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Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies

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RELITIGATION BY FEDERAL AGENCIES: CONFLICT, CONCURRENCE AND SYNTHESIS OF JUDICIAL POLICIES

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I. INTRODUCTION

A. Nature of the Problem

When a matter has been presented to a court by a federal agency and an adverse decision handed down, many of these agencies as a matter of general policy will continue to adhere to the position that has been rejected in the litigation. These agencies will present the same position to other courts in an attempt to get a different decision and gain vindication. This policy of relitigation extends to cases in which the agencies lose in the federal courts of appeals.

It may be questioned whether a policy of relitigation (1) is consistent with the law that has been built up over the past century in the federal courts, (2) is consistent with general concepts of res judicata/preclusion as they have developed and are developing at the present time, and (3) is desirable as a matter of sound judicial administration and is one that should be continued. The following sections will consider the policy of relitigation in the light of these considerations and attempt to come to some conclusions about relitigation and any feasible alternative.

B. Relitigation as a General Policy of the Federal Government

At the present time the agencies of the federal government as a general policy engage in relitigation of issues that have been decided in earlier litigation. The various federal agencies, apparently without exception, engage in this time-consuming practice; some agencies, however, persist more than others in relitigating matters that have already been subjected to judicial examination.

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Perhaps more than any other agency, the Internal Revenue Service in recent years has engaged in the practice of relitigation of issues that the Service has lost initially. Some examples of the practice indicate the attitude that the Service has adopted.

In a series of cases starting in 1969, the government litigated the method of treating net operating loss carryback. The government lost on this point in three different cases at the court of appeals level: *Chartier Real Estate Co. v. Commissioner*,[1] *Olympic Foundry Co. v. United States*[2] and *Foster Lumber Co. v. United States*.[3] At the time of *Foster Lumber* no court that had ever considered the issue had held for the government. The IRS continued to litigate the issue, and subsequent to *Foster Lumber*, two circuits held for the government.[4] In order to resolve a conflict among the circuits the Supreme Court granted certiorari in *Foster Lumber* and held for the government.[5]

Another example of the government continuing to litigate a matter after having lost at the court of appeals level is found in the IRS's response to an adverse decision in *United States v. Morton*.[6] The court in *Morton* found for the taxpayer on the issue of whether proceeds from a fire insurance policy qualified for nonrecognition of gain under a section 337 liquidation when the casualty occurred prior to the adoption of the resolution to liquidate. The government refused to accept the *Morton* decision as binding and relitigated the issue in *Central Tablet Manufacturing Co. v. United States*;[7] in that case the government lost in the district court, but won in the court of appeals and finally in the Supreme Court.[8]

When the IRS litigated the designation of a particular transaction as an "F" reorganization, the Fifth Circuit in 1966 held the transaction was properly classified.[9] In 1968 the same problem came before the Ninth Circuit in two cases,[10] and the IRS urged that court to find that

1. 428 F.2d 474 (1st Cir. 1970) (per curiam), *aff'g* 52 T.C. 346 (1969).
2. 493 F.2d 1247 (9th Cir. 1974) (per curiam), *aff'g* 29 Am. Fed. Tax R.2d 72-759 (W.D. Wash. 1972).
3. 500 F.2d 1230 (8th Cir. 1974), *rev'd*, 97 S. Ct. 204 (1976).
4. *See* Axelrod v. Commissioner, 507 F.2d 884 (6th Cir. 1975); Mutual Assurance Soc'y v. Commissioner, 505 F.2d 128 (4th Cir. 1974).
5. 97 S. Ct. 204 (1976).
6. 387 F.2d 441 (8th Cir. 1968).
7. 339 F. Supp. 1134 (S.D. Ohio 1972), *rev'd*, 481 F.2d 954 (6th Cir. 1973).
8. 417 U.S. 673 (1975).
9. Davant v. Commissioner, 366 F.2d 874 (5th Cir. 1966), *cert. denied*, 386 U.S. 1022 (1967).
10. Associated Machine v. Commissioner, 403 F.2d 622 (9th Cir. 1968); Estate of Stauffer v. Commissioner, 403 F.2d 611 (9th Cir. 1968).

the transaction was not an "F" reorganization. The Ninth Circuit, however, followed the Fifth Circuit.[11] The following year the IRS announced that it would not follow the three court of appeals decisions.[12] Two years later, when the Fifth Circuit was again faced with the question, the IRS urged the court to reject the position it had adopted several years earlier; the Fifth Circuit, however, adhered to its earlier position.[13] One of the grounds given was that the court could not overrule an earlier decision of a panel, since only the court en banc could do that.[14] Later, both the Court of Claims[15] and the Sixth Circuit[16] rejected the government's position. After all these rejections, the IRS still included the issue on its "List of Prime Issues" in November 1974; the government has not given up even though the courts have refused to go along with its position in every case since 1966.

After the passage of the Internal Revenue Code of 1954, there was a question whether an involuntary conversion through casualty was a sale or exchange within the meaning of section 337. The Commissioner adopted the position that it was not.[17] The courts consistently held against this position[18] and, finally in 1964 in Revenue Ruling 64-100, the Commissioner changed his position and revoked Revenue Ruling 56-372, which had advocated the IRS view. Apparently the Commissioner was unable to get any court of appeals level court to go along with him on this issue.

Another example of relitigation of an issue on the part of the government is found in a series of cases dealing with the right to sell property of which a delinquent taxpayer is part owner. In *Folsom v. United States*,[19] the government lost on this issue, but the judgment did not put the matter to rest. For ten years the government apparently kept the matter open, and in *United States v. Kocher*[20] raised the same issue and won.

In addition to the tax cases that have been mentioned, there are other lines of cases in which the government has continued to litigate

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11. *See* cases cited note 10 *supra.*
12. Rev. Rul. 69-185, 1969-1 C.B. 108, 109.
13. Home Constr. Corp. v. United States, 439 F.2d 1165 (5th Cir. 1971).
14. *Id.* at 1169 n.5.
15. Movielab, Inc. v. United States, 494 F.2d 693 (Ct. Cl. 1974).
16. Performance Sys., Inc. v. United States, 501 F.2d 1338 (6th Cir. 1974).
17. Rev. Rul. 56-372, 1956-2 C.B. 187.
18. Kent Mfg. Corp. v. Commissioner, 288 F.2d 812 (4th Cir. 1961); Towanda Textiles, Inc. v. United States, 180 F. Supp. 373 (Ct. Cl. 1960).
19. 306 F.2d 361 (5th Cir. 1962).
20. 468 F.2d 503 (2d Cir. 1972).

a question of statutory construction after it has lost in the court of appeals.[21] *Frankel v. SEC*[22] dealt with the right of access to investigatory files under the Freedom of Information Act. The Court of Appeals for the District of Columbia Circuit was first to face this problem and concluded that the Act applied only if further adjudicatory proceedings were imminent.[23] The same result was reached by other courts.[24] Yet the government refused to accept the judicial interpretation and continued to urge that the Act be applied regardless of whether future adjudicatory proceedings were imminent; at least two circuits ultimately adhered to this position.[25]

The government's policy of relitigating decided questions of law is also evidenced in cases involving the National Labor Relations Board. A study of litigation by this agency points out that in one matter the Board's position was rejected in five courts of appeals, but the Board nevertheless continued to adhere to its position even in those circuits that had rejected it.[26] In another matter involving an allegedly unfair labor practice, the Board's position "has been rejected by at least five circuits in a series of decisions from 1961 on."[27] Still the Board refused to budge on the matter and indicated it would continue in its position until the United States Supreme Court ruled on the matter.[28]

Without doubt the government repeatedly has engaged in this "stubborn persistence" in its refusal to follow adverse decisions of the courts of appeals.[29] This policy of relitigation after the government

21. The United States does not regard a decision of the United States Court of Appeals as authoritative in the traditional common law sense. It is quite prepared to continue to litigate in other circuits a question that has been resolved in only one; even in the same circuit, the United States may be willing to relitigate an issue if minor factual distinctions can be made between the pending matter and the preceding decision. It appears to be the house rule of the Justice Department that three unanimous Courts of Appeals decisions are sufficient to establish authoritatively that a government position is wrong.

Carrington, *United States Appeals in Civil Cases: A Field and Statistical Study*, 11 HOUS. L. REV. 1101, 1104 (1974).

22. 460 F.2d 813 (2d Cir. 1972).

23. Bristol-Meyers Co. v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

24. *See* Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708 (E.D. Pa. 1968).

25. *See* Frankel v. SEC, 460 F.2d 813 (2d Cir. 1972); Evans v. Department of Transp., 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

26. C. SUMMERS, REPORT ON LABOR LAW CASES IN THE FEDERAL APPELLATE SYSTEM 13-14 (1974), *cited in* U.S. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 138 n.26 (1975) [hereinafter cited as COMMISSION ON REVISION].

27. COMMISSION ON REVISION, *supra* note 26, at 139.

28. Inter-Island Resorts, Ltd., 201 N.L.R.B. 139, 142 n.12 (1973).

29. Zacks v. United States, 280 F.2d 829, 831 (Ct. Cl. 1960).

has lost on a particular point should be given very careful consideration. In many of the examples, the government has continued to lose, and the cost/lack of benefits is clear. Society has paid a high price in duplicative litigation, uncertainty, use of the energies of judges, attorneys and litigants, and inequality in the application of the law. Even when the government ultimately wins, there is still a question of whether the benefit achieved, that is, vindication of the government's position, offsets the costs to society.

II. PRIOR DECISION AS CONTROLLING IN SUBSEQUENT LITIGATION IN DIFFERENT COURT

A. Introduction

In any system of common law courts, an adjudication between parties has a variety of effects. In the case before the court a judgment determines the rights of the parties in the immediate controversy. A judgment may also have an effect as the subject of review in a superior, reviewing court.

Beyond the immediate litigation, a judgment may have an effect on three different levels. First, the decision has impact as an adjudication on a point of law, as an increment in the development of the common law. In this way the law is created and developed.[30] Secondly, under the concept of preclusion/res judicata, the first judgment will have a binding effect in subsequent litigation concerning the claim or

30. The building of the common law—the stare decisis effect—is especially important. This principle has been articulated in R. VON MOSCHZISKER, STARE DECISIS, RES JUDICATA AND OTHER SELECTED ESSAYS 1 (1929) (quoting CHAMBERLAIN, STARE DECISIS 19) in the following terms:

> A deliberate or solemn decision of a court or judge, made after argument on a question of law fairly arising in a case, and necessary to its determination, is an authority, or binding precedent, in the same court or in other courts of equal or lower rank, in subsequent cases, where "the very point" is again in controversy; but the degree of authority belonging to such a precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary or inflexible.

Stare decisis originated at least five hundred years ago and is still extremely important in the common law jurisdictions. *Id.* at 1-29. It also serves some very important ends. As Von Moschzisker said:

> It expedites the work of the courts by preventing the constant reconsideration of settled questions; it enables lawyers to advise their clients with a reasonable degree of certainty and safety; it assures individuals that, insofar as they act on authoritative rules of conduct, their contract and other rights will be protected in the courts; and finally, it makes for equality of treatment of all men before the law and lends stability to the judicial arm of government.

Id. at 2.

issue involved in the first action.[31] Finally, an adjudication may be controlling precedent for other courts; for example, a judgment by an appellate court will be controlling on courts inferior to the appellate court.

Relationships between courts are difficult in even the simplest arrangement of courts, such as when there are only a supreme court and a set of trial courts. The complexities of these relationships become greater in scale in the three-tier federal system. In addition, the federal judicial system has changed in organization since its establishment late in the eighteenth century so there is a time variable that must be considered. Morever, the federal system has been and is composed of several different levels of courts—district, circuit, circuit courts of appeals, Supreme Court—existing in separate geographical areas, adding a spatial variable.

The doctrine of controlling decision is easy to apply in some situations. Most simply, the decisions of a superior court are controlling on inferior courts in the system; for example, federal district courts are bound by decisions of the United States Supreme Court. Application is more complicated when the judicial system is more complex.

In any arrangement of courts in which there is more than one court on a particular level, there is a problem of the effect that one court must give to an earlier decision on a point of law rendered by a court of equal stature. When one court has rendered a decision on a point of law and that same question is raised at a later time in another court, the latter can (1) decide the question of law on the merits as it perceives them and either concur in the earlier decision or reach a different result, (2) defer to the earlier decision of the other court without considering the merits of the controversy,[32] (3) give some presumption of correctness to the earlier decision in considering the merits of the controversy, or (4) seek another method of resolving the question if it feels that it cannot follow the earlier decision; for example, the second court can certify the question to a higher court or reserve the question for consideration by the entire panel of the deciding court. Unless the same party is involved, res judicata/preclusion is not applicable, but the relationship of courts involves the same fundamental considerations—saving the time and effort of the judges of the system

31. Ford Motor Credit Co. v. McKee, 416 F. Supp. 652, 655 (E.D. Ark. 1976).
32. *See generally* text accompanying notes 260-72 *infra*.

and avoiding conflicts of rulings, which are unseemly in a court system—that undergird the concept of preclusion/res judicata.

B. *Historical Perspective*

1. Rules Applicable in English Courts

The English courts over the past centuries developed and applied the general concepts of stare decisis, res judicata (known in some circles as preclusion) and controlling decision. In the case of the latter concept, one of the difficult problems was the effect to be given by one court to a prior decision on a point of law of a coordinate court.

At the time the federal courts were developing law concerning their relationship, the English courts were faced with the question of the effect to be given to the decision of a coordinate court. There was no statute or common law rule under which one court was bound to abide by the decision of another court of coordinate jurisdiction.[33] However, by the nineteenth century an opinion was expressed and followed that as a matter of judicial comity a court should follow a decision of a court of coordinate jurisdiction on a question of law. In *The Vera Cruz (No. 2)*[34] the court stated, "But there is no statute or common law rule by which one Court is bound to abide by the decision of another of equal rank, it does so simply from what may be called comity among judges."[35]

Some older cases also deal with this doctrine. In *Parkin v. Thorold*[36] the court mentioned the desirability of uniformity of decisions.

> I have repeatedly stated, that in my opinion uniformity of decision was so important to be obtained, that whenever I found a decision pronounced by one of the Vice-Chancellors, I should consider myself to be bound by that decision, where it related either to a new matter or was not opposed by contradictory decisions, or on some one of those principles of equity on which all decisions are founded; and that I should do so, even though, if it had originally come before me uninfluenced by any such decision, I might have come to a different conclusion.[37]

In *In re Rouse & Co. and Meir & Co.*[38] the court dealing with

33. 19 H. HALSBURY, THE LAWS OF ENGLAND 256 (2d ed. 1935).
34. [1884] 9 P.D. 96 (C.A.).
35. *Id.* at 98.
36. [1852] 96 Rev. R. 32.
37. *Id.* at 34.
38. [1871] L.R. 6 C.P. 211.

construction of a statute mentioned the certainty for individuals to be gained by uniformity of decisions: "When once the construction of a statute has been settled by a court of competent authority, it is expedient, for the sake of the suitors, that no doubt should be thrown upon it by a court of co-ordinate jurisdiction."[39] Several courts have expressed the opinion that "[w]hen a case can be taken to a Court of error, the decision of one Court of co-ordinate jurisdiction ought to be binding on the others."[40]

Some federal courts considering the effect to be given to a judgment of a coordinate court indicated that the federal courts should follow the English practice "to the effect that each division accepts the decisions of the other as of binding force, thereby avoiding the just complaints, and the substantial detriment to the administration of the law, which come from inconsistent proceedings of several tribunals of like authority."[41]

2. Doctrine of Controlling Decision in the Federal Courts

a. Prior to 1891 Change in Courts

In order to understand the relationship between federal courts it is necessary to understand the court structure that existed at various times in the history of the country. Initially, under the Judiciary Act of 1789, there were three tiers of courts: the Supreme Court, the circuit courts and the district courts. The district courts were trial courts; the circuit courts were both trial courts and appellate courts. There were three circuits, the Eastern, Middle and Southern, and initially these courts, composed of two Justices of the Supreme Court and a district judge, "were courts of great power and dignity, and at an early time . . . brought home to the people of every state a sense of national judicial power through the presence of the Supreme Court Justices."[42]

Circuit courts in the early days of the Republic were extensions of the Supreme Court since Justices of the Supreme Court sat on the circuit courts. When a circuit court, necessarily including a Justice of the Supreme Court, ruled on a matter, it ill behooved another circuit

39. *Id.* at 219.

40. Taylor v. Burgess, [1859] 157 Eng. Rep. 1076. *See also* Casson v. Churchley, [1884] 53 L.J.Q.B. 335, 336; *In re* South Durham Iron Co. (Smith's Case) [1879] 11 Ch. D. 579.

41. Duff Mfg. Co. v. Norton, 96 F. 986, 988 (C.C.D. Mass. 1899).

42. J. MOORE, JUDICIAL CODE: COMMENTARY ¶ 0.03(2), at 33-34 (1949).

court to decide the same question in a different way. In 1793 Congress provided that only a single Supreme Court Justice need sit on a circuit court.[43]

In the first half of the nineteenth century, Justice Story, sitting as a Circuit Justice, considered the effect to be given an earlier judgment of a coordinate court and stated,

> The rule of comity always observed by the justices of the supreme court in cases, which admitted of being carried before the whole court, was to conform to the opinions of each other, if any had been given. Such decisions amounted to authority, which, though not conclusive, were operative, whenever the question should be carried up; . . . .[44]

Justice Story concluded that "although his mind was not without much difficulty on this point, he should rule for the plaintiffs in conformity with the opinion of Mr. Justice McLean."[45]

An early line of cases that considered the effect on a circuit court of an earlier decision by a coordinate court dealt with the validity of patents. In 1868 the Circuit Court for the Eastern District of New York decided *American Wood-Paper Co. v. Fibre Disintegrating Co.*,[46] which involved an alleged infringement of a patent. The court, in finding for complainants, stated,

> The questions raised in the case are so similar to those already considered in other actions founded upon the same patents, and especially in an action brought by the same complainants in the circuit court for the eastern district of Pennsylvania, . . . and there decided since the commencement of the present suit, that I feel relieved of much of the responsibility which I should otherwise feel in disposing of questions of this character. In the light of these decisions, my way to a correct determination is not obscure.[47]

The court followed the Pennsylvania circuit court's conclusions concerning certain patents. The court also referred to an earlier decision

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43. *Id.* at 34.

44. Washburn v. Gould, 29 F. Cas. 312, 317 (No. 17,214) (C.C.D. Mass. 1844).

45. *Id.* Mr. Justice Story continued:

> As to the points, which had been ruled by my brethren on other circuits, and which I adopted from that just comity, which belongs to their learning and ability, and which has long been adopted as a fit rule to govern me in my circuits, since I know of no higher authority except that of the supreme court of the United States, I shall continue to adhere to their doctrine, as I have not the presumption to suppose my own judgment entitled to more weight than theirs.

Id. at 325.

46. 1 F. Cas. 728 (No. 320) (C.C.E.D.N.Y. 1868), *aff'd*, 90 U.S. (23 Wall.) 566 (1873).

47. *Id.* at 729.

in that circuit dealing with another aspect of the patent and followed the earlier decision on that point. It is interesting that the New York circuit court followed other circuit decisions in order both to strike down and to uphold the patents involved.

The effect of one circuit opinion on a judge in a different circuit was discussed at length in *Goodyear Dental Vulcanite Co. v. Willis*,[48] a decision by Circuit Judge Emmons in November 1874. The court listened to argument that it should entertain the action "wholly unembarrassed by judicial action elsewhere"[49] and then responded that "with much confidence" it retained the view it held at the commencement of argument,

> that in all the subordinate federal jurisdictions these questions should be deemed at rest until the court of last resort should reverse some of the judgments already rendered. We think the learned counsel for the defendant much underrated the effect which it is our duty to give to judgments pronounced by co-ordinate courts where precisely the same points are brought in litigation before us.[50]

In 1882 district court Judge Brown, sitting as a circuit court judge in a case of original jurisdiction, stated,

> Upon general questions of law we listen to the opinions of our brother judges with deference, and with a desire to conform to them if we can conscientiously do so, but we do not treat them as conclusive. In patent causes, however, where the same issue has been passed upon by the circuit court sitting in another district, it is only in case of a clear mistake of law or fact, or newly-discovered testimony, or upon some question not considered by such court, that we feel at liberty to review its findings.[51]

The court entered judgment for complainant based on a prior determination in the southern district of New York.

The question of the effect to be given to an earlier decision on patent validity finally came before the United States Supreme Court in *Mast, Foos & Co. v. Stover Manufacturing Co.*[52] The Court indicated that federal courts had a responsibility to follow earlier decisions of coordinate courts, stating,

> The obligation to follow the decisions of other courts in patent cases of course increases in proportion to the number of courts

48. 10 F. Cas. 754, 755-56 (No. 5603) (C.C.E.D. Mich. 1874).
49. *Id.* at 754.
50. *Id.* at 754-55.
51. Searls v. Worden, 11 F. 501, 502 (C.C.D. Mich. 1882).
52. 177 U.S. 485 (1900).

> which have passed upon the question, and the concordance of opinion may have been so general as to become a controlling authority. So, too, if a prior adjudication has followed a final hearing upon pleadings and proofs, especially after a protracted litigation, greater weight should be given to it than if it were made upon a motion for a preliminary injunction. These are substantially the views embodied in a number of well-considered cases in the Circuit Courts and Circuit Courts of Appeals.[53]

This was an interesting point of view since it meant that a litigant in the second suit, who may never have had a day in court on the issue of validity of the patent, was to be bound by the earlier adjudication of validity. The idea seemed to be that initial "protracted litigation" would assure correctness of the determination. The concept of binding a person not a party to a suit was unusual and could be justified constitutionally only if it could be assumed that the interests of the party to be bound had been adequately represented in the first suit.[54]

While the doctrine of controlling decision was applied in patent cases, the same doctrine was held applicable in other types of cases. In *Cole Silver Mining Co. v. Virginia & Gold Hill Water Co.*[55] a circuit judge had granted an injunction. In subsequent proceedings of the same case the matter came before a Justice of the United States Supreme Court sitting as a Circuit Justice. He was faced with the question of whether he was bound by the earlier decision in the case. Justice Field, considering the injunction that had been issued, stated,

> The injunction, although preventive in form, is undoubtedly mandatory in fact. It was intended to be so by the circuit judge who granted it, and the objection which is now urged for its dissolution was presented to him, and was fully considered. I could not with propriety reconsider his decision, even if I differed from him in opinion. The circuit judge possesses . . . equal authority with myself in the circuit, and it would lead to unseemly conflicts, if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case.[56]

After considering the prior applicable rulings of law, Justice Field denied the motion to dissolve the injunction.

Although *Cole Silver Mining* involved only a single court, it did involve different judges and the effect to be given to an earlier ruling.

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53. *Id.* at 489.
54. Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357, 376 (1974).
55. 6 F. Cas. 72 (No. 2990) (C.C.D. Nev. 1871).
56. *Id.* at 74.

The deferential attitude reflected in Field's opinion suggests the proper course when one circuit court is faced with an earlier decision by another circuit.

Justice Miller of the United States Supreme Court was sitting on the circuit court that decided *Wells v. Oregon Ry. & N. Co.*[57] Justice Miller held that prior decisions by federal courts involving the right of express companies to use railroad facilities were controlling in this litigation. The court stated that until the Supreme Court decided the matter, decisions of other circuit courts should be a guide.

In *Reed v. Atlantic & P. R. Co.*,[58] litigating the rights of stockholders, the Circuit Court for the Southern District of New York, following the judgment of a coordinate court, stated, "it would be unseemly for this court, in a suit upon the same lease, brought by one of the stockholders, to recover part of the same dividends, to hold the contrary. Such a decision might result in two judgments against the defendants in different jurisdictions, for the dividends."[59] The court adopted a rule from *Goodyear Dental Vulcanite Co. v. Willis*[60] that " 'every suggestion of propriety and fit public action demands' that the decision of the co-ordinate tribunal 'be followed until modified by the appellate court.' "[61]

During the period immediately after the Civil War when the problem of deciding what effect to give to an earlier judgment was first being considered, some judges felt that they either could not or would not follow earlier decisions by coequal courts. The rationales given included (1) the duty to face and decide cases and not pass the responsibility on to some other judge, (2) the opinion that coequal courts are not controlling but rather are courts of different jurisdictions and command respect but not obedience, and (3) the desirability of diversity so that a reviewing court would be able to consider all possibilities.

An example of this refusal to follow an earlier, supposedly controlling decision is found in *Northern Pacific Railroad Co. v. Sanders*,[62] in which the judge obviously felt he was not obliged to follow the earlier decision, as demonstrated in his statement:

57. 15 F. 561 (C.C.D. Ore. 1883).

58. 85 F. 692 (C.C.S.D.N.Y. Aug. 27, 1884); 21 F. 283 (C.C.S.D.N.Y. Aug. 26, 1884) (case reported twice).

59. 85 F. at 693; 21 F. at 283-84 (wording not identical).

60. 10 F. Cas. 754 (No. 5603) (C.C.E.D. Mich. 1874).

61. 85 F. at 693; 21 F. at 284 (wording not identical) (both quoting 10 F. Cas. at 755).

62. 47 F. 604 (C.C.D. Mont. 1891).

> Finally, plaintiff urges that, when one circuit court of the United States decides a point, all the others should conform their views to this decision, until the matter is settled by the rulings of the supreme court. But this is not the rule which prevails in the circuit courts of the United States. . . . A United States circuit court undoubtedly always with reluctance will assert its right to disagree with the decision of another circuit court, even when satisfied that it is erroneous. I am aware that in refusing to concur with the opinions of many able jurists expressed upon the construction of said section 6, I, justly perhaps, subject myself to the charge of presumption. I trust not, however, to the charge of having arrayed myself with the growing army of cranks, who find so congenial a home in our republican society; for I have no desire to be other than conservative, and to adhere to the well-established rules for construing a statute of the class under consideration. In not one of the decisions referred to as supporting the views of plaintiff is there any discussion of the terms under consideration used in said section 6, and they shown to have the force claimed; in none of them a reference to the established rules for construing such statutes. In the Bible there is the command: "Thou shalt not follow a multitude to do evil."[63]

In some cases the refusal to follow an earlier decision was completely consistent with the doctrine of a controlling decision, as when the refusal was based on an element that distinguished the instant case from the earlier one. For example, the Circuit Court for the Northern District of Illinois, in a patent case, refused to follow a Massachusetts circuit court decision on the ground that the proof in the earlier case was quite different from that in the Illinois case. The court said that it would have felt "wholly bound" by the first decision had the evidence been substantially the same.[64]

b. Controlling Decision Following 1891 Change

In 1891 an intermediate appellate court level, the circuit courts of appeals, was created to relieve the Supreme Court of some of the work that had been burdening it. The Act of March 3, 1891, created nine circuits.[65] Each circuit had a circuit court of appeals, which operated as an intermediate appellate court. A member of the Supreme

63. *Id.* at 613-14.

64. Edgarton v. Furst & Bradley Mfg. Co., 9 F. 450, 452 (C.C.N.D. Ill. 1881). *See also* Denny v. Dodson, 32 F. 899 (C.C.D. Ore. 1887).

65. The Act of February 9, 1893, created an additional circuit court of appeals for the District of Columbia. J. MOORE, JUDICIAL CODE: COMMENTARY ¶ 0.03(51), at 455 (1949).

Court assigned to the circuit and the circuit and district court judges within the circuit were competent to sit as judges in the circuit court of appeals. The act establishing the circuit courts of appeals authorized the naming of an additional circuit judge in each circuit to help handle the judicial work of the new courts. The act also eliminated any appellate jurisdiction in the old circuit courts; appeals from the district courts would go to either the circuit court of appeals or the United States Supreme Court.

Following the creation of the circuit courts of appeals in 1891 the circuit courts still existed for some twenty years. This meant the federal courts were forced to make some decisions regarding the relationship among courts in a rather complex court system. There were four specific problems that faced the courts: (1) the problem of the relationship between circuit courts when one had rendered a judgment on a point and the same problem then arose in another circuit court; this was the same problem as the one that existed prior to 1891; (2) the problem of a decision by a circuit court followed by a circuit court of appeals facing the same legal question; (3) the problem of a decision by a circuit court of appeals followed by litigation in a circuit court involving the same legal question; and (4) the situation where a circuit court of appeals had decided a particular question, and the same issue then arose in another circuit court of appeals. This latter question is the one that exists today and that deserves serious consideration.

C. Relationship Among Courts

1. Relationship Among Circuit Courts

Since the circuit courts continued to exist for twenty years after the establishment of the circuit courts of appeals,[66] the federal courts still faced the problem during that period of the effect to be given by one circuit court to an earlier circuit court decision. Circuit courts in Massachusetts,[67] Vermont[68] and Pennsylvania[69] gave controlling effect to an earlier decision by another circuit court in every case including cases involving such different factual situations as patents,[70] freight

66. 1 MOORE'S FEDERAL PRACTICE ¶ 0.3[2], at 21 (2d ed. 1975).

67. Duff Mfg. Co. v. Norton, 96 F. 986 (C.C.D. Mass. 1899); Edison Elec. Light Co. v. Beacon Vacuum Pump & Elec. Co., 54 F. 678 (C.C.D. Mass. 1893).

68. Grand Trunk Ry. v. Central Vt. R.R., 84 F. 66 (C.C.D. Vt. 1897).

69. F.B. Vandegrift & Co. v. United States, 164 F. 65 (C.C.E.D. Pa. 1908); MacMurray v. Gosney, 106 F. 11 (C.C.W.D. Pa. 1901); Macbeth v. Gillinder, 54 F. 169 (C.C.E.D. Pa. 1889).

70. Duff Mfg. Co. v. Norton, 96 F. 986 (C.C.D. Mass. 1899); Edison Elec. Light

routes,[71] an insolvent savings and loan association[72] and customs.[73] The reasons varied among the courts; in one of the patent cases the Vermont circuit court stated,

> The general rule is that where the validity of a patent has been sustained by prior adjudication, and especially after a long, arduous, and expensive litigation, the only question open on motion for a preliminary injunction in a subsequent suit against another defendant is the question of infringement, the consideration of other defenses being postponed until final hearing.[74]

This doctrine prevailed in this kind of situation even though a nonparty to the first suit was affected by the judgment. Other courts relied on comity, avoidance of confusion,[75] time constraints of the courts,[76] and a belief that if the circuit court were not to be followed, the circuit court of appeals should make that decision.[77]

2. Circuit Court Decision Followed by Litigation in a Circuit Court of Appeals

After the establishment of the circuit courts of appeals it was necessary to establish the relationship between the newly established courts and the old circuit courts. In *McNeely v. Williams*[78] the Third Circuit Court of Appeals was faced with an earlier decision by the Circuit Court for the Southern District of New York that seemed to be controlling. The Third Circuit Court of Appeals stated,

> This court as an appellate tribunal is not in the least concluded by the decision in the New York case, nor do considerations of comity toward a circuit court with respect to its rulings have the same potency with a circuit court of appeals as they may properly have with a circuit court when confronted with the alternative of following or departing from the ruling of another circuit court.[79]

This assertion was a recognition of the superior position of the newly created courts and a conclusion that logic required.

Co. v. Beacon Vacuum Pump & Elec. Co., 54 F. 678 (C.C.D. Mass. 1893); Macbeth v. Gillinder, 54 F. 169 (C.C.E.D. Pa. 1889).

71. Grand Trunk Ry. v. Central Vt. R.R., 84 F. 66 (C.C.D. Vt. 1897).

72. MacMurray v. Gosney, 106 F. 11 (C.C.W.D. Pa. 1901).

73. F.B. Vandegrift & Co. v. United States, 164 F. 65 (C.C.E.D. Pa. 1908).

74. Edison Elec. Light Co. v. Beacon Vacuum Pump & Elec. Co., 54 F. 678, 679 (C.C.D. Mass. 1893).

75. Grand Trunk Ry. v. Central Vt. R.R., 84 F. 66, 67 (C.C.D. Vt. 1897).

76. Cutter Elec. & Mfg. Co. v. Anchor Elec. Co., 97 F. 804, 806-07 (C.C.S.D.N.Y. 1899), *aff'd*, 101 F. 120 (2d Cir. 1900).

77. F.B. Vandegrift & Co. v. United States, 164 F. 65, 70 (C.C.E.D. Pa. 1908).

78. 96 F. 978 (3d Cir. 1899).

79. *Id.* at 982.

Duplex Printing-Press Co. v. Campbell Printing Press & Manufacturing Co.,[80] written by Judge Taft, posed the problem of prior patent litigation in a circuit court. The circuit court of appeals was forced to decide the effect of the circuit court decision both on subsequent litigation in the circuit court and on review of the circuit court judgment in the circuit court of appeals. Judge Taft declared,

> The judgment of the circuit court of Massachusetts is entitled to the same consideration in this court, as a reason for granting the preliminary injunction, as it had in the court below. . . . Upon a final hearing upon the merits, it would be different; for then considerations of comity might properly have weight with the court below, which we should not hesitate, as an appellate court, to disregard in finally settling the rights of the parties. . . .
>
> . . . .
>
> . . . It has been decided in this court, and in the courts of appeals of the Second and Seventh circuits, that an adjudication of another circuit court than that whose action is being considered, finding the validity of the patent and its infringement, is a sufficient ground, not only in the circuit court for an order granting a preliminary injunction, but also in the appellate court for affirming such an order.[81]

The circuit court of appeals was considering the effect to be given a decision by a circuit court in another circuit. The facts that a patent was involved and that both a preliminary injunction and a final adjudication were being sought are significant in analyzing Taft's deference to the prior decision.

United States v. Stone & Downer Co.[82] was similar procedurally to the *Duplex* case. The First Circuit Court of Appeals was faced with a prior decision by a circuit court in another circuit. The circuit court decision below had followed the earlier decision of the other circuit court. The First Circuit Court of Appeals delineated both its obligation and the obligation of the circuit court that had followed the prior decision, stating, "This it clearly was justified in doing, whether or not it fully approved that decision. On the other hand, being a decision only of the circuit court, it does not stand as an authority binding us."[83] The court clearly demonstrated the higher position of the circuit court of appeals vis-à-vis the circuit courts.

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80. 69 F. 250 (6th Cir. 1895).
81. *Id.* at 252-55.
82. 175 F. 33 (1st Cir. 1909).
83. *Id.* at 35.

3. Circuit Court of Appeals Decision Followed by Litigation in a Circuit Court

Since the circuit court of appeals was established as an appellate court over the circuit courts, the inferior position of the latter was apparent. However, the relationship of an appellate court in one circuit to a circuit court in another still posed a question of the reach of an appellate decision beyond the circuit in which the circuit court of appeals was sitting.

The question was soon raised. Shortly after the establishment of the circuit courts of appeals, the circuit court in Maine had a case in which an apparently controlling decision had been handed down by the Circuit Court of Appeals for the Sixth Circuit. Although the circuit court was uncertain at first about the effect to be given the earlier judgment, it finally concluded that the judgment was controlling.[84]

The next year the circuit court in Massachusetts was faced with a case in which an earlier judgment by the Circuit Court of Appeals for the Third Circuit was seemingly controlling.[85] The court relied on an opinion from the First Circuit, *Beach v. Hobbs*,[86] to the effect that

> Although the defendants in this case are not the same or in privity with the defendants in the other cases, we think, as a general rule, and especially in patent cases, we should follow the decision of the circuit court of appeals of another circuit upon final hearing with respect to the issues determined, if based upon substantially the same state of facts, unless it should clearly appear that there was manifest error.[87]

The circuit court continued,

> The circuit courts and the circuit courts of appeals throughout the United States are of equal dignity and therefore we are unable to perceive any reason why, unless in cases of clear error or oversight, each of these courts should not follow the rule practiced in the two divisions of the court of appeal, sitting under the English judicature acts, to the effect that each division accepts the decisions of the other as of binding force, thereby avoiding the just complaints, and the substantial detriment to the administration of the law, which come from inconsistent proceedings of several tribunals of like authority.[88]

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84. Fairfield Floral Co. v. Bradbury, 89 F. 393 (C.C.D. Me. 1898).
85. Duff Mfg. Co. v. Norton, 96 F. 986 (C.C.D. Mass. 1899).
86. 92 F. 146 (1st Cir. 1899).
87. *Id.* at 147, *quoted in* Duff Mfg. Co. v. Norton, 96 F. at 988.
88. Duff Mfg. Co. v. Norton, 96 F. at 988.

The situation was replicated in the circuit court in Ohio in a patent case.[89] An earlier decision had been rendered by the Circuit Court of Appeals for the Second Circuit. The court followed the earlier decision, stating that "the authority of the decision of the New York circuit court and the circuit court of appeals . . . would be of controlling weight in this hearing both on the principles of comity and also as adjudications entitled to the greatest respect."[90]

The same position was adopted by circuit courts in Missouri,[91] New York[92] and Ohio,[93] in cases involving patents,[94] liability of stockholders[95] and will construction.[96] Authority for the contrary position was not nearly so great in weight or so persuasive.[97]

4. Relation Among Circuit Courts of Appeals (Later Courts of Appeals)

Following the establishment of the circuit courts of appeals in 1891 and the abolition of the circuit courts in 1911, the federal judicial system had symmetry and logic. The district courts were the base-line trial courts. Appeals were generally to the circuit courts of appeals. The Supreme Court was the apex of the court system and was available to establish the corpus juris of the federal system. Still the question of the effect to be given an earlier decision by a circuit court of appeals when the matter was raised in later litigation in a coordinate court was troublesome. Various intermediate appellate courts faced the question and answered it in various ways.

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89. National Folding-Box & Paper Co. v. Dayton Paper Novelty Co., 95 F. 991 (C.C.S.D. Ohio 1899).

90. *Id.* at 996.

91. New York Filter Mfg. Co. v. Jackson, 112 F. 678 (C.C.E.D. Mo. 1900).

92. The Fayerweather Will Cases, 118 F. 943 (C.C.S.D.N.Y. 1902), *aff'd sub nom.* Fayerweather v. Ritch, 195 U.S. 276 (1904); Hale v. Hilliker, 109 F. 273 (C.C.N.D.N.Y. 1901).

93. Thomson-Houston Elec. Co. v. Holland, 143 F. 903 (C.C.N.D. Ohio 1906); National Folding-Box & Paper Co. v. Dayton Paper Novelty Co., 95 F. 991 (C.C.S.D. Ohio 1899).

94. Thomson-Houston Elec. Co. v. Holland, 143 F. 903 (C.C.N.D. Ohio 1906); New York Filter Mfg. Co. v. Jackson, 112 F. 678 (C.C.E.D. Mo. 1900); National Folding-Box & Paper Co. v. Dayton Paper Novelty Co., 95 F. 991 (C.C.S.D. Ohio 1899).

95. Hale v. Hilliker, 109 F. 273 (C.C.N.D.N.Y. 1901).

96. The Fayerweather Will Cases, 118 F. 943 (C.C.S.D.N.Y. 1902), *aff'd sub nom.* Fayerweather v. Ritch, 195 U.S. 276 (1904).

97. *See* Cimiotti Unhairing Co. v. American Fur Ref. Co., 120 F. 672, 674 (C.C.D.N.J.) (dictum), *rev'd on other grounds,* 123 F. 869 (3d Cir. 1903), *aff'd,* 198 U.S. 399 (1905); Welsbach Light Co. v. Cosmopolitan Incandescent Gaslight Co., 100 F. 648, 649 (C.C.N.D. Ill.), *aff'd,* 104 F. 83 (7th Cir. 1900).

a. First Circuit

Within a short period after the establishment of the circuit courts of appeals in 1891, the First Circuit court was faced with the problem of the effect to be given to an earlier adjudication by another circuit court of appeals. In a patent case, *Beach v. Hobbs*,[98] the court followed a Second Circuit decision and adopted the general rule, to be applied especially in patent cases, that circuit courts of appeals should follow one another if the case was based on substantially the same set of facts, unless the earlier decision was clearly in error.

About the same time, the court had before it a patent case in which a prior decision in another circuit seemed controlling.[99] The court reiterated its position:

> Where the prior adjudication comes from a court of final authority, like the circuit court of appeals in any circuit, and has stood for a series of years, the rule thus stated in Beach v. Hobbs is re-enforced by the additional considerations [of stare decisis, public policy and laches] . . . . In the case at bar it will be found that all the considerations which give weight to prior adjudications, so far as they relate to the validity of certain claims in the patent in issue, have full force.[100]

The same conclusion was reached in *Gill v. Austin*,[101] a tax case in which the court said, "[W]e refer to our practice, as stated many times, with reference to our disposition to follow decisions of the Circuit Courts of Appeals in other circuits whenever they can form a precedent. In accordance with that practice, we hold that the United States cannot prevail."[102] This attitude was repeated by the court the next year in a customs case in which the court deferred to a decision by the Circuit Court of Appeals for the Second Circuit.[103] The following year the court again applied the same doctrine and followed the decision of three circuit courts of appeals. This time it was the Second, Third and Seventh Circuits, and the court referred to the "well-settled rules in this circuit in regard to following the decisions of . . . other circuits unless under especially exceptional circumstances."[104]

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98. 92 F. 146 (1st Cir. 1899), *aff'd*, 180 U.S. 383 (1901).

99. Hatch Storage Battery Co. v. Electric Storage Battery Co., 100 F. 975 (1st Cir. 1900). *See also* Bresnahan v. Tripp Giant Leveller Co., 99 F. 280 (1st Cir. 1900).

100. Hatch Storage Battery Co. v. Electric Storage Battery Co., 100 F. at 976-77.

101. 157 F. 234 (1st Cir. 1907), *cert. denied*, 218 U.S. 677 (1910).

102. *Id.* at 235.

103. United States v. F.A. Marsily & Co., 165 F. 186 (1st Cir. 1908).

104. Kinney v. Conant, 166 F. 720, 721 (1st Cir.), *cert. denied*, 214 U.S. 526

Apparently the Circuit Court of Appeals for the First Circuit next spoke to the matter in 1934, in two cases, one involving tax matters,[105] the other a bankruptcy case.[106] In both the court followed the decisions of other circuit courts of appeals. The court, however, seemed to be backing away from an absolute rule on the matter stating, "While we are not bound to follow the decision of another circuit, it is the rule in this circuit that we will do so when the question decided involves the construction of a federal statute, unless we are of the opinion that it is clearly wrong."[107] The court explained that it would follow the decision unless it had a "clear conviction" that the earlier decision was wrong.[108]

The Court of Appeals for the First Circuit refused to follow two earlier decisions by other courts of appeals in *Round v. Commissioner*,[109] a case involving the taxability of accumulated trust income. The taxpayer argued the controlling nature of the earlier decisions, and the Commissioner conceded "that these cases directly support petitioners' argument that accumulated trust income is not includible in decedent's gross estate, but urges that these cases were wrongly decided and should not be followed by this court."[110] The Court of Appeals for the First Circuit considered the matter, agreed with the IRS and refused to go along with the earlier decisions. In this case the Commissioner's policy of relitigation[111] resulted in a conflict in the circuits concerning the point.

The next time the Court of Appeals for the First Circuit spoke on the effect of a prior decision in another circuit was in *United States v. Mitchell*.[112] In this criminal case the court refused to follow an apparently controlling decision rendered by the Seventh Circuit, simply indicating that the decision of another circuit was not controlling in that circuit.[113]

(1909), *cert. denied*, 218 U.S. 677 (1910) (citing Gill v. Austin, 157 F. 234 (1st Cir. 1907), *cert. denied*, 218 U.S. 677 (1910)).

105. Gottlieb v. White, 69 F.2d 792 (1st Cir.), *cert. denied*, 292 U.S. 657 (1934).

106. Sherman & Son v. Corin, 73 F.2d 468 (1st Cir. 1934).

107. *Id.* at 470.

108. *Id.*

109. 332 F.2d 590 (1st Cir. 1964).

110. *Id.* at 595.

111. The Commissioner was ultimately vindicated in United States v. O'Malley, 383 U.S. 627 (1966).

112. 432 F.2d 354 (1st Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

113. *Id.* at 356.

b. Second Circuit

The Second Circuit Court of Appeals first faced the matter of a controlling decision in litigation involving a customs matter. Initially the Second Circuit had held that temporarily strung beads were not subject to duty.[114] After that decision the Seventh Circuit Court of Appeals had reached the opposite result, holding that such beads were taxable.[115] In a later case, *Henry E. Frankenberg Co. v. United States*,[116] the Second Circuit commented that its initial decision was first in time, that it was not persuaded by the opinion of the Seventh Circuit and that it would adhere to its position and leave it to the Supreme Court to make the law uniform.

Several years later the Second Circuit Court of Appeals was faced with litigation involving the Federal Safe Appliance Act regarding which there was an earlier controlling decision by the Circuit Court of Appeals for the Eighth Circuit.[117] The Second Circuit elected to follow the earlier decision, stating, "[I]n view of the desirability of uniformity in the decisions of the courts of the different circuits in interpreting this act, we feel it our duty to follow the decision of the Circuit Court of Appeals for the Eighth Circuit . . . . The facts in that case are very similar to those appearing here."[118]

The next year in an insurance case the Second Circuit summarily affirmed a decision of a district court because "we are very far from being clear in our convictions that the Court of Appeals in the Ninth Circuit erred in its construction of the contract."[119] This suggests that substantial weight was given to the earlier decision by the other circuit court of appeals.

The Second Circuit rejected the doctrine of controlling decision in the late 1920's in a case involving the claim of a brewery for a tax deduction for obsolescence of good will after the passage of prohibition.[120] The Eighth Circuit Court of Appeals earlier had considered a similar claim on behalf of a brewery and rejected it.[121] The Board

114. Steiner v. United States, 79 F. 1003 (2d Cir. 1895) (mem.).
115. United States v. Buettner, 133 F. 163 (7th Cir. 1904).
116. 146 F. 63 (2d Cir. 1906) (per curiam), *aff'd*, 206 U.S. 224 (1907).
117. Erie R.R. v. Russell, 183 F. 722 (2d Cir. 1910), *cert. denied*, 220 U.S. 607 (1911).
118. *Id.* at 725-26.
119. Norwich Union Fire Ins. Soc'y v. Stanton, 191 F. 813, 815 (2d Cir. 1911).
120. Haberle Crystal Springs Brewing Co. v. Clarke, 30 F.2d 219 (2d Cir. 1929), *rev'd*, 280 U.S. 384 (1930).
121. Red Wing Malting Co. v. Willicuts, 15 F.2d 626 (8th Cir. 1926), *cert. denied*, 273 U.S. 763 (1927).

of Tax Appeals considered the same question and concurred in the conclusion of the Eighth Circuit.[122] In 1928 the Ninth Circuit followed the Eighth on the point involved.[123] Early in 1929, however, the Second Circuit had the same matter before it and concluded that a brewery was entitled to the deduction.[124] The court, composed of Judges Manton,[125] Learned Hand and Swan, refused to follow the decision of the Eighth Circuit or any subsequent decision. The language of the Second Circuit in rejecting the doctrine of controlling decision is interesting in showing the attitude of the court: "Much as we respect the considered decisions of other circuits, we conceive that our duty requires us to form an independent judgment in cases of first impression in our own court, and forbids us blindly to follow other circuits, when our minds are not persuaded by the arguments advanced."[126] The court then indicated that the Supreme Court could "exercise its appropriate function" to reconcile differences between circuits and determine the proper interpretation of this important section of the tax code.[127]

The Supreme Court did in fact reverse the decision of the Second Circuit.[128] At the time the Second Circuit was considering the matter, the Third Circuit was also faced with the same problem, and the latter court indicated that it was persuaded by the earlier decision of the Eighth Circuit, although it was aware of the decisions reaching the opposite conclusion.[129]

In *Pan American World Airways, Inc. v. CAB*[130] the Second Circuit Court of Appeals faced a problem concerning which there seemed to be a controlling decision by the Court of Appeals for the District

122. Manhattan Brewing Co., 6 B.T.A. 952 (1927).

123. Landsberger v. McLaughlin, 26 F.2d 77 (9th Cir. 1928).

124. Haberle Crystal Springs Brewing Co. v. Clarke, 30 F.2d 219 (2d Cir. 1929), *rev'd*, 280 U.S. 384 (1930).

125. For a discussion of Judge Manton see Vestal, *A Study in Perfidy*, 35 IND. L.J. 17 (1959). Judge Manton obviously had very interesting ideas about the proper relationship of judges in the federal system. See especially the discussion of the Fox Theatres Corporation case (Johnson v. Manhattan Ry., 289 U.S. 479 (1933)), *id.* at 22-24, and the IRT receivership case (American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., 4 F. Supp. 68 (S.D.N.Y. 1933)), *id.* at 24-27.

126. Haberle Crystal Springs Brewing Co. v. Clarke, 30 F.2d at 222.

127. *Id.*

128. Clarke v. Haberle Crystal Springs Brewing Co., 280 U.S. 384 (1930) (decision on merits as Supreme Court saw them).

129. Renziehausen v. Commissioner, 31 F.2d 675 (3d Cir. 1929), *aff'd*, 280 U.S. 387 (1930).

130. 380 F.2d 770 (2d Cir. 1967).

of Columbia Circuit.[131] The Second Circuit considered the question at length and ultimately distinguished and determined not to follow the earlier decision by the District of Columbia Circuit Court of Appeals.[132] In the case before the Second Circuit the court stated,

> This court has said that "the law of collateral estoppel is 'growing law.' " . . . Nevertheless judicial aversion to forum shopping is not a sufficient ground for precluding litigation of a question of law by extending the doctrine of *res judicata* into areas traditionally governed by "the ordinary rule of stare decisis." . . . We therefore consider ourselves free "to make an independent examination of the legal matters at issue."[133]

The court isolated the central question in the problem: should the ordinary rules of stare decisis control when federal courts of appeals are involved, or should additional factors be fed into the computations?

Petition for certiorari to the Supreme Court was granted in *Pan American World Airways, Inc. v. CAB*, but unfortunately one Justice was not able to participate in the decision, and the Court split evenly.[134] This had the effect of affirming the decision of the court of appeals but meant that no controlling precedent was established. The final word came through an act of Congress that had the effect of overruling the Court of Appeals for the Second Circuit.[135]

The need for uniformity in the decisions of the federal courts was recognized by the Court of Appeals for the Second Circuit in another case with the identical style, *Pan American World Airways, Inc. v. CAB*,[136] involving rates for international air carriers. In an earlier case in the Court of Appeals for the District of Columbia Circuit the same question had been raised and decided in favor of the government. The Second Circuit observed, "Although we are not bound by the decision or the rationale of the [District of Columbia court], we do find much of its reasoning persuasive."[137] The court also warned against Pan Am's tactics:

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131. American Airlines, Inc. v. CAB, 365 F.2d 939 (D.C. Cir. 1966).

132. Pan American World Airways, Inc. v. CAB, 380 F.2d 770, 774-77 (2d Cir. 1967), *aff'd by an equally divided Court per curiam sub nom.* World Airways, Inc. v. Pan American World Airways, Inc., 391 U.S. 461 (1968).

133. *Id.* at 776-77.

134. *Sub nom.* World Airways, Inc. v. Pan American World Airways, Inc., 391 U.S. 461 (1968).

135. Act of Sept. 26, 1968, Pub. L. No. 90-514, 82 Stat. 867 (codified at 49 U.S.C. §§ 1301(33) & 1371(e)(6) (1970)).

136. 517 F.2d 734 (2d Cir. 1975).

137. *Id.* at 741.

> Possibly petitioners chose to appeal the Board's ruling . . . in this Circuit in the hopes of finding a court more inclined toward their view. Such "forum shopping" should be discouraged. While we do view the issues from a fresh and unbiased viewpoint, we are cognizant of Congressional intent to set a national policy with regard to charter flight operations.[138]

The court reiterated its position, noting, "Congress expected the airlines to be regulated from the CAB in Washington, not from eleven different circuits."[139] The court concluded by finding in favor of the government[140] in accordance with the prior court of appeals opinion.

c. Third Circuit

Soon after the establishment of the circuit courts of appeals, the Third Circuit court was faced with a problem of deciding how much effect to give to an earlier decision by a circuit court in another circuit. Recognizing that the latter court was inferior to the circuit court of appeals, the court stated,

> This court as an appellate tribunal is not in the least concluded by the decision in the [circuit court] case, nor do considerations of comity toward a circuit court with respect to its rulings have the same potency with a circuit court of appeals as they may properly have with a circuit court when confronted with the alternative of following or departing from the ruling of another circuit court.[141]

This position is completely consistent with the controlling decision doctrine since that doctrine involves coordinate courts and not those of different levels.

In the period following the establishment of the circuit courts of appeals, the Third Circuit was faced with several cases raising the question of the application of the controlling decision doctrine. In *McCoach v. Philadelphia Trust, Safe Deposit & Insurance Co.*,[142] a tax case, the court was confronted with an earlier, apparently controlling decision by the Circuit Court of Appeals for the Second Circuit. The Third Circuit followed the Second Circuit, explaining,

> We base this ruling, not upon comity merely, but upon the ground that in suits of this character uniformity in the judgments of the several Courts of Appeals is especially important, and should

138. *Id.*
139. *Id.* at 745.
140. *Id.* at 746.
141. McNeely v. Williames, 96 F. 978, 982 (3d Cir. 1899).
142. 142 F. 120 (3d Cir. 1905).

> be maintained wherever, as in the present instance there has been no decision of the Supreme Court which precludes it.[143]

A few years later, in 1908, the same court, then following a decision of the Circuit Court for the Southern District of New York, stated,

> In suits of this character, uniformity in the judgments of the courts of the first instance, as well as in those of the appellate tribunals, is desirable, and where no direct attack has been made upon a prior adjudication by a Circuit Court of the question sought to be subsequently raised in a similar suit we think that the prior adjudication, unless clearly erroneous, should be followed.[144]

The same rationale was utilized by the Third Circuit again in 1908 in a customs case in which the court indicated it would follow an earlier decision in order to maintain uniformity and avoid confusion in tariff construction at the different points of entry.[145] But there was not unanimity in the circuit; two years later, in another customs case, the circuit court of appeals reversed a circuit court decision that dutifully had followed an earlier Second Circuit Court of Appeals decision. In reversing, the court did not mention the supposedly controlling earlier decision.[146]

On the question of allowance of a tax deduction for obsolescence of a brewery's good will after prohibition, the Third Circuit followed the Eighth Circuit's lead, even though the Second Circuit, in a contemporaneous case, refused to follow that earlier decision. The Third Circuit indicated that it knew that the Eighth Circuit decision was not unanimously accepted but was persuaded by it nonetheless.[147]

Two years later in *Arlac Dry Stencil Corp. v. A.B. Dick Co.*,[148] the Third Circuit Court of Appeals deferred to an earlier decision of the Second Circuit. It is noteworthy in this case that the court recognized that because the parties were the same the earlier decision was res judicata (issue preclusion) on certain issues in the case. The court then referred to a second decision by the Circuit Court of Appeals for the Second Circuit and stated,

> That case, not being between the same parties, does not conclude the defendants. Neither is it binding on this court, yet through

143. *Id.* at 121.
144. Hill v. Francklyn & Ferguson, 162 F. 880, 881 (3d Cir. 1908).
145. Alexander Murphy & Co. v. United States, 162 F. 871, 872 (3d Cir. 1908).
146. United States v. Wanamaker, 175 F. 900 (3d Cir. 1910), *rev'g* 169 F. 664 (C.C.E.D. Pa. 1909).
147. Renziehausen v. Commissioner, 31 F.2d 675 (3d Cir. 1929), *aff'd*, 280 U.S. 387 (1930); *see* text accompanying notes 120-29 *supra*.
148. 46 F.2d 899 (3d Cir. 1931).

> comity is very persuasive. Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 488 . . . .
>
> For these reasons, briefly stated, we discern no error in the court's finding that the decree in the Second Circuit is res judicata of the issues in this case.[149]

d. Fourth Circuit

Apparently the Court of Appeals for the Fourth Circuit did not speak to the question of the effect to be given to an earlier decision by another court of appeals for almost half a century. In 1939 in the case of *United States v. Flannery*[150] the court of appeals in a per curiam decision affirmed a district court decision that had stated that it was customary in that district to follow the decision of another court of appeals when there was no contrary ruling of equal or greater judicial authority.[151] The court of appeals did not articulate its reasons for adopting the district court decision. The prior decision was a ruling in favor of a taxpayer that the Commissioner was unwilling to accept;[152] the litigation was a result of the IRS relitigation policy.

A few years later in litigation concerning an insurance policy[153] the Fourth Circuit acknowledged that the decision of another circuit court of appeals would be of persuasive weight, but stated, "[W]e must make our decision upon the facts presented to us and may not be bound by the findings of another court however similar the circumstances may be."[154] The court found the earlier decision factually to be "so dissimilar that a decision in one would not be a precedent for the other."[155]

More recently the court was faced with antitrust litigation about which a number of courts of appeals had adopted a particular position.[156] The court of appeals, in following the earlier controlling decisions, stated, "Under these circumstances we are of the opinion that we should follow the course outlined in the other circuits in deciding the question in the case at bar."[157] That statement is typical; on the few occasions when it has addressed the problem of the controlling de-

149. *Id.* at 902.
150. 106 F.2d 315 (4th Cir. 1939) (per curiam).
151. Flannery v. United States, 25 F. Supp. 677, 681 (D. Md. 1938).
152. *See* text accompanying notes 1-20 *supra.*
153. Pilot Life Ins. Co. v. Ayers, 163 F.2d 860 (4th Cir. 1947).
154. *Id.* at 863.
155. *Id.*
156. North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960).
157. *Id.* at 676 (footnote omitted).

cision, the Fourth Circuit Court of Appeals has apparently acceded to the thrust of the policy.

e. Fifth Circuit

Of all the courts of appeals, the Fifth Circuit seems to have been the most reluctant to follow a controlling decision handed down by another court of appeals. The court has genuflected in the direction of the policy but the holdings have not upheld it. In *Sokol Brothers Furniture Co. v. Commissioner*[158] the court acknowledged the existence of the doctrine but then rejected it, stating that the decision of another court of appeals is "properly entitled to great weight and itself affords persuasive argument in the determination of the present case. However, after full consideration we are unable to follow [the case decided by the Court of Appeals for the Ninth Circuit]."[159] Judicial attitudes such as represented by *Sokol Brothers Furniture* encouraged the government's policy of relitigation. Here the conflict between the two policies was clear and relitigation won out.

In *C-O-Two Fire Equipment Co. v. Barnes*[160] the Seventh Circuit had reached certain conclusions about venue and patent litigation. When identical issues faced the Fifth Circuit Court of Appeals that court refused to follow the Seventh Circuit.[161] Even though the Seventh Circuit decision was affirmed by an evenly divided Supreme Court, the Fifth Circuit indicated that it would refuse to follow the Seventh Circuit decision even after it had been affirmed by the Supreme Court because of the nature of the affirmance.[162] It should be noted that the last statement of the Fifth Circuit was only an alternative ground for the decision reached.

Shortly after the patent litigation just discussed, the Court of Appeals for the Fifth Circuit was faced with a case[163] under the Food and Drug Act in which an apparently controlling decision had been rendered by the Court of Appeals for the Second Circuit. The Fifth Circuit commented on the practice of according great weight and persuasiveness to an earlier decision when an identical issue is presented in

158. 185 F.2d 222 (5th Cir. 1950).
159. *Id.* at 224.
160. 194 F.2d 410 (7th Cir.), *aff'd mem. sub nom.* Cardox Corp. v. C-O-Two Fire Equip. Co., 344 U.S. 861 (1952).
161. Guiberson Corp. v. Garrett Oil Tools, Inc., 205 F.2d 660 (5th Cir.), *cert. denied*, 346 U.S. 886 (1953).
162. *Id.* at 665.
163. Florida Citrus Exch. v. Folsom, 246 F.2d 850 (5th Cir. 1957).

the second case and no different principle is involved.[164] The court, however, held that since a different factual issue was before the court it would not follow the earlier decision.

The next time the doctrine of the controlling decision was faced in the Fifth Circuit was in a series of patent suits leading to *Bros Inc. v. W.F. Grace Manufacturing Co.*[165] The court of appeals stated forcefully that it would not follow the decision of the Court of Appeals for the Eighth Circuit on a patent matter.[166] The court commented that, "This is apparently an inescapable consequence of our case or controversy approach, and the hierarchical independence of each of the Circuits."[167] The court noted that this litigation had occupied the attention of not fewer than twenty-five judges in three different circuits.[168] Two factors were mentioned in the course of this decision. One was the desirability of exerting "resourceful ingenuity in finding ways to maintain the quality of our celebrated system of justice without squandering precious and limited judge-time . . . ."[169] The other was the idea that the Supreme Court could reconcile the conflicting circuits by deciding specific cases and articulating standards.[170]

Most recently the Fifth Circuit Court of Appeals stated its position in a housing discrimination case: "Perhaps counsel is not aware that this Court is bound only by decisions of this Circuit and the Supreme Court of the United States."[171] Although the court continued that the requirements of the controlling decision by another circuit had been complied with so that there was no conflict,[172] the clear message was that the Fifth Circuit Court of Appeals rejected the idea that it might be bound by an earlier decision by another court of appeals.

f. Sixth Circuit

The authority on the controlling decision doctrine is extremely sparse in the Sixth Circuit. In *Reo Motors, Inc. v. Commissioner*,[173] a tax case, the court refused to follow an earlier decision by the Fifth

164. *Id.* at 856.
165. 351 F.2d 208 (5th Cir. 1965).
166. *Id.* at 210.
167. *Id.* at 210 n.4.
168. *Id.* at 209 n.1.
169. *Id.*
170. *Id.* at 210 n.3.
171. United States v. Northside Realty Ass'n, 518 F.2d 884, 886 (5th Cir. 1975).
172. *Id.*
173. 170 F.2d 1001 (6th Cir. 1948), *aff'd*, 338 U.S. 442 (1950).

Circuit and explained that the earlier decision was "advisory . . . rather than controlling in our conclusion . . . ."[174] This apparently is the only comment of the Sixth Circuit on the problem.

g. Seventh Circuit

Early in this century the Circuit Court of Appeals for the Seventh Circuit, facing the question of a seemingly controlling decision rendered by another circuit court of appeals, said that one of the parties was right "in claiming that he is entitled to our independent consideration and judgment."[175] Nonetheless, the court reached the same conclusion as had the other circuit court of appeals in the earlier decision.

About two decades later in a fraud case the court supported a contrary principle, indicating that comity and the desirability of uniformity should lead to deference to an earlier decision by a court of coordinate jurisdiction when "no insuperable obstacle appears."[176] The court in this case did, in fact, follow the earlier decision.

About thirty years later the Seventh Circuit again faced the question of a controlling decision by another court of appeals and refused to follow the decision.[177] In the case the court stated, "[w]e think the decision of the Fifth Circuit in this matter is erroneous. Such being the case, we are under no more obligation to follow it as the law of the case than that circuit would be to follow what it considers an erroneous decision by this court."[178] The fact that this case involved the same parties as the first litigation in the other circuit does not undercut the thrust of the rejection of the controlling decision doctrine.

A few years later in a case involving the right of the government to assert a federal tax lien on jointly held property and the manner in which the right of the federal government can be asserted, the Court of Appeals for the Seventh Circuit refused to follow an earlier decision by the Fifth Circuit. The Seventh Circuit, after carefully examining the problem, concluded it would reach its own decision even though the Fifth Circuit had reached a "contrary view."[179] In a series of cases

174. *Id.* at 1004.
175. Heckendorn v. United States, 162 F. 141, 143 (7th Cir.), *cert. denied*, 214 U.S. 514 (1908).
176. Ball v. Chapman, 1 F.2d 895, 896 (7th Cir. 1924).
177. Blaski v. Hoffman, 260 F.2d 317 (7th Cir. 1958), *aff'd*, 363 U.S. 335 (1960).
178. *Id.* at 322.
179. United States v. Trilling, 328 F.2d 699, 702 (7th Cir. 1964).

following this decision, at least three other circuits, the Fourth,[180] Ninth[181] and Second,[182] reached the same conclusion that the Seventh had reached.

Ten years later, the Court of Appeals for the Seventh Circuit again articulated an attitude against the doctrine of controlling decision.[183] The Seventh Circuit seemed securely in the camp of those rejecting the doctrine until a recent decision, of importance because of the composition of the panel that decided it. In *Federal Life Insurance Co. v. United States*[184] the Seventh Circuit was faced with litigation involving a refund of taxes allegedly overpaid. The court of appeals, finding for the taxpayer, noted that a number of courts including one court of appeals had accepted the argument that the taxpayer was making. The court stated,

> Respect for the decisions of other circuits is especially important in tax cases because of the importance of uniformity, and the decision of the Court of Appeals of another circuit should be followed unless it is shown to be incorrect, *Goodenow v. Commissioner*, 238 F.2d 20 (8th Cir. 1956). In this case we believe the Fifth Circuit to have been demonstrably correct.[185]

The intriguing thing about this per curiam decision is that the panel deciding the case included Judge John Paul Stevens, who was a circuit judge at the commencement of the appeal but who was Circuit Justice when the opinion was handed down. This decision suggests that the doctrine of controlling decision has vitality at least in the opinion of one Justice of the United States Supreme Court.

h. Eighth Circuit

Shortly after the establishment of the circuit courts of appeals in 1891, the newly established Eighth Circuit Court of Appeals was faced with the question of the effect to be given by a circuit court to an earlier decision by another judge sitting in that circuit court.[186] In *Shreve v. Cheesman* the Eighth Circuit judge at the trial level had refused to fol-

180. Washington v. United States, 402 F.2d 3 (4th Cir. 1968), *cert. denied*, 402 U.S. 978 (1971).

181. United States v. Overman, 424 F.2d 1142 (9th Cir. 1970).

182. United States v. Kocher, 468 F.2d 503 (2d Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

183. United States v. Nickels, 502 F.2d 1173, 1176-77 (7th Cir. 1974).

184. 527 F.2d 1096 (7th Cir. 1975) (per curiam).

185. *Id.* at 1098-99.

186. Shreve v. Cheesman, 69 F. 785 (8th Cir. 1895), *cert. denied*, 163 U.S. 704, *appeal dismissed*, 17 S. Ct. 998 (1896).

low the earlier decision.[187] On appeal, the circuit court of appeals discussed at length the duty of one court to follow the earlier decision of a coordinate court. The court observed,

> It is a principle of general jurisprudence that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action. This principle is nowhere more firmly established or more implicitly followed than in the circuit courts of the United States. A deliberate decision of a question of law by one of these courts is generally treated as a controlling precedent in every federal circuit court in the Union, until it is reversed or modified by an appellate court.[188]

The court then determined that the first court had erred in its interpretation of the law and refused to impose that misinterpretation on the litigants in the second action to their detriment. Rather the court, exercising its appellate review, indicated what it believed the law was and allowed the litigant to meet the requirements of the law so that he would not suffer because of the change in interpretation of the statutory provision. The analysis in this case addressed the situation where a circuit court decision is followed by litigation at the same level at which the same question is raised. With the establishment of the circuit courts of appeals, the same dilemma arose at that level; the new courts were soon faced with the question of what effect each of them should give to an earlier decision by another circuit court of appeals.

In 1918 the Circuit Court of Appeals for the Eighth Circuit confronted the question of the effect to be afforded an earlier decision by another court of the same level.[189] The court opted for following the earlier decision, stating:

> In deciding questions of policy and practice which involve no vital moral issue, certainty in the law and uniformity of decision are often more essential to the wise administration of justice and to the interests of business men than a particular policy or practice. Where the correct decision of such a question is doubtful, and one of the United States Circuit Courts of Appeals has decided it in a considered opinion, it is the duty of the others to follow that decision, unless it clearly appears to them, or to some of them, to be unfair or unwise, and it is the duty of the courts at all times, in the consideration of such issues, to lean towards uniformity of decision and practice.[190]

187. *Id.* at 787.
188. *Id.* at 790.
189. Bright v. Arkansas, 249 F. 950 (8th Cir. 1918).
190. *Id.* at 952.

This position was consistent with the decision and the dicta in *Shreve v. Cheesman.*[191]

After 1918 the decisions of the Court of Appeals for the Eighth Circuit, almost without exception, followed the principle of deferring to controlling decisions by other courts of appeals. Cases applying this principle include *New Amsterdam Casualty Co. v. Iowa State Bank,*[192] *Hennepin Co. v. M. W. Savage Factories, Inc.,*[193] *Danner v. United States,*[194] *United States v. Blosser*[195] and a number of others.[196] During the period immediately following 1918, there was only one case in which the court of appeals refused to follow an earlier decision of another coequal court. In *Guaranty Trust Co. v. Henwood*[197] in 1938 the court recognized a decision that had been handed down by another circuit, yet proceeded to reach its own conclusion. The court explained,

> We are fully conscious of the fine ability of the Judges who wrote and concurred in the opinions urged by appellant; and we are sensitive to the desirability of harmony in the decisions of the various Circuits. However, we are not permitted thus to relieve ourselves of the duty of examining and determining for ourselves the issues coming before us. Where we have serious doubt or the determination is close, we are inclined to give solid weight to the consideration of harmony in decision.[198]

The court proceeded to make its own examination of the question and reach its own conclusion.

Goodenow v. Commissioner[199] is a more recent example of the Court of Appeals for the Eighth Circuit applying the controlling decision doctrine. The fact that another circuit court had spoken on the

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191. *See* text accompanying notes 186-88 *supra.*

192. 277 F. 713 (8th Cir. 1921), *cert. denied,* 258 U.S. 624 (1922).

193. 83 F.2d 453 (8th Cir.), *cert. denied,* 299 U.S. 555 (1936).

194. 100 F.2d 43 (8th Cir. 1938).

195. 104 F.2d 119 (8th Cir. 1939).

196. *See, e.g.,* United States v. Eddy Bros., 291 F.2d 529 (8th Cir. 1961) (tax); Estate of Spicknall v. Commissioner, 285 F.2d 561 (8th Cir. 1961) (tax); Mitchell v. Hygrade Water & Soda Co., 285 F.2d 362 (8th Cir. 1960) (labor); *In re* Eatherton, 271 F.2d 199 (8th Cir. 1959) (bankruptcy); Commissioner v. Moran, 236 F.2d 595 (8th Cir. 1959) (tax); Prewett v. Commissioner, 221 F.2d 250 (8th Cir. 1955) (tax); Birmingham v. Geer, 185 F.2d 82 (8th Cir. 1950), *cert. denied,* 340 U.S. 951 (1951) (tax); Martyn v. United States, 176 F.2d 609 (8th Cir. 1949) (criminal); United States v. Armature Rewinding Co., 124 F.2d 589 (8th Cir. 1942) (tax); United States v. Kelley, 110 F.2d 922 (8th Cir.), *cert. denied,* 311 U.S. 669 (1940) (insurance); Grain Belt Supply Co. v. Commissioner, 109 F.2d 490 (8th Cir.), *cert. denied,* 310 U.S. 648 (1940) (tax).

197. 98 F.2d 160 (8th Cir. 1938), *aff'd,* 307 U.S. 247 (1939).

198. *Id.* at 163.

199. 238 F.2d 20 (8th Cir. 1956).

matter, regardless of the parties involved in the earlier adjudication, seemed crucial. *Goodenow* involved an attempt by one party, the Commissioner of Internal Revenue, to relitigate a matter on which he had lost in another circuit. The Eighth Circuit Court of Appeals refused to allow this, stating,

> This Court has repeatedly ruled, particularly in tax cases, where uniformity of decision among the Circuits is vitally important, that the decision of a Court of Appeals of another Circuit should be followed unless demonstrably erroneous or unsound. . . .
>
> The decision of the Court of Appeals for the Third Circuit in the Uptegrove Lumber Co. case we regard as sound and logical. There is, we think, no reason why it should be rejected by this Court.
>
> The decision of the Tax Court is reversed upon the ground that the assessment of the deficiency was barred by limitations.[200]

The attitude of the Eighth Circuit toward a prior adjudication recurs in *Consentino v. Local 28, Masters*,[201] decided in 1959. In following an earlier decision of the Seventh Circuit, the court stated,

> In the interest of uniformity, a court of appeals is not justified in refusing to follow the decision of another court of appeals unless satisfied that the prior decision is clearly erroneous. . . .
>
> Since the identical order which was the keystone for Judge Harper's action was fully considered by the Seventh Circuit, that Court's interpretation thereof is entitled to great weight, and we should not adopt a contrary view unless it convincingly appears that the decision . . . is palpably wrong.[202]

Having made no such finding, the court followed the earlier decision.

In 1960 the Court of Appeals for the Eighth Circuit faced the question of the effect of improperly admitted evidence of a witness' veracity in a criminal case.[203] The Fifth Circuit had previously considered the effect and refused to reverse, relying on the particular factual situation.[204] The Eighth Circuit concurred, "As in the [Fifth circuit case] we therefore feel constrained to hold, in the interest of criminal administration, that it is not something which under the cir-

200. *Id.* at 22 (citations omitted).
201. 268 F.2d 648 (8th Cir. 1959).
202. *Id.* at 652.
203. Homan v. United States, 279 F.2d 767 (8th Cir.), *cert. denied*, 364 U.S. 866 (1960).
204. Kauz v. United States, 188 F.2d 9 (5th Cir. 1951).

cumstances entitled appellant to a reversal."[205] The Court supported its conclusion, stating,

> We have in a long line of opinions declared that, on unsettled questions of federal law, while a decision by another Court of Appeals is not compulsively binding upon us, we will, in the interest of judicial uniformity, accept it as persuasive and follow it, unless we are clearly convinced that it is wrong.[206]

The court also cited twelve Eighth Circuit decisions in support of this position.[207]

This same attitude was reflected by the Court of Appeals for the Eighth Circuit in *Delk Investment Corp. v. United States*,[208] another tax case in which the court followed the Second Circuit on the point of law involved, stating,

> The policy of this court with regard to uniformity in tax holdings has been stated by us in C.I.R. v. Moran, 8 Cir., 1956, 236 F.2d 595, 596: "* * * This court has repeatedly held, particularly in tax matters, that the decision of another Court of Appeals should be followed unless demonstrably erroneous or there appear cogent reasons for its rejection."[209]

The court thereupon rendered a judgment conforming to the position taken by the Court of Appeals for the Second Circuit.

The Eighth Circuit in 1974 was faced with earlier judgments in two circuits on a particular point of tax law.[210] The court of appeals acknowledged that "[n]one of the decisions is binding precedent in this court, and several of the opinions are quite brief in their discussion of the issue."[211] Yet the court considered the matter and rejected the government's argument, stating, "we cannot dismiss lightly the cumulative weight of our fellow judges' decisions or the divisiveness and administrative confusion that a contrary conclusion at this point might foster."[212]

Most recently the court, in *North American Life & Casualty Co. v. Commissioner*,[213] again articulated the principle of the controlling

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205. Homan v. United States, 279 F.2d at 773.
206. *Id.*
207. *Id.*
208. 344 F.2d 696 (8th Cir. 1965) (per curiam).
209. *Id.* at 697.
210. Foster Lumber Co. v. United States, 500 F.2d 1230, 1232 (8th Cir. 1974), *rev'd*, 97 S. Ct. 204 (1976).
211. *Id.*
212. *Id.* at 1233.
213. 533 F.2d 1046 (8th Cir. 1976).

decision and emphasized its application in tax matters. The court asserted,

> This court has long taken the position that uniformity of decision among the circuits is vitally important on issues concerning the administration of the tax laws. . . . Thus, decisions of other courts of appeals in the area of taxation should be followed unless they are demonstrably erroneous or there appear cogent reasons for rejecting them. . . . Thus, as there appear no cogent reasons for not following them and no other courts of appeals have rendered contrary decisions, we follow them to the extent they are dispositive of the issue before us.[214]

In not all of the cases, however, has the Court of Appeals for the Eighth Circuit followed earlier decisions by other courts of appeals. *Clark v. Board of Education*[215] was a case in which there seemingly was an earlier controlling decision. After examining the case the court decided that it was distinguishable from the earlier decision by the Fifth Circuit. The Court of Appeals for the Eighth Circuit stated,

> The breadth and depth of the segregation problem varies in different states and in different parts of the same state. Therefore, we can have no quarrel with the Fifth Circuit's 2-to-1 decision in United States v. Jefferson County Board of Education. If the majority of the Judges, in *Jefferson County*, believe the H.E.W. Guidelines are the minimum necessary to meet the constitutional mandate of a "unitary, non-racial system" in their Circuit, we feel that is a matter for their sole consideration. As problems vary in different parts of the country, of necessity the courts' orders to effectuate a common goal will also be varied. The Fifth Circuit has borne the brunt of the school desegregation cases and its judgment merits our respect and admiration for their devotion to this admittedly difficult task. However, our factual situation is not the same as theirs. *Jefferson County* is still dealing with dual attendance zones. We are not. A much greater degree of integration has been achieved in Arkansas than in the States directly concerned in the *Jefferson County* decision. We don't think we should flatly condemn a freedom of choice plan, as proposed by the Board, which does give an annual freedom of choice to laterally transfer schools to each student [*sic*], subject only to conditions of overcrowding. We feel the plan should be given an opportunity to work.[216]

Jaben v. United States[217] is another case in which the Eighth Circuit

214. *Id.* at 1051.
215. 374 F.2d 569 (8th Cir. 1967).
216. *Id.* at 571.
217. 333 F.2d 535 (8th Cir.), *aff'd*, 381 U.S. 214 (1964).

was faced with an earlier Ninth Circuit decision and refused to follow it. The court stated, "[T]hat holding is not binding upon us, and with all due deference, we are not inclined—for what we regard to be impelling and cogent reasons—to follow that case."[218] The court then examined a Supreme Court decision, a court of appeals decision and two district court decisions, and concluded that the law was contrary to the decision of the Ninth Circuit. The Court of Appeals for the Eighth Circuit obviously found itself in a very difficult position since earlier decisions of the federal courts were in disagreement; the Court of Appeals for the Eighth Circuit was forced to choose one line rather than another.

i. Ninth Circuit

The Ninth Circuit approved the controlling decision doctrine in 1928 when it followed the decision of the Eighth Circuit disallowing a deduction for obsolescence of goodwill of a wine business because of the passage of prohibition.[219]

In *NLRB v. Victor Ryckebosch, Inc.*[220] the Court of Appeals for the Ninth Circuit was faced with the construction of the "agricultural laborer" exception to the National Labor Relations Act. Three years earlier the Fifth Circuit had faced a case with "substantially identical facts." The Ninth Circuit decided to follow the earlier decision, noting that the federal agency "admits that the facts in [the earlier case] are 'essentially the same' as those here, but urges that the case does not correctly implement congressional intent." The court suggested, first, that if Congress did not like the result in the earlier case it was free to change the law and, secondly, that the federal agency "has not demonstrated that we need create a conflict between the Circuits on this point."[221]

Recently in litigation involving the Environmental Protection Agency, the Court of Appeals for the Ninth Circuit held that it was not bound by an earlier decision rendered by the Third Circuit.[222] The Ninth Circuit explained,

> We recognize that our views both with regard to the interpretation of the Clean Air Act and the constitutional issues here

218. *Id.* at 538.

219. Landsberger v. McLaughlin, 26 F.2d 77 (9th Cir. 1928); *see* text accompanying notes 120-29 *supra.*

220. 471 F.2d 20 (9th Cir. 1972).

221. *Id.* at 21.

222. Brown v. Environmental Protection Agency, 521 F.2d 827 (9th Cir. 1975).

> discussed differ from those expressed in *Pennsylvania v. Environmental Protection Agency*, 500 F.2d 246 (3d Cir. 1974). With regard to the latter issues, we believe with all deference that the Third Circuit failed to recognize the difference between a state engaging in commerce . . . and a state's regulation of the commerce of others.[223]

j. Tenth Circuit

The Tenth Circuit, which is the newest, having been created out of the Eighth Circuit in 1929,[224] apparently has not firmly established a policy on the question of the controlling decision of another circuit. In 1953, however, in *Grimland v. United States*,[225] which was a bankruptcy case, the court of appeals indicated that though the court was not bound by earlier decisions of other circuits, those decisions were "persuasive and entitled to great weight, particularly in tax matters,"[226] and the court did in fact follow the earlier decisions of the Ninth and Sixth Circuits.[227]

k. District of Columbia Circuit

No reference to the doctrine of controlling decisions is found in the decisions of the Court of Appeals for the District of Columbia Circuit during the first half of the twentieth century. In 1958 the court faced a patent problem regarding which there was a controlling decision by the Court of Customs and Patent Appeals.[228] The court of appeals acknowledged that the court making the first decision had the approximate standing of another court of appeals with special competence to deal with technical issues. The court of appeals, however, refused to follow the earlier decision stating that it was "persuasive and entitled to deference" but not "authoritatively binding."[229]

A few years later the District of Columbia Circuit Court of Appeals had before it litigation involving an insurance policy and requiring construction of Missouri law.[230] The court, faced with the question of

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223. *Id.* at 838 n.45.
224. J. MOORE, JUDICIAL CODE: COMMENTARY ¶ 0.03(51), at 455 (1949).
225. 206 F.2d 599 (10th Cir. 1953).
226. *Id.* at 601.
227. Kentucky *ex rel.* Unemployment Comp. Comm'n v. Farmers Bank & Trust Co., 139 F.2d 266 (6th Cir. 1943); *In re* Knox-Powell-Stockton Co., 100 F.2d 979 (9th Cir. 1939).
228. Watson v. Allen, 254 F.2d 342 (D.C. Cir. 1958).
229. *Id.* at 347.
230. Waters v. American Auto. Ins. Co., 363 F.2d 684 (D.C. Cir. 1966).

following the other circuit's controlling decisions, stated,

> Although the views of the Eighth Circuit, reflecting as they do an experience more closely connected than ours with Missouri law, are entitled to great weight, the law of Missouri can only be finally and authoritatively gathered from the decisions of the courts of Missouri. Since the Missouri cases indicate to us a result different from that reached by the Eighth Circuit, we adhere to our reading of those cases.[231]

Again the court refused to follow the earlier decision.

The next year the Court of Appeals for the District of Columbia Circuit faced a problem to which an answer had been given by the Court of Customs and Patent Appeals at an earlier time.[232] The district court from which the appeal was taken had not followed the earlier decision. This time the court of appeals did follow the controlling decision, stating, "We are of course not bound to do more than accord to the holding of the Court of Customs and Patent Appeals the degree of deference due a coordinate court but we feel the holding of that court presents the better alternative [to the district court's decision]."[233]

Subsequently the court was faced with litigation concerning an insurance policy when there were two controlling cases from another circuit, this time the Fifth.[234] The court refused to follow the earlier decisions with the following comment: "Decisions of district courts and other courts of appeal are, of course, not binding on us and are looked to only for their persuasive effect. If they fail to persuade by the use of sound and logical reasoning, they will not be followed, no matter how great their number."[235]

In *United States v. Washington Post Co.*,[236] an assertion was made that an order, entered by the Second Circuit Court of Appeals[237] on the day before an order of the District of Columbia Circuit Court of Appeals, was controlling. The court examined the situation of the litigation and chose to proceed in its own way.[238]

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231. *Id.* at 689.
232. Eli Lilly & Co. v. Brenner, 375 F.2d 599 (D.C. Cir. 1967).
233. *Id.* at 601.
234. City Stores Co. v. Lerner Shops, Inc., 410 F.2d 1010 (D.C. Cir. 1969).
235. *Id.* at 1014.
236. United States v. Washington Post Co., 446 F.2d 1327 (D.C. Cir.) (per curiam), *aff'd per curiam*, 403 U.S. 713 (1971).
237. *Id.* at 1331; *see* United States v. New York Times, 444 F.2d 544 (2d Cir.) (per curiam) (en banc), *rev'd per curiam*, 403 U.S. 713 (1971).
238. United States v. Washington Post Co., 446 F.2d at 1331-32.

5. Different Panels of Same Court of Appeals

The problem of the effect to be given to an earlier decision is found within a single court of appeals as well as between different courts of appeals. One panel of a court may decide a question, and the same question may come before a different panel of that same court at a later time. The second panel must then decide whether it is bound by the decision of the first panel or whether it has the right or duty to decide the matter unrestricted by the first decision and thereby possibly create a conflict within the circuit.[239] If a conflict is created, the matter may have to be heard en banc.[240] A number of courts of appeals apparently have reached the conclusion that one panel of a court of appeals is required to follow the earlier ruling of a different panel of that same court. The Third Circuit, for example, has stated,

> [I]t has long been the rule in this Circuit that decisions made in similar cases by panels of this Court are binding on other panels but are not controlling on the Court En Banc. Indeed it is *only* through the Court En Banc that precedents established by earlier panel decisions may be reexamined.[241]

The Court of Appeals for the Fifth Circuit has repeated its acceptance of this principle in several cases,[242] and recently Judge Roney of that circuit referred to precedent "which this panel is bound to follow under our policy of not overruling prior decisions except *en banc*."[243] The Court of Appeals for the Fourth Circuit has also adopted this position.[244] Thus court of appeals judges have accepted the idea that they are restricted in their power to decide cases; they accept the view that they must operate within the framework of prior cases decided in the circuit. Only in an en banc rehearing can freedom of decision unrestrained by prior case law in the circuit be obtained.

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239. Shattuck v. Hoegl, 523 F.2d 509 (2d Cir. 1975); Garfinkle v. Wells Fargo Bank, 483 F.2d 1074 (9th Cir. 1975).

240. FED. R. APP. P. 35; 9 MOORE'S FEDERAL PRACTICE ¶ 235.02, at 4102 (2d ed. 1975).

241. *In re* Central R.R., 485 F.2d 208, 210-11 (3d Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974).

242. *See* Fulford v. Klein, 529 F.2d 377 (5th Cir. 1976); United States v. Hawes, 529 F.2d 472 (5th Cir. 1976); Burroughs v. United States, 515 F.2d 824 (5th Cir. 1975); Popeko v. United States, 513 F.2d 771 (5th Cir.), *cert. denied*, 423 U.S. 917 (1975).

243. McLellan v. Mississippi Power & Light Co., 526 F.2d 870, 883 (5th Cir. 1976) (dissenting opinion).

244. Doe v. Charleston Area Med. Center, 529 F.2d 638 (4th Cir. 1975). Here, the court stated that a decision by the court itself "is binding, not only upon the district court, but also upon another panel of this court—unless and until it is reconsidered en banc." *Id.* at 642.

The similarities are obvious between this situation and that where one court of appeals has ruled on a matter and another court of appeals is faced with the problem. In both situations a panel of judges must decide what effect will be given to an earlier decision by judges of coordinate jurisdiction. Within the circuits a body of authority is developing a principle that one panel must follow a decision by another panel within that circuit. One might logically ask why this principle does not carry over to the situation where the earlier decision was by another court of appeals.

6. Summary of the Law in the Circuits

As indicated by the preceding discussion, the doctrine of the controlling decision has been a factor of some significance in the deciding of cases by the various courts of appeals.[245] When one circuit reaches a result different from that obtaining in an earlier decision in another circuit it does not necessarily mean the second court has rejected the position of the court first in time. Because of the lag in dissemination of opinions or because of the nature of research done, it may well be that the earlier decision was not called to the attention of the later court. However, to obtain a complete picture, notice must be taken of the numerous conflicts that have developed among the various courts of appeals apparently without any thought being given by the second court to the possibility that the earlier decision might be controlling on subsequent litigation at the court of appeals level.[246]

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245. The Court of Claims and the Court of Customs and Patent Appeals are courts of the same level as the various courts of appeals. The appellate provisions for the three courts are approximately the same; judges can be moved from one of these courts to another. 28 U.S.C. §§ 175, 291, 293 (1970).

In recent years the problem of deferring to an earlier decision by a coordinate court has arisen in cases before these courts. In two cases the Court of Claims in tax litigation elected to follow the earlier decisions by courts of appeals. In Bryan v. United States, 319 F.2d 880, 882 (Ct. Cl. 1963), the court referred to stare decisis, indicated that the court of appeals had answered all the arguments put forth in that earlier case and stated, "there is nothing in either proceeding which causes us to view the Circuit Court's decision as unjust or undesirable." In Ben Constr. Corp. v. United States, 312 F.2d 781, 782 (Ct. Cl. 1963), which also involved elements of preclusion and stare decisis, the court stated, "When two suits involve similar facts and issues, and the Court rendering the first judgment has fully considered all the evidence and given its decision thereon, the Court in the second case is free to follow that prior judgment upon the principle of *stare decisis*, provided such consistency is just and desirable." *But see In re* Nelson, 280 F.2d 172 (C.C.P.A. 1960), in which the Court of Customs and Patent Appeals stated that "[w]hile [a decision of the Court of Appeals for the District of Columbia Circuit] is entitled to deference, it is not authoritatively binding on us." *Id.* at 186.

246. *See* cases cited notes 248-56 *infra*. For examples of cases in which courts of appeals have deliberately chosen not to follow an earlier decision by another court of

This does not necessarily indicate a deliberate rejection of the doctrine of the controlling decision, but it does possibly represent a rejection of the ideas implicit in that doctrine. More than this, the willingness to decide each case unaffected by prior courts of appeals decisions represents (1) an unwillingness to seek conformity, (2) an apparent rejection of the unity of the federal courts, and (3) a willingness to have the law applied in different ways in different areas.

7. After Inconsistent Decisions Rendered

After a court of appeals (1) has unknowingly not followed an earlier court of appeals decision or (2) has faced a supposedly controlling earlier decision by another appellate court and has refused to follow that decision, there arises the problem of a third appellate court facing the problem of the inconsistent earlier decisions. What should the court faced with this situation do? It is difficult to assert which decision should be controlling: the first in time? the most recent decision on the point? Unfortunately a number of these situations have arisen in recent years.[247]

Because of the current indexing methods being used, it is impossible to determine how frequently conflicts between circuits have arisen. Without a doubt, there are numerous points of law on which the circuits have differed and many of these have involved governmental agencies. As soon as a difference occurs courts entertaining subsequent litigation on the issue are faced with the problem of conflicting precedents. Although not exhaustive, the following examples show that the problem does exist.

In litigation preceding the *Bosch* case,[248] the Fourth Circuit was faced with conflicting lines of authority in *Pierpoint v. Commissioner*.[249] In litigation dealing with the effect to be given in tax matters

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appeals, see Shattuck v. Hoegl, 523 F.2d 509, 514-16 (2d Cir. 1975); Zacks v. United States, 280 F.2d 829, 832 (Ct. Cl. 1960), *rev'd*, 375 U.S. 59 (1963). One district court, in United States v. R.J. Reynolds Co., 416 F. Supp. 316 (D.N.J. 1976), has gone as far as to say that only the Supreme Court of the United States can "speak with authority to assure uniformity of federal law among the several circuits and districts." *Id.* at 320. In regard to this principle the court noted in footnote 1 to the opinion:

> It is a matter of some amusement to note that this widely recognized principle is one for which it is difficult to find explicit precedent above the district court level. Yet it must be hornbook law because the existence of a conflict between the decisions of the courts of appeals in two or more circuits provides a major basis for the grant of certiorari by the Supreme Court.

247. *See* cases cited notes 248-56 *infra*.

248. Commissioner v. Estate of Bosch, 387 U.S. 456 (1967).

249. 336 F.2d 277 (4th Cir.), *cert. denied*, 380 U.S. 908 (1964).

to a state court adjudication concerning the property rights of individuals, the court acknowledged the different approaches and stated,

> While the Third Circuit read Freuler somewhat differently and apparently requires improper conduct to render proceedings in a *nisi prius* court collusive, Gallagher v. Smith . . . , we feel our decision is in line with the better reasoned cases of other circuits. See, e.g. the recent cases of Estate of Peyton . . . and Estate of Faulkerson . . . .[250]

In *Jones v. United States*[251] the Sixth Circuit was faced with a problem that it had faced and decided at an earlier time, a question involving anticipatory assignment of income. Since that earlier decision two other circuits had decided the point contrary to the Sixth Circuit. The latter court decided it should follow the other two circuits and reject its own earlier decision.[252] The dissenting judge felt that the district court judge had properly applied the law of the circuit and that it should be affirmed, rather than reversed because of the decisions of the other circuits.

The problem has arisen with regard to various areas of the law. The IRS has been involved in conflicting circuit decisions in litigation concerning scholarships, fellowships and their taxation.[253] In the criminal field, a significant split in the circuits is found in determining whether an individual is "fleeing from justice." Some circuits hold that mere absence is sufficient;[254] others hold that there must be an intent to avoid punishment.[255] In the field of environmental law there are a number of significant conflicts among the various circuits in litigation involving the EPA.[256]

This development, when two courts of appeals have faced the same problem with inconsistent decisions resulting and the matter is

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250. *Id.* at 281.

251. 531 F.2d 1343 (6th Cir. 1976).

252. *Id.* The court stated, "Upon consideration, we are persuaded to adopt the rule expressed by the Second and Eighth Circuits . . . ." *Id.* at 1345.

253. *See* Johnson v. Bingler, 396 F.2d 258 (3d Cir. 1968), *rev'd*, 394 U.S. 741 (1969); Stewart v. United States, 363 F.2d 355 (6th Cir. 1966); Woddail v. Commissioner, 321 F.2d 721 (10th Cir. 1963).

254. King v. United States, 144 F.2d 729 (8th Cir.), *cert. denied*, 324 U.S. 854 (1944); McGowen v. United States, 105 F.2d 791 (D.C. Cir.), *cert. denied*, 308 U.S. 552 (1939).

255. Jhirad v. Ferrandina, 486 F.2d 442 (2d Cir. 1973); Donnell v. United States, 229 F.2d 560 (5th Cir. 1956); Brouse v. United States, 68 F.2d 294 (1st Cir. 1933); Porter v. United States, 91 F. 494 (5th Cir. 1898).

256. *See, e.g.*, Ecology Center v. Coleman, 515 F.2d 860 (5th Cir. 1975); Conservation Soc'y v. Secretary of Transp., 508 F.2d 927 (2d Cir. 1974).

then faced by another court of appeals, needs to be examined with great care. There are several very undesirable aspects of this situation. First, a great deal of time and societal resources are used in deciding the matter. Second, the resolution of the problem is questionable since apparently different law is to be applied in different circuits. Third, and flowing from the second, unfairness to individuals results from this inconsistency.

One of the difficulties that arises when different rules exist in different circuits is that litigants will engage in "forum shopping." This means that some litigants will be able to take advantage of different rules in the various circuits. This perverts the judicial system and seriously undercuts the respect of the general public in the system. The federal government's policy of relitigation is, in part, a cause of this problem because the government attempts to benefit from the conflicts among the circuits by a policy of selective enforcement of the law.

D. Summary of Prior Decision as Controlling in Subsequent Litigation

Without doubt, conflicts have occurred among the various courts of appeals on various points of law.[257] There have been numerous occasions when the courts simply have disagreed on fundamental legal issues. This is not an unexpected development. In fact, Supreme Court Rule 19 refers to the possibility of conflicts among circuits. However, conflict is not the only condition that has existed. For more than a century various federal courts have deferred to an earlier decision of a court of equal stature. During the period since the institution of the circuit courts of appeals (now the courts of appeals), those courts with some regularity have recognized the unity of the federal system and have deferred in some measure to the decisions of coordinate courts. In reaching this conclusion, the courts have given various reasons.

A number of different justifications for the doctrine of controlling decision may be found. First, it might be argued that since they are coordinate courts the second should not presume a superiority to the first and that the normal doctrine of following precedent should control. If the first has decided the problem, that should be sufficient until a higher court changes the rule. Since we are talking about intermediate appellate courts, it can be argued that the prior court's decision

257. *See* especially cases cited notes 248-56 *supra.*

was the result of an initial trial consideration and then appellate review and that this should assure thoughtful consideration.[258]

A second justification for recognizing a binding effect of the first judgment can be found in the desirability of having the same law applied throughout the country. It is extremely unfair and illogical to have, for example, different tax laws applied by the federal government in different areas of the country. An unseemly conflict between courts results if there is one view in one circuit and a different view in another. This is not just theoretical; it is a very real problem. If the law were applied uniformly litigants would not be tempted to play games with the courts to seek particular results.

Finally, there is the use of the time of the courts in relitigating matters that have been fully litigated and decided in an appellate court. In terms of the total costs to society—time of judges, attorneys, litigants —this may be an expense that should not be allowed.

An examination of the recent cases in the courts of appeals suggests that the doctrine of controlling decision may not have the vitality it once had. However, several observations seem to be in order. First, the courts have apparently departed from the doctrine without any real consideration of what they were doing or the negative effect that their action might have. Second, the underlying principles that have been the basis for the doctrine of controlling decision have lost none of their vitality. Third, the growing confusion and conflict among the circuits on questions of law is, in part at least, due to unwillingness to give any effect to the decisions of other circuits. Fourth, the atrophy of the doctrine is due in some measure to a deliberate policy of relitigation on the part of the federal agencies. Even so the doctrine of controlling decision has not completely disappeared. Some of the courts of appeals refer to the doctrine and apply it with some frequency.[259]

258. It must also be remembered that the court of appeals may hear the matter en banc. 28 U.S.C. § 46(c) (1970).

259. The vitality of the doctrine of controlling decision is found in Federal Life Ins. v. United States, 527 F.2d 1096 (7th Cir. 1975) (per curiam), involving a suit for refund of taxes allegedly overpaid. The court of appeals, finding for the taxpayer, noted that a number of courts including one court of appeals had accepted the argument that the taxpayer was making. The court stated,

> Respect for the decisions of other circuits is especially important in tax cases because of the importance of uniformity, and the decision of the Court of Appeals of another circuit should be followed unless it is shown to be incorrect, *Goodenow v. Commissioner*, 238 F.2d 20 (8th Cir. 1956). In this case we believe the Fifth Circuit to have been demonstrably correct.

Id. at 1098-99. The panel deciding this case included Judge Stevens, who was a circuit judge at the commencement of the appeal but who was Circuit Justice when the opinion was handed down.

III. RES JUDICATA/PRECLUSION

In the past three decades there has been an expansion and clarification of the role of res judicata/preclusion in the courts of the country in which the federal courts have played a significant part. As the Supreme Court noted in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,[260] there has been a rejection of the mutuality requirement that allows for a greater use of preclusion, there has been an expansion of the definition of "claim" in bar and merger—claim preclusion—cases, and there has been a greater willingness to use preclusion in criminal cases.[261] There is every reason to believe that the expansion of preclusion is not yet at an end. Several examples may help to explain this.

A stranger to a law suit normally is not bound by the decision in that suit. Interestingly enough, there are some recent decisions that have suggested and even held that a stanger—not in a relationship of privity with a losing party in the first suit—may be bound by the judgment rendered in that suit.[262] This seemingly turns on the relationship that exists, even in an informal sense, between the losing party in the first suit and the party to be precluded in the second.[263]

Another example of the expansion of preclusion is found in the situation where a federal court has handed down a judgment and subsequent litigation is commenced in a state court by a person not a party in the federal court action. If the state court litigation might result in an undercutting of the federal court judgment, the federal court may enjoin the state action. This would be the traditional way to handle the attack on the federal judgment. It may be, however, that the winning party in the federal litigation may elect to raise the federal court judgment in the state court litigation against the person who was not

260. 402 U.S. 313 (1971). In considering what effect is to be given in a federal court to an earlier federal court decision, it can be argued that federal principles should control. A. VESTAL, RES JUDICATA/PRECLUSION V-483 to -490 (1969). The decision in the *Blonder-Tongue* case certainly indicated that the Supreme Court felt that it had freedom to decide what rule of preclusion would be applied in that case. In a diversity case it might be urged that a different result might obtain, but in *In re* Air Crash Disaster, 350 F. Supp. 757 (S.D. Ohio 1972), *rev'd on other grounds sub nom.* Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973), the court indicated that the law of federal judgments will be that constructed by the federal courts. Of course, in litigation involving federal agencies the law to be applied will generally be federal law although this might not always be true.

261. 402 U.S. at 327.

262. *See* Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357 (1974); Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485 (1974).

263. *See* authorities cited note 262 *supra*.

a party to the first proceeding. A state court might well decide that the party attacking the federal court judgment is barred by that judgment and that the state court proceeding must be terminated. This represents a logical expansion of preclusion, one that is demanded by the exigencies of the situation.[264]

A third example of the possible expansion of preclusion is found in *Turner v. American Bar Association*.[265] In this case the judgment purportedly barred litigation of a broad range of claims by any person who might attempt to make them in the future. The judge affirmatively set forth the preclusive effect of the judgment he was handing down as a clear warning to anyone who might try to litigate these matters in the future.

Preclusion is based on a desire to provide an end to litigation. In so doing the rights of individuals are firmly established, harassment of individuals is prevented, the courts are used in a more efficient way and the prestige of the court system is enhanced.[266] The concept of preclusion includes two facets: claim preclusion, which deals with the effect to be given to a judgment in subsequent litigation dealing with the same claim, and issue preclusion, which deals with the attempt to relitigate a fact issue faced and decided in an earlier suit.

The federal government's policy of seeking affirmatively to relitigate questions of law decided adversely to the government involves issue preclusion. There may be some question about applying issue preclusion to a government agency in such a situation because questions of both fact and law are involved; it is not a matter of fact alone. The present trend seems to be toward applying issue preclusion also to questions of law.[267] The ALI *Restatement of Judgments 2d*, Tentative Draft No. 1, provides in section 68, "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." This draft apparently has moved away from the

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264. *See* Vestal, *Protecting a Federal Court Judgment*, 42 TENN. L. REV. 635, 650 (1975).

265. 407 F. Supp. 451 (N.D. Tex., W.D. Pa., N.D. Ind., D. Minn., S.D. Ala., W.D Wis. 1975), also discussed in text accompanying notes 275-77 *infra*.

266. A. VESTAL, RES JUDICATA/PRECLUSION V-7 (1969).

267. RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment c, at 162-63 (Tent. Draft No. 1, 1973).

differentiation between law and fact found in the original *Restatement of Judgments.*[268]

On the question whether a determination of a question of law can be issue preclusion, *Partmar Corp. v. Paramount Corp.*,[269] in which the Supreme Court expressed a willingness to apply the doctrine to issues of law, is instructive. The Court stated, "This was *res judicata* of that fact, if it be considered a fact, and nonetheless *res judicata* if it is a decision on the law, binding in another cause of action arising from the same controversy or claim."[270]

Commissioner v. Sunnen[271] includes a discussion of the application of issue preclusion/collateral estoppel in tax litigation. The Court expressed the view that issue preclusion of a legal issue might give one taxpayer an unfair advantage over others because of a difference in tax treatment. The Court expressed a fear of "inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis of litigious confusion."[272] It might be argued that applying preclusion would minimize the very things the Court feared. Where there is now discrimination in taxes applied to various citizens residing in different circuits, uniformity could be provided by precluding the government from relitigating adverse decision. Where there is now litigious confusion because of relitigation by the government, the application of preclusion against the government would cut down on confusion and litigation.

Although there may be some confusion about the general rule, issue preclusion normally arises if an issue necessary for the decision has been litigated between the parties and if the party to be precluded had the incentive and opportunity to litigate the issue. Since this is a developing area of the law, it would seem that the courts could adopt the rule of decision they feel best serves the interests of the government, the litigants, the courts and society generally. When the government has litigated the matter at the court of appeals level it would seem logical to say that it has had the incentive and opportunity to litigate the matter fully and that preclusion should apply. A strict application of preclusion might demand that the government be precluded by a dis-

268. *Compare* RESTATEMENT OF JUDGMENTS § 68 (1942) *with* § 70 of that Restatement.

269. 347 U.S. 89, 103 & n.9 (1954).

270. *Id.* at 103. *But see* Young v. Edwards, 389 Mich. 333, 207 N.W.2d 126 (1973); A. VESTAL, RES JUDICATA/PRECLUSION V-250 (1969).

271. 333 U.S. 591, 597-602 (1948).

272. *Id.* at 599.

trict court decision, but courts developing the law should consider all of the applicable principles before deciding what rule should be applied. Holding for preclusion at the court of appeals level would seem to be (1) consistent with the concept of preclusion, (2) supported by the principles that undergird preclusion and (3) justified by the role the government plays at that point.

IV. UNITARY NATURE OF THE FEDERAL COURT SYSTEM

In examining the policy of relitigation adopted by federal administrative agencies, it is necessary to look at the federal court system itself. The federal courts—district courts and courts of appeals—are not a disparate group of individuals who operate quite apart from one another. Rather the judges are integrated members of a closely-knit organization. The judges have offices together; they sit together; they move readily from one court to another; district judges sit on courts of appeals; court of appeals judges sit on the district courts. Judges move readily from one circuit to another. The number of judges is small enough and the relationships close enough that most judges are acquainted with many others. They gather annually in circuit conferences. At the national level they participate in conferences together. For example, at an ALI meeting there is a possibility that a substantial number of federal judges will be in attendance.

The unitary nature of the federal court system has been well described by Judge Haynsworth in *Atkins v. Schmutz Manufacturing Co.*[273] Commenting on the emphasis placed on "the functioning of the system as a whole," he stated,

> The great burden of judicial work of the system . . . is conducted in the District Courts; courts of general jurisdiction encompassing almost the whole of federal jurisdiction itself. In each district there is but one District Court, and the boundaries of many districts coincide with those of whole states. . . .
>
> . . . [T]he Circuit Courts exercise substantial administrative control over the District Courts within the Circuit and their judges, and the Chief Circuit Judge may assign judges anywhere in the Circuit if the work requires. With the consent of the Chief Justice and the Chief Circuit Judges concerned, such assignments may be made to other circuits.
>
> In a developing sense, the boundaries of a district are not impenetrable walls strictly confining the power of a District Court.

273. 435 F.2d 527 (4th Cir. 1970).

> Even if the district encompasses only a part of a state, the process of the District Court reaches throughout the state. When additional parties need be brought in, its process may reach out a hundred miles, across district and state boundaries. In interpleader actions, its process reaches throughout the nation.
>
> Relatively liberal provisions for the transfer of cases from district to district permit consolidations for trials and evidence a cooperative functioning of the parts of the system. Recent developments in the handling of multi-district litigation arising out of such things as airline crashes and multitudinous anti-trust claims now permit the consolidation for pretrial processing of all such cases by one judge in one district under the general supervision of a special panel of judges. Duplications and wasteful effort and expense are thus avoided in a system capable of functioning in a unitary manner.
>
> A judgment obtained in one district court may be enforced in another, without formal proof of judgment, by filing a certified copy of the judgment in the district in which enforcement is sought. 28 U.S.C.A. § 1963.
>
> The capacity of the federal courts to function cooperatively led Judge Parker, speaking for this court, to describe the system as "unified" and to approve the transfer of an action, timely filed in the Southern District of New York in the Second Circuit, but where the respondent ship had not been found, to the District of Maryland, where the ship could be attached, though the statute of limitations had run before the transfer. In somewhat similar circumstances, the Supreme Court approved the transfer of a case from the Eastern District of Pennsylvania, where it had been filed but where the defendants could not be "found," to the Southern District of New York where the defendants could be "found." That transfer was made pursuant to 28 U.S.C. § 1406(a), one of several procedural provisions affording federal court litigants protection against "justice-defeating technicalities."[274]

The essential unity of the federal system was shown recently in a case discussed earlier, *Turner v. American Bar Association*.[275] A number of individuals, claiming a right to have unlicensed persons practice law in the federal courts, commenced actions in various federal courts against the American Bar Association and members of the federal judiciary. The Chief Justice, in order to handle this series of cases in the most expeditious manner, assigned all of the cases to a single federal court judge sitting in the Federal District Court for the North-

274. *Id.* at 533-34.

275. 407 F. Supp. 451 (N.D. Tex., W.D. Pa., N.D. Ind., D. Minn., S.D. Ala., W.D. Wis. 1975).

ern District of Texas. This meant that when the district judge held court he was holding court in the Northern District of Texas, the Western District of Pennsylvania, the Northern District of Indiana, the District of Minnesota, the Southern District of Alabama and the Western District of Wisconsin.[276] This one judge was holding court in six different federal courts in four different circuits. This action of assigning these cases to one judge shows the essential unity of the federal system.[277]

The interchangeable nature of the courts of appeals is shown in the cases that allow the transfer of cases from one court of appeals to another. As one court of appeals stated with regard to its ability to transfer a proceeding, "[W]e have the inherent power to order it in the interest of justice and sound judicial administration. While we apparently have not so ruled recently . . . the great weight of authority now is that such inherent power exists."[278]

Implicit in the transferring of cases between circuits are (1) the idea that the law in various circuits is the same, and (2) the idea that the law applicable in the United States courts should be the same. One court faced with a request for a transfer considered the possible benefits accruing from such an action. It stated,

> We must also consider that litigation in several circuits, with possible inconsistent and delayed results on the merits, can only serve to frustrate the strong Congressional interest in improving the environment as evidenced by the Clean Air Act. Additionally, we do not feel that judicial manpower is so abundant as to permit several circuits to solve identical complex legal and factual issues in the present case.[279]

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276. In May, 1974, and thereafter, the Chief Justice of the United States Supreme Court, Warren E. Burger, and the Chief Judge of the Fifth Circuit, John R. Brown, began designating the undersigned [D.J. Garza] to sit in seven similar cases and three related cases filed in the United States District Courts in the States of Texas, Pennsylvania, Indiana, Minnesota, Alabama and Wisconsin.

Id. at 456.

277. This is not the only occasion on which a federal court has sat in more than one district. In United States v. United Air Lines, Inc., 216 F. Supp. 709 (D. Nev., E.D. Wash. 1962), the judge was sitting in two different district courts. In this case the two district courts were in the same circuit so that there was no problem about the appeal. The decision was affirmed in part and modified in part, *sub nom.* United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir.), *cert. dismissed,* 379 U.S. 951 (1964).

278. American Tel. & Tel. Co. v. FCC, 519 F.2d 322, 325 (2d Cir. 1975). *See also* Panhandle E. Pipe Line Co. v. FPC, 337 F.2d 249 (10th Cir. 1964).

279. National Resources Defense Council, Inc. v. EPA, 465 F.2d 492, 495 (1st Cir. 1972).

These same considerations should militate in favor of the application of issue preclusion against government agencies. Using issue preclusion against the government would eliminate inconsistent results and would cut down on the use of judicial manpower in relitigation of issues already decided against the government. The transfer of cases from one circuit to another is apparently premised on a desire for uniformity of decision; the acceptance of such transfer becomes an argument for uniformity through issue preclusion against government agencies.[280]

The concept of a unified system, as opposed to free-standing courts, is found also in the vertical relationship of the federal courts. When a federal court faces a question of state law that is dispositive of the action, the district court judge will decide the matter.[281] Once a district court judge decides the matter, there is a possibility that an appeal will be taken to the circuit court of appeals. Among many of the circuits there is a feeling that some weight should be given to the district court determination of the matter of state law. The degrees of weight accorded are articulated as "deferring" to the district court determination,[282] not reversing if the district court conclusion is permissible,[283] giving great weight to the district court determination[284] or reversing only if the district court misconceived or misapplied the state law.[285] In its various articulations, this general principle has been applied by all of the courts of appeals west of the Mississippi River.[286] Vertical unity is also found in the fact that district court judges sit with some frequency on the courts of appeals and review decisions rendered by other district court judges of the circuit.[287]

The fact that the federal system is, in truth, a unitary one should have some effect upon the operation of that system. The judges, func-

280. The concept of uniformity of decision in the federal courts also undergirds transfers under 28 U.S.C. § 1404 (1970) from one proper venue to another proper venue.

281. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

282. *E.g.*, Manning v. Jones, 349 F.2d 992 (8th Cir. 1965).

283. *E.g.*, H.K. Porter Co. v. Wire Rope Corp., 367 F.2d 653 (8th Cir. 1966).

284. *E.g.*, Sta-Rite Indus., Inc. v. Johnson, 453 F.2d 1192 (10th Cir. 1971), *cert. denied*, 406 U.S. 958 (1972).

285. *E.g.*, Harris v. Hercules, Inc., 455 F.2d 267 (8th Cir. 1972).

286. In its various articulations, it has been applied in the Fifth, Eighth, Ninth and Tenth Circuits. *See* Douglas v. Beneficial Fin. Co., 469 F.2d 453 (9th Cir. 1972); Wyoming Farm Bureau Mut. Ins. Co. v. State Farm Mut. Auto Ins. Co., 467 F.2d 990 (10th Cir. 1972); Harris v. Hercules, Inc., 455 F.2d 267 (8th Cir. 1972); C.H. Leavell & Co. v. Board of Comm'rs, 424 F.2d 764 (5th Cir. 1970); Ford v. International Harvester Co., 399 F.2d 749 (9th Cir. 1968); Insurance Co. of North America v. English, 395 F.2d 854 (5th Cir. 1968); Manning v. Jones, 349 F.2d 992 (8th Cir. 1965); Pendergraft v. Commercial Standard Fire & Marine Co., 342 F.2d 427 (10th Cir. 1965).

287. 28 U.S.C. § 292(a) (1970).

tioning in this close-knit relationship, are in a position to operate so that the output of the system is a consistent whole. At least the conflicts and inconsistencies should be kept to a minimum. The approach of the participants in the judicial system should reasonably be expected to be one of cooperation and understanding rather than conflict and confusion.

V. SYNTHESIS; CONCLUSION

The governmental policy of relitigation of issues decided against the government must be examined in light of (1) the doctrine of controlling decision that has developed over the years and that still has some vitality at the present time,[288] (2) res judicata/preclusion as it has developed and expanded and (3) the unitary nature of the federal system. More fundamentally, the doctrine of relitigation must be examined in the terms of its effect on the public and the possible adverse consequences that may flow from such relitigation.

A factor underlying both the doctrine of controlling decisions and res judicata/preclusion is the desire to afford equal treatment to all litigants. If the same law is going to be applied to all litigants, some way must be devised to establish the law definitively. This does not necessarily mean that the law must be decided correctly but it does mean that the law must be articulated with finality. As has been stated, "This is really one of the silent, unconsidered, yet most valuable functions of a Supreme Court. Not that it is infallible, but that it can authoritatively settle disputed questions and make uniform a law that might be differently and variously decided by the ablest and most upright men . . . ."[289]

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288. *See* discussion of various courts of appeals at notes 98-245 *supra.*

289. Lamar, *A Unique and Unfamiliar Chapter in Our American Legal History*, 10 A.B.A.J. 513, 516 (1924). Speaking to this same point Mr. Justice Brandeis stated, "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation." Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (footnote omitted).

While recognizing the need for some flexibility, Judge Cardozo said in reference to the New York Court of Appeals:

> We have had ten judges, of whom only seven sit at a time. It happens again and again, where the question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time. The situation would, however, be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings. In such circumstances there is nothing to do except to stand by the errors of our brethren of the week before, whether we relish them or not.

B. CARDOZO, *The Nature of the Judicial Process*, in SELECTED WRITINGS 171 (1947).

In the case of litigation concerning federal agencies, certainty and uniformity are more to be desired than correctness in the interpretation of applicable statutes. When a situation exists in which circuits conflict on interpretation there is a serious question about what result is correct. It is undesirable to allow uncertainty and dissimilar treatment to continue for any period of time. Justice Cardozo articulated the reasons: "One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent."[290]

Stability of decision to avoid burdening the courts with repetitive litigation is another concept that undergirds both the doctrine of controlling decisions and res judicata/preclusion. Speaking to the matter of stability of decision, Justice Cardozo stated,

> In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception. . . . the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.[291]

If repeated litigation of the same matter is allowed, courts, attorneys and litigants will be involved in the expenditure of time and effort in a way that would seem to be grossly wasteful of the resources of society. Also, terminating litigation at some point protects parties from harassment and repetitive attacks on the same matter by a litigious individual who is willing to spend his resources in endless litigation.[292] A subordinate but somewhat significant factor is the prestige of the courts, which suffers if there is repetitive litigation of a matter with inconsistent results in various courts with the law being applied differently in different parts of the country.[293]

If the Supreme Court has a genuine "concern for efficient operation of the lower federal courts"[294] it should consider taking steps to minimize relitigation of issues in those courts, such as enforcing issue

290. B. CARDOZO, *supra* note 289, at 153.
291. *Id.* at 170-71 (footnotes omitted).
292. *See, e.g.*, Engelhardt v. Bell & Howell Co., 327 F.2d 30 (8th Cir. 1964).
293. *See* A. VESTAL, RES JUDICATA/PRECLUSION V-12 (1969).
294. Swift & Co. v. Wickham, 382 U.S. 111, 128 (1965).

preclusion on matters of law against government agencies at least at the court of appeals level.

A. Alternative Methods of Getting Uniformity

Should the courts adopt the idea that a court of appeals could establish the law to be applied in the federal courts and so prevent relitigation by the federal government, a giant step would be taken toward uniformity in the law applied in the federal courts. This idea—uniformity of law applied—is an end that has been sought by numerous people from time to time. The proposal for a National Court of Appeals[295] in part is justified by the uniformity in law applied that would be achieved. Uniformity could also be obtained by centralizing all cases of a certain type in a single court either by a jurisdictional provision or by a venue requirement. For example, the Regional Rail Reorganization Act[296] authorized a single special court to handle litigation under that Act.[297] The special court was constituted and ordered to hear litigation pending in federal courts[298] concerning bankruptcies of a number of railroads. In this way uniformity was obtained in proceedings required under sections 207(b) and 303 of the Act. This same uniformity in result was obtained under the Emergency Price Control Act of 1942, which created the Emergency Court of Appeals.[299] This court had exclusive jurisdiction "to determine the validity of regulations, orders, and price schedules issued pursuant to the Price Control Act."[300] As the Supreme Court stated, "This was accomplished by the exercise of the constitutional power of Congress to prescribe the jurisdiction of inferior federal courts, and the jurisdiction of all state courts to determine federal questions, and to vest that jurisdiction in a single court, the Emergency Court of Appeals."[301] Another example is 42 U.S.C. section 4915, which provides for review of EPA orders concern-

295. COMMISSION ON REVISION, *supra* note 26, at 39.

296. 45 U.S.C. §§ 1-794 (Supp. V 1975).

297. 45 U.S.C. § 719(b) (Supp. V 1975).

298. *See In re* Litigation Under Regional Rail Reorg. Act of 1973, 373 F. Supp. 1401 (J.P.M.D.L. 1974) (per curiam).

299. Act of Jan. 30, 1942, tit. II, ch. 26, § 1, 56 Stat. 31 (previously codified at 50 U.S.C. app. § 924(c)). The Emergency Price Control Act expired in 1947. In 1970, Congress established the Temporary Emergency Court of Appeals to handle appeals from the district courts in cases arising under the Economic Stabilization Act of 1970. Act of Aug. 15, 1970, Pub. L. No. 91-379, § 211, 84 Stat. 799 (codified at 12 U.S.C. § 1904 (Supp. V 1975)).

300. 1 MOORE'S FEDERAL PRACTICE ¶ 0.3[9], at 57 (2d ed. 1976).

301. Yakus v. United States, 321 U.S. 414, 429 (1944).

ing noise control only in the Court of Appeals for the District of Columbia Circuit. The same section provides the same venue limitation concerning FAA orders under 49 U.S.C. section 1431. By limiting review there is assured a uniformity in decision.

B. Moving Toward Uniformity in Federal Litigation

It would seem reasonable to apply issue preclusion on matters of law against the government at the court of appeals level. Certainly by the time the litigation reaches that level the government has had the opportunity and incentive to litigate the matter fully. It must be noted that the thesis being advanced here was argued to some extent in *Divine v. Commissioner*,[302] and rejected by the court. A reading of the opinion will suggest that the arguments against the thesis are not convincing. For example, the court states, ". . . having a number of circuits consider the substantive tax issue is desirable inasmuch as several consecutive adverse rulings may convince the Commissioner that the issue should no longer be contested."[303] If the court had held the Commissioner bound by an adverse ruling, it would not have been necessary to convince the Commissioner; he would not have been able to contest the matter; it would have been laid to rest immediately.

The court further stated,

> In concluding our analysis, we think it important to mention that our decision is consonant with the often articulated grounds justifying the rule permitting collateral estoppel. The rule developed as a means of protecting a person from legal harassment and redundant legal fees. Divine [the taxpayer] will be subject to neither.[304]

The court is too simplistic in this analysis of collateral estoppel/issue preclusion. The government does, in fact, pick the party against whom it wishes to litigate, the time at which the litigation is to occur and the court in which the litigation will be heard. Even when the government is sued, it can manipulate the litigation so as to avoid an adjudication at the court of appeals level. Prior to the commencement of the action the government may even concede the point to the potential litigant to avoid the possibility of litigation on the matter with the particular individual at that time.

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302. 500 F.2d 1041 (2d Cir. 1974), rejecting the argument that an earlier decision, Luckman v. Commissioner, 418 F.2d 381 (7th Cir. 1969), should be preclusive.

303. *Id.* at 1050.

304. *Id.*

It may be asked whether it is reasonable to demand that the government accept a court of appeals decision as conclusive on the point and force the government to live with the decision. First, it must be remembered that the decision is the conclusion of a court of appeals, thereby giving the decision some stature. Secondly, the federal government has the right to seek an en banc rehearing on the matter in the court of appeals. Third, the court of appeals if concerned about the correctness of its conclusion can certify the question to the United States Supreme Court for an answer.[305]

More importantly, however, if the government agency feels it cannot live with the interpretation given by the court of appeals, it can ask Congress to change the law, and agencies do seek and get legislation. It would seem reasonable to direct the agency's efforts to get a change toward Congress rather than toward the courts. Relitigation of a decided point in an attempt to get a different result means that the government is attempting to apply the law differently to some persons than it is being applied under the earlier decision to other persons in the same situation. This seems on its face to be discriminatory and undesirable. Some national uniformity in the application of the law and the end to some repetitive, confusing litigation will be achieved if issue preclusion is applied against the government at the court of appeals level.

Preclusion against the government probably should not include decisions on matters of constitutional law. This exception would seem to be logical since the federal agencies could not get a change in the law from Congress. Perhaps, too, on a constitutional matter the balance may be in favor of allowing a number of courts of appeals to address the matter to get a full ventilating of the conflicting considerations before the Supreme Court finally decides the question.[306]

In deciding the effect of the judgment of one court on the proceedings in a second the judiciary has displayed some of its greatest ingenuity. Enormous steps in this area have been taken in the interest of justice.[307] The Supreme Court in *Blonder-Tongue Laboratories,*

305. 28 U.S.C. § 1254(3) (1970).

306. Mr. Justice Frankfurter, speaking for himself in Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950), noted, "It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening."

307. *See, e.g.*, Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964); United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash., D. Nev. 1962), *aff'd sub nom.* United Air Lines v. Wiener, 335 F.2d 379 (9th Cir.), *petition for cert. dismissed,* 379

Inc. v. University of Illinois Foundation, recognizing that res judicata/preclusion was undergoing substantial changes, stated,

> Undeniably, the court-produced doctrine of mutuality of estoppel is undergoing fundamental change in the common-law tradition. In its pristine formulation, an increasing number of courts have rejected the principle as unsound. Nor is it irrelevant that the abrogation of mutuality has been accompanied by other developments—such as expansion of the definition of "claim" in bar and merger contexts and expansion of preclusive effects afforded criminal judgments in civil litigation—which enhance the capabilities of the courts to deal with some issues swiftly but fairly.[308]

The Court then spoke to the broad question, "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue."[309] Other relevant considerations in the eyes of the Court seemed to be the "gaming table" approach to litigation and the possible misallocation of resources in repetitive litigation.[310] These considerations are significant in evaluating relitigation of decided issues, and might be viewed as ample justification for the change in the law that has been suggested.

This is a cry for the federal courts again to take a giant step in the interests of all people in the United States. It is a move beyond the present law, but it is consistent with the precedents of the past and would show again the ability of the courts to face and solve significant problems.

U.S. 951 (1964); Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942).

308. 402 U.S. 313, 327 (1971) (footnotes omitted).

309. *Id.* at 328.

310. *Id.* at 329.