

GREATNESS IN A LOWER FEDERAL COURT JUDGE: THE CASE OF J. SKELLY WRIGHT

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I. JUDGE WRIGHT’S LIFE AND FOOTSTEPS	32
A. EARLY LIFE.....	32
B. JUDGE WRIGHT IN NEW ORLEANS.....	33
C. JUDGE WRIGHT ON THE D.C. CIRCUIT.....	36
1. CASES INVOLVING CALLS TO EXPAND PREVIOUSLY RECOGNIZED RIGHTS IN ORDER TO HELP THE POOR AND DISADVANTAGED.	38
2. CIVIL LIBERTIES CASES UNDER THE BILL OF RIGHTS.	41
3. CASES CALLING FOR JUDICIAL REVIEW OF THE DECISIONS OF ADMINISTRATIVE AGENCIES.	42
II. JUDGING THE JUDGE: APPRAISING GREATNESS IN A LOWER-COURT JUDGE, PART I	43
A. THE DISTINCTION BETWEEN JUDICIAL GOODNESS AND GREATNESS.....	44
B. CRITERIA OF JUDICIAL GREATNESS.....	46
1. POSSESSION AND EXHIBITION OF THE CHARACTERISTIC VIRTUES OF A GOOD JUDGE.	46
2. INFLUENCE WITHIN THE ERA IN WHICH A JUDGE LIVES.....	48
3. MANIFESTATION OF CONSPICUOUS EXCELLENCE OF JUDGMENT IN CASES OF EXTRAORDINARY IMPORTANCE.	49
4. HISTORICAL SIGNIFICANCE.....	50
III. APPRAISING THE GREATNESS OF JUDGE J. SKELLY WRIGHT, PART II.....	52

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In a poem entitled “A Psalm of Life,” Henry Wadsworth Longfellow wrote:

Lives of great men all remind us
We can make our lives sublime,
And, departing, leave behind us
Footsteps on the sands of time¹

As much as—if not more than—any other lower federal court judge of his generation, J. Skelly Wright left large footsteps on the sands of time. As a district judge for the Eastern District of Louisiana from 1949 to 1962, he took a courageous leading role in desegregating the New Orleans schools.² Braving social ostracism, death threats, and a cross-burning on his lawn, he brought about “not only the integration of the public schools in New Orleans but also the integration of universities, buses, parks, sporting events and voting lists, historic moves that reverberated elsewhere in the South in the 1950’s and 1960’s, the era of the civil rights campaigns.”³ As a judge on the U.S. Court of Appeals for the District of Columbia Circuit from 1962 to 1988, Judge Wright wrote path-breaking opinions in a number of areas of the law.⁴ Many of his decisions attracted widespread academic commentary, most of it favorable but some critical. Welcoming the debates, Judge Wright published an accompanying stream of much-discussed articles in the nation’s foremost law reviews.⁵ When Wright died in 1988, tributes described him as among “the

1. HENRY WADSWORTH LONGFELLOW, *A Psalm of Life*, in VOICES OF THE NIGHT 5, 7 (1839).

2. See, e.g., JACK BASS, UNLIKELY HEROES 112-35 (1981); ARTHUR SELWYN MILLER, A “CAPACITY FOR OUTRAGE”: THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT 71-83 (1984).

3. Marjorie Hunter, *Judge J. Skelly Wright, Segregation Foe, Dies at 77*, N.Y. TIMES, Aug. 8, 1988, at D10.

4. For a sympathetic survey, see generally MILLER, *supra* note 2.

5. See, e.g., J. Skelly Wright, *Judicial Review and the Equal Protection Clause*, 15 HARV. C.R.-C.L. L. REV. 1 (1980) [hereinafter Wright, *Equal Protection Clause*]; J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982) [hereinafter Wright, *Money and the Pollution of Politics*]; J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976) [hereinafter Wright, *Is Money Speech?*]; J. Skelly Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971) [hereinafter Wright, *Scholarly Tradition*]; J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974) [hereinafter Wright, *The Courts and the Rulemaking Process*].

2015] **Greatness in a Lower Court Judge** 31

outstanding jurists of the nation's history."⁶ More than twenty-five years after Judge Wright's death, he is less remembered, but surely not forgotten.

My principal aim in this short essay is to recall the work in the law for which Judge J. Skelly Wright is and deserves to be remembered. In substantial part, my reflections constitute a tribute. As a former law clerk to Judge Wright, I make no effort to disguise my admiration and affection for him.⁷ Nevertheless, my assessment will not lack critical bite. My ultimate interests include the qualities that can contribute to, and perhaps are necessary for, greatness in a lower-court judge.

For much of the essay, I shall talk of judicial greatness without seeking to identify the standards for measuring it. Proceeding more inductively than deductively, I shall first unhesitatingly characterize Skelly Wright as a great judge, based on his courage, his integrity, and his indisputable accomplishments. After having reached a somewhat intuitive judgment about Judge Wright's greatness, however, the essay takes a more ruminative and occasionally a more critical turn. Reflecting briefly on the criteria by which greatness in a lower federal court judge ought to be measured, I shall distinguish the excellence of the good judge—who decides individual cases fairly and often narrowly—from the attributes of a great judge—who leaves, and typically sets out to leave, a broader impact on the direction of the law. The achievement of judicial greatness requires bold self-confidence, and it carries risks of hubristic overreaching as well as the possibility of ennobling accomplishment. So recognizing, I shall argue that the aspiration to greatness is an ambivalent quality in a judge—even as I affirm my thankfulness that Judge J. Skelly Wright aspired to greatness, not just goodness.

In the essay's final Part, I address a paradox about Judge Wright that reflection on the general criteria of judicial greatness

6. William J. Brennan, Jr., *In Memoriam: J. Skelly Wright*, 102 HARV. L. REV. 361, 361 (1988); *see also, e.g.*, Geoffrey R. Stone, *A Passion for Justice*, 98 YALE L.J. 213, 218-19 (1988); Patricia M. Wald, *In Memoriam: J. Skelly Wright*, 102 HARV. L. REV. 363, 367 (1988).

7. I should acknowledge, too, that my ruminations do not rest on substantial independent research. For biographical details and other relevant history, I rely heavily on Arthur Selwyn Miller's insightful and sympathetic biography cited in note 2, *supra*.

brings dramatically to the fore. Judge Wright was personally modest and unassuming, embarrassed by praise and attention. Yet he sought determinedly to exert the greatest influence on the direction of the law that he could achieve as a lower court judge. In some of his work as a judge, he held himself rigidly bound by law and demanded that others accede to the law as judicially decreed. In other moments, however, Judge Wright was an unabashed legal Realist who sought to bend legal doctrine to his vision of social justice. In interesting ways, J. Skelly Wright was a man of contradictions. Those contradictions, I shall argue, were crucial to his greatness as a judge.

I. JUDGE WRIGHT'S LIFE AND FOOTSTEPS

My central claim that J. Skelly Wright stands high among the great judges of his generation is easily vindicated, for it is over-determined.⁸ Wholly apart from his service on the D.C. Circuit, Judge Wright's accomplishments as a district judge in New Orleans during its school desegregation struggles left the kind of footsteps on the sands of time that serve as markers of judicial greatness. Yet he would also have acquired the requisite distinction based solely on his record as a judge on the D.C. Circuit. The overall career was breathtaking.

A. EARLY LIFE

James Skelly Wright was born in 1911 in New Orleans, the second of seven children in a family that his biographer described as "poor."⁹ Wright attended Loyola University New Orleans and worked his way through Loyola University New Orleans College

8. I shall not attempt to make appraisals of comparative greatness that would call for a ranking of Judge Wright against such estimable contemporaries as Judge Henry Friendly. The claim of priority asserted by DAVID M. DORSEN, *HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA* (2012) is plausible, but not one that impresses me as obviously correct. Cf. Adrian Vermeule, *Local Wisdom*, *NEW REPUBLIC* (Mar. 22, 2012), <http://www.newrepublic.com/book/review/henry-friendly-supreme-court-david-dorsen> (questioning Dorsen's claim on the ground that Judge Friendly made no enduring contribution to legal thought). *But see* Richard A. Posner, *In Memoriam: Henry J. Friendly*, 99 *HARV. L. REV.* 1724 (1986) (characterizing Friendly as "the greatest federal appellate judge of his time - in analytic power, memory, and application perhaps of any time"). Even if sorting out claims to the title of "greatest judge of his era" were a worthwhile enterprise, I have surely not done the requisite work to support a contestable judgment. Interestingly, Mr. Dorsen's book provides scant documentation or argument for the comparative aspect of his claim regarding Judge Friendly.

9. *See* MILLER, *supra* note 2, at 14.

of Law, from which he graduated in 1934.¹⁰ From 1936 to 1942, he was an assistant United States Attorney.¹¹ During World War II, he served as a Coast Guard officer. While stationed in London, he met the love of his life, Helen Patton, whom he married in 1945.¹² After the war, he resumed working as an assistant United States Attorney before briefly entering private law practice in Washington, D.C.¹³

Although Skelly Wright's family lacked material wealth, he had a politically connected uncle, Joseph P. Skelly, who helped in securing his appointment as an assistant United States Attorney.¹⁴ Thereafter the young Skelly Wright cultivated a number of influential friends and patrons, including United States Attorney General (and later Supreme Court Justice) Tom Clark. When a vacancy opened on the Fifth Circuit in 1948, Wright approached the Attorney General to solicit nomination to the post.¹⁵ Although that seat ultimately went to a more seasoned candidate, President Harry Truman soon named Wright to the District Court instead.¹⁶ At age thirty-eight, he became the youngest federal judge in the nation.¹⁷

B. JUDGE WRIGHT IN NEW ORLEANS

Although he was a southerner by birth, breeding, and temperament, Skelly Wright emerged early in his career as a champion of African Americans' rights. A first signal came in a 1950 decision in *Wilson v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*,¹⁸ in which he applied the Supreme Court's analysis in *Sweatt v. Painter*¹⁹ to order the desegregation of the Louisiana State University School of Law. Louisiana's separate law school for blacks was not the equal of Louisiana State's, he held, and it thus failed to satisfy the "separate but equal" formula that reigning constitutional doctrine used to identify equal protection

10. See MILLER, *supra* note 2, at 14.

11. See *id.* at 14-15.

12. *Id.*

13. *Id.* at 15.

14. MILLER, *supra* note 2, at 14.

15. MILLER, *supra* note 2, at 15.

16. *Id.*

17. *Id.*

18. 92 F. Supp. 986 (E.D. La. 1950).

19. 339 U.S. 629 (1950).

violations. Wright later described the case as a personal watershed: “Until that day I was just another Southern ‘boy.’ After it, there was no turning back.”²⁰

Judge Wright’s next major test began when Oliver Bush, an African-American father of thirteen children, brought suit challenging the constitutionality of segregation in the New Orleans public schools. Although Bush filed his action in 1952,²¹ the suit lay dormant until after the Supreme Court’s epochal 1954 decision in *Brown v. Board of Education*²² and its ruling a year later in *Brown II* that desegregation must occur “with all deliberate speed.”²³ When the Louisiana legislature responded to *Brown* by enacting several pieces of legislation with the aims either of evading or defying the High Court’s ruling, Judge Wright, in *Bush v. Orleans Parish School Board*,²⁴ held that the Louisiana statutes were invalid as applied.²⁵ With that holding as a predicate, he swiftly issued an order directing the New Orleans school board to cease segregation, although only after such time “as may be necessary” to achieve an orderly transition.²⁶ Skelly Wright was the first judge in the Deep South to issue such a directive.²⁷

The school board still took no steps toward desegregation, however. To the contrary, the school board and the state of Louisiana continued to interpose obstacles and artifices. In 1958, Judge Wright invalidated a state statute that, the school board said, had deprived it of authority to implement his desegregation decree.²⁸ Facing more foot-dragging, Judge Wright set a deadline

20. ADAM FAIRCLOUGH, RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915-1972, at 155 (1995). Judge Wright also recounted having been deeply influenced by an earlier episode in which he watched blind Louisianans being led through separate white and black entrances as they arrived for a Christmas party at a home for the blind:

The blind couldn’t segregate themselves. . . . There was somebody else doing it for them. It had an effect on me. . . . It began to make me think more of the injustice of it, of the whole system that I had taken for granted. I was getting mature, too, thirty-five or thirty-six That was the beginning, really.

BASS, *supra* note 2, at 112-13.

21. See BASS, *supra* note 2, at 117.

22. 347 U.S. 483 (1954).

23. 349 U.S. 294, 301 (1955).

24. 138 F. Supp. 337 (E.D. La. 1956).

25. *Id.* at 341-42.

26. *Id.* at 342.

27. BASS, *supra* note 2, at 119.

28. *Bush v. Orleans Parish Sch. Bd.*, 163 F. Supp. 701, 701-02 (E.D. La. 1958).

2015] **Greatness in a Lower Court Judge** 35

of May 1960 for the school board to present a desegregation plan.²⁹ His action in doing so appeared to trigger further manifestations of state and local resistance to federal authority, including more state legislation aimed at thwarting desegregation and inflammatory racist invective by state and local officials. Private violence predictably ensued. Undaunted, Judge Wright set a September deadline for desegregation to commence but, uncertain of support from the Eisenhower Administration, then felt grudgingly obliged to authorize a postponement until November. To prevent further truculent attempts at evasion and defiance, Judge Wright issued injunctions against the governor, the attorney general, the state police, the National Guard, and “all those acting in concert with them.”³⁰ His biographer explains: “Wright was alone, totally alone. . . . [T]he Republican Administration did not want to take any provocative action that might affect the presidential election in November.”³¹

On November 14, 1960, four black first-graders began attendance at previously all-white schools.³² That initial breach of the color barrier had both real and symbolic significance. By February of 1961, when the Kennedy Justice Department entered the case nearly five years after Judge Wright had issued his initial orders, the tide of events had turned.³³ In his book *Unlikely Heroes*, Jack Bass summarizes the denouement of the New Orleans desegregation crisis as follows:

With support by the full federal judiciary and ultimately the Justice Department and by his own personal resolve, Skelly Wright broke the back of the state’s effort at massive resistance and prevented the closing of the New Orleans public schools. He upheld federal supremacy under the Constitution by facing down the full force and power of the entire state of Louisiana.³⁴

Although Judge Wright prevailed, he paid a heavy personal cost. As Bass further recounts:

29. See *Bush v. Orleans Parish Sch. Bd.*, 187 F. Supp. 42, 43 (E.D. La. 1960).

30. *Id.* at 45-46.

31. MILLER, *supra* note 2, at 82.

32. *Id.*

33. See BASS, *supra* note 2, at 135.

34. BASS, *supra* note 2, at 135.

By the end of 1960, Skelly Wright had become the most hated man in New Orleans. Pairs of federal marshals alternated in eight-hour shifts at his home to ensure his physical safety, and they escorted him to and from work. With few exceptions, old friends would step across the street to avoid speaking to him.³⁵

In a reflection on the traits of character that led seemingly ordinary people into collaboration with the Hitler regime in Nazi Germany, Hannah Arendt chillingly observed that the morality of a “family man” could readily draw him into alignment with prevailing social forces, however evil they might be:

We had been so accustomed to admire or gently ridicule the family man’s kind concern and earnest concentration on the welfare of his family . . . that we hardly noticed how the devoted *parterfamilias*, worried about nothing so much as . . . his pension, his life insurance, the security of his wife and children, . . . was ready to sacrifice his beliefs, his honor, and his human dignity.³⁶

Though a devoted family man, Judge J. Skelly Wright never sacrificed his beliefs, his honor, or his human dignity. Resolute throughout, he endured risks not only to himself, but also to his wife and son.

C. JUDGE WRIGHT ON THE D.C. CIRCUIT

Partly based on Judge Wright’s meritorious record, and partly motivated by fears for his safety if he remained in New Orleans, the Kennedy Administration looked for an opportunity to elevate him to a seat on a court of appeals. The Fifth Circuit, in which New Orleans was located, was politically impossible; southern senators would have blocked his confirmation. The D.C. Circuit—to which southern racists were happy to see him removed—thus became the choice.

The new position presented Skelly Wright with enlarged opportunities. The D.C. Circuit is widely perceived as the second most powerful and influential court in the United States, trailing only the Supreme Court. A disproportionately large number of cases involving both constitutional and statutory challenges to

35. BASS, *supra* note 2, at 115.

36. HANNAH ARENDT, *Organized Guilt and Universal Responsibility*, in *ESSAYS IN UNDERSTANDING: 1930-1954*, at 121, 128 (Jerome Kohn ed., 1994).

2015] **Greatness in a Lower Court Judge** 37

action by the federal government appear regularly on its docket. As a judge on the D.C. Circuit, Wright had more occasions to engage with cutting-edge issues in constitutional and administrative law than the judges of any other court of appeals.

In addressing the issues that came before him, Judge Wright wrote opinions of high technical competence.³⁷ Many were long and heavily footnoted.³⁸ Although deciding each case on its facts, he frequently framed his rulings to guide the decision of future cases.

For a long time, Judge Wright prided himself on never having been reversed by the Supreme Court.³⁹ His record did not reflect jurisprudential timidity, however. Rather, in the early years of Judge Wright's tenure, his thinking closely tracked and sometimes anticipated that of the Warren Court. Indeed, his biographer overstated only slightly when he wrote that "[Judge] Wright's professional activities are best understood as an extension of and embellishment upon principles initially promulgated by the Warren Court."⁴⁰ Thoroughly aware of the affinity of views, in 1971, Judge Wright published an article in the *Harvard Law Review* in which he mounted a spirited defense of the Warren Court's characteristic approach against the criticisms leveled by Yale Law School Professor Alexander Bickel and others within what the judge characterized as an unduly rigid and conservative "scholarly tradition."⁴¹

Later in his tenure, as the Supreme Court grew more conservative, Judge Wright suffered reversal more frequently

37. See MILLER, *supra* note 2, at 3-16 (observing that "his is the language of the legal craftsman," and that his opinions include "detailed argumentation").

38. See, e.g., *id.* at 16 ("[H]is opinions look scholarly, in the sense that articles in legal periodicals, which are usually larded with mountains of footnotes, are considered to be scholarly.").

39. See Richard Parker, *In Memoriam: J. Skelly Wright*, 102 HARV. L. REV. 367, 368 (1988). According to Professor Parker, Judge Wright was first reversed months after Parker began his clerkship in 1970. Professor Parker could have been referring to *H. K. Porter Co., Disston Division-Danville Works v. NLRB*, 414 F.2d 1123 (D.C. Cir. 1969) (*per curiam*), *rev'd sub nom.* *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

40. MILLER, *supra* note 2, at 14. Pressing a spirit-of-the-age thesis a step further, the historian John Morton Blum has linked the jurisprudential philosophy of the Warren Court to the political values that animated President Lyndon Johnson's Great Society, which sought a fairer distribution of benefits and opportunities for historically disadvantaged groups. JOHN MORTON BLUM, *YEARS OF DISCORD* 187-88 (1991).

41. See Wright, *Scholarly Tradition*, *supra* note 5.

than in the early years. Indeed, research by one of his former clerks indicates that of the twenty-five cases in which the Court reviewed his decisions, he suffered twenty-one reversals.⁴² Judge Wright did not take those reversals lightly. Aware of the obligations of lower-court judges, he frequently pressed to the limits of such discretion as Supreme Court decisions allowed him, and obviously went further than a majority of the Justices thought permissible in a number of cases, but never did he display intransigence or defiance. On the issue with respect to which he felt that the Supreme Court had erred most grievously—involving the protection the Court gave to expenditures on speech aimed at influencing the outcome of political campaigns—Judge Wright took to the law reviews to explain why he thought that the Court had erred.⁴³

Beyond noting affinities to the Warren Court, it is not easy to summarize the substantive themes in Judge Wright's opinions that helped to earn him broad notice in legal circles. Like any lower-court judge, he decided the cases that appeared on his docket, many of which presented issues of no particular moment. But the D.C. Circuit's caseload, as I have noted, included an extraordinary number of cutting-edge legal disputes. At the risk of oversimplification, I shall single out three categories of cases in which Judge Wright had occasion to write much-discussed opinions.

**1. CASES INVOLVING CALLS TO EXPAND PREVIOUSLY
RECOGNIZED RIGHTS IN ORDER TO HELP THE POOR AND
DISADVANTAGED.**

A jurisprudential hallmark of the Warren Court involved the recognition of new legal rights that had special importance to the poor and disadvantaged.⁴⁴ By the end of the Warren Era, lower courts, as well as the Supreme Court, had begun to work out the remedial implications of some of these rights in suits for injunctive relief that enmeshed them in “polycentric” disputes about the management of complex institutions such as school

42. See Sally Katzen, *J. Skelly Wright: A Clerk's Perspective of the Judge*, 61 LOY. L. REV. 15, 18 (2015).

43. See Wright, *Money and the Pollution of Politics*, *supra* note 5; Wright, *Is Money Speech?*, *supra* note 5.

44. See generally MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998).

departments, prisons, and state hospitals.⁴⁵

As Professor Miller emphasized in his biography, Judge Wright recurrently found opportunities to expand the legal rights of disadvantaged groups, including racial minorities and the poor.⁴⁶ In *Hobson v. Hansen*,⁴⁷ Wright invalidated a D.C. school district policy of assigning students to classes based on academic ability. The assignment system, he ruled, violated the Equal Protection Clause because it worked to the disadvantage of minority races. In order to enforce his ruling, Judge Wright became deeply engaged in the operation of the D.C. schools.⁴⁸ As commentators noted then and later—some admiringly, others critically—his multifaceted involvement epitomized the emerging role of judges in “public law litigation” aimed at reforming inadequately performing governmental institutions.⁴⁹

In *Williams v. Walker-Thomas Furniture Co.*,⁵⁰ Judge Wright held that a legal principle barring the enforcement of “unconscionable” contracts potentially applied to the financing arrangements that a D.C. furniture store offered to its predominantly low-income clientele. Under the challenged contracts, no single item of furniture was ever fully paid for—and all purchases thus remained subject to repossession if even a single payment on one item were missed—until a customer had paid for everything. A contract can be unconscionable, Judge Wright ruled, when one of the parties lacks meaningful choice in accepting its terms due to “a gross inequality of bargaining

45. The literature on “public law,” “structural,” or “institutional reform” litigation is enormous. A classic, pioneering study is Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Other important contributions to the vast literature include Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974), and Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

46. See MILLER, *supra* note 2, at 18-88 (discussing Judge Wright’s perspective on cases involving social justice and race).

47. 269 F. Supp. 401 (D.D.C. 1967). The case occasioned multiple rulings, many of them also memorialized in other volumes of the Federal Reporter and Federal Supplement.

48. See MILLER, *supra* note 2, at 55-71 (discussing Judge Wright’s involvement in *Hobson v. Hansen* and related cases).

49. See sources cited *supra* note 45. For scathingly critical commentary on Judge Wright’s role in *Hobson v. Hansen*, see DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 106-70 (1977).

50. 350 F.2d 445 (D.C. Cir. 1965).

power.”⁵¹

In his sympathetic reconstruction of Judge Wright’s judicial philosophy, Professor Miller characterized Judge Wright as an adherent to the principle of “*Reason-Directed Societal Self-Interest*”:

This term means . . . that through the application of *his* reason Judge Wright, by helping disadvantaged individuals, in effect has acted to help further the overall societal good. . . . He tries to bridge the chasm between social justice for an individual . . . and social justice for the collectivity—the community—in which that individual lives and spends his life. . . . [Although African Americans often] were the manifest beneficiaries [of his decisions,] . . . surely it is accurate to maintain that latent functions (and beneficiaries) existed; those decisions helped to siphon off growing discontent, even rebelliousness⁵²

Although that characterization seems wooden and artificial in some respects,⁵³ it also has a ring of truth. From the bench of the Supreme Court, Chief Justice Earl Warren would sometimes interrupt technical legal arguments to query about whether the rule of decision advanced by a lawyer was good or fair.⁵⁴ Judge Wright, too, once described “goodness” as an ultimate standard for the evaluation of judicial decisions.⁵⁵ And in measuring goodness, he was acutely sensitive to the plight of historically disadvantaged minorities, including the poor.⁵⁶

Judge Wright once described his approach to deciding cases in the following, breathtakingly candid terms:

When I get a case, I look at it and the first thing I think of automatically is what’s right, what should be done—and then you look at the law to see whether or not you can do it. That

51. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

52. MILLER, *supra* note 2, at 19-20.

53. Even Professor Miller does “not maintain that Skelly Wright had that goal (the general good) foremost in his mind when making decisions.” *Id.* at 20.

54. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 257 (2009).

55. Wright, *Scholarly Tradition*, *supra* note 5, at 797.

56. See JOSEPH C. GOULDEN, *THE BENCHWARMERS: THE PRIVATE WORLD OF THE POWERFUL FEDERAL JUDGES* 274 (1974) (“Wright’s continuing interest on the court has been the use of the law to protect the poor.”).

2015] **Greatness in a Lower Court Judge** 41

might invert the process of how you should arrive at a decision, of whether you should look at the law first, but [with me] it developed through making decisions, which involves resolving problems. . . . [I]f you don't take it to extremes, I think that it's good to come out with a fair and just result and then look for law to support it.⁵⁷

2. CIVIL LIBERTIES CASES UNDER THE BILL OF RIGHTS.

Even when the special problems of the poor were not at stake, Judge Wright's docket comprised a number of riveting, high-profile cases that pitted the asserted rights of citizens against the government's regulatory interests, sometimes including interests in national security.⁵⁸ In 1971, for example, he sat on the three-judge panel that ruled on the government's petition for an injunction against publication of the Pentagon Papers.⁵⁹ Dissenting from a decision to enjoin publication for a brief period to let the government present its case, he wrote: "This is a sad day for America. Today, for the first time in the two hundred years of our history, the executive department has succeeded in stopping the presses . . . [and] has enlisted the judiciary in the suppression of our most precious freedom."⁶⁰

Like most judicial liberals of his age, Judge Wright subscribed to a capacious view of the protective reach of the First Amendment.⁶¹ He participated enthusiastically, for example, in the expansion of First Amendment protections to encompass commercial advertising.⁶² He drew a line, however, when challengers to the Federal Election Campaign Amendments of 1974 argued that they had a right to spend unlimited amounts of money to try to influence the outcome of candidate elections.⁶³

57. BASS, *supra* note 2, at 116 (quoting Judge Wright) (first alteration in original).

58. On Judge Wright's record in national security cases, see MILLER, *supra* note 2, at 122-45.

59. *United States v. Wash. Post Co.*, 446 F.2d 1322, 1323 (D.C. Cir. 1971).

60. *Id.* at 1325 (Wright, J., dissenting).

61. See MILLER, *supra* note 2, at 146-73 (discussing "Judge Wright and Freedom of Expression").

62. See *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 587 (D.D.C. 1971) (Wright, J., dissenting) (maintaining that a statute barring on-air cigarette advertising violated the First Amendment).

63. See *Buckley v. Valeo*, 519 F.2d 821, 898-901 (D.C. Cir. 1975) (*per curiam*) (upholding campaign spending limits).

In this case, Judge Wright's egalitarian impulses trumped his libertarian instincts. When the Supreme Court reversed the D.C. Circuit in pertinent part in *Buckley v. Valeo*,⁶⁴ Judge Wright authored a prominent law review article, entitled *Is Money Speech?*,⁶⁵ in which he forcefully argued for a negative answer to the question he had posed. Unyielding in his convictions on this issue, he continued his attack on the dominant position in the Supreme Court in another article published in 1982:

The growing impact of concentrated wealth on the political process, and the glaring inequalities in political campaign resources, threaten the very essence of political equality. . . . Today's threat to democracy is not the impending collapse of the structure of democratic institutions, but their continuing erosion from within. If this erosion is not checked, the principle of one person, one vote could become nothing more than a pious fraud. Ironically, the underpinnings of our democratic system are being menaced . . . in the name of the liberties of the first amendment.⁶⁶

His articles on money and speech were much admired at the time of their publication and continue to be cited today.

3. CASES CALLING FOR JUDICIAL REVIEW OF THE DECISIONS OF ADMINISTRATIVE AGENCIES.

The New Deal era and the years of President Lyndon Johnson's Great Society witnessed a vast expansion in the federal bureaucracy responsible for the distribution of benefits under a variety of entitlement programs. During the same period, and extending into the 1970s, Congress enacted a plethora of statutes charging federal agencies with responsibility to achieve cleaner air and water, to improve workplace safety, and to implement other, similarly ambitious regulatory mandates. As a result, the calibration of the role of courts in ensuring agency compliance with statutory and constitutional obligations emerged as a topic of urgent legal and political interest, with the center of litigation situated in the District of Columbia Circuit.⁶⁷

64. 424 U.S. 1 (1976).

65. Wright, *Is Money Speech?*, *supra* note 5.

66. Wright, *Money and the Pollution of Politics*, *supra* note 5, at 645.

67. For an insightful account of the evolving challenges and of efforts to resolve them, written at the zenith of Judge Wright's influence, see generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669

With characteristic earnestness and enthusiasm, Judge Wright assumed a major role in the debate. Although committed to the view that courts should resolve questions of law without deference to administrative interpretations, by 1980 he had worked his way to the conclusion that courts should otherwise accept agencies' procedural and policy choices as theirs to make, as long as the agencies gave adequate explanations for their decisions.⁶⁸

In the domain of administrative law and procedure, Professor Miller's biography observes that Judge Wright's rulings were less than wholly consistent.⁶⁹ According to Professor Miller, the judge sometimes took an especially vigorous stance in ensuring that agencies fulfilled their mandates in environmental cases.⁷⁰ For Professor Miller, the pattern exhibited Judge Wright's "pragmatic instrumentalis[m]"—what the professor takes to be the judge's wholly appropriate concern with "who wins and who loses in litigation."⁷¹ However one appraises that judgment, at a time when other prominent judges of the D.C. Circuit championed one or another kind of aggressive oversight of agency decision-making,⁷² Judge Skelly Wright furnished a theoretical counterpoint, calling for judicial deference to more democratically accountable officials.

II. JUDGING THE JUDGE: APPRAISING GREATNESS IN A LOWER-COURT JUDGE, PART I

Although I have described Judge Wright as one of the greatest lower-court judges of his generation, and have recited a

(1975).

68. See Wright, *Equal Protection Clause*, *supra* note 5, at 4 ("I believe the judges *should* retrench from their disposition to act as the final arbiters of the public good. We should . . . be more reluctant than we have . . . about filling the void when, in our judgment, the elected branches of government should have acted and failed."); see also Wright, *The Courts and the Rulemaking Process*, *supra* note 5.

69. See MILLER, *supra* note 2, at 110-12, 115.

70. See *id.* at 110-15.

71. *Id.* at 115.

72. See *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (majority opinion of Leventhal, J.) (holding that a court must ensure that an agency has taken a "hard look" at salient problems); David L. Bazelon, *The Impact of the Courts on Public Administration*, 52 IND. L.J. 101, 107 (1976) (calling for courts to closely monitor agencies' decision-making processes); see also Matthew Warren, Note, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2606-31 (2002) (comparing the administrative law approaches of Judges Leventhal, Bazelon, and Wright).

number of facts and related opinions to support that characterization, I have not yet articulated the criteria on which my appraisal must ultimately rest. As I suggested earlier, my thinking about this question is more inductive than deductive. Against the background of what I have said, however, I believe that four criteria—which may also be important in assessing the greatness of other judges—capture the most important elements of the judicial greatness of J. Skelly Wright: (1) exhibition of the most important characteristic virtues of a good judge, some of them perhaps only minimally but others superlatively; (2) influence within the legal environment that he inhabited; (3) manifestation of conspicuous excellence of judgment in cases of extraordinary importance; and (4) historical significance. As is implicit in my formulation of the first of these criteria, crucial to my view is a partial distinction between the characteristic virtues of a good judge, on the one hand, and the attributes of a great judge, on the other hand.⁷³ I shall, accordingly, say a few words about this distinction as a prolegomenon to my discussion of criteria for measuring greatness in a lower-court judge.

A. THE DISTINCTION BETWEEN JUDICIAL GOODNESS AND GREATNESS

It has been a virtual commonplace since a famous essay by Max Weber⁷⁴—if not, perhaps more controversially, since Machiavelli⁷⁵—that large achievements in politics may frequently require deviations from the norms, and also from the virtues of character, that define goodness in private life. Analogously, I do not believe that great judges are always, or certainly necessarily, simply good judges who rank at the high end of a uniform scale of judicial excellence. As the case of Skelly Wright helps to illustrate, greatness in a lower-court judge depends partly on

73. Cf. W.G. de Burgh, *Greatness and Goodness*, 32 PROC. ARISTOTELIAN SOC'Y 1 (1931) (discussing the distinction between goodness and greatness in history and philosophy); Gregory A. Caldeira, *In the Mirror of the Justices: Sources of Greatness on the Supreme Court*, 10 POL. BEHAV. 247 (1988) (comparing different models of greatness for Supreme Court Justices); Stuart S. Nagel, *Characteristics of Supreme Court Greatness*, 56 A.B.A. J. 957 (1970) (similar).

74. See generally MAX WEBER, *POLITICS AS A VOCATION* (1919), reprinted in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77 (H.H. Gerth & C. Wright Mills eds. & trans., 2009).

75. See generally NICCOLÒ MACHIAVELLI, *DISCOURSES ON LIVY* (Julia Conaway Bondanella & Peter Bondanella trans., Oxford Univ. Press 2009) (1531); NICCOLÒ MACHIAVELLI, *THE PRINCE* (Quentin Skinner & Russell Price eds., Cambridge Univ. Press 1988) (1532).

2015] **Greatness in a Lower Court Judge** 45

distinctive qualities or achievements of a kind that, metaphorically speaking, leave footsteps on the sands of time.

As I shall explain more fully below, the divorce between the characteristic virtues or approaches of a good judge and those of a great judge could never be complete. In particular, I do not believe that a judge could be a great judge without also displaying the defining virtues of a good judge, at least to a minimal degree. But possession and display of those virtues will not by themselves, necessarily, constitute judicial greatness.

At this preliminary stage, a single example may help to support the intuition to which I want to appeal. Cass Sunstein has distinguished between judicial “minimalists,” who seek to decide as little as possible in resolving particular cases, and judicial “maximalists,” who prefer to resolve as much as they can.⁷⁶ Maximalists write broad opinions, with rationales that extend sweepingly to cases other than those immediately before them.⁷⁷ They also provide deep normative justifications for their results that, if accepted, provide a further mechanism by which a ruling in one case may determine the decisions of other judges in subsequent cases.

In my view, it is possible for someone to be a very good judge, and possibly even an excellent one, by resolving individual cases fairly and conscientiously on the narrowest possible grounds. In doing so, moreover, a very good judge might stay as safely as possible within the bounds of relevant Supreme Court precedent, without pressing to recognize new rights or to go further in the direction of social justice than the High Court has gone already. If we imagine a judge who consistently wrote minimalist opinions over the course of an entire career, no litigant could complain: such opinions would appropriately consider and resolve the claims of each. Nor would a minimalist judge of excellent judgment and analytical power default on obligations to the legal system as a whole. Although in a thoroughly interstitial way, such a judge’s resolution of particular disputes would advance the systemic interest in clarifying the law for future cases.

Nevertheless, although I do not say that it would be impossible—for reasons that I hope will become clearer below—it

76. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT*, at ix-xi (1999).

77. *Id.* at 10-11.

would be nearly impossible for a very, very good but invariably minimalist lower-court judge ever to achieve greatness in the sense in which I understand the term. Evocative here is praise that Judge Richard Posner bestowed on Judge Henry Friendly—a contemporary of Judge Wright—who, according to Posner, wrote opinions that set out to improve legal doctrine, not just apply it, and who, to achieve his goal, sometimes adopted the role of “a judicial buccaneer.”⁷⁸ Without seeking to unpack that metaphor or to explore its application to Judge Friendly, I would simply echo once more the alternative metaphor that I have taken from Longfellow: mere goodness or even excellence in a lower court is not enough, by itself, to leave footsteps on the sands of time. If the idea of greatness in a lower-court judge is a meaningful one, then greatness requires something more than mere goodness or proficiency.⁷⁹ To put the point more sharply, to achieve greatness, a lower court judge may need to venture boldly, test limits, and be willing to adhere to a normative vision even in the face of rebuke and reversal.

B. CRITERIA OF JUDICIAL GREATNESS

There is no agreed set of criteria for identifying or measuring greatness in a lower-court judge.⁸⁰ As I have said, however, I believe that reflection on the case of J. Skelly Wright will contribute to an inductive effort to develop such criteria.

1. POSSESSION AND EXHIBITION OF THE CHARACTERISTIC VIRTUES OF A GOOD JUDGE.

Although it is important for some purposes to contrast judicial greatness with judicial goodness, I also think it would be

78. Richard A. Posner, *Foreword to DORSEN*, *supra* note 8, at xiii.

79. See Vermeule, *supra* note 8 (criticizing the criteria implicitly relied on by David Dorsen in his characterization of Judge Friendly as the greatest judge of his era on the ground that Friendly made no enduring contribution to legal thought).

80. In recent years law professors have developed a number of quantitative measures of judicial performance and influence, including frequency of citations to a judge's opinions, *see, e.g.*, William M. Landes, Lawrence Lessig, & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998), and inclusion of a judge's opinions in law school casebooks. *See, e.g.*, Mitu Gulati & Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 IOWA L. REV. 1141 (2002). For skeptical appraisals of these measures, see RICHARD A. POSNER, *HOW JUDGES THINK* 147-50 (2008); Robert Anderson IV, *Distinguishing Judges: An Empirical Ranking of Judicial Quality in the United States Courts of Appeals*, 76 MO. L. REV. 315, 320-31 (2011).

impossible for a judge to be a great judge without possessing and exhibiting the characteristic virtues of good judges at least to a minimal degree. In talking about those virtues, I shall neither engage in list making nor linger over banalities.⁸¹ About many matters, there should be no dispute. Like all good judges, J. Skelly Wright ranked high in basic legal and general intelligence.⁸² He understood the importance of procedural fairness and strove scrupulously to provide it. He treated everyone—including litigants, lawyers, and his fellow judges—with respect. He was a person of utmost moral integrity. As I have noted, Judge Wright also held himself to high standards of legal reasoning and craftsmanship. He sought to make the support for his conclusions as strong and his arguments as rigorous as he could make them.

It is also a characteristic virtue of good judges—going beyond a commitment to high standards of craftsmanship—to seek to resolve cases in ways that respect and promote the values of legal consistency, predictability, and adherence to legal authority. Measured against this desideratum, Judge Wright does not emerge as an exemplar. By his own account, he frequently started with his intuitions of moral justice, rather than with the law, and treated the law as more of a potential obstacle than as a guide to decision.⁸³ In my view, a good judge, and especially a lower-court judge, should acknowledge a deeper, richer obligation of fidelity to law than one that merely rules out what the law rather clearly forbids. I believe that a good judge characteristically seeks to discover controlling legal principles within the law itself, typically through a process in which the judge identifies pertinent authorities and then interprets those in the normatively most attractive light.⁸⁴

If we assume that this is the characteristic method of a good judge, Judge Wright's was sometimes different, but the

81. For an exploration of the characteristic virtues of a good judge, see Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 *METAPHILOSOPHY* 178 (2003). For other discussions of judicial virtues and good judging, see, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986); RICHARD POSNER, *REFLECTIONS ON JUDGING* (2013).

82. See MILLER, *supra* note 2, at 16 ("Wright has a sharp, incisive mind, a quick mind that enables him to cut through the dross that lawyers bring to him and get to the core of the disputes before the court.").

83. See *supra* note 57 and accompanying text.

84. See DWORKIN, *supra* note 81, at 49-62.

differences were not as large as might be imagined. In any sensible interpretive process, consequences will matter. All else equal, an interpretation that will yield good consequences should be preferred to one that will produce bad consequences. Indeed, even if all else is not precisely equal along what Professor Dworkin called the dimension of “fit,”⁸⁵ judges should take the normative attractiveness of rival interpretations into account when choosing among them, and normative attractiveness depends heavily on practical implications. Judge Wright was clear, moreover, that when legal authorities and especially Supreme Court opinions spoke decisively to a point, he was bound to follow the law.⁸⁶ Although Judge Wright’s view of his obligations of fidelity to law may press to the limits of what standards of good judging could tolerate, I do not view him as having strayed so far from the ideal in this respect as to be ineligible for categorization as a good judge overall, all things considered.

2. INFLUENCE WITHIN THE ERA IN WHICH A JUDGE LIVES.

To call a judge “great” implies that he or she exerts or exerted an outsized influence.⁸⁷ During his tenure on the bench, and especially on the D.C. Circuit, Skelly Wright’s powerfully reasoned decisions helped to shape the law in a number of areas, notably including administrative law.⁸⁸ His opinion in *Williams v. Walker-Thomas Furniture Co.*⁸⁹ profoundly affected unconscionability doctrine.⁹⁰ His role in the D.C. public schools

85. *See id.* at 230.

86. As quoted by BASS, *supra* note 2, at 115, Judge Wright acknowledged that “there’re certain things that remain pretty accepted as what the law is” and that “[y]ou have to stay within the law.”

87. *Cf.* DORSEN, *supra* note 8, at 354-55 (attempting to chart the influence and greatness of Judge Henry Friendly by tallying citations to his legal decisions and law review articles in other judicial decisions and law review articles). As pointed out in note 80, *supra*, in recent years a number of academic studies have sought to measure particular judges’ influence through tallies of in- and out-of-circuit citations to their opinions, but I have been unable to find raw citations statistics regarding the 1962-88 period in which Judge Wright served on the D.C. Circuit. Anderson, *supra* note 80, at 346, draws attention to the proclivity of Judge Wright’s opinions to draw negative as well as positive citations, but does not list total citations for non-active judges.

88. For a comparison of Judge Wright’s approach with that of his most prominent contemporaries on the D.C. Circuit, see Warren, *supra* note 72.

89. 350 F.2d 445 (D.C. Cir. 1965).

90. *See, e.g.*, James W. Bowers, *Some Economic Insights into Application of Payments Doctrine: Walker Thomas Revisited*, 89 CHI.-KENT L. REV. 229, 232 (2014)

2015] **Greatness in a Lower Court Judge** 49

in *Hobson v. Hansen* illustrated the possibilities and perils of "public law" or "institutional reform" litigation.⁹¹

Judge Wright's law review articles also merit notice as a source of influence. Through them, he took prominent positions on many if not most of the leading legal issues of his day.⁹² In the 1970s and 1980s, no serious participant in debates about those issues could ignore his views.

Judge Wright also exerted a subtler kind of influence by serving as a source of inspiration, especially to young people. During his lifetime, he received admiring attention in myriad books and articles that celebrated the relative handful of brave, southern federal judges who endured popular obloquy and hazarded threats to themselves and their families to enforce the school desegregation mandate of *Brown v. Board of Education* despite "massive resistance."⁹³ His courage under fire helped to instill faith in the law and the judiciary as bastions of justice.

Judge Wright's article *Professor Bickel, the Scholarly Tradition, and the Supreme Court* also deserves mention as a source of inspiration. It provided aid, comfort, and rhetorical and analytical ammunition to many college and law students who instinctively sympathized with the Warren Court, but who otherwise would have lacked the depth of legal and historical background to respond effectively to critics as searching and erudite as Alexander Bickel.⁹⁴

3. MANIFESTATION OF CONSPICUOUS EXCELLENCE OF JUDGMENT IN CASES OF EXTRAORDINARY IMPORTANCE.

No judge who presides over a large docket throughout a lengthy career could possibly avoid all error. All judges have blind spots. But judges are especially remembered for, and

("Williams v. Walker-Thomas Furniture Company is probably the case that jumps first into a student's mind upon hearing the phrase 'aberrant contracts.' The case introduced the last two generations of American law students to the most innovative provision in modern American contract law: the unconscionability defense.")

91. See *supra* note 45 and accompanying text.

92. See *supra* note 5 and accompanying text.

93. See generally, e.g., BASS, *supra* note 2; MORTON INGER, POLITICS AND REALITY IN AN AMERICAN CITY: THE NEW ORLEANS SCHOOL CRISIS OF 1960 (1969); J. W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961).

94. I speak here from personal experience.

measured by, their performance in the cases raising the most legally and politically salient and the most morally fraught issues of their age. A conspicuous positive example comes from the first Justice John Marshall Harlan, whose recognized greatness as a Justice rests heavily on his dissenting opinion in *Plessy v. Ferguson*,⁹⁵ in which he insisted that “[t]he thin disguise of ‘equal’ accommodations for passengers in [legally segregated white and black] railroad coaches will not mislead any one”⁹⁶ and bravely affirmed that “[o]ur constitution is colorblind.”⁹⁷ A poignant contrast involves Chief Justice Roger Taney, whose opinion in *Dred Scott v. Sandford*,⁹⁸ which demeaned African Americans and held slavery in the territories to lie beyond the regulatory power of Congress, constitutes an irredeemable blot on an otherwise distinguished judicial record.⁹⁹

Although many of Judge Wright’s legal views were and remain controversial, he stood as both a beacon and a bulwark with respect to the issue of racial justice that posed his era’s defining legal and moral tests. Insofar as the judicial virtues of judgment and especially courage are concerned, the crucible of the New Orleans school desegregation case afforded Judge Wright an opportunity, and also a responsibility, that few would have welcomed. He rose magnificently to the occasion. By displaying the courage and moral integrity that he did, Judge Wright ennobled the judicial office in a way that few others have had both the occasion and the wherewithal to do.

4. HISTORICAL SIGNIFICANCE.

Very few opinions by lower-court judges ever endure as the authoritative statement of the law on federal issues of large importance. At some point, the Supreme Court almost invariably utters a pronouncement that thereafter stands as controlling, regardless of the cogency of the reasoning in prior lower-court opinions. In addition, because of the nature of their docket, lower federal court judges have relatively few opportunities to write enduring common law opinions.

95. 163 U.S. 537 (1896).

96. *Id.* at 562 (Harlan, J., dissenting).

97. *Id.* at 559.

98. 60 U.S. (19 How.) 393 (1857).

99. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (noting “how the lustre of [Taney’s] great Chief Justiceship came to be eclipsed by *Dred Scott*”).

Nevertheless, at least one of Judge Wright's opinions—in *Williams v. Walker-Thomas Furniture Co.*¹⁰⁰—remains a landmark in the law of contracts. In a further testament to Judge Wright's enduring legacy, elements of his judicial and scholarly output continue to provoke debate. For example, his law review articles on the First Amendment issues raised by political campaign contributions and expenditures enjoy iconic status as among the earliest, most cogent statements of positions to which many still adhere.¹⁰¹

In a more complex and charged example of Judge Wright's impact, some of his rulings and more of his characteristic attitudes are frequently held up as epitomizing the liberal judicial activism that the Warren Court either inaugurated or encouraged.¹⁰² In an examination of Judge Wright's claim to judicial greatness, some, admittedly, would count his association with the judicial liberalism of his era as a negative, not a positive, aspect of his record. To speak in highly simplified terms, he—like other liberals of his age—tended to assume that it lay within the practical capacity of the federal courts to design and implement broad mandates for social change that would benefit the poor and disadvantaged.¹⁰³ That assumption, which was always controversial, has come under unrelenting attack in the past two decades.¹⁰⁴ Without attempting first to summarize and then to adjudicate a multifaceted intellectual debate, I think it fair to say that even most current-day liberals hold chastened views about the appropriate reach of judicial power—even if they have not forsaken all reliance on court-issued mandates. Nevertheless, again without engaging the underlying substantive issues, I think it would be mistaken to exclude Judge Wright from the

100. 350 F.2d 445 (D.C. Cir. 1965).

101. See, e.g., Lloyd Hitoshi Mayer, *Charities and Lobbying: Institutional Rights in the Wake of Citizens United*, 10 ELECTION L.J. 407, 421 (2011) (discussing Judge Wright's "much-cited essay," *Is Money Speech?*); Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUM. L. REV. 1326, 1330 (1994) ("In perhaps the most famous of all of the articles written on the subject of putative constitutional limitations on campaign finance reform, the late Judge J. Skelly Wright asked in the title, 'Is Money Speech?'").

102. See, e.g., HOROWITZ, *supra* note 49, at 106-70.

103. See generally MILLER, *supra* note 2, at 18-71 (discussing "Judge Wright and Social Justice" and Judge Wright's involvement in oversight of the D.C. public schools in *Hobson v. Hanson* and related litigation).

104. See generally, e.g., GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

category of great judges on the ground that some of his judicial opinions and extrajudicial writing may have rested on untenable assumptions. Although history may have revealed flaws in some of Judge Wright's thinking, hindsight recurrently exposes mistakes in the assumptions of nearly all intellectual innovators, statesmen, and judges. In any event, history's final verdict is not yet in. Whatever that verdict may be, I confidently expect Judge Wright to endure as a symbol of a great, innovative, and benevolently motivated set of experiments in judicial decision-making, aimed at improving the lot of the economically and racially disadvantaged.

Finally, claims for Skelly Wright's historical significance possess the further, indisputable foundation of his judicial performance in New Orleans. Regardless of any blows that his reputation might otherwise take, the footsteps that he thereby left on the sands of U.S. history remain undiminished as a source of national pride and inspiration. If one wanted a single symbol of greatness in performance by a lower-court judge, one could do no better than to cite the example of J. Skelly Wright in his role on the district court. In the struggle to desegregate the public institutions of New Orleans, Judge Wright was a hero.

III. APPRAISING THE GREATNESS OF JUDGE J. SKELLY WRIGHT, PART II

In musing about how the case of J. Skelly Wright helps to illuminate the criteria of greatness in a lower federal court judge, I have suggested that a great judge may frequently and perhaps typically need to possess a soaring if not hubristic ambition to impose a broad stamp on the future, a willingness to press to the limits—and occasionally beyond the limits—of prior legal authorities, and a steely indifference to others' disagreement. Stated abstractly, these are at best ambivalent traits. A judge who displayed those traits without also possessing excellent moral judgment could be frightening if not monstrous (even if, through good moral luck, that judge ended up on the right side of history more often than not).

Faced with this implication, those who loved and admired Judge Wright might have an understandable impulse to resist my analysis. Judge Wright, they might accurately point out, was modest, self-effacing, warm, and lovable. In his lonely stand in New Orleans, he cast himself as a man of the law, implementing its clear dictates, and not at all as a legal Realist who thought

2015] **Greatness in a Lower Court Judge** 53

that Supreme Court rulings could be manipulated as he or any other judge thought fit. In many aspects of his personal and professional life, moreover, Judge Wright was as free from hubris as any human being who ever donned a robe.

Although there is truth in all of these counterpoints, the deeper truth, I think, is that J. Skelly Wright was a man, and a judge, of contradictions. Indeed, I believe Judge Wright's contradictions went to the heart of who he was and of his understanding of his role as a judge.

To begin with, although Judge Wright was indeed a man of great personal modesty, it is also undeniable that he craved opportunities not only to influence, but also to be recognized as having influenced, subsequent events and the development of ideas about legal and moral justice. Yes, he was soft-spoken and understated in personal conversation, and he deflected praise as if embarrassed by it.¹⁰⁵ But if praise embarrassed him when it came, he would have been bothered even more if others had taken no note of his decisions and his writings. As I have emphasized, his opinions often advanced sweeping rationales deliberately crafted to determine the resolution of a broad swathe of future cases. His extrajudicial writings represented a further effort to command the legal spotlight and exert influence.

A second contradiction involved Judge Wright's views about the nature of law. While in New Orleans, he sought to enforce the law because he believed that the mandate of *Brown v. Board of Education* was the law of the land to which all law-abiding citizens owed adherence. When he labored over his opinions as a judge of the D.C. Circuit, he similarly took it for granted that his court's rationale would control the decisions of future judges as a matter of law.¹⁰⁶ In many respects in many other cases, however, Judge Wright was a conspicuous, and occasionally an unabashed, legal Realist or pragmatist. "If I want to do something, I can find a way to do it," he told his biographer.¹⁰⁷ As I noted above, he

105. See William J. Brennan, Jr., *Chief Judge J. Skelly Wright*, 7 HASTINGS CONST. L.Q. 859, 861 (1980) ("Chief Judge Wright is a quiet, modest man, more embarrassed than happy with praise.").

106. Reflecting on Judge Wright's understanding of the relationship between law and politics as ingredients in and constraints on judicial decision-making, Professor Miller remarked that "[i]f he has ever thought deeply and comprehensively about the subject, I am not aware of it." MILLER, *supra* note 2, at 213.

107. *Id.* at 5.

told another writer that in deciding cases, he began by asking himself what result would be right or just, and only later began to worry about whether the law would support his preferred conclusion.¹⁰⁸

A third contradiction in Judge Wright's thinking—which was most evident in the domain of administrative law—involved the extent to which courts should substitute their judgment for that of politically accountable institutions of government. On the one hand, Skelly Wright was a champion of political democracy. When self-conscious about his democratic faith, he frequently called for courts to defer to any reasonably defensible agency decision. On the other hand, Judge Wright was a policy-driven moralist—one whom Professor Miller could characterize as “result-oriented” and periodically as a judicial “activist”—who seldom hesitated to scrutinize agencies' decision-making with heightened stringency when they deviated from what he took to be the right reasoning.¹⁰⁹

Finally, Judge Wright was a skeptic of unchecked power, and thus a proponent of judicial review, because of deep-seated beliefs about the tendency of unchecked power-wielders to grow complacent and self-indulgent, if not corrupt. For much of his career, however, he seemed to exempt the judicial branch—with the partial exception of administrative law—from his critical skepticism of powerful institutions, at least as long as he thought that the courts were bent on doing good.

In ascribing contradictions to Judge Wright, I should offer a caution, for I have, admittedly, proceeded summarily. In a more nuanced account—and one that was more richly illustrated with examples—perhaps it would be possible to cast what I have characterized as contradictions as surface or apparent contradictions only. If finer distinctions were drawn, and the full array of cases examined in all of their factual complexity, perhaps an ultimate harmony could be found in his overall body of attitudes, commitments, and beliefs. But I doubt it. Judge Wright was simply not drawn to careful, intellectually searching examination of the first premises of his practical judgments.¹¹⁰ Informed by his life and experience, he grasped intuitively what

108. See *supra* note 57 and accompanying text.

109. MILLER, *supra* note 2, at 115.

110. As his biographer Professor Miller put it, “[h]is [was] not a philosophical mind.” MILLER, *supra* note 2, at 4.

2015] **Greatness in a Lower Court Judge** 55

he took to be the heart of legal and moral problems and acted accordingly.¹¹¹

In reflecting on J. Skelly Wright, I thus recall the self-description that Walt Whitman inscribed in *Leaves of Grass*:

The past and present wilt I have filled them and emptied them,

And proceed to fill my next fold of the future. . . .

Do I contradict myself?

Very well then I contradict myself;

I am large I contain multitudes.¹¹²

Like Walt Whitman, Skelly Wright did not seek to resolve his inner contradictions—or, at the very least, he did not ponder them in a way that might have thrown him into an intellectual paralysis of uncertainty or self-doubt. He trusted his own legal and moral instincts, even when his efforts to explain them—often drafted by his law clerks—appeared to others to contradict positions that he had taken earlier.¹¹³

In my judgment, J. Skelly Wright’s capacity to contain contradictions, coupled with an abundant confidence in his legal and moral judgments despite the contradictions that he embraced, was crucial in his achievement of greatness as a lower federal court judge. Facing new challenges, he could put what he had said and thought in the past behind him and bravely “fill [his] next fold of the future.” If he contradicted himself, so be it. He was determined to perform greatly as a judge in the current moment and going forward.

As a trait of character, a judge’s aspiration to greatness can be a force for either good or for ill. For a society, it can be hazardous to vest power, including judicial power, in those who would dare to be great—those who would put aside self-doubt, test the boundaries of their lawful authority, courageously hold

111. *See id.* at 210 (“Skelly Wright . . . gets his ethical premises, not from a grand schema of moral philosophy but intuitively . . .”).

112. WALT WHITMAN, *LEAVES OF GRASS* 55 (1855).

113. *See* MILLER, *supra* note 2, at 16 (“Wright gives the theme and a clerk (or clerks) provides the language. In some respects, this has led him at times to give at least the appearance of inconsistency—mainly because he has rather uncritically accepted language from some legal aide.”).

fast to their convictions despite the impassioned disagreement of friends and mentors, and seek to achieve the broadest possible influence over the future course of events based on extralegal intimations of what is good or right.

We should probably be grateful that most lower-court judges would not even aspire to greatness.¹¹⁴ In the case of J. Skelly Wright, we should be thankful that he did.

114. *Cf.* Posner, *supra* note 78, at xii-xiii (praising Henry Friendly as a “great judge” who “made interesting cases” and “thus was something of a judicial buccaneer—a role not to be recommended . . . to the average judge”).