


5-29-2018

Court Capture

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Recommended Citation

J. J. Anderson, *Court Capture*, 59 B.C.L. Rev. 1543 (2018), <http://lawdigitalcommons.bc.edu/bclr/vol59/iss5/2>

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COURT CAPTURE

J. JONAS ANDERSON*

Abstract: Capture—the notion that a federal agency can become controlled by the industry the agency is supposed to be regulating—is a fundamental concern for administrative law scholars. Surprisingly, however, no thorough treatment of how capture theory applies to the federal judiciary has been done. The few scholars who have attempted to apply the insights of capture theory to federal courts have generally concluded that the federal courts are insulated from capture concerns.

This Article challenges the notion that the federal courts cannot be captured. It makes two primary arguments. As an initial matter, this Article makes the theoretical case that federal courts *can* be captured. Expanding upon the regulatory capture literature and what literature exists about the capture of courts, this Article demonstrates that the institutional safeguards often thought to shield judges from special interest influence (including political independence, lifetime tenure, and general jurisdiction) may, in some cases, break down, leaving courts exposed to capture in much the same way as agencies.

Then, this Article turns to the application of the theoretical argument. It focuses on the U.S. District Court for the Eastern District of Texas, the district that until recently received the most patent cases of any district court in the country. The Eastern District of Texas exhibits many classic signs of capture, including a revolving door between the federal bench and law firms, the region's economic dependence on litigation, and a mutually beneficial relationship between the plaintiffs' bar and the Eastern District judges. In conclusion, this Article urges Congress to tighten venue requirements and to mandate random assignment of judges. These proposals would better protect the U.S. federal courts from capture.

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* Associate Professor, American University Washington College of Law. I have many people that have helped to improve this Article including Paul Gugliuzza, Clark Asay, Nicholson Price, Rachel Sachs, Oren Bracha, Timothy Holbrook, Mark Lemley, Sean Seymore, Mark Janis, Dmitry Karshtedt, Kevin Collins, Kathy Strandberg, Craig Nard, Chris Cotropia, Mark Niles, Jenny Roberts, Ann Shalleck, Melissa Wasserman, Jake Linford, Jan Osei-Tutu, Jonathan Nash, and Christine Farley. I thank the organizers and participants of the 2016 Mid-Atlantic Patent Works-In-Progress, the 2017 Intellectual Property Scholars Conference, and the 2017 Junior Federal Courts Scholars Conference for helpful guidance. This Article also benefitted greatly from feedback received at faculty workshops at American University Washington College of Law, Vanderbilt University Law School, and Arizona State University College of Law. As always, thanks to my wife Jenn for all of her support.

INTRODUCTION

Capture is a concern of scholars studying the administrative state.¹ Traditionally, capture is thought to occur when an agency becomes too cozy with an industry that it regulates.² For example, capture might result from a revolving door between the industry and government, putting regulators in the awkward position of regulating a future or past employer.³ Or capture may occur when the government agency develops personal relationships with members of the industry such that the agency's regulatory decisions become suspect.⁴ Alternatively, capture can result from an agency being overwhelmed with information (usually provided by the regulated industries) such that the agency's ability to make informed decisions is compro-

¹ See, e.g., Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI-KENT L. REV. 1039, 1043 (1997) (“The principal pathology emphasized [by scholars] during these years was ‘capture,’ meaning that agencies were regarded as being uniquely susceptible to domination by the industry they were charged with regulating.”); see also Christopher Carrigan, *Captured by Disaster? Reinterpreting Regulatory Behavior in the Shadow of the Gulf Oil Spill*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 239, 239 (Daniel Carpenter & David A. Moss eds., 2013) (identifying capture as being partially responsible for the recent BP oil spill); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 167 (1990) (detailing the rise of “capture theory”); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) (proposing a supply and demand model for regulation). But see Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 215–16 (1976) (arguing that regulators who appear to have been “captured” may in fact simply be a result of efficient regulations which maximize profits and minimize prices).

² *Wood v. Gen. Motors Corp.*, 865 F.2d 395, 418 (1st Cir. 1988) (describing agency capture as the “undesirable scenario where the regulated industry gains influence over the regulators, and the regulators end up serving the interests of the industry, rather than the general public”). See generally Samuel P. Harrington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952) (discussing potential capture concerns with the interstate commerce commission); Bradford C. Mank, *Superfund Contractors and Agency Capture*, 2 N.Y.U. ENVTL. L.J. 34 (1993) (arguing that Superfund contractors have captured the Superfund program); Paul Rose & Christopher J. Walker, *Dodd-Frank Regulators, Cost-Benefit Analysis, and Agency Capture*, 66 STAN. L. REV. ONLINE 9, 12 (2013), <https://www.stanfordlawreview.org/online/dodd-frank-regulators-cost-benefit-analysis-and-agency-capture/> [<https://perma.cc/HEU4-E3CB>] (speculating that Dodd-Frank regulators are vulnerable to capture); Luigi Zingales, *Preventing Economists’ Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, *supra* note 1, at 124 (reviewing traditional capture stories).

³ See, e.g., LOUIS M. KOHLMEIER, *THE REGULATORS: WATCHDOG AGENCIES AND THE PUBLIC INTEREST* 49–54 (1969) (describing the behavior of employees going back and forth between federal agencies and industry jobs).

⁴ See, e.g., SIMON JOHNSON & JAMES KWAK, *13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL CRISIS* (2011) (employing “cultural capture” theory to explain the 2008 financial crisis).

mised.⁵ Regardless of how it occurs, capture is a major concern for scholars of administrative agencies.⁶

Yet legal scholars have not generally applied the theory of capture to federal courts.⁷ This lack of scholarship is somewhat understandable. After all, the judiciary has safeguards that protect judges from outside influence, safeguards that are not found in federal agencies.⁸ For example, judicial salaries are constitutionally protected and are not linked to approval of the executive or legislative branches.⁹ Agency employees enjoy no such guarantee.¹⁰ Moreover a judge's employment is not dependent on the approval of highly influential outsiders, like the President.¹¹ On the other hand, most agencies serve some other branch of government. Furthermore, judicial ethical rules limit the ability of an industry to exert influence over judges.¹² It

⁵ See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1329–34 (2010) (proposing the theory of “information capture”).

⁶ Administrative scholars have proposed numerous innovative solutions for recognizing and ferreting out capture. See generally Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (identifying five equalizing factors that are well-suited to address the problem of capture); Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q.J. ECON. 1089 (1991) (proposing an agency charged with searching for regulatory capture).

⁷ See, e.g., Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 827 (applying public choice theory to judges and concluding that the theory has little value with respect to judges because of institutional structures that constrain judges from becoming captured); Richard A. Posner, *Regulation (Agencies) Versus Litigation (Courts): An Analytical Framework*, in REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 11, 19–20 (Daniel P. Kessler ed., 2010) (stating that judges are “less likely” to be captured than agencies).

⁸ See, e.g., Epstein, *supra* note 7, at 844–45 (concluding that judges are restrained from misbehavior by “a powerful set of constraints”).

⁹ See Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1156 (1976) (recalling the colonial experience with judicial independence and stating that the constitutional guarantee of judicial salaries assured independence from the executive).

¹⁰ In fact, Congress recently enacted legislation that allows it to cut any federal employee's pay, not just individual government programs' overall budget. See Jenna Portnoy & Lisa Rein, *House Republicans Revive Obscure Rule That Allows Them to Slash the Pay of Individual Federal Workers to \$1*, WASH. POST (Jan. 5, 2017), https://www.washingtonpost.com/local/virginia-politics/house-republicans-revive-obscure-rule-that-could-allow-them-to-slash-the-pay-of-individual-federal-workers-to-1/2017/01/04/4e80c990-d2b2-11e6-945a-76f69a399dd5_story.html?utm_term=.104fa177955d [<https://perma.cc/SE7B-YDCF>].

¹¹ See Smith, *supra* note 9, at 1156 (recalling the colonial experience with judicial independence and stating that the constitutional guarantee of judicial salaries assured independence from the executive).

¹² See Roger E. Hartley, *“It’s Called Lunch”: Judicial Ethics and the Political and Legal Space for the Judiciary to “Lobby,”* 56 ARIZ. L. REV. 383, 399–400 (2014) (reciting the judicial code of conduct forbidding judges from engaging with lobbyists).

is largely for this reason—the institutional safeguards against capture of the judiciary—that court capture has been largely ignored by scholars.¹³

This Article argues that courts are *not* always protected from capture. It critiques the literature on court capture and demonstrates that the institutional safeguards thought to protect judges from capture by special interests do not always exist. In fact, when the institutional safeguards break down, federal courts are exposed to capture in much the same manner as are the federal agencies that they review.

But, to understand how court capture can occur, some definition of what court capture looks like is necessary. Extant literature on regulatory capture provides the proper framework for talking about court capture. This literature on regulatory capture can be divided into two separate, but related, strains. The first deals with the traditional capture threat: personal benefits.¹⁴ Here, regulators are influenced in their decision-making by the chance of personal gain, through bribes or future job opportunities offered by the regulated industry.¹⁵ Relatedly, regulators may be captured through threats from the regulated industry: the regulator's current job may be threatened, or her agency is faced with defunding if certain decisions are not made.¹⁶ This strain of capture literature has its roots in public choice theory, which envisions regulators as rational, profit-seeking individuals.¹⁷

¹³ See, e.g., Epstein, *supra* note 7, at 827 (applying public choice theory to judges and concluding that the theory has little value with respect to judges because of “institutional strengths” that constrain judges from becoming captured); Posner, *supra* note 7, at 19 (stating that judges are “less likely” to be captured than agencies).

¹⁴ See Laffont & Tirole, *supra* note 6, at 1090–91 (arguing that interest groups have five primary means to influence government policy: bribes, future employment for government decision-makers, personal relationships with government workers, refraining from criticizing the government, and political contributions).

¹⁵ *Id.*; see also Barkow, *supra* note 6, at 46–47 (stating that the revolving door “is often cited as one of the reasons why the SEC failed” to police financial industries during the economic crisis); Jeffrey E. Cohen, *The Dynamics of the “Revolving Door” on the FCC*, 30 AM. J. POL. SCI. 689, 689–93 (1986) (discussing the evidence of revolving door capture at the FCC).

¹⁶ Various sources provide more detail on iron-triangle style capture. See Peltzman, *supra* note 1, at 215–16 (constructing early versions of iron-triangle capture); Stigler, *supra* note 1, at 3 (constructing early versions of iron-triangle capture); see also GORDON ADAMS, *THE POLITICS OF DEFENSE CONTRACTING: THE IRON TRIANGLE* 81 (1981). See generally LAWRENCE C. DODD & RICHARD L. SCHOTT, *CONGRESS AND THE ADMINISTRATIVE STATE* 103 (1979) (discussing the implications of the administrative state and iron-triangles); B. DAN WOOD & RICHARD W. WATKINS, *BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY* 18–28 (1994) (discussing empirical controversies in the clash between politics and bureaucracy and the principal-agent model of bureaucracy); Harrington, *supra* note 2 (discussing potential capture concerns with the interstate commerce commission).

¹⁷ See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285–86 (1988) (describing agency capture as an off-shoot of public choice theory).

The second strain of regulatory capture literature considers regulators to be driven by something other than their own pecuniary interests. This strain theorizes that capture is not always the result of regulators seeking personal benefits. Instead, capture may result from regulators making poor regulatory decisions because they lack good information about the consequences of those decisions.¹⁸ Because the regulator often must rely upon the regulated industry to provide the data necessary for effective decision-making, the regulator is at the mercy of the regulated industry.¹⁹ Similarly, personal relationships between industry and the agency have been theorized to lead to capture.²⁰ Although regulators may not consciously make decisions that a particular industry desires, they can nevertheless be captured because their social acquaintances are from, or at least support, the industry.²¹

So how does this literature apply to the federal courts? Scholars generally assume that there are two primary institutional safeguards protecting federal courts from capture: political independence and the generalized jurisdiction of the federal judiciary.²² Political independence of the judiciary is thought to protect judges from capture because judges are not directly responsive to the President or Congress, and therefore are far more difficult to capture than employees of federal agencies.²³ By lobbying and funding the election campaigns of Congressman and the President, special interests can gain influence over the funding of agencies.²⁴ Judges, however, are not elected and therefore operate independently of outside influence.²⁵

But judicial independence does not eliminate all forms of capture. Just because judges are politically independent of the other branches of govern-

¹⁸ See Wagner, *supra* note 5, at 1321–22 (describing “information capture” as interest groups overwhelming the administrative system with complex information which leads to decision-making processes occurring in the dark).

¹⁹ See *id.*

²⁰ See, e.g., JOHNSON & KWAK, *supra* note 4 at 163–75 (using “cultural capture” theory to partially explain the 2008 financial crisis).

²¹ See *id.*

²² There is little robust commentary about the place of capture on federal courts. The most thorough treatments, without exception, conclude that the federal courts are in little danger of being captured. See, e.g., Epstein, *supra* note 7, at 827 (applying public choice theory to judges and concluding that the theory has little value with respect to judges because of “institutional constraints” that prevent judges from becoming captured); Posner, *supra* note 7, at 19–20 (stating that judges unlikely to be captured).

²³ See *infra* notes 220–250 and accompanying text (discussing the evidence of court capture); see also Posner, *supra* note 7, at 20 (“Federal judges have . . . far more autonomy (in particular, insulation from political and interest-group pressures) than regulators, and . . . [this] advantage[] result[s] in a higher average quality of judicial than of regulatory appointees.”).

²⁴ See Stigler, *supra* note 1, at 3 (making the case that agencies may be captured because of pressure from elected officials).

²⁵ Posner, *supra* note 7, at 20–21.

ment does not mean that they will not fall prey to other forms of capture that scholars have identified, including information capture, cultural capture, and revolving door capture.²⁶ Judicial independence merely guarantees that a court cannot be captured through another branch of government; it does nothing to protect judges from direct special interests influence. Thus, judicial independence provides some protection against some forms of capture, but it does not prevent court capture generally.

Life tenure, another aspect of judicial independence, is also thought to protect judges from capture.²⁷ Federal judges are appointed for life, thereby presumably closing any revolving door between industry and the courts.²⁸ Judges are paid the same amount regardless of expertise, speed, or outcome so, it is thought, there is little financial incentive to skew decisions in favor of one industry.²⁹ Life tenure is also supposed to shelter federal judges from the political whims of the time.³⁰ Furthermore, ethical limitations insulate the judiciary from accepting gifts from lobbyists or other interested parties.³¹

The position of federal judge, however, is not the lifetime calling it once was. Federal judges receive life tenure, but more and more judges are retiring early from the bench.³² In fact, many federal judges retire to enter into the more financially lucrative world of law firms or mediation.³³ This means that instead of embarking on a lifetime of public service once they ascend to the bench, some judges are serving the public for a time before entering the corporate world.³⁴ This raises concerns about revolving door capture. Judges might be biased (consciously or otherwise) toward a prospective future employer.

Scholars have theorized that the generalized nature of judging makes the federal judiciary a far less appealing target for special interest than

²⁶ See *infra* notes 152–175 and accompanying text.

²⁷ See *infra* notes 177–194 and accompanying text.

²⁸ Epstein, *supra* note 7, at 833–35; see Posner, *supra* note 7, at 19–20 (asserting that life tenure for judges makes them superior to agency personnel who do not have guaranteed permanent employment).

²⁹ See Epstein, *supra* note 7, at 836 (“Judges are cut off from the usual sources of market and political gain. Their behavior should reflect their relative isolation, even under the self-interest hypothesis.”).

³⁰ *Id.* at 834 (“[J]udges are insulated from the more obvious demands of the political process . . .”).

³¹ *Id.* (stating that it is clear that judges cannot “practice law, work for business corporations, or lobby Congress”) (citations omitted). For an argument that federal judges do in fact lobby Congress, see generally J. Jonas Anderson, *Judicial Lobbying*, 91 WASH. L. REV. 401 (2016).

³² Albert Yoon, *Love’s Labor’s Lost? Judicial Tenure Among Federal Court Judges: 1945–2000*, 91 CALIF. L. REV. 1029, 1049 n.72 (2003).

³³ See *infra* notes 220–250 and accompanying text.

³⁴ See *infra* notes 220–250 and accompanying text.

agencies.³⁵ Because cases can theoretically be filed in any of the ninety-four federal district courts across the country, the value of capturing one district court is far less valuable than capturing the one agency in charge of regulating an industry.³⁶ This argument is less about judges being protected from capture and more about judges being less inviting to those interested in capture. By allowing many courts to hear many cases, general jurisdiction protects judges from capture by making judges unappealing as capture targets.

Despite this “capture protection” offered by general jurisdiction, specialization among federal judges is increasing.³⁷ Judicial capture has been a concern for scholars of specialized courts, who see it as one of the downsides of creating courts that hear specialized cases.³⁸ Even for generalist federal courts, specialization is on the rise. Many federal courts have recently begun to compete for particular types of cases.³⁹ They have done this in a variety of ways, but perhaps the most successful way is by leaving the litigant the option of choosing the judge who will preside over the case. This

³⁵ See Eric Helland & Jonathan Klick, *Why Aren't Regulation and Litigation Substitutes? An Examination of the Capture Hypothesis*, in REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 231–32 (Cary Coglianese ed., 2012) (stating that the odds of capturing all judges who could hear a particular case makes judicial capture, at first glance, undesirable). As opposed to the general jurisdiction of most of the federal judiciary, courts with specialized dockets have been scrutinized for capture. See, e.g., ROBERT L. HARMON, PATENTS AND THE FEDERAL CIRCUIT 684–740 (3d ed. 1994); Ian Ayres & Paul Klemperer, *Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non-Injunctive Remedies*, 97 MICH. L. REV. 985, 1024 & nn.99–100 (1999) (noting that the Federal Circuit is more “pro-patent” than its predecessor courts); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 17–20, 25–26 (1989) (describing Federal Circuit’s sensitivity to patent policy and resulting pro-patent owner stance in substantive issues as well as improved availability of remedies and preliminary injunctive relief); Lawrence G. Kastriner, *The Revival of Confidence in the Patent System*, 73 J. PAT. & TRADE-MARK OFF. SOC’Y 5, 13 (1991); Allan N. Littman, *Restoring the Balance of Our Patent System*, 37 IDEA 545, 545 (1997) (noting that the Federal Circuit is overwhelmingly pro-patent); Allan N. Littman, *The Jury’s Role in Determining Key Issues in Patent Cases: Markman, Hilton Davis, and Beyond*, 37 IDEA 207, 209 (1997) (“Patent lawyers have perceived both juries and the Federal Circuit to be pro-patent.”) (citations omitted); Robert P. Merges, *Commercial Success and Patent Standards: Economic Perspectives on Innovation*, 76 CALIF. L. REV. 803, 822 (1988) (noting the Federal Circuit’s pro-patent reputation).

³⁶ See *supra* note 35 and accompanying text.

³⁷ See *infra* notes 176–193 and accompanying text.

³⁸ See generally LAWRENCE BAUM, SPECIALIZING THE COURTS (2011) (explaining that courts have become increasingly specialized and that this specialization has led to changes in judicial policy).

³⁹ See J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 667 (2015) [hereinafter Anderson, *Court Competition*] (describing how courts can effectively “compete” for cases); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 255–60 (2016) (theorizing that courts can offer their forums to plaintiffs). See generally J. Jonas Anderson, *Judge Shopping in the Eastern District of Texas*, 48 LOY. U. CHI. L.J. 539 (2016) (describing how the Eastern District of Texas has become the center of patent cases via “judge shopping”).

phenomenon of “court competition” for cases may, in some cases, create particularly appealing targets for capture, even amongst the generalized federal courts.⁴⁰

The second contribution of this Article to the capture literature will be to apply the theory of court capture to modern day courts. In doing so, this Article focuses on the United States District Court for the Eastern District of Texas. The Eastern District of Texas has become a hotbed of patent litigation, receiving over one-third of the patent cases filed in the United States in 2015.⁴¹ But there are some indications that the court has been captured by special interests. A proverbial revolving door has developed between the federal bench and local patent law firms, raising concerns about the influence of those firms on future decisions of the court. Furthermore, East Texas benefits economically from the influx of patent litigation coming to its courthouses. Such benefits have cultural capture implications for the court.

The story of the Eastern District of Texas sheds light on the largest difference between regulatory capture and court capture. Court capture differs from agency capture in who is doing the capturing: in agency capture it is the regulated industries, whereas in court capture it is the litigation industry, and, more specifically plaintiff attorneys.⁴² These attorneys, much like industry in regulatory capture, seek favorable judgments and predictable procedures from certain courts or judges.⁴³

Although the specter of court capture likely cannot be eliminated, there are some common-sense approaches that would reduce the special interest influence on courts such as the Eastern District of Texas. The most obvious approach would be to tighten venue rules in federal court. Strengthening venue requirements limits courts’ ability to attract particular cases to their courtrooms. This limited ability to attract cases also makes courts far less appealing as targets of capture.⁴⁴ The Supreme Court’s recent decision in *TC Heartland v. Kraft Food Brand Groups* is a positive step in this direction, although Congress should do more to limit venue where court are competing for cases.

This Article also proposes mandatory random case assignment for every federal court. This will force courts to assign every case randomly and

⁴⁰ See, e.g., Anderson, *Court Competition*, *supra* note 39, at 667.

⁴¹ Kaleigh Rogers, *The Small Town Judge Who Sees a Quarter of the Nation’s Patent Cases*, MOTHERBOARD (May 5, 2016), https://motherboard.vice.com/en_us/article/the-small-town-judge-who-sees-a-quarter-of-the-nations-patent-cases [<https://perma.cc/22TQ-Q9PK>].

⁴² See Dreyfuss, *supra* note 35, at 3 (summarizing arguments about the potential for specialized courts to be captured “by the bar that regularly practices before them”).

⁴³ *Id.*

⁴⁴ See Anderson, *Court Competition*, *supra* note 39 at 637 (proposing restricting venue as a way to reduce court competition).

eliminate the judge shopping, which is yet another way districts compete for cases. Successfully attracting cases to a district is likely also attract capturers. Fundamentally, these suggested changes have a common purpose: they seek to strengthen the traditional judicial checks against capture.⁴⁵

Part I of this Article reviews the literature about regulatory capture. Then, it introduces the theory of court capture and discusses why the same forces that enable regulatory capture can work on courts. Part II turns to application of the theory, focusing on the recent rise of the Eastern District of Texas as a patent litigation hotbed. Part III concludes by offering suggestions for policymakers about institutional ways to better insulate courts from capture.

I. CAPTURE OF AGENCIES/CAPTURE OF COURTS

Scholars have long been fascinated with the prospect of regulatory capture, yet literature on the capture of federal courts is virtually nonexistent.⁴⁶ Why have scholars devoted so much time and energy to studying the capture of federal agencies but ignored the same phenomenon within the federal judiciary? At first glance the answer is easy: capture occurs in federal agencies, not in federal courts. There is some support for this viewpoint.⁴⁷

This Article calls into question that common presumption and asks two unexplored questions about court capture. First, does the theory of regulatory capture apply to the federal courts? Second, has this theoretical court capture ever occurred? This Article answers both questions in the affirmative.

A. *The Theory of Regulatory Capture*

Regulatory capture is a branch of collective action theory.⁴⁸ In the market for government regulation, small, motivated groups have distinct advantages over larger, but less enthusiastic, groups. Small groups of interested individuals can easily motivate their members to vocally support leg-

⁴⁵ Posner, *supra* note 7, at 19–20; Matthew L. Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts*, 88 YALE L.J. 717, 764 (1979) (“Public choice theory can be used to probe the mechanics of adjudication . . .”).

⁴⁶ For an example of the voluminous literature on regulatory capture, see generally Stigler, *supra* note 1 (proposing a supply and demand model for regulation). On the lack of a similarly voluminous literature about the prospect of court capture, see generally Epstein, *supra* note 7.

⁴⁷ See *supra* note 7 and accompanying text.

⁴⁸ For more on collective action theory, see generally Elinor Ostrom, *Collective Action Theory*, in THE OXFORD HANDBOOK OF COMPARATIVE POLITICS 186 (Charles Boix & Susan C. Stokes eds., 2007).

islative change.⁴⁹ Large groups, on the other hand, encounter a free-rider problem: each member of the group benefits from successful collective action, regardless of the individual contribution of each member.⁵⁰ Thus, each member of a large group has little incentive to participate because the cost of action is high and provides little benefit to the overall success of the group.⁵¹ Therefore, “[t]here is a systematic tendency for exploitation of the great by the small.”⁵² Special interests can outbid larger groups for regulation, even though the special interests’ desires might run counter to the interests of society as a whole.

To use a simplified example, the vast majority of Americans may desire railroads that employ the latest safety devices. The big railroad companies may have precisely the opposite preference because such safety devices may be very expensive and increase their costs of operation. In the end, the railroad companies may win, not because they have greater support from the public, but because the railroad industry is more motivated to quash any legislation mandating new safety devices than the general public is motivated to push for safety device legislation. This may be true, even though the number of people that prefer the safety devices far outnumbers those who do not want them and the societal benefits (the value of improved safety devices to society) may far outweigh the cost of implementing the new devices.

Most of the regulations in the United States are issued not by Congress but by the numerous federal regulatory agencies that are responsible for administering the laws that Congress passes.⁵³ An industry often may find that a particular agency’s rules or regulations affect the industry to a greater degree than the laws passed by Congress.⁵⁴ Those affected industries may seek to influence that agency’s decision-making.⁵⁵ At times, this influence may cross over into “capture” where the agency is actually controlled by those it is meant to regulate.⁵⁶

⁴⁹ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 22–36 (1965) (arguing that small groups have a competitive advantage over large groups in the search for advantageous regulations); Stigler, *supra* note 1, at 3; John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 724–25 (1986).

⁵⁰ See Ostrom, *supra* note 48, at 188 (stating that in large groups, participants that are “free riding will not be noticed and thus it will not affect the likelihood that the good will be provided”).

⁵¹ *Id.*

⁵² OLSON, *supra* note 49, at 29.

⁵³ See STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 6–9 (1979) (outlining the law-making role of administrative agencies).

⁵⁴ *See id.*

⁵⁵ See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 766–67 (1983).

⁵⁶ See Merrill, *supra* note 1, at 1043.

While capture is well-established as a concept, the term is difficult to pin down with a precise definition.⁵⁷ Broadly speaking, regulatory capture describes the situation where regulators have been co-opted by organized interest groups to adopt policies that run contrary to the public interest.⁵⁸ Some scholars dedicated to this area of law have defined regulatory capture as “the results or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself.”⁵⁹

Of course, this definition begs for further clarification. How does one define the “public interest”? Does the industry include other actors who are aligned with the industry’s interests such as trade groups or lobbyists? How does one distinguish between capture and other (seemingly) proper forms of democratic decision-making? These questions and others have occupied administrative scholars for the past fifty years.⁶⁰ This Article’s goal is not to wade into these long-standing debates, but instead this Article presumes the existence of capture as a phenomenon and seeks to apply the insights from fifty years of administrative scholarship to the federal courts.⁶¹

⁵⁷ Daniel Carpenter & David A. Moss, *Introduction*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, *supra* note 1, at 1, 13 (“Many of capture theory’s problems boil down to the lack of a clear definition for the central concept.”). Perhaps this definitional problem is the result of the multitude of ways in which capture is thought to occur. See KAY L. SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 341 (1986) (“Just as there is no single theory of the origins of regulatory capture, there is no single explanation of how capture is perpetuated.”). Regardless, the theory of regulatory capture has played a major and influential role in administrative law literature. See Lawrence G. Baxter, “Capture” in *Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL’Y 175, 175–76 (2011) (describing the wide-scale acceptance of capture theory).

⁵⁸ Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1343 (2013) (“Agency capture is a special case, where regulators within the bureaucracy have been influenced by organized special-interest groups to adopt policies that are out of line with the broad public interest.”).

⁵⁹ Carpenter & Moss, *supra* note 57, at 13.

⁶⁰ See, e.g., Louis L. Jaffe, *The Federal Regulatory Agencies in Perspective: Administrative Limitations in a Political Setting*, 11 B.C. INDUS. & COM. L. REV. 565, 565 (1970).

⁶¹ On this point (whether capture is a real phenomenon), an overwhelming majority of scholars agree that it is. See, e.g., Nicholas Bagley, *Agency Hygiene*, 89 TEX. L. REV. 1, 14 (2010) (suggesting a body within the white house to monitor for capture), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1574&context=articles>; Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL’Y 203, 206–210 (2006) (reviewing the broad regulatory capture literature in economics); Daniel C. Hardy, *Regulatory Capture in Banking* (Int’l Monetary Fund, Working Paper No. 06/34, Jan. 2006) (reviewing the literature on regulatory capture of financial agencies). *But see* William D. Berry, *An Alternative to the Capture Theory of Regulation: The Case of State Public Utility Commissions*, 28 AM. J. POL. SCI. 524, 524–25 (1984) (challenging the capture theory of regulation and reviewing other literature that raise similar challenges); Paul Sabatier, *Social Movements and Regulatory Agencies: Toward a More Adequate—and Less Pessimistic—Theory of “Clientele Capture,”* 6 POL’Y SCIS. 301, 325–26 (1975)

1. How Regulatory Capture Occurs

Regulatory capture occurs when a regulator's objectivity has been compromised by a close relationship between the regulator and the regulated or the financial situation of the regulator in relation to the regulated. While capture can occur through corruption, it can also happen in less obvious ways, such as when a regulator receives a job offer from a company which he or she regulates, or through a "revolving door" between the agency and the regulated industry.⁶² Agencies, however, are also subject to other forms of capture. When an interest group is the sole possessor of information necessary to an agency, the interest group can capture the industry by revealing only that information that is favorable to industry.⁶³ Cultural capture, where the informal influence of an industry along with the interpersonal relationships among agency employees, is a more amorphous type of capture but likely greatly influences regulators.⁶⁴ This subsection will briefly describe the types of regulatory capture that have been identified by scholars, before applying the literature to courts.

a. Classic Forms of Capture: Bribes, Jobs, and Campaign Contributions

Capture can occur either as a result of overly cozy relationships between the regulator and the regulated, or financial entanglements that compromise a regulator's objectivity.⁶⁵ There are numerous ways in which a

(arguing that agency actors are not passive and can avoid the pressures of capture by "disseminating technical information and encouraging input" from interested stakeholders).

⁶² See Baxter, *supra* note 57, at 197 (describing the revolving door as "unavoidable" and "desirable"); Dror Etzion & Gerald F. Davis, *Revolving Doors? A Network Analysis of Corporate Officers and U.S. Government Officials*, 17 J. MGMT. INQUIRY 157, 158–60 (2008) (analyzing staffing in the G.W. Bush and Clinton presidencies and finding a high rate of turnover).

⁶³ See Wagner, *supra* note 5, at 1321 (describing "information capture" as interest groups overwhelming the administrative system with complex information which leads to decision-making processes occurring in the dark).

⁶⁴ See James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, *supra* note 1, at 71, 76–77 (analyzing the debate about whether cultural capture theory is "a critique or an offshoot of capture theory").

⁶⁵ For an overview of this expansive literature, see generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991) (analyzing public choice theory and its possible applications); Barkow, *supra* note 6 (identifying five equalizing factors that are well-suited to address the problem of capture); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991) (analyzing proposals for more intrusive judicial review based on the theory that judges will act in their own self-interest); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123 (1989) (analyzing public choice doctrine in public law); Geoffrey P. Miller & Gerald Rosenfeld, *Intellectual Hazard: How Conceptual Biases in Complex Organizations Contributed to the Crisis of 2008*,

federal agency can fall under the influence of a regulated industry.⁶⁶ The first and the most obvious way involves the industry achieving favorable regulations via gifts or bribes to the employees of the agency.⁶⁷ Fortunately, such actions are rare.⁶⁸ Nevertheless, they represent perhaps the clearest example of the influence that the regulated industry can have on the regulator (the agency).

A modern example of this “you-scratch-my-back” arrangement is that of the Minerals Management Service (MMS), a now-defunct agency of the Department of the Interior charged with supervising off-shore drilling activities.⁶⁹ In two investigations by the Department of the Interior Office of Inspector General, MMS was found to have accepted bribes and excessive gifts from representatives of a drilling company.⁷⁰ Furthermore, agency employees engaged in sexual conduct and drug use with their industry counterparts.⁷¹ Also, an agency employee inquired about the possibility of obtaining a job at a private company while simultaneously making regulatory decisions about that company. This action appears to have compromised the agency employee’s willingness to cite the company for non-compliance.⁷² The actions of MMS employees were scrutinized after the 2010 Deepwater Horizon oil spill killed eleven people and resulted in pouring 210 million

33 HARV. J. L. & PUB. POL’Y 807 (2010) (analyzing intellectual hazard in the 2008 financial crisis and offering solutions to address the risk going forward).

⁶⁶ See SCHLOZMAN & TIERNEY, *supra* note 57, at 341 (“Just as there is no single theory of the origins of regulatory capture, there is no single explanation of how capture is perpetuated.”).

⁶⁷ See Laffont & Tirole, *supra* note 6, at 1090–91 (arguing that interest groups have five primary means to influence government policy: bribes, future employment for government decision-makers, personal relationships with government workers, refraining from criticizing the government, and political contributions); Daniel Schwartz, *Preventing Capture Through Consumer Empowerment Programs: Some Evidence from Insurance Regulation*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, *supra* note 1, at 365, 365–66 (listing bribes, promises of future employment, and political contributions as potential means of capture).

⁶⁸ Schwartz, *supra* note 67, at 365 (“[M]onetary bribes are feasible, although not common.”).

⁶⁹ U.S. DEP’T OF THE INTERIOR, MINERALS MGMT. SERV., BUDGET JUSTIFICATION AND PERFORMANCE INFORMATION: FISCAL YEAR 2011, at 3 (2010), <https://www.boem.gov/uploadedFiles/2011BudgetJustification.pdf> [<https://perma.cc/F6V4-RUD5>].

⁷⁰ See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF THE INTERIOR, INVESTIGATIVE REPORT: MMS OIL MARKETING GROUP – LAKEWOOD 5–8 (2008), <https://www.doiig.gov/sites/doiig.gov/files/RIKinvestigation.pdf> [<https://perma.cc/GAL6-WJPU>].

⁷¹ See *id.* at 7 (“During the course of our investigation, we learned that some RIK employees frequently consumed alcohol at industry functions, had used cocaine and marijuana, and had sexual relations with oil and gas company representatives.”).

⁷² See *id.* at 9–16 (summarizing an investigation into the gifts provided by the oil industry to an MMS employee, and that employee’s assistance in correcting a mistake made by a Chevron employee that “could have cost [him] his job”).

gallons of oil into the Gulf of Mexico.⁷³ Media outlets, including the New York Times and Washington Post, cited to the story as an example of capture: the agency's "cozy ties to industry" led to a regulatory failure.⁷⁴

But there are less corrupt ways that capture can occur.⁷⁵ Capture can occur when the individual regulator is hoping for a job or receives a job from a company that she is simultaneously regulating.⁷⁶ The industry provides regulators with something that regulators desire (high-paying jobs) in exchange for favorable regulations or lax enforcement of existing regulations.⁷⁷ The lure of future employment is well-documented in many industries.⁷⁸ Ronald J. Fox, the former Assistant Secretary of Defense, said that the "revolving door" affects supervisory decisions in defense procurement:

The availability of jobs in industry can have a subtle, but debilitating effect on an officer's performance during his tour of duty in a procurement management assignment. If he takes too strong a hand in controlling contractor activity, he might be damaging his opportunity for a second career following retirement. Positions are offered to officers who have demonstrated their appreciation for industry's particular problems and commitments.⁷⁹

Agency employees frequently rotate between government and industry.⁸⁰ When one administration takes over from another, one set of employees might enter government positions while another set might do the oppo-

⁷³ Campbell Robertson & Clifford Krauss, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, N.Y. TIMES (Aug. 2, 2010), <http://www.nytimes.com/2010/08/03/us/03spill.html> [<https://perma.cc/Q7SA-S3PH>].

⁷⁴ Juliet Eilperin & Scott Higham, *How the Minerals Management Service's Partnership with Industry Led to Failure*, WASH. POST (Aug. 24, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/24/AR2010082406754.html> [<https://perma.cc/4QY6-98SN>]; Ian Urbina, *Inspector General's Inquiry Faults Regulators*, N.Y. TIMES (May 24, 2010), <http://www.nytimes.com/2010/05/25/us/25mms.html>.

⁷⁵ See Laffont & Tirole, *supra* note 6, at 1090–91 (arguing that interest groups have five primary means to influence government policy: bribes, future employment for government decision-makers, personal relationships with government workers, refraining from criticizing the government, and political contributions).

⁷⁶ See, e.g., Dal Bó, *supra* note 61, at 205–12 (reviewing the broad regulatory capture literature in economics).

⁷⁷ See generally GEORGE J. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* (1975) (discussing this implication).

⁷⁸ See, e.g., Barkow, *supra* note 6, at 46–47 (stating that the revolving door "is often cited as one of the reasons why the SEC failed" to police financial industries during the economic crisis); Cohen, *supra* note 15, at 689–90 (discussing the evidence of revolving door capture at the FCC).

⁷⁹ ADAMS, *supra* note 16, at 82 (quoting J. Ronald Fox, the former Assistant Secretary of Defense).

⁸⁰ See, e.g., Etzion & Davis, *supra* note 62, at 158–60 (analyzing staffing in the G.W. Bush and Clinton presidencies and finding a high rate of turnover).

site. There is nothing inherently corrupt about this practice, and, in fact, it may benefit the public by having regulators with real knowledge of the industry they are regulating.⁸¹ But the allure of future employment can be enough to affect regulatory decisions, at least on the margins. Scholars and policy makers are conscious of the favoritism that may develop with regulators who will soon take jobs with the regulated industry.⁸²

Another species of capture concern revolves around congressional funding of agencies. Scholars of this form of capture study how Congress—which controls agency budgets—may become beholden to certain lobbyists or financial supporters who then exert their influence over particular agencies.⁸³ Because agencies depend on Congress for their funding, they may fall victim to the so-called “iron triangle,” in which interest groups, agencies, and Congress form stable, mutually beneficial partnerships.⁸⁴ Under this formulation of the capture story, capture may occur because congressional committees provide agencies with funding;⁸⁵ in exchange for receiving the budget that it requested, the agency must be responsive to policy demands from Congress;⁸⁶ and agencies may provide interest groups with favorable regulations in exchange for political support in Congress.⁸⁷ This three-way relationship (Congress-Agency-Interest Groups) forms the iron triangle. In this sense, the revolving door story is very much a part of the iron triangle story because the promise of future jobs is often what the industry provides to agency personnel.⁸⁸

The public is generally uninformed about the agency’s motives in issuing favorable regulations to industry because most regulations are technical, esoteric, and not of great interest to the majority of voters.⁸⁹ Because of voter disinterest, Congress’ ability to use its budgeting power to control

⁸¹ See Baxter, *supra* note 57, at 197 (describing the revolving door as “unavoidable” and “desirable”).

⁸² See *id.* at 197–98 (reviewing proposals from Congress and scholars to reduce the revolving door).

⁸³ See, e.g., Peltzman, *supra* note 1, at 215–16 (also constructing early versions of iron-triangle capture); Stigler, *supra* note 1, at 3 (constructing early versions of iron-triangle capture).

⁸⁴ Livermore & Revesz, *supra* note 58, at 1343; see also ADAMS, *supra* note 16, at 90; DODD & SCHOTT, *supra* note 16, at 103; WOOD & WATERMAN, *supra* note 16, at 18–28 (discussing empirical controversies in the clash between politics and bureaucracy and the principal-agent model of bureaucracy). See generally Harrington, *supra* note 2 (discussing potential capture concerns with the interstate commerce commission).

⁸⁵ See Livermore & Revesz, *supra* note 58, at 1343 (describing the iron triangle as a series of “stable, mutually beneficial alliances”).

⁸⁶ *Id.*

⁸⁷ See *id.* at 1344 (making the case that agencies provide regulations in exchange for “political support in Congress and perks such as postgovernment jobs”).

⁸⁸ *Id.*

⁸⁹ See *id.* at 1343–44.

agencies remains unchecked.⁹⁰ For the same reasons, the executive does not adequately supervise agencies that may have become captured via the iron triangle.⁹¹

Scholars have also discussed more subtle mechanisms for how interest groups influence agencies, including the control of information,⁹² manipulation of how questions are posed to agencies,⁹³ and thick, interlocking personal and professional networks that include both agency personnel and outsiders.⁹⁴

One of the best studied examples of iron triangle regulatory capture involves the Interstate Commerce Commission (ICC), a now defunct regulatory agency.⁹⁵ The ICC was created initially as an anti-railroad agency, meant to control what many viewed as excessive and unfair prices in the rail industry.⁹⁶ Instead of insuring competitive business practices, however, critics contend that the ICC was doing the bidding of the railroads, setting

⁹⁰ See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284–85 (2006) (describing the political branches as “attuned to the interests of those narrow interest groups”).

⁹¹ See *id.*

⁹² Bagley & Revesz, *supra* note 90, at 1285 (discussing the possibility that “the more one-sided th[e] information, support, and guidance, the more likely that agencies will act favorably toward the dominant interest group”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1685–86 (1975) (detailing explanations of industry orientation though control of information).

⁹³ Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 218 (2003) (discussing the “disproportionate and self-serving influence that the relatively powerful tend to exert” through informal control).

⁹⁴ See Kwak, *supra* note 64, at 76–81 (discussing subtle influence exerted over regulators’ frames of reference); see also Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 151 (2011) (“[A]t least some publicly important rules that emerge from the regulatory state may be influenced heavily by regulated parties, with little to no counterpressure from the public interest.”).

⁹⁵ See generally RICHARD D. STONE, *THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD INDUSTRY: A HISTORY OF REGULATORY POLICY* (1991).

⁹⁶ Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.) (mandating that all railroad services be provided for “a reasonable and just” charge). When the commission attempted to set maximum shipping rates, however, several railroads challenged the commission’s authority to regulate. The ensuing judicial decisions from those challenges severely curtailed the ICC’s powers. See *ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 167 U.S. 479, 511 (1897) (holding that the scope of an agency’s authority is determined by the agency’s organic statute, and the ICC’s organic statute does not (either implicitly or explicitly) include the power to set shipping rates). Because the Supreme Court found that the ICC lacked legislative authority to set rates, the early years of the ICC were uneventful. Soon, however, Congress authorized the ICC to set rates, thereby greatly increasing the power and value of the agency. See Safety Appliance Act of Mar. 2, 1893, ch. 196, 27 Stat. 531; Safety Appliance Act of March 2, 1903, ch. 976, 32 Stat. 943; Safety Appliance Act of April 14, 1910, ch. 160, 36 Stat. 298.

the shipping rates at levels that ensured new competitors were starved for cash.⁹⁷ The ICC started out as a means of controlling the powerful railroads, but soon turned into a tool of the railroad industry to enact policies that it favored.⁹⁸ Attorney General William Miller, in response to a request to disband the ICC from President Cleveland, said, “The Commission is . . . of great use to the railroads. It satisfies the popular clamor for a government supervision of the railroads, while at the same time that supervision is almost entirely nominal.”⁹⁹ The example of the ICC serves as a warning about the pitfalls of iron triangle capture.¹⁰⁰ When an agency fails to regulate an industry and instead serves to thwart competitors from entering, the agency is effectively worse than nothing: the preferable outcome for the public would be no regulation at all.

b. The New Regulatory Capture: Informational and Cultural Capture

A different version of the capture story motivates another group of scholars in administrative law. For these scholars, capture arises from the unique pathologies associated with the bureaucratic nature of federal agencies.¹⁰¹ Underfunded and overworked staff may simply not have sufficient resources to locate the facts needed to regulate properly, resulting in an overly-heavy reliance on industry to identify problematic practices.¹⁰² This group of scholars sees capture as an informational problem: agencies are captured when an interest group is the sole possessor of information that is necessary for the agency to make informed regulatory decisions.¹⁰³

⁹⁷ MILTON FREIDMAN, CAPITALISM AND FREEDOM: FORTIETH ANNIVERSARY EDITION 29 (2009) (“[T]he ICC, which started out as an agency to protect the public from exploitation by the railroads, has become an agency to protect railroads from competition by trucks and other means of transport . . .”).

⁹⁸ See DAVID D. FRIEDMAN, THE MACHINERY OF FREEDOM 41 (1989).

⁹⁹ Thomas Frank, *Politics Will Undermine Regulation Plan*, MARKETPLACE (June 18, 2009), <https://www.marketplace.org/2009/06/18/business/fallout-financial-crisis/politics-will-undermine-regulation-plan> [<https://perma.cc/J4MG-W8LB>].

¹⁰⁰ MILTON FRIEDMAN & ROSE D. FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 194 (1990).

¹⁰¹ See NEAL SHOVER ET AL., ENFORCEMENT OR NEGOTIATION: CONSTRUCTING A REGULATORY BUREAUCRACY 134–35 (1986) (listing lack of agency funds, lack of skilled experts, and congressionally mandated deadlines as encouraging capture).

¹⁰² See Wagner, *supra* note 5, at 1321 (describing “information capture” as interest groups overwhelming the administrative system with complex information which leads to decision-making processes occurring in the dark).

¹⁰³ See Livermore and Revesz, *supra* note 58, at 1372 (noting that disclosure requirements can lead to “information overload” at the agency); see also Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 398 (2010) (“[T]he president attempting to manage regulatory government looks

Additional versions of this informational asymmetry capture story arise with slightly varied facts. For example, some scholars describe the regulated industry as supplying an overwhelming amount of information, leaving regulators dependent on industry to supply relevant information.¹⁰⁴ Alternatively, some of the information that agencies need to make an informed regulatory decision may be shielded from public view, insulating both the industry and the agency from public oversight and criticism.¹⁰⁵

This version of capture as an informational problem is rooted in collective action concerns.¹⁰⁶ Information capture drives up participation costs for some groups, like those concerned with the public interest, while advantaging larger groups within the industry that control the information.¹⁰⁷ Some scholars have written about the various problems that can arise from information capture, including excessive, undigested facts at the agency level, discussions that take place at too high of a level, and discussions that delve into the minutiae of the regulatory decision.¹⁰⁸ To these scholars, the solution to information capture is the creation of “filters,” which allow the regulatory creation process to remain open to all interested parties.¹⁰⁹ In this way, decision-makers have the optimal quantity and quality of information.¹¹⁰ At the same time, these transfers of information would have to occur with public scrutiny if they were to be effective.¹¹¹

Although information capture leads to similar results as other types of capture, the mechanisms by which information capture occurs are quite distinct.¹¹² In classic versions of the capture story, the industry must seek mal-

out over a vast enterprise comprising a huge portfolio of economic, health, safety, and social issues . . .”).

¹⁰⁴ See Wagner, *supra* note 5, at 1321 (describing “information capture” as interest groups overwhelming the administrative system with complex information which leads to decision-making processes occurring in the dark).

¹⁰⁵ See, e.g., Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977, 977–78 (2014) (arguing that the U.S. Trade Representative is likely to be captured because it is exempt from the bulk of the Federal Advisory Committee Act).

¹⁰⁶ See generally STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* 29–52 (2008) (providing an overview of public choice concerns regarding collective action barriers).

¹⁰⁷ See Wagner, *supra* note 5, at 1334–35 (arguing that information costs “drive up the cost of participation and simultaneously lower the payoff, at least to public interest groups that will find it increasingly difficult to translate the issues into tangible public benefits”).

¹⁰⁸ *Id.* at 1335.

¹⁰⁹ *Id.* at 1419–22.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 1336.

leable agency employees who thereafter do the bidding of the industry.¹¹³ In contrast, information capture does not require that the agency employee be conscious of his or her capture. In the case of information capture, the regulator may be unable to locate the information required to make a decision that benefits the public. Information capture fits nicely within the traditional literature on capture because, as with other forms of capture, well-funded special interest groups have been able to control the regulatory process at the expense of the broader public.¹¹⁴

A more recent scholarly discussion focuses on cultural and behavioral forces as the cause of the capture phenomenon, as opposed to personal benefits or information.¹¹⁵ Distinct from “informational capture,” this form of capture is more concerned with the informal influence of industry and the interpersonal relationships of agency employees.¹¹⁶ Cultural capture scholars assume that regulators are subject to the prevailing ideas of their social group, which group may consist of individuals in the very industry to be regulated. As one scholar suggests, “[t]he agency might come to see the world the way that its regulated entities do.”¹¹⁷ Ultimately, cultural capture may be an offshoot of capture theory, or a deconstruction of the topic.¹¹⁸ But the precise theoretical contours of cultural capture are beside the point: capture can occur in ways other than through self-interested agency employees. As described in the *New York Times*, “These men and women may believe they are doing their best, but their worldview is affected by the people they interact with.”¹¹⁹

Cultural capture—because it relies upon personal relationships rather than money or jobs—is much harder to pin down than more traditional forms of capture. For example the Federal Reserve Bank of New York (NY Fed) was accused of having been captured in the events that culminated in the financial collapse of 2008.¹²⁰ The then-President of the NY Fed, Timothy Geit-

¹¹³ *Id.*

¹¹⁴ *Id.* at 1334–42 (discussing information capture’s fit within the extant capture literature).

¹¹⁵ See, e.g., Bagley, *supra* note 61; Kwak, *supra* note 64, at 75–80; Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1629 (2011).

¹¹⁶ See Kwak, *supra* note 64, at 75–80; see also McDonnell & Schwartz, *supra* note 115, at 1629 (discussing how certain persuasive “contrarians” have the power to influence regulation).

¹¹⁷ Bagley, *supra* note 61, at 5, 14.

¹¹⁸ See Kwak, *supra* note 64, at 76–77 (analyzing the debate about whether cultural capture theory is “a critique or an offshoot of capture theory”).

¹¹⁹ Steven Davidoff Solomon, *The Government’s Elite and Regulatory Capture*, N.Y. TIMES (June 11, 2010), <https://dealbook.nytimes.com/2010/06/11/the-governments-elite-and-regulatory-capture/> [<https://perma.cc/5YDN-PNXE>].

¹²⁰ See Ian Katz & Matthew Boesler, *Fed Weighs Steps to Prevent ‘Regulatory Capture’ by Banks*, BLOOMBERG (Apr. 20, 2015), <https://www.bloomberg.com/news/articles/2015-04-20/fed->

ner, had long term friendships with Wall Street bank managers and hedge funds managers.¹²¹ Then, when the financial crisis happened, Geitner brokered a deal with many of those same bank managers and hedge funds, resulting in a massive taxpayer bailout.¹²² This may have been the result of traditional capture—Geitner had ties to the banks and therefore it was in his financial best interest to save the banks—but it was more likely a case of cultural capture if any capture existed at all. Geitner’s views on the importance of the banking system largely mirrored those of the bankers and hedge fund managers with whom he associated, but it is impossible to say whether that was due to friendships with those bank managers or whether Geitner held those views independent of his connections.¹²³ Cultural capture theory is based on the common sense idea that we are influenced by our friends.

Cultural capture, like information capture, does not rely on self-interested agency employees trying to make as much personal gain as possible.¹²⁴ It provides an alternative explanation for how capture can occur. It operates by leveraging one’s personal beliefs and relationships.¹²⁵ It is premised upon identity, status, and relationships, and therefore can be nearly impossible to empirically observe.¹²⁶

2. Regulatory Capture Applied to the Federal Courts

Although agencies differ from federal courts along a multitude of dimensions,¹²⁷ those differences do not preclude capture from occurring in the

said-to-weigh-steps-to-prevent-regulatory-capture-by-banks [https://perma.cc/6BHU-8GDE] (discussing the view held by lawmakers that the Fed was “too cozy” with Wall Street).

¹²¹ Jo Becker & Gretchen Morgenson, *Geithner, Member and Overseer of Finance Club*, N.Y. TIMES (Apr. 26, 2009) <http://www.nytimes.com/2009/04/27/business/27geithner.html>.

¹²² *Id.*

¹²³ *See id.*

¹²⁴ Kwak, *supra* note 64, at 79.

¹²⁵ *Id.*

¹²⁶ *Id.* at 79–81.

¹²⁷ Administrative agencies come in many shapes and sizes, but in general they may act like miniature governments. They possess the power to legislate by setting substantive rules, enforcing those rules, and adjudicating disputes about those rules. Courts, on the other hand, do not possess the power to legislate or enforce the law. Instead, they merely have the power to hear cases or controversies. This major difference between administrative agencies and federal courts may have discouraged academics from advancing capture theory onto the courts. After all, court capture would appear to be ineffective since courts do not have the power to set rules for entire industries or enforcement powers against violators of said rules.

But the fact that courts lack the power to legislate is not a reason to think that courts will not be targets of capture. Federal courts hear incredibly important cases that can be worth hundreds of millions or even billions of dollars to companies. To think that such power would not attract the interest of industry is wrong. Special interests will attempt to influence any organization with power to affect its interests, regardless of the type of organization.

courts.¹²⁸ In the end, both courts and agencies are governmental bodies that often deal in matters of great interest to industry. Capture theory predicts that where there is value to special interests, there is potential for capture.¹²⁹

The traditional model of capture is premised on the expected pecuniary benefits to agency personnel.¹³⁰ In both the revolving door and the iron triangle version of capture, perks (including bribes, money for budgets, nongovernment jobs, etc.) entice a regulator to make favorable decisions to the industry dangling the perk.¹³¹ More modern versions of capture include capturing via information and cultural capture, neither of which require knowingly benefitting industry.¹³² Similarly, a court might receive benefits from capture (indirect economic benefits, for example) or it might be completely unaware of capture by the industry (cultural capture is a good example of this phenomenon).

There are differences between courts and agencies that relate to what type of “industry” might be attempting to do the capturing. In the agency context, the centralization of power over a particular type of rule-making tends to attract the interest of a group of companies that share those same interests. The Federal Reserve, for example, will attract lobbyists from major banks, which are interested in what regulations they will have to follow.

Conversely, although there is some informal specialization and centralization in the federal court system,¹³³ the courts are typically generalists. Because of this, there is no central repository for specific types of cases (like disputes over financial regulations). Courts may, however, attract another type of special interest that does appear continually before them: the litigation industry. The plaintiff and defense bars are powerful organizations that clearly have an interest in influencing courts.¹³⁴ These “industries,” in particular, deserve further study as to their ability to capture courts.

There are two principal reasons that courts and those seeking to influence courts have been excluded from the literature on capture. Scholars generally view courts as politically independent and immune from capture,

¹²⁸ Scholars have raised two primary reasons that capture does not occur at courts: political independence and generalized jurisdiction. I deal with those two arguments extensively in Part I.B. See *infra* notes 135–193 and accompanying text.

¹²⁹ See Ellen R. Jordan, *Specialized Courts: A Choice*, 76 NW. U. L. REV. 745, 748 (1981).

¹³⁰ See *supra* notes 65–100 and accompanying text.

¹³¹ See *supra* notes 65–100 and accompanying text.

¹³² See *supra* notes 101–126 and accompanying text.

¹³³ See Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 522–25 (2008) (demonstrating that appellate federal judges may informally specialize in what opinions they write).

¹³⁴ See Dreyfuss, *supra* note 35, at 3 (summarizing arguments about the potential for courts to be captured “by the bar that regularly practices before them”).

and, consequently, they consider courts to be unattractive targets of capture. The next section will analyze the soundness of thinking that courts are immune from capture concerns.

B. The Theory of Court Capture

In contrast to the wealth of scholarship about regulatory capture, scholars have generally ignored courts as a target of capture.¹³⁵ There have been some attempts to theorize about court capture, but those attempts have been limited and often focused on state courts.¹³⁶ To be sure, scholars have raised capture concerns in relation to specific specialized courts.¹³⁷ The United States Court of Appeals for the Federal Circuit,¹³⁸ landlord tenant courts,¹³⁹ specialized criminal courts,¹⁴⁰ specialized antitrust courts,¹⁴¹ bankruptcy courts,¹⁴² and the United States Foreign Intelligence Surveil-

¹³⁵ It's important to distinguish literature about courts becoming captured from literature about the courts' role in ferreting out capture in agencies. The former, which is the concern of this Article, has received relatively scant scholarly attention whereas the latter has a veritable library. See generally M. Elizabeth Magill, *Courts and Regulatory Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, *supra* note 1, at 397; Merrill, *supra* note 1, at 1039–43.

¹³⁶ State courts have features that make them more susceptible to capture than federal courts, not the least of which is the fact that judges are elected in many states. See, e.g., Helland & Klick, *supra* note 35, at 231–34 (discussing “judicial capture” via state judicial elections by repeat players such as plaintiffs’ attorneys).

¹³⁷ For a fantastic overview of the literature on specialized courts generally, and the heightened capture risk that specialized courts may pose, see generally BAUM, *supra* note 38 (explaining that courts have become increasingly specialized and that this specialization has led to changes in judicial policy).

¹³⁸ See, e.g., Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 380 (“[T]he side that is better heeled or more powerful could capture the [Federal Circuit] and create a bench more likely to issue one-sided opinions.”); Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1449 (2012) (summarizing arguments that the Federal Circuit is prone to capture).

¹³⁹ See LAWYERS’ COMM. FOR BETTER HOUS., NO TIME FOR JUSTICE: A STUDY OF CHICAGO’S EVICTION COURT 4–7 (2003), <http://lcbh.org/sites/default/files/resources/2003-lcbh-chicago-eviction-court-study.pdf> [<https://perma.cc/2N45-RVHK>] (finding that conviction courts failed to adhere to the established procedural protocols and found overwhelmingly against tenants); Steven Brill, *The Stench of Room 202*, AM. LAW., Apr. 1987, at 1, 15–18.

¹⁴⁰ See Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1669 (2012) (stating that specializing criminal courts face capture objections based on specialization worries).

¹⁴¹ Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists Versus Generalists*, 36 FORDHAM INT’L L.J. 788, 807 (2013) (“[T]here is undeniably the potential for regulatory capture through influence over the selection of judges and, to a lesser extent, over their conduct once appointed.”).

¹⁴² See Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 799 (2010) (noting that the notion that the bankruptcy courts have been captured “has its adherents”).

lance Court¹⁴³ have all been considered susceptible to special interest influence at one time or another. Yet many of these “courts” are not Article III courts.¹⁴⁴ Furthermore, all of them maintain specialized caseloads that may increase the likelihood of capture.¹⁴⁵ Scholars generally consider the generalized federal courts to be free of any serious capture concerns.¹⁴⁶ As Thomas Merrill has stated:

Only administrative agencies are subject to the unique pathologies of bureaucracy such as interest group capture. Rival institutions, like the legislature and the courts, [a]re implicitly regarded as being immune from these pathologies or at least as suffering from them to a significantly diminished degree.¹⁴⁷

There are two primary arguments that scholars rely upon in assuming federal court immunity from capture. The first argument is a constitutional argument. Federal judges enjoy life tenure and a constitutionally guaranteed salary. Thus, scholars assume judges are more politically independent than regulators, who are beholden to both the President and to Congress.¹⁴⁸ This political independence makes judges less reliant on approval from the other branches and the special interest influences that work upon those branch-

¹⁴³ BAUM, *supra* note 38, at 85–86.

¹⁴⁴ Currently, only the Federal Circuit and the FISA court are Article III courts. There is some debate about whether the FISA court is consistent with Article III. See Orin Kerr, *Article III Problems with Appellate Review in the Leahy Bill?*, LAWFARE (July 30, 2014), <https://lawfareblog.com/article-iii-problems-appellate-review-leahy-bill> [<https://perma.cc/8QN3-TZMT>]. Whether or not it is constitutionally consistent with an Article III tribunal, it operates as an Article III tribunal. See generally Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161 (2015).

¹⁴⁵ See, e.g., Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 783 (1983) (arguing that courts (particularly courts composed of generalist judges) are insulated from political pressures).

¹⁴⁶ Epstein, *supra* note 7, at 827 (applying public choice theory to judges and concluding that the theory has little value with respect to judges because of “institutional structures” that constrain judges from becoming captured); Merrill, *supra* note 1, at 1054 (stating that the public has come to suspect all governmental institutions suffer the same bureaucratic inefficiencies that can lead to capture “including not just administrative agencies but also from legislatures and possibly courts as well”) (emphasis added); Posner, *supra* note 7, at 19 (stating that judges are “less likely” to be captured than agencies); see also Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1147 n.153 (1990) (“Although commentators have raised arguments about the ‘capture’ of specialized judges, they generally have not explored the mechanisms by which such capture can occur.”).

¹⁴⁷ Merrill, *supra* note 1, at 1051.

¹⁴⁸ See, e.g., Posner, *supra* note 145.

es.¹⁴⁹ Also, life tenure insulates judges from the need to search out future employment, thereby closing any proverbial revolving door.¹⁵⁰

The second argument is an efficiency-based argument. Judges are considered poor targets of capture because they cannot influence an industry to the degree that agencies can.¹⁵¹ Because courts are decentralized repositories of cases, courts and judges are less valuable targets of capture.¹⁵² Why capture one federal judge out of over seven hundred, when capturing one regulator can be so much more valuable?

This section will critique the two common justifications for thinking that the federal courts are immune from capture risks.

1. Political Independence Does Not Shelter Judges from Capture

Political independence is a primary reason scholars are skeptical of judicial capture. The argument claims that judges are much more politically independent than either the executive or Congress and this independence protects the courts from capture because they do not have to worry about raising money for reelection, pleasing constituents from a district, or making politically unpopular choices.¹⁵³ Essentially, there are few political repercussions for a judge that makes a politically unpopular ruling.

It is true that agencies are subject to a higher level of political pressure than courts.¹⁵⁴ Political appointees serve the President and are also closely monitored by Congress. Judges, on the other hand, are an independent branch of government and their tenure does not depend upon the other branches' approval of their decisions. The courts are, however, dependent on Congress for appropriating funds necessary to carry out the work of the federal judiciary.¹⁵⁵ But this sort of control is much less firm than the control that Congress and the Executive wield over the heads of agencies.¹⁵⁶

¹⁴⁹ *Id.*

¹⁵⁰ *See, e.g.,* Posner, *supra* note 7, at 19 (listing the fact that agency personnel may be susceptible to revolving door behavior as a reason to distrust agencies to make neutral decisions).

¹⁵¹ *See, e.g., id.* at 19 (“The fact that agency members are specialized, and that they are less insulated from the political process than judges are, makes them targets for influence by special-interest groups; hence the term ‘regulatory capture.’”).

¹⁵² *Id.* at 20 (arguing that courts are “relatively immune” from interest group pressure because they are generalists).

¹⁵³ *See* Posner, *supra* note 7, at 20 (“Federal judges have . . . far more autonomy (in particular, insulation from political and interest-group pressures) than regulators, and . . . [this] advantage[] result[s] in a higher average quality of judicial than of regulatory appointees.”).

¹⁵⁴ *See, e.g.,* Epstein, *supra* note 7, at 827 (applying public choice theory to judges and concluding that the theory has little value with respect to judges because of institutional structures that constrain judges from becoming captured).

¹⁵⁵ For a good summary of the politics that are involved in budgeting for the federal judiciary and for federal agencies, see Eugenia Froedge Toma, *Congressional Influence and the Supreme*

The Constitution tries to secure judicial independence through (1) guarantees of life tenure for judges who serve with good behavior and (2) an accompanying unreduced salary.¹⁵⁷ These protections are perhaps the most often invoked reasons why the judiciary is not susceptible to capture.¹⁵⁸ Alexander Hamilton, in *The Federalist No. 78*, extolled life tenure as having the power to shield judges from politics, granting them “complete independence.”¹⁵⁹ By appointing judges for life, it is thought, many of the personal benefits of capture that redound to agency employees are unavailable to judges.¹⁶⁰ The most obvious potential benefit is the prospect of future employment.¹⁶¹ A judge, unlike a regulator, is not interested in what employment opportunities exist at the company about which a matter must be decided. David Stras and Ryan Scott state the matter thusly:

[Term limits for judges] would introduce incentives for Supreme Court Justices to cast votes in a way that improves their prospects for future employment outside the judiciary. . . . It is easy to imagine that a young Justice, such as Justice Thomas, who will be sixty-one after serving eighteen years on the Court, could have a successful “second career” in politics.¹⁶²

Although some scholars dispute that life tenure leads to judicial independence,¹⁶³ the majority of scholars who have written about life tenure look upon judicial independence as one of the goals of life tenure.¹⁶⁴

Court: The Budget as a Signaling Device, 20 J. LEGAL STUD. 131, 131–32 (1991) (stating that Congress can “reward[] or penaliz[e] the agencies for their activities” via the budgetary process, in contrast to the judiciary).

¹⁵⁶ See *id.* (stating that Congress can “reward[] or penaliz[e] the agencies for their activities” via the budgetary process, in contrast to the judiciary).

¹⁵⁷ U.S. CONST. art. III, § 1.

¹⁵⁸ See Posner, *supra* note 7, at 19–20 (asserting that life tenure for judges makes them superior to agency personnel who do not have guaranteed permanent employment).

¹⁵⁹ THE FEDERALIST NO. 78 (Alexander Hamilton); see also *United States v. Hatter*, 532 U.S. 557, 567 (2001) (stating that “life tenure” helps guarantee judicial independence); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute,”* 83 WASH. U. L.Q. 1397, 1424 (2005) (claiming that life tenure frees courts “to fairly and correctly interpret the counter-majoritarian Constitution”).

¹⁶⁰ See Stras & Scott, *supra* note 159, at 1425 (“Life tenure on the Supreme Court will always offer one unique form of judicial independence: the option to spend one’s entire career on the Court.”).

¹⁶¹ *Id.* (hypothesizing about tenure restrictions on Supreme Court judges and imagining that such restrictions would make a judge “influenced by plans for post-Court employment”).

¹⁶² *Id.* (citation omitted).

¹⁶³ See Jack N. Rakove, *Once More into the Judicial Breach*, 72 GEO. WASH. L. REV. 381, 385 (2003) (“Article III offers powerful incentives to exploit life tenure, not in the interest of promoting judicial impartiality, but for exactly opposite purposes.”).

With the greater political pressure that agencies feel, it is logical to conclude that they are more likely to be captured than judges. Even so, the lessons of the Interstate Commerce Commission (ICC) and the creation of a specialized court to supervise the ICC teach us that just such a state of capture can arise in courts.¹⁶⁵ The United States Commerce Court was a small, federal court that was tasked with the duty of hearing challenges from regulations issued by the ICC. By capturing this small court, the railroads discovered a way to restrict competition while at the same time enjoying the public perception of regulation.¹⁶⁶

Furthermore, the protection against capture afforded by political independence has generally been overstated by scholars. While it is true that courts are independent from the other two branches of government, this independence does not protect courts from the influence of private parties. Even if we assume that courts do not experience political pressure, this would only shield courts from the type of capture referred to as “the iron triangle.”¹⁶⁷ Other forms of capture (namely, the revolving door type) can exist without political pressure of any sort. In fact, this sort of capture flourishes in the absence of political checks. If a judge is looking for the next job, there is nothing that political independence does to stop that judge from being biased in favor of potential employers.¹⁶⁸

When scholars speak of judicial independence as protecting courts from capture, they often use that term as a short-hand for the life tenure and guaranteed salary that judges enjoy. It is these two constitutionally guaranteed benefits that scholars have believed protect the federal courts from private interests. Judge Richard Posner is among those scholars that believe life tenure makes judges far less-susceptible to capture than agencies:

Execution of valid regulatory policies is often thwarted by the dependence of regulators on information supplied by the regulated entities and by the perverse incentives created by “revolving door” behavior. The large staffs of most regulatory agencies result

¹⁶⁴ Stras & Scott, *supra* note 159, at 1425 (“[S]upporters of term limits believe in these basic goals of life tenure.”).

¹⁶⁵ See *infra* notes 48–135 and accompanying text. For more on the Commerce Court, see George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEGAL HIST. 238, 238–60 (1964).

¹⁶⁶ Dix, *supra* note 165, at 244–45.

¹⁶⁷ See *supra* notes 60–124 and accompanying text (describing how regulatory capture occurs).

¹⁶⁸ See Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265, 1266–68 (2015) (discussing various stories of the revolving door).

in the typical agency-cost problems of bureaucracies that are not disciplined by marketplace competition.¹⁶⁹

Here, Judge Posner is arguing that the structure of the federal judiciary makes the judiciary less attractive to those trying to exert their influence over the courts. Life tenure, by eliminating this “revolving door,” should also eliminate the perverse incentives that accompany it, such as working for the same industry one used to regulate, not having the necessary information to make socially-beneficial decisions, and pay-for-play.¹⁷⁰

It is questionable, however, whether life tenure acts as a capture deterrent or is actually an enticement. Some scholars believe that life tenure is a means to achieve “partisan entrenchment,” by which they mean political parties using life-tenured judges to extend their power beyond their time in elected positions.¹⁷¹ It stands to reason that industry would enjoy the same long-term benefit by placing sympathetic judges on the bench. Just as political parties might seek to capture the nomination process to extend their power, so too might an industry seek to capture the same processes and place favorable judges on the bench for life.

Even if we assume life tenure *decreases* capture risk, there is evidence to suggest that it does not eliminate “revolving door” behavior. While guaranteeing salary and life tenure make leaving the bench for another job less likely, it hardly eliminates the concern. Federal judges are some of the very best lawyers in the country; they are likely to attract significant interest from law firms. Recently, many judges have been leaving the bench because judicial salaries are so far under market.¹⁷² A number of judges have retired early to increase their salaries in private practice.¹⁷³ Of course, the relatively

¹⁶⁹ Posner, *supra* note 7, at 19.

¹⁷⁰ See Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 128–29 (1983) (observing that judges are isolated from outside influences because they enjoy life tenure and guaranteed salaries).

¹⁷¹ See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–77 (2001) (discussing the theory of partisan entrenchment).

¹⁷² Yoon, *supra* note 32, at 1049 n.72.

¹⁷³ Among the judges listed as having left because of the low salary of the judiciary are Judge Joe Kendall of the Northern District of Texas, Chief Judge Edward Davis of the Southern District of Florida, Judge Timothy K. Lewis of the U.S. Court of Appeals for the Third Circuit, Judge Raul Ramirez of the Eastern District of California, and Judge Emery Sneed of the U.S. Court of Appeals for the Fourth Circuit. See Ann Belser, *U.S. Judge Resigning July 1 to Join Buchanan Ingersoll*, PITTSBURGH GAZETTE, Apr. 28, 1999, at B2; Jonathan D. Glater, *Federal Bench Needs a Raise, Bar Groups Say in Report*, N.Y. TIMES (Feb. 13, 2001), <https://www.nytimes.com/2001/02/13/us/federal-bench-needs-a-raise-bar-groups-say-in-report.html>; Bill McAllister, *The Judiciary's 'Quiet Crisis': Prestige Doesn't Pay the Tuition*, WASH. POST, Jan. 21, 1987, at A19; Seth Stem, *A Career as a Federal Judge Isn't What It Used to Be*, CHRISTIAN SCI. MONITOR (Jan. 22, 2002), <https://www.csmonitor.com/2002/0122/p01s02-usju.html> [<https://perma.cc/4HZJ-FNH7>]; Sandra

small percentage of federal judges that leave the bench in any given year is not evidence of a revolving door between the judiciary and private sector employment.¹⁷⁴ It may, however, signal the weakening of judicial autonomy from the private sector.

Thus, even though judicial retirements do not have a large effect on the judiciary as a whole, the concentrated nature of those retirements may raise the question of whether post-employment opportunities influenced any decisions.¹⁷⁵ If judges know that there are potentially lucrative post-bench employment opportunities, regulatory capture theory would suggest that we would see many of the same effects on judicial actors that we observe in agencies. The specter of future employment has long been a factor that capture theorists take very seriously.¹⁷⁶ There is no reason to think that the prospect of future employment should not influence judges as well as regulators. Capture via employment opportunities may be less a concern in the judiciary than in the agency context, but it is a concern nonetheless.

2. Courts Present Attractive Capture Targets

The second argument identified by scholars that supposedly shields courts from capture centers on the generalized nature of judging. Because courts and judges are, generally, unspecialized, some scholars believe they are far less appealing targets of capture than agencies. According to Judge Posner:

Agencies are subject to far more intense interest-group pressures than courts. The agency heads are political appointees and their work is closely monitored by congressional committees. The fact that agency members are specialized, and that they are less insulated from the political process than judges are, makes them tar-

Torry, *Some Judges Decide a Lifetime on the Federal Bench Is Too Long*, WASH. POST, Jan. 20, 1992, at E5; *Federal Judge to Quit Bench; Cites Overwork*, ASSOCIATED PRESS, Nov. 1, 1989, at OC A21.

¹⁷⁴ Stephen B. Burbank et al., *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 12–15 (2012) (stating that 3.8% of all judges retired in the 1970s, 3.9% in the 1980s, 1.2% in the 1990s, and 2.8% in the first decade of the 21st century).

¹⁷⁵ Retired judges frequently turn to mediation. See *Search for a Neutral . . .*, JAMS: RESOLVING DISPS. WORLDWIDE <https://www.jamsadr.com/neutrals/search> [<https://perma.cc/7R53-44NV>] (last visited Apr. 12, 2018) (listing the groups alternative dispute resolution members, many of whom are former judges who are available to mediate patent disputes).

¹⁷⁶ See Scott Duke Kominers, *Salary Erosion and Federal Judicial Resignation* (2008) (unpublished manuscript) (on file with JudgeWatch), <http://judgwatch.org/library/fed-judicial-salaries/Salary-Erosion-Compensation-Levels.pdf> [<https://perma.cc/45SM-ZHCV>] (highlighting the erosion of judicial salaries and examining post-resignation employment).

gets for influence by special-interest groups; hence the term “regulatory capture.”¹⁷⁷

Similarly, Judge Posner feels that specialization of courts makes capture more likely, but that it remains implausible because of the safeguards inherent in the judiciary. According to Posner, “the federal courts are very difficult to ‘buy.’”¹⁷⁸ Thus, one seeking to buy influence would be better served trying to “buy” a high-ranking member of the relevant agency than a federal judge. With a federal judge, the random assignment of cases, the restrictions on venue, and the number of other federal judges, makes ‘buying’ any particular judge a losing proposition.¹⁷⁹ Despite this, Posner repeatedly points to specialization as an invitation to be captured.¹⁸⁰ Agencies are specialized, courts are not. Therefore, courts are not likely to be captured, according to Posner.¹⁸¹

But as Posner notes, federal courtrooms are becoming increasingly specialized.¹⁸² In patent law, all appeals are heard by a single court of appeals: the United States Court of Appeals for the Federal Circuit. Because of this specialization, the Federal Circuit enjoys the attention of nearly every patent attorney in the land. This specialization also brings them the attention of special-interest groups interested in strengthening or weakening the patent system.¹⁸³ The Federal Circuit is a capture target *because* of its specialization. Posner and Landes state:

It was predictable that a specialized patent court would be more inclined than a court of generalists to take sides on the fundamental question whether to favor or disfavor patents, especially since interest groups that had a stake in patent policy would be bound to play a larger role in the appointment of the judges of such a

¹⁷⁷ Posner, *supra* note 7, at 19.

¹⁷⁸ *Id.* at 23.

¹⁷⁹ See Helland & Klick, *supra* note 35, at 231–32 (stating that the odds of capturing all judges who could hear one’s case makes judicial capture, at first glance, undesirable).

¹⁸⁰ Posner, *supra* note 7, at 19 (stating that judges are “less likely” to be captured than agencies).

¹⁸¹ *Id.*

¹⁸² Consider the title of his essay, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*. Posner, *supra* note 145.

¹⁸³ I have written elsewhere about the Federal Circuit’s strange relationship with lobbyists, oftentimes with the judges acting as the lobbyist themselves. See J. Jonas Anderson, *supra* note 31; see also Dreyfuss, *supra* note 35, at 3 (citing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 157 (1985)) (articulating the criticism that specialized judges “are susceptible to ‘capture’ by the bar that regularly practices before them”).

court than they would in the case of the generalist federal courts.¹⁸⁴

While Posner acknowledges that specialized appellate courts are “less independent” than a generalist court, he still finds the risk of capture at such courts to be low.¹⁸⁵ Although these specialized courts are centralized and therefore may attract special interest influence in a way that generalist courts would not, Posner believes the built-in differences between agency administrators and judges make agencies juicier targets for special interests to capture.¹⁸⁶

Specialization of courts has also been a focus of Lawrence Baum. Baum has theorized about the relationship between specialized courts, capture, and centralization.¹⁸⁷ He notes that the CCPA (a forerunner to the Federal Circuit) was captured by the patent bar.¹⁸⁸ By filling the court with sympathetic judges, the CCPA became a tool for patent lawyers and patent-reliant industries.¹⁸⁹ Although it is true that courts are more decentralized than agencies and therefore present a poor target for parties seeking to capture the entire judicial branch, it might be the case that specialized courts—with their increased centralization—could be attractive targets for capture.

However, Baum downplays the impact of capture within specialized courts, generally. For Baum, the “theme of capture should not be overstated.”¹⁹⁰ Capture cannot be presumed to have occurred because the impetus for the creation of specialized courts comes from other courts.¹⁹¹ Furthermore, the judges do not benefit from a court being captured. In fact, the advocates for court specialization were not in a position to directly benefit from those courts.¹⁹² To Baum, specialized courts do not show evidence of capture because the desire for specialized courts is often driven by ideas rather than interests.¹⁹³

¹⁸⁴ William M. Landes & Richard A. Posner, *An Empirical Analysis of the Patent Court*, 71 U. CHI. L. REV. 111, 111–12 (2004).

¹⁸⁵ Posner, *supra* note 145, at 783.

¹⁸⁶ *Id.*

¹⁸⁷ See generally BAUM, *supra* note 38 (explaining that courts have become increasingly specialized and that this specialization has led to changes in judicial policy).

¹⁸⁸ *Id.* at 178–79.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 133. But see *id.* at 85–86 (discussing various views of the FISA court, some of which suggest the court has been captured).

¹⁹¹ *Id.*

¹⁹² *Id.*; see also *id.* at 93 (suggesting that the Court of Appeals for the Armed Forces is insulated from capture by the court’s neutral procedural rules and judges that came from outside the military).

¹⁹³ *Id.* at 178–79.

Baum's position that capture does not occur with specialized courts is based on the specifics of the court's creation. However, courts can be captured at any time, not only upon creation. Even though a court may have been created with the best of intentions, that fact tells us nothing about whether the judges on the court have been captured by a particular interest group. And the creation of specialized courts creates attractive targets for people interested in capturing legal institutions to harness private gains.¹⁹⁴

Furthermore, generalist courts can present targets for capture as well as specialized courts. Cases are not randomly distributed across the country. Particular types of cases tend to cluster in certain courts. This clustering may occur because the court is located near industry, the court has a reputation for handling certain types of cases, juries within a particular district are thought to be exceptionally adept (or inept, depending on your viewpoint), or any number of reasons. The U.S. legal system allows plaintiffs to select their court, with personal jurisdiction and venue serving as limiting principles. But while this might be advantageous to litigants, it may also lead to concentration of cases in a particular district. Therefore, while courts are less specialized than federal agencies, to say that courts have no value to industry because they are not at all specialized would be inaccurate.

* * * *

This Article has thus far endeavored to show that court capture is theoretically possible, both at specialized courts and at courts of general jurisdiction. The supposed constitutional limits on court capture do not actually limit anything, but merely ensure that federal judges cannot be removed without cause. If a judge wants to be influenced by certain constituents or take a job with a law firm, there is nothing in the constitution that prevents such actions. Furthermore, the widespread belief that judges make poor capture targets because of their decentralized docket accurately describes the majority of federal judges; but it is the exceptions we should care about. Some judges find that they receive an inordinate amount of a certain type of case. Those judges are certainly capture targets.

So, theoretically, courts could be captured. But has it occurred? The following Part analyzes whether there has been evidence of court capture at one federal court: the Federal District Court for the Eastern District of Texas. The Eastern District of Texas was, until recently, the district court that received the most patent litigation in the U.S.—over 40% of cases in recent

¹⁹⁴ See Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1767 (1997) (“[T]he generalist judge is less likely to become the victim of regulatory capture than her specialized counterpart, despite the best of intentions on the latter’s side.”).

years.¹⁹⁵ Thus, the patent-related industries (as well as the patent bar) would be incentivized to try to capture the court's decision-making.

II. COURT CAPTURE IN THE EASTERN DISTRICT OF TEXAS

As discussed, scholars have dismissed capture as unlikely to occur within the federal courts.¹⁹⁶ This dismissal has been based on a series of faulty assumptions about courts that this Article has attempted to refute. This Part will sketch out which types of capture identified by administrative law scholars are most applicable to courts. It will do so looking to the categories established by the regulatory capture literature¹⁹⁷ and examining which, if any, of these types of captured behavior we can observe in the Eastern District of Texas. But first, a word about the Eastern District of Texas.

A. *The Eastern District of Texas*

United States federal district court judges outnumber United States federal appeals court judges by almost four to one.¹⁹⁸ Assuming a random distribution of cases, every district court judge has a very small chance of receiving any particular case. For cases on appeal, however, there is a much higher chance of any particular federal appellate judge sitting on a case. This is due in part to the high number of district court judges compared to appellate judges, but also because courts of appeals generally hear cases in groups of three judges.¹⁹⁹ For someone interested in trying to capture a judge, there is more to be gained from capturing an appellate judge than a district court judge.

This should be especially true in patent law. All patent appeals are heard by the Federal Circuit, the specialized federal appellate court created in 1982.²⁰⁰ Thus, there are only twelve active federal appellate judges that are eligible to hear every patent appeal nationwide. At the trial level, over

¹⁹⁵ See Ryan Davis, *Delaware Patent Suits Dwindle as Plaintiffs Flock to EDTX*, LAW360 (Feb. 10, 2016) <https://www.law360.com/articles/756753/delaware-patent-suits-dwindle-as-plaintiffs-flock-to-edtx> [<https://perma.cc/VDA6-T6QB>] (reporting on the number of patent suits in various districts).

¹⁹⁶ See, e.g., BAUM, *supra* note 38, at 45.

¹⁹⁷ See *supra* notes 65–126 and accompanying text.

¹⁹⁸ There are 672 authorized U.S. federal district court judgeships compared to 179 authorized U.S. appeals court judges. See AUTHORIZED JUDGESHIPS, UNITED STATES COURTS 8 (2017), <http://www.uscourts.gov/sites/default/files/allauth.pdf> [<https://perma.cc/FDS7-68ZZ>].

¹⁹⁹ See, e.g., Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 300–01 (2004) (stating at the outset that appellate judges sit on panels of three, for the most part).

²⁰⁰ See J. Jonas Anderson, *Specialized Standards of Review*, 18 STAN. TECH. L. REV. 151, 153 (2015) (stating that the Federal Circuit hears all cases arising under the patent laws).

670 district court judges can hear patent trials.²⁰¹ Thus, it would seem that any attempt to capture a district court judge would be seen as having little effect on the patent system as a whole. But a strange concentration of district court patent cases has recently changed the capture calculus. There is evidence that court competition—the process of district court judges competing for litigants—occurs in patent law.²⁰² Indeed, some district judges have become increasingly open about their desire to attract patent litigants.²⁰³

No court has been more spectacularly successful in encouraging patentees to file in its courts than the United States District Court for the Eastern District of Texas. As recently as 1999, the Eastern District of Texas received relatively few patent cases, as might be expected for a court with only eight active judges and composed entirely of sparsely populated rural towns.²⁰⁴ This situation, however, has changed significantly in the past two decades. In 2015, the Eastern District of Texas had 2,523 patent cases filed in its courtrooms.²⁰⁵ For context, the next most popular court for filing of patent cases, the District of Delaware, received 533 new patent cases in 2015.²⁰⁶ With over one third of all patent cases in the United States heard in its courtrooms, the Eastern District of Texas has gained prominence (or infamy, depending on your viewpoint) as the favored court for patent cases.

And one judge in the Eastern District of Texas handles a majority of the district's heavy patent workload.²⁰⁷ Judge Rodney Gilstrap hears a quarter of the nation's patent cases.²⁰⁸ How does one federal district court hear such a high percentage of the patent cases nationwide? Depending upon who you ask, it may be because of East Texas's notoriously friendly juries,²⁰⁹ judges who are "[k]nowledgeable, [w]elcoming, and [o]rganized,"²¹⁰ plaintiff friend-

²⁰¹ See AUTHORIZED JUDGESHIPs, *supra* note 198, at 8.

²⁰² See Anderson, *supra* note 39, at 667–68 (describing several ways in which district courts can attract plaintiffs); Klerman & Reilly, *supra* note 39, at 255–60.

²⁰³ See Klerman & Reilly, *supra* note 39, at 255–60 (describing the Eastern District of Texas's case assignment procedures, despite Congressional response).

²⁰⁴ See Andrei Iancu & Jay Chang, *Real Reasons the Eastern District of Texas Draws Patent Cases—Beyond Lore and Anecdote*, 14 SMU SCI. & TECH. L. REV. 299, 299 (2011).

²⁰⁵ See Davis, *supra* note 195 (reporting on the number of patent suits in various districts).

²⁰⁶ *Id.*

²⁰⁷ Rogers, *supra* note 41.

²⁰⁸ *Id.*

²⁰⁹ See Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J.L. & TECH. 193, 233 (2007) (concluding that the appeal of the Eastern District of Texas has to do with the "largely uneducated local juries who rule for the plaintiff 90% of the time"). *But see* Iancu & Chang, *supra* note 204, at 300 ("We conclude that there is little evidence that the District's popularity arises primarily from its jury pool.").

²¹⁰ Xuan-Thao Nguyen, *Justice Scalia's "Renegade Jurisdiction": Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 136–38 (2008).

ly procedural rules,²¹¹ unwillingness to transfer cases to a more convenient district court,²¹² differences in substantive law rulings,²¹³ or a host of other reasons.²¹⁴ But much of the Eastern District's attraction to patent litigants has been achieved by eliminating the safeguards that insulate courts from capture. For example, the Eastern District of Texas has effectively eliminated random assignment of cases, allowing litigants to "judge shop."²¹⁵ This and other procedural changes have made the Eastern District extremely popular with patent plaintiffs. Thus, the Eastern District of Texas demonstrates that while the federal courts may be nominally generalists, certain courts can achieve a high concentration of certain cases in their courtrooms.

B. Evidence of Capture

At the outset, something rather obvious should be noted. Identifying when a court has been captured is a highly speculative endeavor. Judges rarely talk about what influences their decision-making process.²¹⁶ Indeed, if a judge had been truly captured by an industry in the hard sense, he would do everything in his power to not demonstrate this to the public.²¹⁷ And it is

²¹¹ See Anderson, *supra* note 39, at 632 (arguing that the Eastern District of Texas "competes" for patent cases through plaintiff friendly procedural rules); Leychkis, *supra* note 209, at 300 (finding that "favorable patent rules" contribute to the Eastern District's attraction).

²¹² See Elizabeth P. Offen-Brown, *Forum Shopping and Venue Transfer in Patent Cases: Marshall's Response to TS Tech and Genentech*, 25 BERKELEY TECH. L.J. 61, 73–74 (2010) (claiming that the Eastern District of Texas had "low" rates of granting motions to transfer venue); Saurabh Vishnubhakat, *Reconceiving the Patent Rocket Docket: An Empirical Study of Infringement Litigation 1985-2010*, 11 J. MARSHALL REV. INTELL. PROP. L. 58, 65 (2011) (noting that the Eastern District of Texas has a historical predilection to refuse motions to transfer). *But see* Paul M. Janicke, *Patent Venue and Convenience Transfer: New World or Small Shift?*, 11 N.C. J.L. & TECH. ONLINE 1, 16 (2009), http://ncjolt.org/wp-content/uploads/2016/09/29_11NCJLTech12009-2010.pdf [<https://perma.cc/qq7m-ewyg>] (demonstrating that the Eastern District of Texas had a higher grant rate for transfer motions on its civil than did other district courts).

²¹³ See Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 STAN. TECH. L. REV. 1, 31 (2017) (finding a low rate of granting *Alice* motions and predicting that litigants are unlikely to bring such motions given the procedural hurdles imposed by Judge Gilstrap).

²¹⁴ See Anderson, *supra* note 39, at 633 (listing assumed reasons for the Eastern District of Texas's popularity).

²¹⁵ See *id.* at 667 (describing how courts can effectively "compete" for cases); Klerman & Reilly, *supra* note 39, at 255–60 (theorizing that courts can offer their forums to plaintiffs). See generally Anderson, *supra* note 39 (describing how the Eastern District of Texas has become the center of patent cases via "judge shopping").

²¹⁶ See Dreyfuss, *supra* note 35, at 69–72 (claiming that the Federal Circuit judges often talk about the policies behind the patent statute, but rarely talk about the policy motivators of their decisions).

²¹⁷ See, e.g., Frank Thompson, Jr. & Daniel H. Pollitt, *Impeachment of Federal Judges: An Historical Overview*, 49 N.C. L. REV. 87, 106 (1970) (recounting the story of the last federal judge who was impeached).

equally difficult to detect other forms of capture. A judge that has been captured informationally or culturally is unlikely to even realize that capture has occurred.²¹⁸ This makes the study of capture very difficult to empirically measure.²¹⁹

The detection difficulty, however, should not cause us to completely abandon the goal of improving the judicial system. Indeed, the same type of empirical evidence is lacking from the regulatory capture literature, yet scholars have written copious amounts about the topic. While we may not be able to identify court capture with precision, we can outline the broad contours of the phenomenon.

1. Classic Capture

The classic example of capture in the administrative law literature involves gifts, or payments (bribes) to the agency in exchange for favorable rulings.²²⁰ Judges are subject to bribes by people trying to influence their decisions. Fortunately, the number of instances of a United States federal judge getting caught accepting bribes is exceptionally low.²²¹ There are other types of pecuniary benefits that judges might receive that should raise capture alarm bells. They might receive employment after their service on the bench, for example, which may influence their decision-making on the bench.

The Eastern District of Texas has seen a dramatic, recent uptick in judges leaving the bench to take employment with law firms. Three of the district's judges, as well as a magistrate judge, have recently left the bench (and their constitutionally-mandated salaries) for positions at private law firms: Chief Judge Ward became a name partner at Ward & Smith; Chief Judge Davis joined Fish & Richardson; Chief Judge Folsom joined Jackson Walker; and Magistrate Judge Charles Everingham IV joined Akin Gump.²²² But the Eastern District is not alone in judges leaving for patent law firms. Other

²¹⁸ See Kwak, *supra* note 64, at 79–80 (stating that cultural capture is more difficult to detect than traditional forms of capture because “there are always multiple explanations for why someone forms the beliefs she has”).

²¹⁹ *Id.* at 79 (complaining that capture is hard enough to recognize because “policymakers invariably cite some justifications other than self-interest for their actions”).

²²⁰ See *supra* notes 42–135 and accompanying text (describing the methods by which agencies, and courts, may be captured).

²²¹ See Thompson & Pollitt, *supra* note 217, at 106 (recounting the story of the last federal judge who was impeached).

²²² Joe Mullin, *East Texas Judge Who Oversaw 1,700 Patent Cases Joins Biggest IP Law Firm*, ARS TECHNICA (Apr. 3, 2015), <http://arstechnica.com/tech-policy/2015/04/east-texas-judge-who-oversaw-1700-patent-cases-joins-biggest-ip-law-firm/> [<https://perma.cc/YCY6-NXAK>]; see *infra* note 224 and accompanying text.

judges from patent-heavy districts have also retired to become partners at private law firms.²²³ Of course, this alone does not suggest that any of these judges were captured by law firms while on the bench. Rather, it highlights that life tenure is a one-way street; judges are promised a job for life upon good behavior, but that promise merely binds the government's hands, not the hands of the judges.

More suspect, however, is the tendency of the judges on the Eastern District of Texas to join law firms that specialize in patent law.²²⁴ None of these judges had patent-related experience prior to their elevation to the bench.²²⁵ This move out of government employment is very similar to that of a revolving door between agency and industry.²²⁶ When such a high number of judges from a relatively small court retire, and all become private patent attorneys, it is natural to wonder if those judges were influenced by the prospect of employment while they were still on the bench. The concerns from administrative law scholars about the revolving door (expected future employment, championing the concerns of industry over the public, etc.) are evident in this context. Patent scholars and federal court scholars would be well served to pay more attention to these concerns.

In the iron triangle conception of capture, the agency, Congress, and the capturing industry all benefit from the agency being captured.²²⁷ The

²²³ For example, Judge Farnan of the District of Delaware, a former U.S. Attorney, retired from the bench in 2010 and started a law firm with his sons; he lists his specialty as “patent litigation and consulting.” See *Joseph J. Farnan, Jr.*, FARNAN LLP, <http://www.farnanlaw.com/attorneys/joseph-farnan-jr/> [<https://perma.cc/74ZL-TBLQ>] (last visited Apr. 7, 2018). Delaware trails only the Eastern District of Texas in the number of patent cases filed. Davis, *supra* note 205. Similarly, Judge Rod McKelvie, a former district court judge for the District of New Jersey, which receives a number of pharma-related patent cases, made a similar move, retiring from the bench and joining Covington, a large D.C. law firm. See *Roderick R. McKelvie*, COVINGTON & BURLING LLP, <https://www.cov.com/en/professionals/m/roderick-mckelvie> [<https://perma.cc/AP8N-Y2JS>] (last visited Apr. 7, 2018).

²²⁴ Chief Judge Davis joined Fish & Richardson, a patent litigation powerhouse, in Dallas. *Leonard Davis*, FISH & RICHARDSON PC, <http://www.fr.com/judge-leonard-davis/> [<https://perma.cc/7JBJ-ECPS>] (last visited Apr. 7, 2018). Chief Judge Ward joined Ward, Smith & Hill, a firm that handles litigation matters, as local counsel for many clients outside of East Texas. *T. John Ward*, WARD, SMITH & HILL PLLC, <http://wsfirm.com/attorneys/t-john-ward/> [<https://perma.cc/99R8-BWYV>] (last visited Apr. 7, 2018). Judge Folsom retired from the Eastern District of Texas in 2012 and is now a partner at Jackson Walker LLP, specializing in intellectual property cases. *David Folsom*, JACKSON WALKER LLP, http://www.jw.com/David_Folsom [<https://perma.cc/T3CB-K5FG>] (last visited Apr. 7, 2018). Magistrate Judge Charles Everingham IV left the bench for Akin Gump's Longview, Texas office where he focuses on patent litigation. *Charles Everingham IV*, AKIN GUMP, <https://www.akingump.com/en/lawyers-advisors/charles-everingham.html> [<https://perma.cc/2AWG-YVC3>] (last visited Apr. 7, 2018).

²²⁵ See *supra* note 224 and accompanying text.

²²⁶ See *supra* notes 47–135 and accompanying text (describing the methods by which agencies, and courts, may be captured, including the “revolving door”).

²²⁷ See *supra* note 98 and accompanying text.

industry controls the agency, the agency gets appropriations from Congress, and Congress gets support and money from the industry.²²⁸ But this series of relationships does not create opportunities to capture federal courts.²²⁹ Because judges enjoy political independence from the other branches, they cannot be captured in the traditional way described by scholars who have written about the iron triangle.²³⁰ The courts' political independence likely inoculates it from this form of capture. Because agencies are so dependent on Congress for funding—funding that can be withheld for virtually any reason—agencies are keenly aware of what is happening in Congress and the ways the political winds are blowing.²³¹ This dependence makes agencies more susceptible to the lure of interest groups lobbying Congress.²³² Courts, on the other hand, basically get the same funding every year regardless of Congressional opinion of a particular court.²³³ Furthermore, the public approval of the judiciary far surpasses that of Congress; any attempt to punish a court based on its decisions would be highly unpopular with the general public.²³⁴ Thus, iron triangle capture, or capture that derives from the desire to strengthen the judiciary via the other branches, likely does not occur.

However, a similar form of capture may have occurred that simply cuts out Congress. In a way, the Eastern District of Texas has become reliant on industry for money and providing the lawsuits that give the district its prestige.²³⁵ Meanwhile, some industry players (mainly patent trolls) have become reliant on the Eastern District of Texas to scare alleged patent infringers to settle.²³⁶ The district also protects industry against the political tides,

²²⁸ See Livermore & Revesz, *supra* note 58, at 1343 (describing the iron triangle as a series of “stable, mutually beneficial alliances”).

²²⁹ See Posner, *supra* note 145, at 783–84 (arguing that the political independence of the judiciary shields judges from the corrupting influence of capture).

²³⁰ *Id.*

²³¹ For a more in-depth discussion of agency budgets and congress, see generally ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* (3d ed. 2007).

²³² See Livermore & Revesz, *supra* note 58, at 1350–56 (disaggregating capture from other justifications for judicial review of agency decisions).

²³³ Although there is general pressure for courts to retain costs, there is no way for Congress to single out a particular court for what it perceives as good (or bad) behavior. See ROBERT A. KATZMAN, *COURTS AND CONGRESS* 108 (1997) (stating that Congress pressures courts to contain costs).

²³⁴ In 2008, Congress' job approval rating was 19%, while the Supreme Court enjoyed the approval of 59% of the population. ALEC GALLUP & FRANK NEWPORT, *THE GALLUP POLL: PUBLIC OPINION* 2009 at 5, 215 (2010).

²³⁵ Here, by “industry” I am referring to whoever may be interested in capturing the Eastern District of Texas's judges. That is a group that includes, but is not limited to, high technology companies, patent trolls, the patent plaintiff bar, and other patent-reliant industries.

²³⁶ See John R. Allison et al., *Understanding the Realities of Modern Patent Litigation*, 92 *TEX. L. REV.* 1769, 1791–95 (2014) (finding that the Eastern District of Texas was “significantly more likely to rule for the patentee” than most other district courts); Daniel Nazer & Vera Ranieri,

insulating it against a hostile Congress, President, and Supreme Court.²³⁷ In this co-dependent situation, a form of capture that mirrors the iron triangle (but with just two nodes) may have occurred.

Defendants may feel the need to invest in the Eastern District of Texas because they find themselves in its courtrooms so often. The cities within the district have been the beneficiaries of this largesse. Take Samsung—the Korean electronics giant—as an example. The city of Marshall, Texas has a skating rink (paid for by Samsung) which greets visitors to the county courthouse.²³⁸ Marshall and nearby Tyler, Texas residents have received over \$50,000 per year in scholarships from Samsung.²³⁹ Many of the festivals in Marshall are sponsored by Samsung or feature Samsung booths which give out high-end electronics to residents.²⁴⁰ Many of the local high schools receive Samsung monitors for free or enjoy field trips to Samsung’s semiconductor plant in Austin.²⁴¹

And it is not just Samsung that feels the need to gain positive press in Marshall and elsewhere in East Texas. Weeks before a blockbuster patent infringement case was decided by a jury in 2006, Tivo—the developers of DVR’s—purchased the Grand Champion Steer (a bull) from the Harrison County Cattleman’s Ball for a record price of \$10,000.²⁴² Critics complained that Tivo was merely trying to influence the jury pool in a small city

Why Do Patent Trolls Go to Texas? It’s Not for the BBQ, ELECTRONIC FRONTIER FOUND. (July 9, 2014), <https://www.eff.org/deeplinks/2014/07/why-do-patent-trolls-go-texas-its-not-bbq> [https://perma.cc/7ZFZ-R3HS].

²³⁷ See Jonas Anderson, *Congress as a Catalyst of Patent Reform at the Federal Circuit*, 63 AM. U. L. REV. 961, 984–90 (2014) (describing Congressional efforts to curb patent trolls in the Eastern District of Texas); J. Jonas Anderson, *Patent Dialogue*, 92 N.C. L. REV. 1049, 1086–87 (2014) (detailing how the Federal Circuit tried to curtail the Eastern District of Texas’s appeal to patent trolls); Kristen Osenga, *Formerly Manufacturing Entities: Piercing the “Patent Troll” Rhetoric*, 47 CONN. L. REV. 435, 437–38 (2014) (“Everyone seems to hate ‘patent trolls.’”).

²³⁸ See Joe Mullin, *Patent Troll Claims to Own Bluetooth, Scores \$15.7M Verdict Against Samsung*, ARS TECHNICA (Feb. 17, 2015), <https://arstechnica.com/tech-policy/2015/02/patent-troll-claims-to-own-bluetooth-scores-15-7m-verdict-against-samsung/> [https://perma.cc/2ZX9-SNY5].

²³⁹ *Id.* (reporting that winners of scholarships receive giant checks with the Samsung logo on them).

²⁴⁰ For example, the Wonderland of Lights Festival is sponsored by Samsung, and also features the Samsung ice rink. See *Marshall, Texas Prepares to Turn on Millions of Holiday Lights*, MARSHALL CONVENTION & VISITORS BUREAU (Nov. 6, 2013), <http://www.prnewswire.com/news-releases/marshall-texas-prepares-to-turn-on-millions-of-holiday-lights-230896461.html> [https://perma.cc/W8LL-4P56].

²⁴¹ Mullin, *supra* note 238 (reporting on an eight-thousand-dollar donation of monitors to Marshall High as reported in a local paper).

²⁴² See Zusha Elinson, *IP Trial Strategy: Buying Tivo’s Bull*, CORP. COUNS. (June 26, 2009), <https://www.law.com/corpocounsel/almID/1202431771710/> [https://perma.cc/8VWJ-8A99] (recounting the story of Tivo and the record setting steer).

of 25,000 people.²⁴³ Tivo claims that it was showing its appreciation for the hospitality it was shown during the trial.²⁴⁴ Two weeks after the Cattleman's Ball, a jury awarded Tivo \$74 million in damages.²⁴⁵

Even more telling, from a capture perspective, are the various ways that the cities of the Eastern District of Texas benefit economically from the patent litigation that its judges attract. In Marshall, Texas, at any given time, six to ten teams of patent lawyers are preparing for trial.²⁴⁶ The restaurants and hotels of Marshall receive steady business because of the litigators that are in the district.²⁴⁷ Construction jobs are easy to find as the litigants need office space.²⁴⁸ Thus, the judges of the district might feel the need to maintain a high flow of litigants.

Indeed, many of the law firms that the Eastern District of Texas's judges join upon retirement from the bench rely upon the district to continually attract litigation to the district's courtrooms.²⁴⁹ These firms would likely not survive without the judges's success in attracting patent cases to the Eastern District of Texas.²⁵⁰ Many of these firms would likely have to pare down their expenses and resources if there was a significant loss of litigation business. This is classic revolving door behavior.

The capture dynamic that has arguably evolved in the Eastern District of Texas thus has a common thread with regulatory capture. The players involved on both sides both benefit from the capture. In regulatory capture, the agency personnel benefit by the capture dynamic either monetarily, through job security, or through connections that they later plan to exploit. Similarly, in the court capture scenario, the judges benefit by increasing the business opportunities in their local communities. And increasingly in the Eastern District of Texas, they directly benefit from the new business opportunities (litigation) when they leave the bench for law firms.

²⁴³ *Id.* The high school senior who collected the prize money obviously did not share critics' views of Tivo's motives: he rechristened the bull "Tivo." *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Joe Nocera, *In Town That Patent Trolls Built, Supreme Court Ruling Is Big News*, WASH. POST (May 26, 2017), <https://www.mercurynews.com/2017/05/26/justices-jangle-nerves-in-texas-town-that-patent-trolls-built/> [<https://perma.cc/5QYY-ZK5J>].

²⁴⁷ *Id.* (quoting a restaurant owner who said that catering to litigants makes up "50 percent of my business").

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* On the other hand, consider Samuel F. Baxter (the purchaser of the notorious Tivo bull) who said that the Supreme Court's recent patent decision would have "not much" of an effect on the patent litigation industry in Marshall, Texas. *Id.*

2. New-Style Capture

Information capture is perhaps the most conceptually difficult form of regulatory capture to analogize to court capture. In the regulatory space, informational capture occurs when one industry controls the flow of information used by regulators.²⁵¹ The industry might withhold information (legally) that would have been helpful to a regulator in making an informed decision. Or, alternatively, the industry might swamp the agency with information in an effort to hide some crucial piece of information.²⁵²

Yet in the judiciary, parties are limited in how much information they can turn over to the court. Furthermore, they can be compelled to reveal very valuable secrets.²⁵³ One cannot say that courts are at the mercy of an industry in control of the information. The adversarial nature of litigation often guarantees that the relevant information will come to light.²⁵⁴ If there is information that would be harmful to one side, the other side has every incentive to reveal it to the court and not allow the information to be overlooked.²⁵⁵ There is little evidence for informational capture at the Eastern District of Texas.

The most likely, and least demonstrable, category of capture that might apply to the federal courts is cultural capture. Cultural capture occurs when regulators give more credence to opinions from their social or professional networks than they do to others. In fact, cultural capture is hard to protect against because “the mechanisms that produce cultural capture are basic features of human interaction.”²⁵⁶

There are a number of factors that make cultural capture much more likely to occur: high similarity between industry and agency (or court) representatives, agency (or court) with obvious social purpose, an industry with high cultural status, social connections between industry and regulators, and technically complex issues.²⁵⁷ The judges of the Eastern District of Texas

²⁵¹ See Wagner, *supra* note 5, at 1321 (describing “information capture” as interest groups overwhelming the administrative system with complex information which leads to decision-making processes occurring in the dark).

²⁵² *Id.*

²⁵³ See J. Jonas Anderson, *Secret Inventions*, 26 BERKELEY TECH. L.J. 917, 930–39 (2011) (describing the ways in which inventors will try to shield their trade secrets from the eyes of competitors).

²⁵⁴ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 382 (1982) (“[O]ur tradition is considered more adversarial than most . . .”). See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001) (comparing the American adversarial system to the legal systems of other nations); Frank B. Cross, *America the Adversarial*, 89 VA. L. REV. 189 (2003) (reviewing KAGAN, *supra* and critiquing Kagan’s conclusions).

²⁵⁵ Resnik, *supra* note 254, at 382.

²⁵⁶ Kwak, *supra* note 64, at 95.

²⁵⁷ See *id.*

are very similar to their counterparts of the patent bar.²⁵⁸ The court itself handles important issues of patent and innovation policy that reverberate in the business community.²⁵⁹ Members of the patent bar enjoy a high social status, and include luminaries from the Supreme Court bar.²⁶⁰ And the court deals with highly complex, technical elements of patented products.²⁶¹

Of course, the mere fact that a court is a prime target for capture in no way proves that the court has been captured. This is among the reasons that cultural capture is among the hardest sorts of capture to identify. But the court is a target for capture by industry because of the centralization of patent cases. If patent cases were distributed evenly among the federal judicial districts, or even amongst the district judges themselves, capture would be very unlikely. With the Eastern District of Texas receiving so many patent cases, it makes the court a stronger candidate for capture to occur.

There are many ways in which influence can be peddled to judges. The Eastern District of Texas also has close ties with the patent bar that may invite cultural capture. Local bar associations are often closely tied with the judges that sit in their localities.²⁶² Those associations have an interest in increasing the legal work within those localities. Because judges often come from those same bar groups and retain friendships and relationships within those groups, they may feel a sense of pride in bringing in business for local attorneys.²⁶³ Many district courts have rules that require local counsel in all cases before the court.²⁶⁴

Patent attorneys are particularly interested in connecting with local federal judges since all patent cases are tried in federal court. Thus, local patent bars are often well-connected with their local judges. Indeed, many judges have commented on the potential benefit of bringing patent cases to the local communities.²⁶⁵ The spillover effects that increased litigation has on the local community can also extend beyond the legal field. A number of cities within the boundaries of the Eastern District of Texas have seen a

²⁵⁸ Anderson, *supra* note 39, at 546–76 (relating the backgrounds of the judges on the Federal Circuit).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² For instance, in the Western District of Pennsylvania, the District's selection for the Patent Pilot Program was seen by both judges and the local patent bar as an opportunity to increase the ability to compete for "out of state" patent cases.

²⁶³ Anderson, *supra* note 39, at 546–76.

²⁶⁴ For instance, the Eastern District of Virginia requires local counsel in all civil cases. *See* E.D. VA. LOCAL CIVIL R. 83.1(D)(1)(b) (2018).

²⁶⁵ Anderson, *supra* note 39, at 546–76; *see* E.D. VA. LOCAL CIVIL R. 83.1(D)(1)(b).

substantial increase in demand for office space and hotel rooms due to the visiting attorneys who come to town for trial.²⁶⁶

For example, the annual Eastern District Bench Bar conference brings together patent litigators and the judges on the Eastern District of Texas.²⁶⁷ Replete with clay pigeon shooting, handgun shooting, and golf (sponsored by local law firms), the conference boosts many big names from the patent world (in 2016 the conference welcomed judges from the Federal Circuit and the PTO commissioner)²⁶⁸ that mingle with the attorneys who attend. These annual conferences, centered on the importance of patent law to the district, reinforce the understanding that the judges of the Eastern District are responsible for bringing business to the district. These types of events may lead to cultural capture, because the professional and personal ties that develop between the judges and litigants can lead the judges to make decisions about important issues (like venue, motions to transfer, etc.) based on the need to keep business local, rather than on the merits of a particular case. It is this sort of capture that is most difficult to root out, precisely because it is based on the “basic features of human interaction.”²⁶⁹

C. The Eastern District of Texas Exhibits Signs of Capture

The judges of the Eastern District of Texas exhibit many of the characteristics that administrative scholars have classified as capture. The district has a revolving door between law firms and federal judges. The last three chief judges of the district have retired from the bench to join prominent patent firms in the region. Other judges in the district have also left the bench for partnerships with patent law firms.

Also, the court exhibits a dependence on the patent litigation industry for economic benefits to the region. Many of the community amenities of the region of east Texas (and especially in the town of Marshall) were funded in part by major tech companies that often find themselves as defendants in the areas courthouses. From ice rinks to state fairs, community life in Marshall has the indelible imprint of patent litigation. Private businesses in Eastern Texas also depend on the constant churn of patent litigants. The ho-

²⁶⁶ See Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES (Sept. 24, 2006), <http://www.nytimes.com/2006/09/24/business/24ward.html> (profiling the Eastern District of Texas town of Marshall, TX and the various perks it receives from companies that are frequent defendants in the district).

²⁶⁷ See CONFERENCE AGENDA, EASTERN DISTRICT OF TEXAS 2016 BENCH BAR CONFERENCE (2016), http://www.edtexbar.com/wp-content/uploads/2014/07/EDTX_Bench_Bar_2016-FINAL-PROGRAM.pdf [<https://perma.cc/HK4P-5NFS>].

²⁶⁸ *Id.*

²⁶⁹ Kwak, *supra* note 64, at 95.

tels depend on patent attorneys to keep them afloat; office space rentals depend on the plaintiffs who open up an office in town in order to persuade the court that venue is convenient;²⁷⁰ the restaurants offer catered lunches for the out-of-town attorneys that are preparing for trial.

Similarly, the litigation industry depends on the court in important ways. Many frequent patent plaintiffs make the court (or a specific judge) their court of choice. Non-practicing entities (NPEs, or more pejoratively, patent trolls) depend on the Eastern District of Texas and make use of the court's lenient judge selection process. In a world in which every government institution seems to despise NPEs (Congress, the Supreme Court, the President, the Federal Trade Commission, and to a lesser extent the Federal Circuit),²⁷¹ the Eastern District of Texas offers freedom to operate. Although recent changes to the law that have hurt NPE's business model have percolated down to the Eastern District of Texas, the District is still perceived by NPEs as the court of choice.²⁷² Invitations to patent law conferences, speaking engagements before the luminaries of the field, and being feted at the District's own Bench and Bar Association's conference are just some of the perks that come from hearing such a large number of patent cases.

Of course, one cannot say definitively that the court has been captured. The Eastern District of Texas judges are very diligent and are almost universally well-respected. Despite this, the court exhibits many of the familiar signs of capture by industry: a revolving door between industry and bench, economic dependence between the region of East Texas and patent litigation, and the cultural connection between bench and bar. All of this does not prove that the Eastern District of Texas has been captured. It does raise concerns, however, that resonate with scholars of regulatory capture.

III. AVOIDING COURT CAPTURE: SUGGESTIONS

Is there anything to be done about court capture? Ultimately, any reform proposal runs into the realities of human nature: trying to completely eliminate bias or favoritism in the court setting is as fruitless an endeavor as

²⁷⁰ These offices largely remain vacant throughout the year.

²⁷¹ See Loren Steffy, *Patently Unfair*, TEXASMONTHLY (Oct. 2014), <https://www.texasmonthly.com/politics/patently-unfair/> [<https://perma.cc/HJC3-ED7H>] (stating that former President Obama and former Supreme Court Justice Scalia agreed that the Eastern District of Texas is bad for patent law).

²⁷² Since the Supreme Court's *TC Heartland* ruling, filings of patent cases have dropped precipitously. See Benjamin Anger & Boris Zelkind, *Where Plaintiffs Are Filing Suit Post-TC Heartland*, LAW360 (July 7, 2017), <https://www.law360.com/articles/942115/where-plaintiffs-are-filing-suit-post-tc-heartland> [<https://perma.cc/7645-LFL9>] (reporting that in the six weeks after the *TC Heartland* decision the Eastern District of Texas dropped to just 13.6% of all patent cases).

eliminating it from all human relationships. Despite the challenges with identifying and expunging capture, there are solutions that will greatly reduce the chances of courts falling victim to capture. Two potential solutions are reforming venue rules and mandating randomized assignment of judges.

A. Venue Reform

Court capture is made possible by grouping a large percentage of particular cases in a certain court. This makes the expense of influencing a judge worth the cost for litigants. Otherwise, influencing a single judge that only rarely sees cases of a particular type or from a certain industry does not indicate that you have captured a court; it merely suggests that one particular judge thinks favorably about a particular case. While that may be concerning on a micro level, this sort of judicial favoritism does not have major implications for the federal courts as a whole. Another judge in another district is likely to have an unfavorable opinion of the same industry. Thus, this favoritism may alter individual case outcomes, but litigants still can have faith that the courts are not systematically biased against them. Furthermore, it is not clear that we could completely inoculate the judiciary from outside influences.

But if a court becomes the predominant court for particular types of cases, the leveling effects of different viewpoints disappears. If a court seeks to encourage filings of a particular type of case, we may see that court develop a pro-plaintiff bias as a means of attracting litigants.²⁷³ Whether this concentration of cases comes from the specialization of the court (as with the Federal Circuit) or through other means (like the Eastern District of Texas competing successfully for patent cases), the attraction of capturing courts increases dramatically when the court hears a large number of similar cases.

In the case of the Eastern District of Texas, this concentration of cases was made possible, in part, by the venue rules that governed patent cases before the Supreme Court's recent decision in *TC Heartland v. Kraft Food Brands*.²⁷⁴ Prior to *TC Heartland*, the venue statute for patent cases allowed most patent plaintiffs to file in any district court in the United States.²⁷⁵ With all ninety-four U.S. district courts to choose from, plaintiffs could se-

²⁷³ See, e.g., Anderson, *supra* note 39, at 697–98 (arguing that competition for patent cases is fueled by adopting “pro-plaintiff” procedural rules).

²⁷⁴ 28 U.S.C. § 1400(b) (2012) (establishing venue for patent infringement actions “in the judicial district where the defendant resides”); see also *id.* § 1391(c) (establishing residence for corporate entities in multiple jurisdictions).

²⁷⁵ *Id.* § 1400(b).

lect the court that they felt offered them the greatest odds of success.²⁷⁶ When patent plaintiffs select a forum, they are very often going to select the district that offers them the most advantages, either from a legal or procedural standpoint.²⁷⁷ The Eastern District of Texas keeps cases filed within its district by rarely granting motions to transfer.²⁷⁸ Once a case is filed in the Eastern District of Texas, it often remains there.²⁷⁹ Thus the initial choice of the plaintiff plays a great role in determining the final outcome of a case.²⁸⁰ Therefore, Congress ought to further restrict the venue choices of patent litigants.²⁸¹ Doing so would reduce a court's ability to amass the specialization that encourages capture.

The courts themselves can also reduce some of the ability for generalist courts to specialize. Until recently, the Federal Circuit has chosen not to interfere with district court venue selection. In fact, before 2008, the Federal Circuit consistently interpreted the patent venue statute quite broadly.²⁸² Prior to December 2008, the Federal Circuit had never, in its twenty-six years of existence, reversed a district court's denial of a motion to transfer venue.²⁸³ Since 2008, however, the Federal Circuit has taken a much more active interest in venue disputes. The Federal Circuit entered the forum selection fray following a decision from the Fifth Circuit overturning the Eastern District

²⁷⁶ See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508 (1995) ("The plaintiff's opening moves include shopping for the most favorable forum."); see also Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 382 (2006) (applying rational choice theory to forum shopping and concluding that "the rational lawyer will choose" the venue that potentially offers "a more favorable outcome").

²⁷⁷ See Clermont & Eisenberg, *supra* note 276, at 1526–27 (calculating the percentage of cases that were transferred to another district as between 1% and 2% between 1979 and 1991).

²⁷⁸ See, e.g., Offen-Brown, *supra* note 212, at 73 (noting that until 2008, "it was difficult to obtain transfer" from jurisdictions like the Eastern District of Texas); Donald F. Parsons, Jr. et al., *Solving the Mystery of Patentees' "Collective Enthusiasm" for Delaware*, 7 DEL. L. REV. 145, 151 (2004) ("Transfer motions in Delaware are rarely granted."). *But see* Paul M. Janicke, *Venue Transfers from the Eastern District of Texas: Case by Case or an Endemic Problem?*, LANDSLIDE, Mar.–Apr. 2010, at 16, 16 (finding that the percentage of patent cases transferred by the Eastern District of Texas "was about the same" as the average nationwide in 2006 and "significantly more" in 2007).

²⁷⁹ Offen-Brown, *supra* note 212, at 73–74.

²⁸⁰ See *supra* note 276 and accompanying text.

²⁸¹ See Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444, 1477 (2010) (proposing limiting patent venue to those courts that are in the district in which the principal place of business of any of a case's defendants is located).

²⁸² See Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 936 (2001) (lamenting the Federal Circuit's conclusion that the patent venue provisions are coextensive with personal jurisdiction with respect to corporate defendants, rendering the patent venue statute "superfluous").

²⁸³ Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 346 (2012).

of Texas's denial of a transfer motion in a products liability lawsuit.²⁸⁴ In 2008 in *In re TS Tech USA Corp.*, the United States Court of Appeals for the Federal Circuit, in a surprise move, granted a mandamus appeal to review a denial of a motion to transfer out of the United States District Court for the Eastern District of Texas.²⁸⁵ The court in *TS Tech* held that the District Court for the Eastern District of Texas abused its discretion in denying a motion for transfer, and directed the Eastern District of Texas to transfer the case to the United States District Court for the Southern District of Ohio.²⁸⁶ Since *TS Tech*, the Federal Circuit granted mandamus review on seven motions to transfer within a very short time.²⁸⁷ All but one of the mandamus actions have arisen out of the Eastern District of Texas. The outlier involved a decision by the Northern District of California to grant a transfer motion into the Eastern District of Texas.²⁸⁸

In line with this Article's suggestions, the Supreme Court recently restricted the districts in which venue is proper in patent cases. In 2017 in *TC Heartland v. Kraft Food Brands Group*, the Supreme Court of the United States re-evaluated the patent venue statute in a case arising out of the United States District Court for the District of Delaware.²⁸⁹ The case challenged a decision from the Federal Circuit holding that the United States District Court of Delaware had venue in a dispute between two companies head-

²⁸⁴ See *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309 (5th Cir. 2008) ("Concluding that the district court gave undue weight to the plaintiffs' choice of venue, ignored our precedents, misapplied the law, and misapprehended the relevant facts, we hold that the district court reached a patently erroneous result and clearly abused its discretion in denying the transfer.").

²⁸⁵ *In re TS Tech USA Corp.*, 551 F.3d 1315, 1318 (Fed. Cir. 2008).

²⁸⁶ *Id.* at 1317–18, 1323.

²⁸⁷ See *In re Microsoft Corp.*, 630 F.3d 1361, 1361 (Fed. Cir. 2011) (holding that the Eastern District of Texas abused its discretion in denying Microsoft's motion to transfer the case to the Eastern District of Washington); *In re Vistaprint Ltd.*, 628 F.3d 1342, 1342 (Fed. Cir. 2010) (holding that the Eastern District of Texas did not err in its denial of Vistaprint and OfficeMax's motion to transfer to the District of Massachusetts); *In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1378–80 (Fed. Cir. 2010) (holding that Eastern District of Texas erred when it denied Zimmer Holdings' motion to transfer to the Northern District of Indiana); *In re Nintendo, Co.*, 589 F.3d 1194, 1196 (Fed. Cir. 2009) (holding that the Eastern District of Texas's denial of a motion to transfer the case to the Western District of Washington was an abuse of discretion); *In re Hoffman-La Roche, Inc.*, 587 F.3d 1333, 1335 (Fed. Cir. 2009) (holding that the Eastern District of Texas's denial of a motion to transfer venue to the Eastern District of North Carolina was an abuse of discretion); *In re Genentech, Inc.*, 566 F.3d 1338, 1347, 1348 (Fed. Cir. 2009) (holding that the Eastern District of Texas abused its discretion in denying a motion to transfer venue to the Northern District of California).

²⁸⁸ See *In re Aliphcom*, 449 F. App'x 33, 35 (Fed. Cir. 2011) (holding that the Northern District of California did not abuse its discretion in allowing a motion to transfer venue to the District Court for the Eastern District of Texas).

²⁸⁹ 137 S. Ct. 1514 (2017).

quartered elsewhere.²⁹⁰ The Court determined that venue is proper when (1) the case is filed in the district within a state in which the defendant company is incorporated or (2) the case is filed within a district in which the defendant has a regular place of business *and* in which acts of patent infringement occurred. *TC Heartland* will likely make it more difficult for the Eastern District of Texas to compete for patent cases.²⁹¹ If there is a significant drop-off in patent filings in the Eastern District of Texas, there will be less incentive to try and capture the judges of the district.

A change in the venue law from Congress would go a long way toward eliminating court capture.²⁹² Indeed, Congress is contemplating such a change in patent law, as well as in bankruptcy, another area that experiences widespread forum shopping.²⁹³ Of course, after *TC Heartland*, much patent litigation has simply shifted from the Eastern District of Texas to the District of Delaware because many companies are headquartered in Delaware. This of course raises the specter of court capture occurring in Delaware, which has a history of such court capture. The Eastern District of Texas is less able to for litigation because venue restricts many litigants from filing in Eastern Texas. Without the specialization that comes from centralization, it is much less likely that courts and judges will be subject to capture; they will not be attractive targets because there is no way of knowing *ex ante* which cases they will be able to hear. The safeguards that legal scholars typically assume prevent capture of courts will be much more relevant.

²⁹⁰ *Id.*

²⁹¹ See J. Jonas Anderson, *Reining in a 'Renegade' Court: TC Heartland and the Eastern District of Texas*, 39 CARDOZO L. REV. 101, 126–33 (2018) (detailing the ways that the Eastern District of Texas has attempted to retain their heavy patent docket despite the holding in *TC Heartland*). Many commentators predict that the case may be the end of Eastern Texas's dominance of patent law. See, e.g., Matthew Bultman, *Justices Could Deal Blow to East Texas Patent Docket*, LAW360 (Dec. 15, 2016), <https://www.law360.com/articles/873372/justices-could-deal-blow-to-east-texas-patent-docket> [<https://perma.cc/LX8F-LT3J>] (predicting that the case “could end up barring most patent owners from filing cases in the patent hotbed of the Eastern District of Texas, and pushing more suits into Delaware”). Of course, those same predictions have been wrong in the past. See, e.g., Ryan Davis, *Del. May Eclipse Texas as Top Patent Venue Under AIA*, LAW360 (Oct. 28, 2011), <https://www.law360.com/delaware/articles/278301/del-may-eclipse-texas-as-top-patent-venue-under-aia> [<https://perma.cc/7XYZ-ED3H>] (claiming that the America Invents Act could “hasten the long-predicted decline of the Eastern District of Texas as a popular venue for patent cases and shift the spotlight to Delaware”).

²⁹² For another example of a Congressional venue reform proposal aimed at eliminating court competition, see Bankruptcy Venue Reform Act of 2018, S. 2282, 115th Cong. (2018) and Adam Schlagman, *Bankruptcy Venue Reform Bill Introduced*, L.J. NEWSLETTERS (Mar. 2018), <http://www.lawjournalnewsletters.com/2018/03/01/bankruptcy-venue-reform-bill-introduced/?slreturn=20180313110221>.

²⁹³ Schlagman, *supra* note 292. See generally LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* (2005) (chronicling the moves by bankruptcy courts in the District of Delaware to attract plaintiffs).

B. Mandate Random Assignment of Judges

There are ways to eliminate capture that go beyond venue reforms. One way that has been suggested in the literature on bankruptcy forum shopping, involves randomization of case assignment.²⁹⁴ Non-random case assignment is subject to universal condemnation by the courts themselves.²⁹⁵ All circuit courts purport to use a randomized system of case assignment.²⁹⁶ However, the random assignment of cases is not mandated by statute²⁹⁷ nor the due process clause of the constitution.²⁹⁸ Thus, in practice there likely is something less than a random assignment of cases at virtually all the U.S. Circuit Courts and the U.S. District Courts.

The Eastern District of Texas has continually had case assignment procedures for patent cases that allow litigants to select the judge who will preside over their case.²⁹⁹ The ability to choose one's judge has proven to be extremely popular for patentees.³⁰⁰ Such an ability to "judge shop" has been uniformly decried as antithetical to notions of justice.³⁰¹ One scholar noted

²⁹⁴ See LOPUCKI, *supra* note 293, at 72–75 (noting the non-randomized assignment of bankruptcy case assignments in the Southern District of New York and that assignment's appeal to bankruptcy filers); Jeff Becker, *On Creating Specialized Patent District Courts: Why H.R. 34 Does Not Go Far Enough to Address Reversal Rates in District Courts*, 61 SMU L. REV. 1607, 1609–13 (2008) (arguing for random assignment of cases); Theresa Rusnak, *Related Case Rules and Judge-Shopping: A Resolvable Problem?*, 28 GEO. J. LEGAL ETHICS 913, 916 (2015) (providing that the random assignment of cases "enhances public confidence in the case assignment process and judicial impartiality as a whole").

²⁹⁵ See *Robinson v. Boeing Co.*, 79 F.3d 1053, 1054–56 (11th Cir. 1996) (demonstrating the negative effects of case manipulation and judge-shopping on the proper administration of justice); *McCuin v. Tex. Power & Light Co.*, 714 F.2d 1255, 1265 (5th Cir. 1983) (noting that permitting assignment manipulation would bring "the judicial system itself into disrepute" and "would permit unscrupulous litigants and lawyers to thwart [the] system of judicial administration"); *United States v. Phillips*, 59 F.Supp.2d 1178, 1180 (D. Utah 1999) (providing cases and scholarly literature indicating that "attempts to manipulate the random case assignment process are subject to universal condemnation" as they are a disruption of the integrity of the judicial system that would undermine public confidence in the assignment process).

²⁹⁶ J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1069 (2000) (stating that all circuits purport to operate randomly, but few require such assignment by rule); see also *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1443 (9th Cir. 1995) (stating that "[j]udge-shopping doubtless disrupts the proper functioning of the judicial system and may be disciplined").

²⁹⁷ See *Brown & Lee*, *supra* note 296, at 1090–96 (listing the governing statutes on case assignment and concluding that the limitations are "vague").

²⁹⁸ *Id.* at 1099–1103 (stating potential constitutional requirements for random assignment and concluding that there is nothing in the Constitution that requires randomization).

²⁹⁹ See *Anderson*, *supra* note 39, at 670–74 (explaining how the Eastern District of Texas has historically allowed litigants to judge shop); *Klerman & Reilly*, *supra* note 39, at 255–60 (discussing judge shopping).

³⁰⁰ *Anderson*, *supra* note 39, at 670–74; *Klerman & Reilly*, *supra* note 39, at 255–60.

³⁰¹ See *Anderson*, *supra* note 39, at 670–74.

that the ability to “judge shop” was one of the features of Delaware bankruptcy courts that initially appealed to bankruptcy filers.³⁰² It has also been cited as a problem in New York’s stop and frisk lawsuits.³⁰³ The ability to manipulate the judge assigned to one’s case is a practice that should be eliminated in the interest of justice.³⁰⁴

Congress could mandate that district courts randomize assignment of patent cases within their districts.³⁰⁵ Limiting the ability of courts, such as the Eastern District of Texas, to deviate from random assignment procedures for patent cases would eliminate a court’s ability to attract, or dissuade, litigants from filing in that court.³⁰⁶ This in turn would reduce the appeal of capturing a judge because securing a judge that is randomly assigned cases is far less valuable than a judge that can be selected by the plaintiffs.³⁰⁷

Congress could quite easily eliminate the courts’ ability to permit preselection of judges. Under 28 U.S.C. § 137, chief judges of district courts have the power to “assign the cases” in accordance with the rules and orders of the court.³⁰⁸ The statute grants chief judges broad discretion in assigning cases.³⁰⁹ Congress could amend the statute to require that district courts assign cases in a randomized manner among the judges of the district or at least in a neutral manner.³¹⁰ This modification would eliminate one of the primary judicial means of attracting litigants with very little cost. Alternatively, the Supreme Court could amend the Rules of Civil Procedure to require random assignment.³¹¹ Such a move by the Supreme Court has the

³⁰² See LOPUCKI, *supra* note 293, at 72–75 (chronicling the moves by bankruptcy courts of the District of Delaware to attract plaintiffs).

³⁰³ See Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York’s “Related Cases” Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199, 201–06 (2014) (demonstrating the dangers of manipulating case assignment using New York’s stop-and-frisk law as an example).

³⁰⁴ See Brown & Lee, *supra* note 296, at 1066–69 (“A system of neutral assignment merely ensures that [judges] were not deliberately placed on the panel to influence the outcome of the case.”).

³⁰⁵ *Id.* at 1107 (rejecting the approach that Congress can issue legislation that would mandate that cases be assigned in a neutral manner).

³⁰⁶ See Anderson, *supra* note 39, at 555–58 (analyzing the ways in which limits on assignment procedures could be enacted).

³⁰⁷ See *supra* notes 135–193 and accompanying text (describing how agency capture theory applies to courts).

³⁰⁸ 28 U.S.C. § 137 (2012).

³⁰⁹ *Id.*; see also Brown & Lee, *supra* note 296, at 1090–91 (concluding that there is nothing in the statute that “requires neutral assignment”).

³¹⁰ *Cf.* Brown & Lee, *supra* note 296, at 1107–08 (outlining Congressional options for achieving the same neutrality goal for circuit courts).

³¹¹ 28 U.S.C. § 2072(a) (granting the Supreme Court the power to prescribe general procedural rules for the United States district courts).

advantage of allowing the details of assignment procedures to be more fully developed by the courts themselves, while at the same time ensuring that cases will be assigned neutrally between the various judges within the district.³¹² Mandating randomness of judge assignment would greatly reduce generalist courts' ability to gain a significant concentration of particular cases.³¹³ This would have the welcome effect of insulating the courts from capture.

CONCLUSION

The capture of courts plays a significant, if under-explored, role in the United States' judicial system. Just as the more traditional regulatory capture questions federal agencies' decision-making abilities, court capture calls into question the decision-making ability, the neutrality, and the legitimacy of courts. But scholars have not seen the connection between regulatory capture and the federal judiciary. This lack of concern for court capture is due to two supposed judicial checks on capture: the federal judiciary's independence—specifically, federal judges's life tenure—and the generalist nature of the judiciary. But, as this Article has demonstrated, these checks on capture are not always effective. For example, judges have political independence, but that independence does little to shield the court from private influence. Furthermore, life tenure guarantees judges a position for life, but it does not guarantee that judges will remain on the bench for life. Recent retirements from the bench raise concerns about a revolving door between the judiciary and private law firms. Lastly, the federal judiciary is mainly composed of generalist judges, but increasing specialization (and the centralization of case that naturally accompanies specialization) raises concerns about court capture.

This dynamic can be observed in the U.S. District Court for the Eastern District of Texas. The Eastern District of Texas has actively competed with other district courts for patent cases. Over the last decade, it has been astoundingly successful, bringing in over one-third of the patent cases in the country to the small, rural district. The bench of the Eastern District of Texas has become very patent-heavy, and in turn, the judges must feel pressure from professional relations to bring in business to the district. Court capture is a real concern in this court, precisely because the court has been so successful at attracting patent infringement plaintiffs. One can't help but wonder whether the judges have an eye towards future employment. This state

³¹² See Brown & Lee, *supra* note 296, at 1108 (making a similar proposal for the Supreme Court to amend the Federal Rules of Appellate Procedure).

³¹³ See generally Anderson, *supra* note 39, at 670–74 (explaining how the Eastern District of Texas has historically allowed litigants to judge shop).

of affairs is troubling for the patent system and the federal judiciary as a whole.

Congress can enact certain reforms to restrain judges from becoming captured. The first thing they can do is enact venue reform. The Supreme Court recently restricted venue in patent cases in *TC Heartland v. Kraft Food Brands Group*, but that result is being narrowed by the judges of the Eastern District themselves. Congress has suggested that venue reform is still on the table following *TC Heartland*. Congress would be well advised to look at venue in non-patent cases as well. Second, Congress or the Supreme Court should mandate random assignment of cases within a district. Both of these changes will protect the federal judiciary from the risk of capture.