Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals

*Marin K. Levy**

Abstract

Federal appellate judges no longer have the time to hear argument and draft opinions in all of their cases. The average annual filing per active judgeship now stands at 330 filed cases per year—more than four times what it was sixty years ago. In response, judges have adopted case management strategies that effectively involve spending significantly less time on certain classes of cases than on others. Various scholars have decried this state of affairs, suggesting that the courts have created a "bifurcated" system of justice with "separate and unequal tracks." These reformers propose altering the relevant constraints of the courts, primarily by increasing the number of judges or decreasing the judiciary's caseload. These approaches, however, have not gained political traction thus far and seem unlikely to in the foreseeable future.

This Article takes a realist approach and argues that we should recognize judicial attention for what it is—a scarce resource—and assess whether there is evidence that the courts are allocating that resource improperly. Loosely borrowing the framework of resource allocation from the political science and economics literatures, this Article considers how to apply the concepts of inputs and outputs to the work of the federal appellate courts, suggesting judicial attention as the input and a combination of error correction and law development as the output. It then makes the preliminary case that the courts' case management techniques in fact largely comport with an output-maximization approach, while still limiting inequality of outputs across cases. This Article concludes that the courts' overall strategy nevertheless presents opportunities for enhancement. It suggests several improvements, focusing on the review structure of cases that receive the least amount of judicial attention, to help ensure that all federal cases receive an appropriate form of appellate review.

---

* Associate Professor, Duke University School of Law. J.D., Yale Law School, 2007. Thanks to Ian Ayres, Will Baude, Joseph Blocher, Jamie Boyle, Curt Bradley, Rachel Brewster, Josh Chafetz, Guy Charles, Brianne Gorod, Chris Griffin, Bert Huang, Jack Knight, Alex Potapov, Stephen Sachs, Neil Siegel, Karen Tani, and Ernie Young, as well as to the participants of the George Mason, George Washington, Duke, William & Mary, and U Street Legal Workshops. Special thanks to Grayson Lambert for excellent research assistance, and to the editors of *The George Washington Law Review*. All views expressed herein, as well as any errors and solecisms are, of course, my own.

TABLE OF CONTENTS

INTRODUCTION 402
I. JUDICIAL ATTENTION AS A SCARCE RESOURCE 407
A. *The Rising Caseload* 407
B. *Unanswered Calls for Change* 409
II. RESPONSES TO SCARCITY 413
A. *The Judicial Response* 414
B. *The Scholarly Response to the Judicial Response* 420
III. EVALUATING THE RESPONSES TO SCARCITY: A PRELIMINARY DEFENSE OF THE JUDICIARY 422
A. *Exploring the Resource Allocation Framework* 423
B. *Maximization in Theory* 429
C. *Matching Theory and Practice* 435
D. *Evaluating the Framework* 439
IV. TESTING AND IMPROVING ALLOCATION PRACTICES 440
A. *Testing Claims* 441
B. *Improving Case Management Practices* 443
CONCLUSION 446

INTRODUCTION

For the past several decades, appellate judges and court scholars have struggled with the existence of, and potential responses to, an overwhelming predicament: the growth of the federal appellate caseload has far outpaced the growth of the federal appellate judiciary.[1] The average annual filings per active judgeship stood at 73 in

[1] *See* Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 543 (1969) ("[T]he federal appellate caseload is likely to continue to increase for the foreseeable future and . . . the resulting congestion poses a serious threat to the institutional role of the courts of appeals."); 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, 877 (1983) ("As the work load of the federal courts and the burdens imposed on federal judges have increased during the last two decades, concern over the effect of these trends on the administration of justice has risen apace."); Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 634 (1974) (commenting on the "crisis in the federal courts" that has been caused by the rising caseload); Carolyn Dineen King, Commentary, *A Matter of Conscience*, 28 HOUS. L. REV. 955, 955 (1991) ("What is the reality of the federal bench today? Insofar as the Court of Appeals for the Fifth Circuit is concerned, we have experienced in the last thirty-two years an exploding case burden."); Diarmuid F. O'Scannlain, *Striking a Devil's Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473, 473 (2009) (stating that "skyrocket[ing]" caseloads in the federal courts between 1960 and 1988 caused a "crisis"); Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1050 (2006) ("[I]f the federal caseload continues to grow . . . the strain on federal appellate courts, as they are now constituted . . . may become acute, even

1950,[2] jumped to 137 by 1978,[3] and hovers around 330 today[4]—even though the number of judgeships has nearly tripled in that time.[5] No wonder then that the phrase "crisis in volume" was coined,[6] and is now commonly used,[7] to describe the workload of the federal courts of appeals.

To cope with their expanding caseload, appellate courts have adopted a wide array of case management techniques.[8] These include holding oral argument[9] and publishing opinions in a smaller percentage of cases,[10] and having staff attorneys prepare dispositions in a larger percentage of cases.[11] Although specific practices vary consid-

---

unbearable."); William H. Rehnquist, Address, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 3 ("Simply put, time and again the nation has looked to the federal courts to handle a larger and larger proportion of society's problems. . . . The point is that as a result of people looking to the federal courts those courts have become overburdened and the system has become clogged.").

2 *See* COMM'N ON STRUCTURAL ALTS. FOR THE FED. COURTS OF APPEALS, FINAL REPORT 14 (1998). Note that this figure takes into account filings from the Court of Customs and Patent Appeals and Court of Claims.

3 *See id*. Note that this figure takes into account filings from the Court of Customs and Patent Appeals and Court of Claims.

4 *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 12 (2011) [hereinafter 2011 ANNUAL REPORT]. This figure was arrived at by taking the number of appeals filed in 2011 (55,126) and dividing it by the number of authorized judgeships (167). Note that these figures exclude data for the U.S. Court of Appeals for the Federal Circuit.

5 Specifically, the number of judgeships has increased from 65 in 1950 to 167 in 2012 (excluding the U.S. Court of Appeals for the Federal Circuit). *See How the Federal Courts Are Organized*, FED. JUDICIAL CTR., http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu3c&page=/federal/courts.nsf/page/A783011AF949B6BF85256B35004AD214?opendocument (last visited Nov. 20, 2012). Two caveats about this data bear mentioning. First, I borrow the metric that the Administrative Office of the U.S. Courts employs—average filing per judgeship—but this metric does not take into account the contribution of senior judges. *See* 2011 ANNUAL REPORT, *supra* note 4, at 12, 32. Second, not all cases place equal strain on the federal courts and, as Judge J. Harvie Wilkinson has written, "[s]ome of the increase came in categories characterized by relatively straightforward cases" such as prisoner petitions, during part of this time period. J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1158 (1994).

6 DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974). The discussion of a caseload "crisis" dates back even further, to at least the 1960s. *See* Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 689 n.8 (2000) (citing Carrington, *supra* note 1).

7 *See* Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1112 (2011) (describing the "flourishing" and "voluminous" literature on the "crisis of volume").

8 *See generally* Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315 (2011) (describing and analyzing the case management practices of five of the federal courts of appeals).

9 *See infra* notes 83–85 and accompanying text.

10 *See infra* notes 79–82 and accompanying text.

11 *See infra* notes 86–90 and accompanying text.

erably from circuit to circuit,[12] their animating rationale is the same: to keep the courts running, some sets of cases must receive considerably less judicial attention than others.[13]

The academy has responded to this overall case management strategy with skepticism and even criticism.[14] Court scholars have decried the disparate treatment of cases, arguing that the appellate courts have created a two-tiered system of justice with "separate and unequal tracks" for reviewing appeals.[15] A few have gone so far as to suggest that the appellate courts effectively have given themselves certiorari power, deciding which cases to hear and which to all but ignore.[16] To ameliorate the current situation, these scholars, along with other academics and judges, have called for changes to the courts' constraints—an increase in the number of judges[17] or a decrease in the number of cases.[18] Although either of these proposals would help relieve the strain on the courts, neither has gained political traction in the decades since they were first proposed. In fact, the ratio of cases to judges has grown worse, not better, since these pleas were initially

---

12 *See* Levy, *supra* note 8, at 365.

13 As the Second Circuit has explicitly stated: "appellate courts certainly have the inherent authority to allocate scarce judicial resources among the petitions and appeals that press for their attention, and such allocations become especially necessary in this era of burgeoning appellate dockets." Pillay v. I.N.S. 45 F.3d 14, 17 (2d Cir. 1995) (per curiam).

14 *See* JOE S. CECIL & DONNA STIENSTRA, FED. JUDICIAL CTR., DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS 9 (1987), http://www.fjc.gov/public/pdf.nsf/lookup/dcwa4cts.pdf/$file/dcwa4cts.pdf ("The procedures adopted by the courts have not always been enthusiastically received by . . . court scholars . . . .").

15 *See* David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1668 (2005).

16 *See* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 275 (1996); *see also* Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 34 (2007).

17 *See* Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52, 53 (calling upon Congress to double the size of the federal appellate judiciary); Richman & Reynolds, *supra* note 16, at 278 (recommending 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"); Vladeck & Gulati, *supra* note 15, at 1672 ("If the cause of [publishing fewer opinions] is the overburdening of judges, then the optimal solution is likely an increase in judicial resources.").

18 *See, e.g.*, Friendly, *supra* note 1, at 634–35 ("If a stream is in mounting flood, common sense would dictate consideration of measures to divert a portion of the flow. I believe that solutions [for the courts of appeals] lie in that direction . . . ."); Jon O. Newman, *Litigation Reforms and the Dangers of Growth of the Federal Judiciary*, 70 TEMP. L. REV. 1125, 1130 (1997) ("[T]he only realistic way to slow the growth of the federal judiciary is to reallocate some cases now within federal jurisdiction to the state courts.").

made.[19] Accordingly, the proposals to relieve the courts' constraints remain aspirational for the foreseeable future.

What is needed during this "crisis"—and what has been missing from the academic literature—is an analysis of how courts should work within their constraints.[20] This Article begins to fill that void. Unlike much of the existing scholarship, this Article proceeds from the premise that the key variables of the appellate workload—the number of judges, the size of their caseload, and the efficiency of those judges—are not going to change in a favorable way anytime soon. Judges only have so much time to decide so many cases, meaning, in an economic sense, that judicial attention is a scarce resource.[21] When put in these terms, the question that comes into focus is not could the courts do better with greater resources, but rather, is there reason to think they could be doing better with the resources they have? With the federal appellate courts acting as the courts of last resort for more than 55,000 cases annually,[22] the answer to this question is vital for tens of thousands of litigants each year, not to mention

---

19 Specifically, the ratio of filings per judgeship was 77 in 1964, 137 in 1978, 194 in 1984, 237 in 1990, and 300 in 1997. *See* COMM'N ON STRUCTURAL ALTS. FOR THE FED. COURTS OF APPEALS, *supra* note 2, at 14 (note that the figures from 1964 and 1978 take into account filings from the Court of Customs and Patent Appeals and Court of Claims, whereas the figures from 1984, 1990, and 1997 take into account filings from the Court of Appeals for the Federal Circuit). As mentioned previously, the ratio from 2011 is approximately 330. *See supra* note 4 and accompanying text.

20 Some scholars and judges have considered the related question in the district courts of how, in a time of constrained resources, judges should divide their time between "managing" their caseloads and actually considering cases, including, most famously, Judith Resnik. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982). For a more recent consideration of this question, see Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 689–97 (2010). Scholars have also considered how limited judicial capacity has affected particular areas of substantive law. *See* Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422 (2012); Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. (forthcoming 2013).

21 Others, of course, have recognized that judicial time or attention is scarce. *See, e.g.*, Cathy Catterson, *Changes in Appellate Caseload and Its Processing*, 48 ARIZ. L. REV. 287, 287 (2006) ("Judicial time is now one of the scarcest items in our society."); Frank I. Michelman, Anastasoff *and Remembrance*, 58 ARK. L. REV. 555, 568 (2005) (noting the "scarce resources of judicial time and care"). Unlike this previous scholarship, this Article focuses on how the scarcity of judicial time should affect the allocation of that time.

22 *See* 2011 ANNUAL REPORT, *supra* note 4, at 12. Specifically, the Administrative Office of the U.S. Courts reports that there were 55,126 cases filed in the U.S. Courts of Appeals in 2011, 55,992 cases filed in 2010, and 57,740 cases filed in 2009 (note that these figures exclude filings from the U.S. Court of Appeals for the Federal Circuit). *Id.* During the 2010 Term of the U.S. Supreme Court, eighty-six cases were argued and eighty-three were disposed of, *see* 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 13 (2011), http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf, effectively rendering the court of appeals the court of last resort in nearly all federal cases.

countless others impacted or bound by the courts' decisions. Perhaps more fundamentally, this question goes to the core of how to understand and improve appellate adjudication in our federal courts.

Borrowing the lessons of resource allocation from the political science and economics literatures, this Article offers a new framework for how to view the courts' response to their resource constraints. Part I begins by describing the burgeoning appellate caseload and shows how judicial attention has become a scarce resource. This Part then discusses proposals developed by members of the academy and judiciary to alter the constraints of the courts—predominantly through increasing judgeships and limiting jurisdiction—and explains why these proposals lack political promise. Part II delineates the ways in which the courts have coped with this scarcity, showing how they ultimately are spending more time on some classes of cases than on others. This Part then turns to the way academics have responded to the courts' case management practices. Scholars generally have viewed these practices as deeply problematic, suggesting that this two-track system divides the "haves" from the "have-nots" and claiming that the courts have abandoned one of their core functions—error correction—in most cases.

Part III then assesses whether there is reason to believe the courts have poorly responded to scarcity, or whether they are simply doing the best they can within their constraints. To answer this question, this Part loosely applies the framework of resource allocation theory to the courts of appeals, exploring the concepts of inputs and outputs. It ultimately identifies judicial attention as the input and error correction and law development as the outputs, and describes how courts, given their limited input, could theoretically go about maximizing those two outputs. The discussion then compares that idealized system to the actual practice of appellate courts, and finds that current case management practices comport fairly well with an attempt by the courts to maximize their error-correction and law-development functions with their limited resources.

Yet demonstrating that these practices largely are consistent with an output maximization approach does not place the case management practices of the courts above scrutiny. Part IV begins by noting that the courts' allocation strategy rests on certain claims about which cases are less likely to need judicial attention, and argues that these claims can and should be tested. After outlining ways of testing such claims, Part IV then suggests ways to improve current court practice at the margins, including increasing the specialization of staff attor-

neys and facilitating the identification of those traditional nonargument cases that are in need of greater judicial attention. The Article concludes that while it is useful to consider the ideal conditions of the courts, it is only by confronting and working within their constraints that we can meaningfully improve the federal appellate system.

I. Judicial Attention as a Scarce Resource

This Part explains how judicial attention has come to be a scarce resource. Section A provides context, by describing how the rate of cases per judgeship has grown precipitously in the federal courts of appeals since the middle of the twentieth century. Section B then discusses the various proposals that scholars and judges have offered in response to the rising caseload, including ways to reduce the number of filings, increase the number of federal appellate judges, and improve efficiency in the courts of appeals. But as this Part shows, because none of these proposals seems likely to be adopted in the near future, the demand for judicial attention will continue to exceed the supply of judicial time, thereby rendering judicial attention a scarce resource.

A. The Rising Caseload

The story of the rise in filings vis-à-vis judges is one of stress and adaptation. From the inception of the federal courts of appeals through the first half of the twentieth century, judges enjoyed the time necessary to decide cases as they saw fit.[23] In 1950, the average annual filings per active judge was only seventy-three cases,[24] which meant that courts could hold oral argument, consider the merits of each case in chambers, and publish full-length opinions in every matter.[25]

This capacity, however, was soon lost. Over the next few decades, the annual filings per federal appellate judgeship nearly doubled, reaching 137 by 1978.[26] This surge has been attributed

---

23 *See* Richman & Reynolds, *supra* note 16, at 341 (noting that the traditional model of appellate decisionmaking lasted until about 1970).

24 *See* Comm'n on Structural Alts. for the Fed. Courts of Appeals, *supra* note 2, at 14 (note that this figure takes into account filings from the Court of Customs and Patent Appeals and Court of Claims).

25 *See* Richman & Reynolds, *supra* note 16, at 278 (describing the era of Judge Learned Hand as a time when oral argument was heard in "virtually all cases," judges conferenced together to discuss the merits, and then one panel member drafted an opinion that "carefully state[d] the relevant facts and law").

26 *See* Comm'n on Structural Alts. for the Fed. Courts of Appeals, *supra* note 2, at 14 (note that this figure takes into account filings from the Court of Customs and Patent Appeals and Court of Claims).

largely to a flurry of congressional activity in the 1960s, which led to new federal rights and "mechanisms for obtaining them."[27]

During this time, judges and scholars speculated about whether an upper bound existed on how many cases an appellate judge could effectively review and what that limit might be.[28] Writing in 1964, Charles Wright observed: "Plainly there is some limit on the extent to which the courts can increase their output to match their intake."[29] Ultimately he suggested that the limit was approximately 180 cases per panel, or 60 cases per judge.[30] Other estimates did not stray far. Judge Ruggero J. Aldisert of the Court of Appeals for the Third Circuit arrived at 80 cases per judge as an upper limit;[31] Paul Carrington, Daniel Meador, and Maurice Rosenberg suggested that the optimal number was 100 cases.[32] But whatever the threshold, by the late 1970s it had been crossed.

Since that time, the ratio of filings to judges has increasingly deviated from the projected limits. According to the Commission on Structural Alternatives for the Federal Courts of Appeals, the filings per judgeship increased from 194 in 1984, to 237 in 1990, and 300 in 1997.[33] This figure reached a high water mark in 2008, with nearly 370 cases per active judge.[34] Although there has recently been a slight

---

27 King, *supra* note 1, at 956–57 ("What are the reasons for this increase in the caseload and what are its results? . . . The legislation in the 1960s which increased rights and created mechanisms for obtaining them has resulted in an explosion of litigation, particularly in the federal courts."). Other factors also contributed to the surge, including the "creation of many new federal rights" by the courts through "judicial interpretation of the Constitution" and "a variety of procedural developments such as expanded use of class actions and 'one-way' shifting of attorneys' fees." FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 5 (1990).

28 *See* PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 143–46 (1976); Ruggero J. Aldisert, *Appellate Justice*, 11 U. MICH. J.L. REFORM 317, 320 (1978); Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 956–58 (1964).

29 Wright, *supra* note 28, at 956.

30 *Id.* at 957.

31 *See* Aldisert, *supra* note 28, at 320 (specifically, Judge Aldisert asserted that an appellate judge could read no more than 240 sets of briefs per year, which would mean 240 cases per three-judge panel or 80 cases per judge).

32 CARRINGTON ET AL., *supra* note 28, at 143–46. Several decades later, the Judicial Conference decided that 255 was the maximum number of merits appeals that a judge could comfortably decide per year. *See* GORDON BERMANT ET AL., FED. JUDICIAL CTR., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS 8–9 (1993). Even considering this new threshold, the number of filings per active judge in 2011 was still nearly twenty-five percent higher. *See supra* note 4 and accompanying text.

33 *See* COMM'N ON STRUCTURAL ALTS. FOR THE FED. COURTS OF APPEALS, *supra* note 2, at 14 (note that these figures include the Court of Appeals for the Federal Circuit).

34 *See* 2011 ANNUAL REPORT, *supra* note 4, at 12. (Note that these figures exclude the Court of Appeals for the Federal Circuit. Note, too, that in 2008, there were only 166 authorized

decline in filings (the number of cases per active judge dipped to 330 in 2011[35]), the ratio remains remarkably high at more than three (or as much as five) times the earlier projected limits. This, in turn, means generally that the courts of appeals continue to be overburdened, and specifically that the judges continue to lack the ability to give each case full attention.

B. Unanswered Calls for Change

As the workload of federal appellate judges became increasingly arduous, judges and scholars began offering proposals to alleviate the burden. In light of the fact that workload is understood as the number of filings divided by the number of judges, it is not surprising that most proposals have been aimed at either decreasing the numerator in the equation (the number of appeals that are filed) or increasing the denominator (the number of appellate judges).[36]

Regarding the first option, many federal judges have argued for decades that the federal appellate courts would benefit from having fewer cases. Judge Henry Friendly of the Second Circuit famously outlined various proposals to limit federal appellate jurisdiction in his lecture *Averting the Flood by Lessening the Flow*.[37] He argued, inter alia, for limits on the availability of collateral attack on judgments of conviction and for the creation of a Court of Tax Appeals that would remove federal tax cases from the dockets of the appellate courts.[38] Judge Friendly's main target, however, was diversity jurisdiction, which he argued should be eliminated altogether.[39] Many other federal appellate judges similarly have called for abolishing or at least minimizing diversity jurisdiction,[40] including Judges Irving Kaufman,[41]

---

judgeships instead of 167, due to the Court Security Improvement Act of 2007, *see id.*, which affected the calculation of the number of cases per active judgeship.)

35 *See id.*

36 As Ewrin Chemerinsky and Larry Kramer write, "[o]ne possibility is to increase the number of judges . . . . The alternative is to reduce the number of cases in the federal courts." Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. Rev. 67, 94–95.

37 Friendly, *supra* note 1, at 634.

38 *See id.* at 643–44.

39 *See id.* at 640–41.

40 By contrast, some state court judges have argued that abolishing diversity jurisdiction would only further burden their own dockets. *See, e.g.*, Sol Wachtler, *Diversity Jurisdiction: Case for Retention*, N.Y. L.J., Jan. 17, 1990, at 39 ("[E]limination of federal diversity jurisdiction could prove disastrous to state court systems . . . .").

41 *See* Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator*, 57 Fordham L. Rev. 253, 267–68 (1988) (calling diversity jurisdiction a "plague" on the federal courts).

Wilfred Feinberg,[42] and Jon Newman[43] of the U.S. Court of Appeals for the Second Circuit, as well as Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit.[44] Judge Posner has also argued for, among other proposals, reducing the scope of federal appellate review of administrative decisions.[45] And Judge Edith Jones of the Fifth Circuit has suggested eliminating prisoner civil rights cases from federal appellate dockets and reforming the review of habeas corpus cases.[46] All of these proposed measures have the same goal: in the words of Judge Newman, "to limit the growth in federal court caseloads in order to preserve the essential nature of the federal courts."[47]

Regarding the second option, many court scholars and a few judges have advocated expanding the appellate bench[48] to ameliorate workload concerns. As Judge Richard Arnold of the Eighth Circuit wrote, "[t]he remedy" to the courts' current workload crisis "is to create enough judgeships to handle the volume."[49] The main point of divergence among such proponents is the number of judges to add.[50]

---

42 *See* Wilfred Feinberg, *Is Diversity Jurisdiction an Idea Whose Time Has Passed?*, 61 N.Y. St. B.J. 14, 14 (1989).

43 *See* Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. Chi. L. Rev. 761, 771–76 (1989).

44 *See* Richard A. Posner, The Federal Courts: Crisis and Reform 176 (1985).

45 *See id.* at 160–62.

46 Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 Tex. L. Rev. 1485, 1502 (1995) (book review).

47 Newman, *supra* note 43, at 776.

48 In addition to those scholars and judges who have advocated expanding the bench, there are some who have pointed to the need to ensure that existing judgeships are actually filled. *See, e.g.*, Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. Rich. L. Rev. 659, 704 (2007) (describing the ramifications for the courts of appeals of unfilled vacancies, including an increased reliance on senior judges). Although providing that existing vacancies are filled will ensure that the strain on current judges does not grow needlessly worse, filling the vacancies alone cannot solve the caseload difficulties. As of December 2012, the Administrative Office of the U.S. Courts reports that there are fifteen vacancies in the U.S. Courts of Appeals, only seven of which have nominees pending. *See Judicial Vacancies*, U.S. Cts., http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx (last visited Dec. 24, 2012). Although the number of vacancies is not trivial, it is a mere fraction of the number of additional judgeships that some scholars and judges have said are needed to respond to the increase in caseload. *See infra* notes 51–52 and accompanying text.

49 Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir. 2000).

50 Of course, some have opposed increasing the number of judges for fear, inter alia, that the quality of the judiciary would be compromised. This sentiment is perhaps best captured by Justice Frankfurter: "a steady increase in judges . . . is bound to depreciate the quality of the federal judiciary and thereby adversely to affect the whole system." Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring). For others of this view, see Edwards, *supra* note 1, at 918 ("It seems clear . . . that we cannot increase the size of the judiciary

For example, William Richman and William Reynolds have argued that the number of federal appellate judgeships should increase by fifty percent[51] while Judge Stephen Reinhardt of the Ninth Circuit has gone further, calling upon Congress to double the size of the federal appellate judiciary.[52] Despite parting ways as to specific numbers, the general consensus among those interested in expanding the bench is that a significant increase in the number of appellate judgeships is necessary to alleviate the strain imposed by the significant increase in caseload.[53]

Finally, outside of efforts to lower the average number of filings per judge, a third type of proposal has gained some adherents: "improving judicial productivity."[54] Suggestions for how this could be accomplished have varied widely. Some scholars have called for more thorough screening practices to shift a greater number of cases off the argument schedule and onto expedited calendars.[55] Others have suggested creating additional specialized courts[56] or dramatically restructuring the current court system by adding a layer of review between the district courts and the courts of appeals.[57] These proposals vary in

---

indefinitely—or even substantially—without adversely affecting our ability to attract and retain qualified judges."); Jones, *supra* note 46, at 1496 ("[T]hese additions ultimately threaten to sacrifice quality for quantity."); Newman, *supra* note 43, at 763 ("I do not believe that the requisite quality of the federal judges can be maintained once the number of federal judges becomes so large that selection of new judges becomes a commonplace occurrence."); Wilkinson, *supra* note 5, at 1169 ("To the extent that recruitment is successful, it is because of the sense that the federal bench remains a special place to work. . . . If that respect were to be undermined by the prospect of indefinite job inflation on the district courts and courts of appeals, the quality that the public and the legal profession have come to expect from federal judges will be compromised.").

51 *See* Richman & Reynolds, *supra* note 16, at 299 ("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).").

52 *See* Reinhardt, *supra* note 17, at 53.

53 *See, e.g.*, Stephen Reinhardt, *Developing the Mission: Another View*, 27 CONN. L. REV. 877, 880 (1995) ("I suggest doubling only because it seems to provide *roughly* the *minimum* number of judges necessary to deal with the current workload. If, after we have doubled the judiciary . . . the crisis has not been alleviated, then we should consider further expansion.").

54 Thomas E. Baker, *Proposed Intramural Reforms: What the U.S. Courts of Appeals Might Do to Help Themselves*, 25 ST. MARY'S L.J. 1321, 1339 (1994).

55 *See, e.g.*, Griffin B. Bell, *Toward a More Efficient Federal Appeals System*, 54 JUDICATURE 237, 239–43 (1971).

56 *See, e.g.*, Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 377; Andrew W. Jurs, *Science Court: Past Proposals, Current Considerations, and a Suggested Structure*, 15 VA. J.L. & TECH. 1, 28 (2010).

57 *See* Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 433 (1987) (citing Shirley Hufstedler & Seth M. Hufstedler, *Improving the California Appellate Pyramid*, 46 L.A. B. BULL. 275 (1971)).

their particulars, but all are efforts to help the circuit courts run faster, as it were.[58]

The problem with all of these proposed solutions—increasing the number of judges, decreasing the caseload, and increasing the efficiency of judges—is that none of them seems likely to be effectuated in the near future, if at all. Despite decades-old calls for judicial expansion, Congress has not created new judgeships sufficient to keep pace with growing dockets; indeed, it has not created any appellate judgeships at all since 1990.[59] Likewise, Congress has shown little interest in significantly limiting the number of cases that come before the federal courts of appeals,[60] and has in fact swelled the federal docket with criminal[61] and immigration cases.[62] Finally, although lim-

---

58 Although judges could likely improve their efficiency at the margins, the general consensus is that judges are working diligently already. The Federal Courts Study Committee surveyed all federal appellate judges two decades ago, when the average number of filings was considerably less than it is today, and eighty-one percent reported that they found the workload to be "overwhelming" or "heavy." *See* Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. Rev. 3, 38. Beyond this study, judges' statements echo this view. For example, in the words of Judge Stephen Reinhardt of the Ninth Circuit: "Most of us are now working to maximum capacity." Reinhardt, *supra* note 17, at 52. Judge Carolyn King, of the Fifth Circuit, has written, "all the judges on my court work very hard, much harder, in my view, than almost all of our peers in law practice." Carolyn Dineen King, *Current Challenges to the Federal Judiciary*, 66 La. L. Rev. 661, 679 (2006). Judge Kaufman of the Second Circuit put the sentiment in more colorful terms: "I am second to none in my admiration of hard work, but that particular ointment has already been liberally applied." Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 Fordham L. Rev. 1, 3 (1990). Although it may be wise to accept the judges' self-reporting *cum grano salis*, it nevertheless seems reasonable to infer that significantly increasing judicial capacity is unlikely.

59 *See* Federal Judgeship Act of 1990, Pub. L. No. 101-650, § 202, 104 Stat. 5089, 5098 (codified as amended in scattered sections of 28 U.S.C.).

60 This is not to say that Congress has made no attempts to limit the caseload. Indeed, Congress made such attempts when it passed the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321-66 to -77 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.), and the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 and 18 U.S.C.). *See* Porter v. Nussle, 534 U.S. 516, 524 (2002) (noting that part of the purpose of the Prison Litigation Reform Act was to "reduce the quantity and improve the quality of prisoner suits."); H.R. Rep. No. 104-369, at 41 (1995) (Conf. Rep.) (noting that part of the purpose of the Private Securities Litigation Reform Act was to reduce the volume of suits). Aside from these interventions, however, Congress has not taken significant steps to limit the federal judiciary's docket.

61 James A. Strazzella, A.B.A. Criminal Justice Section Task Force on the Federalization of Criminal Law, The Federalization of Criminal Law 2 (1998).

62 Though some portions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, "focused on reducing immigration litigation by limiting and streamlining both administrative appeal and judicial review procedures," other portions of the acts in fact "increased litigation by expanding the scope of the

ited gains in efficiency may be possible—particularly if there is greater information sharing among the circuits about which case management practices have saved the most time[63]—those gains are unlikely to alleviate the case volume significantly, without, in the words of the Commission on Structural Alternatives for the Federal Courts of Appeals, "compromising [the courts'] essential functions."[64]

Given that the judiciary's main constraints are unlikely to be alleviated in the foreseeable future, judicial attention likely will remain a scarce resource.[65] The relevant questions, then, are how courts have responded to this scarcity and whether those responses are justifiable.[66]

II. Responses to Scarcity

The preceding Part demonstrated that judicial attention has become a scarce resource; this Part examines how courts have responded to that scarcity. Broadly speaking, the courts of appeals have mitigated the increase in their workload by adopting a series of case management techniques that amount to spending less time on certain classes of cases than on others. This Part then addresses the concerns raised by court scholars about these collective practices.

---

grounds for inadmissibility and deportation and the definition of aggravated felony, which effectively further expanded the grounds for deportation." Margaret Mikyung Lee, Cong. Research Serv., RL33410, Immigration Litigation Reform 1 (2006). Since then, the federal appellate courts have witnessed a significant increase in the number of immigration appeals. *See id.* at 1–2.

63 *See* Levy, *supra* note 8, at 385 (arguing that increased information sharing between the courts of appeals could lead to the implementation of new and efficient practices).

64 *See* Comm'n on Structural Alts. for the Fed. Courts of Appeals, *supra* note 2, at 25 ("We believe . . . that most courts have streamlined their procedures as much as they can without unacceptably compromising their essential functions.").

65 In economics, a resource is defined as scarce if the demand for it exceeds the supply, when the resource is free of charge. *See, e.g.*, John Black et al., A Dictionary of Economics (3d ed. 2008).

66 Interestingly, scholars have consistently found that these types of questions are relevant when considering another constrained judicial institution—the Supreme Court. *See, e.g.*, Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 722–31 (1984) (describing the kinds of cases the Court should consider for certiorari given the limited number of cases it can hear per year). By contrast, relatively few scholars have argued that the Supreme Court should alter its constraints, say by increasing its complement of Justices. *See, e.g.*, Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 Duke L.J. 1439, 1442 (2009).

A. The Judicial Response

Because judges cannot formally alter the relevant court constraints,[67] they have found ways to work within them. Specifically, judges have created several practices for deciding cases more quickly[68]—practices that come at the expense of the traditional model of appellate decisionmaking.[69] First, following a 1964 decision by the Judicial Conference that only opinions of "general precedential value" must be published,[70] the circuits created their own plans for disposing of cases through unpublished opinions.[71] Soon, these short unpublished opinions[72] became the most common form of case disposition.[73] Second, starting in 1968 with the Fifth Circuit, courts began to move away from the default that oral argument would be offered in most, if not all, cases.[74] A 1979 amendment to Federal Rule of Appellate Procedure 34 formalized this change, authorizing the resolution of an appeal without oral argument when the panel determined that the case was frivolous, had already been "authoritatively decided," or when the decisionmaking process "would not be significantly aided by oral argument."[75] Third, starting in 1973, courts began receiving funding

---

67 Although it formally falls to Congress to create more judgeships and significantly alter the dockets, the courts can and have affected their caseload through their own decisions. Elsewhere, I explore the extent to which the Supreme Court has considered the argument that it should avoid deciding cases in ways that would "open the floodgates of litigation." *See* Levy, *supra* note 20.

68 *See* CECIL & STIENSTRA, *supra* note 14, at 8 ("As the number of cases filed has increased, without an equivalent increase in the number of judgeships, the courts have looked for procedures that would enable the judges to dispose of their caseloads more efficiently.").

69 *See* Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1268 (1996) ("Most appellate courts and circuit judges recognize that they have promulgated and applied measures which alter the traditional treatment of appeals.").

70 *See* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 127 (1994) (citing ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964)).

71 *See* William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807, 808 (citing ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12–13 (1974)).

72 Different circuits use different terminology for these short, unpublished dispositions. For example, the Second Circuit calls them "summary orders," whereas the Third Circuit refers to them as nonprecedential opinions, or "NPOs." *See* Levy, *supra* note 8, at 362. Despite variations in nomenclature, the form is generally the same—a short disposition, typically only a few pages in length, which briefly describes the facts, if at all, and states the judgment of the court.

73 *See* Reynolds & Richman, *supra* note 71, at 808. Specifically, the percentage of opinions published by the circuits was 48.4% in 1973 and 37.2% in 1977. *Id.* (citing ADMIN. OFFICE OF THE U.S. COURTS, 1977 ANNUAL REPORT OF THE DIRECTOR 3 (1977)).

74 *See* JOE CECIL & DONNA STIENSTRA, FED. JUDICIAL CTR., DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS 2 (1985).

75 FED. R. APP. P. 34(a)(2); 28 U.S.C. app. Rule 34(a) (Supp. III 1980).

for staff law clerks to assist with certain classes of cases.[76] By 1982, Congress authorized the creation of staff attorney offices within the courts to defray the workload further.[77] Thus, within a twenty-year period, the courts of appeals themselves created, or were given, several ways to expedite their disposal of appeals.

Today, the courts rely heavily upon these methods, which form the (often unseen) backbone of federal appellate docket management.[78] First, the courts of appeals take advantage of their ability to issue unpublished dispositions. Specifically, the vast majority of cases terminated on the merits in Fiscal Year 2011 were disposed of via unpublished opinion or order.[79] Although the percentage of cases terminated by unpublished disposition varied from circuit to circuit—ranging from 54.2% in the Seventh Circuit to 94.3% in the Fourth Circuit—the overall average was 85%.[80] To translate this percentage into raw numbers, of the 30,290 appeals terminated on the merits in this period,[81] 25,734 were decided by unpublished order or opinion.[82]

Second, the courts of appeals now forgo oral argument in most cases on their docket.[83] Again, the percentages vary from circuit to circuit, with the Seventh and Fourth Circuits serving as bookends at 49% and 88.2%, respectively; yet across the twelve regional circuits, an average of 74.9% of cases decided on the merits went without oral argument in Fiscal Year 2011.[84] Accordingly, of the 30,290 appeals terminated on the merits in this period, 22,689 were decided solely on the briefs.[85]

---

76 *See Staff Attorney Offices Help Manage Rising Caseloads*, USCourts.gov, host4.uscourts.gov/newsroom/stffattys.htm (last visited Dec. 25, 2012).

77 *See id.*

78 *See* Thomas E. Baker, *Applied Freakonomics: Explaining the "Crisis of Volume"*, 8 J. App. Prac. & Process 101, 113 (2006) ("We conserved scarce resources by reducing judicial inputs in some cases by various procedural reforms like screening appeals to non-argument calendars and relying on unpublished opinions or doing away with opinions."); J. Clifford Wallace, Essay, *Improving the Appellate Process Worldwide Through Maximizing Judicial Resources*, 38 Vand. J. Transnat'l L. 187, 189 (2005) ("A shrinking proportion of litigants is afforded the opportunity to present cases orally before the tribunal; fewer parties still are fortunate enough to have their disputes resolved in a published, fully reasoned decision.").

79 2011 Annual Report, *supra* note 4, at 38 tbl.S-3.

80 *Id.*

81 In Fiscal Year 2011, 57,357 appeals were terminated. *Id.* at 12 tbl.1. Nearly half of those, however, were terminated for procedural or related defects, leaving only 30,290 appeals that were terminated on the merits. *Id.* at 60 tbl.B-1.

82 *Id.* at 38 tbl.S-3.

83 *Id.* at 36 tbl.S-1.

84 *Id.*

85 *Id.*

Third, all of the federal appellate courts now rely extensively on staff attorneys to review cases.[86] In a 2011 study of the case management techniques of the D.C., First, Second, Third, and Fourth Circuits, I found that the majority of nonargument cases—that is, cases that are determined not to need oral argument at an initial screening stage—are "worked up" predominantly by staff attorneys.[87] In preparing these cases, staff attorneys often draft a proposed order and accompanying memorandum about the case, which is then reviewed by the deciding panel.[88] Although the courts do not provide figures on the percentage of cases terminated on the merits that are prepared by staff attorneys, my study suggests that the percentage is sizeable.[89] Specifically, although the percentage varied from circuit to circuit—ranging between seventeen to twenty-seven percent in the Third Circuit and nearly ninety percent in the Fourth Circuit—the average in these circuits was close to fifty percent.[90]

While each of these individual practices is noteworthy on its own, what is critical about them is the way they are used together. Decisions about whether a case will go to oral argument, whether it will have a disposition drafted by a staff attorney, and whether it will result in a published opinion typically track one another. That is, cases that are not scheduled for oral argument tend to be prepared by staff attorneys,[91] and those same cases almost always result in unpublished dispositions.[92] Indeed, when judges refer to routing cases onto a nonargument track, the implication is that the cases not only will not receive oral argument, but they also will not have their dispositions drafted in chambers and their dispositions almost certainly will not be published. Accordingly, cases that receive less judicial attention at the outset tend to receive less judicial attention throughout the entire decisionmaking process.[93]

---

86 *See* Pether, *supra* note 16, at 6–7 (describing how staff attorneys work on appeals that are screened from oral argument, and arguing that they, along with law clerks, have been delegated the "vast majority of Article III appellate judicial power").

87 *See* Levy, *supra* note 8, at 354.

88 *See id.* at 345–46. Although practices vary from circuit to circuit, the panel members generally consider the materials by the staff attorney and then vote on whether to accept the disposition. *See id.* at 344–53. At any point, the judges can direct the case to the argument calendar and have it scheduled for argument. *See id.*; *see also* FED. R. APP. P. 34(a)(2) (stating that panel unanimity is required to forgo oral argument).

89 *See* Levy, *supra* note 8, at 346–54.

90 *Id.*

91 *See* Pether, *supra* note 16, at 6; Vladeck & Gulati, *supra* note 15, at 1669.

92 *See* Pether, *supra* note 16, at 20; Vladeck & Gulati, *supra* note 15, at 1669–70.

93 Appeals that receive more judicial attention at the outset do not necessarily receive full

Moreover, it is not simply that certain cases receive less judicial attention than others, but rather that certain *kinds* of cases receive less judicial attention than others. The largest category of these cases is comprised of appeals brought by pro se litigants. A 2000 monograph on the case management procedures of the federal courts of appeals published by the Federal Judicial Center noted that "except for the Second Circuit, courts seldom or never allow pro se litigants to argue orally."[94] Since then, even the Second Circuit has shifted its policies; its new default presumption is that pro se litigants will not have oral argument.[95] In some circuits, such as the Fourth, the nonargument treatment of pro se appeals is not simply a general practice; it is considered a rule.[96] Looking beyond oral argument, my 2011 review of five circuit courts revealed that most cases with pro se litigants have dispositions drafted by staff attorneys and result in unpublished orders or opinions.[97] Considering that pro se appeals comprise nearly half of the courts' dockets—they represented 27,143 of the 55,126 filings in the courts of appeals in 2011[98]—the collective decision to give them less judicial attention has a significant impact on a sizeable number of litigants and the courts themselves.

Pro se cases are not the only category of appeals that consistently receive limited judicial attention. Cases from the Board of Immigration Appeals ("BIA") regularly are placed on nonargument tracks as well. This practice emerged after the federal appellate courts experienced a significant surge in the number of appeals from BIA decisions after 2002.[99] Several factors led to the surge,[100] although the

---

judicial attention across the board; a case could receive oral argument, then be decided in chambers, and yet still result in an unpublished order. (In fact, this is the common treatment of most appeals on the argument calendar in the Second Circuit.) The point is simply that cases that are routed for less attention initially tend to receive less attention on the remaining counts—consideration and publication.

94 *See* JUDITH A. MCKENNA ET AL., FED. JUDICIAL CTR., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 8 (2000).

95 Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the Second Circuit, in New York, NY (Sept. 23, 2010, Dec. 10, 2010, & Jan. 5, 2011).

96 If staff or judges determine that argument is warranted in a pro se appeal, counsel will be appointed. *See* Levy, *supra* note 8, at 338; *see also* 4TH CIR. R. 34(b).

97 *See* Levy, *supra* note 8, at 380.

98 2011 ANNUAL REPORT, *supra* note 4, at 39 tbl.S-4.

99 *See* Huang, *supra* note 7, at 1122–24; Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 BROOK. L. REV. 429, 430–32 (2009); John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 17–20 (2006–2007).

100 *See* Newman, *supra* note 99, at 430–31 (describing reasons for the increase in immigration appeals, including "stepped up" efforts by the federal government to locate and deport

most notable was a 2002 decision by the Department of Justice to streamline BIA procedures in an effort to reduce its sizeable backlog.[101] The result was that within a short span of time, thousands of additional immigration appeals came before the appellate courts[102]—particularly the Second and Ninth Circuits.[103]

These circuits responded by altering the treatment of immigration appeals. The Second Circuit, for example, created a nonargument calendar for BIA appeals in Fiscal Year 2006.[104] Since that time, the majority of those appeals have not received oral argument, have had their dispositions drafted by staff attorneys (and then reviewed by a panel of three judges), and have been disposed of by unpublished summary orders.[105] The Third Circuit recently followed suit, creating special nonargument panels to decide immigration appeals.[106] Furthermore, although it has not established a particular calendar or panel to decide appeals from the BIA, the Ninth Circuit screens its immigration cases heavily as well.[107] According to one judge from that court, less than ten percent of immigration appeals reach an argument panel.[108] Finally, the First,[109] Fourth,[110] and Fifth Circuits[111] also tend to place immigration cases on nonargument tracks. As a result, most immigration appeals are decided without oral argument, and by

---

illegal aliens in the 1990s, decisions by the Department of Justice to streamline BIA procedures, and an increase in the rate at which adverse BIA decisions were appealed).

101 *See id.* ("In 2002, then-Attorney General John Ashcroft, concerned that the BIA had accumulated a backlog of 56,000 cases, announced a proposed regulation to expand the BIA's streamlining procedures and clear its backlog. The BIA responded in two ways. First, it authorized single members to make decisions by 'brief order instead of the usual written opinion.' Second, it increased its dispositions from 31,797 in FY 2001 to 47,321 in FY 2002." (footnotes omitted)).

102 *See id.* at 431.

103 *See id.* at 431 n.19 ("From June to September 2004, the Second Circuit received 945 petitions to review BIA decisions, while the Ninth Circuit received 1918 petitions, for a combined total of 2863 out of the 3857 (74 percent) total petitions in circuit courts." (citation omitted)).

104 *See id.* at 433–34.

105 *See* Levy, *supra* note 8, at 349.

106 *See id.* at 350–51.

107 *See* Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1521 (2010).

108 *See id.* (citing *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 9 (2006) (testimony of Carlos T. Bea, J., U.S. Court of Appeals for the Ninth Circuit)).

109 *See* Levy, *supra* note 8, at 335–36.

110 *See id.* at 338.

111 *See* MCKENNA ET AL., *supra* note 94, at 110.

unpublished order or opinion, with staff attorneys drafting the disposition.

Beyond the two large categories of pro se and immigration appeals, several smaller categories of cases consistently receive limited judicial attention in the courts of appeals as well. For example, according to the Federal Judicial Center's 2000 report on the case management practices of the twelve regional circuits and my own 2011 study of the courts of appeals, a sizeable number of the circuits route Social Security appeals onto a nonargument track.[112] Similarly, many of the courts of appeals put *Anders*[113] brief cases—criminal appeals in which the defendant's counsel has stated that the defendant has no meritorious claims[114]—on a nonargument track.[115] Several of the circuits route, or at some point have routed, sentencing-only cases—criminal appeals that raise issues only about a defendant's sentence—to a nonargument track as well.[116] Finally, several of the circuits also place bail appeals on a nonargument track.[117] Accordingly, these categories of cases—pro se appeals, immigration appeals, Social Security appeals, and several types of criminal appeals—generally receive less judicial attention than other categories of cases.

In short, while a limited number of cases continue to receive oral argument, consideration in chambers, and a published opinion, many now receive less judicial attention. Cases in this latter set are placed on nonargument calendars, often have their dispositions drafted by staff attorneys, and often result in unpublished opinions. It is the use

---

112 According to the Federal Judicial Center Report, the First, Fifth, Tenth, and Eleventh Circuits typically place Social Security appeals on a nonargument track. *See* McKenna et al., *supra* note 94, at 57, 110, 178, 191. According to my own 2011 study of five of the federal appellate courts, the Fourth Circuit also tends to route Social Security appeals to a nonargument track. *See* Levy, *supra* note 8, at 338.

113 Anders v. California, 386 U.S. 738 (1967).

114 Following the Supreme Court case *Anders v. California*, appointed counsel can file a motion to withdraw from a case on the ground that an appeal would be frivolous, so long as counsel files a brief "referring to anything in the record that might arguably support the appeal." *Id.* at 744.

115 According to the Federal Judicial Center Report, the First, Sixth, Eighth, and Eleventh Circuits typically place *Anders* brief cases on a nonargument track. *See* McKenna et al., *supra* note 94, at 57, 122, 149, 191. According to my own 2011 study, the Fourth Circuit also tends to route *Anders* brief cases to a nonargument track. *See* Levy, *supra* note 8, at 338.

116 According to the Federal Judicial Center Report, the Eighth and Eleventh Circuits typically place sentencing-only appeals on a nonargument track. *See* McKenna et al., *supra* note 94, at 149, 191. According to my own 2011 study, the Second Circuit until recently routed all sentencing-only appeals to its Non-Argument Calendar. *See* Levy, *supra* note 8, at 349.

117 According to the Federal Judicial Center Report, the First and Tenth Circuits typically place bail appeals on a nonargument track. *See* McKenna et al., *supra* note 94, at 57, 178.

of these case management techniques together that has been the appellate courts' primary response to an overabundance of cases, and ultimately, a scarcity of judicial time.

B. The Scholarly Response to the Judicial Response

The move away from traditional appellate decisionmaking in most cases strikes many as troubling, and court scholars have raised concerns about the increased use of each individual case management technique. Specifically, the use of unpublished opinions has been criticized on the grounds that it has led to a decline in judicial accountability and responsibility[118] and undermines the country's common law tradition.[119] The reduced use of oral argument has been criticized on the grounds that it harms the courts' legitimating function by denying litigants the ability to "address the decisionmaker face-to-face" and deprives judges of the ability to learn fully about the "major issues" of the case.[120] And scholars have criticized the increased reliance on staff attorneys (though less noted than the other two shifts in court practice), on the ground that it means a "significant majority" of "Article III judicial power" is delegated to people who essentially are "junior lawyers."[121]

Perhaps unsurprisingly, though, the strongest criticism has been directed at the way in which the courts have used these case management practices together. For example, William Richman and William Reynolds describe the state of the current system as "injustice on ap-

---

118 *See* Richman & Reynolds, *supra* note 16, at 282–83 (arguing that compared to the "traditional, fully reasoned written opinion," unpublished opinions diminish judicial accountability—"[w]hen a judge makes no attempt to provide a satisfactory explanation of the result, neither the actual litigants nor subsequent readers of an opinion can know whether the judge paid careful attention to the case"—and responsibility—"[j]udges who cannot be held individually responsible either for the reasoning or the result have far less incentive to insure that they 'get it right'").

119 *See* Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 759 (2003). That said, some judges have argued that the law is clearer when fewer opinions are published. *See* Jones, *supra* note 46, at 1495 ("Our real concern should be not that too few opinions are published, but that too many are. The promiscuous growth of published precedent imposes enormous social costs. Trends in the law are becoming much more difficult to ferret out; the legal researcher may plow through dozens of similar cases looking for the facts most 'on point' with a particular problem."); Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 189 (1999) ("Policy-wise, we need to be able to distinguish those opinions worthy of publication, and of making a meaningful contribution to our body of precedent, from those that merely apply settled law to decide a dispute between parties.").

120 BAKER, *supra* note 70, at 112–13.

121 Pether, *supra* note 16, at 10, 65.

peal,"[122] arguing that "those without power receive less (and different) justice."[123] Specifically, while "powerful litigants" can expect judges to "play a very active role" in their cases, a party filing "an appeal involving the denial of social security benefits" will find that "actual judge time probably consists of limited review of the staff recommendations."[124] Similarly, David Vladeck and Mitu Gulati have depicted the appellate courts as "bifurcat[ed]" with "two separate and unequal tracks."[125] Lauren Robel has suggested that Article III judges focus on "elite cases" and not those involving "ordinary citizens."[126] And Penelope Pether has argued that a lack of argument, a lack of consideration in chambers, and a lack of publication create a kind of "second-tier justice" for the "have-nots."[127]

Furthermore, some court scholars view the appellate judges as abandoning one of their core functions: reviewing lower court and agency decisions for potential errors.[128] For example, Paul Carrington has argued that judges have been "giving diminishing attention to the seemingly less gratifying work of error correction."[129] Pether has used more forceful terms, charging judges with "largely abandon[ing] their error-correction function."[130]

What are we to make of these criticisms? To be sure, they are addressing a deeply compelling concern—namely the disparate treatment of litigants. After all, a tenet of the American judicial system is that it dispenses "equal justice under law."[131] It is difficult to square "equal justice" with what appears to be significant disparities in amounts of judicial attention, and indeed, forms of judicial treatment—oral argument, consideration in chambers, and publication. Moreover, in a system based on treating every party fairly,[132] placing

---

122 *See generally* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS (2013).

123 Richman & Reynolds, *supra* note 16, at 277.

124 *Id.* at 275–76.

125 Vladeck & Gulati, *supra* note 15, at 1668.

126 Robel, *supra* note 58, at 58.

127 *See* Pether, *supra* note 16, at 20.

128 For a discussion of the error-correction function, see Part III.A.

129 Carrington, *supra* note 57, at 424.

130 Pether, *supra* note 16, at 24.

131 Indeed, this very phrase is engraved above the entrance to the U.S. Supreme Court.

132 *See* 28 U.S.C. § 453 (2006) ("Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ____ under the Constitution and laws of the United States. So help me God.'").

certain kinds of cases—e.g., pro se, immigration, Social Security, and some criminal appeals—on a separate track should be disquieting to court scholars and indeed to the public more generally.

And yet, much of the criticism goes beyond registering concerns with the current system to suggest that the judges who created it are in some sense falling down on the job by "abandon[ing]" a core judicial function and unfairly "according second-class treatment" to some litigants.[133] In order to evaluate these claims, one first needs to answer a fundamental question: given the real scarcity they face, are judges truly falling down on the job or is there reason to think that they are simply doing the best they can with what they possess? Put another way, are the flaws of the current system a product of judicial decisions or simply the limitations of the resources? It is this question that is vital for understanding and improving the federal appellate courts, and that the next Part considers.

III. Evaluating the Responses to Scarcity: A Preliminary Defense of the Judiciary

The broad scholarly criticism of the appellate courts' treatment of their swollen dockets raises the question of whether there is fire beneath the smoke—in other words, whether there is reason to think that the courts are doing a poor job allocating judicial attention. As noted earlier, this question is particularly pertinent for the tens of thousands of litigants who come before the courts of appeals each year.[134] Perhaps more fundamentally, it goes to the heart of assessing judicial decisionmaking in the federal appellate courts.

The question, though, is challenging to frame much less to answer. As with any inquiry that begs a relative determination, the primary difficulty lies in setting an appropriate baseline. In order to evaluate the courts' allocation of judicial attention, one first needs to identify a reasonable response to scarcity. This task would be far simpler if the institution in question were not the courts of appeals, but instead, say, a factory that produces goods of some kind. In such a scenario, one would use basic economics to determine how to use the scarce resources, or inputs, to maximize the goods, or outputs. But translating the resource allocation framework to the context of judicial administration is challenging in many respects. First, it is difficult to identify what variables should be maximized, and second, once identified, the potential variables defy easy measurement.

---

133 Pether, *supra* note 16, at 24, 34.

134 *See supra* note 22 and accompanying text.

Despite these challenges, it is still possible to gain some normative traction by discussing the broad objectives of the courts and how the courts might allocate judicial attention to maximize those objectives.[135] What follows, then, is something of a thought experiment—a flexible application of resource allocation theory to the courts of appeals. The purpose is not to provide definitive answers, but to flesh out a framework in which to think about them. Section A begins by exploring what it means to speak of inputs and outputs in the circuit courts. Section B then discusses what a reasonable attempt to maximize those outputs would look like in theory. Section C compares that theoretical approach with what courts have done in practice. Finally, Section D assesses the utility of this kind of analysis for the scholarly debate and for federal appellate courts more generally.

A. Exploring the Resource Allocation Framework

In the most basic sense, resource allocation theory seeks to determine how to best allocate scarce resources. As Part I demonstrates, the primary scarce resource in the context of the courts of appeals is judicial attention. The purpose of this Section is to define more precisely what judicial attention means, and then to identify and define the outputs of the federal appellate courts.

One qualification is necessary at the outset. The objective of this Part is not to set out a rigid normative vision of the key variables of the federal courts. Although I hope to persuasively make the case for the input and outputs proposed here, one could certainly postulate different variables for the courts of appeals, or different ways of defining them. Even if one parts company on the particular way this Article identifies or defines the key variables of the courts, though, hopefully the utility of viewing the courts through the lens of resource allocation theory will be clear.

As noted above, the scholarly criticism directed at the courts' docket management practices raises the question of whether the courts are doing a poor job of allocating judicial attention. Considering that question in resource allocation terms casts judicial attention itself as the scarce resource—in other words, the input.[136] Yet what

---

135 This is a different enterprise from assessing what broader objectives judges maximize in their jobs—an enterprise others have already undertaken. *See, e.g.*, Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 39–40 (1993).

136 This definition of "inputs" is admittedly narrow. If one were to consider all of the inputs that go into appellate decisionmaking, one would need to consider other forms of labor, including the work of judicial assistants, law clerks, staff, and so on. Furthermore, one might

exactly *is* judicial attention? Broadly speaking, one can say that judicial attention is the amount of time devoted to a particular case. When conceived of in these terms, the most straightforward formulation of judicial attention in the appellate courts is the number of judicial hours devoted to each appeal. For example, if a panel of three judges cumulatively spends twelve hours preparing and then deciding a particular case, the "input" for that appeal would be twelve hours of judicial attention.[137] This attention could include reading briefs, meeting with law clerks, hearing oral argument, holding interchamber discussions, and so on—roughly the same kinds of activities that a lawyer would count in his or her billable hours. In short, judicial attention loosely can be understood as judicial time.

If judicial time is the relevant input, what is the relevant output of the federal appellate courts? Put another way, what is the objective or function of the courts?[138] Though it is no doubt difficult to capture what the courts were designed to do and what it is that we have come to expect them to do,[139] beginning at least with Roscoe Pound and Karl Llewellyn,[140] scholars and judges consistently have offered two responses: error correction and law development. As Paul Carrington, Daniel Meador, and Maurice Rosenberg have written, "In the received tradition, the functions of appellate adjudication are two-

---

want to include various forms of capital as well, including computers, fax machines, and search websites such as WestLaw and LexisNexis. Yet in light of the fact that the court literature has focused on how much attention cases receive from appellate judges, it seems reasonable here to focus on judicial attention as the main input.

137 If one were to engage in a quantitative analysis of these issues, one would have to decide how to count certain hours. For example, suppose that one panel had two cases that raised the same issue and the panel members collectively spent ten hours on that particular issue—how should those ten hours be counted? Dividing the hours between two cases seems inappropriate; after all, if the court had heard only one of the two cases, that case would have had an input of ten hours of judicial attention. It seems odd to suggest that the same case had only five hours of attention simply because a similar case came to the court at the same time. These judgment calls become more difficult as the timeframe between the two cases is extended or as the composition of the panel changes somewhat. It is not necessary to delve into these issues for the purposes of the analysis here, but they are worth flagging for future research.

138 This question is distinct from the question of what specific jobs the federal courts of appeals are meant to perform (such as enforcing the Constitution, deciding diversity cases, and so on). *See* Chemerinsky & Kramer, *supra* note 36, at 77–94.

139 *Cf.* Sanford Levinson, *Assessing the Supreme Court's Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. ONLINE 99, 100 (2010), http://www.yalelawjournal.org/images/pdfs/842.pdf (describing how one cannot comment upon how the Supreme Court should decide to hear cases "unless one has a conception of what the Court, as an institution, should be doing in the first place").

140 *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 12–13 (1960); ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 3 (1941).

fold. One is to 'review for correctness.' . . . . The second function . . .[is to] announce, clarify, and harmonize the rules of decision employed by the legal system in which they serve."[141] In the words of Chad Oldfather, "[m]ost depictions of appellate courts suggest that they serve two core functions: the creation and refinement of law and the correction of error."[142] And as Judge J. Clifford Wallace of the Court of Appeals for the Ninth Circuit has stated, the federal appellate courts have "two core functions: (1) to decide the appeals by correcting material errors in the cases reviewed, and (2) in so doing, to establish clear precedent to guide constituents within the circuits' jurisdictions."[143] These are but a few examples of a larger consensus within the literature that error correction and law development are the two primary objectives of the appellate courts.[144]

Of course, this is not to say that no scholar or judge has argued for alternative objectives. Indeed, some have made the argument that the appellate courts have, or at least should have, other functions beyond error correction and law development. Many of these alternative goals—from the broad objective of fairness to the narrower objective of trial court supervision—are closely related to, and arguably even subsumed by, the twin purposes of error correction and law development.[145] That said, there are other potential goals that are largely independent of these two functions. For example, some scholars and judges have argued that courts should have a goal of containing costs—those internal to the court, those paid by the parties, and

---

141 CARRINGTON ET AL., *supra* note 28, at 2–3; *see also* DANIEL JOHN MEADOR, APPELLATE COURTS IN THE UNITED STATES 3 (2d ed. 2006) ("Error correcting and lawmaking are the core appellate functions.").

142 Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 49 (2010).

143 Wallace, *supra* note 78, at 189.

144 Numerous other scholars have stated that the twin goals of appellate courts are error correction and law development. For a few additional examples, see David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 74 (2003) ("Discussions of the essential functions of appellate review have been dominated by the distinction between error correction and law development . . . ."); Christopher M. Pietruszkiewicz, *Economic Substance and the Standard of Review*, 60 ALA. L. REV. 339, 360 (2009) ("Appellate courts have two primary purposes . . . . Appellate courts should serve to develop the law in a particular area as guidance for future cases and to rectify egregious errors in particular cases."); Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 52 (1988) ("One should begin by reviewing the purposes and functions of the federal courts of appeals. It is widely acknowledged that these courts serve both an 'error correction' and a 'law development' function.").

145 ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS 19 (1983) ("Although some commentators identify other functions, these other purposes are usually aspects of either error correction or law development . . . .").

those endured by society.[146] A different set of scholars has suggested that courts should embrace the objective of increasing legitimacy—both the legitimacy of the court system and of the government as a whole.[147]

These goals might well be normatively desirable, and indeed some judges undoubtedly keep them in mind when rendering decisions. But, as general goals of appellate decisionmaking, they are not nearly as widely accepted as error correction and law development. Accordingly, the following discussion will treat the latter as the relevant outputs of the federal courts of appeals. One could, of course, choose to allocate judicial attention based on a different conception of outputs—a point that is addressed in Part IV.

Identifying error correction and law development as the primary goals of the federal appellate courts constitutes only the first step; those concepts must themselves be fleshed out and defined. Beginning with error correction, it is not surprising that this objective should be seen as a principal one of the federal appellate courts—in fact, it was the primary goal behind the creation of those courts.[148] When the courts of appeals were created by the Evarts Act of 1891,[149] "[t]he perceived role of the appellate court was to correct the errors of the trial court in applying the law to the facts."[150] More than a century later, that perception, for the most part, is still in place. Although some scholars question whether the courts are in fact devoting their

---

146 *See* Newman, *supra* note 18, at 1125 (arguing that the "objective" of the court should take into account "the degree to which it operates without undue expense and undue delay"); Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 384 (1995) ("The state's objective is minimization of total social costs: the sum of the social costs of adjudication—the costs of trial together with the expected costs of appeal, if appeals are allowed—plus the social harm from erroneous decisions." (footnote omitted)).

147 *See* MEADOR, *supra* note 141, at 2–3 (describing one of the "useful and desirable functions" of the appellate courts as "heighten[ing] the legitimacy and acceptability of judicial decisions"); Martin Shapiro, *Appeal*, 14 LAW & SOC'Y REV. 629, 636 (1980) ("Appeal can therefore be reexamined in the light of the question—to what extent do the mechanisms of appeal contribute to the perceived legitimacy of the regime?—rather than in terms of the conventional question—to what extent does appeal correct the wrongs done by trial courts?"); *see also* Dan Simon & Nicholas Scurich, *Lay Judgments of Judicial Decision Making*, 8 J. EMPIRICAL LEGAL STUD. 709, 721 (2011) ("The research demonstrating the importance of adequate procedures to the legitimacy of the system is well established . . . ."); Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 895–96 (1997) (stating that judges should "seek[ ] to rebuild public trust in the legal system" by paying attention to issues like the court's legitimacy).

148 *See* Carrington, *supra* note 57, at 416.

149 Circuit Courts of Appeals Act (Evarts Act), ch. 517, 26 Stat. 826 (1891) (repealed 1948).

150 Carrington, *supra* note 57, at 416; *accord* Thomas E. Baker & Douglas D. McFarland, Commentary, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1405 (1987).

attention to that task,[151] the dominant view among many is still that the courts *should* treat error correction as a central objective.[152]

This widespread view has a solid normative grounding. "Appellate review" bears its name precisely because the expectation is that the courts will review, and then correct if necessary, the work of lower courts and agencies. This type of review is a staple of the federal court system as a whole. Because of the risk that a single trial judge might commit an error in a case, the fact that not only one additional judge but three additional judges will review the trial judge's work provides some assurance that an appropriate outcome[153] will ultimately be reached. Thus, error correction is widely and properly viewed as a critical function—and therefore an output—of the federal appellate courts.

Error correction can, however, be defined in many ways, from emending legal and factual mistakes to generally reviewing lower court and agency processes.[154] For the purposes of this discussion, I adopt a narrow definition of error correction—as the obligation of an appellate court to review and correct trial court or agency actions that have been properly suggested as error to the trial court or raised with the agency and then properly preserved and presented for review by an aggrieved party. Within the bounds of the appropriate standard of review, the error correction function subsumes challenges to fact-finding, applications of law to fact, and statements of legal principle.[155]

---

151 *See, e.g.*, Pether, *supra* note 16, at 24.

152 *See, e.g.*, MEADOR, *supra* note 141, at 2–3 ("It is axiomatic in our legal order that law should be applied evenhandedly and accurately to all persons within the jurisdiction. Yet correctness and uniformity in legal rulings among such a multitude of trial forums could not be afforded without a common higher court clothed with authority to review their decisions and, if necessary, reverse them. Reviewing for error is thus a large and important part of appellate work.").

153 I am assuming for these purposes that, for the most part, there are appropriate and less appropriate case outcomes. In the words of Harlon Dalton, "It is meaningless to talk about error correction if we cannot, at least theoretically, isolate correct and incorrect outcomes." Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 74 (1985).

154 *See* Oldfather, *supra* note 142, at 59–62.

155 Two caveats are in order. First, error correction does not include the correction of alleged errors that are "harmless"—i.e., errors or defects that do not affect the substantial rights of an aggrieved party. Second, in limited circumstances, a "plain error" affecting susbtantial rights may be addressed by an appellate court even though it was not brought to the attention of the trial court. For a detailed discussion of these points, and the way error correction relates to standards of review more broadly, see generally HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS—STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS (2007).

The other "core appellate function" is law development.[156] Unlike error correction, law development was not initially the intended purpose of the federal appellate courts.[157] As Carrington explains, "[c]ertainly it was very far from the minds of those who adopted the Evarts Act that the intermediate courts of the United States would ever be taken seriously as sources of federal law."[158] And yet over the last century, the legal community has come to accept and indeed expect that federal appellate courts will articulate, clarify, and develop the law.[159]

As with error correction, there are good reasons to consider law development to be a primary function of the appellate courts. In the context of deciding cases, straightforward error correction is not always sufficient—at times, a standard or rule needs to be articulated or clarified in order to resolve a case. This is particularly so after the Supreme Court sets forth a new constitutional rule and leaves further definition to the appellate courts. Filling in the gaps in the law is a critical duty of the courts of appeals, which, in turn, renders law development a critical output of the courts.

Although defining the precise contours of "law development" is a complex endeavor, certain elements are readily identifiable. Judges engage in law development when faced with a matter of first impression or an unclear area of law. Drawing upon the example above, the Supreme Court from time to time sets forth a new constitutional rule and the appellate courts must flesh out how to apply that rule in practice. This recently occurred with the concept of "substantive reasonableness" in the sentencing context[160] and the standard of review for Second Amendment claims.[161] Of course, aside from when the Su-

---

156 MEADOR, *supra* note 141, at 3.

157 *See* Carrington, *supra* note 57, at 416–17.

158 *Id.*

159 *See* Shavell, *supra* note 146, at 415 ("[L]awmaking is evidently a substantial function of the appeals process . . . .").

160 *See* Gall v. United States, 552 U.S. 38, 51 (2007). Following the Supreme Court's decision in *Gall*, lower courts had to determine what constituted an unreasonable sentence. *See, e.g.*, United States v. Cavera, 550 F.3d 180, 190 (2d Cir. 2008) (noting that the "broad statements" of *Gall* "require more specificity, both as to substantive and procedural reasonableness review if they are to guide us in particular cases, including the one before us").

161 Specifically, following the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the lower courts had to determine the appropriate standard of review for Second Amendment claims. *See* Ezell v. City of Chicago, 651 F.3d 684, 706 (7th Cir. 2011) (noting the need to "select an appropriate standard of review" for a Second Amendment claim because "the Supreme Court did not do so in either *Heller* or *McDonald*"); Nordyke v. King, 644 F.3d 776, 782 (9th Cir. 2011) ("Because the Supreme Court has yet to articulate a standard of review in Second Amendment cases, that

preme Court declares a new rule, deciding when something truly is a matter of first impression or when a body of law needs clarification requires the exercise of judgment, and it can be difficult to determine when law needs to be or has been developed. Still, saying that courts engage in law development when they articulate, clarify, or develop the law when they think it is vague or underdeveloped is a sufficiently determinate description for this discussion.

In short, in resource allocation terms, it is reasonable to conceive of the primary input of the appellate courts as judicial attention or time, and of the outputs as a combination of error correction and law development. Working from these key variables, the next Section considers how, in theory, the courts could allocate judicial attention so as to maximize their outputs.[162]

B. Maximization in Theory

How could courts reasonably maximize error correction and law development together?[163] If error correction and law development could easily be measured and quantified, one could create a function that sought to maximize a combination of the two. Unfortunately, however, both error correction and law development defy precise measurement.

If one were attempting to find a measure for error correction, the appellate courts' reversal rate—or rate at which they reverse lower court and agency decisions—would seem promising. After all, the re-

---

task falls to the courts of appeals and the district courts."); United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010) ("*Heller* left open the level of scrutiny applicable to review a law that burdens conduct protected under the Second Amendment, other than to indicate that rational-basis review would not apply in this context. . . . Our task, therefore, is to select between strict scrutiny and intermediate scrutiny.").

162 Of course, there are other allocation approaches that have "operational merit," including input equalization and output equalization. *See, e.g.*, David Kennett, *Standards and Procedures for the Distribution of a Public Service: Shoup Revisited*, 37 PUB. FIN. 80, 81 (1982). Since output maximization is the most common approach, it is the one I focus on here.

163 I am considering how to allocate attention in a static sense. That is, given the cases that the judges currently have on their dockets, how should they distribute their attention to maximize these two outputs? One could consider instead whether judges should spend more attention on their cases at the expense of disposition times. For example, instead of deciding nearly all 330 of her cases in one year, a judge could spend more time per case and decide say only 200 of them, simply expanding the average time it takes to decide each case. The obvious problem with such a strategy is that while tempting in the short term, it quickly leads to disastrous consequences in the long term, as the backlog in the federal appellate courts grows greater by the year. An extreme example of a court facing such consequences is the High Court of Delhi, which, as of 2009, had a projected backlog of 466 years. *See* Renu Agal, *Delhi Justice's 466-Year Backlog*, BBC NEWS (Feb. 11, 2009), http://news.bbc.co.uk/2/hi/7883750.stm.

versal rate conveys how often the courts of appeals decide that lower court and agency decisions were erroneous. The trouble with this measure, though, is that it can only convey frequency, not accuracy. If this measure were adopted, maximizing error correction would amount to maximizing the number of reversals—without any way to take into account whether those reversals were warranted.[164] For a sense of accuracy, one could look to how often the decisions of the appellate courts are affirmed or reversed—say by an en banc court or the Supreme Court—but unfortunately, these courts review cases so infrequently[165] that neither provides a potential measure of how effectively the circuit courts are correcting errors.[166]

Similarly, with law development, there is a convenient measure but not an appropriate one. Publication rates convey frequency—how *often* the courts of appeals are handing down decisions that technically add to the body of precedent. They do not convey whether the courts of appeals are "correctly" identifying the bodies of law that need clarity or whether the opinions do a good job of clarifying or articulating the law. As discussed above with respect to error correction, en banc

---

164 In extreme circumstances, the frequency with which the courts are correcting errors can convey some sense of how well the courts are performing their error-correction function. For example, if an appellate court consistently had a reversal rate of zero percent, one could infer that it was not adequately correcting the errors of the lower courts and agencies. But outside of this limited context, reversal rates cannot convey how well appellate courts are performing their error-correction function.

165 According to the Administrative Office of the U.S. Courts, the twelve regional courts of appeals terminated the following number of appeals on the merits following en banc review in Fiscal Year 2010: D.C. Circuit, 1; First Circuit, 0; Second Circuit, 0; Third Circuit, 3; Fourth Circuit, 4; Fifth Circuit, 9; Sixth Circuit, 4; Seventh Circuit, 2; Eighth Circuit, 3; Ninth Circuit, 19; Tenth Circuit, 2; and Eleventh Circuit, 4. *See* 2011 ANNUAL REPORT, *supra* note 4, at 36 tbl.S-1.

Additionally, the Supreme Court granted the following number of petitions for certiorari from the twelve regional circuits in Fiscal Year 2010: D.C. Circuit, 2; First Circuit, 4; Second Circuit, 16; Third Circuit, 11; Fourth Circuit, 8; Fifth Circuit, 10; Sixth Circuit, 9; Seventh Circuit, 3; Eighth Circuit, 9; Ninth Circuit, 31; Tenth Circuit, 3; and Eleventh Circuit, 16. *See id.* at 71–73 tbl.B-2.

166 Even for those circuits that have relatively high number of cases reviewed by the Supreme Court, how scholars should interpret reversal rates is not always clear. For example, the Supreme Court took twenty-six cases in the October Term 2010 from the Ninth Circuit and ultimately reversed or vacated nineteen of those decisions for a reversal rate of seventy-three percent. *See* Carol J. Williams, *U.S. Supreme Court Again Rejects Most Decisions by the U.S. 9th Circuit Court of Appeals*, L.A. TIMES (July 18, 2011), http://articles.latimes.com/2011/jul/18/local/la-me-ninth-circuit-scorecard-20110718. Although some of those reversals may be due to perceived errors, others might be because the Supreme Court ultimately decided to change a particular rule. Regarding this last point, Judge Reinhardt has colorfully stated: "It would be easy not to get reversed if you just tried to guess what five of nine justices were going to say about the case . . . . If you follow the law the way it is, before they change it, you're going to get reversed." *Id.*

courts and the Supreme Court hear cases too infrequently to provide sufficient information on how well a particular appellate court is performing its function.[167]

Yet even without precise measures, it is still possible to consider how a court could reasonably attempt to maximize both goals by thinking through what maximization of these goals might look like in theory. To simplify the task, one can disaggregate the two variables and consider maximizing them each in turn.

Starting with error correction, what would it mean for the courts of appeals to allocate judicial attention with the aim of producing as many cases as possible that were free of material error? Or, put another way, what would it mean for courts to attempt to minimize the error rate when working with limited resources?

In the most basic sense, if judges lack the time to give every case a careful review, we would expect to see triaging at the courts of appeals. It seems reasonable that they would prioritize spending time on cases that they thought required it—say, because those cases raised particularly complex issues or involved numerous parties. As a corollary, it seems equally sensible that judges would spend less of their own attention on cases that they thought could be corrected without full judicial treatment.

This assessment raises the question, then, of which cases are most likely to be decided correctly without receiving full judicial treatment. Based on how review takes places in the federal system, one can imagine at least two categories of relevant cases: (1) those that are most likely to be reviewed effectively through a nonargument review process and (2) those that are least likely to have errors upon arrival at the appellate courts.

The cases that most plainly fall into the first category are those that raise issues that the courts see frequently. Identifying material errors becomes relatively easy, even with complex issues, if the court sees them repeatedly. Once the court is familiar with such underlying issues, the need for oral argument is substantially reduced (if not obviated altogether), which means that judges do not need to provide as much judicial attention to these appeals as they do with other cases.[168]

A prime example is an appeal from an order of the BIA denying an application for asylum. Although the underlying statutory scheme

---

167 *See supra* note 165.

168 *See* Jones, *supra* note 46, at 1492 (describing how some appeals are placed on a nonargument track because they raise "routine" issues).

for asylum claims is quite lengthy and complicated,[169] most of these cases present a single issue: whether an adverse credibility finding by the BIA is supported by substantial evidence.[170] Some courts, such as the Second and Ninth Circuits, review hundreds if not thousands of these claims per year.[171] As a result, judges have become well versed on this issue and have less of a need to hear argument. Moreover, as Judge Newman has noted, these cases do well on a nonargument track because staff attorneys "develop expertise with respect to this recurring issue."[172] Taken together, these points suggest that it is possible to both reduce the number of cases with material errors and conserve scarce judicial time simply by placing "repeating appeals" on a nonargument track.[173]

As to the second category—cases less likely than others to contain errors upon arrival at the appellate courts—two main subcategories are relevant. The first consists of those cases that are patently frivolous. Examples include the so-called "tax protestor" appeals, in which the appellant challenges a conviction for tax evasion based on the argument that the federal income tax is unconstitutional;[174] cases in which the appellant claims that his conviction violates the Indictment Clause of the Fifth Amendment because only capital letters, instead of both capital and lowercase letters, were used to spell out the appellant's name;[175] and cases in which the appellant argues that he should be able to sue a private attorney for malpractice under 42 U.S.C. § 1983.[176] Appeals such as these present issues that are, on their face, so absurd that it is extremely unlikely that a district court would err in resolving them in the first instance, particularly compared to the chance of error that exists in nonfrivolous cases.

---

169 *See* 8 U.S.C. § 1158 (2006).

170 *See* Newman, *supra* note 99, at 433.

171 *See* 2011 ANNUAL REPORT, *supra* note 4, at 74–79 tbl.B-3.

172 Newman, *supra* note 99, at 433; *see also* Catterson, *supra* note 21, at 298 (describing how the Ninth Circuit has "spent much time and effort in crafting systems that allow the court to handle both a high volume of particular types of cases and cases raising common or related legal issues" and explaining that "[i]mmigration cases lend themselves well to [the Ninth Circuit's] existing systems because there are, more or less, a finite number of countries in the world from which applicants have sought asylum and a fixed number of country reports prepared by the United States Department of State").

173 *See* Tobias, *supra* note 69, at 1277 ("[L]ittle purpose may be served by holding oral argument in the fifth social security appeal which raises a legal issue identical to one decided in four earlier cases . . . .").

174 *See, e.g.*, Allamby v. United States, 207 F. App'x 7, 8 (2d Cir. 2006).

175 *See, e.g.*, United States v. Rogers, 16 F. App'x 38, 39 (2d Cir. 2001).

176 *See, e.g.*, Licari v. Voog, 374 F. App'x 230, 231 (2d Cir. 2010).

The second subcategory of cases is defined not by the substance of the appeal, but by the process it has already undergone by the time it reaches the appellate court—namely, a meaningful layer of review.[177] The intuition behind this category is straightforward: a system with one or even two layers of review of the initial decision is more likely to catch an error than a system in which there is no review before the case reaches the appellate court.[178] While it might be difficult at the margins to determine all manner of cases that should be included in this category,[179] the majority of cases should be apparent. For example, a classic set of cases within this category are Social Security appeals, which first pass through an Administrative Law Judge, then the Social Security Administration Appeals Council, and then a district court before coming to the appellate court.[180] Of course, the district court need not be one of the additional layers of review. Complaints about unfair labor practices are heard by an Administrative Law Judge and then the National Labor Relations Board ("NLRB") before coming to the federal courts of appeals—bypassing the district court altogether.[181] The point is not to focus upon which adjudicatory body has already reviewed the case so long as the review that the case has already received is a meaningful one.

In short, it stands to reason that a court with limited time, hoping to ensure that as many cases as possible are free from material error, would consider which cases could most likely still be decided correctly without receiving full judicial treatment. Repeating appeals and appeals that seem less likely to contain errors at the outset of review—either because they are frivolous or because they already have experienced a meaningful review—are good candidates for limited judicial attention.

---

177 I employ the term "meaningful" to screen out cases that have gone through only a cursory form of review. For example, some have suggested that the BIA's review of decisions by Immigration Judges is not particularly thorough. *See, e.g.*, Guchshenkov v. Ashcroft, 366 F.3d 554, 558 (7th Cir. 2004) (Posner, J.) (describing a decision by the BIA as a "characteristically perfunctory opinion affirming the immigration judge"). For the purposes of this discussion, it is not necessary to take a position on the BIA's quality of review as its appeals tend to raise repeating issues, thus already placing it within a category of cases appropriate for nonargument review.

178 This rationale assumes that the cases that go into each system are equally likely to result in an error in the first instance.

179 For example, it would be challenging to categorize habeas corpus appeals, which can raise a mixture of new and previously reviewed claims. The purpose of this discussion is simply to identify the broad categories that seem relevant for structuring judicial review, not to give a complete account of precisely which cases would be included or excluded from each category.

180 *See* 20 C.F.R. § 404.900 (2012).

181 *See* National Labor Relations Act § 10(a), 29 U.S.C. § 160 (2006).

The preceding discussion is meant to briefly convey one possible way that courts faced with scarce judicial time could attempt to maximize the value (i.e., output) of error correction. The other primary output identified above is law development. The next question, then, is what would it mean for courts to try to maximize law development?

As noted earlier, maximizing law development cannot simply mean publishing as many opinions as possible. Indeed, several judges have argued that flooding the *Federal Reporter* with opinions actually may make the law less, not more, clear.[182] The notion of maximizing law development therefore has to account for the idea that law development is about clarifying the law, not simply adding to it. Thus, one conception of maximizing law development would actually be minimizing the number of areas of law that need clarification or development.

To achieve this goal, judges presumably would manage their dockets so as to spend more time with cases that were likely to require the development or articulation of law and less time with cases less likely to require such detailed development of the law. As for cases that would be more likely to require law development or articulation, an appeal raising a novel issue—say, following the articulation of a new standard by the Supreme Court—presumably would be a good candidate for oral argument, consideration on the merits in chambers, and a published opinion. In other words, a judge would want to allocate significant judicial attention to such a case.

Perhaps unsurprisingly, the categories of cases unlikely to require law development, and thus unlikely to demand much judicial attention, overlap with the categories of cases explored in the context of error correction. First, repeating appeals, almost by definition, offer little need or opportunity for law development. Once the core issue raised by such appeals is resolved—presumably following an oral argument, consideration in chambers, and a published opinion—courts have no need to clarify or articulate the law further. Accordingly, these cases demand little judicial attention.[183]

Second, patently frivolous appeals also are less likely to require law development, thereby requiring considerably less judicial attention as well. This is because the frivolity of these appeals often stems from the fact that they are challenging something that is plainly set-

---

182 *See supra* note 119.

183 *See* Jones, *supra* note 46, at 1494 (describing how certain appeals, including immigration and Social Security appeals, tend not to require the "law-declaring function" of the court because the legal principles are well settled).

tled—for example, the constitutionality of the federal income tax.[184] Unless such an appeal indirectly raises a novel issue, it is unlikely to require the articulation or development of the law. As such, judges approximating the maximization of law development under resource constraints would do well to place such cases on a nonargument track.

C. Matching Theory and Practice

The preceding analysis suggests that a court attempting to maximize error correction and law development should seek out certain cases—those that are complex and those that present novel issues of law—and ensure that they receive argument and consideration in chambers. The court should also separate certain kinds of cases—repeating appeals, patently frivolous appeals, and those that have received at least one meaningful review before reaching the appellate courts—and mark them for less judicial attention. The next question is to what extent this strategy compares with how the judges actually have been allocating their scarce time.

Ultimately, current case management techniques appear to comport fairly well with the approach described above. Beginning with cases that are likely to be selected for full judicial treatment, the Federal Judicial Center Report on case management noted that certain case characteristics are "likely to trigger oral argument," including "novel issues, complex issues, extensive records, and numerous parties."[185] These characteristics appear consistent with an attempt to maximize the outputs as identified here. The courts allocate more judicial attention to cases that are complex, have lengthy records, and involve numerous parties—precisely the cases that present greater error-correction challenges. Courts also allocate attention to cases that present novel issues—precisely those cases that require law development.

Turning to appeals that, conversely, are selected for a nonargument track, several classes of cases that generally involve repeating appeals consistently receive limited judicial attention. For instance, immigration cases, sentencing appeals, and bail appeals often raise repeating issues and, as noted in Part II, are often placed on nonargument tracks in several of the courts of appeals.[186]

---

184 *See, e.g.*, Allamby v. United States, 207 F. App'x 7, 8 (2d Cir. 2006).

185 *See* McKenna et al., *supra* note 94, at 10.

186 *See supra* notes 104–11, 116, 117 and accompanying text.

Additionally, patently frivolous appeals are frequently placed on nonargument tracks. This is true for individual frivolous appeals,[187] such as the tax protestor-cases.[188] It is also true for classes of frivolous cases,[189] such as *Anders* brief cases or those cases in which defense counsel specifically has stated that there are no meritorious issues presented.[190] In short, frivolous appeals—both patently frivolous appeals and those appeals deemed unmeritorious by counsel—typically receive less judicial attention.

Finally, cases that already have received at least one meaningful review are also often given less judicial attention. Prime examples of previously reviewed appeals include Social Security and BIA appeals.[191] As noted in Part II, at least five of the circuit courts routinely route Social Security cases onto a nonargument track.[192] Noted earlier as well, immigration appeals are consistently sent to nonargument tracks in many of the courts of appeals.[193] This is not to suggest that all previously reviewed appeals receive limited judicial attention—for example, the Federal Judicial Center Report does not note any courts that systematically route NLRB or bankruptcy cases onto nonargument tracks—but two of the largest categories of previously reviewed appeals are treated in this way. In short, many of the courts' case management practices appear consistent with how we would expect the courts to maximize error correction and law development in theory.

Indeed, the only significant class of cases that tend to receive nonargument treatment that cannot be accounted for in this way are pro se appeals. As noted in Part I, the circuit courts all currently

---

187 The Federal Judicial Center Report specifically notes that certain courts, including the D.C., Fifth, and Eighth Circuits, route frivolous appeals onto a nonargument track. *See* McKenna et al., *supra* note 94, at 45, 109, 154. And as a more general matter, the Federal Rules of Appellate Procedure explicitly allow for dispensing with oral argument when a panel agrees that a case is frivolous, *see* Fed. R. App. P. 34(a)(2)(A), which would suggest that frivolous appeals routinely receive limited judicial attention.

188 *See, e.g.*, *Allamby*, 207 F. App'x at 8.

189 *See supra* note 115 and accompanying text.

190 *See supra* note 114 and accompanying text.

191 As noted earlier, some have suggested that the review process within the BIA is not particularly thorough. *See supra* note 177. Again, for the purposes of this discussion, it is not necessary to take a position on the BIA's quality of review. Even if one thinks that this kind of review is generally "perfunctory," one can still recognize that immigration appeals are already within a category of cases appropriate for nonargument review because they tend to raise repeating issues.

192 *See supra* note 112 and accompanying text.

193 *See supra* notes 104–11.

route most pro se appeals to a nonargument track.[194] And while pro se prisoner cases may raise some repeating claims—often about the conditions of imprisonment—the more general category of pro se appeals includes claims from all areas of law. An informal survey of cases with pro se appellants decided over a few weeks in the summer of 2011 included appeals stemming from allegations that officers had violated the appellant's Fourth Amendment rights,[195] a judgment that the appellant had violated portions of the Bankruptcy Code,[196] claims that the appellant's right to a speedy trial had been violated,[197] allegations that the appellant's constitutional rights were violated during incarceration as a pretrial detainee,[198] and claims of employment discrimination and retaliation under Title VII of the Civil Rights Act of 1964[199] and the Americans with Disabilities Act.[200] Moreover, although some pro se appeals will have encountered an additional layer of review by the time they reach the courts of appeals—for example, the bankruptcy appeal in the list above—most will not have been previously reviewed.

What seems to be motivating the nonargument treatment of pro se appeals is the presumption that these cases often contain frivolous claims.[201] In the words of Judge Wallace: "[*P*]*ro se* litigants are more prone to make frivolous or incoherent arguments, neglect to fulfill important procedural requirements, and/or file appeals with jurisdictional defects."[202] This view is particularly pronounced with regard to pro se prisoner petitions,[203] which comprise just over half of all pro se appeals.[204] As Judge Newman stated in his article *Pro Se Prisoner Lit-*

---

194 *See supra* notes 94–95 and accompanying text.

195 *See* Flood v. Schaefer, 439 F. App'x 179, 180 (3d Cir. 2011).

196 Wynns v. Davis, 435 F. App'x 27, 28 (2d Cir. 2011).

197 Chavis v. Pennsylvania, 434 F. App'x 50, 50 (3d Cir. 2011).

198 Paulino v. Burlington Cnty. Jail, 438 F. App'x 106, 107–08 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1548 (2012).

199 Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (codified as amended in 42 U.S.C. § 2000e (2006)).

200 Americans with Disabilities Act of 1990, Pub L. No. 101-336, 104 Stat. 327 (codified as amended in 42 U.S.C. § 12101); *see* Price v. Plantation Mgmt. Co., 433 F. App'x 264, 264–65 (5th Cir. 2011).

201 *See* Meehan Rasch, *Not Taking Frivolity Lightly: Circuit Variance in Determining Frivolous Appeals Under Federal Rule of Appellate Procedure 38*, 62 ARK. L. REV. 249, 276 (2009) ("[T]here is a perception among many courts and commentators that a large percentage of meritless suits and appeals are brought by pro se and in forma pauperis litigants.").

202 Wallace, *supra* note 78, at 194.

203 *See* David Greenwald & Frederick A. O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1158 (2002) (noting that it is "generally believed" that "pro se prisoner petitions . . . are overwhelmingly weak and often frivolous.").

204 *See* 2011 ANNUAL REPORT, *supra* note 4, at 39 tbl.S-4.

igation: Looking for Needles in Haystacks, the challenge for courts, even after the passage of the Prison Litigation Reform Act,[205] is "to avoid letting the large number of frivolous complaints and appeals impair their conscientious consideration of the few meritorious cases that are filed."[206] Given the courts' perception of pro se appeals, the nonargument treatment of these cases can be understood as part of a larger attempt to allocate less judicial attention to classes of cases that are thought to have a higher percentage of frivolous claims.[207]

In short, between the categories of cases to which the circuits generally give less attention (appeals that often raise repeating or frivolous issues) and the types of cases to which they generally give more attention (appeals that raise complicated or novel issues), the courts' case management approach appears consistent with an attempt to maximize a combination of error correction and law development.[208]

---

205 Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321-66 to 1321-77 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.). The Prison Litigation Reform Act of 1995 was designed to reduce the number of frivolous prisoner cases. *See id.*

206 Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 527 (1996).

207 *Cf.* Tobias, *supra* note 69, at 1277 ("[L]ittle purpose may be served by holding oral argument . . . in pro se appeals that involve only frivolous legal contentions.").

208 Although the focus of this analysis has been on maximizing outputs, a brief word is in order on the distribution of those outputs. If the courts have correctly identified the cases that fall under the relevant categories (such as which cases are more likely to be frivolous), no significant differences should exist in either the error rates or law-development needs among different classes of cases.

Beginning with error correction, the courts currently place two categories of appeals on nonargument tracks: those that appear to lend themselves well to nonargument review and those that appear less likely to contain errors upon arrival to the appellate courts. With respect to the appeals that lend themselves well to nonargument review, the theory is that because they raise repeating issues, such appeals will have errors that can be identified fairly easily. As such, one would not expect them to have a dramatically higher rate of material errors at the end of the appellate process than cases that received full judicial treatment. With respect to appeals that are less likely to come to the appellate courts with errors—either because they have been through a meaningful review already or because they are frivolous—such cases should likewise not have a significantly higher rate of material errors when compared to cases that received considerably more judicial attention. Turning to law development, it would seem that the relevant categories of appeals—those that are frivolous and those that raise repeating issues—should not have a great need for law development, and certainly they should not have a greater need than the traditional argument cases.

What this analysis suggests is that in addition to being consistent with a general attempt to maximize outputs, the courts' case management practices also should not result in a significant inequality of outputs across classes of cases.

D. *Evaluating the Framework*

Resource allocation theory has both limitations and benefits as a lens through which to look at the appellate courts. As to the former, the analysis rests on something of a thought experiment, rather than a strict set of normative rules or a rigorously quantitative analysis. It is not meant to definitively prescribe exactly how the courts should be allocating their time. What it is meant to do, however, is to provide a way of thinking about how the courts are operating and to convey a sense of how the courts could reasonably spend their time in an effort to maximize their legitimate goals.

Based on this preliminary and tentative analysis, it appears that the courts generally are managing their cases in a way that is consistent with an attempt to maximize error correction and law development. This is not to suggest that they are perfectly maximizing these two goals, but simply that the two-track system generally comports with a maximization approach. To some, this finding may seem unsurprising—of course it should be expected that judges are acting rationally and devoting their scarce time where it would be most useful. But given the range of scholarly criticism that the courts have faced, it is important, as a matter of judicial legitimacy, to consider whether there is reason to think that the courts have erred in their case management or whether they appear to be doing the best they can within their limited means.

Much of the scholarly literature on judicial administration has suggested that the courts have improperly responded to the rising caseload. As noted earlier, some court scholars have argued that judges are devoting their time only to "wealthy, powerful, or institutional litigants"[209] and disregarding the "have-nots."[210] These allegations are troubling, particularly as they seem to suggest that the courts are denying time to the "have-nots" at least in part because they are "have nots." But as the preceding analysis has shown, this is not necessarily the case. Although under the current system certain classes of litigants are likely to be routed onto a nonargument track, this analysis suggests that there are valid reasons for doing so in a time of scar-

---

209 Richman & Reynolds, *supra* note 16, at 341 ("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.").

210 Pether, *supra* note 16, at 8 (describing how the use of unpublished opinions "subject[s] 'have-nots' to discrimination and systematically advantage[s] the powerful").

city—reasons based on the characteristics of the claims and not the status of the parties.

In another vein, some court scholars have claimed that the courts are "giving diminishing attention to the seemingly less gratifying work of error correction"[211] or even largely abandoning that function. The lens of resource allocation offers a different way of viewing the courts' actions here. Although it is true that judges are spending less time reviewing each case for errors when compared to their predecessors a half century ago, their actions nevertheless can be seen as consistent with an attempt to minimize the error rate overall while balancing the needs of law development.

Ultimately, it is still the case that the current system is far from ideal. Judges are not able to give full attention to each case, and as such, there inevitably will be cases that receive less time than we would like. This means that some cases will leave the court system with their errors uncorrected or areas of law still unclear. But these problems are created by scarcity, and not by the courts themselves. The analysis here is meant to move the discussion forward by showing that there are valid reasons for much of the current case management structure given the scarcity faced by the courts. The analysis does *not*, however, suggest that these case management practices are above scrutiny. The two-track system has challenges—namely how to ensure that cases that need more attention receive it, and how to ensure that even cases that receive less attention still receive adequate treatment. Accordingly, the final Part of this Article considers ways to test and improve the case management practices of the federal appellate courts.

IV. Testing and Improving Allocation Practices

Part III suggests that many of the courts' current case management practices are loosely consistent with an attempt to maximize the twin goals of error correction and law development. But this analysis (and indeed, some of the courts' decisions about which practices to adopt) is based on assumptions about the characteristics of various classes of cases—assumptions that can and should be tested. This Part sets forth ways to test these claims. Then, as this Part concludes, even if these claims are found to be valid, there are still several ways in which the case management practices of the appellate courts can be improved at the margins.

---

211 Carrington, *supra* note 57, at 424.

A. *Testing Claims*

The analysis in Part III rests on a series of claims about the nature of law development and error correction. On the law-development side, the primary claim is that certain kinds of cases, such as routine and frivolous appeals, are less likely than others to lend themselves to law development. On the error-correction side, the primary claim is that certain kinds of cases are more likely than others to be free from error after being reviewed on a nonargument track because (1) they contain routine issues, or (2) they are less likely to have errors upon arrival to the appellate courts (because the claims they raise either are frivolous or they have been through a meaningful review already). Although the case management strategies of the courts appear reasonable in theory, these underlying claims should be tested to see if they are appropriate strategies in practice.

In light of the difficulties in measuring law development[212] and error correction,[213] one might think that testing these claims would be impossible. Yet, what is required is not a measure of how well the courts are performing their functions, but a relative measure of which categories of cases are in need of error correction and law development. Both of these outputs have plausible and convenient measures—namely, the rates at which appellate courts reverse decisions and publish opinions, respectively.

If courts were willing,[214] they could randomly select a percentage of cases that normally receive nonargument track treatment and instead give them full judicial treatment—including oral argument and consideration in chambers. One could then examine the outcomes in those cases and compare them to the outcomes in the rest of the argument cases. With respect to error correction, one could observe whether the average reversal rate in the traditional nonargument cases was, indeed, lower than the average reversal rate in the traditional argument cases. Likewise, with respect to law development, one could examine whether the rate of published opinions in the traditional nonargument cases was, in fact, lower than the publication rates in the traditional argument cases. If the publication and reversal rates

---

212 *See supra* note 165 and accompanying text.

213 *See supra* note 167 and accompanying text.

214 Even if most courts might not be willing to conduct such an experiment, a minor proposal like this might be able to get traction in at least one circuit. It is worth noting that members of the federal judiciary have proven willing to participate in some experiments in the past, albeit on themselves (and not on the way they manage cases). *See generally, e.g.*, Chris Guthrie, et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (reporting the results of cognitive study based on 167 federal magistrate judges).

of the traditional nonargument cases turned out to be just as high or higher than those of the argument cases, then the underlying claims about law development and error correction, and indeed the case management practices that undergird the two-track system, would need to be reconsidered. If, however, the publication and reversal rates of the traditional nonargument cases turned out to be lower, then the courts would have provided strong evidence of the utility of their allocation strategy.

Of course, such an experiment is not without its costs or shortcomings. With respect to costs, holding argument in an additional set of cases would impose a burden on the courts—particularly at a time when they are already overburdened. Such a cost would arguably be justifiable in order to test the utility of current court practices, but it would be a cost nonetheless. With respect to shortcomings, one limitation of this experiment is that judges are of course aware of which appeals are traditional nonargument cases. Accordingly, if a judge saw an immigration appeal on the argument calendar, she would know that the case was likely selected for full judicial treatment as part of the experiment (though she would know that there was some chance the case was on the calendar because it contained a novel or complex issue). This knowledge might, in turn, affect the judge's treatment of the case. Still, even with such shortcomings, the proposed experiment would be a significant step forward in evaluating the current case management techniques of the courts.

Finally, as noted earlier, one could utilize the resource allocation framework and include outputs beyond error correction and law development; if others were considered, then claims underlying those potential outputs could be tested as well. As one example, perhaps legitimacy comes to be understood as a primary goal of the appellate courts. One might assume that parties will ascribe more legitimacy to the courts if they are able to participate in oral argument or if they receive a published opinion. Some court scholars already have begun testing these and related assumptions. For example, Tom Tyler has studied the extent to which being heard by a court official increases one's sense of judicial legitimacy in the district court setting.[215] Additionally, Dan Simon and Nicholas Scurich recently evaluated the extent to which differences in the ways decisions are written—specifically, whether the opinion recites arguments for both parties or appears "one-sided"—affect the way people perceive the legitimacy of

215 *See* Tyler, *supra* note 147, at 887.

the courts.[216] One would need to build on this research and examine the relative values of oral argument and a published opinion—whether litigants ascribe more legitimacy to the courts after having received one or the other. Other relevant questions would include just how much time at oral argument litigants need to feel that they were heard and whether that oral argument needs to be before a panel of three judges, or whether one judge—or even another court official—would suffice. The critical point is that if a consensus developed that some other objective should be considered as a judicial output, then questions such as these would need to be answered in order to determine whether and how judicial attention should be reallocated.

B. Improving Case Management Practices

Even if the claims underlying the courts' case management practices can be supported, those practices are not beyond improvement. To the contrary, case management techniques can be enhanced in several key ways—ways that pertain to the structure of nonargument review.

As the analysis in the preceding Part suggests, giving certain cases less judicial attention is appropriate if courts have strong reasons to believe that those cases will be less likely to require law development, less likely to contain errors, or if any errors will be readily apparent in nonargument review. Beginning with the final set of cases—those that lend themselves to nonargument review due to the repeating nature of the underlying claims—the success of their review depends in large part on the staff attorneys who assess them. In particular, if those staff attorneys are able to develop proficiency with the underlying claims, they will have the greatest chance of catching material errors and identifying those cases that require more judicial attention for purposes of law development or error correction. This proficiency, in turn, comes from training and experience, which can be attained either through specialization or extended tenure.

Accordingly, circuit courts would do well to structure staff attorney offices to encourage subject-specific expertise where possible.[217] Although a few circuits purposefully have created specialty staff attorney positions—for example, staff attorneys in the Second Circuit who

---

216 *See* Simon & Scurich, *supra* note 147, at 719.

217 Not all circuits have enough staff attorneys to specialize. As one member of the Clerk's Office for the Court of Appeals for the First Circuit stated, the Staff Attorney's Office "is simply too small" for specialization. Levy, *supra* note 8, at 329.

work on immigration appeals work *only* on those appeals[218]—this is not the norm across circuits. Moreover, this analysis further suggests that, whenever possible, it is important to have staff attorneys who serve terms of at least a few years. Again, although some circuits have mostly long-term staff, many have half or even a majority of their staff serving only one- or two-year terms.[219] The overarching point is that given that staff attorneys are tasked with correcting errors and also with identifying cases that, because they are particularly complex or present a novel issue, should be sent to the argument calendar, their positions should be structured accordingly.

Additionally, it is important to facilitate the identification of those traditional nonargument cases that require full judicial attention and ensure that they receive it. The discussion throughout this Article has focused on general rules for sorting cases and deciding which kinds of cases, overall, should receive more or less judicial attention. But of course, some cases within a larger category of those that typically need less attention will actually require additional treatment. Perhaps, for example, an immigration appeal will be particularly complex, or a pro se appeal will raise a matter of first impression. In such instances, these cases should be moved from a nonargument track to the regular argument calendar, in order to receive the required greater judicial attention.

Part of ensuring that this happens involves properly training staff attorneys, consistent with the proposals outlined in this Article; if staff attorneys have a particular expertise in bankruptcy appeals, for example, they will be better able to identify which cases are particularly complex or raise a novel issue. Yet the other way to ensure that this happens is through ensuring, in turn, that staff attorneys do not meet a great deal of resistance when recommending some traditional nonargument cases for full review.

In some circuits, staff attorneys face discouragement when they send cases from a nonargument track to an argument calendar. For example, one senior staff attorney with whom I spoke stated that judges on his court have been known to chastise staff attorneys for placing cases on the argument calendar that the judges ultimately did

---

218 *See id.* at 330.

219 For example, as of 2010, the Second Circuit's immigration staff attorneys were all hired for one-year terms, with the possibility of renewal; in the Third Circuit, half of the staff attorneys were serving temporary terms of one to two years, with the possibility of extension; and in the Fourth Circuit, over half of the staff attorneys were serving terms, typically of two years, again with the possibility of extension. *See id.* at 330–31.

not think warranted argument. Not surprisingly, this staff attorney noted that they had internalized a strong presumption against moving cases to the calendar in this circuit.[220] This kind of chilling effect creates the risk that certain cases with complex or novel issues will not be correctly decided, or that an area of law that needs clarity will remain unclear.

Accordingly, courts should examine the kind of processes they have in place for sending traditional nonargument cases to the argument calendar.[221] In some circuits, staff attorneys have the authority to send nonargument cases to argument and when they do, their identity is known to the judges. Judges might consider allowing staff attorneys to send such cases anonymously, or having a senior staff attorney sign off on each decision to send a nonargument case to argument. Altering the process in either way would limit the degree to which individual staff attorneys would feel responsible for, and thus chilled from, sending a case to the argument calendar. In short, courts should ensure that the processes they have in place are facilitating, or at least not inhibiting, the designation of certain nonargument cases for additional judicial attention.

Ultimately, the preceding analysis suggests that in a time of scarcity, certain cases should receive less judicial attention in the form of nontraditional review. And yet it remains critical to ensure that this review is as effective as possible given existing constraints. In particular, through structuring staff attorney offices so that individual attorneys obtain expertise—through specialization and lengthened tenures—and through providing that there are appropriate processes in place to identify and move those cases that require additional judicial attention, the courts will be better positioned to guarantee that every case receives effective appellate review.[222]

---

220 Comments made by Justice Stevens suggest that a similar effect occurs when clerks on the Supreme Court decide whether to recommend that the Court grant or deny certiorari. According to the Justice, law clerks he spoke to said that when they were in doubt about a case, they erred on the side of not recommending a grant of certiorari. Interview by David F. Levi with John Paul Stevens, Retired Assoc. Justice, Supreme Court of the U.S., in Durham, N.C. (May 12, 2012).

221 Many thanks to Rachel Brewster for this suggestion.

222 In the words of the Second Circuit:

> As a matter of policy, finally, appellate courts certainly have the inherent authority to allocate scarce judicial resources among the petitions and appeals that press for their attention, and such allocations become especially necessary in this era of burgeoning appellate dockets. We recognize, in this context as in others, the need to exercise this authority with care and discrimination to ensure that nonfrivolous claims are fully considered and fairly decided.

Conclusion

It is tempting to wax poetic about the golden years of the appellate courts, when federal judges had the time to hear oral argument, consider cases in chambers, and write full-length opinions in the majority of their cases. Few, if given the choice, would prefer to have the two-track system, in which the majority of cases are decided without argument, with a staff attorney drafting the disposition, and with the resulting judgment in the form of a nonpublished order. Yet those days ended more than half a century ago. Continuing to contemplate significant changes to the courts in an era in which great change seems unlikely is to do little to improve the judiciary.

For the foreseeable future, judges will be forced to make choices about how to allocate their time and effort across their dockets. Therefore, the academy must begin to consider difficult questions about how judges should make decisions within the resource constraints that courts are facing. This Article has attempted to move that discussion forward by offering a framework in which to understand and evaluate the case management practices that have developed as a result of these resource constraints. By focusing on what courts are expected to produce, and what precisely goes into that production, scholars can consider reasonable ways of allocating one of the scarcest resources in the court system: judicial attention. What this analysis brings to light is that the courts' two-track system appears to comport with an attempt to maximize the outputs of error correction and law development. In short, despite scholarly criticism of the courts' case management practices, there is reason to think that, for the most part, they are doing the best they can with the limited resources they possess.

While this Article has sought to better understand and evaluate the judicial response to scarcity, it also has outlined additional research and measures that should be undertaken to improve the courts. Specifically, it has proposed an experiment for the courts to test precisely which cases do, in fact, contain fewer material errors and have less need for law development. It also has outlined ways to improve courts' practices by increasing specialization in the staff attorneys' offices and increasing the likelihood that cases that need additional judicial attention ultimately receive it.

In the end, it may be difficult to accept that we are unlikely to return to the traditional model of appellate decisionmaking in most

---

Pillay v. I.N.S. 45 F.3d 14, 17 (2d Cir. 1995) (per curiam).

cases. Yet by understanding the resource limitations and how to operate within them, though we cannot return to the golden age of the 1950s, we can work towards ensuring that the federal appellate system functions as well as possible.