1993

The Demand for Judicial Review

Frank H. Easterbrook

Printed in U.S.A.
Vol. 88, No. 1

THE DEMAND FOR JUDICIAL REVIEW

*Frank H. Easterbrook**

We have gathered to celebrate and evaluate one of the most famous, if infrequently read, essays in constitutional interpretation: James Bradley Thayer's *The Origin and Scope of the American Doctrine of Constitutional Law*.[1] I was therefore startled by the title of this panel, having to do with administrative law. For although cabinet officers who serve at the pleasure of the President and the more recent agencies whose members have terms of years have been making "administrative" decisions since the outset (Secretary of State Jefferson had the discretionary power to grant or deny patent applications), Thayer said not a word about the subject.

Professor Zeppos has tried to move the mountain to Mohammed by observing that Thayer's principles of judicial deference to political decisions are similar to the principles of judicial deference that *Chevron*[2] prescribes for judicial review of administrative decisions.[3] Then he asks whether either *Chevron* deference or judicial passivity in general is the arrangement the most powerful actors in society prefer. If puissant people urge the courts to intervene actively, then there is no remaining core of support for Thayer's approach, and we should give up what weak sway it still holds over our consciousness.

I doubt that Thayer himself would accept such a contention. Even though many living persons believe that the courts should leap to their aid, deference may be the right approach. Our Constitution is designed in large measure to protect the structure of government from self-interested claims by the living, and by that structure to protect the people from rent-seeking behavior by the most powerful.[4] The proper relation between the tenured and elected branches cannot be derived from the desires of today's litigants, however strong their beliefs that judges will favor their claims.[5]

---

* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, The Law School, The University of Chicago.

1 7 HARV. L. REV. 129 (1893).

2 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

3 Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296 (1993).

4 *See* THE FEDERALIST No. 10 (James Madison).

5 *See generally* Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992).

Let us take Zeppos on his own terms, however. He treats certain groups as politically powerful. When these groups implore the judiciary to enlarge its own influence at the expense of the political branches, Zeppos infers that everyone rejects deference, of the Thayer or *Chevron* flavors. These politically strong persons turn out to be frequent filers, leading to the conclusion that the "choice of an active Court is the safe harbor to which all groups must ultimately return."[6]

I love data. Professors of law who discourse about what litigants and courts do usually talk through their hats. So it is refreshing to see someone go out and count.[7] Still, doing the right thing does not immunize the inferences from comment. Substantial problems dog each step of the argument.

Who is politically powerful? Step One is identifying persons who have political power and therefore, Thayer might propose, every reason to want judges to keep their hands in their pockets. Zeppos identifies corporations, business associations, states, and organized labor as the holders of this political muscle. The collection and analysis of the data revolve around the conclusion that these entities are the powerful in society. I doubt that Zeppos has fingered the real culprits. I limit my discussion to the claim that "corporations" hold political sway, but the line of argument can be extended.

When asking whether a person or group exercises political influence disproportionate to its numbers, the first question is: how does this group solve the problem of free riding? People who *could* influence legislators, if they tried, need a good reason to try. If other persons similarly situated will do the job, any particular member of the group can sit on the sidelines, reaping the benefits without incurring the costs. As the group grows in size, free riding becomes first serious and then intractable—unless a solution can be found. Overcoming free riding is easier when the group is small, cohesive (ideally, when dropouts are impossible), able to target large benefits on each member and to exclude nonmembers from sharing in these benefits, and able to spread the costs widely so that they do not stir up opposition.[8] Your group prevails if its free riding problem is less serious than the problem afflicting your rivals. In many ways the most powerful groups are those that the conventional wisdom treats as powerless: for example, minorities that have limited

---

6 Zeppos, *supra* note 3, at 334.

7 *See* George J. Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 J. LEGAL STUD. 1 (1972).

8 *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965). See also any of the many economic analyses of interest group politics reflecting the influence of this work, along with JAMES M. BUCANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962), including GEORGE J. STIGLER, THE CITIZEN AND THE STATE 103-41 (1975); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974).

agendas, and from which dropping out is not an option,[9] and dairy farmers who are small in number and whose upbringing and way of life make dropping out of the group very costly.

How do corporations fare in handling free riding? Poorly. Corporations do not vote and are forbidden by law (as well as by the managers' fiduciary duty to investors) from making political contributions. Thus corporate influence depends on firms' ability to engage the interests of investors and other stakeholders. Yet there are many large firms, with constant entry and exit. Large corporations have widely traded investments. Liquid securities markets make buying and selling these investments easy. Dropout at the investor level is almost costless. Portfolio theory has taught investors, and their surrogates at pension and mutual funds, that safety lies in diversification. A diversified investor cares about the success of the economy as a whole and is indifferent to the fortunes of any corporation. Rational ignorance prevails.[10] Most investments today are held in diversified portfolios, and indirectly (by insurance or pension trusts or university endowments) rather than by natural persons. So real people, who alone have the power to vote, do not much care what happens to particular firms.

To speak of "corporations" is to speak of the economy as a whole, and therefore to speak of a disorganized and ineffectual group—the target of small, concentrated, and therefore powerful adversaries. Businesses are at each other's throats (this is what competition in both product and political markets is about) and cannot collaborate to exploit the rest of us—if "rest of us" is even a comprehensible concept, given the wide distribution of investments. Corporations that want to emit soot must fight off corporations that manufacture soot-control equipment. One hundred years ago corporate holdings were more concentrated; the House of Morgan and the Rockefellers could mobilize political power. Their successors, the Vanguard Group of Mutual Funds and TIAA-CREF, are politically neuter.

Only small, closely held corporations are likely to be politically effective: investors in these firms are not diversified, and dropout is costly. No surprise, then, that the small business lobby is influential and that corporations with fewer than, say, fifty employees regularly win exemptions from laws imposing costs on larger businesses.

If you doubt this, ask yourself: why is there a corporate income tax? Not because corporations are wealthy; corporations are just place-holders, collective names for aggregates of investments. The corporate tax is attractive to politicians because it is invisible. No natural person pays

---

[9] See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985), for a rare example of a scholar appreciating that, once able to vote, "discrete and insular minorities" hold disproportionately large political power.

[10] *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 40-89 (1991).

the bill. Investors are so scattered and diversified that they cannot resist it, cannot even tell who pays it. As a matter of economic theory, the incidence of corporate taxation is hard to pin down.[11] Everyone believes that someone else pays it, and so everyone supports it, although it is in many dimensions less desirable than a unified tax system.[12] So, too, everyone believes that "someone else" pays for reductions in emissions, safer products, and the like. No concentrated interest group opposes the demand for regulation, which appears (to those demanding it) to have few costs. Corporations do not hold political power in America: they are too large, and their investors too many.

Despite all this, I do not think that the identification of the "powerful" makes much difference. I am willing to bet that a study of litigation by smaller and more concentrated groups, with greater power of exclusion, would produce similar results. Farmers able to obtain huge subsidies also file suits seeking more; minority groups that obtain large net transfer payments from government litigate constantly; the press is no stranger to courtrooms. Litigation is an American pastime. How should we understand the significance of efforts to get courts to override political decisions?

Why are these people suing? Professor Zeppos repeatedly speaks of "groups" bringing suits that entail a larger judicial role. Few of the suits in his sample were the work of trade associations. They were filed by or against single entities. Knowing that Corporation #357 on the Fortune 500 list wants to upset a regulation, or that New York has come to regret a statute that the states collectively asked Congress to enact,[13] tells us little about where corporations and states in the aggregate believe their interests lie. The litigation may reflect disputes within the group, as New York's effort to escape from its bargain about the disposal of nuclear waste did. It is unwarranted to infer from scattered litigation that any "group" wants a judiciary bent on intervention.

We would learn more if trade associations or states consistently supported the Bumpers Amendment, which would have instructed judges not to defer to administrative decisions, or if they drummed up support for a "Constitutional Values Act" granting judges the power to annul statutes that they believe intrude on the constitutional penumbra. Yet the Bumpers Amendment is no longer on the political agenda, and there has never been organized political support for making the judiciary a *legitimate*, formally authorized, Council of Revision. Proposals of this kind are made only by scholars; practical people looking out for their own affairs run the other way. One man's penumbra is another's polit-

---

11 *See* Charles E. McLure, Jr., *Incidence Analysis and the Supreme Court: An Examination of Four Cases from the 1990 Term*, 1 S. CT. ECON. REV. 69 (1982).

12 *See* AMERICAN LAW INSTITUTE, FEDERAL INCOME TAX PROJECT: REPORTER'S STUDY OF CORPORATE TAX INTEGRATION 21-46 (1993).

13 New York v. United States, 112 S. Ct. 2408 (1992).

ical bonanza. More, judicial review is costly. Transaction costs and uncertainty of litigation are substantial, and most interest groups would much rather deal with one Secretary of Energy than with the 650 district judges and 160 appellate judges who resolve almost all federal litigation.

Individual suits thus reveal nothing about the stance or interests of groups. What is more, they reveal nothing about the long run interests of the litigants themselves. Each litigant would like to win its case. Does it follow, as Professor Zeppos believes, that the litigant *prefers* an active judicial role? Not at all. Perhaps an enlarged judicial role is an unpleasant side effect—most of which will be borne by strangers—of today's victory. The litigant does not seek this consequence but will accept it if the gleanings today are big enough. Because third parties bear almost all the costs, while the litigant keeps the winnings, everyone is gung ho, and devil take the hindmost.

More likely, however, no litigant pays *any* attention to the effect of a given case or argument on the relation between the judicial and political branches. A change in the judicial role counts in the litigant's calculus only if the litigant believes that this case will affect that role. Yet why would any litigant foresee such an effect? There are tens of thousands of corporations, unions, and other organized entities. Federal courts of appeals decide tens of thousands of cases each year, while the Supreme Court handles only 150. Most litigation therefore never reaches the highest court and will leave the prevailing doctrine unaffected. Of those cases that the Supreme Court decides, only a handful make any enduring contribution to the standard of review. Each litigant accordingly recognizes that its chance of altering the overall judicial approach is vanishingly small. From each person's perspective, the standard of judicial review is a public good: it may be consumed without being affected.

In sum, a person who chooses to contest a statute or regulation in court (a) believes that the outcome of the case will not change the relation between judges and political officials in the slightest; and (b) recognizes that, if such a change occurs, almost the entire effect, for good or ill, will be borne by strangers. Under the circumstances, no rational person pays any attention to the systemic effects of his litigating choices. Inferring that these parties want, or welcome, an expanded judicial role is not sound.

Why then do they litigate? To win today's dispute. Tomorrow is irrelevant. Firms choose to litigate for exactly the reason they choose to make or sell products. A corporation deciding whether to expand its output knows that greater aggregate supply implies lower prices. If its output is a sufficiently large share of the market (that is, if it has "market power"), the firm will temper its increase, setting marginal cost equal to marginal revenue. But if the firm is small in relation to rivals (that is, if the market is competitive), it will expand output so long as the price exceeds marginal cost. If price falls a little, so what? Rivals bear that

loss; for the competitive firm, the increase in its own revenues and profits swamps the trivial erosion in the market price. If Firm *A* does not increase its output, Firm *B* will do so, leaving *A* in the dust. Competition *forces* firms to take actions that undermine the interests of producers as a group. Just so for litigation, where the market is assuredly competitive. Firms scraping for advantage in product markets file (or defend) lawsuits in an effort to lower their costs or heap disadvantages on rivals, even though they may know that corporations as a group are net losers.[14] Three or four firms make a product market competitive. Cartels of even a few firms break down as each cheats by increasing its output. Thousands upon thousands of persons compete in the litigation market. The Herfindahl-Hirschmann Index for litigation would be invisibly small, less than 1, while the Department of Justice defines modest concentration as an index of 1000.[15]

Litigation would not be worth the legal fees if rivals could get courts or Congress to undo the victory immediately. Only persons believing that their victories would be too small to notice, or that they have enough political clout to keep what they have won, or that they gain enough in the time before Congress or agency can respond, would think the effort worth the candle. A little of each of these must be at work. Often firms seek, and courts award, boons small enough that they do not provoke political opposition. Larger decisions kick off a political fight, but from a new starting point. Those who lack the political muscle to *win* a fight may be better at organizing the coalition necessary to avoid losing, now that the status quo has changed.[16] Or perhaps the nature of the political deal required litigation: Congress threw a highly visible bone to "public interest" groups while burying in the statute tools to defeat implementation, tools that require litigation (so as to defer public realization of the full package, or shift the blame from Congress and improve the Members' chances of re-election). Litigation then is the way to claim the spoils of victory rather than to stave off some adverse developments.

Here the booming field of public choice has much to contribute. Once limited to simplistic median-voter models in which legislators were the only players, the discipline now analyzes strategic interactions among Congress, the President, and the courts.[17] Each litigant wants to move

---

14 Or that judicial output has little net effect, given the many adjustments the political branches and economic system can make. Lawyers, and especially professors of law, overstate the ability of judges to change a large and complex society. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

15 *See* DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES § 1.51 (1992).

16 *See* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 427-30 (1988).

17 *See generally* THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM (Bernard Grofman & Donald Wittman eds., 1989); PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS

the law as close to its own position as is sustainable. What is sustainable? A position that lies in the interior of a space bounded by the views of the political actors. Left to themselves, the President and Congress will choose a policy from that space. So long as it is careful not to move the policy out of that space, a court may move it a little closer to the litigant's (and the judges') preferences without engendering political reaction. Litigants choose their strategies accordingly.

None of this implies, however, that "groups" or particular litigants want a more active judiciary—a judiciary that can equally well be used by their rivals to move policy choices *away* from the position they have persuaded the political branches to select. But every litigant, and every group, is in thrall to competitive forces and must take every advantage it can.

What do the data tell us? Professor Zeppos presents data from which he concludes that powerful groups file many cases and prevail frequently, leading to the invalidation of gobs of legislation. I have not seen most of the tables to which his essay refers, and thus I cannot comment on his counts,[18] but interpretation is another matter entirely.

First, is it significant that numerous cases involving business, labor, and the states end up on the Supreme Court's docket, and that the Court decides 29.4% of these cases in their favor?[19] Well, that depends on how the cases got to be on the Supreme Court's docket. Did the entity invoke the Court's review, or did the Solicitor General? More: the Court chooses its own cases. A grant of certiorari tells us about the Supreme Court's agenda, not about the litigants' desires.

That a certain kind of claim prevails, say, a quarter of the time, explains why the Court granted review. Only legal arguments with a certain probability of success will generate a conflict among the circuits or otherwise pique the Justices' interests. That probability will change as the Justices and their interests change, but it will not wander very far—for it is worth filing a petition for certiorari only if the chance of a grant, and victory on the merits, is high enough. Thus the finding that businesses and labor enjoy success through the decades, varying within a fairly narrow range,[20] is one implication of the selective effects of litiga-

(James D. Gwartney & Richard E. Wagner eds., 1988); Conference, *The Organization of Political Institutions*, 6 J.L. ECON. & ORG. 1 (1990); Symposium, *Constitutional Law and Economics*, 12 INT'L REV. L. & ECON. 123-296 (1992); Symposium, *Positive Political Theory and Public Law*, 80 GEO. L.J. 457-807 (1992); Symposium, *The Theory of Public Choice*, 74 VA. L. REV. 167-518 (1988). The contributions of the eponymous McNollgast are particularly helpful in understanding why litigants that lack the political power to get legislation may have what it takes to keep much of what they can obtain from courts.

18 Professor Zeppos has furnished his commentators with tables showing statutes invalidated directly or via "interpretation" influenced by constitutional norms—one table with all such decisions, and the other limited to "important" statutes. I have not seen any of the other tables.

19 Zeppos, *supra* note 3, at 310.

20 *Id.* at 312-14.

tion, and not informative about these litigants' attitudes toward judicial review. Tort cases in municipal court would yield similar data.[21]

Second, it would be interesting to know who filed suit, and how many suits there really are. Are the supposedly powerful litigants the plaintiffs or the defendants? Zeppos assumes that all of them are plaintiffs, challenging statutes and regulations under the APA. I doubt it. Many must be defendants struggling to avoid criminal liability or demands by the Sierra Club. Finding that firms and states are defendants fending off challenges to their positions, or that the litigation is internecine (corporation vs. corporation, union vs. corporation, state vs. corporation) generates inferences opposite to those Professor Zeppos draws.

I recognize the attraction of looking at only the cases that reach the Supreme Court and assuming that one side or another must have been the instigator. There are many fewer such cases, and it becomes possible to look only at the ultimate opinion. Even the supply of student research assistants is exhaustible. Still, the relevant body of cases for a study such as this must be those filed in the district court. That is the only place where the *parties* get to choose and where we learn about their hopes and strategies. At higher levels, the choices of the judges dominate and squeeze out information about the parties.

Third, although it is accurate to say that the Court has invalidated or construed away 31 out of 267 important statutes,[22] or 11.6%, this tidbit has the potential to mislead. Major statutes, such as the Internal Revenue Code, the Social Security Act, and the Clean Air Act, span hundreds of pages in the United States Code. Striking out § 1234(e)(6)(G)(viii) of some omnibus bill is a pinprick, no matter how monumental the whole legislative enterprise. I'll wager that less than 0.001% of the column inches of text in the United States Code have been held invalid or construed restrictively to dodge a constitutional question. Thus the empirical question: when a court intervenes, does it kill some vital clause of the legislation, or does it tiptoe around the edges?

Professor Zeppos has found a little of each. His table captioned " 'Important' Statutes Invalidated or Interpretations Using Constitutional Norms" lists two decisions that prevent application of the Fair Labor Standards Act to state and local governments.[23] These are blockbusters, among the few in the whole table. What the table does not reveal is that one decision has been overruled and the other, let us say, restructured.[24] By and large, the decisions in the table not only leave the

---

21 See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984), and the empirical literature to which it gave rise.

22 The list of 267 is in DAVID R. MAYHEW, DIVIDED WE GOVERN (1991).

23 Employees v. Missouri Dep't of Pub. Health, 411 U.S. 279 (1973); National League of Cities v. Usery, 426 U.S. 833 (1976).

24 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (overruling *National League of Cities*); Welch v. Texas Dep't of Highways, 483 U.S. 468 (1987); Pennsylvania v. Union

substance of the law unaffected, but also are hard to interpret as invalidation of any kind. According to the table, and the count of 31 major laws struck down, the Civil Rights Act of 1968 is no longer with us. Yet every first year law student knows that the Court rebuffed the serious challenges to the civil rights laws of the 1960s.[25] What made the table is a decision holding that the Seventh Amendment requires jury trials in actions under Title VIII, which forbids housing discrimination.[26] This unanimous decision, written by Thurgood Marshall, was hardly a body blow to the cause of civil rights.[27] The Court held that because the statute provided for the award of compensatory damages, the Constitution required a jury trial. By my lights, this did not hold a statute unconstitutional, any more than it would hold the Civil Rights Act unconstitutional to say that the Constitution requires cross-examination in trials under that statute. The law did not speak to the question, and the Court then supplied the Constitution's own rule. Other cases in the table dealt with the statutory text but did its general operation no damage.[28] Some cases simply do not belong there.[29]

One aspect of the table is revealing: the names of the parties. The winners go by the names Aptheker, Goldfarb, Kent, Afroyim, Almeida-Sanchez, Chadha, Marchetti, Leary, Cheek, League of Women Voters, Tull, Synar, and Buckley. This list includes communists, house husbands, drug dealers, tax protesters, immigrants from Mexico and India, a Member of the House of Representatives, and a United States Senator. There are a few corporations: Central Hardware, Co., New York Times, Co., GM Leasing Corp., Edward J. DeBartolo Corp., Barlow's, Inc., Rural Telephone Service, Co., Roadway Express, Inc., and Sable Communications. All but two of these victors were closely held rather than public corporations (GM Leasing is unrelated to General Motors). Only a few trade associations appear on the list. There is also a "Haitian Refugee

---

Gas Co., 491 U.S. 1 (1989) (the latter two casting *Employees* in a new light). The difference between *Garcia* and *National League of Cities* cannot readily be attributed to factions or to the Court. Only one Justice changed sides. *Cf.* Frank H. Easterbrook, *Ways of Criticizing the Court*, 92 HARV. L REV. 802 (1982).

25 Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

26 Curtis v. Loether, 415 U.S. 189 (1974).

27 The Civil Rights Act of 1991 extends jury trials to *all* damages actions under the civil rights laws, including those in which the monetary awards had been characterized as restitution.

28 *E.g.*, NLRB v. Catholic Bishop, 440 U.S. 490 (1979) (holding that the Act does not require the Catholic Church to bargain collectively with a union of lay teachers in religious schools).

29 *E.g.*, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980). The table treats this case as interpreting the Occupational Safety and Health Act of 1970 narrowly in light of constitutional concerns about the separation of powers. But only a plurality of Justices subscribed to that view, and the position that the Department of Labor had advanced in the case was adopted by a majority of the Court the next year in American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981).

Center, Inc." which I trust has not been lumped with the corporations for purposes of analysis in other tables.

Let me return to the beginning: I admire this paper for its effort to go beneath the surface, to investigate the why and wherefore of litigation rather than to turn still another pirouette on some doctrine. Unfortunately for Zeppos and the rest of us, competition makes it hard to interpret the data. Corporations litigate because they must, just as they try to chisel down the price of the iron ore they purchase. Justices choose their docket, so that what we can observe conceals the motives and acts of the litigants themselves. But the empirical study of litigation is in its infancy, and perhaps ways can be found to isolate the elements in need of understanding. So I say, two cheers.