# Economic Ideology and the Federal Judicial Task

THE FEDERAL COURTS: CRISIS AND REFORM; by Richard A. Posner.† Cambridge: Harvard University Press, 1985. Pp. xvii, 365. $25.50

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Richard Posner has produced an ambitious "institutional analysis" of the federal judicial system in which he now officially participates (p. 322). Its reach is better reflected in the broad, if less catchy, title of the book ("The Federal Courts") than in the subtitle ("Crisis and Reform"). Though a major portion of the book (chapters three through five) analyzes the dramatic expansion of the federal court caseload in the past twenty-five years and assesses a wide variety of "reform" proposals aiming to alleviate the caseload "crisis," the work as a whole ranges far beyond these topics.

Posner begins with two chapters analyzing the federal court system as an economist or sociologist might study an industrial organization. He describes the system's functions, the demand for and supply of its services, its hierarchical and pyramidal organization, its personnel, and its jurisdiction. He addresses the caseload crisis and "palliatives" designed to cure it in the next three chapters, but the second half of the book branches out in several different directions. Chapter six elaborates an economic and political theory of federalism as a basis for reconsidering the optimal use of federal courts. Chapters seven through ten present essentially normative arguments for ways to improve the quality of judicial performance wherever federal jurisdiction is retained. Here, Posner argues for judicial self-restraint to reduce federal court power, more institutional and less individualistic judicial opinions, statutory and constitutional interpretation more sensitive to legislative compromises when text and history are not determinative, and the systematic use of economic analysis in judging (pp. 220-21). A concluding chapter calls for more social science research into legal institutions to be performed in the law schools[1] and for new law courses in judicial administration, opinion writ-

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1. Posner recognizes that there are substantial "barriers to integrating social science into the law schools" (p. 330), including lack of student interest "in the scientific study of the legal system" (p. 327) and the dominance of "doctrinal analysts" on law school faculties (p. 327). He nonetheless believes a "university environment" is needed for quality research in judicial administration (p. 330).

ing, and legislation.[2]

Posner intends an "eclectic" approach, employing "economic and political theory, statistics, and history, as well as the traditional methods of legal analysis" and to a lesser extent, his personal "experience as a federal court of appeals judge" (p. vii). His predominant focus is nonetheless economic. American law, he believes, is dominated "by utilitarian, pragmatic, 'free enterprise,' and 'balancing' thinking, all of which . . . is a lay version of . . . economics viewed broadly as the science of rational choice" (p. 315). Viewed this broadly, economics may mean only that utilitarian decisions should take account of all relevant considerations, including those that other disciplines highlight. Posner's overarching method, however, is the cost-benefit analysis. This approach focuses on factors such as demand and supply adjustments, incentive structures, substitutes or alternatives, and externalities, among other valuable tools of economic analysis.

A book about so many facets of the federal courts as a legal institution risks a loss of focus and coherence, especially when it is simultaneously descriptive, quantitative, and analytic on the one hand, and normative, speculative and theoretical on the other. A loss of focus perhaps is inevitable considering the broad audience that Posner attempts to address: "lawyers and judges, . . . economists, historians, public administrators, and others who may have significant contributions to make to improving the federal courts" (p. viii). Posner attempts so much in this book that he may be spreading himself as thin as the federal judiciary that he finds is suffering a workload crisis, with the same attendant risk of a decline in quality of performance. He succeeds admirably in establishing an agenda of issues, but is much less successful in justifying his jurisdictional and qualitative proposals.

The numerous vantage points from which one might choose to review such a multifaceted work necessitates a selection process that, ideally, will do justice to the author's effort. This Review evaluates six major strands of Posner's work: 1) his systemic, institutional analysis of the federal courts as providers of judicial services and of the caseload growth phenomenon; 2) proposals to deal with the increased demand for judicial services; 3) Posner's theory of federalism; 4) his prescriptions for lessening the quantity and improving the quality of federal judicial decisionmaking; 5) the parameters that bound Posner's vision of the federal

2. Posner suggests a course on opinion-writing to recognize law clerks' increasingly important role in drafting opinions for judges (pp. 102-19, 335). His suggested course on legislation would cover the process of enactment (including empirical studies of who does the drafting and how Congress responds to judicial interpretation), techniques of judicial interpretation (especially the "debunking literature on the canons of construction"), and methods for researching legislative history (pp. 337-39).

courts' role in the lawmaking process; and 6) his use of economics and social science to analyze the federal judiciary.

## I
## POSNER'S INSTITUTIONAL ANALYSIS AND THE CASELOAD CRISIS

Posner systematically and comprehensively examines the extent, causes, and effects of the demand growth experienced by the federal courts in the last twenty-five years, and assesses possible responses. His "economic model of adjudication" (p. 322) is based on federal court provision of three judicial services: dispute resolution, law creation, and judicial review (pp. 1-7). Potential demand for these services depends on the scope of statutory jurisdiction, the rules of justiciability, and the extent of substantive rights the federal judiciary creates or enforces (pp. 47-55, 77-80). The frequency with which litigants actually will seek to invoke available federal jurisdiction, on the other hand, depends on the extent of the population's activities, their estimated success in litigation, litigation costs, the availability of an attractive state court substitute, and the availability of attractive substitutes for litigation—including arbitration or settlement (pp. 7-10, 77). The supply of federal judicial services may be rationed through price increases or delays in delivery, or expanded through increases in the institution's productive capacity (pp. 10-11, 94-97).

Posner provocatively applies this theoretical framework of institutional demand and supply characteristics to account for the aggregate increase of 250% in district court cases and 686% in courts of appeals cases since 1960 (p. 65). In the 1920's and 1930's, Prohibition alone caused a steep rise in criminal and civil cases in the federal courts (pp. 60-61, 76). The causes of the post-1960 caseload growth, however, are more complex (p. 92). Growth in population and economic activity is not necessarily the answer (p. 77). Rather, Posner argues, the caseload growth is attributable to a lowering of demand barriers (p. 77). For example, providing indigents with free counsel has reduced price impediments (p. 79). Inflation has sapped the capacity of the $10,000 amount-in-controversy requirement to screen out diversity cases (pp. 78-79), and that requirement has been eliminated in federal question cases (p. 79). Courts have relaxed justiciability barriers (p. 79), and the courts and Congress have created new express and implied federal rights (pp. 80, 83).[3] A similar expansion of state law rights partially may account for

3. Diversity filings also may have increased because federal courts are perceived to offer more attractive procedural rules, and more able and impartial judges (pp. 46-47, 55, 144). Apparently, "federal courts are becoming more attractive to diversity defendants" on removal, as well as to diversity plaintiffs (p. 86).

the threefold increase in diversity cases (p. 86). Both regulatory activity and deregulation have produced substantial judicial business, especially in the courts of appeals (p. 84). Uncertainty about the law not only has promoted litigation over settlement (p. 10), but also has fostered a higher rate of appeal (pp. 91-92). Appellate review of federal criminal sentences may further exacerbate the caseload crisis (p. 92),[4] but, in general, the rate of future caseload growth cannot be predicted confidently (p. 93).

Posner also finds that supply has not been restricted to curtail demand. Congress has avoided raising the price of judicial services (p. 95), and there has been little increase in docket delay since 1960 (p. 96). Instead, the system has been enlarged "to whatever size is necessary to meet the demand for its services" (p. 96). While the near-doubling of federal court judges in this period did not match the caseload increases, supply also expanded through growth of a parajudicial bureaucracy—more law clerks, externs, staff attorneys, magistrates, and bankruptcy judges (p. 97).

Posner worries about this exclusive reliance on expanding supply, because it threatens the quality of the federal judges' work in a variety of ways. Creating more judgeships reduces the prestige of the job (p. 99) and makes each judge a less visible, less accountable part of the system (p. 21). Increasing the support staff, particularly the number of law clerks,[5] diverts judges from writing their own opinions to supervising the writing of others (pp. 103-04). This makes the job less attractive to superior candidates (p. 116). It also inhibits the development of great judges, who must create, not adopt or edit, their opinions (p. 111). Moreover, reliance on the "judiciary's own ghostwriting bureaucracy" (p. 116) lowers the quality of opinions by promoting stylistic uniformity, undue length, lack of candor, inadequate research, and excessive citations (pp. 107-10). These ill effects undermine the credibility of opinions and may increase incentives to litigate by creating uncertainty in the law (p. 110).

Factors other than institutional size affect the quality of the federal judicial product too. Excessive workload has resulted in curtailment of oral argument (p. 119), limited publication rules resulting from lower quality opinions (pp. 120-26),. and increases in *per curiam* and "nonreasoned" or conclusory separate opinions (pp. 126-29). The qual-

4. This became a reality with passage of Title II of the Comprehensive Crime Control Act of 1984. *See* 28 U.S.C.A. §§ 991-98 (West Supp. 1985) and SENATE COMM. ON APPROPRIATIONS, COMPREHENSIVE CRIME CONTROL ACT OF 1984, S. REP. NO. 225, 98th Cong., *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3220-373.

5. "Law clerks . . . are the proximate cause of the enormous increase in the federal judicial output of separate opinions, footnotes, citations, and above all words" (p. 115). As the number of clerks has increased, so has each judge's number of opinions and words per opinion. Most dramatic is a 50% increase in Supreme Court opinions and tripling of words in those opinions between 1969 and 1972, "the period during which the Justices each became entitled to a third law clerk" (p. 114).

ity of federal judges, a key variable, largely depends on selection criteria and recruitment inducements. Political patronage is the predominant selection criterion; merit and ideology play a lesser role (pp. 29-31).[6] Inducements to take the job include pay, power, independence, status, and rewarding work. The last two suffer with increased workload and Congress's failure to augment judicial salaries to keep pace with inflation has aggravated the situation (pp. 36, 41-42). Adherence to a geographically uniform salary structure has further harmed recruitment in regions where the cost of living is high (p. 43). Moreover, federal judges, once appointed, have no incentives to perform well in order to achieve job security or pay increases (p. 16), and their prospects for job promotion are limited. On the other hand, the assistance of law clerks, who are chosen on merit, and judges' concern for maintaining status and avoiding criticism (pp. 21-22), may raise the quality of adjudication.[7]

Finally, the constraints of the federal court system as a whole play a significant part. Posner views the pyramidal, three-tiered structure as an efficient, nearly inevitable arrangement to supply the services demanded of courts (pp. 11-13). The single trial judge is primarily a dispute-resolver (p. 12). The appellate courts are primarily providers of consistent legal rules, and two appellate tiers have developed only to share the otherwise overwhelming burden of law creation (pp. 11-13).[8] But while expanding the number of district judges would provide more dispute-resolving capacity, the requirement of consistency in creating legal rules inherently limits the value of adding more appellate judges (pp. 14, 99). Enlarging the support bureaucracy is thus more likely than increasing the number of appellate judges, an unpleasant specter for Posner.

Posner emphasizes methods of limiting demand for federal judicial services rather than expanding their supply (pp. 129-31, 317-21).[9] His mission is quality control. His plan is to eliminate excessive workloads and to improve federal judicial compensation, attitudes, methods, and approaches.

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6. Posner understates the ideological component of appointments below the Supreme Court level, especially the appointments of President Reagan. *See Judging the Judges*, NEWSWEEK, Oct. 14, 1985, at 73 (Reagan Administration uses a formalized, high-level process to screen potential federal court nominees "for ideological irregularity").

7. The likelihood of appointment to the Supreme Court is quite small, but Posner does make clear that "merit often plays a larger role in appointing district judges than nonjudges to the courts of appeals" (p. 45) and that "about 40 percent of the circuit judges come" from the ranks of district judges (pp. 229-30).

8. Because the courts of appeals and the Supreme Court perform the law creation function, "once there is an intermediate court, then quite apart from workload it makes sense for the supreme court to exercise a discretionary rather than mandatory jurisdiction" (p. 13).

9. Although price rationing and delay are discussed as supply-side responses, if adopted they would act to discourage demand. Posner's real aim is to deemphasize supply-expanding responses and focus attention on demand-contracting responses.

Posner's diagnostic framework is impressive and useful. His specific diagnosis of the caseload explosion contains important information and insights. But his analysis is incomplete, vulnerable, and based on debatable value judgments that deserve frank acknowledgment.

First, the selection, recruitment, and working conditions of federal judges seem more complex, and the relevant factors more incompatible with each other, than Posner suggests. Posner is concerned that salary inadequacies make successful law-firm practitioners less interested in federal judgeships.[10] On the other hand, practicing lawyers may be better suited and more attracted to the increasingly supervisorial work of federal judges that Posner decries (p. 105). The inherent systemic restraints on federal judges' power and the increased self-restraint Posner urges may, like inadequate salaries, make the position less attractive to politically disposed candidates with realistic chances of appointment. Posner barely acknowledges that power, as well as pay and status, is a recruitment incentive (pp. 31-32). His emphasis on financial incentives contrasts sharply with his neglect of power incentives. A more comprehensive study would systematically examine how the overall mix of inducements to seek federal judgeships has changed over time and what, if any, effects those changes have had on the composition and quality of the recruitment pool.

Less globally, I doubt that the caseload explosion threatens to deprive us of the occasional "great judge" (p.111). Posner is very taken with the role of the great judge, especially Holmes,[11] and therefore is concerned about the potential loss, or failure of emergence, of such an individual. Is it really likely, however, that people with those kinds of innate capacities, functioning over the course of a long career, will fail to make their creative contributions simply because the need to process caseload promotes managerial and editorial responsibilities?

Posner's preference for quality over quantity, for keeping the federal judiciary an elite institution, runs deep. One might have expected a devotee of economic analysis to suggest a self-correcting mechanism by which litigants would redirect their demand to alternative forums whenever the demands on the federal court system cause a sufficient decline in

10. He cites evidence that the pay cut successful urban practitioners must take to become federal judges has indeed resulted in many "federal judges generally . . . not being appointed from the very top rank of the practicing bar, but from just below the top" (p. 41).

11. Posner admires Holmes for his realism, social darwinism, skepticism, and commitment to judicial self-restraint. Holmes acted consistently along social darwinian lines when he drew on his individualistic, antisocialist philosophy in areas of private judge-made law, but "subordinated [it] to considerations of judicial self-restraint" when asked to review the validity of even redistributive legislative experimentation (p. 215). The marketplace of ideas must be permitted to thrive, and legislative decisions to accept some of them must be permitted to operate. Both ideas are "Darwinian" (p. 221).

the quality of its output.[12] Instead, his approach is to assume that the federal court product should remain the Rolls-Royce of adjudication, and that understandable demand for the better product should be controlled.

Moreover, the conception of "quality" that Posner favors promotes values that slight distributional concerns. It prefers better decisions in a narrower range of cases to incrementally inferior decisions in a broader range. We might well think that the quality of justice would be better served, however, if federal courts did more slightly less well than too little extremely well. There can be, in other words, a qualitative dimension to quantity. The tradeoff between quality and quantity is not necessarily, as Posner assumes, a one-way street pointing towards elite adjudication and away from more broadly distributed federal court justice.

From a less elite perspective, some of the other phenomena Posner examines also look somewhat different. For example, the relaxation of justiciability barriers may be seen as a sensible means of facilitating the law creation function and of providing federal court justice for more people. Similarly, the substantive expansion of federal rights by Congress and the Supreme Court, while increasing judicial business, also embodies a conscious judgment that broadening of the category of rights given legal protection will improve the quality of society.[13] Increasing the availability of lawyers for indigents and declining to use price to ration federal court access reflect kindred judgments.

An optimal mix of quality of decision and breadth of availability must rest on a set of agreed social objectives. The tradeoff between quality and quantity remains, but Posner's preferences for deregulation over regulation and for elite decisionmaking over distributional considerations require justification. We must know whether losses of one are outweighed by gains in the other, taking into account the social value the polity attaches to each. These sorts of judgments are relevant not only to assessing how well the extant federal judicial system balances quality and quantity, but also to assessing what kinds of reforms are appropriate

12. Posner does invoke Adam Smith's "invisible hand" analysis in a less obvious context when he speculates that "swings in the settlement rate should be self-correcting" (p. 10). His idea is that lack of information encourages litigation, which produces information needed for further settlement, which then decreases the need for more litigation. Posner later urges government correction of the rate of litigation and settlement, not litigant self-correction (p. 321).

13. This does not mean, of course, that more explicit focus on the workload effects of newly created claims along the lines of Chief Justice Burger's proposals for "court impact statements" would be undesirable. *See Chief Justice Burger's 1977 Report to the American Bar Association,* 63 A.B.A. J. 504, 505 (1977); Burger, *The State of the Federal Judiciary—1972,* 58 A.B.A. J. 1049, 1050 (1972); *Judicial Impact Statements,* WASH. POST, Feb. 15, 1977, at A14, col. 1. Taking account of the value of new federal rights and the increased burdens their enforcement will place on the federal courts is preferable to decisionmaking that ignores one or the other.

when there is widespread agreement that quantitative adjustments are necessary.

## II
## WHAT TO DO ABOUT CASE OVERLOAD

Assuming Posner is right that we should control demand rather than further expand supply, what methods are available and which should be preferred? Posner first evaluates a moderate group of reform proposals—"palliatives"—that promise little "more than a limited and temporary effect" on caseload (p. 131). He then undertakes a "consideration of fundamental reform" (p. 169), developing a theory of federalism to derive the optimal scope of federal jurisdiction. Finally, he discusses changes in judicial method to reduce caseload and enhance the quality of federal court decisions.

Posner's palliatives include those "that have some prospect of adoption . . . in the foreseeable future" (p. 130). The first set involves price rationing, which represents a departure from the seemingly "unshakable commitment to accommodating any increase in the demand for federal judicial services without raising the[ir] price" (p. 95). Posner would impose moderate user fees to discourage nonindigents from suing in federal court uuless they find the supposedly higher quality adjudication worth the price (pp. 131-36). He also supports two-way fee shifting of attorneys' fees for nonindigent litigants. He suggests this be done experimentally in diversity cases or by allowing recovery of attorneys' fees whenever the losing party was not "substantially justified"[14] in its litigating position (pp. 136-38). He shies away from recommending total abolition of diversity jurisdiction (pp. 146, 176-77), but advocates limiting it by raising the minimum amount in controversy to $50,000 and forbidding residents to invoke it (pp. 146-47). Currently, diversity jurisdiction accounts for twenty percent of case filings in the district courts and nearly fifteen percent of the courts of appeals' dockets (p. 64). About half of all diversity cases are invoked by residents (pp. 146-47). Posner also would reintroduce minimum amount-in-controversy requirements in federal-question cases as a fallback position to imposing user fees (p. 139).

Posner opposes supply-expanding proposals to create new federal courts specialized by subject matter, except for a court of tax appeals (p. 160). Specialization, Posner argues, threatens to reduce job satisfaction and the quality of the judges (pp. 150-51). The ideological component of appellate judging also limits the value of specialists (p. 151). Specialized

14. The standard is borrowed from the Equal Access to Justice Act, 28 U.S.C.A. § 2412(d)(1)(A) (West Supp. 1986).

courts, which decide a narrow range of issues, are more easily dominated by one ideology (p. 152) and controlled by the President and Congress through appointments and appropriations (p. 154). Specialists are less likely to provide a diversity of ideas and approaches (pp. 156-57). Further, because geographic diversity and the "cross-pollination of legal ideas" will be reduced (pp. 156-57), jurisdictional issues may increase. Finally, generalized courts are better able to cope with "unforeseen changes in the caseload mix" (p. 157).

Posner favors strengthening the appellate process within the federal administrative agencies to reduce the need for judicial review of agency decisions (p. 161). He opposes creation of a new appellate court between the courts of appeals and the Supreme Court (pp. 162-66). He is doubtful that uniform resolution of more intercircuit conflicts is preferable to "diversity and competition" (p. 163). He thinks the Supreme Court is responsible for some of its own workload difficulties and that staffing the new court with current courts of appeals judges would only create more work for these already overloaded people, who would have no greater insight than the judges whose decisions they were to review anyway (pp. 165-66). Posner believes that much of the conflict problem could be eliminated if the courts of appeals deferred whenever three other circuits previously have decided an issue the same way (p. 165).

Many of the reforms Posner advocates rest on two potentially objectionable premises. The first is that federal courts should use price as a caseload regulator.[15] The second is that redirecting some federal-question cases to state courts is not undesirable, despite the presumptive sacrifices of quality, expertise, and uniformity of federal law decisions. Posner is indifferent to this reallocation because where others see desirable uniformity in federal court decisions, he sees monopoly (p. 163). Where others see conflict between federal and state court decisions, he sees desirable competition (p. 163).

Posner's advocacy of price rationing is most controversial. His argument for user fees begins from the wholly accurate observation that those who litigate are subsidized by the many taxpayers who do not (pp. 10, 131-32). Nonlitigants benefit because litigation creates legal precedents that allow others to settle disputes without litigation (p. 10). Posner concludes that while the externalized informational benefits of litigation do justify some subsidy to litigants, they do not justify the vast public subsidy that keeps court fees at their present level (p. 132). Posner advocates a small rise in user fees to reduce the taxpayer subsidy a little, not fully, in order to reduce overall demand for federal court litigation

15. Posner does not consider deliberate delay of litigation to regulate caseload a serious option because delay distorts accurate decisionmaking through decay of evidence and makes legal obligations uncertain. These disadvantages outweigh the need to limit caseload (p. 139).

(p. 136). This will help assure higher quality litigation and decisionmaking in the federal courts, because those willing to invest more resources to gain federal court access will be more likely to protect their investments (pp. 132-33). The higher quality federal product will make up somewhat for the lower quality adjudication of cases the user fees divert to the presumptively less able state courts (p. 135). Nonlitigants will benefit as well through the trickle-down effect of better precedents (p. 134). In short, the proposal would move middle-class litigation to state court and reserve the federal courts for higher-stakes cases and those brought by indigents.

The distributional preferences embodied in the scheme are perhaps of more interest than the practical effects, which seem limited unless the user fee becomes very high. The taxpayer subsidy presumes that federal judicial services are a public good, one whose value extends beyond litigants and nonlitigants interested in legal rules to society as a whole. Legal rules not only keep dispute resolution peaceful, but also provide cohesion and integration in a just social order. The justification for litigant user fees is weakened if we acknowledge that those who never litigate and even have no litigable disputes nonetheless are societal users of the judicial system.[16]

Moreover, many claims litigated in the federal courts have public law dimensions that make uniform, expert, and high-quality decision desirable. Every federal-question case shunted from federal to state court risks undercutting these objectives. True, some already arise in state court, and Supreme Court appellate review may be available. But before we impose user fees, or reverse the policy of maximizing uniform treatment that led to abolishing amount-in-controversy requirements in federal-question cases,[17] we should be sure that we share Posner's preference for diversity ("competition") over uniformity ("monopoly") and that we are prepared to accept the quantitative loss of higher quality federal adjudication that Posner's distributional scheme implies.

If we must cut cases from the federal court docket, we should evaluate all the available criteria for excision. Is it better to use financial criteria than to determine what whole categories of cases, such as diversity cases, are less important to us, so that we are prepared to tolerate the incrementally inferior quality of adjudication we presume they will

16. This is not to say that the financial importance of litigation is wholly irrelevant to the allocation of scarce federal court resources, although financial importance may be identified more directly by minimum amount-in-controversy requirements than by user fees.

17. The requirement was eliminated in suits against the United States, its agencies, or officials in 1976, Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721, and altogether in 1980, Federal Question Jurisdictional Amendments Act, Pub. L. No. 96-486, 94 Stat. 2369 (1980). For a summary review of the progressive narrowing of the jurisdictional amount requirement in federal question cases, see C. WRIGHT, THE LAW OF FEDERAL COURTS 176-81 (4th ed. 1983).

receive if turned away from federal court? These are, of course, political value judgments with practical, institutional,[18] distributional, and "constitutive"[19] implications, just like those that lie behind Posner's acceptance of the need to exempt indigents from user fees.

Similar considerations lie behind fee-shifting arrangements as a way to discourage litigation. Even though regulation by price is only one of Posner's suggestions for reducing federal court demand, it is hardly value-neutral. The particular set of values it embodies deserves thorough deliberation before deciding that we want to push the federal courts toward more financially elite litigation.

Posner's second pervasive value—tolerance of nonuniform decisions—also deserves careful appraisal. It not only underlies his price rationing proposals, but also his opposition to an intercircuit tribunal and to more subject-matter specialization in federal appellate courts.[20] There is considerable unacknowledged tension between Posner's preference for diversity of decisions and his urging elsewhere that judges should act to curb uncertainty about the state of the law because uncertainty contributes to increased litigation instead of settlement.[21] Inevitably there will be a tradeoff between how many voices will be allowed to speak to an issue (and how often) and the clarity or definitiveness with which the system as a whole speaks. There is also an inevitable tradeoff between the competitive advantages that may accrue if state and federal courts decide the same kinds of cases and the ability to secure effective, uniform enforcement of fundamental legal norms. The search we must make is for the optimal balance between these two benefits. This, too, involves political judgments. Is more uniformity desirable at the risk of greater concentration or is more diversification desirable at the risk of ineffectiveness? Posner's arguments against appellate specialization may be powerful, but his advocacy of nonuniform decisions overall is unappealing.

## III
## POSNER'S THEORY OF FEDERALISM

Moving from palliatives to "consideration of fundamental reform"

18. For an approving view of taking account of institutional values in adjudication, a view that seems equally relevant to legislative determinations, see Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CALIF. L. REV. 200 (1984). Posner, too, as the author of an "institutional analysis," sometimes emphasizes institutional values (p. 258).

19. *See* Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*, 98 HARV. L. REV. 592, 606-14 (1985).

20. Fear of concentrated legal power in a small number of courts also appears to underlie Posner's opposition to broad holdings (p. 257) and his conclusion that "the second court should decide the breadth of the precedent created by the first" (p. 250).

21. It is also at odds with his preference for adoption of rules rather than multifactored standards (pp. 245-47). *See infra* text accompanying notes 38-39.

(p. 169), Posner proposes a theory of federalism that suggests the optimal bounds of federal jurisdiction. He concedes that his theory would not "have revolutionary implications for reallocating federal judicial business to the state courts" (p. 189).[22] Its primary value is to derive "an ideal allocation of lawmaking responsibilities between the states and the federal government" (p. 175).

Posner's theory is couched largely in economic terms: monopoly, competition, externalities, economies of standardization, and diseconomies of scale. He characterizes federal regulation as monopolistic, because there is effectively no alternative legal regime when our one central government acts. By contrast, state regulation is competitive, because each state offers an alternative regulatory regime from which to choose. He generally prefers state regulation over federal in order to avoid diseconomies of scale and the inefficiency of giant national bureaucracies, and to permit experimentation with diverse laws that will produce valuable policy information (the familiar "states as laboratories" argument) (pp. 173-74). He finds an independent federal judiciary justified to check monopoly federal power.[23] He sees less need for federal judges to control state power, because citizens more easily may migrate to escape burdensome state regulation, giving states a competitive incentive to refrain from regulatory abuse (pp. 172-73). Posner argues that independent federal jurisdiction to check state authority *is* justified, however, when economies of standardization make uniform federal rules efficient and when the rights of nonresidents or "politically disfavored" residents are unlikely to be protected by politically accountable state judges.

As applied, Posner unacceptably limits the implications of his theory for the scope of federal jurisdiction. He is most persuasive in developing the argument that federal judges' relative independence from state political forces justifies their authority to adjudicate cases threatening interstate externalities such as pollution, nonresident interests in diversity cases, suits against the United States, and federal criminal laws based

22. Posner does claim that his analysis yields "the conclusion that the federal courts' jurisdiction should . . . be curtailed relative to that of the states" (pp. 191-92). Elsewhere, he simply asserts that "some redress of the balance of power between federal and state courts is long overdue" (p. 135).

23. According to Posner, the same independence that provides a judicial check against the monopolistic power of the other branches of the federal government also entails "insula[tion] from the usual incentives to efficient performance" (p. 173). It seems doubtful that federal judges are less efficient than their less insulated state counterparts, however, or even than they would be were they not so insulated. Perhaps other incentives neutralize the independence point in this context. To name just a few, a felt sense of professional responsibility, peer pressure from other judges, the demands of litigants, or the desire to exercise power frequently, might spur a federal judge to behave efficiently.

on interstate effects.[24] Conversely, he suggests, the interstate externality justification does not support federal jurisdiction in cases posing no risk of harm to nonresident interests, whether based on diversity or federal statutes.[25] He also presents a convincing argument for federal admiralty jurisdiction based on economies of standardization. Posner argues that the efficiency of having only one body of procedural and substantive law governing maritime businesses that do intermittent business in multiple jurisdictions does not extend to "incidents involving purely domestic uses of navigable waterways" (p. 179). He acknowledges, however, that nonmaritime enterprises doing business worldwide also have a strong argument for one exclusive set of governing rules, an implication of his theory that would expand federal jurisdiction far more than elimination of domestic boating cases would reduce it.

The major weaknesses in Posner's theory are his singularly unpersuasive application of the rationale favoring federal jurisdiction to protect politically disfavored residents and his failure to acknowledge other important reasons for federal jurisdiction. Posner would eliminate federal jurisdiction for age discrimination cases (p. 180), cases brought by state employees and businesspeople (p. 188), and many civil rights cases involving minorities, because he believes "[i]t is no longer true that blacks or Jews or Orientals or even American Indians constitute 'discrete and insular minorities' . . . or that these groups lack political power and representation in the judiciary" (p. 188). He views these cases and state prisoner civil rights and federal habeas actions as "[p]otentially the largest area for federal jurisdictional reform motivated by principles of federalism," although unfortunately he says little about this provocative assertion (p. 186). He does argue against federal habeas jurisdiction for innocence-related claims, especially claims of insufficiency of evidence to convict under *Jackson v. Virginia*.[26] He reasons that state courts are unlikely to be prejudiced against their own innocent, but may resist enforcement of constitutional norms that may benefit the guilty (pp. 187-

24. Posner offers a supplementary justification for federal jurisdiction over some crimes lacking interstate spillover effects. The greater susceptibility of state courts to corrupt factional pressure may warrant federal court enforcement of otherwise local crimes (pp. 177-78).

25. *But see supra* note 24. For example, Posner finds no justification for federal jurisdiction in Federal Employers' Liability Act cases, "Truth in Lending cases, odometer-tampering cases, or [local] securities fraud cases" (p. 184). Interestingly, he thinks Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), the case that requires federal courts to develop and enforce a federal common law of labor agreements, is justified on an interstate spillover rationale (pp. 183-84). If the states had control of this area, anti-union states could use labor law to attract business away from pro-union states (pp. 183-84). He also recognizes that fields of "analytical difficulty" and fields where "national uniformity of legal obligation" is important may justify federal jurisdiction (p. 185). Both rationales potentially support wide-ranging federal jurisdiction (p. 185).

26. 443 U.S. 307 (1979).

88).[27]

Posner's assertion that convicted state prisoners and historically disadvantaged minorities are not politically disfavored in state courts today is highly debatable, if not plainly wrong. State courts are not wholly immune to racial prejudice or insensitivity, whether their own or the local community's. Community intolerance of convicted criminals surely makes them "politically disfavored" residents at risk in courts susceptible to prejudicial majoritarian pressure. Indeed, Posner's own suggestion that federal habeas jurisdiction may be justified to review claims unrelated to innocence is built on the recognition that the guilty "enjoy little political favor" (p. 187). The convicted who claim innocence probably do not enjoy much more favor. Under Posner's own criteria, the political weakness of state prisoners favors retaining federal jurisdiction to review their claims.

Moreover, the policy favoring federal habeas review of innocence-related claims rests not only on potential state hostility or insensitivity to the claim or the person raising it, but also on the importance of correctly deciding the claim. The value of protecting against wrongful conviction may be so high that even if the risk of error is small, the desire to prevent it may justify federal jurisdiction.[28] The courts should not preserve "judicial capital" at the expense of "political capital" (p. 209) by turning away innocence-related claims the public is more likely to support in favor of only the least popular claims.

Posner's exclusion of civil rights claims brought by the elderly, state employees, businesspeople, and others who are perhaps not so vulnerable to distorted state court determinations also is problematic. In these cases, the independence of federal judges is desirable not so much to protect politically weak claimants from class bias, but to ensure effective enforcement of federal claims that threaten the local status quo. For example, state judges may not favor individual state employees who litigate against their government employers. Similarly, independent federal courts may be more willing or able than pressure-prone state courts to enforce changing federal norms, statutory or constitutional, that run counter to entrenched local attitudes, stereotypes, or customs.

Posner's theory of federal jurisdiction is flawed, then, because it is incomplete. It fails to consider all of the values—political, social, and institutional—that might warrant the use of the presumptively higher quality of federal court adjudication. Posner's theory better justifies

27. His critique of federal habeas jurisdiction is a peculiar inversion of the criticism normally levelled at it. For the usual view, see Schneckloth v. Bustamonte, 412 U.S. 218, 256-58, 265, 274-75 (1973) (Powell, J., concurring); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

28. This is the primary basis for Jackson v. Virginia, 443 U.S. 307 (1979).

inclusion of some subjects in federal jurisdiction than exclusion of others. That might suffice for some theoretical enterprises, but not for Posner's. His theory aims to reserve the limited resources of the federal court system for the cases where they are most needed. Such a theory, to be fair and rational, must first take full account of all appropriate claims for federal jurisdiction before setting priorities among them. Posner's partial account denigrates the strength or existence of some claims and skews the establishment of priorities.[29]

## IV
## PRESCRIPTIONS FOR QUALITY CONTROL

Most of Posner's proposals to pare down federal jurisdiction discussed so far are directed to Congress.[30] Four chapters (seven through ten), however, propose reforms the federal judges can implement themselves. The first two urge greater self-restraint in reducing federal court power over other government officials and changes in "judicial technique" and "craft" (p. 223).[31] Posner views judicial self-restraint as the "substantive political principle" (p. 207) that judicial power should be reduced relative to other branches of government. Other conceptions—deference, adherence to stare decisis, avoidance of the use of personal policy preferences, and taking account of political or caseload limits—should not be confused with this notion. Posner argues that the preferred conception, called "structural restraint" (p. 208), is a valid and important, if also "contingent, . . . time-and-place bound" (p. 211), principle of adjudication. It is, however, but one among many factors of "responsible judicial decision making" (p. 220) in those cases where "a judge caunot decide . . . simply by reference to the will of others—legislators, or the judges who decided previous cases, or the authors of the Constitution" (pp. 206-07).

Posner hopes to persuade federal judges that structural restraint will help alleviate the caseload crisis to which the "courts' self-aggrandizement" has contributed (p. 210). Moreover, Posner believes that "contemporary activism" risks too much "projection of the judge's will" (p.

29. Henry Monaghan's review of *The Federal Courts* sounds a similar theme, finding Posner's "jurisdictional analysis . . . incomplete," primarily for failing to take account of "limitations on federal judicial intervention in state affairs" and "to give any meaningful account of potential noneconomic bias agaiust federal policy in the state courts." Monaghan, *Taking Bureaucracy Seriously* (Book Review), 99 HARV. L. REV. 344, 350, 352 (1985).

30. The scope of federal habeas jurisdiction, however, has expanded and contracted at the hands of the Supreme Court without congressional amendment. *See* Wainwright v. Sykes, 433 U.S. 72, 81 (1977) (openly acknowledging the "Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged").

31. The last two, discussed in Part V, urge a particular approach to statutory and constitutional interpretation and increased use of economic analysis.

215). Judicial activism also lacks candor, a quality "more congenial to the restrained than to the activist judge" (p. 218).

It is difficult to tell how critical a factor Posner intends structural restraint to be. Insofar as it aims at significant caseload reduction, a strong principle might well require alteration of the nature of the judicial role. Substantially less weight would necessarily be given to the checking function, particularly the antimajoritarian function, of the federal courts.[32] For Posner, caseload considerations and a desire to curb judicial power both point towards more restraint. In fact, the latter must be more important to Posner, because he rejects a directly caseload-sensitive conception of restraint. Others, however, think the federal courts should curb government overreaching more frequently.[33] For them, any caseload reduction benefits of structural restraint are an undesirable tradeoff against the loss of the federal courts' policing function.

Posner's own analysis suggests, moreover, that structural restraint may aggravate rather than mitigate the caseload crisis. He notes that increasing caseload accompanies periods of legislative deregulation as well as regulation, at least in the short run (p. 84). More generally, changes in law produce litigation that test the nature and scope of the transition. The point applies equally to periods of federal judicial deregulation of government action. Decreasing the power of federal courts will require litigation to locate just where the new and less activist line will be drawn. Caseload considerations thus may conflict with changes in the level of structural restraint. One begins to suspect that the caseload crisis has little to do with Posner's attachment to structural restraint.

It also is unclear how structural restraint applies to cases in which federal courts potentially must decide whether to reach the merits in the first place, and, if so, whether to invalidate challenged government action. Posner clearly would have federal courts refrain from striking down the actions of other government branches. Would he also have them refrain from asserting the authority to review those actions? This question is significant because the Burger Court occasionally seemed to avoid justiciability obstacles, and barriers to review of state court decisions, in order to validate government conduct.[34] That practice simulta-

32. Posner acknowledges this point, stating, "but of course if self-restraint is carried too far the courts will cease to play their appointed role in the system of checks and balances" (p. 214). He leaves unanswered how far is "too far" and what is the extent of the "appointed role" of the federal courts.

33. *See, e.g.*, Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

34. Generous justiciability rulings that led to validation of government policy on the merits include Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) and Sosna v. Iowa, 419 U.S. 393 (1975). *See generally* Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273 (1980). Michigan v. Long, 463 U.S. 1032 (1983), is a noteworthy

neously increases judicial power to hear challenges of government impropriety and decreases substantive judicial limitations on government conduct.

If Posner's structural restraint principle supports such a practice, it may further undermine the objective of relieving the caseload burden. Pliable access doctrines create uncertainty, encourage more cases, and themselves require considerable litigation effort.[35] Moreover, the active manipulation of access doctrines to achieve structural restraint lacks candor.[36] It therefore undermines Posner's claim that admirers of restraint cherish candor more, and are less often formalist,[37] than admirers of activism (p. 220).

Even if Posner would condemn lack of candor in those who manipulate access rules to promote substantive structural restraint, his general point is unfounded. Restraint is not superior to activism because its adherents have more integrity. Activist judges are often candid about their perception that federal judges should function as intermediaries between government and the rights of the people. Restrained judges sometimes refuse to invalidate government action because they fear political or popular disapproval, not because they honestly think intervention is inappropriate. Candor may be more difficult for activist judges because their decisions may be disproportionately unpopular, and restrained judges may more easily disguise insincerity without using formalist props. But activist judges do not inherently lack candor any more than restrained judges inherently lack courage. As with all principles of adjudication, restraint or activism may be honestly or dishonestly invoked.

Posner's proposals to improve judicial technique are questionable, too. Most address the quality of opinion-writing. Judicial opinions should provide greater guidance and discourage litigation.[38] Posner urges judges to make their opinions shorter; to restrain egocentric

example of broadening the Court's appellate jurisdiction over state court decisions to uphold the constitutionality of a police search. An example of an overeagerness that backfired is Illinois v. Gates, 462 U.S. 213 (1983) (the Court, having first invited the parties to address whether a good faith exception to the exclusionary rule should be adopted, concluded that the issue should not be decided because it was not presented to the Illinois courts). Certiorari was granted in another case raising the same issue as *Gates* less than three weeks later, however. United States v. Leon, 463 U.S. 1206 (1983). During the next term the Court approved a good faith exception for police searches, in United States v. Leon, 468 U.S. 897 (1984).

35. *See* Varat, *supra* note 34, at 320.

36. *See id.*

37. For an interesting discussion of the meanings and relationships between formalist and instrumentalist jurisprudence, see Note, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CALIF. L. REV. 119 (1985).

38. Posner makes limited suggestions that district judges more scrupulously verify the existenee of federal subject-matter jurisdiction, certify appeals less willingly to reduce burdens on the courts of appeals, delegate less work to assistants and magistrates, and control discovery more firmly

impulses to display learning; to curtail the use of textual footnotes, printed abuse of colleagues, and excessive concurring and dissenting opinions replete with counterattacking references and footnotes (pp. 230-40); and to adopt rules rather than multifactored standards to govern disputes (pp. 245-47). He also opposes the creation of broad holdings because judicial foresight is limited, although he supports alternative holdings and dicta for guidance (p. 257).

Posner understates the inherent tradeoffs between certainty and sensitivity to complex circumstances, between clarity and the realities of collective decisionmaking, between brevity and candor, and between brevity and information needed for settlement. Indeed, the function of law creation may conflict with the function of dispute resolution. The long, heavily footnoted opinion that responds directly to separate opinions may narrow the majority decision. It also may define areas for further litigation and provide information that bench and bar can use to seek legislative or negotiated solutions. The belabored opinion may pinpoint value differences among judges that a brief opinion may conceal. Thus, a belabored opinion may be more candid and less formalist and its premises more easily subjected to scrutiny by the profession and the public.

Short opinions with narrow holdings may provide little such guidance. What is not said can cause as much uncertainty as what is said tentatively or obscurely. Because the shape of legal doctrine is only one among many causes of litigation, those with legal interests in unaddressed issues may have as much incentive to litigate as they had before the opinion. Moreover, the collectively bargained, unitary opinion, for all its authoritativeness, might necessarily be drafted in a vulnerable or obscure fashion to gloss over differences.[39] Nor is it clear that discursive opinions drafted by law clerks lack authenticity (p. 255). Finally, Posner's preference for rules over multifactored standards deprecates the value of sensitivity to context and is inconsistent with his concern that judges can call upon only limited foresight. With some issues we will prefer to sacrifice the certainty of bright-line rules and instead weigh all relevant considerations in pursuit of a correct decision, because of the values at stake.

The process of judging, the methods of writing opinions, and the use of precedent are inevitably complex tasks not easily reducible to technical proposals for improvement. The connection between the judicial opinion and the uncertainty that foments litigation is especially complex. Clarity

(pp. 225-26). His focus, however, is on law creation in general and the courts of appeals in particular.

39. *See, e.g.*, B. WOODWARD & S. ARMSTRONG, THE BRETHREN 154-56 (1979), discussing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); *see also* Milliken v. Bradley, 418 U.S. 717 (1974).

often comes at the expense of well-considered decisions. Choices often must be made between discretion and rules, between discussion and silence, between legal principles that are less certain but more realistically complex and those that are more certain but potentially oversimplified. Posner, a professed realist, unfortunately obscures these choices and oversimplifies the relationships between judicial craft and the caseload crisis. His realism wars with his reductionism more than he acknowledges or perhaps realizes.

## V

## FEDERAL COURTS AND THE LAWMAKING PROCESS

Not all the changes Posner recommends in this book are designed to alleviate the caseload crisis. Statutory and constitutional interpretation and common law adjudication are suffering a "crisis . . . of quality alone" (p. 261). Posner's cure is to apply the economic literature on the legislative process and the structure of the common law (p. 295).[40] Posner proposes a two-step methodology in both statutory and constitutional interpretation. The judge first should look to whether authoritative guidance exists to decide the current issue and, if it does, should function as "the honest agent of others" (p. 221). If such guidance is not available, because "the will of the principals can no longer be discerned," the judge must "perforce becom[e] a principal himself" (p. 221).

Posner's realist approach to statutory interpretation is based on the influences that prompt a statute's passage: public interest, public sentiment (where utilitarian justifications are not readily available), or the demands of politically effective interest groups (p. 265).[41] The judge

40. Posner doubts, however, that generalist federal judges as currently selected and compensated "can realize the promise of economic analysis of law" (p. 315). His colleague, Seventh Circuit Judge Frank H. Easterbrook, likewise a former law professor at the University of Chicago, also thinks it "unlikely" that judges can "make wise economic decisions routinely." *See* Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984). *Cf.* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 590 (1983) ("[C]ourts have little familiarity with the process of evaluating the relative economic burden of taxes.").

Posner further supports the value of economic analysis by presenting an interesting breakdown of issues the federal courts face and demonstrating that cost-benefit analysis is highly relevant to the lawmaking function of federal judges (pp. 296-315). His further claim that judges make law "as if their goal were to promote economic efficiency" (p. 314) does not follow, however. That claim conflates economic cost-benefit methodology with one substantive economic value—efficiency. Other values may outweigh efficiency and still profitably be examined in cost-benefit terms. More fundamentally, moral judgments play a significant role in adjudication apart from, or despite, efficiency objectives. *See* Schwartz, *Economics, Wealth Distribution, and Justice*, 1979 WIS. L. REV. 799.

41. Posner thinks it possible "to classify statutes according to whether they advance the public interest or . . . the interest of some (narrow) interest group" (p. 265). He believes that rights of action should be implied more readily from public-interest than from interest-group legislation (pp. 270-72). He also thinks "a realistic understanding of legislation is devastating to the canons of

should ascertain how the "enacting legislators . . . would have wanted the statute applied" (p. 286-87). This method of "imaginative reconstruction" would take account of the legislation's character and what compromises it reflects (p. 287). If this does not yield a result, Posner advocates adhering exclusively to the enacting legislators' conception of reasonableness (p. 287). He rejects Calabresi's proposal that courts discard obsolete statutes even when they are constitutionally permissible.[42] Calabresi's view "rests on too tight an embrace of the public-interest conception of legislation" (p. 291).

More fundamentally, Posner views the judicial task as implementing the enacting legislators' product without incorporating contemporary values. But he also rejects Easterbrook's view that courts simply should refuse to apply a statute that neither expressly resolves the issue nor explicitly authorizes judges to create common law to fill in its gaps.[43] The political realities of the legislative process produce "incomplete" statutes requiring judicial augmentation "if legislation is to work" (p. 292). Posner purports to seize the middle ground between politically liberal "no constructionists" who refuse to be bound to the process of original enactment and politically conservative "strict constructionists" who refuse to go beyond the legislation's express coverage. He claims that only his position is constructive and helpful to the legislative process (pp. 292-93).

Posner's two-step approach to constitutional interpretation builds on both his realist theory of legislation and his theory of federalism. If the intended meaning of a constitutional provision is discernible, it must be enforced unless case law firmly establishes a contrary meaning (p. 272). If the meaning is not discernible, or if the provision is designedly open-ended, different considerations should control (pp. 193-97, 273-76). First, the age of most constitutional provisions magnifies the need for flexibility, but also increases the incidence of interpretive error. Posner believes it is better to err in favor of majority will than minority claims (p. 272-73). Like Thayer,[44] he would resolve doubts against claims to restrict government (p. 273). Second, he finds rationality review inappropriate to judge interest-group legislation because it "typically will flunk any test of rationality other than self-interest," and he finds "no express constitutional right not to be disadvantaged by the characteristic opera-

construction" (p. 276) because the canons do not take account of what interests legislation is intended to satisfy. In fact, he attacks many of the canons as remnants of formalism that promote judicial activism by making interpretive choices seem more constrained than they really are (pp. 285-86).

42. *See generally* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

43. *See* Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983).

44. *See* Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

tion of the political process" (p. 274). Third, he seems to oppose strict scrutiny of "public-sentiment" statutes, such as laws regulating sex and obscenity, because they are by nature "not susceptible of utilitarian justification" (p. 275). Finally, even assuming, *arguendo* that the fourteenth amendment's due process clause was "intended to give the Supreme Court broad discretion to invalidate state laws" (p. 193), he believes such discretion should be exercised only to assure black emancipation and "to help prevent the reemergence of dangerous sectional tensions" (p. 196). In particular, courts should use substantive due process to hold state practices invalid only when those practices are rejected by a consensus of legislation in a substantial majority of other states *and* are "so extreme, so shocking, that they threaten national unity" (p. 195). Federal courts, therefore, should not limit state regulation of matters like capital punishment, pornography, educating aliens, and contraception (p. 197).

Few people would attempt a theory of constitutional interpretation in ten pages, and a theory of statutory interpretation in twenty-five. Posner's ambition can be criticized for resulting in assertion rather than demonstration. More important, two of his premises are highly questionable. One is that public-interest interpretation (statutory or constitutional) normatively is appropriate only for public-interest legislation and not for interest-group and public-sentiment legislation. The other is that statutory interpretation should never take account of contemporary views. Both premises rest on too constricted a view of the judicial role in the lawmaking process.

Why should it follow from a realist view of the legislative process that what motivated a statute's adoption should forever control its interpretive course—that "courts should . . . honor the legislative compromise" (p. 282) and ignore current legislative preferences? Posner answers that otherwise judges may effectively repeal legislation and that current legislative preferences are not readily discernible anyway (p. 279). But slavish adherence to past majorities is also problematic. "Imaginative reconstruction" of the original legislative process from dated materials, and ascertaining whether legislation responded to public-interest, public sentiment, or interest-group influences, is at least as difficult as assessment of current policy.[45]

It also is highly doubtful that legislatures always intend their enactments to govern forever or until there is legislative reconsideration, especially if the adopted laws incorporate interest-group compromises. Nor do legislators expect judges to ignore the public interest, intervening developments, and public changes of attitude that have not yet been

45. *See* Easterbrook, *supra* note 43, at 547-48. I do not think this is enough of a reason to forego the inquiry entirely, but it is certainly enough of a reason not to abjure inquiry into current legislative preference if inquiry into past legislative preference is undertaken.

enacted into law. Although activist judges may exercise wide interpretive powers to mold legislation in ways that current congressional majorities would not, Posnerian judges may leave intact legislation that is even further out of line with current majoritarian views. We must choose between active judicial reflection on current policy and passive judicial reliance on past, unrepealed policy as a proxy for current democratic wishes, unless we believe contemporary views are wholly irrelevant to interpreting previously adopted law. Such a belief seems unjustified, however, given the normative priority of current over past majorities and the reality that inertia and agenda limitations, not legislative opposition, often account for failure to update statutes.[46]

Having federal judges act solely as registers of past political compromises also reduces their potential to contribute to the lawmaking process. Posner apparently rejects the Bickel-Wellington-Calabresi tradition, which urges, in varying forms, the recognition of an interactive process between Congress and the federal courts. That tradition urges the federal courts to assess the extent to which past law seems out of step with current majoritarian policy or constitutional norms and sometimes to reach statutory or constitutional judgments that effectively remand the issue for congressional reconsideration.[47] Even if, for reasons of legitimacy[48] or workability,[49] one rejects Calabresi's suggestion that judges nullify obsolete statutes, it does not follow that judges have no role in updating a statute's reach. Posner seeks a middle ground that would help carry out *legislation* as it was initially conceived. But he implicitly rejects another middle ground that would help the *legislative process*, conceived of as an ongoing process of development and alteration of law to which judges legitimately can contribute. The remanding or provocative function of federal courts no more bypasses the legislative process than does the failure to rethink what is on the statute books. Instead, it may educate, generate dialogue, and press for democratic reconsideration of dated policies.

If federal courts should have a greater interactive role in the legisla-

46. For a sophisticated exploration of the democratic limits that periodic elections impose on the power of a past legislative majority to control the legal options of subsequent legislatures, *see* Enle, *Temporal Limits on the Legislative Mandate (Entrenchment and Retroactivity)* (forthcoming in AM. B. FOUND. RES. J.).

47. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); G. CALABRESI, *supra* note 42; Bickel & Wellington, *Legislative Purpose and the Judicial Process: the Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957). For an interesting critique of this school of thought, including some important differences among its disciples, see Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 241-49 (1983).

48. *See* Weisberg, *supra* note 47, at 228, 254; Coffin, *The Problem of Obsolete Statutes: A New Role for Courts?* (Book Review), 91 YALE L.J. 827, 832-36 (1982).

49. *See* Coffin, *supra* note 48, at 838-39.

tive process than Posner believes, then interest-group and public-sentiment legislation should be given different normative weight than public-interest legislation in making interpretive and constitutional judgments. Disparity between past and present perceptions of public interest may be greater with some types of legislation than with others. It is only because Posner denies the legitimacy of judicial input that he also believes the original legislative compromise must be honored. In short, his attempt to derive the proper judicial function from his understanding of the legislative process is circular. With respect to interpretation, it begins and ends with the unexamined assumption that judges should follow the original political alignment that produced the statute.[50] With respect to constitutional assessment, it begins and ends with the unexamined assumption that judges should treat all legislation, whether designed to satisfy public sentiment, the public interest, or particular interest groups, with the same degree of deference. In both instances, Posner moves from what is to what ought to be, or, more precisely, from what was the political event to what should continue to be the legal result. For Posner, "the normative power of the actual"[51] is not only a description of human behavior, but a prescriptive guide for federal judges.

If we want federal judges to make public-interest contributions to the lawmaking process, other elements of Posner's judicial philosophy also lose appeal. His discussion of judicial opinions, for example, focuses on litigants, lawyers, judges, and academics, but pays little attention to legislators, politicians, and the public. Taking these latter audiences into account, his criticisms of opinion-writing lose force. Discursive, scholarly opinions that elaborate the implications of competing regulatory policies may educate the polity and its representatives and prompt wiser political action. Similarly, single-minded pursuit of more certainty in legal rules ignores the value of deliberately tentative opinions that may attract needed legislative and public attention.

Ironically, Posner's opposition to judicial infusion of contemporary policy also may undermine his objectives of increased judicial restraint and decreased litigation. Judges who decide cases based exclusively on outdated laws may shape the legislative agenda more forcefully than judges who update legislation, because they may reinforce unacceptable

50. For a differing view, see Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model,* 86 COLUM. L. REV. 223 (1986). Professor Macey urges federal courts to continue to follow their traditional public-interest approach to statutory interpretation, even when construing statutes with interest-group origins. He believes this will reduce interest group influence over the legislative process and encourage Congress to legislate for the broader public welfare.

51. Cohen, *The Basis of Contract,* 46 HARV. L. REV. 553, 582 (1933) (attributing the phrase to Jellinek).

approaches that demand correction. Moreover, if legislative action is not forthcoming, outdated law is likely to produce more lawsuits.

Finally, many believe the federal courts should be active leaders, not just participants, in how law governs our society.[52] Judge Posner may blanch at the thought, although even he finds *Brown v. Board of Education* "an activist decision, but a justifiable one" (p. 220).[53] Sometimes, the need to suffuse law with contemporary standards and moral principles is too compelling to ignore.

At the very least, we should not accept Posner's approach until we clearly decide what functions we wish federal courts to perform, what their relationship to the legislative process ideally should be, and how our need to accommodate continuity and change should be filtered through the judicial process. Posner, I believe, urges an impoverished conception of the federal judicial role.

## CONCLUSION

This Review criticizes two aspects of Posner's economic and political theory. One is his selective and partial focus. The other is his surprisingly formalist reasoning to derive a normative judicial philosophy from positive economic analysis. The two are related, for the normative case is much stronger if the cost-benefit methodology is applied within the closed system he defines.

Were this book entitled "Some Important Considerations Bearing on Proposals to Reform the Federal Courts," it would be much more successful than it is. Posner's claims are much stronger, however, and belie his prefatory caution that the project is suggestive, not exhaustive, and tentative, not definitive (p. vii). The tendency to draw firmer and larger conclusions than his data or analysis will bear, a risk of any social science work, results in the portrayal of intermediate effects or connections as ultimate logical choices. Posner exaggerates the explanatory power of his economic analysis, which is insufficiently systematic and comprehensive to justify his claim. In any event, the economic concep-

52. *E.g.*, Fiss, *Foreward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

53. Posner does not tell us why he finds *Brown* an example of justifiable activism. This omission may have misled at least one reviewer into concluding that application of Posner's method of constitutional interpretation would result in disapproval of *Brown*. *See* Rahdert, Book Review, 58 TEMP. L. Q. 577, 582-83 (1985). Rahdert neglects to mention Posner's approving, if conclusory, reference to *Brown*. Although I do not disagree with Rahdert that Posner's book has elements of a "position paper" designed to attract support for Posner's elevation to the Supreme Court, *id.* at 577, fairness does require recognition of his position on *Brown*. In fact, I suppose his approval of *Brown* is as much a litmus test for Senate confirmation as his disapproval of Roe v. Wade, 410 U.S. 113 (1973), is a litmus test for a Supreme Court nomination by President Reagan. A more charitable interpretation of his approval of *Brown*'s activism is that it fits within his belief that the fourteenth amendment was designed "to complete the emancipation of the Negro" (p. 193), although it takes something of a liberal, contemporary approach to reach that activist result.

tion probably is too reductionist to capture the full range of qualities and values that should be considered even in a utilitarian, cost-benefit analysis. Whatever the reason, Posner's analysis does not adequately justify his normative prescriptions.

Posner may be insufficiently aware of his own ideology and its effect on his social science analysis. For one who has sought to distinguish the positive and normative aspects of economic analysis,[54] and who previously has been criticized for failing to do so,[55] that conclusion might seem surprising. But the lack of self-consciousness about choices to be made pervades the book—choices between quality and quantity, restraint and activism, responsiveness to past and present majorities, and the public interest and political compromises. Posner may have a significant blind spot rather than a deliberate plan to ignore what he knows to be major difficulties with his analysis. After all, blind spots are often covered by ideology.

Posner's ideology focuses on two dominant values—the overarching worth of economic analysis of law, and the propriety of a limited role for the federal courts. Despite Posner's evident belief that the normative priority of these values can be demonstrated, it is tempting to describe them as articles of faith because they seem to guide his analysis rather than derive from it. Were the two tenets inherently linked, it would at least be easier to understand the jumps from positive to normative analysis, but a confined judicial role is simply not a necessary outgrowth of economic analysis.[56] Posner sometimes separates the two values as, for example, when he argues that structural restraint is a contingent, time-and-place-bound value. At other times he conflates them, as with his prescriptions

54. *See* Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113 (1981); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEG. STUD. 103 (1979).

55. *See* Priest, *The New Scientism in Legal Scholarship: A Comment on Clark and Posner*, 90 YALE L.J. 1284, 1291 (1981).

56. Judge Easterbrook who, like Posner, is a believer in both economic analysis and a limited version of the federal judicial role, recently clarified *his* understanding that the two beliefs are not inherently linked. His *Foreword* extolling the virtues of having judges who appreciate the economic effects of their decisions, *see supra* note 40, led Professor Tribe to respond that Easterbrook's economic emphasis too narrowly confined the judicial role in constitutional adjudication. *See supra* note 19. Easterbrook replied that the "difference between us is not so much about the role of economics in judging as it is about the role of judges in society." Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622, 627 (1985).

The works of Bruce Ackerman, Frank Michelman, and Guido Calabresi make clear that not all who find virtue in economic analysis are led to believe in judicial modesty. *See, e.g.*, B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984); Michelman, *Reflections on Professional Education, Legal Scholarship, and the Law-and-Economics Movement*, 33 J. LEGAL EDUC. 197 (1983); Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). *Compare* G. CALABRESI, THE COSTS OF ACCIDENTS (1970) *and* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972), *with* CALABRESI, *supra* note 42.

for statutory and constitutional interpretation. This renders the analysis more confusing and more vulnerable than Posner appears to appreciate.

In fact, the idea that restraint is a contingent good is fundamentally inconsistent with the idea that a limited interpretive role for the federal courts is not contingent. Posner finds no inconsistency between approving the activism of John Marshall's Court and the restraint of the Burger Court, because the "historical situation" is a relevant factor (p. 211). What, then, of the Warren Court's activism? And how do we know that activism or restraint, or a limited or more expansive interpretive role, is right for the times?

The changes that occurred during Posner's chosen period of analysis, from 1960 to 1983, included much more than caseload growth. As Posner well recognizes, they included a legal revolution characterized by an expansion of federal rights, in significant part prompted by the federal courts. Moreover, the time period he uses, although it shows a steady growth of federal court business, encompasses both a Court that took an activist, expansive view of federal court power and a Court that has reemphasized the structural restraint values that Posner commends. If the scope of the federal judicial role is historically contingent, so should be the economic or social science analysis—at least in its normative dimensions. The analysis and prescriptions surely cannot depend only on the size of the federal court docket, even if that is a major consideration. The assessment must be justified on the basis of the range of society's needs and on the basis of the contributions the federal courts can make to solving them, taking into account institutional limitations and the effects on other agencies of government.

This is a complex business and not easily reducible to even the most powerful theories, especially when the analyst's ideology and historical assessment are either omitted from the analysis or asserted in cursory and conclusory form. Judge Posner's many valuable but partial insights should be read together with *The Federal Courts*'s economic, social science, and ideological omissions before the political choices behind his recommendations are accepted.