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Court Capture

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COURT CAPTURE

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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.
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-

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\(^{1}\) 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).


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

Yet legal scholars have not generally applied the theory of capture to federal courts.\textsuperscript{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.\textsuperscript{8} For example, judicial salaries are constitutionally protected and are not linked to approval of the executive or legislative branches.\textsuperscript{9} Agency employees enjoy no such guarantee.\textsuperscript{10} Moreover a judge’s employment is not dependent on the approval of highly influential outsiders, like the President.\textsuperscript{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.\textsuperscript{12}


\textsuperscript{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).

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


\textsuperscript{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).

is largely for this reason—the institutional safeguards against capture of the judiciary—that court capture has been largely ignored by scholars.\footnote{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).}

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.\footnote{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).} 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.\footnote{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).} 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.\footnote{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. Waterman, 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).} This strain of capture literature has its roots in public choice theory, which envisions regulators as rational, profit-seeking individuals.\footnote{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 offshoot 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.\textsuperscript{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.\textsuperscript{19} Similarly, personal relationships between industry and the agency have been theorized to lead to capture.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{23} By lobbying and funding the election campaigns of Congressman and the President, special interests can gain influence over the funding of agencies.\textsuperscript{24} Judges, however, are not elected and therefore operate independently of outside influence.\textsuperscript{25}

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

\textsuperscript{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).

\textsuperscript{19} See id.

\textsuperscript{20} See, e.g., Johnson & Kwak, supra note 4 at 163–75 (using “cultural capture” theory to partially explain the 2008 financial crisis).

\textsuperscript{21} See id.

\textsuperscript{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).

\textsuperscript{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.”).

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

\textsuperscript{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.\textsuperscript{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.\textsuperscript{27} Federal judges are appointed for life, thereby presumably closing any revolving door between industry and the courts.\textsuperscript{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.\textsuperscript{29} Life tenure is also supposed to shelter federal judges from the political whims of the time.\textsuperscript{30} Furthermore, ethical limitations insulate the judiciary from accepting gifts from lobbyists or other interested parties.\textsuperscript{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.\textsuperscript{32} In fact, many federal judges retire to enter into the more financially lucrative world of law firms or mediation.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{26} See infra notes 152–175 and accompanying text.
\item \textsuperscript{27} See infra notes 177–194 and accompanying text.
\item \textsuperscript{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).
\item \textsuperscript{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.”).
\item \textsuperscript{30} Id. at 834 (“[J]udges are insulated from the more obvious demands of the political process . . .”).
\item \textsuperscript{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).
\item \textsuperscript{33} See infra notes 220–250 and accompanying text.
\item \textsuperscript{34} See infra notes 220–250 and accompanying text.
\end{itemize}
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


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).

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 courthouses. 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.
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 captuers. 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 (Carles Boix & Susan C. Strokes eds., 2007).
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. 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. Therefore, “[t]here is a systematic tendency for exploitation of the great by the small.” 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 outnumber 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 administrating the laws that Congress passes. 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. Those affected industries may seek to influence that agency’s decision-making. At times, this influence may cross over into “capture” where the agency is actually controlled by those it is meant to regulate.
While capture is well-established as a concept, the term is difficult to pin down with a precise definition.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{61}

\textsuperscript{57} Daniel Carpenter & David A. Moss, \textit{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, \textit{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, \textit{“Capture” in Financial Regulation: Can We Channel It Toward the Common Good?}, 21 \textit{Cornell J.L. & Pub. Pol’y} 175, 175–76 (2011) (describing the wide-scale acceptance of capture theory).

\textsuperscript{58} Michael A. Livermore & Richard L. Revesz, \textit{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.”).

\textsuperscript{59} Carpenter & Moss, supra note 57, at 13.


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. 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. 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. 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. 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).


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).

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”).

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. The first and the most obvious way involves the industry achieving favorable regulations via gifts or bribes to the employees of the agency. Fortunately, such actions are rare. 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. 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. Furthermore, agency employees engaged in sexual conduct and drug use with their industry counterparts. 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. The actions of MMS employees were scrutinized after the 2010 Deepwater Horizon oil spill killed eleven people and resulted in pouring 210 million


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.”).

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).

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


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.”).

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. Media outlets, including the New York Times and Washington Post, cited the story as an example of capture: the agency’s “cozy ties to industry” led to a regulatory failure.

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

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

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 Bò, supra note 61, at 205–12 (reviewing the broad regulatory capture literature in economics).
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. 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.

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. 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. Under this formulation of the capture story, capture may occur because congressional committees provide agencies with funding; in exchange for receiving the budget that it requested, the agency must be responsive to policy demands from Congress; and agencies may provide interest groups with favorable regulations in exchange for political support in Congress. 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.

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. Because of voter disinterest, Congress’ ability to use its budgeting power to control

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

Scholars have also discussed more subtle mechanisms for how interest groups influence agencies, including the control of information, manipulation of how questions are posed to agencies, and thick, interlocking personal and professional networks that include both agency personnel and outsiders. One of the best studied examples of iron triangle regulatory capture involves the Interstate Commerce Commission (ICC), a now defunct regulatory agency. 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. Instead of insuring competitive business practices, however, critics contend that the ICC was doing the bidding of the railroads, setting

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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 through control of information).


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.”).


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 . . . .").
100 MILTON FRIEDMAN & ROSE D. FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 194 (1990).
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.\textsuperscript{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.\textsuperscript{105}

This version of capture as an informational problem is rooted in collective action concerns.\textsuperscript{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.\textsuperscript{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 a level, and discussions that delve into the minutiae of the regulatory decision.\textsuperscript{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.\textsuperscript{109} In this way, decision-makers have the optimal quantity and quality of information.\textsuperscript{110} At the same time, these transfers of information would have to occur with public scrutiny if they were to be effective.\textsuperscript{111}

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

\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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”).
\textsuperscript{108} Id. at 1335.
\textsuperscript{109} Id. at 1419–22.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 1336.
liable agency employees who thereinafter 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-

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

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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.
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.

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\(^{130}\) 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.


\(^{134}\) 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. There have been some attempts to theorize about court capture, but those attempts have been limited and often focused on state courts. To be sure, scholars have raised capture concerns in relation to specific specialized courts. The United States Court of Appeals for the Federal Circuit, landlord tenant courts, specialized criminal courts, specialized antitrust courts, bankruptcy courts, and the United States Foreign Intelligence Surveil-

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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).


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”).
Balance Court\textsuperscript{143} have all been considered susceptible to special interest influence at one time or another. Yet many of these “courts” are not Article III courts.\textsuperscript{144} Furthermore, all of them maintain specialized caseloads that may increase the likelihood of capture.\textsuperscript{145} Scholars generally consider the generalized federal courts to be free of any serious capture concerns.\textsuperscript{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, \textit{are} implicitly regarded as being immune from these pathologies or at least as suffering from them to a significantly diminished degree.\textsuperscript{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.\textsuperscript{148} This political independence makes judges less reliant on approval from the other branches and the special interest influences that work upon those branch-

\textsuperscript{143} BAUM, supra note 38, at 85–86.

\textsuperscript{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, \textit{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, \textit{The FISA Court and Article III}, 72 WASH. & LEE L. REV. 1161 (2015).


\textsuperscript{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, \textit{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.”).

\textsuperscript{147} Merrill, supra note 1, at 1051.

\textsuperscript{148} See, e.g., Posner, supra note 145.
es. Also, life tenure insulates judges from the need to search out future employment, thereby closing any proverbial revolving door.

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. Because courts are decentralized repositories of cases, courts and judges are less valuable targets of capture. 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. 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. 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. But this sort of control is much less firm than the control that Congress and the Executive wield over the heads of agencies.
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. These protections are perhaps the most often invoked reasons why the judiciary is not susceptible to capture. Alexander Hamilton, in *The Federalist No. 78*, extolled life tenure as having the power to shield judges from politics, granting them “complete independence.” By appointing judges for life, it is thought, many of the personal benefits of capture that redound to agency employees are unavailable to judges. The most obvious potential benefit is the prospect of future employment. 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.

Although some scholars dispute that life tenure leads to judicial independence, the majority of scholars who have written about life tenure look upon judicial independence as one of the goals of life tenure.
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.\(^\text{165}\) 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.\(^\text{166}\)

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.”\(^\text{167}\) 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.\(^\text{168}\)

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).

in the typical agency-cost problems of bureaucracies that are not
disciplined by marketplace competition.\textsuperscript{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 infor-
mation to make socially-beneficial decisions, and pay-for-play.\textsuperscript{170}

It is questionable, however, whether life tenure acts as a capture deter-
rent 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.\textsuperscript{171} It stands to reason that industry would enjoy the same
long-term benefit by placing sympathetic judges on the bench. Just as polit-
ical 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 guar-
anteeing 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.\textsuperscript{172} A number of judges have retired
early to increase their salaries in private practice.\textsuperscript{173} Of course, the relatively

\textsuperscript{169} Posner, supra note 7, at 19.
\textsuperscript{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).
\textsuperscript{171} See Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87
\textsuperscript{172} Yoon, supra note 32, at 1049 n.72.
\textsuperscript{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 Sneeden of the U.S. Court of Ap-
peals for the Fourth Circuit. See Ann Belser, U.S. Judge Resigning July 1 to Join Buchanan Inger-
soll, PITTSBURGH GAZETTE, Apr. 28, 1999, at B2; Jonathan D. Glater, Federal Bench Needs a
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]; Saundra
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-


\textsuperscript{175} Retired judges frequently turn to mediation. \textit{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).

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

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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.
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”).

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.\footnote{Posner, supra note 145, at 783.} 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.\footnote{Id.}

Specialization of courts has also been a focus of Lawrence Baum. Baum has theorized about the relationship between specialized courts, capture, and centralization.\footnote{See generally BAUM, supra note 38 (explaining that courts have become increasingly specialized and that this specialization has led to changes in judicial policy).} He notes that the CCPA (a forerunner to the Federal Circuit) was captured by the patent bar.\footnote{Id. at 178–79.} By filling the court with sympathetic judges, the CCPA became a tool for patent lawyers and patent-reliant industries.\footnote{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).} 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.”\footnote{Id. at 178–79.} Capture cannot be presumed to have occurred because the impetus for the creation of specialized courts comes from other courts.\footnote{Id. at 85–86 (discussing various views of the FISA court, some of which suggest the court has been captured).} 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.\footnote{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).} To Baum, specialized courts do not show evidence of capture because the desire for specialized courts is often driven by ideas rather than interests.\footnote{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.\textsuperscript{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.\textsuperscript{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 literature\textsuperscript{197} 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.

\textit{A. The Eastern District of Texas}

United States federal district court judges outnumber United States federal appeals court judges by almost four to one.\textsuperscript{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.\textsuperscript{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.\textsuperscript{200} Thus, there are only twelve active federal appellate judges that are eligible to hear every patent appeal nationwide. At the trial level, over

\begin{footnotesize}
\begin{itemize}
  \item[196] See, e.g., \textit{BAUM}, supra note 38, at 45.
  \item[197] See \textit{supra} notes 65–126 and accompanying text.
  \item[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].
\end{itemize}
\end{footnotesize}
670 district court judges can hear patent trials.\textsuperscript{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.\textsuperscript{202} Indeed, some district judges have become increasingly open about their desire to attract patent litigants.\textsuperscript{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.\textsuperscript{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.\textsuperscript{205} For context, the next most popular court for filing of patent cases, the District of Delaware, received 533 new patent cases in 2015.\textsuperscript{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.\textsuperscript{207} Judge Rodney Gilstrap hears a quarter of the nation’s patent cases.\textsuperscript{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,\textsuperscript{209} judges who are “[k]nowledgeable, [w]elcoming, and [o]rganized,”\textsuperscript{210} plaintiff friend-

\textsuperscript{201} See AUTHORIZED JUDGESHIPS, supra note 198, at 8.
\textsuperscript{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.
\textsuperscript{203} See Klerman & Reilly, supra note 39, at 255–60 (describing the Eastern District of Texas’s case assignment procedures, despite Congressional response).
\textsuperscript{205} See Davis, supra note 195 (reporting on the number of patent suits in various districts).
\textsuperscript{206} Id.
\textsuperscript{207} Rogers, supra note 41.
\textsuperscript{208} Id.
\textsuperscript{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.”).
ly procedural rules,\textsuperscript{211} unwillingness to transfer cases to a more convenient district court,\textsuperscript{212} differences in substantive law rulings,\textsuperscript{213} or a host of other reasons.\textsuperscript{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.”\textsuperscript{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.

\textbf{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.\textsuperscript{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.\textsuperscript{217} And it is

\begin{itemize}
  \item \textsuperscript{211} See Anderson, \textit{supra} note 39, at 632 (arguing that the Eastern District of Texas “competes” for patent cases through plaintiff friendly procedural rules); Leyckhis, \textit{supra} note 209, at 300 (finding that “favorable patent rules” contribute to the Eastern District’s attraction).
  \item \textsuperscript{213} See Brian J. Love \& James Yoon, \textit{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 \textit{Alice} motions and predicting that litigants are unlikely to bring such motions given the procedural hurdles imposed by Judge Gilstrap).
  \item \textsuperscript{214} See Anderson, \textit{supra} note 39, at 633 (listing assumed reasons for the Eastern District of Texas’s popularity).
  \item \textsuperscript{215} See id. at 667 (describing how courts can effectively “compete” for cases); Klerman \& Reilly, \textit{supra} note 39, at 255–60 (theorizing that courts can offer their forums to plaintiffs). See generally Anderson, \textit{supra} note 39 (describing how the Eastern District of Texas has become the center of patent cases via “judge shopping”).
  \item \textsuperscript{216} See Dreyfuss, \textit{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).
  \item \textsuperscript{217} See, e.g., Frank Thompson, Jr. \& Daniel H. Pollitt, \textit{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).
\end{itemize}
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.\textsuperscript{218} This makes the study of capture very difficult to empirically measure.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{222} But the Eastern District is not alone in judges leaving for patent law firms. Other

\begin{footnotes}
\footnotetext[218]{See Kwak, \textit{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”).}
\footnotetext[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”).}
\footnotetext[220]{See \textit{supra} notes 42–135 and accompanying text (describing the methods by which agencies, and courts, may be captured).}
\footnotetext[221]{See Thompson & Pollitt, \textit{supra} note 217, at 106 (recounting the story of the last federal judge who was impeached).}
\end{footnotes}
judges from patent-heavy districts have also retired to become partners at private law firms.\textsuperscript{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.\textsuperscript{224} None of these judges had patent-related experience prior to their elevation to the bench.\textsuperscript{225} This move out of government employment is very similar to that of a revolving door between agency and industry.\textsuperscript{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.\textsuperscript{227} The

\textsuperscript{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.faranlaw.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).


\textsuperscript{225} See supra note 224 and accompanying text.

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

\textsuperscript{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. But this series of relationships does not create opportunities to capture federal courts. 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. 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. This dependence makes agencies more susceptible to the lure of interest groups lobbying Congress. Courts, on the other hand, basically get the same funding every year regardless of Congressional opinion of a particular court. 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. 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. Meanwhile, some industry players (mainly patent trolls) have become reliant on the Eastern District of Texas to scare alleged patent infringers to settle. The district also protects industry against the political tides,

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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. 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. Marshall and nearby Tyler, Texas residents have received over $50,000 per year in scholarships from Samsung. Many of the festivals in Marshall are sponsored by Samsung or feature Samsung booths which give out high-end electronics to residents. Many of the local high schools receive Samsung monitors for free or enjoy field trips to Samsung’s semiconductor plant in Austin.

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. Critics complained that Tivo was merely trying to influence the jury pool in a small city.


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).

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

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. The restaurants and hotels of Marshall receive steady business because of the litigators that are in the district. Construction jobs are easy to find as the litigants need office space. 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. These firms would likely not survive without the judges’s success in attracting patent cases to the Eastern District of Texas. 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.

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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.
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.\(^\text{251}\) 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.\(^\text{252}\)

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.\(^\text{253}\) 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.\(^\text{254}\) 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.\(^\text{255}\) 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.”\(^\text{256}\)

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.\(^\text{257}\) The judges of the Eastern District of Texas

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\(^{251}\) 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).


\(^{255}\) 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. The court itself handles important issues of patent and innovation policy that reverberate in the business community. Members of the patent bar enjoy a high social status, and include luminaries from the Supreme Court bar. And the court deals with highly complex, technical elements of patented products.

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. 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. Many district courts have rules that require local counsel in all cases before the court.

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. 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

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).
substantial increase in demand for office space and hotel rooms due to the visiting attorneys who come to town for trial.\footnote{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).}

For example, the annual Eastern District Bench Bar conference brings together patent litigators and the judges on the Eastern District of Texas.\footnote{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].} 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)\footnote{Id.} 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.”\footnote{Kwak, supra note 64, at 95.}

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-
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; 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), 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. 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

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270 These offices largely remain vacant throughout the year.
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. 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*. Prior to *TC Heartland*, the venue statute for patent cases allowed most patent plaintiffs to file in any district court in the United States. 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.\textsuperscript{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.\textsuperscript{277} The Eastern District of Texas keeps cases filed within its district by rarely granting motions to transfer.\textsuperscript{278} Once a case is filed in the Eastern District of Texas, it often remains there.\textsuperscript{279} Thus the initial choice of the plaintiff plays a great role in determining the final outcome of a case.\textsuperscript{280} Therefore, Congress ought to further restrict the venue choices of patent litigants.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{276} See, e.g., Kevin M. Clermont & Theodore Eisenberg, \textit{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, \textit{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”).

\textsuperscript{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).

\textsuperscript{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., \textit{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, \textit{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).

\textsuperscript{279} Offen-Brown, supra note 212, at 73–74.

\textsuperscript{280} See supra note 276 and accompanying text.

\textsuperscript{281} See Jeanne C. Fromer, \textit{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).

\textsuperscript{282} See Kimberly A. Moore, \textit{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”).

of Texas’s denial of a transfer motion in a products liability lawsuit.\textsuperscript{284} In 2008 in \textit{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.\textsuperscript{285} The court in \textit{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.\textsuperscript{286} Since \textit{TS Tech}, the Federal Circuit granted mandamus review on seven motions to transfer within a very short time.\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{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-

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\item[284] See \textit{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.”).
\item[285] \textit{In re TS Tech USA Corp.}, 551 F.3d 1315, 1318 (Fed. Cir. 2008).
\item[286] Id. at 1317–18, 1323.
\item[287] See \textit{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); \textit{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); \textit{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); \textit{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); \textit{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 to the Northern District of North Carolina was an abuse of discretion); \textit{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).
\item[288] See \textit{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).
\item[289] 137 S. Ct. 1514 (2017).
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quartered elsewhere. 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. 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. Indeed, Congress is contemplating such a change in patent law, as well as in bankruptcy, another area that experiences widespread forum shopping. 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-ai [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”).
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


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).


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. It has also been cited as a problem in New York’s stop and frisk lawsuits. The ability to manipulate the judge assigned to one’s case is a practice that should be eliminated in the interest of justice.

Congress could mandate that district courts randomize assignment of patent cases within their districts. 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. 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.

Congress could quite easily eliminate the courts’ ability to permit pre-selection 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. The statute grants chief judges broad discretion in assigning cases. 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. 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. Such a move by the Supreme Court has the

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


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).


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’ 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.