

What Do Judges Maximize?

Public choice theory, a subfield of economics developed extensively over the past sixty years, has sought—in the words of its foremost developer, James Buchanan—to take the romance out of the study of politics and government action.

For a long time, a public-interest theory had held sway among scholars and students of political science. In this perspective, people in the general public respond to ordinary economic incentives and seek ordinary, personal economic goals. Thus, for example, consumers seek to maximize their consumer satisfaction, or “utility,” from the consumption of normal goods and services, and they are constrained by their incomes and by the prices of goods on the market. Producers seek to maximize their wealth—the market valuation of their firms—and they are constrained by technology, the costs of inputs, and the competition of other sellers. And so forth for other private economic actors. But once a person leaves the private sector and takes up a position in the government, he is transformed from a utility or wealth maximizer into a public-spirited actor who seeks to do whatever serves the general public interest best. This idea is so *prima facie* preposterous and counterfactual that one wonders how anyone ever embraced it sincerely, but many people, even scholars, seem to have done so—indeed, many still appear to do so today.

Public choice analysts proposed that this theory ignores the universality of human motives. People do not become transformed from ordinary, money-grubbing actors into angels merely by entering the government. Indeed, even if they sought to do so, they could not; it would be impossible, for example, for any one of them even to know what “the public interest” consists in. Competing ideologies define the concept quite differently, and general agreement is impossible to attain even on matters so seemingly incontestable as a preference for peace rather than war. Public choice analysts proceed on the assumption that no transformation occurs when people leave the private sector and enter the government; they are as motivated by private, personal interests as they were before, and they act accordingly, though now subject to a different set of constraints.

So, public choice analysts developed models of voters, elected officials, and bureaucrats. In these models, voters seek maximum transfers of income via government redistribution, either by direct monetary transfers or by indirect transfers resulting from regulations, subsidies, tariffs, and the way in which the government spends its funds. Elected officials seek reelection. Bureaucrats seek to maximize the budgets, personnel, and discretion placed at their disposal.

Public choice analysts did not develop a standard way of analyzing the actions of judges. For the most part, judges were simply ignored. Of course, if the judges were elected, they could be analyzed in the same way as any other elected officials, but in regard to

appointed judges, especially those appointed for life terms, as the justices of the U.S. Supreme Court are, public choice had little to say.

I spent some time thinking about this matter. In my own study of the growth of government, I paid considerable attention to the decisions of the U.S. Supreme Court, regarding it as an essential element of the story. I read many histories of the court and of particular justices, and I read many court decisions—which, by the way, are among the most intellectually contemptible works that purport to be sound, sophisticated argumentation—and I weaved the courts' history into my overall account of how the U.S. government grew from the late nineteenth century onward. I continued to ponder the question, What do judges maximize?

Thirty years ago, I was invited to present a paper at a small conference held in Barbados on the U.S. and Caribbean countries' constitutions. The conference was a delightful occasion, given the participation of leading judicial officials from the newly independent, former British colonies of the region. I found these men highly educated, articulate—most had been trained in London—but warm, friendly, and outgoing as people tend to be in the Caribbean. So I had a splendid time during the several days I spent with them, at social occasions and meals as well as in the conference sessions. And I took advantage of the fact that two American judges were on the program there, too. One was a judge of the California Supreme Court and the other a judge at the federal court at Philadelphia.

Over dinner one evening, I put the question to them directly: what do judges maximize? I explained how in public choice analysis it is presumed that elected officials seek re-election, voters seek income transfers, and bureaucrats seek funds, staff, and discretion. So, as a general working assumption, what should we assume judges seek?

The California judge was reluctant, or so it seemed to me, to give me a forthright answer. He answered that judges seek to do justice. This answer struck me as too much like something lifted from a public school civics textbook. Judges are human beings with beliefs, desires, and ideologies just the same as those of people in the private sector. Do they suddenly become dispassionate, angelic seekers of impartial, clearly defined justice the minute they sit behind the judicial bench? Not likely, it seems to me.

The federal judge, however, gave me what seemed a more forthright and thoughtful answer. He explained that people want to be judges in order to move the world in certain directions; they know that judges have extraordinary power to do so, especially when they make constitutional decisions about the scope and limits of government power. In effect, this judge was confirming a conclusion I had reached from my own study of the U.S. Supreme Court during the preceding years of the 1980s. (On these findings, see the historical chapters of my book *Crisis and Leviathan*, originally published in 1987.) In a sense, judges of constitutional courts are ideologues in chief or, as it were, the

government's chief ideologues, because they need not seek reelection nor can they do much to feather their own material nests by deciding one way or another. They are almost unique in the government's apparatus in their degrees of freedom and unconstrained power. (At the same time, however, we must recognize that in national emergencies, particularly during wars, the judges are likely to step aside, deferring to the executive branch of the government. I describe a number of such incidents in my *Crisis* book.)

In a formula, we might conclude that constitutional judges seek to maximize their control over the rate and direction of socio-political change. In so doing, they of course act as their ideologies impel them, because their ideologies tell them how the world works, how it ought to work, and how the government might be employed to move it in a better or worse direction. They continue to live in the political world; they mingle with other leading figures in the government; they read the news; they are not immune to how their decisions are received by other governing officials and the general public. It is a useful myth that they seek justice, but justice is never well defined except within the framework of an ideology. Judges, therefore, illustrate perhaps as well as anything, the power of ideological convictions in shaping political, social, and economic life.