

# Elitism Expediency and the New Certiorari: Requiem for the Learned Hand Tradition

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# ELITISM, EXPEDIENCY, AND THE NEW CERTIORARI: REQUIEM FOR THE LEARNED HAND TRADITION

*William M. Richman*† & *William L. Reynolds*‡

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"[T]he docket is 'dumbed-down' by an overwhelming number of routine or trivial appeals . . . ."

Judge Edith H. Jones<sup>1</sup>

"We federal judges are simply unable to abandon our notion of the appellate courts as small, cohesive entities operating in a pristine and sheltered atmosphere."

Judge Stephen Reinhardt<sup>2</sup>

## INTRODUCTION

The federal circuit courts, responding to a dramatic increase in caseload, have transformed themselves radically in the past quarter century.<sup>3</sup> Once the tradition and practice was to hear oral argument

<sup>1</sup> Edith H. Jones, *Back to The Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1493 (1995) (reviewing THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURT OF APPEALS* (1994)).

<sup>2</sup> Stephen Reinhardt, *Surveys Without Solutions: Another Study of the United States Courts of Appeals*, 73 TEX. L. REV. 1505, 1513 (1995) [hereinafter *Surveys*] (reviewing THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE UNITED STATES COURTS OF APPEALS* (1994)).

<sup>3</sup> The increase in caseload is well-documented. The numbers are staggering. In 1960, 3,899 appeals were filed before 68 federal circuit judges; the comparable figures for 1994 are 48,322 filings and 179 judges. See Committee on Long Range Planning, *Judicial Conference of the United States* 2 (1994) (1960 data); L. RALPH MECHAM, *JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1994 REPORT OF THE DIRECTOR*, at 25, B-1 (1994 data).

in almost all cases and for a judge, working virtually alone, to write a fully reasoned opinion explaining the outcome and making it available for all to see. Today those procedures have been sadly truncated; oral argument and formal publication are now the exception rather than the rule. Moreover, the judge no longer sits alone in isolated concentration. Rather, the judge is now the manager of a staff, whose primary role is to conserve judicial effort by screening cases and participating significantly in the decision making process. In other words, the modern federal appellate decision is a team effort. In most cases, the judge's role is primarily or even exclusively supervisory. Clerks and central staff screen the appeals to determine how much judge time should be allocated to each case. These para-judicial personnel also recommend whether oral argument should be granted and whether a full opinion (or, indeed, any opinion) should be written. Not only is judge time rationed, but the key decisions allocating judge time are not even made by judges. Thus, an effective right to *appeal* error to the circuit courts no longer exists; instead, litigants must petition the staff to obtain access to the judges. In short, despite their statutory and historical role as courts of appeal,<sup>4</sup> the circuit courts have become certiorari courts.

These developments have had deplorable effects. The overall quality of the work of the circuit courts has deteriorated markedly. Judge Reinhardt spoke for many when he observed: "Those who believe we are doing the same quality work that we did in the past are simply fooling themselves."<sup>5</sup> In addition, the transformation has created different tracks of justice for different cases and different litigants: important cases (usually measured by monetary value) and powerful litigants receive greater judicial attention than less important cases and weaker litigants. At one end of the spectrum, perhaps in a major securities case, the judges play a very active role: they listen to oral argument, work hard preparing opinions which are circulated among and read carefully by their colleagues, and ultimately have the final opinion published in the Federal Reporter as a precedent. A stark contrast exists at the other end of the spectrum. For example, in an appeal involving the denial of social security benefits, central staff may read the briefs, recommend whether oral argument should be

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This represents a 1240% increase in filings, with only a 263% increase in judges; see also JUDITH A. MCKENNA, FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 18 (1993) (providing data on recent caseload changes). In other words, in 1960, there were 57 filings for each appellate judge; the comparable figure for 1994 is 270. There can be no doubt that the caseload pressure has grown dramatically over the past several decades.

<sup>4</sup> See, e.g., 28 U.S.C. § 1291 (1994) ("the courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.").

<sup>5</sup> Stephen Reinhardt, *A Plea to Save the Federal Courts—Too Few Judges, Too Many Cases*, 79 A.B.A. J., Jan. 1993, at 52 [hereinafter *Too Few, Too Many*].

heard, and prepare a draft opinion. The judge's own clerks then scan the reports from central staff to see if they make sense and should be followed. In these cases, actual judge time probably consists of limited review of the staff recommendations.<sup>6</sup> The draft opinion is not published, and sometimes no opinion (other than a brief affirmation) is issued at all. Of course, many variations between the two extremes will exist, limited only by the individual judge's conscience and wisdom.

That justice is dispensed on different tracks is not really a secret, although it is not generally known outside judicial circles. Sometimes a candid judge will expose the process. Chief Justice Rehnquist remarked a few years back that:

The person who actually decides an appeal is an appellate judge—the person who supervises the processing of such appeals to ultimate decision, though he may be called an appellate judge, is really more of an administrator. Instead of personally delving into and casting a vote on, say, ten cases, he takes part in supervising law clerks who delve into twenty or thirty cases, he approves what the law clerks have done in half or two-thirds of that number, and personally delves into and decides the remainder . . . . [T]he appellate judge . . . plays a different role than the appellate judge of a generation ago.<sup>7</sup>

Justice Breyer wrote in a similar vein when he was Chief Judge of the First Circuit:

Not all 1,200 appeals require the full time and attention of appellate judges. Many appeals disappear from the docket . . . . Others present only a simple fact-related issue. . . . Our office of four staff attorneys will review records and briefs in many such cases, write memoranda and proposed dispositions, and circulate them with the briefs and records to panels of three judges. *Typically, there is little for the three judges to review, and the appeal takes only a little of their time.*<sup>8</sup>

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<sup>6</sup> The judge might in fact only review an elbow clerk's review of the staff recommendations.

<sup>7</sup> Chief Justice Rehnquist, Remarks at the Annual Dinner of the American Bar Association (Aug. 9, 1976), in Carolyn Dineen King, Comment, *A Matter of Conscience*, 28 HOUS. L. REV. 955, 958 (1991).

<sup>8</sup> Stephen Breyer, *Administering Justice in the First Circuit*, 24 SUFFOLK U. L. REV. 29, 32-33 (1990) (emphasis added). Breyer later observed that there may be "some adverse effect on litigants' perceptions of procedural fairness." *Id.* at 43 n.41. See also FRANK A. KAUFMAN ET AL., REPORT OF THE AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS, reprinted in, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH, 125 F.R.D. 523, 532 (1989) [hereinafter ABA REPORT] (arguing that reform "is necessary to preserve and enhance the distinctive role of the federal courts in our society."); Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 424-25 (1987) ("The work of correction takes time that circuit judges no longer feel they have. And making the performance of that work visible and convincing to the bar and the public requires much more time than the judges are allowed by circumstance.").

The implications of these changes are enormous. Federal appellate courts are treating litigants differently, a difference that generally turns on a litigant's ability to mobilize substantial private legal assistance. As a result, judicial procedures no longer permit judges to fulfill their oath of office and "administer justice without respect to persons, and do equal right to the poor and to the rich. . . ."<sup>9</sup> In short, those without power receive less (and different) justice.

These developments are a direct consequence of an increase in caseload which has far outstripped the increase in the number of judges. Yet the transformation was not inevitable. Indeed, it need not have occurred at all. The Judicial Establishment has steadfastly resisted the one obvious solution:<sup>10</sup> to ask Congress for a radical increase in the number of judges. The Judicial Establishment has advanced various reasons for such resistance despite well-known data and arguments to the contrary. More plausible explanations of judicial resistance to an increase in the number of judges are hard to pin down. Among the possibilities are a strong desire to preserve the elite status of a small judiciary and to replicate the comfortable role judges enjoyed at the apex of a career in practice or at the academy. Besides, it is more rewarding professionally to deal with a major securities case than the problems of yet another losing Social Security claimant.

We do not believe that the transformation of the federal appellate courts into certiorari courts dispensing justice unequally has taken place by design.<sup>11</sup> Instead, it has been the by-product of the effort to maintain a small, elite federal judiciary. The size of the tool has dictated the size of the job, rather than the other way around. Moreover, the transformation has gone largely unnoticed and virtually without debate in the larger legal community. That is most unfortunate, for fundamental changes in our system of justice should not take place without the most careful scrutiny. We hope that this Article will advance that process. It begins with a discussion of the changes in the circuit courts and the impact those changes have had on the appellate process. The discussion then turns to the reason for the transformation—the efforts of the judicial establishment to maintain the judiciary at a size that is too small to handle the caseload in the traditional

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<sup>9</sup> 28 U.S.C. § 453 (1994).

<sup>10</sup> Another obvious solution, not directly addressed in this Article, would be to apportion limited judicial time more evenly. Under that sort of plan, all cases would get roughly the same amount of judicial attention. For reasons that will become apparent, the judges have never discussed this solution.

<sup>11</sup> "[W]e should have consistent, sensible, and workable rules for managing an infinitely variable caseload. At present, we often allocate our prime resource (judges' time) according to quixotic combinations of tradition, habit, and personal preference." Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge*, 42 Md. L. Rev. 766, 776-77 (1983).

fashion. We examine each of the relatively weak arguments used to justify that position and then speculate on the real reasons for the opposition to expansion. The Article concludes with a recommendation for a radical increase in the size of the federal appellate judiciary as the only way to maintain, or, more accurately, regain the traditional appellate process in the circuit courts.

## I

### SHORTCUTS TO DECISION MAKING

"We have been forced to adopt . . . shortcuts to cope with the rising volume: we hear fewer oral arguments, publish fewer opinions and rely more heavily on law clerks and staff attorneys. The heavy volume of cases threatens the ability . . . to give each case the attention and care it deserves."<sup>12</sup>

The traditional appellate procedure, which we have styled "the Learned Hand model," is well known, and can be described simply. Oral argument is heard in virtually all cases. Following a thorough discussion among the judges in a face-to-face conference, one panel member prepares a draft opinion, circulates the opinion among the panel, and then revises the draft in response to their comments. The resulting opinion carefully states the relevant facts and law, and explains why the combination of the two leads to the result.<sup>13</sup> The judge uses a law clerk as a research tool and sounding board, but clerks have no significant role in drafting the opinion; there is no central staff. When the panel reaches agreement on the opinion, it is published in a reporter accessible to everyone. That is the traditional, or Learned Hand, model of appellate decision making.<sup>14</sup>

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<sup>12</sup> J. Clifford Wallace, *Developing the Mission of the Federal Courts—A Method to Determine the Size of the Federal Judiciary*, 27 CONN. L. REV. 851, 858 (1995).

<sup>13</sup> "Under traditional procedure an explanatory opinion is written by a judge in almost every case." DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, *APPELLATE COURTS IN THE UNITED STATES* 74 (1994); see also THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 24 (1994) ("Each judge sitting on a case should know enough about it to make his own informed independent decision.").

<sup>14</sup> Although this ideal vision may never have been perfectly followed, even on Learned Hand's court, that court did come quite close to the ideal. The closest student of Learned Hand's court reported that as late as 1960, oral argument was heard in practically every case, "a small number of appeals" were decided from the bench following argument, and about 20% of the appeals were decided in brief per curiam decisions. MARVIN SCHICK, *LEARNED HAND'S COURT* 93-94 (1970). The court's famous "pre-conference" memo practice insured the familiarity of each panel member with the case. *Id.* at 98. As for the influence of law clerks, Judge Medina is supposed to have said that Learned Hand "wouldn't even let a law clerk write a sentence, not one sentence." Harold R. Medina, *The Decisional Process in the United States Court of Appeals, Second Circuit—How the Wheels Go Around Inside—with Commentary*, Address at the New York County Lawyers Association Forum Evening (Apr. 26, 1962), *quoted in* SCHICK, *supra*, at 107 n.92. Analogously, United States District Judge Prentice Marshall, speaking of his clerkship with Judge Walter C. Lindley of the Seventh Circuit, stated:

Today, the courts use the traditional method in less than half of their cases. For the remainder of the docket, they forgo the traditional process in an effort to conserve time and cope with the caseload crisis. The courts employ a variety of methods to reduce judge time. The most frequently used methods are the limitation of oral argument, reduction of the length, quality, and number of written opinions, and expansion of the role of visiting and senior judges and non-judicial staff.<sup>15</sup>

#### A. Oral Argument: Deciding Without Hearing

Perhaps the most visible change in appellate procedure has involved oral argument. At one time, argument in a single case could last several days. The rise of extended briefing and formal record extracts made such lengthy oral argument redundant, and argument was thus limited<sup>16</sup> and made more routine. Nonetheless, a half hour per side was still available in most cases.<sup>17</sup>

Today, however, fewer than half of the Courts of Appeals hear oral argument in at least half of the cases they decide.<sup>18</sup> The trend toward less argument is steep; the percentage of appeals argued has fallen from 56% in 1985 to 45% in 1992.<sup>19</sup> There is great disparity among the circuits as to the availability of oral argument; a pattern, however, is discernable.<sup>20</sup> A safe generalization is that the courts hear argument more frequently in cases involving high-profile matters,

We worked on only a fraction of the assigned cases. During my time with him, he wrote sixty-four opinions and three dissents, plus a significant number of opinions for the then Emergency Court of Appeals. He worked at no more than half of his capacity. And the cases in those days were not simple diversity based personal injury cases. They embraced the full spectrum: antitrust, securities fraud, commodities markets, class actions, major criminal prosecutions, patents, trademarks and copyrights (he devoured patent cases), and yes, even *habeas corpus*.

Prentice H. Marshall, *Some Reflections on the Quality of Life of a United States District Judge*, 27 ARIZ. L. REV. 593, 594 (1985).

<sup>15</sup> Complaints about lack of oral argument, unpublished opinions, and "one-judge" opinions go back many decades. See, e.g., Paxton Blair, *Federal Appellate Procedure as Affected by the Act of February 13, 1925*, 25 COLUM. L. REV. 393, 397 (1925). There can be no doubt, however, that American judges, lawyers, and professors have a "Platonic" concept of the appellate process. It is that concept which has been left behind as judges have sought to cope with the caseload increase without markedly expanding the size of the federal judiciary.

<sup>16</sup> Extended argument was necessary in a time when formal briefs were rare and the appeal proceeded on a bare-bones record. CARROLL T. BOND, *THE COURT OF APPEALS OF MARYLAND, A HISTORY* 81 (1928).

<sup>17</sup> "[I]n 1950 an oral argument and a written opinion were afforded in all federal appeals as a right." BAKER, *supra* note 13, at 47.

<sup>18</sup> *Id.* at 110.

<sup>19</sup> MCKENNA, *supra* note 3, at 43. One ironic result is that appellants in federal circuit courts who have a statutory right to appeal receive *less* oral argument than they do in some states where there is no right to appeal.

<sup>20</sup> See BAKER, *supra* note 13, at 115; MCKENNA, *supra* note 3, at 43.



such as securities and antitrust cases, than in social security or veterans' appeals; courts rarely, if ever, grant oral argument in *pro se* cases.<sup>21</sup> Finally, even when oral arguments are allowed, they are abbreviated: several courts routinely give only fifteen minutes of argument per side.<sup>22</sup>

Because argument can be very valuable, its absence affects the quality of decision making. The Supreme Court, for example, hears argument in virtually all cases in which it grants certiorari. Not surprisingly, in a recent survey, seven of eight federal circuit judges found oral argument "very helpful" or "often helpful."<sup>23</sup> Justice Brennan, Professor Llewellyn, and many others have also spoken of the value of argument.<sup>24</sup> Kenneth Starr, former circuit judge and Solicitor General, observed that, "in the age of overcrowded dockets, the importance of oral argument will, ironically, be enhanced."<sup>25</sup> Chief Justice Hughes once wrote, "The one who decides must hear."<sup>26</sup> It is easy to see the relation between argument and quality. Oral argument brings the judges together and involves them in the case<sup>27</sup> both mentally and physically—a process which helps the quality of decision making.<sup>28</sup> Argument permits judges to ask questions the briefs do not answer and to explore alternative theories that the parties have not developed.<sup>29</sup> The marked decrease in argument, therefore, necessarily reduces the quality of decision making.

Unfortunately for many litigants, argument is most useful in those cases least likely to receive it, *e.g.*, those in which the briefing is *pro se*, bad, or non-existent. Neither the judge nor the staff in those cases will receive useful input about the case from the appellant;<sup>30</sup> in contrast, the appellee, usually a government agency, will be able to place its side of the case before the court. Not surprisingly, cases not argued are "affirmed at a greater rate than cases in which argument

<sup>21</sup> See Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3, 48.

<sup>22</sup> *Id.* The suggested norm in the Appellate Rules is thirty minutes, but additional time may be made available upon request. FED. R. APP. P. 34, advisory committee's note.

<sup>23</sup> Robel, *supra* note 21, at 54.

<sup>24</sup> See Charles R. Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U. L.Q. 257, 317.

<sup>25</sup> Kenneth W. Starr, *The Courts of Appeals and the Future of the Federal Judiciary*, 1991 WIS. L. REV. 1, 6.

<sup>26</sup> *Morgan v. United States*, 298 U.S. 468, 481 (1936).

<sup>27</sup> JOE S. CECIL & DONNA STIENSTRA, *DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS* 159-60 (1987).

<sup>28</sup> See Robel, *supra* note 21, at 49. See also Stephen L. Wasby, *The Functions and Importance of Appellate Oral Argument: Some Views of Lawyers and Federal Judges*, 65 JUDICATURE 340 (1982) (emphasizing the value of oral argument in helping judges focus on the case and in communicating with both other judges and lawyers).

<sup>29</sup> Reinhardt, *Surveys*, *supra* note 2, at 1510.

<sup>30</sup> Robel, *supra* note 21, at 56.

occurs," and "cases not argued are much less likely to be decided with a published opinion."<sup>31</sup> It also is not surprising that oral argument is much more likely to be heard in securities and antitrust cases than it is in veterans' benefit and prisoner petition cases. In short, less interesting cases are less likely to be argued and, therefore, less likely to benefit from the focus and communication that is a part of oral argument. This is unfortunate; both quality and justice suffer. Even in easy cases, "[b]y ensuring that each party has an opportunity to argue his case before the court, oral argument encourages litigants to believe that they are receiving a fair shake from the appellate courts and serves to maintain confidence in our legal system."<sup>32</sup>

Equally disturbing is the process the courts use to determine whether to hear argument. The stated rule is clear enough: Oral argument is heard "in all cases unless pursuant to local rule a panel of three judges . . . shall be unanimously of the opinion that oral argument is not needed."<sup>33</sup> Unfortunately, the apparently strong *de jure* presumption in favor of argument amounts in fact to a *de facto* presumption against argument.<sup>34</sup> Indeed, lawyers frequently have to persuade courts to grant argument. Thus, a typical local rule, that of the Fourth Circuit, requires counsel to append to the brief a statement explaining why argument is desirable.<sup>35</sup> Obtaining oral argument, therefore, really amounts to a petitioning process, and litigants who can afford expert advocates get the lion's share of the scarce judicial resources available. Further, although the petition is addressed to the judges, in many cases it will be reviewed initially by central staff who will recommend whether argument should be heard.<sup>36</sup> Thus, "the process of determining which litigants will receive oral argument is beyond the reach of the adversary process, if not entirely invisible."<sup>37</sup>

## B. Limited Publication: Deciding Without Writing

The court's tangible work product also has changed dramatically in recent years. "Published opinions," Judge Jones wrote recently, "were once the hallmark of the appellate courts' work."<sup>38</sup> The traditional expectation was that an appellate decision would be expressed

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<sup>31</sup> *Id.* at 48.

<sup>32</sup> Reinhardt, *Surveys, supra* note 2, at 1510. See also Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 *YALE L.J.* 1442, 1484 (1983) ("Oral argument places the decisionmaker face-to-face with the contestants and gives what is often a remote and abstract legal system an important human character.").

<sup>33</sup> *FED. R. APP. P.* 34(a).

<sup>34</sup> See BAKER, *supra* note 13, at 108-09 (discussing Rule 34 and concluding that it is "an empty set of words").

<sup>35</sup> 4TH *CIR. R.* 34.1.

<sup>36</sup> MCKENNA, *supra* note 3, at 50.

<sup>37</sup> *Id.* at 45.

<sup>38</sup> Jones, *supra* note 1, at 1492.

in a written and fully reasoned opinion, and that the opinion would be published and added to the stock of precedent.<sup>39</sup> That expectation no longer exists. Rather, each circuit has a local rule identifying those opinions that it will publish.<sup>40</sup> Although the actual criteria differ among the circuits, the publication decision is based on the assumption that opinions which do not "make law" do not need formal publication; as a corollary, unpublished opinions are said to lack "precedential value" and usually cannot be cited as precedent. Given this underlying assumption, it is hardly surprising that published opinions today account for less than a third of federal circuit terminations.<sup>41</sup>

The decline in publication is unfortunate because the traditional, fully reasoned written opinion<sup>42</sup> serves a number of vital functions.<sup>43</sup> For instance, a published opinion enhances predictability. Even if the opinion does no more than restate existing legal doctrine, it can show how the doctrine applies to different facts. Publication thus increases certainty by increasing the stock of precedents.<sup>44</sup> Publication also hardens precedents because it is easier for a court to ignore one inconvenient precedent than ten.<sup>45</sup>

Publication also serves to hold judges accountable for their opinions.<sup>46</sup> Accountability encourages well-reasoned decisions. When a judge makes no attempt to provide a satisfactory explanation of the

<sup>39</sup> A published opinion is the "working tool of lawyers and the building block of judges." John Reid, *Doe Did Not Sit—The Creation of Opinions by an Artist*, 63 COLUM. L. REV. 59, 59 (1963).

<sup>40</sup> Efforts to limit publication by the circuit courts can be traced back to the late 1940s. See, e.g., Francis P. Whitehair, *Opinions of Courts: Fifth Circuit Acts Against Unneeded Publication*, 33 A.B.A. J. 751 (1947). See generally 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) (discussing the history of limited publication).

<sup>41</sup> MCKENNA, *supra* note 3, at 47.

<sup>42</sup> Professor Meador has suggested that there should be more *oral* opinions, delivered at the close of arguments and conducted without time limits. Daniel J. Meador, *Toward Civility and Visibility in the Appellate Process*, 42 MD. L. REV. 732 (1983). An oral opinion need not lack quality simply because it is oral; it could be as well thought out as a written opinion. Because of its evanescent quality, however, an oral opinion will not enhance judicial accountability.

<sup>43</sup> For a somewhat contrary view of limited publication, see Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REF. 119 (1994).

<sup>44</sup> See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS & REFORM* 122 (1985) ("[T]he real significance of an unpublished opinion is that it is not citable as precedent.").

<sup>45</sup> See, e.g., *id.* at 129 (arguing that "stare decisis has a lot more weight than some 'legal realists' think").

<sup>46</sup> See 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, 781 (1995) (Opinion writing "sharpen[s] analysis, and . . . impos[es] a sense of responsibility and discipline on judges").

result, neither the actual litigants nor subsequent readers of an opinion can know whether the judge paid careful attention to the case and decided the appeal according to the law or whether the judge relied on impermissible factors such as race, sex, political influence, or merely the flip of a coin. Perhaps few losing litigants will be persuaded by a carefully reasoned explanation, but that explanation will often reveal whether the judge treated the case seriously.<sup>47</sup> Moreover, full publication helps to insure that judicial opinions are readily accessible, certainly a necessary condition for the realistic evaluation of either a judge or a court.

Similarly, the signed opinion assigns responsibility. The author of a bad opinion cannot hide behind the shield of anonymity; blame, or praise-worthiness, is there for all to see. "By signing his name to a judgment or opinion the judge assures the parties that he has thoroughly participated in that process and assumes individual responsibility for the decision."<sup>48</sup> In contrast, the unpublished opinion (or order) rarely has an author other than that noted Norwegian jurist, "*Per Curiam*."<sup>49</sup> In *per curiam* decisions, blame or praise is spread out among three judges with the pernicious consequence of diffusing the judges' responsibility and accountability. Judges who cannot be held individually responsible either for the reasoning or the result have far less incentive to insure that they "get it right." More accurately, given the increasing reliance on staff to prepare opinions, the anonymous judge has far less incentive to see that *they* get it right.

Non-publication also diminishes the possibility of additional review. For all practical purposes, the courts of appeals are the courts of last resort in the federal system; fewer than one percent of their decisions receive plenary review by the Supreme Court. The limited appellate capacity of the Supreme Court makes it extremely unlikely that it will review an unpublished opinion. After all, a cogent explanation also makes it possible for a reviewing court to understand the case.<sup>50</sup> Without that explanation, the likelihood of discretionary review by an *en banc* court or by the Supreme Court decreases to the vanishing point.<sup>51</sup> Moreover, a reviewing court is far less likely to spend its own

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<sup>47</sup> Or at least that her staff did.

<sup>48</sup> Fiss, *supra* note 32, at 1443.

<sup>49</sup> In this respect, the unpublished opinion resembles those of many European appellate courts. LOUIS JAFFEE, *THE ORACLES OF THE LAW* 406 (1968) (French courts speak with "single voice").

<sup>50</sup> FED. R. CIV. P. 52(a) provides a useful analog here. Rule 52(a) is designed to provide a district court opinion with enough information to permit intelligent review by the circuit court. Far too many opinions of *those* courts, however, fail to meet the standards that they impose on lower courts.

<sup>51</sup> These types of review include not only a grant of certiorari by the Supreme Court, but also rehearings by the original panel and rehearings *en banc*. The Supreme Court can be quite caustic when it does review an unpublished opinion. *See, e.g.*, United States v.

resources on a case already determined to be without precedential value. Although review is very unlikely anyway, a litigant should not have the chances of review further reduced merely because a panel did not think the case worthy of an opinion.

The costs of non-publication are not limited to reduced predictability, accountability, responsibility, and reviewability. It should come as no surprise that unpublished dispositions are also dreadful in quality. In a study conducted fifteen years ago, we found that twenty percent of unpublished opinions in nine of the eleven circuits failed to satisfy a very undemanding definition of minimum standards, and that sixty percent of the opinions in three circuits failed to meet those standards.<sup>52</sup> There is no reason to think that the situation has improved in the years since. It is no wonder, therefore, that former Chief Judge Markey of the Federal Circuit once told his Circuit Conference that unpublished decisions were "junk" opinions.<sup>53</sup> One cannot help but ask, however, whether the losing litigants thought of their claims as "junk," or whether the definition of "junk" has changed over the years.<sup>54</sup>

It is not difficult to understand why unpublished opinions are dreadful in quality. The primary cause lies in the absence of accountability and responsibility; their absence breeds sloth and indifference. Moreover, a judge's mastery of the case is reduced when she does not publish. Every author knows that views often change as she actually begins to write and seek support for what she has to say. Writing out an opinion helps the author to understand the problem, to see things she otherwise would not see.<sup>55</sup>

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Edge Broadcasting, 113 S. Ct. 2696, 2702 n.3 (1993) (We deem it "remarkable and unusual that although the Fourth Circuit Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished per curiam opinion.").

<sup>52</sup> William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 tbl. at 602 (1981). An opinion satisfied the "minimum standards inquiry" if it gave some indication of what the case was about and some reason for the result. *Id.* at 601.

<sup>53</sup> Chief Judge Howard T. Markey, Remarks at the Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 24, 1989), in 128 F.R.D. 409, 414 (1989).

<sup>54</sup> A dozen years ago Judge Edwards observed that the circuit courts were deciding a significant number of cases without opinion even though two decades before those cases would surely have led to published opinions. Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 895 (1983). Judge Wald recently agreed: "Due to the pressure of accelerating caseloads, the majority of federal cases now get this unpublished treatment. Many would have been the subject of full-fledged opinions a few decades ago." Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1373 (1995).

<sup>55</sup> On Learned Hand's court, each judge on the panel prepared a pre-conference memo following oral argument. In that memo, "each judge individually worked through

However poor the quality of unpublished opinions, they are Cardozo-esque in comparison to the practice of issuing mere "Orders"—dispositions that contain no explanation at all.<sup>56</sup> Orders fail any quality test. Their proffered justification is that it is unnecessary "to explain even to the loser, why he lost."<sup>57</sup> That statement is dead-wrong, even for the most frivolous cases. Explanation is fundamental to our system of justice.<sup>58</sup> Its absence in the one-word Orders effectively converts the statutory appeal of right into a denial of a petition for certiorari; in both cases the decision maker has declined to explain its decision. The difference, of course, is that the Supreme Court has been given statutory discretion to deny certiorari without explanation, while the circuit courts are under a statutory duty to hear every appeal.<sup>59</sup>

A final cost of non-publication stems from the problem of unequal access. The circuit courts limit public access to their unpublished opinions by restricting their distribution<sup>60</sup> and prohibiting their citation as precedent.<sup>61</sup> These no-citation rules were designed to off-set the advantages of well-financed and institutional litigants who might possess private data banks of unpublished opinions.<sup>62</sup> That

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the case and reached tentative conclusions before ever consulting with his colleagues." GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 287 (1994). The memos led to "a far greater familiarity with the facts and legal issues." *Id.* The memos also saved judicial time because they "obliged the judges to articulate their reasoning and, as a result, the time needed to confer was often shorter than it otherwise would have been." *Id.* at 288.

<sup>56</sup> For example, Rule 36 of the Federal Circuit permits one-word dispositions. In FY 1995, the court used Rule 36 to dispose of 29% of its merit-based terminations. Letter from Francis X. Grindhart Clerk of the Federal Circuit (May 15, 1996).

<sup>57</sup> Markey, *supra* note 53, at 420. Unfortunately, Judge Markey did not tell his audience why it was not necessary to explain.

<sup>58</sup> "In our law . . . the exercise of a power to speak authoritatively as an interpreter carries with it an obligation to explain the grounds upon which the interpreter gives the authoritative judgment." Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 838 (1991). Compare Judge Markey's position with Judge Rubin's comment: "Every judge should be required to give his reasons for a decision, and those reasons should be sufficient to explain the result to the litigants but also to enable other litigants to comprehend its precedential value and limits to its authority." Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648, 655 (1980).

<sup>59</sup> 28 U.S.C. § 1291 (1994) provides: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

<sup>60</sup> Generally, unreported opinions are distributed only to the parties and the judge below. Robel, *supra* note 21, at 51 n.195. "Unpublished" opinions, however, frequently can be found on computer data bases and in specialized reporters, and are, therefore, readily accessible.

<sup>61</sup> Only two circuits do not prohibit the use of unpublished opinions as precedent.

<sup>62</sup> Reynolds & Richman, *supra* note 52, at 581-83. A useful comparison can be made with official French case reports, which, because they are brief and stylized, cannot be understood without the generally unpublished *conclusions* and *rappports*. See generally Mitchel de S.-O.-I'E. Lasser, *Judicial (Self)-Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1357-69 (1995) (discussing the unpublished opinions of French courts).

hope has not been realized. Even though they cannot cite unpublished opinions, repeat litigants (the federal government is an example), are able to catalog them and use their arguments. They also may request formal publication of those unpublished opinions that they believe will make favorable precedent.<sup>63</sup> In other words, such repeat litigants have been able to skew the precedent-setting function by obtaining publication of a favorable set of unpublished opinions.<sup>64</sup> The negative effects of these practices, once again, bear most heavily upon the poor and the weak. Once again, the losers are prisoner civil-rights litigants, disappointed social security claimants, and other under-represented litigants lacking both the resources to amass and catalog unpublished opinions and the clout and incentive to ask for publication of favorable precedents.<sup>65</sup>

### C. Additional Decision Makers: Deciding By Bureaucracy

Another strategy for dealing with the expanded caseload is to increase the number of decision makers. Although the judiciary has resisted efforts to expand the numbers of circuit judgeships,<sup>66</sup> courts have been much less reluctant to expand the number of personnel involved in the decision making process. Those persons are of two types: judges who belong to other courts and para-judicial personnel.

<sup>63</sup> Robel, *supra* note 21, at 51-52.

<sup>64</sup> Ironically, this disruption of traditional appellate procedure may actually do little to ease the caseload crisis, even though non-publication of an opinion probably saves judicial time. Indeed, we found in an earlier study that scant correlation existed between publication rates and circuit productivity. Reynolds & Richman, *supra* note 52, at 596-97 & tbl. 7. That study did find, however, that unpublished opinions were both shorter and decided more rapidly than their published counterparts. *Id.* at 594, 598. Although productivity was not noticeably enhanced, less work was needed to crank out the decision. We do not know what the judges did with their extra time. *But see* Thomas B. Marvell & Carlisle E. Moody, *The Effectiveness of Measures to Increase Appellate Court Efficiency and Decision Output*, 21 U. MICH. J. L. REF. 415, 438 (1988) (analyzing state appellate procedures).

There is widespread belief at the bar that judges sometimes use the non-publication route to reach decisions that cannot be squared with controlling authority. This belief could have perverse caseload consequences. If true, or even if widely believed by the bar to be true, that use of unpublished opinions actually *increases* the number of appeals. An attorney may take an appeal that she otherwise would not take in the hope that the court will recognize the justice of her client's position and reverse the judgment in an unpublished opinion—one that contains little reasoning and no precedential value. Professor Robel writes, for example, that an attorney "might assess differently" the wisdom of appealing an immigration decision "if he knew that the Ninth Circuit published only 27% of its immigration opinions in [1987], and that over half of the reversals of [agency] decisions occurred in unpublished decisions." 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, 947 (1989). In short, limited publication may increase, rather than reduce, both judicial workload and doctrinal incoherence.

<sup>65</sup> Data on the types of cases for which opinions are not published can be found in Reynolds & Richman, *supra* note 52, at 622; Robel, *supra* note 21, at 65.

<sup>66</sup> *See infra* part III.

### 1. *Visiting Judges*

The days when a panel was made up of three active circuit judges are long gone. Today, "panels often include only one active circuit judge; some include none."<sup>67</sup> The gap has been filled with visiting firefighters: senior judges, visiting judges from other circuits, and district judges. The impact of these visitors is rarely commented upon, but it can be dramatic: In 1991, for example, 12% of appellate judge time was provided by resident senior judges and 7% by visiting judges.<sup>68</sup> In at least one circuit, the percentage of participation in terminations by active judges was only 71.7.<sup>69</sup> Although no data are available on the use of district judges, a glance through the Federal Reporter reveals that they sit quite frequently on the circuit courts.

The use of resident senior circuit judges is close to unobjectionable under any standard. They are wise in the folkways of the circuit and should not disrupt the court's normal workings.<sup>70</sup> Visiting judges, district or circuit, are a different story. One study found that Eighth Circuit judges "noted more disadvantages than advantages from district judge participation."<sup>71</sup> Two problems deserve special mention. First, resident circuit judges expressed reluctance to let trial judges shape the development of the law.<sup>72</sup> Second, 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.<sup>73</sup>

### 2. *Para-judges—“Ghostwriters”*<sup>74</sup>

The most startling development in appellate courts in the past quarter-century has been the very marked increase in the role played by non-judicial personnel, or "para-judges." The number of a judge's personal clerks has grown from one to three.<sup>75</sup> Far more significant, however, has been the exponential growth in the numbers and role of

<sup>67</sup> McKenna, *supra* note 3, at 38.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 38-39 (15% by senior judges; 13.3% by visiting judges).

<sup>70</sup> *But see* Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 720 (1994) [hereinafter *Chicago Report*] (suggesting that the chief judge should be more careful in certifying the continued eligibility of senior circuit judges to sit on panels).

<sup>71</sup> Stephen L. Wasby, *Internal Communication in the Eighth Circuit Court of Appeals*, 58 WASH. U. L.Q. 583, 598 (1980). For a discussion of the pros and cons of trial judge participation in the courts of appeals, see *id.* at 597-600.

<sup>72</sup> *Id.* at 598.

<sup>73</sup> See SCHICK, *supra* note 14, at 80.

<sup>74</sup> Richard A. Posner, *Judges' Writing Styles (and Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1423-24 (1995).

<sup>75</sup> Some judges substitute a fourth clerk for the second secretary they are permitted. MCKENNA, *supra* note 3, at 52 n.96. There are often student interns in chambers as well.



central staff—a group unheard of three decades ago. This growth is the direct result of caseload pressures: “[T]he caseload per judge has risen to the point where very few judges, however able and dedicated, can keep up with the flow without heavy reliance on law clerks, staff attorneys, and sometimes externs too.”<sup>76</sup> The judicial system pays a significant price for that delegation, however, because inappropriate delegation of quintessentially judicial tasks has become the norm.

a. *Personal Clerks*

It is widely assumed in the legal world that law clerks draft most opinions. There may be some debate about how widespread the phenomenon is, but there is agreement that it occurs to a significant extent with a large number of judges.<sup>77</sup> This development raises many serious concerns.

Ideally, a judge would write all of her own opinions.<sup>78</sup> The public advantages of her doing so are clear: Only by going through the record herself can any judge be sure that she, not just her clerks, has mastered the facts of the case; and only by writing the opinion herself can she be sure that the facts play out properly against the reasoning leading to the decision.<sup>79</sup> Lawyers know all too well that some things “just won’t write,” and there is certainly plenty of judicial commentary to the same effect.<sup>80</sup> The judge struggling “to get it right” herself is a

<sup>76</sup> Posner, *supra* note 44, at 103.

<sup>77</sup> See, e.g., *id.* at 103-04. The classic comment on clerks comes from Judge Rubin:

“What are these able, intelligent, mostly young people doing? Surely not merely running citations in Shepard’s and shelving the judge’s law hooks. They are in many situations ‘para-judges.’ In some instances, it is to be feared, they are indeed invisible judges, for there are appellate judges whose literary style appears to change annually.”

Alvin B. Rubin, *Views From the Lower Court*, 23 UCLA L. REV. 448, 456 (1976). Even Judge Edwards, a staunch defender of the clerks’ role, recognizes that the growth in their numbers has stemmed from the growth in caseload. Harry T. Edwards, *A Judge’s View on Justice, Bureaucracy and Legal Method*, 80 MICH. L. REV. 259, 262 (1981).

<sup>78</sup> We hope that this is self-evident. No matter how smart, hard-working, and wise a clerk may be, and no matter how dumb, lazy, or lacking in good judgment a judge may be, the final responsibility for a decision lies with the judge. It is the judge, not the clerks, whom the President nominates and the Senate confirms; it is therefore the judge, not the clerk, who should be making the fully informed decision.

<sup>79</sup> This is not to deny personal clerks a role in the process. Even in an ideal world clerks serve a useful role apart from proofreading or source-checking. The clerk is a sounding board for the judge’s views and is a useful check on judicial logic and wisdom.

<sup>80</sup> See, e.g., Wald, *supra* note 54, at 1375; POSNER, *supra* note 44, at 111:

It is not just a failure of imagination, I think, that makes me unable to visualize Oliver Wendell Holmes coordinating a team of law clerks and secretaries and polishing the drafts that the clerks submitted to him. The sense of style that is inseparable from the idea of a great judge in our tradition is unlikely to develop in a judge who does not do his own writing.

far cry from the judge editing what her law clerk has written.<sup>81</sup> As Judge Frank wrote half a century ago:

It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that . . . the facts are thus-and-so gives way when it comes to expressing that impression on paper.<sup>82</sup>

When a judge had one or perhaps even two personal clerks, the intimacy of the relationship may well have enhanced the judge's own decision making capabilities; two minds worked as one.<sup>83</sup> The increasing size and bureaucracy of judicial staffs, however, have diminished that traditional relationship: "The short stint by the bright, young, just-graduated law student, who moved into an intimate relationship with an old Justice, kept him fresh, and then moved almost immediately on into his own life and career, has already begun to be replaced by a job description and a job."<sup>84</sup> The judge/clerk relationship, in short, has become less personal, and more bureaucratic.

The result of more clerks, therefore, is diminished quality in both decision making and opinion writing in those cases (apparently a large majority), in which clerks do a substantial part of the writing and the judge does the editing.<sup>85</sup> Because law clerk influence is likely to be the greatest in less important cases, which are not argued and will not be published, diminished quality, once again, will be most prevalent there.

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<sup>81</sup> A useful comparison can be drawn with the requirement in FED. R. CIV. P. 52(a) that, in non-jury trials, "the court shall find the facts specially and state separately its conclusions of law thereon." Appellate courts take this requirement seriously and are quite hostile to judicial adoption of findings and conclusions submitted by counsel. *E.g.*, *Roberts v. Ross*, 344 F.2d 747, 751 (3d Cir. 1965). This hostility is due to the fact that "[t]he formulation of the findings and conclusions is part of the decision making process." JACK H. FRIEDENTHAL, ET AL., *CIVIL PROCEDURE* 542 (2d ed. 1994).

<sup>82</sup> *United States v. Forness*, 125 F.2d 928, 942 (2d Cir.), *cert. denied*, 316 U.S. 694 (1942).

<sup>83</sup> A glowing account of the judge/clerk relationship can be found in Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152 (1990).

<sup>84</sup> Joseph Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248, 251-52 (1981).

<sup>85</sup> Judge Posner has identified other costs in the significant use of law clerks in opinion writing, including a loss of credibility and the demise of the great judge. *See* POSNER, *supra* note 44, at 108-11.

b. *Central Staff*

Ironically, the most dramatic change in the circuit courts has also received the least attention from outside observers. Twenty-five years ago there were no central staff attorneys in the federal courts; now most circuits have more central staff than judges. That growth, which Judge McCree years ago called "cancerous,"<sup>86</sup> has occurred despite serious efforts to prevent it.<sup>87</sup> Little is known about how central staff actually work today.<sup>88</sup> Staff duties vary widely among the circuits, but typically staff members screen cases for oral argument, decide motions, and write opinions in cases decided without oral argument. We do not know, however, who hires staff, what their qualifications are, how they are supervised, or how long they stay on the job.<sup>89</sup> Nor do we know why staff are added.<sup>90</sup> No formal procedures spell out their exact duties, which apparently vary significantly among the circuits. Although Congress, in response to concern about staff, has required the circuits to publish their "operating procedures,"<sup>91</sup> the results have been quite vague.<sup>92</sup> The Federal Judicial Center prediction that "litigants and counsel in an appeal decided without argument seldom [will] know what role, if any, a staff attorney played in the handling of their appeal[,]"<sup>93</sup> surely will remain accurate for a long time to come.<sup>94</sup> No wonder, in the words of an elite ABA committee, practitioners "may believe, sometimes correctly, that cases are decided effectively by someone other than an Article III judge."<sup>95</sup>

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<sup>86</sup> Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 787 (1981).

<sup>87</sup> See MCKENNA, *supra* note 3, at 50-51, for details concerning those efforts. The most serious attempt at stopping the growth of central staff was to limit the number of staff to the number of authorized judgeships; that effort failed. BAKER, *supra* note 13, at 146 n.173.

<sup>88</sup> But see DONNA STIENSTRA & JOE S. CECIL, FEDERAL JUDICIAL CENTER, THE ROLE OF STAFF ATTORNEYS AND FACE-TO-FACE CONFERENCING IN NON-ARGUMENT DECISIONMAKING (1989) (detailing the role of staff attorneys in the Tenth Circuit).

<sup>89</sup> The length of a staffer's service is critical. While experience may be very valuable to the staffer's performance, it also creates the strong temptation for the staffer to view himself as an expert decision maker.

<sup>90</sup> The Ninth Circuit has recently added the first federal "Appellate Commissioner." See Reinhardt, *supra* note 1, at 1512 n.28. See also Lauren Frank, *Ninth Circuit Appellate Commissioner Assists Judges*, 78 JUDICATURE 321 (1995).

<sup>91</sup> 28 U.S.C. § 2077(a) (1994).

<sup>92</sup> See MCKENNA, *supra* note 3, at 51-52.

<sup>93</sup> *Id.* at 51-52.

<sup>94</sup> The ABA Report recommended "[f]ormalizing the role of court personnel in such decisions . . . to reduce the misapprehensions of parties and counsel about the extent of their power." ABA REPORT, *supra* note 8, at 549.

<sup>95</sup> ABA REPORT, *supra* note 8, at 548. One prominent attorney has commented that he and his colleagues "regard screening as a device to push the lawyer out of the law entirely. We just don't count anymore." John P. Frank, Remarks at the Conference on Empirical Research in Judicial Administration (Mar. 4 & 5, 1988), in 21 ARIZ. ST. L.J. 33, 126 (1989).

There is a delicious irony here. Federal magistrates, a superbly qualified group, must issue a written report disposing of cases assigned by the district court. If a litigant objects to that report, the district court must review the magistrate's report *de novo*. Moreover, it is grounds for reversal if the district judge simply adopts the magistrate's opinion, as opposed to writing his own.<sup>96</sup> Congress and the appellate courts, in other words, have adopted procedures to assure effective supervision of the work of the magistrates. In contrast, no rule requires any notice to the parties or judicial revision of the drafts suggested by staff. In short, the circuit courts, not surprisingly, are more demanding of the trial courts than they are of themselves.

The cumulative impact of the growth of law clerks and central staff increases the likelihood that a judge will evaluate cases on a second-hand basis. This growth helps process cases, of course, but it also reduces judicial involvement with the raw material of the case—*e.g.*, the briefs, the record, the precedents, and even the counsel. The judge has become a bureaucrat.<sup>97</sup> Of course, no one knows the exact amount of deference given to the work of staff clerks, and deference no doubt varies depending on the clerk, the judge, the court, and the type of case.<sup>98</sup> Nonetheless, the rampant growth of staff clerks strongly suggests that judges believe staff to be useful, and it is very difficult to believe that utility is limited to translating the handwriting on prisoner petitions and working on procedural motions. Clearly, the staff are assisting the court in processing its caseload, a point made by Justices Rehnquist, Breyer, and many others.<sup>99</sup>

Finally, a belief that staff, not judges, are playing a decisive role in decision making and opinion writing undermines the legitimacy of

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<sup>96</sup> *E.g.*, *Hernandez v. Estelle*, 711 F.2d 619 (5th Cir. 1983) (remanding case because of district court's improper reliance on magistrate's report and failure to make independent determination of contested findings).

<sup>97</sup> Judge Rubin, after speaking of delegation to staff and clerks fifteen years ago, observed, "I fear we are approaching a kind of institutional judging in our courts." Rubin, *supra* note 58, at 642.

<sup>98</sup> See Jones, *supra* note 1, at 1492 (stating that staff attorneys "often . . . prepar[e] memoranda that can readily be transformed into . . . opinions").

<sup>99</sup> See *supra* text accompanying notes 7-8. See also ABA REPORT, *supra* note 8, at 549. More than a decade ago, both Judge Edwards and Judge Posner separately wrote that an increase in judicial staff would be counter-productive. POSNER, *supra* note 44, at 119. Edwards, *supra* note 54, at 889-90. Nevertheless, the number of staff continues to grow. Over-delegation of judicial duties is a serious concern expressed both by academics and the judges themselves. See, *e.g.*, Mary Lou Stow & Harold J. Spaeth, *Centralized Research Staff: Is There a Monster in the Judicial Closet?*, 75 JUDICATURE 216 (1992). For a discussion of the bureaucratic effects of central staff, see Fiss, *supra* note 32, at 1456.

A Federal Judicial Center survey found that 28% of judges thought that "over delegation" was a large or grave problem. In contrast, 40% believed there was only "a small problem or [no] problem at all." MCKENNA, *supra* note 3, at 49. Judges are evenly divided over whether to add more staff. *Id.* at 52.

the court's decision making process.<sup>100</sup> Lawyers, litigants, and even lower court judges can find little comfort in a decision which they believe has been made by the staff. This loss of legitimacy is all the more acute because the effect of staff participation is felt most keenly in cases brought by the poor—the group most in need of the services of the federal judiciary.

#### D. Other Shortcuts—Warping Doctrine

Another way to cope with the burgeoning caseload is to propound decisional rules that either discourage litigation, particularly at the appellate level, or make the cases easier to resolve. Although it is difficult to prove that a heavy caseload inspires a particular legal rule, there are certainly many potential candidates. For example, Judge King of the Fifth Circuit has suggested that in at least one of her court's decisions, "the paring down of prisoner petitions was at work in the developing of our rule, even though other factors were also strongly operative."<sup>101</sup> Anyone who follows the federal courts has other candidates for the same observation.<sup>102</sup>

Perhaps less obvious, the increasing emphasis in the courts on the use of strict housekeeping rules as gatekeepers is also attributable, in part, to an effort to reduce caseload. Indeed, some believe that the appellate courts have become nit-pickers, overly concerned with enforcing rules governing the minutiae of practice.<sup>103</sup> Thus, a massive study of the Seventh Circuit identified

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<sup>100</sup> An anecdote neatly sums up the role now played by staff. In the Tenth Circuit, where the judges are scattered across vast areas, it was once the practice for central staffers working on a case to travel to the city where the presiding judge sat to meet with him on the case. Now, however, the judges travel to circuit headquarters in Denver, where staff is located. See SIENSTRA & CECIL, *supra* note 88, at 53-57. It may save money for the mountain to go to Mohammed, but the symbolism of the reverse trip certainly is disturbing.

<sup>101</sup> King, *supra* note 7, at 963 (discussing *Hudson v. McMillian*, 929 F.2d 1014 (5th Cir. 1990), *rev'd*, 503 U.S. 1 (1992)).

<sup>102</sup> It is easy to speculate about other examples. Professor Fisch, for example, has expressed surprise at the fondness the federal circuit courts have shown for the use of vacatur. She found this puzzling in light of the perverse effect of vacatur on caseload—*i.e.*, it will increase the workload of the district courts. See Jill E. Fisch, *The Vanishing Precedent: Eduardo Meets Vacatur*, 70 NOTRE DAME L. REV. 325, 336-38 (1994). The paradox resolves itself when it is realized that vacatur reduces the work of the *appellate* courts.

Similarly, the Chicago Report, *supra* note 70, at 797, suggested that the views of a Seventh Circuit judge on the overwork crisis in federal courts "may influence his rulings in certain cases."

<sup>103</sup> See, *e.g.*, Chicago Report, *supra* note 70, at 696, 703-05 (discussing restrictive limits on the number of pages a brief may contain). See also Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1167 (1993) (discussing changes in federal rules in response to allegations of excessive "litigiousness and frivolousness . . . [even though] the facts probably belie the allegations"). More generally, the federal courts have seen a marked increase in both managerial judging and alternative dispute resolution, a development that has created "a declining interest in fact finding."

a frequently heard complaint: that the court is too concerned with the demands of managing its own business and not aware enough of, or concerned about, the real needs of lawyers and parties in litigating cases. In the Council's view, the court does not consider litigants to be its customers.<sup>104</sup>

Similarly, Professor Wright has attributed the "remarkable new enthusiasm [for] preclusion" to docket pressures.<sup>105</sup>

## II

### THE CUMULATIVE IMPACT OF THE SHORTCUTS

The cumulative impact of decision making shortcuts has imposed costs above and beyond the disadvantages of each individual procedure. As a result of the reforms, the circuit courts have lost their role as appellate courts and have become certiorari courts. Further, the changes in the decision making process have diminished the quality of the courts' work, a degradation which has had the greatest effect upon the poorest and least powerful litigants.

#### A. The New Certiorari Courts

Although Congress has given all losing litigants a statutory right to "appeal,"<sup>106</sup> decisional shortcuts have had the practical effect of transforming the courts of appeals into certiorari courts. The right to appeal is now only nominal.<sup>107</sup> Expressed somewhat differently, the circuit judges are minimizing their historic role as error correctors and emphasizing their role as law makers.<sup>108</sup> They are becoming, in the words of Dean Carrington, "junior Supreme Courts."<sup>109</sup> The characteristics of a certiorari court are well known. It chooses its own docket and typically gives no explanation why it has denied plenary review. Further, denials of plenary review lack precedential effect. Now consider the federal appellate process today. The "appellant's" brief must persuade the staff to recommend argument to the panel. Moreover, even if argument is heard, it is still possible that the case will be disposed of by a one-word opinion (*e.g.*, "affirmed") which explains nothing to the parties. Washed in the realist's "cynical acid,"

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Judith Resnik, *Civil Litigation in The Twenty-First Century: A Panel Discussion*, 59 BROOK. L. REV. 1199, 1214 (1993).

<sup>104</sup> Chicago Report, *supra* note 70, at 696.

<sup>105</sup> Charles Alan Wright, *Overview: The Federal Court System—1886, 1986, and 2086*, 38 S.C. L. REV. 381, 387 (1987).

<sup>106</sup> 28 U.S.C. § 1291 (1994).

<sup>107</sup> See Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals* 34 Sw. L.J. 1151, 1155 (1981).

<sup>108</sup> See Carrington, *supra* note 8, at 416-17 (arguing that error correction, and not law making, was the reason for creating the circuit courts).

<sup>109</sup> *Id.* at 425.

the summary affirmance without oral argument is indistinguishable from a denial of certiorari. In each case there is no argument, no opinion, no precedent, no accountability, and no assurance that any Article III judge has devoted enough time to the case to determine whether the decision is correct.<sup>110</sup>

There is, of course, one significant difference between the two situations. Congress has authorized the Supreme Court to act as a certiorari court,<sup>111</sup> but has required the courts of appeals to hear every litigant's appeal as a matter of right. Thus, the transformation of the circuit courts has not only been unwise, but lawless as well.

### B. The Price of Reform: Diminished Quality

In its 1990 report, the Federal Courts Study Committee asserted that "the courts of appeals have managed to avoid the worst effects of this [caseload] growth."<sup>112</sup> Indeed, the Committee stated that "there has been no systematic breakdown in the quality of the courts' work."<sup>113</sup> However, the Report provides no basis for the Committee's assertion, and, it is largely impossible to verify at least with respect to appeals that get the full Learned Hand treatment. In many cases, however, it is demonstrably false. In particular, oral argument obviously has the potential to be of value in many cases where it is not granted, and its denial clearly diminishes the quality of the court's work. Additionally, the poor quality of so many unpublished opinions provides stark evidence that there has been a "systemic breakdown" in the work-product of the circuit courts. Moreover, the proliferation of central staff has further removed the judge from the actual decision making process, necessarily reducing both quality and accountability. Finally, the perception of a judge's proper role has been altered, perhaps irrevocably, to supervisor rather than sole decision maker.

Although the Committee's Report proclaims continued high quality, its language and tacit assumptions make clear the degradation of the appellate process. The Report states that "[Federal] judges do *much* of their own work, grant oral argument in cases that *need* it, decide cases with sufficient thought, and *produce opinions in cases of prece-*

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<sup>110</sup> In a similar vein, Professor Levinson, after observing that a Justice of the Supreme Court might devote only ten minutes per cert petition on average, noted that "the Supreme Court, at least at the level of decisions on certiorari, is better conceived of as a bureaucratic organization—and subject to bureaucratic imperatives—than as anything that might plausibly be described as a truly deliberative body." Sanford Levinson, *Strategy, Jurisprudence, and Certiorari*, 79 VA. L. REV. 717, 731 n.75 (1993) (reviewing H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991)).

<sup>111</sup> See 28 U.S.C. §1257.

<sup>112</sup> FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 110 (1990) [hereinafter REPORT OF THE FEDERAL COURTS STUDY COMMITTEE].

<sup>113</sup> *Id.*

*dential importance with the care they deserve . . .*"<sup>114</sup> There is no pretense now that judges do all of their own work, or that oral argument is readily available. Even more interesting is the implicit recognition that unpublished opinions receive less care.<sup>115</sup> Indeed, the same report concluded that procedural changes have "transformed [the appellate courts] from the institutions they were even a generation ago."<sup>116</sup> Six years ago a blue-ribbon ABA committee reported that:

The response to increasing caseload by increasing the number of judges and staff and increasing the proportion of cases decided without oral argument has generated a second set of problems concerned with the quality and uniformity of justice on appeal. The side effects of the standard cures for increasing caseload may prove to be as serious as the original disease.<sup>117</sup>

This prophecy has proven all too true. And, sadly, the poor and the powerless have borne the brunt of the "side effects of the standard cures."

### C. The Price of Reform: Disparate Impact

A court is far less likely to hear oral argument or issue a published opinion in a social security or civil rights case, a prisoner petition, or the like than it is to hear argument or publish an opinion in an "important" securities or antitrust case. Central staff takes the lead in "trivial cases," the unwanted stepchildren of the appellate process, by writing initial opinions which receive only abbreviated review by the judges themselves; after all, if most such cases are "chaff," the "the judges are perfectly rational in choosing to rubber-stamp rather than read."<sup>118</sup> It is not surprising, therefore, that the rate of reversal of district court judgments has been cut in half since 1960.<sup>119</sup> The cumulative effect of truncated procedures has a devastating impact on the rights of those most in need of judicial protection, those litigants whose claims raise no systemic law-making concerns, but only the claim that they have been denied justice at the trial court. According to Dean Carrington:

<sup>114</sup> *Id.* at 109 (emphasis added).

<sup>115</sup> See COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 34 (1994) [hereinafter PROPOSED LONG RANGE PLAN] (The "hallmarks of the federal appellate system" are: "oral argument granted in *appropriate matters*. . . [and] *careful opinions produced in cases of precedential import.*") (emphasis added).

<sup>116</sup> REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 109.

<sup>117</sup> ABA REPORT, *supra* note 8, at 529.

<sup>118</sup> Mary Lou Stow & Harold J. Spaeth, *Examining an Analogy: Does the Judicial Monster Eat Chaff?*, 75 JUDICATURE 294, 294 (1992).

<sup>119</sup> See ABA REPORT, *supra* note 8, at 546.



A court that functions with a substantially junior staff, whose judges have no visible contact with appellate litigants or their lawyers, who may even have little contact with one another, and whose judges often make no effort to explain their decisions is one which gives little assurance of its willingness and ability to perform the error correction function.<sup>120</sup>

Of course, this unfortunate result does not come from any deliberate attempt to harm those groups; the federal appellate courts remain a bulwark protecting the citizenry. Nevertheless, the harm is there for all to see; judges are simply less likely to devote serious effort and attention to the routine veterans' benefit denial appeal than to the routine corporate tax case. The discrimination may be *ad hoc* rather than planned, *de facto* and not *de jure*, but it is nonetheless real. One of the basic important principles behind Anglo-American law is that moral responsibility attaches to harm done with the elbows as well as the fists.

The standard explanation for the existence of different tracks of justice is that some cases are more "important" than others. This explanation really has two elements: First, the decisions in important cases may have more immediate impact on the nation; and second, the precedents established in important cases are more useful. Both explanations have intuitive appeal. A ruling on the legality of a merger between two major corporations has more immediate economic impact than does a ruling on the validity of a social security claim. Similarly, the precedent set in the merger case will control more economic activity than the one set in the social security claim. This dichotomy, however, justifies the different tracks only if economic impact is the only measure of the judicial system.<sup>121</sup> Surely that is not so. Justice serves ends other than those of the Invisible Hand, a truth Congress implicitly recognized when it created the circuit courts in order to provide a method for effectively correcting error at the trial level.<sup>122</sup> Unfortunately, the cost of the contemporary *judicial* focus on lawmaking rather than error correction largely falls on those with "unimportant" cases—the poor and powerless. Not only is the quality of decision making lower in those cases, but the system pays another heavy price—the loss of perceived legitimacy.<sup>123</sup> Our judicial system can answer the cynics' charges of a systematic tilt toward the

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<sup>120</sup> Carrington, *supra* note 8, at 428-29.

<sup>121</sup> It is not even clear that the current tracks are economically efficient. The argument certainly exists that a myriad of small decisions and little precedents have a cumulative economic impact similar to that of a few large decisions.

<sup>122</sup> See Carrington, *supra* note 8, at 417-19.

<sup>123</sup> Robel, *supra* note 21, at 58. As Professor Robel has written: "We need our judges most in ordinary cases, not to exercise the wisdom of Solomon . . . but legitimately exercise the power of the government." *Id.*

rich and powerful only if the courts police themselves rigorously and deliver on their sworn promise of equal justice.

Professor Baker recently stated that “[t]he ultimate question is whether this generation of judges is presiding over the demise of the federal appellate tradition.”<sup>124</sup> A key tenet of that tradition, the maxim that “the law is no respecter of persons” is clearly at risk. But there is more at stake than mere tradition. Tradition, after all, is worth preserving only if it furthers social goals. It is therefore significant that the Learned Hand model *does* further social goals by assuring that the complaints of *every* litigant—small or large, rich or poor—are given equal treatment by those most powerful of governmental figures, the judges of the federal courts of appeals. Thus, it is not so much “tradition” that is at stake. Rather, it is the American judicial system’s basic guarantee of justice to all in equal measure that is threatened. Damages caused by the current breach of that promise are severe and incalculable. The next Part of this Article considers whether they are unavoidable.

### III

#### THE OBVIOUS SOLUTION: MORE JUDGES

It is time to face the real problem. If we are not to abandon the tradition of “one appeal as of right,” and if we are to make this a true appeal in the traditional sense—one to be heard and decided by judges—we need both more judges and more circuits.<sup>125</sup>

##### A. Opposition from the Judiciary: An Overview

One way to view the federal appellate courts is as an enormously over-stressed institution in the hands of selfless judges engaged in heroic and creative judicial triage. Certainly the caseload is staggering and the courts lack sufficient judges. The staffing model used by the Administrative Office reveals that 161 judges are doing the work of

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<sup>124</sup> BAKER, *supra* note 13, at 29.

<sup>125</sup> Rubin, *supra* note 77, at 459. What is most remarkable about Judge Rubin’s diagnosis is its date—1976. In the intervening 20 years, caseload and bureaucratization have both increased radically. Conditions that Rubin thought were becoming intolerable, were only the beginning of the decline of the circuit courts into courts of discretionary appellate jurisdiction.

277.<sup>126</sup> And the judges *are* keeping current.<sup>127</sup> They do so by working long, and in some cases, inhuman hours<sup>128</sup> and by using every reasonable case processing innovation from limited publication, to screening, to reduced argument. Thus, like physicians in a mass disaster, they have devised means to apportion their attention to those cases in which they believe it is most needed and can do the most good. Although the system is not ideal, at least the *judges* are not at fault. Under difficult conditions, they have done everything in their power to produce the maximum result with the inadequate resources Con-

<sup>126</sup> As of 1992, there are 179 authorized judgeships for the regional courts of appeals. The actual number of active judges is somewhat lower because of unfilled vacancies. L. RALPH MECHAM, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 99 tbl. 30 (1992) [hereinafter ANNUAL REPORT]. The Judicial Conference has adopted 255 "merits dispositions" as the maximum desirable workload for a circuit judge. See GORDON BERMANT ET AL., FEDERAL JUDICIAL CENTER, IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS 9 (1993) [hereinafter MORATORIUM]. In 1992, the courts of appeals recorded 23,597 merits dispositions, each requiring three judicial votes for a total of 70,791. Dividing by 161 active circuit judges results in 439 participations per active judge. Dividing by 178 authorized judgeships yields 397 participations per judgeship. According to the Judicial Conference formula, 277 active judgeships would be required to handle the current caseload. See ANNUAL REPORT, *supra*, at 131 tbl. B-1.

<sup>127</sup> The average time from the filing of the last brief until hearing or submission was 3.3 months, and from hearing to final disposition, 2.5 months. ANNUAL REPORT, *supra* note 126, at 151 tbl. B4.

<sup>128</sup> In response to an opinion survey undertaken by the Federal Courts Study Committee, 81% of the current judges reported that the workload was "heavy" or "overwhelming." See Robel, *supra* note 21, at 38. The judges' narrative responses reinforce the point:

Done properly, the work is overwhelming. The only way that I can do my work properly is to work nights and weekends. As long as one has the vigor, stamina and good health, it can be done. Eventually, this schedule is bound to take its toll.

....

My work hours have increased to occupy substantially all of my available time. I would not today accept an appointment to this court if I knew the workload—but I have too much invested to get out.

....

My typical day begins at 5:30 a.m. including weekends when I get most of my writing done. I feel I am becoming narrowly focused and less of a generally knowledgeable individual, and consequently in many ways less competent as a judge. I try to keep up friendships and have done so only because my friends are tolerant of my neglect. There is so little time for the pleasures of family and outside activities. I feel guilty when I do take any time off—like Sunday afternoon.

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I calculated I spent 299 days on judicial work last year. Since I took about two and one-half weeks of vacation, it will be seen that I worked on Saturdays more than half the time and on at least 15 or 16 Sundays. This is entirely too much for me and it is especially difficult for the younger judges who have the responsibility of families with small children. This known factor has caused one very able trial judge to indicate he no longer wished to seek the vacancy that will occur when I seek senior status.

gress and society have apportioned the problem of federal appellate justice.

This picture leaves out one crucial and surprising fact. The Judicial Establishment has consistently lobbied *against* the single most obvious solution to the caseload glut—the creation of additional judgeships. To meet the Judicial Conference's staffing models and to treat every appellate case with the full traditional appellate process would require more than half again the current number of circuit court judgeships (277 instead of 179). Ironically, the judiciary has opposed this solution vigorously. To continue the medical analogy, it would be as though the busy surgeon, rushing from one important case to the next while "screening" out the unworthy cases, rejected the help of additional doctors to improve the situation. As odd as it sounds, the judiciary has done just that. Individual judges have written and spoken passionately against the creation of enough judgeships to handle the load.<sup>129</sup> Individual circuits have passed resolutions urging Congress *not* to create new judgeships.<sup>130</sup> The powerful Judicial Conference routinely requests only a small percentage of the judgeships required to satisfy staffing models.<sup>131</sup> National judicial planning and study groups also have inveighed against substantial increases. Thus, the Judicial Conference Committee on Courts Administration and Case Management recommended that federal judgeships (district and circuit) be limited to one-thousand, a number that would permanently assure inadequate capacity in the Court of Appeals.<sup>132</sup> Similarly, the Judicial Conference Committee on Long Range Planning, while rejecting a numerical ceiling, favored "con-

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<sup>129</sup> See, e.g., Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993); 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); Gerald B. Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70; Justice Antonin Scalia, Remarks before the Fellows of the American Bar Foundation and the Natural Conference of Bar Presidents (Feb. 15, 1987), in WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, FEDERAL JUDICIAL CENTER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 44 (Long-Range Planning Series, Paper No. 2, 1994) [hereinafter FEDERALIZATION]. However, some judges disagree and favor substantial increases in the number of judges. See, e.g., King, *supra* note 7; Reinhardt, *Surveys, supra* note 2; Reinhardt, *Too Few, Too Many, supra* note 5. Nonetheless, they do not control the policy and planning apparatus of the federal judiciary. See *infra* text accompanying notes 132-35.

<sup>130</sup> The actions of the Eleventh Circuit Judicial Council in 1989 are reported in BAKER, *supra* note 13, at 203.

<sup>131</sup> In 1992, the Judicial Conference requested that Congress create nine additional circuit judgeships; the Conference's own staffing model called for nearly 100. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 69-70 (Sept. 1992) [hereinafter PROCEEDINGS].

<sup>132</sup> REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT TO THE JUDICIAL CONFERENCE COMMITTEE ON LONG RANGE PLANNING 3 (Feb. 16, 1993) [hereinafter COURT ADMINISTRATION COMMITTEE REPORT].

trolled" growth in judgeships "only after other appropriate alternatives have been exhausted."<sup>133</sup>

In support of this rather paradoxical position, the Judicial Establishment has offered a wide array of extremely weak arguments. Nearly all of these arguments rely on factual premises with no empirical support, and some depend on assumptions contradicted by the only available studies.<sup>134</sup> Others rely on classic logical or statistical fallacies,<sup>135</sup> and still others reveal an amazing insensitivity to the needs of litigants and intimate the belief that the courts of appeals exist to provide professional satisfaction for judges rather than appellate capacity for the nation.<sup>136</sup>

Some of the anti-expansion arguments inveigh against creating new circuits, others oppose enlarging the existing circuits, and still others reject the establishment of nationwide courts of specialized subject matter jurisdiction. Despite the differing approaches of the anti-expansion arguments, two features unite them: They all seek to restrict the size of the federal judiciary, and nearly all of the arguments are weak, some embarrassingly so—the sort of arguments that the judges would reject out of hand had they been asserted by advocates practicing before their courts. The next subsection examines the various arguments against expansion.

## B. Arguments Against Additional Judgeships

### 1. *Quality of the Bench*

Some opponents of increasing judicial capacity stress the inevitable decline in the quality of the bench that would accompany expansion. In its purest form (*i.e.*, that there are not enough good judicial candidates to supply a substantial number of new judgeships)<sup>137</sup> this argument is hard to take seriously. In 1960, there were 4205 attorneys for each circuit judgeship; by 1993 that number had increased to 4880.<sup>138</sup> Today, adding enough judgeships to meet the Judicial Con-

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<sup>133</sup> PROPOSED LONG RANGE PLAN, *supra* note 115, at 32.

<sup>134</sup> See discussion *infra* part III.B.3.a.

<sup>135</sup> See discussion *infra* part III.B.3.a-b.

<sup>136</sup> See discussion *infra* parts III.B.4-5, IV.

<sup>137</sup> See Newman, *supra* note 129, at 188. Judge Newman argues:

A federal judiciary of 3,000 to 4,000 . . . would also include an unacceptable number of mediocre and even a few unqualified people. Today, most observers regard the overall quality of the federal judiciary as higher than that of the average state judiciary. At a size of 3,000 to 4,000, its quality would be indistinguishable from the most pedestrian of state judiciaries.

<sup>138</sup> In 1960, there were 68 circuit court judgeships, PROPOSED LONG RANGE PLAN, *supra* note 115, at 13, and 285,933 attorneys, STATISTICAL ABSTRACT OF THE UNITED STATES 210 tbl. 637 (1994) [hereinafter STATISTICAL ABSTRACT]. By 1993, judgeships had increased to 167, PROPOSED LONG RANGE PLAN, *supra* note 115, at 13, and total attorneys to 815,000, STATISTICAL ABSTRACT, *supra*, at 407 tbl. 637.

ference's staffing model (about 100 added to the current total of 179) would still leave nearly 3000 attorneys per circuit judgeship.<sup>139</sup> Surely among those 3000 lawyers is one willing and able to be a circuit court judge.<sup>140</sup> Moreover, there are over 600<sup>141</sup> federal district judges and about 800 state appellate judges;<sup>142</sup> it is hard to argue that such a pool could not produce 100 distinguished candidates for the circuit courts. It is equally frivolous to contend that among the hundreds of law professors, senior partners, senior United States Attorneys, and public defenders there are not enough qualified and willing applicants.

A variation on the basic dilution-of-quality argument asserts that substantial increases in the number of circuit judgeships will reduce the prestige of the position and thus diminish the pool of distinguished attorneys willing to serve on the bench.<sup>143</sup> Opponents of additional judgeships make this argument confidently, as though its factual premises were beyond dispute. In fact, however, there is no empirical evidence that additional judgeships will reduce prestige or that reduced prestige will diminish the pool of judicial candidates.<sup>144</sup>

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<sup>139</sup> Adding 100 judges to the current total of 179 yields 279 judges. Dividing the current total number of attorneys (815,000) by the number of judgeships yields 2921 attorneys per judgeship.

<sup>140</sup> The average quality of this pool of 3,000 lawyers is probably higher than it was in 1960. First, the population of aspiring lawyers is much larger because of the augmentation of the pool with significant numbers of women and minorities. Second, admissions screening in law schools is much more sophisticated than it was in 1960. Additionally, law schools themselves have much better, larger libraries, larger and more professional full-time faculties, and much more sophisticated curricula (including clinical and skills-simulation offerings) than they did in 1960. Finally, continuing legal education after law school is much more prevalent now than it was in 1960.

<sup>141</sup> In 1992, the number of authorized district court judgeships was 649. ANNUAL REPORT, *supra* note 126, at 61 thl. 5.

<sup>142</sup> There are about 800 state intermediate appellate judges and supreme court justices. DANIEL JOHN MEADOR, AMERICAN COURTS 92-93 app. B (1991).

<sup>143</sup> See Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform: Time As the Greatest Innovator*, 57 FORDHAM L. REV. 253, 260-61 (1988). Justice Frankfurter earlier wrote that "inflation in the number of . . . judges will result, by its own Gresham's law, in a depreciation of the judicial currency." *Lumberman's Mut. Casualty Co. v. Elbert*, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring). By that reasoning, of course, the prestige and quality of the judiciary have been declining steadily since 1789.

Predictably, Judge Posner's variation of the argument emphasizes economics. He maintains that high quality candidates could be found even if the number of judgeships were very high (e.g., 500), but only if judicial salaries were to increase to politically unacceptable levels. See POSNER, *supra* note 44, at 99. Posner apparently believes that high quality candidates will come disproportionately from among the group of high-income lawyers. However, for many able candidates (state judges, professors, prosecutors, and public defenders), a circuit judge's salary would come as a handsome raise.

<sup>144</sup> It is equally plausible that prestige is controlled not by the number of judges, but by the quality of the work they do. See Frank M. Coffin, *Research for Efficiency and Quality: Review of Managing Appeals in Federal Courts*, 138 U. PA. L. REV. 1857, 1867 (1990) ("If the work is rewarding and important, there will be more than sufficient prestige.") Absent empirical evidence, there is no reason to prefer Judge Kaufman's speculation, see *supra* note 143, to that of Judge Coffin.

The limited evidence that is available suggests the opposite. For example, circuit judgeships have not become harder to fill as their number has increased almost threefold since 1950, nor is there a dearth of able and willing applicants.<sup>145</sup> Furthermore, district judgeships—now totaling 649<sup>146</sup>—produce ample applicant pools, again suggesting that circuit judgeships could increase threefold without diminishing the quality or quantity of judicial candidates. Absent supporting evidence, speculation that a substantial increase in judgeships will make the positions less attractive and reduce the quality of the applicant pool should receive no credence at all; this is an empirical question that can be investigated, and thus far it has not been.

Another variation on the basic theme of dilution focuses on the appointment process. The argument is that an increase in the number of appointments reduces the visibility and scrutiny of each appointment,<sup>147</sup> thus permitting the political process to forward and confirm mediocre or incompetent candidates.<sup>148</sup> According to this line of reasoning, an appointment to a small court consisting of six or seven judges produces intense scrutiny from the bar, the press, the academy, and the public. However, the argument goes, as the court grows to twenty or thirty or fifty, vacancies will become so common that they will provoke much less attention and scrutiny.

Once again, this anti-expansionist argument depends on factual assertions utterly devoid of empirical support. Would there really be less scrutiny if appointments were more numerous and would the diminished scrutiny really result in lower quality judges? There is very little evidence concerning either of these issues, and the limited evidence that exists suggests that neither result would occur. There has been no noticeable reduction in scrutiny or quality as the circuit bench has tripled in size in the last forty years. Nor does scrutiny of the many more district court nominees appear to be less rigorous than that focused at the circuit level. Furthermore, even though the circuits differ radically in size, varying from six judgeships in the First

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<sup>145</sup> See PROPOSED LONG RANGE PLAN, *supra* note 115, at 13.

<sup>146</sup> *Id.*

<sup>147</sup> A simpler version of the argument highlights the cost of the appointments process itself. According to this argument, as the number of judgeships grows, the appointments process will become too burdensome for Congress and result in confirmations that occur without thorough investigation and scrutiny. See MORATORIUM, *supra* note 126, at 33-34. This argument mistakenly assumes that the nomination and confirmation process involves a substantial amount of senatorial attention. In fact, the F.B.I. performs the investigations, and staff does most of the other work involved. Hearings usually take a few minutes. *Id.* at 34. In 1992, there were 66 federal judicial appointments. *Id.* at 33. Assuming an average term of 10 years, adding 100 additional judgeships would require an average of 10 more appointments each year—a workload unlikely to cripple the Senate.

<sup>148</sup> See Newman, *supra* note 129, at 187.

Circuit to twenty-eight in the Ninth Circuit,<sup>149</sup> no clear variations in scrutiny or quality have appeared among them. Finally, even supposing that numerical increases could reduce scrutiny and thus quality, there is no indication of the relevant numbers or proportions. In other words, exactly what size increases would harm scrutiny and quality? Is there a linear and direct correlation, or are there thresholds instead? For example, a 1000% increase in judgeships might have a substantial impact on scrutiny and quality, while an increase of 100% (the largest increase suggested so far) might have none. These questions have never been investigated, nor even seriously posed. Given this lack of evidence, it makes little sense to rely on reduced scrutiny and quality as reasons to oppose the needed increases in capacity.

All variations of the quality-of-the-bench argument suffer from an additional and very serious flaw. They all focus on the quality of the active circuit judges—not on the quality of the appellate justice dispensed. The two are distinctly different, because active circuit judges are responsible for only a part of the work of the circuit courts. To see the point clearly, recall the two-track system of justice described in Parts I and II, above. First, consider Track-One—the portion of the circuit courts' terminations that are decided using the traditional appellate process (oral argument, conference, published opinion)—about half the total. Active circuit judges are responsible for only eighty percent of the participations in those cases; the remaining twenty percent is provided by senior and visiting judges.<sup>150</sup> Presumably, large increases in the number of active judgeships would reduce or eliminate the need for participations by senior and visiting district judges and would increase the participations by active current judges. The justice dispensed by the new, active circuit judges probably would not be lower, in average quality, than that dispensed by the visiting and senior judges currently performing the work.

Next, consider the Track-Two cases—those cases that are screened out of the traditional appellate process. These cases are not argued, often there is no conference, no opinion is published and, in some cases, no opinion is even written. These cases get very little attention from the judges;<sup>151</sup> most of the work is done by staff attorneys and law clerks. Thus, for nearly half the circuit courts' caseload there is already a substantial breakdown in the quality of the appellate process. If active judgeships were to increase significantly, however, the need for screening would cease or diminish, and these track-two cases

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<sup>149</sup> MORATORIUM, *supra* note 126, at 51 tbl. 4.

<sup>150</sup> See MCKENNA, *supra* note 3, at 38. As of 1991, the Fifth Circuit did not even guarantee litigants that a three-judge panel would consist of a majority of active, resident circuit judges. See BAKER, *supra* note 13, at 199.

<sup>151</sup> See *supra* part I.C.



would receive much more judicial attention than they receive now. A substantial increase in active judgeships (even if it were to *decrease* average judge quality) would eliminate the need for visiting judges and for "screening," and would therefore substantially *increase* the average level of active circuit judge attention per case, thereby increasing the average quality of appellate justice dispensed by the courts.

The problem can be viewed as one of resource allocation or distributive justice. If the system creates more appellate judgeships, it is *possible* that the average quality of the judges may decline minimally. Accordingly, the quality of appellate justice in the cases already receiving the luxury of the full traditional appellate process might also decline somewhat. In other words, the rich may become less rich. But more judgeships also means that the quality of justice dispensed in the cases currently screened out of plenary treatment would vastly increase. In other words, the poor would become less poor. On the other hand, restricting the number of judgeships virtually insures that the poor will get poorer and that the number of poor will increase in proportion to caseload. It violates modern conceptions of distributive justice to refuse to create a massive benefit for those currently deprived of quality appellate justice in order to preserve a minor benefit for those already enjoying the lion's share of the system's resources.<sup>152</sup> Yet that is precisely the effect of refusing to create additional appellate capacity.

## 2. *It Costs Too Much*

Opponents of additional appellate capacity often mention, but seldom consider in depth, the cost of new judgeships.<sup>153</sup> The numbers do seem formidable at first glance. The annual cost of salaries, benefits, and direct chambers support for a circuit judgeship is \$475,900; adding \$338,100 for court operations and maintenance yields a total annual figure of \$814,000.<sup>154</sup> If 100 new judgeships are needed to generate adequate capacity, the annual bill is just over \$80 million—a considerable figure.<sup>155</sup>

That figure, however, like any large number, can be understood only through comparisons.<sup>156</sup> The federal government spends only

<sup>152</sup> JOHN RAWLS, A THEORY OF JUSTICE 83 (1971).

<sup>153</sup> See, e.g. PROPOSED LONG RANGE PLAN, *supra* note 115, at 32; Kaufman, *supra* note 143, at 258 (1988); see also BAKER, *supra* note 13, at 203; MORATORIUM, *supra* note 126, at 35-36.

<sup>154</sup> ADMINISTRATIVE OFFICE OF THE U.S. COURTS, COST TO THE JUDICIARY OF ESTABLISHING A NEW JUDGESHIP (1992), *cited in* MORATORIUM, *supra* note 126, at 36 tbl. 3.

<sup>155</sup> This figure overstates the cost considerably. Full staffing of the judiciary itself would reduce the need for most quasi-judicial personnel—law clerks and central staff—and thus save millions of dollars.

<sup>156</sup> See, e.g. Reinhardt, *Too Few, Too Many*, *supra* note 5, at 53-54:

two-tenths of one percent of the federal budget on the entire federal judiciary. This amounts to about \$2.6 billion out of the total of \$1.4 trillion.<sup>157</sup> The \$80 million required for 100 new judgeships in turn amounts to less than 3% of the \$2.6 billion dollar judiciary budget, and thus about one two-hundredth of one percent of the federal budget.

Comparisons to other federal expenditures are also revealing. The franking privilege for members of Congress costs about \$60 million per year;<sup>158</sup> the National Gallery of Art costs about \$50 million;<sup>159</sup> and price support payments to wool and mohair producers cost about \$180 million per year.<sup>160</sup> More than forty American universities receive over \$70 million each in Federal Research and Development Funds.<sup>161</sup> The point is clear. The federal government spends vast sums of money on matters important and trivial. Adding one hundred new circuit judgeships would not be a major expense either as a meaningful fraction of the total federal budget, or by comparison to other uses of federal dollars.

The additional-judgeships-are-too-expensive argument suffers from an even more crucial flaw. Even if the extra capacity were too expensive on some platonic scale, that is a reason for *Congress* to refuse to create the judgeships, it is not a reason for the judiciary not to *ask* for it. Put somewhat differently, even though Congress may refuse to fund a weapons system, the generals are usually willing to ask for it.<sup>162</sup> In the congressional funding game, each budgetary supplicant

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[T]he cost of operating the judicial system is an infinitesimal part of our national expenditures. We spend only three-tenths of 1 percent of our federal budget on our court system. We spend almost as much on one Stealth bomber as we do on the whole federal judicial system. We could run the entire federal judiciary for 15 years on the cost of a single space station.

<sup>157</sup> BUDGET OF THE UNITED STATES GOVERNMENT, ANALYTICAL PERSPECTIVES, FISCAL YEAR 1995, at 104 tbl. 7-2 (1994). The figure is taken from the "1993 actual" column because more recent figures are estimates.

<sup>158</sup> *Id.* at 14-15.

<sup>159</sup> *Id.* at 967.

<sup>160</sup> *Id.* at 154.

<sup>161</sup> STATISTICAL ABSTRACT, *supra* note 138, at 611 tbl. 973.

<sup>162</sup> Worries about the national budget have not stopped the judiciary from lobbying for lavish spending on federal court houses, especially those in New York and Boston. Requests for extras such as operating windows, terrazzo floors, private bathrooms, showers and kitchens, English gardens, French doors, custom lighting fixtures, English oak paneling, a public boat dock, and a design by world-famous architects put the projects hundreds of millions of dollars over budget. See Melinda Henneberger, *Report Assails Cost Overruns for New Court*, N.Y. TIMES, Dec. 14, 1994, at B1, B7; Bob Hohler, *Senate Panel Rips Breyer Over Fan Pier*, BOSTON GLOBE, Dec. 15, 1994, at 1; Sydney H. Schanberg, *A Federal Courthouse Fiasco for Foley Square*, NEWSDAY, Dec. 16, 1994, at A53. An investigation by the Senate Committee on Environment and Public Works uncovered found that one out of eight dollars spent on the projects was wasted—a total of over \$500 million. See Senate Committee on Environment and Public Works, Press Release, *Courthouse Construction Costs* (Dec. 15, 1994).

emphasizes the paramount importance of its needs to the national welfare, jockeying with the others to increase its slice of the pie. It is then the job of Congress to choose among the competing claims. The budget process thus relies on the judiciary to inform Congress of the resources needed to do the job—not to engage in self-censorship by asking for only ten percent of the needed positions.<sup>163</sup> If budget cutting is later required because of more pressing national priorities, it is for Congress to weigh the requests of the judiciary, the military, the National Gallery, the universities, and the wool producers and then to establish national value preferences. The Constitution gives the job of making these comparisons and choices to Congress—not to the courts.

The judiciary's failure to make the appropriate requests is especially damaging because Congress and the public (and even the bar) are largely ignorant of the problems of the courts of appeals. Without meaning to, the judges have hidden the problem of insufficient capacity by remaining current. Instead of permitting a scrutiny-provoking backlog to develop, they have adopted the appellate screening (or triage) regime, thus decreasing the quality rather than the quantity of their output. Further, they have screened out of the traditional process those cases that are the least likely to draw the attention of any powerful observer—social security appeals, habeas corpus cases, prisoner civil rights cases, and pro se litigation generally. As a result, Congress lacks the information it needs to perform its budgetary role properly. Under these circumstances, and with other constituencies constantly clamoring for a larger slice of the budgetary pie, Congress is unlikely to notice, on its own, the need for more judgeships in the courts of appeals.

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Nor did fiscal restraint stop the judiciary from petitioning Congress for funds for other resources. See PROPOSED LONG RANGE PLAN, *supra* note 115, at 71-86 (providing 30 separate recommendations to ensure adequate funding including: appropriations to offset the impact on the judiciary of new legislation, funding through general appropriations rather than user fees, regular cost-of-living adjustments to judicial salaries, increased pension credit for bankruptcy judges and magistrates who later become Article III judges, increased pay for senior judges, increased resources for nomination and confirmation, increased security for judges, more technology, improved working conditions for court support personnel, and the provision of continuing education for judges).

Constitutional diffidence cannot explain the judiciary's failure to ask Congress for more judgeships. The judicial establishment shows no reluctance to tell Congress how to do its job so as to improve the quality of justice. See, e.g., PROPOSED LONG RANGE PLAN, *supra* note 115, at 29 ("Congress should refrain from providing federal agency or court jurisdiction over disputes involving economic or personnel relations or personal liability arising in the workplace."). The judiciary's willingness to provide officious advice to Congress on proper legislative goals contrasts starkly with its unwillingness to accurately inform Congress of what the judiciary needs to carry out its own mission.

<sup>163</sup> In 1992 the Judicial Conference asked Congress to create nine additional judgeships instead of the nearly 100 called for by the Conference's own staffing model. PROCEEDINGS, *supra* note 131, at 69-70.

In the end, of course, the question comes down to the quality of justice the nation can afford. Economic efficiency has never been the only goal sought by American law; surely we would prize racial equality even if doing so were costly and inefficient. That does not mean racial justice will be sought at any price, but it does mean that Pareto Optimality is not the only goal. The trade-off between justice and efficiency (and all of the other demands on the nation's budget) is, of course, one for Congress to make. Moreover, that trade-off is exactly the kind of "polycentric" decision that courts are ill-equipped to handle.<sup>164</sup> And yet, judicial adoption of the appellate triage regime has made the judiciary, rather than Congress, the decision maker concerning who gets how much justice.

### 3. *Unstable Law: The Great Red Herring*

Opponents of increases in appellate capacity have argued that such increases will lead to instability in the law.<sup>165</sup> According to this argument, if Congress adds judgeships to existing circuits, the circuit courts will decide more cases and the law of the circuit will become muddled by "so many uncoordinated opinions from so many judges."<sup>166</sup> Furthermore, the argument goes, adding judges to a given circuit increases geometrically the total number of permutations of three judge panels<sup>167</sup> and thus increases the unpredictability of outcomes within that circuit. Unpredictability, in turn, promotes a higher rate of appeal as losing litigants find it increasingly worthwhile to "take their chances" by appealing. Thus, more judges means more appeals.<sup>168</sup> Alternatively, Congress could add capacity and avoid intracircuit inconsistency by adding more circuits, however, anti expansionists contend that doing so would increase intercircuit conflicts, which already are too numerous for the Supreme Court to resolve.<sup>169</sup> No matter how Congress adds capacity, more judges means more decisions. And those opposed to increased appellate capacity vehemently argue that the excess decisions will overwhelm the capacity of commentators to monitor and evaluate them,<sup>170</sup> to the advantage of wealthy litigants who can afford to keep track of the burgeoning law and against poor litigants who cannot.<sup>171</sup>

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<sup>164</sup> Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978).

<sup>165</sup> See BAKER, *supra* note 13, at 206-07; Breyer, *supra* note 8, at 37-40 (1990); Newman, *supra* note 129, at 188; Tjoflat, *supra* note 129, at 70.

<sup>166</sup> REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 114.

<sup>167</sup> ABA REPORT, *supra* note 8, at 541 (1989); Tjoflat, *supra* note 129, at 71-72.

<sup>168</sup> BAKER, *supra* note 13, at 211; Tjoflat, *supra* note 129, at 71.

<sup>169</sup> REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 7; Newman, *supra* note 129, at 188.

<sup>170</sup> Breyer, *supra* note 8, at 39.

<sup>171</sup> *Id.* at 40.

This instability-of-the-law argument is fatally flawed: it is contrary to the empirical evidence and subject to a powerful *reductio ad absurdum* argument. Further, it ignores effective alternatives for reducing inconsistency, and it radically underestimates the costs of the present system of two-track justice.

a. *Empirical Support*

The first of many problems with the instability-of-the-law argument is that its crucial premises lack any empirical support. There simply is no evidence that increasing the number of judgeships within a circuit reduces the stability of circuit law or increases the rate of appeal. Nor is there any evidence that increasing the number of circuits will create a serious problem of unresolved inter-circuit conflicts. Indeed, the data suggest precisely the contrary.

i. *Inconsistency and Circuit Size*

The available evidence suggests that intracircuit inconsistency is not a serious problem and that its prevalence is not a function of the number of judges within the circuit. The data on these issues come from two major studies: an opinion study performed by the Federal Judicial Center in response to a Congressional mandate,<sup>172</sup> and a series of case studies of the Ninth Circuit commissioned by the Executive Committee of the Ninth Circuit Conference.<sup>173</sup>

The Federal Judicial Center opinion study reported that 80% of the responding circuit judges<sup>174</sup> believed that lack of clear circuit precedent was a small or non-existent problem.<sup>175</sup> The highest percentage of judges expressing concern came from the Sixth Circuit (thirteen authorized judgeships) and the next highest from the Ninth (twenty-seven judgeships).<sup>176</sup> Because circuit judges might understate the problem in order to defend their own work, the responses of the district judges are even more interesting. Sixty-eight percent of the district judges considered the problem of unclear circuit precedent to be small or non-existent.<sup>177</sup> The highest percentage of district judges expressing dissatisfaction came from the Ninth Circuit (the nation's

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<sup>172</sup> Federal Courts Study Committee Implementation Act of 1990, § 302(c).

<sup>173</sup> RESTRUCTURING JUSTICE (Arthur D. Hellman ed., 1990). See also Arthur D. Hellman, *Breaking the Banc: The Common Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915 (1991) [hereinafter *Breaking the Banc*]; Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practices of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989) [hereinafter *Jumboism and Jurisprudence*].

<sup>174</sup> MCKENNA, *supra* note 3, at 93. Over 1400 federal judges responded to the survey, including 81% of active circuit judges and 83% of active district judges. *Id.* at 2.

<sup>175</sup> *Id.* at 93.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

largest), but the next highest came from the First Circuit (the nation's smallest with only six authorized circuit judgeships).<sup>178</sup> These results suggest that unclear precedent is not the problem that opponents of additional judgeships suppose. The results also fail to show any clear correlation between circuit size and perceptions of uncertainty.<sup>179</sup>

The Ninth Circuit case studies, conducted by Professor Hellman, targeted inconsistency of circuit precedent and unpredictability of decisions. Hellman examined a sample of one fifth of the published opinions of the Ninth Circuit for 1983 and 1986.<sup>180</sup> He found little evidence of intracircuit conflict. In about half of the cases, there was no evidence of any contrary precedent within the circuit. When arguably contrary precedents did exist, they typically supplied only oblique support for the losing litigant's position. Even when the contrary precedent offered direct support for the losing litigant, the panel was usually able to distinguish clearly between the sample case and the contrary precedent.<sup>181</sup> Most examples of inconsistency dealt with issues governed by fact-specific, multi-factor, or indeterminate legal standards such as probable cause for an arrest, personal jurisdiction over a non-resident, or "rule of reason" cases.<sup>182</sup> Professor Hellman concluded that these issues were likely to cause unpredictability regardless of the number of applicable precedents and, therefore, regardless of circuit size.<sup>183</sup>

In a further effort to gauge uncertainty in the law of the circuit, Hellman examined separate dissenting and concurring opinions on 172 issues in the sample.<sup>184</sup> His analysis led him to conclude that the primary cause of unpredictable outcomes in the Ninth Circuit was not

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<sup>178</sup> *Id.* at 94. Empirical findings do not appear relevant to advocates of court-capping. In spite of the survey results, Judge Tjoflat recently remarked, "One need not be clairvoyant to foresee that the rule of law will be clearer and more stable in the first circuit than it will be in the second, with its 'jumbo court.'" Gerald Bard Tjoflat, *The Federal Judiciary: A Scarce Resource*, 27 CONN. L. REV. 871, 873 (1995).

<sup>179</sup> The American Bar Association Appellate Practice Committee created the Subcommittee to Study Circuit Size. The subcommittee, composed of experienced appellate advocates, found "no evidence that a larger circuit necessarily causes significantly more intracircuit conflict than a circuit of ten to fifteen judges." See *Report on Federal Circuit Size*, APPELLATE PRAC. J. & UPDATE 3 (Winter 1993). Accordingly, the "Subcommittee found no compelling reasons why circuit courts of various sizes—ranging from a few judges to fifty—cannot effectively meet the caseload challenge. Indeed for every argument in favor of smaller circuits, there is an equally compelling argument for larger circuits." *Id.* at 2.

<sup>180</sup> Hellman, *Breaking the Banc*, *supra* note 173, at 920-21.

<sup>181</sup> Hellman, *Jumboism and Jurisprudence*, *supra* note 173, at 595.

<sup>182</sup> Hellman, *Breaking the Banc*, *supra* note 173, at 972.

<sup>183</sup> *Id.* at 977.

<sup>184</sup> *Id.* at 983. Hellman reasoned that such opinions were good markers of issues on which the composition of the panel could produce uncertainty of outcome. Thus, "[w]e can readily suppose that but for the luck of the draw, one of the judges in the majority might have been replaced by a judge who shared the views of the dissenter . . ." *Id.* at 981.

"a plethora of circuit precedents that point in different directions."<sup>185</sup> When the panel split on the content of circuit law, the judges typically considered the same two or three relevant cases.<sup>186</sup> Often the disagreements did not involve circuit precedent at all, but rather the interpretation of new statutory language or legislative history, recent Supreme Court precedent, state law, or the state of the factual record.<sup>187</sup> There were few, if any, cases in which the judges looked to conflicting circuit precedent to support their differing conclusions. Hellman concluded:

In short, what makes for an unpredictable outcome generally is not an oversupply of circuit decisions, but the absence of a circuit precedent that is closely on point or, less commonly, a fact-specific rule of law that by its nature requires case-by-case evaluation. These conditions are no more likely to occur in the large circuit than the small; if anything, they will occur less often in the large circuit because the larger number of decisions increases the odds that there will be a precedent on point.<sup>188</sup>

Hellman's conclusion resonates powerfully with experience and common sense. The bitter truth known to all who do any legal research is that there is not too much law, but rather too *little*. Consider the law of discovery. A glance at standard treatises or casebooks

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<sup>185</sup> *Id.* at 983.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 983-984.

<sup>188</sup> *Id.* at 984. Justice Breyer advances three variations of the unstable law argument. First, he argues that too many decisions, even if they do not produce a direct conflict between abstract legal rules, can produce uncertainty by the effect that such decisions have on "other sorts of rules, rules that grow out of the facts at hand, that arise out of the use of an example." Hellman's findings contradict this argument. A review of Hellman's study shows that his view of "inconsistency" is not limited to abstract legal rules, but also encompasses highly specific, fact-based rules. Indeed, his point seems even stronger in such cases; because more decisions will encompass more factual variations and examples, the law will become more, not less clear.

Breyer's second argument is that more opinions will swamp the efforts of those who must criticize them. Breyer, *supra* note 8, at 39. This argument is well-meant but 50 years too late. The time has long since passed when even a tiny fraction of appellate decisions could receive serious scholarly attention. Further, the proliferation of specialty and practice-oriented journals and newsletters, and loose-leaf services means that inconsistency will not often go unnoticed.

Breyer's third argument focuses on fairness. Breyer, *supra* note 8, at 40. He suggests that only large law firms and institutional litigants will have the resources necessary to locate and analyze the vast, new body of law. This argument would be troubling if true. However, computer-based research tools have leveled the playing field somewhat. Even if access is not equal, Breyer's argument overlooks the basic fact that more law will *benefit* those with scarce resources. Without clear circuit precedent on point, an advocate must guess at the law—by drawing analogies or extending dicta, by researching the law of other jurisdictions, or by reading treatises and law reviews. That is an expensive task, especially when compared to looking up existing pieces of black-letter law. Thus, research in the absence of precedent within the circuit requires much more time, expense, and resources than are often available to the small or rural practitioner.

reveals that many discovery issues lack any precedent at all, and that most of the decisional law comes from the district courts. Attorneys and trial judges dealing with these issues would find some guidance from the appellate courts very helpful. If having more judges leads to more precedents, trial attorneys surely would welcome that outcome. Even when there is some law, more law re-enforces and clarifies the rule, and thereby makes it more certain. If there is only one circuit court opinion on an issue, another court might well feel justified in reaching a different result. However, if several panels or circuits have spoken on different variations of the issue, it will be the rare court which will take a different path. In short, having more judges will make the law *more* stable, not *less* so.<sup>189</sup>

## ii. *Appeal Rates and Circuit Size*

A variation on the unstable law argument asserts that increasing the number of circuit judges would create instability in the law of the circuit and that this instability in turn would increase the rate of appeal. The reasoning behind this argument is that, because instability in the law of the circuit translates into unpredictable outcomes, appellants will "take their chances" that one of the many possible three-judge panels will reverse their trial court defeat.<sup>190</sup> Increasing the number of circuit court judgeships would therefore increase, rather than decrease, the workload of the courts. Proponents of this argument cite the increase in national appeal rates that has accompanied the steady growth in appellate judgeships. They point out that in 1950 (when there were sixty-four circuit judgeships) only one in forty district court terminations resulted in appeal, while in 1989 (judgeships having increased to 165) the appeal rate was one in eight.<sup>191</sup>

This argument is a classic example of the logical fallacy: *post hoc ergo propter hoc* (i.e., if x precedes y, then x must have caused y). To see the point clearly, consider that although the number of judgeships has increased in the last thirty years, other changes in the federal appellate courts have also occurred. In that same time period, for instance, the average height of circuit judges (adjusted for gender) has increased. Absent some clear causal mechanism, it makes no more sense to attribute accelerated appeal rates to additional judgeships than to increased judicial altitude. Not every correlation is a cause.

More enlightening than the historical correlation of appeal rates and appellate judgeships is a comparison of current appeal rates in

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<sup>189</sup> A recent study by Professor Hellman found that unresolved *inter-circuit* conflicts do not present a serious problem. Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693 (1995).

<sup>190</sup> See, e.g., Tjoflat, *supra* note 129, at 71.

<sup>191</sup> BAKER, *supra* note 13, at 211.



circuits of various sizes. If the more-judges-creates-more-appeals argument is valid, we should expect to see a relationship between circuit size and appeal rates. In fact, however, no such correlation exists. A comparison of the appeal rates of the circuits between 1988 and 1991 shows the Federal Circuit (twelve judges) to have the highest average rate, and the Seventh Circuit (eleven judges) to have the lowest. The largest circuit (the Ninth with twenty-seven judges) and the smallest (the First with five judges) have almost identical rates of appeal. These results strongly suggest that increasing the number of judgeships is not likely to increase rates of appeal.

In fact, other factors explain the historical increase in the appeal rate. The forty years between 1950 and 1990 saw dramatic changes in our system of justice. The Supreme Court recognized a criminal defendant's constitutional right to counsel on appeal, legal services became available to a much larger segment of the population, pro se litigation—particularly by state prisoners—increased radically, federal appeals courts began protecting civil rights much more aggressively, and the substantive law (state and federal) on many issues changed at unprecedented rates. It seems quite likely that these trends, rather than the increase in circuit judgeships, caused the increase in rates of appeal.

### iii. *Intercircuit Conflict*

If Congress fears intracircuit inconsistency, notwithstanding logic and empirical evidence to the contrary, it might be unwilling to add enough judgeships to the existing circuits to meet current needs. Nevertheless, it could still supply the nation with adequate appellate capacity by creating more circuits. Creating four or five additional circuits of fifteen judges each, and increasing to fifteen the number of judgeships in the circuits with fewer than fifteen judgeships would add enough capacity to meet the Judicial Conference's staffing model.<sup>192</sup> Opponents<sup>193</sup> of this solution see it merely as a trade of one kind of inconsistency for another. They contend that although intracircuit conflict will not increase, intercircuit conflicts will multiply far beyond the Supreme Court's already inadequate capacity to resolve them.<sup>194</sup>

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<sup>192</sup> We picked 15 as the number of judges for this comparison because it is the current staffing of the second largest circuit. Adding five circuits of 15 judges produces a total of 75 additional judgeships. Increasing the existing circuits to 15 judges each produces an additional 34 positions for a total of 109 new judgeships. Adding 109 to the current 178 produces 287—10 more than the 277 required to reduce merits dispositions per judgeship to 255 (the maximum number a circuit judge can be expected to produce according to the Judicial Conference).

<sup>193</sup> See, e.g., Thomas G. Gee, *The Imminent Destruction of the Fifth Circuit: Or, How Not to Deal With a Blossoming Docket*, 9 TEXAS TECH. L. REV. 799 (1978); John Minor Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787 (1980).

<sup>194</sup> See BAKER, *supra* note 13, at 218; Newman, *supra* note 129, at 188.

Once again, however, the empirical evidence suggests otherwise. The evidence consists of another study conducted by Professor Hellman, commissioned by the Federal Judicial Center pursuant to Congressional request.<sup>195</sup> Hellman examined litigants' claims of inter-circuit conflict in certiorari petitions in order to determine the prevalence of conflicts, their tolerability, and their persistence over time. For Hellman a conflict was "tolerable" if it had not "resulted in differential treatment of similarly situated litigants in different parts of the country"<sup>196</sup>—that is, if it had not led to contrary outcomes in subsequent cases. A conflict would fail the "persistence" test if litigants stopped raising the relevant issue, one of the conflicting circuits overruled its prior "conflicting" position, the Supreme Court later resolved the questions, or subsequent legislation mooted the issue.<sup>197</sup>

Hellman studied 142 issues on which the Supreme Court denied review in the 1984 and 1985 Terms, despite the existence of an inter-circuit conflict. Of these, he found that the persistence and tolerability tests eliminated all but forty issues. In other words, he found only forty conflicts in two Terms that "(a) have not been put to rest by a subsequent Supreme Court decision or otherwise; (b) have continued to generate litigation; and (c) have controlled outcomes in one or more reported cases."<sup>198</sup> Further, he noted that the Supreme Court has ample room on its docket to resolve those conflicts.<sup>199</sup> In 1991, for example, the Court issued only 110 plenary decisions compared with an average of 153 in the 1981-1986 Terms.<sup>200</sup> The study shows not only that unresolved inter-circuit conflict is not a serious problem, but also that the creation of several more circuits is not likely to make it one. The absolute number of persistent, intolerable unresolved conflicts is low, and the Supreme Court has ample capacity to resolve them. Perhaps the addition of several new circuits might increase the

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<sup>195</sup> See ARTHUR D. HELLMAN, FEDERAL JUDICIAL CENTER, UNRESOLVED INTERCIRCUIT CONFLICTS: THE NATURE AND SCOPE OF THE PROBLEM iii (1994). In making its request for the study, Congress followed the recommendation of the Federal Courts Study Committee. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 124-25.

<sup>196</sup> HELLMAN, *supra* note 195, at 113. Following the suggestions of Congress and the Federal Courts Study Committee, Hellman broke down this standard of tolerability into four criteria. He considered whether the conflict

"(1) imposes economic costs or other harm on persons engaging in interstate commerce; (2) encourages forum shopping among circuits; (3) creates unfairness to litigants in different circuits, as in allowing Federal benefits in one circuit that are denied in other circuits; or encourages non-acquiescence by Federal agencies in the holdings of the courts of appeals for different circuits . . . ."

*Id.* at V. 123 (quoting § 302). See also REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 125.

<sup>197</sup> Hellman, *supra* note 195, at 105-12.

<sup>198</sup> *Id.* at 120.

<sup>199</sup> *Id.* at 121.

<sup>200</sup> *Id.*

number of conflicts, but the absolute number would still be low, and in a nation-wide common law system it is unrealistic to insist on a "zero-tolerance" policy for conflict.

Thus, the empirical evidence against the inconsistency argument is very strong—really, one-sided. The data are also so well known, that reliance on the argument by the judicial establishment (all sophisticated federal judges) seems almost perverse.

b. *Reductio Ad Absurdum: The Trade-Off Between Consistency and Capacity*

Even if we assume, in spite of the currently available empirical evidence, that new judgeships will produce significant intracircuit or intercircuit inconsistency, it still does not follow that Congress should refuse to create them. The logical leap from new-judgeships-increase-inconsistency to create-no-new-judgeships is vulnerable to a powerful *reductio ad absurdum* attack. If consistency is the paramount goal of the judicial process, and fewer judgeships mean more consistency, Congress should *reduce* the number of authorized judgeships. At the very least, Congress should not have increased judgeships from the 1960 total of sixty eight to the current total of 179. Yet the consequences of such a zero-growth policy would have been disastrous. Today the circuit courts can keep current by giving full appellate process (oral argument, conference, and published, judge-authored opinion) to only half their caseload; the remainder get no argument, no conference, and a cursory, unpublished opinion drafted by staff attorneys. If Congress had stood pat at the 1960 level of sixty-eight judgeships, only 20% of today's appellate cases would receive the traditional appellate process, and 80% would be handled bureaucratically. To push the absurdity even further, if fewer judgeships mean greater consistency, why not have a single three-judge panel for the nation? That option would eliminate all uncertainty.

The answer, of course, is that consistency is not the only goal. At least as important as consistency is adequate capacity. The system needs enough judges not only to decide the cases carefully and correctly, but also to convince the litigants, the bar, and the public that each case gets the personal attention and reasoned deliberation of Article III judges. Thus, even if we assume (counter-factually) that expansion generates inconsistency, we have proved only that adequate capacity on the one hand and legal consistency on the other are competing values that must be balanced against each other, not that judgeships should be frozen at current levels.

Where then to strike the balance? In order to answer that question, we would need to know much more than we now know (or even presume to know) about the relationship between additional judge-

ships and legal inconsistency. Is there a straight-line correlation, with consistency decreasing proportionately to the number of new judges, or are there gradual slopes and sudden drop-offs in the curve? It is crucial to know the answer in order to generate the maximum amount of both consistency and capacity. Otherwise, there is no reason to prefer one balance of the competing goals over another. The current balance of having enough judges to give traditional appellate process only to cases involving interesting issues, high economic stakes, or powerful parties seems to satisfy the judges, but without much more data, we cannot defend it as an optimal tradeoff between capacity and consistency.

In the absence of data on the purported correlation, the issue turns on the burden of proof. Should that burden fall on the proponents or opponents of additional judgeships? Two arguments show that the burden belongs on the opponents. The first of these arguments is based on the difference between known versus unknown costs and benefits. In this case, the known benefit is the traditional appellate process. Traditional appellate process made the federal appellate courts great; the courts flourished because the judges did their own work.<sup>201</sup> From the earliest days, federal appellate judges heard oral argument, conferred with each other, and gave reasons (oral or written) for their decisions. These reasoned decisions then served as precedent in later cases. This traditional process persisted until the 1960s when the increases in caseload began to outstrip the growth in judgeships. Although the courts were able to compensate by becoming more bureaucratic, no one argues that bureaucratic appellate justice is intrinsically better than the traditional model. Accordingly, the burden of proof on the inconsistency/capacity tradeoff belongs on those who would make permanent the change from the traditional to the bureaucratic model. We ought not give up the proven benefits of the Learned Hand model without a very good reason. Avoiding losses in certainty and consistency might qualify as a good reason if we could be sure they would occur and we could know their orders of magnitude. It makes no sense, however, to suffer the known evil of increased bureaucratization in return for a dividend of increased consistency that is completely speculative in amount and proportion.

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<sup>201</sup> See, e.g., CHARLES E. WYZANSKI, JR., *WHEREAS—A JUDGE'S PREMISES* (1965). When Brandeis understood all that there was to know about the facts, *he himself* . . . prepared his own statement of his findings and conclusions. I will remember a remark a Justice made to me when I first entered the public service: "The reason the public thinks so much of the Justices of the Supreme Court is that they are almost the only people in Washington who do their own work."

The second reason that the burden of proof should fall on the opponents of additional judgeships concerns notions of distributive justice. Distributive justice deals with the allocation of costs and benefits among members of society.<sup>202</sup> Appellate justice, a societal benefit, is not distributed evenly under the current two-track system of appellate review. Wealthy, powerful, institutional, and governmental litigants get far more of the judges' time and attention than do other litigants.<sup>203</sup> Favoring consistency over capacity by restricting the number of new judgeships will increase that discrepancy.

Because "important" litigants are much more likely to spread out their operations geographically and to make repeated use over time of the appellate system, gains in consistency are very important to them. Consistency does not loom so large, however, for other more local, one-time litigants. Gains in capacity, on the other hand, favor poorer, weaker litigants because additional judgeships will increase their chances of receiving the personal attention of Article III judges.

Favoring consistency over capacity by limiting the number of judges thus sacrifices the interests of weaker litigants in favor of the interests of more powerful litigants, who already receive a disproportionate share of society's appellate resources. The current system of rationing appellate justice already favors wealthy and powerful litigants because their cases are less likely to be "screened" out of the traditional appellate process and handled via the track-two method. Restricting judicial expansion merely exacerbates the current distributional discrepancy, and thus violates fundamental democratic values.

### c. *Methods for Increasing Consistency*<sup>204</sup>

If we assume both that creating more judgeships leads to inconsistency<sup>205</sup> and that legal consistency is our appellate system's paramount value,<sup>206</sup> then it would seem to follow that Congress should not supply the new positions. But that conclusion is not inevitable even with those counterfactual assumptions; there are ways to safeguard consistency without permanently limiting the nation's appellate capacity. Thus, a sensible response to the Federal Courts Study Committee's concern about "so many uncoordinated opinions from so many judges"<sup>207</sup> is to supply some additional coordination. The coordinating devices can be divided into those that avoid inconsistency and those that resolve it.

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202 R.W.M. DIAS, JURISPRUDENCE 66 (4th ed. 1976).

203 See *supra* part II.C.

204 See generally BAKER, *supra* note 13, at 224-27; McKENNA, *supra* note 3, at 91-92.

205 But see *supra* part III.B.3.a.

206 But see *supra* part III.B.3.b.

207 FEDERAL COURTS STUDY COMMITTEE REPORT, *supra* note 112, at 114. The Report does not explain how our current system "coordinates" cases.

i. *Better Legislation*

Among the easiest ways to avoid inconsistency is to cut it off at its legislative source. The courts of appeals devote substantial time and effort to litigation dealing with issues of statutory construction. Statutes can be unclear or ambiguous for a variety of reasons. Sometimes the ambiguity is an intentional political compromise, but just as often it results from poor drafting and lack of foresight.<sup>208</sup> Congress could short-circuit these ambiguities before they produced inconsistent interpretations in the courts. As certain as death and taxes, for instance, is litigation to determine whether a new statute should apply retroactively, whether it should preempt state law, whether a private right of action is intended, and what the appropriate limitations period should be. These issues, as well as many others, turn entirely on legislative intent, and Congress could forestall later litigation by resolving them at the outset. To promote this development, the Federal Court Study Committee prepared a checklist of statutory construction issues for use by Congressional Committee staffs and the Office of Legislative Counsel in the House and Senate.<sup>209</sup> A further step toward coordination would be the creation of a "second look" Congressional committee or office to review the progress of new legislation in the courts. The goal would be to identify litigated issues that result from ambiguity or poor drafting and to resolve them in subsequent corrective legislation.<sup>210</sup>

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<sup>208</sup> An example of this sort of poor legislative drafting is 28 U.S.C. § 1367 (1994). The Supplemental Jurisdiction Statute was designed to codify the results of *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and *Owen Equip. and Erection Corp. v. Kroger*, 437 U.S. 365 (1978), and also to overrule both *Finley v. United States*, 490 U.S. 545 (1989), and *Aldinger v. Howard*, 427 U.S. 1 (1976). The idea was to permit pendent claim and pendent party jurisdiction in federal question cases but not to permit the doctrine of supplemental jurisdiction to diminish the complete diversity requirement. Unfortunately, when Congress drafted § 1367 it specifically mentioned FED. R. CIV. P. 14, 19, and 20, but omitted FED. R. CIV. P. 23, probably through inadvertence. The literal language of the statute effectively overrules *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), which had required that each claimant in a Rule 23(b)(3) diversity class action separately meet the amount-in-controversy requirement of 28 U.S.C. § 1332; Congress probably did not intend to overrule *Snyder* and *Zahn*. For a discussion of the issue, see GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 140-41 (2d ed. 1994).

<sup>209</sup> FEDERAL COURTS STUDY COMMITTEE REPORT, *supra* note 112, at 91.

<sup>210</sup> See Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 1012 (1987); Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417 (1987). Both BAKER, *supra* note 13, at 224-27 and MCKENNA, *supra* note 3, at 92, review this proposal. A pilot project exists in the D.C., First, Third, Seventh, and Tenth Circuits, whereby staff attorneys review slip opinions for those cases involving statutes whose drafting glitches have produced troublesome issues of Congressional intent. The court reviews these cases and selects the most appropriate ones to be forwarded to the appropriate congressional offices and committees. See BAKER, *supra* note 13, at 225-26.

Another way to cut off inconsistency at its source is to clean up judicial opinions. Voices within the courts have begun to notice that opinions are growing longer, more

ii. *Better Communication*

Another relatively cost-free mechanism to limit inconsistency is to increase communication among circuit judges. The job of a circuit judge is a lonely one. Most judges are geographically isolated with few, if any, colleagues in the same city.<sup>211</sup> Apart from sitting together on three-judge panels and meeting at circuit conferences, their communication is spotty and haphazard.<sup>212</sup> In some circuits, however, they have begun to increase the use of coordinated communication to avoid inconsistent holdings and dicta. The Ninth Circuit has been a pioneer. Like all circuit courts, the Ninth has an en banc process to resolve intercircuit conflicts and a "first panel" rule, which provides that the first panel decision of an issue binds later panels unless overturned by an en banc decision.<sup>213</sup>

The Ninth Circuit has adopted an additional set of procedures to avoid inconsistency.<sup>214</sup> In the first step, staff attorneys "inventory" the case according to detailed issue codes and feed the information into a computer. When possible, cases raising the same issues are then assigned to a single three-judge panel. If that is not possible, panels hearing cases raising the same issue are so informed and a priority-of-submission rule controls; the panel to whom the issue was first submitted has priority, and other panels must await the outcome and follow the precedent established by the first panel.<sup>215</sup> The second step, which occurs after the filing of the opinion, also involves both judges and staff. The panel circulates its opinion to off-panel judges who have three weeks to communicate with panel members. At the court's direction, the staff reviews all published opinions for potential conflicts and can suggest modifications to preserve consistent circuit law.

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prolix, and overloaded with dicta and string citations. See, e.g., POSNER, *supra* note 44, at 108-09. Poorly thought-out and extraneous dicta, general propositions quoted out of context, and needless rehearsals of basic propositions increase the likelihood of error and the likelihood of disagreement with the extraneous language contained in other opinions; this leads to the appearance of incoherence in the law. Ironically, if Judge Posner is correct in ascribing this deterioration of judicial opinion writing to the proliferation of law clerks, the courts have created a perpetual motion machine: more clerks are needed to deal with the inconsistencies created by more clerks.

<sup>211</sup> See Wasby, *supra* note 71, at 585. Notable exceptions are the D.C. and Federal Circuits, all of whose members sit in the same city.

<sup>212</sup> *Id.* at 586-92.

<sup>213</sup> HELLMAN, RESTRUCTURING JUSTICE, *supra* note 173, at 56.

<sup>214</sup> See *id.* at 58-62; JOE S. CECIL, ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT 8-9 (1985); Stephen L. Wasby, *Communication in the Ninth Circuit: A Concern for Collegiality*, 11 U. PUGET SOUND L. REV. 73, 113-18 (1987).

<sup>215</sup> HELLMAN, RESTRUCTURING JUSTICE, *supra* note 173, at 58-59.

iii. *Specialized Courts, Specialized Panels*<sup>216</sup>

If the more-judges-means-greater-inconsistency thesis is correct, subject-matter specialized courts or panels can help avoid inconsistency by reducing the number of precedential decision makers in a particular area of law. Specialized subject-matter courts are courts of nation-wide jurisdiction over particular types of appeals staffed by a stable corps of judges. Examples in this country are the Court of Appeals for the Federal Circuit,<sup>217</sup> the Temporary Emergency Court of Appeals,<sup>218</sup> and the Court of Military Appeals.<sup>219</sup> In other systems, specialized appellate courts are the rule, rather than the exception.<sup>220</sup> Specialized panels, by contrast, would be subdivisions of the existing regional courts of appeals,<sup>221</sup> staffed by judges of the regional circuit who rotate through subject matter areas for terms of two to five years. In a large court like the Ninth Circuit, for example, the cases could be divided up by subject matter into five major areas, with each area handled by a panel of six judges.<sup>222</sup>

<sup>216</sup> The literature on specialized courts and panels is extensive; see, e.g., PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* (1976); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329 (1991); 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); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 65 N.Y.U. L. REV. 1 (1989); Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944); Clement F. Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597 (1974); Ellen R. Jordan, *Specialized Courts: A Choice*, 76 NW. U. L. REV. 745 (1981).

<sup>217</sup> 28 U.S.C. § 1295. See generally Dreyfuss, *supra* note 216 (treating the Federal Circuit's history and current record in detail).

<sup>218</sup> Economic Stabilization Act of 1970, Pub. L. No. 92-210, 85 Stat. 743, 748-50 (1971).

<sup>219</sup> 10 U.S.C. § 867 (1994).

<sup>220</sup> See generally Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U. S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 610 (1989) [hereinafter *Judicial Architecture*] (describing Pennsylvania system); Daniel J. Meador, *An Appellate Court Dilemma And a Solution Through Subject Matter Jurisdiction*, 16 MICH. J. L. REF. 471, 475-76 (1983) [hereinafter *An Appellate Court Dilemma*] (describing German and English systems).

Our federal system has a prejudice against *de jure* subject matter appellate courts, although such courts exist *de facto*. For instance, in 1987, the Second Circuit had 41 appeals in securities cases brought by the government, while four circuits had none; the Fifth Circuit had 180 marine injury appeals, while three circuits had none; the Ninth Circuit had 31 appeals in environmental cases against the government, while three circuits had only one each. Meador, *Judicial Architecture*, *supra*, at 614. Yet another form of *de facto* specialization exists in the federal appellate system. One set of courts, composed exclusively of Article III circuit judges, hears cases involving important issues, difficult legal questions, and wealthy litigants. Another set of courts, composed largely of young staff attorneys, handles repetitive, fact-specific appeals brought by poor litigants.

<sup>221</sup> There is one example of a specialized panel on a regional court in the federal system. In the Fifth Circuit, oil and gas cases are assigned to a special panel of several judges who have developed expertise in the area. See Meador, *An Appellate Court Dilemma*, *supra* note 220, at 477.

<sup>222</sup> See *id.* at 489-90 (describing a sample plan for subject-matter panels on the Ninth Circuit).



The advantages of specialized panels and courts are expertise, efficiency, and, most important for our purposes, consistency. Judges working in a particular area of the law learn that area well and can supply expert interpretation of the relevant statutes, case law, and policies. Those judges work more efficiently and quickly because they do not need to learn the elementary principles of an unfamiliar subject for each new case on the docket. If the growth and inconsistency hypothesis is correct, however, the greatest advantage of specialized panels and courts, would be gains in consistency. The use of relatively few decision makers means that opportunities for inconsistent holdings would be minimized and also that members of the bar could rely on a known and predictable bench. Specialized courts and panels thus combine the capacity of a large judiciary with the consistency and coherence of a much smaller one.

Opponents of increasing federal appellate capacity through specialization<sup>223</sup> cite the dangers of capture, tunnel vision, boredom, and loss of prestige.<sup>224</sup> A little care, however, in the design of the subject-matter division can avoid these pitfalls. For specialized courts, the key is to resist excessively narrow jurisdictional grants. As long as a court has jurisdiction over different types of cases arising in different social contexts, it runs little risk of the traditional specialization woes.<sup>225</sup> The response is even easier for specialized panels. Establishing only a few divisions per circuit assures each panel a fairly wide range of cases, and relatively short rotation periods minimize the risks of capture, lobbying, tunnel vision, and boredom.<sup>226</sup>

#### iv. *Resolving Inconsistency—Structural Reform*

Thus far, we have concentrated on methods to *avoid* the inconsistencies that supposedly accompany increases in appellate capacity. Another possibility is to *resolve* the alleged increases in inconsistencies

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<sup>223</sup> See, e.g., ABA REPORT, *supra* note 8, at 532-40; PROPOSED LONG RANGE PLAN, *supra* note 115, at 34-35.

<sup>224</sup> According to the opponents of federal appellate specialization, a highly specialized court risks capture because its judges become familiar with the specialized practitioners that routinely practice before it. Further, because its decisions are so important to repeat litigants, appointments to the court provoke extreme lobbying efforts. The problem of tunnel vision occurs when judges see only one particular type of case; they thus lose their perspective as generalists, develop their own jargon and become accessible only to specialists in the bar. Finally, boredom and lack of prestige, which result from repetitive litigation before the court, ultimately make it difficult to find high quality nominees.

For a discussion of these issues see Meador, *An Appellate Court Dilemma*, *supra* note 220, at 482-84. The classic example of a court which succumbed to all of these difficulties is the Commerce Court. Its brief and sad history is discussed in Bruff, *supra* note 216, at 335-36.

<sup>225</sup> See Bruff, *supra* note 216, at 341-42; Meador, *An Appellate Court Dilemma*, *supra* note 220, at 483; Meador, *Judicial Architecture*, *supra* note 220, at 632-40.

<sup>226</sup> A plausible plan appears in Meador, *An Appellate Court Dilemma*, *supra* note 220, at 489-90.

once they appear. That strategy requires, in one form or another, an additional tier in the appellate process. With another level of courts to resolve intercircuit inconsistency, more circuits could be created, allowing each of the circuit courts to remain small enough to minimize intracircuit inconsistency. Further, the resulting pyramidal structure makes sense in light of the dual function of intermediate appellate courts. Error correction requires steadily increasing judgeships as caseloads rise. But, according to the more-judges-creates-inconsistency argument, coherent law declaration requires fewer judgeships. The pyramid meets both needs with a relatively broad base to maximize error correction capacity and a smaller upper tier to focus law declaration.<sup>227</sup>

One serious disadvantage attends any plan to create an additional tier of appellate courts.<sup>228</sup> A fourth layer of courts means additional expense and delay for the litigants; there would be one more round of

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<sup>227</sup> Several different configurations are possible. The Hruska Commission suggested a single national court of appeals staffed by seven or nine life-tenure, Article III judges appointed specifically to the court. Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, in 67 F.R.D. 195 (1975). Another basic model would staff a single national court with judges from the existing circuit courts sitting for relatively short (2-3 year) rotating terms. Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, in 57 F.R.D. 573 (1972). See also BAKER, *supra* note 13, at 253-56 (describing the "In Banc Intercircuit Conference"); Warren E. Burger, *Annual Report on the State of the Judiciary*, 66 A.B.A. J. 442 (1983) (recommending an "Intercircuit Panel"). Yet another configuration would consist of three or four seven-judge super-circuits; each responsible for reviewing five or six circuit courts, which, in turn, would be staffed by nine or ten judges each. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 119-20. The judges of the super circuit courts might be specially appointed for life terms or be recruited for rotating terms from among the judges of the circuit courts. For a discussion of this variation, see MCKENNA, *supra* note 3, at 117-21.

Regardless of the configuration of the new court(s), a host of functional issues would arise. Would the court sit in panels or *en banc*, and, if it sat in panels, would there be provision for *en banc* re-hearings? What would be the precedential effect of the decisions of the court(s) and how would the Supreme Court review those decisions? Could the new court overrule itself? Jurisdiction might be by discretionary, or in some cases mandatory, appeal from the circuit courts, by transfer from the circuit courts, or by referral from the Supreme Court. It could encompass all federal questions, or instead, focus only on issues in which intercircuit conflicts exist. A functioning plan would require a decision on each of these issues and probably several more as well.

<sup>228</sup> Two additional disadvantages have also been raised. First, the appointment process could cause a political headache. If a single president appointed all members of the new court, opposition party legislators might object and retard confirmation. Relatively easy solutions to this political problem exist, however. Appointments could be staggered or, better yet, appointment could be made automatic by seniority among current judges (perhaps subject to executive or legislative veto).

The second objection is that creation of a higher national tribunal will reduce the prestige of the existing circuit judges. Indeed, opinion surveys show overwhelming opposition from judges. See MCKENNA, *supra* note 3, at 121. Opposition based on worries about prestige should count for nothing. Courts exist for the benefit of the nation, not the satisfaction of the judges. In the words of Judge Haynsworth:

[T]hat kind of concern for personal prestige, or the prestige of one's office, can not be permitted to preclude accretions to the system which are neces-

briefing, one more round of argument, and months more waiting before final resolution of the case. There are, however, ways to minimize this impact. For instance, some cases could bypass the circuit court level. Thus, if the district judge or the circuit panel certified that the case raised an intercircuit conflict or some other issue likely to require national law making, the case could proceed directly to the national appellate level. Another time-saving measure would be to consolidate briefing on petitions for discretionary review. If the national appellate court declined discretionary review, the submissions to that court would serve as the materials the Supreme Court would review for certiorari. In a four-tier system, it might be difficult to eliminate entirely additional delay and expense to the parties, but measures like those suggested could diminish the extra burden substantially.

v. *Tradition, Proportion, and Inevitability*

In order to use specialization or a four-tier pyramid to combat the inconsistency that supposedly results from increased appellate capacity, several cherished traditions of American appellate justice must be abandoned. Any configuration for increasing capacity means abandoning the tradition of a small elite federal judiciary, and increased use of specialized courts or panels trenches on the historical role of federal judges as generalists. A four-tier system changes the traditional judicial hierarchy, as well as the practice of allowing conflicts to "percolate" before they reach the Supreme Court. Additionally, significant increases in the number of circuits, a necessary element of a four-tier system, inevitably would violate the traditional convention of circuit alignment (having at least three contiguous states per circuit) and eventually might require splitting a single state between two circuits.

As comforting and familiar as these traditions are, however, they are also peripheral. Historically, the central, defining characteristic of the federal appellate courts was that the judges did their own high quality work. Each case received the personal attention of Article III judges; courts did not "screen" cases or ration justice according to the wealth, power, or prominence of the litigants. That defining characteristic, of course, is in serious jeopardy. Subject-matter specialization or a four-tier system could restore this defining characteristic by permitting substantial growth in capacity while retaining legal coherence.

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sary to its efficient functioning. . . . [A]ny reluctance on my part to look up to sixteen judges above me rather than nine should carry little weight.

Letter from the Honorable Clement F. Haynsworth to A. Leo Levin (April 30, 1975), in 2 *Hearings Before the Commission on Revision of the Federal Court Appellate System*, 94th Cong., 1st Sess. 1327, 1328 (1975) quoted in BAKER, *supra* note 13, at 251.

If the cost of saving the system's defining characteristic is the abandonment of some peripheral traditions, the price may be high, but it is certainly a worthwhile exchange.

Further, if the more-judges-means-greater-incoherence thesis is correct, the loss of the peripheral traditions is inevitable anyway. Because Congress is not going to reduce federal jurisdiction substantially, caseloads will continue to rise. As they do, the system will seek to accommodate them in one of two ways. First, it could keep the number of judgeships relatively low and increase the use of screening and triage to keep pace. There are, however, political limits to that solution. At some point Congress, the bench, the bar, and the public will rebel. Those constituencies remained relatively docile as the courts increased to fifty percent the portion of cases screened out of the traditional appellate process. But will they remain silent as the percentage rises to sixty or seventy-five or ninety percent?

If not, the only alternative will be to increase the number of judgeships. But then, if the growth and inconsistency hypothesis is correct, the law within and among circuits will become incoherent, and structural change—specialization or a fourth tier—will be required anyway. In the end, both the peripheral and the central traditions of the federal appellate system will be lost. If structural modifications are required to accommodate capacity and consistency, it would be much wiser to make them now while the central value of the system can still be saved.

#### 4. *Reduced Collegiality*

Adding judges, it is sometimes argued, would reduce collegiality, thereby impairing judicial quality. Little detail accompanies this objection, and for good reason. "Collegiality" evokes a picture of a small number of judges gathered in a library, sipping sherry and discussing their cases. Reality is quite different; judicial collegiality in that sense appears to be a myth. One study of the Eighth Circuit, for example, found that even among judges on a particular panel, "the memorandum was the most frequently used means of communication."<sup>229</sup> Communication with off-panel judges was "not extensive,"<sup>230</sup> and communication involving track-two cases is nearly non-existent because they usually involve no conference or, at best, a mass conference at which between thirty and fifty cases are treated in each session. Moreover, the court rarely meets as a group, and individual judges are reluctant to relocate their chambers to circuit headquarters.<sup>231</sup>

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<sup>229</sup> Wasby, *supra* note 71, at 589.

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

<sup>231</sup> *Id.* at 603-04.

The findings of this study are particularly instructive because they describe the workings of a small court—the Eighth Circuit had ten active judges at the time of the study.<sup>232</sup> Given judicial perceptions that the number of judges on a court somehow adversely affects communication,<sup>233</sup> the low level of communication in the Eighth Circuit comes as something of a surprise. However, the Eighth Circuit's experience is quite typical. Chief Justice Rehnquist has commented on the lack of real interchange at conferences or otherwise,<sup>234</sup> and Chief Judge Wald of the D.C. Circuit has made the same observation.<sup>235</sup> Both comments are telling. Rehnquist and Wald sit on relatively small, geographically compact courts,<sup>236</sup> and the Supreme Court (of course) does not even sit in panels. If collegiality does not exist on those courts, it surely does not exist anywhere.

Even if collegiality were not a myth, it is difficult to see why it should be valued so highly. Perhaps a collegial court can operate more efficiently. If panel members know the jurisprudential views and work styles of their fellow judges from previous cases, perhaps they can spend less time getting acquainted and proceed to productive work more quickly. They can also be more productive if they don't waste time squabbling.

But collegiality entails a cost. Judges who know, like, and depend on each other might be less likely to risk their relationship by disagreeing on matters of importance to one or the other. Over time, colleagues might accumulate debts of deference on key issues, and subtle, unarticulated vote trading could occur. A "don't-rock-the-boat" mentality might pervade the courts. Of course collegiality does provide one clear benefit: professional life on a collegial court is more pleasant for the judges. The courts, however, exist for the good of the nation, not the professional satisfaction of the judges.

Even if collegiality were a palpable public benefit, it is by no means clear that collegiality is a function of small size. A small court is not necessarily a happy one, as famous feuds on the Supreme Court

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<sup>232</sup> *Id.* at 585.

<sup>233</sup> *Id.* at 602.

<sup>234</sup> See WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 294-95 (1987).

<sup>235</sup> Patricia M. Wald, *Some Real-Life Observations About Judging*, 26 *IND. L. REV.* 173, 178 (1992) ("What do we *not* spend our time doing? Talking or discussing cases with our colleagues.").

<sup>236</sup> Even on the smallest of courts, cohesion is difficult to achieve if only for geographic reasons. On Learned Hand's Second Circuit, for example, "three of its six members . . . did not live in New York and were commuters. . . . The physical dispersal . . . precluded their coalescing into a closely knit social group." SCHICK, *supra* note 14, at 74.

attest;<sup>237</sup> and some quite large bodies are very collegial.<sup>238</sup> Today, increases in size might well make the courts *more* collegial. For one thing, the workload would become more manageable, leaving more time for traditional collegial decision making. Also, personal feuds could be buried in the anonymity of a larger group. Further, if there were more active circuit judges, there would be less need for visiting judges and central staff, and encounters among active circuit judges on three-judge panels would be more, rather than less, frequent.<sup>239</sup>

##### 5. *Jurisdictional Retrenchment: Throwing Out the Baby to Save the Bath Water*

Advocates of a small, elite federal judiciary have their own solution to the problem of appellate overload—jurisdictional contraction. According to these advocates, if Congress would just return federal jurisdiction to the proper, limited scope prescribed by the Constitution, history, and federalism, the caseload of the federal courts would decrease enormously, and there would be no need for significant expansion of the judiciary.<sup>240</sup> The Constitution, the argument goes, contemplates a very limited role for the federal courts, and the jurisdictional statutes, at least until recently, confirm that role.<sup>241</sup> Continued expansion of federal jurisdiction subverts the historic role of the federal courts and usurps the powers of the state judiciaries.<sup>242</sup> Expanding federal jurisdiction into areas of only marginal or insubstantial federal interest makes the courts less able to handle their traditional workload—major litigation involving significant national interests.<sup>243</sup> Most important (so the argument goes), the growth of federal jurisdiction has caused the massive expansion of the federal judiciary, which threatens to alter its basic character. Reversing the expansion of federal jurisdiction would therefore remove the need for even greater and even more damaging judicial expansion.

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<sup>237</sup> *E.g.*, the famous Jackson/Black feud discussed in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 445 (Kermit L. Hall et al. eds., 1992).

<sup>238</sup> *E.g.*, the United States Senate, fire departments, and most law faculties.

<sup>239</sup> See discussion *supra* part I.C. Judge Posner makes this same point with respect to visiting judges. POSNER, *supra* note 44, at 106. Judicial expansion might actually *enhance* collegiality in small cities like Omaha or Birmingham where the number of circuit judges would increase, but still remain quite small.

<sup>240</sup> PROPOSED LONG RANGE PLAN, *supra* note 115, at 19.

<sup>241</sup> FEDERALIZATION, *supra* note 129, at 10-11, 14-15; MORATORIUM, *supra* note 126, at 26-27.

<sup>242</sup> See FEDERALIZATION, *supra* note 129, at 17-26; William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1657, 1660 (1992).

<sup>243</sup> FEDERALIZATION, *supra* note 129, at 21; PROPOSED LONG RANGE PLAN, *supra* note 115, at 19.

Supporters of court-capping have proposed a variety of plans to contract the jurisdiction of the federal courts,<sup>244</sup> but two themes predominate. The first is an inventory of types of cases that should be eliminated. Thus, for example, the Federal Courts Study Committee recommended that Congress curtail diversity jurisdiction, (leaving only complex multi-district litigation, interpleader, and suits involving aliens),<sup>245</sup> prohibit removal of low dollar amount ERISA cases,<sup>246</sup> require state prisoner civil rights plaintiffs to exhaust state institutional remedies,<sup>247</sup> consider recommendations for revising habeas corpus jurisdiction,<sup>248</sup> shunt review of social security disability claims to a new Article I Court of Disability Claims,<sup>249</sup> authorize the Equal Employment Opportunity Commission to arbitrate employment discrimination cases with the parties' consent,<sup>250</sup> and repeal the Federal Employee's Liability Act and the Jones Act, leaving the claims of injured workers to state and federal workers compensation systems.<sup>251</sup>

The second theme is a generalized admonition to Congress to stop "federalizing" the civil and criminal law. According to this line of reasoning, federal law should not duplicate state law; when state law already provides civil and criminal remedies, Congress should resist the constant temptation to try to solve the nation's social and political problems with federal legislation enforced through federal court jurisdiction.<sup>252</sup> Thus, the Committee on Long Range Planning of the Judicial Conference of the United States proposed that federal criminal jurisdiction be limited to offenses against the federal government, criminal activity with substantial interstate or international aspects, sophisticated criminal enterprises requiring federal prosecutorial resources, serious high-level or widespread state or local government

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<sup>244</sup> See, e.g., PROPOSED LONG RANGE PLAN, *supra* note 115, at 19-32; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 35-67; Charles Clark, *Mules and Wagons—A Plea for Jurisdictional Reform*, 14 MISS. C. L. REV. 263, 266 (1994); Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 770-76 (1989). Proposals to save the federal courts by restricting their jurisdiction are not a new phenomenon. See Henry J. Friendly, *Averting the Flood By Lessening the Flow*, 59 CORNELL L. REV. 634 (1974).

<sup>245</sup> REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 38; see also PROPOSED LONG RANGE PLAN, *supra* note 115, at 25.

<sup>246</sup> REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 43; see also PROPOSED LONG RANGE PLAN, *supra* note 115, at 29.

<sup>247</sup> REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 48-49.

<sup>248</sup> *Id.* at 51.

<sup>249</sup> *Id.* at 55; see also PROPOSED LONG RANGE PLAN, *supra* note 115, at 27-28.

<sup>250</sup> REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 60-61.

<sup>251</sup> *Id.* at 62-63; see also PROPOSED LONG RANGE PLAN, *supra* note 115, at 29. Reliance on the EEOC is particularly cynical, given its huge and growing backlog. See, e.g., Peter T. Kilborn, *Backlog of Cases is Overwhelming Jobs-Bias Agency*, N.Y. TIMES, Nov. 26, 1994, at A6.

<sup>252</sup> See PROPOSED LONG RANGE PLAN, *supra* note 115, at 19-32.

corruption, and criminal cases raising highly sensitive local issues.<sup>253</sup> The same committee proposed that federal civil jurisdiction be limited to cases arising under the Constitution, matters involving foreign relations, actions involving the federal government, disputes between states, substantial interstate or international disputes, and matters requiring a nationally uniform rule.<sup>254</sup>

The jurisdictional retrenchment argument, however, like the rest of the court-capping rhetoric, is seriously flawed.

#### a. *Power and History*

Without saying so directly, the jurisdictional retrenchment argument suggests that some Constitutional impropriety results if Congress expands the scope of the federal courts' civil and criminal jurisdiction toward the limits in Article III.<sup>255</sup> That suggestion is simply wrong. It is a matter of black-letter law that Congress has plenary power over the jurisdiction of the lower federal courts and can assign to them any matter described in Article III.<sup>256</sup> Article III is expansive, including (among other jurisdictional grants) jurisdiction over cases "arising under"<sup>257</sup> the Constitution and federal statutes. Thus, the only real constitutional restriction on the ability of Congress<sup>258</sup> to

<sup>253</sup> Proponents of this argument deplore using federal legislation and jurisdiction as a major part of the war on drugs, the attempt to control firearms, or the campaign to reduce violence against women. See Rehnquist, *supra* note 242, at 1660. "Judicial federalism" refers to restraint in assigning the full measure of Article III jurisdiction to the federal courts; "legislative federalism" refers to Congressional restraint in using its full power under the Commerce Clause. See PROPOSED LONG RANGE PLAN, *supra* note 115, at 19.

<sup>254</sup> PROPOSED LONG RANGE PLAN, *supra* note 115, at 23-29.

<sup>255</sup> U.S. CONST., art. III, § 2, gives judicial power to the federal government over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority" and to "Controversies . . . between Citizens of different States."

<sup>256</sup> See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 202 (2d ed. 1994); CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 35 (4th ed. 1983). There may be limits on congressional power to restrict the jurisdiction of the federal courts—particularly if it does so in violation of other constitutional provisions. See CHEMERINSKY, *supra*, at 196. For example, suppose a jurisdictional statute restricting the rights of women to federal courts or one preventing Supreme Court review of certain cases because of dissatisfaction with Supreme Court precedent. Such restrictions would clearly violate constitutional provisions. See *Ex parte McCordle*, 74 U.S. (7 Wall) 506 (1869). For a discussion of the *McCordle* problem, see Chemerinsky, *supra*, at 172-86.

<sup>257</sup> U.S. CONST. art. III, § 2.

<sup>258</sup> Two proponents of a small, elite federal judiciary have recently suggested that if Congress fails to exercise jurisdictional restraint, the federal courts could do so on their own. See Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 Miss. C. L. Rev. 211, 239 (1994). Citing the federal courts' power to refuse to exercise jurisdiction under the abstention and forum *non conveniens* doctrines, Parker and Hagin argue that the courts have "unilateral, inherent powers" to restrict their own jurisdiction if Congress will not control its excesses:

The development in the federal courts of relatively distinct abstention doctrines illustrates especially well the inherent powers of the courts to re-



"federalize" the civil and criminal law is the minimal limit found in the Commerce Clause.<sup>259</sup>

With the constitutional aspect removed, the jurisdictional retraction argument relies mainly on tradition. Historically, Congress has not used the full measure of its Commerce Clause power, nor has it assigned the full measure of Article III jurisdiction to the courts. But tradition can change as congressional perceptions of national policy change. Indeed, the reach of federal jurisdiction has repeatedly ex-

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respond to the excessive enlargement of federal court jurisdiction by Congress. . . . [C]lose attention to the basic principles infusing the abstention doctrines illuminates that, should Congress continue to create "federal" crimes and causes of action exceeding the bounds of federalism and federal court adjudicative ability, the federal courts will have no choice but to concomitantly expand the exercise of their inherent, "abstention" powers—so as to "check" the inefficient, Judiciary-subverting and federalism-thwarting excesses of the Legislature.

*Id.* at 239 (footnotes omitted). Parker and Hagin's argument depends upon a very fundamental misunderstanding of congressional control over federal jurisdiction. There is a lively debate among scholars over whether the courts should exercise all the jurisdiction conferred by Congress or should abstain in a narrow range of cases. Compare Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1829 (1988) (arguing that judicial abstention usurps congressional power) with David L. Shapiro, *Reflections on the Allocation of Jurisdiction Between State and Federal Courts: A Response to "Reassessing the Allocation of Judicial Business Between State and Federal Courts,"* 78 VA. L. REV. 1839, 1845 (1988) (arguing that "history, tradition, and policy support the existence of limited judicial discretion . . . to refrain . . . even when the existence of jurisdiction is clear"). Supporters of the Shapiro position can point to Supreme Court holdings on abstention. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Forum *non conveniens* cases also support the Shapiro position. See, e.g., *Piper Aircraft Corp. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

Nevertheless, no case has held and no commentator (except Parker and Hagin) has argued that the courts could persist in refusing to exercise jurisdiction in the face of congressional insistence. Ultimate congressional control is assumed. See, e.g., Shapiro, *supra*, at 1845 ("[T]he legislature has the burden if it wishes to broaden or narrow the scope of this discretion in a particular area."). One commentator goes so far as to suggest cooperative "dialogic" control, but stops well short of arguing for a "unilateral, inherent" power in the courts to refrain wholesale. Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U. L. REV. 1 (1990).

Analysis of the abstention and forum *non conveniens* doctrine reveals the fundamental error in the Parker-Hagin thesis. The doctrines clearly are not of constitutional stature; either they are constructions of jurisdictional statutes, or they are rules of federal common law. Either way, Congress has the power to abolish or modify both doctrines, as it has done with forum *non conveniens*. See 28 U.S.C. § 1404 (1994). Thus, if the federal courts adopt the Parker-Hagin thesis and refuse to hear "inappropriately federalized" actions, Congress may nullify that refusal and insist that the courts hear the cases. No court or commentator has ever stated that the courts could willfully refuse to hear matters within Article III in the face of Congress's explicit jurisdictional command.

<sup>259</sup> Until quite recently, there were no meaningful restrictions on congressional power under the Commerce Clause. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971). That may be changing given the Court's recent holding in *United States v. Lopez*, 115 S. Ct. 1624 (1995). Or it may be that Congress was sloppy in drafting the statute at issue in *Lopez*, and its accompanying legislative findings, and that as long as Congress does not repeat the error it will retain plenary Commerce Clause power.

panded and contracted in response to changing congressional appraisals of the need for federal solutions to social, political, and economic problems.<sup>260</sup> In the end, the scope of federal jurisdiction has hinged less on theory and tradition and more on politics and expedience. In the words of Professor Warren: "[T]he Federal judicial system has not been a logical development on lines of consistent theory; it has been the product of temporary necessities and emergencies, arising from both political, sectional, and economic conditions. It has not been the embodiment of the theories of any particular party. . . ." <sup>261</sup>

b. *Reality and Politics*

The thrust of the jurisdictional retrenchment argument is that large expansions of the appellate judiciary will be unnecessary if Congress exercises proper jurisdictional restraint. Thus, the real issue in the court-capping debate is not whether jurisdictional retrenchment is a good idea, but whether it is realistic to pin hopes of reducing federal appellate caseloads on jurisdictional retrenchments. Given that Congress wields plenary power over federal jurisdiction, the only real question is: will Congress do it?

The prospects for such a retrenchment are bleak, to say the least. Even the most seemingly sensible federal jurisdiction reform proposals have a knack for prompting spirited opposition. Many of the Federal Courts Study Committee recommendations generated dissenting statements within the Committee. The corporate bar, for instance, opposed the abolition or restriction of diversity jurisdiction;<sup>262</sup> organized labor objected to the repeal of the FELA;<sup>263</sup> and the public interest bar opposed restrictions on § 1983 and habeas corpus claims by state prison inmates.<sup>264</sup> As a result, few of the proposals have even been introduced in Congress, let alone adopted.<sup>265</sup> Further, even if those controversial proposals were passed, they would not be an effec-

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<sup>260</sup> Perhaps the clearest illustration of this phenomenon is the fluctuation in criminal filings in the federal district courts, which presumably provides a gauge of the federalization of criminal law. Filings have not increased in either a linear fashion or in direct proportion to population growth. The number of current filings (just under 50,000), for example, is about half of the all-time high reached during Prohibition, and roughly equal to the number of filings in the early 1970s in spite of a major trough (less than 30,000) in the early 1980s. See FEDERALIZATION, *supra* note 129, at 51 fig. 1; PROPOSED LONG RANGE PLAN, *supra* note 115, at 7. As might be expected, "federalization" (and filings as a measure of federalization) has risen and fallen in response to general fluctuations in the national political perceptions of the appropriate balance between federal and state control.

<sup>261</sup> Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 598 (1925).

<sup>262</sup> See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 42-43.

<sup>263</sup> *Id.* at 63-64.

<sup>264</sup> *Id.* at 50-52.

<sup>265</sup> In the words of Justice (then Chief Judge) Breyer:

tive response to appellate overload. The Federal Courts Study Committee estimated that the combined effect of its recommendations would decrease the caseload of the circuit courts by only about seventeen percent.<sup>266</sup> A decrease of that magnitude would be wiped out by only a few years of normal caseload growth. What then would be subtracted from the jurisdiction of the federal courts so that new appellate judgeships would not be required?

Specific technical jurisdictional proposals thus are not a realistic substitute for expansion of the judiciary. But what of the more global admonitions of the Long Range Planning Committee against continued federalization of the civil and criminal law?<sup>267</sup> At least such proposals are of the right order of magnitude; if Congress vigorously avoided new federalizations and phased out old ones, the resulting reductions in caseloads could be large enough to forestall the need for more judgeships. The probability that Congress will adopt such global restraint, however, approaches zero. Congress "federalizes" the civil or criminal law in response to powerful political forces, and the vision of an elite federal judiciary, unsullied by cases based on improperly federalized crimes and civil claims, has no constituency large, numerous, or powerful enough to oppose groups that favor particular federalizing legislation. On occasion, a brave and principled legislator will fall on her sword and sacrifice re-election over an important principle, but how many will do so to protect the federal courts from the growth that increasing federalization will require?

### c. *Principle and Policy*

The jurisdictional retrenchment argument is not only bad politics, it is bad policy as well. Its fundamental error is to misconceive the function of federal jurisdiction. That jurisdiction exists for the good of the country—not for the good of the federal courts.<sup>268</sup> If Congress believes that "federalizing" some area of the law will benefit the country by controlling the drug problem, or by reducing firearm violence, or by minimizing the victimization of some protected class, it is not merely Congress's right, but Congress's duty to pass such legisla-

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All this is simply to say that the Committee may justifiably take credit for having thought about and crafted its case removal provisions with care. But, it would surprise me to find many of them enacted into law. If I am right, a thoughtful effort having been made, it will be difficult to advocate the door-closing solution to the federal appellate docket problem for some time to come.

Breyer, *supra* note 8, at 37; see also Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 39 EMORY L.J. 1, 48 (1996) (reducing either civil or criminal jurisdiction is not feasible as a political matter).

<sup>266</sup> REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 27.

<sup>267</sup> PROPOSED LONG RANGE PLAN, *supra* note 115, at 21, 24.

<sup>268</sup> See MORATORIUM, *supra* note 126, at 41.

tion,<sup>269</sup> even though it might discomfort the federal judges or require additional judgeships.<sup>270</sup>

The size of the task should control the size of the tool, not vice versa. The jurisdictional retrenchment argument, however, reverses this crucial priority. The argument starts with the premise of a small elite federal judiciary and then reasons that, because of its size, the judiciary should be allowed only a minimal core of federal jurisdiction. But surely Congress's job is to approach the problem from the front end. It must first determine, in light of changing social conditions, how much federal legislation and federal jurisdiction the nation needs. Then it must supply the federal courts with judgeships and other resources equal to the task. There is no "natural,"<sup>271</sup> or a priori, proper size for any institution. An institution's function dictates its appropriate form and size; and in our system the function of federal jurisdiction is to benefit the nation, not the courts.

Another reason to discount the jurisdictional retrenchment argument is the strong classist and elitist themes that run through it. The classism is most apparent in the argument's specific proposals to reduce federal jurisdiction. The Federal Courts Study Committee recommendations target diversity jurisdiction<sup>272</sup> (the suggestion is to "virtually eliminate" diversity jurisdiction or to raise the amount in controversy),<sup>273</sup> ERISA cases (the proposal is to create a \$10,000 amount in controversy requirement),<sup>274</sup> prisoner civil rights litigation (require exhaustion of state remedies),<sup>275</sup> social security cases (divert

<sup>269</sup> Provided, of course, that the proposed statute is within Congress's power under the Commerce Clause, and that the proposed jurisdictional grant falls within Article III limits.

<sup>270</sup> Similarly, if federal prosecutors believe that federal, rather than state, prosecution of an offense would serve the national interest, they should prosecute, even though it might increase the burden on the federal courts. Some members of the judiciary disagree with this last point; the Judicial Conference Committee on Long Range Planning, for instance, recommends that "the potential for harsher federal sentencing policies and greater capacity in the federal prisons should be insufficient grounds, by themselves, to warrant prosecution under a federal, rather than a state criminal statute." PROPOSED LONG RANGE PLAN, *supra* note 115, at 23. However, if federal prosecutors believe that stiffer federal sentences and greater prison capacity can make law enforcement more efficient, the streets safer, and citizens more satisfied with government, why should they forbear? Once again, the goal of federal criminal law is the welfare of the citizenry—not the welfare of the courts and the judges.

<sup>271</sup> Clearly, members of the judicial establishment disagree: "[W]e may be approaching the limits of the *natural growth* of the federal courts, and yet the surge in case filings at both the trial and especially the appellate level continues with no cessation in sight." REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 8 (emphasis added). Invoking the "nature" of an institution or equating what is "natural" with what is good is a well-known and thoroughly discredited jurisprudential technique. See JEREMY BENTHAM, THE THEORY OF LEGISLATION 49-52 (Richard Hildreth trans., 1975).

<sup>272</sup> See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 38.

<sup>273</sup> *Id.* at 39.

<sup>274</sup> *Id.* at 43.

<sup>275</sup> *Id.* at 48.

to an Article I court),<sup>276</sup> employment discrimination suits (divert to arbitration),<sup>277</sup> and the FELA and Jones Act<sup>278</sup> (repeal). These cases deal with the legal problems of the poorest and weakest of federal court litigants, groups that federal courts once took great pride in protecting.<sup>279</sup>

The elitist theme is more apparent in court-capping rhetoric than in specific provisions for reform. Proponents of jurisdictional retrenchment deplore wasting the time and energy of federal courts on "small cases—against first time [drug] offenders or low-level runners,"<sup>280</sup> and bemoan "an ever-increasing caseload with an ever-larger percentage . . . of relatively routine work which neither requires nor engages the abilities of a first-rate judge."<sup>281</sup> The deterioration of the caseload, they fear, "will undoubtedly adversely affect our ability to attract the people who have traditionally been drawn to this special court,"<sup>282</sup> and render the federal courts less effective as "forums for the big case—major commercial litigation . . . and federal actions under . . . laws regulating interstate commerce."<sup>283</sup>

<sup>276</sup> *Id.* at 55.

<sup>277</sup> *Id.* at 60.

<sup>278</sup> *Id.* at 62.

<sup>279</sup> The cases that would be dropped from the scope of federal jurisdiction are, of course, those cases that the courts of appeals currently relegate to track two appellate justice.

<sup>280</sup> Joseph R. Biden, Setting the Stage for the Nineties—Our Mutual Obligation, Address before the Third Circuit Judicial Conference (April 19, 1993), in *FEDERALIZATION*, *supra* note 129, at 30.

<sup>281</sup> William H. Rehnquist, Remarks at the Annual Dinner of the American Bar Ass'n (Aug. 9, 1976), in King, *supra* note 7, at 961. See also Jones, *supra* note 2, at 1493.

[A]s the docket is "dumbed-down" by an overwhelming number of routine or trivial appeals, judges become accustomed to seeking routine methods of case disposition. Their mental and organizational flexibility, so vital for performing the federal courts' classic tasks of defending the Constitution and harmonizing federal law, inevitably suffers. The situation is like that of a competitive tennis player forced to spend the bulk of his time rallying with novices. Just as the player's competitive edge will erode from lack of peer contact, so are judges' legal talents jeopardized by a steady diet of minor appeals.

<sup>282</sup> COURT ADMINISTRATION COMMITTEE REPORT, *supra* note 131, at 5.

<sup>283</sup> Justice Antonin Scalia, Remarks Before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents (Feb. 15, 1987), in *FEDERALIZATION*, *supra* note 129, at 44 n.114.

The elitism of the jurisdictional retrenchment argument also appears in the proposed destination for these trivial cases—the state courts. See Newman, *supra* note 244, at 768. The idea seems to be that penny ante federal question cases, while unworthy of the federal courts, are fine for the state courts. The problem, of course, is that the state courts are even more overloaded than their federal counterparts. State courts handle 52 times the caseload with only 15 times the judges. See *FEDERALIZATION*, *supra* note 129, at 23 n.60. Nor are the state court judges clamoring for the extra work or complaining that the federalizing of the civil and criminal law is usurping their prerogatives. The state court judges and prosecutors welcome the help.

The response of the jurisdictional retrenchment proponents to the overloaded state courts is that the state courts are "already geared to handle high volume." Newman, *supra*

Working on low-status, low resource cases undoubtedly seems tedious and professionally unrewarding to many circuit judges.<sup>284</sup> Their previous leadership positions in prestigious practice organizations and in academia permitted them to shun such work, and they see no reason to take it up upon ascending to the bench. This may help to

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note 129, at 194; *see* REPORT OF FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 40-41. Removing 70,000 cases from the federal courts would decrease their caseload by 30% while increasing state caseloads by only 1%. Proponents boldly assert that the states will hardly notice! Justice (then Judge) Breyer points out correctly, however, the fallacy of that contention:

The question is whether, now, in 1990, transferring several thousand cases from federal courts to state courts will help the human beings who have problems that translate into court litigation. It is difficult to see how the transfer will help. The state courts also have resource problems, often, as in Massachusetts, far more serious problems than those of federal courts in the same region. To that extent one is simply robbing Peter to pay Paul. And to suggest, as does the Committee, that the new, added burden on the far larger state systems will go unnoticed, is a bit like arguing that a new highway through Boston will cost less overall if we can convince federal, rather than state, taxpayers to pay for it.

Breyer, *supra* note 8, at 35. Justice Breyer could have added that there is a profound arrogance in suggesting that the way to preserve the status of the federal courts and the professional satisfaction of federal judges is to add to the burdens of state courts and judges who are even more overworked and who enjoy lower status and less professional satisfaction.

The arrogance toward state court judges is schizophrenic, depending on the context. When arguing that a larger federal judiciary would decline in quality because of inadequate attention paid to the appointments process, Judge Newman related the following:

I have seen the [weakness of the appointments process] . . . at work in the filling of vacancies in a large court—the state trial bench of Connecticut. In a meeting of those with significant power over appointments, the name of someone with dubious credentials is proposed. Even the assembled politicians express dismay. “You can’t be serious,” one tells the candidate’s sponsor. “Come off it,” is the reply. “That court has 127 judges—they’ll never even notice him!” The appointment is made. Few notice. The episode has been repeated in many states.

The point should not be overstated. A federal judiciary of 3,000 to 4,000 would include some extremely able people and a large number of competent people. But it would also include an unacceptable number of mediocre and even a few unqualified people. Today, most observers regard the overall quality of the federal judiciary as higher than that of the average state judiciary. At a size of 3,000 to 4,000, its quality would be indistinguishable from the most pedestrian of state judiciaries.

Newman, *supra* note 129, at 187-88. When arguing that federal question cases could be diverted to state courts without harm, however, Newman saw a more worthy state judiciary:

[S]tate courts are now authorized, indeed required, to adjudicate a vast array of claims arising under federal law, and they do so with considerable skill and faithfulness to the commands of federal statutory and constitutional law. Admittedly, the pressures arising from the need to seek reelection and even to secure reappointment present a risk to courageous decision making by state judges that federal judges enjoying life tenure do not face. But state judges have not only competence, they have courage; it would be a mistake to think that they would routinely be less protective of federal rights than would federal judges.

Newman, *supra* note 244, at 769-70.

<sup>284</sup> Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115, 136 (1991).

explain why opposition to expanding federal jurisdiction and the federal courts comes mostly from the judges themselves.<sup>285</sup> This limited base of support for jurisdictional retrenchment, and the self-serving motivation for that support should give Congress pause. Despite the hubris of the court-capping rhetoric, the federal courts are not a work of art to be appreciated aesthetically and to be protected from the profane and trivial. Nor are they debating or learned societies that exist to enhance the professional satisfaction of the judges. They are instead a national resource—supported by all the taxpayers (including those with boring, routine federal claims)—that Congress should deploy for the benefit of the nation. It may be that jurisdictional retrenchment is a good idea, but if so, it must be because of the good consequences for the country, not because it will save the judges from boring work or the federal courts from needed expansion.

#### IV ELITISM

In the preceding pages, we have argued that judicial opposition to increasing the number of appellate judges cannot be credibly based upon concerns over doctrinal inconsistency, the quality of appointees, or cost. We have also shown that opposition to expansion cannot rely upon the prospect of jurisdictional contraction. This suggests that other motives may form the true basis for judicial opposition to expansion of the federal judiciary. This part of the Article discusses some of these possible motives.<sup>286</sup>

##### A. Familiarity

Even if it were possible, judges simply might not want to use the Learned Hand model in all cases. Indeed, federal judges, hardly a reticent group, seem to accept their new, “administrative” role readily. No doubt part of this acceptance is due to a natural tendency to “view as appropriate that which is familiar.”<sup>287</sup> We believe, however, that a more important consideration is that the process of the new certiorari

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<sup>285</sup> See FEDERALIZATION, *supra* note 129, at 22.

<sup>286</sup> The REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 8, suggested that a small federal judiciary “increases the likelihood that federal intervention will be limited to those situations in which it is most clearly necessary.” As Professor Robel has pointed out, however, this argument assumes its conclusion; the argument assumes that federal judicial “interference” in state affairs should be minimal. Robel, *supra* note 284, at 135. The decision of how much federal judicial involvement should be allowed in state affairs, is, of course, one for Congress and the President to make. In any event, there is no reason to assume that an enlarged judiciary, operating much more in the Learned Hand model, would have the added leisure to “interfere” more aggressively in state affairs. Furthermore, it is always possible that today’s too small judiciary may not interfere “enough.”

<sup>287</sup> Robel, *supra* note 21, at 55.

courts permits the judges to replicate their role in private practice and thus to avoid cases they view with distaste.

### 1. *Replication*

Most judges come from a background in practice in which they acted as team leader rather than as solo practitioner.<sup>288</sup> A senior partner in today's average litigation practice has one or two junior partners, two or three associates, and any number of paralegals and secretaries working under her direction. The job of the senior partner is to supervise—she does not perform the discovery, the research, or the drafting except in the most important aspects of the most important cases. Those tasks are delegated to more junior lawyers, with the senior partner checking only generally to see that the work is done properly—and even most of the supervision is delegated (*e.g.*, “Joe, did you go over Mary’s research?”). The chambers of an appellate judge replicates that hierarchy. The judge (the senior partner) delegates most of the work to personal clerks (junior partners) and central staff (associates). Personal clerks review the work of staffers; the judge reviews the work of personal clerks; and serious judicial intervention is limited to the important cases.<sup>289</sup>

The effect of replicating practice, however, goes beyond the administrative structure of chambers.<sup>290</sup> Replication also insures that a judge will treat most carefully those areas of the law which she knew best in practice. Few judges had much experience as attorneys with social security cases, prisoner petitions, or the routine problems of small stakes litigants. On the other hand, most judges had a good deal of experience with antitrust, securities, mass tort, or general business litigation while in private practice.<sup>291</sup> This observation helps explain why the former set of cases is less likely to receive the Learned Hand treatment.

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<sup>288</sup> It is difficult to determine the practice background of the judges, primarily because so many are now appointed from other judicial positions. See Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 286-88 (1993). Of the 86 Bush federal appointees who did not come from the judiciary, 38 (44%) came from law firms of at least 25 lawyers. *Id.* at 287 tbl. 2. The comparable figure for Reagan appointees is 28%. *Id.* tbl. 2. See also POSNER, *supra* note 44, at 41 (stating that the average income of lawyers appointed to the federal bench in 1980 was \$131,000, indicating successful legal practice).

<sup>289</sup> Judge Wald was perhaps the first to notice this replicating effect. See Wald, *supra* note 11, at 778.

<sup>290</sup> A modern chambers also replicates, although less perfectly, the life of some law professors.

<sup>291</sup> Central staff, who do most of the work on the “lesser” cases, thus develop an expertise in those “mundane” matters. Because the judges do not share this expertise, judicial deference to the work of the expert staff becomes even more likely.



## 2. *Distaste*

The judicial pyramid also insures that judges do not have to spend a lot of time on distasteful cases involving such matters as employee benefits or prisoner complaints. Anyone who talks to judges knows they find those cases quite irksome. The vocation of a judge, however, is to do justice. Although it may be more interesting to read briefs prepared by great lawyers in cases that will be written up in *The New York Times* than it is to sift through *pro se* petitions, that should not necessarily make those cases professionally more rewarding. After all, a veteran's claim that the Government has improperly denied benefits should have at least as strong an appeal to a judge's sense of justice as a claim by a Fortune 500 corporation that it is the target of an illegal tender offer.

In real life, however, appellate judges prefer the notorious insider trading case to the mundane and private world of prisoner complaints. Judge Rubin once wrote that "[t]he desirability of being a federal judge is inversely proportionate to the number of routine cases brought to federal court . . . [t]he professional quality of those who seek a federal judgeship is inevitably affected by the prestige, the challenges and the responsibilities of being a federal judge."<sup>292</sup> Judge King has suggested that "[j]udges also resist more judges simply because mathematics dictates that as the size of the court increases, each judge's chance of drawing an important case diminishes."<sup>293</sup> For many judges, apparently, the lure of the job lies primarily in doing their job in big cases. Judging in small cases, often brought by those who claim they have been victimized by the Government, is far less desirable.

### B. An Elite Judiciary

A clue as to what may really be driving some judicial opposition can be gleaned from a recent article arguing against expansion of the federal judiciary. Written by Chief Judge Tjoflat, the article's anecdotal and *a priori* argument rejects the position, taken by Judge Reinhardt of the Ninth Circuit, that problems associated with doubling the size of the judiciary are soluble. Although Judge Reinhardt's argument is buttressed by statistical evidence and personal experience in a large court, Judge Tjoflat ignores the evidence and dismisses Judge Reinhardt's experience with his own jumbo court. Tjoflat writes:

Those who wish to create or maintain jumbo courts do so for a variety of reasons. Some are members of the jumbo court itself. The court is their Edsel, so it's okay. Presumably, they believe that if

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<sup>292</sup> Rubin, *supra* note 58, at 657.

<sup>293</sup> King, *supra* note 7, at 959.

they try hard enough to make the jumbo court work, it will work. Unfortunately, the most determined elephant will never leap like a gazelle.<sup>294</sup>

This kind of public discourse is rare among members of the federal bench and the language of Tjoflat's dismissal is quite instructive. Obviously, Judge Reinhardt struck an exposed nerve. Perhaps there is more at stake here than an argument over efficiency. Perhaps concerns over quality of life are central to members of the judiciary who oppose expansion. Judge Tjoflat writes that "life as a judge on a jumbo court is comparable to life as a citizen in a big city—life on a smaller court to life in a small town."<sup>295</sup> Thus, "judges in small circuits are able to interact with their colleagues in a more expedient and efficient manner than judges on jumbo courts."<sup>296</sup> Although this image is attractive, reality is somewhat different. As the earlier discussion shows, interaction among judges seems to be quite minimal even on relatively small courts like that of Judge Tjoflat. The small town metaphor is also disturbing. It suggests that judges associate a "small town" existence with comfort, and that Ninth Circuit type experience would be less homey and less comfortable. But once again the comfort of the judges is easily overvalued; courts exist for the good of the nation, not for the satisfaction of the judges.

More is involved than comfort, however; status is also a serious concern of opponents of judicial expansion. Status, however, usually enters the debate through a side door. Advocates of a smaller judiciary sometimes couch their arguments in terms of a need to keep job status high in order to attract quality applicants. The Federal Courts Study Committee expressed it this way:

The independence secured to federal judges by Article III is compatible with responsible and efficient performance of judicial duties only if federal judges are carefully selected from a pool of competent and eager applicants and only if they are sufficiently few in number to feel a personal stake in the consequences of their actions. Neither condition can be satisfied if there are thousands of federal judges.<sup>297</sup>

No data support the assertion that the judiciary will fail to attract quality candidates unless it remains a cozy, little group. A job as a federal judge is very attractive for many reasons: public service, prestige, in-

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<sup>294</sup> Tjoflat, *supra* note 129, at 73.

<sup>295</sup> *Id.* at 70.

<sup>296</sup> *Id.*

<sup>297</sup> REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 112, at 7. See also ABA REPORT, *supra* note 8, at 548-49 ("Some distinction between harder and easier cases must be drawn . . . to preserve the attractiveness and prestige of an increasingly demanding job."); Newman, *supra* note 129, at 187 ("An undue increase in the number of judges will inevitably lead to a reduction in the quality of new appointees.").

teresting colleagues and clerks, good pay and fringes, and perhaps of most importance these days, much less pressure than is found in practice. In fact, judges generally do not leave the bench. Indeed, "[a]lthough the absolute number of departures in the 1980s is large . . . the rate of departure was actually lower than it was in all but three other decades in the history of the federal judiciary."<sup>298</sup> There is thus no lack of excellent candidates eager to take a job as a federal judge. Something other than concern over the applicant pool must be at stake here.

When judges express concern over applicant quality, they really seem to be saying: "I would not have become a judge without the prestige associated with a small and elite body." Judge Wallace has written that "the call to maintain a small and exclusive federal appellate judiciary has not come from the public, or even from the bar. This sentiment appears to be championed by federal judges, and I assume it is rooted in a preference for a small-court culture."<sup>299</sup> Or, as then-Professor Frankfurter wrote long ago: "A powerful judiciary implies a relatively small number of judges."<sup>300</sup> Others are even more explicit about the relation among size, status, and power. Justice Scalia does not want a larger judiciary: "It only dilutes the prestige of the office and aggravates the problem of image."<sup>301</sup> The themes of power, elitism, status, and image appear with distressing regularity.

The task of the federal courts, however, is not to provide status and a comfortable life to the judges; but, instead, to bring justice to our citizens. To quote Judge Wallace: "The federal courts do not exist for the benefit of judges. They exist . . . solely to serve and to meet the needs of the public. Judges are, fundamentally, public servants. Judiciary policy must be dictated by concerns for the judiciary's mission, not by the personal preferences of its members."<sup>302</sup> Unfortunately, it is all too clear that concerns over comfort and status have driven much of the change in the way the circuit courts decide cases and much of the judiciary's advocacy for restricting its own size. Judge Reinhardt is brutal in his candor:

We federal judges are simply unable to abandon our notion of the appellate courts as small, cohesive entities operating in a pristine and sheltered atmosphere. It appears that, rather than surrender

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<sup>298</sup> EMILY FIELD VAN TASSEL, *WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE 1789 TO 1992*, at 9 (1993).

<sup>299</sup> J. Clifford Wallace, *The Case for Large Federal Courts of Appeals*, 77 *JUDICATURE* 288 (1994).

<sup>300</sup> Felix Frankfurter, *Distribution of Judicial Power Between the United States and State Courts*, 13 *CORNELL L.Q.* 499, 515 (1928).

<sup>301</sup> Stuart Taylor, *Scalia Proposes Major Overhaul of United States Courts of Appeals*, *N.Y. TIMES*, Feb. 16, 1987, §1 at 1.

<sup>302</sup> Wallace, *supra* note 299, at 288.

this wholly unrealistic and outdated vision of the federal judiciary, many of us are willing to ration justice, to eliminate some of the best qualities we once associated with appellate decisionmaking, and to shut the doors of the courts to the American people by severely restricting our jurisdiction.<sup>303</sup>

It is not only unfortunate, but also ironic, that this advocacy should come from judges who have sworn to “administer justice without respect to persons, and do equal right to the poor and to the rich.”<sup>304</sup>

## V

### THE ADVANTAGES OF EXPANSION

The preceding Part examined the arguments advanced by opponents of an enlarged federal judiciary. We believe that those arguments cannot justify the continued maintenance of a small, elite corps of circuit judges. A significant expansion of the circuit courts would not come without some costs, of course, but such an expansion would benefit society enormously. Most of the benefits should be apparent from the earlier discussion. Nonetheless, they are worth repeating.

Far and away the most important gain from an enlarged judiciary would be the extension of equal attention by the circuit judges to all litigants—rich and poor, weak and powerful. Before the basic American dream of equal justice under the law can be realized, all cases must be treated equally and with respect. That will not happen if judges must continue to engage in triage merely to get through each day’s work.

A second important benefit of an expanded judiciary would be the creation of more and better law. More judges, writing reasoned opinions in all of the cases brought before them, will create a vast new body of precedent. Contrary to the arguments of other writers on the subject, those precedents will make the law more certain; and that certainty will reduce the costs of all legal consumers and increase accessibility to the law. Computer data-bases will continue to make this enlarged law easier to use. Because this body of precedent will be the work of judges rather than staff, by definition, it will be better law.

Finally, enlarging the judiciary also will benefit society in a way that this Article has not yet touched upon: An enlarged judiciary would be more diverse culturally, geographically, and intellectually. The predominant view in this country is that racial, ethnic, and gender diversity is a good in itself. That certainly makes sense for the judiciary. It is very hard to believe that a culturally diverse bench does not have different dynamics and thoughts from a uniform one.

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<sup>303</sup> Reinhardt, *supra* note 2, at 1513.

<sup>304</sup> 28 U.S.C. § 453 (1994) (judicial oath of office).

Achieving cultural diversity in the federal judiciary, however, is hampered by the slow turnover among the judges. Thus, as women and minority applicants begin to achieve the seniority associated with service on the federal bench, there are relatively few openings for them. A significant increase in the number of judges, however, would create more appointment opportunities and would change the make-up of the bench.

Expansion of the federal judiciary would also enhance diversity in other ways. Circuit judges traditionally have been clustered in large urban centers. The appointment of more judges would likely lead to circuit judges haling from smaller cities or even rural areas. Those new judges would bring a different perspective to their job, a perspective which could easily affect the development of the law. Moreover, judges from cities like Toledo or Omaha would affect the attitudes of judges from bigger cities.<sup>305</sup> Adding more judges would also diversify the intellectual make-up of the courts. There would be more judges coming from public agencies, public interest groups, law schools, and small firms.<sup>306</sup> The perspective of these representatives and of their different constituencies would surely improve the quality of justice.

#### CONCLUSION

Congress established the United States courts of appeals to correct error at the district court level. For the first eighty years of their existence, the circuit courts performed that function as a common law appellate court should—visibly, collegially, personally, accountably, and equitably. The judges provided visibility by hearing oral argument in almost all cases. Litigants could see first hand that the court was familiar with their case and was willing and able to hear their arguments. A face-to-face conference of the panel followed argument, assuring a collective decision and allowing the judges to hear, consider, and respond to each other's views. Back in chambers, and with the help of a law clerk, the judges personally researched and wrote draft opinions and then circulated those opinions to other panel members. The courts guaranteed accountability by publishing most of those opinions and standing by their precedential effect. Finally, the judges used the same basic decisional method for almost all cases—large or small, antitrust or social security—and for all litigants—rich or poor, public or private, habitual or occasional. The court of appeals thus

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<sup>305</sup> Lawyers, clients, and judges will also benefit from a larger bench as it is likely that panels will sit in more cities, thereby reducing travel time and expense.

<sup>306</sup> If Judge Posner is correct and appointment to an enlarged judiciary is less attractive than appointment to a small judiciary, it is possible that fewer lawyers in elite law firms will seek appointment to the federal bench, a development that will *increase* diversity. See POSNER, *supra* note 44, at 99-100.

provided reassurance that the law and the courts treated all litigants equally.

This decision making process, which we have called the appellate ideal or the Learned Hand model, persisted until around 1970, when, in response to an overwhelming increase in volume, the appellate courts began to truncate the traditional model. Today, the circuit courts hear oral argument and conduct meaningful face-to-face conferences in only half of the cases, with a resultant loss of visibility and collegial input. Many cases get very little personal attention from the judges. Most of the research and opinion drafting are the bureaucratic task of dozens of staff attorneys, who seldom confer with the judges who are the titular authors of the opinions. Only a third of the courts' opinions are published; the remainder exist in a quasi-precedential netherworld, vastly reducing judicial accountability. Finally, the courts have abandoned the notion of one appellate method for all cases and all litigants. The significant cases, those brought by wealthy, powerful, or institutional litigants—receive the traditional appellate model. The routine, trivial cases—usually the ones brought by poorer, weaker litigants—are relegated to track-two appellate justice. For these cases (about half the total) the circuit courts have become certiorari courts, rather than the courts of mandatory appellate jurisdiction that Congress intended.

Bifurcation of the appellate process (*i.e.*, triage) is not the only available strategy for coping with the increase in appellate volume. Our approach, which saves the traditional appellate model, is to increase the number of judgeships in proportion to increases in caseload. The leadership of the judiciary (what we have called the Judicial Establishment) has rejected that option and has argued and lobbied consistently for restricting expansion.

The principal arguments offered against proportional increases in the size of the judiciary are weak. The argument that expansion would reduce the quality of the bench lacks empirical support. Judgeships are highly sought after and waiting lists are long. Moreover, even if the average quality of the judges were to decrease slightly, the average quality of appellate justice would *increase* because more cases would receive traditional appellate justice, and fewer would be relegated to staff attorneys and clerks.

Judgeships are costly in absolute terms, but not when compared to other national expenditures. For the amount that the federal government spends annually on the National Gallery of Art, circuit court capacity could be brought close to adequate levels. Further, while excessive cost may be a reason for Congress to refuse to grant additional judgeships, it is not an excuse for the judiciary to refuse to ask for them. Other seekers of federal funds show no such reticence, nor do

the judges themselves when it comes to expenditures for "imperial" courthouses and other forms of support.

The unstable law hypothesis, like the quality of the bench argument, is contradicted by the only available empirical studies. Moreover, the argument wrongly presupposes that legal consistency is the only goal of our appellate system; it discounts the equally important goal of maintaining enough capacity to decide all cases carefully, correctly, and visibly. Finally, the unstable law argument ignores several devices that could ensure legal consistency without sacrificing adequate capacity.

The jurisdictional retrenchment argument is a pipe-dream. Congress is not about to make radical cuts in federal jurisdiction to accommodate the judiciary's desire to remain small, nor should it; the size of the job should dictate the size of the tool, not vice versa.

The superficiality of these anti-expansion arguments suggests, and some judges candidly admit, that the desire to maintain collegiality and prestige is a major reason for judicial opposition to expansion. There is nothing intrinsically wrong with seeking collegiality and prestige; most workers prefer higher status jobs in cordial, cooperative settings. And expansion *might* (although it is not clear that it *will*) diminish one or both of those desiderata. The important question, however, is how much should be sacrificed for the judges' prestige and collegiality, and who will do the sacrificing. The level of prestige and collegiality inure primarily to the benefit of the judges, while the loss of capacity is endured by the nation and the litigants—mostly the poor and powerless litigants. This externality, confirmed by the arrogance and elitism of some anti-expansion rhetoric, makes clear the judiciary's conflict of interest. Further, it adds emphasis to this Article's major theme—the federal courts exist for the good of the nation, not the judges. In what other enterprise, public or private, would we tolerate a 50% loss of capacity in return for a minor fringe benefit for the workers? It may be that the anti-expansion rhetoric represents the views only of the judiciary's leadership and planning apparatus, and not the majority of circuit judges. If so, it is time for Congress to hear from the remainder, as well as from the bar and the public. There is still time to save the Learned Hand tradition in the circuit courts—but not much.