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# Post-Crisis Reconsideration of Federal Court Reform

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# POST-CRISIS RECONSIDERATION OF FEDERAL COURT REFORM

DAVID R. CLEVELAND\*

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#### INTRODUCTION

Caseload volume has been a thorn in the side of the federal appellate system for over a half-century.<sup>1</sup> A rise in the number of appeals has not been accompanied by a commensurate increase in judges to handle those appeals<sup>2</sup> nor has the system been restructured to handle the additional caseload.<sup>3</sup> Still, the caseload has been managed

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<sup>1</sup> RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 59 (1985); David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 63 (2009); Will Shafroth, *Survey of the United States Courts of Appeals*, reprinted in 42 F.R.D. 243 (1967); Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 12 (1996); Donald P. Lay, *Query: Will the Proposed National Court of Appeals Create More Problems Than It Solves?*, 66 JUDICATURE 437, 437 (1982-1983); Maurice Rosenberg, *Enlarging the Federal Courts' Capacity to Settle the National Law*, 10 GONZ. L. REV. 709, 711 (1975); PAUL D. CARRINGTON, DANIEL JOHN MEADOR & MAURICE ROSENBERG, *JUSTICE ON APPEAL v* (1976); Wade H. McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 781-82 (1981); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1157 (1994).

<sup>2</sup> Cleveland, *supra* note 1, at 68, 173 (noting that the number of judges has only modestly increased compared to the “ever-increasing number of cases”); COMM’N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 14 (1998) [hereinafter FINAL REPORT]; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 110 (Apr. 2, 1990) [hereinafter 1990 REPORT], available at [http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/\\$file/repfsc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/$file/repfsc.pdf); Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 MISS. C. L. REV. 211, 211 n.1 (1994); Arthur D. Hellman, *The Crisis in the Circuits and the Innovations of the Browning Years*, in RESTRUCTURING JUSTICE 3, 5 (Arthur D. Hellman ed., 1990) (“The number of federal appellate judges has [] expanded, but at a pace that lags far behind the growth in filings.”).

<sup>3</sup> Since the creation of the federal court system in 1789, there has only been one overhaul of its structure. Dragich, *supra* note 1, at 12. Reform of the federal court system was accomplished through the “Evarts Act.” Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 [hereinafter Evarts Act]. The Evarts Act “instituted a radically different structure for the federal courts. It expanded the federal court system from two to three tiers.” Dragich, *supra* note 2, at 20; J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913, 913 (1983); see also Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 412 (1987). Despite the concern that adding an intermediate level of courts between the district courts and the Supreme Court of the United States “might impair the dignity of office and the

by internal procedural reforms such as reduction of oral argument, increased reliance on court staff, and limitations on publication of opinions.<sup>4</sup> These changes have presented a partial solution and largely managed the “crisis” of volume, albeit by altering the nature of appellate justice.<sup>5</sup> These alterations of the traditional model of appellate justice have been the target of considerable criticism.<sup>6</sup> In sum, “we have lowered our expectations for appellate procedure. We have defined down our appellate values. We have all internalized the post-modern norms of minimalist procedural paradigm.”<sup>7</sup>

While the language of crisis has diminished, the caseload volume problem continues to bedevil the federal appellate courts,<sup>8</sup> and the altered process adopted

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zeal of sitting judges,” the Evarts proposal was passed with little opposition. Carrington, *supra* note 3, at 415–16.

<sup>4</sup> Dragich, *supra* note 1, at 17, 24. Such reforms “amount to procedural shortcuts, resulting in an abbreviated appellate process, justified for the most part by the press of docket. . . . [i]ntramural reforms have been grouped [] by appellate function: oral argument, briefing, opinion writing, case management techniques, and staffing arrangements.” Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913, 913 (1995); see also THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL 32 (1994) [hereinafter BAKER, RATIONING JUSTICE ON APPEAL] (discussing the three goals of appellate reform: “(1) increasing the efficiency of the present capacity; (2) increasing the capacity at a constant efficiency; or (3) reducing the allowable demand on the system”); Lay, *supra* note 1, at 437 (noting that these innovating processes have helped the courts of appeals to deal with the case crunch, but judges are still working “to the very limit of their human capacities”); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984?*, 56 S. CAL. L. REV. 761, 765 (1983); McCree, *supra* note 1, at 777. *But see* Wallace, *supra* note 3, at 914 (noting that some of these proposed “cures” for the caseload problem may prove to be worse than the so-called caseload “disease” in the long run).

<sup>5</sup> Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 4; CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at v (different types of reforms implemented over the past half century to deal with the ever-increasing case load “undermine basic values, destroying the qualities of deliberateness and personal concern that are essential to appellate justice”); McCree, *supra* note 2, at 778 (reforms implemented to increase efficiency in the federal judiciary have lead to “significant costs to quality of justice”); Dragich, *supra* note 1, at 13 (“Measures adopted to cope with rising caseloads have exacerbated the “crisis” by sharply altering time-honored traditions of appellate justice.”).

<sup>6</sup> See *supra* note 5 and accompanying text. *But see* Posner, *supra* note 4, at 764. Posner suggests that we may have to lower our expectations and accept the decline in the quality of justice:

The average quality of many products and services has decreased over time as a function of mass production and consumption. If federal justice has at last been placed into mass production—if more and more people enjoy access to the federal courts—should we not accept the decline in the average quality of those courts as the inevitable concomitant of moving from an elite to a mass provision of judicial services?

*Id.*

<sup>7</sup> Thomas E. Baker, *Applied Freakonomics: Explaining the “Crisis of Volume,”* 8 J. APP. PRAC. & PROCESS 101, 114 (2006).

<sup>8</sup> Cleveland, *supra* note 1, at 68; Martin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 324–25 (2011).

bears some reconsideration. Admittedly, while the volume problem is easy to describe, there are just too many cases to handle with current resources using the time-honored appellate process; there is no simple solution.<sup>9</sup> The path of least resistance—sacrificing appellate standards—has proven workable and effective, and the more significant steps such as reducing appeals or increasing judicial resources have gone unadopted.<sup>10</sup> Various studies and proposals of the federal court system have suggested other methods that could be used to address the problem, and these methods should be seriously considered by the federal judiciary and Congress to improve access, fairness, and accountability.<sup>11</sup> If need be, a new federal court study should be undertaken to help select some of these methods or generate new twenty-first century methods of addressing the issue. Perhaps a sober second look, freed from the debate over the existence of a crisis, will result in reform that restores some of the traditional appellate process while still managing present, and anticipated future, caseload volume.

#### I. HISTORY OF THE FEDERAL COURTS' VOLUME PROBLEM

Concerns about the size of appellate caseloads and the quality of justice are not new.<sup>12</sup> To some extent, they predate the United States entirely. However, the acute and measurable caseload crunch is a twentieth century phenomenon.<sup>13</sup> The United States federal appellate court structure, created in the late eighteenth century, has struggled to deal with the expanded population, litigation, and federal court purview

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<sup>9</sup> Levy, *supra* note 8, at 321.

For much of the past century, federal appellate judges did not need case management as it is conceived of today—that is, judges did not need to make decisions about the amount and kind of judicial attention to give each case based on concerns about the size of their docket. They were able to hear oral argument in nearly all cases, draft dispositions in chambers, and publish those dispositions in the form of full-length opinions. Judges and scholars alike have spoken with nostalgia about this era—one defined by what has been called the “traditional model” of appellate decisionmaking.

*Id.* at 320.

<sup>10</sup> Dragich, *supra* note 2, at 17, 24.

<sup>11</sup> Levy, *supra* note 9, at 318 (noting that the last major study of federal court case management practices was over a decade ago); *see also infra* Part II.C.

<sup>12</sup> Cleveland, *supra* note 1, at 63 (“[C]oncern over the increasing volume of federal case decisions was expressed as early as 1915 . . . .”); Carrington, *supra* note 3, at 413 (the problem with appellate court congestion was evident by 1848); *see also* 1990 REPORT, *supra* note 2.

<sup>13</sup> Posner, *supra* note 4, at 761–62. Although the federal courts of appeals felt the caseload pressures in the early twentieth century, they really began to experience significant increases in appeals between 1960 and the early 1980s:

In the year that ended on June 30, 1981, the number of appeals filed in the federal courts of appeals increased by 13.6 percent over the number filed in the previous fiscal year. It is now 58.3 percent higher than it was as recently as 1975, and more than 400 percent higher than it was in 1960.

*Id.*

of the late twentieth century.<sup>14</sup> In the late twentieth century, this was perceived as a “crisis of volume” in the appellate, especially federal appellate, courts.<sup>15</sup> As the courts move into the twenty-first century, claims of a “crisis” have faded away because federal courts have enacted internal reforms to facilitate the processing of these cases, but these reforms have altered the appellate process and have not addressed the underlying issue of incoming cases or limited judicial resources.<sup>16</sup> Whether the political, public, and judicial will exists to enact systemic reforms remains to be seen, but concerns of diminished appellate justice and ever-increasing volume should at least drive all stakeholders to continued reflection on the issue.

#### A. Historical and Modern Caseload Volume Problems

Concern about increasing appellate case decisions date back to the early days of published appellate opinions in early common law England. This concern, however, was not that there were too many cases for the judicial system to handle but a worry about the number of opinions being written being more than reporters could report and lawyers could research.<sup>17</sup> To some extent, this concern was justified. The contemporary technology and system of reporting was ill-suited to produce accurate

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<sup>14</sup> See, e.g., Carrington, *supra* note 3, at 412 (discussing the formation of today’s appellate structure through the Judiciary Act of 1798); Joseph F. Weis, Jr., *The Case for Appellate Court Revision*, 93 MICH. L. REV. 1266, 1270 (1995) (stating that today’s appellate structure reflects communication and travel considerations, amongst other things, that were important two centuries ago, but are no longer relevant with advancements in technology and means of travel); BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 287–88 (noting that while appellate courts have somewhat managed to cope with the caseload increases through internal reforms, they continue to struggle, and they are forced to ration justice).

<sup>15</sup> See, e.g., PAUL D. CARRINGTON, AM. BAR FOUND., ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS (1968); POSNER, *supra* note 1 (citing DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974)); Michael C. Gizzi, *Examining the Crisis of Volume in the U.S. Courts of Appeals*, 77 JUDICATURE 96 (1993); Jack M. Beermann, *Crisis? What Crisis?*, 80 NW. U. L. REV. 1383 (1986); BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4; Arthur D. Hellman, *The Crisis in the Circuits and the Innovations of the Browning Years*, in RESTRUCTURING JUSTICE 3 (Arthur D. Hellman ed., 1990); Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 J. DISP. RESOL. 115 (1991); Shirley M. Hufstедler, *Bad Recipes for Good Cooks—Indigestible Reforms of the Judiciary*, 27 ARIZ. L. REV. 785 (1985).

<sup>16</sup> Baker, *supra* note 7, at 102.

Over the last ten years or so, however, the doomsday clamor has died away and the sense of urgency has disappeared. But the caseload did not subside—appellate demand did not decline. Indeed, it continued to grow apace. Furthermore, there was no radical structural reform. Yet, today the courts of appeals are not hopelessly backlogged. There is no panicky sense of being overwhelmed. Everything seems to be “business as usual,” at least on the surface.

*Id.*

<sup>17</sup> Lord Coke, one of the earliest, staunchest, and most eloquent advocates of precedent and publication (and public access) nevertheless expressed concern about the reports of cases becoming elephantine in proportions. 2 COKE REP. iii-iv (1777).

and comprehensive reports of decisions.<sup>18</sup> This same concern drove the move to designate some decisions as “unpublished” in the 1970s—a practice indicative of the type of procedural shortcut that gains efficiency at the cost of basic appellate values.<sup>19</sup> But the concern that too many published cases would overwhelm or muddle the common law was unfounded.<sup>20</sup> Increased decisions provide more fodder for common law analysis and better predictability and detail in the common law.<sup>21</sup> Moreover, technological changes to the system of case reporting in the late-twentieth century greatly increased the efficiency of reporting and researching cases.<sup>22</sup>

But the concern about proliferation of written case decisions is only a small part of the greater concern over case volume and the ability of the courts to provide appellate justice in the face of an increased caseload.

### *B. Roots of the Modern Volume Problem*

The increase in appellate filings is undeniable, as is the much smaller relative increase in appellate judges,<sup>23</sup> but the root causes of the increase in volume is more complex. In fact, Paul D. Carrington, a well-respected and prolific author on the subject of appellate court structure has stated:

We cannot explain the enormous increase in caseloads of the United States courts of appeal. The possible causes are far too many and too interlocking to allow us to comprehend . . . we do know that the increase has no obvious cause, being out of all proportion to the growth of the

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<sup>18</sup> Cleveland, *supra* note 1, at 76 (“The second issue impeding the increased reliance on precedent as binding authority was the poor quality of the reports throughout the seventeenth and eighteenth centuries. . . . by the mid-eighteenth century, reports of greater accuracy and reliability were made, which increased the ability of judges to more faithfully adhere to precedent.”).

<sup>19</sup> See generally *id.*

<sup>20</sup> Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Concept*, 75 CALIF. L. REV. 15, 21, 23 (1987); Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CALIF. L. REV. 541, 551 (1997) (“[H]istoric rationales for the limited publication/no-citation plans warrant re-examination in light of current technology.”).

<sup>21</sup> Indeed, the attempt to artificially replace the multiplicity of opinions with concise restatements of the law was unsuccessful. See Cleveland, *supra* note 1, at 84 (describing the American Law Institute’s attempt in the early twentieth century to obviate the need for citation to cases by publishing distilled rules of law in the form of *Restatements*, which produced a useful secondary source but did not diminish the call for case law reports).

<sup>22</sup> Berring, *supra* note 20, at 21; Shuldberg, *supra* note 20, at 551 (“[H]istoric rationales for the limited publication/no-citation plans warrant re-examination in light of current technology.”).

<sup>23</sup> Cleveland, *supra* note 1, at 68 (“In 1970, the Courts of Appeals disposed of 10,699 cases, while in 2005, the Courts disposed of 67,582 cases. During that same period the number of active circuit judges increased much more modestly, from ninety-seven to 167.”); see also JAMES C. DUFF, ADMIN. OFFICE OF U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR (2006), available at <http://www.uscourts.gov/uscourts/FederalCourts/AnnualReport/2006.pdf>.

caseloads in the district courts or the Supreme Court or any other judicial institution in America.<sup>24</sup>

Reasons for the explosion in appellate filings are, as Carrington suggests, many and varied.<sup>25</sup> They are sometimes simple and measurable, as in the overall increase in U.S. population,<sup>26</sup> and sometimes intangible, like the suggestion that Americans are simply more litigious and less willing to accept a trial court's holding.<sup>27</sup> Some of the proffered explanations are more fundamental, such as expansions of civil rights laws, the constitutionalizing of criminal procedure, and the addition of federal programs and prohibitions in the late 1960s and early 1970s, which coincide with the greatest increase in appellate filings and the greatest complaints about a crisis of volume.<sup>28</sup>

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<sup>24</sup> Paul D. Carrington, *An Unknown Court: Appellate Caseloads and the "Reckonability" of the Law of the Circuit*, in *RESTRUCTURING JUSTICE* 206, 206 (Arthur D. Hellman ed., 1990).

<sup>25</sup> Causes include, but are not limited to, an increase in availability of legal services to those criminally convicted, substantive developments in the law that have made it easier to assert certain claims, the durability of certain claims, and the persistence of litigants. CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 5. The creation of new causes of action has also contributed to the caseload explosion. HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 22–26 (1973); *see also* Sarah S. Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 *HASTINGS L.J.* 979, 979–80 (1995) (There are presently over 3,000 federal crimes. Naturally, an increase in federal crimes leads to more charges, convictions, and ultimately, appeals in the federal courts.); Carrington, *supra* note 3, at 413 (The growth in diversity jurisdiction of the lower federal courts and the creation of federal question jurisdiction of the district courts through the Act of 1875 exacerbated the caseload problem.). Although Congress is aware of the pressures that the caseload explosion has placed on the federal courts of appeals, it has done nothing to limit their jurisdiction in order to alleviate some of those pressures. Dragich, *supra* note 1, at 23.

The primary reason [for the federal courts' present crunch of caseload explosion] is legislation which began in earnest in the 1960s. Congress decided that the cure for many things that ail us is federal legislation—creating rights and entitlements and providing the [federal court] mechanism to enforce or obtain them. It would serve no useful purpose . . . to evaluate in the abstract whether the new rights and entitlements have served the country well—clearly some have, and undoubtedly some have not.

Parker & Hagin, *supra* note 2, at 228.

<sup>26</sup> POSNER, *supra* note 1, at 59 (“The enormous increase in the population of the United States . . . made it inevitable that the caseload of the federal courts would expand from its humble beginnings.”).

<sup>27</sup> CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 5; *see also* JUDITH A. MCKENNA, *STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES* 24–26 (1993) (noting that the rate of appeal has increased forty percent since the 1950s—evidence of the fact that litigants are less willing to accept trial results).

<sup>28</sup> Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 *ARIZ. ST. L.J.* 1, 7 (2007); POSNER, *supra* note 1, at 83–84; FRIENDLY, *supra* note 25, at 22–26; CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 5; Wilkinson III, *supra* note 1, at 1158–59.



The need for reform is driven not by the existence of a higher volume of cases on appeal, but by the harms to important values of appellate decision-making that higher volume causes.<sup>29</sup> Ideally, the appellate court system has each case before it is decided by:

[J]udges who are impartial; are multi-partite; are identifiable, not anonymous, and not mere auxiliaries; think individually, but act collegially; respect the interest of adversaries in being heard, but inform themselves fully on the material issues, evidence, and law on which decisions are to be made; and announce their reasons for decisions.<sup>30</sup>

While reducing the problems associated with caseload volume is important, other important values of appellate justice should not be compromised in the process. Litigants have the right to expect their appellate case to be: (1) decided upon by a panel of impartial Article III judges; (2) in a timely and expeditious manner; (3) according to the rule of law as set forth in past precedents; (4) for reasons set forth by the court in its decision; (5) which the court is willing to stand by.<sup>31</sup> These values can be distilled down to concerns about access, fairness, and accountability. Proposed reforms should promote these values whenever possible, and particular caution should be taken when a proposed reform impairs one of these values at the expense of another. Prior reforms should be carefully reviewed through the lens of these values, and where they impede rather than promote these values, they should be reconsidered.

### C. Major Studies and Proposals for Reform

Growing caseloads have been the subject of several major studies undertaken by Congress, academics, and the court itself.<sup>32</sup> From these studies, as well as academic observations, various proposals for reform have been offered over the years. Just as identifying the root causes of the growth in case volume seems impossible, the existence of a single solution that solves the volume problem is extremely unlikely. In the absence of a solution, however, there is still a variety of methods dealing with volume that should be explored. Moreover, methods previously undertaken to manage the volume must be reviewed to weigh their effectiveness and also their cost to the traditional appellate process and appellate values.

Concerns about the abundance of case law, present in common law England in the days of Blackstone,<sup>33</sup> recurred in the United States at the start of the twentieth century. The creation of an intermediate appellate court in the federal system by the

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<sup>29</sup> MCKENNA, *supra* note 27, at 24-26.

<sup>30</sup> CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 8.

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., COMM'N ON REVISION OF FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975); FED. JUDICIAL CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972) [hereinafter 1972 REPORT]; Shafroth, *supra* note 1.

<sup>33</sup> Due to the abundance of caselaw, Blackstone attempted to create a rational system of law, "organizing the common law into a sensible whole." Berring, *supra* note 20, at 16 (1987). However, in his attempt to create a rational and organized system of law, he was only successful in creating a system that *appeared* to be coherent and rational. *Id.*

Circuit Courts of Appeals Act of 1891 and a move by John B. West to provide private, comprehensive reporting of all decisions provoked fear that lawyers and judges would drown in a deluge of decisions.<sup>34</sup> That particular concern, that there would be too much case law for practitioners to know about, runs counter to the very notion of common law—that present cases are governed by the law established in prior cases. Though an attempt was made to replace the comprehensive case reporting with a summary or restatement of the state of the law, this alternative never caught on, presumably, because lawyers and judges preferred to reference the precedent directly rather than rely on a secondary source.<sup>35</sup> This concern was also essentially obviated by developments of data storage and indexing technology of the late twentieth century.<sup>36</sup>

Despite this principled and widely-held preference for published decisions, these values were sacrificed in an early internal reform of the federal appellate courts—limited publication.<sup>37</sup> In the 1940s, the Third and Fifth Circuits began to experiment with limited publication plans, and in 1964, a Judicial Conference Report recommended limiting publication of some opinions.<sup>38</sup> By 1973, the Judicial

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<sup>34</sup> Act of Mar. 3, 1891, ch. 517, 26 Stat. 826; Thomas A. Woxland, “*Forever Associated with the Practice of Law*”: *Early Years of the West Publishing Company*, 5 LEGAL REFERENCE SERVICES Q. 115, 119 (Spring 1985).

[T]he grand structure of law was impossible to support once the practitioner began to be bombarded with tens of thousands of decisions. When publication standards shifted from a selection criteria of quality and utility to total comprehensiveness in coverage, the nature of legal literature changed dramatically. Now the legal researcher was confronted with enormous amounts of available and largely undigested data.

Berring, *supra* note 20, at 22.

<sup>35</sup> See Cleveland, *supra* note 1, at 84 (“[L]awyers proved unwilling to rely on a secondary source when the words of the courts themselves were before them, and they continued to cite cases and to rely upon the Restatement as a useful, but secondary, source.”).

The Restatement movement’s original goal was to provide an intelligent summary and analysis of the existing case law, distilling out the very best and discarding the dross. . . . but such a grand plan was not fulfilled. Though cited with great frequency early on, the *Restatements* became another secondary source. No one stopped dipping into the mire of reported cases.

Berring, *supra* note 20, at 23.

<sup>36</sup> *Id.* at 25–27; see also Scott F. Burson, *Report from the Electronic Trenches: An Update on Computer-Assisted Legal Research*, 4 LEGAL REFERENCE SERVICES Q. 3 (1984); William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 LAW. LIBR. J. 543 (1985).

<sup>37</sup> POSNER, *supra* note 1, at 122–24 (acknowledging that although universal publication may not be possible with the caseload volume, unpublished opinions drastically decrease the quality of the federal courts—unpublished opinions are generally inferior to published opinions, and such inferiority stems from the reduction in quality of the courts’ output).

<sup>38</sup> WARREN OLNEY III, ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964), available at <http://host4.uscourts.gov/judconf/proceedings/1964-03.pdf>. “In 1964, the Federal Judicial Conference recommended that the Courts of Appeals should report only those decisions that

Conference's Advisory Council on Appellate Justice was ready to recommend the non-publication of some opinions, along with an explicit limitation on their citation and a sub silentio denial of precedential value of these opinions.<sup>39</sup> These actions professed concern about the physical costs of publishing opinions and the intangible costs of researching them, but it is clear that this internal reform by the federal circuit courts was a method of addressing caseload volume.<sup>40</sup> The unpublication proposal that it ultimately recommended fundamentally changed the nature of the common law and spawned a mountain of criticism,<sup>41</sup> but at the time, the actions of this committee were overshadowed by the concurrently running Hruska Commission, which involved all three branches of government and a much broader mandate.<sup>42</sup>

More concerted studies of the federal courts' volume problems continued throughout the next few decades in what Thomas E. Baker has called, "[a] generation spent studying the United States Courts of Appeals."<sup>43</sup> In 1968, the American Bar Association (ABA) commissioned the first study of the rapidly expanding federal appellate caseload.<sup>44</sup> Its report, *Accommodating the Workload of the United States Courts of Appeals*, recommended both internal reforms of how the courts process cases and external reforms of its structure.<sup>45</sup> While some of the internal reforms have been enacted, the external reforms have not.<sup>46</sup>

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would be of 'general precedential value' in order to deal with 'the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities.'" Cleveland, *supra* note 1, at 63.

<sup>39</sup> COMM. ON USE OF APPELLATE COURT ENERGIES, ADVISORY COUNCIL ON APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 20 (1973). The Advisory Council on Appellate Justice was created in 1971 as a non-governmental body that was to serve as "a liaison to the Federal Judicial Center and the National Center for State Courts." BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 37. The Council agreed, after four years of study, to develop guidelines to use in the restructuring of the federal appellate system. These guidelines were similar to those created by the Hruska Commission. *Id.*

<sup>40</sup> Samuel A. Alito, *How Did We get Here? Where are We Going?*, Keynote Address at Washington and Lee University Law Review Symposium: *Have We Ceased to be a Common Law Country?: A Conversation on Unpublished, Depublished, Withdrawn and Per Curiam Opinions* (Mar. 18, 2005) [hereinafter *Alito Symposium Address*], available at [http://www.law.com/pdf/dc/alito\\_unpublished.pdf](http://www.law.com/pdf/dc/alito_unpublished.pdf).

<sup>41</sup> See Cleveland, *supra* note 1, at 63, 64 n.15.

<sup>42</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 37.

<sup>43</sup> Thomas E. Baker, *A Generation Spent Studying the United States Courts of Appeals: A Chronology*, 34 U.C. DAVIS L. REV. 395, 396 (2000).

<sup>44</sup> CARRINGTON, *supra* note 15, at Preface.

<sup>45</sup> *Id.*; see also BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 34. "[T]he report . . . recommended some intramural reforms to improve efficiency, recommended an increase in capacity and, most importantly, proposed a sequential strategy for dealing with anticipated federal appellate growth over the long run." *Id.*

<sup>46</sup> Thomas E. Baker made an excellent distinction between reforms which the court itself takes and those that require the action of the political branches to accomplish. He calls these categories, "intramural" and "extramural." I have adopted "internal" and "external" instead; while I am uncertain whether these words are better, they are at least adequate, and I am

In 1972, a Study Group commissioned by the Federal Judicial Center and headed by Professor Paul Freund issued a report primarily focused on the caseload of the U.S. Supreme Court.<sup>47</sup> It was, however, the report's comments regarding the intermediate appellate structure that drew the most attention and criticism.<sup>48</sup> The report proposed the creation of a national court of appeals, which would screen cases, resolve inter-circuit conflicts, and recommend a limited number of cases for the U.S. Supreme Court for possible grant of certiorari.<sup>49</sup> The court would be staffed by seven circuit judges sitting by appointment for staggered terms.<sup>50</sup> The proposal was widely criticized and seemingly dead on arrival, but it did shine some light on the problem of volume in the federal appellate courts as well as reveal the difficulty with making a principled reform.<sup>51</sup>

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certain that they are mine. Thomas E. Baker, *An Assessment of Past Extramural Reforms of the U.S. Courts of Appeals*, 28 GA. L. REV. 863, 863–64 (1994).

<sup>47</sup> 1972 REPORT, *supra* note 32; Hufstедler, *supra* note 15, at 796–800 (stating that the new court would provide significant immediate relief to the Supreme Court of the United States); BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 35; *see also* Wallace, *supra* note 3, at 914.

<sup>48</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 35 (citing Kevin L. Domecus, *Congressional Prerogatives, The Constitution and a National Court of Appeals*, 5 HASTINGS CONST. L.Q. 715, 716 n.7 (1978)); *see also* Hufstедler, *supra* note 15, at 796–97, 799 (discussing how the early critics of the National Court of Appeals saw such proposal as simply a “work relief bill for the individual Justices of the Supreme Court” and how the national court of appeals would not solve the problems of congestion that the federal appellate courts are facing); Wallace, *supra* note 3, at 914. The proposed national court of appeals was one of the most controversial proposals in history. The proposal “sparked several years of intense, often emotional, debate and provoked several sitting Justices of the Supreme Court to take public position, both pro and con.” *Id.*

<sup>49</sup> 1972 REPORT, *supra* note 32, at 47; *see also* Hufstедler, *supra* note 15, at 796; BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 35; POSNER, *supra* note 1, at 162–63.

<sup>50</sup> 1972 REPORT, *supra* note 32, at 19; BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 35; Hufstедler, *supra* note 15, at 799 (Hufstедler noted that a panel of seven judges would be the most effective number because no panel should be comprised of an even number of judges. A panel of three judges would not work because that is the number used for the normal court of appeals’ panel, and the panel should not be as large as nine because it would mirror the Supreme Court of the United States).

<sup>51</sup> Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 BYU L. REV. 617 (1981); Hufstедler, *supra* note 15, at 797 (The proposal was greeted with “firestorms of protest.”).

The lightning bolt that struck and severely damaged the Freund Committee report was the report's recommendation to remove the Supreme Court's unfettered power to exercise discretion in selecting its docket. The proposal pulled the hands of the Supreme Court Justices from the valve controlling the flow of cases to the Supreme Court and substituted those of judges on the new court. Moreover, the Freund proposal, in addition to having the new court select plausible candidates for review, would also have eliminated access to the Supreme Court for all non-selected cases.

*Id.*; *see also* BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 35 (referring to the proposal as “stillborn” upon its arrival); Wallace, *supra* note 3, at 914.

With the attention of the federal bar and judiciary now focused on the issue of volume pressures in the federal courts, Congress created the Commission on Revision of the Federal Courts Appellate System in 1972.<sup>52</sup> The Commission, under Senator Hruska, was charged with proposing systemic and structural reforms for the “expeditious and effective disposition of judicial business.”<sup>53</sup> The Hruska Commission, as it came to be known, issued two reports, which proposed division of the Fifth and Ninth Circuits and renewed the proposal for creation of a national appeals court, this one staffed by seven new permanent Article III judges who would hear cases only by referral from the Supreme Court.<sup>54</sup> The Fifth Circuit was eventually split, but the other proposals were not enacted despite the intense study and thoughtful efforts of the Committee and the involvement of all three branches of government.<sup>55</sup>

The Hruska Commission’s Report was largely supported by the ABA, and over the next decade, the ABA made its own recommendations for internal reforms aimed at improving processing efficiency and other procedural changes within the existing

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<sup>52</sup> Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 407 (codified as amended in scattered sections of Title 5 of the United States Code). Congress acted at the urging of a number of key individuals and groups including Chief Justice Warren Burger, the Chief Judges of the Federal Circuits, the Judicial Conference, the Federal Judicial Center, and the ABA. See BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 36; Hufstedler, *supra* note 15, at 797 (discussing how Chief Justice Warren Burger was a strong advocate of creating a new court and how he pushed for reform).

<sup>53</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 36. The Hruska Commission identified four problems with the federal judiciary system: (1) inter-circuit conflicts that had gone unresolved, (2) delay, (3) the Supreme Court of the United States’s burden in having to hear cases unworthy of its resources, and (4) conflicts in federal law, which caused uncertainty in litigants, lawyers, and the nation as a whole. Wallace, *supra* note 3, at 926.

<sup>54</sup> Comm’n on Revision of the Fed. Court Appellate Sys., *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223 (1973); Comm’n on Revision of the Fed. Court Appellate Sys., *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975); BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 36. The renewed proposal to create a national court of appeals arose from the need to “assure consistency and uniformity by resolving conflicts between circuits.” Wallace, *supra* note 3, at 914 (quoting *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975)). Wallace notes, however, that not all inter-circuit conflicts are necessarily evils that the federal judiciary should seek to avoid.

If all inter-circuit conflicts are evils that should be avoided at all cost, then there can be no objective reason to oppose a national court of appeals modeled along the lines proposed by the Hruska Commission—one that would resolve inter-circuit conflicts in cases by “reference” from the Supreme Court or by “transfer” from the present courts of appeals. But it is not clear that there is anything intrinsically unacceptable about conflicts. Indeed, if conflicts were by their very nature unacceptable, the traditional rule denying precedential status to out-of-circuit decisions probably would not have enjoyed its long history. Conflicts among the circuits appear to embody a subtle mixture of both good and bad aspects.

*Id.*

<sup>55</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 36.

courts.<sup>56</sup> The United States Justice Department, on the other hand, made a series of much broader proposals including eliminating diversity jurisdiction, creating administrative courts, and the creation of a permanent body for coordinating court reform drawn from all branches of government.<sup>57</sup> The Justice Department also pushed for structural reforms such as the use of federal magistrates and the creation of a subject matter-specific appellate court, both of which were enacted.<sup>58</sup>

In 1989, the ABA reviewed the progress since its 1968 Report and reiterated the need for reform. The ABA's experts viewed reform as an inevitable necessity and broadened the ABA's prior proposals to include the creation of additional subject matter circuits, the creation of subject matter panels within circuits, and the study screening devices to limit cases.<sup>59</sup>

In late 1988, the Federal Courts Study Committee was created by Congress, and its members were appointed by Chief Justice Rehnquist.<sup>60</sup> This fifteen-member committee included representatives of all the stakeholders in the federal appellate system, and it cast a wide net regarding public opinion, even holding public meetings and hearings.<sup>61</sup> In its Final Report, the Committee concluded that the need for reform was obvious and inescapable.<sup>62</sup> To a majority of the committee, a "crisis of volume" existed, would continue to grow, and required a "fundamental change."<sup>63</sup> The Committee proposed a host of possible reforms and urged further action by those empowered to enact such reforms—Congress and the courts.<sup>64</sup> The Committee discussed, without endorsing, several sweeping structural changes including: 1) elimination of the existing circuits in favor of more numerous and smaller regional courts; 2) creation of an additional intermediate appellate court above the regional courts, which would have a discretionary docket and absorb some of the Supreme Court's conflict resolution and law-declaring duties; 3) creation of national subject

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<sup>56</sup> *Id.* at 37; *see also* Meador, *supra* note 51, at 617, 628–29; Parker & Hagin, *supra* note 2, at 213 (An inefficient judicial system "endangers the basic principles of our national justice resource: quality resolution of our country's most fundamental, important, and complex legal concerns.").

<sup>57</sup> DEP'T OF JUSTICE COMM. ON REVISION OF THE FED. JUDICIAL SYS., THE NEEDS OF THE FEDERAL COURTS (1977).

<sup>58</sup> The Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (codified as amended in scattered sections of Title 28 of the United States Code); The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of Title 28 United States Code).

<sup>59</sup> AM. BAR ASSOC. STANDING COMM. ON FED. JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROGRESS AFTER A CENTURY OF GROWTH (1989); BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 5, at 158–59.

<sup>60</sup> Federal Courts Study Act, Pub. L. No 100-702, § 102, 102 Stat. 4644 (1988) (codified as amended in scattered sections of Title 28 of the United States Code); *see also* BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 40–41.

<sup>61</sup> Federal Courts Study Act, Pub. L. No 100-702, § 102, 102 Stat. 4644 (1988) (codified as amended in scattered sections of Title 28 of the United States Code).

<sup>62</sup> 1990 REPORT, *supra* note 2.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 3, 171–85.

matter courts or subject matter panels within existing circuits; 4) merger of all existing circuits into a single national appellate court; 5) combining of the existing circuits into fewer, larger units similar to the Ninth Circuit; 6) more formal review of judicial workload, judgeship creation and selection, and internal case management reforms.<sup>65</sup> While substantive changes to the law were outside the Committee's purview, it did suggest the repeal of diversity jurisdiction, reform of prisoner litigation, and elimination of duplication of state and federal criminal cases.<sup>66</sup>

At the request of the Federal Courts Study Committee, the Federal Judicial Center (FJC) conducted a study of the "full range of structural reforms" on appellate workload.<sup>67</sup> In 1993, the FJC issued its report, finding that federal judges were near evenly divided on key questions such as whether the courts had streamlined things through internal reforms as far as they could before sacrificing the quality of appellate decision-making and whether there was over-reliance on court staff.<sup>68</sup> Based on its own analysis, the FJC determined that none of the proposed structural changes would significantly decrease the quantity of case filings, but it abstained when it came to addressing the core question of whether these reforms would improve or ensure the quality of appellate justice because it found that question too subjective.<sup>69</sup> While the report does an excellent job cataloguing and describing various reforms, both structural and jurisdictional,<sup>70</sup> it ultimately concludes that the federal courts' volume problem "derives primarily from the continuing expansion of federal jurisdiction without a concomitant increase in resources. It does not appear to be a stress that would be significantly relieved by structural change to the appellate system at this time."<sup>71</sup> So, while the report is well-detailed and broad in the reforms it reviewed, it demonstrates an unwillingness to choose sides in the crisis/non-crisis debate and refusal to accept any solution, the benefits of which cannot be objectively measured.

Other inquiries into judicial resources and rulemaking have addressed the issue, albeit on a smaller scale or with more specific focus.<sup>72</sup> In addition, there is a wealth of scholarly discussion on federal court reform.<sup>73</sup>

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<sup>65</sup> *Id.* at 118–23.

<sup>66</sup> *Id.* at 14–16.

<sup>67</sup> FED. JUDICIAL CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 1 (1993); *see also* BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 40–41 (discussing the formation of the Committee, its purpose, and its Final Report).

<sup>68</sup> FED. JUDICIAL CTR., *supra* note 67, at 37, 52.

<sup>69</sup> *Id.* at 9, 105.

<sup>70</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 42–43 (discussing the possibility of the following reforms: redrawing circuit boundaries, creating an additional appellate tier, creating national subject matter courts, merging all of the existing courts of appeals into a single centrally-organized court, and consolidating the existing circuits into "jumbo circuits").

<sup>71</sup> *Id.* at 155.

<sup>72</sup> JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT, REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON LONG RANGE PLANNING 10 (1995) [hereinafter LONG RANGE PLANNING]; *see also* Thomas E. Baker & Frank H. Easterbrook, *A Self-Study of Federal Judicial Rulemaking: A Report from the Subcommittee on Long Range Planning to*

Internal reforms have been plentiful but not without cost. Streamlining case management, putting greater authority in the hands of staff, and forgoing the publication and precedential value of most of the federal circuits' decisions have resulted in a significantly more efficient process but at the cost of core values of appellate decision-making. As one experienced federal court reform expert describes it:

Today, most of us seem to be content in believing that the courts of appeals survived the "crisis of volume," whether it was real or imagined. The courts have maintained an appellate equilibrium: They manage to decide about as many appeals as are filed each year. This is important and significant. Cases are not queuing up on the docket, although disposition times have increased appreciably. Furthermore, we now take for granted what were once characterized as "emergency" procedures. We have lowered our expectations for appellate procedure. We have defined down our appellate values. We have all internalized the post-modern norms of minimalist procedural paradigm.<sup>74</sup>

External reforms, such as major restructuring or altering the federal courts' jurisdiction, have not been forthcoming, likely because those changes would have to be imposed on the courts by Congress, and the changes are viewed as too radical.<sup>75</sup> While many have backed off of the "crisis" verbiage, most still acknowledge a large and growing caseload in the federal courts.<sup>76</sup> Resolving this problem seems to be a bit like trying to fix a snag in a tapestry; there are a number of threads that could be pulled, but doing so would have uncertain results on both the problem thread and

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*the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679 (1995); FINAL REPORT, *supra* note 2.

<sup>73</sup> See, e.g., Arthur D. Hellman, *The Crisis in the Circuits and the Innovations of the Browning Years*, in RESTRUCTURING JUSTICE (Arthur D. Hellman ed., 1990); BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4; JOHN P. FRANK, AMERICAN LAW: A CASE FOR RADICAL REFORM (1969); POSNER, *supra* note 1; Dragich, *supra* note 1.

<sup>74</sup> Baker, *supra* note 8, at 113–14 (citing Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the "Crisis of Volume" in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97 (1994)).

<sup>75</sup> See Dragich, *supra* note 1, at 16.

Broadly speaking, reforms aimed at reducing the flow of cases rely on Congress to restrict the jurisdiction of the federal courts by statute, or on the Supreme Court to restrict jurisdiction through abstention, the justiciability doctrines, and similar devices.

Of course, systemic reforms are outside the courts' power to impose, leaving them at the mercy of a Congress that so far remains unpersuaded of the need for decisive action.

*Id.* at 16–18 (emphasis added); see also FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIARY SYSTEM 56–102 (1928); Carolyn Dineen King, Commentary, *A Matter of Conscience*, 28 HOUS. L. REV. 955, 956 (1991).

<sup>76</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 31–32. See generally Dragich, *supra* note 1; POSNER, *supra* note 1.



elsewhere on the tapestry. There has been reluctance to do any but the most minor tweaking, but as the snag grows and threatens to continue to grow, undermining the integrity of the entire garment, something must be done.<sup>77</sup>

## II. METHODS FOR DEALING WITH VOLUME

Many methods for dealing with the volume problem have been proposed or examined by various organizations, studies, and individuals.<sup>78</sup> This section collects them, regardless of size, shape, or era, and highlights the perceived strengths and weaknesses of those reforms, particularly in regard to the values of appellate decision-making each serves or disserves.<sup>79</sup>

### A. *Methods in Use*

There have been many changes to the courts' internal practices, which have resulted in a more efficient processing of appeals.<sup>80</sup> These internal changes have decreased the burden of increased caseloads but at some cost to the traditional appellate values of access, fairness, and accountability.<sup>81</sup> Indeed, while the appearance of business as usual has been maintained, internal changes made since the early 1970s have altered appellate justice.<sup>82</sup>

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<sup>77</sup> "In 1945, litigants appealed about one of every forty district court terminations; they now appeal about one in eight. As a result, appellate filings have risen nearly fifteen-fold." 1990 REPORT, *supra* note 3, at 110. Additionally, case filings in the courts of appeals have risen from about 30,000 in 1983 to over 56,000 in 2010. POSNER, *supra* note 1, at 64; *see also* U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: APPEALS COMMENCED, TERMINATED, AND PENDING tbl.B (2010), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/B00Mar10.pdf>.

<sup>78</sup> COMM'N ON REVISION OF FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975), reprinted in 67 F.R.D. 195; Shafroth, *supra* note 1; 1990 REPORT, *supra* note 1.

<sup>79</sup> Hopefully, this can serve as a potential resource for those interested in the full range of possible reforms or perhaps for the benefit of the next inevitable federal appellate court study. It is inherently descriptive in nature rather than prescriptive.

<sup>80</sup> FED. JUDICIAL CTR., *supra* note 67, at 37; BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 138–224.

<sup>81</sup> Robel, *supra* note 5, at 4; CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at v; McCree, *supra* note 1, at 778; Dragich, *supra* note 1, at 13; Gizzi, *supra* note 15; Pether, *supra* note 28, at 10.

<sup>82</sup> Justice Samuel Alito, then a Third Circuit Judge, noted:

[I]t struck me that the judges of the early 1970s, mostly World War II veterans, had responded to the tremendous increase in the appellate caseload with the same uncomplaining, can-do attitude that their generation had displayed as young men. They quickly identified a number of techniques that permitted the courts of appeals to keep up with their cases without *seeming* to make fundamental alterations in their mode of operation.

Alito Symposium Address, *supra* note 40.

### 1. Unpublished Opinions

One early internal reform adopted by the circuit courts was the creation of system of limited publication of case decisions.<sup>83</sup> In early 1973, the Committee on the Use of Appellate Energy, a subgroup of the Judicial Conference's Advisory Council on Appellate Justice, recommended the non-publication of some opinions, along with an explicit limitation on their citation and an implicit denial of their precedential value.<sup>84</sup> The 1973 Committee perceived a burgeoning problem with increasing caseloads and, in particular, the time it would take judges to produce and lawyers to research the growing number of written opinions.<sup>85</sup> What was devised to address this cost was a system by which a court could differentiate between its error-correcting function and its law-declaring function.<sup>86</sup> Cases that merely corrected

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<sup>83</sup> See generally William R. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981); Daniel N. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 JUST. SYS. J. 405 (1981); Cleveland, *supra* note 1. See also CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 35–41; McCree, *supra* note 1, at 789; Martha J. Dragich, *Will the Federal Courts of Appeals Perish if they Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 760 (1995); Robel, *supra* note 5, at 49–50 (by 1990, only a few federal appeals courts published even half of their decisions on the merits.).

<sup>84</sup> ADVISORY COUNCIL ON APPELLATE JUSTICE, *supra* note 39; BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 37; POSNER, *supra* note 1, at 122 (“With the rapid increase during the 1960s in the number of appeals, both absolute and relative to the number of judges, the practice of universal publication began to be questioned.”); Cleveland, *supra* note 1, at 63–64.

<sup>85</sup> See generally ADVISORY COUNCIL ON APPELLATE JUSTICE, *supra* note 39.

<sup>86</sup> Dragich, *supra* note 1, at 15, 22–23 (The dual functions of the courts of appeals has weakened the federal judicial structure because the courts must take the time to resolve cases and set legal precedent, leading to a “reduction in the attention paid to each case.”). Additionally, Dragich notes, “the courts are unable to perform either function well,” which begs the need to differentiate between the courts’ error-correcting function and law-making function. *Id.*; see also Parker & Hagin, *supra* note 2, at 235 (arguing that the error-correcting function and the law-giving function of the appellate courts do not always deserve the same treatment). But see CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 2–4 (discussing how “the line between the two functions has not been easy to maintain” and how it might be harmful or even futile to try and maintain such a line). See also Carrington, *supra* note 3, at 416–17. During the late 1800s, no one even perceived the federal appellate courts as having a role in making law—the perceived role was simply to correct the errors of the courts below. Carrington suggests that some distinction should be made between the error-correcting and law-making functions of the appellate courts. *Id.* In 1925, federal appellate judges were still primarily engaged only in the error-correcting function, and this sole responsibility had its benefits.

These judges were raised in the formalist traditions of [the] earlier time. They took pride in the work of correcting error and enjoyed the time and space that enabled them to respond to individual party interests. They could listen to arguments, carefully read transcripts, examine the precedents for themselves, hold unhurried conferences among themselves, and fully and directly explain their decisions to the interested bar. These courts, working so visibly themselves, could be counted upon to accept the direction of the higher Court and to bring any idiosyncratic district judge into line as well. Not only the Supreme Court had such expectations of the courts of appeals judges, but the lawyers and district judges had such expectations as well. Those district court judges

error below and simply applied the law as it presently existed would be issued as “unpublished” decisions, while cases that expanded, contracted, or otherwise made new law would be published as usual.<sup>87</sup>

The Committee correctly perceived that the lack of formal publication would not prevent private publishers from printing or lawyers from researching and citing such opinions, however designated, and so decided to add a citation ban on such opinions.<sup>88</sup> This ban, the Committee believed, would eliminate the market for such opinions.<sup>89</sup> While it correctly identified the persistence of the bench in bar in using judicial opinions regardless of their “publication” designation, it underestimated the enduring value the legal system placed on these opinions, and, eventually, the non-citation rule was abolished.<sup>90</sup>

The final question before the Committee, the true jurisprudential question, was whether such unpublished, unciteable opinions would still be accorded their usual precedential value.<sup>91</sup> This question was deemed “a morass of jurisprudence,” and the Committee eschewed addressing the issue.<sup>92</sup> This was a fundamental alteration to the common law method.<sup>93</sup> But it was a method of addressing caseload volume because it did not require significant structural reform and could be accomplished without significant visible change in the courts’ operations.<sup>94</sup>

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and lawyers could often accurately predict what to expect from the court of appeals in a particular case. They knew which circuit judges would have the inclination and opportunity to assure that the district court adhered to the Supreme Court’s precedents, at least to the extent that the circuit judges could comprehend the Court’s opinions. . . .

The work of correction takes time that circuit judges no longer feel they have. And making the performance of that work visible and convincing to the bar and the public requires much more time than the judges are allowed by circumstance. Accordingly, the error correction function of courts of appeals must be less influential in the daily work of district courts where individual fates are resolved.

*Id.* at 423–25.

<sup>87</sup> See POSNER, *supra* note 1, at 120 (various criteria were used to identify whether an opinion would likely have precedential value); Cleveland, *supra* note 1, at 63.

<sup>88</sup> See Cleveland, *supra* note 1, at 63–64.

<sup>89</sup> ADVISORY COUNCIL ON APPELLATE JUSTICE, *supra* note 39; Cleveland, *supra* note 1, at 64, 102, 166-67 (Even with the citation ban, attorneys still researched unpublished opinions. In other words, attorneys continued to rely on unpublished opinions although they were not allowed to cite to such opinions.) (citing TIM REAGAN ET AL., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS 10 (Fed. Judicial Ctr. 2005); Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 401, 414 (2002).

<sup>90</sup> FED. R. APP. P. 32.1.

<sup>91</sup> ADVISORY COUNCIL ON APPELLATE JUSTICE, *supra* note 39.

<sup>92</sup> *Id.*

<sup>93</sup> Cleveland, *supra* note 1, at 68; Dragich, *supra* note 83, at 758 (published opinions are at the heart of our nation’s common law system).

<sup>94</sup> Alito Symposium Address, *supra* note 40.

Issuance of unpublished opinions does undoubtedly improve efficiency, largely by designating some cases as resolvable by court staff that typically draft opinions not designated for formal publication.<sup>95</sup> In fact, as the caseload increased, so has the percentage of cases decided by unpublished opinion.<sup>96</sup> But this efficiency has come at the cost of reducing the active, informed consideration and decision by a panel of Article III judges to relegating those judges to being mere signatories to decisions that at least, in some cases, are akin to “sausages not fit for human consumption.”<sup>97</sup> This method of dealing with volume also undermines fairness by allowing for decisions that are relevant only for a single time and place, which removes the consistency safeguard of the common law—precedent.<sup>98</sup> Already, the market has overcome the limitation on publication, and pragmatic and jurisprudential concerns have eliminated the bar on citation.<sup>99</sup> What remains is the question of whether such opinions remain non-precedential and whether, in the face of full publication and citation, the cost savings of creating a second tier of cases remains significant. This procedural shortcut must be acknowledged as harmful to the appellate process and ended.<sup>100</sup>

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<sup>95</sup> POSNER, *supra* note 1, at 124.

<sup>96</sup> *See* Cleveland, *supra* note 1, at 63, 108.

<sup>97</sup> Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, 51 FED. LAW. 36, 37 (June 2004); Cleveland, *supra* note 1, at 124.

<sup>98</sup> Cleveland, *supra* note 1, at 146–48, 155–60.

<sup>99</sup> *Id.* at 160.

The unpublished decisions of the federal courts of appeals are now uniformly citeable thanks to new Rule 32.1. Such decisions are widely available in the Federal Appendix, on West's and LEXIS's online services, and on the courts' own websites. Even with citation restrictions in place, past practice suggests that these opinions will be looked at and used. If anything, society has pushed back against the encroachment on this traditional common law protection. Nor have any adequate alternate procedures been substituted. It is difficult to imagine what alternative procedure could be substituted to meaningfully replace the ability of litigants to rely upon a court's following its decisions from one case to the next absent some factual distinctions or changes in the law.

*Id.*

<sup>100</sup> Martha Dragich, a proponent of published opinions has stated:

The published judicial opinion is at the “heart of the common law system.” Judicial opinions are a critical component of what we understand to be the “law.” In fact, a legal system’s existence cannot be recognized “until the decisions of [its] courts are regularly published and are available to the bench and bar.” To the extent our “law” is embodied in precedents, published opinions are the authoritative sources of law. Indeed, *stare decisis* cannot operate in the absence of published opinions.

Dragich, *supra* note 83, at 758 (quoting John Reid, *Doe Did Not Sit—The Creation of Opinions by an Artist*, 63 COLUM. L. REV. 59, 59 (1963); GRANT GILMORE, *THE AGES OF AMERICAN LAW* 9 (1977). *But see* Robel, *supra* note 5, at 50 (arguing that limited publication is the most effective method in saving the courts’ time and energy).

## 2. Increased Reliance on Staff

Another internal reform used by federal circuits to deal with the increase in caseload volume is an increased reliance on court staff.<sup>101</sup> There has been an increase in number and importance of both the appellate judges' personal clerks ("elbow clerks") and central staff that serves the entire circuit court of appeals.<sup>102</sup> In addition to a numerical increase, the decisional and law-making power of court staff has increased.<sup>103</sup> Court staff are now the captains of case management and often de facto decisionmakers.<sup>104</sup> While the courts do employ administrative staff to handle non-judicial tasks like schedule setting, filing, and typing, they have also increasingly employed decision-making staff whose responsibilities include making recommended judicial decisions, tracking and weighting cases in ways that dictate the amount of judicial attention they receive, and selecting the precise words in which the decision is rendered.<sup>105</sup> They set and manage the briefing and argument schedule, administering pre-hearing conferences to narrow issues and encourage resolution, virtually rule on motions and grants of oral argument via proposed decisions and pre-drafted orders, propose decisions, and draft opinions (particularly unpublished opinions) that hand down the court's decisions.<sup>106</sup>

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<sup>101</sup> See Posner, *supra* note 4, at 765, 767–75; see also McCree, *supra* note 1, at 782, 785; BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 139–47 (discussing different staffing arrangements and how court staff members represent "the first line of defense against oppressive dockets"); POSNER, *supra* note 1, at 97, 102–19. *But see* John G. Kester, *The Law Clerk Explosion*, 9 LITIG. 20 (1983) (expressing deep concern over the use of this method as a way of coping with the caseload problem).

<sup>102</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 140; CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 44; POSNER, *supra* note 1, at 97 ("There has been a big expansion in the number of law clerks, and the creation of a kind of floating law clerk called a staff attorney."); McCree, *supra* note 1, at 785.

<sup>103</sup> Dragich, *supra* note 1, at 31; POSNER, *supra* note 1, at 104. See generally E. Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 VAND. L. REV. 1179 (1973); DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974); Posner, *supra* note 4, at 768; McCree, *supra* note 1, at 785–86 (citing Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1128–37 (1973); Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299, 300–05 (1961)).

<sup>104</sup> Posner, *supra* note 4, at 768 (arguing that appellate judges may still direct staff members and give orders, but the staff members are ultimately the decision-makers). Some scholars even go as far as to call these staff members para-judges and invisible judges. *Id.* at 770 (quoting Alvin B. Rubin, *Views from the Lower Court*, 23 UCLA L. REV. 448, 456 (1976)); Wilkinson III, *supra* note 1, at 1171–72.

<sup>105</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 139–41; Posner, *supra* note 4 at 768, 770 (noting that the role of the appellate judge has transformed from draftsman to editor). Although the judge has the final say in the wording of a decision written by a staff member, the staff member's ideals and opinions are still very much prevalent in such decision. It is inevitable that the drafter of the decision will have a large impact on the final product. *Id.* at 770.

<sup>106</sup> See BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 139–45; Wilkinson III, *supra* note 2, at 1171; Shirley M. Hufstедler, *The Appellate Process Inside Out*, 50 CAL. ST. B.J. 20, 22 (1975); see also Robel, *supra* note 5, at 43.

Judges' personal clerks<sup>107</sup> are typically new law school graduates who lack experience but are drawn from the tops of their classes at top law schools.<sup>108</sup> What they lack in experience, they make up for in intelligence, eagerness, and low pay requirements. Their position is transient, typically lasting only a term or two,<sup>109</sup> and they are under close supervision of the judge for which they work.<sup>110</sup> Court staff, particularly the decision-making staff attorneys,<sup>111</sup> are typically experienced appellate attorneys in a career position. They work outside the chambers of any individual judges and have a greater role in proposing outcomes.<sup>112</sup>

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<sup>107</sup> Up until the past few decades, judges only had one law clerk whose "role was 'testing the judge's work' by criticizing opinion drafts and arguments, and acting generally as a sounding board." BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 140–41 (citing Wade H. McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 786–87 (1981)). With the caseload increase, though, second and third law clerks were added to help judges deal with the volume. BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 141. In the past, law clerks were merely considered "go-fors" and "sounding boards." POSNER, *supra* note 1, at 104–05. Now, they participate heavily in the opinion-drafting process because opinion drafting is the most time-consuming delegable judicial task. *Id.*; CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 32 (Opinion-drafting is the most expensive and time-consuming phase of the judicial process.).

<sup>108</sup> POSNER, *supra* note 1, at 102, 107; *see also* Robel, *supra* note 5, at 41.

<sup>109</sup> *See* POSNER, *supra* note 1, at 102 (law clerks generally only serve under a particular judge for one to two years).

<sup>110</sup> Posner argues that there is not always close supervision of law clerks: "If [the judge] has only one or two [law clerks], problems of supervision and delegation are unlikely to be serious. But if [the judge] has three or four clerks, a significant amount of his time must be spent in supervising and coordinating their work." POSNER, *supra* note 1, at 103. As a result, the judge is left with less time for his or her conventional judicial duties. *Id.* at 103–04; BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 144–45 (Judges are unable to adequately supervise their clerks because there are simply too many.). By limiting the number of clerks to one or two, judges will be more capable of closely supervising their clerks and perform their conventional judicial duties.

<sup>111</sup> The duties of the staff attorney traditionally include, but are not limited to, the following:

- (1) Acquiring a case once the notice of appeal is filed;
- (2) Carries the case through each procedural step until the closing brief has been submitted;
- (3) Prepares legal memoranda;
- (4) Drafts proposed opinions;
- (5) Recommends the grant or denial or oral argument; and
- (6) Presents everything to the judge in the end for the final decision

Hufstедler, *supra* note 106, at 22; *see also* Robel, *supra* note 5, at 43 (for further discussion on staff attorney duties).

<sup>112</sup> *See* Baker, *supra* note 6, at 144; *see also* BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 139 (Their greater role in proposing outcomes stems from their duty to perform prescreening assessments of appeals.).

The courts' reliance on central staff is undeniable and seemingly necessary.<sup>113</sup> Yet, critics of the practice suggest that too much decision-making power has been placed in the hands of staff.<sup>114</sup> Duties such as approving or denying oral argument, granting or denying a motion, making the initial judgment on the outcome of an appeal, and drafting the precise language that will become law, are viewed as essential appellate judicial functions.<sup>115</sup> Court staff making such decisions, even when reviewed by a judge, seems contrary to the fundamental appellate value that litigants have their case decided by an Article III judge.<sup>116</sup> Moreover, some have expressed a concern that the sorcerer's apprentices are loose in the workshop: "it is the work of these usually newly-graduated lawyers that produces many widespread and troubling inequality effects."<sup>117</sup> To create some guidance for staff in tracking appeals, categories of cases, not individual cases, are examined to be placed on the short list for actual judicial consideration or to be thrown in the pile of less carefully considered and drafted opinions.<sup>118</sup> The practice of relying so heavily on staff to make essentially judicial decisions is an abdication of the judicial function in large categories of cases.<sup>119</sup>

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<sup>113</sup> See Donald P. Ubell, *Evolution and Role of Appellate Court Central Staff Attorneys*, 2 T.M. COOLEY L. REV. 157, 166 (1984) ("Central staff attorneys are here to stay, without question. The reasons that gave birth to their existence remain. Filings continue to increase and the prospect for new judgeships is limited."); POSNER, *supra* note 1, at 103 ("[T]he caseload per federal judge has risen to the point where very few judges, however able and dedicated, can keep up with the flow without heavy reliance on law clerks, staff attorneys, and sometimes externs too.").

<sup>114</sup> See BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 140–41 (Many commentators worry that "the law clerk's role in the reading, studying, considering, and writing has encroached significantly on that of the judge."); POSNER, *supra* note 1, at 104–07 (judges have delegated more and more of the initial opinion-drafting duties to law clerks, transforming the judge into an editor from his traditional role as draftsman). In many situations, law clerks have been considered "para-judges" or "invisible judges" because all of the judicial duties they have taken on over the course of the years. *Id.* at 106 (citing Alvin B. Rubin, *Views from the Lower Court*, 23 UCLA L. REV. 448, 456 (1976)); McCree, *supra* note 4, at 787 ("Rather than critiquing and testing judicial work, clerks may come to perform this work themselves."); Robel, *supra* note 5, at 41–42.

<sup>115</sup> See Patricia M. Wald, *The Problem with the Courts: Black Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766 (1983); see also POSNER, *supra* note 1, at 103–13 (discussing the duties delegated to law clerks and staff attorneys); BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 144 ("Deciding whether a case deserves oral argument and how a case should be decided . . . lie at the core of judicial function.").

<sup>116</sup> As Thomas E. Baker puts it: "[j]udging is deciding; that is the exercise of the article III power." BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 141. Increasing law clerks' and staff attorneys' duties inevitably grants them more power to make decisions concerning the outcome of cases; hence, litigants are not always afforded the opportunity to have their case decided by an Article III judge.

<sup>117</sup> See Pether, *supra* note 28, at 10.

<sup>118</sup> See *id.* at 13–14.

<sup>119</sup> *Id.* at 14.

As federal appellate court expert Thomas E. Baker explains, “these experiments represent uncomfortable choices made in the face of the daunting workload.”<sup>120</sup> The choice has been made, and the efficiency gains are difficult to dispute.<sup>121</sup> Proponents of increased use of court staff, and clearly the circuit courts themselves, believe that the benefits of the practice outweigh its harm.<sup>122</sup> Still, we have reached or will soon reach the limit of volume pressures that additional court staff can ameliorate. Whether due to diminishing marginal utility or an inability of judges to supervise the bureaucracy, there is a limit to the tradeoff between benefit and harm that shifts unacceptably toward harm.<sup>123</sup> Already, the Judicial Conference has taken note and adopted limits on the expansion of court staff.<sup>124</sup> While it has addressed the numerical issue, the issue of appropriate decision-making power remains unresolved.<sup>125</sup>

### 3. Case Management/Tracking

The related process of case management, including the tracking of cases into different categories of review, has also increased court efficiency and helped deal

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<sup>120</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 143.

<sup>121</sup> Baker, *supra* note 7, at 113–14 (“Today, most of us seem to be content in believing that the courts of appeals survived the ‘crisis of volume,’ whether it was real or imagined. The courts have maintained an appellate equilibrium: They manage to decide about as many appeals as are filed each year.”).

<sup>122</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 144–45 (One benefit includes saving the judges’ time, which allows them to focus on the more important appellate tasks. One harm that so many critics discuss is that judges are no longer able to adequately supervise central staff members because there are simply too many.); POSNER, *supra* note 1, at 103–19 (the use of law clerk and other staff members should not be considered a necessary evil, but the overuse of such staff members creates harms that outweigh any benefits).

<sup>123</sup> Baker argues that the limits of delegation and supervision have been reached in most chambers, and great harm would come from multiplying judicial clerkships. “Multiplying judicial clerkships any more would jeopardize the tradition that federal judges are respected and respectful because they do their own work.” BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 143 (citing CHARLES E. WYZANSKI, WHEREAS: A JUDGE’S PREMISES 61 (1965)); *see also* POSNER, *supra* note 1, at 116 (Increased reliance on staff threatens the quality of appointments to the federal bench—judges who are unable or unwilling to write can hide behind their staff, particularly their personal clerks.).

<sup>124</sup> REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 68 (1981); REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 63 (1991); BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 146 n.173.

<sup>125</sup> Wade H. McCree has put it well:

Delegation of some aspects of the judge’s work is essential, as is no doubt true of much of the work of many other public officials. Such delegation appears particularly desirable against the background of overloaded dockets. But we must not lose sight of the fundamental changes in the nature of the judicial enterprise that may accompany delegation of too many or too critical aspects of the judge’s work.

McCree, *supra* note 1, at 789.



with the increased volume of appeals.<sup>126</sup> Case management seeks to deal with volume in multiple ways including: (1) diverting some cases from any judicial attention by promoting resolution between the parties; (2) reducing the judicial attention needed by placing some cases on a staff disposition track; (3) reducing or removing the need for judicial attention to motions and procedural matters by resolving them at the staff level; and (4) improving the efficiency of judicial attention by narrowing the focus of the appeal and improving the quality of briefs and argument.<sup>127</sup> This is true even where judges play a role in case management, though, typically the process is staff administered.<sup>128</sup>

A key feature of case management is the pre-hearing conference.<sup>129</sup> Early in the appeal, counsel meet with court staff to discuss the issues and process of the appeal.<sup>130</sup> The staff attorney attempts to clarify and narrow the issues on appeal, explore the possibility of pre-hearing settlement, and set technical limits, such as scheduling or joint appendix contents, that will aid in resolution.<sup>131</sup> Many case management programs have case diversion or pre-hearing resolution as a goal, and some go so far as to call them settlement conferences or to employ volunteer mediators.<sup>132</sup> While case management plans and experiences with them have varied among the circuits, in general, they are reported as being successful at improving efficiency and the processing of cases.<sup>133</sup>

Another aspect of case management is the weighting or tracking of cases. This practice rests on the premise that not all cases are fungible nor do they all deserve the same process or treatment.<sup>134</sup> A fairly benign form of weighting is the

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<sup>126</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 135–36 (citing Jerry Goldman, *The Civil Appeals Management Plan: An Experiment in Appellate Procedural Reform*, 78 COLUM. L. REV. 1209 (1978); Irving R. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 YALE L.J. 755 (1986); Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator*, 57 FORDHAM L. REV. 253 (1988); Irving R. Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094 (1974)). Case management, however, has been subject to some criticism. Skeptics argue that it is questionable whether managerial techniques truly reduce costs and increase efficiency and that judges who use case management techniques are ultimately deciding how much of the court resources a litigant should have access to. Robel, *supra* note 5, at 17.

<sup>127</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 136; *see also* Robel, *supra* note 5, at 13–17.

<sup>128</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 136.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (conference generally takes place before briefing).

<sup>131</sup> *Id.* at 136–37.

<sup>132</sup> FED. JUDICIAL CTR., *supra* note 67, at 40–42.

<sup>133</sup> *Id.*; JAMES B. EAGLINE, FED. JUDICIAL CTR., THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS 41–42 (1990) (stating the pre-hearing conferences (1) help in the settlement of cases; (2) make cases that do not settle more manageable due to the fact that the issues have already been narrowed and simplified; and (3) reduce delay and expenses).

<sup>134</sup> This premise also underlies the practice of issuing unpublished opinions discussed above.

examination of each appeal and a staff assessment of the judicial time and effort involved. This form of weighting helps to equalize caseload burdens of each panel and each judge, which in turn prevents backlog. A more controversial type of weighting is one where some cases are placed on a track of lesser judicial consideration, often meaning no oral argument and a decision proposed and drafted by staff. Here, the judicial role is reduced to reviewer and editor rather than decision-maker or opinion-crafter. This is often used to deal with immigrants, asylum-seekers, “post-conviction criminal and civil rights appellants . . . the indigent, members of racial and ethnic minority groups, Social Security claimants, and other comparatively powerless individuals suing the federal government,” and other cases designated by staff as destined for unpublished opinions.<sup>135</sup> Objections to this process echo those raised against the use of unpublished opinions and central staff more generally.

Overall, case management is widely viewed as a net benefit in the war against volume, and like the use of central staff, it is likely to be continued and expanded to its outermost manageable limits.

#### 4. Reduction of Oral Arguments

One specific feature of appellate decision-making, oral argument, has been significantly reduced during the crisis of volume era.<sup>136</sup> Oral argument is a relatively small portion of appellate judicial time, but it is a very visible component and one which reportedly alters the outcome in very few cases.<sup>137</sup> In 1979, Federal Rule of Appellate Procedure 34 was amended to explicitly provide for oral argument in all cases unless a three-judge panel unanimously agrees that the case is: 1) frivolous; 2) adequately disposed of by recent decisions; or 3) may be adequately presented by written briefs.<sup>138</sup> Despite the broad guarantee of oral argument and seemingly specific exceptions, oral argument is not the default position, or even the norm, in

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<sup>135</sup> Pether, *supra* note 28, at 20.

<sup>136</sup> See BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 108; McCree, *supra* note 1, at 782; CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 16–24 (Courts now rely more on written submissions than on oral argument.); POSNER, *supra* note 1, at 119. Posner discusses the importance and value of oral argument:

Although the average quality of oral argument in federal courts (including the Supreme Court) is not high, the value of oral argument to judges is high. This is not just because it gives the judge a chance to ask questions of counsel, though this is very important, but also because it provides a period of focused and active judicial consideration of the case. The longer the argument, the more time the judge has to think about the case. Of course there are diminishing returns to oral argument, and judges should not hesitate to terminate an argument when they no longer find it productive. But the imposition of extremely short and stringent time limits, and the elimination of oral argument altogether in many cases where it would be productive . . . have been costly if perhaps inevitable adaptations to the caseload explosion.

*Id.* at 119–20.

<sup>137</sup> CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 19 (noting that it is unlikely that any appellate court spends more than fifteen percent of its working time engaging in oral argument—for many courts, the amount of time spent is much less than fifteen percent).

<sup>138</sup> FED. R. APP. P. 34; BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 108.

federal circuit courts today.<sup>139</sup> The exceptions, particularly the final exception, have swallowed up the rule. By 1994, “fewer than half the Court of Appeals hear[d] oral argument in half the appeals that they decide[d].”<sup>140</sup> Today, that number is barely more than a quarter.<sup>141</sup> Not only has the frequency of oral argument dropped, so too has the duration of individual arguments.<sup>142</sup> At a mere fifteen minutes per side, oral argument, even when granted, is greatly diminished.<sup>143</sup> More troubling is that studies suggest that the grant of oral argument varies across subject matter<sup>144</sup> and that cases where oral argument is granted are more likely to be reversed.<sup>145</sup> Of course, these correlations do not prove causation, and perhaps some areas of law more commonly present frivolous, untenable, or easily briefed appeals.

Even so, the reduction of oral argument does represent a significant reduction in appellate values, arguably for little gain.<sup>146</sup> A 1993 Report of the Federal Judicial Center describes the value lost this way:

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<sup>139</sup> CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 16 (citing DANIEL J. MEADOR, CRIMINAL APPEALS: ENGLISH PRACTICES AND AMERICAN REFORMS 71–80 (1973); Frederick B. Wiener, *English and American Appeals Compared*, 50 A.B.A. J. 635 (1964); D. KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND (1963)) (comparing the English tradition of dependence on oral argument to the reliance on written submissions in America).

<sup>140</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 109; Robel, *supra* note 5, at 48.

<sup>141</sup> Compare ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES: ANNUAL REPORT OF THE DIRECTOR 44, S-1 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/tables/S01Sep10.pdf>, with ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES: ANNUAL REPORT OF THE DIRECTOR 38, S-1, (1997), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/1997/tables/s01sep97.pdf>.

<sup>142</sup> Robel, *supra* note 5, at 47–48; CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 16–17 (noting that over the past few decades the duration of individual arguments has dropped from one hour to forty-five minutes, to thirty minutes, to twenty minutes, and in some cases less than fifteen minutes); POSNER, *supra* note 2, at 119 (in cases where oral argument is actually allowed, the average time allotted is less than twenty minutes).

<sup>143</sup> Robel, *supra* note 5, at 47–48; CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 17 (citing Charles R. Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U. L. Q. 257, 281 (1973) (noting that it is now quite common for cases to be heard without any opportunity for oral argument at all)).

<sup>144</sup> Robel, *supra* note 5, at 48.

<sup>145</sup> *Id.* (citing J. CECIL & DONNA. STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS 20 (Fed. Judicial Ctr. 1987)).

<sup>146</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 112. Paul D. Carrington and his co-authors argue that the reasons for curtailing oral argument do not justify a reduction in appellate values. The reasons typically offered for reducing, or eliminating altogether, oral arguments is that the arguments waste both the judges’ and the attorneys’ time. A judge’s efforts to avoid a backlog of cases “does not in any way compensate for the impairment in the quality of the process which is wrought by the loss of oral argument.” CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 20. Furthermore, time spent by lawyers traveling to oral arguments is no longer a major concern due to modern technology—oral arguments may be conducted via closed-circuit television or by telephone conferences. *Id.* at 19-21.

Oral argument is a valued tradition. Its importance to the correctness of appellate outcomes may not be quantifiable, but argument has long been seen as a fundamental part of the appellate tradition. Many judges value oral argument not only as a way to obtain information, but as a way "to demonstrate to the parties that the members of the panel have attended to the issues raised on appeal, to permit interaction with members of the bar, to provide a forum for the presentation of issues of public concern, to acknowledge the court's responsibility for resolving such disputes, and to provide an opportunity for the judges to confer and hear each other's views."<sup>147</sup>

The value of oral argument lies not only in the actual benefit derived from argument in a given case, but also from the perception that all cases are treated equally and all parties have an opportunity to be heard before a panel of three Article III judges.<sup>148</sup> Additional concerns arise from the fact that denial of oral argument is done with minimal input by counsel and often by staff, further reinforcing litigants' perceptions of lack of access and fairness.<sup>149</sup> In addition, there are concerns that the gain achieved is relatively small.<sup>150</sup> The total judicial time expended on a case involves hours of brief and record review, research, memoranda drafting, and conferences. The addition of a brief oral argument is a relatively small portion of this.<sup>151</sup> Moreover, there is the possibility that decision time is extended and decision quality diminished by the lack of opportunity to narrow issues, obtain concessions, and test the extent or strength of the parties' theories at oral argument.<sup>152</sup>

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<sup>147</sup> FED. JUDICIAL CTR., *supra* note 67, at 44 (quoting in part JOE S. CECIL & DONNA STIENSTRA, *DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS* 159–60 (Fed. Judicial Ctr. 1987)); *see also* Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 SW. L.J. 1151, 1154 (1981).

[I]f a case is worthy of appeal, it is worthy of oral argument. First and foremost, oral argument simplifies cases for the judges. Socratic confrontation between judge and counsel at oral argument often disposes of seemingly complex issues by practical resolution. Oral argument often serves to correct false impressions gained from reading briefs. Invariably, . . . an exchange between judge and counsel during oral argument alters a judge's attitude or vote in conference. This is true in even single issue cases. Finally, I agree with the philosophical importance of oral argument: visibility of oral confrontation between counsel and judge lends virtue to the legal system.

*Id.*

<sup>148</sup> CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 17 ("Oral argument gives to litigants the assurance that the judges themselves are making the decisions. And it also gives litigants the sense of participation which is an essential of the adversary tradition.").

<sup>149</sup> FED. JUDICIAL CTR., *supra* note 67, at 44–45; Lay, *supra* note 147, at 1154. "Once a litigant is denied his right to have counsel present oral argument in a case worthy of appeal, he has indeed lost his right to the full deliberative process of the court." *Id.*

<sup>150</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 112.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

Others view such a reverence for oral argument to exalt form and show over substance. In 1980, then-Chief Judge of the Eleventh Circuit, John Godbold, described oral argument in clear or insignificant cases to be “a waste of societal assets in a world where there are other priorities.”<sup>153</sup>

The best balance of efficiency and appellate values likely lies somewhere between mandatory oral argument and the present anemic rate.

#### 5. Use of Senior Circuit and District Judges to Fill Panels

The court has managed to put more judges onto appellate panels than their allotted number of full-time appellate judges would suggest by increasing the use of senior and visiting judges.<sup>154</sup> Adding and filling judgeships are acts involving the elected branches of government, but the judiciary has made an internal policy adjustment to make greater use of senior judges—those that elect “senior status” rather than outright retirement.<sup>155</sup> A 1993 study by the Federal Judicial Center found that:

Senior judges who continue to handle appeals in their own circuits have been particularly valuable in helping the courts of appeals cope with an increased caseload while maintaining a consistent circuit law. Active district judges also help ease the caseload burden.<sup>156</sup>

It also noted that in circuits with particularly high numbers of judicial vacancies, “panels often include only one active circuit judge; some include none.”<sup>157</sup> Some have suggested that senior judges are vital to the operation of the court under its current caseload pressures:

Their service ameliorates the problems of expanding caseloads and persistent judicial vacancies in the federal courts....Without senior judges, some appellate courts would face “a disastrous build-up of backlogs,” “severe[ ]” problems “administer[ing] justice in a timely fashion,” or even

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<sup>153</sup> John C. Godbold, *Improvements in Appellate Procedure: Better Use of Available Facilities*, 66 A.B.A. J. 863, 865 (1980) (“Perhaps most important of all, the appellate court’s function and value are demeaned by requiring it to carry out acts merely ceremonial, while pretending the facade is real.”).

<sup>154</sup> FED. JUDICIAL CTR., *supra* note 67, at 38; POSNER, *supra* note 1, at 100–01. Visiting judges sat on approximately 47.3 percent of all circuit panels between 1965 and 1969. *Id.* at 101 (citing Justin J. Green & Burton M. Atkins, *Designated Judges: How Well do They Perform?*, 61 JUDICATURE 358, 363 (1978)).

<sup>155</sup> Wilfred Feinberg, *Senior Judges: A National Resource*, 56 BROOK. L. REV. 409, 412–14 (1990); David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 460 (2007); 28 U.S.C. § 371 (2006).

<sup>156</sup> FED. JUDICIAL CTR., *supra* note 67 at 38.

<sup>157</sup> *Id.* at 38. In recent years, however, most panels consist of two active judges, and either a visiting or senior judge. Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 696 (2000); see also Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 328–32 (2011) (listing the number of active and senior judges per circuit).

a “total breakdown in the trial of civil cases.” Senior judges are “indispensable,” “essential,” “inestimable,” “invaluable.”<sup>158</sup>

Senior judges bring experience, perspective, and flexibility to the appellate courts, and their use is an excellent method of addressing volume pressures.<sup>159</sup> The nature of “senior status” allows them to be freely assigned to panels throughout the federal system, including in other circuits and in district courts.<sup>160</sup> The use of senior judges does help to obscure the judicial understaffing problem, however, and there seems to be concern about the proper role of a senior judge, particularly one seeking a purely bureaucratic or purely itinerant role.<sup>161</sup>

Likewise, many federal appellate panels are filled, in part, by district court judges sitting by designation.<sup>162</sup> The term “by designation” is drawn from the statute authorizing the use of district court judges on circuit court panels.<sup>163</sup> The chief judge of a circuit has broad authority to place district court judges on appellate panels, and the practice may be used “whenever the business of that court so requires.”<sup>164</sup> Though it has always been a feature of the modern federal court system that district court judges could sit as visiting judges on circuit panels, that practice has fluctuated over time.<sup>165</sup> For example, while nearly twenty percent of merits decisions by circuit court panels involved a district court judge sitting by designation in the period since 1980, these levels were highest in the early 1980s (twenty-five percent), lower in the period of 1986-93 (seventeen percent), and lower still in the period between 1994 and 2000 (fifteen percent).<sup>166</sup> Whether these decreasing levels are the result of

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<sup>158</sup> Stras & Scott, *supra* note 155, at 455 (copious internal citations omitted). *But see* POSNER, *supra* note 1, at 101 (Even though the use of visiting judges is appropriate sometimes, the extent of the use of visiting judges is a matter of concern—“In a court with nine or more active members and heavy use of senior and visiting senior judges, almost every panel will be different, and the difficulty of maintaining some reasonable uniformity of law within the circuit correspondingly increase[s].”).

<sup>159</sup> Stras & Scott, *supra* note 155, at 455–56.

<sup>160</sup> *Id.* at 455.

<sup>161</sup> *Id.* at 507–16.

<sup>162</sup> Richard B. Saphire & Michael E. Somaline, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation*, 28 U. MICH. J. L. REFORM 351 (1995).

<sup>163</sup> 28 U.S.C. § 292(a) (2006).

The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit.

*Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *See* 28 U.S.C. § 292 (1988) (Historical and Revision Notes) (noting that district judges sitting by designation at the appellate level was a feature of the original Evarts Act in 1891).

<sup>166</sup> James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 LAW & SOC'Y REV. 565, 565, 572 (2001).

increased availability of appellate judges, which seems unlikely, or concerns regarding the use of district judges in an appellate capacity, district court judges remain involved in a significant percentage of federal appellate decisions.

This significant use of district court judges in appellate decisionmaking provides many of the benefits of using senior circuit judges. It extends the resources of the appeals courts, allowing them to hear more cases.<sup>167</sup> However, as with the use of senior judges as active circuit judges, the use of district court judges does present some problems. First, as with senior judges, using district court judges to fill panels obscures the need for more circuit judges and takes those judges away from the duties their normal place in the federal court system requires of them. Second, in addition to those problems, the use of district court judges presents additional difficulties because a district court judge was appointed, confirmed, and accustomed to a different role in the judicial hierarchy, one which he or she must return to after his or her circuit service. The presence of an “unequal” member on so small a decision-making body seems likely to result in some changes in the decision-making process. An empirical study of such panels found that district court judges sitting by designation were less likely to author a majority opinion, less likely to dissent, and more likely to join a majority opinion that provokes a dissent.<sup>168</sup> In addition, they “were significantly less likely than regular appellate judges to reflect their personal or professional backgrounds when voting.”<sup>169</sup> That is, in yet another way, it appears that district court judges are more passive and conforming than their circuit court counterparts or even than themselves in their usual district court roles.<sup>170</sup> Some previous studies suggest that panels including a district court judge may be more likely to have a decision they join reviewed en banc.<sup>171</sup>

These internal reforms have dealt with increasing caseload volume sufficiently to keep the courts running. Other, often external, reforms have been suggested over the last several decades but not attempted. These reforms fall into four broad categories: (1) increasing judicial resources; (2) limiting access to the courts; (3) restructuring the system; and (4) internal or quasi-internal reforms.

#### *B. More of the Same—Increased Judges and Circuits*

The most straightforward response to an increased volume of appeals is to increase the number of appellate judges, and, if need be, appellate circuits.<sup>172</sup> This

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<sup>167</sup> *Id.* at 573 (“[T]he primary reported rationale is efficiency: District judges are asked to serve when there are not enough appellate judges to fill all panels due to vacancies, emergencies, or the sheer volume of cases.”).

<sup>168</sup> *Id.* at 581–84.

<sup>169</sup> *Id.* at 601.

<sup>170</sup> *Id.* at 601; *see also* C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 136, 139, 153 (1996); ROBERT A. CARP & C.K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS 8–9 (1983).

<sup>171</sup> Brudney & Ditslear, *supra* note 166, at 574 n.14 (noting the imprecision of such studies for judging the work of district court judges because they fail to discriminate between district court judges and senior or visiting judges).

<sup>172</sup> Lay, *supra* note 147, at 1152. Lay notes, however, that an increase in the number of appellate judges is only a palliative response and that “[s]uch a move is unwieldy and controversial to say the least. It defies the wisdom of every recent student of judicial

has traditionally been the external reform of choice over the last century, but the increase in judgeships has not kept up with the increase in appeals filed—not even close.<sup>173</sup> In 1970, the Courts of Appeals disposed of 10,669 cases, while in 2005, the Courts disposed of 58,319 cases.<sup>174</sup> During that same period the number of active circuit judges increased much more modestly, from 97 to 167.<sup>175</sup>

The severity of the crisis of volume is often measured by examining the large increase of cases and the very small increase in federal judgeships. The problem at its most basic level is that there are insufficient Article III judges to handle appeals in the traditional pre-boom manner. Demand for judicial services grossly exceeds supply.<sup>176</sup> Nevertheless, the addition of federal judges and circuits to match the demand has never gained much traction, not even among the overworked judges

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administration.” *Id.*; see also Stephen Reinhardt, *Whose Federal Judiciary Is It Anyway?*, 27 LOY. L.A. L. REV. 1, 1 (1993) (Congress has traditionally dealt with the caseload problem at the federal appellate level by adding more judges.); Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648, 656 (1980); Posner, *supra* note 4, at 761–62; Dragich, *supra* note 1, at 45–49; McCree, *supra* note 4, at 789.

<sup>173</sup> Cleveland, *supra* note 1, at 68, 173; FINAL REPORT, *supra* note 2, at 14; 1990 REPORT *supra* note 3, at 110; Parker & Hagin, *supra* note 2, at 211 n.1 (1994); Arthur D. Hellman, *The Crisis in the Circuits and the Innovations of the Browning Years*, in RESTRUCTURING JUSTICE 5 (Arthur D. Hellman ed., 1990).

<sup>174</sup> ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS WORKLOAD STATISTICS FOR THE DECADE OF THE 1970S tbl.B1, 2 (1980); ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS JUDICIAL CASELOAD PROFILE FOR 2010 1 (2010).

<sup>175</sup> ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS JUDICIAL CASELOAD PROFILE FOR 2010 2 (2010).

<sup>176</sup> POSNER, *supra* note 1, at 94–97 (comparing private market ideas and trends of supply and demand to the federal courts of appeal):

In a private market, an unexpected rise in demand has two effects (provided the producers are operating at their full capacity). . . . In the short run, when (by definition) producers are unable to expand their productive capacity, price rises to ration demand to the existing fixed supply. In the long run, when producers can expand their capacity, supply will increase to accommodate (in part anyway) the higher demand and price will fall, though not necessarily to its level before demand rose. However, the federal court system’s response to the steep and unexpected rise in the demand for its services that began in about 1960 (a rise approximated by the increase in case filings) has not followed this conventional pattern.

*Id.* at 94. Judge Richard A. Posner discusses two reasons why the demand for federal judicial services has not been met by simply increasing the number of appellate judges. First, “it is politically impossible to raise federal judges’ salaries to a level that would attract high-quality candidates, in the number required, in the relatively unattractive conditions of employment that would exist if there were as many federal judges as the caseload increases in recent years would justify.” *Id.* at 99. Second, it is difficult to expand the courts of appeals—“one cannot just add judges to each of these courts, because beyond a certain point there are too many judges to deliberate effectively.” *Id.*



themselves.<sup>177</sup> Instead, the intramural reforms noted in Part II.A. above have been pursued to do more with less, or as some would suggest, to just do less.

Increasing the supply of judges to meet the demand of appeals seems like the most obvious reaction, but it is unpopular with both Congress and the courts.<sup>178</sup> Increasing the number of appellate judges presents a number of problems. First, increasing federal judgeships would cost the federal government.<sup>179</sup> These costs include both direct costs, like salary and benefits, as well as indirect costs, like office space, courtroom space, and staff.<sup>180</sup> Because federal judgeships are lifetime appointments, these costs would be difficult, if not impossible, to reduce once appointments were made.<sup>181</sup> Second, increasing the number of federal judges is viewed by many judges, including Supreme Court Justice Antonin Scalia, as

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<sup>177</sup> This proposed reform to the federal judiciary has not gained popularity because many believe that an increase in the number of federal appellate judges would do more harm to the federal appellate system than it would good:

Jumbo courts encourage litigants to demand more of the court's resources; litigants are more willing to bring (and defend) claims in the hope of exploiting the indistinct jurisprudence of the circuit or by drawing a sympathetic appellate panel. We can expect a court of appeals' filings-per-judge to increase as the number of judges on that court increases, further diminishing the benefits attributable to new judges.

Parker & Hagin, *supra* note 2, at 220 (quoting Judge Gerald Bard Tjoflat, *More Judges, Less Justice: The Case Against Expansion of the Federal Judiciary*, 79 A.B.A. J. 70 (July 1993)); see also Dragich, *supra* note 1, at 46–47 (Some believe that adding judges will create a “judicial Tower of Babel,”—meaning that more judges will lead to an increase in disharmonious voices on the law. Furthermore, adding judges exacerbates the current problem with intra-circuit conflicts.); Daniel J. Meador, *Struggling Against the Tower of Babel*, in RESTRUCTURING JUSTICE 195 (Arthur D. Hellman ed., 1990); LONG RANGE PLANNING, *supra* note 72, at 10; Wilkinson III, *supra* note 1, at 1163–64 (When more judges are added, Congress feels justified in further expanding federal jurisdiction, and increased jurisdiction leads to even more cases at the appellate level.).

<sup>178</sup> See Dragich, *supra* note 1, at 46–47 (citing Ruth B. Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 11 (1983)) (Although Congress has traditionally relied on this method in dealing with the caseload problem, it has come to realize that adding more judges leads to more conflicts of law and disharmonious voices at the federal level.).

<sup>179</sup> COMM. ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 17 (1994) [hereinafter PROPOSED LONG RANGE PLAN] (an increase in judges is not practically or economically feasible); see also Wilkinson III, *supra* note 1, at 1161 (noting the budgetary constraints that come with the creation of new judgeships). *But see* Dragich, *supra* note 1, at 46 (those in favor of expanding the size of the federal judiciary believe this remedy would represent a “‘comparatively small’ national investment that would ‘ensure fair hearings to all persons entitled to the federal forum . . . .’”) (citing FED. JUDICIAL CTR., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS 25-26 (1993)).

<sup>180</sup> PROPOSED LONG RANGE PLAN, *supra* note 179, at 17.

<sup>181</sup> Posner, *supra* note 4, at 788 (commenting on the tenure provisions for Article III judges and the appointment of Article I judges for long, fixed terms).

undermining the prestige and attractiveness of the position of federal judge.<sup>182</sup> High quality candidates would be less interested in the position, and the quality and perception of the federal judges would be diminished. Third, additional judges would lead to administrative problems. Expanding the size of the circuits would lead to loss of collegiality, for example.<sup>183</sup> Fourth, increased appellate judges—expanding the size of the circuits—results in less stable law.<sup>184</sup> Lastly, increasing the number of appellate judges would increase the number of decisions rendered, ultimately adding to the Supreme Court’s workload.<sup>185</sup> Each of these concerns could apply also to increasing the number of circuits.

Increasing the supply of judicial decision-making resources remains an option, and a continued increase seems likely, but not a rate that fully brings the case-per-judge ratio back to previous levels. Fortunately, while appellate judgeships seem to have reached a plateau in recent years, the number of cases filed seems to be on the downturn.<sup>186</sup> Where adding judges seems straightforward, but unpopular, limiting

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<sup>182</sup> See *id.* at 763 (noting that Circuit judges are concerned about the dilution of their prestige and power that will follow—in their minds—from increasing the number judges in order to deal with the caseload problem); McCree, *supra* note 1, at 783 (adding judges lowers the status of the position) (citing H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 22–30 (1973); W. KITCHEN, *FEDERAL DISTRICT JUDGES: AN ANALYSIS OF JUDICIAL PERCEPTIONS* (1978)).

<sup>183</sup> Posner, *supra* note 4, at 762; McCree, *supra* note 1, at 784.

<sup>184</sup> Parker & Hagin, *supra* note 2, at 217 (arguing that the number of appellate judges in each circuit should be limited to twelve).

[T]he recommendation to limit the number of appellate judges on each circuit . . . follows from the systemic fundamental that each federal circuit must create and sustain a “coherent body of circuit law,” and that this predictability of law is “created and preserved by a body of judges [a circuit] small enough to function truly as a court.” The risk associated with the unpredictability that has been characterized as the now-too-common “law of the panel” is greatly enhanced in a large court of appeals (a “mega-circuit”). Intra-circuit conflicts are spawned and fostered in “mega-circuits.” And the “signal of unpredictability thereby sent is, of course, unsettling to those who are supposed to follow, and base their affairs on the decisions rendered by the circuit courts: the public at large, the business community even more specifically, and the district courts. This unpredictability of law generates *still more litigation*; such an unpredictable system of justice encourages parties to “roll the dice” to see what panel, or “lot,” they draw.

*Id.* at 217–18; see also LONG RANGE PLANNING, *supra* note 72, at 9; Posner, *supra* note 4, at 763; Dragich, *supra* note 1, at 46–47; McCree, *supra* note 1, at 784.

<sup>185</sup> Posner, *supra* note 4, at 763 (An increase in the Supreme Court’s workload may necessitate the creation of an additional Supreme Court.). If the Supreme Court’s caseload is increased as a result of expanding the circuits—which would lead to an increase in the number of decisions rendered at the appellate level—the Supreme Court may find itself face to face with a volume “crisis” just as the federal courts of appeals did during the twentieth century (and arguably still experiences today).

<sup>186</sup> ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS JUDICIAL CASELOAD PROFILE FOR 2010 (2010); ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS JUDICIAL CASELOAD PROFILE FOR 2005 (2005); ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS JUDICIAL CASELOAD PROFILE FOR 2001 (2001). Federal appellate judgeships have held steady at 167 over the last ten years while federal appellate filings has

access to reduce demand seems radical, but it may provide at least partial relief to the volume problem.

*C. Limiting Access to or Need for Appellate Review*

If judicial resources will not be increased to compensate for the increased caseload, an alternative solution is to reduce the volume of cases. Obviously, such a reduction must be done in a principled manner. Various proposals to reduce or redirect appeals as a method of coping with the increase in the federal appellate caseload have been proposed.

1. Limitation of Jurisdiction

The most direct way to reduce the federal case load would be to limit the federal courts' jurisdiction. The federal judiciary has its jurisdiction determined by Congress under the United States Constitution, Article III, sections 1 and 2.<sup>187</sup> This jurisdiction, except for that explicitly spelled out in the remainder of Article III, can be expanded or reduced by Congress, and it has been from time to time.

One possible way to reduce the flow of cases into the federal system would be to reinstate the amount in controversy requirement for "federal question" cases.<sup>188</sup> An amount in controversy requirement, even for federal question cases, existed prior to 1976 when it was removed for cases against the United States, its officers, agents, or employees.<sup>189</sup> The requirement was subsequently removed for all cases in 1980.<sup>190</sup> Reinstating a minimum amount in controversy for access to the federal courts would certainly limit the cases filed in federal courts, and theoretically, the amount could be fixed at a value specifically set to achieve whatever caseload reduction was sought. While technically possible, this reform seems unlikely. It would merely divert those cases into the state courts and undo the gains sought to be gained by removing the limits in the first place—probably equal application of federal law.<sup>191</sup> The ability to bring all federal law claims in federal court carries an intrinsic logic that weighs against reinstatement of a monetary threshold.

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risen from 57,464 in 2001 to a peak of 68,473 in 2005 and declined to 55,847 in 2010. Perhaps this downturn in filings, if it continues, demonstrates that the federal courts' internal reforms have managed the increase in volume obviating the need for further reform, especially radical reform. It should be noted, however, that observers have been concerned not only with the efficient process of cases but also with a protection of fundamental values of appellate decision-making. BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 5, at 21–26.

<sup>187</sup> U.S. CONST. art. III, § 1–2.

<sup>188</sup> See LONG RANGE PLANNING, *supra* note 72, at 21 (referring to the relatively recent abolition of the requirement but not proposing its reinstatement).

<sup>189</sup> See Act of Oct. 21, 1976, Pub L. No. 94-574, § 2, 90 Stat. 2721.

<sup>190</sup> Federal Question Jurisdictional Amendment Acts of 1980, Pub. L. No. 96-486, §2(a), 94 Stat. 2369.

<sup>191</sup> Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 322 (1989) ("The selective use of caseload as a justification for restricting Article III jurisdiction leads to a decrease in the uniformity and predictability of decisions, and it blurs the boundaries of already ill-defined theories of federal jurisdiction.").

Federal diversity jurisdiction cases, on the other hand, seem ripe for diversion to state courts.<sup>192</sup> Federal courts' authority to hear cases between parties from different states is long-standing, dating back to the Judiciary Act of 1789.<sup>193</sup> However, these cases make up a significant portion of the federal docket and could effectively be heard in state courts. The Long Range Plan for the Federal Courts in 1995 found that diversity cases represented one in five federal civil cases in the federal district courts. These diversity cases also represented about one in every two civil trials, about one in every ten civil appeals, and more than one in ten dollars in the federal judicial budget.<sup>194</sup> This use of federal resources was a cause for concern for the Judicial Conference in 1995, and the study noted, "the federal courts' diversity docket constitutes a massive diversion of federal judge power away from their principal function—adjudicating criminal cases and civil cases based on federal law."<sup>195</sup> Diversity cases now represent nearly double their 1995 share of federal civil case filings.<sup>196</sup> Presumably, this greater share of filings has resulted in similar increases in trials, appeals, and expenditures. Substantively, these types of cases could be more effectively dealt with by the state courts. Again, the Long Range Plan succinctly explains: "Perhaps no other major class of cases has a weaker claim on federal judicial resources. Many believe the original justification for diversity

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<sup>192</sup> See generally David Crump, *The Case for Restricting Diversity Jurisdiction: The Undeveloped Arguments, From the Race to the Bottom to the Substitution Effect*, 62 ME. L. REV. 1 (2010) ("Diversity jurisdiction is an idea whose time has come—and gone. In its present form, it serves its alleged purposes so inconsistently that its benefits are minimal, if they exist at all."); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992); Howard C. Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347 (1976); Robert K. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301 (1979) (listing the critics of diversity jurisdiction to include Roscoe Pound, Felix Frankfurter, and Robert H. Bork); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 969-84 (1979) (identifying benefits of abolishing diversity jurisdiction); Harry Phillips, *The Expansion of Federal Jurisdiction and the Crisis in the Courts*, 31 VAND. L. REV. 17 (1978); Elmo B. Hunter, *Federal Diversity Jurisdiction: The Unnecessary Precaution*, 46 UMKC L. REV. 347 (1977). These sources routinely note that federal diversity jurisdiction has been controversial since the founding.

<sup>193</sup> Judiciary Act of 1789, ch. 20, 1 Stat. 73 (current version at 28 U.S.C. § 1332 (2006)); *Carrington*, *supra* note 3, at 412.

The original Act created three levels of federal courts staffed by two ranks of judges. Each of the fifteen district courts were staffed by one district judge. These courts exercised admiralty jurisdiction. The same district judges and the Supreme Court Justices riding circuit, all serving part-time, staffed the three circuit courts. These courts exercised original jurisdiction over diversity cases and appellate jurisdiction over smaller claims decided in the district courts.

*Id.*

<sup>194</sup> LONG RANGE PLANNING, *supra* note 72, at 30.

<sup>195</sup> *Id.*

<sup>196</sup> ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS JUDICIAL CASELOAD PROFILE FOR 2010 tbl.C-2 (2010) (stating that 102,585 out of 282,307 civil cases filed were diversity of citizenship cases).

jurisdiction—to protect against local prejudice in state courts—longer exists, or that it exists in very few cases.”<sup>197</sup> This expenditure of federal resources is heightened by the need for federal district judges to interpret and often predict substantive state law to reach a decision, a task that intrudes on state court lawmaking and draws the federal courts’ attention away from federal law issues.<sup>198</sup> The federal Judicial Conference has endorsed eliminating diversity jurisdiction since 1977, and state court judges have expressed a willingness to help relieve the federal courts of their diversity caseload burden.<sup>199</sup> The Long Range Plan made several proposals regarding eliminating or sharply curtailing federal diversity jurisdiction.<sup>200</sup> This proposal is not entirely new and Congress has previously entertained the notion of abolishing diversity jurisdiction.<sup>201</sup> Others, however, argue that diversity jurisdiction should be maintained, but with some modifications.

In my view it would be a mistake to eliminate diversity jurisdiction. Diversity cases represent some of the most meaningful and challenging cases that make up the case load of the federal courts. Certain recent disputes have demonstrated beyond question that the original reasons for giving federal courts diversity jurisdiction still exists. . . . Even if our state judicial systems were de-politicized, diversity jurisdiction should still be retained by our federal courts at least with respect to certain cases.<sup>202</sup>

In addition to fully diverting the flow of existing cases to state courts, proposals have been advanced to divert some existing cases through a winnowing administrative review or non-Article III court.

## 2. Use of Administrative Remedies and Article I Courts

With increased federalization in the form of federal statutes that provide federal benefits or create federal regulations has come an increased federal judicial burden. For example, Social Security claims make up the single largest category of federal civil cases involving the United States as a party.<sup>203</sup> At one-third of the U.S. party

<sup>197</sup> LONG RANGE PLANNING, *supra* note 72, at 30–31 (citing FED. COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 426–35).

<sup>198</sup> *Id.* at 31.

<sup>199</sup> ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 8–9 (Mar. 1977); CONFERENCE OF CHIEF JUSTICES, RESOLUTION I(5)(C) (1977); *see also* LONG RANGE PLANNING, *supra* note 72, at 31.

<sup>200</sup> LONG RANGE PLANNING, *supra* note 72, at 29–30 (Recommendation 7).

<sup>201</sup> *See* H.R. Res. 3689-3693, 98th Cong. (1979); H.R. Res. 2202, 96th Cong. (1979); H.R. Res. 130, 96th Cong. (1979).

<sup>202</sup> Stanley Sporkin, *Reforming the Federal Judiciary*, 46 SMU L. REV. 751, 756–57 (1993). In particular, while the concern over state protectionism seems diminished, the politicized nature of state judicial processes remains. In particular the election of state judges in increasingly partisan judicial elections, gives some pause about the abolition of diversity jurisdiction. *See* Victor Flango, *How Would the Abolition of Federal Diversity Jurisdiction Affect State Courts?*, 74 JUDICATURE 35 (1990).

<sup>203</sup> ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS JUDICIAL CASELOAD PROFILE FOR 2010 tbl.C-3 (stating that 13,958 of 43,624 civil cases involving the United States were Social Security cases).

cases and nearly five percent of all cases filed in federal court, these claims make up a significant part of the federal judicial caseload. Similar categories of cases include claims overseen by the Equal Employment Opportunity Commission, which does only a cursory investigation before providing a “right-to-sue letter,” and perhaps civil rights claims arising under 42 U.S.C. § 1983.<sup>204</sup> Any federal right or entitlement could provide, as a first level of review and response, an agency-based process that seeks to screen and resolve disputes.<sup>205</sup> Moreover, any such claim that does not implicate the right to a trial by jury under the Seventh Amendment could also be heard by an administrative law judge or specially constructed Article I court.<sup>206</sup> Even if such claims were ultimately filed in federal court, and it seems likely that at least some of them would not be, it would reduce the federal courts’ burden by having a more robust fact-finding and more formal legal determination.<sup>207</sup> While such processes would shift some burden from the federal courts to the administrative agencies, given equal financing, it is much easier to increase agency resources than to increase federal judgeships. Agencies, Administrative Law Judges (ALJs), and Article I courts, properly formed and funded for the task, would be more flexible, more responsive, and more timely in regard to these claims within the agencies’ own bailiwick.<sup>208</sup>

In addition to these structural changes to the paths for claimants under federal law, more substantive changes to federal law have been proposed.

### 3. Alteration of Substantive Law

Another method of reducing the federal judiciary’s burden lies in purposeful alteration of existing law to simplify adjudication, divert cases to the state systems, or otherwise lessen the federal courts’ caseload.<sup>209</sup> For example, the 1995 Long Range Plan for the Federal Courts identified the following as an overarching principle:

Congress should be encouraged to conserve the federal courts as a distinctive federal forum of limited jurisdiction . . . Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly

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<sup>204</sup> *Id.*

<sup>205</sup> LONG RANGE PLANNING, *supra* note 72, at 33.

<sup>206</sup> *Id.* at 34.

<sup>207</sup> *Id.* at 33–34.

<sup>208</sup> *Id.* 33–34.

Indeed, all agencies with jurisdiction over various kinds of disputes should be empowered and required to conduct more thorough review and encouraged to resolve disputes before they may be brought to the federal courts. . . .

Congress should be encouraged to empower agencies or Article I courts to adjudicate, in the first instance, those types of cases involving government benefits or regulation that routinely require substantial fact-finding. . . .

*Id.*

<sup>209</sup> Levit, *supra* note 191, at 344–53.

defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters.<sup>210</sup>

Toward that end, the Plan proposed a careful review of existing federal criminal law to eliminate provisions that do not serve a distinctly federal purpose.<sup>211</sup> Likewise, it proposed a careful limitation of future grants of federal criminal jurisdiction to cases where either federal government or national interests were clearly involved.<sup>212</sup> Either some acts can be decriminalized on the federal level, returning their prosecution entirely to the states, or state courts can be granted concurrent jurisdiction over some federal crimes allowing states to share in the federal burden in exchange for continued federal assistance with matters not predominantly federal in character.<sup>213</sup> Alternatively, some propose a broader repeal of federal criminal statutes, such as marijuana cases, which represent seven percent of federal criminal cases.<sup>214</sup>

Similarly, federal law, or at least federal court jurisdiction, could be removed in matters that are fundamentally state law in nature and can be adequately adjudicated by the state courts. For example, the Federal Employers' Liability Act (FELA) and the Jones Act provide a federal forum for worker injury cases in certain industries deemed national in nature (railway and maritime, respectively).<sup>215</sup> While perhaps necessary at the time of their passage, significant state workers' compensation systems have been enacted that make a separate federal remedy duplicative.<sup>216</sup> Likewise, while the railway and maritime industries are undoubtedly still important to the national interest, so too are a variety of other fields, such as air transportation, trucking, and civilian military defense and logistical support. Similarly, the Employee Retirement Income Security Act of 1974 (ERISA) provides for concurrent state and federal jurisdiction over benefits recovery plans—claims that arise under state contract and trust law and which would be better adjudicated in state court.<sup>217</sup> However, the FELA and Jones Act cases make up less than one percent of all federal cases filed, and all ERISA cases, of which those mentioned are only a subset, make up only three percent of all federal cases filed.<sup>218</sup> Still, the 1995 Long Range Plan advised that “notwithstanding that these cases are small in number, the jurisdiction

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<sup>210</sup> LONG RANGE PLANNING, *supra* note 72, at 23.

<sup>211</sup> *Id.* at 25.

<sup>212</sup> *Id.* at 24–25.

<sup>213</sup> *Id.* at 26–27 (noting that such burden sharing exists only one way given the increased federalization of crimes and the exclusivity of federal criminal jurisdiction under 18 U.S.C. § 3231).

<sup>214</sup> ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS JUDICIAL CASELOAD PROFILE FOR 2010 tbl.D-2 (2010).

<sup>215</sup> Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60 (West 2012); 15 U.S.C.A. § 1014 (West 2012).

<sup>216</sup> LONG RANGE PLANNING, *supra* note 72, at 36.

<sup>217</sup> 29 U.S.C.A. §§ 1001–1461 (West 2012); *see also* LONG RANGE PLANNING, *supra* note 72, at 36.

<sup>218</sup> ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS JUDICIAL CASELOAD PROFILE FOR 2010 tbls.C-2-C-3 (2010).

of the federal courts under these statutes should be eliminated.”<sup>219</sup> As with the federal criminal law, a careful review of federal benefits statutes to evaluate the necessity of federal jurisdiction may review other areas ripe for reduction that is both jurisprudentially sound and a reduction of the federal court caseload. Similarly, the Long Range Plan proposed careful consideration of future grants of federal jurisdiction, such as in any national health care or employee benefits plan.<sup>220</sup>

Another change to substantive law that would reduce the federal judicial burden would be to streamline the existing law. Judicial calls for more careful, precise, and purposeful statutory drafting are not uncommon.<sup>221</sup>

#### 4. Discretionary Appeals/Alteration of Standards of Review

The flow of cases into the federal appellate courts could also be limited by making appellate review discretionary in at least some cases or by adjusting the standard of review.<sup>222</sup> Leave to appeal could be required in all cases, with differing standards for granting appeal, or merely in some class of cases where appeal is more often unwarranted.<sup>223</sup> Each case would receive some level of review to determine

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<sup>219</sup> LONG RANGE PLANNING, *supra* note 72, at 36.

<sup>220</sup> *Id.* at 37.

<sup>221</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 225–27; Harry T. Edwards, *The Role of a Judge in Modern Society*, 32 CLEV. ST. L. REV. 385, 424–25 (1983–1984); Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417 (1984).

<sup>222</sup> Lay, *supra* note 147, at 1155. Lay sets forth the benefits of discretionary review.

First, the judicial time needed to review petitions for discretionary appeal would be no greater than that which is now spent on screening cases for no argument. Second, tremendous saving of judicial time and resources could be had by obviating the need for full review of lengthy briefs and records and the writing of formal opinions in hundreds of cases. Third, such procedures would tend to place the indigent’s petition for review on the same evaluative basis as the appeal filed by the paid litigant. Fourth, the long delay between filing notice of appeal and the appellate decision would be drastically curtailed for all cases. Fifth, and most importantly, all cases worthy of appeal would be afforded the full deliberative process, including the right to oral argument and written opinion.

*Id.* at 1157; *see also* Parker & Hagin, *supra* note 2, at 235 (noting that discretionary review can help in restoring the important institutional balance between the appellate courts and the district courts); Dragich, *supra* note 1, at 52–54 (discussing the early proposals for discretionary review). Dragich states,

Early proposals for discretionary review in the courts of appeals focused on specific types of cases, such as administrative proceedings, in which multiple appeals as of right are now provided. The premise of such proposals is that one appeal as of right is sufficient to correct errors. Subsequent proposals went further, suggesting that the courts of appeals be granted “discretionary leave to refuse to review, at least in civil cases, any appeal that on its face does not appear to be substantial or meritorious.

*Id.* at 52 (quoting Lay, *supra* note 147, at 1151 (1981)).

<sup>223</sup> 1990 REPORT, *supra* note 2, at 117 (suggesting such a measure as a last resort). Abolishing appeals as of right would represent a “radical departure from one of the basic tenet of appellate justice.” Dragich, *supra* note 1, at 53. *But see* Lay, *supra* note 147, at 1155



whether any legitimate claim of error is presented, but not necessarily a full review with briefing, oral argument, and written opinion. To some extent, this practice already exists in the form of screening and summary procedures, but it is disguised.<sup>224</sup> This system of summary proceedings, diminished proceedings, and lack of written opinion already engenders concern and disapproval, so it is unlikely to be made more forthright and public.<sup>225</sup> Such a system, while providing a substantial barrier to appellate review and lessening the overall court burden, does so “at a price to litigants in the quality of appellate justice which most Americans and their lawyers would or should be unwilling to bear.”<sup>226</sup>

(suggesting that the courts of appeals be allowed “discretionary leave to refuse to review, at least in civil cases, any appeal that on its face does not appear to be substantial or meritorious.”).

<sup>224</sup> Charles R. Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U. L. Q. 257, 275 (1973); Lay, *supra* note 147, at 1153.

The concept of screening is a good one; courts of appeals should not require the calendaring of cases for oral arguments that are either frivolous or so simplistic on their face that the result is obvious to perceive. The difficulty with screening is, however, that meritorious cases as well are being screened for no argument. Estimates in the Fifth Circuit are that 65% of the cases are screened for no argument. Many judges feel this procedure is necessary to save time and expense for the court, counsel, and the parties. The truth is that in many appeals the denial of oral argument is simply short-sighted justice.

*Id.* at 1153–54; see Dragich, *supra* note 1, at 53; Pether, *supra* note 28, at 34; see also CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 133.

<sup>225</sup> Cleveland, *supra* note 1, at 175; Pether, *supra* note 28, at 34 n.216.

<sup>226</sup> CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 133 (citing Graham C. Lilly & Antonin Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 VA. L. REV. 3, 12–14 (1971)). Donald P. Lay suggests, however, that there are ways to avoid denying review to cases that are meritorious, thus eliminating—or at least lessening—the price to litigants.

. . . certain controls should be legislatively established guiding the courts of appeals’ exercise of discretionary jurisdiction. I would propose guidelines that allow a court of appeals to deny review of only those cases that are patently frivolous or those in which the district court opinion appears on its face to be correct as a matter of law or fact. First, all defendants, whether appealing as indigents or not, would have a right of full review, including oral argument, in direct criminal appeals. The denial of liberty and the stigma of conviction should require in every criminal appeal a full deliberative process. Second, each litigant seeking an appeal in any civil proceeding would be required to file a petition for discretionary review with the notice of appeal. The petitions would be limited to ten pages and would set forth the reasons the appeal should be allowed. . . . Third, a three-judge panel would then review this petition within ten days of its filing. . . . Fourth, if the face of the petition presents any colorable issue of disputed law or presents a serious challenge to the sufficiency of the evidence, the appeal should be allowed. Fifth, a district court could certify that an appeal presents a colorable issue for review; if such a certification is given, the parties could proceed without further permission from the court of appeals. Sixth, if the petition for review is not deemed insubstantial by the panel, but nonetheless appears to raise a narrow or simple issue for review, the court may allow docketing of the appeal . . . .

Lay, *supra* note 147, at 1155–56.

Alternatively, the tide of cases could be turned back in part by heightening the standard of review in some fashion. Increasing deference to all or some trial court rulings would decrease the number of viable appeals.<sup>227</sup> The modern trend is generally toward “a more penetrating appellate scrutiny of findings of fact.”<sup>228</sup> This expansion of the scope of the appellate courts’ inquiry increases the courts’ workload, and a trend toward increased deference toward the lower courts’ rulings would reduce the courts’ workload. Whether by rule of court or legislation, the standard by which the court judges appeals could be altered to make appellate review less searching and less likely to result in reversals.<sup>229</sup> For example, the deference given to findings of fact could be extended to all lower court rulings, making reversal less likely but not impossible.<sup>230</sup> Or, less drastically, the line between what constitutes a question of law as opposed to one of fact could be purposefully moved to expand the realm of questions of law.<sup>231</sup> An extreme rule might entitle all lower court decisions to the type of deference given to jury verdicts, essentially closing the doors to appellate review to all but the most egregious of errors.<sup>232</sup> These proposals, while direct and effective at limiting appeals, are problematic. They artificially adjust a balance of power and responsibility between trial and appellate court that has evolved over decades of jurisprudence and, at the extremes, eliminates the important roles each body plays in the overall system.<sup>233</sup> Moreover, they may be difficult to enforce given the current trend toward expanding even the existing standard to promote a more robust appellate review when such a review is desired by the particular appellate panel.<sup>234</sup>

If effective, making appeals discretionary or subject to more deferential standards of review would reduce the incentives for litigants to appeal, but more direct imposition of disincentives has been proposed.

##### 5. Disincentives to Bring Cases

Though it cuts against the grain of the modern trend toward increasing access to justice and lowering the costs of seeking judicial remedies, the rate of appeals could be reduced through an increase in the costs of the appeal.<sup>235</sup> Such costs to potential litigants could be economic or non-economic, and like many proposed reforms, could be enacted across all cases or in a limited class of cases.<sup>236</sup> Examples of

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<sup>227</sup> CARRINGTON, MEADOR & ROSENBERG, *supra* note 1, at 129–30.

<sup>228</sup> *Id.* at 130–31.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 130.

<sup>231</sup> *Id.* at 129–30.

<sup>232</sup> *Id.* at 130.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 130–31 (noting that even the substitutions of specific standards such as “clearly erroneous” or “no substantial evidence” would be ineffective given the elasticity of these phrases in existing jurisprudence).

<sup>235</sup> *Id.* at 133.

<sup>236</sup> *Id.*

reforms to increase the costs of appeal include taxing costs and awarding fees for frivolous claims or dilatory conduct, minimizing stays pending appeal, and increasing the interest rate or accrual pending appeals to at least match the lending rate.<sup>237</sup>

Another additional expense that could be added to the appeals process, though it would serve to reduce appeals in other ways, too, would be to add some alternative dispute resolution to the appellate process.<sup>238</sup>

#### 6. Encourage Mediation of Appeals

Cases might also be prevented from requiring appellate review through expanded use of alternative dispute resolution (ADR) in the trial and appellate courts.<sup>239</sup> Cases diverted to ADR methods and resolved without requiring trial court adjudication each represent a case without the possibility of appeal.<sup>240</sup> ADR encompasses a wide variety of conflict resolution methods including negotiation, mediation, arbitration, case evaluation, mini-trials, and conciliation, to name a few.<sup>241</sup> Advantages of ADR include speed, privacy, finality, and reaching mutually beneficial or at least not purely distributive results.<sup>242</sup> Congress has approved the use of ADR by federal agencies when appropriate.<sup>243</sup>

Suggestions for reducing the flow of cases into the federal appellate system present incomplete, but possibly helpful, responses to the pressures of volume. Another approach would be to alter the federal appellate procedure to handle the existing appeals more efficiently.

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<sup>237</sup> *Id.* at 134 (also proposing some reduction of the incentives for appellate counsel to bring excessive appeals, but noting the lack of any practical manner in which to do so for private, non-governmental counsel).

<sup>238</sup> See generally Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 *FORDHAM L. REV.* 1 (1990); Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 *HARV. L. REV.* 1808 (1986); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 *GEO. L.J.* 1 (1982); Maurice Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, 69 *MICH. L. REV.* 797 (1971).

<sup>239</sup> BAKER, *RATIONING JUSTICE ON APPEAL*, *supra* note 4, at 192; Robel, *supra* note 5, at 23–27 (citing Paul Nejelski & Andrew S. Zeld, *Court Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 *MD. L. REV.* 787, 787–800 (1983); Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 *F.R.D.* 461 (1984)).

<sup>240</sup> BAKER, *RATIONING JUSTICE ON APPEAL*, *supra* note 4, at 193.

<sup>241</sup> *Id.*; Robel, *supra* note 5, at 24.

<sup>242</sup> Some disagree, however, that mediation and other forms of alternative dispute resolution provide such advantages. Lay, *supra* note 147, at 1153. “[Mediation] is time consuming, and it is not the most convenient tool for circuits that have broad geographic areas such as the Eighth and Ninth Circuits.” *Id.*; see also Robel, *supra* note 5, at 29–30 (questioning whether ADR methods really are helpful in saving the courts’ time, litigants’ money, and decongesting court dockets).

<sup>243</sup> Administrative Dispute Resolution Act, 5 U.S.C. § 571 (2006).

*D. Altering the Appellate Procedure*

Some proposals have sought to alter the appellate procedure, not for the purpose of diverting appeals, but to more efficiently process the existing appeals. These reforms fall between the kind of significant alteration of access or alteration of structure often proposed. Each of these reforms attempts to conserve or stretch existing judicial resources. First, the circuits could make use of appellate magistrates to help facilitate cases. Second, the court could adopt two-judge panels to hear more cases with the present judicial resources. Third, in an effort to conserve judicial time as well as court resources required to process appeals, the court could adopt a practice of greater orality.

## 1. Appellate Magistrates

Judicial resources can be used more efficiently if some judicial tasks can be undertaken by non-judges working under the close supervision of judges.<sup>244</sup> This model has been used very effectively in the use of magistrates in the district courts.<sup>245</sup> At the appellate level, many judicial tasks are handled by the central court staff.<sup>246</sup> However, the critical difference is that “a central staff is distinguished from a corps of magistrates by the staff’s lack of formal status, its anonymity, the lack of visibility of its work product, and the lack of any interaction with the interested parties and their advocates.”<sup>247</sup> A magistrate would be able to perform tasks presently performed by both central staff and circuit judges, if properly subjected to circuit review when necessary.<sup>248</sup> Those tasks performed by the circuit judges themselves that could be handled by magistrates represent a direction savings of judicial energy.<sup>249</sup> Moreover, if even some of the more judicial tasks handled by central staff can be shifted to formal judicial officers whose decisions are made publicly, with the aid of parties’ counsel, and subject to appeal, a significant improvement to appellate justice will accrue. The use of federal appellate magistrates would increase visibility, accountability, credibility, and efficiency of the appellate process.<sup>250</sup>

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<sup>244</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 139–147.

<sup>245</sup> John B. Oakley & Robert S. Thompson, *Screening and Delegation*, in RESTRUCTURING JUSTICE 135–36 (Hellman ed., 1990); Robel, *supra* note 5, at 34–36.

<sup>246</sup> *Id.* at 136. BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 139.

<sup>247</sup> Oakley & Thompson, *supra* note 245 at 136.

<sup>248</sup> *Id.*

<sup>249</sup> Parker & Hagin, *supra* note 2, at 221 (noting that an increase in the number of magistrate judges may be essential to ensure efficiency when it comes to case management). “The theory behind the creation of the magistrates’ position was not to have them decide cases but to free judges from some of the pretrial tasks that interfered with deciding cases and writing opinions.” Robel, *supra* note 5, at 35 (citing Linda Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1321 (1975)).

<sup>250</sup> Oakley & Thompson, *supra* note 245 at 136; Thomas E. Baker, *Proposed Intramural Reforms: What the U.S. Courts of Appeals Might do to Help Themselves*, 25 ST. MARY’S L.J. 1321, 1349–51 (1994); Frank A. Kaufman, James E. Noland & Mary M. Schroeder, Am. Bar Ass’n, *The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth*, 125 F.R.D. 523, 548 (1989) (Report of the American Bar Association

## 2. Two-Judge Panels

It has been proposed on occasion to alter the default panel size from three judges to two.<sup>251</sup> At least facially, a switch to two-judge panels would immediately increase appellate efficiency by almost a third. It would seem that such a simple change with such a substantial benefit would be easily agreed upon and enacted. However, three-judge panels are not only traditional but also mandated by statute.<sup>252</sup> That said, two-judge panels are not without precedent, being allowed by statute when an assigned judge cannot see an appeal through to decision.<sup>253</sup> The presumption could be reversed with minimal procedural change, making two-judge panels the default, and bringing in a third judge where there is disagreement.<sup>254</sup> Such a practice raises concerns about diminishing the quality of decision making through the loss of a third perspective and through inherent coercion to agree so as not to require the greater procedure.<sup>255</sup> In addition, there is certain mysticism to the judicial triad, leading to concerns that “[t]he entire decision making process would be changed, perhaps in unknown ways, by moving from a trial to a dyad.”<sup>256</sup> Nevertheless, the Federal

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Standing Committee on Federal Judicial Improvements) (“By analogy to the role now assigned to magistrates in the district courts, central staff attorneys might function as appellate magistrates whose recommendations and opinions were provided to the parties and were subject to objections.”). *Contra* Richard S. Arnold, *The Future of the Federal Courts*, 60 MO. L. REV. 533, 542 (1995).

There's even something in the Ninth Circuit called an appellate magistrate. Incidentally, that phrase makes my blood run cold. If I've got an appeal, I want a judge to decide it. I don't know about appellate magistrates. This is not a term that is in any statute. It's something the Ninth Circuit invented, and they are getting away with it so far. Let me tell you, though, in fairness to them, that the only thing their appellate magistrate does is to evaluate fee applications. I have reservations about more decisions being made by non-judicial personnel.

*Id.*; Stephan Reinhardt, *Surveys without Solutions: Another Study of the Courts of Appeals*, 73 TEX. L. REV. 1505, 1512 (1995) (“Undoubtedly, calls for appellate magistrates and then appellate magistrate-judges will soon follow. If we continue to increase our reliance upon others in order to deal with our unmanageable dockets, we run the risk that Article III judges will lose control of Article III decisionmaking [sic] and that we will surrender far too much of our discretion to those who have not been nominated by the President and confirmed by the Senate.”).

<sup>251</sup> FINAL REPORT, *supra* note 2, at 62–64, app.C(2), 96–98; BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 172–73.

<sup>252</sup> 28 U.S.C. § 46(b)-(c) (2006).

<sup>253</sup> 28 U.S.C. §46(d) (2006) (“A majority of the number of judges authorized to constitute a court or panel thereof . . . shall constitute a quorum.”); BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 172.

<sup>254</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 172–73 (citing Daniel J. Meador, *Appellate Case Management and Decisional Processes*, 61 VA. L. REV. 255, 281–82 (1975) and CARRINGTON, AM. BAR FOUND., *supra* note 15).

<sup>255</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 173.

<sup>256</sup> *Id.*

Courts Study Commission recommended the use of two-judge panels, at least on a trial basis.<sup>257</sup>

### 3. Oral Argument Only/Greater Orality

An increase in oral argument, not just as a supplement to extensive written briefing but in place of it, may yield greater efficiency. It is undeniable that federal circuits have significantly reduced the use of oral argument.<sup>258</sup> More significantly, the grant of oral argument has drastically diminished; the rate of oral argument has dropped to nearly a quarter of all appeals, down from forty percent in 1997.<sup>259</sup> The length of oral argument, when granted, is often as little as fifteen minutes per side.<sup>260</sup> However, oral argument remains a fundamentally important part of the appellate process, and the opportunity for public hearing before the court alone militates in favor of greater oral argument.<sup>261</sup> One federal court reform expert, Daniel J. Meador, has proposed not just restoring oral argument, but reversing the priorities entirely and offering oral argument without time limit and only minimal written submissions.<sup>262</sup> The practice of preparation, processing, and consideration of lengthy briefs represents an extensive expenditure of time and effort in the appellate process.<sup>263</sup> Proponents of greater orality believe that the quality of appellate justice can be maintained or even improved by focusing on the oral argument stage, which can occur more quickly and efficiently.<sup>264</sup> It does, however, seem less useful the more complex the case, though in the modern era of case tracking, it seems practical that many cases could be heard in this fashion.<sup>265</sup>

#### *E. Significant Structural Changes*

A broad examination of possible reforms to address caseload volume and preserve the inherent values appellate justice must include the numerous structural

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<sup>257</sup> FINAL REPORT, *supra* note 2, at 116; BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 173.

<sup>258</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 109; Donald P. Lay, *Reconciling Tradition with Reality: The Expedited Appeal*, 23 UCLA L. REV. 419, 420 (1975–1976) (noting that the decrease in oral argument has been poorly received by members of the practicing bar); *see also* Haworth, *supra* note 224; K. DAVIS, ADMINISTRATIVE LAW TEXT 318–43 (1972).

<sup>259</sup> Compare ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES: ANNUAL REPORT OF THE DIRECTOR 44, tbl.S-1 (2010), *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf>, with ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES: ANNUAL REPORT OF THE DIRECTOR 38, tbl.S-1 (1997), *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/1997/tables/s01sep97.pdf>.

<sup>260</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 110.

<sup>261</sup> *Id.* at 111–12, 114.

<sup>262</sup> Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732, 749 (1983); BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 165.

<sup>263</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 166 n.56.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 166.

changes to the federal judicial system that have been proposed over the last forty years.<sup>266</sup> These alternative structures vary from the general to the specific, and many of them are exceedingly complex.<sup>267</sup> In addition, many are merely variations on a theme, as proposals were revised and re-envisioned throughout prior court reforms.<sup>268</sup> The proposed structural reforms seem, generally, to involve one or more of the following six structural changes, which are not necessarily mutually exclusive.

### 1. Pre-Court of Appeals Court

One structural change that would grant immediate caseload relief would be the formation of an appellate tier above the existing districts and below the existing circuits.<sup>269</sup> Such a court could rule on cases that are numerous, but often unsuccessful, as well as those alleging factual error or abuse of judicial discretion, which are subject to a very demanding standard of review.<sup>270</sup> Cases presenting a genuine matter of legal ambiguity could be passed on or appealed to the circuit courts, often as a discretionary appeal.<sup>271</sup> Such a structure could be created as a wholly new body, though most proposals suggest it as a bifurcation of the existing circuits or the creation of an appellate division or en banc panel of the district court.<sup>272</sup> In a sense, this system would do openly, and with the use of Article III judges, what the current circuit courts do via staff and clerk-driven case management and unpublished opinion. This division of labor presents benefits such as efficiency, transparency, and judicial determination of all matters.<sup>273</sup> However, it would expand the number of federal judges, with all the costs and perceived costs that would entail,

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<sup>266</sup> LONG RANGE PLANNING, *supra* note 72; BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4. Many other sources that propose or discuss proposals for structural change to the federal judicial system.

<sup>267</sup> For example, Professor Daniel J. Meador proposed an “elaborate plan” involving replacing the existing circuits with twenty numbered divisions, five lettered divisions above those, four subject specialized divisions, and various sizes and *en banc* panel possibilities in each category. This is mentioned not to comment on this specific proposal but only to point out that this level of specificity or recitation of every permutation is not explored in this piece. To do so would highlight the differences between proposals. See BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 266–67; Meador, *supra* note 262, n.102.

<sup>268</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 268 (comparing the Meador proposal and the very similar Study Committee Report recommendation); 1990 REPORT, *supra* note 2, at 120–21.

<sup>269</sup> Carrington, *supra* note 3, at 433.

<sup>270</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 256–57; Carrington, *supra* note 3, at 434. For a similar proposal at the state level, see Shirley M. Hufstedler & Seth M. Hufstedler, *Improving the California Appellate Pyramid*, 46 L.A. BAR BULL. 275 (1971).

<sup>271</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 265–61.

<sup>272</sup> *Id.* at 265–71.

<sup>273</sup> Once the courts of appeals have been divested of their error-correcting function, they will have more time to adequately perform other tasks and functions. Carrington, *supra* note 3, at 434. Carrington notes, however, that to some observers, it becomes less clear whether the courts of appeals will be left with an important function to perform once they have been divested of their error-correcting function. *Id.*

as well as potentially causing status issues between judges ostensibly in the same position who are elevated or relegated to superior or subordinate positions.<sup>274</sup>

## 2. Post-Court of Appeals Court

More commonly proposed is the imposition of an additional appellate tier above the existing circuits.<sup>275</sup> Such a tier may include a small number of regional courts or a single national upper-tier appeals court.<sup>276</sup> The basis for appeals to this court varies between proposals from discretionary to by designation of the United States Supreme Court.<sup>277</sup> Such a system would have a less direct impact on the number of cases in the appellate system, but would improve appellate justice by decreasing circuit splits, reducing the use of the very cumbersome circuit en banc process, and reducing the effect of United States Supreme Court's reduced docket in the face of increased appeals. It would also have the effect of allowing a body of Article III judges to screen and highlight cases ripe for Supreme Court review—a task presently influenced, in large part, by recent law school graduates clerking with the Court.<sup>278</sup>

This proposal gained considerable support in the mid-1970s, and was proposed by several court reform studies. By 1983, a test model called the Intra-Circuit Panel (ICP) gained the support of five Supreme Court justices and judicial subcommittees in both houses of Congress.<sup>279</sup> This panel would consist of one judge, serving part-time for a brief term.<sup>280</sup> Despite being desirable to a majority of Supreme Court Justices and favorably reported to full committees in both houses, the legislation stalled and has not been revived.<sup>281</sup>

## 3. Use of Specialized Subject Matter Circuits or Panels

Another proposed structural reform aimed at improving the quality of appellate justice and increasing efficient handling of cases is the use of specialized subject matter courts.<sup>282</sup> Such courts would be constructed with specific and exclusive jurisdiction to handle cases within a well-defined subject area such as tax, admiralty, criminal law, civil rights, labor relations, government benefits, bankruptcy, and

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<sup>274</sup> *Id.*

<sup>275</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 232; FINAL REPORT, *supra* note 2, 119–20.

<sup>276</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 232, 248–49.

<sup>277</sup> *Id.* at 232, 248–49.

<sup>278</sup> *See generally* ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES (2006) (discussing the history of the role of law clerks at the Supreme Court).

<sup>279</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 244; *see also* Arthur D. Hellman, *The Proposed Intracircuit Tribunal*, 11 HAST. CONST. L.Q. 375, 377–78 (1984).

<sup>280</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 243–44.

<sup>281</sup> *Id.* at 244.

<sup>282</sup> Posner, *supra* note 4, at 777–89 (discussing the pros and cons of creating more specialized courts); *see also* David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 68–74 (1975); Patrick E. Higgin-Botham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261, 268 (1980).



specific federal administrative agency appeals.<sup>283</sup> These courts would operate alongside the existing circuits as co-equal bodies sharing the appellate caseload burden in a rational manner.<sup>284</sup> Alternatively, divisions could be made within the existing circuit courts based on subject matter either through formal divisions or panel assignments.<sup>285</sup> Some circuits have already begun to assign cases to panels based on judicial experience.<sup>286</sup>

Obviously, these specialized courts provide panels with greater expertise than is possible from a panel of generalist judges with a portfolio of every increasing federal statute to deal with.<sup>287</sup> Subject matter specific courts provide an alternate Article III forum for federal disputes where expert judges can provide more consistent, stable, and efficient justice.<sup>288</sup> The idea is not new, and its expansion has been strongly advocated.<sup>289</sup> The U.S. Court of Military Appeals, Temporary Emergency Court of Appeals, and Federal Circuit were established to hear subject matter specific dockets.<sup>290</sup> However, specialized courts have traditionally been disfavored.<sup>291</sup> The

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<sup>283</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 232; Wallace, *supra* note 3, at 915 (briefly discussing the addition of specialized article I bankruptcy courts); POSNER, *supra* note 1, at 147.

<sup>284</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 232.

<sup>285</sup> *Id.* at 232, 264–65; *see also* Stuart Nagel, *Systematic Assignment of Judges: A Proposal*, 70 JUDICATURE 73 (1986).

<sup>286</sup> Martin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 337–39 (2011) (noting, for example, that the Second and Third Circuits assign immigration and non-criminal *pro se* cases to special panels) (“All cases that are taken off of the argument track go to special calendars or panels based upon subject-matter criteria that the judges have previously established.”).

<sup>287</sup> Dragich, *supra* note 1, at n.258.

<sup>288</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 222.

<sup>289</sup> Daniel J. Meador, *Appellate Case Management and Decisional Processes*, 61 VA. L. REV. 255, 282–85 (1975); Daniel J. Meador, *Appellate Subject Matter Organization: The German Design from an American Perspective*, 5 HASTINGS INT’L & COMP. L. REV. 27 (1981); Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction, and Proposed Course of Action*, 1981 BYU L. REV. 617, 645–47 (1981); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603 (1989).

<sup>290</sup> U.S. COURT OF APPEALS FOR THE ARMED FORCES, <http://www.armfor.uscourts.gov/newcaaf/home.htm> (last visited Jan. 30, 2012); JONATHAN LURIE, *ARMING MILITARY JUSTICE: ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS* (1992); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1128 (1990) (citing Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 211(b)(1)-(2), 85 Stat. 743, 749 (expired 1974)).

<sup>291</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 222; Posner, *supra* note 4, at 777–89 (discussing the pros and cons of creating more specialized courts). Posner ultimately takes the stance that specialization is bad for the federal judiciary (with a few exceptions)—people are less willing to accept appointment to the federal courts of appeals because of the monotony that specialization entails, it is hard to maintain a high quality federal appeals bench, specialized courts are more political than generalist courts and subject to parochialism and capture, and the geographical diversity of the federal judiciary is reduced with

primary concern seems to be of the possibility of capture of the court by special interests, repeat litigants, and even the bench and bar of the specialized court itself.<sup>292</sup> Another concern is the lack of percolation and varied opinions in the development of the law in areas governed by a single specialized court whose first interpretation of the law in that field would be definitive in nearly every case.<sup>293</sup> Despite these concerns, the Federal Courts Study Report in 1990 did propose a national tax court of appeals, though it declined to recommend the creation of a similar administrative law court.<sup>294</sup> Further expansion into specialized courts has not been forthcoming.

#### 4. Consolidation of Circuits into Jumbo Circuits

Another structural reform that has been proposed is the consolidation of the existing circuits into smaller number, perhaps four or five, “jumbo” circuits.<sup>295</sup> Such a reform takes to heart Congress’s refusal to divide the Ninth Circuit and the Ninth Circuit’s continued growth and adjustment to make a large circuit function.<sup>296</sup> Proponents of this alternative look at the Ninth Circuit not as an oversized behemoth but as a model for large circuits that, while imperfect, have been enacting reforms to use reorganization, case management, and technology to make for a functioning

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specialization. Posner, *supra* note 4, at 779–86; Martha J. Dragich also provides insight into the benefits and harms of creating additional specialized subject matter courts:

Specialty courts would offer a better opportunity for persons well versed in the subject matter to maintain a coherent body of law, and one that would apply nationwide. Specialty courts, however, run afoul of the apparently strong preference in this country for generalist courts. Some suggest that specialty courts are likely to become the captives of one side or the other in disputes that regularly come before them, and that they are likely to lose perspective about the relationship of the special subject matter to the overall body of federal law. They also might present problems for litigants in trying to decide where to take an appeal since many cases involve both “special” and “general” issues of law.

Dragich, *supra* note 1, at n.258.

<sup>292</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 222.

<sup>293</sup> *Id.* at 262.

<sup>294</sup> *Id.*; 1990 REPORT, *supra* note 2, at 71–73.

<sup>295</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 276; *see also* 1990 REPORT, *supra* note 2, at 119; Dragich, *supra* note 1, at 56 (citing Parker & Hagin, *supra* note 2, at 221–22). Parker and Hagin refer to the idea of “jumbo circuits” as a “‘mega-circuit’ animal.” Parker & Hagin, *supra* note 2, at 220. Chief Judge J. Clifford Wallace of the Ninth Circuit proposed that the Nation’s appellate system contain only four or five large circuits. J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 940–41 (1983). The number of judges within these circuits would depend on the caseload demands, and the number of judges could be increased or decreased depending on such demands. *Id.* Chief Judge Wallace believed that having only four or five jumbo circuits would help to mitigate the issues the circuits faced with inter-circuit conflicts. *Id.* at 928–32. However, Parker and Hagin believe that such an approach to the caseload crisis is a “tried-and-failed approach to the problems of structural and procedural inadequacy, and case overload, in the federal courts.” Parker & Hagin, *supra* note 2, at 222.

<sup>296</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 276–77.

large circuit.<sup>297</sup> By reducing the number of circuits, this alternative reduces the number of inter-circuit conflicts and makes a supposedly uniform federal law more uniform and less regional.<sup>298</sup> It also anticipates the necessary future growth of the federal judiciary and creates a structure better able to absorb those additional judgeships.<sup>299</sup> Rather than waiting for growth to occur and attempting to force judges into circuits of traditionally accepted size or trying to split the circuits to create additional circuits of traditionally accepted size, this proposal looks to create a model that accepts and plans for increased case volume and increased judges.<sup>300</sup> This model promises increased administrative efficiency, the opportunity to reconstruct circuit boundaries and internal structures with modern sensibilities, and

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<sup>297</sup> *Id.*; Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in RESTRUCTURING JUSTICE 56 (Arthur D. Hellman ed., 1990) (Hellman notes that the Ninth Circuit has taken steps to ensure consistency of the law within its own circuit. It is committed to intracircuit stare decisis—decisions made by one panel are binding on subsequent panels. There is an exception, however, when a decision has been overruled by the court en banc. Furthermore, the Circuit has put into place numerous mechanisms designed to ensure and maintain consistency. Lastly, in the event of an irreconcilable conflict, review by an en banc panel of the court will take place, which will serve to restore coherence in the law.). *But see* Dragich, *supra* note 1, at 34 (Dragich argues that en banc review is only a partial solution to the problem of intracircuit conflicts. In addition, en banc panels are inherently ineffective in articulating the law, decisions from an en banc review are subject to review by the Supreme Court, and the decisions have no nationwide relevance.). Hellman states that consistency within a circuit is both a virtue and a necessity, and in support of this conclusion, he states the following:

First, the ideal of equality is violated when similarly situated persons receive disparate treatment because two panels of the same court have attached different legal consequences to facts that are identical in all relevant respects. Second, inconsistent appellate decisions create uncertainty about what the law requires or permits. . . . Third, intelligent planning and structuring of transactions is frustrated when the relevant precedents in the governing jurisdiction give conflicting guidance on what the law is.

Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in RESTRUCTURING JUSTICE 57 (Arthur D. Hellman ed., 1990).

<sup>298</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 276–77 (citing 1990 REPORT, *supra* note 2, at 122–23); Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in RESTRUCTURING JUSTICE 55 (Arthur D. Hellman ed., 1990). Hellman notes, however, that not everyone agrees that inter-circuit conflicts will decrease with a smaller number of circuits:

[T]he success of the idea [of creating jumbo circuits] will depend on whether it is possible to maintain consistency and stability in the law of the circuit when cases are decided by hundreds of shifting three-judge panels on a large court. Otherwise, we would simply be trading inter-circuit conflict for intracircuit conflict—a much more pernicious phenomenon.

Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in RESTRUCTURING JUSTICE 55 (Arthur D. Hellman ed., 1990).

<sup>299</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 276–77.

<sup>300</sup> *Id.*

remains relatively consistent with the present two-tiered appellate review format.<sup>301</sup> The drawbacks to such a restructuring mirror those leveled against the undivided Ninth Circuit; namely, its size makes it unwieldy, limiting the coherence and consistency of its jurisprudence.<sup>302</sup> These concerns have driven much of the modern reform—or lack reform—such as splitting the Fifth Circuit and holding the line against the addition of judgeships.<sup>303</sup>

#### 5. Redrawing of Circuits into Many Small Circuits

A proposal opposite that of the call for jumbo circuits is the suggestion that the existing circuits be dissolved and redrawn as small circuits—typically nine-judge circuits that still hear cases in three-judge panels.<sup>304</sup> This model shares with the proposal for jumbo circuits the lessening of regional differences in circuits but takes that concept even further. These mini-circuits need not be constructed based on geographic boundaries, which has the effect of further divorcing them from regional or state affiliations.<sup>305</sup> These myriad circuits would, of course, increase the incidence of circuits split;<sup>306</sup> to avoid this, a “law of the circuits” would bind panels to the first determination of a matter in any circuit court of appeals.<sup>307</sup> Panels in each circuit would be bound by all precedents from all courts of appeals.<sup>308</sup> This model essentially creates a single federal national court of appeals, creating and deciding cases according to a unified appellate law, with the circuit courts acting as organizational tools rather than arbiters of regional interpretation.<sup>309</sup> Like the jumbo circuit proposal, this model also anticipates the addition of judges to the system and allows for them by planned reorganization of circuits—a task of minimal disruption given the circuits’ new status as small administrative rather than large substantive divisions with the intermediate appellate tier.<sup>310</sup> Perhaps more than any other proposed structural reform, this model offers a way to turn back the clock to a truly small, collegial, nine judge appellate court.<sup>311</sup> However, this model is fraught with

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<sup>301</sup> *Id.* at 78.

<sup>302</sup> *Id.* at 279, 86–95; Hellman, *supra* note 298, at 56–57. (“Intracircuit conflicts have become a ‘pernicious’ problem in that they provide insufficient guidance to district judges and make it difficult for lawyers to advise their clients.”); Dragich, *supra* note 4, at 33.

<sup>303</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 65–67, 202–03.

<sup>304</sup> *Id.* at 239; Parker & Hagin, *supra* note 2, at 219; Dragich, *supra* note 1, at n.257, 56.

<sup>305</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 239.

<sup>306</sup> Dragich, *supra* note 1, at 56 (“[I]ncreasing the number of courts or divisions guarantees additional conflicts, and hence, exacerbates incoherence and the possibility of injustice to litigants.”); POSNER, *supra* note 1, at 100 (increasing the number of circuits would increase the number of conflicts between the circuits, which in turn would increase the workload of the Supreme Court).

<sup>307</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 239.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 240.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

problems inherent in its practical execution. For example, the numerosity of circuits makes inter-circuit conflicts inevitable, and the subtle distinction between distinguishing and overruling a sister circuit makes simple adherence to the national precedent exceedingly difficult.<sup>312</sup> Some manner of en banc procedures would be required, and as litigants perceived their cases as wrongly decided, those procedures would increase in use, perhaps to the extent of making that en banc body become the actual national court of appeals.<sup>313</sup> In addition, this model's elimination of geographic circuit boundaries represents a total departure from the historical model and political realities related to federal circuits.<sup>314</sup> Such a model is interesting theoretically and offers an innovative restructuring, but it is hampered by practical and political problems that make it unlikely to be adopted.

#### 6. A True National Court of Appeals

The goal of a single national court of appeals could also be achieved by consolidation of all existing circuits into a single body. As federal court reform expert Thomas E. Baker explained, “[t]he idea of a single, unified national court of appeals has an alluring simplicity: eliminate altogether the geographical boundaries between the Court of Appeals and consolidate them into one unified administrative and jurisdictional tier of an intermediate court.”<sup>315</sup> Such a court would create a more uniform federal law, minimize conflicts, and create efficiencies in administration.<sup>316</sup> This structural reform, arguing that freeing the appellate courts from a focus on the “law of the circuit,” would have a beneficial effect on the federal law, and judicial personnel could be more efficiently employed under a single unified court.<sup>317</sup> It also allows for the easy addition of “an indeterminate number of judges arranged in greater numbers of general and special divisions,” thus allowing easy expansion to meet the increase in caseload.<sup>318</sup> Such a proposal, for all its intuitive appeal, does have some problems. First, the unification of the entire middle tier of the federal judiciary would create a massive, complex, and powerful entity, and the exact nature is difficult to envision. Some, like proponent and court reform expert Paul D. Carrington, envision a complex internal structure that divides the courts work into

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<sup>312</sup> *Id.*; Parker & Hagin, *supra* note 2, at 224.

We [] think the deconstructionist, mani-circuit proposal will generate an unacceptably high level of inter-circuit conflicts—with the United States Supreme Court being decreasingly able to reconcile these conflicts, given the practical limits of its review capabilities—and hence, an unacceptably high level of legal incoherence.

Parker & Hagin, *supra* note 2, at 224; *see also* McCree, *supra* note 1, at 785 (“if we want to preserve uniformity in federal law, we must not increase the number of circuits. The Supreme Court already has enough trouble resolving inter-circuit conflicts. The Supreme Court would have no chance of resolving all-important inter-circuit conflicts if more circuits were added”).

<sup>313</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, at 241.

<sup>314</sup> *Id.* at 241.

<sup>315</sup> *Id.* at 271; Dragich, *supra* note 1, at 49–52.

<sup>316</sup> BAKER, RATIONING JUSTICE ON APPEAL, *supra* note 4, 271 n.112.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 275–76.

General and Special Divisions, with the Special Divisions being constructed to hear cases regarding a single subject matter of national importance or volume of litigation.<sup>319</sup> This structure arguably balkanizes the federal jurisprudence, federal procedure, and the federal judiciary in a different, but perhaps more significant, way than the existing circuits.<sup>320</sup> It also potentially stifles procedural and administrative innovation presently undertaken by the individual circuits by creating a single system nationwide.<sup>321</sup> Perhaps the greatest concern regarding such a plan is that instead of a single, unified, efficient national appellate court, what will be created is a single, stagnant, massive bureaucracy.

Structural reforms offer the opportunity to address the problem of caseload volume in a broad, sweeping manner that focuses on both dealing with volume and maintaining the values of appellate justice. However, such reforms, in part because of their large-scale nature and in part because they must go through the political branches, are difficult to fully assess and more difficult to enact. As we come upon a half-century of discussions about increasing caseloads and concerns about the nature of appellate justice, perhaps it is time for another round of federal court reform study or perhaps even some significant structural reform.

### III. CONCLUSION

Our past is strewn with detailed studies of the federal judiciary and proposals for its reform to meet the increasing caseloads and maintain high standards of appellate justice. The federal courts must be commended for having managed the “crisis of volume” through internal reforms, but those reforms have altered the nature of appellate justice. High case volumes are here to stay, and as Congress continues to expand federal law and regulation, caseloads can be expected to continue to rise. Some reaction seems desirable. Perhaps some of the reform proposals previously proposed are less radical or more applicable than they were when first raised or last studied, or perhaps we need additional study to develop new proposals for the new millennium.

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<sup>319</sup> *See id.* at 274.

<sup>320</sup> *Id.* at 275–76.

<sup>321</sup> *Id.* at 276.