INCENTIVES, REPUTATION, AND THE INGLORIOUS DETERMINANTS OF JUDICIAL BEHAVIOR

Frederick Schauer*

“What Do Judges Maximize?” Judge Posner asked a few years ago. And in answering “The Same Thing Everybody Else Does,” Posner attempted to shift our thinking about judges away from the melange of glorification, celebration, and adoration that pervades much of popular and almost all of academic thinking about the judiciary and towards a more realistic analysis of judicial incentives and judicial behavior. But Judge Posner’s contribution, along with a few others from his compatriots in law and economics, have unfortunately (but perhaps not surprisingly) largely been ignored.

Unexpectedly, the reluctance to engage in critical inquiry into judicial motivation exists even outside of the precincts in which sympathy with the judiciary is the normal order of things. For example, although allegedly hard-headed political scientists routinely attribute various forms of legislative (and especially congressional) behavior to political ambition, to the desire for re-election, and, indirectly, to the desire to

---

* Frank Stanton Professor of the First Amendment and Academic Dean, John F. Kennedy School of Government, Harvard University. This Article is the written version of the Robert Marx Lecture at the University of Cincinnati College of Law, delivered on February 25, 2000. Earlier versions have been presented at the panel on the Legal Theory of Institutional Design, American Political Science Association, August 31, 1997, at the Conference on Norms and Rationality, Research School of Social Science, Australian National University, July 24, 1998, at the Workshop on Rationality and Society, University of California, Berkeley, at the Colloquium on Law, Economics, and Politics at the New York University School of Law, and at faculty symposia at the Fordham University School of Law, the Northwestern University Law School, and the Rutgers University (Newark) School of Law.


5. A common theme in research on congressional institutions is that members of Congress adopt institutions and rules that serve their desire for re-election.” Jonathan N. Katz & Brian R. Sala, Careers, Committee Assignments, and the Electoral Connection, 90 AM. POL. SCI. REV. 21 (1996). See also Jonathan S. Krasno, Challengers, Competition, and Reelection: Comparing Senate and House Elections (1994).
raise campaign funds, we rarely see similar explanations, either in the political science literature or in the law reviews, for judicial behavior. Legislators, executives, and bureaucrats are widely understood by scholars and by the public to be motivated by various forms of self-interest, including the desire for re-election, the desire for promotion to higher office, the desire to expand their base of power, and the desire to maximize future even if not current income, but the similarly self-interested judge is largely an absent figure in the academic literature on the judiciary and on judicial decision-making. This absence might be expected in the literature emanating from the law schools, since law-school based legal scholarship is too-often characterized by an identification of the scholar with the judge, by an internal perspective on the role of the judiciary, and by a consequent reluctance to see judges as (even partly) self-interested and potentially ambitious political actors. In the political science literature, however, the absence of serious attention to self-interested judicial motivation is more surprising. One would have thought that the comparative advantage of the political scientist over the academic lawyer resides largely in the external and empirical focus of the former, and thus we might have expected political scientists, looking at judges and judicial behavior in a less romantic light, to examine the question whether judges, in making their decisions, seek to achieve personal goals analogous to those sought by sitting or aspiring legislators. Yet such an examination is almost as absent from the political science literature as it is from the legal literature. Indeed, the most telling evidence of this comes from the agreement about judicial motivation shared even by those who otherwise have sharp disagreements about methodology. In a relatively recent issue of the newsletter of the Law and Courts Section of the American Political Science Association, for example, Lee Epstein and Jack Knight engage in a spirited debate with Howard Gillman about the appropriate methodology by which social scientists should examine judicial behavior, with Epstein and Knight focusing on the importance of examining strategic behavior and Gillman arguing for a more interpretive and institutional approach. Yet for all of their


7. For my own earlier observations on this phenomenon, see Frederick Schauer, Fuller's Internal Point of View, 13 L. & PHIL. 285 (1994); Frederick Schauer, The Authority of Legal Scholarship, 139 U. PA. L. REV. 1003 (1991); Frederick Schauer, Constitutional Conventions, 87 MICH. L. REV. 1407 (1989).

disagreements, they do not appear to disagree about the absence of self-interest, at least when self-interest is defined as an interest independent of ideology or policy preferences, as an explanation of judicial behavior. In contrast with what political scientists call the "legal" model of judicial behavior, a model which resists what political scientists call the attitudinal model and the legal academy calls Legal Realism, and which insists on the primacy of legal doctrine in determining judicial outcomes, Epstein and Knight on one side and Gillman on the other agree that policy attitudes are the initial primary determinants of judicial behavior.

Epstein and Knight, however, claim that in implementing these policy attitudes (preferences), judges operate strategically, so that in order to understand judicial performance we must engage in the type of scholarly inquiry that focuses on strategic behavior. Gillman, on the other hand, believes that judges are profoundly influenced by the institutional settings in which they find themselves, and that in order to understand judicial behavior we must understand, as only interpretive approaches enable us to understand, the institutional settings in which judges make their decisions. Yet despite this seeming disagreement, neither side of the debate even pauses to examine the possibility that judicial self-interest, rather than non-self-interested policy preferences, determines judicial behavior, or determines the policy preferences of judges in the first instance.

My audience on this occasion is not primarily composed of political scientists. Nevertheless, the example of the political scientists, who unlike law professors ought to know better, demonstrates the importance of Judge Posner's question. For if judges are human beings who have an array of self-interested motivations to accompany their public-

---


11. "[Supreme Court] Justices may have goals other than policy, but no serious scholar of the Court would claim that policy is not prime among them. Indeed, this is perhaps one of the few things over which most social scientists agree." Epstein & Knight, supra note 8, at 5.

interested motivations, then it is important that not only political scientists, but also lawyers, law students, and all the rest of us who study the courts ought to understand these motivations. Although a judge like Ronald Dworkin's tellingly-named Hercules may occupy an exalted and central place in jurisprudential analysis, there is an important empirical question whether there are many actual judges who are in fact like Hercules, and there is an equally important empirical and normative question of what the implications are if there are not.

In one important respect, however, my inquiry departs from Judge Posner's. His focus, Posner says, is on the ordinary judge, especially the ordinary appellate judge sitting on a federal court of appeals. But unlike Judge Posner, I am primarily concerned here with the non-ordinary judge, and especially with Supreme Court Justices. But in describing Supreme Court Justices as non-ordinary, I am describing their role and their numbers and not their abilities. It may be that the talents of Supreme Court Justices are, on average, no greater than the talents of federal judges of courts of appeals and state judges of state supreme courts and intermediate appellate courts, but their visibility is of a different order. When press attention to Supreme Court Justices as ordinary in ability as Sherman Minton and Stanley Reed exceeds the attention given to such non-ordinary "lower" court judges as Roger Traynor and Henry Friendly, it becomes apparent not only that Supreme Court Justices, for better or for worse, occupy a position if visibility vastly greater than any of their other judicial counterparts, but also that this visibility could plausibly create a set of motivations sharply distinguishing Supreme Court Justices from all other members of the judiciary. So although in this paper I will address a diverse number of issues about judicial motivation, and will consider judges at all levels, I will focus to a significant extent on reputation as a motivation, and widespread reputation as a motivation for Supreme Court Justices that is substantially different from the kind of peer group esteem that might plausibly be thought to motivate lower court judges.

13. I do not want to be misunderstood in my overall claim about judicial motivation. I do not claim, and do not believe, that judges are more self-interested or more venal than the rest of us. It is just not clear as yet that they are less.
15. See POSNER, supra note 1, at 109.
17. A January 28, 2000, LEXIS search of the ARCHEWS file of the NEWS library reveals 191 references to Justice Minton, 128 for Justice Reed, 119 for Judge Friendly, and 108 for Justice Traynor. Judge Walter Schaeffer of the Illinois Supreme Court, closer to Friendly and Traynor than to Minton and Reed in professional esteem among lawyers, judges, and law professors, was mentioned once.
I. THE SOURCES OF JUDICIAL DECISION

My inquiry starts where Legal Realism leaves off. Although there are many versions of Legal Realism, and equally many interpretations of the Legal Realist tradition, one central theme of Legal Realism was the Realists’ attempt to refocus attention from the superficial and announced determinants of judicial decisions to what they thought were the “real” determinants of those decisions. 18 Within this agenda, a prominent strand of Realism, associated with figures such as Jerome Frank, 19 Wesley Sturges, 20 Karl Llewellyn, 21 Max Radin, 22 Felix Cohen, 23 Herman Oliphant, 24 and Joseph Hutcheson, 25 maintained that judges were never, rarely, or at least less often than advertised controlled in their decisions by constitutional provisions, statutes, rules, regulations, reported cases, maxims, canons, and all of the other traditional items of formal law. Instead, these Realists argued, the primary causal influences on judicial decision-making consisted of the judge’s views about the immediate equities of the case at hand, 26 the judge’s less particularistic views about wise public policy, 27 or the judge’s array of philosophical, political, and policy views, an array that is nowadays called “ideology.” 28

Having made the decision on one or more of these extra-doctrinal or

27. For a modern version of the claim, and in highly qualified form, see MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE (1998).
extra-legal (adopting a positivist conception of the “legal” grounds, the judge, according to most of the Realists, used legal doctrine or other canonical legal materials only as the post hoc rationalization for decisions that were in fact made on other grounds.

In the political science literature, the Legal Realist view goes by the name of “attitudinalism.” The prevailing view of the attitudinal model of judicial decision-making holds that judges decide cases according to their “sincere attitudes and values,” and even strategic alternatives to or embellishments on the attitudinal model accept that judges “are interested in imposing their policy preferences on society,” although those who emphasize strategic behavior by judges (the positive political theorists) maintain that judges frequently subjugate their own first order policy preferences in particular adjudications in order to maximize their policy preferences over the long-term in a world with multiple political players.

In sharing this common ground of belief that what really matters to judges are their sincere policy preferences, both the positive political theorists and the attitudinalists, along with the institutionalists, tend to ignore or downplay the possibility that judges, no less than legislators and bureaucrats, have strong career-based self-interests that often inform or dominate their policy preferences. In this respect many political scientists who study the courts parallel the Legal Realists, who likewise, and earlier, ignored in their so-called “realist” look at judicial decisions the possibility of self-interested motivations on the part of the

29. See Frederick Schauer & Virginia J. Wise, Legal Positivism as Legal Information, 82 CORNELL L. REV. 1080 (1997).

30. See, e.g., Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model (1993); James L. Gibson, Judges’ Role Orientations, Attitudes, and Decisions: An Interactive Model, 72 AM. POL. SCI. REV. 911 (1978); Jeffrey A. Segal et al., Ideological Values and the Votes of U.S. Supreme Court Justices Revised, 57 J. POL. 812 (1995).


32. See id. at 28.

33. It is important to distinguish the claim that attitudes determine (or at least substantially influence) judicial decisions from the claim that certain background factors are reliable predictors of those attitudes. Even among those who believe that policy attitudes are significant predictors of judicial outcomes, there is disagreement over whether background factors such as age, state of residence, political party, and other demographic factors are significant predictors of policy attitudes. See, e.g., C. Neal Tate & Roger Handberg, Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88, 35 AM. J. POL. SCI. 460 (1991) (finding personal attributes to be significant predictors); Gerard S. Gryski & Eleanor C. Main, Social Backgrounds as Predictors of Votes on State Courts of Last Resort: The Case of Sex Discrimination, 39 W. POL. Q. 528 (1986) (same, with qualifications); Orley Ashenfelter et al., Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. LEGAL STUD. 257 (1995) (questioning predictive value of judicial background); Peter J. Van Koppen & Jan Tan Kate, Individual Differences in Judicial Behavior: Personal Characteristics and Private Law Decision-Making, 18 L. & SOC. REV. 225 (1984) (same).

34. See Gillman, supra note 8; Rosenberg, supra note 9; McCann, supra note 9.
judge. Indeed, even Jerome Frank, purporting to look with psychological sophistication inside the mind of the sitting judge, 35 never considered the judge as someone potentially interested in advancement and praise, among other rewards, rather than (or in addition to) someone interested in doing the right thing in the particular case at hand.

One plausible explanation for this traditional absence of attention to judicial self-interest, both in the political science literature and in the Realist tradition in the legal literature, would be that the hypothesis of judicial self-interest has been tested and found to be false. But this, it turns out, is not the case. With the exception of work on the behavior of elected state judges, 36 and some recent and important work analyzing the behavior of lower federal court judges in Sentencing Guidelines cases, 37 there has been virtually no systematic empirical inquiry into judicial ambition or self-interested judicial motivation. Initially, therefore, we might inquire into why there has been to date so much reticence to engage in serious examination of judicial self-interest. Several possibilities present themselves:

A. The Supreme Court Focus

Although there is not an enormous amount of empirical research on judicial behavior generally, traditionally the overwhelming bulk of what there is has been about the Supreme Court of the United States. 38 Yet a number of factors suggest that, whatever may be true of the Supreme Court regarding the primacy of sincerely held policy preferences over self-interest, it would be difficult to generalize to other courts. One is that the nature of the work of the Supreme Court may concentrate on cases in which policy preferences are likely to be strong. 39 Even putting

35. See Frank, supra note 19.
38. Why this is so is itself an interesting topic, see Edward A. Purcell, Jr., Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts, 24 L. & SOC. INQUIRY 679 (1999), but it is not my topic here.
39. The basic insight of the selection hypothesis is that cases wind up in court in direct proportion to their legal difficulty, see George Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. LEG. STUD. 1 (1984), since litigation presupposes two mutually exclusive positions each of whose adherents has some reason to believe that she will prevail. The selection effect will thus increase with ascendency up the appellate ladder, see Karl Llewellyn, The Common Law Tradition: Deciding Appeals (1960) 6,
aside the operation of selection bias in determining the Supreme Court's caseload, most people, and thus we might surmise most judges as well, have stronger policy preferences about abortion, affirmative action, prayer in the schools, campaign finance reform, the rights of those accused of crime, pornography, guns in the public schools, and gay rights, for example, than they do about ERISA, the Rule Against Perpetuities, the Mailbox Rule in contract law, interpleader, hearsay exceptions, and many of the other common law or statutory questions that occupy the balance of the judicial agenda. As a result, it is plausible to speculate that the Supreme Court is a forum in which cases raising highly salient (for the decision-makers) policy issues, and in which the judges have especially strong policy preferences, are a higher proportion of the Supreme Court's caseload than is the case in any other court, and thus that the policy preferences of the Justices are more likely to be dominant forces across the caseload than would be the case in any other court. Moreover, even if it were true that judges in general were more guided by the possibility of ascendency to a higher court than the "sincerely held policy preferences" model would indicate, this would obviously be of much less moment in the Supreme Court, where, whatever incentives of self-interest may exist, the possibility of promotion to a higher court is not among them. It is possible, therefore, that a concentration of attention on the Supreme Court, especially by empirically oriented political scientists, has produced a commensurate lack of attention on those courts, those judges, and those cases in which judicial self-interest might be expected to have played a more substantial role.

B. The Effect of Life Tenure

Many judges, and all Article III federal judges, have life tenure. Unlike members of Congress, and unlike elected judges in states in which judicial elections are seriously contested, life-tenured judges do not have to worry about being turned out by the electorate. And unlike

64-68; Richard Posner, The Jurisprudence of Skepticism, 86 Mich. L. Rev. 827, 828, 840 (1988); Frederick Schauer, Judging in a Corner of the Law, 61 S. Cal. L. Rev. 1717 (1988), producing for the approximately 85 cases a year that the United States Supreme Court now decides on the merits with full opinion, a set defined substantially by the fact that the law, in a formal sense, is non-dispositive. This might suggest that an ideological or attitudinal model has produced the conclusion that the law does not matter for the set of cases in which the law, by operation of the selection effect, does not matter. But exploring this is for another day.


41. This is only a subset of states in which there are judicial elections. See Kermit L. Hall, Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920, 1984 AM. B. FOUND. RES. J. 345, 355.
many members of the bureaucracy, life-tenured judges do not run the risk of being fired if they fail to conform to the preferences of their political or administrative superiors.\(^{42}\) If the model for policymaker motivation is a legislature or a bureaucracy, therefore, scholars and ordinary citizens under the sway of this model are likely to believe that when the main forms of legislative or bureaucratic self-interest disappear, then most of policymaker self-interest disappears with it, leaving nothing other than non-self-interested policy preference as the chief judicial motivation.

C. Judicial Silence

Few members of Congress are reluctant to talk about their desire for re-election, and few other participants in electoral politics are ashamed of their ambitions for higher office. For a lieutenant governor or state attorney general, the prospect of aspiring to be governor is taken for granted and widely discussed, even by the aspirant. Yet judicial ambition is a topic that is rarely discussed and even more rarely admitted, especially by the judges who may possess it. And for a non-judge to raise the topic of judicial self-interest in the company of judges is something like raising the topic of steak tartare at a convention of vegetarians.\(^ {43}\) Federal District judges almost never talk publicly (or even privately) about their desire to become judges of the Court of Appeals, and Court of Appeals rarely reveal their aspirations to the Supreme Court. Whatever else this judicial silence may signal, it certainly indicates that researching the topic of judicial ambition or self-interest would be extraordinarily difficult,\(^ {44}\) and so scholars, who after all have their own incentives and ambitions,\(^ {45}\) may steer clear of what appears to be such a daunting task.\(^ {46}\)

\(^{42}\) "A federal judge can be lazy, lack judicial temperament, mistreat his staff, berate without reason the lawyers who appear before him, be reprimanded for ethical lapses, verge on or even slide into senility, be continually reversed for elementary legal mistakes, hold under advisement for years cases that could be decided perfectly well in days or weeks, leak confidential information to the press, pursue a nakedly political agenda, and misbehave in other ways that might get even a tenured civil servant or university professor fired; he will retain his position." Posner, supra note 1, at 111.

\(^{43}\) The empirical claim in the text is based, in part, on personal experience.

\(^{44}\) There is, of course, no reason to believe that judges' self-reports of their own motivations, even if sincere, would be particularly reliable. See Frank H. Easterbrook, What's So Special About Judges?, 61 U. Colo. L. Rev. 773, 775 (1990).

\(^{45}\) Each of the social sciences has its own standards of methodological quality, and a frequent negative byproduct of the lack of methodological diversity is that we often see research agendas determined by the quality of the data-set rather than by the importance of the problem that is to be investigated.

\(^{46}\) It is possible that I am overestimating the difficulty of this kind of research. See Amartya Sen, Behaviour and the Concept of Preference, 40 ECONOMICA 241 (1973).
D. The Romantic Ideal

Judges occupy (and themselves frequently promote) a romantic position in much of American consciousness. The fact that judges routinely far surpass other political figures in measurements of public confidence or admiration, when coupled with the dignity of office that the judiciary actively cultivates and protects, serves to produce what appears to be an image of the judge as someone largely lacking in self-interest. And perhaps this image is accurate, with judges, either because of the traits that led to their selection or to the norms of the institutions in which they find themselves, having less self-interest and more public interest than other officials. But it is also possible that what might otherwise be thought of as a testable hypothesis has been taken as axiomatic partly because of the idealized notion of judicial disinterest cultivated by the judiciary, celebrated by the culture of lawyers and law schools, and accepted by most members of the public. To the extent that the romantic ideal of the American judge is firmly rooted in academic and popular consciousness, it is understandable that hypotheses challenging this ideal are so rarely offered or tested.

47. Interestingly, they also far surpass lawyers, as if the determinants of esteem were magically transformed once a lawyer became a judge.

48. It is also possible that the requirement that judges give reasons for many of their decisions, see generally Frederick Schauer, Giving Reasons, 47 STAN. L. REV. 633 (1995), makes it harder for judges to act on the basis of self-interest even if they have it, assuming (controversially) that public reason-giving strongly inclines way from self-interest by making self-interested reasons non-implementable. For a powerful argument to this effect, see AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996). That reason-giving inclines away from self-interest assumes, however, that non-self-interested reasons are largely unavailable for self-interested decisions, a claim that seems dubious. Given the plausibly deceptive nature of most judicial decisions even if the policy preferences account is true, see Rogers M. Smith, The Inherent Deceptiveness of Constitutional Discourse: A Diagnosis and Prescription, in NOMOS XL: INTEGRITY AND CONSCIENCE 218 (Ian Shapiro & Robert Adams eds., 1998), it would not be surprising to discover that deceptive masking of self-interest in judicial opinions was routine and not difficult.

49. That such a high proportion of those who, in legal scholarship at least, study the Supreme Court were law clerks to Supreme Court Justices seems hardly irrelevant to explaining why skeptical explanations of judicial behavior are so absent from existing constitutional scholarship. The high proportion of legal scholars who clerked for some judge or other may also be part of the explanation for the paucity of skeptical explanations of judicial behavior generally. If academic research about congressional motivation were dominated by those who had previously served as Chief of Staff for a Member of Congress, would we expect to see the re-election and fund-raising based explanations we now have, or would we instead expect to see more of a focus on the public statements of Members of Congress (the analogues to judicial opinions), and thus more of a focus on publicly-announced and public-oriented explanations of congressional behavior?
II. A Candid Look at Judicial Motivation

Even though we might understand, therefore, why that form of judicial motivation we could call "self-interest" has been dramatically under-investigated, there still seem good reasons to attempt to remedy this situation, especially since there appear to be hypotheses about judicial motivation that are plausible enough to explore. In what follows I want to offer some plausible, testable, and falsifiable hypotheses, along with some reasons to suppose that these hypotheses are consistent with existing knowledge of judicial behavior.

A. Reputation and the Supreme Court

Since 1968, the year in which Richard Nixon was elected after eight years of Democratic incumbency in the White House, the Supreme Court has seen the arrival of Chief Justices Warren Burger and William Rehnquist, along with Associate Justices Lewis Powell, Harry Blackmun, John Paul Stevens, Sandra Day O'Connor, Anthony Kennedy, Antonin Scalia, Clarence Thomas, David Souter, Ruth Ginsburg, and Stephen Breyer. Of these twelve, ten (all except Ginsburg and Breyer) were Republicans at the time of appointment, and all ten of these were billed (whether correctly or not) at the time of nomination and confirmation as "conservatives." Of those ten, it is plausible to conclude that six—Justices Blackmun, Powell, Stevens, O'Connor, Kennedy, and Souter—have moved to the left (either from the time they joined the Court until the time they left it, or from the time they joined the Court until now) in the policy attitudes that, according to the ideological or attitudinal

50. By "consistent with," I mean that all of the following might be consistent with the idea that judicial policy preferences are very important, but still seeks to explain the sources of, and changes in, those policy preferences.

51. Indeed, both Justices Breyer and Ginsburg were billed as centrist and balanced, which appears to be a coded way of saying that they were more conservative than, say, the center of gravity of the Democratic contingent in the House of Representatives.

52. I recognize that egregious oversimplifications like "left" and "right" to describe aggregations of political views are deeply problematic, but my essential point here does not turn on the accuracy of the labels.

53. In the case of Justice Powell, an additional relevant piece of information, and one not immaterial to his subsequent reputation, is his very public statement of regret about his decision in Bowers v. Hardwick, 478 U.S. 186 (1986). See David J. Garrow, Liberty and Sexuality 652-67 (1994). It is certainly possible that Justice Powell came to regret his vote in Bowers. But it is not inconsistent with believing that he had genuine regret to believe as well that the climate (it was three years later, he was no longer a sitting Supreme Court Justice, and the setting was a law school lecture and not a judicial decision) in which he expressed regret was quite different from the climate in which he made the original decision.
model of judicial decision-making,54 would predict their judgments.55 This is of course testable in a more systematic way, but let us suppose for now that it is true.56 We then might ask why this has been so.

1. The Effect of Precedent

If the formal, doctrinal, or legal model of judicial decision-making were sound, it might have predicted some of this leftward movement, since the accumulated Supreme Court precedents are disproportionately from the Warren Court era, and disproportionately to the left of the policy preferences of the citizenry as a whole. If new Justices faithfully followed precedent, and if those new Justices came to the Court with attitudes and proclivities to the right of existing precedent, we would expect their opinions to move to the left. But recent scholarship has indicated that, at least on the Supreme Court, precedent may have less of an effect than has been ordinarily assumed,57 and thus this precedent-based explanation, occasionally found in the legal literature,58 seems highly likely to be false. Although precedent likely has a substantial constraining effect in courts below the Supreme Court, especially in cases of little political or moral salience for the deciding judges, there is scant evidence that precedent operates as a genuine constraint in Supreme Court cases of substantial moral or political consequence.

54. Here it is especially apparent that I begin where Legal Realism leaves off. Where legal doctrine determines judicial decision-making, the question of judicial policy attitudes does not arise. But insofar as policy attitudes and not legal doctrine determines judicial outcomes, as so much of the research on the Supreme Court appears to indicate, the further inquiry is opened about the source of those attitudes. And where there is some evidence of change in those attitudes, there is then presented the additional question about the source of those attitudinal changes.

55. For documentation of this in the case of Justice Blackmun, see Sandra Wood & Kimi Lynn King, "From Circuit to Supreme: The Case of Harry A. Blackmun" (Aug. 28, 1997) (unpublished paper, American Political Science Association) (on file with author).

56. It might also be true for Justices Breyer and Ginsburg. And for Justice Powell, we might wish to include as a datum the fact that, famously, he renounced his opinion in Bowers v. Hardwick, 478 U.S. 186 (1986), after leaving the Court.


2. An Institution of Rights

Although the Supreme Court deals with a host of questions about separation of powers, federalism, and statutory interpretation, questions that ordinarily do not involve the acceptance or rejection of claims of individual rights, the bulk of the Supreme Court’s business, and an even higher proportion of its most publicly visible business, deals with claims of individual rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, or with claims of individual rights under federal statutes (such as the civil rights laws) aimed at the same broad goals. One possibility, and one that an institutionalist perspective might predict, is that even if precedent matters no more than current research indicates, the Supreme Court still exists as an institution of rights protection and with a consequent internal culture of rights protection. Insofar as members of an institution modify their views and behaviors in light of the norms and culture of the institutions in which they find themselves and by which they define themselves, we might expect Supreme Court Justices to take on more of a rights-protective attitude than they previously would have had. And insofar as a rights-protective attitude is left-leaning, then the leftward movement might be expected.

3. The Effect of Reputation

In his angry dissenting opinion in Romer v. Evans, Justice Scalia noted the shift between Bowers v. Hardwick and Romer, and appears to attribute at least some of this shift to a shift in the culture of American law schools. The not very veiled reference, I suspect, is to a change in the culture of law schools and a consequent change in the views of, among others, the Supreme Court law clerks. Even for those of us who disagree with the legal and political substance of Justice Scalia’s dissent, his causal and empirical claim is worth taking seriously. This is best understood as the claim that shifts in the political climate produced the shifts from Bowers to Romer, and produced the shifts in the views that Justices Kennedy, O’Connor, and Souter espoused in Romer from the views that they might have held at the time that Bowers was decided.

59. The significant and increasingly important counter-examples are the protection of property rights under the Fifth and Fourteenth Amendments, the rights-based objections to affirmative action, and the protection of various forms of moneyled speech (campaign contributions and expenditures, property-based speech claims, commercial advertising, etc.) under the First Amendment.
60. 517 U.S. 620 (1996).
62. See Romer, 517 U.S. at 655 (Scalia, J., dissenting) (referring, inter alia, to the “law school view” of which prejudices are permissible and which are not).
even though only Justice O'Connor was actually on the Court at the time of *Bowers*.

In possibly attributing this shift to the change in law school culture, Justice Scalia may have attributed to the law clerks more direct influence on the outcome of important cases than existing evidence indicates is likely to be the case. Although there is little doubt that law clerks have great influence in the way opinions are actually drafted, since law clerks do most of the opinion writing for most of the Justices, and although it is likely that the clerks have some influence on the outcome of technical cases in which the Justices are unlikely to perceive important ideological or policy stakes on one side or another, there is no evidence that the clerks influence the ultimate votes of Justices on important cases involving separation of powers, federalism, or the recognition and enforcement of individual rights. If Justice Scalia is to be understood as hinting that the clerks influenced the Justices for whom they were employed to vote in a different way from the way in which they otherwise would have voted, the claim is important, perhaps correct, but seemingly counter-intuitive, and counter to what limited evidence we have on the topic.

Yet Justice Scalia may be interpreted as making a different and much more plausible claim. For many of the Justices, the clerks, and the larger law school culture around which the Justices themselves travel, may play a semi-conscious *indicative* rather than causal role, providing evidence to the Justices of the current attitudes of young intellectuals, of law professors, and of the intellectual classes in general. If the Justices desired to appeal to this class, and especially if they desired to appeal to the class of legal intellectuals, the clerks would be a pretty good source of evidence about what this class was now thinking.

Justice Scalia's claim is more plausible still if we remove law clerks from the equation entirely. The Justices themselves have some knowledge of what appears in the law reviews, they have a great deal of knowledge of what appears in the newspapers and in the popular press in general, they themselves travel in the same social circles in which the country's intellectual elite travels, and they also travel in the same professional circles in which legal academics often travel. If this is so, then Justice Scalia (as with Judge Bork before him) might be seen as claiming (which is not yet to say that his claim is correct) that the Justices appear to have a desire to conform their attitudes to the attitudes of the social and professional circles in which they travel, and thus to the attitudes of the intellectual elite in general, and to the attitudes of law professors at elite institutions in particular. If all of this is so, then changes in the attitudes of those groups might be reflected in changes in
the attitudes of the Justices themselves. Or at least so Justice Scalia, most plausibly, might be seen as hypothesizing.

But is there any reason, to believe that Justice Scalia’s hypothesis is correct? Perhaps there is. Or, more generally, and leaving Justice Scalia out of it, perhaps there is reason to believe that there are some reference groups that even life-tenured and highly prominent Supreme Court Justices desire to appeal to in a more or less conscious way. It is widely recognized that reputation or esteem provides a powerful money-independent incentive for many people.63 Perhaps the Justices of the Supreme Court, like the rest of us, care about their reputation, care about the esteem in which they are held by certain reference groups, and care enough such that, at the margin or even far from the margin, they seek to conform their behavior to the demands of the relevant esteem-granting (or withholding) or reputation-creating (or damaging) groups. And if this is so, then we might inquire more closely into the sources of Supreme Court reputation, into the identity of the reputation creators (and esteem grantors) and into the criteria employed by the esteem grantors and reputation creators. If we were to pursue such an inquiry, we might discover that although the relevant esteeming (or non-esteeming) group for lower court judges consisted primarily of other judges and of workaday practicing lawyers in that jurisdiction, by contrast the primary creators of reputation for Supreme Court Justices were the mainstream elite press, elite law professors writing law review articles and other forms of legal scholarship, law professors teaching classes in law schools in which various Justices are described in flattering or non-flattering terms, editors of law school casebooks, law students at elite law schools writing law review notes, and historians, including but not limited to the historians who write judicial biographies. And we might discover as well that in the last twenty years, and for Supreme Court Justices, substantive outcome was a more accurate predictor of judicial reputation than either quotability or a large number of process-based and substance-independent indicia of judicial craft. Whereas a

generation ago judicial craft might have earned high esteem even for the
groups just listed, and even if the products of that craft were not to the
liking of the esteem-granting groups, it now appears that judicial craft
is far less important to these esteem-granting groups, and sympathy with
the outcome is far more important. If this speculation and impression
turned out to be sound, then one hypothesis would be that Supreme
Court Justices moved leftward in order to conform (at an indeterminate
level of consciousness) their attitudes to the attitudes of elite reporters
and elite law professors, for by doing so they increase the esteem in
which they were held by the groups whose esteem they most valued, and
they would enhance their current reputation and increase the likelihood
that they would be lauded both in their lifetimes and thereafter. 64

Now it is quite possible that all of the preceding hypotheses are false,
and that the Justices' attitudes are formed independent of any reputation
effect, and are changed solely by the power of persuasion. Still, there is
some reason to suspect that substantive attitudes affect judicial
reputation, and some reason to suspect that the Justices, for all that life
tenure gives them, are still human, and thus still somewhat vulnerable
to the pull of reputation, the desire for esteem, and the wish to avoid
public criticism. If so, then a serious inquiry into the determinants of
Supreme Court Justice reputation since the middle of the 1980s, 65 and
an equally serious inquiry designed to test both the relationship between
reputation as independent variable and judicial decision as dependent
variable, and judicial decision as independent variable and reputation
as dependent variable, seem like inquiries well worth pursuing.

---

64. Some of the hypotheses in the foregoing sentences are psychological, in the sense that it is
possible that the desire for approval by some relevant reference group is sub-conscious, and that the
formation of attitudes to conform to the attitudes of a reference group is not perceived by the conformer
as being in any way externally influenced. It is also possible, remaining within the realm of testable
psychological speculation that I do not purport to support here, that reputation matters to most of us more
while we are alive than thereafter (that is, we now care more about the reputation that we know of while
we are alive than the reputation that persists after our deaths), such that a concern for reputation might be
correlated in interesting ways with age and health.

65. I use this date because I suspect, and rely on some form of internal perspective on the law school
culture to suspect, that substantive outcome has been much more important in the law school culture and
in legal scholarship in the last ten years than it was before that. Whereas in the Legal Process era of the
1950s, 1960s, and 1970s, a scholar could offer scathing process-based criticism of a decision whose
substantive policy outcome he otherwise might have applauded (school desegregation and abortion,
respectively), see Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959);
John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920 (1973), and a
Supreme Court Justice (John Marshall Harlan, the younger) could be academically celebrated independent
of the outcomes he reached, it seems apparent that both of these phenomena are far less present now, and
that sympathy with the outcome is a far more important determinant of scholarly esteem than it was in the
relatively recent past.
Outside of the Supreme Court, reputation might still be important, but the determinants of reputation might be quite different. Most lower court judges do not find themselves or their opinions widely discussed with any regularity in the press, in law school casebooks, or in the law reviews. Insofar as the opinions of lower court judges are so discussed, it is possible that prose and craft, perhaps more than outcome, may be important, both because outcome is less important in courts whose outcomes are subject to reversal, and because these cases may appear to many people to have far less substantive, political, or ideological valence. A lower court judge who wanted, consciously or not, to rise to the level of respect of a Learned Hand, a Roger Traynor, or a Henry Friendly, or that of a pre-Supreme Court Oliver Wendell Holmes or Benjamin Cardozo, might well believe that things other than substantive outcome on important ideological matters would determine the frequency of citation and the degree of praise in other cases and in the legal literature. Such a judge might thus seek to maximize along a different dimension than a Supreme Court Justice, even assuming that both were seeking to maximize their reputations.

4. Occupational Ambition

Very few Supreme Court Justices appear to have a desire for a job other than the one that they now hold, and it seems most plausible to view instances such as that of Justice Goldberg (who left the Supreme Court to become Ambassador to the United Nations, ran unsuccessfully for the United States Senate from New York, and spent the next twenty years as a relatively invisible - compared to a Supreme Court Justice - practicing lawyer) as the exception and not the rule. If we were looking for the sources of Supreme Court incentives, we would probably not think of looking to the desire on the part of the Justices to get what was perceived to be a better job.

We might be cautious about assuming the same thing, however, for judges other than the Justices of the Supreme Court. However circumspect such judges are about admitting it, it is hardly implausible to suspect that many trial judges desire to become appellate judges, and that most judges of intermediate appellate courts (including the United States Courts of Appeals) desire to become judges of courts of last

67. Moreover, even for Supreme Court Justices the desire to become Chief Justice of the Supreme Court, at a time (such as the present) in which a vacancy in that office is perceived likely in the foreseeable future, might conceivably operate as a decision-influencing or opinion-influencing motivation.
resort. And if this is so, then it would be worth examining what forms of judicial behavior appear to produce the greatest likelihood of the desired reward. Would a federal district court judge who wanted to become a court of appeals judge decide cases in one way rather than another? Would she produce more written opinions on matters of law, even at the expense of some efficiency in case management (and thus even at the expense of some degree of immediate peer group esteem)? Or would such a judge produce fewer opinions, and thus leave less of a Bork-like paper trail, even at the expense of some other forms of recognition and respect? Would a judge of an intermediate appellate court who wanted to be a judge of a court of last resort be especially concerned about non-reversal, or the non-production of controversial opinions, even at the expense of sincerely held policy preferences, and even at the expense of academic reputation (since an intermediate court judge is much more likely to receive academic recognition for making new law, and thus departing from precedent, than for following existing law)? Or would a judge of an intermediate appellate court make a prediction about the substantive attitudes of the current or future appointing and confirming bodies, and then attempt to conform her or his decisions to those attitudes? Many other hypotheses are possible, and I mention these not only because they seem plausible, and not only because each might have some support from the historical record, but also because they suggest the kinds of things that we can imagine once we recognize that judges, like the rest of us, have personal incentives, and that some of those incentives may at times be orthogonal to the conception of what it is, whatever it is, to be a "good judge." Moreover, even though the prospects for promotion of any given judge are low, the well-documented tendency of people to exaggerate the probability of

68. I suspect that a higher percentage of intermediate appellate court judges desire elevation to an appellate court of last resort than trial court judges desire elevation to an appellate court. Some trial judges enjoy the excitement, the quickness, the control, and the human drama of the trial court more than they would enjoy the isolation and the academic dryness of the appellate court, but I can imagine few reasons other than the occasional geographic one why someone sitting on an intermediate appellate court would not want to sit on an appellate court of last resort.

69. For one such study, see Richard S. Higgins & Paul H. Rubin, Judicial Discretion, 9 J. LEGAL STUD. 129, 137 (1980).

70. See Sisk et al., supra note 37, at 1487-93.

71. There is some anecdotal evidence that carrying one's caseload, and avoiding being thought of as a free rider, is a very important motivating force for trial judges sitting on multi-member courts of first resort, as with the federal district judges in the Southern District of New York.

low probability events\textsuperscript{73} may suggest that strategizing for promotion may play a larger role in judicial thinking than the actual probability of promotion would otherwise suggest.\textsuperscript{74}

5. The Immediate Peer Group

Judges, especially judges other than Justices of the Supreme Court of the United States, have peers, which include, most immediately, other judges of the same court or of the same rank, and, less immediately, the community of practicing lawyers, especially practicing lawyers within that jurisdiction. This suggests that judges might desire to appeal to one or more of these peer groups, and this desire in turn might affect judicial behavior. If trial judges will be scorned as ambitious slackers or free-riders by their fellow trial judges in the same multi-member court if they spend too much time writing opinions (or, even worse, scholarly articles) and not enough time moving the docket along, then this might affect their behavior.\textsuperscript{75} So too might a desire to be respected by practicing lawyers, since it is possible (albeit not inevitable) that the determinants of this respect were not congruent with the judges own perception of how she ought to perform as a judge.

6. Influence

Although judges might decide cases in order to promote a particular policy or legal point of view, they might also desire to have an impact for the sake of having an impact.\textsuperscript{76} Influence itself might be desired by some judges, and if and when that is the case, judges could plausibly select outcomes, or select substantive or methodological “trademarks,” for the purpose of maximizing their own influence.\textsuperscript{77} Judicial reputation might thus be seen not only as a primary goal for some judges, but also


\textsuperscript{74} At a conference about five years ago, Judge Douglas Ginsberg reported, with a delightful mixture of sarcasm and accuracy, that he was the only Court of Appeals Judge in the United States who did not believe that he was going to become a Justice of the Supreme Court.

\textsuperscript{75} For an institutional and organizational perspective on the way in which efficiency concerns, as well as court-wide political concerns, affect the behavior of trial judges, see Herbert Jacob, The Governance of Trial Judges, 31 L. & SOC’Y REV. 3 (1997).


as an instrumental goal for those judges who saw an increased reputation as a way of increasing their influence throughout the law and beyond the domain of particular cases.  

III. THE EMPIRICAL QUESTIONS

Although Judge Posner himself has helped to open up the topic of judicial motivation, his own perspective on the topic appears more conceptual than empirical. Posner has likened judging to playing a game, such that a judge who simply wants to be a judge would no more think of trying to maximize either policy or personal preferences than would a chess player think about the possibility that he could maximize self-interest by surreptitiously moving his knight when his opponent was not looking, or would a baseball umpire call balls and strikes based on a desire to enhance either his own personal fortunes or the fortunes of one team or another. As a conceptual matter, the practice (in the Wittgensteinian, form-of-life sense) of judging, Posner argues, requires that one immerse oneself in a role in a way that makes departure from that internal understanding either difficult or impossible. Posner appears to be maintaining, therefore, that what Hart called the "internal point of view" is definitional to the practice of judging, just as starting with a queen is definitional of the game of chess. For Posner, having something other than the internal point of view is simply to be playing a game other than judging. Moreover, just as people frequently play chess because they enjoy it, and would enjoy it less if they were playing something other than chess, some judges plainly "gain intrinsic pleasure in doing what they think is right," and some judges might thus take pleasure out of a practice defined in part by the absence of (or suppression of) self-interest in the outcome.

Posner appears to be correct about what it is to play the game of judging, but it is important to recognize the limitations of the claim. If

78. Judicial influence may be less than often supposed, see Gerald N. Rosenberg, The Irrelevant Court: The Supreme Court's Inability to Influence Popular Beliefs About Equality (or Anything Else), in REDEFINING EQUALITY 172 (Neal Devins & Davison M. Douglas eds., 1998), but the determinant on judicial behavior will not be the degree of actual influence, but the judge's perception of influence, almost certainly likely to be greater than actual influence.

79. See POSNER, supra note 1.


81. See id.


83. Saul Brenner, Comment: A Useful Definition of Strategic Behavior to Study the Supreme Court, 7 L. & CTS. 3, 4 (1997) (quoting LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997)).
Posner is making a conceptual claim about what it is to be a judge, then I have no quarrel with his argument. But if he is making the claim that all of the people who wear robes and are called judges by society are judges in Posner's sense, then this is a testable, and disputable, empirical claim. Take the game of bridge, for example. Just as it is definitional of chess that each player starts with a king, a queen, two bishops, etc., it is definitional of bridge that you cannot, other than in the formal constrained languages we call "bidding" and "signaling," tell your partner what cards are in your hand. Whatever we might call the game in which I pick up my cards and then tell my partner how many hearts I have, it is not bridge.

Yet despite the fact that telling your partner what cards you have is not bridge, there are numerous instances in which people purporting to play bridge have done just that, usually by elaborate—but not quite elaborate enough—foot and hand signals. 84 We call them cheats, we say they are missing the point of the game, and we may even refuse to claim that they are "really" bridge players. But of the millions of people throughout the world who sit at a table and go through the motions of playing bridge (or so it looks to an observer), the number who are cheating, and there is no doubt that the number is greater than zero, and thus who are not "really" playing bridge, is an empirical and not a conceptual question.

So too with judging. Even if Judge Posner is correct in his conceptual claim that it is not "really" judging if you are angling for higher office or playing to the law reviews or trying to help the lawyer with the nicer suit, the question of how many people who look and act like judges but who behave in such a non-judicial way is an empirical and not a conceptual question, not very different from the empirical question of how many of the 535 members of Congress are trying to maximize their personal interest in power or re-election even at the expense of the public interest. Hart has helped us to understand what the internal point of view is, but the question of how many judges within a given system actually have the internal point of view in the Hartian sense is not a question that can be answered with philosophical—as opposed to empirical—tools. And although Judge Posner also maintains that engaging in judging as he understands it produces pleasure and thus utility, it is again an empirical question how many judges derive how much pleasure in this way, as opposed to, for example, judges who derive pleasure from influencing the direction of policy, 85 from being the

84. See Terence Reese, Story of an Accusation (1966).
object of deference by lawyers and litigants, from being adored by legal academics, from gaining higher judicial office, and from seeing the morally worthier party prevail in a particular case.

Once we recognize that these are empirical questions, we can proceed to start formulating testable hypotheses, and then proceed further to test them in a systematic manner. This will not be easy. Even under conditions of confidentiality, which have their own methodological problems,\(^\text{86}\) I suspect that few judges will admit to having very much self-interest in reputation or promotion.\(^\text{87}\) Absent such candid self-revelation about motives, we are left with external indicia, for which the research designs are likely to be very difficult. Even so, however, research in this direction may tell us something we do not know about judicial motivation and judicial incentives, which in turn may tell us something important about the design of judicial institutions. Federal judges in the United States, and many judges throughout the rest of the world, have life tenure because of the effect of a set of empirical beliefs about the consequences to judicial behavior of certain kinds of incentives. The Framers of the Constitution, for example, believed that judges who were freed of the desire for re-election would be in important ways independent. The designers of the institution of academic tenure plainly believed the same thing. Yet if it turns out that judges, like tenured professors, even the tenured professors who have no desire to move to another institution or another job, are still in important ways dependent on certain external stimuli and incentives, this might have important implications for institutional design. The ideological or attitudinal approach to judicial decision-making has helped us to see that the law is not all that the traditional doctrine-caused model of judicial decision-making claims that it is. Perhaps it is now time to investigate whether ideologies and attitudes are not all that the ideologists and attitudinalists claim that they are.

\(^\text{86}\) In saying this, I express considerable sympathy with those who urge the ready availability to other scholars of primary research data, see Gary King, Replication, Replication, 28 PS: POL. SCI. & POL. 444 (and accompanying commentary, 452-99) (1995), but recognize that I cannot imagine any judge giving an on-the-record interview in which she or he revealed anything close to the full range of her or his motivations.

\(^\text{87}\) Or they may believe (whether accurately or inaccurately) that the standards for external reward are only the standards of high judicial craft. On this possibility, see Ronald A. Cass, Judging: Norms and Incentives of Retrospective Decision-Making, 75 B.U. L. REV. 941 (1995). Cass recognizes that judges may be influenced by a desire to gain all sorts of respect and (legal) reward from law professors, practicing lawyers, and the like, but assumes that these groups distribute the rewards based on judicial craft. That is perhaps so, but it too is a testable empirical proposition.