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Court of Public Opinion: Government Accountability and Judicial Independence

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Using a simple model of policy making in a system characterized by formal separation of powers, judicial dependence on government support, asymmetric information between voters and the government, and political accountability of the policy branch, I show conditions under which rational voters force the government to cede power over legislative decisions to the courts. Specifically, the public uses its ability to hold the elected branches of government accountable to enforce a judicial veto when judicial *opposition* to legislation provides more reliable information to voters than government *support* for legislation does. The model thus provides a theoretical justification for, and suggests important limits to, the common assumption that disregard for judicial decisions is politically costly for elected politicians. The model also demonstrates how other observed patterns in judicial politics—including judicial rubber-stamping of government decisions and government "passing the buck" to courts—can arise as equilibria in the same simple framework.

1. Introduction

Courts generally depend on the executive to enforce judicial rulings, and both the executive and legislative branches have at their disposal tools to manipulate or discipline the judiciary (Salzberger, 1993:352–58; Rogers, 2001:91, 95). Yet courts are often, though not always, able to issue controversial rulings that are respected even when they are opposed by the other branches of government. Several of the most important candidate explanations for why the elected branches allow the judiciary to wield such power focus on the role of public support for the courts.[1] However, while it

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1. There are, of course, other explanations for judicial independence that do not rely on public opinion or the political accountability of the elected branches. For example, some scholars have suggested that the legislature grants independent authority to courts because

is often assumed that the public would punish the government for defying the courts (Vanberg, 2001), it is not clear—and it is usually not explained—why this is the case. The assumption that voters defend the courts by imposing political costs on defiant elected officials is especially problematic where courts block government actions that have strong public support. Some scholars suggest that the public relies on courts to monitor the more powerful elected branches, making sure they do not take actions harmful to the public's interests (Sutter, 1997). This explanation, while plausible in part, is problematic inasmuch as the judiciary may not always share the public's interests. Indeed, in many cases the elected branches are more likely than courts to have preferences similar to those of the relevant public constituencies. Most fundamentally, public support for the judiciary in case of conflict with the other branches is not a constant, but a variable, and the source of that variation is not well understood.

This article considers why, how, and under what conditions rational voters use their ability to hold the elected branches of government accountable in order to enable the judiciary to exercise independent authority over policy outcomes. Using a model of policy making in a system characterized by formal separation of powers, judicial dependence on government support, asymmetric information as between voters and the government, and political accountability of the policy branches to the voters, I show conditions under which the public will force the elected government to cede some or all power over legislative decisions to the courts. In particular, I show that the voters' decision is driven by considerations of the relative reliability of judicial and government support or opposition to a given policy and the ex ante probability that that policy is in the public interest. By "reliability" I mean the degree to which an uninformed voter can rely on a given agent's support or opposition for a legislative proposal as evidence that the proposal is in the voter's best interest.

When the opposition of each branch is sufficiently more reliable than the support of the other branch, rational voters will induce a separation-of-powers system in which both the government and the judiciary can veto legislation. When the support of each branch is sufficiently more reliable than the opposition of the other branch, voters will induce a

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the judiciary can act as the legislature's agent, ensuring that the administrative bureaucracy faithfully implements government policy (McCubbins and Schwartz, 1984; Ramseyer, 1998). In such a principal-agent relationship, the better-informed judicial agent has some latitude to advance its own interests even when they diverge from those of the principal (Rogers, 2001). In addition, the judiciary may have some room to maneuver independently if multiple principles must agree to overturn a court decision (Cooter and Ginsburg, 1996; Tsebelis, 2002). Other scholars have suggested that independent courts enable legislatures to make more credible commitments, thus enhancing the legislators' own welfare (Landes and Posner, 1975), while others stress the role of electoral competition, arguing that the constraints imposed by independent courts provide a kind of political insurance for parties engaged in ongoing competition for office (Ramseyer, 1994; Ramseyer and Rasmusen, 2003; Stephenson, 2003). Nonetheless, public opinion figures prominently in a number of explanations for judicial power, and this type of explanation will be the focus of this article.

separation-of-powers system in which either branch can ensure legislation is enacted. If judicial support is more reliable than government opposition, and judicial opposition is more reliable than government support, voters will compel the government to cede all control over the policy decision to courts. Similarly, if the government is always more reliable than the courts, the judiciary will lack public backing and will allow the government to control policy. Thus the model demonstrates that strong public opposition to government interference with judicial power, judicial rubber-stamping of government action, and apparent government deferral of politically difficult issues to courts can all arise as equilibria within the same simple framework. The selection of a particular equilibrium is determined by rational voters' expectations about the desirability of legislation coupled with their expectations of the relative reliability of support and opposition of the judiciary and government.

2. The Model

Consider a policy-making system with three players—a voter (representative of the "public interest"),[2] the government (a combined legislative-executive policy branch), and a judiciary. The salient policy decision is whether to enact a particular piece of legislation. Whether the legislation is in the voter's interest depends on facts that the voter does not know with certainty. The two political agents—the government and the judiciary—have superior information about the state of the world, but may have preferences that diverge from the voter's. Thus the voter, when considering how to delegate decision-making power, faces an agency problem: exploiting the agents' informational advantage risks allowing them to pursue their own agendas.[3] (Voter "delegation" of decision-making power, in the context of this model, does not refer to constitutional or other formal types of delegation, but rather a functional delegation achieved by imposing political costs on the government for some actions but not others.)

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2. All the usual caveats and qualifications regarding treating the heterogeneous "public" as a single voter with well-behaved preferences apply. The voter in this model might be considered the median voter if the relevant policy issue is one-dimensional; similarly one might consider the voter representative of some other powerful, pivotal interest group.

3. This modeling approach is based on recent work by Maskin and Tirole (2001), Rogers (2001), and Vanberg (2001). However, the model developed here differs from this prior work in some important respects. Rogers examines a signaling game between a legislature and a judiciary, where the former is imperfectly informed; there is no electorate in his model. Vanberg incorporates the possibility of "public backlash" in a model similar to Rogers', but in Vanberg's model the behavior of the electorate is treated as an exogenous parameter. Maskin and Tirole focus on the question of which systems of accountability are optimal from a voter's point of view, but they consider the voter's choice as between an accountable politician and an unaccountable judge, rather than how a voter would choose to allocate authority in a system of (potentially) separated powers. The model developed in this article uses a simpler information structure—there is no bayesian learning—but incorporates the strategic interaction of all three relevant actors—the government, the judiciary, and the voters—in a single framework.

The model makes two additional assumptions about the policy-making process. First, the model assumes formal separation of powers, but not symmetry or equivalence of powers.[4] In particular, the power of the judiciary is limited in several important respects. Only the government can propose legislation; the judiciary has the power to "veto" legislation after it has been passed, but cannot require the government to legislate.[5] More importantly, this veto is meaningful only if the government chooses to respect it. This aspect of the model is significant because one of the key questions under consideration concerns the conditions under which the judiciary will wield effective power, even when it has no "real" power.

Second, the model assumes effective political accountability of the government to the voter. In other words, the voter is able to impose relatively high costs on the government at minimal cost to herself.[6] This assumption is plausible in cases of stable and competitive political democracy, where the electorate can express its dissatisfaction with the incumbent government by supporting a rival party. It is less plausible in cases where public censure of the government would require risky or costly mobilization—for example, in repressive autocracies. Thus the model does not directly apply to such cases.

The order of play is as follows:

- Step 0. Nature chooses a state of the world and the preferences of the government and the judiciary. Let $r \in (0, 1)$ be the probability that the state is such that legislation is in the public interest. That is, with probability r the world is in the "good" state, where legislation is preferred by the voter; with probability $(1 - r)$ the world is in the "bad" state, where the voter would prefer no legislation. Let $p_i \in (0, 1)$ be the probability that agent i, $i = \{g, j\}$, prefers legislation in the "bad" state, while $q_i \in [p_i, 1)$ is the probability that agent i prefers legislation in the "good" state.[7] The government and the judiciary know the state and each others' preferences; the voter knows only the ex ante probabilities r, p_g, p_j, q_g, and q_j.

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4. In this model, the "separation of powers" refers only to the separation of powers as between the court and the government rather than a tripartite separation of legislative, executive, and judicial power. I defer investigation of the effects of separation of legislative and executive power, as well as more refined separations, to future research.

5. This assumption is generally a reasonable one. However, there are some cases where courts order the government to enact legislation to address a given problem. Court-mandated legislation would be easy to incorporate into the model; I omit consideration of this possibility here for expositional economy.

6. The judiciary in this model is not directly politically accountable to the voter, an assumption that is substantively reasonable in most cases. While this assumption could be relaxed to cover systems with elected judiciaries, the inclusion of direct judicial accountability to the voter would have no significant effect on the main results.

7. Setting the lower bound on q_i as p_i reflects the assumption that no agent ever opposes legislation in the good state and prefers the same legislation in the bad state. Rather, some agents have preferences that are aligned with the voter's preferences, but some agents have

- Step 1. The government chooses to propose legislation (L) or not ($\sim L$). This and all subsequent choices are observed by all players. If the government does not propose legislation, there is no opportunity for judicial review and the game proceeds immediately to Step 4.
- Step 2. If the government proposes legislation at Step 1, the judiciary either vetoes it (V) or upholds it ($\sim V$). If the judiciary upholds the legislation, the legislation is enacted and the game proceeds to Step 4.
- Step 3. If the judiciary vetoes legislation at Step 2, the government either disciplines the judiciary (D) or allows the veto to stand ($\sim D$). If the government respects the judicial veto, no legislation is enacted. If the government disciplines the judiciary, the legislation is enacted and the judiciary suffers cost $k_j > 0$.[8]
- Step 4. The voter chooses whether to punish the government or not. Punishing is costless to the voter and has no effect on whether legislation is enacted. If the voter punishes, the government suffers cost $k_g > 1$, sufficiently large that the government is never willing to incur the punishment in order to secure its preferred legislative outcome.

After the voter's choice at Step 4, all players receive their payoffs. Each player i receives a payoff of one or zero depending on whether the legislative outcome was favorable (i.e., player i gets payoff one if i favors legislation and legislation is passed, or if i opposes legislation and legislation is not passed, but gets payoff zero otherwise), net any cost k_i. All players are risk neutral. The policy-making game (Steps 1–4) is shown in Figure 1.

3. Analysis

At Step 4 the voter will be in one of four information sets, each of which corresponds to a sequence of preceding moves by the government and judiciary: $\sim L$, $L \sim V$, $LV \sim D$, or LVD (each information set corresponds

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other interests that lead them to always prefer, or always oppose, legislation. One could also describe the preferences of the political agents as follows: Nature selects one of three types for player i: player i is *convergent*, with the same preferences as the voter, with probability $rq_i + (1 - r)(1 - p_i)$; player i is *radical*, preferring legislation even when it is bad for the voter, with probability $(1 - r)p_i$; and, player i is *reactionary*, opposing legislation even when it is good for the voter, with probability $r(1 - q_i)$.

The model makes no strong assumptions about the sources of the preferences of the government and the judiciary. The judiciary, for example, might oppose legislation in the "good" state of the world because it believes that the legislation is bad policy, or because it sincerely believes that the legislation is illegal. The model is thus compatible with a range of foundational assumptions about the motivations of political actors. All actors, though, are presumed to behave strategically.

8. There are several potential sources of this cost term, including actual government coercion, the humiliation of being overtly disciplined, and so forth. The source and magnitude of the cost are not important; all the results go through so long as the judiciary always chooses $\sim V$ at Step 2 if it expects the government to choose D at Step 3. Also, while the model assumes the government does not have to bear any direct cost for selecting D, the results are unchanged by the addition of some cost for this choice, so long as it is outweighed by the benefit to the government of a favorable policy outcome.
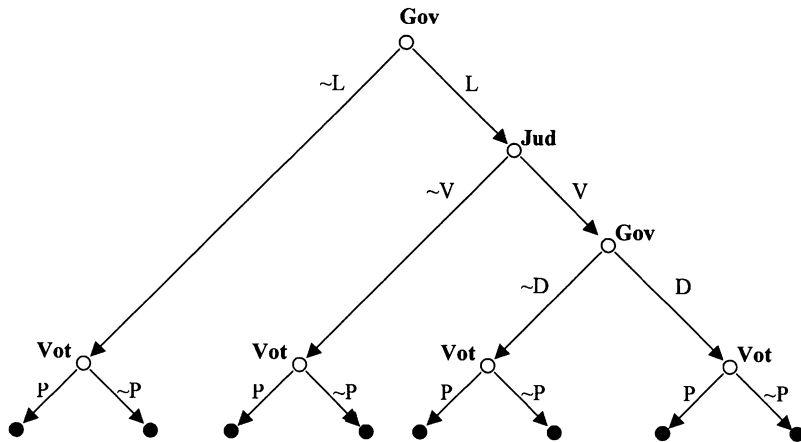
Figure 1. The policy-making process (Steps 1–4).

to one of the four voter choice nodes in Figure 1). The voter's strategy profile will call for the imposition of political cost k_g on the government in some, none, or all of these cases. The voter at Step 4 cannot change the legislative outcome, and so is indifferent between strategies; any punishment strategy profile is therefore credible, and the voter's equilibrium punishment strategy is assumed to be common knowledge (Ferejohn, 1986: 16–17; Austen-Smith and Banks, 1989: 123, 127–30).[9] Thus the voter, through her punishment strategy profile, can induce one of six types of policy-making regime as a subgame perfect equilibrium:

- *Always legislate* (*AL*): Under this regime, the government always enacts legislation and legislation is always upheld by the judiciary, regardless of the state and the preferences of the political agents. The voter can enforce *AL* by punishing the government if the government does not enact legislation at Step 1 ($\sim L$) or if the government fails to discipline the judiciary at Step 3 ($LV \sim D$), but not otherwise.

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9. In this version of the model, where the voter does not commit herself to impose a particular punishment regime, there are a large number of subgame perfect Nash equilibria. For example, the voter could choose never to punish regardless of the path of play, the government could always choose the policy it likes, and the judiciary could always acquiesce. This multiplicity of subgame perfect Nash equilibria is a common problem in retrospective voting models, which is why I employ an equilibrium refinement common in the retrospective voting literature: I assume that, given the voter's indifference between punishing and not punishing once the game reaches the final stage, her strategy profile will be whatever profile would give her the highest expected payoff if she had committed to that strategy at Step 0. This refinement is justified in part by the notion that the strategy that generates the highest expected utility is a natural focal point. Moreover an alternative model in which the Voter announces a punishment strategy at Step 0 and bears some small cost for deviating at Step 4 generates substantively identical results, but in this alternative model these results are unique subgame perfect Nash equilibria.

- *Never legislate* (*NL*): Here, the voter prevents legislation from being proposed,[10] regardless of the state and the preferences of the agents. The voter can enforce *NL* by punishing the government if the judiciary upholds proposed legislation ($L \sim V$) or if the government disciplines the judiciary (LVD), but not otherwise.[11]
- *Government Choice* (*GC*): In this regime, the voter delegates the legislative decision exclusively to the government. Legislation will be enacted—and upheld by the judiciary—if and only if the government favors legislation. The voter can enforce *GC* by never punishing the government, regardless of the path of play.[12] Substantively, this policy-making regime corresponds to cases where the elected branches have total authority over policy decisions, and the institution of independent judicial review, though formally present, is functionally irrelevant. Because the judiciary knows that the voter will not punish a government that rides roughshod over judicial prerogatives, the judiciary does not exercise its power in equilibrium, but instead merely rubber-stamps any legislation passed by the government.
- *Judicial choice* (*JC*): Under this regime, the voter's ability to hold the government accountable enables the voter to delegate full authority over the legislative decision to the judiciary. The government will always propose legislation, but if the judiciary opposes this legislation, it will veto it, and the government will respect this veto. The voter can enforce *JC* by punishing the government if it fails to propose legislation at Step 1 ($\sim L$) or disciplines the judiciary at Step 3 (LVD), but not otherwise. This regime has the counterintuitive feature that the voter punishes the government for failing to propose legislation, but also punishes the government for pushing legislation through over judicial objection. This seeming tension, however, is consistent with cases where the public supports the courts even when they invalidate legislation that the public demanded from the elected branches.
- *Dual Veto* (*DV*): This regime is characterized by a real (rather than merely formal) separation of powers. Legislation can only be successfully passed if it is favored by both the government and the judiciary;

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10. For simplicity of exposition, I assume that if the government is indifferent between L and $\sim L$ at Step 1, the government will choose $\sim L$.

11. The voter can also induce the NL policy-making regime by adopting one of three other pure-strategy profiles: Punish the government in information set $L \sim V$, but not otherwise; in information sets $L \sim V$ and LVD, but not otherwise; or in information sets $L \sim V$, $LV \sim D$, and LVD, but not in $\sim L$. I describe what I believe to be the most empirically plausible equilibrium strategies in the text, and list the observationally equivalent equilibrium strategies in the footnotes.

12. The voter can also induce the GC policy-making regime by using one of five other pure-strategy profiles: punish the government in information set $LV \sim D$, but not otherwise; in information sets $\sim L$ and $L \sim V$, but not otherwise; in information sets $LV \sim D$ and LVD, but not otherwise; in information sets $\sim L$, $L \sim V$, and $LV \sim D$, but not in LVD; or in all information sets.

if either agent opposes legislation, no legislation will be passed. The voter can enforce DV by punishing the government if it overrides a judicial veto at Step 3 (LVD), but not otherwise.[13] This regime seems most consistent with the traditional understanding of a system of separation of powers as a system of multiple "veto players" (Tsebelis, 1995; Henisz, 2000; Tsebelis, 2002). This regime also has the substantively appealing feature that judicial power is sustained because of public support—or, more accurately, public opposition to the subversion of judicial authority by the other branches of government—in a manner consistent with common assumptions about the political costs associated with government disregard for court decisions (e.g., Vanberg, 2001).

- *Dual Option* (DO): Like the preceding case, this regime is characterized by separation of powers. The difference is that, under the DO regime, legislation is enacted if either the government or the judiciary prefers it; opposition of both agents is required to block legislation. The voter can enforce DO by punishing the government if it fails to enact legislation at Step 1 ($\sim L$), but not otherwise.[14] This regime is the least intuitive, since the voter essentially forces the government to propose legislation but is indifferent whether the government overrides a judicial veto. However, this regime may be consistent with examples where popular support compels the passage of certain legislation, but the public is nonetheless willing to let the legislation die if the courts and the policy branches both demonstrate opposition—the former by vetoing the legislation, the latter by respecting the veto despite the lack of direct political costs for doing so.

As the preceding discussion makes clear, the voter's punishment strategy determines the policy-making regime. Following the retrospective voting models developed by Fiorina (1981), Ferejohn (1986), and Austen-Smith and Banks (1989), I assume the voter will adopt the punishment strategy that induces whichever policy-making regime yields the highest expected payoff, and that this is common knowledge.

All six regimes are perfect equilibria, in that they can arise from the consistent expectations of all players. The retrospective voting models followed here employ the equilibrium refinement that the equilibrium selected will be the one the voter prefers. As noted above, it will always be individually rational for the voter at Step 4 to implement the punishment called for. Neither of the other players is able to manipulate expectations, because unlike the government and the judiciary, the

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13. The voter can also enforce the DV regime by punishing the government in information sets $\sim L$, $L \sim V$, and LVD, but not $LV \sim D$.

14. The voter can also enforce DO by punishing the government in information sets $\sim L$, $LV \sim D$, and LVD, but not $L \sim V$.

voter has no incentive to modify her behavior based on what the other players will do.[15] The voter's expected payoffs from each of the six possible regimes, in terms of parameters r, p_g, p_j, q_g, and q_j are given in Table 1. The voter will adopt whichever punishment strategy corresponds to the maximum of these six possible expected payoffs.

For some parameter values, it would be optimal for the voter to induce AL or NL—making the final decision without any functional delegation to the erstwhile agents. However, because we are most interested substantively in environments where the voter has an incentive to delegate decision-making authority, the remainder of the article will consider only those cases where both AL and NL are dominated by at least one other option—that is, where there is sufficient uncertainty about the state of the world that the voter would prefer some form of delegation.[16] Thus

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15. A possible objection to this approach is that it relies on the assumption that the voter is completely indifferent between punishing and not punishing—that is, punishing (or not punishing) is costless—and that this assumption is too strong. Thus the objection runs, introducing some trivial epsilon cost to the voter for choosing to punish the government at Step 4 means the voter would never punish, and the equilibrium would always be GC. There are two responses to this concern.

First, the assumption that punishment is costless, though apparently extreme, may be plausible when punishment takes the form of choosing to vote for a challenger rather than the incumbent. There are costs to voting in the first place, and the explanation of rational voters' choice to go to the polls remains an open research question to which I offer no new answers. If, however, one is willing to assume, consistent with empirical observation, that some set of factors—civic virtue, peer pressure, etc.—is sufficient to get voters to the polls, then it is reasonable to assume that the decision to check the box for the challenger is no more costly, not even at a trivial level, than a decision to check the box for the incumbent. A similar logic would apply if the "voter" in the model represented an influential endorser (such as a newspaper or prominent interest group leader) whose public position affected the fortunes of the incumbent government. The endorser must gain sufficient intrinsic utility from making an influential public statement to take a public position in the first place, but assuming that condition is met, the costs of making a proincumbent or anti-incumbent statement might plausibly be identical.

A second possible response, though one that raises additional complications, is that if players expect the game to be repeated, then the voter's punishment strategy may be sustainable in equilibrium even if punishment imposed nontrivial costs. A repeated game, however, involves a host of other issues that, though interesting, I defer to future research. Also, repetition could support an infinite number of strategies, though the strategy that generates the highest expected utility is a natural focal point. Thus, while I do not rely on repetition as a justification for the credibility of the voter's punishment strategy, intuition suggests that a repeated game might provide an alternative justification for this assumption.

16. This is not to say that the AL and NL equilibria are uninteresting from a substantive perspective. Both of these equilibria correspond to cases where the public does not want the government or the courts to have any discretion over policy choices. Formally, AL is the outcome if $r > \frac{(1-p_g)(1-p_j)}{(1-q_g)(1-q_j)+(1-p_g)(1-p_j)}$ and NL is the outcome if $r < \frac{p_g p_j}{q_g q_j + p_g p_j}$. However, though these equilibria may sometimes be of substantive interest, the main focus of this article is on how the principal (the voter) will choose to delegate authority when some type of delegation is desirable, that is, where $\frac{p_g p_j}{q_g q_j + p_g p_j} > r > \frac{(1-p_g)(1-p_j)}{(1-q_g)(1-q_j)+(1-p_g)(1-p_j)}$.

Table 1. Institutional Decision Rules and Corresponding Voter Utilities

Institutional decision rule	Expected utility to the voter
Always legislate	$EU_{AL} = r$
Never legislate	$EU_{NL} = 1 - r$
Government choice	$EU_{GC} = rq_g + (1 - r)(1 - p_g)$
Judicial choice	$EU_{GC} = rq_j + (1 - r)(1 - p_j)$
Dual veto	$EU_{DV} = rq_g q_j + (1 - r)(1 - p_g p_j)$
Dual option	$EU_{DO} = r(q_g + q_j - q_g q_j) +$ $(1 - r)(1 - p_g)(1 - p_j)$

the voter will choose a strategy by comparing the expected utilities associated with *GC, JC, DV,* and *DO.* Setting up the six relevant inequalities,[17] given the expected utility equations above, yields the following four conditions, each if which is derived straightforwardly from Table 1:

(a) $EU_{JC} > EU_{DO},\ EU_{DV} > EU_{GC} \Leftrightarrow \dfrac{p_g}{q_g}\left(\dfrac{1 - p_j}{1 - q_j}\right) > \left(\dfrac{r}{1 - r}\right)$

(b) $EU_{GC} > EU_{DO},\ EU_{DV} > EU_{JC} \Leftrightarrow \dfrac{p_j}{q_j}\left(\dfrac{1 - p_g}{1 - q_g}\right) > \left(\dfrac{r}{1 - r}\right)$

(c) $EU_{JC} > EU_{GC} \Leftrightarrow \dfrac{p_g - p_j}{q_g - q_j} > \left(\dfrac{r}{1 - r}\right)^{18}$

(d) $EU_{DV} > EU_{DO} \Leftrightarrow \dfrac{1 - p_g p_j - (1 - p_g)(1 - p_j)}{1 - q_g q_j - (1 - q_g)(1 - q_j)} > \left(\dfrac{r}{1 - r}\right).$

The first two conditions, (a) and (b), are sufficient to determine which of the four candidate policy-making regimes will be selected. Those conditions can be rewritten as

Condition 1: $\dfrac{1 - p_j}{1 - q_j} > \dfrac{q_g}{p_g}\left(\dfrac{r}{1 - r}\right)$

Condition 2: $\dfrac{1 - p_g}{1 - q_g} > \dfrac{q_j}{p_j}\left(\dfrac{r}{1 - r}\right).$

Satisfying Condition 1 implies that the voter prefers *JC* to *DO* and prefers *DV* to *GC.* Satisfying Condition (2) implies that the voter prefers *GC* to *DO* and prefers *DV* to *JC.* Thus if Conditions 1 and 2 are satisfied, the *DV* separation-of-powers system is optimal for the voter.[19] If neither condition is satisfied, the *DO* separation-of-powers system is optimal. If only

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17. The six comparisons are EU_{GC} versus EU_{JC}, EU_{GC} versus EU_{DV}, EU_{GC} versus EU_{DO}, EU_{JC} versus EU_{DV}, EU_{JC} versus EU_{DO}, and EU_{DV} versus EU_{DO}.

18. This condition was calculated assuming that $p_g \geq p_j$ and $q_g \geq q_j$. This assumption, and indeed this condition, are unimportant for the remainder of the analysis.

19. This statement, and the remainder of this discussion, is contingent on the assumption that AL and NL are dominated by at least one other outcome. See footnote 16.

Condition 1 is satisfied, the voter's best choice is to delegate all policy-making authority to the judiciary; if only Condition 2 is satisfied, then the voter would prefer to delegate all decision-making power to the government.[20]

The fractions on each side of the inequalities in Conditions 1 and 2 have a substantive interpretation. Recall that p_i denotes the probability that player i prefers legislation when legislation is bad for the voter. One could therefore think of p_i as the probability of player i "false positives." Similarly, $1 - q_i$ is the probability of a player i "false negative"—that is, the probability that player i opposes legislation when legislation would be good for the voter. Probabilities $1 - p_i$ and q_i can similarly be thought of as the probabilities of player i "true negatives" and "true positives" The fraction $\frac{q_i}{p_i}$, the ratio of true positives to false positives for player i, can thus be interpreted as the "reliability" of player i's *support* for legislation: values close to one indicate unreliability, and values approaching infinity indicate reliability. Similarly the ratio of true negatives to false negatives, $\frac{1-p_i}{1-q_i}$, can be thought of as a measure of the reliability of player i's *opposition* to legislation.

These measures of reliability are simply the odds that player i has the "right" preferences, from the voter's perspective, conditional on player i's preference for legislation or no legislation. I use the term "reliability" because these ratios indicate how much the voter can rely on an agent's revealed preference to determine whether she herself ought to support legislation. Thus, for example, if government support for legislation is very reliable, then the fact that the government prefers legislation would be considered by the voter as a strong indication that legislation is probably in her interest. If government opposition is very reliable, then the fact that the government opposes legislation is good evidence for the voter that legislation is not in her interest.

This perspective allows a more substantive interpretation of Conditions 1 and 2. Assume for the moment that $r = \frac{1}{2}$—that is, legislation is ex ante equally likely to benefit or harm the voter. Condition 1 holds when the reliability of judicial opposition is greater than the reliability of government support. Condition 2 holds when the reliability of government opposition is greater than the reliability of judicial support. When government support is more reliable than judicial opposition and government opposition is more reliable than judicial support, the voter prefers to delegate all policy-making authority to the government. Likewise, when government opposition is less reliable than judicial support and government support is less reliable than judicial opposition, the voter prefers giving the judiciary exclusive power over the policy choice. However, when the voter can always rely more on

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20. These conclusions follow from the inequalities used to derive Conditions 1 and 2. To illustrate, take the case where both Condition 1 and Condition 2 are satisfied. Satisfying Condition 1 implies that $EU_{DV} > EU_{GC}$ and $EU_{DV} > EU_{JC}$. Thus the only remaining comparison is of EU_{DV} and EU_{DO}. But we know from Condition 1 that $EU_{JC} > EU_{DO}$ and from Condition 2 that $EU_{DV} > EU_{JC}$, so transitivity implies that $EU_{DV} > EU_{DO}$. The derivations of the other three conclusions are analogous.

	Government opposition is more reliable than judicial support $(\frac{1-p_g}{1-q_g} > \frac{q_j}{p_j})$	Judicial support is more reliable than government opposition $(\frac{q_j}{p_j} > \frac{1-p_g}{1-q_g})$
Judicial opposition is more reliable than government support $(\frac{1-p_j}{1-q_j} > \frac{q_g}{p_g})$	**Dual veto separation-of-powers**	**Judicial choice**
Government support is more reliable than judicial opposition $(\frac{q_g}{p_g} > \frac{1-p_j}{1-q_j})$	**Government choice**	**Dual option separation-of-powers**

Figure 2. The voter's optimal policy-making regime (assuming $r = \frac{1}{2}$).

one agent's opposition to legislation than from the other agent's support for legislation—that is, when government opposition is more reliable than judicial support and judicial opposition is more reliable than government support—then the voter prefers the DV system. The DO system is optimal when each party's support is always more reliable than the other party's opposition. These results are shown in Figure 2.

The reliability of an agent's opposition and support are, of course, related. In particular, player i's support is more reliable than its opposition if $p_i + q_i < 1$, and player i's opposition is more reliable than its support if $p_i + q_i > 1$. The critical questions are whether player i's support is more or less reliable than the other agent's opposition, and whether player i's opposition is more or less reliable than the other agent's support. In general, when a player tends to approve of legislation much more often than not, that agent is probably more reliable when it is opposed than when it is supported. One might therefore infer that, if both agents display a general preference for legislation, both agents are likely more reliable as opponents than as supporters, and therefore the public would probably prefer the DV system.

The odds ratio $\frac{r}{1-r}$ influences whether reliable support or reliable opposition is more important to the voter. When $r > \frac{1}{2}$, legislation is in the voter's interest more often than not; as a result, each agent's

support is weighted more heavily. In other words, Conditions 1 and 2 are harder to satisfy when r is large. On the other hand, when $r < \frac{1}{2}$, legislation tends to be a bad for the voter, and so each agent's opposition is weighted more heavily. That is, an agent's opposition doesn't need to be as reliable, when r is low, in order to outweigh the reliability of the other agent's support.

The most important substantive implication of the foregoing analysis is that satisfaction of Condition 1 is a necessary and sufficient condition for the voter to safeguard judicial review by punishing a government that disregards a judicial veto. This condition may hold even when legislation is more likely than not in the public interest ($r > \frac{1}{2}$) and the government is more likely than the judiciary to support good legislation ($q_g > q_j$). This may at first seem counterintuitive, since one might imagine that, if legislation is probably good, and the elected branches are more likely to approve good legislation than the courts, then the public would prefer delegating exclusively to the elected branches. But the model shows that this is not necessarily the case, because of the propensity of the elected branches to enact bad legislation as well as good legislation.[21] The relevant inquiry concerns the relative reliabilities of government support and judicial opposition rather than the simple probabilities that legislation is good and that each agent favors good legislation.

4. Discussion

The foregoing analysis attempts to capture, in a single framework, a number of patterns of behavior concerning the relationship between the judiciary, the elected branches, and the general electorate. In particular, the model provides a systematic account for three patterns familiar from empirical observation of judicial politics.

First, the government sometimes has a relatively free hand in selecting policy, but the threat of a public backlash constrains the government to respect judicial limitations on its policy choice. This seems to be the case, for example, with judicial review of most social and economic regulation in the United States—a familiar pattern consistent with the DV equilibrium. The model thus provides a rationalist explanation for public support for the judiciary in case of a conflict—that is, a rationalist explanation of the procourt "public backlash" that is often assumed in both formal and informal accounts of judicial independence.

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21. To illustrate with a numerical example, suppose $r = 0.6$, $p_g = 0.8$, $q_g = 0.9$, $p_j = 0.2$, and $q_j = 0.6$. That is, there is a 60% chance ex ante that legislation is in the voter's interest, and the government is 50% more likely than the judiciary to favor legislation in the good state. However, Condition 1 still holds. The reason is that the government in this example is likely to favor legislation even when not in the public interest, whereas the judiciary is less likely to do so. The reliability of government support is relatively low $\left(\frac{q_g}{p_g} = \frac{9}{8}\right)$, while judicial opposition is quite reliable $\left(\frac{1-p_g}{1-q_g} = 2\right)$. (In this example, Condition 2 is also satisfied, so JC is the voter's optimal regime.)

Second, the government is sometimes politically pressured to implement certain policies, but still constrained by public opinion to respect judicially imposed constraints on these policies. This is sometimes the case with regard to laws that restrict the civil liberties of unpopular minorities. These cases are sometimes cited in support of a "blame deflection" explanation for judicial power: the elected branches acquiesce to public pressure to pass legislation because they know the courts will veto it and take the blame for doing so. The model's JC equilibrium provides an alternative, rationalist explanation for this pattern of behavior: voters, rather than being fooled, impose a policy-making regime that confers primary authority on the courts.

Third, courts sometimes cannot count on public support, and so acquiesce in government policy decisions that the courts might otherwise oppose. This phenomenon is probably a rarity in the modern United States, though it may describe court behavior on certain highly sensitive issues related to national security and domestic stability. Weak public support for the courts and the consequent primacy of the policy branches appears to be much more common in other, younger democracies. The model can account for these cases, as this pattern of voter-court-government relationships is consistent with the GC equilibrium. This result is significant inasmuch as explanations for judicial power are sometimes vulnerable to the charge of proving too much—that is, of the inability to explain cases where the courts are weak and do not benefit from strong public backing. The model developed in this article predicts conditions when public support for the courts is likely to be weak as well as when it is likely to be strong.

The remainder of this section discusses these three common patterns and how empirical instances of each one relate to the model's predictions.

4.1. The DV Equilibrium: Economic and Social Regulation

The DV equilibrium, in which the government can choose whether to implement policy but is constrained to respect judicial vetoes, charac-terizes most judicial review of government economic and social regulation in the contemporary United States.[22] Americans often take for granted not only that the legislature and executive will comply with court decisions that invalidate a regulatory policy, but that elected officials would pay a steep political price if they refused to do so. Why is this so?

The model provides a partial explanation. Consider five stylized facts about judicial review of economic regulation. First, voters are uncertain about the consequences of regulatory interventions, that is, r is usually not too close to zero or one. Second, regulatory policy decisions are often socially inefficient wealth transfers (Le Grand, 1991; Coate and

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22. The subsequent discussion will focus primarily on judicial review of economic regula-tion. However, a similar logic applies to many other types of regulation that are not as obviously economic.

Morris, 1995). That is, the probability of government false positives, p_g, is closer to one than zero. Third, the last point notwithstanding, the government is more likely to adopt a particular regulatory policy if it is socially efficient than if it is not (Levine and Forrence, 1990; Croley, 2000). Thus q_g is greater than p_g by a nontrivial margin. Fourth, courts are generally deferential to government decisions on regulatory policy, that is, p_j and q_j are relatively close to one. Fifth, even though courts are deferential, they have developed a set of doctrinal tools to screen out socially inefficient wealth transfers (Sunstein, 1984:1689; 1989:486–88). This means that q_j is greater than p_j by a nontrivial margin.

These factors, taken together, are conducive to the DV equilibrium. If the above conditions hold, as they arguably do for a broad swath of regulatory policy decisions, then the model predicts that the reliability of government support for and opposition to regulatory policy are relatively moderate, whereas the reliability of judicial opposition is high but the reliability of judicial support is low. Thus judicial opposition is likely to be more reliable than government support, satisfying Condition 1, while government opposition is likely to be more reliable than judicial support (i.e., willingness to uphold), thus satisfying Condition 2.

The model's characterization of the DV equilibrium thus seems broadly consistent with (implicit) American public support for judicial decisions that impose limits on government social and economic regulation. This result is important inasmuch as the extant literature has provided surprisingly little theoretical explanation for the widely held notion that the public would impose political costs on politicians if they defied or ignored judicially imposed limitations on government regulatory policy. By providing a rationalist explanation for this anticipated "public backlash," the model addresses this conceptual gap in the literature. It also generates comparative statics results that suggest conditions under which a projudiciary public backlash is less likely, though testing of these more refined predictions is a difficult empirical task that is beyond the scope of this article.

4.2. The JC Equilibrium: Civil Rights of Vulnerable Minorities

The DV equilibrium is not the only equilibrium in which public opinion safeguards the judiciary's veto power. Under the JC equilibrium, Condition 1 is satisfied, so voters will punish the government if it fails to respect court decisions. However, Condition 2 is *not* satisfied—not only is judicial opposition more reliable than government support, judicial support is more reliable than government opposition. Thus the public both compels the government to legislate and punishes the government if it fails to respect a judicial veto.

When this apparently odd pattern of public-government-judiciary interaction is observed, it is often interpreted as evidence supporting a "blame deflection" explanation for judicial power. My model suggests an alternative explanation. The essence of the blame deflection argument is that

the elected branches of government value an independent judiciary because the courts can take the blame for killing legislation that is popular with the public, but undesirable from the government's point of view (Salzberger, 1993:361–64; Hirschl, 2000:116–21).[23] However, while the blame deflection hypothesis has intuitive appeal and appears supported by some empirical evidence, it relies on problematic assumptions about voter rationality. If voters are sophisticated—that is, if they understand the policy process and therefore know that the government can discipline the judiciary—then blame deflection will not work because the elected branches will be punished for allowing the courts to kill popular legislation. (In terms of the model, the voter could impose the AL regime.) On the other hand, if the public is naïve, looking to outcomes rather than process, blame deflection will also be ineffective, since voters will observe that their desired legislation has not been enacted. Blame deflection is only plausible if one of two conditions holds. Either the public must be semisophisticated (i.e., attentive enough to know the government passed legislation and the court vetoed it, but unaware that the government could ignore judicial decisions) or a sophisticated public must recognize some other reason not to allow the government to interfere with the courts.

The model provides an alternative—though potentially complementary—rationalist explanation for the pattern of behavior usually associated with blame deflection. The public pressures the government to pass legislation and also pressures the government to respect a judicial veto of that legislation, because the voters want the decision on the legislation in question to be made by the judiciary. Behavior that looks like blame deflection might thus be reinterpreted as public enforcement of a JC regime. While the traditional blame deflection hypothesis explains this behavior as the government in some sense fooling or exploiting the voters, the model suggests that this behavior actually reflects the voters' rational, optimizing calculations.

The pattern of behavior associated with the JC regime is rarer in modern American politics than the DV regime. However, it may obtain in some cases involving the protection of certain civil liberties. On a number of occasions, the Supreme Court has struck down popular laws—laws that politicians passed at least in part because they feared the electoral costs of not doing so—but the Court appeared secure in the knowledge that it would be politically dangerous for elected officials to defy the Court's rulings. Examples include the Supreme Court's invalidation of a federal anti-flag desecration act (*United States v. Eichman*, 496 U.S. 310, 1990), a federal anti-Internet pornography act (*Reno v. ACLU*, 521 U.S. 844, 1997), and a state statute denying public education to illegal immigrant children (*Plyler v. Doe*, 457 U.S. 202, 1982).

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23. For a similar blame-deflection argument in another context, see Fiorina (1986), who argues that legislative delegation to administrative agencies is explained in part by the desire of legislators to shift blame for unpopular policies from themselves to the agencies.

Contrast the stylized facts about these cases with those that characterize the social and economic regulation cases considered in the previous subsection. As in the regulatory cases, it is plausible that voters are uncertain about the best policy (r not too close to zero or one), that the elected branches are susceptible to false positives (p_g closer to one than to zero), and that courts are likely to approve policies that are in the voters' best interest (q_j close to one). But on these civil liberties issues, courts may be perceived as having considerably greater institutional competence, for two reasons. First, the elected branches' support for particular policies may not be much affected by their ultimate desirability (q_g not much greater than p_g). That is, the degree to which the probability of government support for legislation is increased by such legislation being in the public interest is less in these civil liberties cases than in most economic and social regulation cases. Second, the courts may be more aggressive in striking down bad policies (p_j very low)—the judicial mechanisms for screening out bad policies are stronger in this context than in the regulatory context. If the above conditions hold, the model predicts a JC equilibrium.

The comparison of economic regulation cases and civil rights cases also usefully highlights an aspect of the model discussed earlier—the interrelationship of the level of judicial deference and the reliability of judicial support and opposition. When the judiciary tends to approve almost everything, as in the regulation cases, judicial support for policy is not a reliable indicator, so it would be irrational for the voters to force the government to enact potentially undesirable legislation. But when the judiciary is more discerning and more aggressive, the public can afford to pressure the government to pass statutes and rely on the courts to screen out the bad ones.

Also, inasmuch as it is still the case that judicial opposition is a stronger signal to the voter than judicial support, increases in r are likely to increase the voter's preference for JC relative to DV. That is, if the median voter is skeptical about whether a policy initiative is a good idea, she may want to give both the government and the courts an opportunity to block it. But as she becomes more uncertain (or more sympathetic), at a certain point she will prefer to deprive the government of the option of killing the legislation by failing to enact it, and instead will allow the courts to make the policy decision.

4.3. The GC Equilibrium: Domestic Stability and National Security

The preceding subsections have examined the two equilibria where, because Condition 1 is satisfied, voters would punish the government for defying the judiciary, thus securing the power of the courts to issue controversial rulings. But the model also predicts that when the government, whether in support of or opposition to legislation, sends the voters a more useful signal than the courts do, the likely outcome is the GC equilibrium, where the judiciary recognizes that opposition to the elected

branches is futile. Though this pattern may be relatively rare in the modern American context (and would be difficult to ascertain, because on the equilibrium path the court does not veto), some examples seem consistent, especially in matters relating to national security or other extremely sensitive issues. This pattern may also be more common in other countries, and the model may help explain this cross-national variation.

A striking example—and one in which there is direct evidence that the U.S. Supreme Court's opinion was influenced by anticipated government defiance—was the Court's unanimous opinion in the World War II case *Ex parte Quirin*, 317 U.S. 1 (1942). *Quirin* upheld the legality of trying German saboteurs arrested on American soil—one of whom claimed American citizenship—before a military tribunal rather than an Article III court. According to Justice Douglas's memoirs, the attorney general had told the court that "the Army was going to go ahead and execute the [saboteurs] whatever the Court did" (Douglas, 1980:138–39). From this and other evidence, analysts have concluded that the Court's decision was strongly influenced by the belief that the government would ignore an adverse decision—and, implicitly, that doing so would not be too politically costly under the circumstances (Katyal and Tribe, 2002:1291; Fallon, 2003:30–31).

Another historical example of public imposition of the *GC* equilibrium is the series of 19th century cases in which the Supreme Court revived the doctrine of state sovereign immunity in order to allow former Confederate states to repudiate their debts. These decisions, according to many commentators, were driven by "unrelenting popular pressure" rather than abstract legal reasoning or the justices' own policy preferences (Gibbons, 1983; see also Fallon, 2003:30). The Court was quite reasonably concerned that a decision holding these states liable for their debts would simply be ignored, and the Court could not count on the power of public opinion to come to its assistance.

Though the *GC* equilibrium appears to be exceptional in the modern American context, it may be more the norm elsewhere. The Russian Constitutional Court, for instance, appears much more constrained by the lack of robust public willingness to defend the court against the executive. Indeed, the fate of the first Russian Constitutional Court is a cautionary indication of what can happen off the equilibrium path when the voter-induced equilibrium is *GC* but the judiciary nonetheless vetoes government policy. The first Russian Constitutional Court, which operated from 1991 to 1993, was perceived as activist and political (Howard, 2001:104); it tried to assert its authority through controversial rulings on a number of issues, including President Yeltsin's merger of the KGB and the Ministry of Internal Affairs, a proposed Tatarstan sovereignty referendum, and the status of Communist Party property (Kitchin, 1995:448–49; Pomeranz, 1997:10–11). When the court attempted to constrain Yeltsin in his struggles with parliament, Yeltsin suspended the court indefinitely (Pomeranz, 1997:13–14), and suffered no serious political costs for doing so.

The Russian Constitutional Court was reestablished in 1995, but the scope of its authority is more limited, and it exercises the authority it does have in a "timid manner" (Howard, 2001: 104). This caution, particularly evident in the Constitutional Court's avoidance of an adverse decision regarding the legality of Russian actions with respect to the Chechnya insurgency (Pomeranz, 1997), is consistent with a GC equilibrium (on the equilibrium path) and is similar to the behavior of American courts in the instances described above: a perceived lack of reliable public support leads the court to acquiesce to government actions it might otherwise be inclined to strike down.

The common feature of these cases, in terms of the model, is that they involve situations where the public believes the judiciary, left to its own devices, is likely to be overzealous in striking down government initiatives (q_j is low), whereas the elected government is considered relatively good at making the requisite policy judgments (q_g is high; p_g is low). They are also cases where most voters might plausibly assume ex ante that the government action in question would benefit them (r closer to one). The model is thus able to account for these situations, where the judiciary is weak, as well as situations such as those described in the first two subsections, where the judiciary is strong.

5. Conclusion

Explanations for judicial power often focus on public opinion and political support for the courts. However, the role of public opinion in safeguarding judicial independence is not well understood. This article has developed a simple model in which a policy-oriented but uninformed voter must choose how to allocate power between a court and an elected policy branch. Public support for judicial review is determined by the relative information content of judicial opposition to legislation and government support for legislation. When the former is more reliable, the public will support a judicial veto. When judicial support is also more reliable than government opposition, the public will pressure the government to pass legislation, but will support the court if it vetoes that legislation. This behavior, previously interpreted as a "blame deflection" strategy on the government's part, may in fact reflect rational calculations by uninformed voters. In other circumstances, though, the government's views on legislation are always more reliable information than the judiciary's views. In such cases, the judiciary will lack public support. These predictions are consistent with general observations about judicial politics in a number of issue areas and a number of countries.

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