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INCENTIVES, REPUTATION, AND THE GLORIOUS DETERMINANTS OF JUDICIAL BEHAVIOR

Gerald N. Rosenberg*

How do judges reach decisions? For the lawyer, there is a simple and straightforward answer; judges apply precedent, reason by analogy, and reach a decision that if not compelled by this legal method, is strongly indicated by it. In contrast, for political scientists who study judicial decision-making, there is a different but equally straightforward answer; judges select an outcome that is closest to their preferred policy preferences and then make use of precedent and legal reasoning to justify it.¹ For many political scientists, the legal method is a smokescreen for disguising the policy preferences of judges. For many lawyers and legal academics, this political science "attitudinal model" misunderstands what judges actually do and politicizes courts. Into this debate steps Frederick Schauer.

Professor Schauer investigates what influences judges to reach the decisions they make. Rather than taking sides in the debate, he canvasses the legal and political science literature and finds it wanting because it overlooks yet another potential motivating factor in judicial decision-making; personal ambition and self-interest. As Professor Schauer puts it, "if judges are human beings who have an array of self-interested motivations to accompany their public-interested motivations, then it is important that not only political scientists, but also lawyers, law students, and all the rest of us who study the courts ought to understand these motivations."² In contrast to the study of elected officials, Professor Schauer notes that "there has been virtually no systematic empirical inquiry into judicial ambition or self-interested judicial motivation."³ In the preceding article, he lays out the argument for studying the personal ambition and self-interest of judges as a motivating factor in judicial decision-making and discusses the pitfalls and opportunities it presents.

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1. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995) [hereinafter *Ideological Values Revisited*]; JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993). For an argument that judges must act strategically rather than vote their sincere policy preferences, see LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

2. Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CINN. L. REV. 615, 617-18 (footnotes omitted).

3. *Id.* at 621.

In the material that follows, I will talk about the strengths of this article, raise questions about some of its analysis, and suggest that if we are to study judicial self-interest and ambition, we should take a different approach than Professor Schauer recommends.

I. EMPIRICAL STRENGTHS

A discussant, and a commentator, is only as good as the paper he is asked to discuss. In this case, I am very fortunate because as an empirical political scientist I take my hat off to Professor Schauer. Unlike virtually any other legal academic, he not only cites empirical social science, but he also reads it!⁴ And he reads it intelligently! Throughout his analysis, Professor Schauer stresses the empirical nature of law and courts. For example, in making the case for the visibility of Supreme Court Justices, he compiles and presents data on press references to Justices Sherman Minton and Stanley Reed, federal circuit court judge Henry Friendly, California Supreme Court Justice Roger Traynor, and Illinois Supreme Court Justice Walter Schaeffer.⁵ It's a small point, but Professor Schauer's attention to empirical evidence is noteworthy.

In general, legal academics excel at doctrinal analysis, jurisprudence and legal theory, but often forget they are dealing with real human beings situated in a particular historical, political, social and cultural setting. In contrast, Professor Schauer emphasizes the necessity of empirical investigation for questions and arguments about the real world. In thinking about what motivates judges, Schauer emphasizes the necessity of empirical work. As he puts it, "the question of how many judges within a given system actually have the internal point of view in the Hartian sense is not a question than can be answered with philosophical—as opposed to empirical—tools."⁶ Professor Schauer's insistence on the importance of empirical work is to be praised.

4. For a critique of legal academic scholarship for ignoring social science, see Gerald N. Rosenberg, *Across the Great Divide (Between Law and Political Science)*, 3 GREEN BAG 267 (2d ed. 2000).

5. *See id.* at 618.

6. *Id.* at 635.

II. WHY SHOULD WE EXPECT THE STUDY OF JUDICIAL MOTIVATIONS TO PAY OFF?

As important as empirical investigation is to understanding the way courts and judges actually work, would one advise a young social scientist or legal academic or law review note writer to study the role of personal ambition and self-interest in judicial decision-making? Professor Schauer suggests yes. He notes correctly that political scientists who study judicial decision-making from a variety of theoretical perspectives have ignored "the possibility that judges, no less than legislators and bureaucrats, have strong career-based self-interests that often inform or dominate their policy preferences."⁷ But there may be good reasons for this. In general, the settings are very different. Judges, in contrast to elected officials, operate with a set of institutional and cultural constraints that strongly mitigate against personal ambition and self-interest. In particular, a judge who justified an opinion, either publicly or on the cocktail circuit, on the ground that he was hoping to be elevated to a higher court, or on the ground that it would make him famous or popular with some group, would surely be criticized if not investigated for violating his judicial oath. It is also the case, as I will explore below, that many more factors go into judicial nominations than prior opinions. In contrast, elected officials routinely justify public positions on the ground that they are running for higher office, or justify votes as payoffs to interest groups. These differences mean that scholars investigating judicial self-interest need to explore very carefully the options and tools with which judges work.

Specifically, investigating the role of personal ambition and self-interest in judicial decision-making is extremely hard to do. As Professor Schauer notes, judges are unlikely to talk candidly about their motivations.⁸ In contrast, elected officials will and do. Indeed, elected politicians often take positions to help certain key constituencies, take credit for certain outcomes, position themselves on the issues, etc.⁹ And they love to talk! The constraints on judges not only may explain why the influence of personal ambition and self-interest in judicial decision-making has not been investigated, but also why it is inadvisable to try to do so.

As a final point, it is worth remembering that understanding and studying the factors that influence judicial decision-making is only one

7. *Id.* at 620.

8. *See id.* at 623.

9. For the classic theoretical exposition of this position, see DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

way of studying law and courts, and perhaps not the most important way.¹⁰ There remain a whole host of other theoretically and empirically important questions about what judges and courts do and how they interact with the society in which they operate. These range from the impact of judicial outputs to the role of interests groups and the public to the influence of other branches, and so forth. That being said, there is a literature on judicial decision-making and it does not investigate judicial ambition and self-interest.

III. WHY THE SUPREME COURT?

Having made the case for the lack of work on the role of personal ambition and self-interest in judicial decision-making, Professor Schauer then makes a curious move; he suggests that studies focus on the U.S. Supreme Court.¹¹ I describe the move as curious because Supreme Court Justices are particularly poorly situated, both empirically and theoretically, for such an inquiry. Empirically, it seems safe to state that Supreme Court Justices will not respond to questions about the role of personal ambition and self-interest in their decisions. Surely, the concern that greeted the publication of two books purporting to offer an inside view of the Supreme Court is testimony to the unwillingness of Justices to publicly explore their motivations for decisions.¹² Further, as Professor Schauer points out later, Justices rarely move on to other positions. Justice Arthur J. Goldberg did leave the Court in 1965 to serve as U.S. Ambassador to the United Nations, but reportedly did so only at the behest of President Lyndon Johnson. Justice Charles Evans Hughes resigned in 1916, but he did so to run against Woodrow Wilson for the presidency as the nominee of the Republican and Progressive parties, losing by a mere twenty-three electoral votes. More recently, there were persistent rumors that Justice Douglas was interested in running for President or Vice-President, and similar rumors about Justice O'Connor, but neither have left the bench. These few cases aside, serving as a Supreme Court Justice is not a stepping stone to greater glory.

10. This is true of decision-making in other institutions as well.

11. Professor Schauer suggests studying Supreme Court Justices because their "visibility could plausibly create a set of motivations sharply distinguishing Supreme Court Justices from all other members of the judiciary." Schauer, *supra* note 2, at 618.

12. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979); EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998).

It is also the case that promotions from Associate Justice to Chief Justice are rare. In the entire history of the U.S. Supreme Court, only three sitting Associate Justices have been elevated to Chief Justice; Edward White, Harlan Fiske Stone, and William Rehnquist. In addition, two others who served as Chief Justice had been previously appointed Associate Justices; John Rutledge¹³ and Charles Evans Hughes. Given that over one hundred people have sat on the U.S. Supreme Court, the chances of being elevated to Chief Justice are slight. This reinforces the point that the U.S. Supreme Court is not a particularly rich site for study of the role of personal ambition and self-interest in judicial decision-making. Professor Schauer suggests a way around this—reputation—and I will return to it shortly.

IV. LOWER FEDERAL COURTS AND STATE COURTS: A BETTER BUT STILL PROBLEMATIC RESEARCH SITE

Lower federal court and state court judges may provide a better research site for two reasons. First, they do get promoted. For example, eight of the nine current justices of the U.S. Supreme Court (all but Chief Justice Rehnquist) served as judges prior to their Supreme Court appointment. Second, lower federal court and state court judges do leave the bench, often at ages young enough to allow pursuit of other career interests. In order to illustrate this point, I gathered some preliminary tenure data on twenty randomly selected federal district court appointees of Presidents Carter, Reagan, and Bush.¹⁴ They are presented in Table 1.

TABLE 1

President	Av. Age at Commission	# Resigned/ Retired	Av. Length of Service of Resigned/ Retired Judges
Carter	48	13	16.4 years
Reagan	48	7	14 years
Bush	48	2	8.4 years

13. Rutledge was appointed by President Washington as one of the original associate justices of the Supreme Court, but resigned without ever deciding a case. In 1795 he was appointed Chief Justice and served for four months before the Senate rejected the nomination. See *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* (Kermit L. Hall ed.) (1992).

14. I thank Christopher Rohrbacher for his help in gathering the data.

Table 1 suggests that at least some federal district court judges are leaving the bench at relatively young ages. For example, thirteen of the twenty federal district court judges appointed by President Carter in the random sample have left the bench, having served an average of 16.4 years. Since the average age of appointment was forty-eight, this suggests that these judges were likely in their mid-sixties, certainly young enough for further work. Among the twenty federal district court judges appointed by President Reagan in the random sample, seven have left the bench, having served an average of fourteen years. Since the average age of appointment for the Reagan appointees in the sample was also forty-eight, this suggests that these judges, like those appointed by President Carter, were likely in their mid-sixties, again young enough for further work. On the state level, judges do not have life tenure and there is some turnover, often from electoral defeat (or lack of retention). What these data suggest is that below the Supreme Court judges do leave the bench, opening up the possibility that ambition and self-interest can play a role in their decision-making.

These data suggest that lower federal court and state court judges provide a more promising avenue for research into the role of ambition and self-interest in judicial decision-making. In addition, they might be willing to talk to researchers for three reasons. First, their greater numbers may provide anonymity. That is, if one were to interview federal and state judges who resign or retire, and state judges who lose elections, they would be less readily identifiable than U.S. Supreme Court Justices, even with a guarantee of anonymity. One could refer to them as a federal judge or a state judge without referring to their court, geographic location, or level in the judicial hierarchy. Second, since they would no longer be sitting judges, they might feel less constrained in speaking to researchers than judges in active service. Third, because on the state level elections are public, judges who lose elections might be willing to talk about what they did in trying to retain their judgeships.

Although lower federal court and state court judges appear to offer a more promising site than U.S. Supreme Court Justices for research into the role of personal ambition and self-interest in judicial decision-making, even here there is a caveat; the practice of the judicial selection process. Professor Schauer notes that "it would be worth examining what forms of judicial behavior appear to produce the greatest likelihood of the desired reward" and then asks, "[w]ould a federal district court judge who wanted to become a court of appeals judge decide cases in one way rather than another?"¹⁵ As a matter of logic, this seems

15. Schauer, *supra* note 2, at 632.

unlikely. On the federal level, it requires prodigious powers of prediction about who will be President, what vacancies will occur, what issues will be important, and so forth. Also, it puts far too much weight on judicial decisions as key determinants of career advancement. The literature on judicial selection is clear on two points: potential nominees must belong to the same political party as the president; and potential nominees must win the support of the Senators of the president's party from the state in which the vacancy they seek is located.

There is a practice in the U.S. Senate known as "Senatorial Courtesy." In the flowery language of the Senate of an earlier time, Harold Chase explains it this way: "senators will give serious consideration to and be favorably disposed to support an individual senator of the president's party who opposes a nominee to an office in his [or her] state."¹⁶ Put more bluntly in 1997 by Senator Orrin Hatch, Chair of the Senate Judiciary Committee, "the policy is that if a senator returns a negative blue slip, that person's gonna be dead."¹⁷ In practice this means that federal district court appointees need the support of the Senators of the President's party from the state in which the court sits. With the federal circuit courts there is a tradition of state representation, with seats being earmarked as being held by judges from particular states within the circuit. Thus, circuit court appointees need the support of the Senators of the President's party from the state for which the vacancy is earmarked. The practice of senatorial courtesy is deeply entrenched and may even have jumped across party lines so that opposition from a Senator from the Senate's majority party to an appointment in his or her state may derail a presidential judicial nomination regardless of the party of the President.¹⁸ In practice, then, befriending your Senators is a good deal more important in winning a federal court nomination than crafting a judicial opinion in a particular way.

The key role of political preferences and party activism in judicial appointees can be seen by examining the background of federal court judges. On average, approximately 90% of federal court appointees are members of the same political party as the President who appoints them. For example, 91.7% of President Reagan's federal district court appointees were Republicans, as were 88.5% of President Bush's. To

16. HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* 7 (1972).

17. Interview by Nina Totenberg for NPR with Orrin Hatch (Sept. 24, 1997).

18. For recent examples, see Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 287, 288-90 (1993); Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 262-66 (1997); Sheldon Goldman & Elliot Slotnick, *Picking Judges Under Fire*, 82 JUDICATURE 265, 268-72 (1999) [hereinafter *Picking*]. See generally SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997).

date, 89.1% of President Clinton's federal district court appointees have been Democrats.¹⁹ With the federal circuit courts, a full 96.2% of President Reagan's appointees were Republicans, a percentage of same-party affiliation that dropped only to 85.4% with President Clinton.²⁰ As for party activism, on the whole federal court judges were politically active in their pre-judicial careers. For example, under Presidents Eisenhower and Kennedy, 80% of federal circuit court appointees were political activists in their pre-judicial careers.²¹ In more recent times, more than half have been so. Under President Bush, 58.8% of federal district court appointees were Republican Party activists, as were 64.8% of federal circuit court appointees.²² Although President Clinton has the lowest percentages in recent history of party activists among his federal court appointees, more than half have been Democratic Party activists in their pre-judicial careers. About 62% of Clinton's federal district court appointees have been Democratic Party activists, as have been 81.3% of his federal circuit court appointees.²³ Thus, being a party activist in the party of the President in one's pre-judicial career appears to be a powerful factor in winning a federal court nomination. There is nothing a sitting judge who seeks a federal court appointment or promotion can do to influence this.

It is the case that those seeking federal court appointments or promotions can, and do, campaign and lobby for them. For example, Professor Sheldon Goldman found that about 40% of the files on President Eisenhower and Kennedy's federal court appointees contained letters of recommendation for candidates from other judges.²⁴ Granted, the extent to which sitting federal judges understand the political underpinnings of the appointment system is an empirical question, it is reasonable to assume that since federal judges were nominated at least once, they understand how the system works. The point is simple: examination of judicial ambition and self-interest must be informed by the empirical literature and actual practice.

19. See *Picking*, *supra* note 18, at 275.

20. See *id.* at 280.

21. See Sheldon Goldman, *Judicial Appointments to the United States Courts of Appeals*, in *AMERICAN COURT SYSTEMS* 273 (Sheldon Goldman & Austin Sarat eds., 1978).

22. See *Picking*, *supra* note 18, at 275, 280.

23. See *id.*

24. See Goldman, *supra* note 21, at 271.

V. REPUTATION

In order, perhaps, to avoid some of these difficulties, Professor Schauer suggests another goal for ambitious and self-interested judges: reputation.²⁵ He urges, in effect, that scholars explore the extent to which U.S. Supreme Court Justices reach decisions and write opinions with an eye toward enhancing their reputations. While this avoids the difficulties with promotions and other careers outlined above, it creates another set of difficulties. The key question that a focus on reputation presents is this: Reputation *When*, with *Whom*, about *What*?

The *When* question can be divided into two time periods, the short-term present and the long-term historical. If justices are interested in enhancing their historical reputation over time, after they have left the bench and, perhaps, have died, their cause is hopeless. It is impossible to predict the future with any accuracy. Consider, for example, some celebrated dissenting opinions such as those of Justice Harlan in *Plessy*²⁶ and the *Civil Rights Cases*²⁷ and Justice Holmes in *Lochner*,²⁸ *Abrams*²⁹ and *Gitlow*.³⁰ These were not celebrated as great dissents when written.³¹ They only became so when political views changed. In other words, a Justice seeking to enhance his historical reputation has no way of knowing which of his opinions will be considered great, enhancing his reputation, and which will be relegated to the dustbin of history. Historical reputation seems an unlikely motivating factor for justices.

Professor Schauer seems to suggest that justices seek short-term reputational enhancement, and with a particular group:

Justices appear to have a desire to conform their attitudes to the attitudes of the social and professional circles in which they travel, and thus to the attitudes of the intellectual elite in general, and to the attitudes of law professors at elite institutions in particular.³²

Who are these elites more specifically? Professor Schauer writes that the "primary creators of reputation for Supreme Court Justices"³³ are:

25. See Schauer, *supra* note 2, at 627.

26. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

27. See *Civil Rights Cases*, 109 U.S. 3 (1883).

28. See *Lochner v. New York*, 198 U.S. 45 (1905).

29. See *Abrams v. United States*, 250 U.S. 616 (1919).

30. See *Gitlow v. New York*, 268 U.S. 652 (1925).

31. For an examination of the creation of canonical dissents, see Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998).

32. Schauer, *supra* note 2, at 628.

33. *Id.* at 629.

the mainstream elite press, elite law professors writing law review articles and other forms of legal scholarship, law professors teaching classes in law schools in which various Justices are described in flattering or non-flattering terms, editors of law school casebooks, law students at elite law schools writing law review notes, and historians, including but not limited to the historians who write judicial biographies.³⁴

The difficulty here is that the views of these elites are amorphous and unpredictable. Professor Schauer assumes that these attitudes are consensual rather than conflictual. While one might be able to predict the way a Ronald Dworkin or a Richard Posner will react to a particular opinion, there are a variety of opinions among the elites to whom Professor Schauer points. This means that a justice cannot know with much certainty how an opinion will be more generally received. Enhancing one's reputation in the short-term with the "primary creators of reputation for Supreme Court Justices" is not as straightforward as first appears.

There is also an important question of disentangling reputation as a motivating factor from shared understandings. Consider, for example, Justice Scalia and assume he writes an opinion that is highly praised by conservative academics, journalists, and intellectual elites. It is logically possible that he wrote the opinion to win their approval and enhance his reputation among them. However, it is also logically possible that he wrote the opinion because it represents his sincere judicial views. The fact that the opinion wins praise from conservative groups may not be because Justice Scalia desired to enhance his reputation with them but rather because both he and they share a similar world view. Thus, an opinion that might appear to be the result of reputation-enhancing motivation might have nothing to do with reputation at all.

Complicated though the reputation game may be, Professor Schauer suggests that the political effect of justices seeking to enhance their reputation with intellectual elites is to move them politically to the left. This occurs because many of the leading elites who Professor Schauer suggests can enhance reputation are on the political left, and because the Supreme Court "exists as an institution of rights protection and with a consequent internal culture of rights protection."³⁵ "[I]t is plausible to conclude," he writes, "that six—Justices Blackmun, Powell, Stevens, O'Connor, Kennedy, and Souter—have moved to the left . . . in the policy attitudes that, according to the ideological or attitudinal model of

34. *Id.* at 629.

35. *Id.* at 627.

judicial decision-making, would predict their judgments."³⁶ There are three problems with this analysis.

First, the notion of a left-right continuum on which the claim is based is theoretically problematic.³⁷ It is no longer clear, if it ever was, what it means to be on the left or right of a whole host of issues. For example, is opposition to pornography a conservative right-wing position or a liberal, feminist, left-wing position? Is supporting the family a conservative right-wing position based on notions of patriarchy and religious fundamentalism or a left-wing position based on notions of caring and helping the vulnerable? The left-right claim would be more useful if it specified the issues and the positions that justices were pushed to adopt.

Second, the notion of rights protection as a left-wing attribute is also problematic. There are rights on both sides of the political spectrum. A commitment to rights protection can have deeply conservative outcomes by protecting, for example, the right to private property at the expense of a claimed public need. Again, Professor Schauer is aware of this difficulty,³⁸ but he gives it little attention.

Third, Professor Schauer's claim that the logic of reputation-enhancement pushes justices to the left is not supported by empirical social science. In a seminal article, Jeffrey Segal and Albert Cover examined how justices' perceived ideology correlates with their votes.³⁹ In searching for a measure of the justices' ideology independent of their Supreme Court votes, Segal and Cover analyzed and coded editorials written at the time of nomination in the *New York Times*, the *Washington Post*, the *Los Angeles Times*, and the *Chicago Tribune* for all Supreme Court nominees from Chief Justice Warren to Justice Kennedy. They found a high level of correlation between the ideological values of the justices and their votes in civil liberties cases.⁴⁰ In particular, contrary to Professor Schauer's claim, they find that the votes of Justices Powell, Kennedy, and O'Connor are quite accurately predicted.⁴¹ Overall, while they did find that nine justices voted in a more liberal direction than predicted, they also found that eight justices voted in a more conservative direction than predicted. The point is that social science literature does not support Professor Schauer's intuition that the logic of reputation-enhancement pushes justices to the left.

36. *Id.* at 625-26 (footnotes omitted).

37. Professor Schauer admits this but dismisses its importance.

38. *See id.*

39. *See* Segal & Cover, *supra* note 1.

40. *See* Segal & Cover, *supra* note 1, at 561.

41. In an article updated to include Justice Souter, the authors found that "the predicted result for Souter in civil liberties (43.2) is quite close to his actual score of 47.6," and that with economic cases, the prediction was "within one point for Souter." *Ideological Values Revisited*, *supra* note 1, at 818.

On a related point, Professor Schauer suggests that reputation-enhancement seeking justices are more likely to be outcome-oriented in modern times than in the past because today "judicial craft is far less important to these esteem-granting groups, and sympathy with the outcome is far more important."⁴² This claim romanticizes and glorifies the past and belies both when and where Professor Schauer went to law school. I suspect that the only thing that has changed is the openness with which esteem-granting groups admit to being outcome oriented. Surely Chief Justice Marshall played fast and loose with constitutional and statutory language in cases like *Marbury*,⁴³ but this hasn't prevented him from being considered among the greatest Chief Justices. The Harvard Law School where Professor Schauer received his legal training was the birthplace of the legal process school. Faced with the challenge of explaining the judicial reaction to the New Deal, and defending the judicial system against charges that it made politically-motivated decisions, the legal process school attempted to divorce legal process from substance, glorifying the notion of legal craft and denying the appropriateness of substantive values in judicial decision-making.⁴⁴ Professor Schauer's reference to a less outcome-oriented time has some of this flavor to it.

VI. CONCLUSION

The great strength of Professor Schauer's article is to forcefully remind us that if we want to understand what judges and justices actually do, and what motivates them, we must study them empirically. I am not wholly persuaded by Professor Schauer's suggestion that scholars investigate the role of personal ambition and self-interest in judicial decision-making, and focus on the U.S. Supreme Court. To study the role of personal ambition and self-interest in judicial decision-making, I suggest the lower federal and state courts provide better sites. Judges who sit on these courts are sometimes promoted and do sometimes move on to other jobs. Further, they may be more willing to be interviewed by researchers. But even here, I worry that the notion of reputation is amorphous and unwieldy.

My final point is one with which I am quite sure Professor Schauer agrees. If we are to study judicial ambition and self-interest, we need to

42. Schauer, *supra* note 2, at 630.

43. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

44. For a critique of the legal process school, see Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561 (1988).

do so empirically, and we must build on the empirical work that has gone before. Professor Schauer has pointed us in the right direction.

