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COURT OF PUBLIC OPINION:  
GOVERNMENT ACCOUNTABILITY  
AND JUDICIAL INDEPENDENCE

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**COURT OF PUBLIC OPINION:  
GOVERNMENT ACCOUNTABILITY AND JUDICIAL INDEPENDENCE**

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**ABSTRACT**

This paper contributes judicial politics literature by analyzing the conditions under which the public's ability to hold the elected government accountable might enable courts to exercise independent authority over policy. Using a model of policy-making in a system characterized by formal separation of powers, judicial dependence on government support, asymmetric information between the voters and the government, and political accountability of the policy branch, I show the conditions under which the public will force the government to cede power to the courts. This formal analysis makes three contributions to the literature. First, the model provides a theoretical justification for, and suggests limits to, the common assumption that disregard for judicial decisions is politically costly for the elected branches. Second, the model suggests a systematic account for a number of empirical observations about judicial politics. Third, the model demonstrates how systems of unified or separated powers can emerge endogenously.

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Courts generally depend on the executive to enforce judicial rulings, and both the executive and legislative branches have a number of tools at their disposal that could be used to manipulate or discipline the judiciary (Salzberger 1993, Rogers 2001). And yet courts, at least sometimes, are able to issue controversial rulings on politically salient topics – rulings that are respected, even when they are opposed, by the other branches of government. Among the most important candidate explanations for why the other branches of government allow the judiciary to wield such power are those that focus on the role of public opinion and public support for the courts. However, this aspect of judicial power has not received sufficient theoretical attention. Public support for the courts is usually treated as an exogenous parameter, without explicit consideration of why and under what circumstances the public would defend the judiciary in a conflict with the other branches. Similarly, it is often asserted, explicitly or implicitly, that the public will tolerate certain decisions when they are made by a court, even if those decisions would be extremely unpopular, and thus politically costly, if they were made by the legislature or the executive. Yet the reasons why this would be so are not obvious.

This paper contributes to the literature on the sources of judicial power, and on the separation of powers more generally, by analyzing why, how, and under what conditions the public's ability to hold the elected branches of government accountable might enable the judiciary to exercise independent authority over policy outcomes.

Using a simple model of policymaking in a system characterized by formal separation of

powers, judicial dependence on government support, asymmetric information as between the voters and the government, and political accountability of the policy branches to the voters, I show the conditions under which the public will force the elected government to cede some or all power over legislative decisions to the courts.

The voters' decision is driven by considerations of the reliability of judicial activism relative to government conservatism, and the reliability of government activism relative to judicial conservatism, as well as the ex ante probability that a given piece of legislation is in the public interest. By "reliability" of activism and conservatism I mean the degree to which the voters can rely on, respectively, an agent's support for a legislative proposal (activism) or opposition to that legislative proposal (conservatism) as evidence that the legislative proposal is in fact in the voters' best interests.

When the conservatism of each branch is sufficiently more reliable than the activism of the other branch – that is, when the voters learn more from one branch's opposition to legislation than they do from the other branch's support for the same legislation – then rational voters will induce a separation-of-powers system in which both the government and the judiciary have the power to veto legislation. When the activism of each branch is sufficiently more reliable than the conservatism of the other branch, then rational voters will elect a separation-of-powers system in which either branch has the power to enact legislation. If judicial activism is more reliable than government conservatism, and judicial conservatism is more reliable than government activism, then the voters will compel the government to cede all real control over the policy decision to the courts. Similarly, if the government, whether activist or conservative, is always more reliable than the courts, then the judiciary will have no real public support, and the government will have complete control over the policy decision.

This analysis makes three contributions to the literature on judicial independence and the separation of powers. First, it provides a theoretical justification for, and suggests important limits to, the common assumption that disregard for judicial decisions is politically costly for the executive and the legislature. Specifically, the model demonstrates that this is true if, but only if, the public believes that judicial conservatism is more reliable than government activism, appropriately weighted by public's estimate of the ex ante probability that legislation is a good idea.

Second, this perspective suggests a unified and systematic account for aspects of judicial-government-public interaction that are usually subject to unrelated, and sometimes ad hoc and inconsistent, explanations. In particular, 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 estimates of the reliability of judicial and government activism and conservatism. This perspective sheds light on a number of empirical observations of judicial politics.

Third, while much of the existing formal literature on the separation of powers takes the institutional structure of the policy-making regime as a given, the approach employed here demonstrates how systems of unified or separated powers can emerge endogenously as a result of optimizing behavior on the part of the political principals – the voters (or other powerful interest groups). This contribution is not merely theoretical. Understanding how rational voters might select and enforce a particular policy-making structure is an important area of inquiry for students of comparative politics, especially

given the fact that the distribution of real power in a political system often does not track the allocation of formal authority specified in the constitution, and constitutions themselves are often silent on such issues.

## **THE EXTANT LITERATURE**

The political science literature contains a number of different types of explanation for the power exercised by independent courts. Not all of these explanations rely on public opinion or the political accountability of the elected branches. For example, some scholars have suggested that the policy branches grant the judiciary independent authority because the courts can act as their agent, ensuring that the administrative bureaucracy faithfully implements government policy (McCubbins and Schwartz 1984, Ramseyer 1998). As in all principal-agent relationships, the better-informed judicial agent may have some latitude to make choices that advance its own interests rather than those of its principal (Rogers 2001). Or, it may be the case that, because the judicial agent often has multiple principals who must agree in order to overturn a court decision, the judiciary has some room to maneuver independently (Cooter and Ginsburg 1996, Tsebelis 2002).

Other scholars have emphasized the role of electoral competition, suggesting that independent courts with the ability to constrain the legislature and executive may provide a kind of political insurance for parties engaged in uncertain, and ongoing, competition for office (Ramseyer 1994, Stephenson 2003). Yet another line of argument is that independent courts enable legislators to make more credible commitments, thus enhancing the legislators' own welfare (Landes and Posner 1975).

Nevertheless, public opinion figures prominently in a number of explanations for judicial power and independence. While public opinion plays somewhat different roles in different models, two principal strands of public opinion-oriented explanation for judicial independence are discernible in the extant literature: the “public backlash” hypothesis and the “blame deflection” hypothesis.

The “public backlash” hypothesis holds that the public opposes political interference with court decisions, thus making it politically costly for the elected branches of government to ignore, manipulate, or defy judicial rulings. The “blame deflection” hypothesis maintains that the policy branches favor judicial independence because politicians can avoid political heat for controversial decisions by letting the courts resolve them. Implicit in this latter argument is the idea that public opinion would tolerate the elected branches leaving certain salient issues to the courts, even if the courts issue rulings that public opinion is inclined to oppose. While both the public backlash and blame deflection hypotheses have some intuitive appeal, they are theoretically underdeveloped and, at least in their most common formulations, problematic in their implicit assumptions about the rationality and motives of political actors.

With regard to the public backlash hypothesis, it is often assumed that the public would support the judiciary, rather than the other branches, in case of a conflict between them (Vanberg 2001). However, it is not clear – and it is usually not explained – why this is the case. The assumption that the public would defend the judiciary is especially problematic in cases where the court blocks the government from taking actions that have strong public support, or forces the government to do something unpopular. It may be, as some scholars have suggested, that the public relies on the courts to monitor the more powerful elected branches, making sure that they do not act in ways that are harmful to

the public's interests (Weingast 1993, Sutter 1993). However, this explanation, while plausible in part, overlooks the possibility that the judiciary may not always share the public's interests; indeed, in many cases, the elected branches are more likely than the courts to have preferences similar to those of the relevant public constituencies.

Moreover, other scholars have stressed that the courts generally do not oppose prevailing policy preferences, at least not for long (Rosenberg 1992), an observation that is hard to square with the strong version of the public backlash hypothesis. Most fundamentally, it is apparent that public support for the judiciary in cases of conflict with the other branches is not a constant, but a variable, and the source of that variation is not well-understood.

As for the blame deflection hypothesis, the core of this argument is that the elected branches of government value an independent judiciary because of its ability to take the blame for killing legislation that is popular with the public (or certain important segments of the public) but undesirable from the government's point of view (Salzberger 1993, Hirschl 2000).<sup>1</sup> If the courts were not independent, the argument goes, then the government would lose this useful safety valve. However, the blame deflection hypothesis, at least inasmuch as it is intended to be an *explanation* for judicial independence, rather than a description of how politicians exploit the existence of a judiciary that is independent for some other reason, relies on questionable assumptions about voter rationality.

If voters were sophisticated – that is, if they understood the policy process and therefore knew that the government could manipulate or ignore judicial rulings if it

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<sup>1</sup> For a similar blame-deflection argument in another context, see Fiorina (1986) who argues that legislative delegation to administrative agencies can be explained in part by the desire of legislators to shift blame for unpopular policies from themselves to the agencies.



wanted to – then the blame deflection mechanism would not work, because the elected branches would be punished for allowing the courts to kill popular legislation. On the other hand, if the public were completely naïve, and looked only to policy outcomes rather than the policy process, then the blame deflection mechanism would also be ineffective, since at the end of the day the voters would observe that their desired legislation had not been enacted. Thus, blame deflection is only effective if one of two conditions holds. Either the public must be semi-sophisticated (i.e., attentive enough to know that the government passed legislation and the court vetoed it, but not aware that the government has the power to override or ignore judicial decisions) or a sophisticated public must recognize some other important reason not to allow the government to interfere with judicial decisions. The assumption of semi-sophistication in the former case seems ad hoc and implausible, while the latter position is, essentially, the public backlash hypothesis.

In addition, the public backlash hypothesis and the blame deflection hypothesis appear, at least on the surface, to be somewhat inconsistent. The public backlash hypothesis suggests that the court's decision has strong public support, at least in the sense that the public would back the court if the government attempted to ignore that decision. The blame deflection hypothesis implies that the court decision is extremely unpopular, which suggests that undoing that decision would be favored by the public. The two hypotheses are not completely irreconcilable, but they do appear to be in tension, since the blame deflection hypothesis suggests that the public would prefer undoing or reversing a judicial decision, while the public backlash hypothesis explicitly holds that doing so would provoke a public outcry.

The point of this discussion is not that the public backlash and blame deflection hypotheses are without merit. Indeed, both lines of argument have intuitive appeal and appear supported by some empirical observations. However, the theoretical foundations of both claims are shaky, and the appropriate scope of each hypothesis is not well-understood. This paper contributes to the literature by developing a simple model in which a policy-oriented but uninformed public uses political sanctions against the elected branches to influence the latter's treatment of the judiciary. Within the framework of this model, both public backlash and blame deflection type behaviors can emerge, and their function, scope, and limitations are clarified. The model also generates new hypotheses about policymaking in systems characterized by separation of powers and public accountability.

## **THE MODEL**

I investigate the role of public opinion as a source of judicial power and independence by analyzing a simple model of the policy-making process in a polity with separated powers and political accountability. There are three players – a Voter (representative of the “public interest”),<sup>2</sup> the Government (a combined legislative-executive policy branch), and a Judiciary. The salient policy decision is whether or not to enact a particular piece of legislation. Whether the legislation is in the Voter's interest depends on facts about the world 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 there is some possibility that their preferences diverge from those of the Voter. Thus,

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<sup>2</sup> All the usual caveats and qualifications to 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.

the Voter, when considering how much decision-making power to delegate to the other players, faces a standard agency problem: exploiting the agents' informational advantage risks allowing them to pursue their own agendas rather than that of the Voter-principal.<sup>3</sup>

The model makes two additional assumptions about the structure of the policy-making process. First, the model assumes a formal separation of powers, but not symmetry or equivalence of powers. 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.<sup>4</sup> More importantly, this veto is meaningful only if the Government chooses to respect it. That is, the Judiciary has no independent source of power, but rather is functionally dependent on the Government. 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.<sup>5</sup> This assumption is plausible in cases of stable

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<sup>3</sup> This modeling approach is based on recent work by Rogers (2001), Vanberg (2001), and Maskin and Tirole (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 or 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 paper uses a simpler information structure – there is no Bayesian learning – but incorporates the strategic interaction of all three relevant actors – the legislature, the judiciary, and the voters – in a single framework.

<sup>4</sup> 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.

<sup>5</sup> 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

and competitive political democracy, where the electorate can express its dissatisfaction with the incumbent government by voting (or threatening to vote) for a rival party. It is, however, much less plausible in cases where public censure of the government would require risky or costly mobilization – for example in repressive autocracies or one-party systems – and the model is thus not directly applicable 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 of the world 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, and 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. Similarly, let  $q_i \in [p_i,1)$  be the probability that agent  $i$  prefers legislation in the “good” state.<sup>6</sup>
- The Government and the Judiciary know the state of the world 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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elected judiciaries, the inclusion of direct Judicial accountability to the Voter would have no significant effect on the main results.

<sup>6</sup> The reason that the lower bound on  $q_i$  is  $p_i$  is that the model assumes that being in the good state does not decrease the chance that an agent favors legislation. An alternative way to think about these probabilities is as follows: Nature selects one of three types for player  $i$ : with probability  $r q_i + (1-r)(1-p_i)$ , player  $i$  is *convergent*, with the same preferences as the Voter; with probability  $(1-r)p_i$ , player  $i$  is *radical*, preferring legislation even though it is bad for the Voter; and, with probability  $r(1-q_i)$ , player  $i$  is *reactionary*, opposing legislation even though it is good for the Voter.

Note further that 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.

- 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 reviews the legislation and either vetoes it ( $V$ ) or upholds it ( $\sim V$ ). If the Judiciary upholds the legislation, then the legislation is enacted and the game proceeds immediately to Step 4.
- STEP 3: If the Judiciary vetoes legislation at Step 2, the Government either disciplines the Judiciary ( $D$ ) or allows the judicial veto to stand ( $\sim D$ ). If the Government respects the judicial veto, then no legislation is enacted. If, however, the Government disciplines the Judiciary, the legislation is enacted and, in addition, the Judiciary suffers cost  $k_j > 0$ .<sup>7</sup>
- STEP 4: The Voter chooses whether to punish the Government or not. The punishment has no effect on whether the legislation is enacted, but if the Voter punishes the Government, the latter suffers cost  $k_g > 1$ , which is sufficiently large that the Government is never willing to suffer the punishment in order to secure its most-preferred legislative outcome.

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<sup>7</sup> There are a number of potential sources of this cost term. First, even if the judiciary in fact wields little real power, judges may suffer some cost from the humiliation of being overtly disciplined. Second, the discipline itself may take the form of coercion applied directly to the judges to get them to reverse their prior rulings. Ultimately, the source and magnitude of the cost are not important; all the model's 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, note that, while the model assumes that the Government does not have to bear any direct cost for selecting  $D$ , the results are unchanged by the addition of some fixed cost for this choice, provided that this cost is outweighed by the benefit to the Government of a favorable policy outcome. Of course, the existence of a fixed cost means that any additional cost for selecting  $D$  imposed by the Voter does not need to be as large as it otherwise would be to deter the Government from disciplining the Judiciary.

After the Voter makes a choice at Step 4, all players receive their payoffs. Specifically, each player  $i$  receives a payoff of 1 or 0 depending on whether the legislative outcome was favorable (i.e., player  $i$  gets payoff 1 if  $i$  favors legislation and legislation is passed, or if  $i$  opposes legislation and legislation is not passed, but gets payoff 0 if  $i$  favors legislation but legislation is not passed, or if  $i$  opposes legislation but legislation is passed), net any utility cost  $k_i$ .<sup>8</sup> All players are risk-neutral.<sup>9</sup> The core policy-making game (Steps 1-3) is shown in Figure 1.

**[FIGURE 1 ABOUT HERE]**

## **ANALYSIS**

At Step 4 the Voter will be in one of four information sets, each of which corresponds to one of the possible sequences of preceding moves by the Government and Judiciary:  $\sim L$ ,  $L\sim V$ ,  $LV\sim D$ , or  $LVD$  (each information set corresponds to one of the four nodes at the bottom of Figure 1). The Voter's strategy 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, Austen-Smith and Banks

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<sup>8</sup> The model developed here is a one-shot model, appropriate for cases where the particular policy issue in question will not recur in the foreseeable future, or where the impact of a policy choice is not realized until well after the Government of the day leaves office. The analysis of the one-shot case also establishes a baseline case, which could be extended by treating the one-shot game as a stage game in a repeated game framework. A repeat game could incorporate learning, correlation across issue areas, and reputation effects. However, while such extensions would likely yield additional insights, it would add significantly to the complexity of the basic model, and so I do not explore the repeated game here.

<sup>9</sup> Because the model is completely deterministic, attitude toward risk plays no role other than to simplify the expected utility calculation. However, the assumption of risk neutrality means that one could interpret all the payoffs from policy and punishment as *expected* costs and benefits. That is, each cost  $k_i$  can be interpreted as a punishment of magnitude  $mk_i$  that is imposed with probability  $1/m$ .

1989). Thus, the Voter, through the selection of a punishment strategy, can induce one of six types of policy-making regimes as a subgame-perfect equilibrium of the game:<sup>10</sup>

- *Always Legislate (AL)*: Under this policy-making regime, the Government always enacts legislation and this legislation is always upheld by the Judiciary, regardless of the state of the world and the preferences of the political agents. The Voter can enforce *AL* in equilibrium 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.
- *Never Legislate (NL)*: Here, the Voter prevents legislation from ever being proposed,<sup>11</sup> regardless of the state of the world and the preferences of the Government and Judiciary. The Voter can enforce *NL* in equilibrium by punishing the Government if the Judiciary upholds proposed legislation ( $L\sim V$ ) or if the Government disciplines the Judiciary ( $LVD$ ), but not otherwise.<sup>12</sup>
- *Government Choice (GC)*: In this policy-making regime, the Voter delegates the legislative decision exclusively to the Government. That is, legislation will be enacted – and upheld by the Judiciary – if and only if the Government favors legislation. The Voter can enforce *GC* in equilibrium by never

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<sup>10</sup> That the strategies described in this section are subgame perfect Nash equilibria can be shown straightforwardly using backward induction. The formal proofs are trivial and are therefore omitted.

<sup>11</sup> For simplicity of exposition, I assume that if the Government is indifferent between  $L$  and  $\sim L$  at Step 1, the Government will choose  $\sim L$ . In other words, if the Government anticipates that the legislation would be vetoed, and that the Government would respect that veto, the Government won't bother proposing legislation in the first instance. This assumption has no effect on the substance of the analysis.

<sup>12</sup> The Voter can also induce the *NL* policy-making regime in equilibrium 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  $\sim L$ . In this case and the cases that follow, I have described what I believe to be the most empirically plausible equilibrium strategy in the text, and listed the observationally equivalent equilibrium strategies in the footnotes. The choice, however, is somewhat arbitrary, as all the grouped strategy profiles induce exactly the same behavior.

punishing the Government, regardless of the path of play.<sup>13</sup> Substantively, note that this policy-making regime corresponds to those 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 policy-making regime, the Voter's ability to hold the Government directly 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 always respect this veto. The Voter can enforce *JC* in equilibrium by punishing the Government if the Government fails to propose legislation at Step 1 ( $\sim L$ ) or if the Government disciplines the Judiciary at Step 3 (*LVD*), but not otherwise. This accountability regime has the substantively 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, would be consistent with examples – such as those used to support the blame deflection hypothesis – where the public supports

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<sup>13</sup> 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~D* but not otherwise; in information sets  $\sim L$  and *L~V* but not otherwise; in information sets *LV~D* and *LVD* but not otherwise; in information sets  $\sim L$ , *L~V*, and *LV~D*, but not in *LVD*; or in all information sets.



the courts even when they invalidate legislation that the public demanded from the elected branches.

- *Dual Veto (DV)*: This policy-making regime is characterized by a real (rather than merely formal) separation of powers. In particular, legislation can only be successfully passed, under this regime, if it is favored by *both* the Government *and* the Judiciary; if either of these agents opposes legislation, then no legislation will be passed. The Voter can enforce *DV* in equilibrium by punishing the Government if it overrides a judicial veto at Step 3 (*LVD*) but not otherwise.<sup>14</sup> This policy-making 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 policy 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 quite consistent with that predicted by the public backlash hypothesis.
- *Dual Option (DO)*: Like the preceding case, this policy-making regime is characterized by separation of powers. The difference is that, under the *DO* regime, legislation can be successfully enacted if *either* the Government *or* the Judiciary prefers it; the opposition of both agents is required to block the passage of the legislation. The Voter can enforce *DO* in equilibrium by punishing the Government if it fails to enact legislation at Step 1 ( $\sim L$ ), but not

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<sup>14</sup> The Voter can also enforce the *DV* policy-making regime by punishing the Government in information sets  $\sim L$ ,  $L\sim V$ , and *LVD*, but not in  $L\sim D$ .

otherwise.<sup>15</sup> This policy-making regime is, perhaps, the least intuitive as a substantive matter, since the Voter essentially forces the Government to propose legislation but is indifferent as to whether the Government overrides a judicial veto or not. However, this regime may be consistent with examples where popular support compels the passage of a particular type of legislation, but the public is nonetheless willing to let the legislation die if both the courts and the policy branches demonstrate their 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 that the Voter will adopt the punishment strategy that induces whichever of these six possible policy-making regimes yields the highest expected payoff. 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 as follows:

<u>Institutional Decision Rule</u>	<u>Expected Utility to the Voter</u>
<i>Always Legislate</i>	$EU_{AL} = r$
<i>Never Legislate</i>	$EU_{NL} = 1 - r$
<i>Government Choice</i>	$EU_{GC} = rq_g + (1 - r)(1 - p_g)$
<i>Judicial Choice</i>	$EU_{GC} = rq_j + (1 - r)(1 - p_j)$
<i>Dual Veto</i>	$EU_{DV} = rq_gq_j + (1 - r)(1 - p_gp_j)$
<i>Dual Option</i>	$EU_{DO} = r(q_g + q_j - q_gq_j) + (1 - r)(1 - p_g)(1 - p_j)$

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<sup>15</sup> The Voter can also enforce *DO* by punishing the Government in information sets  $\sim L$ ,  $LV\sim D$ , and  $LVD$ ,

The Voter will adopt whichever punishment strategy corresponds to the maximum of these six possible expected payoffs, and this strategy will be credible (i.e., subgame perfect) because the Voter could never get a better payoff by deviating at Step 4.

For some parameter values, it would of course be optimal for the Voter to induce *AL* or *NL* – in essence, 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 to one or both of the political agents, we 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. Thus, the Voter will choose a strategy by comparing the expected utilities associated with *GC*, *JC*, *DV*, and *DO*. Defining the odds ratio  $W \equiv \frac{r}{1-r}$  and setting up the six relevant inequalities, given the expected utility equations above, yields the following four conditions:

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

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

$$(c) \quad EU_{JC} > EU_{GC} \Leftrightarrow \frac{p_g - p_j}{q_g - q_j} > W^{16}$$

$$(d) \quad EU_{DV} > EU_{DO} \Leftrightarrow \frac{1-p_g p_j - (1-p_g)(1-p_j)}{1-q_g q_j - (1-q_g)(1-q_j)} > W$$

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but not in  $L \sim V$ .

Note that the first two conditions are sufficient to determine which of the four candidate policy-making regimes will be selected. Those two conditions can be rewritten as follows:

$$\text{Condition (1): } \frac{1-p_j}{1-q_j} > \frac{q_g}{p_g} W$$

$$\text{Condition (2): } \frac{1-p_g}{1-q_g} > \frac{q_j}{p_j} W$$

If Condition (1) and Condition (2) are both satisfied, then the *Dual Veto* separation-of-powers system is optimal for the Voter. If neither condition is satisfied, then the *Dual Option* separation-of-powers system is optimal. If only 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.

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 "activism," where values close to 1 indicate unreliability, while values

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<sup>16</sup> 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.

approaching  $\infty$  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

“conservatism.”

Note that these measures of reliability are simply measures of 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 a political agent’s revealed preference to decide whether she herself ought to prefer legislation. Thus, for example, if Government activism 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 conservatism 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  $W=1$  – that is, legislation is ex ante equally likely to benefit or harm the Voter. Condition (1) holds when the reliability of Judicial conservatism is greater than the reliability of Government activism. Condition (2) holds when the reliability of Government conservatism is greater than the reliability of Judicial activism. When Government activism is more reliable than Judicial conservatism and Government conservatism is more reliable than Judicial activism, then the Voter would prefer to delegate all policy-making authority to the Government. Likewise, when Government conservatism is less reliable than Judicial activism and Government activism is less reliable than Judicial conservatism, the Voter would prefer giving the Judiciary exclusive power over the legislative choice. However, when the Voter can always rely

more on the fact that one agent opposes legislation than she can from the fact that the other agent supports legislation – that is, when Government conservatism is more reliable than Judicial activism and Judicial conservatism is also more reliable than Government activism – then the voter prefers the *Dual Veto* separation of powers system. The *Dual Option* system is optimal when each party’s activism is always more reliable than the other party’s conservatism.

**[FIGURE 2 ABOUT HERE]**

The reliability of an agent’s conservatism and activism are, of course, related. In particular, player  $i$ ’s activism is more reliable than its conservatism if  $p_i+q_i<1$ , and player  $i$ ’s conservatism is more reliable than its activism if  $p_i+q_i>1$ . The critical questions, of course, are whether player  $i$ ’s activism is more or less reliable than the other agent’s conservatism, and whether player  $i$ ’s conservatism is more or less reliable than the other agent’s activism. In general, though, when a player tends to approve of legislation much more often than not, then that agent is probably more reliable when it is conservative than when it is activist. One might therefore infer that, if both agents display a general preference for legislation, it is likely that both agents are more reliable as conservatives than as activists, and therefore it is likely that the public would prefer the *Dual Veto* system.

The odds ratio  $W$  influences whether reliable activism or reliable conservatism is more important to the Voter. When  $W>1$ , legislation is in the Voter’s interest more often than not, and, as a result, activism is weighted more heavily. In other words, Conditions (1) and (2) are harder to satisfy when  $W$  is large. On the other hand, when  $W<1$ , legislation tends to be a bad for the Voter, and so conservatism is weighted more heavily.

That is, an agent's conservatism doesn't need to be as reliable, when  $W$  is low, in order to outweigh the reliability of the other agent's activism.

## **DISCUSSION**

### *“Public Backlash” and “Blame Deflection” Revisited*

The foregoing analysis provides a theoretical justification for the assumption that, under some conditions, the public will impose political costs on a government that interferes with or ignores judicial rulings. Specifically, if Condition (1) holds – that is, if Judicial conservatism is more reliable than Government activism (the latter weighted by  $W$ , the odds that legislation is in the public interest) – then the Voter will punish the Government if it disregards a judicial veto. The model therefore specifies an explicit condition for when, in keeping with the public backlash hypothesis, the public will impose political costs on the government for ignoring or manipulating judicial rulings. When Judicial conservatism is a more reliable indicator than Government activism, a rational and self-interested but uninformed public will punish the Government for failing to respect judicial vetoes.

However, the assumption that the public will oppose Government disregard for court decisions is problematic in situations where Government activism, appropriately weighted, is more reliable than Judicial conservatism. In such cases, the Voter's interests are not served by backing the Judiciary in conflicts with the Government. Thus, explanations of judicial power that rely on something like the public backlash explanation may be limited in their applicability to those policy environments where Condition (1) would plausibly hold.

Interestingly, it is clear by inspection that Condition (1) can hold even when legislation is more likely than not in the public interest ( $W > 1$ ) and the Government is more likely than the Judiciary to support good legislation ( $q_g > q_j$ ). To illustrate with a numerical example, suppose  $W=1.5$ ,  $p_g=0.8$ ,  $q_g=0.9$ ,  $p_j=0.2$ , and  $q_j=0.6$ . That is, there is a 60 percent chance (ex ante) that legislation is in the Voter's interest, and the Government is 50 percent more likely than the Judiciary to favor such "good" legislation. However, Condition (1) still holds, meaning that the Voter would punish the Government for disregarding a Judicial veto. The reason is that the Government in this example is quite likely to favor legislation even when legislation is not in the public interest, whereas the Judiciary is much less likely to do so. Thus, the reliability of Government activism is not

very high ( $\frac{q_g}{p_g} = \frac{9}{8}$ ), while Judicial conservatism is quite reliable ( $\frac{1-p_j}{1-q_j} = 2$ ).<sup>17</sup> This

example underscores the fact that, when considering real-world cases, the relevant inquiry concerns the relative reliabilities of Government and Judicial activism and conservatism, rather than the simple probabilities that legislation is good and that each agent favors good legislation.

In addition, the model – in particular the analysis of the *Judicial Choice* decision rule – also suggests a new interpretation of patterns of behavior associated with the blame deflection hypothesis. Recall that, under the *Judicial Choice* regime, the Voter punishes the Government politically if the Government fails to enact legislation, but the Voter also punishes the Government if the latter tries to override a court decision. This behavior is superficially consistent with a blame deflection story: the public appears to demand legislation, which the Government dutifully enacts, secure in the knowledge that the

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<sup>17</sup> In this example, Condition (2) is also satisfied, so *Judicial Choice* is the Voter's optimal policy-making



Judiciary will successfully veto it. However, whereas the blame deflection hypothesis implicitly presumed that the public was unaware the Government could override the Judicial veto, or that the public opposed such an override for unrelated reasons, the analysis of the *Judicial Choice* decision rule in the context of the model suggests an alternative interpretation. The Voter forces the Government to legislate, and supports a Judicial veto, because the Voter wants the decision on this piece of legislation to be made by the Judiciary rather than the Government. Behavior that looks like blame deflection might therefore be reinterpreted as public enforcement of a *Judicial Choice* 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.

### *Empirical Implications*

The model's basic insight – that public support for independent judicial review depends on the relative reliabilities of Government activism versus Judicial conservatism, on the one hand, and Judicial activism versus Government conservatism, on the other – may help explain other empirical regularities in judicial politics, as well as some of the variation in judicial power and independence across countries, across time, and across policy areas. I do not attempt a comprehensive empirical analysis here – such a project is beyond the scope of this paper, and would require both a more elaborate model and sophisticated techniques for gathering and interpreting the requisite data. The following observations nonetheless suggest some of the ways our understanding of empirical

phenomena might be enriched by considering the basic dynamics of the simple model developed in this paper.

First, the model implies an explanation for two stylized facts about judicial power in advanced democracies that are not often linked. First, most courts tend to be deferential to the political branches – that is, most courts, most of the time, tend to approve of (or at least not strike down) legislative initiatives. Second, judicial power tends to be negative power; as a generalization, it is more common to observe courts that wield power consistent with a *Dual Veto* system than with a *Judicial Choice* or *Dual Option* system. The formal analysis suggests a link between these observations in that, when both  $p_j$  and  $q_j$  are relatively high (and therefore  $p_j+q_j>1$ ), Judicial conservatism is much more reliable than Judicial activism, which increases the likelihood that Conditions (1) and (2) are both satisfied. If the Judiciary were much more aggressive in invalidating legislation – that is, if  $p_j$  and  $q_j$  were both very low, such that  $p_j+q_j<1$  – a *Dual Option* system would be more likely to be imposed by the voters.

Second, the model suggests an explanation for the prevalence, at least in advanced democracies, of something resembling a *Dual Veto* separation-of-powers system. When the Government tends to favor the passage of legislation and courts tend to be deferential, conservatism is usually more reliable than activism. A general skepticism toward legislation – that is, an environment characterized by low values of  $W$  – is also conducive to a *Dual Veto* system. Of course, if legislation is excessively likely to be bad, the Voter would simply enforce the *Never Legislate* decision rule. But, as  $W$  increases from 0, the type of policy-making regime that will first surpass *NL* is the *Dual Veto* separation-of-powers system. This is consistent with classical explanations of separated powers, in that separation of powers with multiple veto players is thought to be desirable because

legislation is, more often than not, undesirable. However, the classical explanation usually focuses on the fact that multiple veto players raise the cost and/or the difficulty of enacting new legislation. The analysis here, while not inconsistent with the classical view, suggests a somewhat different interpretation: separation of powers with multiple veto players is desirable not merely because it makes passing legislation more difficult and costly, but because it exploits the potential conservatism of two separate actors. Indeed, even when legislation becomes ex ante desirable – that is, for values of  $W > 1$  – a multiple-veto separation-of-powers system can still be desirable if the reliability of each potential veto player’s conservatism is still sufficiently greater (by factor  $W$ ) than the reliability of the other player’s activism. This, again, is especially likely if both agents tend to favor legislation ( $p_g + q_g > 1, p_j + q_j > 1$ ).

Third, while the *Dual Veto* equilibrium may be the norm in most issue areas most of the time, the model also suggests a reason why courts may sometimes be reluctant to challenge the government. If the courts are perceived to be excessively hostile to certain types of government legislation – that is, if the reliability of Judicial conservatism is low, because the courts are likely to oppose policy even if it is in the public interest – or if the reliability of Government activism is considered particularly high on some issue, then the Judiciary can no longer count on public support in the event of a conflict with the Government. Thus, the Judiciary may be especially weak after a sea-change in electoral politics accompanied by demands for radical revisions in policy.

Similarly, though in the model both the Government and the Judiciary learn the state of the world with certainty, the idea that these branches may have different levels of expertise with regard to different issues can easily be accommodated in this framework. Consider a case where the Judiciary is thought to have no special knowledge about the

effects of a particular type of legislation. In the model, this can be considered as a case

where  $p_j=q_j$ , which implies that Judicial activism ( $\frac{q_j}{p_j}$ ) and Judicial conservatism

( $\frac{1-q_j}{1-p_j}$ ) are both equal to 1. Hence, as long as  $q_g > p_g$  (that is, as long as the Government

is somewhat informed and marginally responsive to the public interest) the equilibrium is *Government Choice*. This may help explain the emergence of various doctrines of judicial deference, e.g. the “political questions doctrine”, and the relative weakness of courts in countries where the judges are considered less sophisticated than other political officials.

Also, although miscalculation is impossible in the basic model, since the Government and Judiciary can anticipate all future moves perfectly, the model nonetheless suggests when overt conflicts between the elected branches and the courts are especially likely. In particular, when the reliability of Judicial conservatism and Government activism are very similar, errors in observation of these values are obviously more likely to result in miscalculation than when these values are very different. Thus, for example, when the Government is likely to favor a certain type of legislation regardless of its effect on the public – meaning that the reliability of Government activism is low – and the Judiciary is likely to oppose that legislation regardless of its effect – the reliability of Judicial conservatism is low – the difference between

Government activism ( $\frac{q_g}{p_g}$ ) and Judicial conservatism ( $\frac{1-p_j}{1-q_j}$ ) is small, and an error in

measurement could lead one party to conclude that Condition (1) is satisfied when in fact it is not, or vice versa.

### *Endogenous Separation of Powers*

In addition to providing a theoretical framework for understanding the interaction of public opinion and judicial power, and suggesting explanations for some empirical observations of judicial politics, the analysis employed in this paper suggests a new approach to the study of policy-making in separation-of-powers games more generally. Traditional formal analysis of separation-of-powers systems has tended to take the institutional policy-making structure – the number of veto players, and the scope of their authority – as exogenous (e.g., Ferejohn and Shipan 1990, Tsebelis 1995, Segal 1997). This is an entirely reasonable assumption for many purposes. However, at a more fundamental level, the structure of the polity itself, and the allocation of decision-making authority between political actors, is, at least in part, a function of the choices made by actors within the system rather than a given and immutable feature of the political world. This paper thus complements the existing literature by developing a model in which the separation of powers is endogenously determined. In particular, the analysis elaborated here demonstrates how the structure of decision-making and the separation of powers can be interpreted as a result of the efforts of a public principal to minimize agency costs under conditions of asymmetric information about the likely effects of legislation.

An approach that emphasizes the endogeneity of the institutional structure is particularly useful in cases where actual allocations of political authority cannot be explained or predicted simply by reading the constitution. Such an approach also offers possible explanations for variation in judicial or government power within a single constitutional system – for example, the emergence of multi-tiered standards of review, “political questions” doctrines or other institutionalized forms of judicial deference, and

the degree to which constitutional norms are underenforced. Moreover, the endogenous selection of policymaking regime may provide additional analytical leverage over issues of regime transition and the emergence (or decline) of judicial power over time.

With regard to the last point, a natural extension of the would be to develop a multi-period game in which the Voter can learn about the state of the world and the preferences of the Government and Judiciary. Such a dynamic learning model could yield additional insights regarding the patterns of change in the allocation of power between elected governments and courts. Another natural extension would be to relax the assumption of perfect information on the part of the Judiciary and the Government, so that they too learn over time. A more refined model could also introduce the possibility of partisan electoral competition and endogenous judicial selection.

These more ambitious modeling projects are deferred for future research. Nonetheless, the simple model developed in this paper suggests one approach toward building endogenous public choice of policy-making regime into institutional models of politics. Such endogenous separation-of-powers models may facilitate the development of more sophisticated, and more predictively accurate, analyses of political behavior.

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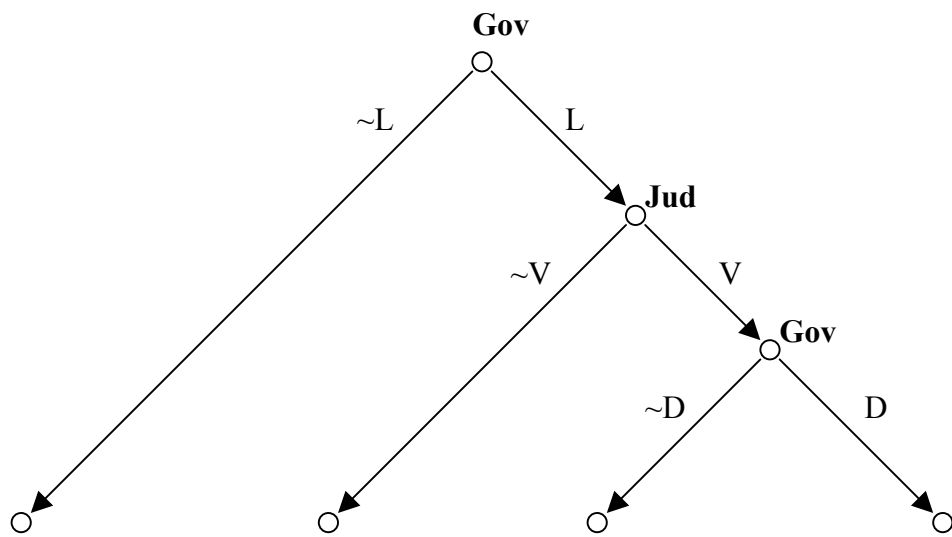
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**FIGURE 1: The Policy-Making Process (Steps 1-3)**

	<i>Government Conservatism is more reliable than Judicial Activism</i> $(\frac{1-p_g}{1-q_g} > \frac{q_j}{p_j})$	<i>Judicial Activism is more reliable than Government Conservatism</i> $(\frac{q_j}{p_j} > \frac{1-p_g}{1-q_g})$
<i>Judicial Conservatism is more reliable than Government Activism</i> $(\frac{1-p_j}{1-q_j} > \frac{q_g}{p_g})$	<b>Dual Veto Separation-of-Powers</b>	<b>Judicial Choice</b>
<i>Government Activism is more reliable than Judicial Conservatism</i> $(\frac{q_g}{p_g} > \frac{1-p_j}{1-q_j})$	<b>Government Choice</b>	<b>Dual Option Separation-of-Powers</b>

**FIGURE 2: The Voter's Optimal Policymaking Regime (assuming  $W=1$ )**