even to produce a judicial insensitivity to habeas corpus petitioners." Boyd v. Dutton, 405 U.S. 1, 8 (1972) (Powell, J., dissenting) (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963)). Chief Justice Roberts made the same point more recently. *See* Jones v. Bock, 549 U.S. 199, 224 (2007) (Roberts, C.J.) ("We are not insensitive to the challenges faced by the lower federal courts in managing their dockets and attempting to separate, when it comes to prisoner suits, not so much wheat from chaff as needles from haystacks.").

147 *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976); *Sykes*, 433 U.S. 72; *Teague*, 489 U.S. 288; *see also* DOYLE, *supra* note 133, at 7.

148 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 102, 110 Stat. 1214, 1217–18 (codified as amended at 28 U.S.C. § 2253(c) (2018)); *see also* Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (explaining that the certificate of appealability requirement is a jurisdictional prerequisite for an appeal in habeas); Margaret A. Upshaw, Comment, *The Unappealing State of Certificates of Appealability*, 82 U. CHI. L. REV. 1609, 1616 (2015) (noting the pre-AEDPA certificate of probable cause requirement).

149 Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 FED. SENT'G REP. 308, 308 (2012).

150 *Id.*

151 Aldisert, *supra* note 65, at 566 ("[P]risoners' petitions continue to inundate the federal courts, pathetic, handwritten grievances; some very real; some rather illusory; some with genuine constitutional issues; some merely stating disagreements with administrative decisions. This litigious flood consumes many judicial manhours and challenges the abilities of federal courts to cope with their own calendars.").

152 141 CONG. REC. 27042 (1995) (statement of Sen. Orin Hatch); *see also, e.g.*, Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES, Mar. 21, 1994, at A1 (discussing infamous examples of frivolous suits, including one based on a dispute about chunky peanut butter). *But see* Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1777 (2003) (disputing the popular narrative and relevance of these infamous frivolous cases being cited by

Litigation Reform Act (PLRA) in 1996.[153] The PLRA sharply curtailed the rate at which prisoners filed civil rights suits and the number of suits filed, but total filings soon plateaued at this lower level as the prison population grew over time.[154]

B. Immigration Appeals

In the past fifty years, Congress has steadily funneled immigration cases almost exclusively into the federal courts of appeals. The trend began in 1961 with the passage of Section 106 of the Immigration and Nationality Act (INA). Before then, aliens challenged immigration determinations mainly in federal district courts by seeking writs of habeas corpus based on "the simple fact that physical restraint was inherently involved in the removal of an unwilling noncitizen."[155] Though Section 106 continued to allow the writ to challenge exclusion determinations, orders of deportation had to be challenged through petitions for review in the courts of appeals.[156]

That scheme governed until 1996, when Congress enacted two statues that further limited the use of habeas corpus to challenge immigration decisions. The first one—AEDPA—amended Section 106 to eliminate habeas jurisdiction in immigration cases[157] and to erect a bar to judicial review for aliens convicted of serious crimes.[158] The second statute—the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)—"carried forward some of AEDPA's key features" when it added a new judicial review provision to the INA.[159] Section

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proponents of the PLRA); Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 519–22 (1996) (same).

153 *See* Roosevelt, *supra* note 152, at 1776 (discussing how an increase in "frivolous lawsuits" inspired the enactment of the PLRA).

154 Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Approaches 20*, 28 CORR. L. REP. 69, 70–72 (2017).

155 Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 461–62 (2006). Following the Supreme Court's 1955 decision in *Shaughnessy v. Pedreiro*, aliens could also challenge orders of removal in federal district courts pursuant to the Administrative Procedure Act. Shaughnessy v. Pedreiro, 349 U.S. 48, 52 (1955). But that route was largely foreclosed by the 1961 amendments to the INA. *See* INS v. St. Cyr, 533 U.S. 289, 306 & n.26 (2001), *superseded by statute*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, *as recognized in* Nasrallah v. Barr, 140 S. Ct. 1683 (2020).

156 Motomura, *supra* note 155, at 462–63 (citing Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5, 75 Stat. 650, 651–53).

157 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 401, 110 Stat. 1214, 1268 (codified as amended at 8 U.S.C. §§ 1531–37 (2018)).

158 *Id.* § 440; *see also* David M. McConnell, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of REAL ID (1996–2005)*, 51 N.Y.L. SCH. L. REV. 75, 83 (2006).

159 Motomura, *supra* note 155, at 464.

242 barred judicial review of "any final order of removal against an alien who is removable by reason of having committed" a series of enumerated offenses.[160] It also abolished the distinction between "exclusion" and "deportation," establishing a unified form of "removal" subject to judicial review only in the federal courts of appeals.[161] The result of IIRIRA, it seemed, was to cut off judicial review for aliens convicted of serious crimes and to locate all other review in the federal courts of appeals.

But district court review persisted. In *INS v. St. Cyr*, the Supreme Court held that, despite the legislative developments in 1996, aliens removable because of criminal convictions could still challenge their orders of removal through habeas.[162] While AEDPA had amended Section 106 to eliminate immigration-related habeas petitions, neither AEDPA nor IIRIRA expressly precluded review under 28 U.S.C.§ 2241, the general habeas statute.[163] The Court buttressed this conclusion with the constitutional avoidance canon.[164] It explained that an expansive reading of AEDPA or IIRIRA could leave certain criminal aliens—who could not obtain relief via petitions for review—without recourse to the federal courts.[165] So "[f]ollowing the *St. Cyr* decision," one observer has explained, "non-citizens who were guilty of a deportable criminal offense were permitted to seek review of their removal orders in district court and then appeal to the circuit courts of appeals, whereas non-criminal aliens were able to generally seek review only in the courts of appeals."[166]

Congress corrected this anomaly in the REAL ID Act of 2005, transferring final immigration decisions to the courts of appeals. That statute amended Section 242 to make clear that "a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal," where "the terms 'judicial review' and 'jurisdiction to review' include habeas corpus."[167] It then softened the effect of the criminal-alien bar, explaining that nothing about the Act "which limits or eliminates judicial review,

160 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 242, 110 Stat. 3009-546, 3009-607 to -608 (codified as amended at 8 U.S.C. § 1231 (2018)).

161 *See* 8 U.S.C. § 1252 (2018).

162 INS v. St. Cyr, 533 U.S. 289, 314 (2001), *superseded by statute*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, *as recognized in* Nasrallah v. Barr, 140 S. Ct. 1683 (2020).

163 *Id.* at 308–14.

164 *Id.* at 299–300.

165 *Id.* at 300.

166 Veena Reddy, *Judicial Review of Final Orders of Removal in the Wake of the REAL ID Act*, 69 OHIO STATE L.J. 557, 571 (2008).

167 REAL ID Act of 2005, Pub. L. No. 109-13, § 106, 119 Stat. 231, 310 (codified as amended at 8 U.S.C. § 1227 (2018)).

shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."[168] So after the REAL ID Act of 2005, aliens—even those removable because of a criminal conviction—could obtain judicial review of questions of law relating to an order of removal, but only in the federal courts of appeals.

With habeas no longer available to most aliens challenging orders of removal, the INA, AEDPA, IIRIRA, and REAL ID Act have contributed to a "surge" of immigration cases in the courts of appeals.[169] Petitions for review of BIA decisions now account for a sizeable portion of the federal appellate docket, especially in circuits with a large border presence.[170] Immigration cases routinely make up the lion's share of administrative appeals filed in the courts of appeals, amounting to eighty percent of such cases between 2023 and 2024.[171] The flood of immigration appeals has prompted proposals for reform. Members of Congress have suggested sending all immigration appeals to a single circuit,[172] and some courts have implemented new case management procedures to help stem the tide.[173]

Experience from our court, the United States Court of Appeals for the Third Circuit, exemplifies the trend. Following reforms in BIA decisionmaking practices and the passage of the REAL ID Act of 2005, the Third Circuit began forming special panels to address a burgeoning immigration docket. The panels issued mostly per curiam opinions, but they sometimes returned petitions to the clerk's office for consideration by ordinary merits panels. We convened seven such panels each year between 2008 and 2014, which increased the annual workload for each circuit judge from 240 to 320 merits cases. As the

168 *Id.*

169 John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3 (2005). Some commentators have identified the 2002 "streamlining" of BIA review as the primary driver of the burgeoning immigration docket in the federal courts. *See, e.g.*, Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1122–24 (2011); Stacy Caplow, *After the Flood: The Legacy of the "Surge" of Federal Immigration Appeals*, 7 NW. J. L. & SOC. POL'Y 1, 4–5 (2012). Even so, AEDPA, IIRIRA, and the REAL ID Act likely contributed to the surge by eliminating first-level district court review in many cases.

170 *See* Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 47–48 (2006); *see also* Huang, *supra* note 169, at 1123–24.

171 *Federal Judicial Caseload Statistics 2024*, U.S. CTS., https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2024 [https://perma.cc/C7FA-RM2M] (last visited Jan. 29, 2025).

172 Reddy, *supra* note 166, at 560–61.

173 *See* Caplow, *supra* note 169, at 9–16 (describing case management reforms in the Second Circuit).

Court worked through its backlog of immigration cases, we briefly dropped to four special panels before ending the practice in 2014. Figures 2 and 3 illustrate this history, reflecting a sharp rise in BIA petitions in 2005 and a gradual decrease through the end of special panels in 2014.

Figure 2. Third Circuit BIA Petitions as a Percentage of Caseload, 2001–2014

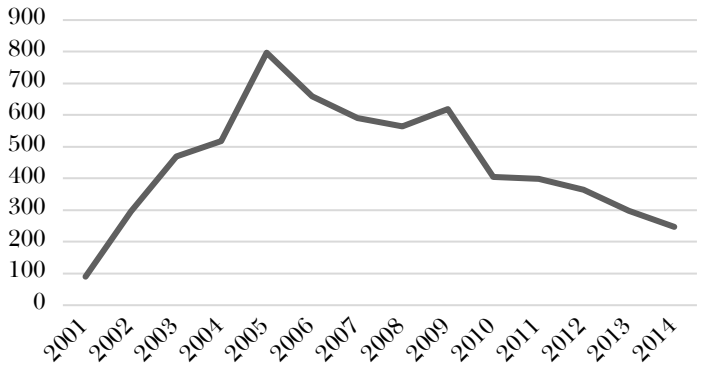

Figure 3. Number of BIA Petitions 2001–2014

* * *

The upshot is that the creation and expansion of vast swaths of federal law in the second half of the twentieth century increased the courts of appeals' caseload in both number and kind.[174] That

174 The categories of cases this Article summarized were not the only contributors to the sharp increases in the courts of appeals caseload. The New Deal brought with it increased federal law and regulation with the creation of agencies like the Federal Deposit

phenomenon, coupled with the 1925 Act's radical remodeling of the Supreme Court's docket, effectively transformed the courts of appeals from intermediate appellate tribunals into final arbiters in almost every federal case.[175]

VII. THE JUDICIARY ACT OF 1925: CONGRESS AND THE COURTS

The Judiciary Act of 1925 was enacted to help the Supreme Court handle its unsustainable backlog of cases. The Act was not, as some have claimed, an attempt to make the Supreme Court a "lawmaking" court[176] or a "ministry of justice."[177] Instead, the evidence suggests it was a practical solution to a serious challenge of judicial administration. Though it is hard to imagine that Chief Justice Taft could have anticipated the growth of the federal government after he left the Supreme Court in 1930, history has vindicated his effort to grant the Court certiorari jurisdiction. As of last year, the courts of appeals decided 40,326 cases[178] with a complement of 179 active judges, assisted by over 100 senior circuit judges and dozens of district judges sitting by designation.[179] That workload obviously exceeds the capacity of nine Supreme Court Justices.

Insurance Corporation (1933), the Federal Communications Commission (1934), the Securities and Exchange Commission (1934), the Social Security Administration (1935), and the National Labor Relations Board (1935). Patrick M. Corrigan & Richard L. Revesz, *The Genesis of Independent Agencies*, 92 N.Y.U. L. REV. 637, 670 (2017); *Social Security History*, SOC. SEC. ADMIN., https://www.ssa.gov/history/orghist.html [https://perma.cc/QL8Q-28HM] (last visited Mar. 12, 2025). The federal bureaucracy continued to expand in the latter half of the twentieth century with the creation of the Department of Health Education and Welfare (1953) (now Health and Human Services), the Department of Housing and Urban Development (1965), the Department of Transportation (1966), the Environmental Protection Agency (1970), the Nuclear Regulatory Commission (1974), the Department of Energy (1977), and the Department of Veterans Affairs (1989). SHARON S. GRESSLE, CONG. RSCH. SERV., RL31472, DEPARTMENTAL ORGANIZATION, 1947–2003, at 2–5 (2003); Jonathan H. Adler, *The Environmental Protection Agency Turns Fifty*, 70 CASE W. RSRV. L. REV. 871, 871 (2020); John Gorham Palfrey, *Energy and the Environment: The Special Case of Nuclear Power*, 74 COLUM. L. REV. 1375, 1380 (1974).

175 For example, in October Term 2023, the Supreme Court decided sixty cases. *Opinions of the Court—2023*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/opinions/slipopinion/23 [https://perma.cc/DFA6-6NQD] (last visited Mar. 29, 2025). That represents roughly 0.15% of the 40,000 cases terminated in the courts of appeals each year. U.S. CTS., *supra* note 171. Put differently, the courts of appeals function as the court of last review in approximately 99.85% of cases.

176 Robert Post, *The Supreme Court's Crisis of Authority: Law, Politics, and the Judiciary Act of 1925*, 100 NOTRE DAME L. REV. 2031, 2076 (2025).

177 Emily S. Bremer, *Making Our Ministry of Justice*, 100 NOTRE DAME L. REV. REFLECTION 255, 256, 253 (2025).

178 U.S. CTS., *supra* note 171.

179 *See Chronological History of Authorized Judgeships—Courts of Appeals*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/about-federal-judges/authorized-judgeships

The steep increase in federal appellate filings from 1960 to 2003 had nothing to do with the Judiciary Act of 1925. It was caused by the proliferation of federal laws and regulations—and the vast bureaucracy established to administer it all. And the Supreme Court itself has affected the caseload, sometimes making it easier, other times harder, to state a federal claim. Like the Supreme Court before the Judiciary Act of 1925, the Courts of Appeals must hear all appeals, large or small, profound or trite.

The Judiciary Act of 1925 also enabled the Supreme Court to serve its primary function as the final interpreter of the Constitution and laws of the United States. And despite the massive caseload in the courts of appeals, the Supreme Court still has the last word when it chooses to exercise that power. It does so usually when there is a difference of opinion about the Constitution or a federal law among the courts of appeals—a so-called "circuit split."[180] Yet a recent study from the Congressional Research Service identified ninety-seven appellate decisions that created or widened a circuit split.[181] So perhaps the Court could take more cases each year to ensure that federal law does not apply unequally based on geography.[182] This does not mean that the Court should reflexively grant certiorari immediately every time a circuit split arises. For good reasons, the Court often waits for a good "vehicle" or allows a thorny legal issue to "percolate" before granting certiorari.[183]

/chronological-history-authorized-judgeships-courts-appeals [https://perma.cc/L4N8-X2B6].

180 *See, e.g.*, Macquarie Infrastructure Corp. v. Moab Partners, L.P., 144 S. Ct. 885 (2024) (resolving circuit split on whether pure omissions are actionable in securities fraud cases); Smith v. Spizzirri, 144 S. Ct. 1173 (2024) (resolving circuit split on the interpretation of Section 3 of the Federal Arbitration Act).

181 MICHAEL JOHN GARCIA, CRAIG W. CANETTI, ALEXANDER H. PEPPER & JIMMY BALSER, CONG. RSCH. SERV., R47899, THE UNITED STATES COURTS OF APPEALS: BACKGROUND AND CIRCUIT SPLITS FROM 2023, at 13 tbl.1 (2024).

182 One unfortunate recent example of this problem is Second Amendment caselaw. During the time between *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), citizens in the First, Second, Third, Fourth, and Ninth Circuits could not exercise Second Amendment rights as their fellow citizens elsewhere. *See, e.g.*, Gould v. Morgan, 907 F.3d 659 (1st Cir. 2018), *abrogated by Bruen*, 142 S.Ct. 2111; Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012), *abrogated by Bruen*, 142 S.Ct. 2111; Drake v. Filko, 724 F.3d 426 (3d Cir. 2013), *abrogated by Bruen*, 142 S.Ct. 2111; United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011), *abrogated by Bruen*, 142 S.Ct. 2111; Young v. Hawaii, 992 F.3d 765 (9th Cir. 2021) (en banc), *abrogated by Bruen*, 142 S.Ct. 2111.

183 *See, e.g.*, Patterson v. Walgreen Co., 140 S. Ct. 685, 686 (2020) (Alito, J., concurring in the denial of certiorari); McCrory v. Alabama, 144 S. Ct. 2483, 2483 (2024) (Sotomayor, J., respecting the denial of certiorari).

On top of its essential task of being the final interpreter of the Constitution and laws of the United States, the Supreme Court has exercised its supervisory power under Rule 10(a) to correct egregious errors. One noteworthy category of cases concerns AEDPA, where the Court was constantly correcting (and sometimes rebuking) the courts of appeals. "Since its enactment in 1996, no law has so vexed the United States Courts of Appeals as" AEDPA.[184] By 2012, the Supreme Court had granted certiorari in ninety-four cases arising under AEDPA, including forty-six cases involving questions of federal court deference to state courts.[185] Of those, thirty-four cases (about seventy-four percent) were reversed because the court of appeals failed to afford sufficient deference to the state court.[186] "Remarkably, twenty-two of those cases—[nearly] fifty percent—were reversed without dissent."[187] The Court has done likewise with qualified immunity, typically reversing the lower courts when they failed to enter judgment for a state actor.[188]

As Dean Post has noted, "[v]irtually every case at the modern Court is now, in one way or another, legally significant, even if not politically salient or controversial."[189] That makes sense because most of the Court's work involves the resolution of circuit splits. But the legal, social, or political significance of the cases decided by the Court does not a "crisis" make. One of the most notable aspects of the work of the Court, mentioned all too infrequently, is the high percentage of unanimous decisions each term.[190] This suggests that a substantial portion of the Court's work is deciding lawyerly cases that have no political salience and are of little or no interest to the media or the public. Those cases undermine the suggestion that there is "a significant crisis of the Court's authority."[191] They also undermine the claim that,

184 Garrus v. Sec'y of Pa. Dep't of Corr., 694 F.3d 394, 412 (3d Cir. 2012) (en banc) (Hardiman, J., dissenting).

185 *Id.* at 412–13.

186 *Id.* at 413.

187 *Id.* at 413–14 (footnote omitted).

188 *See, e.g.*, Taylor v. Barkes, 575 U.S. 822 (2015) (per curiam); Rivas-Villegas v. Cortesluna, 142 S. Ct. 4 (2021) (per curiam); City of Tahlequah v. Bond, 142 S. Ct. 9 (2021) (per curiam). *But see* Taylor v. Riojas, 141 S. Ct. 52, 55 (2020) (reversing the Fifth Circuit's decision granting officers qualified immunity).

189 Post, *supra* note 176, at 2034–35 (footnote omitted).

190 The unanimity rates by year for recent Terms includes: 45.76% in 2023, 46.38% in 2022, 26.39% in 2021, and 35% in 2020. *See* ADAM FELDMAN & JAKE S. TRUSCOTT, EMPIRICAL SCOTUS, SUPREME COURT STAT REVIEW, OCTOBER TERM 2023–2024 49 fig.11 (version 1.2, 2024).

191 Post, *supra* note 176, at 2039.

under the Judiciary Act of 1925, "the Court was required to emphasize . . . 'lawmaking authority.'"[192]

Chief Justice Marshall's statement in *Marbury* that "[i]t is emphatically the province and duty of the judicial department to say what the law is"[193] does not suggest that the Court makes laws. Instead, by discharging its duty to "say what the law is," the Court is finding (or explaining) the law. This may sound like a semantic difference, but the distinction is essential. Commentators who view the courts as "lawmakers" deny the separation of powers by conflating the legislative function with the judicial role.

I concede that, after the 1925 Act, the "specific rights of particular parties are no longer the essence of the controversies before the Supreme Court. They are mere vehicles whereby the Constitution and laws of the United States are interpreted . . . ."[194] That task falls to the courts of appeals now, just as Chief Justice Taft predicted. In his words: "[T]he function of the court of last resort, usually called the Supreme Court, is not primarily for the purpose of securing a second review or appeal to the particular litigant whose case is carried to that court."[195] Taft's qualifier "primarily" can do a lot of work there, however. I do not take him to suggest that the Court cannot (or should not) engage in some amount of error correction if it has the bandwidth to do so. The Court's decisions in *Caetano v. Massachusetts*[196] and *Taylor v. Barkes*[197] are two recent examples that can be explained only as error correction.

Whenever the Court's essential duties to articulate constitutional law and resolve circuit splits occupy less than one hundred percent of its time, it could add cases in which a petition for writ of certiorari persuasively argues that the court of appeals or state supreme court plainly erred. And while Chief Justice Taft wrote that the Court was not there to provide "justice to the immediate parties" but to make "the law clearer for the general public,"[198] those views reflect the reality that the Supreme Court is the final arbiter of the Constitution and laws of the United States. Chief Justice Hughes made a similar point in 1935: "The parties have the right of appeal to the circuit courts of appeal. That satisfies the rights of individual litigants. When it comes to a

192 *Id.*

193 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

194 Post, *supra* note 176, at 2038 (quoting Gregory Hankin, *U.S. Supreme Court Under New Act*, 12 J. AM. JUDICATURE SOC'Y 40, 40 (1928)).

195 William H. Taft, *Delays and Defects in the Enforcement of Law in this Country*, 187 N. AM. L. REV. 851, 851 (1908).

196 Caetano v. Massachusetts, 577 U.S. 411 (2016) (per curiam).

197 Taylor v. Barkes, 575 U.S. 822 (2015) (per curiam).

198 William Howard Taft, *Three Needed Steps of Progress*, 8 A.B.A. J. 34, 35 (1922).

further review by the Supreme Court of the United States, the higher principle of importance to the public at large is involved."[199] While that is true in most cases, it does not mean that the Court is powerless to engage in error review, even if the decision vindicates justice for one party without greater significance to the Republic.

Toward the end of his article, Dean Post likens the Roberts Court to the Warren Court. I have no quarrel with his supposition that "[i]t was perhaps during Chief Justice Warren's leadership that the Court began most fully . . . to inhabit the role enabled by the Judiciary Act of 1925."[200] But that observation does nothing to support his claim that "[l]ike the Warren Court, the contemporary Court plainly and publicly aspires to reshape the landscape of American constitutional law. The Roberts Court makes little effort to cloak its lawmaking power in the necessity of dispute settlement."[201] There are a few obvious problems with this assertion. First, the claim has no support or citation. Second, it is inappropriate to attack the motives ("aspires to") of a justice, much less an entire court. Finally, if the Roberts Court were truly interested in flexing its "lawmaking" power, surely the Court would take twice or three times as many cases as it presently hears. And one would also expect that its most "conservative" justice—Justice Thomas—would be in the majority more than any other justice while one of its most "liberal" justices—Justice Sotomayor—would rarely be in the majority. Recent evidence suggests the opposite.[202] So I reject the notion that the Roberts Court has "maintain[ed] the Warren Court's wholesale commitment to judicial lawmaking."[203]

The Judiciary Act of 1925 has not turned the Roberts Court into a "lawmaking" body. Dean Post is correct that "[s]o long as the Court is free to decide *which* disputes to adjudicate," it is also free to select cases to "serve [its] own independent agenda for the development of federal

199 Post, *supra* note 176, at 2044 (footnote omitted) (quoting *Appeals from Federal Courts: Hearing on S. 2176 Before the S. Comm. on the Judiciary*, 74th Cong. 7 (1935) (statement of Hon. Charles Evans Hughes)).

200 *Id.* at 2084 (footnote omitted).

201 *Id.* at 2085–86 (footnote omitted).

202 In 2020, Justice Thomas was in the majority seventy-eight percent of the time, the same amount as Justice Kagan. *See* Adam Feldman & Jake Truscott, *Another One Bites the Dust: End of 2022/2023 Supreme Court Term Statistics*, EMPIRICAL SCOTUS (June 30, 2023), https://empiricalscotus.com/2023/06/30/another-one-bites-2022/ [https://perma.cc/DY6R-WLBL]. That year, Justice Breyer was in the majority eighty percent of the time. *Id.* The following year, Justice Thomas was in the majority eighty-one percent of the time while Justice Sotomayor was in the majority in just fifty-eight percent of cases. *Id.* In 2022, Justices Jackson (eighty-four percent), Sotomayor (eighty-two percent), and Kagan (eighty percent) were each in the majority more frequently than Justice Thomas (seventy-six percent). *Id.*

203 Post, *supra* note 176, at 2086.

law."[204] But the Court's power to set an agenda does not require any of the Justices, when choosing whether to grant petitions, to exercise that power in a political or ideological way. And after the Court chooses to hear a case, there is nothing to inhibit the Justices from acting like umpires who dispassionately apply the law as written to the facts of each appeal.[205] That is precisely what Justices (and judges) who take their oath of office seriously should do.

CONCLUSION

The 1925 Act's remodeling of the Supreme Court's docket had the incidental effect of transforming the United States Courts of Appeals from appellate tribunals into the de facto courts of last resort in well over ninety-nine percent of federal cases. That change—coupled with the mid-century increase in the federal caseload—amplified the significance of the courts of appeals. And despite the recent decline in the number of cases over the past twenty years, the courts of appeals are still deciding upwards of 40,000 cases a year and remain as influential as they have been at any time since their creation.

204 *Id.* at 2090.

205 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.); United States v. Rahimi, 144 S. Ct. 1889, 1912 (2024) (Kavanaugh, J., concurring).