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ARTICLES

ONCE A CENTURY: TIME FOR A STRUCTURAL OVERHAUL OF THE FEDERAL COURTS

MARTHA J. DRAGICH*

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INTRODUCTION

Congress created the federal court system in 1789¹ and has overhauled its structure only once since then, in 1891,² though the courts' role and jurisdiction have changed markedly over the years. The 1891 restructuring followed decades of lamenting a "crisis" in the federal courts,³ particularly in terms of their appellate capacity. The caseload crisis⁴ so widely debated today strikes a similar chord. The dimensions of a "crisis of volume"⁵ in the federal courts have been the subject of several studies over the past thirty years.⁶ While indicia of the courts of appeals' continuing success exist,⁷ the weight of opinion holds that a

1. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.
2. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 [hereinafter Evarts Act].
3. See, e.g., FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIARY SYSTEM* 4-102 (1928).
4. For an early study of the workload of the federal courts of appeals, see PAUL D. CARRINGTON, *AMERICAN BAR FOUNDATION, ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS* (1968).
5. DANIEL J. MEADOR, *APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME* (1974).
6. See, e.g., FEDERAL COURTS STUDY COMM., 101ST CONG., 2D SESS., *REPORT OF THE FEDERAL COURTS STUDY COMMITTEE* (Comm. Print 1990) [hereinafter FCSC REPORT]; COMMISSION ON REVISION OF FED. COURT APPELLATE SYS., *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE* (1975), reprinted in 67 F.R.D. 195 [hereinafter HRUSKA COMM'N REPORT]; STUDY GROUP OF FED. JUDICIAL CTR., *REPORT ON THE CASELOAD OF THE SUPREME COURT* (1972), reprinted in 57 F.R.D. 573 [hereinafter FREUND REPORT]; WILL SHAFROTH, *SURVEY OF THE UNITED STATES COURTS OF APPEALS* (1967), reprinted in 42 F.R.D. 243 [hereinafter SHAFROTH REPORT].
7. See, e.g., Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 890 (1983) (arguing that rising number of cases in federal system does not necessarily indicate courts are unable to perform their traditional function, and calling for more pertinent studies to determine if such a link exists); Michael C. Gizzi, *Examining the Crisis of Volume in the U.S. Courts of Appeals*, 77 JUDICATURE 96, 99 (1993) (noting reduction in median disposition time and increase in terminations per judge since 1980); Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 MISS. C. L. REV. 211, 227 (1994) (reporting increase in appellate case disposition rate over the past 30 years from 64.2 to 284.2 per judge annually); J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 925 (1983) (arguing that statistics establishing that the courts of appeals are issuing more opinions than 20 years ago or that intercircuit conflicts have risen may indicate that the system is working and citizens are more aware of their legal rights, not that the structure has failed).

crisis is brewing, if not fully developed.⁸ Measures adopted to cope with rising caseloads have exacerbated the “crisis” by sharply altering time-honored traditions of appellate justice.⁹

8. The Federal Courts Study Committee subscribed to this view, as do many federal judges. See, e.g., FCSC REPORT, *supra* note 6, at 6; Levin H. Campbell, *Into the Third Century: Views of the Appellate System for the Federal Courts Study Committee*, 74 MASS. L. REV. 292 (1989); Henry J. Friendly, *The “Law of the Circuit” and All That*, 46 ST. JOHN’S L. REV. 406 (1972); Ruth B. Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1 (1983); Shirley M. Hufstедler, *Bad Recipes for Good Cooks—Indigestible Reforms of the Judiciary*, 27 ARIZ. L. REV. 785 (1985); Donald P. Lay, *The Federal Appeals Process: Whither We Goest? The Next Fifty Years*, 15 WM. MITCHELL L. REV. 515 (1989) [hereinafter Lay, *The Federal Appeals Process*]; Donald P. Lay, *Will the Proposed National Court of Appeals Create More Problems than it Solves?*, 66 JUDICATURE 437 (1983) [hereinafter Lay, *National Court of Appeals*]; Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 SW. L.J. 1151 (1981) [hereinafter Lay, *A Proposal*]; J. Edward Lumbard, *Current Problems of the Federal Courts of Appeals*, 54 CORNELL L. REV. 29 (1968); Carl McGowan, *The View from an Inferior Court*, 19 SAN DIEGO L. REV. 659 (1982); Roger J. Miner, *Federal Courts Reform Should Start at the Top*, 77 JUDICATURE 104 (1993); Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761 (1989); Parker & Hagin, *supra* note 7; S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853 (1990); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761 (1983); Thomas M. Reavley, *A Review of Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals*, 26 TEX. TECH L. REV. 271 (1995); William H. Rehnquist, Seen in a Glass Darkly: The Future of the Federal Courts, The Kastenmeier Lecture (Sept. 15, 1992), in 1993 WIS. L. REV. 1; Stephen Reinhardt, *Whose Federal Judiciary is it Anyway?*, 27 LOY. L.A. L. REV. 1 (1993); Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648 (1980); Stanley Sporkin, *Reforming the Federal Judiciary*, 46 S.M.U. L. REV. 751 (1992); Joseph F. Weis, Jr., *Disconnecting the Overloaded Circuits—A Plug for a Unified Court of Appeals*, 39 ST. LOUIS U. L.J. 455 (1995); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147 (1994); John Minor Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787 (1980). But see FCSC REPORT, *supra* note 6, at 123 (statement of Judge Cabranes). The Federal Judicial Center (“FJC”) explicitly declined to use the word “crisis” in discussing these issues. FJC, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1993) [hereinafter FJC, ALTERNATIVES].

9. See, e.g., Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1443 (1983) (stating that bureaucratization “corrode[s] the individualistic processes that are the source of judicial legitimacy”); Wade H. McCree, 129 U. PA. L. REV. 777, 778 (describing “significant costs to quality of justice” associated with reforms intended to increase judicial efficiency); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3, 4 (noting that procedural innovations and case management techniques “undermine judicial accountability”).

In a previous article,¹⁰ I examined the courts of appeals' retreat from the tradition of writing and publishing full opinions in the majority of cases. Viewing this development from the perspective of the courts of appeals' de facto role as the primary enunciators of national law,¹¹ I concluded that it had dire implications for the development of a coherent body of law and would ultimately exacerbate the litigation explosion in the federal courts.¹² I noted that the courts of appeals should pursue other types of reforms to accommodate rising caseloads while remaining faithful to core values of our legal system. Still focusing primarily on the need to develop and maintain a coherent body of federal law while preserving elements of the appellate process that promote just resolutions in individual cases, I now turn to an analysis of possible structural reforms in the federal courts.

My analysis focuses on the courts of appeals, not because it is only there that a crisis exists, but because that crisis is acute.¹³ The rate of appeal to the courts of appeals has risen much faster than district court filings.¹⁴ At the same time, fewer and fewer cases decided by the courts of appeals are heard by the Supreme Court.¹⁵ Thus, the courts of appeals are squeezed from both ends:¹⁶ from below, by litigants increasingly seeking review of district court decisions; from above, by a Supreme Court able to rule on only the tiniest fraction of cases presented to it.¹⁷ Moreover, the courts of appeals currently perform both aspects

10. 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 (1995) (examining increased incidence of unpublished opinions, summary dispositions, and vacatur upon settlement).

11. For a discussion of law-making responsibility in the federal courts, and the roles of the Supreme Court and the courts of appeals, see *id.* at 766-68 and sources cited therein.

12. *Id.* at 800-01.

13. See, e.g., RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 14 (1985) (noting difficulty of expanding intermediate tier of judicial pyramid); Wilkinson, *supra* note 8, at 1173 (describing courts of appeals as "especially vulnerable to the problem of expansion").

14. Arthur D. Hellman, *The Crisis in the Circuits and the Innovations of the Browning Years*, in *RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF FEDERAL COURTS* 3, 5-6 (Arthur D. Hellman ed., 1990); see also *infra* notes 79-85 and accompanying text.

15. See *infra* note 152; cf. Miner, *supra* note 8, at 106 (stating that increase in the number of cases heard and changes in the process at the Supreme Court level would alleviate the caseload burden of the lower federal courts).

16. Ginsburg, *supra* note 8, at 8; see *infra* notes 72-91, 151-55 and accompanying text; see also Dragich, *supra* note 10, at 768.

17. See, e.g., SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* 1 (1986).

of the appellate function: error correction and law making.¹⁸ The converging caseload pressures and dual responsibilities highlight both the importance of the courts of appeals and the weak spot in the current structure where a breakdown is most likely to occur.

Every commentator who perceives a crisis offers a different solution.¹⁹ But underlying all proposed solutions are two basic

18. See, e.g., PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* 2-3 (1976) (describing "review for correctness" and "institutional review"); Wilkinson, *supra* note 8, at 1173 (noting that functions of appellate courts include resolution of cases and exposition of legal precedent). Carrington et al. acknowledge that it is difficult to draw the line between the two functions. CARRINGTON ET AL., *supra*, at 4. Obviously, many courts make (or clarify) law in the course of resolving specific disputes. But the two appellate functions have entirely different objectives. Review for error focuses on ensuring a just result for the parties, while institutional review focuses on systemic concerns such as promoting uniformity in law and confidence in the legal system. *Id.* at 2-3. This Article examines whether these distinct appellate functions are best assigned to one court, as they are now (for all practical purposes) to the courts of appeals, or to separate courts. In the latter case, the court assigned the law-making function would operate to correct errors in the cases before it, albeit as an incidental, rather than a primary, role.

19. THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 238 (1994). Federal judges have proposed or endorsed a multitude of solutions. See, e.g., Campbell, *supra* note 8, at 296-97 (advocating, among other proposals, a feasibility study for allowing the Supreme Court to refer inter-circuit conflicts down to a neutral circuit for final judgment en banc); Edwards, *supra* note 7, at 901-02, 924-35 (advocating imposition of monetary sanctions on litigants whose claims are determined frivolous, and more attractive, effective methods of alternative dispute resolution to reduce the demand for the federal courts); Ginsburg, *supra* note 8, at 20 (suggesting that federal judges must adopt "appropriate restraint and detachment," become effective "complex case administrators," and, above all, avoid overdependence on staff); Lay, *The Federal Appeals Process*, *supra* note 8, at 525-27 (advocating dividing large circuits into regional divisions while strictly limiting the use of en banc proceedings and limiting the right to appeal); Lay, *A Proposal*, *supra* note 8, at 1151 (arguing for discretionary review in civil cases lacking substance or merit); Lumbard, *supra* note 8, at 44 (advocating circuit division or realignment rather than increasing any appeals court beyond nine judges); McGowan, *supra* note 8, at 664-71 (calling for elimination of diversity jurisdiction, adopting discretionary appeals or creating an experimental national court of appeals); Miner, *supra* note 8, at 106 (arguing that changes at the Supreme Court level are necessary to relieve the caseload burden on lower federal courts); Newman, *supra* note 8, at 768 (calling for reallocation of jurisdiction from federal to state courts and discretionary access to federal court in some categories of cases); Plager, *supra* note 8, at 863-66 (advocating that all circuit courts be modeled after the U.S. Court of Appeals for the Federal Circuit and distinguishing it from a specialty court); Posner, *supra* note 8, at 765 (suggesting that the best long-term methods of handling the caseload crisis are to create monetary disincentives to bringing unmeritorious cases and by reducing the scope of federal law); Reavley, *supra* note 8, at 273 (stating federal court jurisdiction should consist only of federal law questions and consolidated trials of mass tort cases); Sporkin, *supra* note 8, at 754 (advocating, among many proposals, establishment of specialized

strategies: either reduce the flow of cases, or find a way to accommodate the rising tide.²⁰ Broadly speaking, reforms aimed at reducing the flow of cases rely on Congress to restrict the jurisdiction of the federal courts by statute,²¹ or on the Supreme Court to restrict jurisdiction through

courts); William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11-12 (1986) (advocating permanent implementation of Warren Burger's proposed national court of appeals that would act, not as a fourth tier, but as a "lower chamber" of the Supreme Court); Reinhardt, *supra* note 8, at 1 (advocating additional judgeships in order to maintain a purpose of service to the public welfare); J. Clifford Wallace, *The Case for Large Federal Courts of Appeals*, 77 JUDICATURE 288 (1994) (arguing that large circuits, like the Ninth, increase precedential stability and efficiency by providing a large body of case law for lawyers and litigants to draw upon); Weis, *supra* note 8, at 455 (advocating unitary appellate court); Wilkinson, *supra* note 8, at 1186 (advocating the need for a change in attitude toward growth in the federal judiciary, including a realization of the problems of growth, especially the increase of federal judgeships); *see also* FCSC REPORT, *supra* note 6, at 109-36.

20. *See, e.g.*, HRUSKA COMM'N REPORT, *supra* note 6, at 205-06; Parker & Hagin, *supra* note 7, at 214 (quoting the late Judge Rubin's suggestion that the two basic ways to deal with caseload pressures are to decrease the number of cases filed in the district courts or to implement a discretionary system of review). Parker and Hagin believe both approaches are required.

21. Congress has shown no inclination to pursue this approach. In fact, over the history of the federal courts, jurisdiction has steadily expanded. *See, e.g.*, FRANKFURTER & LANDIS, *supra* note 3, at 56-102 (describing steady expansion of federal jurisdiction and unsuccessful attempts to constrict jurisdiction); Carolyn Dineen King, *Commentary, A Matter of Conscience*, 28 HOUS. L. REV. 955, 956 (1991) (noting that Congress attempts to cure national ills by enacting federal legislation "creating rights and entitlements" for the federal courts to enforce); Parker & Hagin, *supra* note 7, at 215 (noting Congress' "penchant for ever-expanding the jurisdiction of the federal courts"); *see also* Edwards, *supra* note 7, at 922-24; Ginsburg, *supra* note 8, at 15-17; Lay, *The Federal Appeals Process*, *supra* note 8, 525-27; McGowan, *supra* note 8, at 664-65; Newman, *supra* note 8, at 768-71; Reavely, *supra* note 8, at 273; Rehnquist, *supra* note 8, at 5; Rubin, *supra* note 8, at 656-59; Wisdom, *supra* note 8, at 789. Political difficulties inhere in any attempt to restrict the jurisdiction of the federal courts. *See, e.g.*, CARRINGTON ET AL., *supra* note 18, at 195; Richard A. Posner, *Introduction of the Federal Courts Symposium*, 1990 B.Y.U. L. REV. 1, 2 (discussing politics of judicial reform generally). Carrington, Meador, and Rosenberg consider jurisdictional reform efforts "doomed." CARRINGTON ET AL., *supra* note 18, at 195. Moreover, the potential for jurisdictional reforms to resolve the caseload problem of the courts of appeals is unknown, since such reforms would operate to reduce filings in the district courts. Fewer filings in the districts courts could be expected to reduce the appellate caseload, but since the rate of appeals has been rising much faster than the rate of filings, this would represent a partial solution at best. *See* FCSC REPORT, *supra* note 6, at 14-15; Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52, 53. For an overview of jurisdictional proposals, *see* FJC, ALTERNATIVES, *supra* note 8, at 141-53. For specific jurisdictional proposals, *see* JUDICIAL CONFERENCE OF THE U.S. COMM. ON LONG RANGE PLANNING, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 20-32 (1994).

abstention, the justiciability doctrines, and similar devices.²² These reforms fall outside the scope of my analysis. I take rising caseloads as a given, and focus on reforms designed to accommodate them.

Such reforms can be classified as internal²³ or systemic²⁴ changes. The courts of appeals have adopted numerous internal, procedural reforms on a circuit-by-circuit basis. These reforms include reduction in oral argument, increasing reliance on central and chambers staff, and decreasing publication of opinions.²⁵ In my view, the potential for internal reforms has been completely exhausted,²⁶ and some of the reforms already adopted are, in fact, detrimental. Thus, systemic, particularly structural, reforms hold the greatest promise of resolving the

22. Cf. MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 24-52 (2d ed. 1990) (discussing Congress' prerogative to restrict jurisdiction of federal courts); George D. Brown, *Nonideological Judicial Reform and Its Limits—The Report of the Federal Courts Study Committee*, 47 WASH. & LEE L. REV. 973 (1990); Nancy Levit, *The Caseload Conundrum, Constitutional Restraint, and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 361 (noting that judiciary treads on legislature's prerogative when it imports caseload analysis into jurisdictional theories); Parker & Hagin, *supra* note 7, at 236-44 (discussing federal courts' inherent powers to implement jurisdictional restraint if Congress fails to do so); Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 603-04 (1985) (discussing preclusion doctrines). Furthermore, jurisdictional reforms may drive out important cases too early—before they have had any hearing. Brown, *supra*, at 988; Levit, *supra*, at 321-22. It might be better to let them in but impose mechanisms to ensure that only meritorious cases advance. *But see* Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 554 (1969). According to Carrington, "relaxation" of the doctrines of ripeness and mootness, and of the final judgment rule, has contributed to the increase in appellate litigation.

23. BAKER, *supra* note 19, at 106 (describing what he terms "intramural" reforms).

24. *Id.* at 186 (describing "extramural" reforms).

25. Baker provides an overview in Chapter Six ("Intramural Reforms Already Implemented: What the Courts of Appeals Have Done to Help Themselves") of his book, *Rationing Justice on Appeal*. *Id.* at 106-50. For examples of additional internal reform proposals by federal judges, see Donald P. Lay, *Reconciling Tradition With Reality: The Expedited Appeal*, 23 UCLA L. REV. 419 (1976) (advocating reducing the time from notice of appeal to final disposition from an average of 7.8-10 months to 75 days for most civil and criminal cases within the federal system); Rubin, *supra* note 8, at 655-56 (calling for better non-judge staff management).

26. Baker suggests that additional intramural reforms may prove productive, but admits that "these [reforms] appear to be . . . variations on a theme," and concedes that intramural reforms have been "all but exhausted." BAKER, *supra* note 19, at 152; *see also* FCSC REPORT, *supra* note 6, at 109 (pointing particularly to internal reforms aimed at increased productivity); Edwards, *supra* note 7, at 916 (concluding that internal reforms, such as increasing administrative capabilities and judicial productivity, have reached their limit).

appellate crisis. 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.

In this Article, I describe a structure capable of accommodating growing caseloads in a manner consistent with basic values of appellate justice. Before doing so, I sketch in Part I the structural evolution of the federal courts. Part II describes the current pressures on the courts of appeals, while Part III examines the effects of internal reforms on the quality of appellate justice and the development of a coherent body of national law. Next, in Part IV, I posit requirements for the federal courts' third century. Part V reviews major proposals to address the caseload crisis in the courts of appeals. These proposals include increasing the number of judges, adding a fourth tier to the federal court system, adopting a certiorari-like system for initial appeals, and adjusting the present circuit structure. I argue that these reforms, especially considered in the alternative, either will not meaningfully address the caseload crisis for any length of time or will, in the process, compromise dearly-held notions of appellate justice. Finally, in Part VI, I propose a structure that interweaves aspects of several earlier proposals. Briefly, this structure establishes District Court Appellate Panels and a unitary Court of Appeals with largely discretionary jurisdiction, but leaves the role and responsibilities of the Supreme Court unchanged. I argue that this structure can accommodate rising caseloads without further diluting appellate justice or threatening coherence in federal law. Moreover, the proposed structure is consistent with the pattern of change in the federal courts over the past two hundred years.

I. STRUCTURAL EVOLUTION OF THE FEDERAL COURTS²⁷

The Constitution requires that there be "one supreme court," and allows for such lower federal courts as Congress "may from time to time ordain and establish."²⁸ The Judiciary Act of 1789²⁹ established the

27. This section provides only the barest outline of the structural evolution of the federal courts. For thorough histories, see PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1-39 (3d ed. 1988); FRANKFURTER & LANDIS, *supra* note 3, at 4-102; John P. Frank, *Historical Bases of the Federal Judicial System*, 13 *LAW & CONTEMP. PROBS.* 3 (1948); Daniel J. Meltzer, *The History and Structure of Article III*, 138 *U. PA. L. REV.* 1569 (1990); Erwin C. Surrency, *A History of Federal Courts*, 28 *MO. L. REV.* 215 (1963); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *HARV. L. REV.* 49 (1923).

28. U.S. CONST. art. III, § 1.

29. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

original federal court system, and only once since then, in 1891,³⁰ has a major revision of the original design been implemented.³¹ The Act of 1789 established a two-tiered system of courts consisting of trial courts and the Supreme Court.³² Initially, the federal courts' primary caseload was diversity and admiralty cases.³³ The federal courts did not exercise general federal question jurisdiction until 1875.³⁴ Appeal to the Supreme Court by writ of error was provided from final determinations of the lower federal courts,³⁵ but there was no right to appeal from criminal convictions until 1889.³⁶

Light caseloads in the pre-Civil War period permitted the Supreme Court to supervise the lower federal courts effectively. In addition, the

30. Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891) (popularly known as the Evarts Act).

31. Actually, Congress enacted major revisions to the original design in 1801. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89. These reforms, however, were soon repealed by the Act of Mar. 8, 1802, ch. 8, 2 Stat. 132. See FRANKFURTER & LANDIS, *supra* note 3, at 24-28 (describing enactment and repeal of 1801 reforms). Thus, only the 1891 reforms significantly affected the structure of the federal court system.

32. Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73, 73 (describing the Supreme Court); *id.* § 3, 1 Stat. at 73 (establishing the district courts); *id.* § 4, 1 Stat. at 74 (establishing the circuit courts). The district courts were trial courts; the circuit courts were primarily trial courts but also exercised limited appellate jurisdiction. See Act of Sept. 24, 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76-78; Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 412 (1987). Although the 1789 Act established three courts, many scholars describe it as a two-tiered system. See FRANKFURTER & LANDIS, *supra* note 3, at 13 (characterizing the district and circuit courts as "two nisi prius courts dealing with different items of litigation" and noting "not a trace . . . of a suggestion for an [intermediate] appellate tribunal"); Thomas E. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 S.W. L.J. 687, 689 (1981) (describing the original circuit courts as "the principal federal trial court" and the Supreme Court as "the principal appellate court"). Others characterize the original structure as having three tiers though staffed by two ranks of judges. See, e.g., Carrington, *supra*, at 412.

33. See FRANKFURTER & LANDIS, *supra* note 3, at 7-10; Carrington, *supra* note 32, at 413.

34. General federal question jurisdiction was conferred by the Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. Previously, cases asserting rights arising under the Constitution, laws, or treaties of the United States were heard in the state courts, subject to Supreme Court review from the highest state court. See FRANKFURTER & LANDIS, *supra* note 3, at 65 (describing changes wrought by the Act of 1875 as "revolutionary," at least in retrospect). *But see* David E. Engdahl, *Federal Question Jurisdiction Under the 1789 Judiciary Act*, 14 OKLA. CITY U. L. REV. 521, 521-22 (1989) (stating that "federal question jurisdiction was fully vested by the Judiciary Act of 1789").

35. Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 73, 84.

36. See Carrington, *supra* note 32, at 412. The Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656, established a right of appeal in capital cases only. The right was extended to all criminal cases by the Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

provision that two Supreme Court justices would sit on each circuit court³⁷ brought a national perspective to bear at the intermediate appellate level. But as the country grew and the jurisdiction of the federal courts expanded, caseloads rose. An appellate caseload crisis developed in the post-Civil War period.³⁸ This crisis was attributable, in part, to the Supreme Court's responsibility for both error correction and law making.³⁹ That is, the practical difficulties of riding circuit led to untenable conditions for the correction of error, such as appeal to a single district judge.⁴⁰ On the other hand, circuit-riding duties combined with the Supreme Court's mandatory jurisdiction caused severe backlogs in the Supreme Court, preventing it from addressing questions of national law in a timely fashion.⁴¹

The Evarts Act of 1891⁴² instituted a radically different structure for the federal courts. It expanded the federal court system from two to three tiers.⁴³ The district courts retained their trial jurisdiction.⁴⁴ The Act assigned the two appellate functions to two separate courts.⁴⁵ The

37. Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 73, 74. The Justices' circuit-riding duties were reduced in 1869, at the same time that the first circuit judges were authorized. Act of April 10, 1869, ch. 22, 16 Stat. 44; see FRANKFURTER & LANDIS, *supra* note 3, at 69-70 (describing these reforms as ineffectual).

38. See, e.g., ESTREICHER & SEXTON, *supra* note 17, at 11; Carrington, *supra* note 32, at 413.

39. FRANKFURTER & LANDIS, *supra* note 3, at 69-70 (noting that Supreme Court docket was "a record of arrears"); Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction and a Proposed Course of Action*, 1981 B.Y.U. L. REV. 617, 622 (describing pressure on Supreme Court and characterizing "insufficient appellate capacity" as the "most serious problem affecting the system").

40. See FRANKFURTER & LANDIS, *supra* note 3, at 69 (describing as "evil" the "unrestrained power" of district judges sitting alone on appeal).

41. See *id.* at 60, 69; Carrington, *supra* note 32, at 413 (citing contemporary opinion that Supreme Court arrears "amounts almost to a denial of justice" and that circuit riding substantially limited the Supreme Court's caseload capacity).

42. Evarts Act, ch. 517, 26 Stat. 826 (1891).

43. The Act provided for the establishment of circuit courts of appeal with appellate jurisdiction over decisions of the district and circuit courts, with the possibility of further review by the Supreme Court. Evarts Act, ch. 517, §§ 2, 6, 26 Stat. 826, 826, 828. As a political compromise, the 1891 Act retained the old circuit courts, but eliminated their limited appellate powers. *Id.* § 4, 26 Stat. at 827; see FRANKFURTER & LANDIS, *supra* note 3, at 99-101 (describing passage of Evarts Act); *id.* at 128-35 (recounting efforts to remedy this feature of the 1891 Act).

44. The Evarts Act made no changes to the composition or jurisdiction of the district courts. Evarts Act, ch. 517, 26 Stat. 826 (1891).

45. The Act gave the circuit courts of appeals jurisdiction to review, by appeal or writ of error, cases other than those for which the Act explicitly preserved direct appeal to the Supreme Court. Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891). Direct appeal to the Supreme Court was available in cases where the jurisdiction of the courts

courts of appeals fulfilled the error-correction role, taking appeals as of right from the district and circuit courts.⁴⁶ The Supreme Court remained responsible for interpretation of the Federal Constitution, enunciation of national law, and supervision of the lower federal courts, but “self-consciously ceased playing [the] role” of a court of error.⁴⁷

The Evarts Act organized the courts of appeals regionally into circuits of three judges each.⁴⁸ Only two of the three judges were permanently assigned to the circuit court of appeals.⁴⁹ The third judge was either the circuit justice or a district judge.⁵⁰ The Act of 1911⁵¹ merged the circuit courts into the district courts.⁵²

The Evarts Act began, and the Judiciary Act of 1925⁵³ continued, the trend toward discretionary jurisdiction in the Supreme Court.⁵⁴ Recent developments have eliminated almost all remaining vestiges of mandatory jurisdiction in the Supreme Court.⁵⁵ Thus, appeal as of right presently lies only to the courts of appeals.⁵⁶

was in issue, in capital cases, and in cases involving the construction or application of the Constitution, challenging the constitutionality or construction of a federal statute, or alleging that a state statute violated the United States Constitution. *Id.* § 5, 26 Stat. 826, 827. Moreover, the circuit courts of appeals were allowed to certify to the Supreme Court “any questions or propositions of law.” *Id.* § 6, 26 Stat. 826, 828. Thus, direct appeal to the Supreme Court remained available for most questions of law, leaving the new circuit courts of appeals to fulfill the error-correction role.

46. CARRINGTON ET AL., *supra* note 18, at 200. Likewise, Estreicher and Sexton argue that the correction of errors plays virtually no part in the Supreme Court’s role today. ESTREICHER & SEXTON, *supra* note 17, at 4-5.

47. ESTREICHER & SEXTON, *supra* note 17, at 1; *see also id.* at 129-30.

48. Evarts Act, ch. 517, § 2, 26 Stat. 826, 826 (1891).

49. *Id.* § 1, 26 Stat. at 826 (authorizing one additional circuit judge per circuit).

50. *Id.* § 3, 26 Stat. at 827.

51. Act of Mar. 3, 1911, ch. 1, 36 Stat. 1087.

52. *Id.* §§ 289-291, 36 Stat. 1087, 1167; *see* FRANKFURTER & LANDIS, *supra* note 3, at 128-35 (describing confusion inherent in Evarts Act’s retention of two sets of courts, district and circuit, of largely concurrent jurisdiction).

53. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (often called the “Judges Bill”).

54. The Evarts Act allowed a second appeal as of right in civil cases where the amount in controversy was over \$1,000, except in diversity and certain other cases. Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891). The 1925 Act enlarged the certiorari jurisdiction of the Supreme Court and reduced mandatory appeals. Act of Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936, 936 (amending § 240 of the Judicial Code of 1911 to allow certiorari upon petition of either party and amending § 238 of the Judicial Code of 1911 to restrict direct review by the Supreme Court of district court judgments).

55. Supreme Court Case Selection Act, Pub. L. No. 100-352, § 2, 102 Stat. 662, 662 (1988) (codified at 28 U.S.C. § 1254 (1994)). The 1988 Act repealed 28 U.S.C. § 1252, which had permitted appeal to the Supreme Court from any case declaring a federal statute unconstitutional, or where a federal agency was a party.

56. 28 U.S.C. § 1254 (1994) provides for Supreme Court review from the courts of appeals by writ of certiorari upon petition of either party or by certification by the

Precisely the same problem that faced the Supreme Court a century ago has recurred, this time in the courts of appeals.⁵⁷ Facing unprecedented demand for the correction of error below, but also having assumed de facto a large share of the law-making burden for the federal courts, the courts of appeals are unable to perform either function well. Caseload pressures have grown to the point where the courts of appeals cannot devote sufficient time or attention to reviewing individual cases for error. In terms of law declaration, the courts of appeals lack not only time but also the national focus that is essential to the coherent development of federal law.⁵⁸ In 1891, when the current structure was designed, "the perceived role of an effective appellate system was to correct the error of the trial court in applying the law to the facts. No one thought appellate courts necessary or useful in making law or policy."⁵⁹ The courts of appeals' sole focus on error correction made sense in a time when the body of federal law was small and the Supreme Court was easily capable of overseeing its development.⁶⁰ By the early 1970s, however, the federal courts of appeals were "charged with declaring and defining the national law, subject only to Supreme Court

court of appeals of a question of law. Both routes are discretionary. *See, e.g.,* *Fay v. Noia*, 372 U.S. 391, 436 (1963) (stating that review by certiorari "is not a matter of right, but of sound judicial discretion, and will be granted only when there are special and important reasons therefor"); *Rutherford v. AMA*, 379 F.2d 641, 644 (7th Cir. 1967) ("certification of questions [to the Supreme Court] . . . rests in the discretion of [the court of appeals] and cannot be invoked by a party as a matter of right"). Moreover, while 28 U.S.C. § 1254(2) (1994) seems to require the Court to accept cases on certification, "there are so many grounds on which the Court may find the certificate improper that its jurisdiction over certificates is in fact discretionary." CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS* § 106, at 777 (5th ed. 1994).

57. *See* Meador, *supra* note 39, at 644.

58. *See, e.g.,* *Wilkinson*, *supra* note 8, at 1165-66 (describing federal courts' increasing orientation toward local controversy, rather than significant national interests); *id.* at 1177-78 (noting that increase in number of circuits will "move federal law in a more parochial direction" at the expense of the "interstate character of [federal] appellate review).

59. *Carrington*, *supra* note 32, at 416; *see also* CARRINGTON ET AL., *supra* note 18, at 200. The design of the courts of appeals as error-correction courts also reflects the view that judges "discovered" and applied the law, but did not make it. *See, e.g., id.* at 3 (noting that "[u]ntil recent decades . . . we were given to proclaiming that judges do not make law" but that "[t]oday, such a comment is seldom heard"); POSNER, *supra* note 13, at 1 (stating that "the fact remains that judges make, and do not just find and apply, law"); Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 *YALE L.J.* 62, 69 (1985) (stating that "[i]t is by now a commonplace that courts do and should engage in judicial lawmaking, in interpreting, shaping, and articulating the law, when statutory and constitutional pronouncements fall short or land wide").

60. CARRINGTON ET AL., *supra* note 18, at 200 (noting that Supreme Court was sufficient to handle any need for judicial law making).

review.”⁶¹ As the specific role of the courts of appeals within the federal court system has changed over time, these courts have evolved into institutions quite different from those created by the Evarts Act.⁶² The courts of appeals’ actual responsibilities are out of sync with the structure established by the century-old Act.⁶³

The evolution of the federal courts reflects steadily expanding jurisdiction along with a reduction in the attention paid to each case.⁶⁴ Although well aware of the caseload pressures confronting the lower federal courts, Congress has not limited their jurisdiction.⁶⁵ In fact, the trend is to open federal courts to cases heretofore heard exclusively in the state courts, and to create previously unknown causes of action.⁶⁶ Opposite trends, such as restriction of diversity jurisdiction, pale in comparison in terms of their impact on caseloads. Resistance to curtailing the jurisdiction of the federal courts is not new.⁶⁷ But while jurisdiction

61. HRUSKA COMM’N REPORT, *supra* note 6, at 206.

62. See Carrington, *supra* note 32, at 428 (noting that “contemporary circuit judges are under pressures of time that are inconsistent with the role envisioned for them by the draftsmen of the Evarts Act”).

63. See Weis, *supra* note 8, at 464 (describing “the jerry-built system of the courts of appeals that has grown up over the last 100 years [as] obviously out of date”).

64. See, e.g., FRANKFURTER & LANDIS, *supra* note 3, at 187 (noting “vast expansion of the bounds of the inferior federal courts” and corresponding narrowing of the scope of review by the Supreme Court). Arguments about whether this evolution reflects the proper role of the federal courts are outside the scope of this Article.

65. Congress has tinkered with jurisdiction in fairly modest ways, such as increasing the amount in controversy requirement from \$10,000 to \$50,000 in 1988. Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 201, 102 Stat. 4642, 4646. The proposed Federal Courts Improvement Act of 1995 would raise the amount to \$75,000 and tie it to increases in the Consumer Price Index. See S. 1101, 104th Cong., 1st Sess. § 309 (1995); H.R. 1989, 104th Cong., 1st Sess. § 309 (1995) (containing identical provisions to S. 1101). I characterize these adjustments as “modest” because litigants can easily get around them and because they would eliminate relatively few cases. See, e.g., Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961, 976 (1995) (noting that even raising amount in controversy to \$100,000 would eliminate only eight percent of diversity cases).

66. See, e.g., Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40302, 108 Stat. 1796, 1941 (creating a federal cause of action for recovery of damages for victims of violent crimes motivated by gender). See generally Richard S. Arnold, *The Future of the Federal Courts*, 60 MO. L. REV. 533, 540-41 (1995); HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 22-26 (1973) (listing Civil Rights Act of 1964, Voting Rights Act of 1965, National Environmental Policy Act of 1969, and numerous other examples of this trend); 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) (describing steady expansion of federal government’s criminal authority and noting that there are now over 3000 federal crimes).

67. See, e.g., FRANKFURTER & LANDIS, *supra* note 3, at 136-44 (describing unsuccessful attempts to curtail jurisdiction between 1891 and 1911). Congress has been

has grown, the appellate process has changed dramatically. Few litigants have the opportunity to be heard in the Supreme Court anymore, an option once open in all cases where jurisdictional requirements were met.⁶⁸ The Supreme Court itself has stated that review by writ of certiorari "does not provide a normal appellate channel in any sense comparable to the writ of error."⁶⁹

In the courts of appeals, the appellate process has also changed dramatically. Cases are screened by staff attorneys instead of judges, oral arguments are becoming a rarity, and the courts frequently do not explain their decisions in published opinions.⁷⁰ At the district court level, the use of magistrate judges to hear certain cases, the implementation of alternative dispute resolution programs, and the active participation of judges in settling cases also fit this pattern.⁷¹ In short, the federal courts have opened their doors ever wider, but have steadily reduced the process afforded to litigants once they enter.

much more prone to create new courts and authorize additional judges. *Id.* at 220. Moreover, Congress has specifically exempted jurisdictional reform from studies it has commissioned, such as the Hruska Commission. Maurice Rosenberg, *Enlarging the Federal Courts' Capacity to Settle the National Law*, 10 GONZ. L. REV. 709, 711 (1975).

68. The 1789 Act provided for Supreme Court review, by writ of error, of any case in which the matter in dispute exceeded \$2000. Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 72, 84; see FRANKFURTER & LANDIS, *supra* note 3, at 258 (noting deep opposition to 1891 Act's elimination of litigants' right to resort to Supreme Court for vindication of federal claims).

69. *Fay v. Noia*, 372 U.S. 391, 436 (1963).

70. *Robel*, *supra* note 9, at 40-56.

71. I do not mean to suggest that these developments are necessarily bad; in fact, they are widely regarded as beneficial to litigants and essential to the district courts' ability to manage their caseloads. In addition, many of these programs in the district courts operate to reduce the number of appeals taken to the courts of appeals. The point is that Congress and the federal courts have made, and society has accepted, substantial departures from the original model for delivery of justice.

II. CURRENT CONDITIONS IN THE COURTS OF APPEALS

Statistics show that the lower federal courts have changed drastically since 1960.⁷² District court filings increased 216% from 1960 to 1994.⁷³ In the courts of appeals, filings soared 1139% over the same period.⁷⁴ Terminations on the merits have fallen in both the district courts⁷⁵ and the courts of appeals.⁷⁶ Of cases terminated on the merits,

72. The year 1960 is used as a line of demarcation because it seems to signify a turning point for the federal courts. According to the Federal Courts Study Committee, "[f]or decades before this transition year caseload growth had been moderate in the district courts . . . and virtually nil in the courts of appeals; since then it has been consistently great in both." 1 FEDERAL COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 31 (1990) [hereinafter FCSC, WORKING PAPERS].

73. District court filings grew from 89,112 in 1960 to 281,864 in 1994. DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS, 1960 ANN. REP. tbl. C1, at 224, tbl. D1, at 288 [hereinafter 1960 ANNUAL REPORT]; DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2 (1994) [hereinafter 1994 ANNUAL REPORT]. The sharpest increase occurred between 1980 and 1990; the rate of growth leveled off somewhat after 1990. Caseload expansion outstrips population growth. District court filings grew from 32.8 civil cases and 15.6 criminal cases per 100,000 population in 1960 to 86.6 civil cases and 19.1 criminal cases per 100,000 population in 1990. Charles W. Nihan & Harvey Rishikof, *Rethinking the Federal Court System: Thinking the Unthinkable*, 14 MISS. C. L. REV. 349, 360, 362 (1994).

74. In 1960, 3899 cases were commenced in the courts of appeals. 1960 ANNUAL REPORT, *supra* note 73, tbl. B1, at 210. By 1994, filings had grown to 48,322. 1994 ANNUAL REPORT, *supra* note 73, at 2. Courts of appeals statistics for 1994 exclude the Federal Circuit because the *Annual Report* does not collect them. The sharpest increase occurred between 1990 and 1994. Caseload trends in the courts of appeals necessarily lag behind those in the district courts, so it may be that the slower rate of increase experienced in the district courts since 1990 has yet to be felt in the courts of appeals. Of course, not all appeals come from the district courts.

75. In 1960, 11.2% of district court cases were tried; by 1994 this figure had fallen to 6.3%. Compare 1960 ANNUAL REPORT, *supra* note 73, tbl. C7, at 274 (reporting 9998 trials in 1960) with 1994 ANNUAL REPORT, *supra* note 73, tbl. C-7, at AI-90 (reporting 17,771 civil and criminal trials). Due to increased pressures of criminal caseloads, district courts now try more criminal and fewer civil cases. Beale, *supra* note 66, at 988.

76. The courts of appeals terminated 72.2% of cases in 1960 on the merits, compared with 55.3% in 1994. Compare 1960 ANNUAL REPORT, *supra* note 73, tbl. B1, at 210 (reporting 3713 cases terminated) with 1994 ANNUAL REPORT, *supra* note 73, tbl. B-5, at AI-26 (reporting 49,184 cases terminated).

the courts of appeals' reversal rate has steadily declined.⁷⁷ Nevertheless, the rate of appeal continues to rise.⁷⁸

The federal judiciary, of course, has also grown during the period of remarkable caseload expansion.⁷⁹ In 1960, there were 248 authorized district court judgeships;⁸⁰ in 1994, there were 649.⁸¹ In the courts of appeals, 68 judgeships were authorized in 1960,⁸² compared with 167 in 1993.⁸³ Even so, filings per judgeship have continued to rise in both the district courts⁸⁴ and the courts of appeals.⁸⁵

Caseload trends are susceptible of a variety of interpretations. For purposes of this Article, two implications are important. First, a shift in the caseload mix in the courts of appeals indicates increasing demand for the resolution of federal questions and for supervision of the criminal

77. In 1960, the courts of appeals affirmed or enforced 78.1% (1924 of 2681) and reversed 24.5% of cases terminated on the merits. 1960 ANNUAL REPORT, *supra* note 73, tbl. B1, at 210. Other merits terminations, such as remands and dismissals, accounted for the remaining 3.7%. *Id.* In 1994 the courts of appeals affirmed or enforced 80.4% and reversed only 10.4% of cases terminated on the merits. 1994 ANNUAL REPORT, *supra* note 73, tbl. B-5, at AI-26. Other merits terminations account for the remaining 9.2%. *Id.*

78. In 1960, one in 30 district court terminations was appealed. 1960 ANNUAL REPORT, *supra* note 73, tbl. C1, at 224 (reporting 61,829 civil terminations), tbl. D1, at 288 (reporting 29,864 criminal terminations). Today the figure is one in five. 1994 ANNUAL REPORT, *supra* note 73, tbl. B-7, at AI-38 (reporting 42,983 appeals from district courts), tbl. C, at AI-48 (reporting 228,361 district court terminations). The Federal Judicial Center recently reported that although district court terminations doubled and appeals tripled between 1977 and 1993, FJC, STALKING THE INCREASE IN THE RATE OF FEDERAL CIVIL APPEALS 7 (1995), the rising rate of appeal was largely accounted for by growth of appeals in prisoner and civil rights cases, cases that "raise fundamental questions of personal liberty" and face "decreased financial barriers to court access." *Id.* at 16-17.

79. See *infra* part V.A. for a discussion of proposals for further expansion of the federal judiciary.

80. FCSC, WORKING PAPERS, *supra* note 72, at 29.

81. 1994 ANNUAL REPORT, *supra* note 73, tbl. 3, at 7. The current provision for district judgeships appears at 28 U.S.C. § 133(a) (1994), and that for circuit judgeships is at 28 U.S.C. § 44(a) (1994).

82. 1960 ANNUAL REPORT, *supra* note 73, at 68.

83. 1994 ANNUAL REPORT, *supra* note 73, tbl. 1, at 3. This figure excludes Federal Circuit judgeships, currently totalling 12. See 28 U.S.C. § 44(a) (1994).

84. Compare 1960 ANNUAL REPORT, *supra* note 73, at 86 (reporting 221 civil and 107 criminal filings per district judgeship) with 1994 ANNUAL REPORT, *supra* note 73, tbl. X-1A, at AI-301 (reporting 342 civil and 74 criminal filings (unweighted) per district judgeship).

85. Compare 1960 ANNUAL REPORT, *supra* note 73, at 68 (reporting 3899 filings and 68 judgeships, or 57.3 filings per judgeship) with 1994 ANNUAL REPORT, *supra* note 73, tbl. 1, at 3 (reporting 48,322 filings and 167 judgeships, or 289.3 filings per judgeship).

justice system. Among civil cases, private federal question appeals have increased dramatically.⁸⁶ Diversity appeals, on the other hand, have declined.⁸⁷ Meanwhile, criminal appeals and prisoner filings have risen in the courts of appeals,⁸⁸ outstripping district court filings.⁸⁹ Criminal cases, prisoner petitions, and private federal question cases are unlikely to be eliminated by any jurisdictional reforms that Congress might eventually adopt.⁹⁰ Moreover, since diversity appeals are already

86. In the courts of appeals these cases made up 13.7% of the docket in 1960, compared with 43.1% in 1994. Compare 1960 ANNUAL REPORT, *supra* note 73, tbl. B5, at 223 (reporting 532 private federal question cases) with 1994 ANNUAL REPORT, *supra* note 73, tbl. B-1A, at AI-8 (reporting 20,824 private federal question cases). Similarly, in the district courts, private federal question cases grew from 10.3% of case filings in 1960 to 57.5% in 1994. Compare 1960 ANNUAL REPORT, *supra* note 73, tbl. C2, at 232 (reporting 9207 private federal question cases) with 1994 ANNUAL REPORT, *supra* note 73, tbl. 4, at 7 (reporting 135,853 private federal question cases).

87. In the courts of appeals, diversity cases made up 19% of the filings in 1960, but dwindled to 8.1% of appellate filings in 1994. Compare 1960 ANNUAL REPORT, *supra* note 73, tbl. B5, at 223 (reporting 740 diversity cases) with 1994 ANNUAL REPORT, *supra* note 73, tbl. B-7, at AI-40 (reporting 3898 diversity cases). Despite increases in the amount in controversy requirement, however, see *supra* note 65, diversity cases have held steady at about 19% of district court filings from 1960 through 1994. Compare 1960 ANNUAL REPORT, *supra* note 73, tbl. C2, at 230 (reporting 17,048 diversity cases, or 19.13%) with 1994 ANNUAL REPORT, *supra* note 73, tbl. C-4, at AI-80 (reporting 53,632 diversity cases, or 19.02%).

88. In the courts of appeals, 84% of the cases commenced in 1960 were civil, while 16% were criminal cases. 1960 ANNUAL REPORT, *supra* note 73, tbl. B1, at 210 (reporting 623 criminal and 3276 civil cases commenced). Figures for prisoner petitions at the appellate level are unavailable in the 1960 report. In 1994, 77.9% of the cases commenced in the courts of appeals were civil, and 22.1% were criminal. 1994 ANNUAL REPORT, *supra* note 73, at 4 (reporting 32,309 civil and 10,674 criminal cases commenced). Prisoner petitions made up 27% of the docket. *Id.* (reporting 13,061 state and federal prisoner petitions filed). Thus, in 1994, criminal cases plus prisoner petitions occupied 49.1% of the appellate docket.

89. In contrast to the sharp increase in appeals, criminal and prisoner petition filings have remained steady in the district courts. In 1960, 64.7% of cases commenced in the district courts were civil, while 31.6% were criminal cases. 1960 ANNUAL REPORT, *supra* note 73, tbl. C1, at 224 (reporting 59,284 civil cases filed), tbl. D1, at 288 (reporting 29,828 criminal cases commenced). Prisoner petitions made up just over two percent of the district court docket. *Id.* at 116 (reporting 1851 prisoner petitions filed in 1960). Thus, criminal cases plus prisoner petitions combined made up 33.6% of the district court docket in 1960. By contrast, in 1994, 83.9% of district court filings were civil cases, and only 16.1% were criminal. 1994 ANNUAL REPORT, *supra* note 73, at 2 (reporting 236,391 civil cases and 45,473 criminal cases commenced). Prisoner petitions, however, accounted for 20.5% of the district court civil filings. *Id.* tbl. C-2A, at AI-58 (reporting 57,940 prisoner petitions). Thus, criminal cases plus prisoner petitions accounted for 36.6% of the district court docket in 1994.

90. *Cf.* Ginsburg, *supra* note 8, at 15-16 (stating that federal questions, constitutional questions, and civil rights questions comprise "the principal role of the

declining, jurisdictional reforms aimed at driving these cases out of the district courts would have relatively little impact on the courts of appeals. Thus, structural reform is essential to accommodate caseloads that will continue to rise. But certain structural reforms, such as eliminating appeals as of right, would be unpalatable in view of the high demand for supervision of the criminal justice system.

Second, the rising rate of appeal, despite the contemporaneous decline in the reversal rate, indicates that litigants and lawyers believe appeals are justified in a growing number of cases. To pursue an appeal, the losing party must believe that error occurred at the district court level, or that the law upon which district court rulings are based is uncertain.⁹¹ To succeed over the long term, proposed reforms must aim to reduce the volume of appeals by promoting certainty and predictability in the law while preserving appeal as of right to correct error.

III. EFFECTS OF INTERNAL REFORMS

Burgeoning caseloads and internal reforms have combined to cause two maladies at the appellate level: dilution of appellate justice in individual cases, and incoherence in federal law. These ills are compounded by the courts of appeals' dual appellate responsibilities. When a single court is charged with both aspects of the appellate function, it may become unduly preoccupied with one function to the neglect of the other.⁹² This problem plagues the courts of appeals today,

federal courts"); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles"*, 78 VA. L. REV. 1769, 1798 (1992) (arguing that diversity jurisdiction should be "jettisoned" before "attacking the federal judiciary's primary function"—federal question jurisdiction); Jonathan D. Varat, *Determining the Mission and Size of the Federal Judiciary Via a Three-Branch Process: The Judges' Debate and a Reform Menu*, 27 CONN. L. REV. 885, 909 (1995) (discussing improbability of reduction in federal criminal jurisdiction).

91. Of course, many other factors, such as a decrease in the marginal cost of appeal, could also explain this trend. See GERHARD CASPER & RICHARD POSNER, *THE WORKLOAD OF THE SUPREME COURT* 32-34 (1976). The increase in criminal and habeas appeals, for example, is probably attributable in large part to developments such as the provision of counsel on appeal, which removes any disincentive to appeal. See *id.* at 41; Maurice Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576, 582 (1974). Moreover, the conviction rate in federal criminal prosecutions has risen and sentences are now appealable, both trends which are likely to increase the rate of appeal in criminal cases. Beale, *supra* note 66, at 986-87.

92. See CARRINGTON ET AL., *supra* note 18, at 3 (noting that the "traditional duality in the functions of appellate adjudication" leads to "preoccup[ation]" with both "general principles which govern the affairs" of non-parties and the "impact of decisions on particular litigants"); McGowan, *supra* note 8, at 663-64 (stating that federal appeals

where the competing demands cause both functions to receive insufficient attention. Indeed, Judge Weis ascribes some current problems to “the fact that [the courts] now treat all appeals in the same way.”⁹³ On one hand, the natural tendency of error-correction courts is to focus their attention on individual litigants rather than on the system as a whole.⁹⁴ The courts’ inundation with innumerable appeals alleging error below deflects attention from the rarer appeals that present opportunities to clarify the law. Thus, case-specific error correction predominates over orderly development of law. On the other hand, law making may seem a higher calling than error correction.⁹⁵ The courts of appeals’ screening of “routine”⁹⁶ cases for summary treatment or non-publication of opinions is an open admission that error correction merits less time and attention than law making.⁹⁷ The net result is that both the quality of appellate justice and coherence in the law suffer. This section examines factors in the current structure, practices, and size of the courts of appeals that contribute to these ailments.

A. Dilution of Appellate Justice in Individual Cases

The courts of appeals have adopted internal reforms that hinge on changing the one variable appellate judges can control: the use of their own time.⁹⁸ Federal judges “have implemented rationing[, saving] their time for the cases they believe require the most, [and] delegating . . . work they view as routine to non-Article III adjuncts.”⁹⁹ Judges

court with too many cases “experiences severe tensions” in trying to perform both error-correction and law-making functions).

93. Joseph F. Weis, *Restoring the Authority of the District Court*, in *THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY* 97, 99 (Cynthia Harrison & Russell R. Wheeler eds., 1989).

94. See, e.g., Carrington, *supra* note 32, at 417.

95. See *id.* at 420 (noting that Supreme Court has “approved and encouraged this tendency”); *id.* at 428.

96. Robel, *supra* note 9, at 4.

97. See, e.g., Weis, *supra* note 8, at 455-57; see also Carrington, *supra* note 32, at 424-25 (stating that focus of the appeals courts has shifted to law making as evidenced by screening procedures designed to streamline the role of error correction).

98. Most notably, the courts of appeals have sharply reduced the time allotted for oral argument and the number of cases in which oral argument is allowed, and they publish fewer and fewer opinions. For example, in 1978, 33% of all courts of appeals cases terminated on the merits were decided without oral argument. See FCSC, *WORKING PAPERS*, *supra* note 72, at 76. In 1994, the figure is 59.4%. 1994 ANNUAL REPORT, *supra* note 73, tbl. S-1, at 28.

99. Robel, *supra* note 9, at 3-4. The cases that “require the most” are usually considered to be those calling for enunciation or clarification of the law, rather than those alleging error under settled law.

themselves no longer perform all the traditional tasks of judging in many cases.¹⁰⁰ And even when they do, they do so more hurriedly than in the past—and more quickly, perhaps, than justice requires.¹⁰¹ Judge Lay pointedly states that “the courts of appeals today may provide in many appeals only an appearance of justice rather than justice itself.”¹⁰²

Judges save time by eliminating oral arguments, processing each case more quickly, limiting the time spent conferring with other members of the panel, and writing fewer opinions. The fact that judges spend less time studying cases¹⁰³ must affect their decisions. When judges have insufficient time to study a case carefully, they may overlook errors. Cases decided without oral argument are nearly always affirmed.¹⁰⁴ The affirmance rate has risen in the years since internal reforms were implemented.¹⁰⁵ To the appellant, a rushed affirmance dilutes justice

100. *Id.*

101. According to Judge Lay, the federal courts of appeals “are so inundated by the volume of appeals that appeals as of right can no longer be given the full deliberative process to which they are entitled.” Lay, *A Proposal*, *supra* note 8, at 1151. Likewise, “the right to appeal has in practice begun to shrink to a mere formality . . . as appellate judges severely restrict oral argument, deliberate alone, write skeletal opinions, write unpublished opinions, affirm without opinion, and in some cases rule from the bench.” Dalton, *supra* note 59, at 63.

102. Lay, *A Proposal*, *supra* note 8, at 1155.

103. Robel, *supra* note 9, at 38.

104. *Id.* at 48 (reporting that in the Third Circuit, 61% of argued cases are affirmed, compared with 91% of non-argued cases). Lesser disparities exist in the other circuits. *Id.* It is difficult to sort out cause and effect. The high affirmance rate in cases not argued may indicate that the courts of appeals effectively sort out the cases presenting no difficult issues. But the high rate of affirmance may instead result from the courts’ failure adequately to explore the issues presented.

105. A subcommittee of the Federal Courts Study Committee opined that the falling rate of reversal indicates that cases on appeal are becoming easier. FCSC, WORKING PAPERS, *supra* note 72, at 37 (report of the Subcommittee on the Federal Courts and Their Relation to the States). But it is equally probable that the falling reversal rate means cases on appeal are not getting the attention they deserve. When time is short, when information is lacking, and when non-judicial personnel have a hand in the decision-making process, it is likely that more affirmances will result. See Carrington, *supra* note 22, at 554. Ordinary principles of decision and deference have always suggested that in a close case, the decision below should be affirmed. Thus, for example, the effect of an equally divided decision is to affirm the court below. Certain standards of review strongly favor affirmance unless, for example, the appellate court is persuaded that the lower court abused its discretion. See, e.g., *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 875 (1st Cir. 1995) (describing abuse of discretion standard as “deferential” and “not appellant-friendly”). The “harmless error” doctrine calls for affirmance despite the presence of acknowledged error, if the error is thought not to have dictated the outcome. See, e.g., *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1512 (D.C. Cir. 1995) (“harmless error inquiry ‘involves an assessment of the likelihood that the error affected the outcome of the case’”). But even

by failing to convince him or her that the case received the court's full attention.¹⁰⁶ When courts overlook errors, hasty affirmances deny justice. Moreover, internal reforms do not affect all litigants equally,¹⁰⁷ heightening the possibility of injustice in individual cases.

Appellate judges today rely increasingly on central and chambers staff to screen cases for summary review, read the transcript and the briefs, conduct legal research, draft opinions, and perform other tasks formerly reserved for judges.¹⁰⁸ In addition, they have delegated some opinion-writing tasks to clerks and staff attorneys.¹⁰⁹ To be sure, judges supervise the work of their clerks.¹¹⁰ But the act of decision-making—the judges' responsibility—cannot be separated from the steps of studying the case, reflecting on it, and explaining and justifying the result. To the extent that non-Article III personnel perform decisional tasks, judicial involvement declines and judicial accountability suffers.¹¹¹ Thus, the appellate process is diluted¹¹² from the model of careful and

deferential review requires significant time and attention. Determining whether the court below abused its discretion, or whether error below was "harmless" may call for a more searching inquiry than the abbreviated appellate process permits.

106. See Lay, *A Proposal*, *supra* note 8, at 1154 (characterizing denial of oral argument as "short-sighted justice" and as denial of litigant's "right to the full deliberative process of the courts"); Rubin, *supra* note 8, at 652 (describing "institutional judging").

107. Robel, *supra* note 9, at 49 (oral argument); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989) (non-publication and non-citation rules). Both articles argue that intramural reforms advantage repeat litigants such as the government and big business and disadvantage individual litigants, and further note that these reforms have been applied disproportionately to certain types of cases, such as social security benefits disputes.

108. Through a survey administered to appellate judges, the Federal Courts Study Committee found that "63% of respondents rely on their clerks to do at least some work they believe they should do themselves, and 30% do so 'often' or 'usually.'" FCSC, WORKING PAPERS, *supra* note 72, at 72. Similarly, 39% of appellate judges reported that they "sometimes," "often," or "usually" rely on staff attorneys to do work the judges believe they should do themselves. *Id.* at 74; see also FJC, ALTERNATIVES, *supra* note 8, at 13-15 (stating that the increasing caseload at the appellate level threatens just outcomes because of the resulting loss of collegiality); cf. Carrington, *supra* note 32, at 423 (describing appellate process of early 20th century).

109. Robel, *supra* note 9, at 38.

110. But see Rubin, *supra* note 8, at 652 (noting that judges "cannot completely review everything that . . . law clerks do or learn all that they know. Inevitably they assist him not only in routine tasks but in the work of judging.").

111. Robel, *supra* note 9, at 51 (noting that giving reasons is the "sine qua non" of accountability); see also FJC, ALTERNATIVES, *supra* note 8, at 13-15.

112. See, e.g., Rubin, *supra* note 8, at 653 (lamenting "dilution of judicial responsibility as we have come to know it").

wise judging that Article III sketches and society expects.¹¹³ Several federal appellate judges have commented that caseload pressures make it impossible for them to devote sufficient time and attention to ensure a thoughtful and principled decision in each case.¹¹⁴ The courts of appeals cannot short-circuit the deliberative decision-making process without provoking a significant reduction in the quality of justice provided to individual litigants. Reconceptualizing the appellate process is required to ensure adequate consideration of each case despite rising caseloads.

B. *Incoherent Law*

Caseload pressures and productivity-oriented reforms breed incoherence in federal law. Pressures of time strike at the heart of the decision-making process.¹¹⁵ The decisional process in the courts of appeals has traditionally been one of reflection and discussion, but judges report that they now have little time for either.¹¹⁶ Without the benefit of oral argument to sharpen the issues, and with insufficient time to study the records and briefs or to research the law, important issues may be missed or their nuances glossed over. And the sheer volume of cases requiring decision makes it difficult for appellate judges to focus on the need to develop a coherent body of law. Moreover, decision-making was formerly concentrated in a court of three judges, all of whom participated in each decision. It is now dispersed across numerous panels of much larger courts and often includes law clerks and staff attorneys in some tasks. Clarity in the law is bound to suffer as more people, some less familiar with the law than others, have a hand in the process.

113. See, e.g., *Bishop v. United States*, 223 F.2d 582, 585 (D.C. Cir. 1955) (describing trial judge as "wise, careful and experienced"); *In re Nathan N.*, 391 N.Y.S.2d 599, 600 (App. Div. 1977) (commending opinion in which judge "carefully and wisely exercised . . . wide discretion and grave responsibilities"); *Edwards*, *supra* note 7, at 888 (discussing habits of "careful judges"); *McCree*, *supra* note 9, at 780 (noting that judicial appointees are expected to possess "wisdom"); *Rubin*, *supra* note 8, at 656 (noting that "wise decisions" cannot be made by judicial assembly line).

114. *Robel*, *supra* note 9, at 38-40 (quoting judges' responses to a survey by the Federal Courts Study Committee). The Ninth Circuit has adopted additional measures to cope with its unusually large caseload and complement of judges. These measures include among others the use of "mini-en banc" panels to resolve intracircuit conflicts or to decide difficult or important issues. See *infra* note 127.

115. See, e.g., *Arnold*, *supra* note 66, at 542 (noting the "disturbing" trend that judges are spending less time on each case); Harry T. Edwards, *The Role of a Judge in Modern Society*, 32 CLEV. ST. L. REV. 385, 403 (1983-84) (noting that "[t]he bigger the dockets, the less time we spend on the difficult cases and the more mistakes we make.").

116. See, e.g., *Edwards*, *supra* note 115, at 420.

Internal reforms that limit opinion publication and the citation of unpublished opinions cloud the concept of "law" in a system based on precedent.¹¹⁷ Failure to publish statements of decisions and the underlying reasons is anathema to the concept of a law-making court, and creates confusion about which decisions are, in fact, "law." The courts of appeals' publication rules generally favor publication of "law-making" opinions, but this definition has proved difficult to apply.¹¹⁸ Prohibitions on the citation of unpublished opinions compound the problem by making it possible for courts to ignore prior rulings. These practices undermine the system of precedent, create a "secret" body of law, and fail to provide guidance for future cases.¹¹⁹ In short, they jeopardize coherent law development. But at the same time, the vast number of decisions rendered threatens coherence by creating innumerable rulings which are impossible to assimilate.¹²⁰

Fragmentation inherent in the current structure further undermines coherent law development. The concept of a "court" of appeals is a "sheer illusion"¹²¹ masking the reality that the "court" is merely a series of panels functioning in a totally ad hoc manner.¹²² 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.¹²³ Mechanisms intended to allow the full court to supervise its own law are breaking down.¹²⁴ The use of the en banc court¹²⁵ to resolve intracircuit conflicts or to decide issues of particular

117. See, e.g., Dragich, *supra* note 10, *passim*. In 1994, 74.2% of courts of appeals opinions were unpublished, ranging from 46.6% in the First Circuit to 86.6% in the Fourth. 1994 ANNUAL REPORT, *supra* note 73, tbl. S-3, at 30. Every circuit, except the First, publishes fewer than 50% of its decisions. *Id.*; see also Robel, *supra* note 9, at 49-50.

118. See, e.g., Dragich, *supra* note 10, at 788-91.

119. *Id.* at 785-800.

120. Gerald B. Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70.

121. Erwin N. Griswold, *The Federal Courts Today and Tomorrow: A Summary and Survey*, 38 S.C. L. REV. 393, 404 (1987).

122. *Id.* at 404-05; see also Parker & Hagin, *supra* note 7, at 217 (predicting that growth within circuits will exacerbate the "now-too-common 'law of the panel'").

123. Arthur D. Hellman, *Junboism and Jurisprudence*, 56 U. CHI. L. REV. 541, 543-45 (1989).

124. *Id.* at 545.

125. The Supreme Court approved the en banc procedure in *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326 (1941) (explicitly imposing upon the courts of appeals responsibility for maintaining stable law within each circuit). The Court's approval of en banc proceedings was later codified and now appears at 28 U.S.C. § 46(c) (1994). The *Federal Rules of Appellate Procedure* provides that en banc hearings or rehearings "ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding

importance is increasingly rare and unproductive.¹²⁶ At least in the Ninth Circuit, en banc review itself now involves the participation of only a minority of active judges currently sitting on that court.¹²⁷ But even full en banc review is, at best, a partial solution to the problem of maintaining the law of the circuit.¹²⁸ En bancs are inherently ineffective in enunciating the law.¹²⁹ Further, en banc decisions are subject to review by the Supreme Court.¹³⁰ Moreover, they have no nationwide relevance, and are no substitute for a Supreme Court ruling in guiding future conduct of multi-circuit actors.¹³¹ The decline in opinion publication contributes to the intracircuit conflict problem by making it difficult for subsequent panels to discover the potentially conflicting decisions of prior panels.¹³²

Adding judges further threatens coherence by exacerbating fragmentation. Each additional judge on a court represents a different view on new or difficult issues. Because of the lack of time for reflection and discussion to resolve subtle differences, this fact alone suggests that cases will more often be distinguished (fragmenting the rule) than

involves a question of exceptional importance." FED. R. APP. P. 35(a).

126. See CARRINGTON ET AL., *supra* note 18, at 162 (concluding that the increasing number of judges on a single court eventually causes ineffective en banc proceedings); Hellman, *supra* note 123, at 546-47; Michael A. Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 818 (1993) (reporting average of 7.5 en banc decisions annually per circuit for the years 1982-91); Tjoflat, *supra* note 120, at 72 (describing en banc proceedings within large circuits as "unpleasant, tiring and largely futile").

127. This procedure was authorized by statute in 1978 for courts having more than fifteen active judges. Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (codified at 28 U.S.C. § 46(c) (1994)). Ninth Circuit en banc panels now consist of eleven judges, selected at random, plus the Chief Judge. Twenty eight judgeships (not including senior judges) are authorized for that court. 28 U.S.C. § 44 (1994). For a description of the Ninth Circuit's en banc process, see Hellman, *supra* note 123, at 547. The pre-split Fifth Circuit declined to use the mini-en banc procedure. See, e.g., *United States v. Michael*, 645 F.2d 252, 259 (5th Cir. 1981) (noting that en banc court consisted of 24 judges).

128. See, e.g., Meador, *supra* note 39, at 643.

129. See, e.g., Carrington, *supra* note 32, at 427 (theorizing about how district judges and lawyers apply en banc rulings in later cases); Arthur D. Hellman, *Courting Disaster*, 39 STAN. L. REV. 297, 306 (1986) (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)) (noting that en banc courts "can resolve conflicts over which rule is to be chosen [but] cannot harmonize variant approaches to applying the rule").

130. Carrington, *supra* note 32, at 425 (noting that en bancs are, in effect, a fourth tier of courts in the federal system).

131. See, e.g., *id.*

132. Dragich, *supra* note 10, at 785-86.

harmonized into a coherent whole.¹³³ As the number of judgeships grows, the number of panel combinations possible within the circuit rises exponentially.¹³⁴ This fact, together with the pressures of time and the increasing rarity of opinion publication, creates a system in which intracircuit conflicts are sure to develop.¹³⁵ The “prior panel” rules adopted by the circuits are of little help in preventing intracircuit conflicts if prior rulings are unavailable or if judges and their clerks have insufficient time to locate and analyze them.¹³⁶ The likelihood that any of the current panel judges also participated in earlier, relevant decisions becomes increasingly remote as the court expands.¹³⁷

Intercircuit conflicts are an equally serious problem.¹³⁸ Though we live in an “increasingly federalized society,”¹³⁹ conflicts allow “the same provision of the Constitution or the same federal statute [to be] given differing authoritative meanings in different regions of the country.”¹⁴⁰ Though their existence is known, intercourt conflicts

133. See Rosenberg, *supra* note 67, at 722 (noting that the more decisions rendered by circuit panels, the less decisively they settle the national law because large numbers of decisions produce variations that cannot be reconciled); Rubin, *supra* note 8, at 650; Wilkinson, *supra* note 8, at 1174-75; see also FJC, ALTERNATIVES, *supra* note 8, at 13-15.

134. Tjoflat, *supra* note 120, at 71-72 (concluding that the large number of panel combinations, and resulting instability in the law, encourages appeals by litigants willing to chance the appellate process in hopes of drawing a sympathetic panel).

135. See FJC, ALTERNATIVES, *supra* note 8, at 93 (stating that intracircuit conflict increases with an increased judiciary because more and more decisions are being produced while at the same time more and more judges and staff are being added to handle the increasing caseloads).

136. Tjoflat, *supra* note 120, at 72 (commenting that unless judges strictly monitor the work of their colleagues, a task requiring increased amounts of the judges' scarce time as each additional judge is added to the court, the panels can easily bypass the “prior panel” rule).

137. See FRANK M. COFFIN, ON APPEAL 215 (1994) (noting that when First Circuit had only three judges, “There was no precedent created in which all of [them] did not participate.”).

138. A recent Federal Judicial Center Study helps fill in empirical evidence on the number and seriousness of intercourt conflicts that was lacking in earlier discussions of the problem. This study found a “considerably larger number” of unresolved conflicts than earlier studies predicted. FJC, ALTERNATIVES, *supra* note 8, at 58 (noting estimate of 215 separate conflicts passed over for review in Supreme Court's 1989 term). For a contrary view, see ESTREICHER & SEXTON, *supra* note 17, at 34-35 (noting that the “federal judicial system . . . reveals in its very structure that a degree of conflict is desirable, at least in the short run”).

139. ESTREICHER & SEXTON, *supra* note 17, at 128 (recognizing need for more effective national lawmaking but accepting present system of “multilayered, regionally diverse courts”).

140. The traditional acceptance of a certain level of conflicts is based on a belief in the value of “the percolation of law that is afforded by consideration of issues in

often go unaddressed by the Supreme Court.¹⁴¹ Even the potential (let alone the reality) for intercircuit conflicts in what should be uniform national law (such as the interpretation of federal statutes)¹⁴² hinders the activities of multi-state actors.¹⁴³ Both actual and potential conflicts raise the specter of unfairness to litigants and citizens.¹⁴⁴

The current structure treats the circuits as autonomous units within the intermediate tier.¹⁴⁵ Moreover, the courts of appeals have developed doctrines such as the "law of the circuit"¹⁴⁶ that emphasize

multiple circuits." See JUDICIAL CONFERENCE COMM. ON COURT ADMIN., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON LONG RANGE PLANNING (1993) [hereinafter LONG RANGE PLANNING], reprinted in Parker & Hagin, *supra* note 7, at 253. Baker has described the percolation theory as "perverse," Thomas E. Baker, *Imagining Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913, 962 (1994) [hereinafter Baker, *Imagining*], and as "nonsense." Thomas E. Baker, *Siskel and Ebert at the Supreme Court*, 87 MICH. L. REV. 1472, 1482 (1989) [hereinafter Baker, *Siskel and Ebert*] (reviewing SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE (1986)); see also Judith Resnik, *Tiers* (pt. 1), 57 S. CAL. L. REV. 840, 858 (1984) (noting acceptance of an "impressive quantity" of legal discord associated with circuit structure despite the fact that consistency is a "valued feature" of the legal system); Weis, *supra* note 8, at 462 (calling percolation theory "pernicious" to litigants).

141. Justice White, in particular, frequently pointed out the existence of conflicts when he dissented from the denial of certiorari. See, e.g., *Brown Transp. Corp. v. Atcon, Inc.*, 439 U.S. 1014, 1017-21 (1978) (White, J., dissenting from denial of certiorari); see also FREUND REPORT, *supra* note 6, at 580 (noting that conflicts are not as likely to be resolved by the Supreme Court now as they were when its docket was much smaller); Carrington, *supra* note 32, at 427 (noting that the federal courts fail "to resolve authoritatively many questions of interpretation of federal statutes").

142. See Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123, 126-31 (1992) (describing costs of statutory ambiguity resulting, in part, from conflicting interpretations of federal statutes).

143. FJC, ALTERNATIVES, *supra* note 8, at 60; HRUSKA COMM'N REPORT, *supra* note 6, at 207; Carrington, *supra* note 32, at 427.

144. See, e.g., CARRINGTON ET AL., *supra* note 18, at 210-11 (noting "significant problem of non-uniformity in the enforcement of national law").

145. See, e.g., Weis, *supra* note 8, at 459-64 (discussing circuit autonomy, law of the circuit doctrine, and percolation theory); Baker, *Imagining*, *supra* note 140, at 927 (characterizing autonomy as "ersatz," increasing the potential for intercircuit conflicts).

146. Established doctrine deems the holding of another circuit merely persuasive. See Thomas E. Baker & Douglas D. McFarland, *The Need for a National Court*, 100 HARV. L. REV. 1400, 1407 (1987). The autonomy of the circuits is thoroughly ingrained in the minds of federal judges. To illustrate, consider the comments of courts aware that they were creating intercircuit conflicts: *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1127 (7th Cir. 1993) ("Because this opinion creates a conflict among the circuits, it was circulated before release to all judges in active service. . . . None favored a hearing in banc."); *United States v. Vasquez-Olvera*, 999 F.2d 943, 943 (5th Cir. 1993) ("A copy of this opinion was circulated to all active judges prior to the issuance hercof; and a majority of the judges declined to seek en banc consideration of the issue as to which this

their regional focus.¹⁴⁷ The very concept of the “law of the circuit” is anomalous under a Constitution that establishes federal—not regional—courts.¹⁴⁸ Professor Carrington put it bluntly: “for institutions given to law-making, [the courts of appeals] are organized as poorly as can be imagined.”¹⁴⁹ But nothing in the governing legislation or current case law requires the courts of appeals to adopt a broader focus. Nor do circuits have the power to act outside their own boundaries.¹⁵⁰ Arguably, the present structure of the federal court system, by allowing conflicts to develop, is at odds with societal

opinion will create a conflict with another circuit.”). The Judicial Conference of the United States opposed a recommendation of the Federal Courts Study Committee that the circuits be required to follow each others’ prior decisions unless “plainly wrong.” *REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S.* 88 (1990); *see also* Rosenberg, *supra* note 67, at 723 (noting that it is no surprise, given the “ambiguous” position of courts of appeals judges, that “they follow their separate lights and that univocal resolution of a common issue is not their highest priority”); Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 *YALE L.J.* 677, 686 (noting that although “Congress may never have intended that the concept of law of the circuit develop, . . . [it] was inevitable because the Evarts Act directed each court of appeals to interpret federal law, independently”). According to Marcus, “independent decisionmaking by each court of appeals . . . is inherent in the system created by the Evarts Act.” *Id.* at 687.

147. *See, e.g.*, CARRINGTON, ET AL., *supra* note 18, at 210 (noting that this concept of “regional law” was introduced “not because territoriality is intrinsically desirable, but because the Supreme Court could not be responsible for harmonizing all decisions of all panels of a court of appeals”).

148. *See infra* notes 182-84 and accompanying text.

149. Carrington, *supra* note 32, at 434.

150. No circuit has the power to address actual or potential intercircuit conflicts, other than by weighing in on one side or the other. In reaching decisions, panels often consider the potential for creation of an intercircuit conflict. *See, e.g.*, *In re Mayer*, 51 F.3d 670, 675 (7th Cir. 1995) (“we do not create conflicts among the circuits without strong cause”); *United States v. Humphreys*, 34 F.3d 551, 560 (7th Cir. 1994) (“we should be hesitant to create intercircuit conflicts and to overrule decisions of this circuit”); *United States v. Larm*, 824 F.2d 780, 784 (9th Cir. 1987) (“absent some good reason to do so, we are disinclined to create a direct conflict with another circuit”). *But see* *Achison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 443 (7th Cir. 1994) (“while we carefully consider the opinions of our sister circuits, we certainly do not defer to them. . . . Our duty is to independently decide our own cases, which sometimes results in disagreements with decisions of the other circuits.”) (emphasis added); *United States v. Edwards*, 13 F.3d 291, 294 (9th Cir. 1993) (“we recognize that our decision . . . will create an intercircuit conflict . . . [but] we cannot adopt the Fifth Circuit’s rationale because we are bound by the law of this circuit . . . in the absence of an intervening Supreme Court decision or an Act of Congress”); *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393, 1400 (8th Cir. 1986) (“because we are not bound by the precedents of other circuits, we are free to make a new assessment of [the] issue”).

expectations that expanding federal law be applied uniformly across the country.

The Supreme Court, of course, considers the development of law from a national perspective, but its inability to decide more than about 150 cases per term renders it incapable of effectively performing this function.¹⁵¹ Of necessity or by preference, the courts of appeals have assumed much of the law making role now unattended to by the Supreme Court.¹⁵² The current structure prevents the courts of appeals from effectively performing this function by rendering them incapable of “speak[ing] to any nation-wide problems with definitive or unifying authority.”¹⁵³ Thus, appellate capacity at the national level is

151. Some commentators have argued that the Supreme Court is capable of hearing and deciding more cases. *See, e.g.*, William O. Douglas, *The Supreme Court and Its Caseload*, 45 CORNELL L.Q. 401, 402 (1960) (calling the claim that the Supreme Court is overworked a “myth”); Erwin N. Griswold, *Rationing Justice: The Supreme Court’s Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 338 (1975) (citing judges who believe the United States Supreme Court is not overworked). Others have suggested that the Court could do a better job of selecting cases, so that, for example, it could resolve all cases of inter-circuit conflict. *See, e.g.*, COFFIN, *supra* note 137, at 308; ESTREICHER & SEXTON, *supra* note 17, at 116. I take no position on this question other than to note that the Supreme Court’s output has been relatively steady over the years, although the marked decline in cases taken during the 1994-95 Term raises further doubts about the likelihood of an expansion of the Supreme Court’s docket. *Cf.* Nihan & Rishikof, *supra* note 73, at 351 (noting that Supreme Court’s caseload has fallen from peak of 184 cases in 1983).

152. *See, e.g.*, Carrington, *supra* note 32, at 424 (noting that tendency of intermediate courts to emulate Supreme Court’s law-making role, together with caseload growth, has led to Supreme Court’s loss of “effectiveness of command” over federal court system). The Supreme Court is no longer able to exercise reasonable supervision over the development of federal law. In 1993, the Supreme Court reviewed 0.25% of federal appeals court dispositions, and only 2.36% of cases in which petitions for certiorari were filed. Dragich, *supra* note 10, at 767-68. Typically the Supreme Court hears as few as 55 cases per year in all areas of federal non-constitutional law. HRUSKA COMM’N REPORT, *supra* note 6, at 212. One commentator notes that the Supreme Court “has almost abandoned any attempt to supervise the application of commercial and business law in the private sector,” although these cases made up the bulk of the Supreme Court’s early jurisdiction. Paul M. Bator, *Commentaries I*, 38 S.C. L. REV. 449, 450 (1987). Moreover, access to the Supreme Court “is now very much in the hands of the . . . federal government.” *Id.* at 450-51. Private litigants have virtually no chance for Supreme Court review. *Id.* at 451. The infinitesimal sampling of cases considered by the Court affords it insufficient opportunity to exercise meaningful supervision or control over the development of federal law.

153. Rosenberg, *supra* note 67, at 723 (noting that the federal court system “theoretically speaks through one supreme voice but actually babbles with many heads and even more mouths”).

insufficient.¹⁵⁴ Appellate capacity cannot be increased at the Supreme Court level.¹⁵⁵ The establishment of largely discretionary Supreme Court review has been wholly inadequate to allow the Court to review more than a minute fraction of the output of the courts of appeals. Therefore, reform must occur in the intermediate tier.

IV. REQUIREMENTS FOR INTERMEDIATE FEDERAL APPELLATE COURTS IN THE THIRD CENTURY

Several characteristics define the courts of appeals today: (1) they are the only courts between the district courts and the Supreme Court, (2) they take appeals as of right, (3) they sit in three judge panels (except for rare en banc proceedings), and (4) they are organized geographically into circuits.¹⁵⁶ They are, for the most part, generalist courts.¹⁵⁷ These characteristics are so ingrained that a radically different structure is almost inconceivable. But the federal courts are faced with a crisis that will require "fundamental change."¹⁵⁸ This section posits requirements for the federal intermediate appellate courts in their third century, against which the reforms discussed in succeeding sections of this Article should be evaluated. These requirements derive from three sources: the functions of the federal courts, basic tenets of appellate justice, and lessons from the past and present structure of the federal court system.

As in architecture, the federal courts' structure should follow from their functions. According to the Federal Courts Study Committee, the federal courts currently fulfill six major functions.¹⁵⁹ The federal courts enforce the United States Constitution; protect the interest of the federal government as sovereign; serve as an umpire in interstate disputes; assure uniform interpretation and application of federal law; develop the federal common law; and hear appeals from other adjudicatory bodies, such as

154. The "need for . . . a larger number of nationally binding adjudications" was the "major factual premise" of the Hruska Commission. Rosenberg, *supra* note 67, at 718. *But see* ESTREICHER & SEXTON, *supra* note 17, at 2, 133.

155. Estreicher and Sexton disagree. They propose "changes in the case selection process designed to minimize the over-granting phenomenon" ESTREICHER & SEXTON, *supra* note 17, at 116.

156. BAKER, *supra* note 19, at 231; FCSC REPORT, *supra* note 6, at 113.

157. The Federal Circuit, of course, departs from a truly generalist model. But some commentators point out that its subject matter jurisdiction is broad enough to retain many aspects of a generalist court. *See, e.g.,* Plager, *supra* note 8, at 860, 864; Daniel J. Mcador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 611-12 (1989).

158. FCSC REPORT, *supra* note 6, at 109.

159. FCSC, WORKING PAPERS, *supra* note 72, at 108-25.

administrative agencies.¹⁶⁰ These functions require that the federal courts be structured to promote the uniform interpretation of the United States Constitution and federal statutes and regulations, and the orderly development of federal common law. Thus, adequate national law-making capacity must be built in, and the potential for conflicting rulings must be minimized. The fact that “we are a continent . . . [requiring] a system of national courts workable over so vast and diversified a country”¹⁶¹ profoundly influences the structure of the federal courts. It highlights the need to build in a national focus without entirely losing sight of local concerns.

Basic tenets of appellate justice must also inform any proposed modification of the federal court structure. These principles are fundamental (and perhaps obvious); all proposed structural forms must be measured against them. In the United States, rough consensus exists on the following premises.

First, the legitimacy of the federal court system depends on the personal responsibility and accountability of judges.¹⁶² Internal reforms have weakened this tradition. Proposed reforms must augment, not further restrict, the personal involvement of judges throughout the decisional process and must encourage judges to provide reasons for their decisions.¹⁶³ Adding judges to increase available judge-time, or restricting caseload by eliminating appeals as of right, are two possible ways to restore a higher level of participation by and accountability of judges in appellate decision-making.

Second, the system must provide for a check on the enormous power of individual federal judges, who are insulated from the political process once appointed.¹⁶⁴ This means that every litigant deserves one real

160. *Id.* Two of these functions, protecting the federal government’s interests as sovereign and resolving interstate disputes, are primarily matters of federal-state jurisdiction and hence, are outside the scope of this Article. Moreover, these two functions account for a relatively small part of the overall caseload. *Cf.* Beale, *supra* note 66, at 988-90 (discussing core constitutional functions of the federal courts).

161. FRANKFURTER & LANDIS, *supra* note 3, at 217.

162. *See, e.g.*, COFFIN, *supra* note 137, at 231-32, 243-45 (discussing legitimacy and accountability); *id.* at 302 (describing core values of individual integrity, pride in demanding intellectual work, and climate of security and independence that form the essence of appellate judging).

163. *See* CARRINGTON ET AL., *supra* note 18, at 10; Ruth B. Ginsburg, *The Obligation to Reason Why*, 37 U. FLA. L. REV. 205, 221-23 (1985) (discouraging the practice of abbreviated appellate opinions stating no reason for decision). On the historical link between written opinions and development of the common law, see Dragich, *supra* note 10, at 768-75, and sources cited therein.

164. This was a central premise of the Evarts Act. *See* FRANKFURTER & LANDIS, *supra* note 3, at 86-87 (describing power of district judges and noting practical lack of

appeal.¹⁶⁵ Otherwise, the system fails to provide adequately for the correction of errors. Elimination of the right to appeal would tell litigants they are “dependent on the reactions of a single judge whose decisions will be reviewed by a higher authority only as an act of grace.”¹⁶⁶ Fairness requires that appeals be heard by panels to guard against arbitrary, idiosyncratic decisions of individual judges.¹⁶⁷ Reformers must respect these principles. Discretionary appeals and appeals to a single judge, both of which would increase judge-time per case, run afoul of the right to one real appeal.

Third, justice should be swift and certain.¹⁶⁸ Swift justice requires that the appellate process not be unduly lengthened.¹⁶⁹ Adding a fourth tier would likely do just that. Moreover, any new structure should be capable of absorbing projected caseloads and adapting to other changes that confront the courts, without experiencing unacceptable delay. Certainty demands that a final decision be reached at a fairly early stage, not only after multiple appeals. The structure must encourage the development of a stable, predictable body of law that is faithful to pre-existing authority, but also flexible enough to respond to societal changes.¹⁷⁰ Thus, the new structure should facilitate the early

review of their decisions); *id.* at 109; FRIENDLY, *supra* note 66, at 43 (criticizing proposal by Judge Hufstedler that would allow trial judges to participate on appellate panels reviewing their decisions); Resnik, *supra* note 22, at 607 (discussing congressional debates concerning creation of courts of appeals); Resnik, *supra* note 140, at 850 (describing desirability and methods of circumscribing power of judiciary).

165. The right to appeal proceeds from statute, not from the Constitution. *McKane v. Durston*, 153 U.S. 684, 687 (1894). For 100 years, defendants in criminal cases had no right to appellate review. *Carroll v. United States*, 354 U.S. 394, 400 (1957); *see also* FRANKFURTER & LANDIS, *supra* note 3, at 109. From 1891-1925, two appeals of right were provided in several types of cases, but the 1925 Act clearly established that one mandatory appeal was sufficient. *Id.* at 260-62. Nevertheless, the “right” to appeal without obtaining leave of the court is “nearly universal” in the United States, and has become “sacrosanct.” Dalton, *supra* note 59, at 62. So thoroughly ingrained is this “right” that few commentators even bother to justify it. *Id.* at 66.

166. Carrington, *supra* note 32, at 431 (noting further that “discretionary accountability . . . [looks] . . . very much like no accountability at all”).

167. *See, e.g.*, FRANKFURTER & LANDIS, *supra* note 3, at 79 (noting that prior to 1891, single district judges often constituted the ultimate court of appeals); *see also id.* at 87, 109. Moreover, multiple decision makers may yield better results. Resnik, *supra* note 140, at 856.

168. *See, e.g.*, The Speedy Trial Act, 18 U.S.C. § 3162(a) (1988). One of the most common complaints by users of the federal courts is that it takes too long to resolve a dispute. Parker & Hagin, *supra* note 7, at 213.

169. Rosenberg, *supra* note 67, at 715-16.

170. *See* Dragich, *supra* note 10, at 775-80. *But see* Wallace, *supra* note 7, at 917-19 (pointing to the major judicial reformations, such as Evarts Act and Judges Act of 1925, as evidence that Congress has historically placed uniformity of federal law

resolution of conflicts, and, more importantly, should discourage the development of conflicts in the future. It also must seek to enlarge the capacity for providing final decisions of nationwide applicability.

The structural evolution of the federal courts provides additional lessons to guide reformers. From the beginning, Congress has provided for trials, correction of error, supervision of the court system, and the enunciation of federal law.¹⁷¹ The 1789 Act, however, neither assigned each of these functions to a single court, nor endowed each court with a distinct mission. Instead, it split trial jurisdiction between the district and circuit courts, and assigned the circuit courts both trial and appellate jurisdiction.¹⁷² In addition, the 1789 Act assigned the Supreme Court responsibility for both error correction and enunciation of the law. The 1891 Act, on the other hand, appears to have adopted the premise that each court should have a distinct mission.¹⁷³ Thus the district courts were designed as trial courts, the courts of appeals as error-correction courts, and the Supreme Court as the law-making court. As noted earlier, the courts of appeals presently depart from this model by performing both aspects of the appellate function. It is no coincidence that the appellate crisis today, like the one of the last century, is lodged in the tier that bears the burden of both error correction and law making. The idea that each court should have a distinct mission is still sound,¹⁷⁴ and should guide reform efforts. But structural reforms must not impinge upon the Supreme Court's ability to control its own docket, nor appear to create another final, national law-making tribunal. Reformers must separate error correction from law making,¹⁷⁵ and must also find a way to distinguish the role of the intermediate tier vis-a-vis the Supreme Court in law making.

Both the 1789 and 1891 Acts constituted some courts, at least in part, of judges assigned to other courts.¹⁷⁶ The 1911 Act established the

second in importance to supremacy and should continue to do so).

171. See FRANKFURTER & LANDIS, *supra* note 3, at 11-12 (discussing 1789 Act); *id.* at 99 (discussing 1891 Act).

172. For a recital of early, strenuous objections to this structure, see *id.* at 17-20.

173. *Id.* at 129.

174. ROSCOE POUND, ORGANIZATION OF COURTS 107 (1940) (noting that circuit courts, which under 1789 Act had both original and appellate jurisdiction, came to be thought of as intermediate appellate courts, and that 1891 Act essentially ratified this development); *id.* at 195 (describing as "anomalous" the system of two courts of general trial jurisdiction).

175. See Varat, *supra* note 90, at 905-06.

176. Both Acts constituted circuit courts of Supreme Court justices and district judges. Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 72; Act of Mar. 3, 1891, ch. 517, § 3, 26 Stat. 826, 827; see FRANKFURTER & LANDIS, *supra* note 3, at 14 (noting that three tiers of courts were operated by two sets of judges, and describing resulting problems);

principle that each court should have its own judges.¹⁷⁷ Personal accountability and institutional loyalty are well served by this principle. Collegiality is more likely to develop on a court of stable composition than on one that draws judges from other courts. Judges who regularly have to answer to each other for their decisions are likely to feel a heightened sense of accountability, and judges assigned to a single court probably develop a stronger identity with that court and its mission than would judges who shift from one court to another.¹⁷⁸ Reform proposals should retain the concept of assigning each court its own judges.

Traditionally, the federal court system has resembled a pyramid¹⁷⁹ with fewer and fewer cases moving up the hierarchy to courts of broader geographic scope and greater finality.¹⁸⁰ The pyramidal shape is currently distorted by the burgeoning middle level and the extreme narrowing of the final tier.¹⁸¹ Assuming the pyramidal shape to be sound, reform proposals should restore it.

Other structural features of the federal court system, while they have persisted from the 1789 Act to the present, are not essential. The regional organization of the federal courts is one example. Dividing the federal courts into regions was prudent when prevailing modes of transportation and communication made it impractical to operate the federal courts on a nation-wide basis.¹⁸² Numerous realignments of

Carrington, *supra* note 32, at 426 (likening existence of en bancs as an additional tier without a separate rank of judges to the situation under the 1789 Act).

177. Act of Mar. 3, 1911, ch. 1, § 1, 36 Stat. 1087, 1087 (providing for appointment of district judges); *id.* ch. 6, § 118, 36 Stat. at 1131 (providing for circuit judges); ch. 7, § 136, 36 Stat. at 1135 (providing for judges of the Court of Claims); *id.* ch. 8, § 188, 36 Stat. at 1143 (providing for judges of the Court of Customs Appeals); *id.* ch. 10, § 215, 36 Stat. at 1152 (providing for Supreme Court justices). The sole exception concerns the short-lived Commerce Court, which was to draw judges "assigned thereto by the Chief Justice of the United States, from amongst the circuit judges of the United States, for the period of five years." *Id.*, ch. 9, § 200, 36 Stat. at 1146.

178. Judge Weis underscores the importance of judges' psychological identification with the court on which they sit, noting that, under his proposal, "judges would *think of themselves* as members of a court that issues opinions on uniform, national law." Weis, *supra* note 8, at 466 (discussing unified court of appeals) (emphasis added).

179. See POSNER, *supra* note 13, at 13, 317.

180. ABA STANDING COMM. ON FED. JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH 3 (1989) [hereinafter ABA, REEXAMINING STRUCTURE].

181. Cf. POSNER, *supra* note 13, at 14 (noting difficulty of expanding intermediate tier and apex).

182. Weis, *supra* note 8, at 464. The regional organization also reflected a young country in which state and regional identity was as strong as, and often stronger than, national identity. See Nihan & Rishikof, *supra* note 73, at 370 (noting that regional structure balanced need for national uniformity and regional diversity).

regional boundaries¹⁸³ over the years, however, indicate that the regional structure is a matter of convenience and is not based on fundamental principles.¹⁸⁴ A second example is the constitution of the federal courts as generalist rather than specialized tribunals. Although the federal courts were originally (and for the most part, still are) generalist courts, the creation of some specialized federal courts casts doubt on the theory that all federal courts must remain general tribunals.¹⁸⁵ Moreover, the regional circuits have developed particular expertise in specialized cases they are called upon more frequently than other circuits to decide.¹⁸⁶ Traditional features of the federal court system, such as regionalism and generalism, should be reexamined in light of current societal conditions and the functions the federal courts are presently expected to fulfill.

183. See Nihan & Rishikof, *supra* note 73, at 371-74 (describing numerous realignments since 1789); Thomas E. Baker, A Background Paper on the Circuit Boundaries of the United States Courts of Appeals, in FCSC, WORKING PAPERS, *supra* note 72, ch. II, § A.

184. The regional organization of the courts of appeals is unrelated to principles of federalism, which concern the relationship between states and the federal government. The organization of federal district courts so that no district (with the minor exception of the District of Wyoming, see 28 U.S.C. § 131 (1994)) overlaps state boundaries reflects the importance of local concerns. Judicial accountability is heightened when the judge is a member of the same community, relatively speaking, as litigants. It is important, too, that federal judges have the requisite expertise to apply state law. But even under the current structure of the federal courts, these concerns are satisfied only at the district court level. On appeal, litigants are not assured a panel including a judge from their home state. For many litigants, the odds are overwhelmingly against drawing a home-state judge. And even assuming judges from nearby states are more sympathetic to litigants' arguments than judges from distant states, current regional circuit boundaries establish courts designed poorly, if at all, to effectuate shared regional concerns. For example, Arkansas and North Dakota are both in the Eighth Circuit, but appear to have little in common. On the other hand, states such as Minnesota and Wisconsin, or Wyoming and Montana, share common interests but are assigned to different circuits. Arguably, the 1789 design contemplated the need for national uniformity and addressed that need by requiring Supreme Court justices to ride circuit. This feature was lost when circuit-riding became overly burdensome, but was not necessarily rejected in principle. See Weis, *supra* note 8, at 459 (discussing passage of Evarts Act despite flaw of failure to provide for intercircuit consistency).

185. See, e.g., Plager, *supra* note 8, at 864.

186. For example, the Second and Third circuits are considered experts in commercial law, the Fifth in admiralty law, and the Fifth and Ninth in immigration law. Cf. Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 728 n.171 (1984) (noting that the perception of expertise of the Second Circuit in securities and Ninth Circuit in Indian and federal land management cases may cause other circuits to defer to rulings of those courts).

Finally, reform proposals must be evaluated in relation to the problems they are trying to solve.¹⁸⁷ Not all reformers see the same evils in the caseload crisis. Some, for example, focus on federal judges' heavy workload, others on delays in the delivery of justice, still others on the presence of inter- and intra-circuit conflicts as a source of injustice. This Article focuses on two effects of the caseload crisis and internal reforms: the dilution of appellate justice and the growing incoherence in federal law. Thus, in my analysis reforms are judged beneficial if they: (1) promote greater involvement of Article III judges in the appellate process (or at least avoid further degradation of appellate decisionmaking); or (2) facilitate the development of a coherent body of federal law by encouraging well-considered decisions, promoting publication of all law-making decisions, or lessening the potential for conflicts to develop.

V. PROPOSED STRUCTURAL REFORMS, APPELLATE JUSTICE, AND THE DEVELOPMENT OF LAW

This section reviews major proposals for structural reform in the courts of appeals,¹⁸⁸ measuring them against the requirements outlined in the preceding section. Reform proposals fall into four broad categories: (1) adding more judges to keep pace with caseload, while adopting mechanisms similar to those now used in the Ninth Circuit to cope with increased court size; (2) adding a fourth tier court between the courts of appeals and the Supreme Court to reduce intercircuit conflicts; (3) implementing a system of discretionary appeals, at least for certain types of cases; and (4) adjusting the present circuit structure. Although innumerable variations exist within each category, prototypical models show how each of these reforms might impact appellate justice and the coherent development of federal law.

A. More Judges

Adding more judges within the existing structure has long been Congress' response to caseload problems in the federal courts.¹⁸⁹ Currently, the Judicial Conference determines the need for additional judgeships according to workload formulas and other factors, and submits

187. Edwards, *supra* note 7, at 873.

188. Because I assume that Congress will not significantly reform the jurisdiction of the federal courts, I do not consider proposals to divert cases into other forums, such as new Article I courts, alternative dispute resolution mechanisms, and the like.

189. FCSC, WORKING PAPERS, *supra* note 72, at 94; *see also* Reinhardt, *supra* note 8, at 1; Rubin, *supra* note 8, at 656.

its recommendations to Congress.¹⁹⁰ Congress “is under no obligation to adopt [these] recommendations,” but usually does so eventually.¹⁹¹ This solution is inherently reactive because it is implemented only after pressures have become acute.¹⁹²

Those who favor expanding the size of the federal judiciary believe that “Congress will surely expand jurisdiction” and that as federal caseloads grow, Congress will be “incapable of the carefully calibrated adjustments to jurisdictional statutes that might otherwise restrain federal filings.”¹⁹³ Without additional judges, the courts would be forced to adopt “massive changes,” such as providing a “much greater role for staff [or] severely truncat[ing] procedures.”¹⁹⁴ Instead, increasing the size of the judiciary by double or more would represent a “comparatively small” national investment that would “ensure fair hearings to all persons entitled to the federal forum”¹⁹⁵ Under this view, adding judges would counteract—and possibly reverse—the dilution of appellate justice.

Conversely, many have argued that a moratorium on additional judges is required.¹⁹⁶ In terms of the development of law, the remedy of adding judges has been described as creating a “judicial Tower of Babel.”¹⁹⁷ More and more judges—or more properly, more and more panels—speak in disharmonious voices on federal law.¹⁹⁸ Adding

190. FEDERAL JUDICIAL CTR., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES 8 (1993) [hereinafter, FJC, MORATORIUM]. Some circuits, most notably the Eleventh, have declined to request the Conference’s recommendation of additional judgeships to which they would be entitled under the workload formulas.

191. *Id.* at 9.

192. *See, e.g.*, BAKER, *supra* note 19, at 201-02 (stating that this “ad hoc solution” adds more problems to the courts of appeals and fails to provide any long-term relief); J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 270 (1981) (suggesting additional judgeships are only a “quick fix” for small circuits, and only adds to problems of instability and coherence in larger circuits); Thomas E. Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 FLA. L. REV. 225, 278 (1985) (noting gap between the need for and creation of judgeships and further noting problems of assimilating large numbers of new judges added at once); Wilkinson, *supra* note 8, at 1161-63 (arguing that the formulaic method of appointment of new judgeships ignores critical considerations such as new jurisdiction, increased judicial workload and limited judicial resources, thus perpetuating a congressional cycle of increasing judgeships and increasing federal jurisdiction).

193. FJC, MORATORIUM, *supra* note 190, at 25 (summarizing arguments against a moratorium).

194. *Id.* at 44.

195. *Id.* at 25-26.

196. *Id.* at 26-54 (evaluating arguments for and against a moratorium).

197. Meador, *supra* note 39, at 642; *see also* Jon D. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993).

198. Ginsburg, *supra* note 8, at 11; Posner, *supra* note 8, at 762-65 (commenting that on a court of more than nine judges, deliberation resembles that of a legislature more

judges within the existing circuit structure exacerbates the problem of intracircuit conflicts, as large circuits find it increasingly difficult to ensure control by the majority over the law of the circuit.¹⁹⁹ Adaptations such as increasing reliance on chambers staff, reduction in time available for review and discussion of draft opinions, and non-publication of opinions have removed the safeguards that were intended to allow a “court” to sit in rotating panels while still providing for coherent development of the body of law under the watchful eyes of all its members. Furthermore, divergent panel rulings within a circuit represent additional points of potential conflict with rulings in other circuits.

Quite apart from its impact on the development of law, adding judges is no remedy for the current problems of the courts of appeals.²⁰⁰ Congress simply cannot add new judgeships fast enough to keep pace with the rising tide of appeals.²⁰¹ Even after the massive influx of new judges authorized in the 1990 Biden Bill,²⁰² the lower federal courts are

than a judicial body, and arguing that addition of more appellate judges would “seriously degrad[e] the quality of federal appellate justice”); *see also* Tjoflat, *supra* note 120, at 71-73 (stating the addition of each new judge further threatens coherence and uniformity, increases litigiousness, and decreases the court’s ability to protect litigants rights).

199. See ABA, REEXAMINING STRUCTURE, *supra* note 180, at 7-8 (concluding that increasing the size of the judiciary increases the cost of resolving intracircuit conflicts because more judges must sit en banc, unless measures similar to the Ninth Circuit’s mini-en banc approach are adopted); JUDICIAL CONFERENCE OF THE U.S. COMM. ON LONG RANGE PLANNING, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 17 (Comm. Print 1994) (noting the prohibitive cost of additional facilities and concluding that unrestrained increase in the number of judgeships is not economically or practically feasible).

200. See, e.g., COFFIN, *supra* note 137, at 217 (noting that need for judges will continue to rise and that capping the size of the judiciary would result in the exclusion of many litigants from the judicial process); Baker, *supra* note 192, at 276 (noting that impact on appeals per panel ratio lasts only one year after addition of judges). As long ago as 1954, Justice Frankfurter warned that adding judges would not alleviate caseload pressures but would threaten the quality of the federal judiciary. *Lumbermen’s Mut. Casualty Co. v. Elbert*, 348 U.S. 48, 58-59 (1954) (Frankfurter, J., concurring).

201. See FCSC REPORT, *supra* note 6, at 6-8 (acknowledging that expanding judicial and support staff at any level within the federal courts cannot meet the unlimited increases in caseloads in the long run, in part because of the three-tier structure); BAKER, *supra* note 19, at 199 (suggesting “the crisis of volume has exceeded existing judge-staffing mechanisms”).

202. The Judicial Improvements Act of 1990, Pub. L. No. 101-650, §§ 202-203, 104 Stat. 5089, 5098-5101 (adding 11 court of appeals judges, 61 district judges, and 13 temporary judgeships). The Senate Judiciary Committee, however, “emphatically reject[ed]” the view that adding judges was sufficient to correct problems of cost and delay in the federal courts. S. REP. NO. 416, 101st Cong., 2d Sess. 2 (1990).

as overworked as ever.²⁰³ The circuits are approaching a size at which they cannot function as designed.²⁰⁴ Some argue that expanding the size of the federal judiciary may have the effect of reducing the quality of judges.²⁰⁵ In short, maintaining a relatively small appellate judiciary is necessary “to protect [the judiciary’s] effective working relations, prevent undue inter- and intra-court conflicts, avoid an unacceptable number of mediocre appointments, and provide the public with an effective and respected forum.”²⁰⁶ Moreover, proponents of a moratorium argue that it would “force Congress to control jurisdictional expansion and restrict unnecessary access to the courts.”²⁰⁷

Many of the arguments against adding judges hinge on the specific characteristics of the courts of appeals as presently structured.²⁰⁸ If the current regional structure were abandoned, or if subject matter specialization were adopted, arguments against expanding the judiciary would lose some of their force. Either of these structural modifications

203. Wilkinson points out that, after packing the lower federal courts to reach a total of 828 federal judges in 1990, Congress feels encouraged to confer further federal jurisdiction on the courts, thus continuing the cycle of increased workloads and increased judgeships. Wilkinson, *supra* note 8, at 1163-64.

204. The conventional view is that a circuit should have no more than nine active judges. See ADMINISTRATIVE OFFICE OF U.S. COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 15 (1964). At present, every circuit except the First exceeds this number. See 28 U.S.C. § 44 (1994). The Ninth Circuit is presently authorized 28 judgeships. *Id.* Although the courts of appeals grew beyond nine judges with little apparent difficulty, the prospect of circuits of forty, fifty, or more judges is anathema to most commentators. See, e.g., Edwards, *supra* note 7, at 918 (arguing that increasing the federal judiciary at the appellate level threatens the circuits’ manageability as well as judicial collegiality). *But see* Reinhardt, *supra* note 21, at 52.

205. See, e.g., FCSC, WORKING PAPERS, *supra* note 72, at 95-97; Newman, *supra* note 8, at 763-66 (arguing that an increase in federal judgeships decreases the quality of the selection process, as well as the quality of performance); Wilkinson, *supra* note 8, at 1167-78 (concluding that increasing the number of federal judgeships decreases collegiality at the appellate level, destabilizes the law of the circuit, and lowers the quality and status of the position).

206. FJC, MORATORIUM, *supra* note 190, at 23 (summarizing arguments in favor of a moratorium).

207. *Id.* at 24; *cf.* Posner, *supra* note 8, at 761 (arguing further that a moratorium on the number of district court judgeships is the simplest and cheapest way to stem the rising flow of the appellate caseload).

208. See FCSC REPORT, *supra* note 6, at 7-8 (noting that “the reason that the federal courts cannot accommodate unlimited increases in the demand for their services by expanding their personnel lies both in the character of the federal judiciary and the limitations of the pyramidal three-tier system within which federal courts now operate”); *cf.* POSNER, *supra* note 13, at 148 (commenting that perceived disadvantages of reform proposals such as those calling for specialized courts assume maintenance of the existing court structure).

would lessen potential conflicts.²⁰⁹ But under the present structure, adding judges in sufficient numbers to keep pace with burgeoning caseloads would be counterproductive to maintaining coherence in federal law.

B. Fourth Tier

Numerous studies have recommended the creation of a fourth tier appellate court located above the courts of appeals.²¹⁰ Reformers have postulated a variety of relationships between the Supreme Court and the new court. The Freund Group²¹¹ in 1972 proposed a National Court of Appeals, to be charged with screening all cases seeking Supreme Court review.²¹² This new court would pass several hundred cases on to the Supreme Court each year.²¹³ The new court's denial of further review would be final.²¹⁴ The proposed new court would decide on the merits cases of inter-circuit conflict involving issues that did not warrant Supreme Court review.²¹⁵ The Freund Group proposed that the National Court of Appeals be composed of seven active circuit judges serving limited, staggered terms,²¹⁶ and sit as a unitary court, not in panels. The objective of this plan was to conserve the Supreme Court's time for law making by relieving it of the burden of screening petitions of review.²¹⁷ It also sought to secure prompt and final resolution of inter-circuit conflicts.

209. Posner, *supra* note 8, at 790.

210. Major proposals in this category include the report of the Freund Committee, Chief Justice Burger's inter-circuit tribunal proposal, and other proposals for a national court of appeals. The possibility of a fourth tier was mentioned as early as 1928. FRANKFURTER & LANDIS, *supra* note 3, at 300 (noting that a fourth tier would be an improbable solution for relieving predicted future expansion of the Supreme Court's caseload); see also BAKER, *supra* note 19, at 238-79; Campbell, *supra* note 8, at 297; Hufstedler, *supra* note 8, at 798.

211. The Study Group on the Caseload of the Supreme Court was appointed in 1971 by Chief Justice Burger. As its name suggests, this group was charged with addressing problems of the Supreme Court, not the lower federal courts. The Study Group was chaired by Professor Paul A. Freund of the Harvard Law School.

212. All petitions for review now filed with the Supreme Court would be filed with the new court. FREUND REPORT, *supra* note 6, at 590.

213. *Id.*

214. *Id.* at 592.

215. In such cases, the decision of the new court would be final and not reviewable in the Supreme Court. *Id.* at 592-93.

216. *Id.* at 591. Thus, this proposal ran afoul of the notion that each court should have its own judges.

217. See *id.* at 594-95; ESTREICHER & SEXTON, *supra* note 17, at 26.

In 1975, the Hruska Commission²¹⁸ also called for the establishment of a National Court of Appeals,²¹⁹ but it resembled the Freund proposal in name only. The Hruska Commission's National Court of Appeals would take cases either by referral from the Supreme Court or by transfer from a circuit panel. Transfer would be appropriate in cases turning on a rule of federal law "applicable to a recurring factual situation" and requiring prompt determination,²²⁰ or in cases presenting an intercircuit conflict.²²¹ The new court would have discretion to reject cases received on transfer or referred by the Supreme Court.²²² The new court would have seven judges sitting as a single bench.²²³ They would be appointed and serve under the same conditions as all Article III judges.²²⁴ The objective of this proposal was not to conserve the Supreme Court's time by relocating its screening function, but to create additional capacity for rendering uniform, nationally-applicable interpretations of federal law and for resolving conflicts beyond the number the Supreme Court itself decides.²²⁵

Later proposals urged the creation of an intercircuit tribunal.²²⁶ Former Chief Justice Burger proposed that the tribunal be set up on a temporary, experimental basis.²²⁷ Others argued that it should be permanent.²²⁸ The Supreme Court would refer cases to the tribunal. The decisions of the tribunal would be binding on all federal courts. The

218. The Commission on Revision of the Federal Court Appellate System was chaired by Senator Roman Hruska. As its name suggests, the mandate to the Hruska Commission was broader than that of the Study Group on the Caseload of the Supreme Court.

219. HRUSKA COMM'N REPORT, *supra* note 6, at 199.

220. *Id.* at 199-200.

221. *Id.* at 199.

222. *Id.* at 200.

223. *Id.* at 199.

224. *Id.*

225. *Id.* at 208-14.

226. Legislation to create such a tribunal was introduced into Congress in 1983, but was never passed. For a discussion of variations on the intercircuit tribunal idea, see ESTREICHER & SEXTON, *supra* note 17, at 20-24.

227. Warren E. Burger, *The Time is Now for the Intercircuit Panel*, A.B.A. J., Apr. 1985, at 86, 88. For an analysis of Chief Justice Burger's proposal, see Rehnquist, *supra* note 19, at 12-14 (advocating permanent implementation of Burger's proposed national court of appeals functioning not as a fourth tier, but as a "lower chamber" of the Supreme Court). See also Arthur D. Hellman, *Preserving the Essential Role of the Supreme Court: A Comment on Justice Rehnquist's Proposal*, 14 FLA. ST. U. L. REV. 15, 15-18 (1986); Michael J. Broyde, Note, *The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White's Dissents from Denial of Certiorari During the 1985 Term*, 62 N.Y.U. L. REV. 610 (1987).

228. See, e.g., Hufstedler, *supra* note 8, at 798.

court would be composed of regular court of appeals judges who would sit for limited periods of time and who would retain their original circuit assignments.²²⁹ The objective of the intercircuit tribunal would be to resolve conflicts quickly and authoritatively.

Fourth tier proposals have been met with extreme hostility. They often appear to create a second "supreme court" in violation of Article III of the Constitution. Opposition to the Freund Plan centered on its relocation of the Supreme Court's screening function to the proposed National Court of Appeals. According to one commentator a "powerful refrain" emerged: access to the Supreme Court must remain open to all litigants, and the Supreme Court must retain "total, absolute control of its docket."²³⁰ Subsequent proposals addressed these criticisms. They provided instead for cases to be referred by the Supreme Court to the new body.²³¹ Cases decided by the new court would be eligible for Supreme Court review on certiorari.²³² Opponents of the Hruska Plan charged that the plan would not work. Either the Supreme Court would closely supervise the decisions of the National Court of Appeals, eliminating any reduction in the Court's workload, or it would cede some of its authority to the new court.²³³ Finally, fourth-tier proposals would elongate the appellate process by adding, in most instances, an additional layer, and would thus exacerbate the problem of delay in the federal courts.²³⁴

Fourth-tier proposals offer no relief to the courts of appeals, where help is needed most. Rather, proposals to add a fourth tier recognize that the Supreme Court cannot keep up with its (theoretically) exclusive responsibility for law making.²³⁵ A fourth-tier court like the Hruska

229. Thus, like the Freund Group's National Court of Appeals, it would be a court without its own judges.

230. Rosenberg, *supra* note 67, at 714-15; *see also* ESTREICHER & SEXTON, *supra* note 17, at 26-27; *cf.* Patrick E. Higginbotham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261, 266-67 (1980) (calling creation of a national court a "carcinogen" in part because it is based on the false assumption that the Supreme Court's role as final arbiter is delegable).

231. *See, e.g.*, HRUSKA COMM'N REPORT, *supra* note 6, at 199.

232. *Id.* at 200.

233. ESTREICHER & SEXTON, *supra* note 17, at 29.

234. *See id.* at 29-30; Lay, *The Federal Appeals Process*, *supra* note 8, at 524 (stating that fourth-tier proposals fail to address the need for expeditious results, thus decreasing the public's image of the judicial system); Rosenberg, *supra* note 67, at 724-29; Wilkinson, *supra* note 8, at 1184-85 (arguing that fourth tier would prolong litigation without helping the system decide any additional cases).

235. *See* Wallace, *supra* note 7, at 914 (acknowledging that the Hruska Commission's proposal was aimed at relieving the perceived "crushing burden" experienced by the Supreme Court). Professor Hellman, for one, disputes the theory that the Supreme Court is overworked and cannot resolve actual and potential conflicts in a timely manner. Arthur D. Hellman, *The Proposed Intercircuit Tribunal: Do We Need It?*

Commission's National Court of Appeals or the intercircuit tribunal attempts to remedy the Supreme Court's inability to resolve intercircuit conflicts and establish uniform rules on recurring issues.²³⁶ But such a fourth-tier court cannot relieve the congestion in the courts of appeals. Nor can it help the courts of appeals counteract the dilution of appellate justice that has resulted from those courts' self-help remedies. Finally, with limited transfer and reference jurisdiction, fourth-tier courts cannot facilitate the coherent, consistent enunciation and application of federal law, for which the courts of appeals would remain the last resort in most cases.

C. Discretionary Appeals

One obvious way to ease the courts of appeals' caseload would be to implement discretionary appeals, a strategy some commentators view as inevitable.²³⁷ 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.²³⁸ The premise of such proposals is that one appeal as of right is sufficient to correct errors.²³⁹ 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."²⁴⁰ On the other hand, Judge Lay's proposal explicitly preserved "a right of full review, including oral argument, in [all] direct criminal appeals."²⁴¹ Professor Dalton proposed a "partial certiorari"²⁴² system in which appeal as of right should be preserved where it is "extrinsically justified" because it "produces gains . . . that more than offset the costs of uncorrected error."²⁴³ Such cases would

Will It Work?, 11 HASTINGS CONST. L.Q. 375, 380-92 (1984).

236. Estreicher and Sexton state that fourth-tier proposals fail to reflect modern reality of the Supreme Court's role, "rarely attempt[ing] to specify what the Court's mandatory responsibilities are or to demonstrate that the court is not adequately handling those responsibilities." ESTREICHER & SEXTON, *supra* note 17, at 2; *see also* FCSC REPORT, *supra* note 6, at 116-17.

237. *See, e.g.*, Parker & Hagin, *supra* note 7, at 244-45.

238. *See, e.g.*, FRIENDLY, *supra* note 66, at 177; McGowan, *supra* note 8, at 666-70. These cases, however, make up a relatively small portion of the appellate courts' caseload. *See* Newman, *supra* note 8, at 771-74.

239. *See* Lay, *A Proposal*, *supra* note 8, at 1151.

240. *Id.*

241. *Id.*

242. Dalton, *supra* note 59, at 93.

243. *Id.* at 97.

include criminal cases,²⁴⁴ cases in which the government is a party,²⁴⁵ certain class actions,²⁴⁶ and public law cases raising “issues of considerable public moment.”²⁴⁷ A system of discretionary appeals would require the screening of petitions for review, and might save little time beyond that already realized through the current screening procedures which track many cases into summary proceedings.²⁴⁸

Proposals to abolish appeals as of right, at least in certain categories of cases, represent a radical departure from one of the basic tenets of appellate justice.²⁴⁹ On the other hand, the widespread acceptance of current screening measures by litigants, lawyers, and judges reflects consensus that not all appeals deserve the same process.²⁵⁰ Judge Lay justifies discretionary appeals as a better use of the courts of appeals’ time, arguing that his recommendation “would actually provide more thoughtful judicial input into meritorious appeals than presently exists.”²⁵¹ Professor Dalton shares Judge Lay’s assessment that the courts of appeals no longer provide more than a fragment of the full process formerly thought to inhere in an appeal as of right. Moreover, Dalton argues that appeal as of right serves neither to promote correct

244. *Id.* at 102.

245. *Id.* at 103.

246. *Id.* at 104-05 (discussing class actions where a class is certified and adequacy of representation is at issue, or where the class is not certified).

247. *Id.* at 105. Dalton admits these cases will not be easy to isolate. Arguably, Dalton’s proposal would exacerbate the problem, noted by Professor Bator, of obtaining Supreme Court review of business or commercial law cases. *See* Bator, *supra* note 152, at 450-51.

248. *See* Carrington, *supra* note 32, at 430 (noting that “first-level appellate will write about as much . . . whether the action sought is a reversal or a leave to appeal”).

249. The Supreme Court has held that there is no constitutional right to an appeal. *McKane v. Durston*, 153 U.S. 684, 687 (1894) (holding that appeal is not a matter of right, independent of constitutional or statutory provision therefor, and noting that appellate review of criminal convictions “was not at common law and is not now a necessary element of due process of law”). This holding has been reaffirmed. *See, e.g., Jones v. Barnes*, 463 U.S. 745, 751 (1983). *But see id.* at 756 n.1 (Brennan, J., dissenting) (suggesting that the court might decide differently). Presently, appeal as of right in the federal courts is conferred by statute. 28 U.S.C. § 1291 (1994). Nevertheless, as I argued in part IV, appeal as of right has become a defining characteristic of the federal court system. One of the premises underlying passage of the Evarts Act in 1891 was rising public demand for an appeal as of right in criminal cases. All states except Virginia and West Virginia also provide every litigant one appeal as of right.

250. *See, e.g., Lay, A Proposal, supra* note 8, at 1157 (noting that 28 U.S.C. § 1915 (1994) already “places in forma pauperis cases on a different footing than paid appeals,” in that only the former can be denied as frivolous before briefing).

251. *Id.*

results²⁵² nor to encourage self-correction by trial judges sensitive to the threat of reversal.²⁵³

From the standpoint of law development, discretionary appeals make sense. Law-making courts typically are given the power to choose appropriate cases for enunciation, clarification, or extension of the law. Courts exercising discretionary jurisdiction, as a result, reverse a much higher percentage of cases than non-discretionary courts do.²⁵⁴ Their output is much smaller, allowing, at least in theory, for less fragmentation of the emerging law. Law-making courts typically are small courts that sit as a single bench, reducing the probability of conflicting decisions within the court or between it and other courts. The problem with proposals for discretionary appeals is that they have generally assumed the continuing existence of the present federal courts structure. In that case, they would severely dilute appellate justice to the extent they eliminate the sole appeal as of right. Furthermore, implementing discretionary review in the courts of appeals would only add another dimension to the lack of coherence in law development that structure already fosters.²⁵⁵

252. Dalton, *supra* note 59, at 73-86.

253. *Id.* at 86-93.

254. The Supreme Court, for example, typically reverses over half of the decisions it reviews. According to the *Harvard Law Review*, the Supreme Court's reversal rate was 62.7% of cases reviewed on writ of certiorari during the 1990 Term, 62% for the 1991 Term, 52.8% for the 1992 Term, 42.6% for the 1993 Term, and 61.6% for the 1994 Term. *The Supreme Court, 1990-1994: A Statistical Retrospective*, 109 HARV. L. REV. 349, 349 (1995) (figures include cases appealed from the courts of appeals as well as from state supreme courts and other sources). The courts of appeals, on the other hand, reversed only 10.4% of all appeals terminated on the merits in 1994. 1994 ANNUAL REPORT, *supra* note 73, tbl. B-5, at A1-26.

255. That is, over time it might appear that the screening function is exercised differently in various circuits, advantaging or disadvantaging particular classes of litigants or claims and creating confusion about standards of "cert-worthiness."

D. Adjustment of Circuit Structure

Many reform proposals recommend adjustments in the present circuit structure.²⁵⁶ These proposals typically focus on either the size and number of circuits,²⁵⁷ or on subject matter specialization.²⁵⁸ The Federal Courts Study Committee considered five variations,²⁵⁹ endorsing

256. See, e.g., Lay, *The Federal Appeals Process*, *supra* note 8, at 525-27 (advocating dividing large circuits into regional divisions); Lumbard, *supra* note 8, at 44 (advocating circuit division or realignment rather than increasing any appeals court beyond nine judges); Plager, *supra* note 8, at 863-66 (suggesting that all circuit courts be modeled after the U. S. Court of Appeals for the Federal Circuit, a non-regional subject-matter based appellate court, distinguishing it from a specialty court); Sporkin, *supra* note 8, at 754 (advocating, among many proposals, establishment of specialized courts); Wallace, *supra* note 19, at 288 (arguing that large circuits, like the Ninth, increase precedential stability and efficiency by providing a larger body of case law upon which lawyers and litigants can draw). *But see* FJC, *ALTERNATIVES*, *supra* note 8, at 114 (concluding that reorganization of the present circuit structure would do little to reduce the appellate caseload).

257. Interestingly, there are as many proposals to move to fewer but larger circuits as there are proposals to move to more numerous, smaller circuits. See Parker & Hagin, *supra* note 7, at 219 (describing proposals to create “an internally-chaotic, small set of ‘nega-circuits’ [or] an interactively-chaotic, large set of atomic ‘mani-circuits’”). The advantages of fewer, larger circuits are a reduction in intercircuit conflicts and possibly, a more uniform federal law. The drawbacks, however, include increased intracircuit conflicts. The advantages and disadvantages of more, smaller circuits are just the opposite: decreased intracircuit conflict at the expense of increased intercircuit conflicts.

258. Either separately or in addition to recommendations to change the number and size of the circuits, some proposals suggest the creation of additional subject specialty courts alongside the generalist regional circuits. 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. A further refinement of some proposals is to create subject matter divisions within the regional circuit structure. For further discussion of specialty court proposals, see ABA *STANDING COMM. ON FED. JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH* 10-13 (Comm. Print 1989) (advocating non-regional specialized appellate courts for particular areas of the law with nationwide significance, such as Internal Revenue Code and Federal Communications Act, that are given only regional appellate review under the current circuit structure); Griswold, *supra* note 121, 408-09 (advocating specialized appellate courts for tax cases and certain commercial cases, among others); Plager, *supra* note 8, at 857-63.

259. FCSC *REPORT*, *supra* note 6, at 116-24; *see also* FCSC, *WORKING PAPERS*, *supra* note 72, ch. III, § B.

none and calling for further study.²⁶⁰ These five alternatives were (1) to redraw circuit boundaries periodically to keep each at nine judges, with a "Central Division" to allow the circuits to function as a unified court;²⁶¹ (2) to create a fourth tier of about thirty ten-judge regional divisions between the district courts and the courts of appeals and consolidate the present circuits into four or five higher regional tribunals;²⁶² (3) to create national subject-matter courts;²⁶³ (4) to merge all courts of appeals into a single, centrally-organized body;²⁶⁴ and (5) to consolidate the courts of appeals into five "jumbo" circuits.²⁶⁵ The Committee noted that in some respects these alternatives overlap.²⁶⁶ It also acknowledged that at least some of the plans would require additional changes, such as an agreement that circuit panels "adhere to the precedents established by panels of other courts, unless the Supreme Court had spoken."²⁶⁷

The number of variations on the theme of tinkering with the present circuit structure makes it difficult to generalize about their impact. A few elements, however, can be isolated. First, any plan requiring that courts remain at nine judges (or any other arbitrary number) will require constant redrawing of boundaries, assuming caseloads continue to grow. Such plans fail to address the problem of rising caseloads, but instead, merely shuffle the cases around. If the decisions of a court are binding only within its borders, instability in the law would result each time the boundary moves. Moreover, increasing the number of courts or divisions guarantees additional conflicts, and hence, exacerbates incoherence and the possibility of injustice to litigants. Second, creating a few "jumbo" circuits ignores the strong opinion of many federal judges that circuits are too large even now. The adaptations these courts would have to make, such as increasing reliance on central and chambers staff and using mini-bancs, threaten coherent development of the law in the same way internal reforms already have done. Third, creating additional subject-matter courts or divisions, especially if narrowly defined, calls for

260. FCSC REPORT, *supra* note 6, at 117. One further study of possible structural reforms is the FJC's report, *Structural and Other Alternatives for the Federal Courts of Appeals*. The FJC considered and evaluated total or partial consolidation of the circuits, reducing the size of the circuits, and multi-tiered courts of appeals options. FJC, ALTERNATIVES, *supra* note 8, at 105-22.

261. FCSC REPORT, *supra* note 6, at 118-19.

262. *Id.* at 119-20.

263. *Id.* at 120-21.

264. *Id.* at 121.

265. *Id.* at 122-23.

266. *Id.* at 122.

267. *Id.* at 118 (discussing alternative (1)).

segmenting the law more neatly than is possible.²⁶⁸ Moreover, it seems incongruous to design a system in which only the middle layer is subject specialized. Finally, inserting a fourth tier would delay final rulings. Delay is a hardship to litigants and prolongs the period when inconsistent or provisional rulings are operative.

In sum, neither additional judges, a fourth tier, discretionary appeals, nor adjustments in the circuit structure alone offer any real hope of addressing the caseload crisis without risking further dilution of appellate justice or greater incoherence in federal law.

VI. A COMPLEX STRUCTURE FOR THE THIRD CENTURY

Structural reform of the federal court system will succeed only if it creates a flexible design capable of adapting to the “kaleidoscopic changes” that characterize the courts’ history.²⁶⁹ In my view, flexibility can be assured only by recognizing that the multi-dimensional nature of the caseload problem calls for a multi-faceted solution.²⁷⁰ Thus, I propose a structure that draws on numerous prior proposals, weaving disparate elements into a complex whole.

268. Recall the maxim that “the law is a seamless web.” Cf. ESTREICHER & SEXTON, *supra* note 17, at 127 (concluding that specialized appellate courts would not effectively reduce the Supreme Court’s caseload and are particularly vulnerable to the influence of special interest groups); Paul R. Michel, *The Challenge Ahead: Increasing Predictability in Federal Circuit Jurisprudence for the New Century*, 43 AM. U. L. REV. 1231, 1233 (1994) (commenting that, although the “semispecialized” U.S. Court of Appeals for the Federal Circuit has improved “doctrinal clarity,” it has not greatly improved predictability); Posner, *supra* note 8, at 775-83 (cautioning that the advantages of subject-matter specialization in the federal judicial structure are fewer than in other areas of human activity where specialization is practiced); Wilkinson, *supra* note 8, at 442 (noting added difficulty of placing individual cases into only one area of the law).

269. Rosenberg, *supra* note 91, at 578.

270. The Judicial Conference Committee on Court Administration and Case Management has taken a multi-dimensional approach, calling for the establishment of ten generalist circuits of 12 judges each, along with a two-track appellate process and restructuring of the district courts. See LONG RANGE PLANNING, *supra* note 140, reprinted in Parker & Hagin, *supra* note 7, at 253-55. Others have called for multi-faceted solutions, but have included jurisdictional reforms and additional internal reforms as part of the package. See, e.g., Parker & Hagin, *supra* note 7, at 214.

A. Major Elements of the Proposed Structure

This proposal calls for District Court Appellate Panels responsible for review for error,²⁷¹ a unitary Court of Appeals responsible for discretionary review and provisional national law making, and an unchanged Supreme Court responsible for final declaration of federal law. This structure rests on three premises. First, error correction and law making should be separate. Second, national appellate capacity can be increased by eliminating the geographic organization of the courts of appeals and providing for discretionary review. Third, the Supreme Court should be left alone. This section describes more fully the two central elements of the proposal, the District Court Appellate Panels and the unitary Court of Appeals.

1. DISTRICT COURT APPELLATE PANELS

The first premise of this proposal is to apply the Evarts Act strategy of separating review for error from law declaration. As the 1891 Act did, this proposal pushes the error-correction function lower in the hierarchy. To do so, it creates District Court Appellate Panels²⁷² modeled generally on the Bankruptcy Appellate Panel of the Ninth Circuit.²⁷³ An appeal as of right would lie to a panel of three district

271. Other than the creation of District Court Appellate Panels, the proposal calls for no changes to the district courts.

272. The FJC laid out a sample model for district court review. FJC, *ALTERNATIVES*, *supra* note 8, at 137-38. Parker & Hagin state that proposals to "add another layer of federal appellate court structure—comprised of three district court judges from within the circuit" have "garnered some . . . support," but cite neither the proposals nor the commentary. Parker & Hagin, *supra* note 7, at 224. Although it did not adopt this approach, the Court Administration and Case Management Committee described the creation of an appellate division of the district court as a "workable solution." *Id.* at 254. Other proposals advocating some type of district court review include Carrington, *supra* note 32, at 433-34, and Shirley Hufstедler & Seth Hufstедler, *Improving the California Appellate Pyramid*, 46 L.A. B. BULL. 275 (1971) (discussing state courts).

273. Bankruptcy Appellate Panels (BAPs) were initially authorized by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 160, 92 Stat. 2549, 2659. The current provision appears at 28 U.S.C. § 158 (1994). For history and commentary on BAPs, see Thomas E. Carlson, *The Case for Bankruptcy Appellate Panels*, 1990 B.Y.U. L. REV. 545; Gordon Bermant & Nancy J. Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 ARIZ. ST. L.J. 181 (1989); Lloyd D. George, *The Bankruptcy Appellate Panels: An Unfinished Experiment*, 1982 B.Y.U. L. REV. 205, 251 (concluding that panels seem to be acting expeditiously and with desired degree of finality). After the Supreme Court invalidated portions of the 1978 Act in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), Congress passed the Bankruptcy

judges from the same or nearby districts,²⁷⁴ but not including the district judge whose ruling was appealed.²⁷⁵ District judges would become eligible to sit on Appellate Panels after serving for five years.²⁷⁶

The District Court Appellate Panels would have jurisdiction over most initial appeals. The Panels themselves would initially determine whether jurisdiction should be retained or transferred. One way to identify cases appropriate for Appellate Panel review would be to focus on the applicable standard of review.²⁷⁷ Standards of review already “defin[e] the relationship and power shared among judicial bodies.”²⁷⁸ Currently, matters such as admission of evidence, discovery, jury instructions, and findings of fact are reviewed deferentially for the presence of error.²⁷⁹ Under the proposal, these cases would be heard

Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. Under the 1984 Act, consent of both parties is required to trigger the jurisdiction of the BAP. *Id.* By court rule, the Ninth Circuit has implemented an opt-out system whereby either party can decline BAP jurisdiction and invoke district court review. 9TH CIR. R. 8001. The consent requirement flows from the fact that bankruptcy judges, who staff the Panels, are Article I, not Article III judges. Since the availability of an appeal to an Article III court is assumed, consent is required to waive it. This requirement is irrelevant to District Court Appellate Panels, which would be made up of Article III judges.

274. Of course, the increased workload engendered by the Appellate Panels would necessitate a substantial influx of new district judges. *See* LONG RANGE PLANNING, *supra* note 140, reprinted in Parker & Hagin, *supra* note 7, at 254.

275. The Evarts Act prohibited the judge who had tried a case from hearing its appeal. Act of Mar. 3, 1891, ch. 517, § 3, 26 Stat. 826, 827; *see* FJC, ALTERNATIVES, *supra* note 8, at 136 (discussing inadvisability of allowing review of judge’s own work). The Ninth Circuit decided that the Bankruptcy Appellate Panels would not include any judge from the same district as the judge who originally decided the matter, and the authorizing statute now so provides. 28 U.S.C. § 158(b)(5) (1994). Bankruptcy Panel judges are to be drawn from within the circuit for which the Panel is established. 28 U.S.C. § 158(b)(1) (1994).

276. This requirement assures that judges have substantial experience on the federal bench before hearing appeals.

277. *See* FJC, ALTERNATIVES, *supra* note 8, at 135 (discussing cases reviewed for abuse of discretion or insufficiency of the evidence). The courts of appeals essentially apply a two-tiered standard of review now: de novo review (for questions of law) and a more deferential standard, such as abuse of discretion (for review of factual determinations and conduct of the trial). *See, e.g.,* United States v. Lucien, 61 F.3d 366, 372 (5th Cir. 1995). The proposal attempts to channel these two levels of review to two separate courts, de novo reviews to the Court of Appeals and highly deferential reviews to the District Court Appellate Panels.

278. 1 STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 1.01, at 103 (2d ed. 1992).

279. *See, e.g.,* United States v. Juvenile N.B., 59 F.3d 771 (8th Cir. 1995) (plain error review for admissibility of hearsay testimony); *In re Lindsay*, 59 F.3d 942 (9th Cir. 1995) (abuse of discretion review for discovery issue); United States v. Bostian, 59 F.3d

by the Appellate Panels.²⁸⁰ Panels would be authorized to certify to the next level cases raising debatable points of law or arguing for a change in settled law, sparing litigants an additional layer of proceedings.

Review for error under highly deferential standards of review calls for careful study of the record and established law, a task with which district judges are highly familiar.²⁸¹ One court of appeals judge estimates that approximately one-half of the appeals heard “are ‘easy’: the pertinent legal rules seem . . . unambiguous and their application to the facts appears clear.”²⁸² These “easy” cases are the ones in which initial appeals should be decided by the District Court Appellate Panels. This proposal’s strategy for determining when the District Court Appellate Panel should retain jurisdiction comports with the Panels’ purpose of correcting obvious or egregious errors below. By definition, errors of this type occur only when the law is well settled and its application reasonably straightforward, or where the weight of the evidence is clear. On the other hand, “very hard” cases should go directly to the proposed Court of Appeals; “hard” cases are the ones whose initial appellate destination is least clear.²⁸³

The District Court Appellate Panel proposal will work only if it is the Panel’s prerogative to determine whether to hear the case or certify it to a higher tribunal. Counsel must not be permitted to evade the appellate jurisdiction of the Panel simply by asserting a claim, meritorious or otherwise, for a change in the law. Some appeals, of course, present both assertions of error in the fact finding process and questions of law. Under the proposed structure, courts would follow the established policy discouraging piecemeal litigation.²⁸⁴ The appeal would proceed as a

474 (4th Cir. 1995) (abuse of discretion review for jury instructions); *Brunet v. City of Columbus*, 58 F.3d 251 (6th Cir. 1995) (clear error review of findings of fact).

280. Consent of the parties is not required for Panel review. In the case of the BAPs, consent is required because BAP review is by bankruptcy judges, not Article III judges. Since District Court Appellate Panels would be composed entirely of Article III judges, there is no waiver of Article III review, and no need for consent.

281. See FJC, *ALTERNATIVES*, *supra* note 8, at 133. For a similar argument urging that the Supreme Court not be required to pass on issues of fact, see FRANKFURTER & LANDIS, *supra* note 3, at 290-91.

282. Moreover, Judge Edwards opines that the opinions of other judges about “which cases are ‘easy’ would probably be reassuringly consistent.” Edwards, *supra* note 115, at 390-91.

283. Judge Edwards divides the non-easy cases into “very hard” cases (requiring the exercise of discretion) and “hard” cases (presenting at least a colorable argument on each side). *Id.*

284. See, e.g., 18 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4432 (1981) (noting that requirement of finality of judgment prior to appeal “has been expanded far beyond its traditional elements in response to perceived needs of effective appellate review”).

whole, not be parceled out to the Appellate Panel and Court of Appeals simultaneously. Normally, the Appellate Panel would decide the whole appeal, reaching questions of law only when necessary to the result. When Panels decide questions of law in "mixed" appeals, discretionary review would be available by the Court of Appeals. "Mixed" appeals would be certified, in their entirety, to the Court of Appeals when, in the Panel's judgment, that course seemed advisable.

A few types of cases deserve special treatment. The initial appellate destination for certain cases would be determined by the type of case regardless of the error alleged or the applicable standard of review. For example, convictions and sentences in capital cases would be reviewed initially by the Court of Appeals. The impact of error in these cases is so great as to justify immediate review by a higher tribunal. In addition, these cases will undoubtedly be appealed to the Court of Appeals anyway, and the expenditure of resources for an additional, earlier review is wasteful. For the same reasons, habeas actions in capital cases would also go directly to the Court of Appeals. On the other hand, administrative agency rulings would be reviewed initially by the District Court Appellate Panels.²⁸⁵ Given the deferential review of agency decisions,²⁸⁶ review by the Appellate Panel is appropriate.²⁸⁷

Precise procedures to be employed by the District Court Appellate Panels are a matter for another day.²⁸⁸ Whether oral argument is

285. Many such rulings are currently appealed to single district judges. Review by an Appellate Panel would eliminate the somewhat anomalous review by an individual judge. The rulings of a few agencies currently are appealed directly to the courts of appeals. *See, e.g.,* Resnik, *supra* note 22, at 608 (describing elaborate adjudicatory arrangement provided by Title VII).

286. *See, e.g.,* Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 619-21 (1966) (noting that agency action may be set aside only if arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence, and commenting on the highly deferential nature of such standards of review).

287. *But see* Resnik, *supra* note 22, at 620-21 (arguing that redundancy built into Title VII and similar schemes is essential to remedy possible deficiencies of first-tier decision-makers).

288. An immediate question is what to do with cases already in the pipeline on the date the proposal would take effect. Past experience is instructive: when the Eleventh Circuit came into being, all cases submitted for decision before the effective date were to be decided as if the Act creating the Eleventh Circuit had not been enacted. Pub. L. No. 96-452, § 9, 94 Stat. 1994, 1995 (1980). Matters not yet submitted for decision were handled by the Eleventh Circuit or the new Fifth Circuit as if they had been filed there after the Act took effect. *Id.* The former Fifth Circuit continued to exist for administrative purposes for nearly three years after the Act took effect. *Id.* § 11, 94 Stat. at 1996. Similar principles would govern the implementation of this proposal, as to both District Court Appellate Panels and the unitary Court of Appeals. Since the proposal preserves appeal as of right, litigants face only a different court (which may, of course,

required to ensure a just result in an error-correction proceeding under a highly deferential standard of review, for example, is an open question. Courts of appeals judges have already dispensed with some elements of traditional appellate procedure in cases considered easy or routine,²⁸⁹ and some of the internal reforms adopted in the courts of appeal may be appropriate for Appellate Panel review.

The decisions of the District Court Appellate Panel would be communicated in brief, unsigned memoranda intended to inform the parties and the trial judge of the reason for the ruling. Giving reasons is essential to maintain the quality of appellate justice. These decisions would not be published in print or online, and would be neither precedential nor citable.²⁹⁰ Appellate Panel decisions would not make law and should not be treated as if they did. Further appeal from the ruling of a District Court Appellate Panel would be discretionary with the Court of Appeals.

be significant), not the loss of an appeal.

289. See, e.g., Robel, *supra* note 9, at 3 (noting that judges have “endorsed . . . procedural innovations” to speed up cases); *id.* at 54-55 (relating judges’ belief that oral arguments are held and opinions are written for publication in cases that need it, and eliminated only in appropriate cases).

290. See FJC, ALTERNATIVES, *supra* note 8, at 138. Questions may arise about the potential for conflicting rules by the District Court Appellate Panels, especially since the non-publication rule I proposed would make such conflicts difficult to discover. In my view, the term “conflict” is a misnomer applied to the rulings of the new Appellate Panels. The Panels’ review would be extremely fact-specific. Since cases are like snowflakes—no two exactly alike—different rulings would not generally pose a “conflict.” Likewise, when the Panels would review decisions for error in the application of well-settled law, but would certify cases where the law is unsettled to the new Court of Appeals, the potential for conflict would be low. The potential for conflicting decisions of the Appellate Panels would also be reduced because all Panels would be charged with applying the same body of law, and all opinions of the Court of Appeals and the Supreme Court (the law to be applied) would be published. Moreover, we already tolerate some conflict between district court rulings: there is no “law of the district,” let alone a rule or policy favoring adherence to the rulings of another district. Although district judges often speak of “the law of this district,” see, e.g., *Aramburu v. Boeing Co.*, 885 F. Supp. 1434 (D. Kan. 1995), at least one circuit has flatly held that “there is no such thing as ‘the law of the district.’” *Threadgill v. Armstrong World Indus.*, 928 F.2d 1366, 1371 (3d Cir. 1991); see also *Johnson v. Town of Trail Creek*, 771 F. Supp. 271, 274 (N.D. Ind. 1991) (noting that “opinions of other district judges are entitled to ‘whatever weight their intrinsic reasoning warrants’” (quoting *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987))). Conflicting rulings would be settled by the Court of Appeals, which should, in the exercise of discretionary jurisdiction, accept such cases for review.

2. UNITARY COURT OF APPEALS

The second premise of this proposal is to increase national appellate capacity by eliminating the geographic organization of the courts of appeals and providing for discretionary review. The proposal dissolves the current circuits and creates a unitary United States Court of Appeals.²⁹¹ Most cases would reach this court through a certiorari-like process following decision on the merits by the Appellate Panel. Thus, the new court's jurisdiction would be largely discretionary. Less frequently, the Court of Appeals would take appeals by certification from a District Court Appellate Panel,²⁹² or directly in capital and other specially designated cases. In these two situations, jurisdiction would be mandatory. The Court of Appeals would be responsible for final error correction in cases that reach it directly and in discretionary cases in which the petition for review makes compelling assertions of error that persisted even after Appellate Panel review. In many such cases, the error most likely results from uncertainty or lack of clarity in the law. Thus, the review is directly tied to the Court of Appeals' primary role: provisional declaration of federal law.

All current courts of appeals judges would initially serve on the new Court of Appeals, with the number to be reduced by attrition as caseloads warrant.²⁹³ Future judges would be appointed and serve according to the provisions of Article III. The new court would sit in panels of five²⁹⁴ assigned at random, often (but not necessarily) drawn from

291. Professor Rosenberg earlier proposed a unitary Court of Appeals for the United States. Rosenberg, *supra* note 91, at 592. The Federal Courts Study Committee and the FJC also studied similar options. See FJC, ALTERNATIVES, *supra* note 8, at 108-10. The FJC noted that a "large majority of both district and appellate judges registered strong or moderate opposition to a proposal linking discretionary review by appellate courts with error-correction by a district court appellate division." Nevertheless, the FJC found this approach "worthy of further consideration." *Id.* at 139. The most recent proposal for a unitary appellate court appears in Weis, *supra* note 8, at 455 (using the name "United States Court of Appeals").

292. The Court of Appeals' certification jurisdiction should be mandatory in order to spare litigants the possibility of various courts passing the case back and forth.

293. For similar courts of appeals proposals discussing the role of attrition, see Baker, *Imagining*, *supra* note 140, at 948.

294. The larger panel size helps ensure that a wider range of perspectives is brought to bear in each case, thereby reducing the potential for intra-court conflicts. See Carrington, *supra* note 32, at 434 (noting that present panels "are much too small"). Interestingly, 28 U.S.C. § 46(b) (1994) currently provides that the Federal Circuit "may determine by rule the number of judges, not less than three, who constitute a panel." See FED. CIR. R. 47.2 (providing that panels shall consist of an odd number of judges not fewer than three, and that certain appeals from the Court of International Trade ordinarily will be heard by a panel of five judges). Assuming the current complement of 179 circuit

within the former circuit for convenience.²⁹⁵ The doctrine of the “law of the circuit” would be abolished²⁹⁶ and panels would be required to follow the rule of any prior panel of the Court of Appeals.²⁹⁷ As a law-

judges, approximately 35 panels of five judges could sit at any one time, compared with 59 panels of three judges. Thus, the larger panel depends on a reduction in caseload.

295. It should be possible to devise a random, rotational system for assigning judges to panels, taking into account geographical preferences and workload. One of the advantages of a unitary court is the ability to assign judges where they are needed most. *Cf. Parker & Hagin, supra* note 7, at 225 (discussing proposal to make district court structure coterminous with circuit boundaries and noting resulting flexibility of assigning district judges anywhere within the large district).

296. Some proposals call for abolition of the “law of the circuit” doctrine and adoption of a rule that a circuit must follow the prior ruling of another circuit absent intervening Supreme Court or congressional actions. Given judges’ acknowledged resistance to this course, doctrinal change must be accompanied by structural reform to succeed.

297. One question to be worked out early on is what law (other than Supreme Court decisions) would bind the new Court of Appeals on its first day (and until a sizable body of its own precedent accrued). This Article assumes federal law to be, in some degree, incoherent, containing numerous intercircuit and intracircuit conflicts. Thus, rather than trying to select a body of precedent, I would have the unitary Court of Appeals reach what it considered the best rule. In the short term, this approach could have a destabilizing effect on federal law. This risk would be greatly reduced, however, when one considers that judges act in good faith and strive to do the right thing. Unquestionably, judges of the new court would examine decisions of the former circuits (on which they all sat) and apply them conscientiously. The larger panel size I propose would help somewhat by bringing more perspectives to bear on each decision of the new Court of Appeals. But most importantly, it must be remembered that the Court of Appeals would be a brand-new (and very different) court, whose role would be to make national law, subject only to Supreme Court review. It would make no sense to create such a court without entrusting to it the discretion to select the best rule among conflicting decisions of the courts of appeals. Decisions regarding the application of former circuit precedents were left to the two newest circuits. *See South Corp. v. United States*, 690 F.2d 1368 (Fed. Cir. 1982) (en banc) (stating that “the court sits in banc to consider what case law, if any, may appropriately serve as established precedent” and holding that it would consider prior rulings of the Court of Claims and the Court of Customs and Patent Appeals binding); *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (considering “what case law will serve as the established precedent of the Eleventh Circuit at the time it comes into existence” and holding that prior decisions of the Fifth Circuit would be treated as binding precedent). In *South Corp.*, the Federal Circuit expressed a strong preference for maintaining continuity with prior decisions rather than “start[ing] from scratch,” 690 F.2d at 1370-71, but reserved to itself the “power . . . to overrule an earlier holding with appropriate explication of the factors compelling removal of that holding as precedent.” *Id.* at 1370, n.2. The Federal Circuit further noted that, as a new “court of nationwide geographic jurisdiction,” it would face many questions outside the scope of rulings of its predecessor courts. *Id.* at 1371. In that event, the court found it better to adopt the “careful, considered, cautious, and contemplative” approach of selecting the best rule in each case than to make a “one-shot selection” of “one from many available bodies of law” that may conflict. Although my proposal magnifies the

making court, the Court of Appeals would be required in every case to publish an opinion stating the reasons for its decision. Decisions of the Court of Appeals would be reviewable on certiorari by the Supreme Court.

A Screening Panel made up of experienced Court of Appeals judges serving staggered three-year voluntary terms would select cases for Court of Appeals review.²⁹⁸ The screening function is critical: it is the hallmark of a law-making court.²⁹⁹ As such, screening is best accomplished centrally, not by the regular, widely-dispersed panels. Acceptance or rejection of cases for discretionary review strongly influences the development of the law. Thus, screening should be performed by judges, not staff attorneys or clerks. The additional burden of the screening function would be offset by reduced service on panels.³⁰⁰ Decisions of the Screening Panel would be final.

The Federal Circuit would be retained as a special division of the new Court of Appeals, exercising its current jurisdiction.³⁰¹ The specialty division would be bound to follow the rulings of panels of the unitary court on issues outside its specifically-assigned jurisdiction. Judges of this division would be drawn from the general pool of Court of Appeals judges, but would be assigned to the special division for

scope of the decision about what law to apply follow, the question is not different in character from the one addressed by the Federal Circuit. Finally, discretionary appeal to the Supreme Court would be available from the Court of Appeals. Early on, the Supreme Court should expect a number of certiorari petitions asserting that the Court of Appeals chose the wrong rule from pre-existing, conflicting precedents. These cases would simply be the successors of present intercircuit conflict cases.

298. Discussing unified appellate court models, Baker suggests that panels be designed to ensure "substantial stability." Baker, *Imagining*, *supra* note 140, at 962. Presumably, stability of the Screening Panel would be enhanced by relatively long terms and by staggering terms so that some experienced members always remain. The Freund Plan also called for staggered terms on the proposed National Court of Appeals. FREUND REPORT, *supra* note 6, at 591.

299. 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, 1330 (1994). The importance of screening cases for review was illustrated vividly by the furor over the Freund Group's proposal to relocate the Supreme Court's screening function to the National Court of Appeals. See, e.g., Rosenberg, *supra* note 67, at 713-15.

300. Screening judges could be provided one additional law clerk to assist with this task. In view of the expected decline in caseload compared to the present courts of appeals, and the larger panel size, other judges of the new Court of Appeals might find two clerks sufficient.

301. Cf. Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944) (discussing possible addition of tax appeals to the Federal Circuit's jurisdiction).

staggered terms of perhaps three years.³⁰² Initially, all current Federal Circuit judges would be assigned to the special division.

For administrative purposes only, the present geographic circuits would be consolidated into about six divisions of the new court.³⁰³ The office of Chief Judge would be retained at the division level and would continue to exercise the current administrative duties of that office.³⁰⁴ Panels of the new court would sit in the current circuit headquarters locations or in other current places of holding court. Judges should continue to be drawn from, and to hold court in, all parts of the country. This provision emphasizes the importance of localism in judicial accountability³⁰⁵ and minimizes the need for litigants to travel farther to have their appeals heard.

B. Advantages of the Proposed Structure

The proposed structure incorporates elements of earlier solutions advocating additional judges, a fourth tier, discretionary appeals at the intermediate level, and adjustments in the circuit structure, but avoids some of their major disadvantages. Judges are added, but at the district court level, where they can be absorbed without endangering the

302. 28 U.S.C. § 46(b) (1994) currently directs the Federal Circuit to develop a procedure "for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard." See FED. CIR. R. 47.2.

303. While the law-making function demands a unitary Court of Appeals, administrative matters relating to personnel, space and facilities, and similar concerns are best dealt with in the decentralized fashion that currently prevails. See FJC, ALTERNATIVES, *supra* note 8, at 110. This administrative structure roughly parallels that of large administrative agencies, which have regional headquarters in major cities. See U.S. GOVERNMENT MANUAL 553-55 (1994-95) (describing the Environmental Protection Agency); *id.* at 299-300 (describing the Department of Health and Human Services); *id.* at 806 (map showing standard federal regions); see also Weis, *supra* note 8, at 476 (suggesting four regional administrative headquarters). To minimize disruption, I would be content to leave much of the bureaucratic apparatus of the federal courts (dealing with space and facilities, employment and similar matters) in place. See, e.g., Weis, *supra* note 8, at 468 (discussing use of existing facilities). But this is a separate matter from the necessity of a regional structure.

304. Chief Judges should continue to hold office under the provisions of 28 U.S.C. § 45 (1994). During the transitional phase, the most senior of the Chief Judges of the combined former circuits could serve as Chief Judge of the new administrative divisions, to be succeeded by the next most senior former Chief Judge, and so on, until the usual rules again became appropriate.

305. As Frankfurter and Landis noted in 1928, proposals for "judges at large without local responsibilities and attachments" have met with stiff opposition. FRANKFURTER & LANDIS, *supra* note 3, at 236.

coherence of the law.³⁰⁶ Authorized judgeships at the appellate level would likely decline, providing for the concentration of law development in the hands of a relative few. The proposed “fourth tier” is actually an alternative second tier. It does not, in most cases, represent an additional layer of review that would elongate the process. Some cases would reach the Court of Appeals directly, bypassing the District Court Appellate Panel. For most others, the Appellate Panel would be, in effect, the end of the line. Discretion to reject insubstantial or non-meritorious appeals from review by an intermediate law-making body would be implemented, but not at the expense of an appeal as of right. The present circuit structure is modified dramatically, collapsing all circuits into a unitary Court of Appeals. Though radical, this reconceptualization of the intermediate tier addresses the problem of conflicts and provides flexibility to cope with rising caseloads and other changes over the long term.

The remainder of this Part outlines the advantages of the proposed structure in counteracting the dilution of appellate justice and promoting the coherent development of federal law.

1. HIGH QUALITY APPELLATE JUSTICE

The proposed structure offers the potential for improving the quality of appellate justice, reversing the dilution of justice described in Part III.A. The dilution of appellate justice results from time pressures and the imposition of time-saving procedures, and from the courts of appeals’ dual focus on error correction and law making. By separating these two functions—as the Evarts Act did—the proposed structure allows more focused attention to be devoted to each one. It also opens the way for the development of distinct procedures at the two appellate stages.

First, and most importantly, the proposed structure preserves appeal as of right. Review for error is an integral part of our appellate tradition; proposals to eliminate it violate our definition of justice and are unlikely to succeed.³⁰⁷ Opposition to relocating appeal as of right to the district courts may be expected, just as opposition arose when appeals of right were moved from the Supreme Court to the courts of appeals.³⁰⁸ But

306. See, e.g., FJC, ALTERNATIVES, *supra* note 8, at 106 (noting that growth affects courts of appeals differently from district courts). But see FRIENDLY, *supra* note 66, quoted in FCSC, WORKING PAPERS, *supra* note 72, at 100 n.9.

307. See, e.g., Parker & Hagin, *supra* note 7, at 254 (rejecting pure discretionary review on basis of courts of appeals’ traditional concern with error correction).

308. FRANKFURTER & LANDIS, *supra* note 3, at 258 (describing “deep professional feeling against taking away from litigants the right to resort to the Supreme Court for vindication of their federal claims”).

within a short time after their creation, the courts of appeals were “taken for granted as courts of great authority.”³⁰⁹ In the Ninth Circuit, the Bankruptcy Appellate Panel has come to be highly regarded.³¹⁰ The same should be true of the proposed Appellate Panels. The provision for an Appellate Panel of three judges preserves the flavor of the current appellate system and helps guard against the potentially arbitrary or idiosyncratic ruling of a single judge.

Second, the proposed structure highlights the importance of error correction. The screening function, which now operates covertly to diminish the character of an appeal as of right, becomes an open step in the process. Rather than selecting cases for abbreviated review, the Appellate Panel would certify cases requiring consideration of a new rule, a change in the law, or resolution of an apparent conflict. Thus, screening by the Appellate Panel would ensure more complete review of difficult cases, without denigrating the importance of review for error in the majority of cases. Under the new structure, the mission of district courts and district judges would be to provide a federal forum for resolving disputes. Ensuring fairness through deferential review for error can be seen as an integral part of that mission, not an entirely distinct objective.³¹¹ Review for error would call upon Appellate Panel judges

309. *Id.*

310. Even though parties may opt out of the Bankruptcy Appellate Panel, over two-thirds of direct bankruptcy appeals in the Ninth Circuit go to the Panels. Bermant & Sloan, *supra* note 273, at 198 (reporting figures for 1986 and 1987). Panel decisions are appealed to the Ninth Circuit less frequently than district court decisions reviewing Bankruptcy Court actions. *Id.* at 205, 209. Attorneys who have appeared before the BAPs prefer them to the district courts and believe they should be continued. *Id.* at 214-16. Moreover, the Bankruptcy Reform Act of 1994 provides for the establishment of bankruptcy appellate panels in all circuits, subject to certain exceptions, indicating satisfaction with the Ninth Circuit’s BAP experience. Pub. L. No. 103-394, § 104(c), 108 Stat. 4106, 4109-10 (1994); *see also* Ned W. Waxman, *The Bankruptcy Reform Act of 1994*, 11 BANKR. DEV. J. 311, 313-14 (1994-95). The Federal Courts Study Committee recommended that all circuits establish BAPs. FCSC REPORT, *supra* note 6, at 74-76.

311. The proposed structure arguably runs afoul of the requirement posited in part IV that each court should have a distinct mission and its own corps of judges. The district courts, with the creation of the Appellate Panels, would appear to have a dual mission. Moreover, the Panels, made up of district judges, would not constitute a separate court with its own judges. I would argue that the Appellate Panels would be an integral part of the district court and share its mission. The Panels would be concerned, as are the district courts themselves, with the integrity of the fact-finding process and the application of settled law to the facts of individual cases. The Panels’ responsibility for the initial review of these processes for error would be an extension of the district courts’ mission, not a distinct mission. Experience with the Bankruptcy Appellate Panels has demonstrated the viability of this structure. The proposed Appellate Panels’ focus would be quite different from that of the proposed Court of Appeals, which would be designed (as the present courts of appeals are not) as a law-making court.

to weigh evidence and apply established law, much as they would do during regular district court proceedings. The combination of performing fact-finding and reviewing the fact-finding process for error would bring together two similar functions, compared to the two highly dissimilar functions currently exercised by the courts of appeals.

Third, discretionary review in the proposed unitary Court of Appeals, coupled with appeals as of right to the District Court Appellate Panel, would afford some cases fuller appellate process than they receive today. Well-established procedures in the courts of appeals currently allow cases thought to be “routine” (usually those involving review, under a highly deferential standard, of the fact-finding process or calling for the application of settled law) to be “screened” for summary treatment. Mandatory appeals screened for summary treatment frequently are denied oral argument and decided without a published opinion, and not all cases receiving such treatment seem easy.³¹² Thus, entitlement to one appeal does not carry with it the right to any particular process. Truncated procedures may be appropriate for adoption by the District Court Appellate Panels.³¹³ But the objective of the proposal—to provide one real appeal in every case—must not be lost. By contrast, all cases that reach the Court of Appeals, either by petition or by certification, would enjoy full, traditional appellate process. These cases would be afforded full oral argument, would be decided by written, published opinion, and would be precedential.

2. COHERENT LAW DEVELOPMENT

The proposed structure’s separation of error correction from law making also facilitates the coherent development of law because it is easier to reconcile a smaller body of rulings than a larger one. Court of Appeals decisions would be comparatively few. If Judge Edwards’ estimate that one-half of all appeals are “easy” holds true, the caseload of the new Court of Appeals should be far lighter than that of the present courts of appeals. A small number of cases would reach the Court of Appeals directly; most would come under its discretionary jurisdiction. Presumably, the proposed court would accept only cases calling for the enunciation of a new rule, clarification of an existing rule, or resolution

312. *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 n.3 (1993) (describing as “remarkable and unusual” the Fourth Circuit’s affirmance, without published opinion, of a judgment holding an Act of Congress unconstitutional as applied).

313. *See, e.g.*, Carrington, *supra* note 32, at 433 (noting with approval that district court appellate review, under Hufstedlers’ proposal, *see supra* note 272, would be accompanied by “renewed and rehabilitated rules of courts that assured oral argument, conferences of the sitting panel, and written explication of the results”).

of a conflict. The comments of current courts of appeals judges suggest that such cases are relatively rare.³¹⁴

Besides reducing the sheer volume of appeals, the implementation of discretionary review promotes coherent development of the law in other ways. Full traditional appellate procedure would be afforded to each case heard by the new Court of Appeals, providing the court ample opportunity to study the case and its issues. In all cases accepted for review, the Court of Appeals would publish a full opinion, making it easier for citizens, litigants, and the courts themselves to ascertain the current state of the law. By contrast, decisions of the District Court Appellate Panel, which by definition would add little to the law (other than undesirable bulk and confusion),³¹⁵ would not be published. Current doubts about which decisions constitute precedent would disappear.

The proposed structure promotes coherent development of the law by abandoning the outmoded regional circuit arrangement, while preserving the generalist tradition of the federal courts. These two features lessen the potential for conflict in and fragmentation of the law.³¹⁶ Intercircuit conflicts disappear with the demise of the circuits.³¹⁷ More importantly, the proposed structure eliminates the conceptually suspect "law of the circuit" and restores the supremacy of federal law.³¹⁸ This proposal leaves undisturbed the important connection of the federal district courts to the states within whose boundaries they exist. But the profound influence of localism in the structure of the federal appellate courts has persisted long after a national focus largely supplanted local concerns.³¹⁹ Whatever need still exists for a local perspective at the appellate level

314. See, e.g., Edwards, *supra* note 115, at 389-92.

315. This, at least, is the argument behind the current limited publication rules. See, e.g., POSNER, *supra* note 13, at 120-27.

316. Scholars and judges have steadfastly argued that the regional arrangement permits the beneficial "percolation" of an issue through several courts, leading eventually to better or more harmonious decisions. See Weis, *supra* note 8, at 461 (describing and criticizing percolation theory). Along with Judge Weis, Professor Carrington roundly criticizes the theory's disregard for costs and delay borne by litigants. E.g., Carrington, *supra* note 32, at 427-28 (noting that percolation requires "litigants . . . [to] pay its bill and lawyers . . . [to] endure repetitious and dilatory proceedings").

317. Weis, *supra* note 8, at 463.

318. See *id.* (noting that it "would hardly shake the foundation of the Republic if the courts of appeals began to think more in terms of the law of the Nation and less of the law of the circuit"); *id.* at 466.

319. See FRANKFURTER & LANDIS, *supra* note 3, at 218, 219; Weis, *supra* note 8, at 463-64. But see Nihan & Rishikof, *supra* note 73, at 370 (arguing that regional structure has "served the country well . . . [and] struck an appropriate balance between national uniformity and regional diversity").

would be satisfied by review in most cases by a relatively local Appellate Panel.

The proposed structure retains subject specialization where consensus seems to exist on its utility, such as bankruptcy,³²⁰ intellectual property,³²¹ and similar areas, but does not extend subject specialization to other areas. By preserving the generalist tradition of the federal courts, the new design promotes a broad, integrated view of the law and avoids the fragmentation that may accompany increased specialization.

Finally, the proposed structure preserves the role of the Supreme Court as the ultimate arbiter of federal law, an essential element in maintaining coherence. The proposed structure makes no change to the composition, jurisdiction, or procedures of the Supreme Court. It would continue to control its own docket and hear approximately 150 cases each year.³²² These cases would most likely present, as do those reviewed today, questions of constitutional interpretation or paramount national importance. In contrast to earlier fourth-tier proposals, cases decided by the proposed unitary Court of Appeals would not come from the Supreme Court's docket, but would be cases now decided by the courts of appeals. Although the decisions of the new Court of Appeals would have nationwide applicability, they would still be provisional determinations of federal law. Review from decisions of the Court of Appeals would be available by certiorari exactly as today. Access to the Supreme Court would remain theoretically open to all litigants (though the likelihood of review is still extremely low). The Supreme Court would retain its exclusive responsibility for the final articulation of federal law, and it alone would decide which cases merit its review.

Indeed, the proposed structure actually would restore some of the Supreme Court's "diminish[ed] ab[ility] to control"³²³ the federal court hierarchy. As a practical matter, it would increase the Supreme Court's law-making capacity. Though many intercircuit conflicts currently go unaddressed, the "largest segment" of the plenary docket is devoted to such cases.³²⁴ Presumably, the Court would decline to take most of

320. This is possible through the continuation and expansion of Bankruptcy Appellate Panels.

321. This would be achieved by preserving the Federal Circuit as a specialized division of the new Court of Appeals.

322. I assume that the reduced Supreme Court dockets of recent years are a temporary aberration. See, e.g., Linda Greenhouse, *The Supreme Court—The Overview: U.S. Justices Open Their New Session by Refusing Cases*, N.Y. TIMES, Oct. 4, 1994, at A1 (noting that during 1993 Term, the Court decided only 84 cases, the lowest number since 1953).

323. Carrington, *supra* note 32, at 432.

324. Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 1015 (1985) (reporting that "conflicts were

these cases were it not for the conflict. By lessening the need to devote a substantial part of its docket to the resolution of intercircuit conflicts, the proposal frees the Court to hear other cases it now must pass over. Thus, the Court's opportunity to direct the development of federal law would increase.

The proposed structure restores the supremacy of the Supreme Court as the ultimate arbiter of national law. Constructs such as the "law of the circuit" and en banc review lend an inescapable appearance of autonomy and finality to the courts of appeals.³²⁵ Although the distinction is subtle, the proposed unitary Court of Appeals would look more like a subordinate court. It would lack a mechanism for controlling its "own" law.³²⁶ Conflicts between Court of Appeals panels could be expected to decline, owing to the smaller number and larger size of panels, the manageable, discretionary caseload, and the requirement that all decisions be published. The proposed structure does not call for en banc review of conflicting rulings. Such conflicts should be few enough that the Supreme Court could address them. The proposed structure reinforces the Supreme Court's ultimate responsibility for overseeing federal law.

The Supreme Court's "effectiveness of command"³²⁷ is enhanced under the proposed structure. Instead of thirteen courts, the Supreme Court would oversee the decisions of only one court. All responsibility for final error correction would be explicitly delegated to the Court of Appeals. More importantly, the output of "law" from the lower courts would be much reduced. The District Court Appellate Panels would not create precedent, because they would not publish their decisions. The provision for discretionary Court of Appeals review would encourage that court to accept only those cases calling for development of a new rule or clarification of an old one. Although all Court of Appeals decisions would be published, the volume of cases heard would be such that far fewer decisions would be published than are today under limited publication rules. Thus, the body of law the Supreme Court oversees would become more manageable. Although the Supreme Court itself would remain far removed from the district courts,³²⁸ it would preside

present in more than one-third of the 593 cases that received plenary consideration in the first four Terms of the 1980's").

325. Carrington, *supra* note 32, at 425 (describing the courts of appeals as "junior Supreme Courts, each having a territory in which it is 'semi-supreme' and for which it is a giver of temporary law").

326. *Cf.* Weis, *supra* note 8, at 460 (remarking on courts of appeals' references to "our" law—e.g., the law of the circuit—not to federal or national law).

327. Carrington, *supra* note 32, at 423.

328. See Carrington, *supra* note 32, at 432 (describing Supreme Court and courts of appeals as becoming "less connected" to the realities of the trial courts).

over a structure in which the importance of the error-correction function regained its former prominence.

CONCLUSION

The proposed structure is consistent with the evolution of the federal courts from 1789 to the present day.³²⁹ The only major revision to date created a significantly more differentiated structure than the original design. The 1891 design responded to a caseload crisis in the Supreme Court by creating an additional appellate tier, pushing review for error down to the new, lower tier, and providing for discretionary review in the higher, law-making court. Internal reforms adopted in recent years clearly recognize that not all appeals require the same process. But we have continued to expect the courts of appeals to handle all initial appeals. The result has been to dilute justice and lessen coherence in the law. The proposed structure returns to the Evarts Act approach of separating the two appellate functions.

Though controversial, the design proposed is less extreme than jurisdictional reform, which would keep many cases out of the federal courts altogether. Moreover, the proposed structural reforms are no more radical than those implemented a century ago. Congress was slow in coming to the rescue of a federal court system in crisis in the post-Civil War period. The reforms it eventually adopted have stood the test of time despite sweeping changes in the role of the federal courts. The present structure of the federal courts is so thoroughly ingrained that change is hard to contemplate.³³⁰ But a major structural overhaul is imperative. Congress has done well to move slowly, carefully studying the issues surrounding the caseload crisis, its effects, and possible solutions. It must recognize that adding judges, without more, is no longer a viable solution.

The demands on the federal courts are numerous and complex. No single treatment will ensure their well-being through the third century. Instead, a complex structure, combining elements of several distinct proposals but based on simple and enduring principles, must emerge. As the federal courts approached their second century, vast changes in American life created intolerable caseload pressures and called for an overhaul of the federal court system. A century later, equally sweeping changes demand another comprehensive restructuring. The time has come for Congress to enact a new design.

329. *Id.* at 435 (noting that district court review mechanism might secure "at least some of the values . . . [of] the Evarts Act").

330. Carrington, *supra* note 22, at 542.

