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**Lawrence Baum: Judges and Their Audiences**

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## Chapter 1

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### THINKING ABOUT JUDICIAL BEHAVIOR

In 1989, Cincinnati Reds manager Pete Rose faced an investigation of his alleged gambling activities by major league baseball. Rose's attorneys filed suit to block the investigation, and they steered the case to a Cincinnati judge who faced re-election in 1990. That judge, Norbert Nadel, allowed his announcement of a decision to be televised. When he "started the hearing with a microphone check," according to one writer, "you knew Pete Rose had the home-court advantage" (*Cleveland Plain Dealer* 1989). Indeed, the ruling gave Rose what he wanted. (*Cincinnati Enquirer* 1989)

As George W. Bush ran for president in 2000, commentators speculated about possible candidates for Bush appointments to the Supreme Court. J. Harvie Wilkinson and J. Michael Luttig, two subjects of the speculation, sat on the federal court of appeals for the Fourth Circuit in Virginia. In two cases decided in June 2000, Luttig wrote opinions attacking relatively liberal positions that Wilkinson was taking. In an environmental case Luttig linked Wilkinson's position with that of two liberal Supreme Court justices. In a freedom of speech case Luttig used Wilkinson's name more than fifty times, with four of the mentions coming in a paragraph that described sexually explicit material related to the case. (*Urofsky v. Gilmore* 2000; *Gibbs v. Babbitt* 2000)

On the day in 1992 that the Supreme Court announced its decision in *Planned Parenthood v. Casey*, Justice Anthony Kennedy talked with a legal reporter in his chambers before the announcement. Looking through his window at the crowd of demonstrators on both sides of the abortion issue, Kennedy referred to the impending decision in which he coauthored the decisive opinion. "Sometimes you don't know if you're Caesar about to cross the Rubicon or Captain Queeg cutting your own tow line." Shortly before taking the bench, Kennedy asked to be alone. "I need to brood," he explained. "I generally brood, as all of us do on the bench, just before we go on. It's a moment of quiet around here to search your soul and your conscience." (T. Carter 1992 39–40, 103)

A few weeks earlier, Justice Harry Blackmun spoke for an hour at a luncheon meeting of the Legal Aid Society in San Francisco. During his talk Blackmun read some of the fan mail he received from the public. He also expressed his disappointment about the Supreme Court's growing conservatism on civil

liberties issues. “It seems to get a little lonely. If I had more sense, I suppose I would turn in my suit.” According to a reporter, this statement elicited “a chorus of ‘No!’ ” Blackmun responded that he would “stay there for the moment.” (Holding 1992)

Justice Antonin Scalia frequently speaks in public about his views on legal matters. In these talks he sometimes discusses issues that the Supreme Court addresses, such as capital punishment and the church-state relationship. In a 2003 speech, for example, Scalia criticized a federal court of appeals ruling that inclusion of “under God” in the Pledge of Allegiance violated the First Amendment (Salmon 2003). Nine months later, when the Supreme Court voted to review that ruling in *Elk Grove v. Newdow*, Scalia acceded to the plaintiff’s request that he recuse himself from the case. (Lane 2003)

THE FIVE EPISODES just described are diverse in form, but they also have something in common: all of these judges were communicating with sets of people and trying to influence the perceptions of those audiences. In quite different ways they all sought to present themselves in a favorable light and, in the case of Judge Luttig, to cast an unfavorable light on a colleague (A. Cooper 2000).

The motivations of the judges in the first two episodes are uncertain, but each judge may have perceived a concrete advantage to his actions. Judge Nadel could anticipate that gaining the maximum publicity for his ruling in favor of a popular figure would enhance his prospects for reelection the next year. Judge Luttig could hope that by calling attention to the differences between his legal positions and those of a possible rival for promotion, he was advancing his candidacy.

Indeed, these judges’ career goals might have influenced the substance of their decisions. Judge Nadel had good reason to think that his chances for reelection would improve if his ruling was consistent with the strong views of many Cincinnati voters. Judge Luttig probably would have taken the same general positions even if he had no interest in promotion, because those positions were consistent with his well-established conservatism. But the value of distinguishing himself from Judge Wilkinson may have led Luttig to accentuate his conservative stances on free speech and environmental protection in these cases.<sup>1</sup>

<sup>1</sup> Four years later, at a time when Chief Justice Rehnquist’s health problems led to the expectation of an imminent vacancy on the Supreme Court, Judge Luttig wrote a concurring opinion in a death penalty case to attack Judge Wilkinson’s prodefendant dissent in strong terms. *Humphries v. Ozmint* (4th Cir. 2005). Also of interest are the dueling opinions of Wilkinson and Luttig in *Robles v. Prince George’s County* (4th Cir. 2002), a case in which Luttig took the more liberal position.

Of the scholars who study judicial behavior, most would see these possibilities as credible. These scholars typically give limited attention to judges' career goals, in part because their field focuses on the Supreme Court. Still, few would reject the proposition that judges with insecure tenure or prospects for promotion sometimes act with those considerations in mind (but see Posner 1995, 111).

The motivations of the Supreme Court justices in the other three episodes do not have as straightforward an explanation. What did these justices expect to gain from their public expressions? With life terms on the highest court, they could not be seeking retention in their positions or promotion to another position—except, perhaps, chief justice.<sup>2</sup> Students of the Supreme Court emphasize the justices' interest in the substance of legal policy, in making good law or good policy, more or less to the exclusion of other goals. Perhaps these three justices thought they were advancing their conceptions of good law or good policy in some fashion. It is difficult, however, to see how Kennedy or Blackmun could do much to achieve those goals through the public expressions I described earlier.

In the case of Justice Scalia, this explanation is more plausible. Scalia may seek to shape attitudes about legal issues within the public and the legal community, ultimately helping to win judicial support for the policies he favors. But this is a strategy with a highly uncertain and distant payoff, and that potential payoff would not seem to merit even the limited efforts required to undertake it. Moreover, as Scalia's recusal illustrates, the effects can be negative as well as positive.

Yet the behavior of these justices does not defy explanation. Presented with descriptions of the three episodes, most people outside the academic world would have a ready explanation: judges, like other people, get satisfaction from perceiving that other people view them positively. If Justice Kennedy wanted to be seen as a serious and thoughtful jurist, if Justice Blackmun liked to hear that some fellow lawyers appreciated his presence on the Court, if Justice Scalia enjoyed presenting his positions to groups that agreed with him, those motivations accord with what we know about human nature. Nor, I suspect, would most students of judicial behavior

<sup>2</sup> Both Justice Kennedy and Justice Scalia were mentioned as potential candidates for that position. Kennedy's creation of a "Dialogue on Freedom" program in which the participants included Laura Bush and Senator Edward Kennedy aroused speculation that he was subtly campaigning for chief justice (Lane 2002). In 2005 some people thought that Scalia was campaigning for the position by demonstrating his personal charm in public appearances (Carney and Cooper 2005). But Scalia's public expressions of his views and Kennedy's interview would seem more likely to reduce their chances for promotion than to enhance them.

dissent from this interpretation. After all, these scholars seek to explain judges' choices in cases, not the choices they make in other settings.<sup>3</sup>

But what if a desire for approval actually affected the positions these justices took in cases? Perhaps Kennedy's unexpected position in *Planned Parenthood v. Casey*, upholding the bulk of what the Court had decided in *Roe v. Wade*, reflected an interest in approval from the lawyers to whom he was talking through a reporter. Perhaps Blackmun was reinforced in his shift toward a more liberal record by the favorable reactions of liberal groups such as the one to which he spoke. Perhaps Scalia takes more extreme positions than he otherwise would in order to win accolades from conservative groups with which he interacts.

Students of judicial behavior might agree that this type of influence exists. But their research hardly ever takes it into account, because it involves a motivation that does not fit in the models that dominate scholarship on judicial behavior in political science. In those models judges are impervious to influence from others, or they are susceptible to this influence only for instrumental reasons—in the case of the Supreme Court, as a means to help them achieve good legal policy.

This book departs from those conceptions of the relationship between judges and their audiences. I argue that judges care about the regard of salient audiences because they like that regard in itself, not just as a means to other ends.<sup>4</sup> Further, I argue, judges' interest in what their audiences think of them has fundamental effects on their behavior as decision makers. Through their choices in cases, judges engage in self-presentation to audiences whose esteem is important to them.

Because this argument does not fit within the dominant models, it offers a different perspective. The central purpose of this book is to show how that perspective can enhance our understanding of judges' choices. This perspective is intended as a means to think in new ways about issues in judicial behavior and, in the process, to strengthen the dominant models.

The book's inquiry is limited to courts in the United States. I give primary attention to higher courts, especially the Supreme Court.<sup>5</sup> That em-

<sup>3</sup> One kind of choice that students of judicial behavior usually leave aside is whether or not to become a judge. With a few exceptions, I follow the same practice. Richard Posner (1995, ch. 3) concluded that the motivations to become a judge may be quite different from the motivations for choosing particular positions in cases. However, Payne and Woshinsky (1972) argued that the motives that bring people into politics affect their behavior as officeholders, and Caldeira (1977) and Sarat (1977) applied that perspective to trial judges.

<sup>4</sup> In the book I use the term *regard* in its meaning of a positive view about a person. I use *esteem* and *approval* as synonyms for regard, and I occasionally refer to popularity and respect as more specific elements of regard.

<sup>5</sup> Of course, the line between higher and lower courts is not sharp. As a group, students of judicial behavior do the preponderance of their research on federal courts and state supreme courts, and I focus on those sets of courts.

phasis mirrors the subject matter of scholarship on judicial behavior. Further, it is in higher courts that the perspective of audiences raises the most serious challenges to existing understandings of judicial behavior. However, my interest extends to lower courts. As I discuss in chapter 6, a perspective based on judges' relationships with their audiences is one means to study lower courts in the same terms as higher courts.<sup>6</sup>

The place to begin my inquiry is with the dominant models.<sup>7</sup> The next three sections of the chapter review those models with the aim of identifying their assumptions, examining the implications of those assumptions, and considering their limitations. The final section sketches out an audience-based perspective as a means to expand our understanding of judicial behavior.

At the outset, I should underline a distinction between the views of scholars and the scope of the models they employ. I emphasize the restrictive assumptions of the dominant models concerning judges' motivations. Models are intended to simplify reality for analytic purposes, and many scholars who adopt those models would accept broader conceptions of judicial motives. Some explicitly caution that their models do not fully encompass the forces that shape judicial behavior (e.g., Maltzman, Spriggs, and Wahlbeck 2000, 27–28; see Epstein and Knight 1998, 49). Thus I characterize not the views of scholars in the field but the models that dominate research in the field.

## MODELS OF JUDICIAL BEHAVIOR

The scholarship on higher courts has depicted three ideal types of judicial behavior, typically labeled legal, attitudinal, and strategic. In a pure legal model, judges want only to interpret the law as well as possible. For this reason they choose between alternative case outcomes and doctrinal positions on the basis of their legal merits. In a pure attitudinal model judges want only to make good public policy, so they choose between alternatives on the basis of their merits as policy. In most pure strategic models judges seek to make good policy, but they define good policy in terms of

<sup>6</sup> Like judges, other participants in the legal process are influenced by their own audiences. Mather and Yngvesson (1980–81; see Yngvesson and Mather 1983) delineate how audiences shape the development and outcomes of legal disputes. That impact is especially evident in lower courts, though it extends to higher courts as well. Because my subject is judges, the book will not consider this broader impact of audiences.

<sup>7</sup> In this chapter I focus on models and research in political science. To a considerable but lesser degree, students of judicial behavior in other disciplines adopt similar models explicitly or implicitly. As I note later, however, a number of economists and legal scholars have pointed to a wider range of judicial motivations than political scientists typically consider.

outcomes in their court and in government as a whole. Thus they may deviate from their most preferred policy position in a case as a way of helping to secure the best outcome.

In practice, the picture is more complicated. Scholars have developed variants of the three ideal types, and only one of those types—the strategic type—currently has many adherents in its pure form. I begin by considering models based on the strategic type and then turn to the mixed models that developed from the other types.<sup>8</sup>

### *Strategic Models*

Like related terms, *strategic* is used in various ways (see Baum 1997, 90 n. 2; Caminker 1999). My summary of strategic models indicates my own usage of the term. Strategic judges consider the effects of their choices on collective outcomes, both in their own court and in the broader judicial and policy arenas. In other words, they do not simply do the right thing as they see it, such as voting for the most desirable policy on freedom of speech. Rather, they seek to have the right thing triumph in their court's decision and, more important, in public policy as a whole. For this reason, whenever strategic judges choose among alternative courses of action, they think ahead to the prospective consequences and choose the course that does most to advance their goals in the long term.<sup>9</sup>

To achieve this result, judges might vote and write opinions that differ from their own conceptions of the right thing. Thus we cannot assume that a judge's vote in a freedom of speech case fully reflects the judge's conception of good policy. If the goal of an appellate judge is to advance freedom of speech as much as possible, she might take a more moderate position in a particular case in order to win majority support for a pro-free speech ruling by her court. The judge might also try to avoid a decision that provokes Congress to enact legislation limiting free speech.

Judges could act strategically to advance a variety of goals, not just good policy. State judges who lack life terms might balance policy goals against their interest in remaining judges (e.g., M. Hall 1992; Langer 2002). Judges might seek to advance their conceptions of good law (Ferejohn and Weingast 1992) or strive to achieve both good law and good policy (Spiller and Tiller 1996). But in most strategic models that are applied to federal courts, judges act solely on the goal of achieving good policy.

<sup>8</sup> The various positions that students of judicial behavior espouse are examined in Maaveety 2003.

<sup>9</sup> I will refer frequently to goals and motives or motivations. Goals can be thought of as ends that people try to achieve, and motives as reasons to pursue those ends, but the two concepts are intertwined.

As suggested already, strategic policy-oriented judges direct their efforts at multiple objects. They consider colleagues on their own court (Maltzman, Spriggs, and Wahlbeck 2000; Hammond, Bonneau, and Sheehan 2005) and judges on other courts (Songer, Segal, and Cameron 1994; Cameron, Segal, and Songer 2000). They also concern themselves with the other branches of government (Spiller and Gely 1992; Schwartz, Spiller, and Urbiztondo 1994; Epstein, Knight, and Martin 2001) and the general public (Epstein and Knight 1998, 157–77). As a result, the strategic judge is subject to influence from a variety of sources. One possible result underlines the impact of strategy: judges who do not care about making good law nonetheless might base their decisions on legal considerations, because they think the public expects them to act on a legal basis. They do so in the belief that if they act in accord with public expectations, the public will be more willing to accept and comply with their decisions (Epstein and Knight 1998, 163–77; see Easterbrook 1992, 287).

Models of strategic judges who are devoted to achieving good policy have some very attractive features. They provide a comprehensive and coherent framework for the analysis of judicial behavior. They also promote rigor in the analysis of that behavior. Primarily because of these virtues, strategic models have become highly influential, and a strategic conception of judicial behavior is now the closest thing to a conventional wisdom about judicial behavior (see Epstein and Knight 2000).

#### *Attitudinal and Quasi-Attitudinal Models*

In the terms used in rational choice analysis, judges of pure attitudinal models act sincerely (or naively) rather than strategically. Devoted to good policy as a goal, attitudinal judges act directly on their policy preferences without calculating the consequences of their choices. They cast votes and write opinions that perfectly reflect their own views, regardless of what their court colleagues and other policymakers might do in response. In this model a judge's vote on an issue involving freedom of speech reflects solely what the judge thinks is good policy on the issue in question.

In the judicial behavior scholarship of the 1960s and 1970s, something like a pure attitudinal model was the leading approach to the study of the Supreme Court (e.g., Schubert 1965; Spaeth 1979). Scholars frequently applied attitudinal models to other courts as well, though often implicitly. At the same time, students of judicial behavior—including adherents to attitudinal models—were analyzing strategy in decision making (Schubert 1963; W. Murphy 1964; Rohde and Spaeth 1976, chs. 8–9). For this reason some accounts of judicial behavior appeared to lack theoretical coherence.

Since the 1990s some scholars have overcome this problem by adopting fully strategic models of judicial behavior. Meanwhile, the leading proponents of the attitudinal approach have made more explicit how they integrate strategy into their approach (Segal and Spaeth 2002). They have set aside the original premise of the attitudinal model that judges act sincerely on their policy preferences: as they now see it, judges think strategically. But they argue that in two respects, strategic considerations have only limited impact on the positions of Supreme Court justices. First, justices seldom have to modify their positions to accommodate the preferences of those outside the Court, such as Congress and the general public (Segal and Spaeth 2002, 326–49, 424–48; Segal 1997). Second, while justices act strategically in regard to their colleagues at preliminary stages of decision (such as case selection), they need not do so when they vote on case outcomes, since final votes on outcomes are the last stage in the decision process (Segal and Spaeth 2002, 96–97).

Segal and Spaeth's depiction of the Supreme Court, then, is a hybrid of ideal types. Justices think strategically, but for the most part they act attitudinally. While other scholars have not explicitly adopted this formulation, it is implicit in much of the research on judicial behavior.

#### *Models with a Legal Component*

The judge who conforms to the legal ideal type seeks only to make good law. In other words, this judge aims to interpret the law accurately, without concern for the desirability of the policies that result. Faced with a free speech case, the law-minded judge simply seeks the best interpretation of the First Amendment.

This explanation of judicial behavior maintains a foothold in law school teaching and exerts some influence on legal scholarship (Cross and Nelson 2001, 1439–43). But at least since the legal realist movement, few scholars have fully accepted this explanation (W. Fisher, Horwitz, and Reed 1993; R. Smith 1994). However, legal realists differed in the role they ascribed to the law. Those who could be called radical legal realists largely rejected the law as a basis for judicial choice (e.g., J. Frank 1930), a position taken more recently by critical legal theorists (Dalton 1985; D'Amato 1989). In contrast, moderate legal realists left room for the law in judges' decision calculus (e.g., Cardozo 1921). In their conception, judges who decide an issue involving freedom of speech make their choices on the basis of both what they deem to be good policy and how they think the First Amendment is best interpreted.

This moderate version of legal realism is implicit in much of the research by legal scholars. It has also been accepted by some political scientists such as C. Herman Pritchett, a key figure in the movement to analyze

judicial behavior systematically (see, e.g., Pritchett 1954). These scholars agree that judges' policy preferences play a substantial part and perhaps the largest part in judicial decisions. But they argue that legal considerations also play a part, chiefly because judges reach decisions within a legal framework.

To a degree, advocates of the other models have kept adherents to moderate realism on the defensive (Gillman 2001b, 466). But their position has achieved something of a revival in a school that is usually labeled historical institutionalism (R. Smith 1988; Clayton 1999; Gillman 1999; "Courts" 1999; Whittington 2000). Moreover, some scholars from outside this school incorporate legal considerations into their analyses of judicial behavior (H. Perry 1991; Songer and Lindquist 1996; D. Klein 2002; Richards and Kritzer 2002; Kritzer and Richards 2003).

Moderate legal realists who focus on the interplay between legal and policy considerations give limited attention to strategy. However, historical institutionalism emphasizes the links between courts and the broader political regime (Gillman 2004). Gillman (1997) and Graber (2004) made explicit what is implicit in some writings by moderate realists: judges act strategically, but their strategic behavior is in the service of both legal and policy goals. Indeed, it has been suggested, much of the strategic interaction that occurs within appellate courts should be understood as an effort to enhance coherence in the law by achieving an opinion that a majority of judges can support (Kornhauser and Sager 1993, 52–53; Edwards 2003).

#### SHARED ASSUMPTIONS: THE JUDGE AS MR. SPOCK

The competing models of judicial behavior differ on a number of issues, ranging from the place of law in judging to the public's influence on the Supreme Court. Much of the scholarship in the field focuses on these differences, as scholars advocate particular positions and conduct research on points of disagreement among models.

Significant as these differences are, the issues on which these models agree are even more fundamental. All the major models share the premise that policy considerations powerfully influence the choices of higher-court judges. Further, each model allows for judicial strategy.

At a deeper level, these models share a basic premise—so basic that it is hardly ever noticed (but see Baum 1997, 27–28; Schauer 2000, 615–17). Each model incorporates the assumption that Supreme Court justices act solely on their interest in the substance of legal policy, whether that interest is centered on policy or on a combination of law and policy. No other goal has any impact on the justices' behavior. The same assumption is often applied to judges on other federal courts, though not always explicitly.

This is a striking assumption, because it treats judges as people whose choices are based on a very narrow set of goals. If this assumption is accurate, judges' interest in shaping legal policy must be far stronger than other goals that might affect their decisions. To assess this assumption, then, it is necessary to consider both the strength of good legal policy as a type of goal and the potential impact of alternative goals. I will give primary attention to the Supreme Court, because the argument that judges act only on their interest in legal policy is most widely and most fully accepted for the Court.

### *The Strength of Legal Policy as a Goal*

Central to the dominant models of judicial behavior is the premise that judges on higher courts care a great deal about the content of legal policy. The reasons why judges might care so much are hardly ever spelled out. Rather, having observed patterns of judicial behavior that seem consistent with a strong judicial interest in legal policy, scholars see no need to inquire into the bases for this interest.

This does not mean that such bases cannot be identified. Consider first of all the judge who is devoted to making good policy through decisions. Undoubtedly most lawyers who become judges, like other people in law and politics, have strong preferences about a range of policy issues. As a result, they gain satisfaction from the feeling that they are making or contributing to good policy (W. Landes and Posner 1975, 887; Higgins and Rubin 1980, 130; Posner 1995, 131). If commitment to a vision of desirable public policy can motivate political action in other arenas, such as interest group activity (Moe 1980; Verba, Schlozman, and Brady 1995, ch. 4), surely a similar commitment can influence judges' choices. Further, judges who act strategically on their policy goals may enjoy the feeling that they are winning victories and exerting influence.

Similar motivations can spur judges' efforts to make good law as distinct from good policy. Socialized through their legal training and practice, judges gain satisfaction by interpreting the law as well as they can (Stinchcombe 1990; D. Klein 2002, 11–12; Cross 2003, 1473–76). Judge Richard Posner (1995, 131, 133) has suggested that judges enjoy following the rules of the “game” of judging, such as compliance with the strictures of law.

It is very difficult to assess the general strength of these motivations, but it is far from obvious that they are strong enough to dominate judicial decision making. For one thing, a judge does not benefit directly by making good law or good policy. The state of government policy on issues in labor relations or freedom of religion is unlikely to have much effect on

a judge's life. Few judges who vote to limit the use of capital punishment expect to become defendants in murder cases.

Thus, working to achieve legal and policy goals does not serve judges' self-interest as conventionally defined. "If one looks only at financial incentives," one legal scholar argues, "it is difficult to explain why most federal judges do not simply decide their cases by flipping a coin, and then take the rest of the day off and go fishing" (Stout 2002, 1606). The same is true of other aspects of self-interest.<sup>10</sup>

### *The Impact of Other Goals*

It might be, however, that the goal of making good legal policy dominates judicial decision making by default. If other goals are pretty much irrelevant to the task of judging, then judges devote themselves to achieving good law or good policy because they have nothing else to do with their power. This is essentially the position of some of the most influential analyses of Supreme Court decision making (Rohde and Spaeth 1976, 72–74; Epstein and Knight 1998, 36–49; Segal and Spaeth 2002, 92–96).

In considering alternative goals, these analyses give nearly exclusive attention to career maintenance and advancement, an obvious possibility for public officials. Students of judicial behavior accept the relevance of this goal to lower-court judges, especially elected state judges (e.g., M. Hall 1992, 1995). In contrast, Supreme Court scholars argue that it has little relevance to the justices (Rohde and Spaeth 1976, 72–74; Epstein and Knight 1998, 36–39; Segal and Spaeth 2002, 93–96). In their view, justices' life terms and the attractiveness of their positions rule out self-interest in the form of career considerations. This answer is a bit too sweeping, in that some justices have been interested in nonjudicial positions or—as noted earlier—elevation to chief justice.<sup>11</sup> Further, it is possible that this interest affects the positions that ambitious justices take in certain cases. Still, for most justices career goals are indeed irrelevant.

<sup>10</sup> Self-interest is an elusive concept, and some commentators have defined it so broadly that it encompasses virtually all motivations (see Adam Smith 1759/2000, 449–60). With this usage, judges' satisfaction from taking positions that accord with their conception of good legal policy or from helping to achieve good policy could be considered a form of self-interest. A few scholars label judges' policy goals as self-interested (Spiller and Gely 1992, 464; Schwartz, Spiller, and Urbiztondo 1994, 57), and it might be that they are thinking about this kind of satisfaction. Still, there is a fundamental distinction between concrete or tangible benefits and symbolic or psychic benefits that people obtain from their actions, and that distinction can be maintained by labeling only the pursuit of tangible benefits as self-interested.

<sup>11</sup> Justice William O. Douglas's interest in the presidency and the ambitions of some of his colleagues are discussed in B. Murphy 2003. On Justice Byron White's possible interest in other positions, see Klain 2002.

While political scientists say little about other alternatives to the goal of achieving good legal policy, career goals do not exhaust the possibilities. “Indeed, once salary and tenure are guaranteed, ironically the door is open for many other factors to influence judicial behavior” (Burbank and Friedman 2002, 27). Scholars with an economic orientation have posited a multiplicity of goals for judges on various courts (e.g., Anderson, Shughart, and Tollison 1989; Miceli and Cosgel 1994; Cass 1995; Posner 1995, ch. 3; Toma 1996; Drahozal 1998; Gulati and McCauliff 1998; Georgakopoulos 2000; Bainbridge and Gulati 2002). For the Supreme Court some of these goals, like career goals, can be set aside as very weak at best. The same is true of goals whose impact is idiosyncratic. To take an extreme example, one could imagine a situation in which a Supreme Court justice has an incentive to decide a dispute over a presidential election in a way that makes the justice more comfortable about retiring.<sup>12</sup> But that incentive, decisive though it might be in a major decision, could not be an important component of any theory of judicial behavior.

In contrast, some other goals might have a more regular impact. One candidate is pleasant working relations with colleagues. On appellate courts, judges must work together. Even in an era with limited face-to-face contact among Supreme Court justices, decision making requires considerable interaction among the justices. Frictions are inevitable. The potential for more serious hostility always exists and sometimes comes to fruition (P. Cooper 1995). The justices would be an unusual group indeed if most of them did not prefer to minimize conflict (see Edwards 2003).

In turn, that goal may affect the justices’ behavior. This impact should not be exaggerated: occasional reading of dissenting opinions makes it clear that justices sometimes take actions that could foster conflict. Moreover, it can be very difficult to identify the motivations that underlie efforts to minimize conflict: justices who seek to maintain a pleasant environment and justices who seek to win colleagues’ support for their legal and policy positions might behave in quite similar ways (see W. Murphy 1964, ch. 3). Yet it is quite plausible that concern for interpersonal relations affects behavior such as opinion writing and joining.

Another possibility is usually called leisure (Posner 1995, 124–25), though perhaps a better label is limiting workload. Judges on any court might seek to maximize leisure time or time for other pursuits by working less rather than more at judging. It is noteworthy that a federal court of

<sup>12</sup> Readers may recall the report that Justice Sandra Day O’Connor expressed great dismay on election night in 2000 when she thought that Al Gore had won the election, because she would have to delay her retirement from the Court (E. Thomas and Isikoff 2000–2001, 46). Whether or not this report was accurate, Justice O’Connor’s continued tenure on the Court until 2006 suggests that an interest in retirement did not have a strong impact on her position in *Bush v. Gore*.

appeals judge (Posner 1995, ch. 3) has emphasized workload as a goal that can affect judges' choices (see also Macey 1994; Drahozal 1998, 475–76; Gulati and McCauliff 1998, 172; Bainbridge and Gulati 2002). Occasionally, a judge is open about holding this goal. “I didn’t get elected to work hard. I worked hard as a trial lawyer” (Flemming, Nardulli, and Eisenstein, 1992, 98). The possibility that Supreme Court justices care about limiting their workloads is supported by the anecdotal evidence that some work less than full days (e.g., Woodward and Armstrong 1979, 270) and by the array of extracurricular activities in which they engage during Court terms, activities that range from law school speeches to duck-hunting expeditions.

Workload considerations affect agenda setting. In courts with discretionary jurisdiction and large numbers of petitions for hearing, there is an unavoidable maximum to the number of cases that judges can accept and handle adequately. The most obvious sign that judges seek to limit their workloads is that they accept substantially fewer cases than that maximum.

This has been the Supreme Court’s practice in the last two decades. There was a precipitous decline in the number of certiorari grants per term during the early years of the Rehnquist Court, and the new lower level has been maintained since that time. Commentators have offered various explanations for this decline (Hellman 1996; O’Brien 1997). Some have suggested (though gently, at least in print) that the Rehnquist Court justices preferred doing less work to more (Lacovara 2003). Evidently aware of this interpretation, Justice Ginsburg protested that “the cutback in opinions doesn’t mean that the court is becoming a lazy lot” (Biskupic 1994c).

In decisions on the merits, judges’ goal of limited workload may result in deference to other people. Judges in some appellate courts strongly defer to the members of central staffs who prepare proposed decisions and opinions (Davies 1981; Stow and Spaeth 1992). Judges may also defer to the colleague who is initially assigned a case, suppressing disagreement in order to avoid writing separate opinions (Wold 1978, 64; Linder 1985, 486; Maltzman, Spriggs, and Wahlbeck 2000, 24). At the extreme, this deference is so great that the outcome of cases largely depends on the identity of the assigned judge (Sickels 1965).

More broadly, workload considerations limit judges’ efforts to get decisions “right” as law or policy. This effect is especially important. The distance between a decision and a judge’s ideal will tend to decline as the judge devotes more time and effort to the decision. Like people in other positions, judges must determine where to draw the line, at what point to stop working on a case because the likely benefits of additional work are outweighed by the value of spending time on other pursuits. If





















