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The Right to Appeal

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It is time for the Supreme Court to explicitly recognize a constitutional right to appeal. Over the last century, both the federal and state judicial systems have increasingly relied on appellate remedies to protect essential rights. In spite of the modern importance of such remedies, however, the Supreme Court has repeatedly declined to recognize a due process right to appeal in either civil or criminal cases. Instead, it has repeated nineteenth-century dicta denying the right of appeal, and it has declined petitions for certiorari in both civil and criminal cases that seek to persuade the Court to reconsider that position.

This Article argues that a right to appeal protects both private litigants and the justice system as a whole. First, doctrinal consistency necessitates the explicit recognition of a constitutional right to appeal—a right that the Supreme Court's criminal and punitive damages doctrines have already implicitly recognized. Second, the modern procedural system has developed in a way that relies on appellate remedies as part of fundamental due process. Traditional procedural safeguards—such as the jury trial and the executive clemency process—may once have sufficiently protected due process rights. In the modern era, however, these procedures have diminished at the same time that reliance on appeals has grown. As a result, if appellate remedies are removed from the procedural framework, the system as a whole cannot provide adequate due process protection. Finally, recognizing constitutional protection for appellate rights would also express a normative policy choice, promoting the values of institutional legitimacy, respect for individual dignity,

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predictability, and accuracy. Appellate procedure has earned a place in our contemporary understanding of due process; it is time to recognize its role as a fundamental element of fair judicial practice.

INTRODUCTION

The promise of appeal is built into American popular culture. It is "the immemorial cry of every defeated litigant: 'I'll take it to the

Supreme Court!' "[1] Both the criminal defendant who is wrongly convicted and the civil defendant facing a potentially bankrupting judgment hold on dearly to the promise of error correction in a higher court. Their lawyers may quickly instruct them that Supreme Court review is both discretionary and difficult to obtain, trying to refocus their hopes on a state or federal court of appeals.[2] What even the lawyers may not know, however, is that appellate review is not constitutionally guaranteed; in some jurisdictions, the losing litigant may be forced to go without any review of the trial court's verdict at all. This was the case for Massey Energy Company, which faced a quarter-billion-dollar verdict (the seventh-largest verdict nationwide in 2007) that was reviewed only by a single trial judge in West Virginia.[3] It was also the case for Frank Billotti, who was found guilty of first-degree murder and sentenced to life in prison without the possibility of parole—and without the right of direct appeal.[4]

This Article argues that the Supreme Court should explicitly recognize a constitutional right to appeal. Over the last century, both the federal and state judicial systems have increasingly relied on appellate remedies to protect individual rights, including the fundamental rights of life and liberty.[5] In spite of the modern importance of such remedies, however, the Supreme Court has repeatedly declined to recognize a due process right to appeal in either civil or criminal cases. Instead, it has repeated nineteenth-century dicta denying the right of appeal,[6] and it has declined

1. James J. Kilpatrick, *Supreme Court Load Grows Heavier*, EVENING INDEP. (St. Petersburg, Fla.), Dec. 30, 1972, at 14-A.

2. *See* The Honorable Samuel A. Alito, Jr. et al., *The Inaugural William French Smith Memorial Lecture: A Look at Supreme Court Advocacy with Justice Samuel Alito*, 35 PEPP. L. REV. 465, 477 (2008) ("Well, one thing that you cannot control is a client that is absolutely convinced that the decision below is wrong, and therefore they want to take it to the Supreme Court. You hear that expression, 'We'll take it all the way to the Supreme Court.' Sometimes I can say to them, 'I mean, literally, you have zero chance of having the Court grant certiorari in this case.' ").

3. *See* Petition for a Writ of Certiorari at 2, Cent. W. Va. Energy Co. v. Wheeling Pittsburgh Steel Corp., 555 U.S. 1045 (2008) (No. 08-218), 2008 WL 3884291, at *2.

4. Billotti v. Legursky, 975 F.2d 113, 114 (4th Cir. 1992). Billotti filed a habeas petition in federal court; the federal court found that West Virginia's discretionary review procedures "comport[ed] with the requirements of due process," and dismissed the case. *Id.*

5. *See infra* Part II.B.

6. *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 31 & n.4 (1987) (Stevens, J., concurring) (stating that the Supreme Court's "precedents . . . tend to support" the idea that "[s]tates are under no constitutional duty to provide for civil appeals"); Cobbledick v. United States, 309 U.S. 323, 324–25 (1940) ("[T]he right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice . . . ."); McKane v. Durston, 153 U.S. 684, 687–88 (1894) ("A review by an appellate court of the final

petitions for certiorari in both civil and criminal cases seeking to persuade the Court to reconsider that position.[7]

The Supreme Court has been able to avoid ruling on the matter precisely because appellate remedies are nearly universal: the federal court system and forty-seven states provide—as a matter of state law—either a constitutional or statutory requirement for appeals as of right in both civil and criminal cases.[8] Nevertheless, this high degree of state-level protection does not obviate the need for a constitutional remedy. Without the protection of an effective system of appellate review, there will continue to be parties who face significant deprivations of liberty or property without any guarantee of review by a higher court. Even if these cases are few in number, they are nonetheless important; the due process doctrine is, after all, meant to protect the unusual or rare case in which justice has been denied. As

judgment in a criminal case, however grave the offence of which the accused is convicted, . . . is not now a necessary element of due process of law.").

7. *See, e.g.*, Superior Highwall Miners, Inc. v. Frye, 130 S. Ct. 2354 (2010); *Cent. W. Va. Energy Co.*, 555 U.S. 1045; NiSource, Inc. v. Estate of Tawney, 555 U.S. 1041 (2008); Camden-Clark Mem'l Hosp. Corp. v. Boggs, 553 U.S. 1017 (2008); Mountain Enters., Inc. v. Fitch, 541 U.S. 989 (2004). On the criminal side, the Court denied certiorari petitions in *Ratliff v. Virginia*, 516 U.S. 815 (1995), and in *Billotti*, 507 U.S. 984.

8. *See* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 513–14 (1992). There are three states—New Hampshire, West Virginia, and Virginia—without a state constitutional or statutory provision for appeal as of right for criminal defendants. *See* Bundy v. Wilson, 815 F.2d 125, 128 (1st Cir. 1987). Two of these states (New Hampshire and West Virginia) have, within the last decade, adopted a court rule providing review of all appeals in the state supreme court. *See* N.H. SUP. CT. R. 3, *available at* http://www.courts.state.nh.us/rules/scr/scr-3.htm ("A mandatory appeal shall be accepted by the supreme court for review on the merits. A mandatory appeal is . . . an appeal from a final decision on the merits issued by a superior court . . . ."); W. VA. R. APP. P. 21 (clerk's cmt.), *available at* http://www.courtswv.gov/legal-community/court-rules/appellate-procedure/pdfs/Revised-Rules-of-Appellate-Procedure-FINAL.pdf. The New Hampshire rule, however, does note certain exceptions that do not constitute mandatory appeals such as "an appeal from a final decision on the merits issued in a sentence modification or suspension proceeding. N.H. SUP. CT. R. 3. Virginia does have an intermediate appellate court, but the court has discretionary review power over non-capital criminal cases, and provides appeals as of right only in limited categories of civil cases. General civil cases, by contrast, do not go to the intermediate court and are instead subject to discretionary review in the Virginia Supreme Court. *See* VA. CODE ANN. § 17.1-4056(A) (2010); *see also* Bevel v. Commonwealth, 717 S.E.2d 789, 790 n.11 (Va. 2011) ("In criminal cases in Virginia, other than in cases where a sentence of death is imposed, the awarding of an appeal is discretionary and not a matter of right."); L. Steven Emmert, *Certiorari v. Error Correction: Which Is Which, and Why It Matters*, VA. APP. NEWS & ANALYSIS (Feb. 3, 2010), http://www.virginia-appeals.com/essay.aspx?id=155 (explaining that the Supreme Court of Virginia has discretionary review in most cases and noting that "you have to petition for a writ in criminal and traffic cases"). However, a "refusal" by the Supreme Court of Virginia is considered to be a decision on the merits. *See* Sheets v. Castle, 559 S.E.2d 616, 619 (Va. 2002).

the Supreme Court has stated, "[E]xtreme cases are more likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards. This is particularly true when due process is violated."[9] By recognizing a nondiscretionary constitutional right to appeal, the Court can ensure that liberty and property rights remain protected even in the unusual or uninviting case.

Recognizing constitutional protection for appellate rights also prevents states from eliminating current statutory protections in an era of shrinking state budgets. Even before the current fiscal crisis, some scholars had advocated that states eliminate appeals as of right in order to save fiscal and administrative resources.[10] That threat moved closer to becoming a reality in 2012, when a Virginia state lawmaker proposed eliminating the state's intermediate appellate court in order to save eight million dollars a year.[11] But when weighed against the risks of erroneous and uncorrectable rulings, the disruption of other procedures that depend on robust appellate rights, and diminished faith in the judicial system, the costs of guaranteed review are costs worth shouldering.

This Article argues that a right to appeal protects both private litigants and the justice system as a whole.[12] Part I examines the role

9. Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 887 (2009). *But see* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 373 (1993) ("For better or for worse, the [due process] doctrine reflects an implicit premise that individual fairness must often be sacrificed to the practical needs of the modern administrative state.").

10. *See* Bernard G. Barrow, *The Discretionary Appeal: A Cost Effective Tool of Appellate Justice*, 11 GEO. MASON L. REV. 31, 31 (1988); Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeal*, 34 SW. L.J. 1151, 1156–57 (1981); Robert M. Parker & Ron Chapman, Jr., *Accepting Reality: The Time for Adopting Discretionary Review in the Courts of Appeals Has Arrived*, 50 SMU L. Rev. 573, 582 (1997) ("Discretionary review would save time, money, and effort and would more honestly describe the system currently in place, a system in which courts exercise discretion behind a facade of deliberation.").

11. *Deeds: Kill the Court of Appeals*, VLW BLOG (Jan. 3, 2012), http://valawyersweekly.com/vlwblog/2012/01/23/deeds-kill-the-court-of-appeals/ (noting that Senator Creigh Deeds introduced a bill to abolish the Virginia Court of Appeals).

12. This Article is the first to present a sustained argument in favor of an overarching right to appeal in civil and criminal cases. One scholar has proposed such a right in a short piece. *See* Henry G. Fins, *Is the Right of Appeal Protected by the Fourteenth Amendment?*, 54 JUDICATURE 296, 297 (1971). Other scholars have argued explicitly for a right to appeal in criminal cases or in limited subsets of civil cases. *See, e.g.*, Arkin, *supra* note 8, at 513, 520 (arguing for right in criminal cases); Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 69 (1985) (arguing for a right in limited categories of civil cases); James E. Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction*, 8 U. PUGET SOUND L. REV. 375, 375 (1985) (arguing for right of appeal in criminal cases); Alex S. Ellerson, Note, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373,

of appellate remedies in the American justice system, analyzes appellate outcomes and reversal rates, and explores the convergence of civil and criminal appellate remedies. Parts II and III make doctrinal arguments for the recognition of a constitutional right: Part II focuses on the private interests of individual litigants, applying the *Mathews v. Eldridge* balancing test to weigh those private interests against the cost of appellate review, and Part III argues that doctrinal consistency necessitates the explicit recognition of a constitutional right to appeal, as the Court's criminal and punitive damages doctrines have already implicitly recognized such a right. Part IV moves away from doctrine to examine the larger structure of the modern procedural system. It argues that even though Congress and the states may have voluntarily exceeded the requirements of constitutional due process when they first adopted broad appellate rights, the procedural system that has grown up around those rights relies on appellate remedies so broadly that they are now part of fundamental due process. Traditional procedural safeguards—such as the jury trial and the executive clemency process—may once have sufficiently protected due process rights. In the modern era, however, these procedures have diminished at the same time that reliance on appeals has grown; if appellate remedies are removed from the procedural framework, the system as a whole cannot provide adequate due process protection. Finally, Part V examines the expressive value of constitutionalizing appellate rights. It weighs the normative values inherent in constitutional recognition of a nondiscretionary right to appeal, and it analyzes the values that would be favored—as well as those that would be disfavored—by extending a nondiscretionary right of appeal.

I. THE ROLE OF APPELLATE REMEDIES IN THE AMERICAN JUSTICE SYSTEM

Appellate remedies play a significant role in the American justice system.[13] Legal scholars have identified a number of different

382 (1991) (arguing for a right in criminal cases). Two prominent scholars have also filed an amicus brief arguing for a right to appeal in civil cases. *See* Brief of Amici Curiae Law Professors in Support of Petitioner at 1, *Cent. W. Va. Energy Co*., 555 U.S. 1045 (No. 08-218), 2008 WL 4360892, at *1. Another has suggested that the Supreme Court should recognize a right to civil appeals in the context of a broader discussion of constitutional procedure. *See* John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 580 (1984).

13. This Article uses the term "appeal" in its broad modern sense "to designate any attempt to have a higher court review the factual or legal findings of a lower tribunal." Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety*

functions that a robust appellate system serves, including correcting legal and factual errors;[14] encouraging the development and refinement of legal principles;[15] increasing uniformity and standardization in the application of legal rules;[16] and promoting respect for the rule of law.[17] In criminal cases, appellate rights play an additional role in guarding against wrongful conviction of the innocent.[18]

This Part examines the role of appellate remedies in the American justice system. It begins by analyzing appellate outcomes, including the rate of appeals, the rate of reversals, and the winners and losers of the appellate process. It continues by examining the intertwining of process and policy on appeal; specifically, it argues that although some people have advocated for differential treatment of civil and criminal appeals as a policy matter, the two spheres present the same process values. Treating the two spheres together allows a deeper focus on the procedural and systemic benefits of the appellate process that go beyond the question of who wins and who loses in a particular case.

of Appellate Courts' Resolving Issues in the First Instance, 87 NOTRE DAME L. REV. 1521, 1546 (2012) (citation omitted).

14. *See* Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 49 (2010) ("Most depictions of appellate courts suggest that they serve two core functions: the creation and refinement of law and the correction of error.").

15. *See* PAUL D. CARRINGTON, DANIEL J. MEADOR, & MAURICE ROSENBERG, JUSTICE ON APPEAL 3 (1976) ("[A]ppellate courts are needed to announce, clarify, and harmonize the rules of decision employed by the legal system in which they serve."); Oldfather, *supra* note 14, at 49 (noting that a function of appellate courts is "the creation and refinement of law"); *see also* Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203, 214 (2011) (examining the "institutional dimension" of how courts handle changing legal doctrine through the appellate process).

16. *See* Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 771 (2006); Cassandra Burke Robertson, *Forum Non Conveniens on Appeal: The Case for Interlocutory Review*, 18 SW. J. INT'L L. 445, 455 (2012) ("The classic remedy for inconsistent application of the law is appellate review.").

17. *See* Michael Heise, *Federal Criminal Appeals: A Brief Empirical Perspective*, 93 MARQ. L. REV. 825, 827 (2009) ("Despite their comparative scarcity, appealed cases—far more than cases that settle or go to trial—form the basis of much of what many observers know about the legal system.").

18. *See* Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 591–92 (2009) (noting the role of criminal appellate courts in protecting against wrongful conviction).

A. Appellate Outcomes

Appellate remedies are able to play a significant jurisprudential role precisely because of the near-universality of appellate rights. In federal court and in nearly every state, litigants who lose in the trial court are guaranteed one appeal as of right.[19] In civil cases, not every losing party will avail itself of an appeal; researchers examining appellate outcomes have estimated that only approximately fifteen percent of state-court civil cases are appealed.[20] Plaintiffs and defendants appealed trial-court judgments at a nearly equal rate.[21] In criminal cases, defendants who plead guilty—especially to smaller crimes—are unlikely to appeal.[22] However, almost every criminal defendant who loses at trial will have an incentive to file an appeal.[23]

On appeal, civil defendants tend to do better than plaintiffs.[24] Overall, when ruling on the merits, state appellate courts affirmed the trial court verdict in about two-thirds of all cases and reversed or modified the judgment in nearly one-third of the cases.[25] When broken down by type of appellant, however, success rates diverge significantly; forty-two percent of trial court decisions favoring plaintiffs were reversed or modified, as compared to only twenty-one

19. *See* Arkin, *supra* note 8, at 513–14.

20. *See* THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 212979, APPEALS FROM GENERAL CIVIL TRIALS IN 46 LARGE COUNTIES, 2001–2005, at 2 (2006).

21. *See id.* at 3 (noting that forty-eight percent of appeals were filed by plaintiffs and fifty-two percent by defendants).

22. *See* Heise, *supra* note 17, at 832 ("[P]lea bargains are rarely reviewed for error."); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 320 (2011) ("[O]nly a small percentage of individuals convicted of a misdemeanor file an appeal or seek other post-conviction review of counsel's effectiveness."); *see also* JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 185055, FEDERAL CRIMINAL APPEALS, 1999 WITH TRENDS 1985–1999, at 1, 3 (2001), http://bjs.ojp.usdoj.gov/content/pub/pdf/fca99.pdf (noting that defendants appealed sixteen out of every 100 federal court convictions overall, but only five per 100 in misdemeanor cases).

23. *See, e.g.*, Heise, *supra* note 17, at 829 ("Because pursuing a criminal appeal is essentially free—or more accurately, because criminal appellants are not forced to internalize the full costs of their appeal—there is little incentive *not* to appeal."); J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 445 n.43 (1994) ("In 1991-92, there were 152 appeals from every 100 convictions after contested trials. A significant number of appeals follow guilty pleas, which explains how 152 appeals follow 100 convictions after *contested* trials." (citations omitted)).

24. *See* Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125, 125 (2001) ("Defendants appealing their losses after trial by jury obtain reversals at a 31% rate, while losing plaintiffs succeed in only 13% of their appeals from jury trials.").

25. *See* COHEN, *supra* note 20, at 1.

percent of decisions favoring defendants.[26] Large verdicts were especially likely to be overturned; "nearly half (48%) of appeals from trials with damage awards of over $1 million were reversed or modified by the appellate courts," while only thirty-five percent of cases with a damage award between $1 and $100,000 were overturned on appeal.[27] In federal court, verdicts favorable to plaintiffs were reversed in one-third of appeals, and verdicts favorable to defendants were reversed in only twelve percent of cases.[28]

Appeals from criminal convictions arise in a very different landscape than civil appeals. First, the prevalence of plea bargaining filters those cases which go through the trial process.[29] Second, generally only the convicted defendant has a possible appellate remedy, as double jeopardy protections prevent the government from appealing an acquittal.[30] Those defendants who are convicted at trial have incentive to appeal, and indigent defendants are provided publicly appointed counsel.[31] Thus, the cases eligible for appeal may differ from the larger universe of criminal cases in two different—and potentially opposing—respects. At the pretrial stage, the defendant who chooses to go to trial rather than accept a plea bargain is likely to have a relatively stronger case. After trial, however, a losing defendant has a strong incentive to appeal even a case that has proven quite weak.[32]

Most criminal convictions are affirmed on appeal. In federal court, the affirmance rate is approximately seventy percent, though there are significant differences among federal circuits.[33] In state

26. *See id.* at 5.

27. *Id.* at 6.

28. *See* Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 947.

29. *See* Heise, *supra* note 17, at 827 ("Selection effects and case stream filtering work in a manner that most often reduces the number of criminal appeals likely to be reversed."); *see also* Editorial, *Trial Judge to Appeals Court: Review Me*, N.Y. TIMES, July 17, 2012, at A24 ("[A] vast majority of criminal cases—97 percent of federal cases, 94 percent of state cases—are resolved by guilty pleas.").

30. *See* Heise, *supra* note 17, at 830–31 ("In the civil context, either party has the ability to appeal. In the criminal context, however, constitutional double jeopardy protections for criminal defendants generally afford defendants only with the opportunity to appeal an adverse trial judgment.").

31. *See id.* at 829.

32. *See id.* ("Because pursuing a criminal appeal is essentially free—or, more accurately, because criminal appellants are not forced to internalize the full costs of their appeal—there is little incentive *not* to appeal.").

33. *See id.* at 833 ("Although the overall average nationwide affirmance rate for 2006 criminal appeals was 68.5%, across the nation's twelve federal circuits affirmance rates

court, the affirmance rate varies between seventy and eighty percent.[34] When appellate courts reverse a conviction, they are much more likely to order a retrial than to acquit the defendant entirely.[35] Outlier sentences—both the shortest and the longest—are more likely to be reversed on appeal than mid-range sentences, though defendants facing longer sentences are less likely to win complete acquittal on appeal than those facing shorter ones.[36]

B. The False Dichotomy Between Civil and Criminal Appeals

Arguments in favor of extending constitutional protection to appellate remedies have typically focused either on criminal or civil appeals, rather than supporting a generalized appellate remedy.[37] But while some policy reasons may apply in one sphere and not the other, the process values supporting broad appellate remedies are more alike than different.

Those who argue in favor of extending constitutional protections only to civil appeals point out the extensive safeguards already present in criminal cases.[38] For example, criminal prosecutions must be proven beyond a reasonable doubt; the indigent criminal defendant is entitled to appointed counsel; and criminal juries may acquit without being subject to review.[39] In many states, juries can convict

ranged from a low of 49.3% (D.C. Circuit) to a high of 85.1% (Eleventh Circuit). Reversal rates ranged from 5.7% to 20.5%.").

34. *See id.* at 830; *see also* JOY A. CHAPPER & ROGER A. HANSON, NAT'L CTR. FOR STATE COURTS, UNDERSTANDING REVERSIBLE ERROR IN CRIMINAL APPEALS 5 (1989) ("[T]he overall affirmance rate for [appellate courts in five states] is 79.4%. Four of the courts (all but Rhode Island) are within plus-or-minus two percentage points of that figure (78.6, 79.3, 79.3, and 81.7%); Rhode Island's affirmance rate was 70.8%.").

35. CHAPPER & HANSON, *supra* note 34, at 5 ("Acquittals constituted only 1.9% of all appeals and only 9.4% of all nonaffirmances or 'winners.' In no jurisdiction did acquittals occur in as many as 4% of all appeals. A remand with the possibility of retrial was more likely—6.6% of all appeals and 31.9% of all winners.").

36. *See id.* at 6 (" 'Winning big' (i.e., an acquittal or a new trial) occurs most frequently in appeals with the least serious sentence; appeals involving the longest sentences show the highest percentage of 'winning little' (i.e., resentencing or other modification).").

37. *See, e.g.*, Brief of Amici Curiae Law Professors in Support of Petitioner, *supra* note 12, at 1, 2008 WL 4360892, at *1 (focusing on civil appeals); Arkin, *supra* note 8, at 513 (focusing on criminal appeals).

38. *See* Brief of Amici Curiae Law Professors in Support of Petitioner, *supra* note 12, at 6–7, 2008 WL 4360892, at *6–7.

39. *See id.* at 5–7, 2008 WL 4360892, at *5–7; *see also* Lavett v. People, 7 Cow. 339, 343 (N.Y. 1827) ("Criminal proceedings have thrown around the innocent so many guards that the writ of error is almost useless."); Bedinger v. Commonwealth, 7 Va. (1 Call) 461, 469 (1803) (stating that some safeguards of defendants in criminal cases include the "power of the jury to acquit in a criminal case, the pardoning power of the executive, and the objection to great delays in the execution of the criminal law").

only though unanimous agreement, and the executive branch generally possesses the power to grant clemency.[40] As a result, some have concluded that criminal outcomes are protected by sufficient procedural safeguards, and that "guaranteed access to postjudgment review" is therefore needed only in civil cases.[41] This view is also grounded in long-standing practices, as the federal system and some states historically offered greater appellate remedies in the civil sphere than in the criminal sphere.[42] This divergence continues today in Virginia, where parties can appeal as of right in civil cases involving domestic relations, workers' compensation, and administrative law cases—but have only a discretionary appeal in noncapital criminal cases.[43]

In spite of the historically greater protection for civil appeals, some have argued that it is more important to extend appellate protection to criminal cases than civil ones.[44] Criminal appeals protect against the erroneous deprivation of liberty and, in capital cases, against the erroneous deprivation of life.[45] As one scholar has pointed out, it is "generally accepted as a part of American social philosophy that the right to liberty is as great as, if not greater than, the right of property."[46] As a result, some scholars have argued that it violates the constitutional guarantee of equal protection to allow civil appeals as of right without extending the same protection to criminal appeals.[47]

40. *See* Brief of Amici Curiae Law Professors in Support of Petitioner, *supra* note 12, at 5–6, 2008 WL 4360892, at *5–6.

41. *Id.* at 7, 2008 WL 4360892, at *7.

42. *See, e.g.*, Reetz v. Michigan, 188 U.S. 505, 508 (1903) ("Neither is the right of appeal essential to due process of law. In nearly every State are statutes giving, in criminal cases of a minor nature, a single trial, without any right of review . . . . In civil cases a common rule is that the amount in controversy limits the entire litigation to one court, yet there was never any serious question that in these cases due process of law was granted."); Andrews v. Swartz, 156 U.S. 272, 272 (1895) (noting that, at the time the case was decided, New Jersey law allowed appeals as of right in non-capital cases but allowed only a discretionary "writ of grace" in capital cases).

43. VA. CODE ANN. § 17.1-405 (2010); *see also* Bevel v. Commonwealth, 717 S.E.2d 789, 790 n.1 (Va. 2011) ("In criminal cases in Virginia, other than in cases where a sentence of death is imposed, the awarding of an appeal is discretionary and not a matter of right."); Robert P. Davidow & Damon W.D. Wright, *Virginia's Discriminatory Treatment of Criminal Appeals: Some Constitutional and Policy Considerations*, 6 GEO. MASON U. C.R. L.J. 1, 5–6 (1996).

44. *See* Arkin, *supra* note 8, at 521–24; Lobsenz, *supra* note 12, at 389.

45. *See* Lobsenz, *supra* note 12, at 383 (arguing that the "risk of convicting the innocent" justifies constitutional protection of criminal appeals).

46. Fins, *supra* note 12, at 297.

47. Davidow & Wright, *supra* note 43, at 33–34 (arguing that Virginia's appellate statutes "placed civil litigants in a 'preferred appellate position' " in relation to that of criminal defendants).

Others have argued that the complexity of constitutional criminal procedure makes appellate remedies particularly important within the criminal justice system.[48]

But while most commentators have argued for expanded protection of either civil or criminal appeals, the justifications that they cite are largely the same in both spheres. Both civil and criminal appeals protect against arbitrary or erroneous application of the law; both promote the development and standardization of legal doctrine; and both assist in standardizing outcomes for similarly situated litigants.[49] The risks of withholding appellate remedies are also more similar than different. On the criminal side, scholars have pointed out that because of the high error rate at trial, appeals are critical to maintaining institutional legitimacy: "The degree of error reported, if left uncorrected because of the elimination of a right of appeal that is merely statutory, would be intolerably high and would delegitimate any punishment imposed through such an adjudicatory process."[50] Others have made a similar legitimacy argument in support of civil appeals:

> As the framers of the Constitution recognized, the absence of a guaranteed appeal in cases involving substantial deprivations of property would undermine confidence in the judicial system; "were there no appeal [guaranteed for civil judgments], every man would have reason to complain, especially when a final judgment, in an inferior court, *should affect property to a large amount*."[51]

Given the similar roles played by civil and criminal appeals, it is surprising that some would recommend treating them differently. This inconsistent treatment makes more sense, however, when viewed in terms of policy rather than doctrine. In the criminal justice system,

48. *See* Arkin, *supra* note 8, at 574–76.

49. *See* Barbara B. Crabb, *In Defense of Direct Appeals: A Further Reply to Professor Chemerinsky*, 71 AM. BANKR. L.J. 137, 138 (1997) ("Americans continue to believe in the right of appeal, both as a means of giving a second chance to be heard, albeit in limited fashion, thus providing a greater sense of fair treatment, and for its normative function, in essence reining in the outliers among the lower courts, with the result that litigants can expect reasonably uniform and consistent treatment within the courts of any particular jurisdiction.").

50. Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943, 980 (2002).

51. Brief of Amici Curiae Law Professors in Support of Petitioner, *supra* note 12, at 7–8, 2008 WL 4360892, at *7–8 (quoting NOAH WEBSTER, EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION (1787), *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–1788, at 53 (Paul Leicester Ford ed., 1968) (1888)).

robust appellate remedies aid criminal defendants—a group with very little political support.[52] Those who do support expanded protections for criminal defendants tend to fall nearer to the left side of the political spectrum.[53] In civil cases, however, support for a robust system of appellate review skews toward the right: because large civil verdicts are more likely to be reversed on appeal, corporate defendants and tort reform groups are more likely to support civil appellate rights.[54] The effect of judicial elections may further solidify these positions, as the public is likely to choose judges whose views conform to those of the electorate.[55]

Thus, when people advocate for expanded appellate process, they may advocate for that expanded process only in a limited number of cases: only in death penalty cases, or only in felony cases, or only in civil cases, or only in civil cases where punitive damages have been awarded. Such a strategy may backfire, however, if it limits the

52. *See* Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1300 (2000) ("[L]egislatures often do not consider the interests of criminal defendants. In a 'tough on crime' political world, politicians do not win elections unless they announce that they will punish criminals severely."); *see also* Gerstein v. Pugh, 420 U.S. 103, 127 (1975) (Stewart, J., concurring) ("[T]he Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, the custody of a refrigerator, the temporary suspension of a public school student, or the suspension of a driver's license." (citations omitted)).

53. *See, e.g.*, Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 34 (2001) ("In criminal cases, Democratic judges generally are more sympathetic to criminal defendants, while Republicans tend to favor prosecution and law enforcement."); William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74, 75, *available at* http://www.usnews.com/opinion/articles/2008/12/09/william-rehnquist-writes-in-1957-on-supreme-court-law-clerks-influence (characterizing Supreme Court clerks as taking "left[ist]" positions that showed "extreme solicitude for the claims of Communists and other criminal defendants").

54. *Cf.* Richie Heath, *Their View: Personal Attacks Aimed at Protecting Profits, Not Justice*, W. VA. REC. (May 18, 2011, 1:00 PM), http://wvrecord.com/arguments/235596-their-view-personal-attacks-aimed-at-protecting-profits-not-justice (arguing that the West Virginia Association for Justice's primary motive for objecting to the creation of a state intermediate court of appeals and to the guarantee of appeals as of right in civil cases is that its members—personal injury lawyers—benefit from the state's restrictive appeals process, using it to extort lucrative settlements from businesses, and noting that employers are leaving the state to escape the inhospitable legal environment).

55. Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 171 (2009) ("Judges facing Republican retention agents [i.e., a Republican electorate] tend to vote in accord with standard Republican policy: they are more likely to vote for businesses over individuals, for employers in labor disputes, for doctors and hospitals in medical malpractice disputes, for businesses in products liability cases, for original defendants in torts cases, and against criminals in criminal appeals. The mirror image applies for judges facing retention decisions by Democrats.").

political constituency that could support the expansion of appellate rights and reduces the possibility of coalition building; members of the electorate who support greater appellate rights in cases involving punitive damages, for example, may be different from those who support greater appellate rights for criminal defendants.

This effect may explain the difficulty faced in West Virginia, where tort reform groups have supported, and plaintiffs' attorneys have opposed, a guaranteed right to appeal.[56] Because the measure was presented as an outlet to review high punitive damage awards, it gained traction only with those who supported damage limitations as a policy matter.[57] Although the West Virginia Supreme Court adopted new rules for 2011 that require disposition on the merits, a proposal to create an intermediate court of appeals stalled in the state legislature.[58]

If different policy preferences account for people's varying views about the importance of civil and criminal appeals, then considering the civil and criminal spheres together may overcome a narrow political emphasis.[59] At the individual level, such unification

56. *See* Heath, *supra* note 54.

57. *See, e.g.*, Brief of Amici Curiae Law Professors in Support of Petitioner, *supra* note 12, at 7–8, 2008 WL 4360892, at *7–8 (limiting the argument to civil cases); Heath, *supra* note 54 (noting the difference in political support).

58. *See* Andrea Lannom, *Appeals Declining but Some Still Want Intermediate Court*, ST. J. (W. Va.), Feb. 10, 2012, at 23 (quoting supporters of the creation of an intermediate court as stating that such a court would "increase review of circuit court decisions and to aid in the development of West Virginia law," and quoting opponents of the measure who state that it would merely "create a new layer of judges that the richest companies in West Virginia can appoint themselves").

59. When advocating that civil and criminal appeals be considered together, this Article refers only to direct appeals, as these provide the closest analogy between the civil and criminal spheres. On the criminal side, however, there are other types of post-trial judicial review that are beyond the scope of this Article, most notably habeas corpus review. *See* Christopher M. Johnson, *Post-Trial Judicial Review of Criminal Convictions: A Comparative Study of the United States and Finland*, 64 ME. L. REV. 425, 428 (2012) (noting that the American judicial system divides " 'post-trial judicial review' into three phases for state prisoners (direct appeal, state post-conviction review or collateral attack, and federal habeas corpus), and two phases for federal prisoners (direct appeal and habeas corpus)"). As others have noted, the relief offered through collateral review in a habeas proceeding does not substitute for direct appellate review. *See, e.g.*, Russell M. Coombs, *A Third Parallel Primrose Path: The Supreme Court's Repeated, Unexplained, and Still Growing Regulation of State Courts' Criminal Appeals*, 2005 MICH. ST. L. REV. 541, 626 ("[C]onstitutional doctrine applicable to a case is more likely to favor the defendant in a state appellate court than in a federal habeas court. . . . [The Supreme Court] requires that defendants challenging their convictions or sentences on direct appeal in state courts receive the benefit of new rules of federal constitutional law that favor them. In contrast, the Supreme Court has held that, perhaps with narrow exceptions, state prisoners seeking habeas relief in federal courts do not receive that benefit.").

allows for consistency between the two spheres in cases where the remedies overlap; punitive damages can serve a punishment purpose in civil litigation, and monetary restitution may be ordered in a criminal case. In such cases, "comparable deprivations should generally require a comparable degree of process. . . . The mere label of 'criminal' or 'civil' should not be determinative of due process rights that attach when the individual is threatened with virtually the same harm in either instance."[60]

Even when civil and criminal remedies play different roles, taking a unified approach to civil and criminal appeals allows the discussion to focus on the systemic effects of changed processes rather than the policy effects of changed outcomes.[61] Such systemic changes will have real policy outcomes, but these policy outcomes are not limited to the immediate effect of who wins and who loses in a particular case. Instead, policy outcomes extend to the population at large: those who observe the justice system, those who participate in it, and those who consider participating in it—for example, by choosing between litigation and arbitration, by including forum selection clauses in contracts, and even by choosing where to locate a business.[62]

II. DUE PROCESS PROTECTION FOR APPELLATE REMEDIES

The Supreme Court has repeatedly disclaimed the existence of constitutional protection for either criminal or civil appeals.[63] Because

60. Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 57–58 (2006).

61. *See* Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 86 (2008) ("[T]o the extent that detaching the two spheres is justified in substance, a parallel split in procedure is not necessarily entailed. . . . [D]issociating substantive civil and criminal law from procedure would better serve the goals of both.").

62. *See, e.g.*, Justin Anderson, *Bill Lays Out Intermediate Appellate Courts*, W. VA. REC. (April 2, 2009, 11:30 AM), http://www.wvrecord.com/news/218275-bill-lays-out-intermediate-appellate-courts (noting that Chesapeake Energy removed hundreds of jobs from West Virginia after the state supreme court denied appellate review of a $400 million verdict against it).

63. *See* M.L.B. v. S.L.J., 519 U.S. 102, 131 (1996) (Thomas, J., dissenting) (acknowledging the Court's "oft-affirmed view that due process does not oblige States to provide for any appeal, even from a criminal conviction"); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 31 n.4 (1987) (Stevens, J., concurring) (disclaiming constitutional protection for civil appeals); Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."); Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("[T]he right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice . . . ."); Reetz v. Michigan, 188 U.S. 505, 508 (1903) ("Neither is the right of appeal essential to due process of law. In nearly every state are statutes giving, in criminal cases of a minor nature, a single trial, without any right of review. . . . In civil cases a

most jurisdictions granted a statutory right of appeal, however, these statements were almost always dicta; the Court has only rarely been faced with cases in which all appellate review was denied. On the criminal side, the issue has been raised in at least two certiorari petitions in recent decades;[64] however, the last time that the Supreme Court accepted such a case was in 1895, in *Andrews v. Swartz*.[65] At that time, New Jersey law allowed an appeal as of right in non-capital cases but allowed only a discretionary "writ of grace" in capital cases.[66] After the defendant was convicted of murder in the New Jersey state court and sentenced to death, the State denied his application for a writ of error.[67] The defendant then sought a writ of habeas corpus in federal court, arguing that New Jersey's discretionary appeal statute violated the U.S. Constitution.[68] The Supreme Court upheld the denial of habeas relief, repeating its earlier words from *McKane v. Durston*[69]:

> A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. It is, therefore clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be proper; and whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself.[70]

common rule is that the amount in controversy limits the entire litigation to one court, yet there was never any serious question that in these cases due process of law was granted."); McKane v. Durston, 153 U.S. 684, 687–88 (1894) (disclaiming constitutional protection for criminal appeals).

64. The Court denied at least two petitions for certiorari that explicitly raised the issue. *See* Billotti v. Legursky, 975 F.2d 113, 114 (4th Cir. 1992) (originating in West Virginia), *cert. denied*, 507 U.S. 984 (1993); Petition for Writ of Certiorari at 4–7, Ratliff v. Virginia, 516 U.S. 815 (1995) (No. 94-1982).

65. 156 U.S. 272, 273 (1895).

66. *See id.* at 272.

67. *Id.* at 272–73. The principal ground for the defendant's attempted appeal was that "all persons of his race and color were excluded in the drawing of the grand jury which indicted him" and from the petit jury hearing his case; although there were African-American citizens "qualified in all respects to act both as jurors and grand jurors," they "were purposely excluded, and always have been, by the sheriff of Warren county." *Id.* at 273.

68. *Id.* at 273–75.

69. 153 U.S. 684 (1894).

70. *Andrews*, 156 U.S. at 275 (quoting *McKane*, 153 U.S. at 687–88).

Much can change over the course of a century, however, and nearly ninety years later two members of the Supreme Court expressed doubt that the denial of appellate review would be upheld in the modern era. In a case challenging the quality of appellate representation in a criminal appeal, Justice Brennan, in a dissent joined by Justice Marshall, argued that if the Court were directly presented with a case in which a criminal defendant had been denied the right to appeal altogether, he would "have little doubt that we would decide that a State must afford at least some opportunity for review of convictions, whether through the familiar mechanism of appeal or through some form of collateral proceeding."[71] He added that "[t]here are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property."[72]

Justice Brennan's reference to "liberty or property" seems to imply that his due process rationale would extend to both civil and criminal cases. In recent years, however, the Supreme Court has, on at least seven separate occasions, declined an invitation to consider the question of constitutional protection for appellate rights.[73] Five of the seven were civil cases arising in West Virginia,[74] where the state lacks an intermediate appellate court and had an overburdened state supreme court with the power of discretionary review.[75] Between 1999 and 2008, the West Virginia Supreme Court refused to hear sixty-nine percent of civil appeals and eighty-four percent of criminal appeals, leaving the losing party with no appeal from the trial court's judgment.[76] As a result, some very large civil cases were denied appellate review entirely; in one case, a $220 million verdict was

71. Jones v. Barnes, 463 U.S. 745, 756 n.1 (1983) (Brennan, J., dissenting).

72. *Id.*

73. On the civil side, the Court denied certiorari petitions in *Superior Highwall Miners, Inc. v. Frye*, 130 S. Ct. 2354 (2010); *Camden-Clark Hospital Corp. v. Boggs*, 553 U.S. 1017 (2008); *NiSource, Inc. v. Estate of Tawney*, 555 U.S. 1041 (2008); *Central West Virginia Energy Co. v. Wheeling Pittsburgh Steel Corp.*, 555 U.S. 1045 (2008); and *Mountain Enterprises, Inc. v. Fitch*, 541 U.S. 989 (2004). On the criminal side, the Court denied certiorari petitions in *Ratliff v. Virginia*, 516 U.S. 815 (1995), and *Billotti v. Legursky*, 507 U.S. 984 (1993).

74. *See supra* note 73.

75. *See* Lannom, *supra* note 58, at 23; Anderson, *supra* note 62. In December 2010, the West Virginia Supreme Court adopted new appellate rules providing for a ruling on each appeal. *See* W. VA. R. APP. P. 21 clerk's cmt. Rulings may be made by non-precedential memorandum opinions. *Id.*

76. W. VA. PUB. DEFENDER SERV., THE NEED FOR AN INTERMEDIATE COURT OF APPEALS IN WEST VIRGINIA WITH AN APPEAL OF RIGHT IN CRIMINAL CASES 5 (2009), *available at* http://www.wvpds.org/PDS.intermediate%20court%20Proposal%20and%20Argument.pdf.

denied appellate review, and in another case a $400 million verdict was similarly denied review.[77] Two remaining cases were both criminal convictions, one of which arose in West Virginia and the other in Virginia, which provides only discretionary review for most criminal convictions.[78]

The question of constitutional protection for appellate rights will likely continue to arise in both civil and criminal cases until the Supreme Court agrees to address the issue. This Part examines possible bases for such a right. It first looks at the historical protection for appellate remedies and concludes that although some scholars have argued that historical practice supports the inclusion of appellate remedies within an originalist conception of due process, the evidence to support that position is not strong enough to be likely to carry the day with the Supreme Court. This Part then examines the role of contemporary practice in the due process calculus, and determines that there is a stronger argument for considering contemporary practice in the due process analysis, given how interwoven appellate remedies have become in both the civil and criminal justice systems. Finally, using contemporary practice, this Part analyzes protection for appeals as of right under the *Mathews v. Eldridge* balancing test.

A. Limited Historical Protection for Appellate Remedies

Almost every legal system has provided for a second level of review in some situations. As one scholar has pointed out, "The underlying sentiment that there is (or must be) a higher authority which may be consulted to correct injustice has been ingrained in formal, governmental dispute-resolution systems throughout recorded history."[79] Thus, while ancient procedures do not match modern ones, there is at least some historical support for a right of appeal. The extent of this support, however, is less than clear; "[n]o part of the history of United States courts presents such a tangle of detail as does the handling of appeals."[80]

On the civil side, scholars have argued that appellate remedies were part of the due process rights recognized either at common law

77. Adam Liptak, *U.S. Supreme Court Is Asked to Fix Troubled West Virginia Justice System*, N.Y. TIMES, Oct. 12, 2008, at A41.

78. *See* Davidow & Wright, *supra* note 43, at 5.

79. J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 433 (1994).

80. Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 918 (1997) (quoting JAMES WILLIAM HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 101 (1950)).

or at least by 1868, when the Fourteenth Amendment was adopted.[81] They have rested this argument on the fact that the "writ of error," which facilitated the correction of legal error by a higher court, was allowed "as a matter of right" under English common law.[82] The term "appeal" was primarily used on the equity side, and referred to review of factual matters rather than being limited to legal error.[83] In criminal cases, however, review was much more limited, and, somewhat counterintuitively, was more readily available in the least serious criminal cases than in the most serious.[84] Review was provided as of right in misdemeanor cases, as long as "the defendant made a showing to the attorney-general of sufficient probable cause," but, in capital cases (like the New Jersey case discussed above[85]), "such a writ was granted only upon the express consent of the attorney-general, which was a matter of grace."[86]

In the early days of the United States, the right to appellate review was significantly limited. There was no right of review for criminal convictions in federal cases until 1879.[87] On the civil side, an appeal as of right was more common. The federal judiciary statute

81. *See, e.g.*, Brief of Amici Curiae Law Professors in Support of Petitioner, *supra* note 12, at 7–8, 2008 WL 4360892, at *7–8 (tracing back to colonial times the sentiment that guaranteed appeals for civil litigants were essential to confidence in the judicial system).

82. David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 541 (1990); *see also* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 452 (1996) ("At common law, review of judgments was had only on writ of error, limited to questions of law.").

83. *See* Bilder, *supra* note 80, at 914 ("The legal procedure known as 'the appeal' did not refer to what we now think of as an 'appeal'—the correction by a higher court of errors of law made by a lower court. Instead, the 'appeal' referred to a procedure under which a higher tribunal could completely and broadly rehear and redecide not only the law, but also the entire facts of a case."); James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1570 (2001) ("Both appeals from proceedings in equity and admiralty, and writs of error to secure review of judgments at common law, were available to appellants and petitioners in error as a matter of right.").

84. Until the 1700s, any review in criminal cases was allowed only *ex gratia*, as a matter of grace and discretion by the Crown. In the eighteenth century, however, review in minor cases was delegated to the courts and allowed as of right. R. v. Wilkes (1770), 4 Burr. 2527, 98 Eng. Rep. 327, 339 (K.B.). In more serious cases of treason and felony, however, review remained available only by permission of the Crown. In these cases, the defendant was said to have "forfeited all he has to the Crown," and the sovereign could therefore "exercise his pleasure whether or not to give it back." *See* 2 JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE § 1362, at 1176–77 (2d ed. 1913).

85. *See supra* note 65.

86. Rossman, *supra* note 82, at 541.

87. Fins, *supra* note 12, at 296. ("[T]he remedy of appeal to a reviewing court developed very slowly. . . . [F]rom 1789 to 1879, a period of 90 years, a person who was convicted criminally by a federal court had no right of review.").

incorporated such a right, but only in cases meeting an amount in controversy requirement.[88] Not all states extended such appeal rights.[89] Some states were slow to develop an appellate court system.[90] Others who had offered appeals as of right for civil cases at the time of their founding subsequently eliminated that right when later faced with crowded dockets.[91] While there was greater protection at common law for appellate review in civil cases than in criminal ones, this preference did not take root in every state; for example, Louisiana constitutionalized a right to criminal appeals in 1845, specifying at the time that the state supreme court should provide them "preference over civil cases."[92] Thus, while the historical argument for due process protection is stronger for civil appeals than for criminal appeals, historical practice is by no means clear. This lack of clarity, combined with the Supreme Court's own refusal to extend due process protection to the right of appeal suggests that the Court will be unlikely to locate such a right in an originalist conception of historical practice.

B. The Evolution of Due Process

However, even if the Supreme Court is unpersuaded that historical practice demonstrates a due process protection of appellate remedies, it may nevertheless decide to extend such a right in light of modern practice. As one legal scholar has noted, "[W]hen it comes to what types of 'procedures' are 'due,' almost no one embraces

88. *See* Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 606 & n.22 (1985).

89. *See* Rossman, *supra* note 82, at 522 (noting that the First Judiciary Act in 1789 permitted writs of error in civil cases exceeding $2,000 in value, but "made no explicit provision for writs of error in criminal cases"); *see also* James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1461–62 (2000) (noting that although "the scope of review differed," for the appeal in equity and the writ of error at common law, "both forms of appellate review were available as a matter of right and did not depend on the exercise of equitable discretion by the superior court," leading to the creation of "a set of geographically convenient inferior federal tribunals in order to avoid the necessity of appeals to the distant and expensive Supreme Court in every case").

90. Rossman, *supra* note 82, at 543 (noting that Georgia did not establish a state supreme court until 1848).

91. *See* Meredith R. Miller, *A Picture of the New York Court of Appeals at the Time of* Wood v. Lucy, Lady Duff-Gordon, 28 PACE L. REV. 357, 372 (2008) (noting that in New York, "with the court's docket still overburdened, the legislature eliminated appeals as of right in most civil cases, effective on June 1, 1917").

92. Jeremiah E. Goulka, *The First Constitutional Right to Criminal Appeal: Louisiana's Constitution of 1845 and the Clash of the Common Law and Natural Law Traditions*, 17 TUL. EUR. & CIV. L.F. 151, 195 (2002).

originalist methods of interpretation."[93] Instead, most observers agree that the specific requisites of due process can and will change over time, even, on occasion, doing so "exceedingly quickly."[94] The Supreme Court itself has written that "[d]ue process, as this Court often has said, is a flexible concept that varies with the particular situation."[95]

Given the flexibility of the due process analysis, the Court may well be persuaded that even if the right to appeal in state court was not considered to be an integral part of due process in 1868, it has certainly become one by the current time. In describing the importance of an appellate remedy in the modern system, observers have pointed out that "[a]lthough its origins are neither constitutional nor ancient, the right has become, in a word, sacrosanct."[96] In modern American practice, "the availability of review by a 'multi judge' appellate tribunal [has become] an essential safeguard."[97] International law likewise recognizes the importance of appellate remedies; the International Covenant on Civil and Political Rights provides that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."[98]

The Supreme Court has not provided a bright-line rule for determining "when procedures that satisfied the demands of due process in the past may be rendered unconstitutional by changes in the facts and circumstances."[99] In the personal jurisdiction context, the Court has stated that the requirements of due process "can be as readily offended by the perpetuation of ancient forms that are no

93. Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 2 (2007).

94. Alex S. Ellerson, Note, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373, 382 (1991); *see also* Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1362 (2012) ("[C]urrent due process doctrine strongly suggests that requiring procedural safeguards to adapt to changing facts and circumstances is faithful to the Court's understanding of the dictates of procedural due process.").

95. Zinermon v. Burch, 494 U.S. 113, 127 (1990).

96. Dalton, *supra* note 12, at 62.

97. Fins, *supra* note 12, at 296.

98. International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 54 (Dec. 16, 1966); *see also* Cavallaro, *supra* note 50, at 983–84 & n.135 (noting that "federal implementing legislation may yet be necessary" to incorporate this ICCPR provision into domestic law, as "at the time of ratification, every state did provide for some form of appellate review, but . . . states are free to abrogate those rights where they are statutory or to amend them where protected by state constitutions").

99. Parkin, *supra* note 94, at 1361.

longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage."[100] In the civil context more broadly, the Court has been willing to consider both "[m]odern practice" and "common-law practice" in its due process analysis,[101] and has applied the *Mathews v. Eldridge*[102] three-factor balancing test (discussed at greater length in Part II.C.) for determining "what process is due."[103]

It is less clear whether the Supreme Court would likewise consider modern practice in the criminal context. The Court's due process jurisdiction has been more restrictive in criminal than in civil cases. In *Medina v. California*,[104] a decision upholding a state's decision to place the burden of proof on criminal defendants in competency hearings, the Court limited the use of the *Mathews* balancing test in criminal cases, holding that it "does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process."[105] Instead, the Court concluded that it was appropriate to defer to state choices and to conclude that a state's procedural practice is "not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[106]

But even in the criminal context, the Court has not limited its due process inquiry to historical practice alone, as it demonstrated in *Medina*.[107] After "[d]iscerning no historical basis" for concluding that "the allocation of the burden of proving incompetence to the defendant violates due process," the Court also "turn[ed] to consider whether the rule transgresses any recognized principle of 'fundamental fairness' in operation."[108] Justice O'Connor's concurrence, joined by Justice Souter, noted that the Court's opinion did not foreclose an evolving view of due process requirements; she wrote, "While I agree with the Court that historical pedigree can give a procedural practice a presumption of constitutionality, the presumption must surely be rebuttable."[109] As a result, she concluded

100. Shaffer v. Heitner, 433 U.S. 186, 212 (1977).
101. *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 426, 435 (1994).
102. 424 U.S. 319 (1976).
103. *Id.* at 335.
104. 505 U.S. 437 (1977).
105. *Id.* at 443.
106. *Id.* at 445 (quoting Patterson v. New York, 432 U.S. 197, 201–02 (1977)).
107. *Id.*
108. *Id.* at 448.
109. *Id.* at 454 (O'Connor, J., concurring) (citation omitted).

that the majority opinion should be read "to allow some weight to be given countervailing considerations of fairness in operation, considerations much like those the Court evaluated in *Mathews*."[110] Legal scholars have also agreed that Justice O'Connor's reading comports with the Court's criminal due process jurisprudence, as "an exclusively historical approach is inconsistent with a large number of the Court's prior criminal cases."[111] As Justice O'Connor had pointed out, in cases dealing with such diverse matters as psychiatric evaluation for insanity claims, the potential for prejudicial media publicity, and the standards for handling potentially exculpatory evidence, the Court has historically applied a flexible due process standard.[112]

Thus, the prevalence of appellate remedies in modern practice may support the extension of due process protection to the appellate process. On the civil side, the typical test for procedural due process is the *Mathews* balancing test.[113] On the criminal side, support of the *Mathews* test would probably not be enough by itself; an advocate would also need to show that the right to appeal can be "ranked as fundamental" in modern practice.[114]

C. Applying the Mathews *Balancing Test*

In *Mathews v. Eldridge*, the Supreme Court adopted a three-factor balancing test for determining "what process is due."[115] In the decades since it has been adopted, the *Mathews* test has become the most commonly used yardstick for measuring the boundaries of due

110. *Id.*

111. Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 423 (2001); Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 15 (2006); Bruce J. Winick, *Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of* Medina v. California *and the Supreme Court's New Due Process Methodology in Criminal Cases*, 47 U. MIAMI L. REV. 817, 827 (1993) ("In those cases, cited by Justice O'Connor but ignored by the majority, the Court held that the Due Process Clause required procedural safeguards despite a lack of historical tradition.").

112. *Medina*, 505 U.S. at 454 (O'Connor, J., concurring) (providing a due process right for a state-paid psychiatric evaluation in support of insanity claims); Sheppard v. Maxwell, 384 U.S. 333, 335 (1966) (providing due process protection from prejudicial media publicity); Brady v. Maryland, 373 U.S. 83, 86 (1963) (requiring the production of potentially exculpatory evidence); Winick, *supra* note 111, at 826 n.57.

113. *See infra* Part II.C.

114. *Medina*, 505 U.S. at 445 (quoting Patterson v. New York, 432 U.S. 197, 201–02 (1977)) (internal quotation marks omitted).

115. Mathews v. Eldridge, 424 U.S. 319, 333–35 (1976).

process.[116] The *Mathews* standard requires courts to weigh (1) "the private interest that will be affected by the official action" and (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" against (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[117] The *Mathews* test essentially applies a cost-benefit analysis to procedural due process; the Court noted that "[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased insurance that the action is just, may be outweighed by the cost."[118] This cost-benefit analysis is not entirely unbounded, however. Although it applies to the "additional or substitute procedural safeguards" under consideration, it does not constrain those procedures necessary to ensure a basic level of fairness; courts have noted that "[t]he benefits of efficiency can never be purchased at the cost of fairness."[119]

What, then, are the private interests protected by the appellate process? The error-correction function of appellate review protects litigants from being wrongfully deprived of property (in civil litigation) or life and liberty (in criminal litigation). These interests go to the heart of the Due Process Clause, which by its very terms protects against the deprivation of "life, liberty, or property, without due process of law."[120]

The value of appellate safeguards for preventing such deprivation is likewise significant. Examining the reversal rates described above demonstrates the value of appellate protection.[121] In civil cases, state appellate courts reversed the underlying judgment in whole or in part in approximately one-third of the cases.[122] In cases where the consequence of erroneous property deprivation was the

116. *See* California *ex rel.* Lockyer v. Fed. Energy Regulatory Comm'n, 329 F.3d 700, 709 n.8 (9th Cir. 2003).

117. *Mathews*, 424 U.S. at 335.

118. *Id.* at 348.

119. Malcolm v. Nat'l Gypsum Co., 995 F.2d 346, 350, 354 (2d Cir. 1993) ("[I]t is possible to go too far in the interests of expediency and to sacrifice basic fairness in the process.").

120. U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."); *id*. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

121. *See supra* Part I.A.

122. *See supra* Part I.A.

highest (that is, in cases with the largest verdicts), appellate remedies were even more valuable; "nearly half (48%) of appeals from trials with damage awards of over $1 million were reversed or modified by the appellate courts."[123] Without the right to an appeal, civil defendants facing a large verdict would be forced to absorb an erroneous damage judgment nearly half the time. By any measure, this is significant "risk of an erroneous deprivation."[124]

On the criminal side, the incidence of reversal is lower,[125] but the rights protected—life and liberty—are even more fundamental. Given the value of these rights, even a small risk of erroneous deprivation is troubling.[126] As in civil cases, the defendants at the extremes of the sentencing continuum are also the ones most protected by allowing a robust appellate process—researchers have found that defendants facing the longest sentences were more likely to obtain some relief on appeal than were those defendants given middling sentences, while defendants facing lower sentences were more likely to obtain complete relief.[127]

The other side of the *Mathews* equation—the fiscal cost and administrative burden of providing appeals as of right—cannot outweigh the benefits provided by a robust appellate system; as one scholar has noted, "[I]f appeals were so unduly burdensome . . . it seems unlikely that forty-seven states would have enacted a first appeal as of right in criminal cases and the other three would have enacted discretionary appellate procedures."[128] When donning the Rawlsian "veil of ignorance"[129] to determine what procedures an individual would expect if facing either a large civil verdict or criminal sentence, most individuals would likely find the cost of

123. COHEN, *supra* note 20, at 6.

124. Mathews v. Eldridge, 424 U.S. 319, 335, 345 (1979).

125. *See supra* Part I.A.

126. Such reversals may arise either because the defendant was factually innocent or because the defendant was denied important procedural protections. *See* Arkin, *supra* note 8, at 548 ("If factual innocence is the ultimate criterion, then current reversal and sentence modification rates may overstate the additional accuracy provided by an appeal because many of these determinations reflect procedural defects rather than judgments that the defendants were, in fact, possibly innocent.").

127. CHAPPER & HANSON, *supra* note 34, at 6 (" 'Winning big' (i.e., an acquittal or a new trial) occurs most frequently in appeals with the least serious sentence; appeals involving the longest sentences show the highest percentage of 'winning little' (i.e., resentencing or other modification).").

128. Arkin, *supra* note 8, at 549.

129. *See* JOHN RAWLS, A THEORY OF JUSTICE 136–42 (1971) (developing the concept of a "veil of ignorance," which asks what societal rules parties would make if they were forced to act without knowledge of whether those rules would prove beneficial or detrimental to them personally).

appellate procedure a small one to pay for the protection against erroneous deprivation of life, liberty, or property.

In fact, the electorate of almost every U.S. jurisdiction has chosen to support just this balance: the federal system and nearly all states already provide an appeal of right even absent a constitutional obligation to do so. In the states without statutory protection for appeals, the electorate's inability to don such a Rawlsian veil has hindered the adoption of such a right. On the civil side, corporations who believe they are likely to face large verdicts support expanded appellate rights, and plaintiffs' attorneys who rely on enforcing large judgments oppose them.[130] On the criminal side, felon disenfranchisement laws means that those facing significant prison sentences may be excluded entirely from the electorate.[131] The extension of appellate rights has thus become politicized in recent decades,[132] and a state facing such questions today is therefore in a different position than a state that adopted broad appellate rights a century ago.

For the jurisdictions who have already created such a statutory right, however, constitutionalizing the appellate process would not increase costs at all—though it would prohibit cutting existing appellate rights to remedy a budget shortfall.[133] In a jurisdiction without mandatory appellate rights, there would be an added cost in providing an appeal as of right in every civil case.[134] Expansion of the court system requires funding, and adding additional cases to appellate dockets is likely to delay the resolution of pending cases. The administrative burden is somewhat lighter given that the

130. *See supra* Part I.

131. Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1504 n.146 (2005).

132. *See supra* Part I.B.

133. *See* Parker & Chapman, *supra* note 10, at 582 ("Discretionary review would save time, money, and effort and would more honestly describe the system currently in place, a system in which courts exercise discretion behind a facade of deliberation."). *See generally* Barrow, *supra* note 10 (arguing that reform of Virginia's discretionary appeal would be a cost-effective way of improving the quality of appellate justice); Lay, *supra* note 10 (arguing for the adoption of discretionary appeal in federal cases).

134. It should be noted, however, that when the West Virginia Supreme Court adopted a new rule providing appellate review as of right, it did so without additional funding or resources. Because the rule was changed in late 2012, it remains to be seen how well it will work in practice. Additionally, because the change was adopted through the rulemaking process, it remains subject to change by the court. *See* Robin Jean Davis, Supreme Court Justice of the W. Va. Supreme Court, *Revised Rules of Appellate Procedure Modernize the Appellate Process*, W. VA. LAW., http://www.courtswv.gov/public-resources/press/cj-column/Davis-July-Sep-2010.htm (last visited July 17, 2012).

appellate infrastructure already exists. Even states with a purely discretionary system of appeals could integrate an appeal as of right without changing their court structure, although they might face the fiscal cost of added staff and a higher administrative burden if the same number of judges were to issue opinions on a larger number of cases. West Virginia's new court rule providing review of all appeals will be a good test case for whether such review can be done with additional funding; even without legislative support, the court quintupled the number of cases decided in the first four months of operating under the new rules.[135]

III. DOCTRINAL CONSISTENCY AND APPELLATE REVIEW

The fundamental importance of private interests which appellate error correction protects—and the risk of erroneous deprivation of life, liberty, or property without such process—may tip the balance in favor of recognizing a constitutional due process right of appeal. As the American Bar Association has pointed out, appellate review is not merely a desirable part of legal practice—it is, instead, a "fundamental element of procedural fairness."[136]

This Part goes beyond the *Mathews* analysis to examine how the right to appeal has become ensconced among the procedures required to ensure basic fairness. It analyzes the role of appellate remedies in the development and consistent application of legal rules. Whereas the prior Part analyzed the right to appeal as a matter of freestanding procedure, this Part puts the right within its doctrinal context. It argues that the Supreme Court's disavowal of such a right is inconsistent with the way the Court has developed constitutional doctrines related to the appellate process.

In examining the right to appeal as part of the larger doctrinal framework, it is necessary to go beyond the bare requirements of the *Mathews* procedural due process analysis. As other scholars have noted, *Mathews* itself is not ideal for determining when judicial review (either by a district court judge or on appeal) is needed; these questions "raise issues lying beyond the *Mathews* framework."[137] As

135. Margaret Workman, *An Intermediate Appeals Court Is a Bad Idea; W.Va. Doesn't Need It; Taxpayers Cannot Afford It*, CHARLESTON DAILY MAIL, June 13, 2011, at P5A.

136. 3 AM. BAR ASS'N, JUDICIAL ADMIN. DIV., STANDARDS RELATING TO APPELLATE COURTS § 3.10, at 18 (1994).

137. Fallon, *supra* note 9, at 331; *see also* Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 643 (2006) ("*Mathews*'s utilitarianism created intellectual space for

the Supreme Court has recognized, procedures that are required for fundamental fairness are not subject to restriction under the *Mathews* test.[138] Assessing whether a practice ranks as fundamental brings together the substantive and procedural strands of the due process analysis; both of the strands, at their core, protect against the arbitrary application of government power.[139]

With regard to appellate review, the surrounding doctrine suggests that a right to appeal has indeed become a fundamental protection of litigant rights in both civil and criminal litigation. First, the Supreme Court's equal protection jurisprudence has effectively created a right to meaningful appeal for indigent criminal defendants. Second, the Court's treatment of criminal appeals mooted by the defendant's death expresses a degree of deference to the appellate process that is inconsistent with a lack of appellate rights. Finally, the Court's requirement of heightened review on appeal in punitive damage and libel cases can only be effective if there is also a right to appellate review in the first instance.

A. Equal Protection and Due Process on Appeal

Although the Supreme Court has not yet acknowledged a due process right to appeal, it has relied on the equal protection doctrine to prohibit states from withholding statutory appellate remedies from indigent criminal defendants. This trend began with *Griffin v. Illinois*,[140] in which the Court reversed a state-court judgment that allowed non-capital defendants to appeal only if they paid for a copy of the trial record and transcript, and ordered that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[141] The plurality opinion reiterated its statement from *McKane v. Durston* that states are "not required by the Federal Constitution to provide appellate courts or a right to appellate review at all," but it specified that the lack of an appellate requirement did not mean that a "[s]tate that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."[142]

undue process claims. Its balancing test placed governmental interests in decision costs on the same plane as private interests in process modifications.").

138. *See* Medina v. California, 505 U.S. 437, 443 (1992).

139. *See* Fallon, *supra* note 9, at 372.

140. 351 U.S. 12, 18 (1956) (plurality opinion).

141. *Id.* at 19.

142. *Id.* at 18 (citing McKane v. Durston, 153 U.S. 684 (1894)).

Although the plurality opinion in *Griffin* seemed to rest on an equal-protection ground, it emphasized the importance of appellate review in general. The opinion noted that "[a]ll of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence."[143] It also recognized how reliant the states have become on the error-correction function of appeals, stating that "[s]tatistics show that a substantial proportion of criminal convictions are reversed by state appellate courts" and acknowledging that "deny[ing] adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside."[144]

Perhaps because this rhetoric sounded as if the Court might be willing to recognize a due process right of appeal, Justice Frankfurter concurred separately in an attempt to forestall such an interpretation. He noted that it might be tempting to find a due process basis for such protection: "The right to an appeal from a conviction for crime is today so established that this leads to the easy assumption that it is fundamental to the protection of life and liberty and therefore a necessary ingredient of due process of law."[145] Nevertheless, he cautioned that such an interpretation would be in error: "It is significant that no appeals from convictions in the federal courts were afforded (with roundabout exceptions negligible for present purposes) for nearly a hundred years . . . it is now settled that due process of law does not require a State to afford review of criminal judgments."[146] He therefore suggested that states who found themselves overly burdened by facilitating indigent appeals could choose to reduce appellate rights for all.[147]

In spite of Justice Frankfurter's concerns, states did not retract appellate rights after *Griffin*—instead, appellate practices continued to develop, and the Supreme Court came nearer to recognizing the fundamental importance of appellate remedies. In *Eskridge v. Washington State Board of Prison Terms & Paroles*,[148] the Court

143. *Id.*

144. *Id.* at 18–19.

145. *Id.* at 20 (Frankfurter, J., concurring).

146. *Id.* at 21.

147. *Id.* at 24 ("But in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong. When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent.").

148. 357 U.S. 214, 215 (1958).

struck down a law that authorized a trial judge to order a transcript at public expense only "if in his opinion justice will thereby be promoted."[149] Although this procedure instituted an extra level of discretionary review by having the trial judge review the case to see if an appeal was warranted, the Court nevertheless held that the case was controlled by *Griffin* because it discriminated against indigent defendants in the appeal process; those who could pay for a trial transcript did not need to persuade the trial court that justice would be promoted by allowing an appeal.[150]

In *Douglas v. California*,[151] the Court further expanded the *Griffin* anti-discrimination rule to include the right to counsel on appeal. Specifically, it held that the state's failure to appoint counsel for an indigent's appeal violated equal protection:

> Where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.[152]

Again, while the Court's reasoning focused on the different situations of rich and poor, the Court's rhetoric also hinted at the importance of the appellate process more generally; the Court noted that without appointed counsel, an indigent defendant would be left "without a champion on appeal" and would thereby be "deprived" of "showing that his appeal ha[d] hidden merit" beyond what was shown in the trial record.[153]

Interestingly, the Court retreated a bit from its equal protection jurisprudence in *Ross v. Moffitt*[154] and appeared to move toward a due process principle. In *Ross*, the question before the Court was whether an indigent defendant was entitled to counsel for a second level of appeal—specifically, the defendant had an appeal as of right in the North Carolina Court of Appeals (and was provided counsel for that appeal), but sought further review in the Supreme Court of North Carolina.[155] The U.S. Supreme Court acknowledged that a strict equal protection analysis would give rise to a requirement for appellate counsel: rich defendants, after all, had access to counsel to assist in

149. *Id.*
150. *Id.* at 216.
151. 372 U.S. 353, 355–56 (1963).
152. *Id.* at 358.
153. *Id.* at 356.
154. 417 U.S. 600 (1974).
155. *See id.* at 602.

petitioning the state supreme court.[156] Nevertheless, the Court acknowledged that the "precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated," and noted that "some support" was "derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment."[157] In an analysis that combined the two clauses, the Court determined that failure to provide appellate counsel for the first appeal as of right would unconstitutionally discriminate against the poor, but that the provision of counsel in a second layer of appellate review was a choice left to the state; any remaining disadvantage would be "far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in Douglas."[158]

In spite of the Court's unwillingness to acknowledge a constitutional right of appeal in criminal cases, its jurisprudence nonetheless supports such a view. As the Court acknowledged in *Ross*, the Equal Protection Clause cannot be doing all the work—if equal protection were the only rationale, there would be no basis on which to distinguish a first level of appeal from a second level.[159] The Court's willingness to find a constitutional right to a trial record and to appellate counsel suggests that the Court recognizes the fundamental importance of the appellate process. The Court's unwillingness to extend the right to counsel beyond a single appeal as of right further suggests a limiting principle—the existence of one appeal as of right may be fundamentally woven into the fabric of the justice system, but that a second level of review is not likewise engrained in a basic notion of fairness.[160] The Court's subsequent jurisprudence on effective assistance of counsel on appeal further reinforces this distinction. When a state provides a right of direct appeal, criminal defendants have a right to effective assistance of counsel on appeal—and this right means that counsel cannot simply decline to file an appeal they believe is meritless, but must instead

156. *See id.* at 616.

157. *Id.* at 608–09.

158. *Id.* at 616, 619.

159. *Id.* at 609 n.8 (quoting the circuit court's opinion, which noted that if *Douglas* rested on equal protection alone, "the same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals" (quoting Moffitt v. Ross, 483 F.2d 650, 655 (4th Cir. 1973))).

160. *Cf.* Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 544 (2009) (arguing that "due process and equal protection principles" would dictate a similar result when the direct appeal process did not afford an opportunity to raise critical issues, and thus "whenever habeas petitioners seek review of claims for which habeas corpus provides the first opportunity for judicial review").

brief any issue "that might arguably support the appeal."[161] On collateral or discretionary review, however, such procedures are not required.[162]

B. The Treatment of Criminal Appeals Mooted by Appellant's Death

The treatment of criminal convictions mooted by the appellant's death also demonstrates the value placed on the appellate process in the criminal justice system. If an individual convicted of a crime in federal district court dies while the case is on appeal, the circuit courts of appeals require the conviction to be abated ab initio—that is, the court will not merely dismiss the pending appeal, but will also enter "orders remanding [such] cases to the district courts with instructions to vacate the judgment and to dismiss the indictment or information."[163] At one time, the Supreme Court followed the same rule for petitions for certiorari.[164] However, it later overruled that decision, choosing only to dismiss the certiorari petition and not the underlying case.[165] The shift was interpreted by the circuit courts as an acknowledgement of the different roles played by the discretionary certiorari system versus the appeals of right allowed in the circuit courts:

> The Supreme Court may dismiss the petition without prejudicing the rights of a deceased petitioner, for he has already had the benefit of the appellate review of his conviction to which he was entitled of right. In contrast, when an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an "integral part of [our] system for finally adjudicating [his] guilt or innocence."[166]

When appeals as of right are statutorily granted (as they are in the federal courts), dismissing the indictment—rather than merely the appeal itself—only makes sense if the appeal is considered to be a

161. Anders v. California, 386 U.S. 738, 744 (1967).

162. Pennsylvania v. Finley, 481 U.S. 551, 558 (1987).

163. Cavallaro, *supra* note 50, at 951.

164. Durham v. United States, 401 U.S. 481, 483 (1971).

165. Dove v. United States, 423 U.S. 325, 325 (1976) ("The petition for certiorari is therefore dismissed. To the extent that *Durham v. United States* may be inconsistent with this ruling, *Durham* is overruled." (citation omitted)).

166. United States v. Pauline, 625 F.2d 684, 685 (5th Cir. 1980) (quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956)).

fundamental part of the criminal process. In other words, the underlying principle cannot just be that "punishment is impossible without the body of the defendant"—if this were the only reason for the practice, dismissal of the appeal as moot would be sufficient, or at the least the appeal could consider the conviction in order to determine the propriety of monetary forfeitures or penalties.[167] Abating the case ab initio, however, supports the view that "punishment is illegitimate without appellate review of the trial court conviction," and that there is "not only an irrevocable individual right of appeal, but also a societal need for certitude that is dependent upon appellate review."[168] Nevertheless, a number of courts place such weight on the value of appellate review that they extend the abatement remedy beyond the conviction itself, and likewise vacate the collateral punishments of "criminal forfeitures and fines."[169]

Of course, the Supreme Court itself has not required such abatement of criminal appeals as a part of constitutional practice. Nevertheless, the circuit courts' treatment of the cases aligns with the Supreme Court's emphasis on the protection of constitutional rights by and through appeals in criminal cases. Thus, for example, the Court "has prescribed and applied new requirements of de novo appellate review of lower courts' decisions of some (but not all) mixed questions of federal constitutional law and fact in criminal cases"—even while professing that there is no constitutional right to appeal and without "specify[ing] what provision of the Constitution authorizes it to so regulate criminal appeals in states that do choose to allow them, much less to explain why it so interpreted this unidentified provision."[170] In these criminal-law cases, the Court left unclear whether state-level appellate courts were obligated to apply the same appellate standard;[171] as discussed in the next Section,

167. Cavallaro, *supra* note 50, at 956.

168. *Id.* at 956–57.

169. United States v. Christopher, 273 F.3d 294, 297 (3d Cir. 2001); *see also* Cavallaro, *supra* note 50, at 961 ("Some courts erase all collateral aspects of a conviction as having no independent force absent the convicted offender."). It should be noted, however, that this approach is a matter of custom rather than law—and it is a custom that the states do not uniformly follow. *See, e.g.*, State v. Gartland, 694 A.2d 564, 568 (N.J. 1997).

170. Coombs, *supra* note 59, at 542–43 (discussing Ornelas v. United States, 517 U.S. 690 (1996)).

171. *Id.* at 551; *see also* State v. Thurman, 846 P.2d 1256, 1265 (Utah 1993) ("[A]fter reflecting on the principles governing the choice of a particular standard of review and considering the law on analogous questions, we have concluded that this court is not required to apply federal standards of review when presented with challenges to trial court determinations made under federal law.").

however, the Court did require state appellate courts to do so in the related area of punitive damages.[172]

C. Heightened Appellate Review in Certain Civil Cases

The Supreme Court's civil jurisprudence also relies on the assumption that appellate remedies will buttress constitutional rights. As some scholars and litigants have pointed out, this assumption is most easily visible in the Court's jurisprudence on punitive damages.[173] Two decades ago, a plurality of the Supreme Court asserted that the Due Process Clause prohibits a court from making a punitive damage award that is "so excessive that it must be deemed an arbitrary deprivation of property without due process of law."[174]

A year later, in *Honda Motor Company v. Oberg*,[175] the Court struck down a judgment for punitive damages in a case arising out of an Oregon state court, holding that judicial review of punitive damage awards was required as a matter of constitutional due process.[176] At the time the case arose, a provision of the Oregon Constitution prohibited judicial review of punitive damage awards "unless the court [could] affirmatively say there [was] no evidence to support the verdict."[177] A jury awarded the plaintiff $5 million in a product liability case against Honda, and both the Oregon Court of Appeals and the Oregon Supreme Court affirmed the verdict.[178] The U.S. Supreme Court reversed that judgment and remanded to the Oregon Supreme Court for further review.[179] Although the Court's opinion focused on judicial review rather than appellate review (and it therefore left open the possibility that the trial judge's review of the jury's verdict could suffice), the opinion did state in dicta that "the availability of both 'meaningful and adequate review by the trial court' *and subsequent appellate review*" would give rise "to a strong presumption of validity."[180]

172. *See infra* Part III.C.

173. *See, e.g.*, Brief Amicus Curiae of the American Academy of Appellate Lawyers in Support of the Petition for a Writ of Certiorari at 7–10, Mountain Enters. v. Fitch, 541 U.S. 989 (2004) (No. 03-1223), 2004 WL 692247, at *7–10; Brief of Amici Curiae Law Professors In Support of Petitioner, *supra* note 12, at 7, 2008 WL 4360892, at *7.

174. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453 (1993).

175. 512 U.S. 415 (1994).

176. *Id.* at 418.

177. *Id*.

178. *Id.*

179. *Id.* at 435.

180. *Id.* at 420–21 (emphasis added) (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 457 (1993)).

The Supreme Court subsequently addressed the standard of review on appeal in *Cooper Industries, Inc. v. Leatherman Tool Group*.[181] In that case, a jury had awarded $4.5 million in punitive damages in a trademark infringement case.[182] The trial judge "considered, and rejected, arguments that the punitive damages were 'grossly excessive.' "[183] The Ninth Circuit affirmed the judgment after reviewing it under an "abuse of discretion" standard.[184] The Supreme Court reversed the judgment, holding that the appellate court had a duty to review the judgment under a non-deferential de novo standard of review.[185] The Court relied on an analysis of institutional competence in applying the three guideposts of a due process review of punitive damages. It concluded that the district court might have a "somewhat superior vantage" in reviewing "the degree or reprehensibility of the defendant's misconduct," but that the trial and appellate courts were equally good at determining "the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award" and that appellate courts had greater expertise in reviewing "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[186] The Court therefore held that appellate courts must conduct a de novo review of punitive damages.[187] Although *Cooper Industries* applied to the federal circuits, the Supreme Court soon extended the de novo review requirement to state courts of appeals as well.[188]

The Court's requirement of heightened review in punitive damages cases undermines previous statements that no such right exists. Indeed, the Court's language, though written to explain why deferential review is insufficient in the punitive damages context, actually reads more as a defense of appellate review in general. First, the Court pointed to the error correction function of appellate review, noting that "[e]xacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a

181. 532 U.S. 424 (2001).
182. *Id.* at 429.
183. *Id.*
184. *Id.* at 430–31.
185. *Id.* at 436.
186. *Id.* at 440.
187. *Id.* at 436.
188. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003) (noting, in a case arising in a Utah state court, that "[w]e reiterated the importance of these three guideposts in *Cooper Industries* and mandated appellate courts to conduct *de novo* review of a trial court's application of them to the jury's award").

decisionmaker's caprice.' "[189] Second, the Court noted that "de novo review tends to unify precedent and stabilize the law," and it expresses hope that the amorphous concept of "gross excessiveness" will gain stability and meaning through case-by-case application at the appellate level.[190] The law-stabilizing and unifying effects are also classic benefits of appellate review.[191] Thus, the basis for requiring heightened appellate review of punitive damage awards mirrors the benefits of appellate review in general; it is very difficult to reconcile the Court's requirement of de novo appellate review of punitive damages with a system in which no appellate review is required at all.

Moreover, at least one state has interpreted the Supreme Court's punitive damage jurisprudence as trumping state constitutional restrictions on the jurisdiction of appellate courts.[192] In Texas, the state constitution prohibits the Texas Supreme Court from ruling on questions of fact; it requires that "[t]he decision of [the courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error."[193] The Texas Supreme Court had interpreted the provision to limit that court's review of the excessiveness of trial court judgments; while the intermediate courts were free to suggest a remittitur, the Texas Supreme Court could not do so.[194] Thus, on questions of excessiveness, the intermediate courts of appeals would have the last word under the state constitution.[195] Nevertheless, the Texas Supreme Court adopted the requirement that it conduct a de novo review of punitive damages.[196] It noted that "the Supreme Court of the United States has found unconstitutional a state constitutional provision limiting appellate scrutiny of exemplary damages to no-evidence review" and concluded that "[o]nly by adhering to [its] practice of reviewing exemplary damages for constitutional (rather than factual) excessiveness [could it] avoid a similar constitutional conflict."[197] Again, however, if constitutional due process does not

189. *Id.* (quoting *Cooper Indus.*, 532 U.S. at 436).

190. *Cooper Indus.*, 532 U.S. at 436.

191. *See supra* Part I (explaining the benefits of appellate review).

192. Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 307 (Tex. 2006).

193. TEX. CONST. art. V, § 6.

194. Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981); TEX. R. APP. P. 46.3.

195. R. Jack Ayres, Jr., *Judicial Nullification of the Right to Trial by Jury by "Evolving" Standards of Appellate Review*, 60 BAYLOR L. REV. 337, 413 (2008).

196. *Tony Gullo Motors*, 212 S.W.3d at 307 n.30.

197. *Id.* at 307. It is also difficult to separate the "constitutional" part of the analysis from the "factual" part. *See, e.g.*, Sandra Sperino, *Judicial Preemption of Punitive Damages*, 78 U. CIN. L. REV. 227, 231 (2009) ("[I]n many cases lower courts simply

require an appeal at all, it is hard to imagine that it requires a state court to adopt a heightened level of review that it would not otherwise apply—especially when that review would conflict with a state constitutional provision.

Finally, punitive damages are not the only area in which the Supreme Court's constitutional doctrine conflicts with the denial of appellate review. The Court has also required heightened appellate review of actual malice in libel cases, holding that the normal "clearly erroneous" standard would not apply on appeal, but that instead "[a]ppellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity."[198] In the libel context, the constitutional interest being protected was one of speech, not one of due process; essentially, the Court resolving a conflict between "deference to factual findings by the trier of fact and an appellate duty to safeguard First Amendment freedoms."[199] The Court's rationale for independent appellate review was again reminiscent of the logic of appellate review in general; it needed to supervise the lower courts to ensure that its announced legal principles "have been constitutionally applied"[200] in a consistent manner "in order to preserve the precious liberties established and ordained by the Constitution."[201] As in the Court's punitive damages jurisprudence, its rationale for heightened review reflects the importance of appellate review in general; without it, the Court implies, we would not be able to ensure the preservation of constitutional guarantees.[202]

claim the mantle of constitutional excessiveness to justify other, nonconstitutional inquiries, with little or no actual relationship to excessiveness.").

198. Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 514 (1984); *see* Brief of Amicus Curiae of the American Academy of Appellate Lawyers, *supra* note 173, at 10–12, 2004 WL 692247, at *10–12.

199. Tung Yin, *Independent Appellate Review of Knowledge of Falsity in Defamation and False Statements Cases*, 15 BERKELEY J. CRIM. L. 325, 386 (2010).

200. *Bose Corp.*, 466 U.S. at 508.

201. *Id.* at 485.

202. Other commentators have argued that appeals are integral to the protection of substantive constitutional rights. *See* Arkin, *supra* note 8, at 557 ("[S]o much of constitutional criminal law is woven around the availability of an appeal to effectuate explicit constitutional guarantees that appeals are constitutionally necessary whenever any explicit constitutional right is implicated."); Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 551 (1970) ("The first amendment due process cases have shown that first amendment rights are fragile and can be destroyed by insensitive procedures; in order to completely fulfill the promise of those cases, courts must thoroughly evaluate every aspect of the procedural system which protects those rights.").

IV. THE SYSTEMIC INTEGRATION OF PROCEDURAL SAFEGUARDS

Doctrinal consistency requires a right to appeal at least criminal convictions, punitive damages awards, and libel judgments. But what about other areas of the law? This Part explores how the modern American justice system has developed in a way that weaves a robust system of appellate remedies into the very fabric of the justice system as a whole, creating a unified tapestry of procedural safeguards.[203] At the time of the country's founding, the idea of error correction through the appellate process was more unusual; the function of "[l]aw declaration" was written into the Constitution with the creation of the Supreme Court, but the concept of "law application" through appeal developed only later with the creation of the intermediate appellate courts.[204]

As a matter of practice, appeals have grown in prevalence and have become part of the legal culture.[205] At the same time, however, the procedural safeguards of an earlier era have diminished: civil jury trials are far less common today; class actions and other types of high-stakes litigation have increased, summary judgment has grown, and civil pleading requirements are in flux.[206] These procedures developed in an era of robust appellate remedies, and they have created a situation in which the relationship between the trial and appeal are rightfully considered to exist in a symbiotic relationship.[207]

A. Procedural Changes

The shifting procedural landscape demonstrates how the importance of appellate review extends beyond individual satisfaction

203. On the importance of cross-doctrinal and transsubstantive consistency, see, for example, Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 111 (2009) ("[T]here is widespread understanding that in a system that seeks to allocate prospective lawmaking responsibility categorically overt departures from transsubstantivity would raise questions of institutional power and legitimacy."); Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 79 (2008) ("Doctrinal consistency looks at the particular provision and its doctrinal equivalents, such as the statutes of limitations. Cross-doctrinal consistency, on the other hand, looks at how doctrinally analogous provisions have been treated.").

204. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 239 (1985) ("Law declaration, not law application, is the appellate courts' only constitutionally mandated duty."); Steinman, *supra* note 13, at 1618 (noting that the intermediate appellate courts primarily engage in error correction, whereas the Supreme Court primarily acts to "pronounce and harmonize" the law).

205. *See supra* Part I.

206. *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012).

207. Arkin, *supra* note 8, at 577–78 (arguing that the constitutionalization of criminal procedure also creates a need for appellate remedies).

and the private rights included in the *Mathews v. Eldridge* analysis. Instead, appellate review sustains civil procedure more broadly. The availability of appellate review allows trial judges to take a broader and more managerial role in litigation, while protecting against the possibility of irreversible harm caused by a single judge's biased or otherwise flawed decision making. It is unlikely that we would have seen some of the recent procedural developments take place in the absence of robust appellate rights; without the safety valve that appellate rights provide, the judicial system would have had to rely on other mechanisms of protecting litigants' interests—perhaps by allowing more cases to go all the way through the trial process or by allowing even fewer cases to proceed as class actions. Unless the Supreme Court decides to turn back the clock on these procedural developments, a robust system of appellate remedies is required to ensure that litigants' substantive rights can be protected.[208]

1. The Growth of Complexity

Legal doctrine has grown increasingly complex in both criminal procedure and in civil litigation. On the criminal side, observers have noted that "[b]oth state and federal criminal trials are far more complex proceedings today than they were just before the turn of the century when *McKane v. Durston* was decided."[209] This modern criminal procedure has been called a "jungle of doctrines" that includes the law of custodial interrogation and *Miranda* rights, search-and-seizure practices, the exclusionary rule, and the right to counsel.[210] These doctrines increase the complexity of criminal prosecutions and thereby "enhance[] the likelihood of trial error at the trial level and the corresponding need for corrective appellate process."[211] As a result of the growth in criminal doctrine, cases tend

208. *See* Leubsdorf, *supra* note 12, at 613 ("[W]hatever faults today's procedural systems may have, no systemic remodeling appears on the horizon.").

209. *Id.* at 574; George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819, 1819 (1997) (reviewing AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997)) ("[T]he law of criminal procedure had become encrusted with doctrinal complexities that seemed to bear little or no relationship to the underlying constitutional rights.").

210. Leubsdorf, *supra* note 12, at 600.

211. Arkin, *supra* note 8, at 576. *See generally* Thomas, *supra* note 209 (noting these various complexities in constitutional criminal procedure). This complexity is compounded in cases involving technology; thus, for example, search-and-seizure doctrine must accommodate technological developments that "enable an increasing array of searches that, while not necessarily *physically* intrusive, have the potential to wholly eviscerate an individual's privacy." Jeffrey Bellin, *Crime-Severity Distinctions and the*

to be "increasingly front-loaded such that the trial is no longer the main event."[212] Instead, pretrial procedure and plea bargains play a larger role.[213]

On the civil side, courts today are facing a greater number of complex, high-value, high-stakes lawsuits.[214] Economic development and the migration of corporate headquarters led to greater complexity in commercial litigation across the nation; likewise, patent, antitrust, civil rights, and environmental cases also added complexity in civil litigation and increased the length of trial proceedings.[215] Class actions and other forms of aggregate litigation have also increased dramatically.[216] As complexity and value increased, so too did risk; such large-scale litigation created a risk—and sometimes a reality—of bankruptcy, even for large corporate defendants.[217]

2. The Vanishing Jury Trial and the Rise of the Managerial Judge

Due in part to the growth of complexity, modern litigation has seen a shift of power from the jury to the trial judge. Historically, expanded jury rights protected against the risks inherent in having a single decision maker.[218] When the Seventh Amendment guarantee

Fourth Amendment: Reassessing Reasonableness in a Changing World, 97 IOWA L. REV. 1, 40 (2011).

212. Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1162 (2012).

213. *Id.* at 1162 n.6.

214. Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 536 (1994) ("Recent decades have shown, however, an increase in the volume, complexity, length, and cost of high-stakes litigation, especially in the federal courts.").

215. *See* Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 30 n.115 (1992).

216. *See* Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 657 (2011) ("Through new procedures, mechanisms, and doctrines, the possible meanings of the word 'case' changed—such that tens of thousands of people came to be understood as somehow together . . . in something called a 'litigation' that can result, on occasion, in institutional reform or in millions of dollars distributed to thousands of individuals as compensation for injuries.").

217. *See In re* Johns-Manville Corp., 36 B.R. 727, 729 (Bankr. S.D.N.Y. 1984); Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2045 (2000) ("The high costs of litigation threaten both adequate compensation for the vast number of victims and the survival of the defendant's business."); Resnik, *supra* note 216, at 659 ("Some of the asbestos manufacturers had gone into bankruptcy, and their tort claimants trailed along, forcing group-based handling of mass torts.").

218. *But see* Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1370 (2012) (noting that although others have argued that the jury offers the " 'many-minds' benefits of information aggregation and deliberation," these potential

was adopted in 1791, proponents expected the civil jury to "protect private parties against the application of unjust laws, overreaching by the government when it appears as a litigant, and biased federal judges."[219] The jury trial functioned, at least to some degree, in just this manner; civil juries in the early years of the Republic "nullified" debt-collection actions by British loyalists and abolitionist juries refused to apply civil remedies in cases involving slavery.[220] By the end of the nineteenth century, however, "the American tradition of law-finding by jurors" had given way to a more limited role for the jury as fact-finder, reserving pure question of law for the judge alone.[221]

At the same time as the jury's power decreased in civil cases, the managerial power of the judge increased.[222] Judges took a greater role in "speeding the resolution of cases and for persuading litigants to settle rather than try cases whenever possible"; judges also took on new roles as "mediators, negotiators, and planners" in an effort to efficiently manage a growing docket.[223] On the criminal side, reliance on plea bargains has grown dramatically and in turn reduced the power of the jury.[224] At the trial court level, therefore, the power of the judge grew, while the litigants were left "with fewer procedural safeguards to protect them from abuse of that authority."[225]

In both civil and criminal litigation, the pretrial phase (where the judge is preeminent) has grown to overshadow the trial phase and therefore "inevitably undermined" the jury even further by reducing the number of trials.[226] In 1936, 20% of civil cases filed went to trial; by 2002, 1.2% of federal cases went to trial before a jury, and only 0.6% of state cases did so.[227] In criminal cases, the rise of plea bargaining means that only 4% of federal prosecutions and 1.2% of

benefits "are not likely to support a claim of epistemic superiority given the way the jury actually functions").

219. Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1627 (2001).

220. *Id.* at 1628.

221. *Id.* at 1631 (noting that the United States Supreme Court, in *Chicago Rock Island & Pacific Railway Co. v. Cole*, 251 U.S. 54, 56 (1919), "rejected a federal due process challenge to [an Oklahoma] constitutional provision that preserved a law-finding function for civil juries on certain issues in tort litigation").

222. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 379 (1982).

223. *Id.*

224. Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) ("[T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

225. Resnik, *supra* note 222, at 380.

226. Langbein, *supra* note 206, at 571.

227. *Id.* at 524.

state prosecutions now get to a jury.[228] As with criminal practice, pretrial activity has overshadowed trial procedure; now, as Professor Langbein has stated, "[T]he pretrial becomes the nontrial."[229]

3. Summary Judgment Practice and Pleading Standards

Going along with the decline in jury trials and the rise of the managerial judge, summary disposition devices in civil litigation have also increased markedly in some categories of civil litigation.[230] Although the precise number of cases dismissed on summary judgment is disputed,[231] it is agreed that the use of summary judgment has had a tremendous impact in certain civil cases—research has shown that defendants prevail on summary judgment in nearly two-thirds of civil rights and employment discrimination cases.[232]

Summary procedures give individual judges a great deal of control over which cases should be allowed to go forward. Summary judgment, which was made easier by a 1986 trilogy of Supreme Court cases, allows cases to be resolved after the time for discovery has passed if, in the judge's view, there are no remaining issues of material fact to be decided at trial.[233] Professor Suja Thomas has argued that the use of summary judgment unconstitutionally undermines the Seventh Amendment right to a jury trial;[234] other scholars, disagreeing that summary judgment is unconstitutional, nevertheless agree that it reduces the jury's power.[235]

228. *Id.* at 562.

229. *Id.* at 542.

230. *Id.* at 568.

231. *Id.* at 566.

232. Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 549 (2010).

233. Celotex Corp. v. Catrett, 477 U.S. 317, 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242–43 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 574–75 (1986); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 10 (2010) ("The three decisions in one term sent a clear signal to the legal profession that Rule 56 provides a useful mechanism for disposing of cases short of trial when the district judge feels the plaintiff's case is not plausible. Many courts responded to this invitation with considerable receptivity.").

234. Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 139–40 (2007).

235. *See* Edward Brunet, *Summary Judgment Is Constitutional*, 93 IOWA L. REV. 1625, 1651 (2008) (arguing that modern procedural devices "reduced the power of the jury without substantially damaging the institution of the jury itself"); William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653, 1660 (2008) ("The American economy on which we rely could not function if today's juries possessed

In the last five years, the Supreme Court's pleading decisions have gone beyond summary judgment and given a stamp of approval to the dismissal of civil suits at an even earlier stage in litigation, even before the parties had engaged in the discovery process.[236] In *Bell Atlantic Co. v. Twombly*,[237] the Supreme Court required a more detailed pleading from the plaintiff than had been previously required.[238] Previously, a plaintiff could go forward with a case unless "it appear[ed] beyond doubt [from the plaintiff's complaint] that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."[239] After *Twombly*, however, the plaintiff was required to make a showing of "plausibility"; in the antitrust context in which *Twombly* arose, the Court held that plausibility would mean "enough factual matter (taken as true) to suggest that an [anticompetitive] agreement was made."[240] The Court then extended the plausibility requirement outside of the antitrust context in *Ashcroft v. Iqbal*[241] to require judges to "draw on . . . judicial experience and common sense" in "[d]etermining whether a complaint states a plausible claim for relief."[242]

Professor Arthur Miller has suggested that use of these mechanisms has created a "new model of civil procedure."[243] In the past, "jurors once were trusted with deciding issues of fact and applying their findings to the applicable principles of law following the presentation of evidence," but now, after *Twombly* and *Iqbal*, "judges are authorized to make these determinations using nothing but a naked complaint and their own discretion."[244] The new standards increase the judge's power even beyond the increase already experienced with the rise of managerial judging; part of the Court's justification for *Twombly*'s stricter pleading standards was a concern that in the antitrust class action, the high cost of litigation "will push cost-conscious defendants to settle even anemic cases before reaching those proceedings [summary judgment or trial]."[245] Even "careful case

the broad powers of classic, eighteenth-century juries and the accompanying capacity to hamper investment and trade.").

236. Ashcroft v. Iqbal, 556 U.S. 662, 680–84 (2009); Bell Atl. Co. v. Twombly, 550 U.S. 544, 556 (2007).

237. 550 U.S. 544.

238. *Id.* at 555.

239. Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

240. *Twombly*, 550 U.S. at 555.

241. 556 U.S. 662.

242. *Id.* at 679.

243. Miller, *supra* note 233, at 34.

244. *Id.*

245. *Twombly*, 550 U.S. at 559.

management" could not offset the risk of cost-driven injustice, "given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side."[246] This growth in judicial power has increased the number of cases dismissed before trial.[247]

4. Money, Politics, and Judicial Selection

At the same time that individual trial judges have been growing ever more powerful, the increasing influence of money and politics—and the growing awareness of individual biases—have led to a recognition of the need for checks and balances within the judiciary. Most state judges are elected, not appointed.[248] Although state-court judicial elections have been common since the 1850s, these races have become significantly more political and more costly in recent years.[249] In the past, running for judge meant placing "a few yard signs and [making] perfunctory remarks to civic or professional groups"; today, it often means raising more than a million dollars and campaigning over highly contested partisan political issues.[250]

It is not surprising that individual judges are less trusted than they were in past eras.[251] First, the visibility of outside interests in choosing judges reduces the public's trust in the judiciary.[252] This lack of trust is compounded when judges themselves demonstrate bias or corruption. Sometimes the bias may be unconscious; judges are, after

246. *Id.*

247. *See* Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 41 (2010) ("[T]he summary judgment motion and the motion to dismiss may have similar effects, including the significant use of the procedures by courts, a related increased role of judges in litigation, and a corresponding increased dismissal of employment discrimination cases.").

248. Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 335 (2011); David E. Posen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266 (2008) (noting that "the majority of U.S. states have subjected at least some of their courts to popular elections; roughly ninety percent of state general jurisdiction judges are currently selected or retained this way").

249. Thomas R. Phillips, *Time Has Come to Reform Judicial Selection System*, HOUSTON LAW., Mar./Apr. 2003, at 10, 10.

250. *See* Thomas R. Phillips, *When Money Talks, the Judiciary Must Balk*, WASH. POST, Apr. 14, 2002, at B.02 (noting changes in judicial elections resulting from increased donations to candidates).

251. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 44 (2003) ("There seems to be a general consensus that court-directed hostility has been on the upswing in recent years, with any number of manifestations.").

252. Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 995 (2001) ("The public perception is that judges are influenced by campaign contributions . . . . Perception in this instance is as important as reality. If voters believe that donors call the tune, . . . confidence in the judicial system will be eroded.").

all, subject to the same cognitive biases as anyone else.[253] In other cases, however, there may be straightforward criminal corruption, as there was in Pennsylvania's "Cash for Kids" scandal, in which "judges are believed to have accumulated between $2.6 and $2.8 million in kickbacks from two different private detention facilities" for ordering juveniles to be sent to those facilities.[254] Finally, the same political pressures are also present when elected officials in the executive branch review judicial outcomes. Because of these political pressures, executive clemency in criminal cases has become exceedingly rare in the modern era—even though, unlike the appellate process, it is a remedy specifically mentioned in the U.S. Constitution.[255]

The existence of appellate review serves as a check on both the perception and the reality of biased or corrupt judging. As others have stated, "[W]hat is involved in appellate review is, at bottom, simply confidence or lack thereof in another person's decision."[256] Reviewing the judge's decision through the appellate process provides a check on potential abuse of power and thereby restores confidence. Lack of confidence in a single individual is also minimized by selecting a larger panel of decision makers; in the United States, appellate panels typically comprise at least three judges.[257]

This "rule of three" has often been expressed in terms of "three heads . . . being better than one," though often with little explanation.[258] Professor Chad Oldfather has expanded on the "three

253. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 43 (2007) ("[J]udges, like everyone else, have two cognitive systems for making judgments—the intuitive and the deliberative—and the intuitive system appears to have a powerful effect on judges' decision making.").

254. Sarah L. Primrose, *When Canaries Won't Sing: The Failure of the Attorney Self-Reporting System in the "Cash-for-Kids" Scheme*, 36 J. LEGAL PROF. 139, 146 (2011).

255. U.S. CONST. art. II, § 2; Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1212 (2010).

256. RICHARD A. POSNER, HOW JUDGES THINK 113–14 (2008).

257. Nguyen v. United States, 539 U.S. 69, 82 (2003) ("[T]he statutory authority for courts of appeals to sit in panels . . . requires the inclusion of at least three judges in the first instance."); Samuel P. Jordan, *Irregular Panels*, 60 ALA. L. REV. 547, 582 (2009) ("[A]ll circuits but one permit a panel of two judges to decide the merits of an appeal in certain circumstances . . . . Generally, a third judge must be assigned to replace an unavailable judge if the two remaining judges do not agree, and may be assigned if the two remaining judges agree but decline to exercise their discretion to decide the case by quorum.").

258. William W. Schwarzer, *Defining Standards of Review*, *in* THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY 100, 101–02 (Cynthia Harrison & Russell R. Wheeler eds., 1989) ("The appellate court's claim to superior judgment . . . lies in numbers, three heads usually being better than one.").

heads are better than one" concept by breaking it down into two specific benefits.[259] First, there is the advantage of deliberation, in which "the need to secure two votes in order to form a majority requires the judges to exchange viewpoints and information regarding the issues presented, and, perhaps more significantly, requires them to take the viewpoint of at least one other person into serious consideration."[260] Second, there is the advantage of probability—the idea that having more people answers a particular question can increase the probability of reaching a correct answer, even when their conclusions are independent of each other.[261] The probability advantage has also been termed the "wisdom of crowds"; research has repeatedly shown that aggregating a number of flawed individual judgments can provide a significantly more reliable result.[262] Finally, multi-judge panels can reduce bias and arbitrary decision making, as the panel can benefit "not merely by the presence of more than one mind but also by the presence of more than one vantage point."[263]

B. The Distributive Power of Appellate Review

Modern procedural changes at the trial court level tell a story of the growing power of trial judges in the face of diminishing power of traditional procedural safeguards. Jury trials are diminishing; trial judges are taking an increasingly influential role in managing both the process of how legal claims are handled as well as substance-based decisions about whether cases should be allowed to go forward at all.[264] The stakes have never been higher for the litigants, as cases grow in value and complexity; confidence in individual judges, however, is not always high, as money and politics take a toll on public trust.[265]

The existence of a guaranteed right of appellate review can redistribute the effects of these procedures on due process. The jury trial once ensured that decisions would not be made by a single decisionmaker; now, the rise of appellate review by a multi-judge

259. Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 328 (2009).

260. *Id.*

261. *Id.*

262. *See* JAMES SUROWIECKI, THE WISDOM OF CROWDS, at xiv (2004) ("[D]espite all these limitations, when our imperfect judgments are aggregated in the right way, our collective intelligence is often excellent.").

263. Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1209 (1992).

264. *See supra* Part IV.A.2–3.

265. *See supra* Part IV.A.1, 4.

panel plays that role. Appellate court supervision also cabins in the managerial power of the trial judge. In some cases, the appellate court might be needed to reverse an abuse of discretion; in other cases, however, the mere availability of appellate review can deter a trial judge from abusing that power in the first instance.[266] Appellate review is also necessary to ensure that viable claims are not eliminated at the pleading stage or by summary judgment procedures. This review is especially valuable to plaintiffs, who might otherwise find that an overworked trial judge's view of the merits is unconsciously influenced by concerns for docket control.[267]

The modern increase in large-scale litigation magnifies the redistributive due process effect of appellate procedure. Regardless of whether this increase in high-stakes litigation is a good thing or a bad thing, such complex litigation could not have developed without a robust system of appellate review. When a negative outcome could bankrupt a party, a reliable outlet for error correction is essential. This effect can be seen when parties choose litigation over arbitration in some high-stakes cases; though arbitration might otherwise limit the cost of dispute resolution, the elimination of appellate remedy may simply be too great a risk to bear.[268]

In large-stakes and complex cases generally, the question may be "not about whether to appeal, but when."[269] In these cases, the cost of

266. *See, e.g.*, Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 947 (1988) ("Appellate review can provide an effective check against politically influenced adjudication, arbitrary and self-interested decisionmaking, and other evils that the separation of powers was designed to prevent."); Resnik, *supra* note 88, at 607 (stating that appellate review "has the capacity to rectify disparities and inequities produced in the first tier and to promote consistent norm enforcement").

267. Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903, 946 (2002) (noting "the possibility that the courts are, consciously or unconsciously, utilizing the heuristics to clear complex cases that would otherwise remain on the dockets for lengthy periods of time").

268. *See* William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 533 (2000) ("[S]ome possible consumers will choose not to arbitrate because their transactions are too large to bear the risk of error without adequate means to correct those mistakes, instead taking their chances in national courts or agreeing to settle on terms that would not be acceptable if a viable dispute resolution alternative were available."); Guy S. Lipe & Timothy J. Tyler, *The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases*, 33 HOUS. J. INT'L L. 1, 36–37 (2010) ("[C]ourts and parties continue to innovate with hybrid procedures that may make litigation less expensive and thus more attractive to parties who would want the appellate review desirable for 'bet the farm' cases.").

269. James E. Pfander & David R. Pekarek Krohn, *Interlocutory Review by Agreement of the Parties: A Preliminary Analysis*, 105 NW. U. L. REV. 1043, 1095 n.219 (2011).

appealing the trial court's judgment is likely to be only a small fraction of the overall litigation cost; the expense and delay of the appeals process improves accuracy without unduly adding to the expense of litigation.[270] Because appellate remedies play such a critical role in complex litigation, appellate rights may even be extended before final judgment; thus, for example, the Federal Rules of Civil Procedure were amended to allow interlocutory review of class-certification decisions, and similar proposals have been made for multidistrict litigation.[271]

Within the procedural system, appellate review may therefore redistribute power in ways that are consistent with constitutional values. Without appeals, the modern procedural system is at risk of failing to protect such values; the demise of civil jury trials and the increase in criminal plea bargaining, for example, have diminished the power of the jury. Likewise, the complexity of modern litigation creates risks of legal error that were largely unknown when the Bill of Rights was adopted.[272] These risks are compounded by political realities that place new pressure on judges at the same time that judges' individual power is increasing.[273] These procedural realities require a safety valve that can correct injustice and distribute power away from the individual judge. It is not surprising, then, that appellate review has developed to play just this role in modern practice.

V. THE EXPRESSIVE VALUE OF NONDISCRETIONARY APPELLATE REVIEW

Previous Sections of this Article discussed the effect of appellate remedies on litigant outcomes, doctrinal consistency, and systemic procedure. This Part moves beyond these functions to examine how constitutionalizing a nondiscretionary right of appeal would express certain social and legal values that shape both culture and norms. Unlike the cost-benefit analysis that comes out firmly in favor of

270. *Id.* at 1060 n.76, 1095 n.219 (noting that pretrial expenses in large-stakes cases often vastly outweigh appellate costs, and concluding that, given the high value of the interests at stake in such cases, an appeal is therefore virtually guaranteed regardless of the outcome at trial).

271. Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1693–94 (2011) ("Congress and the Supreme Court have extended mandatory appellate jurisdiction over several categories of interlocutory orders. The time has come to make another categorical value judgment, adding certain MDL orders to that list.").

272. *See supra* Part IV.A.1.

273. *See supra* Part IV.A.2–4.

extending appellate rights, the effect on normative values is more nuanced: there are significant reasons to protect values on both sides of the equation.

There is no doubt that procedural choices can both reflect and shape systemic values. As Professor Judith Resnik has noted, procedure has a power beyond the outcomes it creates; it can also "instruct about and . . . act out the political system, . . . legitimate decisions of the state, . . . dignify the participants, and . . . make meaningful the interaction between individuals and the state."[274] Some have taken this idea even further, stating that "courts exist to give meaning to our public values, not to resolve disputes," and that "[c]onstitutional adjudication is the most vivid manifestation of this function."[275] Appellate procedure more specifically has been described as expressing the background values of fairness, predictability, efficiency, and respect for the adversarial process.[276]

Even outside procedure, formalizing rules can alter social norms and social meaning. Thus, for example, some have suggested that the passage of the Civil Rights Act of 1964 helped give force to the social meaning of equality by associating the values of nondiscrimination and respect for the law.[277] Within the procedural system, the process values underlying the American justice system (including, but not limited to, the values of participatory governance, legitimacy, respect for individual dignity, certainty and predictability, and finality) likewise shape societal expectations about what it means to have a fair judicial process.[278] Formalizing procedural requirements through the constitutionalization of appellate review can therefore give added force to the values protected by the procedural system.

A. The Importance of a Nondiscretionary Appellate Right

In order to harness the expressive power of a constitutional rule, it is important that appellate review be guaranteed to all litigants, requiring the appellate court to decide the appeal and without granting

274. Resnik, *supra* note 88, at 619; *see also* Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 337 (2008) ("In addition to governing human behavior through rules and sanctions, the law conveys social messages.").

275. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979).

276. Sarah M. R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251, 294 (2004).

277. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2043–44 (1996).

278. Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values"*, 60 CORNELL L. REV. 1, 20–27 (1974) (cataloging process values).

it the authority to voluntarily decline jurisdiction. Some commentators have argued against such a rule, asserting that a discretionary certiorari system can provide a sufficient appellate remedy.[279] They have contended that the fact that the parties can present their arguments to the higher court sufficiently protects appellate rights even if the court then denies the appeal.[280] This position has pragmatic support, as the discretionary denial of review has the same outcome as affirming a lower court's judgment—in both cases, the original judgment stands unchanged.[281]

Nevertheless, from a procedural point of view, the discretionary denial of appellate review is by no means equivalent to an affirmance. A court with discretionary review power may deny review for any number of reasons other than the perceived correctness of the lower court's ruling. A court may decline review, for example, because the underlying judgment is small and its effect appears limited to the parties before the court and unlikely to affect future cases; in these cases, "mere error in the lower courts is insufficient to warrant review."[282] Even if the case is important, a court may deny review if the record is unclear or underdeveloped, if the briefing is of low quality, or to allow similar cases to develop in the lower courts.[283] A right to nondiscretionary appellate review, on the other hand, requires the reviewing court to act upon the lower court's judgment—either reversing or affirming it, in whole or in part. Much of the power of nondiscretionary review stems from this universality.

A right to nondiscretionary review also requires the court to give a reason for its action. Again, therefore, it is necessary to set a baseline: what is the minimal opinion that preserves the underlying goal of appellate review? Nearly every scholar who has examined that question has concluded that, at a minimum, there must be some explanation of the reason for the court's decision; to include no explanation at all for the court's disposition "effectively converts the

279. *See, e.g.*, Brief in Opposition to Petition for Writs of Certiorari at 14–15, Cent. W. Va. Energy Co. v. Wheeling Pittsburgh Steel Corp., 129 S. Ct. 626 (2008) (Nos. 08-217 & 08-218), 2008 WL 4685267, at *14–15.

280. *Id.*

281. Billotti v. Legursky, 975 F.2d 113, 116 (4th Cir. 1992) (stating that because of administrative limitations, a system of appeals as of right would not provide "a more meaningful opportunity to be heard than does West Virginia's system of discretionary appeals").

282. Hon. Craig T. Enoch & Michael S. Truesdale, *Issues and Petitions: The Impact on Supreme Court Practice*, 31 ST. MARY'S L.J. 565, 605 (2000) ("If an issue fails to demonstrate an error of jurisprudential significance, but only one affecting the parties to a case, then perhaps that error is less likely to survive the scrutiny of the petition process.").

283. Maryland v. Balt. Radio Show, 338 U.S. 912, 917–19 (1950).

statutory appeal of right into a denial of a petition for certiorari," as "in both cases the decision maker has declined to explain its decision."[284] The use of non-precedential opinions combined with rules against citation of those opinions has been more controversial; some have defended them as a time-saving device that prioritizes the need for the parties before the court to obtain a relatively speedy decision by de-prioritizing the interests of others not currently before the court.[285] Others, however, have criticized the practice as antithetical to the development of the common law by inhibiting the development of binding legal rules.[286] Constitutional arguments have been made to support both sides of such no-citation rules.[287]

This Article does not take a side in the particulars of that debate, but seeks only to identify the minimum rule needed to protect effective appellate review. In that regard, this Article identifies the key aspects of a judicial opinion as (1) providing at least a brief reference to the substantive law or reasoning that drives the

284. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 285 (1996) (citing Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 838 (1991)) ("In our law . . . the exercise of a power to speak authoritatively as an interpreter carries with it an obligation to explain the grounds upon which the interpreter gives that authoritative judgment."); Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648, 655 (1980) ("Every judge should be required to give his reasons for a decision, and these reasons should be sufficient not only to explain the result to the litigants but also to enable other litigants to comprehend its precedential value and the limits to its authority."). *But see* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 659 (1995) ("[W]hen context, case-by-case decisionmaking, and flexibility are thought important, the benefits of requiring decisionmakers to give reasons do not come without a price.").

285. Hart v. Massanari, 266 F.3d 1155, 1178 (9th Cir. 2001) ("Deciding a large portion of our cases in this fashion frees us to spend the requisite time drafting precedential opinions in the remaining cases. Should courts allow parties to cite to these dispositions, however, much of the time gained would likely vanish."); Kenneth Anthony Laretto, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037, 1038 (2002) ("[N]o-citation rules are . . . constitutionally justified as applied to decisions that are objectively non-precedential.").

286. *See, e.g.*, Anastasoff v. United States, 223 F.3d 898, 898 (8th Cir.), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc); Daniel N. Hoffman, *Publicity and the Judicial Power*, 3 J. APP. PRAC. & PROCESS 343, 353 (2001) ("The freedom of litigants to call to our attention and to the courts' attention any precedents and principles they deem inconsistent with the result advocated by the other side is a necessary condition for having the confidence we need. Otherwise there is no sufficient check, scrutiny, or accountability.").

287. *Massanari*, 266 F.3d at 1178 (concluding that such rules are constitutionally permitted); *Anastasoff*, 223 F.3d at 898 (concluding that they are not).

decision;[288] and (2) allowing future citation to that decision for its persuasive value, even if it is designated as non-precedential.[289] Reason-giving ensures a minimum of due process and prohibits the court from effectively declining to review the underlying judgment.[290] And even an opinion designated as non-precedential can fulfill the error-correction function of appellate review; it still resolves the dispute in the case at hand.[291] Furthermore, since no two cases are exactly alike, even opinions designated as precedential can generally be distinguished on the facts.[292] Yet, the ability to cite appellate decisions—whether formally precedential or not—is crucial to the appellate functions that extend beyond mere error correction: encouraging the development and refinement of legal principles; increasing uniformity and standardization in the application of legal rules; and promoting respect for the rule of law.[293] If parties are precluded from arguing that their case should be resolved similarly—or differently—from other cases that share similar characteristics, then appellate courts would not be able to ensure uniform treatment of

288. *See* Daniel N. Hoffman, *supra* note 286, at 353 ("How much must we be told to enable us to understand what the law is, according to which the conflict has been resolved? 'Affirmed in light of the precedent, *P v. D*' might conceivably suffice. But 'Affirmed, Rule 51' cannot suffice, because rule 51, which simply permits summary dispositions, is not a rule of substantive law. It does not even pretend to explain why this plaintiff, or those similarly situated, are entitled to prevail. At most, it suggests that the court has deliberated and, for unknown reasons, has determined that such is the case.").

289. *See* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1469 (2003) (describing a proposed rule which would "allow the citation of unpublished opinions solely for persuasive value"); *see also* FED. R. APP. P. 32.1 ("A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as 'unpublished,' . . . and (ii) issued on or after January 1, 2007."); ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., CITING UNPUBLISHED FEDERAL APPELLATE OPINIONS ISSUED BEFORE 2007, at 2–4 (2007) (showing variation among courts' positions on citing unpublished opinions through a series of tables).

290. Richman & Reynolds, *supra* note 284, at 285; *see also* Paul R. Verkuil, *Crosscurrents in Anglo-American Administrative Law*, 27 WM. & MARY L. REV. 685, 703 (1986) ("The statement of reasons ingredient is critical to American due process jurisprudence . . . . [I]t gives the parties notice of the basis on which their claims are denied[;] . . . it satisfies the parties and the public that the democratic principle of rational decisionmaking has been vindicated; and . . . it forces intellectual discipline upon deciding officials, which enhances the correctness of the initial decision process.").

291. *See, e.g.*, *Massanari*, 266 F.3d at 1178 ("An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision.").

292. *See* Shawn J. Bayern, *Case Interpretation*, 36 FLA. ST. U. L. REV. 125, 169 (2008) ("[D]ecisions are stated and then narrowed or expanded as facts test the generality of those decisions. The law that evolves is bound to—rather than insensitive to—the facts that give rise to it.").

293. *See supra* notes 14–17.

like cases and would not be able to aid in the development of the underlying legal principles.

Nondiscretionary review combined with reason-giving therefore gives expression to values of individualized justice, litigant dignity, and institutional legitimacy of the judiciary. Nevertheless, there are also costs to promoting these values within the appellate system. Nondiscretionary review also enforces a preference for accuracy over finality, while it diminishes the power of individual states—especially of the political branches of government within those states—to exercise policy choices in funding the judiciary.

B. Institutional Legitimacy and Individual Dignity

Discretionary review focuses primarily on systemic values and permits the Supreme Court to exercise what Professor Ratner has termed the two "essential appellate functions under the Constitution"—to resolve conflicts among lower courts and to maintain the supremacy of federal law.[294] Nondiscretionary review, however, promotes error correction in a wider variety of cases; it is largely the purview of intermediate appellate courts, whose very creation was left to the will of Congress.[295] The appellate judicial role in error correction is essential to a functioning system—and it is a role that is not replicated in any other branch of government.[296]

Because nondiscretionary review better ensures error correction in individual cases, it also better comports with popular conceptions of justice and due process. Litigants routinely expect to have a right to appeal, notwithstanding the Supreme Court's statements that no such right exists under the U.S. Constitution.[297] The idea of justice on appeal is firmly established in popular culture:

294. Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960).

295. *See id.*

296. *See* Paul D. Carrington, *A Critical Assessment of the Cultural and Institutional Roles of Appellate Courts*, 9 J. APP. PRAC. & PROCESS 231, 235 (2007) ("Yes, of course, appellate courts make law. But we do have other institutions to provide that service. The indispensable task of the appellate court is to correct error, or perhaps more precisely, to convince the parties and their counsel that the possibility of incorrect application of the law has been seriously considered by judges of rank and security, and to remind trial judges that they are indeed confined by the law in the choices that they may make in response to overtures from parties.").

297. Arkin, *supra* note 8, at 504 ("[M]ost people—if not most law school graduates—simply assume that the constitutional guarantee of due process of law includes some right to appeal a criminal conviction.").

> Like *Miranda* warnings, the expectation of appellate review following a trial court conviction is deeply embedded in our national consciousness, as exemplified by fictional and filmic protagonists who cry out at the jury's verdict, "I'll appeal!" or who languish—perhaps temporarily—in prison while their destiny is in the hands of an appellate court. It would surprise many Americans to learn that there is, in fact, no right to such review as there is a right to trial by jury and a right not to incriminate oneself. By this admittedly imperfect measure of "national culture," the right of appeal deserves a loftier stature than it now enjoys.[298]

It is likely that the pervasive statutory right to appeal has allowed the concept of appellate justice to permeate through the national culture. In a sense, then, constitutionalizing the right to an appeal would simply reflect the status quo that many people believe already exists.[299] If the public were aware that such appellate rights were in fact not guaranteed—and that such rights are not available in every state at the present time, and could be taken away by other cash-strapped state legislatures at a future time—then the justice system could well face a crisis of legitimacy.[300] As other scholars have noted, the value of the appellate system's ability to increase public trust in judicial outcomes may exceed the amount of error correction actually accomplished.[301]

This institutional legitimacy value also overlaps with the values of individual dignity and participation in the justice system. Again, the instrumental importance of error correction may be subsidiary to the process values of participation, dignity, and trust: even when litigants lose their appeal on the merits, empirical research has shown that the mere fact of being heard promotes a sense of procedural fairness and leaves people feeling better about the outcome.[302] A right of appeal allows litigants "to present the evidence and the arguments they consider essential to protect their rights."[303] When litigants appeal an adverse verdict, one goal is to reverse that outcome—but

298. Cavallaro, *supra* note 50, at 985–86.

299. *See id.* (noting that litigants expect a right of appeal); *see also supra* notes 1–2 (noting similar popular perceptions).

300. *See* Cavallaro, *supra* note 50, at 980.

301. *Id.* at 981; Dalton, *supra* note 12, at 98.

302. *See* SCOTT BARCLAY, AN APPEALING ACT: WHY PEOPLE APPEAL IN CIVIL CASES 12, 101–12 (1999) (analyzing the result of an empirical study of why people choose to appeal, and finding that litigants appeal because they seek "to be heard fairly," and concluding that a fair hearing may meet their appellate goals "even if the subsequent outcome is negative").

303. Leubsdorf, *supra* note 12, at 593.

another goal is "to be heard fairly by someone in authority in regard to the issue that the litigants think is at the heart of their dispute."[304] The Supreme Court has, in the past, recognized that "a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests."[305]

Professor Dalton's explanation of the appellate process may shed light on the mechanism of how even a loss on appeal can improve trust in judicial procedure. In his view, the state's power over individuals in the judicial process is so great, that before it acts on that power, "the state must satisfy itself several times over that such a judgment is warranted"; likewise, "before depriving an individual of liberty the state must act in a way that evidences and reaffirms respect for that liberty, lest we all be cheapened, diminished, and rendered more vulnerable."[306] The appellate system promotes participation by allowing losing litigants to seek a second chance at justice by presenting their concerns to a higher tribunal.[307] Even if they do not prevail on appeal, a ruling on the substance of their claim by a second tribunal gives losing litigants a greater voice in the justice system; it reassures litigants "that they are getting the personal attention of judges that is the heart of the Due Process guaranteed by state and federal constitutions."[308]

In this regard, the trial system and appellate system protect different litigant interests: at the trial court, the litigant's dispute is with the opposing party, and at the appellate level the litigant's dispute is with the state. Due process at the trial level protects the litigant's right to complain about—or to defend against—the opposing party's actions. On appeal, however, the complaint is not that the opposing party acted wrongfully, but rather than the trial court below acted wrongfully in its handling of the underlying dispute. Due process at the trial level can at most give the litigant a sense of being heard in the dispute with the opposing party; by

304. *Id.*

305. Carey v. Piphus, 435 U.S. 247, 262 (1978); *see also* Douglas Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clause Nonjusticiable*, 60 TEX. L. REV. 875, 887 (1982) ("The sense of unfair treatment felt by victims of inadequate procedure is precisely the sort of individual harm that constitutional rights and judicial review are meant to protect against.").

306. Dalton, *supra* note 12, at 102.

307. *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 321 (2004) ("Procedure without participation may command obedience, but it cannot win principled allegiance.").

308. Carrington, *supra* note 296, at 236.

definition, it cannot give the litigant a sense of being heard with regard to the court's action. Because it is the trial court that ultimately takes action by imposing (or failing to impose) civil damages or criminal penalties, the litigant who seeks to appeal will have a complaint about the trial court's action that is separate and distinct from any complaint against the opposing party. Thus, although the denial of a discretionary appeal may ultimately have the same outcome as an affirmance on the merits (both actions would leave the trial court's action undisturbed), the discretionary denial of review does not provide the same sense of being heard—it does not "demonstrate to the world that someone [backed by the state's authority] has heard and understood the substance of the appellant's contention."[309] As a result, the discretionary review in a certiorari system may work quite well as a second-level layer of protection, but it does not ensure "adequate and effective review" of the trial court's action, and it is therefore no substitute for a first-level appeal as of right.[310]

Finally, a nondiscretionary right to appeal also protects a litigant's dignity by diffusing the power of an individual judge—a diffusion that is especially important in an era where the power of the trial judge is larger than ever before.[311] With a right to appeal, a single person is no longer in control of the litigant's destiny; instead, the power of the state must be exercised through a multi-judge appellate panel in addition to the trial court. In this way, "[d]ecentralized decisionmaking limits the amount of power vested in a single individual[, and] . . . the coercion of the state is legitimated by the limitations on concentrations of power."[312] The appellate process thereby ensures not just that the litigant will have a voice in the process, but that the litigant will lose only if a larger number of voices join together in that decision. Thus, win or lose, a right to appeal gives individuals a voice in the justice system, endorses the ideals of

309. Paul D. Carrington, *Justice on Appeal in Criminal Cases: A Twentieth-Century Perspective*, 93 MARQ. L. REV. 459, 472 (2009).

310. Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 DUKE J. COMP. & INT'L L. 1, 45 (2011) (noting that different countries provide different types of appellate review in criminal cases, but arguing that "[w]hile the exact form that an appeal takes may vary, all appeals must afford a convicted person the ability to access an adequate and effective review of conviction and sentence").

311. *See supra* Part IV.

312. Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 851 (1984).

human dignity and collective decision making, and reflects a deeply held cultural expectation.[313]

C. *Finality, Federalism, and the Political Process*

Appellate review necessarily creates a tension between the values of finality and accuracy. The value of accuracy is at the heart of appellate review, and underlies both the error-correction function of review and the public-trust function.[314] The existence of compelling inaccuracies that are incapable of correction stokes distrust of the justice system generally; this effect is highly visible both in the number of "innocence projects" around the country that seek to free the wrongly convicted and the call for constitutional protection of actual innocence claims.[315]

In almost every case, however, the value of accuracy will eventually give way to a need for finality, as evidenced by the universal existence of appellate deadlines.[316] The value of finality is not just a matter of efficiency: it is also "an expression of a desire to

313. *See* Lena Husani Hughes, *Time Waits for No Man—But Is Tolled for Certain Post-Judgment Motions: Federal Rule of Appellate Procedure 4(a)(4) and the Fate of Withdrawn Post-Judgment Motions*, 112 COLUM. L. REV. 319, 357–58 (2012) ("[T]he right of appeal remains, for many, an important indication that the justice system values accuracy in its decisions and promotes fair treatment of litigants who participate in the system."); *see also* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 177 (2011) ("The legitimacy of our legal system is premised on its constitutional roots, which guarantee due process of law. But in practice, the subjective assessments about the quality of justice received will also influence participants' perceptions about legitimacy—in particular, the quality of procedural justice received.").

314. *See supra* Part I.

315. *See, e.g.*, Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 637 (2009) ("The empirical record shows that the American system for appealing criminal convictions regularly fails in its most important role of protecting against erroneous conviction of the innocent."); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970) ("I would also allow an exception to the concept of finality where a convicted defendant makes a colorable showing that an error, whether 'constitutional' or not, may be producing the continued punishment of an innocent man."); Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1699 (2007) ("The lack of a capstone innocence claim under the Federal Constitution has resulted in a conflicted regime.").

316. *See* Aaron-Andrew P. Bruhl, *When Is Finality . . . Final? Rehearing and Resurrection in the Supreme Court*, 12 J. APP. PRAC. & PROCESS 1, 2 (2011) ("A case that is still on appeal is not yet final in this sense, and so an appellate court can reverse a trial court decision that was perfectly correct when rendered but that has become incorrect by the time of the appeal. After finality attaches, however, the judgment stands even if the law later changes." (footnote omitted)); Catherine T. Struve, *Time and the Courts: What Deadlines and Their Treatment Tell Us About the Litigation System*, 59 DEPAUL L. REV. 601, 622–23 (2009) (describing the strict nature of post-judgment motion deadlines).

limit the time between the eruption of a dispute, its resolution, and the implementation of a solution[;] . . . a view that fluidity, flexibility, and open-endedness work injustice, lead to instability, and undermine the rule of law."[317] Without finality, "[t]here comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility."[318]

In an individual case, it can be difficult enough to draw a line between the competing values of accuracy and finality. When the question of individual justice is compelling enough, even a reasonable deadline will give way in the need for "fundamental fairness"; thus, for example, when a man on death row was effectively abandoned after his attorneys left their law firm, the Supreme Court was willing to waive the appeal deadlines.[319] Even with the compelling facts of this case—the life-or-death consequence, the lack of counsel, and the lack of an opportunity to present an ineffective assistance of counsel claim on direct appeal—the Supreme Court divided seven to two about whether the value of accuracy or the value of finality would control the outcome.[320]

The balance between accuracy and finality within a system of nondiscretionary review becomes even more difficult to assess when federalism concerns are thrown into the mix.[321] States must make political choices about the resources they are able to allocate to their judicial systems, and this means making a choice about when to focus those resources away from correcting inaccurate judgments and

317. Resnik, *supra* note 312, at 851–52.

318. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452–53 (1963).

319. *See* Maples v. Thomas, 132 S. Ct. 912, 927 (2012).

320. *Id.* at 927 (acknowledging the values of comity and finality, but concluding that "fundamental fairness [remains] the central concern of the writ of habeas corpus"); *id.* at 929 (Scalia, J., dissenting) (stating that federal habeas corpus review undermines the states' "practical interest in the finality of their criminal judgments").

321. Cases that fit within the Supreme Court's exclusive original jurisdiction are an interesting example of this balance; by their nature, these cases necessarily escape appellate review. However, these are also the types of cases where finality is most urgently needed. *See, e.g.*, Virginia v. Tennessee, 148 U.S. 503, 504 (1893) (noting that the Court has original jurisdiction in boundary disputes between states, "which otherwise might be the fruitful cause of prolonged and harassing conflicts"); *see also* Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 632–33 (2001) (explaining the Supreme Court's original—and exclusive—jurisdiction in interstate disputes and noting that this "exclusive nature of the Court's original jurisdiction thus requires the Court to function in all respects as a trial court, or a court of first instance, in cases between state opponents").

"toward more productive ends."[322] If fundamental due process is interpreted to require a nondiscretionary right of appeal, then state freedom to make a political choice about whether to offer an appeal is limited. Thus, for example, a state such as Virginia may have a policy that emphasizes the supervisory role of the appellate system over the error-correction function; by relying on a system of discretionary appeals, appellate courts are able to focus their resources on the cases that raise questions that are important to the jurisprudence of the state. Creating a nondiscretionary review requirement would turn the appellate judiciary into courts of error correction and would thereby limit the state's ability to channel its judicial resources as it sees fit.

Adopting a constitutional requirement for appeals that overrides state political processes is problematic: the political process most clearly represents the public's policy choices, and it remains flexible to changing conditions.[323] As some have pointed out, "The legislature creates substantive rights; why should it not decide how vigorously it wants to enforce those rights and what procedures will suffice?"[324] Justice Brandeis famously noted that the states can serve as laboratories of democracy, and can "try novel social and economic experiments without risk to the rest of the country";[325] why not allow states to decide for themselves whether to offer a nondiscretionary right of appeal?

Constitutionalizing a right to appeal is therefore not without cost: it enforces a preference for accuracy over finality, and it does so at the cost of individual states' policy choices. In one sense, this may be the case with any constitutional protection. As Alexander Bickel noted half a century ago—and as many academic commentators have explored in the interim—some of the Court's most important work is explicitly countermajoritarian, protecting the politically disempowered against majority rule.[326] Of course, on a national level

322. Bator, *supra* note 318, at 453.

323. *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 58 (2004) ("Public participation seems easier in state and local politics; this may be so because the issues seem more immediate, because citizens are more likely to know state or local politicians personally, or because the barriers to entry into politics are lower at the state and local level.").

324. Leubsdorf, *supra* note 12, at 593.

325. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

326. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–17 (1962); *see also* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) ("For decades, legal academics have struggled with the 'countermajoritarian difficulty': the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges

the right to appeal is not countermajoritarian; almost every jurisdiction chooses to provide appeals as of right.[327] But in the individual states that do not currently offer such rights, the constitutionalization of a right to appeal would have a countermajoritarian effect and would create "interference with state autonomy."[328]

Thus, constitutionalizing the right to appeal requires making a choice between several competing values, and it comes at a cost both to the political branches of government and to state autonomy. Is it worth it? Although it is a close call, there are systemic reasons to believe that the protection of individual rights through the appellate process can outweigh the importance of deference to state political choices. As Professor Leubsdorf has argued, "[C]ourts should not leave questions of access and participation to the political process, for access and participation constitute an integral part of the democratic system that legitimizes that process."[329]

Current research into the juvenile justice system illustrates the importance of appellate review in protecting the access and participation rights of the politically disempowered, suggesting that appellate remedies tend to be underutilitized in the juvenile justice system.[330] Across the United States, juveniles who are adjudicated delinquent (the juvenile equivalent of a criminal conviction) appeal in only five out of every one thousand cases.[331] Rates vary significantly from state to state, but do not seem to correlate with the level of state protection: instead, appeals are more common when system

in what we otherwise deem to be a political democracy."); Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 417 (2009) ("The whole point of having an unelected judiciary is its ability to serve as a check on majority rule, which is why the Supreme Court's countermajoritarian capacity undergirds most every normative theory of judicial review.").

327. Lain, *supra* note 326, at 418.

328. *Id.*

329. Leubsdorf, *supra* note 12, at 598. *But see* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 916 (2010) (noting that, at the federal level, the political process has successfully safeguarded the Supreme Court's appellate jurisdiction; although there have been times when "Congress has successfully displaced the inferior federal courts," it has nevertheless "proven far more difficult for Congress to curb the Supreme Court's appellate review power"). While these structural safeguards have protected the Supreme Court's supervisory appellate power, they do not protect the error-correction function of the intermediate federal courts or of state courts.

330. *See* Megan Annitto, *Juvenile Justice on Appeal*, 66 U. MIAMI L. REV. 671, 672 (2012) ("Although the discretion of judges in juvenile delinquency cases is not 'unreviewable,' in practical terms, juvenile delinquency cases are rarely subject to appellate review.").

331. *Id.* at 716.

participants have "an awareness of the importance of appeals."[332] In Florida, the state with the highest appeal rate, one juvenile public defender emphasized the role of appeals in guaranteeing basic rights: she stated, "If someone came to me and wanted to build a model office to represent juveniles, I would say to them, if you have ten dollars, put nine of them into having a good system of appellate review."[333] When appellate protections are offered in juvenile cases, they have offered significant protection.[334] Appellate review has proved especially important in guarding against wrongful convictions due to false confession, as the risk of such false confessions is much higher with minors than with adults and increases as the age of the accused offender decreases.[335]

It is interesting that appellate review is so rarely used in juvenile cases, even in states that otherwise provide robust appellate remedies, and even when juveniles have a de jure right to appeal their adjudications. Given the different appeal rates across states, it does not appear that appeals are simply unneeded or unwanted in juvenile cases; instead, it appears to be more a function of the legal culture and awareness of appellate protections.[336] In this regard, the expressive power of a constitutional rule may outweigh a statutory right; the very act of constitutionalization may heighten the role of appellate remedies within the larger legal culture.[337] As Professor Leubsdorf has written, constitutional law can "improve civil procedure by focusing legislative attention on dark spots and neglected values and by forcing the system to respond to an individual's claim of injustice."[338] Even if the impact of this change were limited to marginalized groups or outlier cases, the overall increase in justice would be consistent with the goals of due process.[339]

332. *Id.* at 716–17.

333. *Id.* at 730.

334. *See id.* at 717.

335. *See id.* at 732 ("A study of falsely convicted youth found that 31% of exonerated youth that were previously convicted had falsely confessed to the crime, mostly due to police inducement. The number increased to nearly half when isolating younger juveniles ages eleven to fourteen.").

336. *See id.* at 717.

337. For an empirical analysis of the expressive function of law, see Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135, 156 (2007) (concluding that "governmental actions which appeal to the civic duty (i.e. by legally prescribing it) may have substantial effects," whereas "actions which target at reducing the costs of provision of the public good might be less effective in certain situations").

338. Leubsdorf, *supra* note 12, at 615.

339. *See, e.g.*, Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 887 (2009) ("[E]xtreme cases are more likely to cross constitutional limits, requiring this Court's

In order to tap the expressive power of constitutional recognition, however, the effect of that power must be distributed throughout the legal culture. Recognizing the need for marginalized groups to obtain justice is a substantive end that is susceptible to being excluded by the political process.[340] Constitutional recognition of the process values underlying appellate rights, by contrast, is less susceptible to encroachment; generalized process values are better able to shape the larger legal culture than are more politically controversial substantive ends.[341] The most effective way to protect the substantive rights of marginalized groups may therefore be to enshrine procedural rights of appeal for all.[342]

CONCLUSION

The Supreme Court should explicitly recognize a due process right of appeal in both civil and criminal cases. Appeals play a number of important roles in the justice system: they allow the correction of legal and factual errors, encourage the development and refinement of legal principles, increase uniformity and standardization in the application of legal rules, and promote respect for the rule of law. Nearly every U.S. jurisdiction has found that the benefits of a robust appellate system outweigh the costs, and has therefore chosen to protect appellate rights though the political process. Without constitutional protection, however, these rights are not universally guaranteed—and they are not immune from the demands of declining state budgets. Recognizing a constitutional right to appeal would ensure that they are extended to all litigants, even in times of fiscal stress.

intervention and formulation of objective standards. This is particularly true when due process is violated.").

340. *See* Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1343 (2010) (noting that criminal defendants are a "politically disfavored class of litigants").

341. *See* Rosen-Zvi & Fisher, *supra* note 61, at 81, 155 (acknowledging that procedural change happens "as a result of political, social, and economic transformations and reflect emergent social values" and advocating for the elimination of the civil/criminal distinction, though disputing that all procedural rights should be distributed equally "in the name of abstract and uncritically accepted notions of fairness and due process").

342. This conclusion in some ways combines Derrick Bell's "interest convergence" theory, which suggests that minority rights would be more likely to obtain recognition when they converge with majority interests, Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–24 (1980), with the notion that procedure in general is necessary to protect substantive rights. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1981 (2007) ("The primary goal of procedure is to produce outcomes that enforce the substantive law properly.").

Constitutional recognition of a right to appeal would also comport with modern litigation realities. The Supreme Court's criminal and punitive-damages doctrines have already implicitly recognized a right to appeal, and making that protection explicit would ensure doctrinal consistency. Moreover, the procedural system has changed along with substantive doctrine; now, both civil and criminal procedures have grown in ways that depend on an effective appellate system. If appellate remedies were removed from the modern procedural framework, the system as a whole would no longer provide adequate due process protection. Finally, recognizing constitutional protection for appellate rights would also express a normative view, promoting the values of institutional legitimacy, respect for individual dignity, predictability, and accuracy. Appellate procedure has earned a place in our contemporary understanding of due process; it is time to recognize its role as a fundamental guarantee of fair judicial practice.