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Pluralism, The Prisoner's Dilemma, and the Behavior of the Independent Judiciary

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PLURALISM, THE PRISONER'S DILEMMA, AND THE BEHAVIOR OF THE INDEPENDENT JUDICIARY

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Discussions of Thayer's conception of judicial review, as this symposium amply demonstrates, tend to be normative. Professor Nick Zeppos's paper,[1] which offers more of a positive analysis, is therefore a welcome addition. Zeppos's paper includes three especially valuable insights. First, he demonstrates the close parallel between Thayer's theory of judicial review[2] and the Supreme Court's *Chevron* doctrine.[3] The former would have the judiciary enforce clear constitutional commands but otherwise defer to legislative understandings of constitutional meaning; the latter would have courts enforce clear legislative commands but otherwise defer to administrative interpretations of statutes. Second, he offers evidence that in both the constitutional review context and the *Chevron* context, the Supreme Court does not in fact behave in a Thayerian fashion. The Court invokes its understanding of the Constitution to invalidate or modify legislative outcomes at a higher rate than Thayer's conception of judicial review would permit; the same holds for judicial modifications of administrative outcomes under *Chevron*. Third, Zeppos notes that the best-known positive model of the independent judiciary—that offered by Landes and Posner[4]—asserts that courts in a pluralist democracy will behave in fact the way Thayer and *Chevron* say they should behave in theory: as faithful agents enforcing pluralist outcomes. If it turns out that the independent judiciary behaves differently, then this suggests the need for a different positive model of judicial behavior.

Where Zeppos's paper falls short is in specifying a satisfactory alternative to the Landes-Posner model. The crux of the problem, I will argue, is that Zeppos, like Landes and Posner before him, overlooks the prisoner's dilemma aspects of the problem. The Landes-Posner theory specifies how the independent judiciary would behave in a world where

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1 Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296 (1993).

2 James B. Thayer, *The Origin and Scope of the American Doctrine of Judicial Review*, 7 HARV. L. REV. 129 (1893).

3 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

4 William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

individual pluralist actors (specifically, legislators) fully cooperate in demanding a standard of review that maximizes their collective wealth. They posit that this is the faithful agent standard. Zeppos, seeing that the independent judiciary does not in fact conform to the faithful agent model, seeks an alternative account of what kind of judicial behavior pluralist actors would demand in a world of complete cooperation among individual pluralist actors. He argues, in effect, that pluralist actors (focusing now on groups) are risk averse and hence will want courts to engage in moderate activism to provide insurance against the vagaries of the pluralist process.

What both accounts ignore is that individual pluralist actors (especially groups) are unlikely to cooperate in enforcing a standard of judicial review that serves the interests of pluralist actors in general. Any individual group that winds up the loser in the pluralist process has an incentive to defect from the cooperative solution and urge the courts to apply a standard of review that promotes its own interests. I will argue that this prisoner's dilemma dimension of the problem provides the most parsimonious explanation of the divergence between what the Landes-Posner model predicts and what Zeppos's data show. And I will suggest that a model based on the Landes-Posner model, modified by the prisoner's dilemma insight, is superior to Zeppos's model based on risk aversion.[5]

I

One of Zeppos's most important contributions, which unfortunately is implicit rather than explicit in his paper, is the development of an expanded version of the original Landes-Posner model. This expanded version is useful because it creates more opportunities for empirical testing than the original version.[6]

The Landes-Posner model is simple and elegant. It is also quite

[5] Landes and Posner assume explicitly, and Zeppos implicitly, that the political institutions of society operate like a market in which rival groups bid for outcomes supplied by political actors in return for reciprocal benefits such as campaign contributions, etc. This assumption was recognized to be an oversimplification when the Landes-Posner article was published, *see* James M. Buchanan, *Comment*, 18 J.L. & ECON. 903 (1975), and this shortcoming has been confirmed by subsequent research. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 17-33 (1991) (reviewing political science and economic literature on influence of interest groups). Nevertheless, because Zeppos does not quarrel with this aspect of the Landes-Posner model, and to avoid cluttering the discussion, I too will accept the political marketplace assumption as a given.

[6] For other attempts to expand the Landes-Posner model in order to facilitate empirical testing, see Gary M. Anderson et al., *On the Incentives of Judges to Enforce Legislative Wealth Transfers*, 32 J.L. & ECON. 215 (1989); W. Mark Crain & Robert D. Tollison, *Constitutional Change in an Interest-Group Perspective*, 8 J. LEGAL STUD. 165 (1979); W. Mark Crain & Robert D. Tollison, *The Executive Branch in the Interest-Group Theory of Government*, 8 J. LEGAL STUD. 555 (1979). Whereas Landes and Posner and Zeppos concentrate on the federal system and the Supreme Court, these studies draw on cross-jurisdictional data about state courts and reach findings that tend to confirm the Landes-Posner theory. I express some skepticism about one of these studies *infra* note 14.

powerful because it offers an explanation of two phenomena that on their face seem quite puzzling: why a pluralist political system would sustain the institution of an independent judiciary, and why an independent judiciary would tend to abide by the results of pluralist bargaining rather than impose its own preferred solutions. The key assumption that links and explains these phenomena is that an independent judiciary acts as a faithful agent "enforc[ing] legislation in accordance with the intentions of the enacting legislature."[7]

The role of the independent judiciary as a faithful agent explains why legislators value it as an institution. Landes and Posner assume that in a pluralist political system "legislation is 'sold' by the legislature and 'bought' by the beneficiaries of the legislation."[8] But a problem quickly emerges: who will enforce these legislative contracts in the future? The identity of the legislature changes every two years. Thus, if the legislature itself or some controlled institution (such as an administrative agency) does the enforcing, later legislatures are likely to renege on the original deal. Knowing this, potential customers will not spend much on legislative goods. Now, introduce an independent judiciary that faithfully enforces past legislative contracts. Given the high cost of enacting repealing legislation and faithful judicial enforcement of past legislative bargains, legislative deals have a greater prospect of durability. The demand for the legislative output goes up, and since the demand goes up, the price the legislators can charge goes up too. Accordingly, the legislature will support the institution of an independent judiciary because it maximizes the returns to the legislators in a system of pluralist politics.

Landes and Posner are more equivocal about the supply side of the equation—why an independent judiciary would adopt the faithful agent mode of interpretation. But the basic argument is clear enough.[9] Although the judiciary is independent, the political branches can make life more or less pleasant for judges. In terms of material rewards, Congress can increase or freeze judicial salaries and pensions, build lavish courthouses or allow existing structures to deteriorate, provide funds for a large or small support staff, and so forth. In terms of nonmaterial rewards, Congress can reaffirm or overrule judicial decisions, "tinker[] with the courts' jurisdiction, [or alter] the composition of the judiciary by the creation of many new judgeships."[10] Landes and Posner imply that if courts play the role of faithful agent, the rewards will rise; if the courts interpret statutes some other way, the rewards will fall. The judges are presumably cognizant of all this, and in order to maximize the total returns from holding judicial office, they will adopt—at least most of the

[7] Landes & Posner, *supra* note 4, at 882.

[8] *Id.* at 877.

[9] *Id.* at 885-87.

[10] *Id.*

time—the faithful agent mode of statutory interpretation.[11]

As Zeppos recognizes, the faithful agent interpretation posited by Landes and Posner closely approximates the normative standard for judicial behavior endorsed by Thayer.[12] Thayer would have courts perform as faithful agents of the framers of the Constitution—enforcing clear constitutional requirements (constitutional "contracts"). But absent a clear directive from the framers, Thayer's judges would enforce whatever outcomes the legislature generates. As Zeppos further recognizes, the Landes-Posner model is also consistent with the *Chevron* doctrine, which can be read as instructing courts faithfully to enforce legislative deals, but absent a bargain struck in the legislative arena, to enforce whatever outcomes emerge from pluralist bargaining at the administrative level.[13]

Generalizing from this, we have what amounts to an expanded version of the Landes-Posner model of the independent judiciary. The expanded model focuses not just on judicial interpretation of legislation, but posits an independent judiciary that acts as the faithful agent of a wide range of pluralist political outcomes: constitutional, legislative, and administrative. In effect, the faithful-agent judiciary employs a three-step decisional tree in every case involving a federal statute. First, it applies the Thayer thesis, asking whether the statute violates a clear command of the federal Constitution. If it does, then the constitutional deal prevails over the statutory deal; otherwise the statute will be upheld.[14] Next, the faithful agent judiciary applies the original Landes-Posner thesis, seeking to interpret the statute in accordance with the intentions of the enacting legislature. Lastly, if the legislation has been implemented by an administrative interpretation, the faithful agent judiciary adopts the *Chevron* thesis, asking if the administrative interpretation is consistent with the original legislative bargain. If it is not, it is struck down; otherwise any rational administrative outcome is upheld.

Expanding the Landes-Posner model in this way is useful because it gives us a larger universe of data with which to test the model. Landes

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11 This understanding of the supply side of the Landes-Posner theory is made explicit in Anderson et al., *supra* note 6, where the authors argue (based on a multi-state regression analysis) that the greater the independence of the judiciary, the higher the judicial salary scale.

12 Zeppos, *supra* note 1, at 302.

13 *Id.* at 321-32. This assumes that the legislators who enacted the statute would prefer that open questions be resolved through an administrative pluralist process rather than by the judiciary. In individual cases this may not be correct, for example if the enacting legislature is highly mistrustful or jealous of a particular agency. *See* McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 737 (1992).

14 Curiously enough, Anderson et al. adopt as a measure of judicial independence the frequency of judicial overturnings of legislation under the substantive due process doctrine. *See* Anderson et al., *supra* note 6, at 222-24. However, a judiciary that freely wields this doctrine—which is generally regarded as having no foundation in the original understanding of the Constitution—is the antithesis of the faithful agent that lies at the heart of the Landes-Posner model. In effect, Anderson et al. have shown that legislators reward wild-card judges with higher salaries than faithful agent judges. If true, this finding cannot be deemed a confirmation of the Landes-Posner theory.

and Posner looked only at evidence that would support or reject what I have called the Thayer thesis: rates of Supreme Court invalidation of federal statutes.[15] Zeppos offers some helpful emendations that tend to cast doubt on their conclusion that the Court has acted like a faithful agent in this context. In particular, he observes that interpretations based on the canon that statutes should be read to avoid constitutional questions should also count as deviations from the faithful agent model[16] and that when these cases are added in, the rate of invalidations more than doubles.[17] I would add the caveat that the expanded model suggests that a decision by the Court to invalidate a federal statute based on enforcement of a constitutional deal (*i.e.*, the original understanding) should not count against the model, but rather in favor of it. Nevertheless, since it is extremely rare for the Court to strike down federal legislation based on the original understanding of the Constitution, it probably does not distort Zeppos's conclusions to count all constitutional invalidations as disconfirming the model.

The degree to which courts act as faithful agents is not, however, simply a function of the rate of constitutional invalidations—or of constitutional invalidations plus constructions to avoid constitutional issues. As the expanded model makes clear, courts can also "overturn legislative deals"[18] by adopting a mode of interpretation that produces results different from those that would be generated by the faithful agent approach. Thus, another source of data relevant to whether courts conform to the Landes-Posner model would be ordinary statutory construction cases, which would reveal if the Court in fact follows the original intent approach to interpretation or some other approach. Zeppos does not address such evidence in the present paper, but both he and Professor Eskridge have published studies that bear on the problem.[19] The general conclusion of these studies is that the Court is at best a part-time original intentionalist in statutory construction cases. Often it eschews any examination of the understanding of the enacting Congress in favor of a textualist or plain meaning approach. On other occasions, it relies on precedent or other sources that inject an evolutionary or dynamic element into statutory construction. These findings must also be counted against the Landes-Posner hypothesis that the independent judiciary acts as a faithful agent carrying out legislative bargains.

Finally, a third source of evidence, as Zeppos insightfully perceives,

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[15] Landes & Posner, *supra* note 4, at 895. In a footnote, the authors suggested that other data, such as incidence of interpretations that deviate from the original understanding, would also be relevant. *Id.* at 895 n.41.

[16] Zeppos, *supra* note 1, at 306.

[17] *Id.* at 309.

[18] Landes & Posner, *supra* note 4, at 895.

[19] William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1099-101 (1992).

can be found in cases involving the *Chevron* doctrine.[20] If the Court follows the dictates of *Chevron*—invalidating administrative interpretations only if they conflict with the original deal struck in the legislature—then this too would tend to confirm the Landes-Posner model. On the other hand, if the Court deviates from *Chevron*, either by upholding administrative interpretations inconsistent with legislative intent or by invalidating administrative interpretations not inconsistent with legislative intent, then this would tend to disconfirm the model. Here the qualification I noted above is more pertinent. One cannot look at the total rates of Supreme Court invalidation of administrative interpretations in order to test the expanded Landes-Posner model, since some invalidations (those based on enforcing the original legislative bargain) are consistent with the model. Although Zeppos is not careful to observe this qualification,[21] he does cite data (including a previous study of my own) that show the Court deviates often from what a faithful application of *Chevron* would require, and this too tends to count against the Landes-Posner thesis.

The expanded version of the Landes-Posner theory therefore allows a much wider range of testing of the critical assumption of their model: that the independent judiciary acts as the faithful agent of the pluralist political system. On every front, we find reason to believe that the Landes-Posner thesis is at least incomplete. Although it is clear that our pluralist democracy does support the institution of the independent judiciary, the judiciary does not consistently behave like the faithful agent the Landes-Posner model describes. Instead, courts often adopt outcomes that cannot be fairly attributed to the understandings of the framers of the Constitution, or to a majority of a subsequent legislature, or even to an administrative tribunal. What is more, Zeppos collects data suggesting that the very groups one would expect to do well in the hurly-burly of pluralist politics—business associations, labor unions, state governments—seem to support this type of semi-activism.[22] Apparently, we need a different model of how an independent judiciary will behave in a pluralist political system.

II

Zeppos frames his paper in terms of a paradox about why groups powerful enough to secure beneficial legislation through pluralist bargaining would turn around and seek judicial invalidation of similar legislation procured by other powerful groups.[23] He develops his answer in the vocabulary of constitutional choice literature.[24] In essence, his expla-

20 Zeppos, *supra* note 1, at 322-24.

21 For the most part, Zeppos focuses only on "rates of reversal," *see id.* at 323-24, although he also notes the frequency of "doctrinal deviations from *Chevron*," *id.* at 324.

22 *Id.* at 312-14.

23 *Id.* at 296-98, 333-34.

24 *Id.* at 299, 304, 315, 328. By constitutional choice literature, I refer to works concerned with

nation is that groups are risk averse. When faced with the prospect of various types of uncertainty associated with the pluralist political process, they will choose a governance structure that provides for moderate judicial activism as a kind of insurance policy against these political risks, rather than a standard of faithful enforcement of any and all legislative deals.[25]

My own view is that this part of the puzzle—why do dominant groups occasionally urge activist judicial review?—has a much more straightforward and mundane explanation, which can be expressed in terms of the prisoner's dilemma. Indeed, as I shall discuss momentarily, the prisoner's dilemma perspective reveals a basic flaw in the Landes-Posner model and provides an important clue as to why the independent judiciary behaves the way it does. But first let us consider why dominant groups often seek activist judicial review.

The prisoner's dilemma, as is by now well known,[26] illustrates a ubiquitous problem in social organization: individual rational actors have incentives to adopt self-regarding solutions that leave them worse off than they would be if they and other similarly situated actors consistently adhered to cooperative solutions. The problem of group behavior toward an independent judiciary can be described in similar terms. Well-organized groups as a whole would be better off if they could agree to "cooperate" in supporting no deviations from the Thayerian faithful agent style of interpretation. In the individual case, however, any group that ends up a loser in the process of pluralist bargaining has an incentive to "defect" and urge the judiciary to upset the legislative bargain. The net result is exactly what Zeppos uncovers: many examples of well-organized groups, who on the whole presumably fare well in the pluralist political process, going to court and advancing arguments in support of judicial activism.

As an illustration of the phenomenon, consider one of the examples mentioned by Zeppos: the role of labor and management with respect to plant safety standards.[27] Presumably, these two relatively well-organized interests will wield considerable influence in any pluralist process (legislative or administrative) designed to set safety standards. Certainly, they will exercise more influence than more diffuse interests, such as consumers (who may be injured if high safety standards cause product prices to

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normative public choice theory, such as JAMES M. BUCHANAN, THE ECONOMICS AND THE ETHICS OF THE CONSTITUTIONAL ORDER (1981), *cited in* Zeppos, *supra* note 1, at 298 n.15, 315 n.79; JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962), *cited in* Zeppos, *supra* note 1, at 315 n.78; and Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988), *cited in* Zeppos, *supra* note 1, at 308 n.57, 315 n.79.

25 *See generally* Zeppos, *supra* note 1, at 314-21.

26 For basic exposition of the prisoner's dilemma, see DAVID M. KREPS, GAME THEORY AND ECONOMIC MODELING (1990); ERIC RASMUSSEN, GAMES AND INFORMATION (1989).

27 Zeppos, *supra* note 1, at 317.

rise) or taxpayers (who may be injured if low safety standards leave large numbers of injured workers on public disability rolls). Undoubtedly, the standards produced through pluralist bargaining will not be completely to the liking of either labor or management—they will embody a compromise. But in the long run, the overall pattern of compromises will probably be more advantageous to these groups than the pattern of outcomes that might be reached under other standards of review, for example, under a utilitarian or cost-benefit criterion of decision.[28]

Thus, if there *were* a moment of constitutional choice before any legislation or regulation was considered, it would be in the interests of labor and management to cooperate in promising to support a Thayerian standard of review. A Thayerian judiciary would uphold what amounts to wealth transfers from diffuse to well-organized interests. In contrast, a judiciary that exercises independent judgment, perhaps applying a utilitarian or cost-benefit canon that weighs all affected interests equally, would be less likely to uphold such transfers.

In reality, however, there will be no such moment of constitutional choice—or at least none that will result in a binding agreement or norm of cooperation. "Labor" and "management" are simply too large and diverse—and too lacking in coercive authority—to impose such an agreement on their constituent elements. What will happen is that once legislation is in place, and once the administrative entity responsible for generating specific standards goes to work, individual industries will be unhappy with some plant safety standards, and individual unions will be unhappy with others. In each case, the loser will have an incentive to defect from the cooperative Thayerian review solution that would be agreed upon in the hypothetical moment of constitutional choice and to go to court asking that the standard be overturned. Thus, the prisoner's dilemma can account for one of Zeppos's principal puzzles—why groups that tend on average to fare well in the process of pluralist bargaining nevertheless end up in court urging activism.

The prisoner's dilemma perspective also suggests a serious flaw in the Landes-Posner account, namely that they tacitly assume the prisoner's dilemma does not operate. In effect, the Landes-Posner model assumes that today's legislature will "cooperate" in supporting a standard of review that will inure to the benefit of all legislatures over time, even if urging a departure from this standard would work to the immediate ad-

[28] For example, management and labor might agree to set standards based on feasibility analysis, which would require that safety measures be adopted only to the extent they do not cause a decline in the plant's share of the relevant market. Consumers and taxpayers, in contrast, might settle on a cost-benefit criterion, which would require that all cost-justified safety measures be adopted, even if they result in the closure of plants. After flirting with a cost-benefit requirement in Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980), the Supreme Court endorsed a feasibility construction of the Occupational Safety and Health Act in American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981).

vantage of today's legislature. Similarly, they assume that the courts in individual cases will "cooperate" in adhering to a standard of review that maximizes the support for the independent judiciary among legislators over time, even if departing from this standard would be popular with today's legislature.

To be sure, if we focus only on legislatures and courts (as Landes and Posner do), there may be some warrant for these assumptions. Both legislators and judges work closely with their colleagues in a setting governed by institutional norms that probably induce greater cooperation than would exist in a more atomized setting, such as a competitive market. And individual legislators and judges are repeat players, involved in enacting hundreds of bills each Congress and deciding hundreds of cases each judicial term. Any legislator or judge who consistently "defects" by supporting judicial activism may be subject to retaliation from his or her peers.[29] Still, given the weakness of party and institutional loyalties among today's legislators and the almost total lack of official constraints on judges who engage in activist decisionmaking, it is reasonable to expect some defection from both quarters.

In any event, even if it is possible to hypothesize institutional forces that work against defection by legislatures (the sellers of legislation) and courts (the enforcement agents), this still does not account for the customers of legislation—the multifarious interest groups. Here, as we have seen, it is highly plausible that something like the prisoner's dilemma will continually frustrate any cooperative choice in favor of Thayerian review. And the views of the customers will surely carry considerable weight with the sellers of legislation. In fact, if the defecting groups offer to compensate the legislature for its support for an activist judicial solution (rather than new legislation), the legislature can double its money by taking the deal and selling its scarce legislative resources to some other coalition. Once defecting groups get the current legislature on board, the judiciary will have little to gain by stubbornly persisting in faithful agent review. Indeed, if courts insist on faithful agent behavior in these circumstances, support for the independent judiciary in the legislature will probably decline.

The point can be illustrated most clearly by considering what happens when obsolete or outdated legislation comes before a court. The Landes-Posner model predicts that the court will enforce the obsolete bargain, requiring the parties to go to the legislature to secure a repealer. But if a dominant coalition of current groups is unhappy with the outdated law, it will applaud a court that invalidates or "reinterprets" the statute, thereby saving the costs of purchasing new legislation. If some of the savings from the judicial solution are diverted to the legislature to

[29] In effect, legislatures and courts may be involved in a situation resembling an "iterative" prisoner's dilemma, which has been shown to evolve toward cooperative solutions. *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984).

secure its approval, applause can be expected from that quarter as well.[30] A court that disregards the original intent of obsolete legislation will be hailed for its statesmanship by the current coalition of groups, and perhaps by the Congress too.

The point can be generalized to any situation where the outcome reached in past actual pluralist bargaining diverges from the outcome that would be reached in a present hypothetical pluralist bargain.[31] Any such situation presents a temptation for both groups and the independent judiciary to defect from the strategy that Landes and Posner say will maximize their returns in the long run. Landes and Posner implicitly assume that both the legislature and the independent judiciary will cooperate in these situations and resist the temptation to defect. But they offer no theory or mechanism that would explain why groups generally depicted as engaged in a ruthlessly competitive struggle or courts concerned only with their standing in the eyes of pluralist institutions, would consistently resist the temptation to defect, or even why they would resist it often enough to make the faithful agent strategy work.

III

We are now in a position to outline what might be called the prisoner's dilemma variation to the Landes-Posner model of the behavior of the independent judiciary in a system of pluralist politics. Following the lead of Landes and Posner, the prisoner's dilemma variation posits that the independent judiciary seeks to maximize its material and nonmaterial rewards. But the variant model departs from Landes and Posner's suggestion that the maximizing strategy will be faithful adherence to the Thayerian standard of review. Instead, it posits a more complex maximizing strategy. Because it is always in the long-run interest of the legislature and dominant groups that the courts engage in faithful agent interpretation, Thayerian review may be said to be the presumptive rule that courts follow. But the presumption can be overcome in any case where there is sufficiently strong group and legislative defection from the long-run solution. Roughly speaking, therefore, when courts are confronted with a case in which there is little deviation between the original pluralist bargain and the present confluence of pluralist forces, they will play the role of faithful agent and enforce the original understanding.

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[30] *See* Eskridge, *supra* note 19, at 390 n.179 (criticizing Landes-Posner model on the ground that "[i]t seems more plausible that the Supreme Court would assign greater weight to the preferences of the current and future Congresses (which might override the Court's preferences) than to those of the enacting Congress, particularly if, as often happens, that Congress is long departed").

[31] Another example besides obsolete laws might be laws enacted in a burst of ideological enthusiasm that overwhelms the usual group bargaining processes. The federal environmental laws of the early 1970s may fit this description. *See* John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 284-315 (1990) (advocating that agencies and courts ignore the literal commands of environmental laws adopted as symbolic statements).

But when courts are confronted with a case in which there is a major deviation between the original pluralist bargain and the current preferences of dominant groups and the legislature—a deviation large enough that courts suspect their standing may decline in the eyes of pluralist institutions if the groups are not placated—then the courts will strive to find some way to avoid enforcing the original pluralist bargain.

The prisoner's dilemma variation has an imprecise quality that may frustrate easy empirical testing. Nevertheless, it has considerable general explanatory power. For example, it can account for both the major findings of Zeppos's paper. Zeppos finds, first, that well-connected groups who presumably fare well in pluralist politics nonetheless often seek judicial intervention to upset pluralist outcomes. This, of course, is what would be expected given any positive level of defection among groups from the cooperative standard of review. Zeppos also finds that courts respond to these entreaties in a semi-activist fashion, generally upholding the pluralist outcome but deviating from it in approximately one quarter of the decided cases.[32] The prisoner's dilemma model can explain this result by positing that in roughly three-quarters of the cases there is little conflict between past and present patterns of pluralist demand, but in roughly one quarter of the cases the present pattern of pluralist demand deviates significantly from the historical pluralist bargain.

In contrast, the alternative model that Zeppos sketches, based on a constitutional choice by risk averse groups in the face of political uncertainty, seems both less plausible and less explanatory of his findings. It is less plausible because it implicitly posits the existence of a collective constitutional choice grounded in risk aversion that has no observable correlate in the Constitution or the Administrative Procedure Act. Moreover, like Landes and Posner before him, Zeppos has no theory that explains how groups overcome the collective action or prisoner's dilemma barriers to achieving such an enforceable constitutional understanding.[33]

Zeppos's theory is also less explanatory because the factors he identifies as influencing group behavior—the unpredictability of legislative and administrative outcomes, the possibility of political change over time, the risk aversion of groups, etc.[34]—all run in the direction of increasing demand for judicial activism. Given his account of the superiority of judicial over political decisionmaking from a group perspective, one might expect that groups would want *every* important decision to be

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[32] Zeppos, *supra* note 1, at 309-10 (constitutional invalidations); *id.* at 323-24 (rejections of agency interpretations).

[33] A similar critique of normative public choice theory has been advanced by Professor Elhauge, who notes that these theories presuppose—without supporting theory or proof—that the process of interest group influence is suspended once conflict moves from the political branches to the courts. *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991).

[34] Zeppos, *supra* note 1, at 314-21.

made by courts rather than legislative and administrative bodies. But his own data suggest a stable equilibrium of semi-activism, not a judocracy. A satisfactory positive model should be able to account for the strong element of restraint demonstrated by the independent judiciary as well as the deviations from the Thayerian ideal.

In addition to explaining Zeppos's major findings, the prisoner's dilemma variation can also account for several elements in the broader picture regarding the behavior of the independent judiciary. First, there is what might be called the pervasive hypocrisy of judicial review. In effect, courts pay elaborate obeisance to norms of judicial restraint, as reflected, for instance, in the enduring appeal of Thayer's article and in the *Chevron* doctrine. But at virtually no time in its history has the judiciary actually abided by these norms. The prisoner's dilemma variation provides an explanation for the consistent tension between judicial rhetoric and reality. Faithful agent review is associated with a cooperative solution, *i.e.*, a solution that reflects the long run interests of the legislature and dominant groups. It should not be surprising that such an approach is intuitively regarded as being the legitimate one.[35] Activist review, in contrast, represents a concession to expediency brought on by defection from the cooperative solution. It is a necessary evil that courts must indulge in to maintain support for an independent judiciary. Not surprisingly, such a practice carries the stigma of illegitimacy. The asymmetry in the normative status of the two approaches may explain why courts continue to prefer hypocrisy—saying that the original understanding is binding and then periodically ignoring it—rather than adopting some other theoretical understanding of their role that would expressly permit a significant measure of activism.

Second, the prisoner's dilemma model helps explain why, in practice, virtually any system of judicial interpretation will place great emphasis on devices that permit the meaning of statutes to change over time. Most prominent here is the doctrine of precedent, which permits the meaning of statutes to be determined by reasoning analogically from prior judicial decisions—which have multiple layers of meaning—rather than by evidence of original understanding. In addition, the doctrine of deference to executive interpretations, the use of canons of construction, and the practice of referring to subsequent legislative history all serve in various ways to inject a dynamic component into statutory interpretation.[36] In terms of the prisoner's dilemma variation, these doctrinal devices provide the "escape hatch" that allows courts, in appropriate circumstances, to depart from Thayerian review and reach results that accommodate the demands of current coalitions of dominant groups.

Third, the prisoner's dilemma variation suggests that courts are

[35] Game theorists have in fact used the prisoner's dilemma to explain the evolution of social and ethical norms. *See* JON ELSTER, THE CEMENT OF SOCIETY (1989).

[36] *See* Eskridge, *supra* note 19.

more apt to adopt the Thayerian standard of review with new statutes and will deviate increasingly from that standard as statutes age. The newer the statute, the more likely it will be that the historic pattern of group preferences corresponds to the current pattern of group preferences. Thus, with a new statute, the odds are good that the cooperative outcome coincides with the outcome that would be reached by measuring group sentiment in response to a challenge brought by a defector. To be sure, Landes and Posner found little evidence that the Supreme Court is more likely to invalidate old than new statutes.[37] But when one also takes into account interpretations that deviate from original intent and failures to invalidate administrative constructions based on original intent—as the expanded version of the Landes-Posner model requires—there can be little doubt that deviations from faithful agent interpretations increase over time. The clearest example of this is the U.S. Constitution, which is a very old and revered document, but is today almost never enforced in accordance with its original understanding.

Fourth, the prisoner's dilemma perspective provides an explanation for Thayer's proviso that the faithful agent standard should apply only to judicial review of federal legislation, not state legislation,[38] and for the fact that the Supreme Court does indeed invalidate proportionately more state than federal laws. From an interest group perspective, Thayerian review presupposes that all groups have had an opportunity to put in their bids before legislation is enacted. With respect to federal legislation, this presumption has some validity, at least if the community of groups is limited to U.S. citizens. But with respect to certain types of state legislation, this is not the case. For example, state laws that conflict with or undermine federal laws may represent attempts by parochial state interests to escape from a comprehensive bargain struck by groups at the federal level. Relatively close scrutiny of these statutes under the Supremacy Clause is therefore warranted. Alternatively, state laws that discriminate against goods and services produced in other states or that seek to export costs to persons in other states, may also reflect parochial state interests attempting to gain an advantage at the expense of groups not represented in the state political process.[39] Again, fairly exacting judicial review under the dormant Commerce Clause or Privileges and Immunities Clause is appropriate.

Finally, the prisoner's dilemma model suggests that judicial activism will not result over time in a shift away from dominant groups to "discrete and insular minorities" or other underrepresented interests.[40] Rather, the model predicts that courts will deviate from faithful agent interpretation only in response to the demands of current coalitions of

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37 Landes & Posner, *supra* note 4, at 897.

38 Thayer, *supra* note 2.

39 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819).

40 *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

powerful groups—the very groups with the capacity to obtain new legislation. The model therefore suggests that judicial activism will at most affect the rate of legal change in society, not its ultimate direction. Typically, an emerging coalition of groups will seek change through judicial invalidation or reinterpretation of existing law. If it succeeds, the legal change will occur rapidly. If it fails, then the emerging coalition will have to muster its resources and stand in the legislative queue to obtain relief, and change will come more slowly. Legal changes sought in the last three decades by civil rights groups, women's groups, environmental groups, those seeking access to contraceptives and abortion, and gays and lesbians are roughly consistent with this observation.

I will limit myself to two points by way of support for this assertion. First, does anyone believe that if *Griswold v. Connecticut*[41] had been decided the other way, it would still be the law of Connecticut today that married couples may not use contraceptives for birth control? Second, consider *Boutilier v. INS*[42] applying a faithful agent mode of interpretation to hold that the INS could exclude homosexual aliens on the ground that Congress understood the term "psychopathic personality" to include homosexuality. Departing from faithful agent interpretation would have struck an early blow in favor of gay rights. But as Eskridge has recounted, *Boutilier* was overturned by Congress in 1990, largely because gay and lesbian groups have emerged as an important political force with considerable support in Congress.[43] In other words, an activist rather than faithful agent decision in *Boutilier* would have accelerated the speed of legal change, but would not have changed the ultimate outcome.

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41 381 U.S. 479 (1965).

42 387 U.S. 118 (1967).

43 *See* Eskridge, *supra* note 19, at 358-59. *Compare* William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990) (drawing upon hermeneutic theory to justify activist outcome in *Boutilier*).