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Judicial Incentives and the Appeals Process

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Articles

JUDICIAL INCENTIVES AND THE APPEALS PROCESS

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ALL, or virtually all, court systems have some sort of appeals process whereby litigants that are dissatisfied with an initial decision can challenge that decision "on appeal." The federal court system in the United States, for example, has three tiers of adjudicators: an initial decision-maker (a United States district court), which finds facts as well as decides questions of law; and two tiers of appellate review (a United States court of appeals and the United States Supreme Court), which decide questions of law and engage in very limited review of fact finding.[1] The court systems of other countries likewise commonly provide for an initial decision-maker subject to some form of appellate review.[2] The widespread availability of an appeals process in court adjudication contrasts sharply with the lack of an appeals process in commercial arbitration, where a party has essentially no ability to appeal an adverse award.[3]

The literature identifies two principal functions served by an appeals process. The first function of an appeals process is to correct errors by the initial decision-maker. Trial courts make mistakes, and appellate courts, because of their greater expertise, lesser time pressures, collegial

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1. *See* 28 U.S.C. §§ 1, 41, 44, 132-133 (1994); *see also* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS §§ 2-4 (5th ed. 1994). This description oversimplifies somewhat by not including bankruptcy judges and magistrate judges, whose decisions also are subject to appellate review.

2. *See, e.g.*, PETER MCCORMICK, CANADA'S COURTS 23-33 (1994). *See generally* Peter E. Herzog & Delmar Karlen, *Attacks on Judicial Decisions* § 8-9, *in* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE (Mauro Cappelletti ed., 1982).

3. *See* Pieter Sanders, *Arbitration* § 12-224, *in* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE (Mauro Cappelletti ed., 1996); GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 32.02 (rev. ed. 1990) (noting exceptions).

decision-making, or some other reason, correct those mistakes.[4] Steven Shavell has argued that an appeals process for correcting errors is superior to the alternative of improving the quality of trial courts to prevent errors, because it requires the expenditure of resources only in cases in which the party bringing the appeal has determined that trial court error was likely.[5] "The appeals process," according to Shavell, "may allow society to harness information that litigants have about erroneous decisions and thereby to reduce the incidence of mistake at low cost."[6]

The second function attributed to the appeals process is lawmaking. At least in common law countries, appellate judges decide cases that provide precedents to guide decisions in future cases. The highest appellate court ensures that the law created by the courts is uniform.[7] William M. Landes and Richard A. Posner have argued that the lack of an appeals process in commercial arbitration "suggests that the principal value of appellate proceedings is not to correct errors at the trial level but to formulate rules of law."[8] They reason that the benefits of lawmaking by judges are largely external to the parties involved in a particular case; thus, parties to an arbitration agreement have little incentive to provide for an appeals process and pay the appeals tribunal to engage in lawmaking.[9]

This Article extends the existing literature by addressing the functions of an appeals process from the perspective of the incentives of judges rather than from the perspective of the incentives of litigants.[10] Because the institutional characteristics of courts at different tiers of the court system vary, the incentives of judges at the different tiers vary as well. As a result, on the margin a judge may decide a case differently depending on whether the judge sits on a trial court, an intermediate appellate court, or

4. *See, e.g.*, Herzog & Karlen, *supra* note 2, § 8-4; PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 2-4 (1976).

5. *See* Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 381-82 (1995). Shavell emphasizes that his focus on error correction is "not to deny the importance of other possible purposes of the appeals process, notably, of lawmaking." *Id.* at 381.

6. *Id.* at 382.

7. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 12 (1985) [hereinafter POSNER, THE FEDERAL COURTS]; Herzog & Karlen, *supra* note 2, § 8-7.

8. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 252 (1979).

9. *See id.* at 238. Shavell explains that the lack of appeals in commercial arbitration as based, not only on the fact that arbitrators do not make "law," but also as a consequence of the parties' ability to select the arbitrator and an arbitrator's incentive to preserve his reputation by minimizing errors. *See* Shavell, *supra* note 5, at 423-24; *see infra* text accompanying notes 146-50.

10. Shavell addresses judicial incentives to some degree, although the analysis here differs from his. *See* Shavell, *supra* note 5, at 390-91. Judge Posner has dealt with judicial incentives at length in other contexts, but has dealt with judicial incentives only to a limited degree in connection with the appeals process. *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 14-15 (1993) [hereinafter Posner, *What Do Judges and Justices Maximize?*]; *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.14 (4th ed. 1992) [hereinafter POSNER, ECONOMIC ANALYSIS OF LAW] (discussing interlocutory appeals and the doctrine of finality).

a supreme court. The appeals process requires a rational utility-maximizing trial judge to take the possibility of review by a decision-maker with different incentives into account when making his or her initial decision, thereby constraining the trial judge's decision making.

An approach that focuses on judicial incentives complements and refines the approaches of Shavell and Landes and Posner. Shavell examines the correction of errors through the appeals process. This Article explains how the appeals process can prevent errors as well by aligning the incentives of trial court and appeals court judges. The alignment may not be exact, however; some "errors" will still occur. Such errors are not simply mistakes that could be avoided with greater care, but are a function of the institutional characteristics of the court system. Landes and Posner conclude that, because of the lack of an appeals process in commercial arbitration, the main purpose of the appeals process is to create law.[11] This Article offers an additional reason for the lack of an appeals process in arbitration—the differing incentives of arbitrators and judges.

This focus on judicial incentives builds on the growing body of literature treating judges as rational utility maximizers, which is summarized in Part I. Judges, particularly judges in an "independent" judiciary such as those of the United States and Canada, are difficult to fit into traditional economic and public choice models. Nonetheless, the literature has been increasingly successful in identifying the preferences of judges in such things as respect, leisure, discretion, promotion, and the like.

Part II examines how differences in institutional characteristics between the tiers of the court system affect the incentives of judges. Because of institutional differences between trial courts and appellate courts, the incentives of trial court judges differ in a systematic way—with the trial judge's preferences for leisure and promotion relatively more important—from the incentives of appeals court judges.

Part III analyzes how the appeals process constrains these differing judicial incentives. The principal conclusion is that the appeals process alters the incentives of trial court judges by requiring them to include in their decision-making calculus the likelihood of review by appellate court judges with differing incentives. The deferential review of trial court fact-finding by appellate courts plays a key role in this analysis.

Finally, Part IV explains how the lack of an appeals process in commercial arbitration proceedings may be understood, at least in part, as a consequence of the differences between the incentives of arbitrators and judges. Because arbitrators, unlike judges, have to compete for each new case, they have an incentive not only to avoid mistakes but to decide cases so as to maximize the benefit to the parties, thus increasing their own likelihood of being appointed again as an arbitrator.

Part V summarizes my conclusions.

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11. *See* Landes & Posner, *supra* note 8, at 252.

I. WHAT DO JUDGES MAXIMIZE?[12]

Public choice applies the methods of economics to the study of politics.[13] It views government officials as rational actors who maximize their own utility subject to institutional constraints.[14] Based on this underlying assumption about human behavior, public choice theorists have made important contributions towards understanding and predicting political activity. Until recently, these contributions have focused largely on the behavior of the legislative and executive branches of government and the individuals supporting them.[15] Little was said about the judiciary.[16]

Indeed, Judge Posner has called the difficulty of explaining the behavior of the judiciary in economic terms "a mystery that is also an embarrassment."[17] Richard Epstein writes of the "meager harvest" likely to result from such an attempt, at least when directed at judges acting as judges rather than judges acting as employers, administrators, or the like.[18] The difficulty is most pronounced when analyzing the behavior of an independent judiciary, made up of judges who are largely isolated from the political pressures faced by elected officials and from the market pressures faced by other economic actors. Federal judges in the United

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12. *See generally* Posner, *What Do Judges and Justices Maximize?*, *supra* note 10. Unless the context indicates otherwise, the discussion that follows applies to Supreme Court Justices as well as to trial and appellate court judges.

13. *See* Dennis C. Mueller, *Public Choice in Perspective*, *in* PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 1 (Dennis C. Mueller ed., 1997).

14. *See, e.g.*, ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 4-11, 27-28 (1957); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 17-18 (1962); FRED. S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 144 (1997); Michael E. DeBow & Dwight R. Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 TEX. L. REV. 993, 996-97 (1988). For a description of the underlying rationality assumption, see Michael C. Jensen & William H. Meckling, *The Nature of Man*, 7 J. APPLIED CORP. FIN. 4 (1994) (describing "resourceful, evaluative, maximizing model"). For a brief discussion of the development of variations on this underlying behavioral assumption, see Mueller, *supra* note 13, at 15-17.

15. For an excellent overview of the public choice literature, see Mueller, *supra* note 13.

16. A classic exception is William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975). A far older example might be Lord Campbell's opinion in Scott v. Avery, 25 L.J. Ex. 308, 313 (H.L. 1856), in which he explained the common law reluctance to grant specific enforcement of arbitration agreements as based on the self-interest of the judiciary:

> The doctrine had its origins in the interests of the Judges. There was no disguising the fact that, as formerly, the emoluments of the Judges depended mainly, or almost entirely, upon fees, and as they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall . . . . And they had great jealously of arbitrations whereby Westminster Hall was robbed of those cases which came not into Kings Bench, nor the Common Pleas, nor the Exchequer. Therefore they said that the Courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law to do so.

Id. at 313. See the discussion in Landes & Posner, *supra* note 8, at 255-56; *see also* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942).

17. Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 2.

18. *See* Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827.

States, for example, are appointed by the President and confirmed by the Senate, with life tenure and a salary secure from legislative reduction.[19] Federal judges cannot rule in cases in which they have a direct financial interest,[20] and their income is essentially unaffected by the number of cases they decide or the quality of their decisions.[21] The difficulty of applying economic models to individuals who are largely insulated from the economic and political considerations so familiar to economists seems obvious.[22]

This supposed failing of public choice is rapidly being corrected by a growing body of literature that analyzes judicial behavior from an economic perspective. This body of literature develops the likely elements of

19. *See* U.S. CONST. art III, § 1. Even the federal judiciary is subject to some checks by the legislative branch. Congress can decline to give judges raises. *See* Epstein, *supra* note 18, at 834; POSNER, THE FEDERAL COURTS, *supra* note 7, at 21. It can reward the judiciary by giving raises. *See* Gary M. Anderson et al., *On the Incentives of Judges to Enforce Legislative Wealth Transfers*, 32 J.L. & ECON. 215, 219-20 (1989). It also controls court budgets for items other than salary. *See* Eugenia F. Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. LEGAL STUD. 131, 146 (1991). However, Congress's ability to use monetary rewards to influence the judiciary is limited because all judges on the same court are paid the same. *See* Epstein, *supra* note 18, at 835.

Congress also can legislatively overturn non-constitutional decisions of the courts (and even constitutional decisions can be overturned by a constitutional amendment). Thus, Professors Gely and Spiller have argued that "[t]he ability of other political actors to take actions to reverse the Supreme Court decisions is what constrains the scope and power of the Court." Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 263, 265 (1990); *see also* Robert D. Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 INT'L REV. L. & ECON. 295 (1996). This legislative constraint is likely to be of less significance for lower federal courts than it is for the United States Supreme Court; Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan*, 12 INT'L REV. L. & ECON. 45 (1992) [hereinafter Gely & Spiller, *The Political Economy of Supreme Court Constitutional Decisions*]; Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988*, 23 RAND J. ECON. 463 (1992).

20. *See* 28 U.S.C. § 455(b)(4) (1994).

21. In addition, as Judge Posner points out, judges are discouraged from returning to private law practice (where their reputation as a judge might significantly increase their earnings) by the "heavily backloaded" nature of judicial compensation, particularly the job's "attractive pension arrangements." Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 5-6.

22. Decision-making by state judges in the United States, many of whom are elected, presumably would be more amenable to traditional public choice analysis. *See, e.g.*, Harold W. Elder, *Property Rights Structures and Criminal Courts: An Analysis of State Criminal Courts*, 7 INT'L REV. L. & ECON. 21 (1987) (finding a relationship between the system of judicial selection and the behavior of judges in criminal cases); *see also* Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RES. Q. 5, 24 (1995) (finding that method of selection and length of tenure affect judges' votes on use of the death penalty). Even elected judges, however, may retain some degree of independence. *See* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 969 n.95 (1995); Richard L. Hasen, *"High Court Wrongly Elected:" A Public Choice Model of Judging and Its Implications for the Voting Rights Act*, 75 N.C. L. REV. 1305, 1335 (1997). For descriptions of the varying systems of judicial selection in the states, see COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 133-5 (1996); Steven P. Croley, *The Majoritarian Difficulty: Elective Judges and the Rule of Law*, 62 U. CHI. L. REV. 689, 725-26 (1995).

a judicial utility function and then treats judges as seeking to maximize their utility when deciding cases or developing legal doctrine.[23] Although the precise components of the judicial utility function are subject to some disagreement, and individual judges may vary widely in their preferences, the key elements identified in the literature are the following:[24]

Deciding. Deciding cases is what judges do, and presumably they derive utility from doing so, having given up much more lucrative work to become a judge. Building on the suggestions of others,[25] I propose that judges derive utility in deciding cases from two different, and possibly conflicting, aspects of the decision process: from the outcome in a particular case ("ideological utility")[26] and from following professional norms of legal reasoning in deciding the case ("reasoning utility").[27] Some judges favor expansive federal authority to regulate interstate commerce; others favor narrower federal authority. Some judges favor defendants in criminal cases; others favor the prosecution (the so-called "hanging judge"). Judges derive ideological utility from deciding cases consistently with these preferences so as "to impose their personal preferences and values on society."[28] But many, if not most, cases have little ideological

23. There is certainly no reason to assume that judges are innately non-economic in their behavior, as illustrated by Richard Epstein's example of federal judges behaving precisely as predicted by cartel theory (i.e., cheating on the "cartel") in failing to abide by a self-imposed deadline for hiring law clerks. *See* Epstein, *supra* note 18, at 841-44. The difficulty with applying economic models to judges results from the incentive structures facing the judges, not with the judges themselves.

24. Judge Posner also includes pecuniary income in his formal specification of the judicial utility function so as to be able to derive predictions about the impact of changes in judges' income on their behavior. *See* Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 31-34.

25. *See* Cass, *supra* note 22, at 970-81 (examining "three types of incentives that together may explain a fair amount of judicial behavior: (1) incentives (such as reputation among and relations with professionals) to follow professional norms; (2) incentives (such as maintaining favorable standing with important political actors) to reach particular outcomes irrespective of their satisfaction of professional norms; and (3) concerns internal to (or already fully internalized by) the judge"); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1636-37 (1995) (judges "accord some significant weight to personal views about what the government should do and how government officials should do it, and are willing to make compromises between judicial and political norms and their personal policy preferences"); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1053-58 (1995) (identifying "two generally accepted components of judicial decisionmaking:" "craft," meaning "the well-reasoned application of doctrine to the circumstances of the particular case" and "outcome," i.e., "focus[ing] on the result in a given case and its implications for the parties and society as a whole").

26. Shapiro & Levy, *supra* note 25, at 1054.

27. *Compare* Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 15-19 (analogizing judges to spectators at a play or voters in a political election and arguing that judges derive consumption value from the act of voting), *with* Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31, 49 (1994) (judges trade-off "private utility"—their "personal view of how a case should be decided"—and "reputational utility"—their "expectation of how [a] decision would be viewed by observers of the legal process").

28. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 10, § 19.7 at 535. Gely and Spiller explain that "[i]t is reasonable to expect that both Congress and the President will prefer the potential justice to have particular, but not necessarily the same, ideological

component.[29] In these cases, judges derive reasoning utility by using standard means of legal reasoning to decide the case in accord with precedent.[30] The judge's reasoning utility is greater when the judge decides the case "correctly" given the governing precedent, although presumably reasoning utility is greater when a judge decides an uncertain issue of law rather than merely applying clear and long-settled principles.[31]

Prestige/Respect. Judges gain prestige simply by being judges. This type of prestige varies little with how a judge decides a case.[32] But judges also gain respect within the legal community based on how well they apply professional norms of legal reasoning in deciding cases. Lawyers and, to a lesser extent, legal academics benefit from the increased predictability of the law that results when judges apply professional norms in deciding cases.[33] They will reward judges who behave this way by showing them greater respect.[34] In addition, judges may gain respect from certain groups—lawyers, politicians, or others—based on the outcome of a case.[35] This sort of respect would reinforce the judge's ideological utility and may enhance the judge's chances of promotion as well.

Leisure. Another commonly identified element of the judicial utility function is leisure.[36] Judges, like the rest of us, value leisure time. As a

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preferences, and will reject candidates either with the wrong or extremely erratic preferences." Gely & Spiller, *The Political Economy of Supreme Court Constitutional Decisions*, *supra* note 19, at 47.

29. *See* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 286-88 (1997).

30. Judge Bork's infamous answer during his confirmation hearings to the question of why he wanted to be a Supreme Court justice—that "it would be an intellectual feast just to be there"—provides what may be an extreme example of what I mean by reasoning utility. *See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong. 854 (1987).

31. *See* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 172 (1994) (courts of appeals judges "are very independent, highly motivated individual decision-makers who feel a great responsibility to 'get it right'"). Unlike a crossword puzzle, there may not be a single "correct" decision in a particular case that can be obtained by applying standard legal reasoning techniques. But in at least some cases there likely would be a single correct decision, and certainly in many there are more correct and less correct decisions. Indeed, this follows from the common argument that legal reasoning norms are valuable because they enhance the stability and predictability of the law. *See infra* text accompanying notes 33-34.

32. *See* Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 13-14.

33. *See* Eric Rasmusen, *Judicial Legitimacy as a Repeated Game*, 10 J.L. ECON. & ORG. 63, 72 (1994).

34. *See* Cass, *supra* note 22, at 971-74. Note that as for procedural rules, the judicial preference for respect might lead to rules that favor practicing lawyers. *See also* Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 631 (1994) ("judges' considerable human capital investment in the legal system is likely to align their preferences with the preferences (and interests) of the legal community as a whole. Consequently, judges are likely to view procedural rules that maximize the demand for lawyers' services as socially desirable, not because of any cynical desire to pad the pockets of members of the bar, but because of a tendency to see the benefits of procedural rules but not the costs.").

35. *See* Cass, *supra* note 22, at 975-77; Shapiro & Levy, *supra* note 25, at 1057.

36. *See* GORDON TULLOCK, TRIALS ON TRIAL 123 (1980) ("judges may find a situation confronting them where a particular decision will greatly reduce their workload; they are

purely anecdotal example, one of my colleagues tells of a judge he observed repeatedly making problematic, if not incorrect, rulings excluding evidence from a hearing. The judge eventually informed the parties, in a moment of perhaps undue candor, that he was to leave on vacation the following week and that he was not going to let the hearing interfere with his trip.

At some point, the opportunity cost of foregone leisure exceeds the benefits to the judge of additional time spent in making decisions. Thus, one would expect judges to decide at least some cases so as to protect or increase their leisure time and to be more likely to do so as their caseload increases. Granting a motion to dismiss or a motion for summary judgment avoids a possibly lengthy trial. Rejecting the validity of a questionable legal theory may reduce the volume of similar cases filed in the future. Settlements also reduce a judge's caseload and have the added benefit of generally not being subject to appellate review. Thus, one would expect judges to adopt procedural rules and to take other steps to encourage settlement.[37] Again, the prediction is that leisure affects judicial decisions on the margin. Not every decision will be an attempt by a judge to increase his or her leisure.[38] But on the margin one would expect leisure to be relevant.[39]

Discretion. Judges prefer unconstrained decision making to constrained decision-making.[40] A judge who merely follows a clear and simple rule will receive less job satisfaction than a judge who has broad discretion in how to decide a case. A judge applying a clear rule would receive little reasoning utility, while a judge exercising broad discretion will have much room for enhancing his or her ideological utility. Thus, on the margin one would expect judges to decide legal issues so as to preserve or expand their discretionary decision-making.

Promotion to a Higher Court. Judges have limited incentive to pursue job opportunities outside of the judiciary because of the back-loaded na-

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likely to move toward the lower work load because their pay is not affected by the number of hours they put in on the job"); Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 20-22 (identifying various doctrines that reflect the "influence of leisure-seeking on judicial behavior"); Epstein, *supra* note 18, at 837-38; *see also* Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 6-11, 38-40.

37. *See* Macey, *supra* note 34, at 634-35.

38. In addition, there may be societal benefits from what appears to be leisure-seeking activity. *See, e.g.*, Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 22-23; Cass, *supra* note 22, at 989-94.

39. The discussion in the text is somewhat simplified. First, the term "leisure" may be misleading. It includes not only vacation or relaxation time but also time spent with family (which may or may not be relaxing) and other non-judging activities such as teaching at law schools or writing books. Second, given the backlog of cases many judges face, time-saving decisions may be reflected not so much in additional leisure time but instead in a reduced backlog of cases. In turn, backlog may be a factor in the respect judges receive from the practicing bar or among their judicial colleagues: judges with longer backlogs may be respected less. *See supra* text accompanying notes 32-35.

40. *See* Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" about the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 186-87 (1991) [hereinafter Cohen, *Explaining Judicial Behavior*].

ture of judicial compensation.[41] However, judges do have an incentive to seek promotion within the judiciary—by being appointed to a higher court.[42] Promotion within the judiciary is desirable because of the higher salary and the greater prestige that comes with sitting on a higher court,[43] as well as the expanded ability of higher court judges to promote their policy preferences. Accordingly, on the margin one would expect judges to decide cases so as to increase their chances of appointment to a higher court (such as by making decisions that accord with the policy goals of the sitting president) and to be more likely to do so when opportunities for promotion are imminent (e.g., when higher court seats are vacant or vacancies are expected).[44] To the extent that the desire for promotion alters judicial decision-making, it is a consequence of the existence of an appeals process. If there were no appeals process, opportunities for advancement within the judiciary would be extremely limited or nonexistent.

Aversion to Reversal. This element of the judicial utility function also is a result of the existence of an appeals process. Judges do not like having their decisions reversed by higher courts.[45] Judges who are averse to reversal will, on the margin, decide cases so as to reduce the likelihood that the decision will be reversed on appeal.[46] In addition, even judges who are not averse to reversal itself will take into account the probability of reversal to the extent that it has an impact on other elements of their utility function.[47] For example, if a judge's decision is likely to be reversed on appeal and remanded for further proceedings, thereby decreasing the judge's leisure time, the judge's incentive to make that decision may be substantially reduced. This point is developed more in Part III.

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41. *See supra* note 21.

42. Roughly one-half of United States Court of Appeals judges served as district court judges before being promoted. *See* Cohen, *Explaining Judicial Behavior*, *supra* note 40, at 188. Seven of the nine current United States Supreme Court justices are former court of appeals judges. *See* Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 5 n.7.

43. *See* POSNER, THE FEDERAL COURTS, *supra* note 7, at 25-36.

44. *See* Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT'L REV. L. & ECON. 13, 16 (1992) [hereinafter Cohen, *The Motives of Judges*]. *But see* Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 5.

45. *See, e.g.*, Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 14; Andrew S. Watson, *Some Psychological Aspects of the Trial Judge's Decisionmaking*, 39 MERCER L. REV. 937, 949 (1988) (describing "[t]he inevitable narcissistic desire not to be reversed").

46. *See* Shavell, *supra* note 5, at 390-91.

47. *See* POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 10, § 19.7, at 535 (explaining judges' "sensitivity to being reversed by a higher court" as derived from the desire of judges to promote policy preferences: "[t]he reversal wipes out the effect of the judge's decision both on the parties to the immediate case and on others who are similarly situated, whose behavior might be influenced by the rule declared by the judge."); TULLOCK, *supra* note 36, at 165-66 ("I suppose an advocate of this argument would say that the judges are made unhappy and their reputations damaged when their decisions are overthrown. To avoid this, they make decisions which they think the higher court will accept. We cannot prove that this is not true, but I think it would be a fairly weak motive.").

The available empirical evidence, although mixed, provides some support for the utility-maximizing model of judicial behavior. Richard Higgins and Paul Rubin hypothesized that frequent reversals hurt a judge's chance for promotion.[48] Because older judges may have less opportunity for advancement, Higgins and Rubin predicted that reversal rates would increase with a judge's age. Their empirical work, however, failed to find any systematic relationship between age and reversal rate in a small sample of appeals in the Eighth Circuit.[49] By comparison, Mark Cohen, in his study of district court decisions on the constitutionality of the United States Sentencing Guidelines, found that judges with heavy caseloads were more likely to find the Guidelines unconstitutional.[50] According to Cohen, district court judges believed that the Guidelines would increase their workload by discouraging plea bargaining. Cohen also theorized that the Reagan administration might perceive judges holding the Guidelines unconstitutional to be unduly activist and thus would be less likely to appoint them to a higher court. As predicted, Cohen found that judges with greater promotion potential were more likely to find the Guidelines constitutional.[51] Similarly, in his study of antitrust sentencing, Cohen found that increased opportunities for promotion resulted in a statistically significant increase in the sentences given to antitrust defendants.[52] The existing evidence thus provides some support for both leisure and opportunity for advancement as elements of the judicial utility function. Indeed, as explained below, the appeals process will tend to mute the effect of those factors in trial court decisions, making Cohen's findings even more significant.[53]

II. COURT TIERS AND JUDICIAL INCENTIVES

This Part argues that, on the margin, differences in the institutional characteristics of court tiers will alter the incentives of judges on those tiers. That is, an identical judge may decide an identical case differently if that judge is a trial court judge rather than an intermediate appellate court judge or a Supreme Court Justice—not because of any difference in the judge's preferences but because of institutional differences that give rise to different incentives. Indeed, the institutional characteristics of the appeals process are such that certain elements of the judicial utility function—particularly leisure and promotion—are likely to play a less significant role in judicial decision-making in the appellate courts than in the trial courts. This Part develops several empirically testable hypotheses

48. *See* Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129 (1980).

49. *See id.*

50. *See* Cohen, *Explaining Judicial Behavior*, *supra* note 40, at 192-93.

51. *See id.*

52. *See* Cohen, *The Motives of Judges*, *supra* note 44, at 19-22.

53. *See infra* text accompanying notes 112-21. This observation applies only to Cohen's findings concerning decisions on the constitutionality of the Sentencing Guidelines, because sentences given to antitrust defendants essentially are not subject to appellate review.

that follow from this theoretical point and highlights the implications of institutional characteristics for research into judicial preferences generally.

A. Institutional Characteristics of Court Tiers

The institutional differences between trial courts and appellate courts are numerous. Some of the most important differences for my analysis are the following: (1) the nature of the proceeding; (2) the pyramidical structure of the court system; (3) the court's control over its docket; and (4) precedential constraints.[54] I will use the United States federal court system as an illustration, although other court systems often share these same institutional characteristics.

Nature of the Proceeding. Trial courts hear trials; appellate courts hear appeals. While this is an oversimplification, in essence it is the central difference between the tiers. Because resolving a dispute often requires at least some inquiry into the underlying facts, every court system must at some level decide factual issues. In the United States federal court system, the fact finder is the United States district court judge or a jury supervised by the district court judge. Although trial judges decide legal issues as well as factual issues, appellate review of legal issues is de novo.[55] By comparison, judges on the United States courts of appeals and (even more so) Justices on the United States Supreme Court largely defer to the fact findings of the trial court. Moreover, an appeals court that determines further proceedings are necessary remands the case to the trial court to conduct the further proceedings; the appeals court does not conduct those proceedings itself.[56]

The primary responsibility of trial courts for fact finding has a significant effect upon the nature of cases in trial and appeals courts.[57] First, the possible variation in the time required for any particular case is greater at the trial level than at the appellate level. Cases in both courts vary in time demands. Some trials are short; some are long. Some appeals are resolved with a short opinion without oral argument; others re-

54. Another institutional difference that deserves brief comment is public scrutiny. Appellate courts (particularly the United States Supreme Court) receive the greatest public scrutiny of their decisions. They issue written opinions seeking to justify most of their decisions. Trial courts, by comparison, issue far fewer written opinions. But, so far as day-to-day activities go, trial judges are under much greater scrutiny than appellate court judges. Trial judges appear in court more frequently, often before the same lawyers, and very quickly develop a reputation in the local legal community. Appeals judges appear in court only to hear oral argument and are less likely to be seen repeatedly by the same lawyers. *See* Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 7.

55. *See generally* Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. Kan. L. Rev. 1, 4-10 (1991) (discussing appellate standards of review).

56. By comparison, civil law court systems often have a greater degree of fact review at the first tier of appellate review; however, even those court systems limit the highest levels of appellate review to legal issues. *See* Herzog & Karlen, *supra* note 2, §§ 8-53, 8-92.

57. If the parties agree on the facts in the trial court but disagree as to the law or the application of the law to the facts, a district court case will look much more like an appeals court case. However, such a situation is the exception rather than the rule.

quire oral argument and an extensive opinion. Indeed, the average time a judge spends on a single case may be no greater at the trial level than at the appellate level.[58] But the variance in time per case is greater in trial court cases. The time a trial judge spends on longer cases can be greater than the time an appeals judge spends on longer appeals—much greater in some instances.[59]

Second, trial courts have less ability to delegate time-consuming work than appellate judges. Appellate judges delegate substantial parts of case preparation and opinion-writing—the two most time-consuming tasks of an appeals judge—to law clerks.[60] Trial court judges, by comparison, cannot delegate time spent presiding over trials to a law clerk; indeed, even magistrate judges are statutorily precluded from sitting in the district judge's place in a jury trial without the consent of both parties.[61]

Third, trial judges have greater abilities to cut cases short (by decision or by encouraging settlement) than do appellate judges. Appellate judges can (and do) avoid complicated issues by deciding on simpler grounds. They can decide cases without oral argument, which saves argument and preparation time. Seldom do appellate judges dispense with an opinion altogether (by reliance on the trial court's opinion, for example), which would save even more time.[62] By comparison, a district court judge who grants a motion to dismiss can avoid years of pretrial haggling between the parties, a potentially lengthy trial, pre- and post-trial motions, accompanying opinions, and the like. Indeed, the more active role of trial court judges in encouraging settlement is strong evidence that the benefits to the judge of settlement (and, by extension, to making dispositive legal rulings) are greater at the trial level than at the appeals level. While appeals courts have begun taking steps to encourage parties to settle,[63]

58. *Compare Appellate Court Caseweights Project, in* FEDERAL JUDICIAL CENTER, MANAGING APPEALS IN FEDERAL COURTS 309, 317-18 (1988) (estimated average hours spent by courts of appeals judges per type of case ranged from 4.0 to 34.1) *with* FEDERAL JUDICIAL CENTER, 1979 FEDERAL DISTRICT COURT TIME STUDY 36-37 (1980) [hereinafter 1979 FEDERAL DISTRICT COURT TIME STUDY] (average time spent by district court judges in several categories of cases ranged from 56.07 minutes to 2516.45 minutes during recording period); FEDERAL JUDICIAL CENTER, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 169 app. C tbl. 19 (1996) (average time spent by district court judges on certified class action was 34.5 hours and on uncertified class action was 6.1 hours).

59. *See* 1979 FEDERAL DISTRICT COURT TIME STUDY, *supra* note 58, at 35-37 (the longest antitrust case in survey required 21,680 minutes of district judge time; the longest diversity case required 5650 minutes; and the longest criminal case required 5500 minutes; indeed, the antitrust case "alone accounted for 1.18 percent of all time recorded in the entire survey"); NATIONAL CENTER FOR STATE COURTS, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 12 (1988) (median length of trials ranged from 9 hours, 48 minutes to 30 hours, 48 minutes; 75th percentile ranged from 13 hours, 56 minutes to 47 hours, four minutes; 95th percentile ranged from 22 hours, 14 minutes to 160 hours, 35 minutes).

60. *See* Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 19 (noting that judges often decide a case and then delegate the opinion-writing task to law clerks).

61. *See* 28 U.S.C. § 636(c)(1) (1994).

62. *See* BAKER, *supra* note 31, at 121-25.

63. *See, e.g., id.* at 135-39 (describing "experiment[s]" of several courts of appeals with case management plans).

those efforts lag far behind the well-documented efforts of trial court judges to promote settlement.[64]

Control over Docket. United States district court judges have virtually no control over what cases will come before them. Lawsuits are initiated by plaintiffs, who choose the forum in which to file suit. Cases are then assigned to judges essentially on a random basis.[65] A judge has a handful of devices to use to shift a case to a different court, but those devices are available only in very limited circumstances.[66]

Similarly, United States court of appeals judges have little control over their docket. Appeals are available as a matter of right,[67] and the decision to appeal is in the control of the parties. The timing of the appeal is governed by the doctrine of finality, which generally limits appeals to "final" decisions of the trial court.[68] But in virtually every case a final decision of the trial court can be appealed. After a decision is appealed, the case is assigned to a panel of judges by the court administrator; the judges have little or no control over the selection of cases they hear.[69]

By comparison, the United States Supreme Court has virtually complete control over its docket. Parties file petitions for certiorari asking the Court to review their case; thus, the Supreme Court also is limited to those issues the parties bring before it. But unlike the lower federal courts, the Supreme Court ordinarily is not required to review the cases brought to it.[70] If the Supreme Court does not want to review a case or

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64. *See, e.g.*, D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 23 (1986) ("most [trial court] judges encourage lawyers to settle civil cases" and "use a variety of techniques to do so"); Robel, *supra* note 36, at 16-17, 37-57 (discussing settlement as a means of coping with caseload pressures in federal district courts while not even mentioning settlement in discussing court of appeals caseloads).

65. *See* Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 266-70 (1995).

66. *See* 28 U.S.C. § 1404(a) (1994) (transfer); Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (forum non conveniens).

67. *See* 28 U.S.C. § 1291 (1994); Hardy v. United States, 375 U.S. 277, 278 (1964) ("[w]e deal with the federal system where the appeal is a matter of right.").

68. *See* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373-74 (1981) (describing benefits of rule of finality); *see also* POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 10, § 21.14.

69. The clerk's office assigns cases to panels of judges, either randomly or in a manner that balances their respective calendars by case type. Separately, judges are assigned to oral argument panels with no consideration of the specific cases to be heard. *See, e.g.*, 3D CIR. IOP 1.1 ("fully briefed cases are randomly assigned by the Clerk to a three-judge panel"); 4TH CIR. IOP 34.1 (clerk maintains a list of cases "and on a monthly basis merges those cases with a list of three judge panels provided by a computer program designed to achieve total random selection"); 5TH CIR. IOP and 5TH CIR. R. 34 (functions of assigning judges and calendaring cases are "carefully separated . . . [t]o insure complete objectivity"); 11TH CIR. IOP 2, 3 (functions of judge assignment and case assignment are separated; the clerk attempts to balance caseload of panels by case type).

70. *See* 28 U.S.C. §§ 1254(1), 1257 (1994). In 1988, Congress passed legislation significantly reducing the mandatory appeals jurisdiction of the court and giving the court essentially total control over its docket. *See* Pub. L. No. 100-352, 102 Stat. 662 (1988); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE §§ 2.1, 3.1-3.2 (7th ed. 1993). For a discussion of the limited exceptions to this rule, see *id.* §§ 2.5-2.9. Even before the passage of that legislation, however, the Court exercised significant discretion in deciding cases within its appellate jurisdiction. *Id.*

cases, it simply denies the petition for certiorari.[71] Indeed, during the October 1996 term, the Court granted review in only 1.3 percent of all cases filed with it.[72]

Pyramidical Structure. Court systems typically are structured like a pyramid: a large number of trial courts make up the lowest tier of the pyramid, several intermediate appellate courts occupy the middle tier, and the pyramid is topped by one supreme court.[73] The federal court system in the United States reflects such a pyramidical structure—there are 632 United States district court judgeships, 179 United States court of appeals judgeships, and nine Supreme Court justices.[74] It is a matter of simple mathematics that the opportunities for promotion within such a pyramidical structure are greatest for district court judges and significantly less for court of appeals judges.[75]

Conversely, as Lewis Kornhauser has pointed out, "the composition of the courts at each level, by contrast, form an inverted pyramid:" United States district court judges ordinarily decide cases alone, United States courts of appeals judges usually sit in panels of three when hearing cases, and the nine Justices of the United States Supreme Court hear all cases brought before the court.[76] The collegial decision-making of appeals courts is seen as aiding the accuracy of appellate decision-making.[77] It also means that the time savings from any particular decision must be shared among multiple judges.

Stare Decisis. An important distinction between judicial tiers lies in the degree to which judges are bound by or adhere to the principle of stare decisis—that is, the degree to which judges follow precedent.[78] The con-

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71. If Supreme Court Justices do not, for legal or practical reasons, deny a petition, they may fall back on "decision-avoidance doctrines, such as mootness, ripeness, political question, and the absence of a real case or controversy . . . in order to reduce the element of hassle in their work." Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 39.

72. *See* 66 U.S.L.W. 3136 (Aug. 12, 1997) (2055 paid cases and 4578 in forma pauperis cases docketed during term; 87 cases made available for argument).

73. *See* Herzog & Karlen, *supra* note 2, § 8-9; POSNER, THE FEDERAL COURTS, *supra* note 7, at 3-5; MCCORMICK, *supra* note 2, at 24 ("the Canadian system is a single pyramid (possibly best conceptualized with a large lump on one smooth side representing the federal courts)").

74. *See* 28 U.S.C. §§ 1, 44(a), 133(a) (1994).

75. There are 6.5 district court judgeships for every court of appeals judgeship, and 19.9 court of appeals judgeships for every Supreme Court justiceship. The potential for promotion for district judges may vary depending on the number of vacancies in the circuit in which the district court is located (and, indeed, whether the vacancy is one that previously was filled by a court of appeals judge from the state in which the district court sits). Nevertheless, the potential for promotion for a district judge is still likely to be greater than for a court of appeals judge.

76. *See* Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1607-08 (1995).

77. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 846-47 (1994).

78. For economic analyses of stare decisis, see, McNollgast, *supra* note 25; Miceli & Cosgel, *supra* note 27; Posner, *What Do Judges and Justices Maximize?*, *supra* note 10; Rasmusen, *supra* note 33; Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989); William M. Landes & Richard A. Posner, *Legal Prece-*

straining effect of precedent differs depending upon whether the judge is a trial judge, an intermediate appellate judge, or a Supreme Court Justice. Supreme Court Justices are least constrained by precedent. Court of appeals judges are bound by prior Supreme Court decisions and by prior circuit precedent unless the court of appeals sits en banc and overrules the prior case. Federal district court judges likewise are bound by Supreme Court precedent and precedent of the circuit in which the district court is located. The degree to which courts make decisions with precedential effect is inversely related to the precedential constraint. Supreme Court decisions are binding on all lower federal courts. Court of appeals decisions are binding on other panels in the same circuit and on all federal district courts in the circuit. Decisions by district court judges do not bind even other district courts in the same district.[79]

B. Institutional Characteristics and Judicial Incentives

Because of the institutional differences among court tiers, the incentives facing judges at each of those tiers differ as well. Take a simple judicial utility function with three elements: deciding (including both reasoning utility and ideological utility), leisure, and promotion. The judicial preference for respect reinforces the utility a judge receives from deciding, and so I will not treat respect as a separate element. The judicial preference for discretion may be important in certain cases, such as Cohen's study of decisions on the constitutionality of the Sentencing Guidelines, which I discuss further below,[80] but otherwise I put it aside. For the time being I also will put aside the extent to which the appeals process constrains decision-making by lower courts in the judicial hierarchy (including a judge's aversion to being reversed). That is the subject of Part III. What I develop in this Part is how the institutional characteristics of the court tiers, as described above, affect the decision-making of a utility-maximizing judge or justice.

Trial judges will decide cases so as to maximize their utility, which consists of the elements of deciding, leisure, and promotion. The prominence of each of these elements will vary depending on the judge and the case, but on the margin, all may affect how a judge decides a case. This model includes leisure and the desire for promotion, both of which are supported by Cohen's findings.[81] The trial judge likely will face tradeoffs (as will appellate judges) among the various elements of the judicial utility function. For example, more carefully reasoned opinions (or opinions that further ideological goals in the face of potentially contrary prece-

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dent: A Theoretical and Empirical Analysis, 19 J.L. & Econ. 249 (1976); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 Chi.-Kent L. Rev. 93 (1989); Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 Seton Hall L. Rev. 736 (1993).

79. *See* Caminker, *supra* note 77, at 824-25.

80. *See infra* text accompanying notes 84-87.

81. *See supra* text accompanying notes 50-53.

dent) require more time to prepare, and thus reduce a trial judge's utility derived from leisure.

At the intermediate appellate court level, both leisure and promotion play a relatively less important role in judicial decision-making than they play at the trial court level, all else equal, although both may still be significant on the margin. Because of the nature of trials versus appeals, the decision of an appellate court judge in a particular case will less likely be affected by his or her preference for leisure than that of a trial court judge. A trial court judge who grants a summary judgment motion may avoid presiding over a long trial. An appellate court judge who reverses the grant of a summary judgment motion does not have to conduct the trial on remand; the trial court judge who originally granted the motion does. In addition, a decision that enhances leisure time in a particular case at the trial court level principally benefits the judge making the decision. At the appellate level, a majority of the panel must agree to the time-saving decision. Yet the benefit of time saved will go largely to the judge writing the opinion, and thus the other judges have less incentive to decide cases so as to reduce workload.[82] The opportunities for advancement also are far fewer at the court of appeals level than at the district court level (although the difference is counteracted to some degree by the greater reward of being appointed to the Supreme Court). As a result, the utility an appellate judge derives from deciding—including both reasoning utility and ideological utility—will be relatively more important than at the trial court level. While appellate judges can overturn prior circuit precedent, they generally must sit en banc to do so, such that the constraining effect of precedent is similar at the two tiers. But, unlike trial court judges, appeals court judges make decisions with precedential effect—they bind district courts and other panels in the same circuit. Appellate judges also are constrained in promoting their preferences by the fact that at least one other judge on the panel must agree with the decision. Overall, however, appeals court judges likely have greater ability and incentive to make decisions that promote their own policy preferences than do trial court judges.

Finally, at the level of the highest appellate court, leisure and promotion are even less important than at the intermediate appellate court level. The United States Supreme Court has virtually total control over its docket, meaning that it can control its workload by denying certiorari in more cases rather than by adopting substantive legal rules that enhance its leisure. And there are no higher courts to which a Supreme Court Justice can be promoted. Thus, the utility derived from deciding will be the central element in judicial decision-making at the highest court. In addition, the Supreme Court is far less constrained by precedent than

82. The fact that appellate panels hear multiple cases at one sitting may provide judges some ability to overcome this difficulty by sharing the time savings from several appeals. The ability to cooperate on future appeals is limited, however, because the judges making up the panels change at every argument session.

lower courts are, and can make precedential decisions with far greater reach than courts of appeals, with the result being that Justices will be relatively more likely than lower court judges to decide cases to further their ideological preferences.[83]

The fundamental points are twofold. First, on the margin, the differing institutional characteristics change the relative importance of judicial preferences. Second, as a case moves up the judicial hierarchy, a judge's preferences for leisure and promotion become relatively less important, and a judge's preferences for deciding—and particularly a judge's ideological preferences—become relatively more important in judicial decision-making.

Both of these points can be illustrated by Cohen's study of district court rulings on the constitutionality of the United States Sentencing Guidelines.[84] The Guidelines replaced what was largely unguided trial court discretion in imposing criminal sentences with calibrated guidelines that significantly restricted trial court discretion. For this reason alone, one might expect utility-maximizing trial judges to find the guidelines unconstitutional.[85] In addition, trial courts feared that the Guidelines would increase their workload by discouraging plea bargains. This, too, gave trial judges an incentive to rule against the Guidelines, one that Cohen verified empirically. Conversely, Cohen predicted that trial judges who hoped to be promoted to the court of appeals would likely uphold the Guidelines to avoid being perceived as too "activist" by Republicans. His findings supported this prediction. Finally, there was little relevant precedent, leaving trial judges largely unconstrained by stare decisis in making their decisions.

But the effect of the Sentencing Guidelines on a judge's utility differs dramatically if the judge is on the highest appellate court rather than a trial court. A United States Supreme Court Justice would be largely unaffected by workload concerns or the reduction in discretion resulting from the Guidelines, given its virtually absolute discretion in deciding what cases to hear. Promotion also would be of little concern. One would expect ideological grounds to drive the Supreme Court's decision. Thus, it should not be surprising that a majority of the almost 200 district judges who ruled on the constitutionality of the Sentencing Guidelines found them unconstitutional,[86] while the United States Supreme Court, by an 8-to-1 vote, found the Guidelines constitutional.[87]

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83. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 69-72 (1993).

84. *See* Cohen, *Explaining Judicial Behavior*, *supra* note 40, at 183.

85. *See id.* at 186-87; Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 21.

86. *See* Cohen, *Explaining Judicial Behavior*, *supra* note 40, at 191 (116 of 196—59%—of district court judges held the Sentencing Guidelines unconstitutional).

87. *See* Mistretta v. United States, 488 U.S. 361, 362 (1989); *see also* Cohen, *Explaining Judicial Behavior*, *supra* note 40, at 187. Because the Supreme Court granted certiorari before judgment in a case from the Eighth Circuit, no United States court of appeals ever decided the issue. *See Mistretta*, 488 U.S. at 371; *see also* SUP. CT. R. 18.

C. Testable Hypotheses

The theory that differing institutional characteristics affect judicial decision-making gives rise to several hypotheses that may be empirically tested. First, all else being equal, a judge's preference for leisure will have the greatest relative influence on decisions at the trial court level, where the judge's decision on one aspect of a case can result in a far greater time savings than at the appeals court level. Similarly, because trial court judges have more opportunities for promotion than appellate court judges, that element of the judicial utility function likewise should be most important at the trial court level. Conversely, a judge's preference for particular outcomes (i.e., ideology) will have the greatest relative influence on decisions at the highest appellate court level, where other elements such as leisure and promotion potential are much less important, where precedent is least constraining, and where decisions affect the greatest number of future cases.[88]

Thus, one would expect to find stronger relationships between judicial decisions and factors such as caseload and opportunity for promotion in trial courts than in appeals courts. That, indeed, is where the relationship has been found in existing research.[89] Conversely, one would expect to find stronger relationships between judicial decisions and ideology—measured by variables such as the appointing president and personal characteristics of the judges or justices—in cases at the appellate level than at the trial court level. This prediction seems to find support in empirical studies of judicial decision-making, which more consistently find variables reflecting ideology important in the United States Supreme Court[90] and

88. For a different view, see Ashenfelter et al., *supra* note 65, at 264 ("[i]n their isolation, district judges may feel less constrained by legal doctrine and thus be more likely to follow political inclinations, precisely because district judges decide alone and often without publishing an opinion."). Note that the concentration of cases presenting ideological issues likely will be greater at appellate levels as well, complicating any empirical analysis. *See id.* at 281. In addition, appointments to higher appellate courts may be based more on ideological grounds, given the greater precedential reach of decisions by those courts.

89. *See* Cohen, *Explaining Judicial Behavior*, *supra* note 40, at 193; Cohen, *The Motives of Judges*, *supra* note 44, at 22.

90. *See, e.g.*, Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277, 280 (1988) ("political party identification and judicial experience" are "predictors of justices' votes in equal protection cases"); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 561-62 (1989) ("results provide exceptional support for the attitudinal model as applied to civil liberties cases"); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355, 362-66 (1981) (developing "satisfactory 'attribute' models of judges' decision-making behavior"); S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases*, 17 AM. J. POL. SCI. 622, 625 (1973) (finding that age at appointment, federal administrative experience, and religious affiliation explained "70 percent of the variance in the rate at which . . . 14 justices supported state or federal governments in criminal cases"). *See also* John R. Schmidhauser, *Stare Decisis, Dissent, and the Background of the Justices of the Supreme Court of the United States*, 14 U. TORONTO L.J. 194, 209-12 (1962) (relating backgrounds of justices to propensity to dissent and adherence to precedent).

the United States courts of appeals[91] than in the United States district courts.[92]

Second, the theory predicts that individual judges or Justices will decide cases differently, all else being equal, when sitting as trial court judges than when sitting as appeals court judges. It might be possible, for

91. *See, e.g.*, William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 120-21 (1991) ("conservatism of a substantial number of Carter appointees has yielded a greater convergence of Carter and Reagan voting conduct than the conservative court-packing hypothesis would predict"); Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48, 54 (1986) ("When voting on four civil rights and three economic issues which were thought likely to divide judges of different ideological predispositions, Reagan's appointees are not clearly or dramatically more conservative than Nixon's or Ford's appointees, although they *are* clearly more conservative than appointees of the Carter, Kennedy and Johnson administrations"); Donald R. Songer, *The Policy Consequences of Senate Involvement in the Selection of Judges in the United States Courts of Appeals*, 35 W. POL. Q. 107, 113 (1982) (data "reinforce the suspicion that the policy positions of presidents influence the selection of appeals court judges"); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 504 (1975) (concluding that it "appears reasonable that the judicial behavior of appeals court judges be interpreted as representing gradations of broadly defined political and economic liberal-conservative attitudes"); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-1964*, 60 AM. POL. SCI. REV. 374, 382 (1966) ("there appears to be some evidence of . . . 'liberal' and 'conservative' voting on issues involving political liberalism and economic liberalism").

92. *See* ROBERT A. CARP & C.K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS 7 (1983) ("the evidence for a relationship between judicial background variables and subsequent policy decisions is somewhat inconclusive. Although it is fairly strong for appellate court judges, it is weak and inconsistent for trial jurists"). *Compare, e.g.*, Ashenfelter et al., *supra* note 65, at 281 ("we cannot find that Republican judges differ from Democratic judges in their treatment of civil rights cases"); Cohen, *The Motives of Judges*, *supra* note 44, at 24 ("[o]ne somewhat surprising result is the apparent lack of systematic difference in sentencing patterns between Democratic and Republican judges."); Cohen, *Explaining Judicial Behavior*, *supra* note 40, at 196 ("Few of the ideology or demographic variables were significant in either equation."); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 614-15 (1985) (finding no areas of significant difference between judges of different race and few between judges of different sex); *and* Thomas G. Walker, *A Note Concerning Partisan Influences on Trial-Judge Decision Making*, 6 L. & SOC'Y REV. 645, 647 (1972) ("[t]he notion that the political party of district judges and decisional outcomes on civil liberties litigation are related does not receive support in this analysis"); *with* Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298, 300 (1993) (district court "appointees of Democratic presidents clearly have been more liberal in their decisions than those of Republicans"); Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1170-80 (1992) (finding a relationship between political party and appointing president and the outcomes of sex discrimination cases, but no relationship between these attributes and the outcomes of race discrimination cases); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1190-91 (1991) (finding some judicial background variables statistically significant, but also finding that political party and appointing president were not statistically significant in explaining outcomes in race discrimination cases); C.K. Rowland et al., *Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges*, 22 L. & SOC'Y REV. 191, 195-96 (1988) ("In the aggregate Carter appointees are almost twice as supportive of criminal defendants as are Reagan appointees"); *and* Kenneth N. Vines, *Federal District Judges and Race Relations Cases in the South*, 26 J. POL. 337, 356-57 (1964) (finding race relations decisions influenced by "linkages with the local social and political system").

example, to examine a sample of similar cases decided by judges who were promoted from a United States district court to a United States court of appeals. This theory would predict that, all else being equal, leisure and promotion would be relatively less important after promotion than before. Alternatively, a sample of trial court judges sitting by designation on appellate courts (or vice-versa) might be used,[93] although the temporary nature of the designations might make the results less clear.[94]

D. Implications for Research on Judicial Preferences

The theory described above also has implications for research on judicial preferences generally. Because the incentives of judges at each tier of the court system differ, on the margin one would expect utility-maximizing judges to behave differently depending on whether they sit on a trial court, an intermediate appellate court, or the Supreme Court. Accordingly, in seeking to understand a particular decision or rule as a product of judicial preferences it is important to focus upon the incentives of the judges or Justices on the particular court making the decision or promulgating the rule rather than upon the supposed preferences of the judiciary generally. Consistent with this caution, Cohen,[95] as well as Higgins and Rubin,[96] developed models of the preferences of United States district court judges and used those models to predict the behavior of those judges. Judge Posner distinguished between the incentives of trial court judges and those of appeals court judges, and directed his attention to the latter.[97]

Other analyses of judicial preferences do not draw this distinction. For example, several commentators have linked pro-arbitration decisions by the United States Supreme Court to the judicial preference for leisure, suggesting that courts that favor arbitration do so to reduce their own caseload.[98] That suggestion makes little sense as applied to the Supreme

93. *See* 28 U.S.C. § 292(a) (1994).

94. Although the sample size would be small, one could also compare the decision-making of the United States Supreme Court in its certiorari docket with the Court's decision-making in its original jurisdiction docket—cases, such as those between states, in which the Court acts as a trial court with no right to appeal. *See* U.S. CONST. art. III, § 2; 28 U.S.C. § 1251 (1994). This theory would predict that Justices would exhibit a far greater preference for leisure in original cases because of the differing nature of the proceeding. And in fact they do—the Justices do not conduct trials themselves but appoint a special master to conduct the proceedings and review the report of the special master based on objections by the parties. *See* STERN ET AL., *supra* note 70, § 10.12.

95. *See* Cohen, *The Motives of Judges*, *supra* note 44, at 15-17; Cohen, *Explaining Judicial Behavior*, *supra* note 40, at 186-90.

96. *See* Higgins & Rubin, *supra* note 48, at 130-33.

97. *See* Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 6-7, 13-30.

98. *See* Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 U.M.K.C. L. REV. 449, 449 (1996) ("[t]aking the task into their own hands, judges, in an attempt to reduce their workload without increasing costs or delays, have embraced arbitration as an alternate means for resolving disputes"); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74

Court. The Court, which has significantly extended the enforceability of arbitration agreements in recent years,[99] already has almost total control over its docket and would not significantly (if at all) reduce its caseload by encouraging arbitration.[100] By comparison, the enhanced enforceability of arbitration agreements presumably would benefit trial courts by reducing their caseload. But trial court judges who enforce arbitration agreements today are not necessarily doing so for their own benefit—they are constrained by the Supreme Court decisions in favor of enforceability. There is no way to know for certain whether those courts would have decided the same way without that constraint, although the theory of judicial preferences predicts that, all else being equal, they would.

Jonathan Macey's analysis of *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*[101] is subject to a similar criticism.[102] In *Chevron*, the United States Supreme Court adopted a two-tiered approach to judicial review of statutory interpretations by administrative agencies, providing for active judicial scrutiny if a statute is clear and deference to the agency if the statute is ambiguous.[103] Macey contends that from the perspective of judicial self-interest, "*Chevron* must be viewed as an act of genius" because it permits judges to use their generic legal skills (which Macey suggests judges prefer to do) and "to minimize the time and effort involved in judging."[104] While Supreme Court Justices may in fact prefer to use generic legal skills, I am skeptical of Macey's reliance on the judi-

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WASH. U. L.Q. 637, 643 (1996) ("[w]hile binding arbitration may well be preferable from the standpoint of certain segments of society—particularly . . . judges who can reduce their own workload—there is no reason to believe that society as a whole is better off with binding arbitration"); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 137-38 (1996) ("the Court's strongly pro-arbitration decisions of the last twenty years are . . . largely consistent with a 'docket-clearing' theory of arbitration. That is, they are largely consistent with the view that courts favor arbitration as a way to reduce their caseloads whether or not parties have contracted for it"). *See also* Casarotto v. Lombardi, 886 P.2d 931, 939 (Mont. 1994) (Trieweiler, J., specially concurring) (writing to "those federal judges who consider forced arbitration as the panacea for their 'heavy case loads'"—addressing court of appeals judge by name but apparently including United States Supreme Court Justices), *vacated sub nom.*, Doctor's Assoc., Inc. v. Casarotto, 515 U.S. 1129 (1995).

99. *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Perry v. Thomas, 482 U.S. 483 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Southland Corp. v. Keating, 465 U.S. 1 (1984); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

100. *See supra* note 70. One or more of the justices may well believe—as a matter of their own ideologies—that the judiciary as a whole would be more effective if it had a reduced workload and uphold the enforceability of arbitration agreements to further this preference. *See, e.g.*, Warren E. Burger, *Using Arbitration to Achieve Justice*, ARB. J., Dec. 1985, at 4. This is what Ian Macneil seems to be saying when he identifies a Supreme Court "policy" of "docket-clearing:" i.e., that "the Court is motivated to reduce the cases having to be tried by the judicial system, particularly the federal judicial system." IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 172 (1992).

101. 467 U.S. 837 (1984).

102. *See* Macey, *supra* note 34, at 639-41.

103. *See Chevron*, 467 U.S. at 843-45.

104. Macey, *supra* note 34, at 640-41.

cial "taste[ ] for leisure"[105]—again, the Supreme Court has little need to use *Chevron* to protect its leisure time. Instead, Macey's argument seems to be that the Supreme Court was acting in the self-interest of others—the rest of the federal judiciary—in deciding *Chevron*.[106]

Macey's companion argument—that significant features of the rules of procedure governing practice in the United States district courts can be explained by the self-interest of district court judges[107]—also is subject to question on similar grounds. Macey's focus on judicial preferences is broadly consistent with my approach here, and his argument may be persuasive as applied to recent amendments to the Federal Rules.[108] However, his claims are too broad. A number of the rules Macey examines, particularly those concerning liberal discovery practices (Rules 26-37) and offers of judgment (Rule 68), have been in existence since 1938 when the Federal Rules were originally promulgated.[109] Although federal trial judges today have a significant representation on the committee that drafts amendments to the Federal Rules, that was not the case in 1938. No sitting judges were on the Advisory Committee that drafted the original Federal Rules.[110] Although the Committee consulted with federal

105. *Id.* at 641.

106. For different analyses of *Chevron* based on economic models of judicial behavior, see Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, L. & CONTEMP. PROBS., Spring 1994, at 65; Shapiro & Levy, *supra* note 25, at 1051. *See also* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987) (*Chevron* "can be seen as a device for managing the courts of appeals that can reduce (although not eliminate) the Supreme Court's need to police their decisions for accuracy.").

107. *See* Macey, *supra* note 34, at 635-39.

108. Even today there is significant involvement of parties other than district court judges in drafting amendments to the Federal Rules—including a United States court of appeals judge (who would likely have different incentives than a trial judge), a state court judge (who competes with federal judges as to cases in which parties can choose among fora), and private attorneys (who, as Macey acknowledges, may have very different preferences for procedural rules than trial court judges). *See id.* at 628. In addition, changes in the rulemaking process have led some to fear a growing importance of organized private interests, although how such interest groups would influence independent federal judges has not yet fully been explained. *See* Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 843-55 (1991); *see also* Macey, *supra* note 34, at 646.

109. The Federal Rules have been amended since 1938 on a number of occasions, but the key features of the discovery rules and Rule 68 were in place in 1938. *See* 2 JAMES WM. MOORE & JOSEPH FRIEDMAN, MOORE'S FEDERAL PRACTICE UNDER THE NEW FEDERAL RULES § 26.01, at 2443 (1938) (describing Federal Rules as providing "full and equal mutual discovery"); *id.* at 3363 (quoting original Rule 68).

110. The original members of the Advisory Committee were William D. Mitchell, Scott M. Loftin, George W. Wickersham, Wilbur Cherry, Charles E. Clark, Armistead M. Dobie, Robert G. Dodge, George Donworth, Joseph G. Gamble, Monte M. Lemann, Edmund M. Morgan, Warren Olney, Jr., Edson R. Sunderland, and Edgar B. Tolman. *See* Order of June 3, 1935, Appointing Advisory Committee, 295 U.S. 774 (1935). George Wharton Pepper replaced Wickersham after Wickersham's death. *See* Order of February 17, 1936, Appointing a Member of the Advisory Committee, 297 U.S. 731 (1936). The members of the Advisory Committee were practicing lawyers and legal academics, although several had judicial experience. *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1004, at 22 (1987). *Cf.* POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 10, § 19.7, at 534 ("where a particular outcome would promote the interest of a

trial judges and shared drafts of the proposed rules (as it did with the practicing bar as well), the drafters themselves were not judges.[111] A theory that the Federal Rules of Civil Procedure as originally drafted reflect the self-interest of the judiciary thus needs a better explanation for precisely how that happened.

III. THE APPEALS PROCESS AS A CONSTRAINT ON JUDICIAL PREFERENCES

Thus far this Article has examined how judicial incentives differ across the tiers of the court system and why elements of the judicial utility function such as leisure and promotion are relatively less important (and the judge's utility from deciding relatively more important) in judicial decision-making at the appellate level than at the trial level. This Part develops the implications of these points for an understanding of the appeals process. Importantly, this Part holds the preferences of judges constant in examining how the appeals process constrains the preferences of lower court judges. Certainly, if judges have different preferences, they may decide cases differently; appeals courts may reverse decisions of trial court judges on the basis of their differing preferences.[112] This Part considers the constraining function of the appeals process in holding judicial preferences constant, and describes how the appeals process nonetheless serves as an important constraint on lower court decision-making.

A. THE APPEALS PROCESS AND JUDICIAL INCENTIVES: A SIMPLE ILLUSTRATION

The proposition that an appeals process constrains lower courts, to varying degrees at least, is commonplace. At a minimum, the appeals process provides such a constraint in cases in which the appellate court reverses the lower court. The appeals process affords an adversely affected party the opportunity to have a case reviewed by judges whose

group to which the judge no longer belongs, . . . the judge's self-interest is not advanced by selecting that outcome, although his previous experience may lead him to evaluate the merits of the case differently from judges of different backgrounds."). Donworth was a United States district judge from 1909-1912 who then returned to private practice. Olney was an associate justice on the California Supreme Court from 1919-1921, after which he also returned to private practice. Clark and Dobie were appointed to the federal bench (court of appeals and district court, respectively) in 1939—after the effective date of the Federal Rules. *See* WHO WAS WHO IN AMERICA vols. I-IV, VII, X (1950-1993).

111. *See* Order of January 17, 1938, Expressing Appreciation, 302 U.S. 783 (1938); *see also* 4 WRIGHT & MILLER, *supra* note 110, § 1004, at 24-25 & nn.12, 15, & 17. It could be that some of the drafters anticipated being appointed to the bench, but in fact nowhere near a majority were ever appointed. *See supra* note 110.

112. McNollgast, *supra* note 25, at 1646 (describing a model in which legal "[d]octrine emerges as part of the equilibrium interaction among the Supreme Court and the lower courts, each acting to maximize its own preferences or ideology. The Supreme Court sets a narrow or wide range of acceptable decisions to induce the optimal pattern of compliance among the lower courts. Judges in the lower courts are modeled as strategic actors facing a trade-off between pursuing a personal policy agenda and seeing some of their decisions reversed by a higher court, and adopting the best available complying doctrine, without fear of successful appeal.").

decision is less likely, all else being equal, to be affected by judicial preferences for leisure and promotion. In addition, appellate court decisions serve as a constraint to the extent that lower courts follow appellate precedent in deciding a case.[113] That precedent, again, will be established by judges whose decisions are relatively less influenced by leisure and promotion than, on the margin, the trial court judge would be. Beyond that, commentators have grounded the constraining effect of appeals in judges' aversion to reversal of their decisions. The assumption is that judges do not like being reversed by appellate courts, so they decide cases to reduce the possibility of reversal.[114]

The focus here on judicial incentives suggests another way in which the appeals process constrains lower court decision-making—by requiring a lower court judge, when making a decision, to take into account the possibility of review by a decision-maker with different incentives. A trial judge ruling on a summary judgment motion, which, if granted, would avoid a six-month trial, will consider the likelihood that a decision granting the motion will be reversed and the case will then proceed to trial.[115] All else being equal, the more important judicial preferences other than deciding are in the trial court's decision, the greater the likelihood of reversal because those preferences will be less important in the appeals court's decision on the same case. Thus, an appeals process will alter the trial judge's incentives—and perhaps the judge's decision—without regard to whether the judge has some particular aversion to being reversed by the appellate court. Instead, the trial judge must merely consider the possibility of further proceedings following remand in his or her decision-making calculus, as a rational decision-maker would do. This constraint does not eliminate all errors. The probability of appeal and reversal will be uncertain, and judges will discount the costs of future proceedings following any remand. Thus, trial judge "errors" will still occur. Nonetheless, by changing the trial court's incentives, the appeals process reduces the likelihood of such errors.

What follows is a simple and hypothetical example that illustrates this incentives-altering aspect of the appeals process. In this illustration, the appeals court not only would correct an error by the trial court, but, in fact, the mere existence of the appeals process will prevent that error from happening. The "error" is not a simple mistake, but is a result of the incentives facing the trial court. Preventing that error results from changing those incentives by establishing an appeals process. This illustration does not show that in every case the appeals process serves this function,

113. *See, e.g.*, Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 89 (1985).

114. *See, e.g.*, Shavell, *supra* note 5, at 390-91; *see supra* text accompanying notes 45-47. Indeed, their aversion to being reversed might induce some judges to take excessive precautions against reversal. *Id.* at 391 n.21; Dalton, *supra* note 113, at 86-93.

115. *See* Macey, *supra* note 34, at 633 ("when a case is reversed on appeal it generally is returned to the trial judge who originally ordered the dismissal. Consequently, dismissal on the law, if reversed, will not permit the trial judge to avoid hearing the case").

but it does demonstrate that it can, in fact, do so. The illustration admittedly is a highly simplified one and one with values carefully chosen (although not necessarily unrealistically) to make it work. Nonetheless, it illustrates the key point of the analysis—that the appeals process constrains lower courts by changing their incentives.

1. Trial Judge as Sole Decision-Maker

I begin with a highly simplified model of the litigation process. The first step in this model is the filing of a complaint by the plaintiff. The defendant responds by filing a dispositive motion challenging the legal sufficiency of the complaint. If the trial court grants this motion, the defendant wins. If the motion is denied, the case proceeds to discovery and trial. At the conclusion of the trial, one or the other party wins. Initially, I assume that no appeal is available to the losing party—the trial judge is the sole decision-maker. Eventually I will add an appeals process. For now, I focus on the incentives facing the trial judge as the sole decision-maker.

I assume that the trial judge will decide the case to maximize the judge's utility. For simplicity, I assume that the judge derives utility from only two elements—deciding and leisure—and that the case is not one from which the judge will receive any ideological utility from the outcome. There is a tradeoff between these two elements of the judge's utility function. To make a better decision (i.e., one that is more correct given the facts of the case and existing law), the judge must spend more time working on the case and less time engaged in the leisure activities the judge enjoys. Conversely, spending more time at leisure makes it less likely that the judge will decide the case correctly. At a minimum, the judge could spend no time at all on the case—simply guessing at the outcome—and still have some probability of getting it right. In addition, assume that from a societal viewpoint, the "correct" decision is for the plaintiff to prevail.

For purposes of this illustration, I will assign the following values to the various outcomes that might result from the case. If the judge decides the case correctly, assume that the judge's benefit is +10. If the judge decides the case incorrectly, the judge's benefit is 0—any positive utility from making a decision is offset by the negative utility of getting it wrong. If the case goes to trial, the judge's utility is reduced (because of the reduction in available leisure time) by 4 (i.e., the judge's benefit from the trial is -4). I assume that the judge is risk neutral in evaluating how to decide the case.

The case before the judge is one in which conducting discovery and holding a trial increases the likelihood that the judge will get the right result. I call such a case a fact-intensive case. Many, if not most, cases in the real world benefit to some extent from such factual development. Accordingly, if the trial judge decides the case before trial (on defendant's dispositive motion), assume that there is a 0.5 likelihood that the

judge will get the right result.[116] If the case proceeds to discovery and trial, the trial judge has an 0.8 likelihood of getting the right result.

Given these values, how will the trial judge decide the case? The assumption, again, is that the judge is trying to get the decision right, but that doing so is costly to the judge in that it takes time—a scarce resource. If the trial judge grants the dispositive motion, there is a 0.5 likelihood that the decision will be correct (with a benefit of +10) and a 0.5 likelihood that the decision will be incorrect (with a benefit of 0). The case will not go to trial (with a benefit of 0). On net, granting the motion results in an expected benefit of 5 to the judge ((0.5*10) + (0.5*0) - 0 = 5). If the trial judge denies the motion, the case proceeds to discovery and trial. Conducting discovery and holding a trial increases the likelihood that the judge will decide the case correctly (from 0.5 to 0.8), but at a cost to the judge of less leisure time (a benefit of -4). On net, denying the dispositive motion and proceeding with the case has an expected benefit of only 4 to the judge ((0.8*10) + (0.2*0) - 4 = 4). The judge will therefore grant the motion and find in favor of the defendant. The judge's preference for leisure leads to the wrong result.

Investing more resources in improving the quality of trial judges will not necessarily correct this result. The wrong decision is not a mistake by the trial judge that could be prevented by greater skill, but is a result of the judge's incentives.[117] Investing the resources instead in reducing the judge's caseload might change the result. Reducing the caseload of the judge might reduce the disutility to the judge of conducting a trial (from -4 to -3 or -2), and thus change how the judge rules on the motion.

Another possibility is to appoint trial judges who prefer conducting trials to other activities that they might do in their leisure time. In other words, appoint trial judges who derive positive rather than negative utility from holding trials. If, on these hypothetical facts, the trial judge receives a benefit of +2 from holding a trial rather than -4, the judge will hold a trial and have a greater likelihood of reaching the correct result.

This solution has its own difficulties, however. First, it is costly to identify judges who prefer trials[118]—although if nothing else there may be some self-selection in that regard.[119] Second, given the law of declining marginal utility, it seems likely that at some point even trial judges who

116. Such a probability might result from the so-called "selection effect." *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 5 (1984). *But see* Steven Shavell, *Any Frequency of Plaintiff Victory at Trial is Possible*, 25 J. LEGAL STUD. 493 (1996) (challenging the selection effect theory and summarizing the literature).

117. If greater skill enabled the judge to reduce the length of the trial, thus offsetting the judge's negative utility derived from holding a trial, then increased skill might lead to a different result.

118. *See* Rasmusen, *supra* note 33, at 67.

119. If a prospective judge strongly dislikes trials, that judge may well decline to be considered for a district court appointment. *Cf.* Cohen, *Explaining Judicial Behavior*, *supra* note 40, at 188 n.13 (noting that some judges might "find the appeals court to be quite isolating and prefer" to remain trial court judges).

prefer trials will find holding a trial so costly in terms of their leisure time that the utility derived from holding another trial will be negative. Third, and perhaps most important, judges who prefer trials may end up holding trials in cases in which trials are unnecessary. Take, for example, a law-intensive (as opposed to a fact-intensive) case, a case in which a trial does not increase the likelihood of a correct result. In such a case, whether the trial judge grants a dispositive motion or decides the case after a trial, the likelihood of a correct decision is 0.8. If holding a trial has a positive utility for the judge (e.g., +2), the judge will proceed to trial even though the trial is purely a waste of resources. If the judge grants the dispositive motion, the expected benefit will be 0.8(10) + 0.2(0) - 0 = 8; if the judge holds a trial, the expected benefit will be 0.8(10) + 0.2(0) + 2 = 10. The parties will bear much of the cost of a trial and can control whether there will be one by settling the case; thus they have an incentive to avoid a trial and limit the scope of the problem. Nevertheless, this example shows that merely selecting trial judges based on their preference for (or dislike of) trials is not an ideal solution.

Indeed, what this analysis suggests is that the best decision-maker in this illustration is one who has a slight (but only slight) aversion to the case proceeding to trial. If the case is a fact-intensive one, such a judge will decide that the case should proceed to trial. If the case is a law-intensive one, the judge will decide the case on the law without a trial. The preference must remain relatively constant, however, and it is unlikely that even a trial judge with such preferences will satisfy that requirement.

2. *Appellate Judge Reviews Case on Appeal*

Assume now that there is a single appellate judge who will review the case on appeal. Assume also that this appellate judge has preferences identical to those of the trial judge. As is the current American approach, if the appellate judge reverses the grant of the dispositive motion, the case will be remanded for further proceedings before the original trial judge.[120] Thus, the appellate judge does not bear the costs of conducting a trial on remand—the trial judge bears those costs. Because the costs of a trial are external to the appeals court judge, they do not figure into that judge's decision whether to affirm or reverse. Instead, the main cost of reversal and remand (as opposed to affirmance) to the appellate judge is the possibility that one of the parties will appeal after the trial and the appellate judge will need to consider the case again. Although that cost is a real one, it presumably is far less significant than the cost of conducting the trial on remand.

120. *See, e.g.*, United States v. Gray, 31 F.3d 1443, 1447 (9th Cir. 1994) (per curiam); United States v. Robin, 553 F.2d 8, 9-10 (2d Cir. 1977). *Cf.* 7TH CIR. R. 36 ("Whenever a case *tried* in a district court is remanded by this court for a new trial, it shall be reassigned by the district court for trial before a judge other than the judge who heard the prior trial . . . .") (emphasis added).

Thus, an appellate judge will receive some negative utility from reversing a trial court's decision and remanding it for trial. But the negative utility is likely to be less than that of the trial judge because the costs of reversal to the appellate judge are far less than those facing the trial judge. In addition, although the appellate judge's (dis)utility likely will vary (as will the trial judge's), that variance will likely be far smaller than that experienced by the trial judge. Thus, an appellate judge deciding the case will be more like the "best" decision-maker described above than will be the trial judge.

Assume now that there are two tiers of judges, one trial and one appellate. Both judges have identical preferences, which are the same as those of the trial judge above. That is, both judges benefit by +10 for a correct decision and 0 for an incorrect decision. Both judges have the same preferences for work versus leisure, but the trial judge receives disutility of -4 from holding a trial while the appellate judge receives disutility from reversal of only -0.5 (from the possibility of a second appeal following trial on remand). If this is a fact-intensive case, with a 0.5 probability of a correct result if there is no trial and a 0.8 probability of a correct result with a trial (and assuming for now that the trial judge does not consider the possibility of reversal), the trial judge will erroneously grant defendant's dispositive motion as explained above.

How will the appellate judge, with identical preferences to the trial judge, decide the case? The appellate judge will reverse the trial court's grant of a dispositive motion and remand the case for trial. If the appeals judge affirms, there will be a 0.5 probability that the result is correct, and the judge will receive no negative utility from remand: 0.5(10) + 0.5(0) - 0 = 5. If the appeals judge reverses, the trial court will proceed to trial, there will be a 0.8 probability of a correct result, and the appellate judge's utility is reduced by 0.5 due to the possibility of an appeal following remand: 0.8(10) + 0.2(0) - 0.5 = 7.5. Accordingly, the appeals judge will reverse the trial court's decision and remand the case for trial. In this simple example, the presence of an appeals process results in a "mistake" or "error" of the trial court being corrected by reversal on appeal. Because the appeals judge has different incentives than the trial judge (even with identical preferences), that judge decides the case correctly.

Further, the presence of an appeals process may alter the initial decision by the trial judge and make an appeal unnecessary. With an appeals process (and the possibility of reversal), the trial judge now faces the possibility that the appeals court will reverse the grant of a dispositive motion and the trial judge will have to hold a trial anyway. Although granting the motion may increase the trial judge's leisure in the short term, the trial judge may nonetheless incur the negative utility of the trial in the long term. Because the negative utility will be incurred at some point in the future, it will be discounted both by the probability of reversal and by some "discount rate" for the delay before trial is held (a trial next year is less costly than a trial today). The probability of reversal will

be inversely related to the likelihood the trial court's decision is correct: the greater the likelihood of a correct decision, the less likely it is that the appeals court will reverse.

Assume that the negative utility of a trial on remand is -3 and that there is a probability of 0.5 that the appeals court will reverse the grant of the dispositive motion.[121] Taking the same trial court preferences as before, if the trial court denies the motion and the case proceeds to trial, the trial judge's expected benefit is (0.8*10) + (0.2*0) - 4 = 4; if the trial court grants the motion, then the expected benefit is (0.5*10) + (0.5*0) - (0.5 *3) = 3.5. The trial court will deny the motion and go to trial, which is the correct result, but one that would not have happened without an appeals process.

Note again that this result does not require that the trial judge be reversal averse—i.e., that the judge receive negative utility from the reversal itself. Indeed, the trial judge may recognize that the reversal is no reflection on the judge's abilities, and yet still decide the case differently than the judge would without an appeals process. The key is that the appeals process requires the trial judge to consider the possibility of having to hold a trial in the event the appeals court reverses the grant of the dispositive motion.

B. Variations in the Appeals Process

This section extends the basic analysis by examining briefly how three variations in the appeals process would affect judicial incentives. The three variations analyzed are (1) eliminating or restricting the appeals process; (2) expanding review of factual issues by appellate courts; and (3) creating asymmetric rights of appeal whereby one party but not the other may appeal. The analysis that follows is largely a positive one (or at least it attempts to be)—predicting the likely effect of the variation discussed. Nonetheless, the results may be of normative interest as well, because the effect on judicial incentives presumably will be relevant to whether such a variation is desirable.[122]

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121. For purposes of this simple model, I assume that if the trial judge holds a trial, the appeals court may affirm or reverse the judgment but will not remand the case for a new trial.

122. An overall normative evaluation is difficult because the marginal costs and benefits facing the participants in dispute resolution (including the judges) do not necessarily coincide with the marginal costs and benefits to society of a particular resolution of any dispute. *See* Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. Legal Stud. 333 (1982); *see also* Louis Kaplow, *Private Versus Social Costs in Bringing Suit*, 15 J. Legal Stud. 371 (1986); Peter S. Menell, *A Note on Private Versus Social Incentives to Sue in a Costly Legal System*, 12 J. Legal Stud. 41 (1983); Susan Rose-Ackerman & Mark Geistfeld, *The Divergence Between Social and Private Incentives to Sue: A Comment on Shavell, Menell, and Kaplow*, 16 J. Legal Stud. 483 (1987). *See generally* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. Legal Stud. 307 (1994); Tullock, *supra* note 36, at 123-25.

1. Eliminating or Restricting the Appeals Process

The United States Constitution does not guarantee the right to appeal.[123] As a result, in theory at least, Congress can eliminate the appeals process across the board or in certain categories of cases.[124] In recent years, a variety of commentators,[125] including a number of federal judges,[126] have considered or advocated the desirability of eliminating or restricting the appeals process.

Analyzing the effect on judicial incentives of eliminating the appeals process altogether is relatively straightforward. The sole decision-maker—the trial court—would decide both the legal and the factual issues in a case. The parties would no longer have the option to seek review by a court with different incentives than the trial court. Nor would the trial court have to consider the possibility of appellate review in making its decisions in the first instance. Thus, one would expect that leisure would become a more important factor in trial court decisions in the absence of an appeals process. In addition, judges who took precautions against reversal because they were reversal-averse would reduce their level of precautions. Finally, one of the advantages to the judge of settlement over dismissal would disappear—currently, settlements are a "superior, low-cost alternative" to dismissal because they generally are not subject to review on appeal.[127] As a result, one would expect judges to substitute dismissals on the merits for facilitated settlements. If appeals were eliminated only in certain types of cases, those cases would be the ones in which these effects would occur.

If the appeals process were eliminated altogether, trial court judges would have substantially reduced opportunities for promotion within the judiciary because there would be no appellate judgeships. As a result, one would expect the influence of that element of the judicial utility function largely to disappear. Eliminating appeals only in selected types of cases would not affect judicial preferences for promotion unless the number of appellate judgeships were reduced as well.

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123. *See* Jones v. Barnes, 463 U.S. 745, 751 (1983); Abney v. United States, 431 U.S. 651, 656 (1977). Indeed, criminal defendants had no statutory right to appeal until 1889. *See* Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655.

124. Restrictions on the right to appeal would, of course, be subject to other constitutional provisions, such as the Due Process clause. *See* U.S. CONST. amend. V; *see, e.g.*, M.L.B. v. S.L.J., 117 S. Ct. 555, 566 (1996).

125. *See* TULLOCK, *supra* note 36, at 163-66; GORDON TULLOCK, THE LOGIC OF THE LAW 203-08 (2d ed. 1987); Martha J. Dragich, *Once A Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 52 (discretionary appeals); Dalton, *supra* note 113, at 95-107; Judith Resnick, *Tiers*, 57 S. CAL. L. REV. 837, 1028-30 (1984); Irving Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?*, 56 GEO. L.J. 417 (1968).

126. *See* Robert M. Parker & Ron Chapman, Jr., *Accepting Reality: The Time for Adopting Discretionary Review in the Courts of Appeals Has Arrived*, 50 SMU L. REV. 573 (1997); Donald P. Lay, *The Federal Appeals Process: Whither We Goest? The Next Fifty Years*, 15 WM. MITCHELL L. REV. 515, 532-33 (1989); Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 SW. L.J. 1151 (1981).

127. Macey, *supra* note 34, at 634.

If, as some have proposed, review by the United States courts of appeals were made discretionary rather than a matter of right,[128] the constraining effect of the appeals process would still decline, although not so dramatically. Much would depend on the frequency with which courts of appeals reviewed (or declined to review) cases: if appellate review became relatively rare, the effect on judicial incentives would be more like the effect of eliminating the appeals process altogether.[129]

2. *Expanding Review of Factual Issues by Appellate Courts*

Appellate courts generally defer to the findings of fact in the trial court.[130] In the United States, the Seventh Amendment protects jury fact-finding from court (including appellate court) interference.[131] In cases in which the trial court itself is the fact finder, appellate courts likewise defer to the trial court's findings of fact.[132] By contrast, review of legal issues is always de novo.[133]

Gordon Tullock has questioned this differing treatment of factual and legal issues. He contends that "[i]f we are going to have an appellate procedure, however, and we do think that it improves the quality of 'justice,' then there does not seem to be very much argument for not allowing appeals on every aspect of the case," including factual issues.[134] More generally, Lewis Kornhauser faults "agency models of adjudication" that "focus on the conflicting interests among judges to explain the existence of hierarchy," for not "explain[ing] the specialization of trial courts in fact-finding."[135]

This Article suggests a reason for deferential factual review at the appellate court level: its effect on the incentives of the appellate judge.[136]

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128. Some have contended that, in practice, the courts of appeals already exercise discretionary review. *See, e.g.*, William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 293-94 (1996).

129. It may be that the United States Supreme Court currently reviews so few cases from the courts of appeals that the risk of reversal by the Court provides little constraint on courts of appeals judges. *See* Posner, *What Do Judges and Justices Maximize?*, *supra* note 10, at 14-15.

130. At least in common law countries they do. Civil law countries are somewhat different. *See infra* note 137.

131. U.S. CONST. amend. VII ("no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law").

132. *See* FED. R. CIV. P. 52(a) ("clearly erroneous" standard of review). Indeed, when Congress first permitted bench trials, it provided for trial court findings of fact to receive the same deference as those made by juries. *See* Act of March 3, 1865, § 4, ch. 86, 13 Stat. 501 ("The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.").

133. *See, e.g.*, Sward, *supra* note 55, at 9-10.

134. TULLOCK, *supra* note 36, at 166-67; *see* TULLOCK, *supra* note 125, at 202.

135. Kornhauser, *supra* note 76, at 1609-11. The divergence in incentives between trial courts and appellate courts might be characterized as a form of "agency cost." *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308-09 (1976).

136. There may be other reasons for deferential review, at least of certain types of factual issues, such as the inability of appellate judges to view the demeanor of witnesses. *See*

The greater the factual review by an appeals judge, the more the appeals judge's incentives become like those of a trial judge, at least as to the judge's preference for leisure. Currently, an appellate judge engages only in limited factual review and the costs of any fact-finding on remand are external to the appeals judge's decision-making. If appellate courts were to conduct de novo trials of cases on appeal, the appellate judge would have much the same incentives with respect to leisure as trial court judges. Expanding factual review in less extensive ways—such as permitting new evidence to be introduced on appeal[137]—would have lesser incentive effects, but these effects would still be in the direction of reducing the differences between trial judges and appeals judges.[138]

3. *Creating Asymmetric Rights to Appeal*

The right to appeal in criminal cases in the United States is "asymmetrical." If the defendant is convicted, he or she has the right to appeal the conviction. If the defendant is acquitted, however, because of double jeopardy considerations the government does not have an equivalent right to appeal.[139] Kate Stith argues that if a trial court judge "seeks to avoid reversal, the prohibition on government appeal of acquittals provides an incentive to make pro-defendant errors."[140] This Article suggests that such an incentive exists even if the judge is not reversal averse. A rational trial court judge would consider the asymmetrical risk of reversal and retrial in making decisions in criminal cases. Deciding in favor of the government is more costly, all else being equal, because there is a risk that the decision will be reversed and the court will have to try the case (or try it again). Deciding in favor of the defendant does not have that same cost. Accordingly, one would expect trial court decisions on the margin to favor criminal defendants.

POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 10, § 21.14, at 584-85; TULLOCK, *supra* note 125, at 202; Sward, *supra* note 55, at 9-10.

137. Civil law systems provide for greater review of factual issues by appellate courts. *See* Herzog & Karlen, *supra* note 2, § 8-62. A possible explanation for this difference from common law systems may be that civil law systems rely less on the parties and more on the trial court judge to develop the facts. Trial court judges in such an inquisitorial system are not passive observers but are fact developers, which, along with the bureaucratic nature of civil law judiciaries, may give them different incentives than common law trial court judges and make expanded factual review by appeals courts likely. *See also* TULLOCK, *supra* note 36, at 125-26 (discussing incentives of judges in civil law system).

138. Some review of fact findings by appellate courts would seem to be useful. Otherwise, trial courts would have the incentive to avoid appellate review of their decisions by making incorrect fact findings. Or trial courts might decide factual issues so as to reach legal issues that "correct" fact findings would not present. Retaining some appellate oversight of factual issues limits these incentives. In addition, the right to jury trial gives a party the right to select a jury as a fact-finder if it believes the case might be one of this sort.

139. *See* U.S. CONST. amend V; Benton v. Maryland, 395 U.S. 784, 795-97 (1969); Kepner v. United States, 195 U.S. 100, 126 (1904). In extraordinary cases, the government might be able to seek review by writ of mandamus. *See* FED. R. APP. P. 21.

140. Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 36 (1990).

IV. JUDICIAL (AND ARBITRAL) INCENTIVES AND THE LACK OF AN APPEALS PROCESS IN COMMERCIAL ARBITRATION

This Article has focused on the function of an appeals process in an independent judiciary. Nonetheless, it is appropriate to discuss at least briefly the most prominent anomaly in the otherwise widespread availability of an appeals process—the lack of an appeals process in most commercial arbitration proceedings.[141] The rules of the American Arbitration Association and the leading international arbitration institutions do not provide for an appeals process; the award of the arbitrator is final.[142] Further, with few exceptions, treaties and statutes that authorize court action to enforce or vacate arbitration awards carefully circumscribe the grounds on which courts can second guess the decisions of arbitrators.[143]

As noted above, the widespread presence of an appeals process in court adjudication, and the lack of one in commercial arbitration, lead Landes and Posner to conclude that lawmaking is the main function of appellate proceedings.[144] There is no right of appeal in arbitration because the parties do not find it worth their while to pay for a lawmaking function that largely benefits others.[145] Shavell explains the lack of an appeals process in arbitration as based, not only on the fact that arbitrators do not make "law," but also on (1) the parties' ability to "choose an arbitrator who is knowledgeable about the issue in dispute and who is known for the soundness of his past decisions," and (2) the arbitrators' "economic interest in not making errors and in maintaining their reputation."[146]

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141. *See* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 342 (1993); Shavell, *supra* note 5, at 423.

142. *See* American Arbitration Ass'n, Commercial Arbitration Rules §§ 42 & 43; American Arbitration Ass'n, International Arbitration Rules, art. 27; International Chamber of Commerce, Rules of Arbitration art. 28(6) (effective Jan. 1, 1998). Under the ICC Rules, the ICC International Court of Arbitration is to review arbitration awards before they are issued "as to the form of the Award," although "without affecting the Arbitral Tribunal's liberty of decision," the Court may also "draw its attention to points of substance." *Id.* art. 27; *see also* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 13 & n. 57 (1994) ("[t]he Court's review is in theory non-substantive, but has sometimes been viewed as touching on the merits of the decision.").

143. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 art. V, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3; 9 U.S.C. § 10 (1994); UNIF. ARBITRATION ACT, § 12; UNCITRAL Model Law on International Commercial Arbitration, art. 36, U.N. doc. A/40/17 annex 1 (1985); TOM CARBONNEAU, CASES AND MATERIALS ON COMMERCIAL ARBITRATION 8 (1997) ("courts rarely vacate arbitration awards"). *See generally* IAN R. MACNEIL ET AL., IV FEDERAL ARBITRATION LAW § 40 (1995) (addressing grounds for vacating arbitration awards).

144. *See* Landes & Posner, *supra* note 8, at 235.

145. Landes and Posner note that rule production by arbitrators benefits both future parties and competing judges, benefits for which the arbitrator is not compensated. *See id.* at 238. *But see* Christopher J. Bruce, *The Adjudication of Labor Disputes as a Private Good*, 8 INT'L REV. L. & ECON. 3, 7-10 (1988) (concluding that "a private arbitration system is able to produce consistent, precedential rulings").

146. Shavell, *supra* note 5, at 423-24.

The focus here on judicial incentives suggests an additional reason for the lack of an appeals process in commercial arbitration. As Shavell notes, the incentives of arbitrators differ from the incentives of trial court judges. Robert Cooter points out that "private judges have to attract business, so they are exposed to the same market pressures as anyone who sells a service."[147] Because of this economic incentive, Cooter argues, "income-maximizing private judges make decisions which are Pareto efficient with respect to the litigants (pair-wise efficient)."[148] Trial court judges have no similar incentive. Their pay is the same regardless of how they decide cases.[149]

This economic incentive may reduce the likelihood that arbitrators will make mistakes, as Shavell contends.[150] But in addition, it reduces the role played by various elements of the judicial utility function—in particular leisure. Indeed, arbitrators generally get paid more the longer they spend on a case.[151] If anything, their incentive is to spend too much time on a case rather than too little. An appeals process would do little to control this incentive problem. Instead, the market provides the necessary constraint because an arbitrator who spends too much time on a case is less likely to be hired as an arbitrator in the future. Because the market constrains an arbitrator's incentives in a way that it does not constrain federal judges, an appeals process is not worth what it would cost the parties to provide.[152]

147. Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 107 (1983); *see also* TULLOCK, *supra* note 36, at 122, 127-33; Robert D. Cooter & Daniel L. Rubinfeld, *Trial Courts: An Economic Perspective*, 24 L. & SOC'Y REV. 533, 545 (1990).

148. Cooter, *supra* note 147, at 107. As Gordon Tullock points out, however, if "one of the parties to future contracts is apt to hold superior information [about the previous decisions of an arbitrator], it may lead to a very strong element of bias on the part of the arbitrator." TULLOCK, *supra* note 36, at 127; *see also* Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 521-29 (1997).

149. Cooter posits that trial judges may seek to reach the same decision in a case as an arbitrator in order to increase their prestige in the legal community; lawyers would want trial judges who behaved in that fashion to decide their cases even though the lawyers would not have that choice. *See* Cooter, *supra* note 147, at 128-30. That view is plausible as far as it goes, and the ability of parties in California to use a peremptory challenge to "veto" a judge may make judicial incentives more like those of arbitrators. *See* CAL. CIV. PROC. CODE § 170.6 (West 1982 & Supp. 1997). But the point here is that the judicial utility function is not so simple and that the economic incentives of arbitrators are different than those of trial court judges.

150. *See* Shavell, *supra* note 5, at 423-24.

151. *See* Cole v. Burns Int'l Security Servs., 105 F.3d 1465, 1480 n.8 (D.C. Cir. 1997) (detailing arbitrators' hourly rates). *But see* Eric A. Schwartz, *The ICC Arbitral Process Part IV: The Costs of ICC Arbitrations*, 4 ICC INT'L CT. OF ARB. BULL. 8, 10 (1993) (ICC, unlike many arbitration institutions, sets fees in accord with published fee schedule).

152. Some arbitration rules, particularly those promulgated by commodities trade organizations, do provide for appeals tribunals. Interestingly, those rules generally provide for de novo hearings in which the appellate panel rehears the case in its entirety. *See* DEREK KIRBY JOHNSON, INTERNATIONAL COMMODITY ARBITRATION (1991). The problem deserves more study, but Johnson suggests that "the theory of two-tier systems is that the first arbitration should be fairly quick, and that an appeal is an opportunity for rather deeper exploration of the case and for heavier guns to be brought to bear, if required." *Id.* at 80.

V. CONCLUSION

Not all trial court "errors" are mistakes.[153] At least some are the result of differing incentives facing judges at different tiers of the court system.[154] A judge's preferences for leisure and promotion, for example, will be less important in judicial decision-making, all else being equal, at the appellate level than at the trial court level. An appeals process permits parties to have their case reviewed by a court with different incentives than the trial judge, and ensures that the trial judge considers that possibility in deciding the case. As a result, the appeals process prevents some such "errors;" others will be corrected by the appellate court. An appeals process does more than correct cognitive mistakes by trial court judges; it changes the trial judge's incentives.

Arbitrators, by comparison, have very different incentives than trial judges. Unlike judges, the compensation of arbitrators varies with the amount of time they spend on a case, and arbitrators compete with each other for future cases. Market forces constrain the self-interest of arbitrators in ways that they do not for judges, making an appeals process of less value to the disputing parties in an arbitration proceeding. The differing incentives of judges and arbitrators thus provide an additional, incentives-based explanation for the lack of an appeals process in commercial arbitration.

153. *See* Fred S. McChesney & William F. Shughart II, *The Unjoined Debate*, *in* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE 341, 345-47 (Fred S. McChesney & William F. Shughart II eds., 1995) (identifying "public-policy processes in which 'mistake' theories eventually gave way to explanations based on rational, self-interest-seeking political behavior").

154. That would also explain why not all errors are corrected at trial, a question that troubles Shavell. *See* Shavell, *supra* note 5, at 413-15.