ARE JUDGES TIED TO THE PAST? EVIDENCE FROM JURISDICTION CASES

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Do past decisions bias judges? This Article argues that judges might be unduly affected by previously spent judicial efforts. Appellate courts, for instance, are more reluctant to reverse a case if the trial judge invested a large amount of resources in coming to a decision.

To provide empirical evidence for this proposition, this Article examines reversal rates of jurisdictional questions. As jurisdiction is independent of the merits, its resolution should not be affected by subsequent judicial efforts on the merits. Nonetheless, this Article finds that the more resources that are invested on the merits of the case, the less likely appellate courts are to reverse the underlying jurisdictional determination. This correlation is statistically significant and non-trivial in size.

This Article then discusses the normative implications of this phenomenon. The major implication is reforming the final judgment rule. A broader right to interlocutory appeals would moderate appellate judges' tendency to rely on past proceedings and improve decision-making.

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[R]easonable caution is needed to be sure that mooted litigation is not pressed forward . . . solely in order to obtain reimbursement of sunk costs.

– Lewis v. Continental Bank Corp.[1]

[A]rgument from sunk costs [to the judicial system] does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest.

– Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.[2]

I. INTRODUCTION

A defendant raises a preliminary defense. The trial court denies, and proceeds to the merits. The defendant loses on the merits, then appeals and reiterates the same preliminary defense. Upon ruling on the *preliminary defense*, is the court of appeals influenced by the judicial efforts that the trial court has spent on the *merits* of the case? While this may be a common intuition,[3] this Article is the first to provide empirical evidence.[4]

Though this phenomenon has far-reaching implications for the appropriate design of the appeals process, there has been no attempt to find evidence of the implication. The absence of empirical evidence stems from severe methodological difficulties. Judges may appear to be influenced by prior decisions, but in fact, large efforts spent on previous decisions indicate better decision-making.[5] In the context of appeals,

1. 494 U.S. 472, 480 (1990).

2. 528 U.S. 167, 192 (2000).

3. *See, e.g.*, Rafael Gely, *Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis*, 60 U. PITT. L. REV. 89, 110-13 (1998) (arguing that judges assign excessive weight to past decisions when deciding whether to deviate from a precedent); Goutam U. Jois, *Stare Decisis Is Cognitive Error*, 75 BROOK. L. REV. 63, 86, 88-89, 96-97, 135 (2009) (asserting, in the context of precedents, that "the way we humans make choices strongly suggests that we are inclined to choose existing arrangements, not because they are preferable but merely because they exist"); Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 803-04 (2014) (positing that when a judge denies a preliminary injunction based solely on the plaintiff's failure to show likely success on the merits, a "lock-in" effect is created); Robert L. Scharff & Francesco Parisi, *The Role of Status Quo Bias and Bayesian Learning in the Creation of New Legal Rights*, 3 J.L. ECON. & POL'Y 25, 34-36 (2006) (stating that judges tend to stick to the current status quo); *see also* David E. Cole, Note, *Judicial Discretion and the "Sunk Costs" Strategy of Government Agencies*, 30 B.C. ENVTL. AFF. L. REV. 689, 693-95, 724-25 (2003) (claiming that courts take into account irrevocable investments previously made by agencies to avoid waste of public funds).

4. Relevant literature has found a "status quo" bias, indicating that judges tend to stick to their own prior determinations. *See, e.g.*, Magnus Söderberg, *Uncertainty and Regulatory Outcome in the Swedish Electricity Distribution Sector*, 25 EUR. J.L. & ECON. 79, 83, 90 (2008).

5. *See, e.g.*, Gely, *supra* note 3, at 106-07.

longer adjudication at the trial court might be taken as a proxy for a better judgment, hence leading to fewer reversals. A proper research design, then, should focus on the influence of previous judicial efforts that are irrelevant to the quality of the decision.

This Article introduces such a design. It relies on the distinction between jurisdiction determinations and decisions on the merits. As will be explained in further detail, jurisdictional questions typically possess several unique characteristics: they are essential to adjudication; a lack of jurisdiction mandates dismissal; the parties cannot waive or create jurisdiction by consent; and jurisdiction is decided at the outset of the litigation.[6] In short, jurisdictional determinations are independent of the merits. They should not be decided differently due to subsequent judicial efforts on the merits. Therefore, a correlation between reversals of jurisdictional questions and judicial efforts on the merits can indicate that appellate judges are unduly influenced by past decisions.

Against this backdrop, I created a database containing 375 appellate court decisions in which the trial court's subject matter jurisdiction was challenged. An analysis of the database reveals that jurisdictional determinations that were followed by a bench or jury trial are less likely to be reversed. In contrast, jurisdictional determinations that are followed by a non-trial judgment are reversed more often.[7] Therefore, the findings demonstrate that the more judicial efforts spent on the merits, the less likely the appellate court is to reject the trial court's jurisdiction. This correlation is statistically significant, considerable in size, and robust under various specifications.[8] It suggests that many denied appeals should have been accepted.

Having found this evidence, this Article proposes several modifications in legal procedure to cope with this phenomenon.[9] The most effective strategy would be to avoid the very situations in which a mistaken determination is followed by additional judicial efforts. This can be achieved through reforming the final judgment rule, as a broader right to interlocutory appeals prevents the accumulation of unreviewed judicial efforts. This Article delineates the possible scope of such interlocutory appeals, relying on examples of interlocutory review from class certification decisions and orders compelling, and refusing to compel, arbitration. Finally, the Article addresses alternative readings of the empirical findings. What if judges say "jurisdiction," but really mean

6. *See infra* Part III.A.
7. *See infra* Table 1.
8. *See infra* Part IV.B–C.
9. *See infra* Part V.

something else? Should a different concept of jurisdiction be adopted? Can the findings be explained by trial judges' and/or litigants' behavior?

Part II sets forth the theoretical framework.[10] Part III discusses the methodology,[11] and Part IV describes the results.[12] Part V suggests normative implications.[13] Part VI discusses alternative explanations,[14] and Part VII concludes.[15] The Appendix presents statistical data.[16]

II. THEORETICAL FRAMEWORK

This Article examines whether appellate judges are influenced by the mere efforts of trial judges, however irrelevant those efforts may be. Why should appellate judges care about irrelevant efforts previously spent on a case? What makes appellate judges committed to the path taken by trial judges?

The behavioral literature addresses a similar phenomenon, identified as the "sunk-cost," "entrapment," or "escalation of commitment" effect.[17] While decision-makers should disregard fixed, already-incurred, and irrelevant costs when deciding to move forward,[18] people often do take these costs into account.[19] Some of the reasons the literature provides for this phenomenon seem relevant to the judicial context. The following are the three main relevant explanations.

The first is cognitive biases; people simply tend to justify a previous course of action.[20] It has been noted that: "[I]ndividuals have an almost uncanny ability to bias facts in the direction of previously

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10. *See infra* Part II.
11. *See infra* Part III.
12. *See infra* Part IV.
13. *See infra* Part V.
14. *See infra* Part VI.
15. *See infra* Part VII.
16. *See infra* Part VIII app.
17. Itamar Simonson & Barry M. Staw, *Deescalation Strategies: A Comparison of Techniques for Reducing Commitment to Losing Courses of Action*, 77 J. APPLIED PSYCHOL. 419, 419 (1992).
18. *See, e.g.*, Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1124 (2000). The same wisdom—avoiding fixed costs that were incurred when deciding to move forward—is associated with some popular aphorisms such as "don't cry over spilled milk" and "you can't turn back the clock." RICHARD A. IPPOLITO, ECONOMICS FOR LAWYERS 116 (2005).
19. Korobkin & Ulen, *supra* note 18, at 1124. In an illustrative experiment, it was found that people ate less when they received a refund for an "all-you-can-eat" lunch, compared to those who had to pay for it themselves. RICHARD H. THALER, QUASI RATIONAL ECONOMICS 11, 12 & n.8 (1991). For additional examples, see Gely, *supra* note 3, at 96 & n.24.
20. *See* Barry M. Staw & Jerry Ross, *Behavior in Escalation Situations: Antecedents, Prototypes and Solutions*, *in* 9 RES. ORG. BEHAV. 39, 53 (L. L. Cummings & Barry M. Staw eds., 1987) [hereinafter Staw & Ross, *Behavior in Escalation*].

accepted beliefs and preferences."[21] The magnitude of this phenomenon varies. Individuals with high self-esteem, for instance, tend to be more committed to their original decisions.[22]

This explanation can be relevant to the judicial context. Indeed, previous experiments have found that federal judges are not immune to cognitive biases.[23] Nonetheless, in the context of appeals, where one judge reviews a course of action taken by another judge, the cognitive explanations seem weaker.[24]

The second explanation is social; decision-makers desire to rationalize their actions to others,[25] and to not appear wasteful.[26] Similarly, when social norms favor consistency, the commitment to the past is stronger.[27] The greater the need to justify decision-making, the more likely a losing course of behavior will persist.[28] Those who are politically vulnerable, for example, are more likely to suffer from this phenomenon.[29]

This explanation seems relevant in the judicial context. It also pertains to appellate decision-making, to the extent that wastefulness and inconsistency (or the appearance thereof) reduces litigants' and the public's confidence in courts.[30] The greater the need to justify judicial

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21. *Id.*

22. *Id.* at 49. When the behavior has been entered into freely and publicly, the binding effect is heightened. *Id.* at 52.

23. *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 801-03, 808-10, 813-14 (2001) (finding several cognitive biases among federal district and magistrate judges).

24. Indeed, the commitment effect is reduced—but not eliminated—when subsequent decisions are made by different decision-makers. Jerry Ross & Barry M. Staw, *Organizational Escalation and Exit: Lessons from the Shoreham Nuclear Power Plant*, 36 ACAD. MGMT. J. 701, 726 (1993); *see also* Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 ORG. BEHAV. & HUM. DECISION PROCESSES 124, 134-35 (1985); Brian H. Bornstein & Gretchen B. Chapman, *Learning Lessons from Sunk Costs*, 1 J. EXPERIMENTAL PSYCHOL. APPLIED 251, 264 (1995) (showing that, in some situations, bifurcated decision-making is nonetheless more prone to errors).

25. Ross & Staw, *supra* note 24, at 717.

26. Arkes & Blumer, *supra* note 24, at 125, 132; Bornstein & Chapman, *supra* note 24, at 252-53; *see also* Hal R. Arkes & Peter Ayton, *The Sunk Cost and Concorde Effects: Are Humans Less Rational than Lower Animals?*, 125 PSYCHOL. BULL. 591, 598-99 (1999).

27. *See* Staw & Ross, *Behavior in Escalation*, *supra* note 20, at 58-59.

28. *Id.* at 55-56.

29. Ross & Staw, *supra* note 24, at 717 (discussing business and political pressures faced by companies).

30. In the same vein, it has been argued that reversing a decision might generate a new—and inconsistent—decision, which could have the effect of "introduc[ing] misgivings about the judicial system that will undermine its legitimacy." Qian A. Gao, Note, *"Salvage Operations Are Ordinarily Preferable to the Wrecking Ball": Barring Challenges to Subject Matter Jurisdiction*, 105 COLUM. L. REV. 2369, 2389 (2005); *cf.* Jois, *supra* note 3, at 79-80, 92-94 (explaining the theories of "judicial legitimacy" and "system justification," which point to reasons "why individuals support

decision-making, the stronger the inclination to commit to prior decisions.

The third explanation is organizational—due to administrative inertia, deviating from a heavily invested course of action yields friction and is less likely to occur.[31] This explanation seems relevant in the context of appellate decision-making. In particular, proximity among judges might hinder appellate judges from nullifying their fellow judges' efforts.

With this background for the reasons behind appellate judges' reluctance to deviate from a heavily invested prior course of action, the next Part discusses the methodology taken to test this observation.

III. METHODOLOGY

There are, then, various reasons that make appellate judges more likely to affirm prior decisions in which the trial judge put considerable efforts, regardless of the quality of the lower court's decision. While some supportive anecdotal evidence of such practice may exist,[32] this Article makes a more rigorous inquiry.

One can look for a correlation between reversals and judicial efforts at the trial court. However, such a correlation is not a reliable piece of evidence. Rather, it may reflect an alternative phenomenon: larger judicial efforts at the trial level can indicate that the trial judge had a better factual knowledge of the case, and/or achieved a more accurate legal judgment. Appellate judges would thus consider larger judicial input at the trial level as a proxy for a more accurate and well-informed decision.[33] Prior efforts, then, are not independent of the outcome. Hence, the research design should focus on prior judicial efforts that do not improve decision-making. This is the methodological difficulty that this Article seeks to overcome by delineating the distinction between jurisdictional and merits decision-making.

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and prefer the existing system, even when doing so appears to do more harm than good" (internal quotation marks omitted)).

31. Staw & Ross, *Behavior in Escalation*, *supra* note 20, at 59-63; *see also* Keiko Aoki et al., *Effects of Prior Investment and Personal Responsibility in a Simple Network Game*, 13 CURRENT RES. SOC. PSYCHOL. 10, 18-19 (2007); Arkes & Blumer, *supra* note 24, at 134-35.

32. *See, e.g.*, Motorola Credit Corp. v. Uzan, 388 F.3d 39, 55-56 (2d Cir. 2004) (denying a "substantial" claim due to, *inter alia*, the fact that "significant (and probably non-duplicable) judicial resources [were expended]"); *see also* sources cited *supra* notes 1-3.

33. Note, though, that this logic implies that trial judges might over invest in the case in order to signal a more accurate decision and lower the odds of reversal. *Cf.* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 569-73 (7th ed. 2007) (noting the common perception that judges are eager to clear their dockets).

A. Jurisdiction Versus Merits

In order to find a correlation between reversals and irrelevant judicial efforts at the trial level, this Article suggests a methodological innovation: focusing on questions of subject matter jurisdiction. The idea is simple: jurisdiction is independent of the merits. No matter how much work a trial judge invests on the merits, these efforts have nothing to do with the quality of his or her jurisdiction determination. Hence, appellate judges should disregard the merits when they review the trial court's jurisdiction ruling.

The sharp doctrinal distinction between jurisdiction and merits is well grounded. Subject matter jurisdiction only "delineat[es] the classes of cases . . . falling within a court's adjudicatory authority."[34] Typically, questions of jurisdiction are purely legal ones, and do not require factual inquiry.[35] They are also decided at the outset, before evidence is proffered and the merits are discussed.[36] Thus, the trial court has no comparative advantage *vis-à-vis* the appellate court in determining jurisdiction.[37]

Most importantly, jurisdiction is an essential requirement to adjudication. Appellate courts cannot rely upon ambiguous jurisdiction determinations of the trial court, regardless of the decision on the merits.[38] As has been stated by the Supreme Court: "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is . . . dismissing the cause."[39] Theoretically, at least, a want

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34. Kontrick v. Ryan, 540 U.S. 443, 455 (2004). Subject matter jurisdiction is defined as "the extent to which a court can rule on the conduct of persons or the status of things." BLACK'S LAW DICTIONARY 931 (9th ed. 2009).

35. *See, e.g.*, *Kontrick*, 540 U.S. at 452-53.

36. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91, 93-95 (1998) (deciding an Article III standing jurisdictional question, Justice Scalia forcefully condemned the doctrine of "hypothetical jurisdiction," i.e., adjudicating the merits before deciding the preliminary jurisdictional dispute); Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379, 382 (1884) ("[T]he first and fundamental question is that of jurisdiction.").

37. The trial court may ask for evidence, such as additional affidavits, to resolve the jurisdictional dispute. *See, e.g.*, Phoenix Consulting, Inc. v. Republic of Angola, 216 F.3d 36, 40 (D.C. Cir. 2000). In any event, extensive factual inquiry on the merits has no bearing on prior resolution of questions of jurisdiction. *See id.* at 40-41.

38. *See, e.g.*, Craig v. Ont. Corp., 543 F.3d 872, 875 (7th Cir. 2008) ("Subject-matter jurisdiction is so central to the district court's power to issue any orders whatsoever that it may be inquired into at any time, with or without a motion, by any party or by the court itself."); *Phoenix Consulting, Inc.*, 216 F.3d at 41 (reversing and remanding on the jurisdictional determination, notwithstanding the resources invested in discovery).

39. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868); *see also* United States v. Tran, 234 F.3d 798, 807 (2d Cir. 2000) ("Where the district court acted without subject matter jurisdiction, this Court does not have the discretion not to notice and correct the error; it must notice and correct the

of subject matter jurisdiction is never a harmless error.[40] Considerations, like the amount of work invested in the proceedings or in subsequent litigation, should not matter to the appellate court, even when the result on the merits is clearly correct.[41] As the Supreme Court cautions, an "argument from sunk costs [to the judicial system] does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest . . . ."[42]

Acquiring jurisdiction is crucial, and the timing of raising the argument against it is unimportant. Notably, "[i]f the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action."[43] Moreover, "[a] litigant . . . may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance."[44] Litigants are also free to invoke federal jurisdiction and, upon losing, raise a jurisdictional defect.[45] More generally, jurisdiction is independent of the parties' will.

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error.").

40. *See, e.g.*, Torres v. Oakland Scavenger Co., 487 U.S. 312, 317 (1988); *see also* cases cited *supra* note 36.

41. *See generally* Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567 (2004). In *Grupo Dataflux*, a partnership sued a Mexican corporation in federal district court under diversity jurisdiction. *Id.* at 568. At the very moment at which the complaint was filed, the parties were not diverse, but soon afterwards they were. *Id.* The defendant did not raise jurisdictional challenges at first. *See id.* After three years of pretrial motions and discovery, followed by a six-day trial, the jury returned a verdict in favor of the partnership. *Id.* at 569. Before entry of judgment, the defendant filed a motion to dismiss for lack of subject matter jurisdiction. *Id.* The Supreme Court held, in a five to four decision penned by Justice Scalia, that the Court lacked subject matter jurisdiction, and the case was dismissed. *Id.* at 568, 581-82. The quality of the result on the merits, and the fact that the jurisdictional flaw cured after the case was filed, did not matter. *Id.*; *see also* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 340-41 (rev. 9th ed. 2008) [hereinafter FRIEDENTHAL ET AL., CIVIL PROCEDURE I]; Gao, *supra* note 30, at 2371 ("Regardless of the time and resources that the parties and the court have expended, a finding of lack of subject matter jurisdiction . . . requires a dismissal.").

42. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 192 (2000) (footnote omitted).

43. FED. R. CIV. P. 12(h)(3).

44. Kontrick v. Ryan, 540 U.S. 443, 455 (2004); *accord* GMAC Commercial Credit LLC v. Dillard Dept. Stores, Inc., 357 F.3d 827, 828 (8th Cir. 2004) ("Any party or the court may, at any time, raise the issue of subject matter jurisdiction."); Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 127 (1804) (holding that the lower court lacked subject matter jurisdiction and that the case should have been dismissed, although the jurisdictional claim was raised only on appeal). For a criticism of this long-standing rule, as well as a proposal for an alternative rule barring tardy jurisdictional challenges, see Gao, *supra* note 30, at 2404-07.

45. *See* Am. Fiber & Finishing, Inc. v. Tyco Healthcare Grp., LP, 362 F.3d 136, 142 (1st Cir. 2004). The court reasoned:

> There is admittedly something unsettling about a party bringing a case in a federal court, taking the case to final judgment, losing, and then invoking a jurisdictional defect that it created—with the result that it escapes from the judgment and returns, albeit in a different venue, to relitigate the merits. But the federal courts are courts of limited jurisdiction and their institutional interest in policing the margins of that jurisdiction is of

The court cannot deny a jurisdictional challenge because a litigant intentionally and strategically chooses to raise it at a later point.[46] Being such a fundamental requirement, a lack of subject matter jurisdiction may even justify, in certain situations, a collateral attack after the original proceedings are over.[47] Finally, an inquiry into subject matter jurisdiction should be raised by appellate courts *sua sponte*, even absent any contention to the trial court's jurisdiction.[48]

Though one may doubt their wisdom, these strict rules of subject matter jurisdiction are well entrenched in American legal tradition.[49] Indeed, courts sometimes enforce these rigid rules while simultaneously lamenting the resulting inequitable and inefficient outcomes.[50] In one extreme example, the defendant raised a successful jurisdictional challenge only after a jury verdict in the plaintiff's favor.[51] The Eigth Circuit Court of Appeals vacated the judgment by stating the following:

> Despite our holding, we note the [defendant's] failure to raise the motion earlier has resulted in delay, expense to appellees, and waste of judicial resources. Nonetheless, because "[s]overeign immunity . . . is a jurisdictional prerequisite which may be asserted at any stage of the proceedings, . . . [a] Court simply cannot ignore arguments, however belated, that call into doubt the Court's authority to exercise jurisdiction over [a] matter.[52]

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greater concern than any perceived inequity that may exist here.

Id. at 142-43.

46. *See* Wight v. Bank Am. Corp., 219 F.3d 79, 90 (2d Cir. 2000) ("[I]rrespective of how the parties conduct their case, the courts have an independent obligation to ensure that federal jurisdiction is not extended beyond its proper limits."); United States v. Leon, 203 F.3d 162, 164 n.2 (2d Cir. 2000); FRIEDENTHAL ET AL., CIVIL PROCEDURE I, *supra* note 41, at 339; *see also* Gao, *supra* note 30, at 2390-92 (discussing additional cases where courts looked beyond manipulative behavior of the parties to determine whether jurisdiction was proper).

47. *See* United States v. Kerley, 416 F.3d 176, 178-79, 181 (2d Cir. 2005); FRIEDENTHAL ET AL., CIVIL PROCEDURE I, *supra* note 41, at 248-49, 341-42.

48. *See Kontrick*, 540 U.S. at 455; FRIEDENTHAL ET AL., CIVIL PROCEDURE I, *supra* note 41, at 339.

49. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998); *Kerley*, 416 F.3d at 181.

50. *See, e.g.*, Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d 1040, 1042-44 (8th Cir. 2000).

51. *Id.* at 1042.

52. *Id.* at 1044 (citing Resolution Trust Corp. v. Miramon, 935 F. Supp. 838, 841 (E.D. La. 1996)). In another illustrative decision, *Díaz-Rodríguez v. Pep Boys Corp.*, the First Circuit Court of Appeals nullified a summary judgment decision due to a jurisdictional defect that was not raised by the losing party at trial. 410 F.3d 56, 62 (1st Cir. 2005). In a footnote, the court cited language from one of its previous opinions:

> There is something faintly inequitable about a party letting a case go to judgment without questioning the court's jurisdiction, losing, and then profiting from a jurisdictional defect noted *sua sponte* by the appellate court. . . . [However], federal courts are courts of

Put differently, the federal courts' "institutional interest in policing the margins of [subject matter] jurisdiction is of greater concern than any perceived inequity that may exist."[53]

Jurisdiction, therefore, is independent of the merits; its boundaries should be strictly enforced. Unless these declarations are empty rhetoric, a correlation between reversals of subject matter jurisdiction and judicial efforts spent at the trial court on the merits can suggest that judges are overly influenced by past judicial input. This is the hypothesis of this research.

B. The Database

Given the hypothesis (jurisdiction is independent of the merits, and its boundaries should be strictly enforced), this Article looks for an empirical correlation between reversals of jurisdictional questions and judicial efforts at the trial level on the merits. Therefore, the data consists of appellate cases in which the trial court upheld its jurisdiction, proceeded to the merits (with or without a trial), and the jurisdiction dispute was challenged again at the appellate court. The dependent variable is the likelihood of reversing the trial court's jurisdiction.[54] The independent variable indicates judicial efforts spent at the trial level on the merits.[55]

> limited jurisdiction. Consequently, such courts must monitor their jurisdictional boundaries vigilantly.

Id. at 62 n.5 (citing Am. Fiber & Finishing, Inc. v. Tyco Healthcare Grp., LP, 362 F.3d 136, 139, 142-43 (1st Cir. 2004)); *see also supra* note 45. Another example is *Del Vecchio v. Conseco, Inc.*, where the Seventh Circuit Court of Appeals voided a summary judgment entered by the trial court, admitting that:

> While we are not unsympathetic to the waste of effort represented by a case that has been fully litigated in the wrong court, both the Supreme Court and we ourselves have noted time and again that subject matter jurisdiction is a fundamental limitation on the power of a federal court to act. Once it appears, as it has here, that subject matter jurisdiction is lacking, only one path lies open to us. We hereby [vacate] the [trial court's summary judgment].

230 F.3d 974, 980 (7th Cir. 2000) (citations omitted); *see also* Shaffer v. GTE North, Inc., 284 F.3d 500, 504-05 (3d Cir. 2002) (vacating the settlement agreement at issue, as the district court lacked subject matter jurisdiction, and asserting that "this reconfirmation of basic jurisdictional principles . . . will [hopefully] avoid any further repetition in other cases of the painful lesson taught here.").

53. *Am. Fiber & Finishing, Inc.*, 362 F.3d at 142-43.

54. The "dependent variable" is a variable that represents the phenomenon that the theory attempts to explain. *See* ANOL BHATTACHERJEE, SOCIAL SCIENCE RESEARCH: PRINCIPLES, METHODS, AND PRACTICES 12 (2d ed. 2012). In this context, the dependent variable is whether or not the appellate court reverses the trial court's jurisdiction. I expect to observe more reversals where more judicial efforts were spent on the merits.

55. The "independent variable" is a variable that explains changes in the dependent variable. *Id.* In this context, the independent variable is the amount of judicial efforts at the trial level on the

This Article relies on the procedural posture in which the original case ended as a proxy for previous judicial efforts. Specifically, the independent variable indicates whether the district court decides the merits by a bench or jury trial, or before trial—through a motion to dismiss, or a motion for summary judgment, for example.

The procedural posture in which the trial court disposed of the case plausibly indicates judicial efforts on the merits. Generally, the later the procedural stage, the more the district judge invests in a case.[56] In particular, cases that ended with jury or bench trials ordinarily implicate larger judicial resources than cases that ended with summary judgments or motions to dismiss.[57] More importantly, a later procedural posture does not mean that the district judge made a correct jurisdictional determination. Jurisdictional questions are adjudicated at the outset, and are not affected by a subsequent disposition of the merits.[58] The fact that the case proceeded to a bench or jury trial on the merits should not, in itself, make the preliminary jurisdiction decision correct when the appellate court later reviews it.[59]

The database consists of courts of appeals' decisions in which there is a genuine challenge to the trial court's subject matter jurisdiction. I collected the data through an online legal research database. In order to keep only non-frivolous jurisdictional challenges, the dataset includes

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merits, and I expect this variable to be correlated with fewer reversals.

56. *See, e.g.*, RICHARD D. FREER, CIVIL PROCEDURE 403-05, 442-44 (2d ed. 2009).

57. *See generally* Craig M. Reiser, *The Unconstitutional Application of Summary Judgment in Factually Intensive Inquiries*, 12 U. PA. J. CONST. L. 195 (2009) (arguing that although summary judgment motions help preserve further use of judicial resources that would be necessary for trial, there is an underlying constitutional issue under the Seventh Amendment).

58. *See, e.g.*, Howard M. Wasserman, *Jurisdiction, Merits, and Substantiality*, 42 TULSA L. REV. 579, 591 (2007).

59. In early versions of this research, I experimented with two other variables for judicial efforts and tested the results on a small subsample. The first variable was the length (pages) of the decision (or decisions) rendered by the district court; the second was the time (months) during which the case was pending at the trial court. The length of the trial court opinion had virtually no effect on reversal rates of jurisdictional questions. This outcome might be due to measurement distortions, as the court often issues several decisions, not all of them reported. The time during which the case was pending at the trial court had a mixed effect—cases that ended within one year did have the highest reversal rate of jurisdictional questions, as expected, but cases that ended in the second year had a lower reversal rate than cases that ended after more than three years. This effect, though far from being statistically significant, may indicate that the time the case is pending is an unreliable measure for judicial efforts, as some cases are latently pending for a long time.

Be that as it may, the use of opinion-pages and months also entails conceptual difficulties, as one cannot know whether these judicial efforts—indicated by the time the case was pending and the length of the decision—are truly independent of the jurisdictional issue. In contrast, judicial work during trial on the merits is by definition irrelevant to the preliminary jurisdiction determination. For this reason, I focused on the procedural posture in which the case ended to indicate past judicial efforts on the merits.

appellate cases in which the exact phrase "subject matter jurisdiction" appears in one of the following: synopsis; digest; topic; notes; or summary of the opinion.[60] I reviewed the cases manually to keep only the cases in which the appellate court indeed examined the trial court's decision to retain jurisdiction. The resulting database encompasses all of the decisions of the last decade in six different circuit courts, in which a genuine challenge to the trial court's jurisdiction arose—overall, 375 decisions.[61]

IV. RESULTS AND DISCUSSION

A. The Variables and Descriptive Statistics

The dependent variable is JURISDICTION—whether the circuit court affirmed, reversed, or remanded the jurisdictional question. In the majority of the cases (approximately 63%), the court of appeals affirmed the trial court's jurisdiction.[62] Note that this variable solely describes how the appellate court handled the jurisdictional question, as it might affirm jurisdiction, but reverse the merits. Usually, however, the resolution of the jurisdictional question comports with the decision on the merits.[63]

The independent variable is the procedural posture in which the district court, upon affirming jurisdiction, disposed of the case, and, in particular, whether a complete jury or bench TRIAL was held. The majority of cases (approximately 85%) ended before a full trial (e.g., upon a summary judgment motion). I expect appellate judges to reverse on jurisdictional grounds more often where there was no trial on the merits at the district court.

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60. Technically, the search command on Westlaw was: sy("subject matter jurisdiction") no("subject matter jurisdiction") di("subject matter jurisdiction") to("subject matter jurisdiction") su("subject matter jurisdiction").

61. Cases ended between January 2000 and October 2009 in the First, Second, Third, Seventh, Eighth, and the D.C. Circuit Courts of Appeals. These six circuits were chosen because they diverge on a number of characteristics such as: number of districts per circuit; average distance between the circuit and district headquarters; geographical location; and workload.

62. Cases in which the appellate court remanded the jurisdiction question comprise approximately 5% of the database. I conjectured that appellate judges' tendency to affirm stems from concerns about rendering prior judicial efforts useless. *See supra* Part II. Hence, remands are closer to affirmations: the appellate court actually enables the trial court to correct its mistakes and avoid a loss of judicial efforts by finding an alternative ground for jurisdiction. Thus, unless otherwise stated, remands are treated as affirmations. *See infra* notes 82-83 and accompanying text.

63. To illustrate, when the appellate court affirms the trial court's jurisdiction, the odds of reversing the case (on the merits) are only approximately 10%.

The regression includes a host of control variables.[64] These are the most important ones:

INTERLOCUTORY APPEALS—the "final judgment rule" notwithstanding, there are some exceptions in which litigants can bring interlocutory appeals amidst a trial (e.g., preliminary injunctions).[65] Most of the cases in the sample represent appeals from final orders (approximately 88%). Interlocutory appeals avoid prolonged litigation.[66] Therefore, I expect appellate judges to reverse jurisdiction more often in interlocutory appeals.

The regression also controls for the TYPE of the case. The majority of the cases in the database (approximately 54%) are civil cases. Other categories are public law (administrative and constitutional cases), civil rights, criminal, and post-criminal (e.g., habeas corpus) cases.

For each case, there is information about the CIRCUIT that decides the case and the DISTRICT from which the case originated. As mentioned above, the database includes cases from six different circuit courts over the last decade.[67] In order to account for doctrinal trends, the regression also controls for the YEAR in which the appellate court rendered the decision.

The database contains information regarding the district court's DISTANCE from the circuit court. As mentioned, judges might be reluctant to reverse their fellow judges who invested considerable efforts in the case; the closer the judges, the less likely reversals are to occur. In order to grasp—albeit roughly—the proximity between circuit and district judges, I recorded the distance between the circuit and district headquarters. The farthest district is Puerto Rico—which is part of the First Circuit—and located 1671 miles from Boston.[68] The closest districts are those that are located at the circuit headquarters (e.g., the Southern District of New York).

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64. Regression analysis is a common statistical technique for modeling and analyzing the relationship between the dependent variable (here, the likelihood of reversing jurisdiction) and the independent variable (whether there was a trial), controlling for other explanatory variables.

65. *See, e.g.*, John C. Nagel, Note, *Replacing the Crazy Quilt of Interlocutory Appeals in Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200, 203 (1994) (discussing interlocutory appeals as an exception to the final judgment rule).

66. *See* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 610-12 (1975) (discussing the background of interlocutory appeals and their intended purpose of promoting judicial efficiency).

67. *See supra* note 61.

68. *Compare Court Location*, U.S. COURT APPEALS FIRST CIRCUIT, http://www.ca1.uscourts.gov (last visited Feb. 15, 2015), *with Puerto Rico District Court*, JUSTIA, https://www.justia.com/us-states/puerto-rico/courts/district_court/main-office.html (last visited Feb. 15, 2015).

CLASS ACTIONS account for approximately 7% of the database. Class litigation is a proxy for a more complicated case, which requires larger judicial resources at the trial court. Hence, I expect appellate judges to reverse jurisdiction less frequently in class action lawsuits.[69]

B. Correlating Judicial Efforts with Reversal Rates

The results reveal the negative correlation between district judges' efforts on the merits and appellate courts' tendency to reverse the trial court's jurisdiction. Table 1, below, demonstrates this phenomenon. In cases that ended before a full trial, there is an approximately 36% chance of reversing the trial court's jurisdiction. In cases that ended after a jury or bench trial, the corresponding figure is only approximately 16%:

Table 1: Reversal Rates v. Trial

	Decisions Without Trial	*Decisions After Trial*
Jurisdiction Reversed	35.7%	15.8%
Jurisdiction Affirmed	64.3%	84.2%
Total	100%	100%

A regression analysis,[70] that takes into account the control variables, shows that this effect of trials at the district court—which is associated with a sharp difference in the likelihood of reversing the jurisdiction question—is also statistically significant.[71]

Other noteworthy patterns emerge from the regression:[72] interlocutory appeals are correlated with more reversals of the district

69. The same logic applies to consolidated cases (approximately 23% of the dataset). Other variables are APPELLANT (recognizing that, in approximately 64% of the cases, the original defendant appeals), and UNANIMOUS (noting that, in approximately 92% of the cases, there is no dissent or concurring opinion).

70. Unless otherwise stated, the regression analysis that this Subpart refers to is Regression (1). *See infra* Table A.1.

71. "Significance" in statistics means that the odds that a certain result was created by chance are below a certain low threshold (commonly, 1%, 5%, or 10%). Here, the correlation between trials and reversals of jurisdiction is statistically significant at the 5% level. *See infra* Part VIII app.

72. The relevant regression, Regression (1), treats bench and jury trials alike. One may think, however, that appellate judges respond differently to bench and jury trials, affirming jurisdiction to a different extent in each case. Several regressions in the appendix accordingly break the variable TRIAL to bench and jury trials, with mixed results. *See infra* Tables A.1–.2.

court's jurisdiction.[73] This fits initial expectations, as interlocutory appeals involve less judicial efforts at the trial court.[74]

Class litigation is correlated with affirming the trial court's jurisdiction,[75] as expected. Complex litigation is more likely to involve heavy judicial investments at the district court on the merits, and thus, the court of appeals is more likely to affirm the trial court's jurisdiction.

The type of case matters. In particular, jurisdictional questions in criminal cases stand out as the least likely to be reversed.[76] This might suggest that questions of jurisdiction in criminal cases are less complicated, hence trial courts are less likely to err. This correlation might also suggest that the observed phenomenon is driven by distinct motives. Criminal cases are visible. Public opinion, it seems, would find a reversal of criminal conviction for mere jurisdictional flaws particularly troublesome.[77] Therefore, the pattern observed in criminal cases might be motivated by the desire to gain public confidence through a facade of consistency.[78]

The district circuit distance is correlated with more reversals of the trial court's jurisdiction, as expected. The further away the district court is, the more likely the appellate court is to reverse jurisdiction. This effect is, however, small in magnitude and statistically insignificant. This point should be clarified, then, by further research.

To sum up, the findings reveal a non-trivial and statistically significant correlation between having a trial at the district court and affirming the lower court's jurisdiction. To demonstrate the magnitude of this phenomenon, all else being equal, take the following hypothetical examples with and without a trial at the district court:

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73. This effect, other things being equal, is statistically significant at the 10% level. It is also substantial in magnitude.

74. *See* Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, LAW & CONTEMP. PROBS., Summer 1984, at 157, 160.

75. This effect, other things being equal, is statistically significant at the 10% level and also substantial in magnitude.

76. Not only is this effect statistically significant at the 5% level, it is also very strong in magnitude.

77. Moreover, criminal cases typically implicate additional substantial investment of resources, by grand juries that decide whether or not to indict. Hence, one may expect appellate judges to be all the more reluctant to waste these efforts through reversals.

78. Compare the reversal rate of criminal to post-criminal cases (e.g., habeas corpus). In the latter, where the defendant is usually the government, the court of appeals is by far more likely to reverse the district court's jurisdiction.

Table 2: Numerical Illustrations[79]

Case	*Affirming Jurisdiction Given No Trial*	*Affirming Jurisdiction Given Trial*
Civil Case: 2d Circuit	79.5%	90.3%
Civil Case: 7th Circuit	65.8%	82.2%
Criminal Case: 8th Circuit	95.8%	98.2%
Public Law Case: D.C. Circuit	75.6%	88.2%
Human Rights Case: 1st Circuit	68.6%	84.0%

Though they are only conservative estimates,[80] these figures show the non-trivial effect—a trial can make a difference of almost up to twenty percentage points. Thus, many denied appeals should have been accepted.

C. Robustness Checks

I conducted several additional checks to buttress the findings.

1. Remands

In addition to affirming and reversing, the appellate court can remand the question of jurisdiction to the district court for reconsideration.[81] Remands allow the court of appeals to potentially save judicial resources from vanishing. Up to this point, remands have been treated as affirmations. But what happens when a closer look is taken?

When remands are excluded, the results are similar, though some statistical significance is lost.[82] However, when remands are compared to affirmations, an opposite, and more interesting, picture appears. Other things being equal, appellate courts are much more likely to remand a jurisdictional question when there was a bench or jury trial at the district court,[83] and this correlation is statistically significant.[84]

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79. In all of these simulations, except the D.C. Circuit simulation, the defendant appeals and the distance is the median distance. In the D.C. Circuit example, the district and circuit courts are located at the same place.

80. These numbers are based on the results of Regression (1) in the appendix. *See infra* Part VIII app. This is the most conservative regression. All other regressions show a higher, and sometimes much higher, influence. *See infra* Tables A.1–.2.

81. *See* 28 U.S.C. § 2106 (2006).

82. The correlation between having a trial at the district court and affirming jurisdiction becomes significant at the 10% level, rather than the 5% level. *See infra* Table B.

83. *Cf.* Gao, *supra* note 30, at 2379 (discussing the proposition that courts should sustain

The observed phenomenon, then, has dual influence. Not only do courts of appeals prefer affirming jurisdiction to reversing it when the trial court spent precious judicial resources; they also tend to use more remands in these circumstances.

2. Federal Question Cases

Federal courts can obtain jurisdiction when the plaintiff alleges a violation of the U.S. Constitution or of a federal statute.[85] These are federal question cases. Alternatively, federal courts can acquire jurisdiction because the parties are "diverse" in citizenship, i.e., they are residents of different states or non-U.S. citizens.[86] This is diversity jurisdiction.

One can argue that this study should focus on federal question jurisdiction, and exclude diversity cases. Determining diversity may require some factual inquiry.[87] Furthermore, diversity is a fluid feature; it can be "created" and "destroyed,"[88] sometimes by the litigants themselves.[89] Thus, it makes sense to reiterate the regressions with only federal question cases.

When including only federal question cases, the results are all the more robust. Given no trial at the district court, the odds of reversing the district court's jurisdiction are approximately 36%; with a bench or jury trial, these odds are only approximately 13%. This difference is statistically significant.[90]

3. Non-Similar Cases

Appeals might not be representative of the universe of cases—litigants choose to appeal, and this selection process might bias the results. In particular, litigants may appeal more aggressively after full trials. To account for this, I ran several other regressions.

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jurisdiction when it actually exists but was not properly pled).

84. The correlation is statistically significant at the 5% level. *See infra* Table B.

85. 28 U.S.C. § 1331 (2012).

86. 28 U.S.C. § 1332(a) (2012).

87. *See* FRIEDENTHAL ET AL., CIVIL PROCEDURE I, *supra* note 41, at 259-60; Gao, *supra* note 30, at 2379-80.

88. *See* FRIEDENTHAL ET AL., CIVIL PROCEDURE I, *supra* note 41, at 262-63; Gao, *supra* note 30, at 2382-85 (showing a variety of examples where diversity can be created or destroyed).

89. *See* FRIEDENTHAL ET AL., CIVIL PROCEDURE I, *supra* note 41, at 262-63; *cf.* Caterpillar Inc. v. Lewis, 519 U.S. 61, 64-66 (1996) (finding that the litigants were able to create diversity). What matters doctrinally, however, is the time of filing. *See* Gao, *supra* note 30, at 2380-81.

90. The results are statistically significant at the 5% level. *See infra* Table A.2. The federal question sample includes 140 cases of the original 375 cases—I included in the new sample only cases in which the phrase "federal question" or "federal subject-matter jurisdiction" appears.

a. Excluding Frivolous Challenges to Jurisdiction

One might argue that the underlying jurisdictional questions are different across cases, as cases that ended in a full trial are more likely to be appealed, and frivolous challenges to jurisdiction are more likely in this group. The research already accounts—to some extent—for this concern, as the database consists of decisions in which the phrase "subject matter jurisdiction" appears only in the synopsis, digest, topic, notes, or summary. However, "notes" or "topic" may be very broad. To further mitigate these concerns, and exclude frivolous jurisdictional challenges, I ran the regressions on a subsample of cases in which the phrase "subject matter jurisdiction" appears only in the summary or the synopsis of the decision.[91]

The results are telling: while the reversal rate of jurisdictional questions for non-trial decisions is approximately 39%, a trial decreases this figure to approximately 8%. Not only is this effect large in magnitude, it is also highly statistically significant.[92] This suggests that, if anything, the selection process mitigates the observed phenomenon.[93] Focusing on serious, genuine questions of jurisdiction, the observed phenomenon is much stronger.

b. Controlling for the Merits

Cases in the database vary in the strength of their substantive merits. To account for this problem, additional regressions were conducted.

First, summary order cases were excluded. A summary order is a decision without any reasoning or precedential value.[94] Hence, these cases are more likely to represent unmeritorious appeals. When summary orders are excluded, the results are—again—very similar.[95]

Second, the monetary value of a case can indicate its importance. Unfortunately, the monetary value is usually not apparent from the appellate court decision. In a small subsample, though, the decision

91. The subsample included 139 cases overall.

92. The effect is statistically significant at the 1% level. *See infra* Table A.2.

93. One explanation is that weaker, non-trial cases are more likely to raise frivolous challenges to jurisdiction.

94. *See, e.g.*, Anne Coyle, Note, *A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in the Federal Courts of Appeals*, 72 FORDHAM L. REV. 2471, 2491 (2004) (describing summary orders and stating that they are often given orally from the bench).

95. Given no trial, the probability of reversing jurisdiction is approximately 37%. Where a trial was held, however, the odds are much smaller—approximately 15%. This effect is statistically significant at the 5% level. *See infra* Table A.2.

indicates the monetary value.[96] Within this sample, monetary value has a meager and insignificant effect on reversal rates of jurisdictional questions and the phenomenon that this Article describes.[97]

These checks lend further support to the proposition that appellate judges are increasingly reluctant to reverse jurisdiction where the trial judge invested more efforts on the merits of the case. This effect increases the odds of both affirming and remanding jurisdiction, and the results are even more robust when a smaller sample of federal question cases is considered. The exclusion of frivolous and non-meritorious jurisdictional challenges and appeals enhances the observed phenomenon, and it seems that the monetary value of a case does not influence the basic findings. To the extent the results can be generalized to settings other than jurisdictional questions, one has to think of the implications.

V. NORMATIVE IMPLICATIONS

The results indicate that appellate judges are influenced by seemingly irrelevant efforts spent by trial judges.[98] This phenomenon invites modifications in the existing rules of procedure.

One direction for reform is related to standards of review. If appellate judges are less likely to reverse where trial judges made considerable efforts, a more aggressive standard of review of previous decisions should compensate for the tendency to stick to a prior course of action. Moreover, the standard of review should be tailored to the efforts previously invested. In the context of appellate decision-making, this logic leads to a more searching review of final judgments (as opposed to interlocutory appeals), and questions that are decided at the beginning of litigation and are followed by considerable judicial efforts on other issues (typically legal questions, as opposed to factual questions).[99]

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96. Sometimes, the appellate decision indicates the monetary award at the trial level. When only the amount the plaintiff demanded was indicated, I recorded half of this figure as the monetary value (under the rough assumption that plaintiffs win 50% of the time).

97. As an unreported regression shows, controlling for the monetary value leaves the magnitude of the correlation between trial at the district court and reversing jurisdiction intact. However, this finding should be interpreted with caution, as the number of decisions in this subsample is small (79 cases) and the results are statistically insignificant. Nonetheless, the correlations are illustrative. All else equal, monetary value and affirmations of jurisdiction are negatively correlated, suggesting that, if anything, jurisdictional determinations in more important cases are more likely to be reversed. However, the correlation between trial at the district court and affirming jurisdiction remains positive.

98. *See supra* Part IV.B–C.

99. Interestingly, this distinction fits current doctrine. Questions of law are reviewed under a

The same logic applies to other contexts in which one judge evaluates prior decisions made by another decision-maker. Given judges' tendency not to deviate from a prior course of action, then, courts might benefit from a more demanding review of administrative and arbitration judgments, and a greater attention to habeas corpus and new trial petitions.

To the extent that the empirical findings can be further generalized, and individual judges are not likely to deviate from their own prior decisions,[100] the findings strengthen the argument for bifurcating decision-making. In several areas of law, there is an ongoing debate regarding whether or not to split decision-making between two different judges. One notable example is remanding a case to the same trial judge for further proceedings;[101] another is the ability of class action judges, who were heavily involved in settlement negotiations, to assess, impartially, the fairness of a settlement.[102] As bifurcated decision-making can reduce—though not eliminate—the attachment to a prior course of action,[103] the findings suggest that a greater propensity to bifurcate improves decision-making in these areas.

These procedural modifications notwithstanding, the major reform that this Article proposes is a broader right to interlocutory appeals. Thus, interlocutory appeals are an effective tool to improve appellate decision-making.

A. The Final Judgment Rule

If appellate judges are affected by the trial court's efforts, even where these efforts are irrelevant, one should attempt to insulate appellate judges from data concerning the trial court's decision.[104] This

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broad *de novo* review. *See generally* 9C CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2588 (3d ed. 2008). Questions of fact, however, are reviewed under a narrow "clearly erroneous" standard. FED. R. CIV. P. 52(a).

100. For a discussion on cognitive biases in this respect, see *supra* notes 20-24 and accompanying text.

101. The current test for reassigning to a different judge upon remand is very narrow. Absent "unusual circumstances," courts of appeals tend not to reassign a case to a different judge. *See, e.g.*, United States v. Sears, Roebuck & Co., 785 F.2d 777, 780 (9th Cir. 1986); *see also* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 1006-09 (2d ed. 2007) (surveying the different standards that different circuit courts apply).

102. *See* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 426-27 (2001); *cf.* Judith Resnik, *Managerial Judging*, 96 HARV. L. REV. 374, 424-31 (1982). By and large, judges cannot be disqualified for structuring settlements. *See* FLAMM, *supra* note 101, at 335-41.

103. *See supra* note 24.

104. *Cf.* Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE. L.J. 399, 403-05 (2001) (praising some sort of ignorance in decision-making).

"veil of ignorance" is not a practical solution. Instead, one should aim at avoiding the very situations in which appellate judges review interim decisions after the case has already been decided on the merits. The implications are clear—a broader right to interlocutory appeals should result in more accurate appellate decision-making.

Legal systems have different views on interlocutory appeals. Some states—most notably, New York[105]—are known for their broad right to interlocutory appeals. The federal system, however, is notorious for its strict adherence to the "final judgment rule:"[106] appeals can only be taken from "final decisions of the district courts of the United States."[107] What are the policy considerations behind the federal final judgment rule?

Emanating from early English tradition,[108] the final judgment rule has obvious policy advantages; "The basic rationale of the finality rule is conservation of judicial resources."[109] The benefits of the final judgment rule include: enabling a speedy and smooth trial;[110] reducing the number of appeals in each case;[111] allowing the appellate court a more comprehensive review of the merits;[112] avoiding tactical delays and harassment through frequent petitions for review;[113] and, allegedly, better respect for the authority of the trial judge.[114]

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105. *See* N.Y. C.P.L.R. § 5701(a)(2) (McKinney 1995) ("An appeal may be taken to the appellate division as of right . . . [including from orders that] involve[] some part of the merits; or affect[] a substantial right . . . ."). Other notable states that share a similar procedural policy include Wisconsin, Arizona, California, and New Jersey. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 620 & n.18, 621 & n.22 (4th ed. 2005) [hereinafter FRIEDENTHAL ET AL., CIVIL PROCEDURE II].

106. FRIEDENTHAL ET AL., CIVIL PROCEDURE II, *supra* note 105, at 622 ("Without doubt, the federal courts are among the most strict in adhering to the finality requirement . . . .").

107. 28 U.S.C. § 1291 (2012). A final judgment is a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945).

108. *See* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 727 (1993); Nagel, *supra* note 65, at 202.

109. Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 351-52 (1961) [hereinafter Note, *Appealability*]; *see also* Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1547-48 (2000).

110. DiBella v. United States, 369 U.S. 121, 124 (1962) ("This insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice . . . ."); *see also* Note, *Appealability*, *supra* note 109, at 351-52.

111. *See* Note, *Appealability*, *supra* note 109, at 352. Potential interim appeals will eventually be consolidated into a single, final appeal. *See id.* In addition, parties may settle before trial or completely forgo their right to appeal. *Cf.* Nagel, *supra* note 65, at 203.

112. *See* Note, *Appealability*, *supra* note 109, at 352.

113. *Id.* at 351; *see* Cooper, *supra* note 74, at 158; Nagel, *supra* note 65, at 203; *see also* Solimine & Hines, *supra* note 109, at 1547-48.

114. *See* Nagel, *supra* note 65, at 203; *cf.* Note, *Appealability*, *supra* note 109, at 352.

The literature has also noted the parallel counter-arguments. Interlocutory appeals can avoid costly and redundant proceedings;[115] correct situations in which final judgments have no practical importance;[116] and produce essential guidance to lower courts where interim orders are not likely to be reviewed within final appeals (e.g., discovery rules).[117]

Every legal system strikes a balance between these competing considerations, on a continuum between a complete final judgment rule and a full right of interlocutory review. It has been noted that "[t]he difference between the two approaches to appealability . . . is not as much philosophical as it is a difference in the method in which a particular jurisdiction has decided to balance [the conflicting interests] . . . ."[118] Even the apparently strict federal final judgment rule is not intact, as "the courts and Congress have created a patchwork of exceptions" to it.[119] Moreover, "[t]he final judgment requirement has been supplemented by a list of elaborations, expansions, evasions, and outright exceptions that is dazzling in its complexity."[120] Indeed, much ink has been spilled in an attempt to decipher or suggest the exact boundaries of the federal final judgment rule.[121]

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115. *See* Cooper, *supra* note 74, at 160; Note, *Appealability*, *supra* note 109, at 352.

116. *See* Cooper, *supra* note 74, at 157, 162; Note, *Appealability*, *supra* note 109, at 352-53; *see also* Nagel, *supra* note 65, at 203.

117. Cooper, *supra* note 74, at 158, 162 ("Loss of the need for review . . . may carry a cost that goes beyond the demands of the particular case, as appellate courts may be deprived of the opportunity to clarify and improve the law on matters that repeatedly evade review."); *see also* Note, *Appealability*, *supra* note 109, at 352.

118. FRIEDENTHAL ET AL., CIVIL PROCEDURE II, *supra* note 105, at 621-22; *see also* Nagel, *supra* note 65, at 203-04 ("The battle between these competing concerns explains why the Supreme Court . . . for many years failed to apply the final judgment rule rigidly, eschewing a clear definition of 'final judgment.'" (footnotes omitted)).

119. Nagel, *supra* note 65, at 200. Notable areas in which there is available interlocutory review are: concluding orders in cases of multiple parties, FED. R. CIV. P. 54(b); injunctions, 28 U.S.C. § 1292(a)(1) (2006); notice requirement in class actions, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 169-72 (1974); posting of security for costs, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949); and appointment of receiverships, 28 U.S.C. § 1292(a)(2) (2006).

120. Cooper, *supra* note 74, at 157; *see also* Note, *Appealability*, *supra* note 109, at 352, 357.

121. *See, e.g.*, Martineau, *supra* note 108, at 749-54 (suggesting to move toward a discretionary appeal system); Nagel, *supra* note 65, 204-09 (same); Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1685-93 (2011) (arguing for interlocutory review in multidistrict litigation); Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1168, 1178-79 (1990) (advocating for "less judicial hostility toward interlocutory appeals"); Leah Epstein, Comment, *A Balanced Approach to Mandamus Review of Attorney Disqualification Orders*, 72 U. CHI. L. REV. 667, 673, 675-78 (2005) (discussing interlocutory appeals from attorney disqualification decisions); Nathan A. Forrester, Comment, *Mandamus as a Remedy for the Denial of Jury Trial*, 58 U. CHI. L. REV. 769, 775-80 (1991) (discussing interlocutory appeals from decisions to deny a jury trial); Gayle Gerson, Note, *A Return to Practicality: Reforming the Fourth*

This large body of literature neglects one important issue—how the final judgment rule affects appellate judges' decision-making. This Article attempts to fill the gap. As it shows, the final judgment rule, which accumulates judicial resources at the trial court level, is correlated with fewer reversals.[122] Had interlocutory appeals been available, some meritorious appeals, currently unsuccessful, would have likely been accepted.[123] As long as accurate appellate decision-making is an important value,[124] the phenomenon that this Article describes tilts the current balance between the final judgment rule and interlocutory appeals in the latter direction.

To be more specific, this logic can highlight certain enclaves where the risk of inaccurate appellate decision-making is greater, and thus, interlocutory appeals are presumably more desirable. This class of cases includes lower court decisions that, if wrong, would entail a huge waste of judicial resources.[125] One obvious candidate is lower courts' decisions to uphold their subject matter jurisdiction. This logic is also pertinent to other contexts. In fact, every denial of a preliminary challenge that can serve as a ground for dismissal fits this pattern. Notable examples are personal jurisdiction, affirmative defenses (e.g., statute of limitations, res judicata), other prudential restrictions on jurisdiction (e.g., *forum non conveniens*), and recusal applications.[126]

Given that the relevant factor is the amount of judicial effort spent in case the interim decision is mistaken, rights to interlocutory appeals should sometimes be asymmetric.

Cox *Exception to the Final Judgment Rule Governing Supreme Court Certiorari Review of State Court Judgments*, 73 FORDHAM L. REV. 789, 800 (2004) (discussing interlocutory review by the Supreme Court from constitutional judgments decided in state courts); *see also* Niehaus v. Greyhound Lines, Inc., 173 F.3d 1207, 1210-11 (9th Cir. 1999) (expanding interlocutory review of decisions to remand cases to state courts).

122. *See supra* Part IV.B.

123. *See supra* Part IV.B.

124. For the utility of more accurate decision-making, see Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 396-97 (1994).

125. *Cf.* Cooper, *supra* note 74, at 162-63 ("The substantive impact of possible error may seem so clear as to warrant a routine right of interlocutory appeal . . . ."); Pollis, *supra* note 121, at 1643 (asserting that interlocutory review in multidistrict litigation is important, as a single "error can have . . . sweeping impact on thousands of cases").

126. *See, e.g.*, FED. R. CIV. P. 12(b)(1)–(6) (identifying various defenses that a party may bring in response to the plaintiff's complaint at an early stage of the litigation, including lack of personal jurisdiction and failure to state a claim); FRIEDENTHAL ET AL., CIVIL PROCEDURE I, *supra* note 41, at 338-42 (discussing attacks on district court decisions on subject matter jurisdiction); FRIEDENTHAL ET AL., CIVIL PROCEDURE II, *supra* note 105, at 622 (discussing how the preliminary decision of a trial court in rejecting to hear a personal jurisdiction objection is interlocutory, and cannot be heard until a final judgment is rendered on the merits).

1. Interlocutory Review from Class Certification Decisions[127]

The case for interlocutory review of decisions to certify (or refuse to certify) class actions is illuminating. Certification decisions should be made at the beginning of litigation.[128] Certification is crucial, as the stakes are often too small to justify individual litigation.[129] A false-negative—i.e., an erroneous order denying class certification—serves, therefore, as "the 'death knell' of the litigation."[130] Similarly, false-positives constitue "the inverse-death-knell doctrine," because "if [the certification] order were erroneous, and therefore reversed on appeal, the action would for all practical purposes be at an end."[131] Based on these doctrines,[132] several courts of appeals decided that certification orders are "final judgments," allowing interlocutory appeals accordingly.[133] The Supreme Court, however, rejected this view.[134] Congress responded, authorizing the advisory committee to reconsider this subject.[135] The adoption of Federal Rule of Civil Procedure 23(f) ("Rule 23(f)") followed in 1998.[136] Rule 23(f) allows a broader right to interlocutory appeals from certification decisions.[137] It gives "[t]he court of appeals . . . unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for

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127. Class actions are not automatically available, as the court has to certify a lawsuit as a class action. *See* FED. R. CIV. P. 23(c). Hence, after filing a complaint, the plaintiff should move to have the class certified.

128. FED. R. CIV. P. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.").

129. Janet Cooper Alexander, An Introduction to Class Action Procedure in the United States 5-6 (unpublished manuscript) (on file with the *Hofstra Law Review*).

130. Solimine & Hines, *supra* note 109, at 1553.

131. Kohn v. Royall, Koegel & Wells, 496 F.2d 1094, 1098-99 (2d Cir. 1974); FRIEDENTHAL ET AL., CIVIL PROCEDURE II, *supra* note 105, at 625. Furthermore, erroneous grants of class certifications "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." FED. R. CIV. P. 23(f) advisory committee's note.

132. The death knell doctrine is defined as "[a] rule allowing an interlocutory appeal if precluding an appeal until final judgment would moot the issue on appeal and irreparably injure the appellant's rights." BLACK'S LAW DICTIONARY 459 (9th ed. 2009).

133. FRIEDENTHAL ET AL., CIVIL PROCEDURE II, *supra* note 105, at 621, 625.

134. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 467-68, 475-77 (1978) (holding that an order denying class certification does not qualify as a final judgment, and therefore, the "death knell" doctrine does not support appellate jurisdiction).

135. 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at vii (1997) [hereinafter WORKING PAPERS], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/WorkingPapers-Vol1.pdf.

136. Christopher A. Kitchen, Note, *Interlocutory Appeals of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal for a New Guideline*, 2004 COLUM. BUS. L. REV. 231, 242.

137. *See* FED. R. CIV. P. 23(f).

certiorari."[138] Providing this wide discretion, Rule 23(f) guides courts of appeals to "develop standards for granting review."[139] Courts and academics alike have been struggling to develop these standards.[140] This Article adds a new perspective to this endeavor.

To be sure, the desire to allow a broader right to interlocutory appeals from class certification orders was not driven by the fear of erroneous appellate decision-making; rather, it endorses the so-called death knell rationales.[141] Nevertheless, the logic of this Article can be helpful to clarify the appropriate standards for granting interlocutory review from class certification orders.

The advisory committee is agnostic between grants and refusals of class certification,[142] but the findings of this study are not. A decision refusing to certify a class is, *de facto*, equal to terminating the case, with only little additional investment of judicial efforts.[143] However, an order granting class certification can be followed by adjudication, entailing the risk of heavy investment of irreparable judicial efforts that are required to resolve the claims of the entire class. Hence, an order granting certification represents a more appropriate case for interlocutory review.

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138. FED. R. CIV. P. 23(f) advisory committee's note.

139. *Id.*

140. *See, e.g.*, Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834-35 (7th Cir. 1999) (considering several factors including: whether a denial of certification is likely to end litigation; to what extent the defendant is pressed to settle; and the legal importance of the rule); Carey M. Erhard, *A Discussion of the Interlocutory Review of Class Certification Orders Under Federal Rule of Civil Procedure 23(f)*, 51 DRAKE L. REV. 151, 171-74 (2002) (summarizing case law and recommending more uniformity across circuits); Charles R. Flores, *Appealing Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f)*, 4 SETON HALL CIRCUIT REV. 27, 41-44 (2007) (surveying case law and urging appellate courts to better explain their reasoning behind granting or denying interlocutory appeals); Solimine & Hines, *supra* note 109, at 1577 (advocating several relevant factors, such as: "[T]he presence of a death knell or a reverse death knell; the likelihood of reversal; the presence of intraclass conflicts; and the existence of simultaneous, related litigation in other courts"); Kitchen, *supra* note 136, at 233 (suggesting that "courts of appeals should . . . allow[] for appeal when . . . the district court's decision is 'likely erroneous'"); Aimee G. Mackay, Comment, *Appealability of Class Certification Orders Under Federal Rule of Civil Procedure 23(f): Toward a Principled Approach*, 96 NW. U. L. REV. 755, 809 (2002) (stressing that "courts should accept review in cases involving important questions . . . [such as] certification orders that present truly novel issues").

141. FED. R. CIV. P. 23(f) advisory committee's note ("Permission is most likely to be granted when . . . as a practical matter, the decision on certification is likely dispositive of the litigation.").

142. *Id.* Rule 23(f) states:

> An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.

Id.

143. *See* Alexander, *supra* note 129, at 6. Even if the case is not finished, the court will only invest the resources required to solve the plaintiff's personal claims.

In other words, the court of appeals is more likely to deny meritorious challenges to class certification orders where certification was granted (and then followed by costly proceedings). In this sense, the inverse-death-knell theory is a stronger argument than the death knell theory.[144] Therefore, and subject to the idiosyncrasies of each case, this study advocates an asymmetric right to interlocutory appeals from class certification orders.

2. Asymmetric Interlocutory Appeals—Arbitration Proceedings

While the drafters of Rule 23(f) did not craft an asymmetric right to interlocutory review, asymmetric interlocutory appeals do exist in the Federal Arbitration Act.[145] Section 16(a) of the Federal Arbitration Act provides that an appeal may be taken from an order denying a petition to compel arbitration. However, in a mirror-image case—an order compelling arbitration—there is no similar right to interlocutory review.[146]

This asymmetric interlocutory appeal does not seem to be driven by the desire to improve appellate decision-making;[147] rather, it appears to be part of a broad pro-arbitration policy.[148] Whether the drafters had in mind appellate decision-making or not, § 16 embraces the logic of this Article. Where a trial court's erroneous order is likely to trigger redundant proceedings in federal courts—and hence, a greater risk of biased appellate decision-making—interlocutory appeals are more valuable. When the trial court's mistake does not entail additional federal proceedings, there is less risk of error in appellate decision-making, and interlocutory appeals are not as important. Hence, from the perspective of this Article, the case for interlocutory appeals from orders denying arbitration is stronger. This approach can be extended to other

144. Interestingly, and contrary to this logic, courts of appeals used to be less receptive to the inverse-death-knell theory. *See* FRIEDENTHAL ET AL., CIVIL PROCEDURE II, *supra* note 105, at 625 (discussing how the inverse-death-knell doctrine was accepted only in the Second Circuit).

145. 9 U.S.C. § 16 (2012).

146. § 16(b).

147. The story of § 16 resembles Rule 23(f). At first, courts of appeals found exceptions to the final judgment rule, allowing interlocutory appeals from orders compelling or refusing to compel arbitration. *See, e.g.*, Mahlon M. Frankhauser, *Arbitration: The Alternative to Securities and Employment Litigation*, 50 BUS. LAW. 1333, 1342 (1995). Then, the U.S. Supreme Court stepped in, preventing interlocutory appeals. *Id.* at 1342-44. Finally, Congress responded by enacting § 16. *Id.* at 1344 & n.92.

148. *See* Bombardier Corp. v. Nat'l R.R. Passenger Corp., 333 F.3d 250, 254 (D.C. Cir. 2003); *cf.* Stephen H. Kupperman & George C. Freeman III, *Selected Topics in Securities Arbitration: Rule 15c2-2, Fraud, Duress, Unconscionability, Waiver, Class Arbitration, Punitive Damages, Rights of Review, and Attorneys' Fees and Costs*, 65 TUL. L. REV. 1547, 1605 (1991) (advocating, based on the same pro-arbitration policy, an asymmetric standard of review of trial courts' decisions to affirm or vacate arbitration awards).

areas in which courts struggle to delineate the optimal scope of interlocutory appeals.[149]

Thus, contrary to the final judgment tradition, this Article advocates a broader right to interlocutory review. This mechanism is particularly useful for interim decisions that are followed by costly adjudication. Rights to interlocutory review should sometimes be asymmetric, as mistaken interlocutory decisions often entail different investments of judicial efforts, depending on the winning party.

Interlocutory review does not have to be complete. Speedy, unreasoned appellate orders can avoid many of the difficulties that this Article describes. Nevertheless, it is true that even a moderately broader right to interlocutory review entails more costs.[150] The appropriate balance between the costs and benefits of interlocutory appeals merits a separate discussion. The purpose of this Article is to add a new argument in favor of interlocutory appeals—improving appellate decision-making—to the regular array of for-and-against considerations. The findings in this Article show that larger efforts by the trial court are associated with a non-trivial distortion in appellate decision-making, as reversal rates are around five to twenty percentage points lower, in conservative estimates.[151] With a broader interlocutory review, then, many appeals that are currently denied would have been accepted.

VI. ALTERNATIVE READINGS OF THE FINDINGS

A. Rethinking Jurisdiction

The empirical findings are based on the sharp distinction between jurisdiction determinations and merits adjudication. This Subpart revisits the thesis of this Article to account for the possibility that the concept of jurisdiction is not as rigid as the rhetoric of judges implies. Simply stated, appellate judges may say jurisdiction, but mean something else in order to achieve a better outcome in each case.

There are circumstances in which appellate court decisions that find lack of jurisdiction trigger new proceedings in another forum (e.g., state

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149. One notable example is the Class Action Fairness Act of 2005, which makes remand orders reviewable: "[A] court of appeals may accept an appeal from an order of a district court *granting or denying* a motion to remand a class action to the State court from which it was removed . . . ." 28 U.S.C. § 1453(c)(1) (2012) (emphasis added). An asymmetric right to review—making only orders denying remand reviewable—may be more important from the perspective of this Article.

150. *See* Nagel, *supra* note 65, at 220, 222.

151. *See supra* Table 2.

courts).[152] This consideration might justify affirming jurisdiction where it does not exist but the result on the merits seems correct, in order to save prospective judicial resources at the other forum.[153] Indeed, litigants sometimes explicitly raise this kind of argument.[154]

Do courts of appeals consider prospective judicial resources? According to judicial rhetoric, the answer is clearly negative.[155] Moreover, the desire to save future judicial efforts by affirming questionable jurisdiction cannot apply straightforwardly across cases.[156] There are several distinct, hypothetical scenarios when jurisdiction is found lacking at the appellate court.[157] The alternative forum can be, for instance, a state court or a foreign system, and it may seem more acceptable to burden a foreign legal system with future litigation.[158] Furthermore, the alternative forum might not be available for litigation—a statute of limitations, for example, often precludes litigation in the alternative forum regardless of jurisdiction.[159]

To the extent appellate judges misuse the concept of jurisdiction to save prospective judicial expenses in specific cases, such practice will have obvious costs. It tends to expand jurisdiction in order to save judicial efforts that were mistakenly spent.[160] It spawns uncertainty in an

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152. *See, e.g.*, Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 581-82 (2004) (notwithstanding judicial efforts spent in the federal court procedure, the Court remanded to the state court due to lack of subject matter jurisdiction).

153. *See* Caterpillar Inc. v. Lewis, 519 U.S. 61, 76-77 (1996) ("To wipe out the adjudication postjudgment, and return to the state court . . . would impose an exorbitant cost on our dual court system . . . ."); *cf. Grupo Dataflux*, 541 U.S. at 594-95 (Ginsburg, J., dissenting) ("[R]igid insistence on the time-of-filing [diversity jurisdiction] rule . . . would mean an almost certain replay of the case, with, in all likelihood, the same ultimate outcome.").

154. One example in the database is *Smith v. American General Life & Accident Insurance Co.*, where the court rejected the plaintiff's argument. 337 F.3d 888, 897 (7th Cir. 2003).

155. *See, e.g.*, *id.* ("While we are not unsympathetic to [the plaintiff's] situation . . . we are simply not in a position to create federal jurisdiction where it is otherwise lacking.").

156. *See* Gao, *supra* note 30, at 2389.

157. *See id.* at 2388-90 (discussing possible alternative scenarios upon dismissal for lack of jurisdiction).

158. Similarly, it seems more acceptable to encumber state courts, as opposed to federal courts, with the burden of relitigation. *See, e.g.*, *id.* at 2388-89 (explaining that in cases that are dismissed for lack of jurisdiction, it seems less wasteful to file in state court than federal court).

159. *Id.* at 2388 & n.119 ("[I]n many situations, especially where the litigation has gone on for years, [the assumption that the statute of limitations on the plaintiff's case has not run] is likely a faulty one.").

160. *Cf.* Smith v. Am. Gen. Life & Accident Ins. Co., 337 F.3d 888, 896-97 (7th Cir. 2003) (holding that the court is not in a position to expand jurisdiction where "it is otherwise lacking" just because the plaintiff has run up a large bill); Del Vecchio v. Conseco, Inc., 230 F.3d 974, 980 (7th Cir. 2000) (discussing that while courts are sympathetic to the waste of efforts when a case is fully litigated in the wrong court, subject matter jurisdiction is necessary for a federal court to decide a case).

area of law that loathes it.[161] It seems to confuse litigants, as evidenced by the lower reversal rates of jurisdiction determinations that were followed by a trial.[162] In short, this judicial behavior may achieve just results in specific cases, but it pays a long-term doctrinal price. As the Supreme Court emphatically cautions, "incremental benefit is outweighed by the impact of . . . an individualized jurisdictional inquiry on the judicial system's overall capacity to administer justice."[163] Indeed, even if misusing the concept of jurisdiction may achieve broader policy goals,[164] the practice of affirming jurisdiction in aberrant cases that made it to the merits, though jurisdiction was lacking, advances no such general benefits.[165]

In case appellate judges are driven by the desire to achieve a better outcome in each case at the expense of doctrinal clarity and certainty, one can think of two directions for reform. First, it may be beneficial to rethink the concept of jurisdiction, such that judges could indeed deviate from doctrinal mandates, though in a more transparent way. In some exceptional cases, then, the appellate court should hold that the proceedings on the merits in the lower court are not void, even though jurisdiction was lacking. One can think of several relevant considerations for such decisions: whether the decision on the merits appears correct; whether we expect the case to be relitigated in the "true" forum, if this

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161. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 618 (1992) ("An important feature of laws regarding form is that they be cheaply accessible and precisely predictable.").

162. *Cf.* Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125, 130-32, 133 & n.13, 134 (2001) (attempting to explain why litigants appeal even though few cases are reversed).

163. Coopers & Lybrand v. Livesay, 437 U.S. 463, 473 (1978).

164. *See generally* Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971 (2009) (discussing the ways in which courts use jurisdiction to further other goals). Frederic M. Bloom argues that the entire concept of jurisdiction is a "noble lie," which is "devised . . . to secure a set of . . . benefits" rather than to deceive. *Id.* at 974-75. More concretely, Bloom draws on several Supreme Court precedents to aver that flexible jurisdiction rules allow judicial pragmatism and express "careful incorporation of more functional concerns," such as the relative expertise of different forums, impact on judicial workload, and the proper balance of federalism. *Id.* at 1009. Nonetheless, Bloom argues, the rigid rhetoric of jurisdiction doctrine is essential. *Id.* at 1021. It keeps some degree of formality, guides lower courts, and creates well-defined categories. *Id.* at 1022-26. In sum, the split between rhetoric and practice, the argument goes, enables the Supreme Court to "adapt wisely over time," while guiding lower courts and parties, who understand that there needs to be "careful justification of any jurisdictional deviation." *Id.* at 1024-25.

165. The cases in the database are mundane cases in which appellate judges say one thing and do another. None of these cases produced a new Supreme Court jurisdiction precedent. What the data does show is erratic application of jurisdictional doctrines, subject, perhaps, to the irreparable waste of judicial efforts and the need to relitigate the case. Put differently, the "jurisdiction lie" that this Article reveals is an ex post lie, which stems from the desire to accommodate salient, aberrant features of specific cases; it has nothing to do with a better design of jurisdiction rules, allegedly sensitive to federalism concerns and the exigencies of the time.

forum is available at all; the importance of adjudicating the case in the appropriate forum; and the severity of the jurisdiction mistake (i.e., the extent to which parties can plausibly litigate a case in the wrong forum). Appellate judges, who currently lack complete information regarding these concerns, should transparently discuss these issues, letting litigants raise relevant arguments. This approach has several notable benefits. Particularly, it can save prospective judicial resources and maintain doctrinal clarity, as appellate courts will not be compelled to expand jurisdiction in these aberrant cases. This approach also has some drawbacks—most notably, it publicly affirms, though in exceptional cases, proceedings without jurisdiction.[166]

A second approach follows the main policy recommendation of this Article—interlocutory appeals. Interim review would correct jurisdictional mistakes before the case proceeds to the merits, avoiding the need to bend doctrine where the results on the merits seem reasonable. It would also prevent haphazard expansion of jurisdiction. Interlocutory appeals can thus lead to more accurate resolutions of jurisdictional questions, as well as greater doctrinal clarity and certainty.[167]

Would it be better to rethink the rigid use of the concept "jurisdiction" to accommodate exceptions when the lower court has mistakenly adjudicated the case without jurisdiction? Are the additional costs of interlocutory review worth the benefits of predictable rules of jurisdiction and more accurate results? Is the balance between potentially efficient results in individual cases and better rules optimal? These questions exceed the scope of this Article and are left to future research. This Article, however, does provide a more comprehensive view of the costs and benefits of misusing the concept of jurisdiction at the appellate level.

B. Methodological Concerns

One may argue that other forces drive the observed results. In the following Subparts, I discuss various methodological issues and their implications on the foregoing normative discussion.

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166. Such an approach may, of course, raise constitutional concerns as well. *See, e.g.*, Gao, *supra* note 30, at 2395-2402 (discussing the constitutional argument in support of an American Law Institute proposed rule which would bar subject matter jurisdiction challenges after the commencement of trial on the merits in the district court).

167. *Cf.* Dustin E. Buehler, *Solving Jurisdiction's Social Cost*, 89 WASH. L. REV. (forthcoming 2014) (manuscript at 45, 62-63) (on file with the *Hofstra Law Review*) (advocating, for different reasons, procedures that ensure that courts "affirmatively adjudicate and resolve all jurisdictional issues at the outset of litigation").

1. Selection of Appeals

This study looks at appellate court cases.[168] Litigants are those who have to trigger appeals.[169] If appealed cases systematically differ from cases that are not appealed, the results we observe might be biased. Are cases that ended with a trial on the merits more or less likely to be appealed? It seems intuitive that heavily invested cases are the hardest ones, and also more likely to reach appellate review.[170] However, this does not mean that the underlying jurisdictional resolutions, which are typically decided at the outset, are different. The underlying jurisdictional issues are detached from the merits of the case and assumed to be independent of the main dispute.[171] There can be a hard case on the merits with an easy underlying jurisdictional question, and vice versa (a difficult jurisdictional dispute with easily resolved merits).[172]

Other factors mitigate the effect, if any, of sample selection. First, the regressions control for several variables that plausibly influence the decision to appeal (examples include the type of the case, the appellant's identity, and whether interlocutory review was granted).[173] Similarly, I ran additional regressions to control for the strength of the merits.[174] Second, the database includes only genuine jurisdictional challenges—I excluded cases with frivolous jurisdiction arguments.[175] Thus, even if litigants excessively appeal jurisdiction resolutions following a trial on the merits, the database contains only the non-frivolous ones. Likewise, I ran additional regressions to better rule out non-meritorious jurisdictional claims, and the results were all the more robust.[176] This

168. *See supra* Part III.B.

169. *The Appeals Process*, USCOURTS.GOV, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/TheAppealsProcess.aspx (last visited Feb. 15, 2015).

170. *Cf.* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17 (1984) (attempting to define economic incentives to prefer litigating to settling, and concluding that "disputes lying close to the decision standard are more likely to be litigated than disputes lying far from the decision standard"); Joel Waldfogel, *The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory*, 103 J. POL. ECON. 229, 233 (1995) (providing empirical evidence for Priest and Klein's propositions). By this logic, close cases, which are presumably those that are more likely to end with a trial, may also be the ones in which losing litigants appeal more often.

171. *See* Gao, *supra* note 30, at 2375.

172. *Compare* Champion v. Ames, 188 U.S. 321, 345-46 (1903) (establishing the limits of Congressional power under the Commerce Clause in Article I of the U.S. Constitution), *with* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013) (determining whether the Alien Tort Statute, a "strictly jurisdictional" statute, could apply extraterritorially).

173. *See supra* Part IV.A.

174. *See supra* Part IV.C.3.b.

175. *See supra* Part III.B.

176. *See supra* Part IV.C.3.a.

discussion suggests that it is not the selection process that drives the results. Indeed, previous studies that considered appellate decision-making have concluded that "any selection of cases for appeal seems overall to reflect little or no systematic filtering on the basis of case strength."[177]

A variation of this argument regarding selection of appeals is the following. Litigants somehow intuit the tendency of appellate judges to affirm dubious jurisdiction when the trial court proceeds to the merits. Hence, litigants might adapt by appealing fewer jurisdictional questions that were followed by a considerable judicial input on the merits. Similarly, a litigant whose jurisdictional challenge was denied might push for an interlocutory appeal (though they are generally not available);[178] when these attempts are unsuccessful, litigants may find creative ways to avoid a long—and presumably jurisdiction-lacking—trial.[179] Alternatively, litigants can agree, ex ante, to a partial settlement, gaining immediate review of the most disputed issue.[180] These caveats seem appealing. On the other hand, by no means is it self-evident to attribute perfect information to litigants.[181] Be that as it may, there is reason to think that the foregoing strategies cannot explain the observed results. To the extent that litigants do effectively appeal to a lesser degree when a jurisdictional question is followed by a trial on the merits,

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177. Clermont & Eisenberg, *supra* note 162, at 146. Directly modeling the decision to appeal based on their data, the authors argue that "case selection on appeal functions largely as a random sampling, rather than a systematic screening." *Id.* at 148; *see also* FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 147 (2007) ("[L]itigants do not appear to play a major role in driving juridical decisions. . . . Litigants are necessary to enable judicial action but they do not appear to drive the outcome of that judicial action.").

178. *See* 28 U.S.C. § 1292 (2006). The regressions, however, control for interlocutory appeals. *See supra* Part IV.A.

179. Indeed, the database includes cases in which one party defaulted after losing on jurisdictional grounds in order to obtain an immediate appeal. *See, e.g.*, Wilkinson v. Shackelford, 478 F.3d 957, 958, 962 (8th Cir. 2007). The plaintiff, whose motion to remand the case to a state court was denied, voluntarily dismissed her remaining claims, and then appealed. *Id.* at 962. The appellate court, indeed, held that jurisdiction was lacking. *Id.* at 962-64. However, such cases where litigants default to obtain prompt review are scarce, since, presumably, defaulting entails a significant risk and a defaulting litigant can only appeal on preliminary grounds.

180. The practice of partial settlements is a relatively recent phenomenon, which can be explained by the desire to reduce risky and costly trials. In practice, partial settlements may also be motivated by the parties' desire to obtain immediate interim review, rigid rules of federal procedure notwithstanding. For practical examples in the context of patent claims, see Geoffrey Gavin & Matthew Warenzak, *Disputed Claim Constructions*, PAT. WORLD, Mar. 2009, at 31, 31-32 (discussing the desire for interlocutory appeals to resolve claim construction issues in patent cases, and the use of stipulated judgments to obtain interlocutory appeals).

181. Note, in this context, that certain circuits and judges, such as Judge Richard Posner and Judge Frank H. Easterbrook, have constantly shown higher reversal rates, but apparently litigants fail to adjust their behavior accordingly. For relevant data, see Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 54 (2001). *See also* Clermont and Eisenberg, *supra* note 162, at 131-34.

this tendency would wash out the results—we would observe an attenuated inclination to affirm jurisdictional decisions that were followed by heavy judicial investments. If anything, the capacity of litigants to adjust their decision to appeal means that the results we observe do not reflect the full effect of prior judicial efforts on appellate decision-making.[182]

2. Litigation at the Trial Court

This study focuses on courts of appeals.[183] Perhaps, trial courts' dynamics are driving the results.[184]

a. Litigants

Sophisticated litigants who understand the tendency of appellate courts to affirm jurisdiction may adjust their litigation strategy at the trial court and influence, to some extent, the quality of the district court's jurisdictional determinations.[185] Litigants may invest more in resolving jurisdiction where they expect lengthy litigation on the merits, in order to avoid paying potentially redundant legal expenses. Likewise, jurisdictional arguments can be raised time and again during trial. Thus, litigants who previously lost their jurisdictional challenge can raise an improved one when they understand how costly the trial is.[186] On the other hand, jurisdiction is typically a legal question, which judges ought to raise *sua sponte*, even when litigants failed to do so.[187] The capacity of litigants to influence the jurisdictional ruling is questionable. In addition, these arguments imply that litigants with larger stakes produce better jurisdictional resolutions at the trial court. However, I found no such correlation between the value of the case and affirming the trial court's jurisdiction.[188] These findings suggest that litigants' behavior cannot

182. For an elaborated and formal discussion of this logic, see Daniel Klerman & Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J. LEGAL STUD. 209, 209-14 (2014). Daniel Klerman and Yoon-Ho Lee show that, under broad categories of cases and fairly general assumptions, the capacity of litigants to litigate (or, in our case, appeal) selectively does not prevent inferences from litigated (or appealed) cases; if anything, this selection process weakens the observed results.

183. *See supra* Part III.B.

184. *See infra* Part VI.B.2.a–b.

185. *Cf. supra* Part VI.B.1.

186. *Cf.* Gao, *supra* note 30, at 2379-80. One can further argue that appellate judges respond to anticipated litigants' behavior. Hence, appellate courts might be inclined to affirm the trial court's rulings on jurisdiction when they are followed by a lengthy trial, in order to induce litigants, ex ante, to invest more in resolving jurisdiction.

187. *See supra* Part III.A.

188. *See supra* Part IV.C.3.b.

fully account for appellate courts' tendency not to reverse the more efforts trial courts spent on the case.

b. Trial Judges

Trial judges, one may argue, are the driving force behind the results. Anticipating a long trial following a jurisdictional determination may result in trial judges reacting differently. Particularly, when judges expect a trial, they can aim at improving their jurisdictional resolution. As they tend to suffer from heavy dockets,[189] district judges are likely more careful not to mistakenly uphold jurisdiction, and then proceed to a protracted adjudication. According to this logic, an observed correlation between reversals of jurisdictional questions and judicial input on the merits represents trial judges' capacity to generate better jurisdictional determinations when complicated trials on the merits are expected. The corollary-argument is that district judges would be less careful when they mistakenly deny jurisdiction, as, in this case, an error would result in fewer cases to adjudicate.[190]

To the extent this argument is taken as true, it essentially presents a different interpretation of the findings. The basic results persist: preliminary issues that are followed by heavy judicial investments on the merits are scrutinized differently than identical issues that are followed by little judicial investment. Indeed, the main prescriptive message of this Article—that interlocutory appeals subtly improve judicial decision-making—remains the same under this alternative interpretation. To the extent the empirical findings are driven by trial judges' behavior, interlocutory review can reduce judicial incentives to act strategically in the face of prospective, costly adjudication.[191] Indeed, it was observed that "[a] realistic possibility of [interlocutory] review . . . may spur district courts to take [interlocutory] decisions more seriously."[192]

Regardless, one may wonder whether this description of trial judges' strategies is correct. In fact, an opposite strategy is plausible: district judges predict appellate judges' tendency to affirm—for

189. *See, e.g.*, Jordan Smith, *Docket Is Full, But Judges Are Few*, AUSTIN CHRON., July 27, 2012, http://www.austinchronicle.com/news/2012-07-27/docket-is-full-but-judges-are-few.

190. Put differently, for trial judges, a false-positive error (upholding jurisdiction) is more costly than a false-negative error (denying jurisdiction).

191. This does not mean that interlocutory appeals are always valuable; rather, they constrain the freedom of trial judges to treat identical issues differently. There may be reasons to nonetheless allow trial judges such control over their cases.

192. WORKING PAPERS, *supra* note 135, at 411; *see also* Solimine & Hines, *supra* note 109, at 1565. This and other concerns led to the 1998 amendment that permits, through Rule 23(f), interlocutory appeals from orders certifying class actions. *See* FED. R. CIV. P. 23(f).

whatever reason—when large, irreparable efforts are invested at the trial level. In order to maximize their leisure and reduce odds of reversal,[193] in anticipation of appellate courts' inclination to affirm heavily invested decisions, trial judges might, consciously or not, change their behavior in response. In particular, trial judges may reduce the quality of their jurisdictional determinations if extensive litigation is likely to follow. If this effect exists, it likely mitigates the observed phenomenon. At this point, it is hard to safely conclude which strategies, if any, dominate.[194]

VII. CONCLUSION

This study uses the distinction between jurisdiction and merits adjudication to reveal a surprising phenomenon: appellate judges take into account irrelevant efforts made by trial judges, and the more efforts trial judges invested in the case, the less often appellate judges reverse.[195] Some appeals that should be accepted are denied. The findings are non-trivial in size and robust under various specifications.

This phenomenon has far-reaching implications, and this Article focuses on one simple procedural modification. A broader right to interlocutory appeals would rectify judges' propensity to take into account past decisions, and, hence, improve appellate decision-making. This Article, then, adds a new perspective to the array of traditional arguments for and against the final judgment rule.

There are several reasons to be cautious about the findings. Particularly, the findings may express appellate judges' perspectives regarding jurisdictional questions and/or trial judges' strategic behavior. But even under these alternative readings, the main prescriptive implication of this Article—broader interlocutory review—remains valuable. While this Article establishes a strong correlation between past efforts and reluctance to reverse, there is room for further research. Different study designs might better trace the origins of this phenomenon and rule out alternative explanations.[196] In this sense, this Article is a first step in an unexplored direction.

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193. *Cf.* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 14-15 (1993).

194. One can further argue that circuit courts react to trial judges' strategic behavior. When trial judges uphold jurisdiction and then move on to a lengthy trial, they signal that they have gotten a better jurisdictional determination. Appellate judges' behavior, however, depends on their beliefs regarding trial judges' strategic behavior. This discussion exceeds the scope of this Article.

195. *See supra* Part IV.B.

196. One potential methodology is conducting an experiment and challenging participants with hypothetical situations. Ideally, such experiments can be administered on federal judges. *Cf.* Guthrie et al., *supra* note 23, at 784-87.

VIII. APPENDIX

A. Logistic Regressions: The Effect of a Trial at the Lower Court

The following are the results of seven logistic regressions, in which "JURISDICTION" is the dependent variable. It equals 1 when the court of appeals affirms the district court's jurisdiction, and 0 when jurisdiction is reversed. The independent variable is the procedural posture.

Regression (1): This is the basic regression. It includes all cases in the database. The independent variable, TRIAL, indicates whether there was a bench or jury trial on the merits at the district court or not (1 and 0, respectively). This regression also includes circuit court fixed effects.

Regression (2): Includes all cases in the database. The independent variables represent the procedural posture in which the case ended (MOTION, SUMMARY JUDGMENT, BENCH TRIAL, or JURY TRIAL).

Regression (3): Same as Regression (1), but includes district court fixed effects instead of circuit court fixed effects.

Regression (4): Same as Regression (1), but the database includes only federal question cases.

Regression (5): Same as Regression (2), but the database includes only federal question cases.

Regression (6): Same as Regression (1), but summary orders are excluded from the database.

Regression (7): Same as Regression (1), but the database only includes decisions in which the phrase "subject matter jurisdiction" appears in the summary or synopsis.

Table A.1: Procedural Posture and Reversal Rates of Jurisdiction Questions: All Observations (Regressions (1)-(3))

Explanatory Variables	*(1) Coefficient (Standard Error)*	*(2) Coefficient (Standard Error)*	*(3) Coefficient (Standard Error)*
Trial (Bench/Jury)	0.88 (0.44)**	-	1.03 (0.50)**
Procedural Posture:			
Summary Judgment	-	0.15 (0.28)	-
Bench Trial	-	1.39 (0.74)*	-
Jury Trial	-	0.59 (0.54)	-
Interlocutory Appeal	-0.72 (0.38)*	-0.65 (0.40)*	-0.72 (0.43)*
Type of Case:			
Civil Rights	0.14 (0.63)	0.54 (0.60)	0.44 (0.69)
Criminal	2.75 (1.22)**	2.79 (1.23)**	3.73 (1.14)***
Civil	0.62 (0.59)	0.54 (0.61)	0.91 (0.68)
Public Law	0.58 (0.63)	0.51 (0.65)	0.81 (0.70)
Unanimous Opinion	0.10 (0.44)	0.12 (0.43)	0.23 (0.52)
Nonconsolidated	-0.18 (0.31)	-0.17 (0.32)	-0.19 (0.34)
Non-Class Action	-0.85 (0.48)*	-0.88 (0.48)*	-0.77 (0.50)
Appellant:			
Plaintiff	-0.70 (0.50)	-0.68 (0.50)	-0.65 (0.53)
Defendant	-0.16 (0.48)(a)	-0.16 (0.49)	-0.26 (0.54)
Log(Distance)	-0.04 (0.06)	-0.04 (0.06)	0.05 (0.25)
Circuit Fixed Effects	Yes	Yes	No
District Fixed Effects	No	No	Yes
Year Fixed Effects	Yes	Yes	Yes
Constant	1.11 (1.05)	1.11 (1.05)	1.26 (1.19)
Observations	367	367	352
Pseudo R Squared	10.83%	11.11%	16.15%

(a)—the joint effect of "appellant is plaintiff" and "appellant is defendant" has a p-value of 10% in Regression (1).
*—indicates statistical significance at the 10% level.
**—indicates statistical significance at the 5% level.
***—indicates statistical significance at the 1% level.

Table A.2: Procedural Posture and Reversal Rates of Jurisdiction Questions: Subsamples (Regressions (4)-(7))

Explanatory Variables	*(4) Coefficient (Standard Error)*	*(5) Coefficient (Standard Error)*	*(6) Coefficient (Standard Error)*	*(7) Coefficient (Standard Error)*
Trial (Bench/Jury)	1.96 (0.92)**	-	0.95 (0.46)**	2.85 (0.85)***
Procedural Posture:				
Summary Judgment	-	-0.19 (0.48)	-	-
Bench Trial	-	1.59 (1.29)	-	-
Jury Trial	-	2.18 (1.18)*	-	-
Interlocutory Appeal	-0.85 (0.73)	-0.88 (0.75)	-0.74 (0.39)*	0.15 (0.85)
Type of Case:				
Civil Rights	-0.30 (1.98)	-0.17 (2.06)	0.11 (0.64)	-1.83 (1.00)*
Criminal	-(a)	-(a)	2.71 (1.22)**	-(a)
Civil	-1.71 (1.76)	-1.59 (1.81)	0.58 (0.60)	-0.20 (0.83)
Public Law	-1.36 (1.81)	-1.25 (1.86)	0.68 (0.64)	-0.56 (1.01)
Unanimous Opinion	0.92 (0.74)	0.96 (0.74)	0.08 (0.43)	0.24 (0.99)
Nonconsolidated	-0.57 (0.54)	-0.60 (0.54)	-0.13 (0.33)	-1.97 (0.68)**
Non-Class Action	-1.15 (0.60)*(b)	-1.09 (0.61)*(b)	-0.77 (0.50)	-0.27 (0.70)
Appellant:				
Plaintiff	0.48 (0.85)	0.55 (0.86)	-0.85 (0.52)*	0.09 (1.11)
Defendant	1.16 (0.85)	1.21 (0.88)	-0.30 (0.51)(c)	0.82 (1.15)
Log(Distance)	-0.06 (0.12)	-0.06 (0.12)	-0.04 (0.06)	-0.04 (0.13)
Circuit Fixed Effects	Yes	Yes	Yes	Yes
District Fixed Effects	No	No	No	No
Year Fixed Effects	Yes	Yes	Yes	Yes
Constant	1.02 (2.34)	0.85 (2.45)	1.21 (1.08)	1.82 (1.67)
Observations	135	135	341	128
Pseudo R Squared	17.63%	17.78%	10.85%	26.22%

(a)—the sample for Regressions (4), (5), and (7) does not include criminal cases.
(b)—the joint effect of consolidated cases and class actions has a p-value of 5% in Regressions (4) and (5).
(c)—the joint effect of "appellant is plaintiff" and "appellant is defendant" has a p-value of 10% in Regression (6).
*—indicates statistical significance at the 10% level.
**—indicates statistical significance at the 5% level.
***—indicates statistical significance at the 1% level.

B. Multinomial Regression: Remands

The following are the results of two multinomial regressions. "JURISDICTION" is the dependent variable. It equals 1 when the court of appeals affirms the district court's jurisdiction, 0 when it reverses, and 2 when the jurisdictional question is remanded to the trial court.

The regression includes all the cases in the database; column (1) is the effect on reversing jurisdiction; column (2) is the effect on remanding; and base outcome is affirming.

Table B: Procedural Posture and Reversal Rates of Jurisdiction Questions: Multinomial Regression

Explanatory Variables	*(1) Coefficient (Standard Error)*	*(2) Coefficient (Standard Error)*
Trial (bench/jury)	-0.79 (0.45)*	2.15 (0.88)**
Interlocutory Appeal	0.91 (0.39)**	2.43 (1.04)**
Type of Case:		
Civil Rights	-0.19 (0.64)	-17.12 (-)
Criminal	-2.71 (1.22)**	-17.13 (-)
Civil	-0.57 (0.60)	18.67 (-)
Public Law	-0.53 (0.64)	18.51 (-)
Unanimous Opinion	0.03 (0.44)	20.84 (-)
Nonconsolidated	0.23 (0.32)	1.08 (0.73)
Non-Class Action	0.62 (0.50)	-2.11 (0.84)***
Appellant:		
Plaintiff	0.57 (0.52)	-1.85 (0.87)**
Defendant	-0.06 (0.51)	-3.87 (1.09)***
Log(Distance)	0.04 (0.06)	0.01 (0.15)
Year Fixed Effects	Yes	Yes
Circuit Fixed Effects	Yes	Yes
Constant	-0.87 (1.06)	-38.95 (-)
Observations	367	
Pseudo R Squared	18.58%	

*—indicates statistical significance at the 10% level.
**—indicates statistical significance at the 5% level.
***—indicates statistical significance at the 1% level.