Dear Duke Roundtable Participants: I am excited to share this very early-stage project with you all and to be in conversation (virtually and on paper) with those of you who have written on these issues before. I very much look forward to your thoughts and to "seeing" you all soon. Thank you for taking the time to review! Best, Merritt

DEFINING MERIT AND REDESIGNING THE FEDERAL APPELLATE PROCESS

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"Meritless appeals," federal judges say, are a major problem.[1] That problem has persisted since "meritless appeals" first emerged in the 1960s[2]—a boom time, perhaps not coincidentally, for federal civil and criminal constitutional and statutory rights as well. Indeed, the term "meritless" was used just 21 times in the federal appellate courts' available decisions issued before 1960.[3] But it's been used in at least 26,565 decisions since the beginning of 1960.

The specter of "meritless" appeals has transformed the federal appellate process. Merit, or perceptions of it, is the engine of process for these courts. Appeals with "merit" receive judicial time and attention, oral argument, and sometimes a precedent-setting decision.[4] Meritless appeals, on the other hand, do not; instead, they are handled by staff attorneys, receive little judicial time and attention, and almost always end in non-precedential decisions.[5] That may seem as it should be. Why spend time or resources on appeals that are losers?

One problem is that the vast majority of appeals are losers. In the federal system, the average annual outright reversal rate across the geographic circuit courts is only a little more than 8%.[6] Few of us would defend a system where only 8% of appeals receive meaningful judicial attention. Another 1.5% of appeals earn a remand—another favorable result. Again, few might defend an appellate review system that bestows judicial scrutiny to only 10% of filed appeals.

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[1] Hon. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 181-82 (1999) (identifying "meritless appeals" as a major problem affecting the federal appeals courts); *see also* LEE EPSTEIN, WILLIAM M. LANDES, RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE 55 (2013) ("The vast majority of unpublished decisions are affirmances, and . . . this is a reflection of the signal lack of merit of most cases filed in the federal district court.").

[2] Surely there were meritless appeals filed well before the 1960s—and likely many of them; but they did not enter the judicial and scholarly conscience in the way we think of them today before at least the 1960s. *See, e.g.*, Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004).

[3] To obtain this number and the next, I searched Westlaw's federal appellate courts' database for the word "meritless" using a date range for decisions issued before (and after) 1960.

[4] *See* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 275–76 (1996) (describing federal appellate triage system); *see also see also* RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISING ITS ORAL ARGUMENTS (2017).

[5] *Id.*; *see also* Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 345–54 (2011); David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1668 & n.2 (2005).

[6] ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS tbl.B-5 (2019).

Another—perhaps more fundamental—problem is: how do we know, at the outset, which appeals are losers? We only know whether an appellant should win or lose—that is, has advanced winning arguments or not—once the court has invested significant resources in evaluating and deciding the appeal. From the perspective of institutional design, courts must be able to make value-laden judgments about the relative merit of appeals ex ante to avoid investing too much time in the losers (however we define those terms: "too much" and "losers"). If merit is one commodity, time is the other—and it is a resource that is seemingly just as scarce.[7]

And, so, the modern federal appellate triage system was born. Since then, it has been criticized and defended. Scholars have offered modest reforms[8] and more radical ones.[9] But the process has remained largely unchanged: at the outset of most appeals in the federal appellate system, judicial staff make an initial cut of possible winners and likely losers; that pivotal decision affects the extent of process and judicial attention each appeal receives.[10] For the triaging system to work, some appeals are presumed to have merit, while others are presumed to lack it. Appeals involving pro se litigants, for example, are presumed to lack merit from the outset.[11] If an appeal comes from a pro se appellant, as half of all appeals do,[12] it goes to a second, lesser track irrespective of whether, objectively speaking, it's a winner or a loser.[13] By design, second-track appeals will receive less judicial time and attention—that's how the courts have set up the system.[14] The same is true for certain classes of appeals, including immigration appeals and Social Security disability benefits cases, whether lawyered or not.[15]

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[7] *See, e.g.*, Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 405 (2013) (describing judicial attention as a "scarce resource").

[8] *Id.* at 443–46 (discussing suggested reforms, including "structur[ing] staff attorney offices to encourage subject-specific expertise," providing better training to staff attorneys, and ensuring that staff attorneys do not "face discouragement when they send cases from a nonargument track to an argument calendar").

[9] Ryan Copus, *Statistical Precedent: Allocating Judicial Attention*, 73 VAND. L REV. 605 (2020) (advocating use artificial intelligence to help judges identify and sort cases that require more and less attention); *see also* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS (2013) (advocating doubling the federal appellate bench).

[10] *See* Levy, *Judicial Attention*, *supra* note 7, at 416 (describing triaging process).

[11] *See id.* at 416–18 (discussing categorical presumptions for "pro se appeals, immigration appeals, Social Security appeals, and several types of criminal appeals" that drive tracking decisions).

[12] JUDICIAL BUSINESS tbl.B-9 (2019).

[13] *Compare* Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 310 (1990) ("While some groups of appellants may be statistically more likely to bring appeals which have less merit than those brought by other types of appellants, the identification of the appellant per se should make no difference.").

[14] *See* Richman & Reynolds, *Elitism*, *supra* note 4, at 306 ("Further, [the courts of appeals] have screened out of the traditional process those cases that are the least likely to draw the attention of any powerful observer—social security appeals, habeas corpus cases, prisoner civil rights cases, and pro se litigation generally."); *id.* at 303 ("Next, consider the Track-Two cases—those cases that are screened out of the traditional appellate process. These cases are not argued, often there is no conference, no opinion is published and, in some cases, no opinion is even written. These cases get very little attention from the judges; most of the work is done by staff attorneys and law clerks. Thus, for nearly half the circuit courts' caseload there is already a substantial breakdown in the quality of the appellate process.").

[15] *See* Levy, *Judicial Attention*, *supra* note 7, at 418–19.

Courts say this is a triage system born of necessity, because the courts cannot give equal attention to every appeal.[16] Instead, in a world of limited resources, courts distribute judicial attention to those they perceive as most deserving—that is, appeals with merit. Lurking in debates over how to distribute resources smartly and fairly are threshold questions that we have never squarely interrogated: how should courts define "merit"; how should they identify those appeals with "merit"; and what consequences should flow from that determination? Are only the winners, or *potential* winners, entitled to meaningful judicial time and attention? And, if that's so, how do we measure that necessary *potential* for success? Put more starkly: what does "merit" mean in a system where the vast majority of *every* appealing party loses? And, most importantly, has the separation of the "merit-less" from the "merit-full" become a cover for disfavor based on criteria that have little, if anything, to do with the merits of a dispute?

We use the word "merit" in at least two distinct senses in the law—one descriptive and one normative. This is the descriptive sense of "merit": we say that a court has decided a question "on the merits," which means that the court has reached and resolved the underlying legal dispute. For example, say a court has granted summary judgment finding no material issue of fact as to the defendant's liability for a product liability injury. That's a ruling "on the merits." Were the court to rule, instead, that there was a procedural defect in the suit—for example, a lack of subject matter jurisdiction—we might say that the court has not reached "the merits" of the underlying dispute. In that example "merits" functions descriptively to identify the underlying substance of the legal dispute—that is, the substantive rights of the respective parties.

There's a normative use of "merit," too. That's the use of "merit" to define what's *worthy* of judicial time and attention: we say, for example, that courts are clogged with "meritless" litigation or, for present purposes, "meritless" appeals. Those statements are not simply descriptive, though they may do that work, too (*e.g.*, these are appeals where the appellant will lose), but "meritless" conveys something more in this usage. It signals what courts *should* spend their time doing, and, conversely, what courts should *not* spend their time doing. This is the central premise of the triage system itself: by sorting the merit-full (or at least potentially merit-full) from the merit-less (or very likely merit-less) we distribute resources in a way that preserves meaningful judicial review for the kinds of appeals where at least some think it's needed most (e.g., close questions, novel questions, and/or important questions—categories that merit attention in the eyes of many).

Merit as a normative assessment—like any normative assessment—arrives loaded with priors about what makes anything worthy. Some priors may seem innocent enough. For example, a judge might find certain kinds of disputes inherently more interesting and therefore worthier of her attention, because that judge handled similar cases before her appointment to the bench. But even that seemingly innocent prior necessarily reflects the rarified air of those appointed to the federal bench.[17] Almost all priors are loaded with assumptions based on experience and privilege, and the federal bench is an elite bunch (as are, of course, the law professors who write about them).

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[16] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 168-69 (1996) ("Given the workload of the federal courts of appeals today, the realistic choice is not between limited publication, on the one hand, and, on the other, improving and then publishing all the opinions that are not published today; it is between preparing but not publishing opinions in many cases and preparing no opinions in those cases. It is a choice, in other words, between giving the parties reasons for the decision of their appeal and not giving them reasons even though the appeal is not frivolous.").

[17] *See, e.g.*, Mark Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOWARD L.J. 661, 664 (2013) ("Justices tend to act on elite values because Justices are almost always selected from the most affluent and highly educated stratum of Americans."); Jason Iuliano & Avery Stewart, *The New Diversity*

"Meritless" may sometimes be used in a way that denotes "frivolous," too. But that's a distinct concept in the law, as Alexander Reinert has convincingly argued in the only substantial work to date on the value of meritless litigation.[18] Reinert argues that courts, Congress, and scholars alike have elided the difference between "frivolous" and "meritless" litigation—and they have done so to the legal system's detriment. By substantially undervaluing meritless litigation, courts and Congress have promoted reforms that stymie legal innovation and thwart the day-in-court imperative. A similar distinction between "meritlessness" and "frivolousness" is important to draw in this context, too. Indeed, it may be even more important given the law-making function of the appellate courts and the capacity of meritless litigation to develop the contours of law, as Reinert has described.

This Article will interrogate what "merit" means in the context of appeals and, more controversially, argue that a system that relies on presumptions about relative merit to distribute resources is fundamentally unequal. Presumptions about the relative merits of certain kinds of appeals infect the federal appellate system in ways that perpetuate inequality in the distribution of the federal system's most scarce resource: judicial attention.

Although merit plays a role in the distribution of district court resources, too, the role it plays in the U.S. Courts of Appeals is especially stark. For decades, a tiered system of appellate review has existed across every federal appellate court in the country. Some have argued that these changes have effectively eliminated the appeal-as-of-right in federal court for at least some claimants, rendering the appellate process in the intermediate federal courts more like what we find in the picky courts of last resort.[19] To the extent that criticism is true,[20] there's a notable failure to attend to—structurally speaking—the significance of the triage decision itself.

Unlike at the Supreme Court of the United States where each petition for writ of certiorari receives the same initial treatment as a matter of internal process—that is, each is sent to a law clerk for review and summary through the law-clerk driven *cert.* pool process[21]—the federal appellate courts have developed a tracking system that relies, instead, on categorical presumptions about how to treat certain appeals. These defaults allow for speed and efficiency, but they weaken the possibility of individualized review. Many may be unbothered by this prospect because, again, we write off most of these appeals as "meritless" anyway.

But that same criticism surely could be levied at the flood of "meritless" *cert.* petitions filed in the Supreme Court each year. That Court grants less than 1% of the requests it receives. Yet the initial process for each petition is exactly the same: a law clerk prepares a memo on the relative "*cert.* worthiness" of each petition that is filed; that memorandum is distributed to the other Justices' chambers who participate in the pooling process. Each chambers then reviews the pool memos independently as an internal cross-check. From this individualized screening process, the Justices

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Crisis in the Federal Judiciary, 84 TENN. L. REV. 247 (2016); Barry J. McMillion, *U.S. Circuit and District Court Judges: Profile of Select Characteristics*, Congr. Research Serv., 2017.

[18] Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L. J. 1191, 1225 (2014).

[19] *See generally* Richman & Reynolds, *Elitism*, *supra* note 4.

[20] Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2401–02 (2014) (reviewing RICHMAN & REYNOLDS, INJUSTICE ON APPEAL) (evaluating ways federal appellate courts do, and do not, function as effectively "certiorari courts").

[21] *See, e.g.*, David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947 (2007) (describing *cert.* pool process).

select the petitions to review on the merits (or resolve through the "shadow docket"[22]). There are fair criticisms, to be sure, of the *cert.* pool process, and yet there is also something to admire in its procedural egalitarian-ness from the perspective of institutional design.

Instead of adopting something like a *cert.* pool process where law clerks devote significant time and attention to the triage decision itself, federal intermediate appellate law clerks generally only work on the equivalent of the "merits" cases themselves. These courts, instead, use default rules and staff attorneys to handle one of the most consequential decisions in the federal appellate process: whether an appeal will receive first- or second-track review.

This Article's most basic normative argument is that one of the most consequential decisions in the appellate process—whether an appeal deserves first- or second-track treatment—should be more like the *cert.* pool process. That means, it should happen within a judge's chambers, be based on an individualized assessment, be overseen by the judge, and be subject to a meaningful cross-check by other judges' chambers. Based on that initial, individualized assessment, a judge could designate an appeal for oral argument or not, designate an appeal as likely frivolous, or determine an appeal should go to a specialized staff attorney with subject-matter expertise before returning the appeal to a judge's chambers for either oral argument or a final decision.

The advantages of such a scheme are at least these: by delegating this task to (more often) term law clerks, those with the least accumulated bias against or toward any particular group will make an initial, individualized assessment about the relative need for the court to invest more time in a particular appeal. That decision may be informed by a variety of criteria that could develop over time—not unlike how *cert.* worthiness criteria have. Those criteria might expand to address novel, dignitary aims—and not only the needs of the court itself. Consider, for example, Matthew Lawrence's work in distributing procedure to those who might benefit most from the procedural justice experience of the process itself in the context of triaging Medicare appeals.[23] Courts might, indeed, develop individualized assessments that balance considerations of efficiency against other needs, like law development, individual day-in-court values, and risk of error.

There are obvious drawbacks to this scheme—not the least of which may be insufficient judicial resources to handle the task. Current caseloads, however, suggest that court resources may be sufficient to handle this redistribution of work; federal appellate law clerks are mostly no busier than Supreme Court law clerks, whose job tasks they might more directly mirror. And to the extent the Courts of Appeals may believe themselves under-staffed to take on this task, Congress should add judges to the courts, whose membership has been stagnant for three decades. (A tall, and politically complicated, order, I recognize—especially depending on what occurs in January in the Georgia special election.)

This Article will proceed in four parts. The first will explain the appellate triage model, detail the criticisms it has received, and consider existing reform suggestions. The second will consider how "merit" has been used to defend a system that, procedurally speaking, is unequal. The third will argue for dismantling the federal appellate triage system by interrogating and redefining what it means for an appeal to have merit. The final part will offer institutional reforms that better align with a system that distributes procedural resources based on individualized assessments and not based on categorical presumptions about the relative value of appeals.

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[22] *See, e.g.*, William Baude, *Foreward: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIB. 1 (2015).

[23] *See* Matthew J.B. Lawrence, *Procedural Triage*, 84 FORDHAM L. REV. 79 (2015).