

9-1-1990

## The Independence of Judges: The Uses and Limitations of Public Choice Theory

Richard A. Epstein

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Judges Commons](#)

---

### Recommended Citation

Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. Rev. 827 (1990).  
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1990/iss3/14>

This Symposium Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# The Independence of Judges: The Uses and Limitations of Public Choice Theory

*Richard A. Epstein\**

## I. INTRODUCTION: A MEAGER HARVEST

How do judges behave in deciding cases? The question seems to be peculiarly immune to the ordinary techniques of social science analysis. While public choice theory in particular has achieved important breakthroughs in understanding legislative behavior, it has not achieved similar successes in dealing with judicial behavior. Yet, in an odd sense, its inability to provide us with strong predictions as to how judges behave should be regarded as a backhand confirmation of the theory, and not as its refutation. Given the set of institutional constraints under which judges routinely labor, the basic assumption of public choice theory—that self interest rules behavior in public as well as private transactions—*should* yield only weak and instructive generalizations about judicial behavior. The fundamental soundness of our constitutional structure has channeled self-interest away from its most destructive paths, and has robbed it of its greatest possibilities of doing political and constitutional mischief.

To develop these themes, this paper will proceed in several steps. Section II takes a short detour into the standard modes of self-interest analysis that social scientists (and to some extent lawyers) bring to these issues. It then explains why public choice analysis, as applied to judicial behavior, necessarily yields a very meager harvest. Section III deals with “judicial temptation” and its institutional constraints. These constraints are so effective that, even when judges do act to maximize their own individual self-interest, by default they are influenced by the matters of

---

\* James Parker Hall Distinguished Service Professor of Law, The University of Chicago. This paper was prepared for a Conference on Public Choice and the Judiciary, sponsored by the Institute of Political Economy, Utah State University. I also presented an earlier version at a faculty workshop at Washington & Lee University Law School in October, 1989. I have profited from comments by Jonathan Macey and Richard Posner on an earlier draft of this paper, and I should like to thank Gerhard Casper for his advice on many of the issues raised in this paper.

background and temperament that receive so much weight in the ordinary political science accounts of judicial behavior. Finally, section IV turns to the related issue of judicial "virtue": does the independence of the judiciary, once secured, advance or impede long term social welfare? Here I conclude that it is a mistake to assume, as has been argued by Professor Landes and Judge Posner,<sup>1</sup> that judges function as the legal glue that holds in place the deals generated by interest-group politics. By the same token, however, judicial independence offers no guarantee that judicial decisions will serve the public interest, even if we could all agree as to how it should be defined.

## II. IS SELF-INTEREST UNIVERSAL?

There is today a single dominant social science paradigm for the analysis of individual and group behavior—one that argues that individuals in all their roles act to maximize their individual self-interest under conditions of uncertainty. Within this framework there are no independent moral constraints upon behavior. The theory as stated is totally remorseless in its scope and regards any deviation from the central thesis as unwarranted sentimentality or as an ad hoc retreat from the rigors of academic discipline.<sup>2</sup>

This hard line carries with it certain distinct methodological and intellectual attractions. If individuals do not maximize individual self-interest, then just precisely what do they do? Do we, for example, boldly proclaim that self-interest is irrelevant to individual motivation? If so, political actors, for example, could be posited to act solely in pursuit of the common or collective good, as social welfare theorists define it. But empirically the extreme position of universal, disinterested benevolence seems wrong. There are too many instances of greed in government and elsewhere, of which the widespread misappropriation in HUD programs and grants is only one conspicuous recent example.<sup>3</sup> Self-interest may not be the whole truth but it is a large part of the truth nonetheless—too big for any theory to ignore.

Any assumption of universal benevolence, moreover, gener-

---

1. See generally Landes & Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875 (1975).

2. E.g., Becker, *The Economic Approach to Human Behavior*, in RATIONAL CHOICE 108 (J. Elster ed. 1986).

3. See, e.g., Pound, *House Panel Urges Broader HUD Inquiry*, Wall St. J., Jul. 25, 1990, at 14, col. 4.

ates harmful prescriptions for good government. The complex structures of government—the separation of powers, the system of checks and balances, and the arduous procedures required under the name of due process—all rest on the skeptical assumption that individuals vested with public power are both able and willing to turn that power wrongly to private ends.<sup>4</sup> Any constitutional assumption that fashions institutions in the belief that individuals generally behave in accordance with the maxim, “from each according to his ability, to each according to his need,” renders these complex constitutional provisions redundant and useless. Why erect elaborate safeguards against risks that will never come to pass? Worse still, if these safeguards are discarded, then the rate of return to bad actors from taking positions of public power will increase. The wrong social incentives will therefore tend to propel the most corrupt and venial individuals into positions of public power and responsibility. The public choice perspective thus offers an important moral and cautionary dimension.

If, therefore, we are to abandon the remorseless vision of individual self-interest, then we must adopt some “mixed” vision of the determinants of individual behavior: Persons—sometimes, usually, virtually always—act to maximize their self-interest but—often, occasionally, rarely—deviate from that principle. From a sense of duty and honor, persons may discharge their prior obligations or sacrifice themselves to advance some more altruistic end, but they may also fail to do so. These mixed solutions carry the appearance of sweet reason, but they raise serious conceptual difficulties as well. The first of these specifies the proportions in the mix. Do we assume that self-interest dominates 55% of the time, or 99.99% of the time, and why? For the political theorist concerned with the structure of political institutions, that question is important but not all consuming. So long as self-interest is regarded as a persistent but not universal danger, there will still be a strong need to take

---

4. Similar assumptions exist, moreover, for private voluntary organizations, be they churches, corporations, clubs or condominiums. In each case there is commonly a division of power between a supervisory board and a single individual with executive power. Private individuals can also convert other people's private wealth to their own personal gain. See, e.g., Fama & Jensen, *Separation of Ownership and Control*, 26 J.L. & Econ. 301 (1983) (examining the problem of optimal firm structure for public corporations, professional partnerships and nonprofit organizations).

For the parallels between private organizations and constitutional structure, see Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906 (1988).

structural precautions against it. The precise level of the precaution depends upon the frequency and severity of improper conduct, as well as the costs of reducing that conduct. In matters such as these, rough estimates are the best that can be expected. Thus even if the self-interest hypothesis is not universally true, then there is still good reason for acting as though it were in order to justify the constitutional safeguards on government actors.

The academic theorist, however, cannot take refuge in those probabilistic verities. The postulate that all individuals maximize their self-interest will only ground a comprehensive theory if it rises to the level of a universal truth. It must account for *all* instances of individual behavior, which by common experience runs from egregious to benevolent. From the standpoint of Darwinian biology, a single act of generosity in nature is a refutation to the theory of natural selection,<sup>5</sup> and social scientists who take the remorseless view of self-interest have to take much the same view of human behavior.<sup>6</sup> They have to supply ready explanations for the difficult cases (like judges) as well as the easy ones (like most legislators). Sometimes it might be possible to dismiss a benevolent action as a mistaken aberration, unlikely to be repeated. Sometimes a network of indirect or reputational benefits generates self-interested explanations for what appears to be benevolent behavior. And sometimes people may have interdependent utility functions which explain why happiness to children is a benefit to parents and vice versa.

The hard theoretical question is whether these qualifications, taken together, amount to an important enrichment of the theory of individual self-interest or to its transformation, sub silentio, into an unfalsifiable tautology. I suspect that the theory survives its qualifications. Such is in accord with most of our considered intuitions about self-interest, captured in David Hume's wonderful phrase, "selfishness and confin'd generosity."<sup>7</sup> But taking this sober middle position comes at a price. It risks a total retreat from analytical rigor, for whenever the evidence is difficult to square with the self-interest hypothesis we can in-

---

5. R. DAWKINS, *THE SELFISH GENE* 4, 38 (1978).

6. See generally Becker, *supra* note 2.

7. "Here then is a proposition, which, I think, may be regarded as certain, that 'tis only from the selfishness and confin'd generosity of men, along with the scanty provision nature has made for his wants, that justice derives its origin." D. HUME, *A TREATISE ON HUMAN NATURE* 495 (L. Selby-Bigge ed. 1960).

voke its benevolence exception until the overall theory is robbed of all explanatory power.

So there is a hard initial choice. The richer theory with its qualifications may fall prey to ad hoc explanations, while the more powerful, unqualified theory single mindedly may miss important features of the overall situation. Within the context of the self-interest debate, judicial behavior presents a special challenge. If the theory of individual self-interest that grounds public choice is as strong as its proponents claim, then it should supply insights into the behavior of all classes of public officials. Yet it is quite clear that the major strides in this area are made largely with legislative and political actors who are the subject of most public choice analysis.<sup>8</sup> The judiciary is generally left off to one side because judges are typically thought, by conscious constitutional design, to lie in some qualified space outside the political process, immune from the temptations that pervade the legislative and executive branches of government.<sup>9</sup>

There is much truth to the common observation that self-interest theory reaches its low ebb with judges. But that conclusion need not refute public choice theory, even in its most pristine form. Judges may well act only out of self-interest, but the system is so organized that they do not face the pressures and temptations necessarily encountered by other political actors. The structure of the "independent" judiciary is designed to re-

8. See, e.g., Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); McChesney, *Rent Extraction and Rent Creation in The Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971); Weingast & Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 771 (1983) ("[e]ach representative chooses actions (voting, introducing new legislation) so as to maximize his political support function generated by the interests within his district").

For what it is worth, two comprehensive introductions to public choice theory, I. McLEAN, *PUBLIC CHOICE: AN INTRODUCTION* (1987) and D. MUELLER, *PUBLIC CHOICE* (1979), do not refer to the behavior of judges.

9. See, e.g., H. HART, JR. & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958); see also Farber & Frickey, *supra* note 8, at 908-11 (Discussion of the judiciary is largely confined to the question of whether courts can distinguish sufficiently between public interest and special interest legislation to intervene usefully in the process. Their skeptical conclusion leads them to take the view that judicial restraint is the appropriate response to factional politics.). I have taken a different view. See, e.g., R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984). In both cases I treat all conscious deviations from competitive markets as a form of special interest legislation, a baseline that Professors Farber and Frickey do not examine.

move judges from the day-to-day pressures and temptations of ordinary political office, and with some qualifications it achieves that end. It is a strategy that recognizes the forces of self-interest, regards them as potentially destructive, and then takes *successful* institutional steps to counteract certain known and obvious risks. Independence is of course not an absolute—Congress has power over judicial salaries and the judicial budget<sup>10</sup>—but independence remains a dominant constitutional theme. The bounded success of our overall constitutional design has allowed the judicial branch to escape the criticism and scrutiny that has been heaped on the overtly political branches of government. But the strategy, like all management strategies, is not a cure for all institutional risks. It only minimizes certain risks *ex ante*, but it does not create an error-proof environment where all decisions are necessarily made correctly. There are both costs and benefits of independence, and a candid assessment of our present system of judicial independence requires both to be taken into account at the same time.

### III. MOTIVATIONS AND TEMPTATIONS OF JUDGES

What would a self-interested judge *do* to maximize his or her individual returns from public office? In answering this question, it is helpful to distinguish between two ordinary judicial roles. The first, and more conventional role, concerns their activities in hearing arguments, deciding cases and writing opinions. The second concerns their other judicial functions, which may involve judicial administration, hiring clerks, appearing before Congress, and participating in professional organizations and conferences. In general, the sensitive portion of the judicial role concerns the first class of duties, and it is to those duties that the issue of judicial independence is directed. As to the second class of judicial functions, judges are not subject to any exceptional constraints, except those needed to buttress the relative isolation needed for their first role. Otherwise they are constrained, for better or for worse, by the same forces that normally control market actors. The distinction between these two classes of judicial activities offers a chance to test the relative strength of institutions and character in determining individual behavior. On this point the public choice theory presupposes

---

10. Concerning the judicial budget see Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. LEGAL STUD. 131 (1991).

that judges act out of self-interest in both roles, and hence maximize utility, subject only to the different external norms. Where these norms bite, judges bend. Where they do not, judges behave like other individuals. The non-public choice view places far greater stress upon character. Under this view, taking on the role of a judge invests individuals with a sense of place and position. Judges have a superior fitness for office that keeps them from reverting to the usual self-interested behavior when the sanctions upon them are relaxed. In general, I think that the more cautious view of human nature offers superior predictions of how judges will behave when their conduct is not regulated by the elaborate set of institutional constraints now in place. The available anecdotal evidence suggests that judges will behave more or less like the rest of us when their conduct is not closely constrained.

### A. *Judging Cases*

#### 1. *Incentive structures*

Judging cases lies at the heart of the judicial function. Therefore, we should expect judges who misbehave in this critical role to face powerful sanctions. Judges may not talk about pending business with any outsider;<sup>11</sup> nor reveal privately the decision in any case prior to its disclosure to the immediate parties and the public;<sup>12</sup> nor allow connection or money to (even appear to) influence the outcome of a case.<sup>13</sup> Bias is a "hanging" offense. These prohibitions against deciding cases in which judges have either a personal or a financial interest are strong and unyielding, and for good reason. Where the law is just and wise, bias could lead judges to disregard it in favor of some more partisan interest. Where the law is unjust or unwise, bias and favoritism do nothing to correct its intrinsic weakness, but only add a second layer of mischief to compound the first. The isolation of judges from these types of influences is strictly necessary for them to preserve their ability to perform their institutional function. *Ex ante*, probably no one gains from a biased or corrupt judiciary.

The only question is how this basic principle is enforced. Corrupt behavior, once detected, is subject to massive penalties.

---

11. CODE OF JUDICIAL CONDUCT Canon 3, § B(11) (1990).

12. *Id.* at Canon 3, § B(9).

13. See generally *id.* at Canon 4.



To forestall the need to apply these heavy sanctions, the legal system generates a wide range of prophylactic rules that allow judges to escape even the suspicion of bias.<sup>14</sup> They can recuse themselves from cases;<sup>15</sup> they can avoid socializing with lawyers who have, or are likely to have, cases before them;<sup>16</sup> and they can sharply limit their other activities. It is obvious that judges cannot practice law,<sup>17</sup> work for business corporations,<sup>18</sup> or lobby Congress.<sup>19</sup> Accordingly, their outside activities are largely limited to writing books, giving speeches, and teaching,<sup>20</sup> and these have now been subject to extensive limitation by Congress.<sup>21</sup> The academic cast to judges' work is no accident, for academics also function in a world in which there is some, albeit less, premium on detachment and independence. Like Caesar's wife and baseball umpires, judges must be above suspicion.

In addition, federal (and some state) judges are insulated from the more obvious demands of the political process—at least if they survive, as Robert Bork did not, the initial confirmation process. They serve with tenure for life on good behavior.<sup>22</sup> Their salary cannot be reduced during their term of office,<sup>23</sup> and it would provoke a major constitutional crisis for Congress to use its budget power to deprive them of the staff and support needed to discharge their ordinary duties. All this is not to say that judges are wholly immune from congressional scrutiny. There is always some discretion in the appropriations process, as much for the judicial branch as for any other, and at the margin, it may well incline judges to act more as the current Congress would like.<sup>24</sup> The refusal to grant an overall pay raise, which is within the ordinary congressional prerogative, might influence how judges act and behave, especially in periods of inflation.<sup>25</sup>

It is easy, however, to overstate the effectiveness of these

---

14. See generally CODE OF JUDICIAL CONDUCT (1990).

15. *Id.* at Canon 3, § E(1).

16. *Id.* at Canon 4, § A.

17. *Id.* at Canon 4, § G.

18. *Id.* at Canon 4, § D(3).

19. *Id.* at Canon 4, § C(1).

20. *Id.* at Canon 4, § B.

21. Ethics and Reform Act of 1989, Pub. L. No. 101-194, § 601, 103 Stat. 1760-61 (to be codified at 5 U.S.C. App. § 501-05).

22. U.S. CONST. art. III, § 1.

23. *Id.*

24. See the evidence on this point collected in Toma, *supra* note 10, at 130-32.

25. Indexing judiciary salaries to inflation may be a viable strategy, at least if the starting point were correctly determined.

financial sanctions at Congress' disposal. While pay raise limitations may be directed at the judiciary, they must be used across the board.<sup>26</sup> Thus it is not possible to deny increases to judges who have voted one way on a critical abortion or civil rights case, while granting increases to sympathetic judges who voted the other way.<sup>27</sup> Fortunately, because the control over salaries is subject to a nondiscrimination constraint, the congressional power over the purse is reduced to a blunt and imperfect instrument that must be visited on friend and foe alike.<sup>28</sup> For example, the senator or representative who wants to get even with Justice Scalia must impose identical penalties on Justice Marshall. (It is, however, easier for Congress to "get" the Supreme Court than the lower courts because there is only one court with far fewer members than the Circuit Courts.) The political sanctions imposed upon judges are therefore far less than the *selective* and *pointed* sanctions routinely imposed upon other political actors—who have the constant risk of the next election, and the constant pressure from constituents and special interest groups to hew to one line or another. *Ex parte* contacts are out of bounds in the judicial context; they are mother's milk for the legislators and administrators.

This brief survey of the institutional constraints on judges offers a good explanation of why hard-nosed public choice analysis loses its force and allure when applied to the judiciary's ordinary business in deciding cases. The set of institutional structures that has been introduced at the federal level has done its job.<sup>29</sup> The structure of the federal courts is surely not a function of happenstance. As with our other constitutional choices, it is a function of reflection and choice, not one of accident and force.<sup>30</sup>

---

26. See generally *Evans v. Gore*, 253 U.S. 245, 248-54 (1920).

27. *Id.*

28. *Id.*

29. Many of these constraints also work at the state level, but there, judges are in some cases subject to reelection, even if they serve for lengthy terms. See, e.g., CAL. CONST. art. VI, § 26; ILL. CONST. art. VI, § 12. The patterns of selection in New York are a crazy quilt of different rules for Civil Court, Criminal Court, Housing Court, Supreme Court (e.g., trial court) and Appellate Court. New York City has even run ads to get lawyers to apply for positions as judges. See Frank, *Help Wanted: Ads Attract Potential Judges*, A.B.A. J., Feb. 1986, at 18.

Recall petitions, as with former Chief Justice Rose Bird in California, can also engender some political element into the entire system. See generally Chiang, *State Bar to Talk Power This Weekend*, San Francisco Chron., Aug. 24, 1990, at 5, col. 1; Sappell, *Death Penalty Controversy Trails Bird*, L.A. Times, May 14, 1990, at 1, col. 3.

30. As Alexander Hamilton stated:

The risks of a judiciary dependent upon the legislature or the President were well foreseen by the framers of the Constitution, who were aware of the situation in England. In their constitutional moment, the framers chose a set of safeguards that have worked well to minimize the impact of such risks. The usual public choice analysis presupposes that what drives politicians is the desire for reelection to office, election to higher office, or influence and power within office, as with critical committee assignments and the like.<sup>31</sup> Political actors are, therefore, in some sense only an inch away from the pressures of the ordinary political process, where they can be challenged either by an opposing party or by primaries within the parties. By conscious design, federal judges are insulated from these electoral sanctions and therefore have far greater ability to ignore short-term public opinion except in the most pressing and important cases.<sup>32</sup> In addition, their compensation cannot be diminished during their term of office,<sup>33</sup> nor are judges allowed to sell their services to the highest bidder. They cannot initiate law suits in order to extract promises from political actors, nor can they contract to sell their services in any other market. While they might violate these prohibitions, the probability of being caught is not insubstantial, and the legal and social sanctions for being caught are inexorable and severe. Judges are cut off from the usual sources of market and political gain. Their behavior should reflect their relative isolation, even under the self-interest hypothesis.

With the dominant sources of gain, loss, and influence closed to them, there is less material on which the logic of self-interest can work. The self-interest payoff structure for being a judge probably exerts a modest selection effect on who chooses to take the role. Knowledge of the isolated conditions of the job

---

It has been frequently remarked, that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force.

THE FEDERALIST No. 1, at 3 (A. Hamilton) (J. Cooke ed. 1961).

31. See, e.g., Farber & Frickey, *supra* note 8, at 875-83.

32. Those state court judges who do face electoral tests may well act more like the public choice model predicts, although most states structure their election laws for judges in ways that moderate the political pressures. The terms may be long, or the judges may run for office outside the ordinary two party structure.

33. U.S. CONST. art III, § 1. "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." THE FEDERALIST No. 79, at 531 (A. Hamilton) (J. Cooke ed. 1961).

and the relatively low financial compensation structures tends to induce persons of judicial "temperament" to seek and obtain judicial appointments.<sup>34</sup> But owing to the enormous political importance of the job in the current legal climate, the pay-off structure may well be dominated by other more powerful passions, as the battle over the Bork nomination so clearly illustrated.

More important are the effects of this system of sanctions on how judges handle and decide cases. The elaborate prohibitions make it difficult, if not impossible, to yield to the normal kinds of financial and electoral pressures other public officials experience because the usual highways of exploitation are effectively controlled. As a result, the theory of self-interest predicts that judges will then seek to maximize their self-interest by travelling along unregulated byways. In this context, there is an instructive parallel to the ordinary theory of rate regulation, which asks how members of a firm behave when the firm faces sharp restrictions on the rates of monetary return it can realize from its activities.<sup>35</sup> With the pecuniary avenues for gain closed, firm managers turn to nonpecuniary gains—first class tickets, large offices, extensive lunch breaks and the like to maximize their profits. The impulse toward self-interest is thus diverted into areas of activity that fall outside the scope of regulation.

Within the scope of the firm, these responses to regulation are generally regarded as unfortunate. If the firm spends \$1000 in revenue to provide its managers perks that managers value at only \$500, then everyone is better off if the managers are allowed to accept from the corporation a simple transfer of \$750 in cash. Within the context of the theory of regulation, there are good reasons to impose restraints on the ability of judges to go to the market to increase their financial remuneration. But once the focus turns from justification to prediction, it seems clear that judges will respond to restrictions on their freedom much like managers of the regulated firm. If judges cannot command money for their labor, and if they need not worry about reelection, then what is left? One possibility is that judges will maximize leisure by slacking off on the time and energy that they put into their judicial decisions. If their salary is constant regardless

---

34. See generally Greenburg & Haley, *The Rule of Compensation Structure in Enhancing Judicial Quality*, 15 J. LEGAL STUD. 417 (1986).

35. See generally R. POSNER, *ECONOMIC ANALYSIS OF LAW* 321-33 (1986).

of their performance, then why not take it easy? To be sure, there are limits on this strategy, for judges who fall too far behind in their work may be subject to serious sanctions, such as being barred from sitting on new cases. But judicial independence is surely consistent with some reduction in output by judges who have lost the taste and enthusiasm for their job.

The presence of sharp financial and political controls could lead to other responses: ambitious judges could seek to maximize their "influence" and "prestige," which are normally achieved by excellence in argument and writing. Other judges and lawyers are more likely to be impressed by judges who have a strong command of their subject matter, who make the strongest possible arguments for their position, and who avoid relying on raw and untested clerks to splice together quotations from earlier cases and law review articles. It matters to judges that their opinions are cited and followed by others who are free to ignore them. It matters to judges that their opinions are included in casebooks and discussed in popular journals and law reviews. How could it be otherwise? Self-interest, therefore, pays powerful dividends to judges who excel in these traditional areas, just as the public choice theory should predict, given the constraints on the system.

In addition, the lack of short-term financial incentives necessarily increases the relative importance of a judge's world view. If judges are immune from the pressures of reelection, they are likely to try to satisfy themselves or their close friends. It follows that we should expect to see the decisions of judges heavily influenced by the intellectual orientation and political inclinations that they brought with them to the bench in the first place.<sup>36</sup> Judges with a strong commercial practice may be expected to work heavily in that area. Those who are drawn from public areas may have a special understanding of the strengths and weaknesses of their offices. Clerks too may have a strong influence in the way in which they "socialize" judges by passing on the latest in academic fad or fancy. These influences may well get weaker over time.

---

36. The point was recognized early on. See, for example, the comments of William Smith of South Carolina, noting with respect to federal judges: "Should the district judge be under any bias, it is reasonable to suppose it would be rather in favor of his fellow-citizens than in favor of foreigners, or the United States." 1 ANNALS OF CONG. 799 (J. Gales ed. 1789), *quoted in* G. Casper, *The Judiciary Act of 1789 and the Independence of Judges* 12 (unpublished manuscript).

Nonetheless, there is a range of factors that we should look to in order to predict the judicial decisions of judges, even from the public choice perspective. Thus, one oft-cited study by Professor Tate finds that "parsimonious attribute models" of the voting behavior of Supreme Court judges explain between seventy and ninety percent of the "liberal" and "conservative" variance by an appeal to such variables as party identification, appointing president, region of birth, and prior judicial and prosecutorial experience.<sup>37</sup> Note, however, that this model, while predictive, makes no reference at all to how judges maximize anything. Rather than looking forward to see how judges obtain power, promotion, influence, wealth, or prestige, the model finds those certain key historical facts which are likely to shape the values that judges bring to their decisions. But we should not expect otherwise. It is the absence of any powerful financial or political inducements which allows these second order factors to dominate.

When all is said and done, however, these determinants seem to be fairly weak, for they lack certain focus and definition; judges do what they think to be right or expedient without having to pay an obvious political or electoral price. The theory of self-interest predicts, however, that as the external constraints are weaker, judges maximize their own welfare by looking to these other intangibles. But stated in this fashion, public choice theory loses its allure and driving force. It becomes description, and rather bland description at that, without expose.

In dealing with political actors, the intellectual thrust of public choice theory exposes the divergence between the private and the social interest manifested by politicians when they sell out to "special" interest groups or engage in logrolling of one form or another. The "news" in public choice theory is tied to the notable failures of the political system, whether in legislation

---

37. Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355-66 (1981). Under Tate's model, liberals and conservatives were evaluated in two separate domains: civil liberties and economic matters. In the first, liberals were regarded as more likely to protect civil liberties than conservatives. In the second, liberals were more likely than conservatives to favor government intervention into markets and the protection of employees as against their employers. Tate's model predicted that Democrats appointed by Democratic presidents with prior judicial, but not prior prosecutorial, experience from outside the South were far more apt to be liberal than conservative. The data base ends with the 1978 term, and it is not clear whether his conclusions would hold for the more fractured Supreme Court decisions of the 1980s. *Id.*

or regulation. Its social and reform agenda is to construct a system of constitutional, procedural, or voting rules that stem the abuses so closely associated with the problems of faction and self-aggrandizement. The repeated failures of electoral reform, ethics, and conflict of interest legislation and the like indicate just how intractable the problem is. Legal restrictions on official action may be too restrictive as well as too lax, which can easily be the case with conflict of interest rules applicable to executive officials, both before taking office and after leaving it.<sup>38</sup> But, with judges as deciders of cases there are *no* major divergences between public and private interest that can be found, and no genuine structural reforms can be devised which might improve the overall situation. The self-interest theory predicts that given this set of institutional constraints judges will behave more or less as the public interest demands—relatively immune from the short-term improprieties that could bring down the system as a whole.

## 2. *Cyclical voting*

The same basic analysis applies to Judge Easterbrook's effort to apply yet another element of public choice analysis to judicial behavior.<sup>39</sup> Easterbrook demonstrates at elaborate length that the familiar problems of cycling—those that occur when three voters are faced with three or more alternatives—can often arise within the judicial context.<sup>40</sup> Given that the Supreme Court conveniently has nine members, it is easy to construct cycles in which three judges take each of three positions. The existence of cycles influences the way judges write their opinions. As Easterbrook notes, it is important for each group of judges to write separately in order to preserve its options for the next round of cases.<sup>41</sup> As that process repeats over time, a certain

---

38. For a pointed discussion of the obstacles that are hurled in the path of public service, see Norton, *Who Wants to Work in Washington?*, *FORTUNE*, Aug. 14, 1989, at 77. One instance that captures the excess: Donald Atwood, age 65, a key General Motors executive, took a Defense Department job. In addition to being required to sell all his stocks in taxable transactions, he was required to take out an insurance policy at his own expense that guaranteed his pension, his life insurance, and his health benefits against the insolvency of General Motors, lest he direct business in that direction to prop up the firm in order to secure his own pension. *Id.* Why bother?, which is one conclusion of Norton's article.

39. Easterbrook, *Ways of Criticizing the Court*, 95 *HARV. L. REV.* 802 (1982).

40. *Id.* at 814-31.

41. *Id.* at 809-11.

level of doctrinal inconsistency will necessarily crop up even if each individual judge (or group of judges) takes consistent doctrinal positions across the board—although this often is not the case.<sup>42</sup> The problem of cyclical voting, therefore, can independently undermine the output of judges just as it undermines the output of any political body.

Easterbrook has engaged in a form of public choice analysis by showing that the ordinary rules of voting behavior apply to courts. But, public choice theory is concerned with more than voting cycles. It also posits that individual actors vote to maximize their self-interest. With or without cycles, therefore, it is necessary to find out how judges reach their own complex, substantive positions that lead to cycles in the first instance. What position do they take on child pornography, abortion, state aid to religious education, environmental protection and other issues? There is at this level simply no external pressure that drives the judges to select their positions that is remotely comparable to the powerful political forces legislatures are exposed to, forces, for example, like those surrounding school busing.

Judges vote only for themselves and not as representatives of anyone. The voting behavior in judicial and legislative bodies may suffer from some of the same problems of collective choice. But it does not follow that the preference functions of judges are formed in the same way as those of legislators, given their radically disjointed incentive structures. When commentators say that courts act like superlegislators, it is because they disapprove of the level of judicial intervention. They attack the subject matter or the substance of the decision as inappropriate. They do not assume that the same political forces work on judges as on legislators. Quite the opposite, the claim is that judges, as unelected officials, should not assume the same role as legislators precisely because they are all too free of the political restraints that bind elected and appointed officials.

### *B. Judges as Market Actors*

The situation changes once our attention is turned to judges as market actors in their secondary, non-courtroom activities. One example is sufficient to illustrate the more general point. Judges need to hire clerks, and they do so in a competitive employment market that has many judges on one side of the mar-

---

42. *Id.* at 831.



ket and many third year students or recent law school graduates on the other. Hiring clerks is not governed by any strong norms of the sort that involve judicial decisionmaking, and the consequences are evident to all of us who have both participated in and observed the clerkship market. The best way to explain how the market works is to assume that judges behave like any other employers. They seek to obtain the best clerks for themselves and have proven markedly resistant to various external efforts to regulate the market.

The basic story, much simplified, goes like this.<sup>43</sup> For many years the date of clerk selection, particularly by the elite judges, moved earlier and earlier. Judges (at least federal circuit and district court judges) surveying clerk prospects are often confident about hiring decisions the moment that the editorial boards for the law reviews are chosen in the spring of the second year. There is little variation in grades from the first to the third year, so the chance of a major mistake is relatively small. For judges seeking the best clerks, law review selection of authors is the last piece of really important information they require. Few judges think that further delay in selection will yield more valuable information, and each fears that further delay will allow other judges, armed with this information, to cream off the best of the clerkship market.

It should be apparent that a collective action problem infects clerkship selection. If all judges waited (say until beginning of the third year) to select their clerks, then perhaps all could make marginally better decisions. The stage was therefore set for a joint response to control this prisoner's dilemma game. After much skillful negotiation, the major law schools were able to persuade the Federal Judicial Conference (an umbrella organization for federal judges) to adopt a rule prohibiting federal judges from accepting applications from, or letters of recommendation about, prospective clerks until September 15, 1984, or from hiring before that date.<sup>44</sup> Could this cartel-like arrangement (I do not pass judgment as to whether the cartel is either good or bad) prove stable over time? Standard economic theory predicts that it would not. Individual judges and individual applicants had strong incentives to jump the gun in order to secure the best

---

43. Some information about the story can be found in Levin, *Notes from the Executive Director*, Law Schools Newsletter, April 1990, at 6. Much of the rest of what is contained here comes from recollection of the chain of events of myself and others.

44. *Id.* at 6.

possible match. And that is exactly what happened, in stages. Initially some judges suffered major inconvenience because they were not at work at the time of the original deadline but were on vacation or business trips, often overseas. Forced to choose between selecting too early or too late, they placed enormous pressures on faculty and students alike for early decisions made "for cause," lest they lose out altogether. Other judges, who were willing to abide by the deadlines so long as everyone else followed them, became alarmed and also began to make inquiries before the deadline, as did enterprising students whose friends from the recent graduating class got wind of what was happening. The cartel began to unravel.

Worse still, the designers of the September 15th deadline did not appreciate the difficulties of their newly created matching program. Matching programs have been widely and successfully used to place recent graduates of medical schools into residency programs.<sup>45</sup> Medical school graduates and teaching hospitals list their choices in rank order, and a computer spits out the job assignments for all graduates on a single day, with both graduate and institution bound to accept the match. But the simple time deadline in the law school setting did not work in that fashion. Matches could not be made simultaneously when the restraint was lifted. In consequence, as soon as applications became "legal," there was (as economic theory would predict) a mad scramble. Judges summoned students to interviews so that they could make their hiring decisions. Many students were asked to go to both coasts on the same day. I heard stories of students who received telephone offers from Judge X in one circuit, while interviewing with Judge Y in chambers somewhere else. The system quickly broke down.

In 1985 the understanding was that July 15th was the deadline, but that deadline quickly eroded. Within two years, the older practice of early applications and decisions by some judges resumed. This past year, 1990, some effort was made to institute a rule whereby applications were not to be accepted before March 1, 1990, and hiring offers were not to be made until May 1, 1990.<sup>46</sup> Here too, there were notable defections from the sys-

---

45. See Roth, *Evolution of the Labor Market for Medical Interns and Residents: A Case Study in Game Theory*, 92 J. POL. ECON. 991 (1984).

46. Originally, letters of recommendation were not supposed to be submitted before April 1, 1990, but the date was moved back to March 1, 1990 to facilitate letter writing and interviewing during spring break. The May 1, 1990 decision date has held. See Let-

tem: the Fifth Circuit judges, for example, refused; the Seventh and Eighth Circuits did not take a position; some judges on the Ninth Circuit have refused to accept the limitation; and there were occasional stories of some offers being made in violation of the May 1, 1990 norm.<sup>47</sup> By the close of the 1990 hiring season, the partial system of hiring restraints had buckled, but had not cracked. When the 1991 hiring season opened this January, there were no signs of any of the prior restraints that had been operative in 1990. The word was quickly passed that all restrictions were off. Judges asked for applications and letters of recommendation when the pleased, and it seems clear as of this writing (February 1991) that the judges who are so inclined will make their initial hiring decisions as soon as they receive information about the law review selections. The cartel is no more, and there is no talk that it will be revised in future years. Freed of the restraints of office, the judges have acted like other economic actors, so that economic theory has triumphed again.<sup>48</sup>

The point of the above example can be generalized. Whenever judges appear at conferences, serve on committees, teach in law schools, or sit on boards, they act pretty much the way the rest of us do, because they no longer labor under the distinctive set of incentives that apply to their case work. And that is the way it should be. Judicial output is the key role of judges, not hiring clerks or delivering speeches.

#### IV. VIRTUE

##### A. *Are Independent Judges Agents of Social Good?*

At the level of intrigue and misbehavior, then, the public choice analysis yields the happy conclusion that the system works as well as we might hope. When it comes to deciding cases, the independence of judges is hemmed in by a powerful set of constraints that cut off the obvious forms of misbehavior and abuse. Nonetheless, the success in coping with these obvious

---

ter from Betsy Levin to Deans of Member Law Schools and Members of the House of Representatives (Jan. 23, 1990) (Memorandum 90-5).

47. *Id.*

48. It is worth noting that these problems have never emerged at the Supreme Court level. There are only nine Justices, and they can more easily coordinate their plans, and in any event each has his or her own set of special connections for finding clerks. Some like to choose early; others like to wait. But there will probably not be a system of direct regulation of Supreme Court clerkships as had been tried the circuit and district court judges.

problems ushers in a second tier of analysis, one that is concerned with effects of judicial independence that are more difficult to sort out. Apart from intrigue and bias, what *institutional* strengths and weaknesses are introduced by the conscious political decision to insulate the judicial function from the daily pressures of interest group politics? On this score, the independence of the judiciary is very much a two-edged sword. With the obvious political pressures off, judges will tend to respond to more subtle and diffuse pressures. They may even find it in their interest to do solely what they think is "right" from a legal and moral point of view—at once an appealing and terrifying prospect. Yet their desires and their rectitude are not the tests of their effectiveness. Effectiveness depends on an assessment of their work and the soundness of the decisions they reach relative to some normative social benchmark. Any overall assessment therefore depends on a decidedly political judgment of the right and wrong of judicial conduct. One has to know what is the right behavior for judges to ask whether they have fulfilled their expectation.

Consider, for example, the decisions of the old, pre-1937 Court to uphold property and contract rights against various forms of legislative control. For those who thought (and think) that the New Deal legislation was necessary to correct some powerful market and structural failures, the independence of the judges was an obstacle to be overcome and not a virtue to be applauded. President Roosevelt was prepared to pack the Supreme Court to obtain his way, notwithstanding the unsettling implications for long-term practice. Yet, if one thinks (as I think) that markets should be protected against legislatures, then in this context at least, the independence of the judiciary was (before it faltered) a welcome virtue on those same issues.

Yet, sometimes the shoe is surely on the other political foot. Those who (like myself) are uneasy about the constant expansion of race and sex conscious legal norms are likewise uneasy about a judicial system that adopts or endorses sexual and racial criteria in advance of explicit legislative authorization and perhaps even after such authorization.<sup>49</sup> Yet, others who think that matters of race and sex rise to the top of the political agenda will applaud judicial intervention even in the teeth of deter-

---

49. See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (modifying *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

mined legislative resistance. Nor are these matters immune from changes in fad or fashion. Calls of judicial restraint were on the conservative wing until the last round of 1988 Supreme Court decisions when suddenly appeals to legislative intent and *stare decisis* became liberal watchwords.<sup>50</sup> Taken issue by issue then, no astute political actor should have either intrinsic affection or distrust for judicial independence. Rather, political types of all persuasions use a different measure. First they know their goals; only then do they support that constellation of attitudes toward judicial behavior that advances those goals. So far the analysis follows the self-interested line that public choice theory might predict.

Yet, what if one rises above the fray and asks whether, behind a veil of ignorance, we should support or oppose judicial independence. At one level that choice is easy because only a fair measure of judicial independence makes it possible to avoid the ugliest forms of legislative domination and judicial misbehavior. An independent judiciary may be bad, but a dependent one is worse. But the choice is more problematic if we restate the inquiry on the somewhat fanciful assumption that bias and corruption already have been controlled by narrow, well-tailored criminal sanctions. At the ultimate level, the only constant across all substantive issues is the *number* of hurdles that must be crossed before the state can impose its commands on individual citizens. When an independent judiciary exercises its own powers of statutory construction and constitutional interpretation, it interposes one more obstacle between collective will and the force of law. Therefore, those people who entertain a global skepticism about government power should applaud judicial independence as a general principle even if they deplore its outcome in particular cases. Conversely, those people who are more supportive of expansive government action should be skeptical of judicial independence. Perceived defects in private ordering call for far more government than the advocates of *laissez-faire* would tolerate. A caring government cannot work quickly and efficiently if beset by divided powers and a complex system of checks and balances.

More complex permutations are also possible. Modern con-

---

50. See *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co.*, 109 S. Ct. at 2115; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

stitutional law revolves around two critical distinctions.<sup>51</sup> The first of these is between preferred freedoms (e.g., speech and association, and perhaps religion) and ordinary economic rights. The second is between suspect classifications (race and perhaps sex) and classifications between ordinary economic activities. It is no accident that the higher level of scrutiny attached to preferred freedoms and suspect classifications rests on the powerful judicial distrust of legislative institutions. The clear sense of legislative failure invites the system of "multiple vetoes" implicit in the institution of judicial review. Yet where the courts believe that the legislature does its job, then the far lower standard of rational basis review is invoked.<sup>52</sup> Judicial activism, like judicial independence, is prized only where the confidence in political institutions is at its low ebb.

Judicial independence, and judicial activism, become most problematic when they are used to subvert, and not support, a system of multiple vetoes. That problem arises most acutely when the judicial power is used, not to strike down legislation, but to impose affirmative duties to tax and to spend for particular services, be they to run school systems, mental hospitals, prisons or public housing projects.<sup>53</sup> By undertaking these functions, courts act as legislators, executive, and judiciary all rolled into one. The use of judicial power in this context is designed to subvert, not reinforce, the principle of separation of powers by allowing courts to circumvent the usual obstacles that lie in the path of creating new laws. It is for this reason, I suspect, that the most heated denunciations of judicial activism arise when the courts initiate activities and order moneys spent in ways that render the executive and legislative branches superfluous.<sup>54</sup>

---

51. The genesis of these distinctions is *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

52. See generally *Williams v. Lee Optical*, 348 U.S. 483, 488 (1955).

53. See, e.g., *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990) (5-4 decision).

54. See, e.g., L. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* 13 (1976). Regarding the Supreme Court's busing decisions, Professor Graglia states:

Busing could not have become a serious issue, much less actually occur, in almost any community in America through the processes of accountable representative government. It has become an issue and does occur only because it has been imposed by the United States Supreme Court—our least accountable and least representative institution of government—in the name of constitutional law.

*Id.*

It hardly needs saying that Professor Graglia regards the use of extensive busing as a

But even this apparent exception reinforces the basic rule: the case for judicial independence is at its lowest ebb when courts abandon their checking function and assume more robust powers of initiation.

*B. Judges as Agents of Interest-Group Politics*

The view of judicial independence taken here is at sharp variance with that once offered by my colleagues, Professor Landes and Judge (then Professor) Posner.<sup>55</sup> As their original position has received a fair bit of attention, it is useful to examine it in some detail, even though there is some evidence that Posner himself has either abandoned or modified his position.<sup>56</sup> Landes and Posner start from a public-choice-like assumption that interest group politics is the only game in town.<sup>57</sup> Their universe appears to include *no* statutes enacted for the public good.<sup>58</sup> In their view statutes represent political deals between various interest groups whose value, in part, depends upon two key variables: the durability of the legislative arrangement and the probability that it will be interpreted and enforced in accordance with its original terms.<sup>59</sup> Thus, if dairy farmers obtain a generous subsidy in exchange for their support for remedial reading programs for inner city students, the gains from trade will be both a function of the number of years that the deal continues in place and of the initial willingness of the participants to commit resources to obtain that deal.

At this point, the analysis closely follows that often made of long-term private commercial contracts.<sup>60</sup> Ordinary business parties will be reluctant to commit to these long-term relationships if they cannot trust any arbitrator or judge to provide an honest resolution of their disputes. Similarly, in the political context, if judges are known to misconstrue statutes, (i.e., at variance with their jointly intended meaning) then political actors will be more reluctant to enter into similar transactions in the

---

self-defeating disaster.

55. See Landes & Posner, *supra* note 1.

56. See *infra* note 71 and accompanying text.

57. A point noted by James Buchanan in his comment on Landes and Posner immediately following their article. Buchanan, *Comment*, 18 J.L. & Econ. 903 (1975).

58. *Id.*

59. Landes & Posner, *supra* note 1, at 880-85.

60. See generally Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CALIF. L. REV. 2005 (1987).

future. Bad judicial construction reduces its joint overall value at formation. Straightforward interpretation in accordance with original intention therefore greases the wheels of politics, and that type of interpretation can only come from independent judges who have no special affiliation with either party to the transaction. Landes and Posner write: "If we assume that an independent judiciary would, in contrast [to a judiciary acting as an agent of the present legislature], interpret and apply legislation in accordance with the original legislative understanding. . .[,] it follows that an independent judiciary facilitates rather than, as is conventionally believed, limits the practice of interest-group politics."<sup>61</sup> Thereafter, they argue that their assumption indeed holds, both because there are very few political efforts to reign in judicial conduct and because impartial and neutral judges aid the legislative process by making its outcomes more predictable.<sup>62</sup> To be sure, they acknowledge that independent judges cannot eliminate all risks to legislative deals, for in a world of pure interest-group politics, what one legislature puts into place another can always rip asunder.<sup>63</sup> But by controlling one source of risk, judges do increase the private gains from partisan and cooperative political action. Judges, in a word, have to take the high ground in order for interest-group politics to function business as usual. To be the enforcers of deals generated by the political system, judges must lie outside of it.

This account of the independent judiciary is flawed, I believe, in several key respects. While Landes and Posner are somewhat reticent as to the desirability of interest-group deals, in principle we can condemn these deals with a good deal of fervor because the gains to the participants of these deals are more than offset by the losses that are inflicted upon losing parties. Therefore, it would be grotesque to justify the independence of judges as a way to keep these suspect deals afloat. Far better it is to justify judicial independence on the grounds that the judges would strike down such deals (at least in greater proportion than they do sound public legislation).

To be sure, interest group deals are grist for today's legislative mill at the federal, state, and city levels. But that ought not to be the case. The founders of our Federal Constitution, at

---

61. Landes & Posner, *supra* note 1, at 879.

62. *Id.* at 885.

63. *Id.* at 877.



least, were well aware of the power of faction and its ability to generate special interest deals. But surely they did not celebrate this practice just because they recognized its persistence.<sup>64</sup> Rather, their concern with faction shows that they understood that the give-and-take of redistributive legislation always yields a negative sum game, so that special interest deals had to be curtailed to improve the functioning of the social system.<sup>65</sup> Toward that end they introduced an elaborate set of jurisdictional limitations and substantive protections designed to *reduce* the opportunities for these deals. Any judge, therefore, who is concerned with fulfilling her constitutional office must do more than enforce the deals as they are made. She must also decide that these deals, fairly construed, pass constitutional muster. Any independent judge, once appointed, has to be prepared to strike down legislation propounded by the very political groups that propelled her into high office, as is evident in the recent furor over the flag burning cases.<sup>66</sup>

This pivotal constitutional role generates a very different explanation for the neutrality and independence of judges. Far from propping up interest-group deals, independence allows judges to strike them down without fear of immediate and personal retribution.<sup>67</sup> Independence also plays an important role when no question of statutory construction or validity is before

64. On two types of pluralism, see Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 *YALE L.J.* 1633 (1988).

65. See, e.g., *THE FEDERALIST* No. 10 at 59 (J. Madison) (J. Cooke ed. 1961). James Madison noted:

But the most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views.

*Id.*

Madison then notes that while “[n]o man is allowed to be a judge in his own cause,” the same constraint does not apply to legislatures, and he wonders how self-interest can be constrained without, however, discussing judicial review. *Id.*

66. *United States v. Eichman*, 110 S. Ct. 2404 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

67. “A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation.” *THE FEDERALIST* No. 79, at 532 (A. Hamilton) (J. Cooke ed. 1961). As ever, Hamilton overstates his case, given that he has previously recognized in the same essay that “fluctuations in the value of money” can erode the effective rate of compensation, but he does not give voice to these difficulties. *Id.* at 531.

the court, for it allows judges to make findings of fact on liability, or on guilt or innocence, even against high government officials, without fear of political retribution. The judge who scuttles some elaborate political compromise or resists powerful popular demands is insulated by the system from the wrath of the legislature in the *full range* of judicial activities. There is no removal from office save by impeachment and conviction for "high Crimes and Misdemeanours,"<sup>68</sup> and there is no reduction of salary that can take place during the term of office.<sup>69</sup>

Landes and Posner, on the contrary, assume that independence guarantees that judges will decide cases in accordance with the norm of "original tenor" or "original meaning"<sup>70</sup>—a view which reduces the cost of drafting interest-group (or any other type of) legislation. But independence from external constraint does not commit judges to any canon of statutory construction or to any particular approach to legislation. Quite the contrary, it frees them to develop whatever theories of statutory construction and constitutional interpretation, wise or foolish, deferential or mischievous, that captures their fancy.<sup>71</sup> Often judges use that power in ways that do not seem to increase the durability of interest-group legislation. The Supreme Court today is remarkably tolerant of legislation that strips individuals of vested economic rights created under prior legislation.<sup>72</sup>

---

68. U.S. CONST. art. II, § 4. "The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanours." "Civil officers" includes judges.

69. Article III states:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

70. See Landes & Posner, *supra* note 1, at 885.

71. Judge Posner seems to acknowledge this point in his book on the Federal Courts. "It is a myth that independence guarantees a nonpolitical judiciary. Its tendency, rather, is to make the court system an autonomous center of political power. Independence means that once the judge is appointed he cannot be compelled or even induced to do the bidding of the appointing authority." R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 16 (1985). But he does not comment on the apparent inconsistency with his earlier paper with Landes. See Landes & Posner, *supra* note 1, at 885.

72. See, e.g., *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). *Connolly* held that Congress was allowed to renege on its original promise to allow companies that had joined the Pension Guar-

Again, some of the most independent judges can (and over the years have strained to) import constructions on statutes that bear little or no connection to the original statutory design, even if their decisions have been much more in tune with the temper of the contemporary Congress than with the one which first enacted the laws. For example, the Civil Rights Act of 1964 (especially Title VII on employment) meant one thing to the 1964 Congress that drafted, debated, and passed it, but quite another thing now that the Supreme Court has construed its central provisions, as they relate to sex-based annuity tables,<sup>73</sup> affirmative action,<sup>74</sup> the use of bona fide employment testing,<sup>75</sup> or bona fide occupational qualifications.<sup>76</sup> In each case, the more cautious, color-blind language of the original 1964 statute was overridden in favor of an aggressive statutory interpretation that confers additional rights to certain "protected groups," women and minorities, who enjoyed no special status under the original statute.

One can either hail or oppose these developments, but that is beside the point in any debate on judicial independence. Their own freedom makes judges inappropriate guardians of interest-group deals or indeed of any statutory compromise. As with the civil rights statutes, the Court was far more in tune with the congressional moods of the 1970s than with those of the 1960s. Independence and neutrality do not guarantee, or even promote the likelihood, that judges will use ordinary and honest interpretative methods in dealing with matters of statutory construction. Judges are not commercial arbitrators hired on a case-by-case basis. They do not have to return to the market in order to

---

anty Corporation to withdraw without financial penalty. See *Connolly*, 475 U.S. at 211. After many companies joined in reliance on this promise, the government changed the rules of the game and retroactively imposed penalties upon withdrawal. *Id.* at 211. The Court therefore allowed a subsequent legislature to upset the elaborate deal imposed by the earlier legislature.

The net effect was to reduce the effectiveness of legislative deals. It is hard to square this relaxed attitude with an assumption that the Court wants to facilitate the ability of interest groups to fashion long-term accommodations. Rather, the present judicial position reduces the expected durability of any legislative compromise. The decisions in *Connolly* and *Turner-Elkhorn* also make it more difficult for private firms to do business with the government, and thus raise the cost for future transactions on both sides, which in turn creates an unambiguous social loss.

73. *E.g.*, *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

74. *E.g.*, *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

75. *E.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

76. *E.g.*, *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

maintain their book of business. They have the luxury of behaving like monopolists with an assured supply of new cases. Their own independence allows those who are so inclined to indulge in every temptation to renege on the arrangements that gave them power. Independence also allows judges to remain, in large measure, outside the sphere of legislative control. Independence therefore encourages judges to become the proverbial "loose cannon" on the decks of the law. If judges were part of the network of special-interest contracting, then Congress or state legislatures would have some way to keep them in line. But as the system is presently constructed, judicial independence negates accountability.

### C. *Can Independent Judges Be Constrained?*

The independence of judges is a mixed blessing, both from a social and an interest-group perspective. This ambivalence, moreover, was evident from the earliest days.<sup>77</sup> At the same time that article III of the Constitution gave judges their independent position, and (it seems likely) their power of judicial review, Congress itself was uneasy about allowing judges to remain wholly immune from external influences. The 1789 Judiciary Act therefore is notable for its effort to limit the scope of the jurisdiction of the federal courts in ways, however, that did not allow a meddlesome Congress to exercise case-by-case review of judicial decisions.<sup>78</sup> General federal question jurisdiction was not granted to the lower courts.<sup>79</sup> The right to a jury trial was preserved, both in the Judiciary Act and independently in the seventh amendment.<sup>80</sup> Similarly the power of the courts to award equitable remedies, which harkened back to the English royal

---

77. See generally G. Casper, *The Judiciary Act of 1789 and the Independence of Judges* (unpublished manuscript) which contains a superb summary of the relevant history.

78. Note that this alternative is not quite so far fetched as it seems. The House of Lords as a judicial body exercises that kind of power, even though its members, at least at the time of United States Constitution, had substantial legislative powers as well. And in this country some legislative bodies had judicial functions as well. See *Calder v. Bull*, 3 U.S. (1 Dall.) 386 (1798) (an important case of retroactivity and the contracts clause arose because the upper house of the Connecticut legislature had the power to review the provisions of an individual will).

79. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79 (jurisdiction in diversity and criminal cases only).

80. See *id.* §§ 9, 12, 13 (providing for jury determinations of issues of fact, save for admiralty, maritime and equity cases).

prerogative, was not available in cases "where [a] plain, adequate and complete remedy may be had at law."<sup>81</sup>

Nor is there anything necessarily churlish on the part of Congress in proposing some limitations on the scope of judicial decisions. If one starts with the assumption that all public officials, whatever their role and function, are subject to whims and political pressure, then there is no easy solution which says "trust me, trust my branch of government" in all cases. Any "corner solution" that vests full discretion in some branch of government and none in another is likely to be a mistake. Because splitting power across separate branches is the preferred strategy, the Constitution probably is unsound in conferring appointments of judges during good behavior, effectively for life.

In this regard, the constitutional solution departs in substantial ways from its English and state law precedents which, as Gerhard Casper has pointed out, used the good behavior standard only to insure that judges did not serve at will.<sup>82</sup> It was not paired with tenure for life. Service during good behavior is a sensible standard when a judge is appointed for a term of seven or ten years, as was common at the time of the revolution.<sup>83</sup> Similarly, service during good behavior carries with it less risk when the judge is subject to a mandatory retirement age, such as seventy.<sup>84</sup> But the good behavior standard comes at a far higher price when it is used to protect judges in their eighties whose intellectual powers and physical endurance have in all likelihood diminished. I think that a constitutional amendment, especially for Supreme Court Justices, requiring retirement at a fixed age (present members excepted), or after a fixed term (say of eigh-

---

81. *Id.* § 16.

82. *See Casper, supra note 77.*

83. *Id.* Casper notes that in six states—Massachusetts, New Hampshire, New York, Delaware, Pennsylvania, Maryland and South Carolina—judges were removable upon the demand of both houses of the legislature, as was the case for members of the House of Lords in England. In five states—Connecticut, Rhode Island, New Jersey, Pennsylvania and Georgia—judges served only for a term of years.

Note that the removal power gives the legislature only an imperfect check over sitting judges. First, it does not allow the legislature to reverse any particular decision and forces the legislature to remove a judge for a decision on one (or a few) issues, even if the legislature likes other decisions the judges have made. Second, removal does not give the legislature any power to select the replacement judge, who may be less to its liking.

84. Some states, e.g., California, have an odd system whereby a judge can continue to serve after 70, so long as he is willing to take a reduction in retirement benefits. *See CAL. GOV'T CODE*, § 75075 (Deering 1982). The statute was upheld against constitutional challenges in *Rittenband v. Cory*, 159 Cal. App. 3d 410, 205 Cal. Rptr. 576 (1984).

teen years) would, on balance, be welcome even if it did limit the "independence" of the judges.<sup>85</sup> Other variations are easily imagined. As is the case with separation of powers more generally, it may not make that much of a difference exactly how the various lines of control are drawn. What does make a difference is that some lines are drawn somewhere.

#### V. CONCLUSION

This examination of the independent judiciary bears mixed fruit. Where there is some awkward compromise and accommodation, there is little to keep the purist in us happy. But the control of alternative forms of error is a persistent dilemma that the purist can identify effortlessly but only the well-informed pragmatist can help to contain. The independence of the judiciary contains a core of good sense; judges should not be accountable directly to the legislature or the executive for their decisions. Beyond that, however, it is a principle that is subject to a wide range of qualifications that seek to bring judges within the orbit of constitutional control. Some constraints, namely those against obvious forms of abuse and misbehavior, are easily justified. But even with these in place, the uneasiness that we feel about unaccountable power carries over to the judicial sphere. But it is a problem that we endure. For as is so often the case, any radical cure of judicial excesses is likely to create a set of institutional difficulties more permanent and more risky than the ones that are eliminated.

---

85. This proposal would stagger nominations and remove the quirkiness of having one president with great power over appointments while other presidents have none. Additional rules could be introduced to fill terms left unexpired by death or resignation.