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INTRODUCTION

Over the past four decades, the number of cases filed in federal courts has expanded dramatically. This increase has had little impact on the workload of the Supreme Court, which in its most recent term decided fewer cases on the merits than it did in 1960.[1] It has, however, transformed the workings of the federal district courts and courts of appeals. Perhaps most obviously, the federal bench, both district and appellate, has grown as its caseload has expanded, although the former growth has not matched the latter. Congress has created hundreds of new district and circuit judgeships[2] and carved new judicial districts and circuits out of the existing structure,[3] and yet relative caseloads still hit new highs each year.[4] Put sim-

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[1] *See* Linda Greenhouse, *Split Decisions; The Court Rules, America Changes*, N.Y. TIMES, July 2, 2000, at 1 ("During the [October 1999] term . . . , the Court decided only 73 cases, the fewest number of any term since the early 1950's".); *see also* Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029, 1031, 1034-36 (1999) (detailing that "the courts of appeals continue to generate an ever-increasing volume of decisions . . . [while] the [Supreme] Court's docket of argued cases has shrunk to levels not seen since the 1950s"). The Supreme Court has faced some additional burdens from the increased federal caseload through a large increase in the number of petitions for certiorari. *See generally* David M. O'Brien, *Join-3 Votes, The Rule Of Four, The* Cert. *Pool, And The Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779 (1997) (discussing modern growth in the volume of certiorari petitions and the Supreme Court's response).

[2] Since 1950, the number of authorized district judgeships has grown from 212 to 646, and the number of circuit judgeships has grown from 75 to 179. *See* COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 14 & tbl. 2-3 (1998) (reporting data which includes, in 1950, judges from the Court of Customs and Patent Appeals and Court of Claims and which includes, today, judges from the Court of Appeals for the Federal Circuit) [hereinafter WHITE COMM'N REPORT].

[3] In the best-known example, the Fifth Circuit was split in 1980 in recognition of the increased caseload in the southeastern United States. *See generally* DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM (1988). Proposals continue to be debated for a similar split in the Ninth Circuit because of the large size and large caseload of that court. *See generally* Arthur D. Hellman, *The Unkindest Cut: The White Commission Proposal To Restructure The Ninth Circuit*, 73 S. CAL. L. REV. 377 (2000); Symposium: *The Proposal to Split the Ninth Circuit Court of Appeals*, 57 MONT. L. REV. 241 (1996). At the district court level, too, new districts have been created in many states. *See* Judicial Conference of the United States, *History of Federal Judgeships*, *at* http://www.uscourts.gov/history/district.html (visited Sept. 6, 2000).

[4] *See* Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of*

ply, the map and the moil of the federal judiciary is not what it was in the days of the Warren Court.

The practices of the lower federal courts have also changed, particularly operations in the courts of appeals. With a much smaller caseload, decision-making in the federal circuit courts could reasonably aspire to what has been described as "the Learned Hand model"—a model in which cases are decided by a panel of collegial judges, following full briefing and oral argument, through a published opinion crafted by one of the judges after receiving considerable input from other circuit judges.[5] But while many still long for this idealized model of appellate decision-making, there is no doubt that the modern courts of appeals cannot and do not operate in this manner (to the extent that they ever did so). In order to deal with the massive increase in the judicial caseload, the modern court of appeals not only has more judges than it did forty years ago, but also more law clerks and substantially more administrative and legal staff, all of whom have a hand in appellate adjudications.[6] Judges, of course, retain final decision-making authority, but in practice, staff attorneys and law clerks influence both the decision-making process and often its outcomes. Moreover, the growing caseload has not only restructured the personnel involved in the federal appellate process, it has also brought dramatic changes in both the input to, and output from, the courts of appeals. Litigants' opportunities to submit briefs and to make oral arguments to the courts of appeals have been curtailed, while the circuit courts have come to dispose of a majority of cases through unpublished opinions.[7]

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the Federal Courts, 1996 WIS. L. REV. 11, 26 (noting that, despite increases in the number of federal judges, "filings per judgeship have continued to rise in both the district courts and the courts of appeals"); *see also* WHITE COMM'N REPORT, *supra* note 2, at 14 & tbl. 2-3 (detailing that near tripling of the number of federal judges since 1950 has not kept pace with escalating filings in the federal courts, especially in the courts of appeals).

[5] *See* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 278 (1996) (describing the "traditional appellate procedure" and terming it "the Learned Hand model"); *see also* Henry P. Monaghan, *Taking Bureaucracy Seriously*, 99 HARV. L. REV. 344, 345, 356-58 (1985) (reviewing RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985)) (discussing the traditional approach to appeals in terms of the "Hart-Hand model").

[6] *See discussion infra* Part I.B.

[7] *See discussion infra* Part I.C-D.

Not surprisingly, the increased workloads facing the federal circuit courts, as well as the corresponding changes in their administrative structures and practices, have prompted substantial scholarly commentary.[8] Much of this literature can be readily placed into one of two camps, which essentially battle over how best to balance concerns of efficiency and justice in the decision-making of the modern federal appellate courts. One school defends, with varying degrees of enthusiasm, the transformations in circuit court operations as necessary to allow the federal appellate courts to continue to function in an age of ballooning dockets.[9] The opposing school acknowledges the difficulties posed by the courts' increased workload, but contends that the changes adopted in the face of those difficulties unduly shift decision-making authority away from those in whom the authority is constitutionally vested and reduce the quality of justice for many litigants.[10]

This Article contends that, while both schools make important points, their depictions of the courts of appeals are incomplete, which in turn makes many of their recommendations less than fully satisfying. Commentators have heretofore failed to take full account of the unique features that structure and affect the workings and the work product of the federal appellate courts. Consequently, assessments of the current state of affairs and prescriptions for the future have largely failed to be fully attentive to the special challenges to effective decision-making in the federal courts of appeals. This Article's main contention is that certain fundamental, but often overlooked, institutional features of the modern federal circuit courts significantly affect the balance between efficiency and justice in

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[8] Commentators have warned of a caseload "crisis" in the courts of appeals since at least the late 1960s, *see generally* 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 (1969); HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 31 (1973), and concerns about the impact of the volume of cases on circuit court practices have spawned dozens of articles by both academics and judges. *See, e.g.*, Thomas E. Baker, *A Bibliography for the United States Courts of Appeals*, 25 TEX. TECH L. REV. 335, 343-47, 354-405 (1994) (providing an extensive list of scholarly works concerning the operations of the federal circuit courts, with lengthy sections on "docket growth and the crisis of volume" and on implemented "intramural reforms").

[9] *See discussion infra* Part II.A.

[10] *See discussion infra* Part II.A.

appellate decision-making, and that the on-going dialogue about court reforms must be recast to take full account of these institutional realities.

Laying the groundwork, Part I details the changes in practices and structure within the courts of appeals driven by the dramatic expansion of the federal caseload since the 1960s. Though this transformation has been noted and debated for over twenty-five years, our account gives particular attention to the extremely limited role that each individual circuit judge now plays in the development of the decisions and doctrines of the courts of appeals. Part II then reviews and evaluates the scholarly commentary on the modern circuit courts' practices. This Part concludes that, while this literature makes many sound and important observations, the existing commentary still fails to take full account of the institutional and structural pressures that the courts of appeals face and therefore is unable to suggest fully appropriate alternative directions for the courts to pursue. Part III describes four essential characteristics of the existing courts of appeals, as well as the ramifications of those characteristics for appellate judicial decision-making. Part IV then develops a more refined model of federal appellate decision-making and urges the courts of appeals to explore Alexander Bickel's "passive virtues"—techniques for the avoidance of premature law-making—as a means of relieving institutional pressures while avoiding certain "casual vices" that have been rightly assailed in some scholarly critiques.

I. BURDENS OF AN EXPANDING CASELOAD AND THE JUDICIAL RESPONSE

The idealized model of circuit court adjudication has at least seven phases, all of which facilitate and foster careful, deliberative, and collective judicial appellate decision-making. The judges considering an appeal are to: (1) review briefs submitted by the parties, (2) hear oral argument, (3) conference following oral argument, (4) personally assess the case in a memorandum to be circulated before or soon after argument and conference, (5) draft an opinion or opinions, (6) circulate the draft(s) for comment and modification, and (7) finalize the opinion(s) for publication.

At each phase, the appellate judges who are assigned to the panel for the particular case are to be actively engaged with the substantive issues of the case and the process for resolving these issues. The three judges on the appellate panel are to perform the principal review of the briefs, carefully reading each submission in preparation for oral argument. They are to engage the attorneys for the parties in questioning during the argument and thereafter conference to discuss collectively their views of the case. Just before or just after this discussion, each judge is to personally articulate her individual assessment of the case issues in a memorandum to be shared with the other judges on the panel. Once the group settles on a tentative resolution of the case, one judge is assigned the task of drafting the opinion. That judge then prepares the draft; she may ask her law clerks to assist in research and may use the clerks as sounding boards, but the draft opinion is primarily the work of the judge herself. Having finished the draft, the judge then circulates her work to her colleagues on the panel, each of whom personally reviews the draft and proposes changes as he or she sees fit. The drafting judge may modify her opinion to reflect her colleagues' comments, further rounds of circulation may occur, and the other judges may decide to prepare concurring or dissenting opinions that also circulate among the panel members. Finally, the resulting opinion or opinions are issued by the court and are sent to a publisher to appear in an official reporter.

In this model, it is a given that all of the judges assigned to the panel for a case will be actively involved, both individually and collectively, in every aspect of the court's decision-making process. Further, the idealized model of circuit court adjudication includes both formal and informal mechanisms for even those judges not on an assigned panel to have a hand in a case's ultimate resolution, especially when the case appears to be particularly consequential or controversial. As a matter of court custom, panel members may circulate draft opinions to all judges of the circuit if and when an opinion seems significant either because of the issues involved or because it marks a redirection of circuit precedent. As a more formal matter, the en banc process provides a means for the parties, or even the circuit judges themselves, to request that a case be considered and resolved by all active members of the circuit court.

This ideal may have reflected reality during the years when Judge Learned Hand was a member of the Court of Appeals for the Second Circuit.[11] For the first half of this century, the number of cases to be adjudicated by the federal courts of appeals was sufficiently small to allow such active and collective judicial involvement in every aspect of the appellate decision-making process. With the relatively few appeals for the judiciary to handle and with the relatively small number of judges comprising each circuit,[12] it was reasonable to expect all three panel members to be actively involved in each case's resolution, and even possible for nearly every circuit judge to have some part in the decision-making of nearly every case.

Since the early 1960s, however, the courts of appeals have had to diverge significantly from the traditional model. That appellate procedures and methods have changed is conceded by the judges themselves, many of whom have written, supportively or critically, of the innovations that the courts have adopted.[13] The reason for the changes, too, is virtually uniformly acknowledged: the courts of appeals now decide far

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[11] *See generally* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994) (discussing practices of the Second Circuit during Judge Hand's tenure); MARVIN SCHICK, LEARNED HAND'S COURT (1970) (same).

[12] In 1930, a few years after Learned Hand became a circuit judge, the average circuit court had only four circuit members and there were only an average of sixty-four filings per judgeship per year. *See* WHITE COMM'N REPORT, *supra* note 2, at 13-14 & tbls. 2-2 & 2-3. In 1950, just before Judge Hand retired from active service, the average circuit court still had only six circuit members and there were still only an average of seventy-five filings per judgeship per year. *See id.*

[13] *See generally* 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); Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485 (1995); Donald P. Lay, *The Federal Appeals Process: Whither We Goest? The Next Fifty Years*, 15 WM. MITCHELL L. REV. 515 (1989); Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761 (1989); 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); William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1; Steven Reinhart, *Too Few Judges, Too Many Cases*, 79 A.B.A. J. 52 (1993); 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).

more cases than they did during the Learned Hand era, and they have changed their procedures in an attempt to cope with their dramatically increased caseloads.

In 1960, the federal appellate courts accepted 3,765 filings, of which 2,811 represented direct appeals from the district courts.[14] By 1995, filings had increased to 49,625, of which 43,924 were direct appeals from the district courts.[15] Since then, the number of appeals has continued to increase: the Administrative Office of the United States Courts reports that during the twelve month period ending September 30, 1999, there were 54,693 appeals filed in the twelve geographical federal circuits.[16] During this period, the number of federal circuit judges also has increased, but to a far lesser degree: in 1960, the Judicial Code authorized the existence of 68 circuit judges distributed among eleven appellate circuits,[17] while the current code distributes 179 judges among thirteen circuits.[18] The result has been a sharp increase in the workloads of individual circuit judges: whereas in 1960, a judge was responsible for approximately 150 cases per year, her counterpart today bears a load of over 900 cases per year.[19]

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[14] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 57 (1996).

[15] *See id.* at 60-61.

[16] Administrative Office of Courts, *Judicial Business of the United States Courts: 1999 Annual Report of the Director*, at tbl. B, *at* http://www.uscourts.gov/judbus1999/b00sep99.pdf (last visited Sept. 8, 2000). The Administrative Office's figures do not include appeals to the Federal Circuit. *Id.* Because Judge Posner does not cite the source of the statistics he sets forth in his book, it is not clear whether Judge Posner's numbers can be compared directly with the Administrative Office's numbers. It appears, however, that the number of federal appellate filings has continued on an upward course in the years since Judge Posner published his study, as the Administrative Office reported 51,991 filings for the twelve months ending September 30, 1996, 52,319 filings for the twelve months ending September 30, 1997, 53,805 filings for the twelve months ending September 30, 1998, and 54, 693 for the twelve months ending September 30, 1999. *Id.*

[17] *See* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3506 (1984).

[18] *See* 28 U.S.C. § 44 (2000). This number includes the twelve judgeships authorized for the Federal Circuit. *Id.*

[19] The number of appeals filed divided by the total number of active judgeships yields an average of just over fifty filings per active judge in 1960, but over 300 filings per active judge in 1999. *See* WHITE COMM'N REPORT, *supra* note 2, at 14 (noting that "[s]ince 1960, circuit judgeships have grown by 160%, but appeals per judgeship have grown by 450%"). To calculate each judge's average caseload, however, the number of filings per judgeship must be multiplied by three because

With such a pronounced increase, it was inevitable that the courts would adjust their procedures for disposing of cases. And, indeed, the courts of appeals today bear only a superficial resemblance to their predecessors of four decades ago. To be sure, the courts of appeals continue to decide appeals in panels of three judges, as they have since the creation of the modern version of the circuit courts of appeals in 1891.[20] But in other respects, the courts have been transformed from small collections of largely autonomous judges into large, bureaucratic institutions in which managerial functions now at least partially define the role and responsibilities of a federal circuit judge. And in the course of this transformation, both the responsibilities and the opportunities for each individual circuit judge to play a role in the development of the decisions and doctrines of her court of appeals has declined considerably.

A. *Changes in Actual Decision-Makers: Visiting and Senior Judges*

Even changes in the appellate process that have not substantially modified the judicial role still have profoundly affected the workings of the federal circuit courts. Consider, in particular, the use of senior and visiting judges. The Judicial Code allows senior judges and district court judges to sit by designation on appellate panels; it also permits judges from one circuit to sit by designation on a panel in another circuit.[21] As caseloads have grown, the courts have come to rely increasingly on senior judges, as well as judges from other circuits and the district courts, to fill out the panels required to deal with the burgeoning dockets. Thus, by 1998, nearly twenty-five percent

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three judges are involved in the adjudication of each case. Of course, to the extent senior and visiting district judges fill in, *see infra* text accompanying notes 21-28, this total burden for each active judge is reduced somewhat.

[20] The Circuit Court of Appeals Act of 1891, Act of March 3, ch. 57, 26 Stat. 826 (1891), popularly known as the Evarts Act, created nine circuit courts of appeals and thereby established the three-tiered federal court system that we know today. Prior to 1891, the circuit system in the federal courts was primarily a means of allocating federal trial responsibilities, while the U.S. Supreme Court served as the principal appellate tribunal. *See* WHITE COMM'N REPORT, *supra* note 2, at 7-11 (detailing the history and evolution of the structure and alignment of the federal court of appeals system); Dragich, *supra* note 4, at 18-21 (same).

[21] *See* 28 U.S.C. §§ 291-294 (2000).

of the judges participating in the disposition of appeals were either senior or visiting judges.[22]

There is nothing inherent in the use of visiting and senior judges that itself transforms the judicial function. Indeed, where an appellate panel includes a senior judge from the panel's own circuit, the panel's functioning may be largely unaffected since the senior judge, by dint of experience, is likely familiar not only with circuit precedent and the formal local rules, but also with informal traditions and the personalities of the judges within the circuit.[23] Using judges from other circuits, however, may introduce some obstacles, as such judges may have less knowledge of, or regard for, the practices and precedents of the host circuit than do the circuit's own judges.[24] And appointing district judges to serve temporarily on an appellate panel may introduce problems of its own: the district judge, accustomed to deciding cases for herself and mindful of her typical place in the judicial hierarchy, may be somewhat less willing to find error by one of her district court colleagues than would an appellate judge.[25] Nevertheless, in its essence,

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[22] *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1998, at 53 tbl. S-2 (1998) [hereinafter 1998 JUDICIAL BUSINESS]. Vacancies within a circuit, of course, increase the court's reliance on visiting judges. Thus, in 1991, when the elevation of Judge David Souter to the Supreme Court and the retirement of Judge Frank Coffin left the First Circuit with only four active judges, a considerable percentage of the court's dispositions involved the participation of a visiting or senior judge. Similarly, when a string of retirements and deaths left the Second Circuit short-staffed in 1998, panels with visiting or senior judges accounted for nearly fifty percent of the court's dispositions. *See* 1998 JUDICIAL BUSINESS, *supra*, at 53 tbl. S-2.

[23] *See* Richman & Reynolds, *supra* note 5, at 287 (suggesting that the "use of resident senior circuit judges is close to unobjectionable under any standard").

[24] *See* Richman & Reynolds, *supra* note 5, at 287 (contending that "visiting circuit judges may disturb collegial ways by their disregard for the host circuit's individual practices, and by their ignorance of, or disdain for, circuit precedent"); *see also* POSNER, *supra* note 14, at 135 (expressing concern that "heavy use of visiting judges . . . [increases] the difficulty of maintaining reasonable uniformity of law within the circuit").

[25] *See generally* James J. Brudney & Corey Ditslear, *Designated Bunting: District Court Judges on the Courts of Appeals* (forthcoming 2002) (demonstrating through empirical study that district judges sitting by designation typically keep a low profile by writing fewer opinions and dissents than their appellate peers); Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal? An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 MICH. J. OF LAW REFORM 351 (1995) (assessing and criticizing the use of district judges on the courts of appeals).

the use of visiting and senior judges creates no obstacles to the traditional appellate procedure. The decision-making process remains in the hands of Article III judges.

Yet while the increased reliance on senior and visiting judges does not fundamentally alter the traditional appellate process, it still can significantly affect the cohesiveness, the continuity, and perhaps even the legitimacy of circuit court decision-making. With senior and visiting judges playing a substantial role, the federal appellate norm is no longer a panel of three active judges of the circuit; rather it is a panel comprised of only two active circuit judges and either a visitor or a senior judge.[26] Indeed, it is not entirely uncommon for a litigant to have an appeal heard by only one active judge of the host circuit, with the panel's other two members filled by senior or visiting judges.[27] Combined with the reality that all but one circuit is comprised of eleven or more active members,[28] the considerable involvement of senior and visiting judges means that typically less than twenty percent (and often less than ten percent) of a circuit's active judges directly participate in the adjudication of each particular case.

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[26] As noted before, for the year ending in September 1998, nearly twenty-five percent of the judges participating in dispositions were either senior or visiting judges. *See* 1998 JUDICIAL BUSINESS, *supra* note 22, at 53 tbl. S-2. This number means that a senior or visiting judge is more likely than not to be a member of the average three-judge appellate panel. Moreover, given that in some circuits the percentage of visitors or senior judges exceeded thirty percent, and approached fifty percent in one circuit, *see id.*, in many circuits a considerable majority of three-judge panels will include a visiting or senior jurist.

[27] *See* JUDITH A. MCKENNA, FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 38 (1993) (noting that "panels often include only one active circuit judge; some include none").

[28] The circuits currently range in size from six to twenty-eight judges:

D.C.:	12	5th:	17	10th:	12
1st:	6	6th:	16	11th:	12
2nd:	13	7th:	11	Fed.:	12
3rd:	14	8th:	11		
4th:	15	9th:	28		

28 U.S.C. § 44 (2000).

B. *Changes in Functional Decision-Makers: Law Clerks and Staff Attorneys*

Other changes by the federal appellate bench to deal with increased caseloads even more clearly represent a modification in the way appellate judges resolve cases, and they serve to exacerbate the diminution of the role of each judge in the decisions and doctrines of her circuit. Some of these changes have occurred within the chambers of the individual judges, perhaps most dramatic among them relating to the number and use of law clerks. In 1960, each court of appeals judge had but one law clerk; in 1970, this number increased to two, and in 1980 to three.[29]

This increase in number has often been accompanied by a change in role. Generalization is difficult, because the manner in which law clerks are used varies widely from judge to judge, depending on individual temperament and style. Nevertheless, there is considerable anecdotal evidence to suggest that judges rely far more on law clerks than they did in the past. It is widely recognized, for example, that law clerks now draft many of the decisions that emanate from an appellate judge's chambers.[30] While judges who have written on the subject often assert that the decisional function remains with the judge,[31]

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[29] *See* POSNER, *supra* note 14, at 139.

[30] *See, e.g.*, J. Daniel Mahoney, *Law Clerks: For Better or for Worse?*, 54 BROOK. L. REV. 321, 332-34 (1988) (admitting that, in most chambers, law clerks prepare draft opinions while judges edit those drafts); Patricial M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or, Collegiality under Challenge*, 42 MD. L. REV. 766, 777-78 (1983) (suggesting that judges must utilize law clerks to draft opinions to keep pace with the large number of difficult and complex cases); *see also* Richard J. Cardamone, *How an Expanding Caseload Impacts Federal Appellate Procedures*, 65 BROOK. L. REV. 281, 288-92 (1999) (revealing that his standard practice is to have a clerk "prepare[] the initial draft of [an] opinion"); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3, 38 (discussing increased reliance on law clerks for opinion drafting); POSNER, *supra* note 14, at 143 (asserting that there is "no doubt that law clerks do more of the opinion writing today than they did thirty-five years ago").

[31] *See, e.g.*, Cardamone, *supra* note 30, at 290; Wald, *supra* note 30, at 778; *see also* Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913, 945 (1995) (noting that, even when judges concede that they have delegated some of the responsibilities of opinion writing to clerks, "[t]hey explain that the core function—the actual deciding—still resides with the judge").

others have suggested that the decision-making process nevertheless does change: the judge, adopting the role of editor rather than drafter, is deprived of the insights and shifts in thinking that inevitably occur during the act of drafting.[32]

Changes in the initial review that a case receives may have occurred as well. To cope with the increase in the number of filings, many judges have delegated the initial screening of cases to their clerks, who will summarize the dispute and perhaps suggest a possible resolution.[33] While the judge in all likelihood will then review the parties' submissions herself, the judge's impression of the case is likely to be shaped, at least in part, by what the law clerks have said or written. Law clerks may also review draft opinions that have circulated from other chambers and suggest changes to the judge. Again, while it is to be expected that the judge will not simply rubberstamp the law clerks' suggestions, the clerks' initial input is likely to affect in some way the manner in which the judge reacts to the work of her colleagues on the bench. Thus, while different judges have different working styles and interact with their law clerks in different ways, law clerks appear to have opportunities to influence judicial decision-making throughout the appellate process.

The increased number and influence of law clerks has coincided with the rise of centralized bureaucracies within the circuits. Some form of bureaucracy is necessary to allow the courts to function, of course: panels must be created, cases must be scheduled and assigned, briefs must be distributed, opinions must be collected for filing and distribution to the parties, and so on. These purely administrative functions do not impinge on the judicial role; they merely provide the support necessary for the performance of that role.[34]

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[32] *See* Dragich, *supra* note 4, at 32 (arguing that explaining and justifying a result is integral to decision-making and that "judicial involvement declines and judicial accountability suffers [and] the appellate process is diluted" when opinion-writing tasks are delegated to clerks); Richman & Reynolds, *supra* note 5, at 288 (suggesting that "only by writing the opinion herself can [the judge] be sure the facts play out properly against the reasoning leading to the decision"). *See generally* Nadine J. Wichern, Note, *A Court of Clerks, Not of Men: Serving Justice in the Media Age*, 49 DEPAUL L. REV. 621 (1999) (complaining about trend toward having clerks assume opinion-writing responsibilities).

[33] *See* Cardamone, *supra* note 30, at 290; Mahoney, *supra* note 30, at 333.

[34] To be sure, the random assignment of a case to a particular panel of judges

The growth of the central circuit office has moved beyond such administrative functions, however, and has begun to encompass the substance of cases as well. In particular, the circuits have created pools of staff attorneys who perform preliminary reviews of the merits of certain classifications of cases that routinely appear on the appellate dockets, principally prisoner claims and Social Security appeals. In these cases, a staff attorney typically will read the briefs to prepare a memorandum suggesting a resolution of the appeal and may even prepare a brief opinion and order disposing of the appeal.[35] The staff attorney's memorandum will, of course, be reviewed in the chambers of the three judges assigned to the case, and the judges and their law clerks may well disagree with, and are free to disregard entirely, the staff attorney's proposed disposition. Nevertheless, the filtering of the case through a single individual in a central office does tend to reduce the likelihood that the case will receive a full, fresh look in the chambers of each judge on the panel and thus decreases the likelihood that issues and arguments not raised (or not well presented) by the parties will be caught by a member of the panel.[36] The rise of the staff attorney therefore fairly may be said to have a substantive impact on the performance of the judicial function and thus further dilutes the extent to which circuit judges control doctrinal developments in their courts.

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may have a practical impact on the outcome of the case; so long as the random assignment process maintains its integrity, however, the act of assigning a case to a panel does not in any way call for the exercise of judgment but remains a purely administrative function.

[35] *See, e.g.*, Baker, *supra* note 31, at 943-50 (discussing role and impact of central staff who assist in case screening for circuit judges); Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CAL. L. REV. 937, 982-87 (1980) (same); Richman & Reynolds, *supra* note 5, at 290 (same). The rise in the use and reliance of central staff was extensively discussed and debated in the early 1980s in terms of the "bureaucratization" of the federal courts of appeals. *See generally* Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983); Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777 (1981); Joseph Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248 (1981).

[36] *See* Baker, *supra* note 31, at 947-50; Dragich, *supra* note 4, at 31-32; Richman & Reynolds, *supra* note 5, at 290-92.

C. *Changes in Input: The Decline of Oral Argument*

In addition to personnel changes—within panels, within chambers, and within central circuit offices—the courts of appeals have altered the steps that a case goes through before release of a final decision. In particular, the courts have cut back dramatically on oral argument. Oral advocacy was once a fixture in the appellate process, as it remains in law school moot court programs and in Hollywood's depiction of legal practice. In reality, however, oral argument in federal appellate cases has become the exception rather than the rule: in roughly sixty percent of appeals filed, the judges reach their decision after reading the parties' briefs but without hearing argument.[37]

To be sure, the parties may request argument, which will increase the likelihood that it will be granted. Moreover, the circuits vary widely in their approaches to oral argument. In the Second Circuit, for example, it remains the norm rather than the exception.[38] In other circuits, however, the reverse is true: the Third Circuit, for example, has a tradition of having entire days of calendared cases in which no argument is heard.[39]

This streamlining of the appellate process may properly be expected to reduce, at least at the margins, the degree of attention that many cases receive. To be sure, oral argument may not be useful in all cases. A *pro se* litigant, for example, is unlikely to provide much useful insight into any claims of error on the part of the district court, simply because of lack of familiarity with the law and with proper court procedures.[40]

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[37] *See* WHITE COMM'N REPORT, *supra* note 2, at 22 & tbl. 2-6; *see also* POSNER, *supra* note 14, at 160-62 (discussing "the curtailment of both the length and frequency of oral argument"); Baker, *supra* note 31, at 915-23 (same).

[38] *See* WHITE COMM'N REPORT, *supra* note 2, at 22 & tbl. 2-6. (detailing that the Second Circuit hears oral argument in eighty-five percent of cases involving counsel and in sixty-five percent of all cases).

[39] *See* JOE S. CECIL & DONNA STIENSTRA, FEDERAL JUDICIAL CENTER, REPORT, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS 113-30 (1987).

[40] Values other than simply assisting the court in reaching an appropriate result may be served by permitting *pro se* litigants to argue. Participation itself may have value by providing the *pro se* litigant with the sense that she has had an opportunity to be heard. *See* Dragich, *supra* note 4, at 31-32; Richman & Reynolds, *supra* note 5, at 290-92.

Some counsel, unfortunately, similarly struggle when set before an appellate panel. The value of argument, however, should not be underestimated simply because it is not uniformly of high quality. Oral argument represents the only real chance for the judges to ask questions of those who know the case the best—the attorneys who litigated the action in the district court. In the absence of argument, a judge is deprived not merely of the opportunity to have her own questions answered, but also of the chance to hear from her colleagues on the panel, whose questions may reveal their thoughts about the case in ways that conference alone could not.[41] Moreover, the possibility exists that the very fact of oral argument will lead the judge to examine the case more carefully than she would in the absence of argument, so as to be prepared with questions for the parties.

D. *Changes in Output: Unpublished Opinions and Judgment Orders*

Among the most dramatic changes at the courts of appeals in recent decades has been the emergence of the unpublished opinion. It used to be that virtually all of the courts' dispositions of appeals, at least in those cases that reached the merits of the appeals, were published in the Federal Reporter.[42] As

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[41] *See* Stanley Mosk, *In Defense of Oral Argument*, 1 J. APP. PRAC. & PROCESS 25, 27 (1999) (stressing that "oral argument provides an important forum for an interchange of ideas between counsel and the judges, and between the judges themselves"). A similar reduction in the "input" judges receive, which is also a casualty of increased caseloads, concerns the practice of writing and circulating pre-conference memoranda in which each judge develops his or her own tentative view on the legal issues under consideration. As Gerald Gunther has explained, the use of pre-conference memos, which "reached its peak during [Judge Hand's] tenure" on the Second Circuit, served to "promote individual consideration of each case prior to giving it collegiate attention" and "assured an unequaled degree of intellectual engagement." Gerald Gunther, *Reflections on Judicial Administration in the Second Circuit, from the Perspective of Learned Hand's Days*, 60 BROOK. L. REV. 505, 508 (1994); *see also* GUNTHER, *supra* note 11, at 286-88 (discussing Judge Hand's use of pre-conference memorandum). But, despite recognizing the considerable benefits that flow from this practice, the burdens of an increased caseload has entailed that "the use of pre-conference voting memoranda has declined significantly." Cardamone, *supra* note 30, at 284; *see also* Gunther, *supra*, at 509 (lamenting the declining use of pre-conference memorandum).

[42] *See* POSNER, *supra* note 14, at 163; Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical*

the number of dispositions began to increase, however, and the production of new volumes of the official reports began to accelerate, voices within the judiciary began to question whether it was necessary to publish in every case.[43]

At present, each circuit, by local rule, allows cases to be decided by unpublished opinion. At its most basic, the "opinion" may be no more than a one-word or one-sentence order, stating simply that the judgment of the district court is reversed or, more commonly, affirmed. More typical is the summary opinion, either attributed to one judge or per curiam, which sets forth a brief summary of the facts and a short explanation of the court's result. In many instances, this explanation is very brief, though the sheer number of issues raised on appeal may lead the judges to write a longer opinion in some cases. On occasion, the length and intellectual rigor of an unpublished opinion may rival those of opinions that appear in the Federal Reporter.

The circuits vary widely both in the types of unpublished opinions that they write and in the proportion of cases that they decide by unpublished opinion.[44] These differences seem to be as much the product of different informal norms as any written policy.[45] There are significant formal differences, how-

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Reality, 73 JUDICATURE 307, 308 (1990).

[43] *See generally* 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) (detailing increased use of unpublished opinions); *see also* Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119 (1995) (same); 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) (same); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978) (same).

[44] *See* WHITE COMM'N REPORT, *supra* note 2, at 22 & tbl. 2-7 (reporting varying circuit rates for cases decided on the merits that resulted in a published opinion); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 112 (2001) (discussing results of empirical study showing "substantial difference in publication rates among the circuits").

[45] *See* Merritt & Brudney, *supra* note 44, at 111 (noting that, while formal publication criteria within each circuit "play a large role in predicting publication . . . , [j]udges for different circuits apply relatively similar publication criteria to arrive at widely different publication rates").

ever, in the weight that the circuits attach to unpublished opinions. Including the Federal Circuit, six circuits prohibit any citation to unpublished opinions, except perhaps where offered to establish claim preclusion, issue preclusion, or law of the case; whereas in six other circuits, unpublished opinions may be cited in unrelated cases, but even there the opinions may be cited for their persuasive value alone, and citation usually is "disfavored."[46] In none of the circuits are unpublished opinions binding precedent.[47] This treatment arises out of the courts' rationale for the unpublished opinions: the notion that, where a case is easily resolved on the basis of existing law, there is no need for the court to take the time to write a polished, published opinion because the case adds nothing new to the body of law, and there is no need for anyone to cite the court's decision because other precedent exists to establish the pertinent point.

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[46] *Compare* D.C. Cir. R. 28(c) (prohibiting citation to unpublished opinions for purposes other than preclusion); 1st Cir. R. 36.2(b)(6) (allowing citation of unpublished opinions only in related cases); 2d Cir. R. § 0.23 (same); 7th Cir. R. 53(b)(2) (prohibiting citation to unpublished orders except for purposes of claim preclusion, issue preclusion, or law of the case); 9th Cir. R. 36-2 (same); Fed. Cir. R. 47.6 (prohibiting citation of unpublished opinion as precedent); *with* 4th Cir. R. 36(c) (citation to unpublished opinions is disfavored but is permissible where counsel believes that no published opinion would serve as well); 5th Cir. R. 47.5.4 (stating that an unpublished opinion is not precedent but may be persuasive); 6th Cir. R. 24(c) (stating that citation to unpublished opinions is disfavored but is permissible where counsel believes that no published opinion would serve as well); 8th Cir. R. 28A(k) (allowing citation where the unpublished opinion is persuasive and no other opinion would serve as well); 10th Cir. R. 36-3 (unpublished opinion may be cited if it is persuasive, no published opinion has addressed the issue, and citation would assist the court); 11th Cir. R. 36-2 (unpublished opinion is not binding precedent but may be persuasive). The Third Circuit is something of a wildcard. Its local rules are silent on the citability of unpublished opinions. The court's Internal Operating Procedures state that the court will not cite unpublished opinions, but as to whether counsel may cite such opinions in their submissions to the court, the Internal Operating Procedures are silent. *See* 3RD CIR. INT. OP. PROC. 5.8. In practice, it appears that counsel do occasionally refer to unpublished opinions in their briefs.

[47] In a surprising and remarkable opinion that is discussed *infra* at Part IV.B.2.d, a panel on the Eighth Circuit very recently held unconstitutional a local circuit rule which restricted the precedential authority of unpublished opinions. *See* Anastasoff v. United States, 223 F.3d 898 (8th Cir.), *vacated*, 235 F.3d 1054 (8th Cir. 2000) (en banc). Whether the Eighth Circuit itself or other circuits will begin to change its established local rules and customs concerning the precedential effect of unpublished opinions remains to be seen.

II. CASUAL VICES OR NECESSARY EVILS?

Inevitably, the changes that the courts of appeals have undergone have generated commentary by both scholars and judges. Commentators generally have divided into two camps. Those who oppose what the courts have done to cope with their increased workload criticize the development of what might be called "casual vices," labor-saving mechanisms by which the courts have abdicated much of their responsibility, both to the parties that appear before them and to the system of law that their decisions create. Those who defend the changes tend to do so on the grounds that these steps were necessary to allow the courts to function under their increased burdens, although they do argue that the use of unpublished opinions has had the positive effect of preventing the existing body of binding precedent from becoming so unwieldy as to be unmanageable.

Both camps raise legitimate concerns about the changes that the courts of appeals have undergone in the past four decades. Ultimately, however, neither side's position is entirely satisfactory. In part this is so because each side tends to overstate its own positions and undervalue those of the other. But in part this is so because each rests on a conception of the federal courts of appeals that is not fully formed, or at least not fully articulated.

A. *The Casual Vices*

There are many vocal critics of the courts' of appeals transformation in the face of increased caseloads.[48] These commentators acknowledge, as they must, that, given the pres-

[48] A complete list of all the works that express concern about modern federal circuit court practices would itself fill dozens of pages. *See generally* Baker, *supra* note 8 (providing an extensive list of scholarly works concerning the operations of the federal circuit courts). Among the most prominent of these critics are Professor Thomas Baker, *see, e.g.*, THOMAS A. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1995); Baker, *supra* note 31; Professors William Richman and William Reynolds, *see, e.g.*, Richman & Reynolds, *supra* note 5; William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. APP. PRAC. & PROCESS 37 (1999); Professor Martha Dragich, *see, e.g.*, Dragich, *supra* note 4; Dragich, *supra* note 43; and Professor Lauren K. Robel, *see, e.g.*, Robel, *supra* note 30; Robel, *supra* note 43. Most of the criticisms summarized in this section are drawn from the works of these commentators.

sures of burgeoning dockets, the courts could not remain what they once were, in idealized form if not always in reality: relatively small, collegial bodies whose members had more than sufficient time to delve into each case, deliberate, and explain their considered judgment in published opinions. They contend, nevertheless, that the particular mechanisms that the courts have adopted threaten the integrity of the bench.

Focusing on changes in personnel, critics contend that the increase in the number of law clerks and the rise of circuit staff attorneys have changed the role of the individual circuit judge in a way that is ultimately inconsistent with the act of judging. The increase in law clerks has fundamentally altered the judge-clerk relationship: with only one clerk, judges could be the principal motivating force behind the clerk's efforts; with multiple clerks working independently on different projects, the judge cannot maintain the same level of involvement in the clerks' work. Staff attorneys pose an even more serious threat to the appellate system, according to critics, because they are hired through a central administrative office and work in their own offices. The supervision and interaction between the staff attorneys and judges is minimal which means that, unlike personal law clerks who can become familiar with the judge's way of thinking and mold to the judge's style, staff attorneys will remain largely detached from the personal dynamics of working with the judges they serve. This relative independence of the staff attorneys, which is furthered by the fact that they do not work for any one judge but serve the circuit at large, represents in the view of critics an even more substantial shift in power away from the judges into the hands of a central, non-judicial administrative body. The delegation of the chore of drafting opinions to law clerks and central staff simply exacerbates the transfer of power.

The increasing roles that law clerks and staff attorneys play in the appellate process has had two deleterious consequences, according to critics. First, it has tended to move power away from Article III judges and into the hands of non-judicial personnel who lack the training and experience, not to mention the formalities of the nomination and confirmation processes, that judges have.[49] While critics have difficulty

[49] *See, e.g.*, Baker, *supra* note 31, at 944-46; Richman & Reynolds, *supra* note

pointing to individual cases and suggesting that different results would have been reached had the influence of law clerks or staff attorneys been less, they suggest that, given the substantive input that law clerks and staff attorneys have, such cases are virtually inevitable.[50] Second, the role of law clerks and, to a lesser extent, staff attorneys in drafting opinions has meant that the quality of the court's collective work has declined. Law clerks, after all, tend to be at the beginning of their legal careers; they are aware, as well, of their subsidiary positions within chambers. They thus lack the experience, the vision, and frequently the confidence to write distinctive, original opinions, and tend instead to fall into familiar rhythms and patterns.[51] The result is too many plodding, dull opinions that lack the spark of creative legal thought.

Professors Richman and Reynolds criticize these collective developments by giving clerks and staff the label of "para-judges," and they assert and lament that "inappropriate delegation of quintessentially judicial tasks has become the norm."[52] In the view of Professors Richman and Reynolds and other like critics, appellate judges have been transformed from principal actors into managers and supervisors of the actions of others.[53] The critics also take issue with the changes in appellate procedures that have accompanied the changes in personnel. They decry the limits on the availability of oral argument.[54] Critics argue that in the absence of the opportunity to explore the subtleties of the case in an interactive environment with those who know the most about the case, judges are less likely to render sufficiently nuanced decisions, thus diminishing the

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5, at 291-92.

[50] *See, e.g.*, Richman & Reynolds, *supra* note 5, at 289, 291-92.

[51] Seventh Circuit Chief Judge Richard Posner, who tends to take a more balanced perspective in his analysis of federal court transformations, *see generally* POSNER, *supra* note 14, has expressed particular concern about the impact of law clerks and other non-judicial personnel on opinion writing. *See* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1446-49 (1995) (suggesting that the formalized voice in which many opinions are written is the product of excessive involvement by law clerks and operates to stifle the creativity of judicial thought).

[52] Richman & Reynolds, *supra* note 5, at 287-88.

[53] *See* Richman & Reynolds, *supra* note 5, at 289, 291-92; *see also* Baker, *supra* note 31, at 944-51.

[54] *See, e.g.*, Richman & Reynolds, *supra* note 5, at 279-81; Baker, *supra* note 31, at 915-23.

quality of justice that the courts are able to deliver.[55] They suggest, moreover, that oral argument serves more than simply a functionalist purpose; it also furthers participatory values by allowing losing parties to feel that they have at least had the opportunity to be heard.[56]

Critics frequently reserve the worst of their ire for unpublished opinions. While summary orders—one-sentence dispositions that say nothing about the reasons for the court's decision—typically receive the harshest treatment, opponents of unpublished opinions express a more general concern about the impact of unpublished opinions on the quality of justice that the circuit courts deliver. Commentators frequently bemoan the alacrity with which many unpublished opinions are written, suggesting that the brief and unpolished summary memoranda issued by the courts betray a lack of careful thought on the part of the deciding judges.[57] Worse, opponents note, unpublished opinions frequently reflect, even more so than published opinions, significant contributions by law clerks and staff attorneys, individuals who lack the expertise and experience, let alone the constitutionally granted authority, of Article III judges.[58] The result is second-class justice, or at least the perception of lesser justice, since parties whose arguments are dismissed summarily in unpublished opinions may feel that they have not been treated with sufficient respect and that their claims have not been given due consideration.[59]

B. *The Necessary Evils*

Those who defend the appellate courts' adaptations to their increased workload tend to do so without tremendous enthusiasm, and often with some reservations. These defenders

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[55] *See, e.g.*, Baker, *supra* note 31, at 919; *see also* Mosk, *supra* note 41, at 27; Stephen L. Wasby, *The Functions and Importance of Appellate Oral Argument: Some Views of Lawyers and Federal Judges*, 65 JUDICATURE 340, 340 (1982); Don Babwin, *Appealing Oral Arguments*, CAL. LAW., Sept., 1992, at 19.

[56] *See, e.g.*, Richman & Reynolds, *supra* note 5, at 281.

[57] *See, e.g.*, Dragich, *supra* note 43, at 785-800; Robel, *supra* note 43, at 945; *see also* Reynolds & Richman, *supra* note 43, at 1205.

[58] *See, e.g.*, Richman & Reynolds, *supra* note 5, at 289, 291-92.

[59] *See, e.g.*, Baker, *supra* note 31, at 953. *See generally* Kerri L. Klover, Comment, *"Order Opinions"—The Public's Perception of Injustice*, 21 WM. MITCHELL L. REV. 1225 (1996).

frequently are judges, individuals who experience first-hand the burdens of overcrowded dockets.[60] Many of them express a wistful longing for the days of the Learned Hand model. The present arrangements, in other words, do not accord with their notions of how the ideal appellate court would function. Still, they recognize that appellate filings will not decline to their previous levels, and they believe that the adjustments that the courts have made represent appropriate accommodations to the present reality.[61] They experience personally the need for help in handling their duties and the benefits of having young, bright, enthusiastic minds to assist them with their work; thus, while they recognize the danger of deferring too much to their law clerks, they see no need to complain of their presence.[62] Similarly, staff attorneys are seen as an efficient means of addressing large numbers of cases in well-defined categories that repeatedly raise a narrow set of issues.[63] And, in their minds, where a case presents a straightforward legal question on the briefs, oral argument would be superfluous.[64] Law clerks, staff attorneys, and restrictions on oral argument, then, principally represent time-saving devices that allow judges to concentrate their energies where they are most needed.

Unpublished opinions, on the other hand, are sometimes seen as more than a time-saving device. To be sure, defenders of unpublished opinions note the efficiencies that unpublished opinions create. Commentators argue that requiring published opinions in all cases would cause judges already overburdened

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[60] *See, e.g.*, Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 182-83 (1999); Phillip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909 (1986); Cardamone, *supra* note 30; Wald, *supra* note 30; POSNER, *supra* note 14; *see also* sources cited *supra* note 13. Most of the defenses of circuit court transformations summarized in this section are drawn from these works.

[61] *See, e.g.*, Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1494-97 (1995) (reviewing BAKER, *supra* note 48); Cardamone, *supra* note 30; Mahoney, *supra* note 30; Martin, *supra* note 60; Wald, *supra* note 30.

[62] *See generally* Cardamone, *supra* note 30; Mahoney, *supra* note 30; Wald, *supra* note 30.

[63] *See, e.g.*, Jones, *supra* note 61, at 1494.

[64] *See* Alvin B. Rubin & Gilbert Ganucheau, *Appellate Delay and Cost—An Ancient and Common Disease: Is It Intractable?*, 42 MD. L. REV. 752, 762 (1983); *see also* Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to Conventional Wisdom*, 72 IOWA L. REV. 1, 21-24 (1986).

by swelling caseloads to spend too much of their limited time on cases with little merit.[65] In addition, they claim that requiring the publication of all dispositions would add needlessly to the bulk of the Federal Reporter diminishing the cohesiveness and coherence of the body of the law.[66] Unpublished opinions, in the supporters' view, act as a safety valve to relieve the pressure on both the judges' workloads and the library shelves groaning under the ever-increasing mass of published authority.[67]

C. *The Missing Pieces*

The debate between supporters and opponents of the changes in the courts of appeals ultimately is unsatisfying. The criticisms levied against the alterations contain some fair points, and yet many of them carry an air of unreality. Consider the critique of the failure to hold oral argument in all cases. Anyone who has spent much time in an appellate courtroom knows that there are many cases in which oral argument is little more than a *pro forma* exercise, adding little to nothing of substance to the arguments set forth in the briefs. In such cases, foregoing oral argument hardly seems a terrible loss. Provided, therefore, that judges make their decisions in a fair-minded fashion and do not give the perceived inconveniences of oral argument too much weight, little would seem lost from the decision not to hear oral argument in every case.[68] At some level, many of the most vocal critics of circuit court transformations seem to view the statutory right to appeal as

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[65] *See, e.g.*, Jones, *supra* note 61, at 1494-95; Diana Gribbon Motz, *A Federal Judge's View of Richard A. Posner's* THE FEDERAL COURTS: CHALLENGE AND REFORM, 73 NOTRE DAME L. REV. 1029, 1038 (1998) (Book Review); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This: Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAWYER, June, 2000, at 43.

[66] *See, e.g.*, Kozinski & Reinhardt, *supra* note 65, at 43, Martin, *supra* note 60, at 181-83.

[67] *See, e.g.*, Nichols, *supra* note 60, at 927-28; Martin, *supra* note 60, at 181-83.

[68] Critics may counter that, while there may be cases in which oral argument proves unproductive, it is difficult to identify in advance the cases in which oral argument will lack value. Yet if anyone is capable of making such a prediction, it would seem to be the appellate judges themselves, who work immersed in the arguments, written and oral, of counsel. And the requirement that the decision not to hear argument be unanimous among panel members adds a layer of protection against the erroneous judgments of any single judge.

if it was a requirement that a set of judges devote an enormous amount of time to the consideration of every litigant's claim of error, giving inordinate attention to every aspect of the decision-making process even when the case's resolution is straightforward, clear, and easily seen.

The solutions that the critics propose, too, sometimes seem similarly ungrounded. Professors Richman and Reynolds, for example, have been outspoken in calling for a dramatic increase in the number of circuit judges as a means of restoring the ratio of cases per judge to something approaching what it was in the 1960s.[69] Restoring the balance between the number of judges and the number of cases, they believe, would reduce reliance on law clerks, eliminate the need for staff attorneys, and leave the judges time to hear oral argument.[70] Yet while Professors Richman and Reynolds have reasoned rejoinders to those who argue that such a change would destroy the collegiality of the courts and increase the number of inter- and intra-circuit conflicts, they fail to fully defuse concerns that massive expansion of the federal judiciary could dilute the quality of judicial decision-makers or at least diminish the perceived importance of the task of federal judges so that no single federal decision garners the extended attention or scrutiny that at least some cases now receive.[71] Perhaps even more damning, the proposal of Professors Richman and Reynolds, like so many well-intentioned suggestions put forward by those in the academy, has little or no real chance of being adopted. Given the slow pace at which existing vacancies have been filled over the past decade, as well as the disdain with which elected officials from each major party decry the "activism" of judges nominated by presidents of the other party, it seems highly unlikely that a plan calling for the doubling or tripling of the size of the federal judiciary could be passed into law.

Those who defend the changes in the courts of appeals, in contrast, seem too focused on the bottom line, on the ability of the courts to clear cases from their dockets efficiently. This is,

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[69] *See* Richman & Reynolds, *supra* note 5, at 297-334; Richman, *supra* note 48, at 39-47.

[70] *See* Richman, *supra* note 48, at 50-51.

[71] *See* Jon O. Newman, *Litigation Reform and the Dangers of Growth of the Federal Judiciary*, 70 TEMP. L. REV. 1125, 1128-32 (1997).

to be sure, an important goal—the cases on the courts' dockets must be decided, both for their own sakes and to allow judges to move on to subsequent filings, which show no sign of abating. Many of the defenders, however, pay little if any heed to competing concerns, notably participatory values and the appearance of fairness. A party whose appeal is decided without oral argument, and whose arguments are summarily dismissed in a brief, unpublished opinion, is unlikely to be satisfied—not only because she did not prevail, but also because of the appearance that the court did not treat her appeal seriously. Such a litigant is likely to note, as well, that other parties in other appeals seem to have been treated more respectfully: they have had the chance to argue before the court, and the court has explained its decision in a reasoned manner, in an opinion that is disseminated to the public through the court's official reporter. This is not to say that the courts must be brought to a standstill so as to devote a massive amount of time and energy to each and every case. But the court that ignores these concerns goes a long way toward defeating the truism that the law is no respecter of persons.

What ultimately is unsatisfying about the debate is not simply that those engaged in it seem to be talking past each other, but rather that they seem to rest on incomplete conceptions of the unique role and the unique structure of the federal courts of appeals. The courts of appeals are more than dispute resolvers; they are also uniquely important and central as the custodians of a complex and ever-changing body of law. These roles create competing demands, which are compounded by the unique institutional pressures faced by circuit courts resulting from their position between the district courts, which resolve factual disputes, and the Supreme Court, which authoritatively interprets the law. Moreover, the judicial structure through which circuit judges must discharge these functions compounds and complicates the challenges that confront the federal courts of appeals. Those who have addressed the increases in the appellate caseload, and the reforms undertaken to cope with those increases, do recognize these elements at some level, but they seem not to have thought through their implications for the courts' ability to formulate and develop a coherent body of law in an age with more courts, more judges, and more cases. Part III endeavors to provide a more complete and realistic

account of the central challenges to effective decision-making for the modern federal courts of appeals.

III. THE FUNDAMENTAL CHALLENGE FOR THE COURTS OF APPEALS

A. *The Competing (Yet Intertwined) Functions of the Courts of Appeals*

It is frequently observed that the courts of appeals have two essential functions: error-correction and law-making.[72] The first function is to provide litigants who believe they have been victimized by erroneous decisions in the district courts with a forum in which claims of error may be assessed. The obligation for courts of appeals in discharging this error-correction function is to ensure that an appropriate and just outcome has been reached in each individual case brought before them. As such, this function is inherently backward-looking: the appeals court looks back at the district court proceedings to adjudge whether a fair process and a just result were achieved in that forum.

The second function of the courts of appeals is to develop a body of law that defines the parameters of legal rights and obligations for those subject to the law and that provides guidance to courts for the adjudication of subsequent cases. This is the law-making function of the circuit courts of appeals, and it is inherently forward-looking: the appeals court looks forward with a concern for effectively and justly governing the future behavior of actors and courts.

Of course, it almost goes without saying that each of these important functions independently presents its own special challenges for the federal appellate courts. Looking back at completed proceedings, wise and well-intentioned jurists will often disagree as to whether error was committed below, and they may also reach different reasonable conclusions concern-

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[72] *See, e.g.*, BAKER, *supra* note 48, at 14-16; PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 2-4 (1976); ABA COMM'N ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO APPELLATE COURTS § 3.00, commentary, at 5 (1994 ed.) ("The appellate courts have two functions: to review individual cases to assure that substantial justice has been rendered, and to formulate and develop the law for general application in the legal system.").

ing the appropriate remedy for any errors that are identified. Likewise, looking forward toward the developing legal landscape, judges will frequently have differing views as to the proper direction for the law to evolve, as well as divergent visions concerning the appropriate means for courts to engineer legal change.

Less discussed than the inherent challenges of error-correction and law-making for a circuit court is the fact that these two functions, taken together, will sometimes pull an appellate court in different directions, especially as the judges decide how best to craft their opinions. Consider a court's position when concluding on appeal that there was some procedural flaw in a lower-court proceeding, but that this flaw in the case at hand does not justify reversing the decision below. For example, imagine a criminal prosecution in which the defendant, having been convicted at trial, complains on appeal that the district judge erroneously allowed evidence of an illegal search to get before the jury. The appellate panel is convinced that the search was indeed illegal but also believes that the error in allowing evidence from the search to be introduced was harmless beyond a reasonable doubt. To meet the court's error-correction function, it would suffice to simply affirm the conviction; because the district court's error did not affect the ultimate result, there is no need to correct it. At the very most, if an error-correcting court believes it should explain the basis of its decision as a service to the parties or as a means to check and fortify its conclusions, the appeals court might write a brief opinion simply explaining that any error was harmless, without addressing the question of whether the search was illegal. On the other hand, the court's law-making duties suggest the panel should provide in its opinion a full account of not only the basis for finding the error harmless, but also the reasons why the search was illegal. This discussion will then have the potential to influence law enforcement personnel in future searches, and to affect the analysis of district courts in future cases in which similar searches are challenged. This section of the court's opinion will of course be dictum because it is not necessary to the resolution of the case. The panel may nevertheless expect that, as an indication of the court's thinking, it will have influence and thus contribute in a broad sense to the existing body of law. In other words, the appellate

court's obligation to achieve a just result in this individual case (its error-correction function) could be discharged by a simple affirmance, but the court's obligation to define the law for the future (its law-making function) would require a meaningful and instructive explanation of both the nature of the mistake that occurred below and why this mistake should not lead to a reversal.

Moreover, and of critical importance for a full appreciation of the appellate courts' work, though the dual obligations of error-correction and law-making often create competing demands, they are inextricably linked. Judges' perceptions of, and contributions to, the legal landscape and legal trends will always be affected by the specific facts and procedural posture of the case before them, as well as by the specific arguments developed (and not developed) by the parties. Put another way, the appellate courts' perspective and production as lawmakers looking forward are defined and shaped by the cases and claimed errors they are looking back upon. Consequently, the order and the manner in which individual cases come before appellate courts is of great import; the unique case-specific context in which certain issues are first raised will inevitably affect the development of the law. Even though appellate courts cannot possibly know or foresee all the contexts in which future cases will raise certain legal issues, their initial decisions on particular issues in the context of individual cases will shape, through the power of precedent, the framework within which future cases are decided.

The inherent tension and necessary synergy between error-correction and law-making functions is a fundamental aspect of the work of every appellate court. Critically, though, these appellate dynamics combine with the unique institutional structure of the federal courts of appeals to produce particular difficulties for these courts in discharging their judicial responsibilities and ensuring the sound and sensible development of the law. There are four central characteristics of the federal courts of appeals—characteristics that define the types of cases that come before the courts, the procedures by which the courts decide cases, and the ramifications of the courts' decisions for future litigation—which deepen and aggravate the tension created by the competing functions of error-correction and law-making. To fully appreciate these dynamics, it is im-

portant to review and examine these four fundamental features of the federal circuit courts.

B. *The Four Key Characteristics of the Courts of Appeals*

Within the federal judiciary, the courts of appeals occupy a unique place, have a unique structure, and exercise unique powers. In the federal district courts, judges act individually and independently to decide an enormous number of cases and address a range of issues, but their legal rulings lack any binding precedential effect. In the United States Supreme Court, the justices act collectively (though rarely cohesively) and command the observance of lower courts, but they decide only a limited number of cases each year. Resting between these courts and expected to rule both collectively in panels of three judges and independently through separate panels, the judges of the federal circuit courts face a variety of particular institutional challenges that affect virtually every aspect of the courts' business and have a profound impact on both their error-correction and law-making functions.

1. Mandatory Jurisdiction

The jurisdiction of the federal appellate courts, as defined by statute, consists of two major categories: appeals from final judgments and interlocutory appeals. As to the latter category—which represents only a tiny fraction of the courts of appeals' dockets[73]—the appellate courts have wide discretion to accept or reject particular petitions for review.[74] As to the

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[73] *See* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1176, 1198-99 (1990) (discussing statistics concerning small number of interlocutory appeals and urging greater use of this procedure).

[74] *See* 28 U.S.C. § 1292(b) (2000); *see also* MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE § 2.09, at 106-12 (3d ed. 1999) (discussing procedures for seeking interlocutory appeals). Even if the district court has reached a conclusion that the case presents an important legal question as to which there is substantial ground for disagreement and that the ultimate termination of the case will be advanced by an immediate appeal, the court of appeals retains the authority to refuse to hear the appeal. *See* TIGAR & TIGAR, *supra*, at 110-11 (discussing cases in which circuit courts refused to hear interlocutory appeal despite certification of appeal by district judge). Some categories of interlocutory appeals do fall within the appellate courts' mandatory jurisdiction, including:

former category, however, jurisdiction is mandatory: a party against whom a district court enters a final judgment may seek review before the court of appeals for the circuit in which the case was brought.[75] Thus, by law, any and every litigant dissatisfied with a judgment at the district court level has an appeal as of right to the court of appeals in her circuit. Put another way, the federal courts of appeals, in discharging their error-correction function, are obliged to examine and assess every claim of error asserted to them.

As a consequence of its mandatory jurisdiction, the federal courts of appeals have no effective means of controlling the number or types of cases that come before them. Though a court of appeals has some discretion when deciding precisely how to resolve cases on its docket, it must render an on-the-record disposition in every case in which an appeal is sought.[76] Unlike the Supreme Court, which is able to structure its caseload and decision-making through the exercise of its *certiorari* power,[77] the courts of appeals have no real control over the content of their dockets. While the Supreme Court can determine the time, manner, and context in which it will address and resolve particular issues by carefully selecting

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appeals from orders granting, denying, modifying, or dissolving injunctions; appeals from orders appointing receivers; and appeals from certain decrees in admiralty cases. *See* 28 U.S.C. § 1292(a).

[75] *See* 28 U.S.C. § 1291.

[76] The methods of on-the-record dispositions vary from circuit to circuit, as each federal circuits' local rules set forth various means for resolving appeals. *See* D.C. Cir. R. 36(b) (permitting the court to use abbreviated disposition methods when deemed appropriate); 1st Cir. Loc. R. 27.1 (allowing for summary disposition); 1st Cir. Loc. R. 36.1 (permitting the court to choose the method of disposition: order, memorandum and order, or opinion); 2nd Cir. § 0.23 (permitting for disposition in open court or by summary order); 3rd Cir. Appx. 6.2 (permitting for use of judgment order as a method of disposition); 5th Cir. R. 47.6 (allowing affirmance without opinion); 6th Cir. R. 19 (providing for disposition in open court after oral arguments); 7th Cir. R. 53(c) (permitting the use of unpublished orders); 8th Cir. R. 47A (allowing the use of summary disposition); 8th Cir. R. 47B (permitting affirmance, and sanctioning enforcement, without opinion); 9th Cir. R. 3-6 (providing for summary disposition); 10th Cir. R. 27.2 (providing for summary disposition); 10th Cir. R. 36.1 (allowing the court to dispose of certain appeals by unpublished order); 11th Cir. R. 36-1 (providing for affirmance without opinion); Fed. Cir. R. 36 (providing for affirmance without opinion).

[77] *See* 28 U.S.C. §§ 1254, 1257 (2000). *See generally* David M. O'Brien, *The Rehnquist Court's Shrinking Plenary Docket*, 81 JUDICATURE 58 (1997) (discussing how the Supreme Court has reduced its caseload through fewer grants of certiorari).

which cases to grant *certiorari* on the merits, the federal courts of appeals may not decline to hear an appeal that falls within their mandatory jurisdiction, and they have only a limited practical authority to defer resolution of such an appeal.[78] Moreover, unless an appeal raises multiple issues, resolution of any one of which would represent a full disposition of the appeal, a circuit court is not at liberty to pick and choose among the issues presented. In this way, the courts of appeals resemble the federal district courts, which, with very narrow exceptions, must hear cases within their subject matter jurisdiction. In both the courts of appeals and the district courts, the litigants, rather than the courts, determine which, how, and when issues must be addressed.

These realities, which are a product of the courts of appeals' robust error-correction obligation, have a profound impact on the circuit courts' functioning as lawmakers. If a legal issue in a petition for *certiorari* does not seem ripe for resolution, or if a particular case presents that issue in a peculiar manner, or even if the parties and their counsel simply appear unable to brief and argue the issue effectively, the Supreme Court can, through denial of *certiorari*, avoid consideration of the issue and thus avoid any potential problems the case might pose for effective law-making. Lacking such authority, and forced to examine each and every asserted error, the courts of appeals are forced to discharge their law-making obligations through cases in which the time, manner, posture, and context are determined by aggrieved litigants.

2. Courts of Last Resort

As the mid-level courts in the three-tiered federal judiciary, the courts of appeals technically are not courts of last re-

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[78] Interestingly, Professors Reynolds and Richman contend and complain that circuit courts' use of unpublished opinions, combined with other court practices, has now resulted in *de facto certiorari* that denies to the parties the full benefits of an appeal of right. *See* Reynolds & Richman, *supra* note 5, at 275; *see also* William L. Reynolds & William M. Richman, *The New Certiorari Courts*, 80 JUDICATURE 206, 206 (1997). However, as discussed in Part IV, we believe that there may actually be some considerable value in the ability of the courts of appeals to exercise a *certiorari*-like control over the discharge of their law-making function. *See infra* Part IV.

sort. A party that suffers defeat before the appellate court remains free to petition the Supreme Court for review on writ of *certiorari*. As a practical matter, though, this is little more than a paper right for the vast majority of litigants. In 1998, the Supreme Court received over 7,000 petitions for *certiorari*, comprising requests for review of state supreme court decisions as well as decisions from the federal appellate courts.[79] Of these, the Supreme Court granted the writ and took the appeal in only eighty-one cases; *certiorari* thus was granted in just over one percent of those cases in which review was sought.[80] This highly limited application of discretionary jurisdiction by the Supreme Court, combined with mandatory jurisdiction at the circuit court level, means that, for nearly all federal appellate litigants, their cases will end with a disposition by the court of appeals. Specifically, the federal courts of appeals resolved nearly 25,000 cases on the merits for the year ending September 1998,[81] while the Supreme Court in its 1998-1999 Term chose to review only seventy cases arising from the federal circuit courts.[82] Put simply, for the vast majority of litigants, the court of appeals will be the last court to evaluate their arguments and pass judgment on their cases.[83]

The role of the federal circuit courts as effective courts of last resort impacts both the courts' error-correcting function and its law-making function. The reality that the court of appeals represents the last forum for error-correction in the vast majority of cases affects not only the litigants, who realize that they realistically have only one appellate forum in which to press their claims, but also the circuit court judges, who realize that they have a special obligation to try to achieve the best possible resolution of every dispute. At the same time, final review at the court of appeals level not only heightens the importance of circuit courts' discharge of their error-correction function, it also increases the significance of its law-making function. Although the Supreme Court's decisions garner most

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[79] *See The Supreme Court, 1998 Term, The Statistics*, 113 HARV. L. REV. 400, 406-07, tbl. II (1999) [hereinafter *Supreme Court Statistics*].

[80] *See id.*

[81] *See* 1998 JUDICIAL BUSINESS, *supra* note 22, at 52 tbl. S-1.

[82] *See Supreme Court Statistics*, *supra* note 79, at 408 tbl. II(E).

[83] *See* Dragich, *supra* note 43, 766-77 (discussing the realities of the fact that the circuit courts are "the *de facto* courts of last resort in the federal system").

of the attention from the media and the academy, much of the legal developments within the federal judiciary—the evolution of doctrines old and new through innovations and retrenchments in statutory interpretation and constitutional analysis—occurs not at the Supreme Court but within the courts of appeals.[84] The circuit courts are almost always the first appellate voice on the panoply of legal issues that occupy the federal courts,[85] and on many issues they remain—at least for a substantial period of time—the only appellate voice.

3. Three-Judge Panels

In contrast to the Supreme Court, in which almost all decisions are rendered by a full court of nine Justices,[86] the courts of appeals do most of their work in panels of three judges. While each Supreme Court Justice has an opportunity to contribute her or his voice in every case before the High Court, nearly all of the decisions rendered by the federal circuit court are the product not of the whole court, but of a randomly selected group of three judges who purport to speak for the entire court.[87] Thus, except for those relatively rare instances when a case is considered en banc,[88] only a minority (and of-

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[84] *See* Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 213 (1999) (noting that the "U.S. Courts of Appeals . . . effectively have become [not only] the courts of last resort for most litigants [but also] the source of doctrinal development for most legal issues").

[85] In a few settings with cases involving certain subject matters—e.g., bankruptcy proceedings, some administrative matters—the existence of specialized tribunals sometimes creates a layer of appellate review that precedes review in the federal courts of appeals.

[86] Examples of instances in which a Court of fewer than nine Justices may render a decision include a vacancy on the bench, an illness of a Justice, and a recusal of a Justice for real or perceived conflict of interest.

[87] *See* 28 U.S.C. § 46(b) (2000) (permitting the courts of appeals to hear and determine cases by separate panels consisting of three judges).

[88] 28 U.S.C. § 46(c) provides generally for en banc review. Although each Circuit has adopted its own particular procedural requirements for initiating en banc review or re-hearing, the subject of en banc review is dealt with generally by Federal Rule of Appellate Procedure 35. Rule 35(a) states: "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Rule 35(a) provides that a majority of the judges in active service may order that an appeal or proceeding be heard en banc. Rule 35(b) requires that a party seeking en banc

ten a very small minority) of a circuit's active judges directly participate in the adjudication of each particular case.[89] Moreover, because panels will often include a senior judge, a judge from another circuit, or even a district court judge sitting by designation, it is not uncommon for only two or even just one active judge of the circuit to participate in the resolution of certain cases.[90]

The critical (and yet rarely discussed) fact that only a small percentage of the active judges of a circuit actually hear any individual case has a profound impact on both the error-correction and law-making functions of the courts of appeals. Both when looking backward to correct claimed errors and when looking forward to develop the law, the courts of appeals necessarily operate in a fractured manner and thus necessarily assess claims of errors with a fractured viewpoint and speak with a fractured voice. Only when a court of appeals considers a case en banc can the litigant seeking correction of an error below, or the actors and courts seeking future legal guidance, be confident that the views, insights, and judgments of all the members of the circuit court were brought to bear on a particular case.

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review of a panel decision must state that the petition is necessary to address a conflict in the law between the circuit and the Supreme Court, or within the circuit itself, or that the appeal involves questions of "exceptional importance."

Ninth Circuit Rule 35-3 permits for a limited en banc court. The Rule states that the en banc court shall consist of the chief judge of the circuit and ten additional judges to be chosen by lot from the active judges of the court. *See* 9th Cir. R. 35-3.

[89] As detailed before, the circuits range in size from six to twenty-eight judges. *See supra* note 28.

Thus, assuming that all of the circuit's seats were filled, a panel of three judges would represent at most one-half and as little as eleven percent of the circuit's active judges. The existence of vacancies would improve these numbers somewhat. *See* Federal Judiciary Homepage, *Vacancy List by Circuit and District Report*, *at* http://www.uscourts.gov/vacancies/judgevacancy.htm (last visited Sept. 6, 2000) (reporting twenty vacancies and fourteen pending nominations for the federal courts of appeals as of September 1, 2000). Vacancies within a circuit, however, would also be likely to increase the number of panels that are not composed entirely of active circuit judges. *See supra* notes 26-28 and accompanying text.

[90] For the year ending in September 1998, nearly twenty-five percent of the judges participating in dispositions were either senior or visiting judges. In a number of circuits, this percentage exceeded thirty percent, and in the Second Circuit, it approached fifty percent. *See* 1998 JUDICIAL BUSINESS, *supra* note 22, Table S-2.

4. Self-Binding Precedents

It is well-established precedent in every circuit that one panel's reported holding can only be overruled through en banc procedures in which all of the active judges in the court participate.[91] Thus, while only a fraction of the active judges on the court are involved in most circuit court decisions, those decisions have, in a sense, more precedential weight than decisions rendered by other courts within the federal judiciary. A decision by a federal district court is not thought to have any binding force in future cases[92]; decisions by the Supreme Court, though binding on the courts of appeals and the district courts, are subject to modification or outright reversal by the justices themselves (limited only by the degree of respect they hold for the doctrine of stare decisis). But at the appellate level, the entire court considers and holds itself bound in all future cases by the decision of a prior panel. That the circuits generally require review by the entire court sitting en banc—a procedure that the courts of appeals collectively employ no more frequently than the Supreme Court accepts *certiorari*[93]—to re-

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[91] Panels in each circuit have consistently stated that they lack the authority to overrule decisions by prior panels; thus, as a general matter, a panel's decision binds subsequent panels absent an intervening decision of the Supreme Court, act of Congress, or en banc decision by the court as a whole. *See, e.g.*, Dantzler v. IRS, 183 F.3d 1247, 1250 (11th Cir. 1999); Turner v. United States, 183 F.3d 474, 476 (6th Cir. 1999); United States v. Ortega, 150 F.3d 937, 947 (8th Cir. 1998); Barber v. Johnson, 145 F.3d 234, 235 (5th Cir. 1998); United States v. Nicholas, 133 F.3d 133, 136 (1st Cir. 1998); Ritz Carlton Hotel Co. v. NLRB, 123 F.3d 760, 765 & n.4 (3d Cir. 1997); Roundy v. Commissioner, 122 F.3d 835, 837 (9th Cir. 1997); Unbelievable, Inc. v. NLRB, 118 F.3d 795, 807 (D.C. Cir. 1997); Moore v. Office of Personnel Mgmt., 113 F.3d 216, 218 (Fed. Cir. 1997); United States v. Foster, 104 F.3d 1228, 1229 (10th Cir. 1997); *In re* Skupniewitz, 73 F.3d 702, 705 (7th Cir. 1996); Samuels v. Mann, 13 F.3d 522, 526 (2d Cir. 1993); Etheridge v. Norfolk & Western Ry. Co., 9 F.3d 1087, 1090 (4th Cir. 1993); *see also* 3RD CIR. INT. OP. PROC. 9.1 ("It is the tradition of this court that the holding of a panel in a reported opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a published opinion of a previous panel. Court *en banc* consideration is required to do so.").

[92] *See, e.g.*, Gould v. Bowyer, 11 F.3d 82, 84 (7th Cir. 1993) ("A district court decision binds no judge in any other case, save to the extent that doctrines of preclusion (not stare decisis) apply.").

[93] For the year ending in September, 1998, there were a total of only eighty three en banc dispositions out of nearly 25,000 appeals terminated on the merits. *See* 1998 JUDICIAL BUSINESS, *supra* note 22, Table S-1.

Notably, several circuits observe practices, established with varying degrees of

verse a panel's precedent has a fundamental impact on the circuit courts' discharge of their error-correction and law-making functions. Given the rarity of en banc review, each three-judge panel's decision not only purports to represent the entire court in the case at hand, but it also commands the allegiance of all future panels in the consideration of subsequent cases. This means that future panels, either looking backward to correct perceived error or looking forward to shape the direction of legal change, are inextricably tied to the results and reasoning set forth by prior panels in all prior cases.

C. *The Collective Dilemma*

Taken together, the tensions inherent in the dual obligations of error-correction and law-making combine with the institutional structure of the federal courts of appeals to produce considerable difficulties for the sound and sensible development of the law. Because of the courts' mandatory jurisdiction and its error-correction obligations, litigants ultimately determine both when and how cases are presented to the courts of appeals. In other words, the error-correction function of the federal circuits sets the agenda for, and the parameters of, their decision-making. As a result, circuit judges will sometimes first confront novel or important legal issues within cases that are factually or procedurally atypical, or which are poorly developed, briefed, and argued by counsel. Accordingly, circuit courts must unavoidably consider some consequential legal questions in less-than-ideal contexts for the discharge of their law-making functions.[94] And yet, because of the binding

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formality, that permit one panel to overrule a decision of another—typically based on an intervening decision of the Supreme Court or act of Congress—through circulation of its opinion to the entire court. If a majority of the court does not vote to hear the issue en banc, the later panel's analysis is permitted to displace the former panel's approach. For example, Seventh Circuit Rule 40(e) provides:

> A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court . . . shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted.

7th Cir. R. 40(e). Other circuits have adopted a similar practice. *See, e.g.*, United States v. Coffin, 76 F.3d 494, 496 n.1 (2d Cir. 1998) (discussing practice in Second Circuit and others).

[94] *Cf.* Harlon Leigh Dalton, *Taking The Right to Appeal (More or Less) Serious-*

force given to circuit court precedents, early decisions rendered in such imperfect settings may and often will establish how all future cases raising the particular legal issue are litigated and decided.

For these reasons, judges may quite justifiably be reluctant in some cases to issue a firm and conclusive legal decision for fear that they might harmfully "petrify" the precedential framework for the consideration of future cases. A court may realize that the imperfect context or imperfect manner in which certain issues are raised in a particular case makes the case an especially poor vehicle for the creation and development of sound legal doctrine. And though obliged to render decisions that discharge its error-correction function, an appellate court faced with such a case may sensibly seek to avoid or limit the discharge of its law-making function.

Indeed, this reluctance to engage in law-making may be reinforced by the fact that the federal courts of appeals operate through three-judge panels, the decisions of which bind the entire court. A three-judge panel that confronts a novel or important legal issue probably should be quite reticent about establishing a definitive precedent before other judges can have some input. Such reticence might be based in a circuit judge's general disinclination to speak for and to bind fellow judges before having some inkling for their views, or based in a circuit judge's candid appreciation that colleagues may be more knowledgeable or familiar with a particular legal issue. Accordingly, when a particular panel is forced to confront a consequential legal issue in a less-than-ideal context, the case for consciously avoiding the issuance of a firm and conclusive legal decision becomes especially compelling.

Interestingly, though the institutional problems facing the federal courts of appeals that create a concern about premature law-making are in large part an outgrowth of modern expansion of the appellate caseload and the appellate bench, the basic dilemma is very similar to the one that Alexander Bickel, nearly four decades ago, saw facing the Supreme Court.

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ly, 95 YALE L.J. 62, 69-71 (1985) (suggesting that allowing appellate courts to select which cases to review might better serve their law-making function because an "appellate court arguably is in the best position to determine whether, where, when and how the law is in need of clarification or revision").

As developed in Part IV, the solution, too, may lie, at least in part, in the analysis and the methods that Bickel developed as providing an answer for the Supreme Court: the passive virtues.

IV. RECONCEIVING THE PASSIVE VIRTUES FOR THE COURTS OF APPEALS

A. *Defining the Passive Virtues*

Alexander Bickel first described the passive virtues in a 1961 article[95] and expanded his ideas in book-length form the following year.[96] Bickel's conception of the passive virtues grew out of his perception of the Supreme Court's place in the American system of government. In Bickel's view, the Supreme Court, to function properly as a judicial body, had to decide constitutional cases based on fundamental neutral principles—principles that not only resolved the case before the Court but also could be applied broadly across a range of cases.[97] Decisions that did not rest on such broadly applicable fundamental principles, Bickel believed, represented no more than preferences among permissible policy alternatives, a role that was constitutionally allocated to the legislature rather than the judiciary.[98] The need to rest its decisions on fundamental principles placed the Court in a difficult position, however, because it risked depriving the Court of flexibility in its decision-making. Principle, Bickel asserted, was essential to the functioning of a good society, but a good society could not function in rigid adherence to principle.[99] Yet pursuing a course other than adherence to principle threatened to delegitimize the Court's decision-making.

The Court's role in deciding constitutional cases created a further difficulty. When the Court invalidated a piece of legislation because the policy preferences embodied in the legisla-

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[95] *See generally* Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

[96] *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

[97] *See id.* at 50.

[98] *See id.* at 54.

[99] *See id.* at 64.

tion exceeded the bounds of constitutional principle, the Court played its proper role as the enunciator of principle. When the Court determined that a particular piece of legislation represented a permissible policy decision, in contrast, the Court did not, at least in theory, delegitimize other possible policy choices. In other words, it did not transform Congress' determination of policy into fundamental principle. But because of the Court's role in setting forth fundamental principles, Bickel argued, the mere act of finding a statute constitutionally permissible had some tendency to legitimate the statute. Thus, with the Court's imprimatur in place, the likelihood of reconsideration and reevaluation of policy alternatives by Congress (and, to some degree, by the public) diminished.[100]

The Court faced a third difficulty as well: its role was to enunciate general principles, yet, as Bickel recognized, it was asked to do so within the context of individual cases. And there was no guarantee that the first case to present a particular issue would do so in an ideal setting. There might be something unusual about the factual setting of the case that would lead the Court to enunciate the principle in a manner that would complicate application in subsequent cases. Or the particular state law being challenged might speak to an issue addressed by questionable statutes in other states as well, but it does so in a distinctive way, again raising the possibility that the Court's statement of principle would be shaped as much by the anomalous quality of the particular statute as by the underlying, fundamental issue. Or the case might arise at an awkward time, either in the midst of an on-going political debate that might well resolve the underlying issue in a manner that would not require a declaration of constitutional principle or following a long period of quiescence suggesting that the statute did not reflect a contemporary or near-contemporary political decision. Any of these peculiarities arising in the individual case might lead the Court to an ill-considered enunciation of principle and thus threaten the Court's constitutional and popular legitimacy.

To Bickel, the passive virtues provided a way for the Court to maintain its principled role while avoiding many of the difficulties that its position within the governmental structure

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[100] *See id.* at 70.

created.[101] Faced with a constitutional challenge to a statute, the Court could void the statute as inconsistent with constitutional principles, thereby defining boundaries of permissible legislative action, or the Court could affirm the statute as consistent with constitutional principles, thereby effectively validating the statute in a way that would discourage further legislative action.[102] Or, Bickel argued, the Court could do neither, instead deciding not to decide the case by relying on one or more devices to dispose of the case without a resolution on the merits.[103]

The devices that Bickel associated with the passive virtues were not all of a type. Some were plainly discretionary mechanisms, such as the Court's authority to accept or reject appeals under its *certiorari* jurisdiction.[104] Some were constitutional or quasi-constitutional doctrines in and of themselves: vagueness, delegation, political question, desuetude. These doctrines permitted the Court to insist that the legislature (state or federal) render a clear, contemporary decision on the policy question at hand before the Court would entertain substantive constitutional challenges. Finally, some were procedural devices associated with the constitutional definition of what constituted a case or controversy, such as standing and ripeness. These doctrines limited the ability of litigants to place difficult constitutional issues before the Court, by assuring that the litigants had concrete interests at stake and that the dispute between the parties had matured to the point that the interests of one of the parties either faced imminent harm or had already been harmed. Facially, these doctrines did not seem to provide the Court with much flexibility, but Bickel read them broadly to allow the Court to dismiss for lack of jurisdiction, not only in those cases in which standing and ripeness were not present according to their traditional formulations, but also

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[101] *See* Bickel, *supra* note 95, at 50-51.

[102] *See* Bickel, *supra* note 95, at 48, 50; BICKEL, *supra* note 96, at 69, 129, 200-03.

[103] *See* Bickel, *supra* note 95, at 50-51; BICKEL, *supra* note 96, at 69-71.

[104] *See* BICKEL, *supra* note 96, at 126. The discretionary power to decline to hear cases through denial of *certiorari* did not provide the Court with the full measure of flexibility that Bickel desired. Until the 1988 amendments to the Judicial Code, appeals from state supreme courts challenging the constitutionality of state statutes fell within the Court's appellate jurisdiction, rather than its *certiorari* jurisdiction. *See* 42 U.S.C. §§ 1252, 1254(2) (repealed 1988).

in those cases in which the issue presented to the Court did not itself seem ripe.[105] Bickel recognized that the Supreme Court did not have all of these passive devices available to it in each case, but he conceived of these doctrines as malleable enough to often give the Court the option of invoking one or more as a means of avoiding a premature decision.[106]

Use of these devices would have two advantages in Bickel's view. First, it would allow the Court to avoid premature resolution of issues, making it more likely that by the time a definitive decision was made the legal and factual context would have been sharpened and the constitutional principle at issue would have come into focus.[107] Second, the choice of device, and the manner in which the Court applied the device, would encourage further exploration of the legal issue by the political branches of government, and by the public at large, possibly leading to additional legislative action that would either eliminate the need for a constitutional decision or frame the constitutional issue in more precise terms.[108] The use of these devices, Bickel argued, would provide the Court with a measure of flexibility that was essential to public acceptance of the Court's role as enunciator of constitutional principles.[109] These, then, were the passive virtues—passive, because they allowed the Court to avoid decision-making; virtues, because by allowing the Court to avoid decisions in some cases, these devices ultimately strengthened the Court's ability to fulfill its constitutional duties and fostered important and valuable institutional dialogues.

The virtues of the devices that Bickel championed were not universally acclaimed. Gerald Gunther, in particular, was highly critical of Bickel's work.[110] Gunther was sympathetic to Bickel's underlying premise—that the Court's decision-making should rest on broadly applicable principles and should not

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[105] *See* BICKEL, *supra* note 96, at 123-24.

[106] *See id.* at 170.

[107] *See id.* at 177.

[108] *See* Bickel, *supra* note 95, at 50, 60; BICKEL, *supra* note 96, at 70-71, 146, 179.

[109] *See* BICKEL, *supra* note 96, at 204-06.

[110] *See generally* Gerald Gunther, *The Subtle Vices of the Passive Virtues—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

yield to mere policy preferences.[111] Gunther also had little quarrel with Bickel's invocation of the Brandeisian notions of avoiding broad constitutional decisions by deciding the merits on narrow, and if possible non-constitutional, grounds.[112] Gunther was highly critical, however, of Bickel's proposed use of jurisdictional devices as discretionary tools to evade declarations of constitutional principle. Gunther complained that by expanding the application of doctrines such as standing and ripeness beyond their constitutional boundaries, Bickel reshaped their content, not because of anything intrinsic to the doctrines themselves, but simply so that they could better serve as means to an end, the avoidance of premature constitutional decision-making.[113] Gunther also asserted that by treating the Court's appellate jurisdiction as discretionary—similar if not identical to *certiorari*—Bickel failed to take seriously Congress' legislative definition of the Court's jurisdiction.[114] Finally, Gunther feared that Bickel's approach, when put to the test, was open to cynical manipulation so as to avoid undesirable substantive results.[115] Gunther recognized that the use of the passive virtues could and likely would be highly dependent on the Court majority's view of the merits of the case, resulting in not simply a distortion of the law defining the mechanisms that constituted the passive virtues, but also a distortion of the substantive constitutional law that the passive virtues were meant to protect.[116]

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[111] *See id.* at 5.

[112] *See id.* at 16-17. Gunther did, however, express concern that the effort to avoid constitutional decisions would cause courts to distort their methods of statutory interpretation, and thereby compromise non-constitutional substantive law. *See id.* at 21.

[113] *See id.* at 9-10.

[114] Gunther, *supra* note 110, at 11-12, 16. In asserting that the Court's appellate jurisdiction, like its *certiorari* jurisdiction, permitted a measure of discretion, Bickel relied in part on a remark by Chief Justice Warren that the distinction between appellate and certiorari jurisdiction was one of degree, not of kind. *See* BICKEL, *supra* note 96, at 126 (quoting Chief Justice Warren's statement at an ALI Annual Meeting that it "is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on certiorari"). Gunther contended that Bickel misinterpreted the Chief Justice's comment, which, Gunther argued, was directed only at the question of whether oral argument was available as of right. *See* Gunther, *supra* note 110, at 11.

[115] *Id.* at 14-16.

[116] *Id.* at 20-24.

Any assessment of Bickel's description of the passive virtues, and the criticism that it provoked, must recognize that Bickel's work was very much a creature of its time. Bickel wrote against a backdrop of controversial cases, many dealing with race relations issues—segregation statutes, antimiscegenation statutes, and the like—that provoked passionate responses from large segments of the public.[117] While hostility to desegregation had many targets, a good measure of the verbal backlash (if not the physical violence) was directed against the Court itself. With the outright rejection of the Court's authority as constitutional arbiter a very real threat in certain parts of the country, it was understandable that Bickel would look for devices to enable the Court to resolve the cases before it while maintaining a balance between principle and expediency that would allow it to continue its constitutional function with the consent of the governed.

While the tumult of the early civil rights era that inspired Bickel's conception of the passive virtues has passed, statutory changes to the Supreme Court's jurisdiction have rendered the passive virtues, as Bickel conceived them, largely superfluous. At the time Bickel wrote, the Supreme Court had mandatory appellate jurisdiction over judgments that invalidated federal or state statutes as unconstitutional.[118] In this setting, Bickel saw the passive virtues as an important safety valve that would allow the high court to avoid exercising its constitutional law-making function in settings where a Supreme Court decision on the merits would either present too great a departure from public sentiment (if the Court declared the statute unconstitutional) or risk legitimating what the Court saw as inadvisable legislation (if the Court held the statute consti-

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[117] Bickel himself recognized that *Brown v. Board of Education*, 347 U.S. 483 (1954), and its companion cases—the legal and procedural issues that they raised and the resistance that they met in the South—were central to his analysis of the Supreme Court's institutional role and proper functioning. *See* BICKEL, *supra* note 96, at 244. Bickel also analyzed cases involving sit-ins at lunch counters, *see* BICKEL, *supra* note 96, at 175-80 (addressing *Garner v. Louisiana*, 368 U.S. 157 (1961)), and anti-miscegenation statutes. *See* BICKEL, *supra* note 96, at 174 (noting with approval the Court's dismissal of a challenge to such a statute in *Naim v. Naim*, 350 U.S. 985 (1956)).

[118] *See* 28 U.S.C. §§ 1252, 1254(2) (repealed 1988). *See generally* Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81 (1988).

tutional).[119] The Supreme Court no longer faces the conundrum that Bickel identified, however. In 1988, Congress amended the Judicial Code to eliminate virtually all of the Court's mandatory appellate jurisdiction and placed within the Court's *certiorari* jurisdiction those appeals that previously the Court had lacked the discretion to refuse.[120] To the extent that the Court wishes to avoid premature constitutional resolution of a controversial question, the Court now has the means to do so simply by denying *certiorari.*

B. *The Need and Opportunities for Passive Virtues in the Courts of Appeals*

Though Bickel's conception of the passive virtues was uniquely a product of its time, Bickel's general concerns have an enduring resonance. As others have noted, Cass Sunstein's recent advocacy of "decisional minimalism"—i.e., judicial efforts to keep judgments "shallow and narrow" as a means to fortify democratic processes[121]—is a direct progeny of Bickel's ideas.[122] More to the point of this Article, Bickel's core themes now find particular relevance in an arena that Bickel himself did not explore—the work of the federal courts of appeals. Though the Supreme Court can now completely control its docket through the exercise of its *certiorari* power, the circuit courts' mandatory jurisdiction saddles them with a caseload and a docket that is determined entirely by the litigants and not by the courts. Thus, in every case brought to them, the courts of appeals must continually confront the difficulties of, and inherent tension between, their dual obligations of lawmaking and error-correction. Moreover, the massive caseload increase in the courts of appeals and the corresponding increase in the number of judges within each circuit have heightened the challenges that these dual obligations pose for indi-

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[119] *See* BICKEL, *supra* note 96, at 69-72.

[120] *See* 28 U.S.C. §§ 1254, 1257 (2000).

[121] *See generally* Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided,* 110 Harv. L. Rev. 4 (1996); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

[122] *See* Neal Devins, *The Democracy-Forcing Constitution,* 97 Mich. L. Rev. 1971, 1972-74 (1999) (reviewing SUNSTEIN, *supra* note 121) (suggesting that Sunstein's ideas are linked more closely to Bickel's than Sunstein himself acknowledges).

vidual judges and for circuit courts as institutions. As a result, jurists on the federal courts of appeals, both individually and collectively, have a special need for the sort of decisional flexibility—for means to balance concerns of principle and expediency—that Bickel was seeking to create for the Supreme Court through his articulation of the passive virtues.

When acting in their law-making capacity, circuit judges must be aware and concerned with matters of principle, because the rules they set forth will be applied broadly beyond the context of the individual litigation in which those rules are first announced and developed. And yet, concerns of expediency cannot be avoided in the course of such law-making, because the reality is that not every case that the courts of appeals are required to adjudicate provides a useful or appropriate vehicle for the effective annunciation of sound legal rules. The circuit courts' obligation to correct errors in the face of a massive caseload likewise creates the need for balance of principle and expediency: the courts must endeavor to reach a principled resolution of every appeal, but they must also do so efficiently and rapidly if they are to be able to have the time needed to determine exactly what result principle calls for in the massive number of cases they are called upon to adjudicate.

Moreover, as stressed before, the dual obligations of error-correction and law-making create competing demands while being inextricably linked.[123] Because appellate courts' development of the law is significantly affected by the order and the manner in which individual cases come before the court, and because the error-correction function of the federal circuits sets the agenda for, and the parameters of, their decision-making, circuit judges will sometimes first confront novel or important legal issues within cases that are factually or procedurally atypical or that are poorly developed, briefed, and argued by counsel. Consequently, with circuits courts unavoidably forced to consider some consequential legal questions in less-than-ideal contexts for law-making and yet governed by the binding force given to circuit court precedents, Bickel's development of the importance of avoiding premature law-making takes on a special bent for circuit court judges. That is, the institutional realities that confront the courts of appeals make even more

[123] *See supra* Part III.A.

acute their need to balance principle and expediency. An appellate panel, confronted with a novel legal issue, is in a difficult position. Pursuant to its jurisdictional mandate, it must decide the case before it. If it does so by the traditional means of a published opinion, however, it will create legal doctrine for the circuit, even though its decision will be based on the incomplete picture created by the particular facts of the individual case and even though only a minority—frequently, a small minority—of the active judges in the circuit will have participated in the decision.

At first blush, it may appear that judges on the federal courts of appeals have few real options for effectively and appropriately avoiding definitive judgments while still facilitating a legal dialogue on an issue raised in an appeal. The passive virtues as Bickel conceived them—jurisdictional devices used as a means of avoiding decisions on the merits—are unlikely to regularly provide an appropriate escape from this dilemma: assuming that all of the elements of a justiciable case or controversy are present, the parties to the dispute are entitled to a resolution, not to an avoidance. Having to render decisions in every case that comes before them as a reviewing court with mandatory jurisdiction, the circuit courts often appear to have no real decisional flexibility.

But, with the context and institutional dynamics altered, Bickel's core insights about the value of judges seeking to avoid premature law-making and to facilitate effective legal dialogues still can and should merit special consideration; upon reflection and analysis of the complex and often subtle realities of circuit court adjudications, one discovers that the courts of appeals may in fact have a range of mechanisms at their disposal that can enable them to be passively virtuous. Specifically, there are both substantive doctrines and procedural mechanisms by which the courts may be able to effectively engage in their law-making function in a more ordered manner, while simultaneously performing their jurisdictional obligation to correct errors in individual cases.[124] The tension between the circuit court's error-correction and law-making functions is, in the end, a product of their different goals. In a sense, a court's error-correction function is concerned almost

[124] *See infra* Part IV.B.1.

exclusively with results, not process, with ends, not means. Thus, it is fair to say that a circuit court's error-correction obligation is faithfully discharged when it reaches and renders what it genuinely believes to be the proper result in the case at hand.[125] In contrast, a circuit court's law-making function is fundamentally concerned with means and process. Regardless of the specific result reached in any individual case, what matters is the route taken to that result, because it is the content of that route—what is said and what is not said in any opinion that justifies the outcome reached—which comprises and defines the court's discharge of its law-making obligation.

Understood in these terms, the possibilities for the federal courts of appeals to effectively avoid unwise discharges of its law-making function while still being faithful to its error-correction function start to come into focus. As long as the circuit court panel arrives at a final result that it views as just, the court has fully and faithfully fulfilled its error-correction function; the court then can, and we suggest should, tailor its means and methods for rendering that result with a view toward best effectuating its law-making function.

1. Avoidance Mechanisms Enabling Circuit Courts to be Passive, if not Virtuous

As detailed below, there are some mechanisms through which courts of appeals can achieve just results that allow them to completely avoid, at least with respect to some issues, rendering on-the-record decisions. These avoidance mechanisms have Bickelian value as "passive" because they enable a circuit court to defer a final and confining pronouncement on a particular issue, though they are not clearly virtuous because they do not readily afford a means to enhance important legal dialogues. Nevertheless, as long as these mechanisms are not stretched to the point of abuse, they are important and valuable devices for circuit courts to avoid making premature precedents.

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[125] In this context, the means to that result—e.g., whether the court hears argument and carefully reviews the briefs; how the court justifies its ruling—will often be of some instrumental value in ensuring for the court itself, for the parties, and for observers that a proper result was indeed achieved. But, with regard to the error-correction function, it is the final result which is of fundamental significance.

a. *Appeals with Multiple Issues*

In describing the passive virtues, Bickel drew heavily on Justice Brandeis' discussion of how substantive constitutional decision-making could and should be avoided through the consideration of alternative substantive grounds that would resolve cases on the merits.[126] The idea that the Court should rest its decision on the Constitution only when necessary, and rely on statutory or common law grounds as the basis for decision where those authorities may properly be invoked, has a long lineage and is by now thoroughly ingrained in this country's jurisprudence. Even Gunther, Bickel's harshest contemporary critic, found this idea unobjectionable, so long as the Court is forthright in its application of statutory or common law and does not distort the substance of the law for the purpose of avoiding a constitutional decision—in other words, as long as the Court is not using the statutory or common law purely as the means to a particular end.[127]

The strategy of resorting to alternative grounds for a decision, which the Supreme Court historically has invoked for avoiding unnecessary constitutional law-making, will often be available as a means for the courts of appeals to avoid imprudent law-making in appeals raising multiple issues. Indeed, this strategy may be available more frequently in the courts of appeals than in the Supreme Court. Unlike the Supreme Court, which accepts *certiorari* on particular issues and therefore effectively limits its grounds for decision even before it directly confronts the merits, the courts of appeals confront issues defined by the parties. And when the parties frame the issues for appeal, it is quite common for them to raise multiple issues, any one of which might allow the court to dispose of the appeal in its entirety. An appellate panel confronted with a novel or difficult issue, or an issue presented in a peculiar way within the setting of the particular case, may well be able to avoid resolution of the issue by turning to alternative grounds

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[126] Justice Brandeis provided his most complete account of the "rules under which [the Supreme Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision" in his renowned concurring opinion in *Ashwander v. TVA*. *See* 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

[127] *See* Gunther, *supra* note 110, at 16-17.

for decision. Provided that the panel does not twist one area of the law to avoid a decision in another, there is no reason to object if the court refuses to decide all of the issues presented on appeal. Indeed, our suggestion is that courts embrace such avoidance opportunities if and when they are fairly presented and enable the fulfillment of the error-correction function without forcing a discharge of law-making responsibilities in an imperfect context.

b. *Waiver and Other Procedural Devices*

Bickel's discussions of the procedural doctrines of standing and ripeness also had their root in Justice Brandeis' ideas, although Bickel arguably took those doctrines farther than Justice Brandeis would have permitted. The very same doctrines that Justice Brandeis described, and upon which Bickel elaborated, may properly be considered when a case is before a circuit court, just as they may be considered by the Supreme Court. To these may be added other doctrines that cumulatively set limits on the jurisdiction of the federal appellate courts. These would include the requirement that the party bringing the appeal have lost in the district court, as well as the requirement that the case have been brought to a final judgment.[128] The appellate panel may also consider quasi-jurisdictional doctrines such as waiver—the requirement that, to be an appropriate subject of appeal, an issue must have been properly submitted to the district court. If any of these requirements is not met, then the appellate court may—indeed, must—dismiss, and thereby avoid a decision on the merits. Moreover, these issues may appropriately be raised *sua sponte* by the panel, as they go to the question of whether the court has authority to decide the question or questions before it.

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[128] *See* 28 U.S.C. § 1291 (2000). This requirement does not apply, of course, to interlocutory appeals. Such an appeal, however, may only be brought if both the district court and the appellate panel conclude that an immediate appeal would materially advance the ultimate resolution of the case and would otherwise be appropriate. *See* 28 U.S.C. § 1292(b); *see also supra* note 74 (discussing the rules governing interlocutory appeals). In other words, unlike the vast majority of appeals, interlocutory appeals may be brought only at the discretion of the appellate panel. In this context, the federal courts of appeals have a discretionary authority that is largely akin to the Supreme Court's *certiorari* power, and thus there is little need for avoidance devices other than simple denial of leave to appeal.

2. The Importance of Mechanisms that Also Enhance Dialogue

Until this point, this Article principally discussed avoidance mechanisms that are available to the courts of appeals, devices that are simply "passive" in that they permit the appellate courts to evade the resolution of difficult or novel issues of law in less-than-ideal settings. But Bickel's vision and elaboration of the passive virtues encompassed more than avoidance. Bickel developed and advocated his devices as "virtues" because they operated to promote dialogue at multiple levels: between the federal judiciary and the other branches of the federal government, between the federal judiciary and the state governments, between the public at large and the various organs of state and federal government. The Supreme Court, Bickel believed, was uniquely positioned to promote this type of dialogue because of its place at the top of the nation's judiciary and its designation as the ultimate arbiter of constitutional principles—when the Court speaks, it garners the attention of, and prompts responses from, the other branches of government and the people governed.[129]

The appellate courts have considerably less authority to compel, or even to inspire, such dialogue within other branches of government or among the electorate. The multitude of appellate voices across the twelve geographic circuits diminishes the likelihood that the decision of any one court will provoke a meaningful reaction from Congress, the executive, or the public. A circuit might be thought to have a greater ability to elicit responses from the governments of the states that make up the circuit, as those state governments will have to respond to the circuit's pronouncements of federal constitutional law insofar as they affect state law. Even here, however, the dialogue-promoting abilities of the circuit will be diminished: given the reality of diversity jurisdiction, the mobility of modern society, and the breadth of the Court's jurisprudence of personal jurisdiction, it will not be uncommon for the appellate court in one circuit to have to address the law of a state outside its circuit boundaries. The appellate courts' ability to inspire inter-institutional dialogue is also reduced by the breadth of the issues

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[129] *See* BICKEL, *supra* note 96, at 188.

that they confront. Although the Supreme Court addresses a variety of issues, constitutional questions—those that might be expected to command the most attention from other government entities and from the public—comprise a disproportionately large portion of its docket. The courts of appeals, in contrast, must address all manner of federal laws as well as routine state law matters arising through diversity jurisdiction. This is not to say that the courts of appeals are entirely unable to generate meaningful responses from other government entities. Particularly in a subject area where the government is a repeat litigant, an appellate decision, creating binding authority within the circuit, may well inspire the executive to press for legislative change, or at least for review by the Supreme Court. Despite these opportunities, however, promoting inter-institutional dialogue generally is not, and cannot be, a principal objective of the appellate courts.

If inter-institutional dialogue is less important at the appellate level than it is at the Supreme Court, however, intra-institutional dialogue takes on an enhanced importance. Intra-court dialogue presents no great difficulties at the Supreme Court. The Justices maintain their chambers in a single building; except where a Justice is required to recuse herself, they all hear every case that comes before the Court and each has formal and informal opportunities to have her views considered before a decision of the Court is finalized. At the appellate level, however, such opportunities are greatly reduced. The individual judges within a circuit are free to maintain their chambers in cities other than the one in which the central court offices are located, thus reducing the opportunities for regular, informal communication. Moreover, as we have stressed (in part because it is a key feature of circuit court decision-making that is rarely discussed), each judge does not participate in every decision, or even most decisions, of her circuit. Unless and until a case is heard en banc, no more than three active judges of a circuit—and typically only two and sometimes just one of the court's active judges—takes part in the decision-making of the court. The ability of an individual judge to make her views known, and to have those views considered within the context of an individual case before a legal issue is resolved—and binding circuit precedent is created—is therefore quite limited.

These realities highlight the need for mechanisms that can promote intra-court dialogue within the federal courts of appeals. Such a dialogue, which would increase the likelihood that a particular precedent would have the support of at least a majority of the circuit's active judges, seems critical to ensuring that the controlling "law of the circuit" set forth in each published decision really represents just that. Such a mechanism does exist and, with proper usage, has the potential to alleviate the dilemmas imposed on the courts of appeals by the institutional structure of the federal judiciary. That mechanism is one that, to this point, has been regarded chiefly as little more than a time- and paper-saving device: the unpublished opinion.

3. The Passive Virtue of the Unpublished Opinion

The use of unpublished opinions began in the early 1970s as part of the wave of reform and structural changes in the courts that followed the dramatic expansion of the appellate dockets in the 1960s. And the use of unpublished opinions has proven to be among the more controversial reforms that the courts have adopted.[130] The controversy arises principally, however, from an incomplete vision of unpublished opinions, which in turn stems from an incomplete conception of the appellate courts' institutional role. When considered within the context of the structural constraints on the courts' of appeals functioning, the unpublished opinion emerges as an exemplar of the passive virtues, perhaps a more powerful mechanism for improving decision-making at the appellate level than any of the techniques Bickel described for the Supreme Court.

a. *The Unpublished Opinion as an Avoidance Device*

Imagine a court of appeals panel facing a novel and difficult issue of statutory interpretation. Pursuant to the court's statutorily imposed jurisdiction and its error-correction function, the court is obliged to resolve the case before it. Imagine, too, that no alternative issue will allow a resolution on the merits and that the members of the panel conclude that they

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[130] *See generally* sources cited *supra* note 43.

cannot, in good conscience, invoke an avoidance mechanism, such as standing, ripeness, or waiver, because the requirements of those doctrines are not met. There thus seems to be no way to avoid a resolution on the merits, one that will require the panel to resolve the statutory issue. And yet, while the members of the panel tentatively agree on an approach to the question, and one member of the panel drafts an opinion embodying the agreed-upon approach, the members of the panel are uncertain whether their approach constitutes the best or most thoroughly reasoned approach. Under traditional doctrine, if the panel publishes its opinion, the approach that the opinion describes becomes the law of the circuit, despite the judges' uncertainty about the wisdom of their conclusion. One or more of the judges may express that uncertainty in a concurring opinion, yet, in the absence of en banc review by the entire court—a highly unlikely proposition—the decision stands as binding authority, both for the judges on the panel and for the other judges within the circuit. To be sure, the panel's opinion may play a role in the development of the law elsewhere—other circuits will remain free to challenge, to expand upon, to learn from and adopt or depart from the original panel decision. But the law in the initial panel's circuit will effectively be frozen, despite the tentative nature of the decision. The unpublished opinion—which is not considered a binding precedent under local circuit rules—provides an escape from the dilemma faced by a panel in this kind of situation. By deciding the case by means of an unpublished opinion, the panel may fulfill its error-correction function while maintaining flexibility in its law-making function.

It must be acknowledged that it is just this aspect of the unpublished opinion that provokes much of the criticism leveled against unpublished opinions. Critics contend that an appellate court that reaches a decision in a particular case without a willingness to state firm legal principles (and knowing that such principles will be followed in other cases that the court decides) is, in effect, acting in an unprincipled manner.[131] There is something to this criticism, but only because of the way unpublished opinions presently are treated.

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[131] *See, e.g.*, Baker, *supra* note 31, at 944-46; Dragich, *supra* note 43, at 785-800; Richman & Reynolds, *supra* note 5, at 291-92; Robel, *supra* note 43, at 945.

Currently, in six jurisdictions, unpublished opinions are not precedent in any form: they may not be cited in briefs or arguments to the court, except for the very limited purpose of establishing claim preclusion, issue preclusion, or law of the case.[132] In other jurisdictions, unpublished opinions are recognized as persuasive authority and may be cited to the court. Even in these jurisdictions, however, reliance on unpublished opinions is discouraged; lawyers typically are admonished to use unpublished opinions only if they believe that no other opinion of the court will serve as well.[133] Thus, while presently, as a formal matter, unpublished opinions may serve as a means of fulfilling the court's error-correction function, they play little or no role when the court turns to law-making.

Under these circumstances, judges may on occasion be tempted to resolve a particular case in a way that they would not care to see carried over into other cases. To put it bluntly, they may be willing to decide an individual case in an unprincipled manner. Although judges are of course unwilling to state that any particular case has been decided in an unprincipled manner, some do acknowledge the possibility, or at least the appearance of the possibility.[134] This difficulty is alleviated, to a large degree, if not entirely, to the extent that the opinions are citable: judges are less likely to engage in legal flights of fancy if they know that they may be confronted with their decisions in subsequent cases.[135] Given the present judicial culture, however, which tends to regard citation of unpublished opinions with a measure of disdain even in those jurisdictions where citation is allowed, the problem is not entirely eliminated. Some change, not merely in formal citation rules, but also more generally in the esteem in which judges hold unpublished

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[132] *See supra* note 46 and accompanying text.

[133] *See id.*

[134] *See, e.g.*, Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 223 (1999) (noting that the use of unpublished opinions allows judges who wish to reach a certain result, but who have trouble justifying the result under the law, to attain the desired end while avoiding the difficulties).

[135] Even in those jurisdictions that do not permit citation to unpublished opinions, the mere fact that those opinions are available to the bar and to the public through the commercial online research services may lessen the likelihood that unpublished opinions will be abused. As of September 2000, only three circuits—the Third, Fifth, and Eleventh—do not make their unpublished opinions available to LEXIS or Westlaw.

opinions, would seem necessary if the criticisms voiced by those who oppose unpublished opinions are to be met. Such a change is possible, however, once it is recognized that there is an additional function that unpublished opinions can play, one that draws on Bickel's conception of the passive virtues not merely as avoidance devices, but also as dialogue-enhancing devices.

b. *The Unpublished Opinion as a Dialogue-Enhancing Device*

Rules that allow citation of unpublished opinions, already in place in seven circuits, open the possibility that unpublished opinions might serve as more than avoidance devices. Through the use of an unpublished opinion, a panel confronting a novel or difficult issue can avoid the premature establishment of firm circuit precedent, but, as importantly, the panel may also communicate its views to future panels that will confront the issue. The initial unpublished opinion thus has the potential to initiate a process in which panels communicate with each other across time and across factual settings. At some point, of course—and perhaps sooner rather than later—a panel will be sufficiently confident of its resolution of the novel or difficult issue to embody its decision in a published opinion, thereby establishing new binding authority. The use of unpublished opinions by prior panels, however, means that by the time this occurs, other judges from the circuit, and not just those who participate in the published opinion, will have had the opportunity to make their views known, and the panel writing the published opinion will have had the opportunity to view the operation of possible conclusions in more than one factual setting. The potential therefore exists for a more considered, more nuanced resolution than would have been likely had the initial panel to confront the issue been compelled to create binding authority on the one hand, or to issue an uncitable opinion on the other.

At least in those circuits where citation of unpublished opinions is permitted, the use of unpublished opinions as a dialogue-enhancing mechanism would require little more than a subtle shift in judicial attitude. To this point, unpublished opinions have commanded little respect in subsequent cases and are only rarely cited in published opinions. This may in

part simply be a matter of the use to which unpublished opinions are most commonly put. Many unpublished opinions do not involve novel or complex issues, but rather represent straightforward applications of clear, binding authority. Little would be gained by citing these opinions, as the legal rules that they apply are set forth more fully in other, published opinions. In those relatively few instances where unpublished opinions do set forth careful analysis of complex issues, the reason for disregarding those opinions is harder to surmise. It cannot be simply that the unpublished opinions do not represent binding authority. Appellate decisions routinely cite the decisions of panels in other circuits, although those opinions have no binding authority outside the circuits in which they were decided. And while it might be said that published opinions from other circuits at least have binding authority somewhere, and are entitled to some respect as a result, appellate decisions also frequently cite district court opinions, which do not establish law in a formal sense and only have value insofar as they are found persuasive. In this respect, an unpublished appellate opinion might be thought to be similar to a district court opinion: it derives its value from the persuasive force of its reasoning. Where an unpublished opinion originated from the same circuit as the subsequent panel, however, the unpublished opinion is entitled to more consideration than a district court opinion: it represents the considered judgment of members of the same court, and thus it is entitled to consideration by those who would speak with the court's authority.

The unpublished opinion, then, can in many ways accomplish for the courts of appeals what Bickel hoped his passive virtues would achieve for the Supreme Court. It allows the circuit court to avoid premature decision-making in less than ideal circumstances and can also foster a valuable form of legal dialogue. Moreover, an unpublished opinion can achieve these ends without requiring a circuit court to distort either the existing substantive law or the reach of the various procedural avoidance devices, as critics of Bickel claimed his vision of the passive virtues required. The unpublished opinion allows circuit court panels to fulfill its error-correction function faithfully in every case, while facilitating an enhanced dialogue among members of the court, across a range of factual settings, during the process of formulating legal rules. The end result is that,

while the fulfillment of the error-correction function will helpfully shape the direction of the court's law-making, it will not harmfully control the court's law-making agenda.

c. *Integrating Unpublished Opinions with Other Mechanisms for Collective Circuit Court Decision-Making*

The unpublished opinion is not, of course, the only means of promoting the sort of intra-circuit dialogue that is needed for effective and collective circuit court decision-making. In fact, there are two other mechanisms formally recognized in court rules: the rehearing of a case by the circuit court en banc and the displacement of existing circuit precedent through circulation of a new opinion to all active members of the court. The en banc procedure is statutorily based,[136] and it is described in the Federal Rules of Appellate Procedure as well as various local rules of the individual circuits.[137] The displacement of precedent through circulation of opinions has a less exalted pedigree, but it nevertheless does appear in formal rules of several circuits and appears to be well established as a matter of custom in others.[138]

Each of these formal mechanisms, however, is substantially limited in its ability to promote effective intra-circuit dialogue. Moreover, the limitations of the en banc and circulation mechanisms is offset by the advantages of unpublished opinions, while the difficulties presented by unpublished opinions as dialogue-enhancers are offset by the strengths of the en banc and circulation procedures. Unpublished opinions thus serve as an ideal supplement to existing mechanisms for collective decision-making in the courts of appeals; they are not, by themselves, a cure-all for the problems posed by the courts' law-making in individual panels, but they effectively complement other mechanisms that are already in place.

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[136] *See* 28 U.S.C. § 46(c) (2000).

[137] *See* Fed. R. App. P. 35; *see also, e.g.*, 2nd Cir. R. 35; 4th Cir. R. 35.

[138] *See, e.g.*, 7th Cir. R. 40(e); United States v. Coffin, 76 F.3d 494, 496 n.1 (2d Cir. 1998) (discussing practice in Second Circuit and other courts of appeals).

i. Rehearing En Banc

In many ways, the rehearing of a case by an en banc panel is the ultimate device for the promotion of intra-circuit dialogue and for the ordered and collective discharge of the court's law-making function. With all of the circuit's active judges assembled together, along with any visiting or senior judges who may have participated in the original panel's decision, each judge has a full opportunity to explore the nuances of the case, to ask questions of counsel, to make her views known to her colleagues, and to engage actively in debating the merits. En banc review also avoids the problem of litigant-driven law-making that plagues individual panels: because en banc rehearing is a discretionary device, the court is free to withhold en banc review in cases that are factually or procedurally problematic and to wait for a case in which an important legal question is squarely and competently presented.

Yet, while the en banc rehearing is a powerful device for enabling all circuit judges to have input in setting circuit precedent, it is not a mechanism without its own flaws. First, it is quite demanding of time and resources. Not only must judges depart from their regular sitting schedules to assemble for oral argument, but the court's entire decision-making process—the drafting, circulating, commenting upon, and revising of opinions—is significantly complicated and extended by the inclusion of a greater number of participating judges.[139] Second, perhaps in part because of the resources it commands, the en banc rehearing is, and is likely to remain, an infrequently used device. While the rate of en banc decisions varies from circuit to circuit, en banc decisions typically comprise no more than 0.5% of all of adjudications within the federal courts of appeals.[140] The courts thus seem committed to the use of en

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[139] *See* Kozinski & Reinhardt, *supra* note 65, at 43 (explaining that "[b]ecause the deliberative process is much more complicated for a [larger] panel . . . , hammering out an en banc opinion is even more difficult and time-consuming than writing an ordinary panel opinion"); *see also* Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, 382 (1984) (discussing the "cumbersome" nature of en banc proceedings); Carrington, *supra* note 8, at 582 ("The en banc procedure is . . . time consuming for the judiciary and burdensome to litigants.").

[140] *See* 1998 JUDICIAL BUSINESS, *supra* note 22, at tbl. S-1 (documenting that for the year ending in September 1998, there were only eighty-three en banc dis-

banc review as a kind of ultimate weapon, whose power is to be kept in reserve for those instances in which its exercise is most essential.

ii. Circulation of Opinions as a Means of Displacing Circuit Precedent

Perhaps in recognition of the reality that en banc decisions are likely to remain uncommon, most of the circuits have developed an alternative method of enabling circuit precedent to evolve effectively through collective involvement. In these circuits, when a panel reaches a decision that conflicts with existing circuit precedent, the panel may circulate the opinion to the active members of the court; if the majority do not call for the court to review the case en banc, the new opinion is permitted to displace previous circuit precedent.[141] Circulation of an opinion in accordance with this procedure has many of the advantages of full en banc consideration: it allows each active member of the court to participate in the creation of important circuit precedent and to have her views considered by other members of the court. Yet it bypasses the most time-consuming elements of the en banc process, assembly for oral argument followed by the long process of opinion writing, editing, and circulation for comment.

Although this method of reconsidering circuit precedent has significant value as an intra-circuit dialogue-enhancing device, it too has its drawbacks. First, although each member of the court has the opportunity to ponder the legal issue posed by the proposed precedent-displacing opinion, there is reason to question the amount of attention that each such circulation will receive. Judges, after all, already bear a heavy load in resolving the cases assigned to them directly; the amount of time each can devote to other circuit business, including review

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positions out of nearly 25,000 total appeals terminated on the merits); *see also* Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 830-35 (1993) (detailing small (and declining) percentage of cases considered *en banc* by the courts of appeals in recent years).

[141] *See generally* Steven Bennett & Christine Pembroke, *"Mini" In Banc Proceedings: A Survey of Circuit Practices*, 34 CLEV. ST. L. REV. 531 (1986) (reviewing this practice in the circuit courts).

of opinions by other panels within the circuit, necessarily is limited.[142] Second, although judges may have the opportunity to provide input when an opinion is circulated to the entire court, they are asked to do so with some fairly significant constraints and within the relatively narrow context of a single case. The judges who did not participate in the panel decision typically will not have reviewed the parties' briefs or the record on appeal, and they will not have participated in any oral argument that might have taken place. They will have little, in other words, on which to base their decision other than the panel's proposed opinion, which, if not exactly a *fait accompli*, at least carries with it an air of completeness that the other judges, as latecomers to the case, may be reluctant to upset.[143]

iii. The Role of Unpublished Opinions in Developing Circuit Precedent

While en banc review and the circulation of precedent-displacing opinions enhance intra-circuit dialogue to facilitate the effective development of circuit precedent, each mechanism carries with it significant limitations. Consequently, while the use of the unpublished opinion is not the only way of facilitating the development of precedent in new or complex areas of the law while enabling intra-court dialogue, unpublished opinions have significant potential to serve as an effective supplement to the en banc hearing and the circulated opinion as dialogue-enhancing devices. Where the en banc hearing and the opinion circulated to the entire court permit the evolution of circuit precedent within the context of a single case, the unpublished opinion allows the evolution to proceed for a time across cases and across panels. The reevaluation of prior circuit decisions by judges who did not participate in those decisions therefore will take place within the context of new facts, new arguments from the lawyers representing the new parties, and possibly new precedents from other circuits–enhancements

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[142] *See* Stein, *supra* note 140, at 858-59 (noting that "some jurists hold the perception that consistent attention to decisions of other panels takes a great deal of time from a busy judge's own panel duties").

[143] *See* Stein, *supra* note 140, at 858-59 (noting forces leading to judicial resistance to "meddle" in circulated opinions).

not available to the original deciding panel that provide contextual richness for the evolution of circuit precedent.

d. *A Constitutional Coda*

This Article's argument that the courts of appeals can and should use unpublished opinions to avoid the premature establishment of binding precedent and to promote intra-circuit dialogue assumes, of course, that such use of unpublished opinions is properly within the courts' power. That assumption has been called into question by the Eighth Circuit's recent opinion in *Anastasoff v. United States*.[144] In *Anastasoff*, the appellant, in advancing a position contrary to that taken by a previous panel in an unpublished opinion,[145] urged that the court was free to disregard the prior decision because, according to the Eighth Circuit's rule, the unpublished decision was not binding precedent.[146] In an opinion by Judge Richard Ar-

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[144] 223 F.3d 898 (8th Cir.), *vacated*, 235 F.3d 1054 (8th Cir. 2000) (en banc) [en banc decision hereinafter *Anastasoff II*]. As the text explains, Judge Arnold's majority opinion in *Anastasoff* declared that Eighth Circuit Local Rule 28(A)(i), treating unpublished opinions as without binding precedential effect, was unconstitutional. After the Eighth Circuit agreed to rehear Anastasoff's appeal en banc, the parties reached a settlement, rendering the appeal moot. Writing for the en banc court, Judge Arnold acknowledged that the constitutional status of the court's rule on unpublished opinions remained of significant interest. *See Anastasoff II*, 235 F.3d at 1056. In the absence of an active case or controversy, however, he concluded that the court lacked the authority to consider the issue. *See id.* The court therefore vacated its previous ruling, effectively leaving Rule 28(a)(i) untouched. Although the panel's decision in *Anastasoff* itself has no binding precedential effect, it has already generated scholarly commentary. *See* Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CALIF. L. REV. 1673, 1692 n.72 (2000); John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 522-24 (2000); Merritt & Brudney, *supra* note 44, at 73-74; *see also generally Recent Cases: Constitutional Law—Article III Judicial Power—Eighth Circuit Holds That Unpublished Opinions Must Be Accorded Precedential Effect*, 114 HARV. L. REV. 940 (2001). It also seems extremely likely that the issues addressed in the opinion, having been raised for the first time, will soon receive renewed judicial attention.

[145] Christie v. United States, No. 91-2375 MN (8th Cir. Mar. 20, 1992) (per curiam) (unpublished).

[146] Eighth Circuit Rule 28(A)(i) states:

> Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no

nold, the court asserted that it lacked authority to consider its prior unpublished decision non-precedential and held that the Eighth Circuit's rule indicating otherwise was unconstitutional.[147] Written in broad and sweeping terms, the *Anastasoff* opinion's reasoning and conclusion has the effect not only of invalidating the Eighth Circuit's rule on unpublished opinions, but also of calling into doubt those of the other circuits; it would seem to foreclose not merely the use of unpublished opinions as a passive virtues device, but also any treatment of unpublished opinions as other than binding precedent.

Judge Arnold's opinion in *Anastasoff* is essentially an originalist argument that the rule of *stare decisis* was inherent in the Framers' conception of the "judicial power" delegated to the courts by Article III.[148] Underlying the Framers' conception of the judicial power was, he argued, a clear and well-established view that respect for precedent lay at the heart of the judicial function.[149] Judge Arnold is not the first to argue that respect for precedent is an essential part of the Article III judicial power,[150] and it hardly seems outrageous to contend that precedent plays a role in the judicial function. The issue remains, however, how rigid that rule must be. While a full treatment of the extent to which Article III requires courts to adhere to precedent (and, in turn, to eschew the use of non-precedential opinions) is beyond the scope of this Article, a review of the historical sources on which Judge Arnold relies suggests that the doctrine of *stare decisis*–the notion that precedent must be respected in a subsequent case, even if the court in the later case believes that the precedent was wrongly decided–was not fully formed at the time the Constitution was ratified. Indeed, the idea that judges could depart from precedent when reason suggested a different result was foreign to neither the English nor the American legal systems in the second half of the eighteenth century. This historical evidence

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published opinion of this or another court would serve as well. 8th Cir. R. 28(A)(i).

[147] *Anastasoff*, 223 F.3d at 900.

[148] *Id.*

[149] *Id.* at 901-03.

[150] *See, e.g.*, William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 9-11 (1994); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754-55 (1988).

alone suggests that Justice Arnold's sweeping conclusion that any use of unprecedential opinions necessarily violates Article III is unwarranted. Moreover, given the significant evolution of federal court caseloads, and the radically changed institutional circumstances under which the modern federal courts of appeals operate, a strong case can be made that at least the use of unpublished opinions in the manner that we describe in this Article is constitutionally permissible.

i. (Re)examining the History

Judge Arnold begins his analysis in *Anastasoff* by looking to the English jurists and legal scholars whose writings informed the Framers' thinking about the judiciary. He begins with the work of Sir Edward Coke, the seventeenth-century advocate of judicial independence from the crown. Coke, as Judge Arnold notes, wrote on a number of occasions that the role of the judiciary was not to make law but to declare law.[151] Similarly, Sir William Blackstone, whose COMMENTARIES greatly influenced the founding generation's thinking on the proper role of the courts,[152] and on whose work Judge Arnold heavily relies, also adhered to this "declaratory" conception of the law. Blackstone's COMMENTARIES, as Judge Arnold stresses, emphasized the importance of observing prior court decisions.[153]

The "declaratory" conception of the law, however, did not treat prior decisions as the law itself, but rather as evidence–the best evidence, perhaps, but still merely evidence–of what the law was.[154] While precedent was entitled to respect,

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[151] *See Anastasoff*, 223 F.3d at 900-01.

[152] Sir William Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND, published between 1765 and 1769, represented a comprehensive effort to rationalize and summarize the system of English law as it existed in the mid-eighteenth century. *See* DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 31-32 (1989). First published in the American Colonies in 1772, it was widely read by the founding generation of the United States. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 114 (2d ed. 1985); JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 75, 77 (1996).

[153] *See Anastasoff*, 223 F.3d at 901 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES at § 69).

[154] *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 660 (1998).

in other words, it did not command unquestioned support, and while a judge was not simply to decide cases based on his own preferences, neither was he bound to follow precedent that was contrary to reason.[155] Indeed, Blackstone himself explained that obedience to precedent was not to be absolute or unthinking. Blackstone recognized that judges do sometimes err, and he asserted that "where the former determination is most evidently contrary to reason," judges were not obliged to follow it, but rather ought properly to "declare[], not that such a sentence was bad law, but that it was not law."[156] In other words, Blackstone, like Coke, viewed the law as something beyond the simple amalgamation of precedents; while prior decisions usually would be compelling evidence of the law, judges were not bound to follow them in all cases. Blackstone's COMMENTARIES, moreover, were delivered during a time when Lord Mansfield–Chief Justice of the King's Bench from 1756 to 1788, and another figure much admired in America–had embarked on his ambitious overhaul of England's commercial law, a process that necessarily emphasized the use of reason to discern guiding principles over strict adherence to existing precedent.[157]

It thus appears that the English approach to precedent in the second half of the eighteenth century did not amount to a fully-formed doctrine of *stare decisis*, but rather it invited courts to disregard precedent in those cases where it seemed contrary to reason. This approach seems to have found its way across the Atlantic. As historian Gordon S. Wood has recently noted:

> American judges in the early Republic interpreted the common law flexibly in order to mitigate and correct the harm done by the profusion of conflicting statutes passed by unstable democratic legislatures. Judges were often able to play down the importance of precedents and to emphasize instead reason, equity, and convenience in order to bring the law into accord with changing commercial circumstances.[158]

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[155] *Id.*

[156] 1 BLACKSTONE, COMMENTARIES § 69-70.

[157] *See* LIEBERMAN, *supra* note 152, at 126-27; *see also* Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 799 (1999).

[158] Gordon S. Wood, *The Origin of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1444 (1999).

Some courts were remarkably up-front in asserting that they did not consider themselves bound by precedent. In *Kerlin's Lessee v. Bull*,[159] for example, the chief justice of the Pennsylvania Supreme Court wrote:

> A Court is not bound to give the like judgment, which had been given by a former Court, unless, they are of opinion that the first judgment was according to law; for any Court may err; and if a Judge conceives, that a judgment given by a former Court is erroneous, he ought not in conscience to give the like judgment, he being sworn judge according to law. Acting otherwise would have this consequence: because one man has been wronged by a judicial determination, therefore every man, having a like cause, ought to be wronged also.[160]

Even those who emphasized the need for courts to pay heed to prior decisions left room for judicial flexibility. For example, in his preface to the first volume of the Supreme Court's official reports for which he served as reporter, William Cranch stressed the importance of publishing judicial opinions, arguing that prior decisions represented a check upon judicial discretion and that publishing those decisions could only enhance the effectiveness of that check.[161] Cranch did not regard precedent as strictly binding, however. A judge, he wrote, "can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public."[162]

The degree to which the "judicial power" entailed respect for precedent, then, was uncertain at the time the Constitution was ratified. On the one hand, it seems, courts were expected to take account of existing precedents; they could not simply decide each case according to their own whims. On the other, courts were not compelled to follow precedents that they firmly believed were wrongly decided, although, were they to depart from precedent, a reasoned explanation was desirable to ensure that judges did not overstep the bounds on their judicial functions.[163]

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[159] 1 U.S. (1 Dall.) 175 (Pa. 1786).

[160] *Id.* at 178.

[161] 5 U.S. (1 Cranch) iii (preface) (1804).

[162] *Id.* at iii-iv.

[163] *See* Lee, *supra* note 154, at 664-66 (describing the attitudes toward precedent in the founding generation).

What, then, are the implications of the ambiguous historical conception of the "judicial power" for Judge Arnold's conclusion that the courts of appeals' use of non-precedential unpublished opinions is unconstitutional? With regard to those circuits that do not permit citation to unpublished opinions,[164] Judge Arnold's reasoning would seem to be on relatively solid ground: the idea that the courts could, *a priori*, designate a category of decisions as uncitable and non-precedential would raise the possibility that the courts would decide such cases in the unbounded exercise of their discretion. Such decisions, which have been the focal point of much of the criticism of unpublished opinions, might appropriately be regarded as "non-judicial." In those circuits that, like the Eighth Circuit, permit citation to unpublished opinions,[165] however, Judge Arnold's criticism seems less apt, though not entirely groundless. In these circuits, recall, unpublished opinions may serve as persuasive authority, though they do not formally bind subsequent panels. To the degree that subsequent panels may simply disregard those unpublished opinions that parties bring to their attention, the court rules that permit such conduct may be problematic according to the historical sources on which Judge Arnold relies. If, however, a panel were to respect the persuasive authority of prior unpublished decisions within its circuit, and to refuse to follow those decisions only on a reasoned conclusion that those cases were incorrectly decided, the panel's course of conduct would seem fully consonant with the notions of proper judicial conduct current in the late eighteenth century.

ii. Responding to Modernity

Whatever the merits or demerits of originalism as a constitutional interpretive philosophy, it surely should not serve as the basis of a decision where reference to the founding generation's interpretation of the relevant constitutional text fails to yield clear guidance. This is particularly so where the institution concerning which originalist guidance is sought has been greatly transformed by the demands of a growing nation

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[164] *See supra* note 46.

[165] *See supra* note 46 and text accompanying note 133.

and a more complex society. Although a review of historical sources suggests some uncertainty about the Framers' conception of the judicial power, it is certain that their conception of federal courts was nothing like what exists today. The original judicial structure established by the Constitution seemed to contemplate at least the possibility of Supreme Court justices alone handling all federal judicial responsibilities. Article II vests the judicial power in "one Supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish."[166] To the extent the Founders envisioned "inferior courts," they could scarcely imagine the possibility that each year well over 600 district judges would have to tackle more than 300,000 federal case filings and that nearly 200 circuit judges would have to confront over 50,000 appeals.[167]

The reality of these sheer numbers–together with the federal judicial structure that has developed to handle institutionally this massive caseload–weighs against narrow adherence to originalist arguments, especially when the originalist sources provide no clear answer. When the possible number of cases and number of judges addressing an issue expands from a handful to hundreds, the notion that a judge should be bound because another judge previously has addressed a legal issue becomes less tenable. Indeed, this is a conceded and established fact in the work of federal district courts, wherein the decision by a district judge is understood to have no binding precedential force even for future cases arising in the same district.[168] In this context, and given the fact that an appellate panel that decides an issue represents only a small minority of the active judges in the circuit,[169] it hardly seems unreasonable to suggest that the courts might adopt a procedure that would permit a panel to state its conclusion tentatively until other members of the court had an opportunity to examine the issue. This is not to say that the modern realities of caseload and federal judging serve to reduce the concept of precedent to a nullity either as a matter of principle or as a matter of constitutional law. But in light of the dramatic ex-

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[166] U.S. CONST. art. III, § 1.

[167] *See supra* notes 15-19 and accompanying text.

[168] *See supra* note 92 and accompanying text.

[169] *See supra* notes 86-90 and accompanying text.

pansion of the federal docket, and the concomitant increase in the federal judiciary, an adjustment to rigid notions of precedent that would enhance judicial dialogue and improve the appellate courts' ability to exercise their law-making function seems both constitutionally permissible and conceptually sound.

CONCLUSION

Effectively bringing a form of Alexander Bickel's "passive virtues" to the federal courts of appeals will not magically resolve all the challenges that circuit courts must confront in trying to balance concerns of efficiency and justice in the face of an enormous increase in the number of cases they must resolve each year. Judges and scholars have been discussing and debating the response of the federal courts of appeals to rising caseloads for at least thirty years, and we neither expect nor hope our suggestions will cease such an important and valuable dialogue.

However, we do believe that too much of this discussion has gone forward without taking full account of the unique features that structure and affect the workings and the work product of the federal appellate courts. Consequently, assessments of the current state of affairs, and prescriptions for the future, have failed to be fully attentive to the special challenges to effective decision-making in the federal courts of appeals. Our primary contention is that certain fundamental, but often overlooked, institutional features of the modern federal circuit courts significantly affect the balance between efficiency and justice in appellate decision-making, and that the dialogue about court reforms must be recast to take full account of these institutional realities. We also believe that our suggested model for federal circuit court decision-making—a model which draws upon the "passive virtues" ideas first developed by Bickel—is more attentive and responsive to the modern dynamics of the federal courts of appeals. We thus do expect and hope that this Article can and will effectively inform the ongoing debates.