

# THE ECONOMICS OF LAW-RELATED LABOR V: JUDICIAL CAREERS, JUDICIAL SELECTION, AND AN AGENCY COST MODEL OF THE JUDICIAL FUNCTION\*

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## INTRODUCTION

In an important introduction to an important symposium on judicial selection, Professor Michael Shapiro argued with great perspicacity that one's vision of the proper mode of judicial selection depends very much on one's theory of the judicial function.<sup>1</sup> According to Shapiro, his argument is one that calls for a "mapping [of] adjudicatory theory onto judicial selection."<sup>2</sup> For example, if one's theory of the judicial function is that judicial decisionmaking solely involves the application of community values, then one will probably favor election of judges as the proper mode of judicial selection.<sup>3</sup>

Shapiro notes the existence of an abundance of literature regarding the selection of judges and theories of the judicial function,<sup>4</sup> but laments that little of this scholarship proposes linking judicial function theories with judicial selection realities.<sup>5</sup> Curiously and unfortunately, Shapiro's lament is all too true. It is curious because since there are many different theories of the judicial function, one can assume that the propounders of these different theories would probably have different and interesting things to say about the proper mode of judicial selection. It is unfortunate because the dis-

1. Michael Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555, 1555-56 (1988).

2. *Id.*

3. *See id.* at 1556 (hypothesizing that judicial selection could be based on ability of prospective judge to conduct empirical study into desires of local community).

4. *Id.* at 1557-58 nn.13-14. Shapiro cites the following works: JOHN S. BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS 1254-64 (1983) (positing that judicial decisionmaking requires judges' adherence to "institutional morality"); John S. Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1764-80 (1988) (theorizing on link between judicial selection and judicial function in United States through analysis of French judicial system); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 279-86 (1987) (discussing impact of individual's personal values on impartiality of judicial decisionmaking process); Louis M. Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1048-50 (1987) (analyzing role of judge and judicial review process in light of parties' mixed allegiances to society's universal value system versus individuals' particular value systems).

5. *See* Shapiro, *supra* note 1, at 1557 (stating that only significant work on such linkage has been done by Professor Bell); *see supra* note 4 (listing works by Professor Bell and others on judicial function and selection theories).

cussion on judicial selection would probably benefit greatly from the greater theoretical grounding made possible by these theories of the judicial function.

In view of the foregoing, the purpose of this Article is to fill the breach in academic scholarship by generating an analytic model that links a theory of judicial function with the factual realities of the lower court federal judge selection process.<sup>6</sup> Because there is a dearth of economic-based theories of the judicial function, in this Article I shall attempt to create such a theory as a means by which to analyze selection practices. Furthermore, the Article places both the economics-based judicial function theory and the theory's application to judicial selection into a broader intellectual context, calling the new perspectives the "economics of law-related labor."<sup>7</sup>

The Article is organized as follows. Part I provides an introduction to the economics of law-related labor. Part II presents a summary of the factual details regarding the selection of lower court federal judges. Part III introduces a general agency cost model<sup>8</sup> of the judicial function. Finally, Part IV examines the link between an agency cost theory of judicial function and the realities of judicial selection. Throughout these sections, I will consider the nature of the judicial selection process as well as the practicability of legislative and non-legislative reforms proposed for the judicial selection process.

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6. This Article focuses only on lower court federal judges, i.e., district court and court of appeals judges. Although aspects of the Article might apply to the Supreme Court and state court selection processes, full treatment of those processes will be left for another day.

7. This Article is the fifth in a series in my economics of law-related labor research. The other four manuscripts are: Linz Audain, *Conceptualizing the Economics of Law-Related Labor I: The Case of a Prestige-Denominated, Rent-Seeking, Search Model of Lawyers' Judicial Labor Strategies* (1991) [hereinafter *Law-Related Labor I*] (unpublished manuscript, on file with *The American University Law Review*) (proposing mathematical model of strategies pursued by lawyers in their attempts to secure judgeships); Linz Audain, *The Economics of Law-Related Labor II: Agency Cost Signalling, Social Welfare, and the Market for Judges* (1991) (unpublished manuscript, on file with *The American University Law Review*) (providing mathematical analysis of behavior of executive branch of government in award of judgeships); Linz Audain, *The Economics of Law-Related Labor III: Communitarian Preferences and a Comparative Static Entry Cost Model of Judicial Selection* (1991) (unpublished manuscript, on file with *The American University Law Review*) (analyzing behavior of various types of lawyers as they incur "entry costs" in attempt to enter judicial market); Linz Audain, *The Economics of Law-Related Labor IV: A Note on the Theoretical Specification of the Supply of and Demand for Judicial Labor* (1991) (unpublished manuscript, on file with *The American University Law Review*) (providing theoretical analysis of judicial market from simple "supply and demand for judges" framework).

8. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) (explaining that when interests of agent in principal-agent relationship found in a business environment are not perfectly compatible with interests of principal, "agency costs" arise as costs incurred by both agent and principal due to divergence of their particular interests).

## I. AN INTRODUCTION TO THE ECONOMICS OF LAW-RELATED LABOR

The economics of law-related labor can be defined as the use of formal, informal, and empirical economic models to study the employment decisions and activities of law-related laborers.<sup>9</sup> Given the importance of competition within a market-based economy,<sup>10</sup> and in light of the natural segmentation of law-related laborers into functional categories, it follows that the economics of law-related labor can be organized along "market for laborer" lines.<sup>11</sup> Using such an organizational structure, it is possible to categorize the work of various scholars in accordance with their respective areas of emphasis (e.g., market for lawyers) and to identify the substantive areas of study in which little or no scholarly work has been done.<sup>12</sup>

Specifically, consider the market for lawyers and the market for judges. Three conclusions can be drawn from existing scholarship regarding these markets. First, most scholarly work in the field of law-related labor economics has focused on various aspects of the market for lawyers and not the market for judges.<sup>13</sup> Second, scholarship dealing with the market for judges has scrutinized judicial decisions with very little emphasis on the nature of judicial selection.<sup>14</sup> Third, no published scholarly work has examined the nexus be-

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9. See Law-Related Labor I, *supra* note 7, at 2 (introducing and developing concept of "economics of law-related labor").

10. See generally RALPH T. BYRNS & GERALD W. STONE, *ECONOMICS* 29-33 (2d ed. 1984) (explaining differences between market-based competitive economies and sovereign-centered command economies).

11. In other words, law-related laborers can be grouped into various markets, for example, the market for judges, the market for lawyers, the market for legal scholars, and so forth.

12. See Law-Related Labor I, *supra* note 7, at 3-9 (reviewing and classifying economists' work in markets for lawyers and judges and arguing that although some economists have analyzed market for lawyers, few have examined market for judges, and virtually none have explored manner in which lawyers become judges).

13. See, e.g., Ronald J. Gilson and Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 *STAN. L. REV.* 313, 321-35 (1985) (analyzing large corporate law firms' partnership fee structures through theories of diversified portfolio of capital assets, market for human capital, and principal-agent considerations); B. Peter Pashigian, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 *J. LAW & ECON.* 53, 55-63 (1977) (positing theoretical model of demand and supply of lawyers in United States market); S.S. Samuelson and L.J. Jaffe, *A Statistical Analysis of Law Firm Profitability*, 70 *B.U. L. REV.* 185, 204-09 (1990) (reporting results of study performed to assess firms' economic health, viability, and profitability); Law-Related Labor I, *supra* note 7, at 3-5 (focusing on market for lawyers).

14. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 527-28 (3d ed. 1986) (contending that economically inefficient common law rules will impose costs on society through added litigation, but over time, added litigation may result in more efficient rendering of rules); Linz Audain, *Of Posner, and Newton, and Twenty-First Century Law: An Economic and Statistical Analysis of the Posner Rule for Granting Preliminary Injunctions*, 23 *LOY. L.A. L. REV.* 1215, 1223-33 (1990) (discussing statistical and economic ramifications of Judge Posner's rule dictating when to grant preliminary injunctions); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 *J. LEG. STUDIES* 51, 51-63 (1977) (commenting on Judge Posner's contention that common law implicitly strives for economic efficiency).

tween these two markets (e.g., the economic determinants relevant to a lawyer's decision to become a judge).<sup>15</sup>

This Article provides an agency cost model of the judicial function that can be used to address this nexus between markets. That is, the model can be used to explain the lower court federal judge selection process. Having set the stage generally, it is now possible to consider some factual details regarding judicial careers and the selection of lower court federal judges. These details will become relevant after the completion of the theoretical discussion below.

## II. AN INTRODUCTION TO JUDICIAL CAREERS AND THE SELECTION OF LOWER COURT FEDERAL JUDGES

The following portion of the Article provides factual information on the strategies lawyers pursue in attempting to secure positions as federal trial or appellate court judges. The process by which these judges are ultimately selected is also discussed. Much of the work cited reflects the efforts of political scientists, sociologists, psychologists, and other non-economists.<sup>16</sup> Because of the dearth of empirical information on the subjects discussed, the views expressed will sometimes reflect personal observations.

### A. *Becoming a Federal Judge: Decision Timing, Cost-Benefit Analysis, Strategy*

#### 1. *Planning for the judgeship*

I will begin by assuming that the lawyers under discussion are unopposed to the possibility of becoming judges. Anecdotal evidence supports the notion that most attorneys aspiring to the bench pursue a career plan in their efforts to become judges.<sup>17</sup> In fact, one

15. See Law-Related Labor I, *supra* note 7, at 7-9 (suggesting that scholarship regarding market for judges is lacking because few groups are willing to fund such studies; variables of reputation, prestige, and power are difficult to quantify economically; and substantial information costs must be incurred to analyze market for judges).

16. See *infra* notes 17-38 (reviewing scholarship on judicial selection process to provide factual basis for determining economic and other forces that influence selection process).

17. See Greg A. Caldeira, *The Incentives of Trial Judges and the Administration of Justice*, 3 JUST. SYS. J. 163, 163, 167, 169, 171, 174 (1977) (citing examples of lawyers obtaining judgeships through local political work or legal scholarship); Joseph S. Perry, How I Got to Be a Federal Judge, Speech Before the Chicago Bar Association (Nov. 20, 1951), in COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 137, 137-39 (Walter F. Murphy & C. Herman Pritchett eds., 3d ed. 1979) [hereinafter COURTS, JUDGES, AND POLITICS] (describing in humorous terms personal planning that led to appointment as federal district court judge in Illinois). Empirical evidence suggests that only one-fourth of the labor force, largely unskilled and semi-skilled workers, fail to follow a career plan of any kind. See DONALD E. SUPER, THE PSYCHOLOGY OF CAREERS: AN INTRODUCTION TO VOCATIONAL DEVELOPMENT 70-79 (1st ed. 1957) (discussing four types of career patterns: stable, conventional, unstable, and multiple-trial career patterns); Paula Mergenhagen, *Doing the Career Shuffle*, AMERICAN

can assume that lawyers surviving the rigors of the complex appointment and selection process<sup>18</sup> become judges in large part *because* they developed and implemented career plans. Assuming, therefore, that most judges actively planned to become judges, a second point of discussion considers the personal and professional choices motivating a lawyer's decision to seek a judgeship.

## 2. *Internal calculus of the plan*

A lawyer considering the possibility of becoming a judge behaves as if he or she were conducting a cost-benefit analysis. Presumably, an aspiring judge believes that the benefits of becoming a judge outweigh the costs. Therefore, a discussion of benefits is in order. Arguably, the benefits sought by a judicial candidate relate in some measure to prestige and power. Empirical studies have verified the relatively high level of prestige accorded to judges in our society,<sup>19</sup> a status that has remained quite stable over the past seventy-five years.<sup>20</sup> Anecdotal evidence gathered from state trial judges provides an example of such an empirical study.<sup>21</sup>

Several conclusions can be drawn from work done in the area of judicial prestige. First, research indicates that many judges do not take kindly to having their decisions reversed on appeal,<sup>22</sup> despite

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DEMOGRAPHICS 42 (Nov. 1991) (discussing importance of career planning and outplacement programs in contemporary workplace).

18. See HOWARD BALL, *COURTS AND POLITICS: THE FEDERAL JUDICIAL SYSTEM* 189-227 (2d ed. 1987) (elaborating on complexity of federal judicial selection process); William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 25-34 (1990) (suggesting that growing public participation affects and complicates judicial selection process); Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735, 1755-56 (1988) (discussing "merit selection" notion and encouraging examination of moral predispositions of judges during selection process); Patricia Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 888-95 (1987) (discussing influence of politics and press on federal judicial appointment process).

19. See Robert Hodge et al., *Occupational Prestige in the United States 1925-1963*, in DONALD G. ZYTOWSKI, *VOCATIONAL BEHAVIOR: READINGS IN THEORY AND RESEARCH* 86, 86-91 (1968) (ranking occupational prestige of Supreme Court justice and county judge as first and fourteenth, respectively, out of ninety occupations for 1947 and 1963).

20. *Id.*

21. See Caldeira, *supra* note 17, at 165 (arguing that four fundamental types of trial judges exist, including "game judges," "program judges," "status judges," and "obligation judges"). The game judge finds emotional satisfaction in managing the trial as a complex game. *Id.* The program judge derives satisfaction from identifying and solving challenging problems in the administration of justice. *Id.* at 168. The status judge receives satisfaction from the social and professional prestige that accompanies judicial office. *Id.* at 171. Finally, the obligation judge gains satisfaction from fulfilling a perceived obligation to aid society, in this case by becoming a judge. *Id.* at 173. Because a comparable analysis regarding the nature of federal judges does not exist, it is assumed that Caldeira's findings on state court judges carry over to the federal judiciary as well.

22. See, e.g., Andrew J. McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 62 n.25 (1992) (providing example of federal district court judge who considered reversal of his deci-

the fact that a judge's reversal rate has an inconsequential effect on the judge's income.<sup>23</sup> Because there is no income effect, it must be the loss of prestige upon reversal that is important. Second, because federal courts are often viewed as being "more prestigious" than state courts,<sup>24</sup> it can be assumed that prestige is even more important to federal judges than to state judges. Finally, the importance of prestige to federal judges is further supported by the fact that more federal court appointees come from law firms than from any other source.<sup>25</sup> Because prestige, power, and high incomes are commonly available amenities for partners in large law firms and because those partners are willing to take substantial reductions in income to become judges,<sup>26</sup> it follows that the judiciary confers more prestige (and power) on these individuals than is available to them in the law firm context.

As for the importance of power as a job benefit, a prospective judge will probably consider not only the virtually absolute authority bestowed by a judgeship over litigants and lawyers, but also the broader social impact a judge's decisions have as precedent and as

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sions by court of appeals to be equivalent to receiving failing grade on test paper); cf. Caldeira, *supra* note 17, at 165 (describing type of judge who finds satisfaction from being sustained by appellate courts).

23. Judicial salaries are reviewed by the Commission on Executive, Legislative, and Judicial Salaries. 2 U.S.C. § 356 (1988). The Commission makes recommendations to the President regarding any salary changes. *Id.* § 357. The President then submits those recommendations, if acceptable, to Congress for its review. *Id.* § 358. These recommendations go into effect unless Congress disapproves of them by a joint resolution. *Id.* § 359. The latest pay increase for the federal bench went into effect on January 1, 1991. Exec. Order No. 12,736, 55 Fed. Reg. 51,385 (1990).

24. See Robert Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 234 (1976) (addressing National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, The Pound Conference, St. Paul, Minnesota, April 7-9, 1976), quoted in Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 937 & n.111 (1990). Then-Solicitor General Robert Bork noted that "[l]arge numbers [of federal judges] dilute prestige, a major attraction of a career on the bench, and make it harder to recruit first-rate lawyers. Large numbers damage collegiality, lessen esprit, and diminish the possibility of interaction throughout the judicial corps." *Id.*

25. BALL, *supra* note 18, at 208 (Table 6-6).

26. See *Law Partners' Salaries Decreased Slightly During 1990*, LAW. WKLY., Sept. 16, 1991, at 31 (discussing recent study of some 10,000 lawyers from 750 law firms nationwide that noted median income in 1990 for law partner was \$146,010); see also James L. Oakes, *Judges on Judging: Grace Notes on "Grace Under Pressure"*, 50 OHIO ST. L.J. 701, 715 (1989) (discussing disincentives created by low judicial salaries to attorneys' acceptances of federal judgeships). Judge Oakes stated the following:

Morale is, because of the salary fiasco, at an all-time low. It is not only demeaning to be begging the Congress or the public for more pay; it is the recognition that society holds us in such low esteem that is hurtful. The last thing that one expects to do when becoming a federal judge is to have to be concerned from day to day about making ends meet. . . . Even when one has capital, it is annoying, even scary, always to be invading it to live in the style or fashion to which one is accustomed.

*Id.* In January 1991, the salary for federal district court judges increased to \$125,000. Exec. Order No. 12,376, 55 Fed. Reg. 51,385 (1990).

social policy. Indeed, the power of federal courts to set social policy and thereby "govern America" has been the subject of much discussion.<sup>27</sup> Trial courts as well as appellate courts have been found to possess and exercise far-reaching powers,<sup>28</sup> powers of such magnitude that the cautionary phrase "imperial judiciary" is often used to refer to judicial use of these powers.<sup>29</sup> Additionally, an aspiring judge will also consider the issue of power defined as control over his or her person, that is, control over personal time, freedom from client problems, and greater possibilities for free activity and intellectual independence and stimulation.<sup>30</sup> The existence of these many opportunities to exercise power, however, does not necessarily mean that all lawyers become judges simply to have access to power. Yet, the inference that many do is strong because the availability of power in all its manifestations is one of the few variables whose magnitude increases significantly in the transition from lawyer to judge.

On the costs side, a prospective judge's most important consideration is likely to be the immediate income loss associated with accepting a judgeship. Currently, a lawyer who leaves a large New York law firm to become a federal judge has to accept a pay cut equal to one-half or more of the lawyer's private practice salary.<sup>31</sup> Income loss is clearly a cost, however, only if one assumes that a lawyer does not derive additional utility from the greater certainty provided by dependable future flow of judicial income. For exam-

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27. See, e.g., BALL, *supra* note 18, at 2 (describing impact of federal courts on substantive rights due to increased judicial recognition of actions based on "equal protection" and "due process" concerns); COURTS, JUDGES, AND POLITICS, *supra* note 17, at 663-68 (providing historical basis for judicial power); RICHARD NEELY, HOW COURTS GOVERN AMERICA 145-89 (1981) (discussing social impact of court decisions involving criminal law reform and reallocation of state monies directed to state public education).

28. See generally ROBERT A. CARP & C.K. ROWLAN, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS 1-24 (1983) (discussing expansion of federal judiciary's role in policymaking, especially at federal district court level).

29. See Nathan Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INTEREST 104, 112-23 (1975) (positing three reasons for expanded social role of Supreme Court: broadened concepts of standing, growth of government, and increasing number of cases being filed); David M. O'Brien, "The Imperial Judiciary": *Of Paper Tigers and Socio-Legal Indicators*, 2 J.L. & POL. 1, 4-29 (1985) (providing evidence of more expansive role of judiciary since early 1970s in overseeing governmental programs and handling increased case loads); Louis M. Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1571-74 (1988) (analyzing theory of judicial independence against backdrop of need for greater accountability); Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573, 576 (1985) (providing general overview of role of federal courts in both interpreting and creating law).

30. But see Ira Robbins, *Judicial Sabbaticals*, 30-31 FED. JUD. CENTER (1987) (advocating use of periodic sabbaticals for judiciary to prevent "burn-out" from overwork).

31. Compare Doreen Weisenhaus, *What Lawyers Earn*, NAT'L L.J., May 6, 1991, at 53 (noting average 1990 salary of equity partner at Shearman & Sterling's New York office was \$860,000) with Exec. Order No. 12,376, 55 Fed. Reg. 51,385 (1990) (stating that 1991 federal district court judges' salaries were \$125,000).



ple, a highly risk-averse lawyer might prefer the lifetime income guarantee associated with a judgeship to the higher but riskier future income associated with the private practice of law. As a result, the economic cost to this individual in terms of income loss would be mitigated by the benefit of a lifetime income guarantee.

Beyond the threshold issue of income loss accompanying the acceptance of a federal judgeship lies the more troubling "cost" of restrictions on judicial behavior. That is, a prospective judge might be concerned about a judge's socially mandated isolation from political debate.<sup>32</sup> Furthermore, the Canons of Judicial Ethics impose a number of behavioral restrictions on federal judges, including requirements that judges maintain political neutrality and avoid conflicts of interest.<sup>33</sup> The Canons are designed to minimize abuses of power that could result from improper influences on a judge's behavior, of which political, relational, and monetary influences are a few examples.<sup>34</sup>

### 3. *Strategies for obtaining a judgeship*

There is a remarkable paucity of data regarding the strategies pursued by lawyers wishing to become federal judges. Notwithstanding this empirical deficiency, the general lore among lawyers describes two routes attorneys generally travel to secure judgeships. First, a lawyer can come to the attention of judicial appointments authorities as a result of the lawyer's achievements in legal scholar-

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32. See Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 863-64 ("The judiciary . . . bears a heavy institutional responsibility to nurture a conception of law and justice as principled ventures, distinct from politics and devoted to some larger concepts of the public good."); Wald, *supra* note 18, at 907-08 (noting that federal judges are required to isolate themselves from partisan politics for remainder of life). *But see* Edwards, *supra*, at 863-64 ("[T]he judiciary does not, of course, stand by itself, in isolation from the rest of the legal world. Judges obviously deal with lawyers on a regular basis and, in part because those lawyers (like judges' law clerks) are law school trained, indirectly with the legal academy as well.").

33. See MODEL CODE OF JUDICIAL CONDUCT CANON 4 (1990) (requiring judges to avoid conflicts of interest regarding judges' avocational, civic, charitable, financial, and fiduciary activities); MODEL CODE OF JUDICIAL CONDUCT CANON 5 (1990) (declaring that judges and judicial candidates should not, among other things, solicit funds for political organizations, attend political events, hold office in political groups, or publicly endorse or oppose political candidates).

34. See Lawrence Baum, *Lower-Court Response to Supreme Court Decisions: Reconsidering a Negative Picture*, 3 JUST. SYS. J. 208, 214-16 (1978) (discussing how judges' policy preferences and personal interests can lead them to reject law decided by superior courts); Louis De Alessi, *Property Rights and the Judiciary*, 4 CATO J. 805, 807-10 (1985) (discussing discretionary authority of federal judiciary and arguing for selection of federal judges who have public interest at heart); Steven Lubet, *Regulation of Judge's Business and Financial Activities*, 37 EMORY L.J. 1, 44 (1988) (exploring ethical limitations placed on financial activities of judges); Thomas D. Morgan, *The Quest for Equality in Regulating the Behavior of Government Officials: The Case of Extrajudicial Compensation*, 58 GEO. WASH. L. REV. 488, 494-501 (1990) (discussing impact of proposed ethics legislation on previously allowed extrajudicial income sources).

ship.<sup>35</sup> Alternatively, a lawyer can come to the appointing authorities' attention because of outstanding success in legal practice.<sup>36</sup> It is instructive to consider two addenda to these basic strategies. First, a lawyer who aspires to become a judge generally has no sense of how outstanding he or she must be to secure favor in the eyes of the appointing authorities. A rational lawyer would tend to find it profitable, therefore, to bring his or her qualifications to the attention of the appointing authorities by engaging in some measure of self-promotion. Given the limited amount of formal information available on proper strategies to pursue in attempting to obtain federal judgeships, it is also conceivable that a lawyer would attempt to obtain academic and professional credentials that are as outstanding as possible. Second, some anecdotal evidence supports the proposition that a judgeship may serve as a reward to politically active and faithful lawyers.<sup>37</sup> Thus in formulating a strategy for obtaining a judgeship, a lawyer should be mindful of the fact that ideology is very relevant to appointment. Indeed, an examination of judicial appointments from 1888 to 1977 reveals that an average of ninety-two percent of all federal judicial appointees during that time period were members of the same political party as the appointing President.<sup>38</sup> The lowest percentage of like-party judicial appointments occurred during the Ford presidency with seventy-nine percent. President Wilson had the highest percentage with nearly ninety-nine percent.<sup>39</sup>

### B. *The Judicial Selection Process*

The process of selecting federal judges is remarkably complex. Despite the complexity, it is possible to cull out four central observations regarding the selection process from the array of facts amassed on the subject.<sup>40</sup> First, although different actors come onto

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35. See Albert P. Malone et al., *Too Little Advice, Senatorial Responsibility, and Confirmation Politics*, 75 JUDICATURE 187, 189 (1992) (citing use of legal scholarship to predict judicial performance of Supreme Court nominees from Thurgood Marshall to David Souter); see also Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1185-86 (1988) (arguing that too much emphasis is placed on notion of professional accomplishment in attempt to make judicial selection process appear objective).

36. See Carter, *supra* note 35, at 1185-88 (discussing proper qualifications for Supreme Court nominee).

37. See COURTS, JUDGES, AND POLITICS, *supra* note 17, at 137-39 (suggesting that federal judgeship nomination served as reward for political activity and loyalty to President's party); Wald, *supra* note 18, at 888-92 (providing historical backdrop for thesis on judicial appointments as rewards for politically active).

38. See BALL, *supra* note 18, at 176 (illustrating that federal judicial appointments since 1977 have not deviated significantly from 1888-1977 like-party appointment average of 92%).

39. BALL, *supra* note 18, at 176.

40. See *supra* notes 17-18 (providing sources by political scientists, judges, and other

the scene with each new judicial appointment, the major judicial players remain virtually unchanged for long periods of time.<sup>41</sup> Howard Ball divides these major actors into three categories: the initiators, the screeners, and the affirmers.<sup>42</sup> That is, the judicial selection process consists of first initiating the name of a candidate, next screening the candidate, and ultimately affirming the candidate. The initiators include the President, the Attorney General and his or her staff, the United States Senators from the state or states in which the judicial vacancy has occurred, local party leaders, judges, and, of course, the lawyer who wants to be considered for the vacancy.<sup>43</sup> The screeners include the Senate Committee on the Judiciary (Judiciary Committee), the Department of Justice, the Federal Bureau of Investigation, the American Bar Association (ABA), interest groups, and the media.<sup>44</sup> Finally, the affirmers are the Judiciary Committee and the United States Senate as a whole.<sup>45</sup> The initiators may affect the outcome of a judicial candidacy by testifying before the screeners in the Judiciary Committee.<sup>46</sup> At any point during the screening of a candidate, the candidate may be rejected and a new candidate considered.<sup>47</sup> Interestingly, the Judiciary Committee's screening vote is not binding on all the members of the Senate. The full Senate must vote to accept or reject each candidate nominated to a federal judicial position.<sup>48</sup>

The second general observation that can be made regarding the judicial selection process is that the nature of each judgeship determines which of the actors plays the dominant role in the process. In the event of a district court vacancy, the Senators from the state in which the vacancy occurs are permitted to exercise "senatorial courtesy."<sup>49</sup> That is, the Senators from the particular state are free to select candidates from their own state first.<sup>50</sup> Then, a bargaining

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scholars that explore various facets of judicial selection process). No effort will be made here to present an analysis that deviates from the analyses already conducted by political scientists and other court commentators.

41. See BALL, *supra* note 18, at 193-206 (describing participants in judicial selection process as remaining constant).

42. BALL, *supra* note 18, at 193-206.

43. BALL, *supra* note 18, at 193-94; HERBERT JACOB, JUSTICE IN AMERICA 104-05 (3d ed. 1978).

44. BALL, *supra* note 18, at 203-05. All screeners except the members of the Senate Judiciary Committee play purely advisory roles; advisory players are not authorized to formally accept or reject any judicial candidates. *Id.*; JACOB, *supra* note 43, at 104-05.

45. BALL, *supra* note 18, at 206; JACOB, *supra* note 43, at 103.

46. See BALL, *supra* note 18, at 113 (providing diagram that illustrates roles of and interactions between actors in judicial selection process).

47. BALL, *supra* note 18, at 113.

48. BALL, *supra* note 18, at 113.

49. BALL, *supra* note 18, at 197-201; JACOB, *supra* note 43, at 104.

50. BALL, *supra* note 18, at 198.

process between Senate staffers and presidential staffers typically occurs, resulting in a nominee, perhaps from the state in question and perhaps not, being put forward for Senate confirmation.<sup>51</sup> If one of the Senators from the state has not been involved in the initiation of the candidate, the Senator receives a "blue slip" from the Judiciary Committee that must be returned within one week if the Senator objects to the candidate.<sup>52</sup> If the blue slip is sent by the objecting Senator to the Judiciary Committee, the nomination of that particular candidate is theoretically withdrawn.<sup>53</sup> Interestingly, however, blue slips received from Senators who are not members of the President's party are typically ignored.<sup>54</sup>

In the case of appointments to the federal courts of appeals, the dominant actors tend to be the United States Attorney General and Deputy Attorney General.<sup>55</sup> A modified senatorial courtesy exists in these situations in that a circuit court vacancy must be filled by someone from the retiring judge's home state.<sup>56</sup> Unlike the district court situation, though, no single Senator is allowed to exercise dominance over the selection process because several states are affected by courts of appeals appointments, given that each court of appeals spans many states.<sup>57</sup> It is for this reason that the Attorney General exercises such influence in initiating and shepherding a candidate through the federal court of appeals selection process.

Because a large number of candidates' names are submitted by selection process initiators for each judicial vacancy (trial or appellate), the process has become dependent on procedural informality and driven by politicking and negotiating.<sup>58</sup> As soon as a candidate's name is received from an initiator, the staffs of either of the Senators involved or the Department of Justice begin researching the candidate. A candidate who is ultimately formally nominated by the President to the full Senate is one who has been approved by various actors at various different levels. The candidate will have been agreed upon within the Department of Justice, between the

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51. BALL, *supra* note 18, at 198.

52. BALL, *supra* note 18, at 199; JACOB, *supra* note 43, at 107; Wald, *supra* note 18, at 889.

53. BALL, *supra* note 18, at 199-200; JACOB, *supra* note 43, at 107; Wald, *supra* note 18, at 889.

54. BALL, *supra* note 18, at 199-200; *see also* JACOB, *supra* note 43, at 104 (suggesting that opposition party Senator is not consulted when President is selecting district court nominees).

55. BALL, *supra* note 18, at 197.

56. BALL, *supra* note 18, at 200. *But see* JACOB, *supra* note 43, at 107 (contending that no senatorial courtesy exists when appellate court judges are nominated).

57. BALL, *supra* note 18, at 200; JACOB, *supra* note 43, at 104.

58. *See, e.g.*, BALL, *supra* note 18, at 198 (discussing instance in 1978 where President Carter's input as to selection of nominee was negligible because both Senators from state, Arkansas, agreed on same candidate).

President and the Department of Justice, among the Senators of the state or states involved, and between the President and the Senator or Senators involved.<sup>59</sup>

The third important observation to be made regarding the judicial selection process is that the President is responsible for setting the general criteria by which the Department of Justice chooses candidates for federal judgeships.<sup>60</sup> These criteria have, not surprisingly, varied from President to President. For example, President Kennedy emphasized qualities of mind and character in the selection of federal judges, while President Eisenhower emphasized a candidate's age, health, and level of ABA rating.<sup>61</sup> Because federal judges have traditionally been appointed from small, homogeneous segments of the population, it appears that little other than ideology exists that truly distinguishes lower court judges from each other. For example, most district court judges have come to the federal judiciary from private law practice, the state judiciary, or from government practice,<sup>62</sup> and most appellate-level judges are appointed from the ranks of the federal district courts.<sup>63</sup> The demographics of these judges are startlingly similar, with the vast majority of the federal bench being white, Protestant, male, politically active, middle-aged, middle- to upper-income, and educated in law schools in the state or region of judicial appointment.<sup>64</sup>

A final observation regarding the selection process is that the process' entire structure varies greatly from President to President. For example, President Carter instituted a decentralized appointment process during his tenure as Chief Executive.<sup>65</sup> In contrast to the traditional centralized judicial selection model that has been discussed up to this point, Carter created "Judge Nominating Commissions" that were responsible for nominating appellate judges.<sup>66</sup>

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59. BALL, *supra* note 18, at 206; JACOB, *supra* note 43, at 104-05.

60. BALL, *supra* note 18, at 194-95.

61. BALL, *supra* note 18, at 194.

62. STEPHEN T. EARLY, *CONSTITUTIONAL COURTS OF THE UNITED STATES* 85 (1977).

63. BALL, *supra* note 18, at 209 (Table 6-7).

64. EARLY, *supra* note 62, at 85; *see also* JACOB, *supra* note 43, at 109-10 (indicating that President Johnson broadened representative population in federal judiciary to small extent to include some Catholics, Jews, minorities, and women).

65. *See* LARRY C. BERKSON & SUSAN B. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES*, *AMERICAN JUDICATURE SOCIETY* 24-26 (1980) (describing President Carter's order creating 13 panels within federal judicial circuits, each composed of representative societal groups and authorized to nominate candidates to fill federal-level judicial vacancies).

66. *See id.* (noting that formal name for Carter's 13 nominating panels was "United States Circuit Judge Nominating Commissions"). President Carter created the Commissions in Executive Order No. 11,972, 42 Fed. Reg. 9659 (1977), which was subsequently superceded by Executive Order No. 12,059, 43 Fed. Reg. 20,949 (1978). These executive orders were issued for two purposes: to appoint federal judges on the basis of merit as opposed to political

The Commissions were obliged to publicize judicial vacancies and interview candidates before nominating successful candidates to the President.<sup>67</sup> The names of the recommended candidates given to the President were no longer held in confidence, but were publicly disseminated.<sup>68</sup>

Without question, the Commissions succeeded in making the selection process more public than it had been in the past. Furthermore, President Carter succeeded in appointing more minorities and females to federal judgeships than any of the Presidents who preceded him.<sup>69</sup> But the question remains whether Carter succeeded in depoliticizing the selection process. Such an accomplishment does not appear likely because eighty-seven percent of the members of Carter's Nominating Commissions were Democrats,<sup>70</sup> seventy-nine percent of their recommended candidates were Democrats,<sup>71</sup> and eighty-six percent of the judges appointed to the circuit courts by Carter were Democrats.<sup>72</sup>

In conclusion, it is clear from this introduction that much remains to be done by way of empirical research.<sup>73</sup> This need looms particularly large in view of the important role played by the judiciary in American society. Of course, the economist can contribute to this dearth of research by proposing theoretical models, which lay the

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patronage, and to appoint more women and minorities. BERKSON & CARBON, *supra* note 65, at 31-35.

67. Exec. Order No. 12,059, § 3, 43 Fed. Reg. 20,950 (1978). The individual commissions greatly differed on how they notified the public of vacancies, including sending notices to newspapers, television stations, local and state bar associations, and law firms located in the relevant geographical area. BERKSON & CARBON, *supra* note 65, at 65.

68. BERKSON & CARBON, *supra* note 65, at 26.

69. BERKSON & CARBON, *supra* note 65, at 151-52. See Patrice M. Pitts & Linda Vinson, *Breaking Down Barriers to the Federal Bench: Reshaping the Judicial Selection Process*, 28 HOW. L.J. 743, 754 n.42 (1985) (stating that President Carter appointed more women, blacks, and Hispanics to federal bench than all previous administrations combined) (citing 2 Presidential Papers of Jimmy Carter 2138 (1979)); see also Michael J. Slinger et al., *The Senate Power of Advice and Consent on Judicial Appointments: An Annotated Research Bibliography*, 64 NOTRE DAME L. REV. 106, 108 n.16 (1989) (citing Walter Berns, *Whom Do Judges Represent?*, Address Before the American Enterprise Institute for Public Policy Research (June 1, 1981)). With regard to appointing federal judges, President Carter reportedly stated, "If I didn't have to get Senate confirmation of appointees, I could tell you flatly that 12 percent of my judicial appointments would be black, 3 percent would be Spanish-speaking and 40 percent would be women and so forth." Slinger, *supra*, at 108 n.16.

70. BERKSON & CARBON, *supra* note 65, at 49.

71. BERKSON & CARBON, *supra* note 65, at 179.

72. BERKSON & CARBON, *supra* note 65, at 181.

73. While I have cited a fair amount of empirical data on the judiciary in the introduction, it is by no means my intention to denigrate the authors of those studies by observing that additional work remains to be done. I have merely indicated instances and observations that could benefit from further empirical work. See, e.g., *supra* note 21 (observing that current studies on types of trial judges only looked at state court judges and that corresponding study on federal court judges is lacking); *supra* note 5 and accompanying text (noting that few studies have discussed link between judicial function and judicial selection).

groundwork for further empirical research. One such theoretical model is the focus of the next portion of this Article.

### III. AN AGENCY COST MODEL OF THE JUDICIAL FUNCTION

#### A. *The General Agency Cost Model*

In a pathbreaking article in 1976, Michael Jensen and William Meckling introduced the economics profession to the idea of "agency costs."<sup>74</sup> According to these economists, an agency relationship is "a contract under which one or more persons, the principals, engage another person, the agent, to perform some service on their behalf which involves delegating some decision making authority to the agent."<sup>75</sup> Assuming that both parties are utility maximizers, the interests of the agent may on occasion diverge from the interests of the principal.<sup>76</sup> Limiting these divergences necessitates the occurrence of agency costs.<sup>77</sup>

Jensen and Meckling identified three types of agency costs: monitoring costs, bonding costs, and residual loss.<sup>78</sup> "Monitoring costs" are incurred by the principal and include "efforts on the part of the principal to 'control' the behavior of the agent through budget restrictions, compensation policies, operating rules" and the like.<sup>79</sup> "Bonding costs" are incurred by the agent to "guarantee that he [or she] will not take certain actions which would harm the principal or to ensure that the principal will be compensated if [the agent] does take such actions."<sup>80</sup> Bonding costs include, for example, "explicit bonding against malfeasance on the part of [a] manager."<sup>81</sup> Finally, even though maximum monitoring and bonding costs may be incurred, the loss resulting from the divergence of principal and agent interests can never be efficiently reduced to zero. This cost of the agency relationship is referred to as "residual loss."<sup>82</sup>

Several observations about this general model are in order. First,

74. Jensen & Meckling, *supra* note 8, at 305.

75. Jensen & Meckling, *supra* note 8, at 308.

76. See Jensen & Meckling, *supra* note 8, at 308 (arguing that rational party will attempt to maximize satisfaction or "utility" of his or her stake in organization); see generally WALTER NICHOLSON, MICROECONOMIC THEORY 79-80 (3d ed. 1985) (contending that individuals in their economic lives make economic choices to maximize their overall satisfaction, or "maximize their utility"). For a summary of criticisms of the utility framework and responses to those criticisms, see Linz Audain, *An Essay in Law and Economics and Two Essays in the Economics of Law-Related Labor* 291-94 (1991) (unpublished Ph.D. dissertation, Duke University).

77. Jensen & Meckling, *supra* note 8, at 308.

78. Jensen & Meckling, *supra* note 8, at 308.

79. Jensen & Meckling, *supra* note 8, at 308 n.9.

80. Jensen & Meckling, *supra* note 8, at 308 n.9.

81. Jensen & Meckling, *supra* note 8, at 325.

82. Jensen & Meckling, *supra* note 8, at 308.

contracts play a vital role in the Jensen and Meckling agency cost model because contracts make the agency relationship possible. Indeed, "contractual relations are the essence of the firm, not only with employees but with suppliers, customers, creditors, etc. The problem of agency costs and monitoring exists for all of these contracts . . . ." <sup>83</sup> Under this view, organizations are "legal fictions which serve[] as a nexus for a set of contracting relationships among individuals." <sup>84</sup>

Second, it is quite clear from Jensen and Meckling's work that they never intended to restrict the application of their model to the study of the business firm. <sup>85</sup> It is significant for purposes of this Article that the authors viewed their nexus-of-contract definition of the organization as being applicable to "governmental bodies" and "government enterprises." <sup>86</sup> Jensen and Meckling asserted that the problem of divergent principal-agent interests that gives rise to agency costs exists "in all organizations and in all cooperative efforts," including "governmental authorities and bureaus." <sup>87</sup>

Sadly, the aspiration held by Jensen and Meckling that their model would give rise to a rich theory of organizations <sup>88</sup> remains an unfulfilled goal. Granted, the authors' forwarding of the agency cost model has precipitated voluminous literature on the problem of agency costs within the context of the business firm. <sup>89</sup> Systematic agency cost analyses of non-business firm organizational structures, however, have not been forthcoming.

Specifically, in the realm of judicial functioning, no literature can

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83. Jensen & Meckling, *supra* note 8, at 310.

84. Jensen & Meckling, *supra* note 8, at 310. This view, when applied to the business firm context, has come to be known as the "contractarian" view of the firm, which has gained widespread acceptance among scholars. See Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 290-91 (1980) (discussing concept of contractual nature of business organization where set of contracts among principal and agents are in competition with each other, thereby reducing efficiency of business operations); William A. Klein, *The Modern Business Organization: Bargaining Under Constraints*, 91 YALE L.J. 1521, 1553-63 (1982) (presenting view, similar to that of Jensen and Meckling, that business firm is arranged according to series of contractual agreements, subject to time constraints in making of long-term relationships). There are, however, scholars who disagree with the contractarian point of view. See, e.g., Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1411-27 (1985) (arguing that contractarian analysis is seriously flawed because in practice stockholders lack effective mechanisms to control management).

85. See Jensen & Meckling, *supra* note 8, at 309 (stressing that concept of agency costs exists in all organizations and relationships that require cooperative effort).

86. Jensen & Meckling, *supra* note 8, at 310.

87. Jensen & Meckling, *supra* note 8, at 310.

88. See Jensen & Meckling, *supra* note 8, at 309 (suggesting that agency cost model is applicable across spectrum of organizations, including universities, unions, and governmental organizations, but confining analysis to contractual relationship between owners and top management of corporations).

89. See *infra* notes 98-107 and accompanying text (describing various agency costs and listing scholarship examining agency cost theory).



be found that proposes an explicit agency cost model for judicial behavior.<sup>90</sup> At best, passing references are made in articles to the role judges play in controlling agency costs through judicial control of the degree of divergence between the interests of principal and agent. For example, E. Donald Elliott argues that through the use of such mechanisms as attorney sanctions, judges are able to minimize attorney-client agency costs.<sup>91</sup> As another example, Murray Horn and Kenneth Shepsle argue that government bureaucrats involved in the administrative enforcement of statutes often "drift away" from the original purposes of the statutes.<sup>92</sup> Judges minimize the agency costs implicit in such departures from congressional intent by checking for statutory compliance on the part of these bureaucrats.<sup>93</sup>

Scholars have not, however, even in passing reference, addressed what is perhaps the more fundamental question of who controls the controllers. That is, assuming the validity of the Jensen and Meckling model,<sup>94</sup> it must be true that judges themselves are the

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90. What is suggested here is that an *agency cost* model of judicial behavior does not exist. There are, however, a number of good general economic models of judicial behavior on the market. See Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUBLIC CHOICE 107, 107-11 (1983) (developing market theory for "private judges," retired judges who are hired to conduct closed-door trials, and relating theory to objectives of "public judges," or traditional jurists presiding over trial courts); Jerome Culp, *Judex Economicus*, 50 LAW & CONTEMP. PROBS. 95, 95-99 (1987) (providing overview of increased use of economics in judicial decisionmaking in wake of appointment of economically oriented judges); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. LAW & ECON. 249, 249-55 (1980) (developing economic approach to legal precedent focused on capital formation and investment). Judge Richard Posner's work provides the best case for an exception to the observation that there are no agency cost models of the judicial function. See *infra* note 132 and accompanying text (examining Judge Posner's theory of economics of constitutional law, in which several ancillary observations about agency costs of judging are made).

91. See E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 332-33 (1986) (theorizing that judges may enhance administration of justice by repressing attorneys' manipulation of costs and delay, but cautioning that judges might occasionally misdiagnose cases as frivolous and impose attorney sanctions where such sanctions are unwarranted). For example, attorney-client agency costs might occur when the solution to the client's problem may not involve litigation, but it is in the attorney's economic interest to pursue and prolong litigation. *Id.* at 333. In such an instance, a judge could intervene through the use of attorney sanctions. *Id.*; see also FED. R. CIV. P. 11 (authorizing courts to impose sanctions against attorneys whose pleadings, motions, or other court filings are submitted for purpose of delaying or increasing costs of litigation).

92. See Murray J. Horn & Kenneth J. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 501-04 (1989) (analogizing legislative and bureaucratic tensions arising from interpretation and enforcement of statutes as that of principal and agent in private firm where principal uses incentives to ensure compliance with principal's interests and reduce agency costs).

93. See *id.* at 502 (positing that legislatures can limit bureaucratic drift by delegating oversight and enforcement power over bureaucracy to independent agents such as courts).

94. See *supra* notes 74-87 and accompanying text (describing Jensen and Meckling's agency cost model).

source of agency costs.<sup>95</sup> The question then arises as to the nature of the mechanisms present in the judicial context to limit divergence of principal-agent interests and/or to limit agency costs. This question and similar questions are addressed further below.

The third observation about the Jensen and Meckling model is that there is a sizeable literature on the nature of various mechanisms that can be used within the context of the business firm to limit principal-agent divergence of interests and to limit agency costs. It is useful to summarize that literature here. The relevance of that literature will be discussed once the summary is complete.

For purposes of this Article, the available agency cost controlling mechanisms will be classified as external to the principal, internal to the principal (but external to the agent), and internal to the agent. In the following discussion, the principal is a business firm and the agent is a manager in the firm. The broader question, of course, is whether these agency cost controlling mechanisms can be generalized beyond the context of the business firm and the manager.

The first category of agency cost controlling mechanisms, mechanisms that are external to the business firm, is defined to include the various markets that are capable of affecting the behavior of the firm and/or the manager. The "market for capital" is one mechanism that keeps agency costs low because a failure to restrain such costs would limit the firm's ability to raise funds in the capital market.<sup>96</sup> Another mechanism, the "market for corporate control," refers to the threat of hostile takeovers of the firm.<sup>97</sup> Such threats induce firm management to limit the divergence of managerial interests from those of the firm's shareholders.<sup>98</sup> Finally, the "market for

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95. See *infra* notes 110-12 and accompanying text (explaining that judges may be source of agency costs by intentionally increasing agency costs between principal and agent or by failing to control agency costs).

96. See VICTOR BRUDNEY & MARVIN A. CHIRELSTEIN, CORPORATE FINANCE 133-35 (3d ed. 1987) (defining market in which firm seeks to obtain funds to operate its business as "capital market" and noting that firm can sell its own stocks or bonds for cash in such market).

97. See Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 110-18 (1965) (originating concept of market for corporate control of organization). For more recent discussions of this market from a legal perspective, see Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1931-33 (1991) (discussing trends underlying transition from booming corporate takeover law practices in 1980s to increase in bankruptcy and reorganization work in 1990s); William Proxmire, *What's Right and Wrong About Hostile Takeovers?*, 1988 WIS. L. REV. 353, 353-56 (providing congressional perspective of market for corporate control in takeover context). See generally Michael C. Jensen & Richard S. Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON. 5 (1983) (speculating on potential advantages of market for corporate control on target corporations).

98. See Manne, *supra* note 97, at 115 (arguing that threat of hostile takeover causes firm's managers to be more attentive to shareholders' interests); Dennis Honabach & Roger Dennis, *The Seventh Circuit and the Market for Corporate Control*, 65 CHI.-KENT L. REV. 681, 688 n.38 (1989) (citing Manne article, *supra*, as "path breaking" in applying law and economics analysis to disciplining ineffective management); Betsy Boyce Brainerd, Comment, *Northeast Bancorp*,

managerial talent" mechanism refers to the diminished employability of managers who are known for generating high agency costs.<sup>99</sup>

The second category of agency cost controlling mechanisms, mechanisms that are internal to the principal but external to the agent, are those mechanisms that relate to the regulation of the agent's reward structure and to the monitoring of the agent by various principal-related constituencies. For instance, agency costs will be lower where managerial compensation is tied to the performance of the firm.<sup>100</sup> A similar effect is achieved by making managers part owners of the firm, such as by providing stock option plans to managers, or by making managers holders of the firm's debt.<sup>101</sup>

As for the monitoring of management by various principal-related constituencies, it appears that there are several groups capable of

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*Inc. v. Board of Governors: Green Light for Regional Interstate Banking*, 35 AM. U. L. REV. 387, 397 n.76 (1986) (citing Manne's market for corporate control thesis as means of providing competitive efficiency and protection of non-controlling shareholder interests in corporate context).

99. See James D. Cox, *Insider Trading and Contracting: A Critical Response to the "Chicago School,"* 1986 DUKE L.J. 628, 635-42 (analyzing concept of market for managerial talent and effects of insider trading on efficiency of capital markets); Fama, *supra* note 84, at 297-98 (discussing concept that where manager deviates from his or her contract, thereby generating high agency costs, these deviations can have long-term effect on future employability); David W. Leebron, *Games Corporations Play: A Theory of Tender Offers*, 61 N.Y.U. L. REV. 153, 211 (1986) (discussing concept of market for corporate talent).

100. See generally John A. Byrne et al., *Executive Pay*, BUS. WK., Mar. 30, 1992, at 51 (providing overview of executive compensation and compensation versus corporate performance issues); Geoffrey Colvin, *How to Pay the CEO Right*, FORBES, Apr. 6, 1992, at 60 (describing difficulty of establishing effective method of determining management compensation and discussing issue of such compensation's relation to firm performance); Thomas McCarroll, *Executive Pay: The Shareholders Strike Back*, TIME, May 4, 1992, at 46 (reporting that corporate executive pay has increased at four times rate of average workers' salaries and three times rate of corporate profits, causing greater interest in requiring connection between corporate performance and executive pay). Compare John A. Byrne et al., *Is the Top Brass Overpaid? Six Big Guns Sound Off*, BUS. WK., Mar. 30, 1992, at 56 (quoting five CEOs and one Senator responding to media focus on high compensation and defending current executive pay levels) with Mark Potts & Frank Swoboda, *CEOs Turn a Cold Shoulder to Heat Dished Out by Shareholders*, WASH. POST, May 11, 1992, at A6 (noting general passive disposition of CEOs at recent management/shareholder conference). The U.S. Securities and Exchange Commission recently stated its position of support for greater shareholder involvement in management compensation decisions. See *SEC Will Consider Proxy Reform in the Near Future, Breedon Says*, Daily Rep. for Executives (BNA), at A-13 (May 4, 1992) (reporting on SEC chairman's renewed support for increasing disclosure of executive compensation to accommodate shareholders' interest in curbing excessive compensation where firm's profits are not commensurate with such compensation).

101. See Sanjai Bhagat et al., *Incentive Effects of Stock Purchase Plans*, 14 J. FIN. ECON. 195, 195-98 (1985) (discussing positive stock market reaction to employee stock purchase plans that are adopted by corporate directors to provide incentives to managers); Sanford J. Grossman & Oliver D. Hart, *Corporate Financial Structure and Managerial Incentives*, in THE ECONOMICS OF INFORMATION AND UNCERTAINTY 107, 107-40 (John J. McCall, ed. 1982) (analyzing effects of bankruptcy threat on quality of management in publicly held corporation); Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323, 323-29 (1986) (discussing conflicts of interest between shareholders and managers over free cash-flow payment policies and how such conflicts can affect agency costs).

taking on that responsibility. Outside executives recruited into the firm can monitor entrenched managers.<sup>102</sup> Similarly, outside directors who have no prior affiliation with the corporation and are hired to provide directorship services have a labor-market incentive to provide effective monitoring of firm management.<sup>103</sup> Finally, monitoring by shareholders becomes possible to the extent that the dispersion of shareholders ceases to provide a basis for the existence of agency costs.<sup>104</sup> The latter situation is made possible because of the concentration of shares or because of the presence of institutional investors.<sup>105</sup>

The third category of mechanisms for controlling agency cost, mechanisms that are internal to the agent, refer to the norms and values that may operate on a psychological level to limit agency costs. For example, Gordon Donaldson and Jay Lorsch have found that the survival of an organization is one of the most basic motivations influencing managerial behavior.<sup>106</sup> Similarly, Kenneth Arrow

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102. See Roger L. Faith et al., *Managerial Rents and Outside Recruitment in the Coasian Firm*, 74 AM. ECON. REV. 660, 660-72 (1984) (analyzing impact of outside hiring on behavior of incumbent managers in handling their responsibilities). Given the relatively limited amount of time typically spent by members of boards of directors in handling their corporate responsibilities, the rewards of being selected as a board member are very effective in attracting directorial talent. See, e.g., Mark Potts, *Raising the Stakes in the Board Game*, WASH. POST, Sept. 9, 1991, at F1 (reporting on generous compensation packages available to corporate board members in return for little actual work). A survey of compensation packages for corporate directors found that a director of one major oil company could earn at least \$42,000 simply for attending all board meetings held in one year (10 in the year surveyed) and over \$50,000 for attending several board committee meetings as well as the full board meetings. *Id.*

103. See Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 225, 227 (1991) (suggesting improved compensation arrangement for outside directors to enhance oversight of corporate management and performance); *Stock-Based Plans for Outside Directors Experienced Swift Growth*, *Hewitt Reports*, Daily Rep. for Executives (BNA), at A-11 (May 4, 1992) (noting compensation packages for outside directors continue to grow commensurate with growth of their corporate responsibilities). The argument is that outside directors want to continue to be gainfully employed as directors with their current corporations. In addition, they may wish to be employed as outside directors by other corporations. For both of these reasons, they will try to be effective "managers" of corporate management so that the corporations they are affiliated with will be profitable and stay in business for long periods of time.

104. See ADOLPH BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 1-119 (1932) (discussing trend toward separating ownership of corporation from controlling authorities of modern corporate operations). Berle and Means argue that a major reason for the separation of shareholder ownership from shareholder control of a business firm is that shareholder ownership is diffused. See JESSE H. CHOPER ET AL., *CASES AND MATERIALS ON CORPORATIONS* 24 (3d ed. 1989) (providing overview of Berle/Means thesis of diffused ownership). The diffusion becomes less an issue where large institutional shareholders, or a controlling shareholder, own shares. *Id.* at 25.

105. See Mark Trumbull, *Who's Running the Company?*, CHRISTIAN SCI. MONITOR, Aug. 3, 1992, at 6 (citing burgeoning influence of large investors such as pension and mutual funds in single companies, which forces greater managerial and directorial accountability to shareholders).

106. See GORDON DONALDSON & JAY W. LORSCH, *DECISION MAKING AT THE TOP* 79-109 (1983) (studying financial and psychological forces that shape strategic choices of top managers).

has argued that feelings of managerial responsibility toward a firm are inculcated very early in the managerial socialization process.<sup>107</sup> Against this general background discussion of the agency cost model, it is now possible to discuss the applicability of this model to the judicial function.

### B. *An Agency Cost Model of the Judicial Function*

An agency cost model of the judicial function can be extrapolated from the business firm model just discussed by first distinguishing the judge as controller from the judge as source of agency costs.<sup>108</sup> In the analysis of the judge as controller, a typology could be constructed that focuses on the types of principals and agents whose agency costs are best controlled by judges. Additionally, one could try to predict *a priori* or determine empirically which types of agency costs judges control most effectively. To the extent that the literature has focused almost exclusively on the judge as controller of agency costs, a body of data exists that could be tapped for the purpose of generating the typologies mentioned above.<sup>109</sup> The very worthwhile pursuit of constructing these typologies will, however, be left for another day.

It is the analysis of the judge as source of agency costs that merits immediate attention. As a threshold matter, it is possible to see that the law's "misfeasance-nonfeasance" distinction applies quite readily to this situation.<sup>110</sup> That is, a judge might intentionally cause agency costs to increase. A judge who commits misfeasance by making a decision that results in increased agency costs between a principal and an agent is the source of such increased costs. Alternatively, a judge is the source of agency costs when that judge commits nonfeasance by failing to control agency costs. Instructive as the "misfeasance-nonfeasance" distinction might be, however, the categorization presupposes the resolution of something that perhaps calls for a subtler distinction.

Recall from the discussion above that agency costs arise as a result

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107. See Kenneth J. Arrow, *The Economics of Agency*, in PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 37, 37-38 (John W. Pratt & Richard J. Zeckhauser eds., 1985) (studying relationship between principals and agents as to how basic tenets of relationship can be applied to advance and structure business).

108. See *supra* note 90 and accompanying text (discussing status of agency cost model of judicial behavior); *infra* note 132 and accompanying text (analyzing Judge Posner's theory of judges as economic agents).

109. See *supra* note 90 and accompanying text (listing sources suggesting judges act as market participants).

110. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 373 (5th ed. 1984) (defining misfeasance as active misconduct working positive injury and nonfeasance as passive inaction or failure to prevent harm).

of a divergence between the interests of the agent and those of the principal.<sup>111</sup> In view of this definition, two broad categories of divergences can be established in the context of the judicial function. The first category of divergences, which I shall call "business divergences," refers to those divergences that can occur within the context of a business firm as well as within the judicial system. An example of nonfeasance in this category would be judges or accountants who play golf instead of performing their duties, and an example of misfeasance would be judges or accountants who fail to conduct proper hearings or audits. The term "non-business divergences" will be used to refer to all other types of divergences, such as a judge's ideological deviation from the ideology of the principal.<sup>112</sup> Each kind of divergence is discussed in turn.

1. *Business divergences ("business agency costs")*

If one focuses on the possible business divergences that could arise within the judicial system, it becomes clear that the system confronts a potentially severe agency cost problem. There are at least three reasons this might be so. The first reason is that, of the three categories of mechanisms for controlling agency costs discussed above,<sup>113</sup> only the third category is useful in the judicial context. In the first category, the control of agency costs through external market processes, talk of a "hostile takeover" of the judicial function is not justified because the function is completely and necessarily controlled by government.<sup>114</sup> A "market for judicial control" analogous to the market for corporate control mechanism<sup>115</sup> is therefore unavailable. Similarly, a "market for judicial talent" analogous to

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111. See *supra* notes 74-82 and accompanying text (discussing Jensen and Meckling's theory and model of agency costs).

112. The nature of the problem in the non-business divergence context is that of ascertaining the identity of the principal. See *infra* notes 131-33 and accompanying text (explaining that principal for judge-as-agent can vary based on interests that judge perceives enabled him or her to attain office).

The distinction between business divergence and non-business divergence is unique to this Article. It should be stressed that in the business context there are certain characteristics of the agent that are irrelevant to the conduct of business, such as the agent's ideology. This is not the case in the judicial sphere, where a judge's ideology may be very important to the administration of justice.

113. See *supra* notes 96-107 and accompanying text (discussing three general agency cost control mechanisms: external to principal, internal to principal but external to agent, and internal to agent).

114. The presence of "private judges" does little to alter this conclusion. See Cooter, *supra* note 90, at 107-11 (defining private judges as retired judges who conduct private trials at behest of parties). This is true simply because all contracts for private judging can ultimately be challenged in a court that exists under the aegis of, and has the power to exercise, the coercive and final power of the state.

115. See *supra* note 97 and accompanying text (introducing concept of "hostile takeovers" as agency cost control mechanism in business settings).

the market for managerial talent<sup>116</sup> is also ineffectual as a cost control mechanism because many federal judges retire as judges, regardless of whether they gain a reputation for generating high agency costs.<sup>117</sup>

A consideration of the second category of agency cost controlling mechanisms, which includes the manipulation of agent reward structures and the monitoring of agents by principal-related constituencies,<sup>118</sup> makes clear that these mechanisms are also unavailable in the judicial context. For example, any system of compensation approximating merit pay is not presently paid to judges by government, and the idea of making judges "part-owners" of governmental enterprise is an idea that has not been circulated or implemented. Further, while Congress is responsible for monitoring the federal judiciary,<sup>119</sup> the only monitoring tool Congress has to fulfill this task is the drastic remedy of judicial impeachment.<sup>120</sup> That tool has been used with such rarity<sup>121</sup> as to lead to an inference that impeachment is effective only in instances where unambiguous and egregious agency cost violations have occurred.

The third category of agency cost control mechanisms, concerning the agent's personal values,<sup>122</sup> contains the only mechanisms

116. See *supra* note 99 and accompanying text (introducing theory of "market for managerial talent" as agency cost control mechanism); see *supra* note 23 (showing that judges' salaries are determined by legislation, not by performance); see also William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 240-42 (1979) (observing difficulty in financing judicial services through free market means because users of judicial services are not only beneficiaries of those services). The argument is that the market for managerial talent does not apply in the context of federal judgeships. Although business managers often have to worry about obtaining and keeping managerial employment, federal judges, sometimes known as "Article III" judges, need not worry about job security because the Constitution grants them life tenure on the bench. *Id.*; see also U.S. CONST. art. III, § 1 (conferring lifetime tenure on federal judges).

117. See *infra* notes 124-27 and accompanying text (arguing that life tenure for federal judges diminishes incentive to excel as jurist, resulting in higher agency costs).

118. See *supra* notes 100-05 and accompanying text (introducing agency cost control mechanism internal to principal but external to agent).

119. See U.S. CONST. art. I, § 2 (conferring impeachment power upon House of Representatives); see also U.S. CONST. art. I, § 3 (providing removal upon conviction by two-thirds of Senate).

120. See *supra* note 119 (describing process of judicial impeachment as set forth in Constitution).

121. See Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765, 767-68 (1989) (positing that judicial impeachment is maintained primarily as remedy for judges' commission of "high crimes or misdemeanors"); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 10 n.29 (1989) (listing offenses that qualified for impeachment of federal judges as including, inter alia, favoritism, bribery, corruption, perjury, tax evasion, drunkenness, and blasphemy); Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 665-98 (1969) (providing historical perspective of difficulty in establishing requirements for impeachment of federal judges).

122. See *supra* notes 106-07 and accompanying text (discussing agency cost control mechanisms that are internal to agent).

that are unequivocally available for controlling business agency costs within the judicial system. The difficulty is that even within the context of a business firm, data on the effectiveness of this third category is scant. An inference may be drawn that the mechanisms in this category are not exceptionally effective in reducing agency costs because if the mechanisms were effective, the mechanisms of the first two categories would be superfluous. Clearly, however, those mechanisms are not superfluous.<sup>123</sup>

The second reason that explains why the judicial system confronts a potentially severe agency cost problem derives from the fact that not only are agency cost control mechanisms unavailable within the judicial context, but rather, institutional arrangements exist within the federal judiciary that *encourage* the generation of business agency costs. For example, under the clear language of the Constitution, Congress may not diminish the salaries of federal judges.<sup>124</sup> Therefore, judges who neglect their judicial duties may do so without concern that their actions (or lack thereof) will affect their salaries. As another example, a federal judge is guaranteed life tenure under the Constitution.<sup>125</sup> This type of arrangement creates a "moral hazard" problem,<sup>126</sup> which in turn leads to potentially high agency costs. As a final example, it could be argued that because the doctrine of judicial immunity insulates judges from the consequences of their actions, the doctrine may in some sense diminish judges' incentives to excel as jurists.<sup>127</sup>

The third reason the judicial system confronts an agency cost

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123. See Benjamin M. Oviatt, *Agency and Transaction Cost Perspectives on the Manager-Shareholder Relationship: Incentives for Congruent Interests*, 13 ACAD. MGMT. REV. 214, 214-16 (1988) (discussing incentives and methods that may control opportunistic behavior among managers, such as controlling executive compensation, and suggesting that further research on manager-shareholder congruence needs to be performed).

124. See U.S. CONST. art. III, § 1 (stating that "[t]he Judges, both of the Supreme and inferior Courts, shall . . . receive for their Services, a Compensation which shall not be diminished during their Continuance in Office.").

125. See *id.* (stating that "[t]he Judges . . . shall hold their offices during good Behavior").

126. See WALTER NICHOLSON, *MICROECONOMIC THEORY* 217-18 (3d ed. 1985) (suggesting that problem of "moral hazard" arises where presence of insurance for risk induces individual to take even more risks). Because the Constitution guarantees that judges' salaries will not be reduced during their service, U.S. CONST. art. III, § 1, judges will be apt to take more risks than they would if such a guarantee were not available. Landes & Posner, *supra* note 117, at 235.

127. See J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 897-920 (providing broad overview of doctrine of judicial immunity in the United States); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 405-06 (1987) (focusing on expansive and sometimes extreme nature of judicial decisions protected by judicial immunity). *But see* David R. Cohen, Note, *Judicial Malpractice Insurance? The Judiciary Responds to the Loss of Absolute Judicial Immunity*, 41 CASE W. RES. L. REV. 267, 278-82 (1990) (noting that limitations recently imposed on previously absolute nature of judicial immunity have brought about protective measures by judges through purchase of judicial malpractice insurance).



problem is that the total cost of making constitutional changes is remarkably high.<sup>128</sup> This elevated cost of change may partially explain why constitutional changes relevant to judicial behavior have been virtually nonexistent. It can be argued that because judges are rational utility maximizers, they probably generate more agency costs than they would if the cost of constitutional change were lower.

To reiterate, agency costs are the costs that arise because there is a divergence between the interests of the agent and those of the principal. Business divergences arise when the agent fails to do a job whose description is clear. Where the agent in question is a business manager, mechanisms are available to limit divergence and thereby lower agency costs. Where the agent is not a business manager but is a federal judge, mechanisms of this sort are few.

Indeed, these reasons were offered to explain why the agency cost reduction mechanisms available in the managerial context are not available in the federal judicial context. The agency costs generated by judges (as agents) are therefore not reduced. The judicial agency cost problem is made more severe because other principals and agents are perhaps relying on judges to limit these agents' business divergences, perhaps by imposing sanctions on an attorney/agent who is pursuing self-interest instead of the interests of the client/principal.<sup>129</sup> In this instance, a judge's failure to act effectively, which is a source of agency cost, causes an agency cost ripple effect that spills over into the lives of other principals and agents.<sup>130</sup>

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128. See Nicholas Mercurio, *Toward a Comparative Approach to the Study of Law and Economics*, in *LAW AND ECONOMICS* 1, 2-6 (Nicholas Mercurio ed., 1989) (arguing that societies progress through at least three sequential stages: constitutional, institutional, and economic impact stages). Because the constitutional stage is the period in which fundamental decisions are made regarding the ordering of government and society, *id.*, it seems reasonable to assume that the costs of reversing or altering the choices made in the constitutional period in later periods, such as by ratifying a constitutional amendment, are very high.

129. See FED. R. Civ. P. 11 (permitting judges to impose sanctions on attorneys for filing of claims whose only purpose is to harass, intimidate another, or drive up costs of litigation).

130. An example here will hopefully suffice to explain this point. Recall that business divergence costs are under discussion here (i.e., the judge fails to engage in the business of judging). Assume that a judge refuses to entertain a meritorious motion for attorney sanctions in a given case. The judge's reason: He or she would rather spend time on the golf course than spend time rendering a decision on the motion. First, focusing on the judge as agent, regardless of the way in which one chooses to define the judge's principal (i.e., society, government, the judicial system), it should be clear that the divergence between the judge's personal interest and the principal's interest has given rise to agency costs (e.g. "residual loss"). See Jensen & Meckling, *supra* note 8, at 308 (describing "residual loss" as inability of principal to reduce agency costs efficiently to zero because some level of "monitoring" and "bonding" costs are always present in principal-agent relationship). For example, a possible residual loss here is that the judge's behavior causes the integrity of the judicial system to suffer.

Second, focusing on the attorney/agent who was the object of the motion for sanctions, it is possible to see how the judge's behavior leads to an agency cost ripple effect. For example,

## 2. *Non-business divergences ("non-business agency costs")*

The three reasons listed above as explanations for the judicial system's potentially severe agency cost problem, with judges as the source of agency costs, presume that the analytical focus is on business divergences, wherein a judge is literally not doing the job of judging. Outside the domain of business divergences, however, where the judge *is* doing the job of judging, it is not at all clear that the judicial system confronts an agency cost problem of any kind. This is not to suggest that the concept of agency costs loses its analytic value, however.

The presence of agency costs is ambiguous in the context of non-business divergences in interest because the existence of a divergence depends very much on how one chooses to define the principal and the relevant interest(s).<sup>131</sup> For example, assume that ideological interests are at stake. If one defines the principal as the ideological interest group that swept a particular judge, the agent, into appointed office, then judicial rulings by that judge that agree with the ideological standard of the group would not constitute a divergence of interests giving rise to agency costs. Conversely, if the principal is defined as the broader universe of voters who through their elected representatives effectively ratified the laws that an interest group opposes, then judicial rulings favoring the ideology of the interest group would constitute a divergence of interests giving rise to agency costs.

The ambiguous nature of agency costs in the non-business divergence context becomes even more apparent when we consider the relevant dimensions in which a principal can be defined. I shall define at least four such dimensions: the paradigms of "temporally defined principal," "sociologically defined principal," "psychologically defined principal," and "ideologically defined principal." A temporally defined principal is a principal to which a judge is bound by means of a time element. That is, the principal-agent relationship arises from the past (such as an interest group becoming responsible for a judge's appointment), in the present, or in the future (wherein a judge feels beholden to the next generation). A sociologically defined principal, on the other hand, is a label that may be

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because the attorney was not disciplined in this one instance, it is conceivable that the same attorney might engage in the same action later, perhaps on a larger scale. The same client and future clients may, as a result, incur larger agency costs in dealing with this attorney than they would have had the attorney been properly sanctioned. This, all because the judge as agent failed to do his or her job as controller of agency costs.

131. See *supra* notes 110-12 and accompanying text (defining and discussing distinctions between business and non-business divergences).

used to refer to the members of a particular social group such as a political or ethnic group, for whom a judge feels responsible. A psychologically defined principal is an ethereal creature that is difficult to capture, being as it is a particular psychological state to which a judge might feel bound, such as feelings of obligation to adhere to the image of the stern, serious jurist. Finally, the equally attenuated ideologically defined principal may materialize from any articulable set of principles to which a judge might be committed, such as a particular vision of the world.<sup>132</sup>

Plainly, these dimensions represent "ideal types," and any actual agency cost model principal could be defined in several of the dimensions. For example, a judge might be beholden to a combined temporally and psychologically defined state. Of course, it might be theoretically possible to make cost predictions on the basis of single ideal types. That is, one might expect socially defined principals to have more influence over a judge than psychologically defined principals.<sup>133</sup> Such predictability breaks down, however, once the interaction of ideal types is considered. Inability to identify which principal exerts the most influence on a judge's behavior makes it difficult to argue that a divergence from the interests of any particular principal has occurred. A prescriptive argument is not as

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132. See Richard A. Posner, *Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 1, 7 (1987) (discussing ideologically driven divergences of interests between principals and agents). In applying economics to standard setting in constitutional law, Posner observed:

The problem with a standard is that often its practical effect is to delegate the real policymaking authority to the persons who administer the standard—in the present setting, the judges. Because of this problem it may well be descriptively more accurate to view the Supreme Court as the (constrained) agent of the present generation than as the agent of the Constitution's Framers, the latter view being unrealistic because of an insurmountable agency-cost problem. The Framers are dead; the 'instructions' they left, the most important of which are in any event (and inevitably) vague, are losing pertinence with every passing year; and the Framers' agents [if this is how judges should be normatively viewed] have weak incentives to be faithful agents.

*Id.*

To superimpose the agency cost model proposed in this Article onto Posner's comments, Posner seems to suggest that defining a temporally defined principal as the Framers in the constitutional context would give rise to significant non-business divergences and consequent substantial agency costs. Posner's solution to this agency cost problem appears to be a redefinition of the temporally defined principal as the present generation. It could be argued that Posner's redefinition is not the only solution to the agency cost problem he identifies, however. That is, a judge might be deemed to be faithful to the instructions of the Framers if he or she is faithful to the ideology (ideologically defined principal), interest group concerns (sociologically defined principal), or mental make-up (psychologically defined principal) the Framers' possessed. This analysis demonstrates that an agency cost model of the judicial function could be used to predict tension and conflict among judges depending on which principals judges choose to incorporate into their decisionmaking process.

133. The empirical assumption made here is that the social and socio-psychological variables that define a person would, assuming all other things are constant, be more relevant to a judge's decisionmaking than some possibly transient psychological state of mind.

problematic as after-the-fact analysis, however, because a case can always be made for the principals that should govern a judge's behavior in the future.

At this point, three general practical conclusions can be drawn from the preceding analysis of business and non-business divergences in the judicial context. First, the design of agency cost control mechanisms for the purpose of diminishing business divergences will be problematic. This is because the designed mechanism might be perceived by some non-business principals as decreasing the congruence of interests between judge and principal.<sup>134</sup> Second, even if mechanisms could be designed to control business divergences, the stability and longevity of those mechanisms would be called into question by the uncertainty of defining what constitutes a non-business divergence. The introduction and existence of various control mechanisms would only be indicative of the strength of various principals at any point in time. In other words, one could always do something to mitigate the potentially severe business agency cost problem that is confronted by the judicial system. Doing so, however, would alter the preeminence of principals in the judicial system status quo.<sup>135</sup>

Finally, the framework discussed above can be used to cast light upon a host of issues in the economic analysis of judicial behavior. For purposes of this Article, the most significant example of this framework's usefulness is its provision of a rationale for the manner in which lawyers and the executive and legislative branches of gov-

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134. Returning to the golf example discussed *supra* at note 130, assume that the judge in that example was privately compensated per motion hearing held. It is conceivable that there is some level of motion compensation that would cause the judge to sacrifice his or her golf game. In this instance, the "per motion compensation plan" would have become an agency cost controlling mechanism (i.e., the judge hears the motion and no residual loss from failing to do so is incurred). This mechanism works fine if business agency costs are under discussion (i.e., the mechanism gets the judge to do the job of judging). A different conclusion follows however if non-business agency costs are considered. Recall that the definition of the nature of the principal is what determines whether non-business agency costs will arise. See *supra* notes 131-33 and accompanying text (giving examples of varying definitions of principals in judicial context and how interests of principal and agent can diverge to create non-business agency costs). For example, if the relevant principal is held to be the poor and disenfranchised, it is plain that the agency cost controlling mechanism used above does not diminish, but rather exacerbates, agency costs. Specifically, the poor and disenfranchised clients will be unable to compensate the judge, which will lead to a greater divergence between their interests and the judge's interests. This greater divergence will in turn lead to greater agency costs. See Jensen & Meckling, *supra* note 8, at 308 (introducing concept that both principal and agent will seek to "maximize their utility," which will most often diverge). In response, the principal will seek to limit these divergences, thereby incurring agency costs. *Id.*

135. Continuing the example from note 134, *supra*, if the "per motion compensation plan" were ever adopted, wealthy clients might achieve preeminence over poorer clients. If the putative status quo is "equal justice for all," the compensation plan would have clearly altered the preeminence of principals (i.e., wealthy clients vs. poorer clients) within that status quo.

ernment behave prior to and during the judicial selection process. A consideration of this rationale and of related judicial selection matters will be discussed next.

#### IV. MAPPING AN AGENCY COST ADJUDICATORY THEORY ONTO JUDICIAL SELECTION

In subpart A of this portion of the Article the discussion of Part II is revisited, but now as seen through the prism of an agency cost model of the judicial function. Subpart B contains a discussion of agency cost model applications that evaluates some of the judicial selection process reforms proposed by other authors.

##### A. *Introduction to Judicial Careers and Judicial Selection Revisited*

As explained in Part II of this Article, an agency cost model of the judicial function suggests that the plans, cost-benefit calculus, and strategies of lawyers are all reactions to a judicial selection process that has its own agency cost agenda. Recall that the judicial selection process can be described by four general observations.<sup>136</sup> A summary of these four observations along with agency cost explanations follows.

The first observation asserted that a central role in the judicial selection process is played by certain actors who can be classified as initiators, screeners, and affirmers of judicial candidates.<sup>137</sup> The presence of multiple stages of inspectors reflects a concern for correctly ascertaining the competence of a judicial candidate and for predicting whether the candidate will be a source of high or low business agency costs. This concern for minimizing business agency costs could be successfully addressed, however, by having multiple stages of inspection within a single class of inspectors. In view of the existence of different categories of judicial candidate inspectors, though, one might conclude that non-business divergences are the concern. Principals that are differently defined wish to influence the placement of judicial agents so as to minimize the presence of agency costs, whatever they perceive those costs to be.<sup>138</sup>

The second observation suggested that the nature of each judgeship determines which of the judicial process actors will be most involved in the selection process.<sup>139</sup> This situation is once again

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136. See *supra* notes 41-72 and accompanying text.

137. See *supra* note 41 and accompanying text (defining actors involved in judicial screening process).

138. See generally Jensen & Meckling, *supra* note 8, at 308 (describing generally how principals seek to limit agency costs by limiting divergent interests between principal and agent).

139. See *supra* note 49 and accompanying text (discussing differences in judicial selection

consistent with a business divergence agency cost explanation. That is, keeping other factors constant, the higher the level of judicial office, the more widespread will be the impact of the judge's business divergence. One would expect to see, then, that an increase in the level of judicial office would be accompanied by increased involvement of actors who have greater resources, monetary, human, or otherwise, to contribute to the screening of judicial candidates for potential business agency costs.

Yet once again, protecting against potential business agency costs at high levels of judicial decisionmaking cannot be the only motivation for heightened involvement by resource-rich actors. If such protection is the only motivation for increased involvement, a single Senator could simply be endowed with an amount of resources commensurate with the particular level of judicial office being filled. Instead, a partial explanation might be that the decisions of higher judicial offices affect a wide variety of principals and that the different actors who become involved in the selection process might be said to represent those diverse principals or the compromises of those principals.

The third observation is that the President sets the general criteria by which Department of Justice officials will select judicial candidates.<sup>140</sup> Assuming that non-business judicial divergence is the central issue, it seems that giving the President power to set criteria for judicial selection, or, otherwise stated, to identify the principals by which incoming judges will be bound, is an anomalous result. Presumably, compromise among various principals can best be attained by the legislative branch of government. From a non-business agency cost standpoint, therefore, it would be optimal to allow the legislature, and not the executive, to set the criteria for judicial selection. The optimality of that posture, however, is not so apparent once costs other than agency costs are considered. Specifically, the present value of expected non-agency costs of legislative criteria setting would be much higher than presidential criteria setting because in the worst case, the legislature could revisit and redefine, with each new judicial candidate, the selection criteria upon which it had previously agreed.<sup>141</sup>

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process for considering judges at different levels of judiciary). The example given was the extension of home state senatorial courtesy for district court nominees but not for circuit court nominees. *Supra* note 49 and accompanying text.

140. *See supra* note 60 and accompanying text (discussing role of President in judicial selection process).

141. That is, higher costs would result from many more people becoming involved in the criteria-setting process. A single individual is likely to be far more consistent and efficient in the decisionmaking process required to define judicial selection criteria.

There are difficulties, of course, with presidential criteria setting as well. Because of the all-or-nothing nature of presidential elections, the national compromise represented by the President is at bottom a compromise among principals with respect to the issue of time, measured in four-year sections.<sup>142</sup> On the other hand, the judicial selection criteria set by the President are not necessarily criteria that represent a compromise among all principals. Such a populist compromise would more likely be struck in the legislature. An agency cost model of judicial selection would therefore predict the incidence of efforts by disenfranchised principals (those not represented by the President) to "muscle in" on the presidential criteria-setting function before the time allocated to that President expired. The greater the potential non-business agency cost associated with a particular judicial candidate, the greater will be the costs incurred by disenfranchised principals who attempt to influence the criteria-setting process.<sup>143</sup>

Disenfranchised principals could not muscle in on a permanent basis, however, because such a result would obviously defeat the cost effectiveness of having the President set the criteria for judicial selection. For example, if interference by disenfranchised principals took the form of influencing the legislature, the total cost of such interference could never efficiently exceed the cost of having the legislature set the criteria in the first instance. A question arises as to whether disenfranchised principals can remain disenfranchised for a sustained period of time. One possible response is that disenfranchised principals will remain as such until such time as the social cost of their disenfranchisement<sup>144</sup> exceeds the efficiency gain in-

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142. By means of a presidential election, the voting public principal implicitly agrees that one principal, represented by the ideology of the President, has "won," but only for a time period of four years.

143. See Mark Hansen, *The High Cost of Judging*, 77 A.B.A. J. 44, 44 (Sept. 1991) (discussing large sums of money required in judicial election campaigns in many states, noting inherent conflicts of interest that arise when interests that might later come before court contribute money to judicial campaigns, and pointing out desirability of alternatives to current system of electing judges).

144. Perhaps the ultimate expression of social disenfranchisement would be a revolution in which entities within the body politic disagreed. The term "social cost" is a reference to the cost attendant to such a revolution. For example, although the causes of the Rodney King riots in South Central Los Angeles are extremely complex, there is little doubt that the disenfranchisement of the rioters was a part of that causal structure. See Neal Gabler, *Moral Relativism? 'You Don't Get It'*, L.A. TIMES, June 14, 1992, at M1 (stating that some commentators explain riots as behavior of disenfranchised people). Of course, the costs attendant to that social revolution, in both human life and pecuniary terms, were quite real. See Frederick Rose & Sonia L. Nazario, *Fury at Police Verdict Turns Los Angeles into Scene of Mayhem*, WALL ST. J., May 1, 1992, at A1 (reporting loss of life and damage to businesses during April 1992 Los Angeles riots). But see Alix M. Freedman et al., *Some Try to Cash in on Los Angeles Riot*, WALL ST. J., May 6, 1992, at B1 (reporting increased business experienced by gun dealers, funeral homes, and real estate agents in Los Angeles as result of riots).

herent in allowing the President to select the general criteria used in the judicial selection process.<sup>145</sup>

The fourth general observation regarding the judicial selection process is that the entire process may vary greatly from President to President.<sup>146</sup> This notion is consistent with the idea that the President represents the compromise of many principals,<sup>147</sup> a compromise that is reflected in turn by the President's choice of screening criteria for the judicial selection process. Because the distribution of possible national compromises is great, it is not surprising that consistency in compromises from President to President does not exist, and accordingly, that the judicial selection process would reflect this variability.

Having analyzed the judicial selection process from an agency cost perspective, it is now possible to briefly conduct an agency cost analysis of lawyer behavior in the context of the judicial selection process. A distinction relevant to this analysis is the conflict between lawyers' underlying motivations in seeking judicial office and the methods used by lawyers in pursuit of such office.

Regarding aspiring judges' motivation, recall that there are high prestige and power accorded to the federal judiciary. This suggests that the prospect of earning "psychic rent" motivates lawyers to pursue judgeships. That is, the difference between what one is presently earning versus one's next-best earning opportunity is known as "economic rent."<sup>148</sup> Analogously, lawyers pursue judgeships because the judiciary provides them with psychic income such as prestige and power that is far greater than the psychic income they earn in their existing positions. Therefore, because lawyers are motivated by the psychic equivalent of economic rent, it can be said that they are motivated by the prospect of earning psychic rent.

An attorney's motivation for pursuing a judgeship does not necessarily dictate the method that must be used in such pursuit, however. In this regard, an agency cost model of the judicial selection

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145. A social revolution that lurks on the horizon would have an anticipated cost attached to it. If that anticipated cost was greater than the benefit of allowing Presidents to tailor the criteria for judicial selection to their own ideology and to stipulate the principals to which judges would have to be bound to be confirmed, then it would not be worthwhile to continue to allow presidential criteria setting.

146. See *supra* notes 65-72 and accompanying text (discussing different processes and criteria Presidents have used to select judges).

147. See *supra* note 142 and accompanying text (explaining that all types of principals, including members of sociologically defined groups, revisit identity of President every four years).

148. See HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS: A MODERN APPROACH* 386-87 (2d ed. 1990) (defining economic rent as "those payments to a factor of production that are in excess of the minimum payment necessary to have that factor supplied").



process provides an explanation for at least two types of strategies taken by aspiring judges. In the first strategy, the lawyer's operative consideration is the fact that the normal business agency cost controlling factors, for example, the market for corporate control, are not present in the judicial context. Instead, the government is forced to rely on societal norms and personal values as agency cost controlling mechanisms. According to the first strategy, therefore, a lawyer would set about the business of "signalling"<sup>149</sup> to the government that his or her values are consistent with those of a low-business agency cost judge (e.g., successful law professor or lawyer).

A second type of strategy might focus on non-business divergences and attendant agency costs rather than on analogous business divergences and costs. Under this strategy, lawyers could determine the relative expected value of aligning their interests with those of a single principal, as opposed to an amalgamation of principals. For example, lawyers cognizant of the role that ideology has played in the appointment of federal judges might focus exclusively on the ideologically defined principal,<sup>150</sup> assuming such focus is consistent with their own tolerance for risk (i.e., judgeship as reward for politically/ideologically faithful).

### *B. An Agency Cost Assessment of Recommendations for Improving the Judicial Selection Process*

In this section of the Article I shall attempt to evaluate, from an agency cost perspective, two sets of recommendations for improving the judicial selection process. The first recommendations discussed come from Charles Mathias, formerly a United States Senator from Maryland and a member of the Senate Committee on the Judiciary.<sup>151</sup> The second set of recommendations examined are promul-

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149. See generally LOUIS PHILIPS, *THE ECONOMICS OF IMPERFECT INFORMATION* 1-15 (1988) (analyzing theory of market signals and resulting problems in market situations when some agents are imperfectly informed); A. MICHAEL SPENCE, *MARKETING SIGNALLING: INFORMATIONAL TRANSFER IN HIRING AND RELATED SCREENING PROCESSES* 107-15 (1974) (developing economic theory of market signals, which are activities or attributes that influence other individuals in market).

150. See *supra* note 132 and accompanying text (introducing concept of ideologically defined principal developed by Judge Posner).

151. See Charles M.C. Mathias, Jr., *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200, 201-06 (1987) (exploring constitutional foundations and actual exercises of U.S. Senate's advice and consent power and suggesting improvements to system of nominating and approving judges); see also U.S. CONST. art. II, § 2, cl. 2 (stating, in relevant part, that "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States").

gated by Patrice Pitts and Linda Vinson, two practicing attorneys.<sup>152</sup>

### 1. *The Mathias recommendations*

Senator Mathias makes three main recommendations for reform of the federal judicial selection process. First, the Senator recommends that the United States Senate reassess the overall importance of its constitutional role in approving judicial nominees.<sup>153</sup> At times, according to Mathias, the Senate's role in judicial selection may outweigh its role in setting the legislative agenda, and under such circumstances, the Judiciary Committee must be adequately staffed and funded to meet the task.<sup>154</sup> This recommendation seems to be aimed at reducing the judiciary's potential for incurring business agency costs. With greater resources, the Judiciary Committee will be able to separate more effectively those judicial candidates expected to engender low agency costs from candidates expected to engender high agency costs. Although it is conceivable that some interest group or socially defined principal might object to this added governmental spending for purposes of reducing agency costs, such opposition would not be based on a split of interests between specific judges and certain interests groups. Instead, the objecting interest group, called a "budget-control principal," would agitate about the government's decision to hire additional judges but would have no effect on the decisions of those judges once they took office.

Considering the broader economic picture, a more robust statement of Mathias' first recommendation is that the Senate should compare the cost of the additional resources to any additional benefit conferred by those resources. Presumably, these benefits will come from reduced expectation of business agency costs, that is, from higher quality judges and a more cost-effective judicial system. Mathias seems to assume that additional benefits will result that will be at least as large as the additional costs incurred. It is simply not true, however, that the mere incurrence of costs necessarily leads to the generation of benefits.

In his second recommendation, Mathias urges that all members of the Senate should be given the opportunity to examine, in detail, the record of each nominee. He favors routinely making available from the Judiciary Committee a full hearing record and report on each candidate, including dissenting views, for the use of all Sena-

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152. See Pitts & Vinson, *supra* note 69, at 747-53 (discussing participation of minorities in federal judicial system).

153. Mathias, *supra* note 151, at 205.

154. Mathias, *supra* note 151, at 205.

tors.<sup>155</sup> The business agency cost argument for this recommendation is difficult to make. The notion that the full Senate rather than just the Judiciary Committee would be more able to correctly predict the likelihood that a particular judge would generate low agency costs is hard to accept. A non-business agency cost rationale for this recommendation is far more plausible. The principals that are not effectively represented on the Judiciary Committee but are represented by non-committee Senators would have, under Mathias' recommendation, more effective representation. Non-committee Senators could view the nominee's record directly, and perhaps interpret that record in a light favorable to their principals. A more complete analysis of this recommendation, however, would consider the possibility that there might be no additional benefits—that is, reductions in expected non-business agency costs from some principals might be canceled out by increased agency costs of other principals—with an almost certain increase in other economic costs, such as the opportunity costs of non-committee Senators' time.

In his third selection reform recommendation, Mathias suggests that the Senate inquire about the criteria used by the Justice Department in selecting a nominee and about that nominee's satisfaction of those criteria.<sup>156</sup> Mathias requests a similar level of detail from the ABA's Standing Committee on the Federal Judiciary and from the advisory committee of any Senator recommending a nominee.<sup>157</sup> As with the recommendation discussed above, the reductions in expected business agency costs that would result from the implementation of this recommendation are hard to see. In considering the non-business agency cost effect of this recommendation, the analysis is identical to the analysis of the question of removing the President's authority to set judicial selection criteria.<sup>158</sup> In requesting that the Senate be provided with explicit statements of all such selection criteria, the relevant question seems to be the extent to which the principals represented by various Senators would seek to have their Senators revisit the criteria on a candidate-by-candidate basis. The cost-effectiveness of a Judiciary Committee's function would be defeated if a substantial amount of such revisitation occurred.

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155. Mathias, *supra* note 151, at 206.

156. Mathias, *supra* note 151, at 206.

157. Mathias, *supra* note 151, at 206.

158. See *supra* notes 65-72 and accompanying text (analyzing agency costs generated by presidential exercise of authority to set federal judiciary selection criteria).

## 2. *The Pitts/Vinson recommendations*

In an insightful piece published in the pages of the *Howard Law Journal*, Patrice Pitts and Linda Vinson made a case for the installation of an affirmative action program within the federal judiciary.<sup>159</sup> The introduction to their Article is sufficiently eloquent to merit reproduction almost in its entirety.

Barriers that historically have blocked the path of blacks to the educational and professional experiences valued in jurists have preserved the federal bench as the domain of whites. The judicial selection process has stressed qualifications more strongly associated with career patterns more typical of whites and has invited the input of legal and political networks from which blacks historically have been excluded. Thus, black aspirants to the federal judiciary have been placed at a competitive disadvantage relative to their white counterparts.

[T]he federal bench should be more heterogeneous and should better reflect America's cultural pluralism. Failure to take steps to make the federal bench more heterogeneous could undermine the competence and legitimacy of the federal courts by limiting the perspectives of judicial personnel and diminishing the ability of the federal bench to generate public consensus about its decisions. Diversification of the federal judiciary would benefit the aspiring black jurist, and, by improving the competence and representation of the federal judiciary, would bolster public confidence in the legitimacy of the federal courts.<sup>160</sup>

Pitts and Vinson recommend passage of a Senate resolution and issuance of an Executive order by the President that would allow black lawyers to occupy a percentage of district court judgeships equivalent to the percentage of blacks in the general population.<sup>161</sup> As controversial as these recommendations might be, it is possible and desirable to submit Pitts' and Vinson's analysis to the scrutiny of an agency cost model of the judicial selection process. Such analysis will conclude that these authors' recommendations are supportable on grounds of "legitimacy," "competence," and "representation." A summary of the competence claim made by Pitts and Vinson follows and demonstrates how that claim and the legitimacy claim seem ultimately to be reducible to the question of acceptance of judicial decisions. Then, this question of the judicial decision acceptance is analyzed from the standpoint of the agency cost model

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159. See Pitts & Vinson, *supra* note 69, at 768-72 (advocating twofold program where race is viewed as positive factor in evaluating minority candidates and input is solicited from black legal professional organizations).

160. Pitts & Vinson, *supra* note 69, at 743-44.

161. Pitts & Vinson, *supra* note 69, at 769.

presented in this Article. Finally, it is argued that the representation claim forwarded by Pitts and Vinson provides a powerful economic argument that is supportive of their recommendations. That this third Pitts/Vinson claim cannot be successfully analyzed using only an agency cost model demonstrates forcefully the limitations of applying such an economic model to the judicial selection process.

Regarding the first matter, Pitts and Vinson establish certain propositions that, for purposes of this Article, will be taken as given. According to these authors, courts are in the business of making public policy, and judges do so within their judicial discretion.<sup>162</sup> That discretion is informed by a judge's personal values, so in terms of the agency cost model, a judge is an agent beholden to certain sociologically or ideologically defined principals.

Specifically, in a culture in which an individual's race has independent sociological and psychological significance, one would expect a judge of the majority race to be beholden to the sociologically and psychologically defined principals represented by that majority race. By virtue of what it means to be in the majority, there would be no expectation that a judge of the majority race would be beholden to the principals represented by the minority race. A judge of the minority race can never fully appreciate what it means to be a member of the majority race, and vice versa.<sup>163</sup> What it means to be a member of a minority race, however, is that one will have received majority race sociological and psychological inculcation far greater than any minority race sociological and psychological inculcation received by a member of the majority race. It is against this background that Pitts and Vinson present their claim that race-based affirmative action in the federal judiciary would result in greater "competence" within the judiciary. They argue that adding racial diversity to the federal bench would produce a more broad-based, open-minded judicial perspective that would be less likely to ignore the consequences of court rulings affecting minorities.<sup>164</sup>

The unarticulated assumption of this claim is that the judiciary would be deemed to be incompetent in instances where its decisions resulted in ineffective public policy. However, the impact of judicial

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162. See Pitts & Vinson, *supra* note 69, at 759-64 (stressing federal courts' inherent ability to use their discretion when faced with issues never before addressed by courts, and more racially diverse bench would increase various perspectives contributing to use of this discretion).

163. See Pitts & Vinson, *supra* note 69, at 758-61 (noting that human tendency is to identify most easily with members of one's own racial group).

164. Pitts & Vinson, *supra* note 69, at 759.

decisions on *minorities* could be used as a standard for determining competence, as long as the effectiveness of the decision as public policy depended on the acceptance or implementation of the decision by minorities. In other words, if a judicial decision could become effective public policy without the acceptance or implementation of the decision by minorities, then the question of the impact of the decision on minorities would be irrelevant to the question of public policy effectiveness and, therefore, irrelevant to the determination of judicial competence. The importance of judicial decision acceptance to the Pitts/Vinson recommendations is even more apparent once one considers the "legitimacy" rationale for those recommendations. Pitts and Vinson argue that appointing black judges will enhance the legitimacy of federal courts, which is a compelling objective because courts derive ultimate authority from the public respect for their rulings.<sup>165</sup>

Next, the second matter of superimposing an agency cost overlay onto the analysis conducted by Pitts and Vinson will be examined. As a threshold issue, it seems relatively clear that the competence discussed by the authors is not a reference to a judge's ability to control agency costs. The Pitts/Vinson analysis deals purely with non-business agency costs, or the divergence of interests between the judge and alternatively defined principals.<sup>166</sup> Viewed from this perspective, it seems that acceptance of a judicial decision tells only part of the competence story. Indeed, the ultimate issue seems to be the social loss resulting from a decision in which divergence of interests is present, whether or not acceptance of that decision served as a midwife to that social loss. Accordingly, a more balanced approach to the Pitts/Vinson recommendations is that such recommendations would be justified in instances where the marginal expected social loss from a divergence in interests—the cost of not having additional minority perspectives on federal courts that is incurred because majority race judges are primarily bound to majority race sociologically and psychologically defined principals—exceeded the expected social cost of the recommendations.

It is a testament to the binding power of majority race sociologically and psychologically defined principals that most courts do not see race discrimination as an "endemic social phenomenon," but rather as the isolated actions of a few misguided individuals.<sup>167</sup>

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165. Pitts & Vinson, *supra* note 69, at 756.

166. See *supra* note 132 and accompanying text (discussing categorization of alternatively defined principals).

167. Alan Freeman, *Legitimizing Racial Discrimination Through Administrative Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978).

Based on the assumption that, on the whole, majority race judges can never be as sympathetic to minorities as minority race judges, it follows that a minority defendant in a capital case who argues that he or she was arrested only because of an unwritten majority race police practice of rounding up minorities in the vicinity of crimes would not receive a sympathetic hearing from most courts. The probability of such a defendant receiving a sympathetic hearing would increase appreciably, however, in the instance where a sitting minority judge had only the day before been unsuccessful in hailing three cabs that had driven past her, only to pick up a majority race customer two blocks down the road. The judge's relation of the story to her fellow judges would also assist in sensitizing them to the existence of racial discrimination as an endemic social phenomenon.<sup>168</sup>

Assuming that it is the majority race sociologically and psychologically defined principals that precondition a majority or minority race judge to disbelieve a defendant such as the one discussed above, it follows that minority race principals will provide a corrective. Use of these principals will lead to a decreased probability of judicial error. Indeed, the expected social cost of not having the minority corrective present will be the difference in the probability of judicial error<sup>169</sup> multiplied by the human cost in each case, which in the hypothetical above would be the value of the defendant's life.

The preceding hypothetical put the case starkly to illustrate the application of the agency cost model. In the interests of completeness and intellectual honesty and stepping away from the agency

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168. It is conceivable, indeed likely, that majority race judges might resent the beneficiaries of affirmative action appointments and would therefore not be receptive to the possibility of being sensitized to minority concerns. The claim made here, however, is that the personal experiences of minority judges would increase the probability that a minority defendant living through similar experiences to the judge's might receive a more sympathetic hearing.

169. See Audain, *supra* note 14, at 1230 n.84, 1266 n.300 (1990) (suggesting that litigants demand "errorless judicial decisions" from judges because litigants ignore the probability of harm inherent in all proceedings from judicial error). By way of example, assume that the probability of erroneously sentencing a minority defendant to death, absent the presence of a minority judge, is 45%. If that probability is 25% with the presence of a minority judge on the bench, the difference in probability is 20% and the minority defendant's chance of receiving a just sentence becomes 20% greater. The idea of expected value is that magnitudes that are uncertain should be weighed by their probability of occurrence. VARIAN, *supra* note 148, at 214-17. In other words, if there is only a 10% chance of receiving a dollar, that dollar is only worth 10 cents. Applying this to the example here, the expected loss to society would be 20% multiplied by the value of the defendant's life, which in our society is generally measured by future earnings. For example, wrongful death statutes typically limit damages available to plaintiffs/beneficiaries to economic or pecuniary benefit which might have been expected from the decedent in the form of services, support, or contribution during the expected remainder of the decedent's lifetime. WILLIAM L. PROSSER AND W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 127, at 949-51 (5th ed. 1984).

cost model to consider the broader social calculus, it is conceivable that the bias created by the minority race principals would lead to an increase in judicial decisional error. In addition, the expected value of further loss of life caused by the erroneous release of guilty criminal defendants would have to be weighed in the balance. The expected psychic value of retribution for the victim and the victim's loved ones would also have to be considered.

Finally, and briefly, an analysis of the "representation" rationale advanced by Pitts and Vinson<sup>170</sup> reveals the limitations of an agency cost model of the judicial selection process. Namely, it is quite clear that the control of agency costs is not the only function performed by judges. For example, the presence of a minority judge in a position of prestige and power on the federal bench would yield social benefits unrelated to the judge's actual performance in the office by providing a positive role model to other minorities. In a society in which racism imposes a high psychic cost upon its members, not to mention the cost of wasted human capital, the representation argument has a powerful economic appeal. An agency cost model of the judicial function sheds very little light on the representational function performed by minority judges, however. Indeed, the model would have to be distorted beyond recognition to achieve that purpose. This is not to say that no other economic models might be more appropriate here; for example, the representational argument might be explained by focusing on the preference-shaping function of the judicial office.

#### CONCLUSION

In this Article, I have argued that an agency cost model of the judicial function holds a great deal of intellectual promise. I have attempted to demonstrate that promise by proposing one such model and by applying that model to selected recommendations for improving the judicial selection process. My work here is a first approximation. I can only hope that others will soon share in my sense of promise.

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170. See Pitts & Vinson, *supra* note 69, at 764-68 (arguing that federal bench comprised of more minority judges would better represent spectrum of opinions in American society, resulting in more democratic judiciary, despite fact that life tenure removes judges from political arena).