

1990

## What's So Special about Judges?

Frank H. Easterbrook

Follow this and additional works at: [http://chicagounbound.uchicago.edu/journal\\_articles](http://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

### Recommended Citation

Frank H. Easterbrook, "What's So Special about Judges?," 61 University of Colorado Law Review 773 (1990).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

## WHAT'S SO SPECIAL ABOUT JUDGES?

FRANK H. EASTERBROOK\*

Article III of the Constitution says that the "judicial Power of the United States" belongs to the Supreme Court and such "inferior" courts as Congress chooses to establish. It tells us that judges may resolve "Cases" and "Controversies" and that Congress may make "Exceptions" to and "Regulations" of the Supreme Court's appellate jurisdiction. And it says that federal judges hold office during "good Behavior." That is a spare mandate. The Constitution does not identify the scope of the "judicial Power" or spell out what "Behavior" is "good."

Article III does not mention the power that has come to be synonymous with the judiciary in popular, political, and academic minds: to set aside statutes and regulations that do not comport with the Constitution and to direct other political actors to implement the judges' constitutional vision. Such a power of review was not granted; it was inferred.

It was not inferred because of any attribute unique to judges. Under the Supremacy Clause, the Constitution binds the states; the President takes a special oath to uphold the Constitution; every political actor owes an obligation to put the Constitution (the "supreme Law of the Land") first, a statute or regulation second, and his private conception of The Good third.<sup>1</sup> Nothing in the text of the Constitution marks a special role for judges; each public official applies the Constitution when it is time to act.

"Expertise," a leading contemporary justification for the judicial role, did not support judicial review in 1803. By and large the drafters of the Constitution sat in Congress, not on the Court. Not until after the Civil War did the Court start undoing (on Constitutional grounds) the work of Congress. Such experience as judges have acquired is a consequence of their jobs, not a cause. Anyway, professors of law

---

\* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, The University of Chicago School of Law. This essay is a comment on Frederick Schauer, *Judicial Self-Understanding and the Internalization of Constitutional Rules*, presented at the Ira C. Rothgerber, Jr. Constitutional Law Conference at the University of Colorado on April 13, 1990. It is © 1990 by Frank H. Easterbrook. I thank Alan J. Meese and Richard A. Posner for helpful comments on an earlier draft.

1. See *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1054-56 (7th Cir. 1990) (Easterbrook, J., concurring); *Cooper v. Eugene School Dist. No. 4J*, 301 Or. 358, 362-365 & n.7, 723 P.2d 299, 302-03 & n.7 (1986) (Linde, J.). See also Easterbrook, *Presidential Review*, in — CASE W. RES. — (forthcoming 1990).

have a good deal more knowledge about their subjects than does a generalist judge.

Judicial review was inferred from the fact that we have a written Constitution, which by its own terms is "Law." Not only the Framers whose words on the subject antedate the approval of the document (particularly Alexander Hamilton in the *Federalist Papers* and James Wilson in the Pennsylvania ratifying convention),<sup>2</sup> but also the Supreme Court in *Marbury v. Madison*,<sup>3</sup> derived judicial review from the quality of the Constitution as law—a decision taken yesterday that binds us when exercising public power today.<sup>4</sup> The Constitution establishes a limited government using *rules*, which is how we departed from the United Kingdom, whose government is regulated by tradition. Rules imply enforcement. Hence judicial review.

This method of justifying judicial acts implies a corresponding limit. When there is no rule of law, the decision is taken by vote among the people and their representatives. Moral views not only inform votes but also shape rules of law; still they are not themselves law. Whether to be governed by John Rawls' maximin principle—something appropriate only for a highly risk-averse populace—is settled by determining the risk preferences of an actual populace (rather than supposing that a decision has been made by deductive logic). As Dean Ely cracked, a judge may not say: "We like Rawls, you like Nozick. We win, 6-3. Statute invalidated."<sup>5</sup> If a judge wrote such an opinion, the judgment properly would be treated like an editorial in *The Elkhart Truth*: no one would need to comply.

Mundane, you say. We know all this. Fine. Yet I start here because how judges approach their tasks depends on what those tasks are. Professor Schauer starts with the academy not only because he knows it well, but also because he seeks to transfer to judges what he learns by introspection. Yet although, as he says, much of the legal writing from the law schools is advocacy journalism rather than scholarship, and although the professor-advocates seek to influence others' behavior, it does not follow that the lessons are transferrable to judges who also seek to influence conduct. One could say the opposite: that because the methods of influence—persuasion for professors, prison

---

2. FEDERALIST NO. 78, at 491-93 (A. Hamilton) (B.F. Wright ed. 1961); Remarks of James Wilson at the Pennsylvania ratifying convention (Dec. 7, 1787), reprinted in *PENNSYLVANIA AND THE FEDERAL CONVENTION OF 1787-1788*, at 304-05 (L. McMaster & F. Stone eds. 1888).

3. 5 U.S. (1 Cranch) 137 (1803).

4. See generally Easterbrook, *Approaches to Judicial Review*, in *THE BLESSINGS OF LIBERTY: AN ENDURING CONSTITUTION IN A CHANGING WORLD* 147 (J. David & R. B. McKay eds. 1989).

5. J.H. ELY, *DEMOCRACY AND DISTRUST* 58 (1980).

for judges—differ, so must the tools of interpretation. Scholars are paid to be novel; judges are paid to be right.

Professor Schauer finds it “not immediately apparent” why a professor rather than a judge is giving the principal lecture. This is not for want of trying. The dean couldn’t get a judge—at least not this judge, and undoubtedly he tried others. Why should judges know much about what they do? Do not ask a rat to *analyze* a maze, as opposed to run it. Karl Llewellyn expressed disappointment that his academic colleagues appointed to the bench by President Franklin Roosevelt did not write about their work and could not describe to him how they did their jobs.<sup>6</sup> No surprise here. Objectivity is the first ingredient of scholarship—it is why medical experiments are *double blind*.

Judges are not objective about themselves or their roles. No one is. Economists suppose that businesses maximize profits. If you ask managers whether they maximize, they will answer that they don’t. Does it follow that economics is wrong? That depends on whether some other set of assumptions would produce more accurate results. George Stigler conducted a survey that wonderfully illuminates both the limits of surveys and the limits of self-knowledge. He asked a selection of managers whether they set prices so as to maximize the firms’ profits. They replied that they do not. Then Stigler asked whether they would make more money if they reduced prices. They said no. Next he asked whether they would make more money if they increased their prices. Once again they said no. Well, there you have it. A scholar might infer that the managers were maximizing profits, although they would not accept the conclusion.

So you should not put much stock in what I say about judges. Still, I am here and offer a few observations. All of them suggest answers to the question “What’s so special about judges?” All answers to this question must take into account the things that are at least arguably distinctive: judges’ tenure, their insistent demands to be obeyed, and the fact that appellate judges are the last generalists of the legal profession.

*1. Tenure.* There is much hoo-hah about federal judges’ life tenure and salary protection. Professors of law have the same benefits—if these attributes are benefits at all when both judges and professors make less than the median lawyer, and inflation makes worthless the promise that salaries will not be cut. Nothing special here. Or is there?

Why do judges have tenure? Judges like what they are doing, and

---

6. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 264-65 (1960).

they value the office independent of the money. (Why else did they take these jobs?) Tenure liberates the judge from contemporary political pressures. The judge needn't conform to retain the job. Yet why should we ameliorate the pressure to conform? (It can never be eliminated—not if the judge values praise or contemplates the possibility of advancement.) One possibility is that freedom from the demands of the present enables the judge to be a better servant of the past.<sup>7</sup> A constitution is designed to constrain the present. Today's majority must live within guidelines established by yesterday's majorities—and for our Constitution, yesterday's super-majorities. Demands from the past are more likely to be honored, even in the face of a strong contrary view today (which we usually denigrate as “temporary passions”), if the judge may not be turned out of office on account of faithful obedience to rules.

A second possibility is that tenure liberates the judge *from* law—yesterday's as well as today's. Instead of implementing either a decision taken in Philadelphia in 1787 or a decision taken in Washington in 1987, the judge may direct that the government do what the judge prefers. This does not imply whimsy; the judge may draw his vision from great political philosophers or other sources external to his druthers. But we know that however sublime the vision, it was twice in the minority—then and now.

It would not be insane to give judges such powers. Anyone knowing the ability of interest groups to defeat the interests of the majority may think that in the judiciary the “real” public interest could prevail. But it is most improbable that the Framers of our Constitution authorized anything of the kind. Recall that they believed people vain and corruptible, in need of check. The design of the government places power against power, and uses brief tenure as a leash. (The “corruption” could be intellectual more than monetary; to say that “power corrupts” is not to say that the officeholder is on anyone's payroll.) Madison knew about the evils of faction but explained in *Federalist No. 10* that the diffusion of power between state and federal governments, and among branches, was the best check on faction.<sup>8</sup> Diffusion is the antithesis of concentration of power in the hands of the “wise.”

Practical politicians gravely worried about the power of faction and the imperfection of all those who wield power were unlikely to

---

7. In addition to the many historical sources, see Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

8. FEDERALIST NO. 10 (J. Madison); see also FEDERALIST NO. 51, at 358-59 (J. Madison) (B.F. Wright ed. 1961). See generally Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

suppose that a tenured, deliberately self-indulgent group of people would be the protectors of the Republic. No, judges have tenure *in spite of*, not because of, its liberating effect. It is odd that the astute students of government who met in Philadelphia did not comment on the dual effects of tenure; Hamilton's *Federalist No. 78* is touching in its belief that insulation from daily politics will produce faithful implementation. Perhaps Hamilton and his contemporaries recognized the liberating effect of tenure but thought it unimportant because "the least dangerous branch" lacks the power of the purse.<sup>9</sup>

Contrast the academy. Professors need not be faithful to the past. They are out to understand the past and change the present; obedience to a dead hand is not part of the formula of good scholarship. A free mind is apt to err—most mutations in thought, as well as in genes, are neutral or harmful—but because intellectual growth flows from the best of today standing on the shoulders of the tallest of yesterday, the failure of most scholars and their ideas is unimportant. High risk probably is an essential ingredient of high gain. Academic tenure is desired for reasons opposite to that of judicial tenure: scholars have freedom so that they may be creative, and *in spite of* the possibility that tenure may protect routineers who unblinkingly do today what was done yesterday.

Because the unwelcome byproduct of tenure for judges is the *raison d'être* of tenure for scholars, and the reverse, introspection into how one group functions will not be the best guide for the other.

**2. Obedience.** Which effect of tenure is desired and which is tolerated differs between groups because judges wield the power of the state. Let me now turn the knife slightly and ask, not why a few public officials have tenure, but why people should obey judges. Judges question the acts of the other branches and on occasion do otherwise than these rules command. The judge refuses to abide by a statute because he believes that some higher law requires this. Although the judge as a person is no less fallible than the members of the other branches, the judge insists that no one is entitled to question judicial decisions in the way judges themselves question other persons'. Why this difference? Why should the President and the people not treat judges' opinions as judges treat statutes: to be carried out when persuasive, but not otherwise?

If judges claim a power to act on the basis of contested moral and

---

9. They did not anticipate *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990), but this is hardly surprising. Taxation at the command of judges was not plausible until the Constitution created the sort of costly rights that are attributable to the Civil War amendments and the decisions of the twentieth century.

political considerations, there is no particular reason why their decisions should be conclusive. Philosophers have debated for hundreds of years the conditions of justice. A pluralist society will contain people who hold different and often incompatible views. To say that there is no "right" answer to these questions is to say that political society can tolerate different (and conflicting) dispositions. Judges' demand for obedience is supportable if the "higher law" informing their decision is *law*; a judge has at least the virtue of disinterest in interpreting the law, and the disinterested answer may be applied to the political branches. Judges are "interested" persons, though, when the question is moral. Everyone would like society at large to be governed by his philosophical conclusions, to share his aspirations and concerns. Fervent belief in a moral judgment makes the judge more rather than less "interested" in the outcome, and diminishes any claim to be obeyed when addressing them.

A professor may spend a career developing arguments about which legal or philosophical position is superior, but his rivals will not leap into prison at his command. (We view as barbaric societies that legislate "right answers" to moral matters, largely because we do not believe that there *are* "right answers"—or that if there are, political processes are good at finding and enforcing them.) Freedom for the scholar follows from the fact that he must persuade rather than coerce. It is tolerable because a scholar's errors do not injure strangers. The power of coercion implies forbearance by judges, a fundamentally different role. Judges may not derive the power to coerce others from the existence of legal rules and then say: "Now that I have the power, I needn't follow the rules." Rules are the source of the power being asserted.

3. *Portfolios*. Judges are the administrative agencies with the largest portfolios—the last real generalists in the law. This has consequences for how they understand their jobs, including the limits on their competence.

Much of the judge-centered scholarship in contemporary law schools assumes that judges have the leisure to examine subjects deeply and resolve debates wisely. Professors believe they have this capacity and attribute it to judges. Pfah! Professors, like most practitioners these days, are specialists. They devote lifetimes to understanding one or two fields in depth. If they are energetic they write three to six articles per year. More often they write one, or none at all. Scholarship is hard work.

In 1989 I issued 67 published opinions and was responsible for perhaps 30 unpublished opinions. You can work it out that I partici-

pated in approximately 300 cases, with perhaps three issues presented in the average case. Judges have a broad understanding of the law, not a deep one. Who can study 900 issues in depth? With luck, pluck, and awareness of intellectual limits, a judge may succeed in holding the rate of error as low as 5%. You may rest assured that we lack the rigorous training in music, metaphysics, mathematics, and gymnastics that Plato thought essential to his guardians—and that the process for selecting judges does not check whether the candidate has the acquaintance with the conduct of the Peloponnesian Wars that Learned Hand thought essential.<sup>10</sup> The demands of the office preclude the ongoing intellectual study and extended discourse that would help a judge fulfill the expectations others have of judicial work.

Although judges inevitably come up short compared to the academy in depth of study, they will (at least should) make fewer errors. For good scholars are bolder than good judges, and accordingly are wrong more often. Progress is made by decades of writing, contradiction, refinement, and replication. The fields I know best, antitrust and corporate law, are in turmoil in the academy not only because different scholars bring different ideologies, but also because there are vast bodies of data tugging in different directions, and more tests still to perform.<sup>11</sup> A high proportion of all ideas is unsuccessful (most papers are never cited, even by their authors). A very few scholars, both in ages past and today, produce a high percentage of all the ideas we find useful. These successful ideas have emerged after decades of attack and parry in the journals, nurtured by intellectual communities (the "Chicago School" of economics, for example). No one would propose the direct translation of a randomly-selected paper in a given field into a rule of law—yet we give this effect to opinions written by persons who have devoted less thought to the question than has the author of that paper.

What happens when you turn a generalist loose in a complex

---

10. I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability.

Hand, *Sources of Tolerance*, 79 U. PA. L. REV. 1, 12-13 (1930).

11. See generally, Bebchuck, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989) (corporations); INNOVATION, ANTITRUST AND INDUSTRIAL POLICY (D. Teece & T. Jorde eds., forthcoming 1991) (antitrust).



world? An ignorant or unwise judge will be unaware of his limits and is apt to do something foolish. A sophisticated judge understands that he is not knowledgeable and so tries to limit the potential damage. How is this done? By and large, it is done by constructing "five-part balancing tests." Not only judges but also the leaders of the bar find this approach congenial. The American Law Institute's *Restatements* teem with multi-factor approaches.

It is much easier to see what is relevant to a solution than to know how to use these relevant things to *achieve* the optimal solution. So the court lists what it thinks relevant. Other judges later add to the list. A particularistic approach is a form of damage-control. Judges who can neither know the full implications of rules nor predict private responses to them abolish rules. (Balancing is also useful for judges who seek to enhance their own discretion at the expense of the legislative branch, but I am not concerned here with this problem.)

Coping with uncertainty in this way limits the damage any opinion can do at the expense of eliminating *law*. Balancing tests are not "tests"; the factors on these laundry lists conflict with each other, and the lists never provide weights to resolve the inevitable conflicts.<sup>12</sup> "Balancing" is a confession of the inability to devise tests. That is a big loss, for you will recall that judicial review derives from the existence of law—from the possibility, at least in principle, that there are right legal answers to hard legal questions. A court that throws up its hands also logically gives up any entitlement to have the last word.

Things get worse. Multi-factor approaches to the tough questions increase the amount of litigation. Cases can be settled when parties agree on the likely outcome. When there are no rules of law, when the judge must apply his own weights to inconsistent factors, agreement is less likely. So the fuzzy standards that come out of multi-member courts doomed to make inconsistent decisions, on which sit judges who recognize the limits of their own understanding, make litigation more common and so aggravate the very conditions that lead to these standards. It is a mark of the difficulty of predicting outcomes that appeals in the federal system have been rising five times faster than the number of cases filed.<sup>13</sup> If legal rules are simple, then once the trial

---

12. *E.g.*, Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943, 966-68, 976-79, 984-95 (1987); Easterbrook, *Substance and Due Process*, 1982 *SUP. CT. REV.* 85, 109-15; Scalia, *The Rule of Law as a Law of Rules*, 56 *U. CHI. L. REV.* 1175, 1185 (1989). *Cf.* Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 *N.Y.U. L. REV.* 16 (1988).

13. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 110 (April 2, 1990), observing that in 1940 litigants filed one appeal per forty terminations in the district court, and in 1989 one in eight. Because the great bulk of civil cases are settled, one appeal per eight terminations may add up to more than one appeal per litigated case.

court finds the facts the case is over. If rules are complex, knowing the facts may be insufficient; appeal ensues. Until the last judge has spoken, it is not possible to know the result under a multi-factor approach. New judges bring new weights to the conflicting factors. Every new opinion is apt to make the standard a little more complex—especially when the judge boosts the level of generality, an increasingly common move that liberates the court from all semblance of rules.<sup>14</sup> The alternative is a bright-line rule, which may be a calamity for different reasons.

Multi-factor approaches also invite *ex post* pie-slicing. Take the events as given; ask how losses should be apportioned among the parties. This is common in litigation, for judges' emphasis is on the facts before them and not on how rules affect future conduct. When there are no "rules" the tug of fair treatment is especially strong. Judges who have personal idiosyncrasies or ideologies may indulge them freely; the true reasons for decisions are hard to discern. Yet courts cannot fool society for long. Observations about how things turn out *ex post* become the expectation. Judges who believe that they write for "this day and case alone" are deluding themselves—or they deny that there is a rule of law by which the significance of the "particular facts" is understood. If there is a rule, it will be inferred; if there are only contradictory decisions, society will learn to muddle through without a reliable system of courts. In either event, whatever benefits a rule would produce *ex ante* are lost.<sup>15</sup> The tug between the *ex ante* and the *ex post* in litigation is unending.<sup>16</sup> A judge who believes that there is "no rule," but only facts and circumstances, is apt to produce a porridge of *ex post* reallocation and personal predilection.

---

14. See, e.g., Justice Brennan's dissenting opinion in *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2351 (1989), defining liberty as "freedom not to conform" and using that definition to argue that a mother in an adulterous relationship must conform to a demand that she make the child available to the natural father, and that every state must conform to Justice Brennan's view of the proper familial relations. The Justice did not see the irony in using a "freedom not to conform" as the basis for a demand that the Court be obeyed and that states alter rules of law that have endured for centuries. Justice Brennan and the two other Justices who joined his opinion in *Michael H.* also believe that fathers have no rights of any kind when the question is whether the mother may abort the pregnancy. These Justices did not attempt to reconcile their view in *Michael H.* that the Due Process Clause subordinates the mother's and child's interests to the father's with their view in the abortion cases that the Due Process Clause subordinates the child's and father's interests to the mother's. Because it is possible to prove anything you want with a kit of "interest balancing" tools, they probably have no obligation to try. Using levels of abstraction such as "freedom not to conform," a judge may decree anything—yet why, if there is such a "freedom not to conform," must everyone else follow the lead of the Court?

15. See generally Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 10-12 (1984).

16. For a recent application to a common law question, see *Carroll v. Otis Elevator Co.*, 896 F.2d 210 (7th Cir. 1990) (Easterbrook, J., concurring).

You might think that I am about to suggest that judges resign en masse, before we do any more damage. Not at all. The problems I have been discussing become acute only if we suppose that judges *invent* the rules rather than apply them.<sup>17</sup> It takes much more information to invent than to apply. The Constitution and the stock of precedents contain the results of the labors of thousands of lawyers and judges.<sup>18</sup> The more modest the judge—that is, the more the judge conforms to the premise that judicial review depends on “law” that binds Court and Congress alike—the greater the value of the accumulated body of rules. Trying to make fresh moral judgments or to decide what contemporary society “really wants”—or “really ought to want if they were smart like us”—is complex business that is not suited to the judicial office even if it has been authorized (which it has not been).

Judges apply well only rules that they have internalized. They do not have time to start anew on each case, and the variance from judge to judge would be intolerable if they did. Constitutional scholarship does not much influence judges, because unlike chemists who pore over professional journals, judges do not read the law reviews.

A few, simple rules of law go a long way. When judges start to reach for Augustine or worry whether nine “factors” capture the full complexity of “the real world,” they ought to stop, reconsider what separates a professor from a judge, and relax. There is likely to be a simple rule, a bit of *law*, that can be used in its stead. When there is not, courts should recognize that if law runs out representative democracy still exists.

---

17. Lest you think that my legal education stopped with Blackstone, I disclaim the idea that judges are like clocks, with gears producing outcomes. Interstitial (“molecular,” Holmes would say) movements are desirable, and anyway are inevitable. I am more concerned with larger changes, and with trying to decide by “constitutional law” when all the judge has to offer is a combination of bluster and strongly held moral views.

18. See Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988). The value of precedent is qualified, though, by the fact that multi-member courts produce conflicting decisions. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982). Because contradictory premises are built into the cases, a “rich” body of precedent may make decision harder without constraining discretion.