

## Preface: "The More Things Change . . ."

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## PREFACE

“THE MORE THINGS CHANGE . . .”

This Symposium Issue of the *St. John's Law Review* commemorates the Centennial of the United States Court of Appeals for the Second Circuit. It is published under the auspices of the Second Circuit Committee on Historical and Commemorative Events and is a product of the joint efforts of the members of the Committee and the editors, staff, and faculty advisors of the *Law Review*.

The Issue includes what we believe to be an interesting array of Articles dealing with some of the matters that have been of concern to the court during the past one hundred years. It is apparent from the Articles that many of the questions facing the court today are the same questions that have confronted the court in the past. Although the number and variety of cases heard have increased enormously since the court convened for its first working session on October 27, 1891, there are many “constants” that have spanned the life of the court. “The more things change, the more they remain the same” is an aphorism that applies to the Second Circuit Court of Appeals. The Articles included in this Issue demonstrate that this is so.

Justice Thurgood Marshall submitted his Introductory Remarks for publication just before he announced his retirement from the Supreme Court. Having served as a judge of the Second

Circuit Court of Appeals from 1961 until 1965 and as its Circuit Justice from 1972 until his retirement, he is well aware of the customs and traditions of the Second Circuit. He observes in his Remarks, among other things, that the efficiency of the court has not been affected by its refusal to join its sister circuits in the practice of screening cases for oral argument. Chief Judge James L. Oakes, who first became associated with the court in 1947 as a law clerk to Judge Harrie B. Chase, has written an Introduction that touches upon the enduring qualities of the court and of the judges who have done its work. Chief Judge Oakes is a past Chairman of the Second Circuit Historical Committee, and his continued interest in matters historical is apparent from his Introduction.

Civil forfeiture cases have appeared on the Second Circuit docket since the court's earliest days. In *Civil Forfeiture in the Second Circuit*, Judge George C. Pratt and William B. Petersen discuss a number of these cases in their historical contexts. The authors express some important constitutional concerns about the expanding use of the forfeiture device in modern times. They focus on the dangers of further expanding the fiction of proceeding against "guilty" property, and they suggest that a reexamination of the entire subject may be in order.

My own Article, *Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the Federal Courts Study Committee*, emphasizes the need to consider the court's past in planning for its future. The very comprehensive report recently issued by the Federal Courts Study Committee is examined in depth in an effort to determine which of its suggestions might be adopted for the Second Circuit. The effort is colored by the history, traditions, customs, and practices of the court's first century.

Floyd Abrams finds the court's decision in *Edwards v. National Audubon Society, Inc.* typical of "the extraordinary vision of the Second Circuit" in protecting first amendment values. According to Mr. Abrams, it was not always thus. In *The First Amendment in the Second Circuit: Reflections on Edwards v. National Audubon Society, Inc., the Past and the Future*, he contends that the Second Circuit's first amendment rulings during the court's early years did not demonstrate "particular sympathy" for free speech claims. An evolving jurisprudence is identified.

*The Second Circuit's Role in Expanding the SEC's Jurisdiction Abroad*, by Roberta S. Karmel, raises some important issues pertaining to the extraterritorial application of federal securities

laws. Professor Karmel finds that the Second Circuit has supported the expansion of Securities and Exchange Commission jurisdiction abroad. This support has been significant because the Second Circuit has been the "Mother Court" of securities law since the adoption of the Securities Acts of 1933 and 1934. The author questions the wisdom of the noted expansion of jurisdiction, arguing that the globalization of securities markets calls for deference to the rules of other nations.

Copyright issues have commanded the attention of the Second Circuit since it opened for business. How could it be otherwise for a court that always has been "[c]entered in the capital city of publishing and the arts . . ."? James H. Carter (*They Know It When They See It: Copyright and Aesthetics in the Second Circuit*) examines the court's legacy of copyright law, focusing on the areas of fair use, compilations, and works of applied art and industrial design. In each of these areas, according to the author, the court has found difficulty devising a test to keep aesthetic judgments to a minimum.

The law of antitrust has provided grist for the Second Circuit mill on a regular basis for one hundred years. Edward D. Cavanagh, author of *Antitrust in the Second Circuit*, characterizes the role of the Second Circuit in developing the law of monopolization as "most prominent." His Article provides a comprehensive appraisal of the court's leading decisions in the area of horizontal restraints as well as monopolization. The author presents detailed analyses of two leading Second Circuit antitrust cases—*United States v. Aluminum Company of America* and *Berkey Photo, Inc. v. Eastman Kodak Co.*

"*Plus ça change, plus c'est la même chose*": The theme of this Preface is echoed by Edward P. Krugman in his whimsically-titled Article, *Soap, Cream of Wheat, and Bakeries: The Intellectual Origins of the Colgate Doctrine*. Highlighted in the Article is the opinion written by Judge Emil Lacombe in *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, a notable Second Circuit case. Judge Lacombe, one of the original members of the court, in that case found no antitrust violation in a refusal to deal situation, holding that "[w]e have not yet reached the stage where the selection of a trader's customers is made for him by the government." Mr. Krugman sees *Cream of Wheat* as the intellectual predecessor of the Supreme Court decisions in *United States v. Colgate & Co.* and the more recent *Monsanto Co. v. Spray-Rite Service Co.*

According to Lewis M. Steel and Miriam F. Clark (*The Second Circuit's Employment Discrimination Cases: An Uncertain Welcome*), the court "has, over the past decade, addressed certain key issues in the area of employment discrimination." The authors review with critical eyes the cases in which those issues were raised. Their thesis is that the court should be wary of creating legal standards that are barriers to employment discrimination litigants, and they discuss in detail the cases in which they believe such barriers were erected. They also discuss those cases in which they think the court has displayed "judicial sensitivity" to employment discrimination claims.

In the final Article of this Issue, *One Hundred Years of Solitude: Dissent in the Second Circuit, 1891-1991*, John J. Hoeffner provides an historical survey of dissenting opinions in the Second Circuit. The author discusses the arguments for and against dissenting opinions and the extent to which the various arguments have found acceptance. Mr. Hoeffner proclaims "that concerns for court efficiency tend to weaken the impulse to dissent." Accordingly, it is his contention that the sparseness of dissent in the present-day court is attributable to the court's desire to stay current in its calendar and "is likely to prevail in the Second Circuit as long as its caseload pressures remain high." I respectfully dissent!

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