RESPONSE

JUDGES COMPETE BECAUSE THEY ARE HUMAN[†]

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ABSTRACT

Judges are human, and they compete for cases because they are susceptible to the same kinds of very human incentives as the rest of us. But what is unusual about federal judges is their workplace: they have a glorious dead-end job that's missing traditional carrots and sticks. This dynamic produces some strange results, including forum selling, where judges seek more work for the same pay. In conversation with Why Do Judges Compete for Cases?*, this Response suggests that forum selling (and its attendant risks and harms) is inevitable, because judges, like the rest of us, will act out of self-interest to improve the nature of their work and its rewards. And that's especially true when ambitious, driven people find themselves in these important but ultimately dead-end roles with decades of similar work ahead of them.*

[†] An invited response to Paul R. Gugliuzza & J. Jonas Anderson, *Why Do Judges Compete for Cases?*, 104 B.U. L. REV. 1981 (2024).

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INTRODUCTION

Judges are human.[1] Paul Gugliuzza and Jonas Anderson's thoughtful and important work on why (at least some) judges compete against one another for cases provides another important reminder of this basic fact.[2] Because they are human, judges are susceptible to very human incentives, including acting in their own self-interest. Although the federal judicial role has been structured to minimize the risk that ordinary self-interest might affect decision-making, Gugliuzza and Anderson's account reminds us that self-interest can nevertheless creep into the federal judicial process. And it does so, I argue, in part because of the frustrations of being in a glorious but seemingly dead-end job.

We've long known that litigants forum shop, but this is the first sustained examination of why judges do something similar: they forum sell. Although we know that judges are active and managerial in all sorts of ways once a case begins,[3] some may still cling to the idea that judges are passive recipients of the cases filed before them. Cases are assigned to judges based on default rules,[4] even if, as we know, those assignments are not perfectly random[5]—especially in jurisdictions with single-judge divisions.[6] But in the conventional narrative, judges sit back and wait for a case to be assigned to them. Gugliuzza and Anderson have shown in earlier work that some judges are not passive receivers of patent cases;[7] scholars like Lynn LoPucki have shown that's true, too, in the

[1] *See* Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 23-24 (1931) (pondering "personal element in court justice"); Tom S. Clark, Benjamin G. Engst & Jeffrey K. Staton, *Estimating the Effect of Leisure on Judicial Performance*, 47 J. LEGAL STUD. 349, 349 (2018) ("One of the most significant lessons of the social science of law and courts during the 20th century might be summarized as follows: judges are people too.").

[2] Paul R. Gugliuzza & J. Jonas Anderson, *Why Do Judges Compete for Cases?*, 104 B.U. L. REV. 1981 (2024).

[3] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982) (identifying emergence of a new active and "managerial" trial judge).

[4] 28 U.S.C. § 137(a) ("The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.").

[5] *See* Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 2-3 (2015) (questioning pure randomness of case assignments given constraints such as scheduling).

[6] *See, e.g.*, Gugliuzza & Anderson, *supra* note 2, at 1986 n.32 (discussing nonrandom assignment to Judge Albright in Waco Division of Western District of Texas because Judge Albright is only sitting judge in that division).

[7] J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 DUKE L.J. 419, 421-22 (2021) (reporting efforts by Judge Albright to encourage patent case filing in Waco, Texas); J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 635 (2015) (arguing court competition explains prevalence of patent forum shopping).

bankruptcy context.[8] And there are other contexts where we find "case-seeking behavior," including in politically charged litigation.[9]

An important—and perhaps ultimately unknowable—question is, why? And that's the question that Gugliuzza and Anderson grapple with here. The behavior itself—judges seeking more cases and harder cases—runs counter to what we might expect of judges as workers,[10] given that judges have fixed salaries that do not depend on the amount or quality of their work.[11] Another traditional incentive that might motivate worker behavior is largely missing, too: the prospect of promotion for most judges is remote.[12] So, why would judges do more, harder work for the same pay?

The answers that Gugliuzza and Anderson give are predictably human. They suggest that one of seven broadly framed incentives may explain why at least some judges compete for cases.[13] Some of these incentives may seem perfectly reasonable (e.g., prior experience creates an interest in a particular kind of case), while others are deeply problematic on their face (e.g., a judge seeks to boost post-judicial career opportunities for themself by developing a particular expertise or relationship). Regardless of whether they seem beneficent, benign, or malign, these incentives are all about the judges themselves. Gugliuzza and Anderson's account is largely a story about judges acting for their *own* interest (or the interest of the local community in which they serve, which is also still

[8] LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 15-18 (2005) (describing rise of competition for bankruptcy cases by U.S. forums and judges).

[9] Gugliuzza & Anderson, *supra* note 2, at 1983 (arguing case-seeking behavior was present "over public health measures related to COVID-19").

[10] Thinking of judges as workers is not a new idea, of course. *See* RICHARD A. POSNER, HOW JUDGES THINK 7 (2010) ("[J]udges are not moral or intellectual giants (alas), prophets, oracles, mouthpieces, or calculating machines. They are all-too-human workers, responding as other workers do to the conditions of the labor market in which they work.").

[11] 28 U.S.C. § 135 (making no mention of workload-based salary adjustments).

[12] Frank B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 183 (2008) (reviewing RICHARD A. POSNER, HOW JUDGES THINK (2008)) ("Promotion is a possibility for some federal judges, but its odds are not high, and the standard for judicial evaluation are sufficiently obscure that it is difficult for federal judges to adapt their behavior to enhance their prospects."). District court judges may be more influenced by the possibility of promotion than appellate judges. *See* Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1488 (1998) (noting while chances of circuit judge being promoted to Supreme Court are slim, "forty percent of circuit judges are promoted from the ranks of the district judges"). That said, there is no evidence that the quality of judicial decisions or reversal rates has any effect on promotion prospects. *See* Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 135-37 (1980) (finding "only a very slight responsiveness of the probability of promotion to changes in the reversal rate").

[13] Gugliuzza & Anderson, *supra* note 2, at 1987.

about the judges themselves).[14] Their account demonstrates that self-interested decision-making—even when it does not rise to an extreme level like bribery or direct financial gain—still carries a risk of subverting procedure to satisfy that interest. And that's the problem with case-seeking behavior, no matter the reason.

Whatever might motivate an individual judge—and it could be one or more of the incentives that Gugliuzza and Anderson identify—I argue it has something to do with self-interest. And that expression of self-interest, I suggest, is ultimately endemic to the structure of the judiciary itself. Federal judges are in powerful, prestigious, but largely "dead-end jobs." I don't mean that as a pejorative. It's an evocative way of describing that for many judges, a federal appointment is the end of the line, or could be, and there are some attendant realities to that position that make case-seeking behavior more likely. That's especially true as federal judicial appointees become younger and younger. There may be little we can do to eliminate these kinds of behaviors, unless and until we attend to the structure of the courts themselves.

In what follows, I first explain why self-interest creeps into federal judging despite the structural constraints against it. Then, I explain why, in my view, Gugliuzza and Anderson's account is a product of "dead-end judging"—that is, the challenge of a highly ambitious person being "stuck" at a young age in their (potentially) last job.

I. SELF-INTEREST MOTIVATES JUDGES, TOO

Judges put their pants on one leg at a time—just like the rest of us. That judges are human, and self-interested,[15] is now well established,[16] even if many of us remain in thrall to the federal judiciary. At least some of the time, it's possible that self-interest—including the possibility of earning recognition for one's

[14] Gugliuzza & Anderson, *supra* note 2, at 2030 (describing benefits to judges of bringing business to community in which they sit).

[15] *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Things Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1, 3-4 (1993) ("Politics, personal friendships, ideology, and pure serendipity play too large a role in the appointment of federal judges to warrant treating the judiciary as a collection of genius-saints miraculously immune to the tug of self-interest."); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 617-18 (2000) ("For if judges are human beings who have an array of self-interested motivations to accompany their public-interested motivations, then it is important that not only political scientists, but also lawyers, law students, and all the rest of us who study the courts ought to understand these motivations." (footnotes omitted)).

[16] *See* POSNER, *supra* note 10, at 7; Joanna Shepherd, *Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory, and Judicial Behavior*, 2011 U. ILL. L. REV. 1753, 1757-59 (evaluating empirical support for Posner's claims). *See generally* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013) (exploring similar themes).

work to increase the odds of advancement,[17] increasing one's reputation,[18] or securing more leisure time[19]—informs judicial decision-making. Influential former federal appellate judge Richard Posner first invited us to be skeptical of judges and evaluate them as workers seeking utility maximization like everyone else.[20] What judges maximize might be distinct, Posner observed, but judges remain utility maximizers, and those distinctions say more about institutional constraints than about judges themselves.[21]

Although academics were initially reluctant to embrace the image of a self-interested federal judiciary on par with more traditionally political actors,[22]

[17] That includes the possibility of promotion. *See, e.g.*, Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63, 64-65 (2005) (discussing possibility federal judges use decisions and opinions to signal quality of work to appointing authorities); *cf.* Sisk et al., *supra* note 12, at 1487-93 (discussing behavioral approach to examining judicial decision-making with respect to career advancement); Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT'L REV. L. & ECON. 13, 14 (1992) (exploring incentive structure around promotions in judicial decision-making); Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 188-90, 193 (1991) (arguing district judges seeking promotion incentivized to hold sentencing commission constitutional and finding statistical correlation between constitutional holdings and likelihood of appellate appointment).

[18] *See* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 138-51 (2006) (testing empirically the claim that Republican appointees to Supreme Court who are new to Washington, D.C. scene drift more left over time to improve their reputation in national media outlets—the so-called "Greenhouse effect," named after longtime *New York Times* Supreme Court reporter, Linda Greenhouse); *see id.* at 151 ("[T]he hypothesis of a Greenhouse effect should not be dismissed out of hand. Judges want the approval of individuals and groups that are salient to them, and their interest in approval may affect their judicial behavior."); *see also* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1574-79 (2010) (analyzing judicial ideological shift to left due to "Greenhouse effect").

[19] *See, e.g.*, Clark et al., *supra* note 1, at 383 ("[O]ur difference-in-differences design shows that when judges' alma maters appear in the [March Madness Basketball tournament], they divert effort away from judging, as predicted by the literature on judges in the labor market."); *cf.* Ahmed E. Taha, *Publish or Paris? Evidence of How Judges Allocate Their Time*, 6 AM. L. & ECON. REV. 1, 5-6 (2004) (examining empirical likelihood that judges publish their decisions as function of maximizing utility and time, including for leisure).

[20] *See* Posner, *supra* note 15, at 2. Posner's most thorough work on judges as workers is in HOW JUDGES THINK. POSNER, *supra* note 10.

[21] POSNER, *supra* note 10, at 11 ("[Judges] want the same basic goods that other people want, such as income, power, reputation, respect, self-respect, and leisure. If the typical judicial weighting of the various goods is distinctive, it is because of the incentives and constraints that the office of judge creates . . . .").

[22] *See, e.g.*, Schauer, *supra* note 15, at 615. As Schauer explains:

> "What Do Judges Maximize?" Judge Posner asked a few years ago. And in answering "The Same Thing Everybody Else Does," Posner attempted to shift our thinking about judges away from the mélange of glorification, celebration, and adoration that pervades

empirical evidence supports some of Posner's observations.[23] So compelling, in fact, is this modern account of judicial decision-making that Lee Epstein and Jack Knight—the two originators of one of the leading social science theories of judicial decision-making[24]—acknowledged they were "wrong" to have argued in earlier work that policy-preference maximization was the paramount concern for most judges.[25] Instead, a more accurate view of judicial decision-making, they said, must account for the "importance of personal motivations," including, among them, "job satisfaction."[26]

That self-interest influences any judicial decision is sobering,[27] given, especially, that the Framers of Article III structured the federal judiciary to mitigate the ordinary self-interest that drives many of us. As a workplace, the federal judiciary lacks common carrots and sticks thought to shape worker behavior.[28] Federal judges can't lose pay, be easily removed from office, or relocated—the "sticks," if you will.[29] They also don't earn more money for good work or for doing more work;[30] they often toil in obscurity;[31] they generally lack substantial control over the type of work they do and how much of it they have;[32]

> much of popular and almost all of academic thinking about the judiciary and towards a more realistic analysis of judicial incentives and judicial behavior. But Judge Posner's contribution, along with a few others from his compatriots in law and economics, have unfortunately (but perhaps not surprisingly) largely been ignored.

Id. (footnotes omitted).

[23] Shepherd, *supra* note 16, at 1757 ("Numerous empirical studies have found results consistent with Judge Posner's conjecture."). *But see id.* at 1759 (noting that "empirical evidence is somewhat mixed" but that "the majority of recent studies find that self-interest concerns, such as promotion desires and reversal aversion, influence the decisionmaking of judges with permanent tenure").

[24] *See generally* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998) (outlining theory of judicial decision-making).

[25] Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11, 12 (2013) ("[S]cholars . . . have demonstrated that although the policy goal is crucial to understanding judicial behavior, it is not the only motivation; it may not even be dominant for many judges.").

[26] *Id.* at 18-19.

[27] *See* Gregory C. Sisk, *Judges Are Human, Too*, 83 JUDICATURE 178, 211 (2000) (observing empirical studies of judicial behavior are "sobering splash in the face with cold reality").

[28] *See* Posner, *supra* note 15, at 4-5 (discussing how Article III has been framed to limit common worker incentives and disincentives or carrots and sticks among federal judges).

[29] *See id.*, at 4-5; *see also* Gugliuzza & Anderson, *supra* note 2, at 1988-91 (discussing available incentives and disincentives for judges).

[30] The British experimented with something like this, where, for a time, judicial income depended on the volume of litigation—an arrangement that led judges to lean in favor of plaintiffs more often. *See* POSNER, *supra* note 10, at 36 (mentioning past British practice).

[31] There are obviously notable exceptions, especially at the Supreme Court level.

[32] Even if Gugliuzza and Anderson have convincingly shown that *some* judges can influence the kinds of cases they receive, most judges don't pick their cases—at least not at

and many have few opportunities for real career advancement[33]—that is, the job lacks "carrots."

But, as Gugliuzza and Anderson's account demonstrates, self-interest can still creep into the judicial process. We're not talking about gross abuses of power, like bribes or direct financial gain. Indeed, that kind of behavior will (or at least should) result in disciplinary action.[34] The kind of self-interest at the heart of this story is far more subtle—and almost entirely unavoidable. Indeed, "the absence of strong incentives and constraints" in the judicial workplace, Posner has argued, "creates a space for weak ones to influence behavior."[35] It is entirely possible that considerations like job satisfaction, external reputation, and public recognition may matter more to judges than to those in other professions—precisely because other, more common carrots have been removed. That raises the stakes on what incentives do remain and the extent to which those carrots might shape judicial choices.

Even if judges act on self-interest, judicial decisions are often highly constrained, especially in the "inferior"[36] federal courts. Although district court judges have substantial discretion to make many decisions that are not subject to robust appellate review, both their jurisdiction and autonomy are ultimately limited. Because substantive decisions of a district court judge may be constrained by vertical precedent, it is often difficult for judicial self-interest to emerge as a contributing factor in case-specific adjudication.[37] But, as Gugliuzza and Anderson persuasively show, it very well may emerge in other, more indirect ways that necessarily also affect the judicial process, like case-seeking behavior.

To the extent self-interest plays a role in judicial decision making, it may be most likely to shape the relatively unguided (and often unreviewable) structural choices before judges—like, for example, case assignment rules. Meaning, it very well may creep up where Gugliuzza and Anderson have spotted it: in the behind-the-scenes procedural wranglings that lead to forum selling. This, after all, was Richard Epstein's point years ago when he first considered the extent to

most levels of the federal system, where cases are filed and appealed as of right. *See, e.g.*, 28 U.S.C. § 1291 (granting appeal as of right from final decisions of district courts).

[33] Some federal judges have greater promotion prospects than others, so for some, surely, that possibility is influential. *See* EPSTEIN ET AL., *supra* note 16, at 35-36 (recognizing that about 11% of district judges are promoted to courts of appeals, but "promotion prospects" for some judges may be particularly high).

[34] *See, e.g.*, 28 U.S.C. § 351(a).

[35] POSNER, *supra* note 10, at 140.

[36] U.S. CONST. art. III, § 1.

[37] *See* Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 831-32. (arguing even though "[j]udges may well act only out of self-interest," independent federal judicial structure mostly "takes *successful* institutional steps to counteract certain known and obvious risks" of ordinary self-interest).

which public-choice theory could apply to judicial decision-making.[38] Epstein suggested that the theory had the most purchase in non-courtroom activities (that is, not when judges are deciding cases).[39] But where judges have more freedom and less constraint, as they might in designing a procedural system, they might have more freedom for motivated decision-making. That is exactly what we're seeing in the competition for cases, where judicial self-interest motivates an unexpected practice: judges seeking more, harder, and ultimately higher-profile work.

II. AMBITION, JUDICIAL WORK, AND AGE

Let me start with an anecdote. I was recently at a dinner with a federal appellate judge who'd been on the bench for twenty years and was in their sixties and a federal district court judge who was decades younger with fewer than five years on the bench. I asked them what percentage of their time was spent on intellectually interesting, challenging cases. The federal appellate judge said nearly all of it. The district judge quickly confirmed that was not their experience. Not at all.

I expected this response based on how these courts structure their work. Forum selling, I argue, is a natural byproduct of very human judges, constrained against acting in some self-interested ways, running headlong into a (likely) dead-end job. And that job, although glorious in many ways, may not be nearly as interesting as the appointee expected: much of federal judicial work is dull, monotonous, and voluminous.[40] So, although it's surprising that a judge might want *more* work, case-seeking behavior seeks not a change in quantity, but a change in *quality*. And the kinds of folks who make it to the federal bench are exactly who we might expect to have an interest in higher profile, more intellectually challenging work. Bottom line: some case-seeking behavior is exactly what we should expect in the federal system, given the profile of judicial appointees, the nature of the judicial work before them, and the unique constraints of their workplace.

All of us get bored and stale in our work, especially if the opportunities for career advancement are few. At some point, a federal district court judge becomes too old for another judicial appointment or elevation; they are stuck where they are. And, depending on their age at the time of appointment, they

[38] *Id.* at 827. Epstein described the application of public-choice theory to judicial decision-making as a "meager harvest" in the main, given the institutional constraints on judicial decision-making. *Id.* ("[P]ublic choice analysis, as applied to judicial behavior, necessarily yields a very meager harvest.").

[39] *See id.* at 841-44 (explaining this theory using example of competitive market for hiring judicial law clerks).

[40] For a more thorough discussion of the many ways in which the federal courts at every level have avoided what we might think of as the drudgery of federal judicial service, see Merritt E. McAlister, *White-Collar Courts*, 76 VAND. L. REV. 1155 (2023) (delving into type and quantity of work Article III courts receive and how courts have responded to that work).

could have years more on the bench before hitting pension eligibility. In other words, the judge is stuck in something of a dead-end position—unless they decide to leave the bench or find ways to make that work more interesting and more challenging. Under those circumstances, it's perfectly reasonable to expect that middle-aged judges might look for new opportunities to diversify their experiences, develop a specialty that leads to more opportunities for high-profile speaking gigs, or even seek post-judicial employment opportunities. It may not be normatively desirable, but it's entirely reasonable and understandable.

These dynamics seem even more likely given the background of many of the folks who end up as federal judges. Although judges may be human, they are not exactly ordinary or average humans. Those who receive judicial appointments—especially in the federal system—are ambitious, high-achieving, and (increasingly young or) mid-career professionals.[41] It's nearly impossible to secure these positions without a resume peppered with elite credentials—the kind of credentials amassed only with the right combination of luck, hard work, privilege, and ambition.[42] Although these folks may be less motivated by financial rewards than their peers—because they could earn much more in the private sector—they are, no doubt, motivated by other intangibles like a commitment to public service, intellectual challenge, power, and prestige.

Also, judicial appointees are getting younger and younger, and that may heighten the risk that judges seek out cases to avoid complacency or generate other kinds of rewards. In the last two presidential administrations, the percentage of judicial appointees who were under forty-five at the time of their appointment rose, compared to recent administrations. More than 20% of judicial appointments for the courts of appeals and the district courts were under

[41] *See, e.g.*, Micah Schwartzman & David Fontana, *Trump Picked the Youngest Judges to Sit on the Federal Bench. Your Move, Biden*, WASH. POST (Feb. 16, 2021), https://www.washingtonpost.com/outlook/2021/02/16/court-appointments-age-biden-trump-judges-age/ (observing Trump's appointments to federal appellate courts "were, on average, 47 years old when nominated—five years younger than President Barack Obama's" and noting only five of Trump's intermediate appellate appointments were older than 55).

[42] *See, e.g.*, Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *These Judges Are Shifting the Appeals Courts to the Right*, N.Y. TIMES, https://www.nytimes.com/2020/03/14/us/trump-appeals-court-takeaways.html (last updated June 29, 2020) ("Many of the appointees have elite credentials, with nearly half having trained as lawyers at Harvard, Stanford, the University of Chicago or Yale, and more than a third having clerked for a Supreme Court justice. That surpasses the appointees of both Mr. Obama and Mr. Bush."); *see also* Elena Mejia & Amelia Thomson-DeVeaux, *How Biden Is Reshaping the Courts*, FIVETHIRTYEIGHT (Dec. 7, 2021), https://fivethirtyeight.com/features/how-biden-is-reshaping-the-courts/ [https://perma.cc/4V8M-DW45] ("Biden's appointees . . . "are more likely to have attended the country's most prestigious universities and law schools than judges appointed by past presidents).

the age of forty-five at the time of their commission.[43] While presidents may wish to appoint younger judges to influence the federal judiciary for generations, recent work suggests that judges appointed at younger ages may be more likely to resign their positions sooner,[44] as opposed to waiting until sixty-five to retire under the federal pension plan by taking "senior status."[45] Indeed, judges who retire shortly after becoming pension eligible and those who resign from office without receiving a pension do so for reasons we might expect: they generally are either dissatisfied with judicial work for salary reasons, or they seek greater professional satisfaction or new challenges.[46] These reasons are entirely consistent with the kinds of motivations that Gugliuzza and Anderson identify as informing judicial case-seeking behavior. Judges are seeking better opportunities for themselves—financially, professionally, and intellectually. And that's exactly what we might expect them to do when they find themselves in largely dead-end jobs.

[43] Suzanne Monyak, *Biden Favors Younger Judges in Shift from Previous Democrats*, BLOOMBERG L. (July 24, 2024, 4:45 AM), https://news.bloomberglaw.com/us-law-week/biden-favors-younger-judges-in-shift-from-previous-democrats.

[44] Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 18 (2012) (showing judges who retire for reasons of inadequate salary, other employment, or return to private practice, their average age at time of appointment was in mid- to low-forties).

[45] *See* 28 U.S.C. § 371(c). This is known as the "rule of 80"; the judge's age and years of service must add up to eighty to trigger retirement benefits. Accordingly, a judge who is appointed to the bench later in life (say, at fifty-four), may retire at sixty-seven (67 + 13 years of service = 80).

[46] Overall, retirements were driven foremost by a desire for more income, and, secondarily, by a desire to seek new challenges. Burbank et al, *supra* note 44, at 71 tbl.21. Notably, income was far more significant to district court judges than it was to circuit court judges. *Id.* Although a smaller category of retirements appeared to be for health reasons, approximately 69% of retirements were for financial reasons or to obtain both financial rewards, and a more diverse and challenging experience outside of judicial service. *Id.* at 64 fig.6. Those judges who retired to private practice shared a few characteristics: they retired relatively young (the median age was 67.5), and they retired soon after becoming pension-eligible (the median judge waited just one year after eligibility to retire). *Id.* at 63. Likewise, judges who resigned sought more lucrative opportunities in private practice, other employment, or complained about inadequate salaries. *Id.* at 12-13, 13 fig.1 (noting "overlap" between decision to return to private practice and being motivated by inadequate salary); *see also id.* at 15 (noting most resignations during study period were related to "inadequate salary"). Of those who expressed dissatisfaction with the judicial office, specifically, those judges complained about the workload, constraints on judging imposed by the Sentencing Guidelines, dissatisfaction with the monastic lifestyle, and a desire to seek "new challenges." *Id.* at 15 (collecting publicly stated reasons for dissatisfaction with federal judicial office as reason for resignation).

CONCLUSION

We should expect case-seeking behavior when smart, ambitious people land in federal judicial service and have the freedom to design a procedural system that facilitates such behavior. It's perfectly human, yet also problematic for the reasons Gugliuzza and Anderson explore.[47] In addition to their prescriptions, I might suggest that Congress create more exit ramps for judges in judicial service. Because the incentives to remain until pension eligibility are strong, judges might be especially motivated to find ways to make their work more interesting before hitting pension eligibility. Sticking powerful, ambitious federal judges in "dead-end" jobs is a recipe for some strange results, and forum selling is one of them.

[47] Gugliuzza & Anderson, *supra* note 2, at 2031-38 (considering negative effects of case-seeking behavior and its causes).