

University of Chicago Law School

## Chicago Unbound

---

Journal Articles

Faculty Scholarship

---

1989

### Afterword: On Being a Commercial Court

Frank H. Easterbrook

Follow this and additional works at: [https://chicagounbound.uchicago.edu/journal\\_articles](https://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

#### Recommended Citation

Frank H. Easterbrook, "Afterword: On Being a Commercial Court," 65 Chicago-Kent Law Review 877 (1989).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

## AFTERWORD: ON BEING A COMMERCIAL COURT

FRANK H. EASTERBROOK\*

What makes a good “commercial court”? Start with knowledge of business, yesterday’s and today’s. Learned Hand thought that to be a good constitutional judge one should know the work of Acton and Maitland, Thucydides and Gibbon, Homer and Shakespeare, Machiavelli and Montaigne.<sup>1</sup> Constitutions have meaning only within social and political contexts. Judges must know them to give accurate judgments and to avoid Santayana’s curse that those who fail to learn from the past are condemned to repeat it.

So too with commerce. A good commercial judge knows Smith and Riccardo, Mill and Marx, Coase and Pigou, Becker and Stigler, and remembers with Chandler that economic hands may be visible as well as invisible. Good commercial judges know the probable effects of their decisions and seek to reduce the transaction costs of doing business. Knowledge requires theories about the methods of business and the effects of legal rules, and information about past and current business. Markets do not hold judges in check; theories and facts may.

A good commercial judge prefers rules to standards, for even when a rule is flawed people may form contracts against a known background. Certainty and predictability make free contracting possible, and contracting makes commerce operate efficiently. Certainty means rebuffing claims to do justice in retrospect, to undermine the force of the contract because as things turned out it operated to the advantage of one party. Again Hand illuminates: “[I]n commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves.”<sup>2</sup> Palliatives after the fact make bargains harder to arrange (people try to protect themselves against judicial creativity) and less valuable all around. Opportunities to obtain from courts a boon not specified in the contract also make enforcement expensive, for they make more facts relevant (hence more discovery) and settlement difficult. Strict enforcement of rules is not “unjust” *ex ante*, for a rule

\* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, The Law School, The University of Chicago. This essay is an Afterword to the Seventh Circuit Symposium issue of the Chicago-Kent Law Review and is © 1990 by Frank H. Easterbrook.

1. Hand, *Sources of Tolerance*, 79 U. PA. L. REV. 1, 12-13 (1930).

2. *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344, 346 (2d Cir. 1933).

saying (to take a possibility at random) "sellers win all warranty disputes" or any other one-sided doctrine leads to an adjustment in the purchase price — provided the rule is known. On top of that, today's buyer is tomorrow's seller.

It helps, of course, to get the background rule "right" in addition to making it stable. In a world free of complications, a judge would select the rule that commercial actors themselves would pick if information and transacting were free. A few simple lessons from economics go a long way toward establishing what these rules consist in.<sup>3</sup> Private bargains can adjust things when the standby rule does not fit the situation. It is not easy to determine what rule is best; judges almost always lack information essential to a sound conclusion. But they may learn, as good judges always have learned, from observing the ways of commerce and choosing rules that mimic the solutions parties themselves have reached when the subject was sufficiently important. If nonetheless the court specifies a poor rule, judges observe persons trying to transact around it and may change the rule in response.

"Getting it right" is never easy. Judges such as Cardozo on the Court of Appeals of New York and Mansfield on the King's Bench dealt principally in the common law. Success, if possible, is most likely on such courts. A United States Court of Appeals faces constraints these judges rarely encountered. First in line are statutes. Federal commercial law is statutory law (antitrust, securities, environmental, tax, patent, and on and on). Statutes may reflect deals among interest groups; even when they do not, the statutes greatly constrain judges' freedom. What makes for "good statutory construction" may not be what makes for good commercial judging. When federal courts do not deal with statutes, they usually encounter bodies of law created and principally administered by other institutions, whether state courts or federal administrative agencies. Even when there is play in the joints, courts of appeals must enter into these bodies of law in the same spirit their principal guardians display, else there will be incoherence.

Cardozo and Mansfield had the benefit of stable benches. During Cardozo's time the seven judges of the Court of Appeals of New York sat in panels of five. A majority of the court thus heard every case, and a single judge could reshape an entire body of law. Federal courts of appeals sit in panels of three. The Seventh Circuit has eleven active and

3. A point I made when I was on the business of evaluating judicial performance, asking whether the Supreme Court of the United States is a good commercial court. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 8-19 (1984).

three senior judges (all of whom continue to sit); occasional visiting judges supplement the rolls. Three members of a much larger court may resolve a particular legal issue but cannot resolve deeper questions such as “What is the right way to read statutes?” or “Are antitrust laws designed exclusively for consumers’ welfare?” Moreover, each panel represents an institution and must try to replicate the result (if not necessarily the style of explanation) that any other randomly selected group of judges would produce. Efforts to preserve consistency among panels promote predictable decisions but never match the ability of a court that always sits en banc, and they hinder efforts to design better commercial law. Cardozo could re-rationalize the law of sales knowing that his colleagues were on board; a panel of a court of appeals cannot change the institution’s course so smartly.

A state court may lay claim to greatness in commercial law by rendering strong decisions in corporate law, torts and contracts, including specialized contracts such as letters of credit. A federal court must cope with several states’ law on each of these subjects, plus antitrust, securities, bankruptcy, tax, labor, pensions, intellectual property, and several different bodies of environmental law, all accompanied by the jurisdictional problems that haunt a court of limited jurisdiction.

Whether a federal court of appeals succeeds as a commercial court depends on whether it can maintain a consistent body of doctrine that facilitates contracting and resist the siren call of fair adjustments *ex post*, and whether it can maintain inspired performance across a large number of bodies of law. Unfortunately there are no objective tests of success. You can’t run out and measure the rate of economic growth in the jurisdiction; too many other things (including the decisions of other courts) affect that. You might count citations to the court’s opinions, recognizing the limitations of this measure of influence. You might see whether people voluntarily specify the forum for the resolution of their disputes, but it is hard to choose a specific federal forum in advance (far harder than, say, agreeing that a dispute will be resolved under the substantive law of New York), and plaintiffs’ choice after the contested events is unreliable. (A plaintiff with a weak case wants a jurisdiction with high variance, not one with a sound body of law.)

Notice that I have left out of the list criteria such as whether the court writes exhaustive opinions considering the full text, comments on, history of, general principles behind, and other decisions concerning, the body of law. Length is no virtue. A judge should be aware of the text, commentary, and history, and many other things too. Know all this, consider all this — but don’t rehearse it. Judicial opinions serve roles

different from surveys in law reviews. *True* "code courts," such as those of France, issue exceedingly terse opinions; a federal court need not adopt every device scorned in a code country to earn the laurel of being a good commercial court.

Do we admire today the judges whose exhaustive opinions covered the waterfront? Willis Van Devanter comes to mind. Or do we admire instead those who write short, sophisticated, and memorable opinions that reflect greater knowledge than the authors feel compelled to display? Karl Llewellyn, the chief reporter of the Uniform Commercial Code, named as his pantheon Holt, Mansfield, Stowell, Blackburn, Kennedy, Hamilton, and Scrutton of the U.K., together with our own Cowen, Hough, and Hand, all of whom wrote in the Grand Style.<sup>4</sup> He disdained those who treated the judicial task as one of looking up the law and trudging through the sources to reprint text and commentary that may be found already in convenient paperbound volumes.

I have also left out of the list any praise for judges who seize the moment to write essays about issues the parties did not present. Just as parties may choose the terms of their contract, they may choose the subjects of their litigation. Resolving a case on a ground not presented denies the parties this autonomy and increases the risk that an uninformed opinion will impede rather than promote commerce. It is hard enough to navigate when the court sticks to questions fully ventilated by counsel.

Finally, I have omitted from the list any concern for whether the court is "pro" one group or another, be it sellers or corporate executives. In the long run, no stable body of law transfers wealth from one group to another. Prices adjust. It matters whether the law satisfies other criteria of "good" decisions, but if law, carefully chosen, means that one group or another regularly wins, that is ground for praise rather than criticism. Judges are not random number generators, laboring hard to emulate the flip of a coin so that each side wins "its fair share."

What is more, I take with a grain of salt any claim that one side or another consistently wins or loses in a given court. The decision to litigate is endogenous. If a court develops a reputation as favoring claims under the trademark laws, the substantive tilt will affect the probability of litigation and the terms of settlement. Parties will spend the large sums necessary to get an appellate decision only when uncertainty remains. Both a "pro-trademark" court and an "anti-trademark" court could be expected to render about half of their decisions for the plain-

4. See K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

tiffs.<sup>5</sup> Pro-trademark and anti-trademark courts will apply different rules; parties who would have won in one court will lose in the other; but over any sample of cases large enough to be statistically significant (an important qualifier), the probability that the trademark proprietor will prevail should be the same in each court and unaffected by the substance of the rule. What we learn from surveys showing substantial disparities across courts is principally that the samples are too small for statistical significance, a major and endemic problem when there are so many separate fields of commercial law that no court has very many cases of a given type. Whether the pro- or the anti-trademark court is a "good" commercial court depends on the desiderata I have already discussed; consistency in the pursuit of sound rules is no vice.

Is the Seventh Circuit a good commercial court? Judges are not good students of their own institutions, so I shall leave the answer to others. I applaud the attention the Chicago-Kent Law Review has given to this court, and the scholars who contributed to this symposium issue. As these comments imply, I do not always agree with the criteria of goodness they apply to commercial decisions; the authors do not necessarily agree with each others' criteria of evaluation.<sup>6</sup> That is much less important than the existence of sustained attention to a question. Environmental, warranty, and takeover law is a tiny fraction of the commercial business in this court. Whether this circuit deserves laurels or thorns depends in large measure on how well we handle securities law, intellectual property, pensions, bankruptcy, and the many other commercial subjects beyond the scope of this symposium. I await with interest future installments.

5. Cooter, *Why Litigants Disagree: A Comment on George Priest's "Measuring Legal Change,"* 3 J.L. ECON., & ORG. 227 (1987); Priest & Klein, *The Selection of Disputes for Litigation*, 14 J. LEGAL STUDIES 1 (1984).

6. I offer only one comment beyond the general ones on method in the text. Professor Branson trumpets that economic analysis of law is "duty bound ex post to provide a rationale for everything corporate titans need or want." Branson, *A Corporate Paleontologist Looks at Law and Economics in the Seventh Circuit*, 65 CHI.-KENT L. REV. 745, 753 (1990). Professor Branson ought to consider that the subject of the principal paper on which he is a commentator, Honabach & Dennis, *The Seventh Circuit and the Market for Corporate Control*, 65 CHI.-KENT L. REV. 681 (1990), is one on which economic analysts have given the titans quite a fright. A vigorous market in corporate control terrifies most corporate executives. Economic analysts favor deregulation (the pages of the *Journal of Law and Economics* teem with articles showing that regulation is pro-producer and anti-consumer), low tariffs and abolition of other import controls, and espouse other policies that many corporate managers find unpalatable. It is hard to describe this agenda as one for apologists of Big Business.