

# **A Formal Analysis of Accountability and Activism in Judicial Elections**

by

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# Abstract

Within the context of judicial review, it is expected that judicial elections lead to more activist decisions because voters should prefer judges who are willing to ignore constitutional constraints and vote along the policy preferences of voters. Using a simple model of political agency, I show that judicial elections can create incentives to be activist because judges are either incentivized to pander to the electorate or the electorate selects for activist types. I also find that if there is some risk that activist judges, like politicians, are noncongruent with the preferences of voters, then under some conditions, voters prefer judges to base their decisions on narrow constitutional grounds. However, voters can never induce activist judges to decide cases on constitutional grounds in equilibrium. This has implications for debates about whether elections will inherently create incentives for judges to be activist. I discuss how this model affects our normative understanding of judicial elections and judicial review.

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# Introduction

Since its first use in *Marbury v. Madison*, judicial review by American courts has been criticized as an undemocratic practice that compromises the democratic policymaking process. Supporters of judicial review, whom I will refer to as “constitutionalists,” argue that judicial review is a necessary institution to prevent tyrannical majorities from violating constitutional principles and harming the individual rights of political minorities. For constitutionalists, judicial review is only as useful as judges are independent. If judges are susceptible to the policy considerations of an electorate, then that threatens the whole goal of judicial review.

We assume that the voters have policy preferences; they want certain legislation enacted and other legislation to be discarded. Voters might care about the constitutionality of legislation but only to the extent that it affects whether or not their preferred policies get enacted. The vast majority of voters in a constitutional democracy are not going to be trained in interpreting or understanding constitutional law. Their voting behavior in a judicial election, just like their voting behavior in any election, will be reflective of extralegal factors: their policy preferences, their general feelings towards the judge, etc. Voters are not lawyers nor experts in constitutional law. Although some voters may be concerned with infringing upon people’s rights, we should expect that the vast majority of voters to care more about policy outcomes than constitutional outcomes. From a constitutionalist perspective, this is problematic for a constitutional democracy that seeks to prevent elected legislatures from infringing on the rights of political minorities.

This thesis, using a model of electoral accountability, formalizes the argument that judicial elections create incentives for judicial activism because voters are policy-oriented. Using a traditional model of electoral accountability, I find that conditions under which this hypothesis holds and discuss how those conditions affect the normative concerns with judicial elections and judicial review.

## **A Constitutionalist Conception of a Principled Judiciary**

Most normative arguments about how judges ought to review the constitutionality of legislation consider the effect of judicial review on constitutionalism. Constitutionalism as a principle and as a theory arises from “a fear of the consequences of majoritarian rule” (Croley, 1995, p.704). Constitutionalist advocates for constitutional constraints on the majority’s power to prevent such consequences. In a society governed by the majority, constitutional principles and protections of individual rights may be ignored or put aside in favor of implementing some popular action. To prevent a tyranny of the majority, constitutionalists need some mechanism that checks democratic outcomes. For most constitutionalists, that mechanism is carried out by the judiciary in the form of judicial review. The power of judicial review allows a court to declare a government action unconstitutional. But for judicial review to be an effective tool to prevent majorities from overstepping the bounds of the Constitution, the judiciary must be making decisions on constitutional grounds. Thus, the effectiveness of judicial review is determined by whether judges decide cases on constitutional grounds or on extralegal factors.

Evaluating a judiciary based on whether their decisions are valid on constitutional grounds is distinct from how we evaluate other branches of government. Ronald Dworkin distinguishes arguments of policy from arguments of principle. “Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole ... Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right” (Dworkin, 1977, p.82). Dworkin makes the case that judges should be deciding cases based on principles. Constitutionalist debate about what those principles are and how a judge should apply them, but nearly all constitutionalist theories of judicial review argue that judges should rely on principles instead of policy considerations. Under some constitutionalist theories, judges do not necessarily have to be able to clearly determine

which principles apply. Frank Lovett’s republican theory of adjudication assumes that a judge cannot always apply clear legal rules. When rules are clear, judges should apply them. When rules are not clear, judges should consider the “expectations of the various parties affected” and determine how those expectations fit within existing legal rules (Lovett, 2016, p.172). Contrasting with Dworkin and Lovett are legal formalists who argue that judges should completely ignore social contexts and policy considerations and instead apply strict legal rules and precedents to cases. For legal formalists, correct legal outcomes can be deduced from the facts of the case and the existing legal precedents and interpretations.

I have ignored plenty of other theories of judicial review that defend the institution under a constitutionalist framework. But these constitutionalist theories of judicial review all share a common premise: judges should be deciding cases based on principles. The key distinction between policy considerations and principles is that judges who decide cases on principles must remain consistent in future decisions. We do not expect our policymakers to always apply policy consistently. “It does not follow from the doctrine of responsibility... that if the legislature awards a subsidy to one aircraft manufacturer one month it must award a subsidy to another manufacturer the next” (Dworkin, 1977, p.88). The second manufacturer’s expectation that they will receive a subsidy does not entail that the legislator must give them a subsidy. An elected official can and should consider principles in their decision-making, but we would only expect that they chose the best policy for the most people. If it is better for the collective group that only one party receives a subsidy, then that is what should be done under an argument of policy.

Unlike evaluations of legislators, courts need to be consistent under most constitutionalist frameworks. If a law restricting abortion is unconstitutional based on a principle of bodily autonomy, then a new law that bans abortion must be unconstitutional on that same principle. Again, I do not enter the debate as to what extent judges must hold to precedent or prefer one set of principles over another. I am demonstrating how we can

distinguish a constitutionalist judiciary that holds to principles and a policy oriented judiciary that holds to policy considerations. For most constitutionalist theories of judicial review to hold, judges ought to be deciding cases based on legal rules, legal precedents, societal expectations, and other principles that are distinct from policy considerations. From that assumption, a judicial retention system that incentivizes judges to do the opposite would be problematic.

## **The Problem with Judicial Elections**

We have seen how constitutionalist theories of judicial review are based on the argument that judges must decide cases on principles. These principles are separate from the judge's personal policy considerations and, by extension, the policy considerations of the voting majority. Based on this description of constitutionalism, it is easy to see how judicial elections undermine the goal of incentivizing judges to decide cases on principles.

The whole point of using elections is to force politicians to be accountable to the majority of voters. In social choice literature, electoral accountability comes in the form of either politicians pandering to the preferences of voters while in office or voters punishing bad behavior by ousting bad incumbents (Ashworth, 2012). Elections create incentives for politicians to act in the best interest of voters, and create a mechanism for voters to punish politicians when they fail to act in their best interest. Electoral accountability is not a perfect mechanism for holding politicians accountable, but holding politicians accountable is certainly the goal of elections. And political scientists have empirically demonstrated that elections have some effect of making politicians congruent with the preferences of voters (Ashworth, 2012).

If judicial elections induce judges to consider the policy preferences of voters, then the constitutionalist ideal of having judges decide cases based on principles is undermined. If judges are pressured by the majority to uphold a law that harms the rights of minority groups, then judges who are directly accountable to the majority are more likely to give

in to those pressures.

## **Popular Constitutionalism and Judicial Elections**

Although we have seen how judicial elections might compromise the goals of constitutionalism, popular constitutionalists have advocated for the use of judicial elections. Larry Kramer defined popular constitutionalism as the people assuming an “active and ongoing control over the interpretation and enforcement of constitutional law” (Kramer, 2006). Popular constitutionalism rejects the idea that an unelected judiciary should have final authority about what the Constitution means. David Pozen, an advocate of popular constitutionalism, argues that judicial elections can serve as a mechanism for the people to influence how the Constitution is interpreted. He argues that one reason that judicial elections can “advance the popular constitutionalist agenda” is that elections can serve as an accountability mechanism for constitutional issues. (Pozen, 2010, pp. 2068, 2070). Elections provide a way for citizens to punish judges who interpret the Constitution in a way that is not congruent with the citizenry’s understanding of the Constitution, and a mechanism to replace them with a judge with a congruent interpretation of the Constitution (Pozen, 2010, pp. 2070-2071). Competitive elections with competent challengers can also increase the voters’ knowledge of judicial decisions which furthers the aim of developing popular interpretations of the Constitution. Pozen’s argument contrasts with traditional constitutionalist theories because popular constitutionalism does not entail that judges need to rely on legal precedents or expectations of constitutional protections. The majority should decide what the Constitution means, and the elected judge should apply that interpretation in judicial review cases.

However, even a popular constitutionalist theory that explicitly demands that judges to conform to majoritarian interests would still want judges to decide cases on principles. A majoritarian interpretation of the Constitution is not the same as majoritarian policy preferences. It could be true that a popular interpretation might be more congruent

with the policy preferences of voters than a traditional interpretation, but they are still distinct. Pozen idealizes a world where judges compete for an office by debating which constitutional theory is best, and then voters would be given the choice of who gets to hold the office (Pozen, 2010, p.2073). But if voters only have policy preferences, then judges will be accountable to those policy considerations and not some popular interpretation of the Constitution. Thus, judges will not make decisions on “popular” constitutional principles. They will make decisions on policy outcomes.

## **The Benefits of Judicial Elections for Constitutionalists**

Although we have seen the problem with using judicial elections from a constitutionalist perspective, there are still many practical and theoretical benefits from using judicial elections. At the federal level, unelected judges with life tenure are given the power of judicial review. The unaccountable nature of the country’s federal judiciary has undermined the legitimacy of the court in the eyes of the public. At the state level, elected judges do not have as much of a problem with legitimacy in the public. Studies have shown that an elected judiciary is actually more likely to be seen as legitimate by the public (Woodson, 2017). Elected judges also satisfy majoritarian concerns with judicial review. Much of the criticism about the practice of judicial review is centered around the process-related concerns about whether an unelected group of specialized lawyers should be the ones deciding whether the legislature’s latest policy overstepped the bounds of the Constitution (Waldron, 2006). Now, judicial elections are not going to solve every normative concern about the practice of judicial review. The point is that constitutionalists have plenty of reasons to support the use of judicial elections. Judicial review would no longer need to be defended against claims of being counter-majoritarian. However, the way we expect voters to behave in a democracy makes judicial elections irreconcilable with the constitutionalist ideal about what judicial review should be.

## **An Activist Judiciary and a Principled Judiciary**

If judicial elections create incentives for judges to decide cases purely on policy considerations, then judicial elections can lead to activist judiciaries. Judicial activism is a term that gets thrown around to criticize judges for their decisions. The term is derided by legal scholars for not meaning anything substantive and only being used to criticize judges when they make an unpopular decision (Barnett, 2007; Roosevelt, 2006). But as Craig Green points out in his account of the intellectual history of judicial activism, the actual term “judicial activism” must be distinguished “from the concept of judicial activism” (1200). The overuse or vagueness of a term does not entail that the concept behind the term cannot be discussed, debated, and studied.

This thesis defines activism as “the willingness of a judge to inject into a case his or her own personal values about what is good and bad public policy” (Carp et al., 2019). By extension, activism would also be the willingness to inject the “personal values” or policy considerations of the voters. This thesis also models activism as a product of “activist judges.” An activist judge is more willing than a principled judge to inject extralegal factors into her decision-making.

With these conceptions of a principled judiciary and an activist judiciary, we can explore how elections change the way a judge decides judicial review cases. A formal model of electoral accountability can clarify whether elections truly undermine the constitutionalist goals of judicial review. In elections, we should expect that incumbents will be incentivized to pander to the preferences of the voters. In a judicial election, incumbent judges would be incentivized to pander to the voters’ policy preferences. If the voters learn that an incumbent judge decided a case on constitutional grounds, then we should expect that judge will be removed so that an activist judge can come into office.

## Related Literature

This thesis borrows from and relates to models of electoral accountability. Elections create incentives for politicians to act accountable, i.e. to act in a way that aligns with what voters want.(Ashworth, 2012). Models of electoral accountability typically use a simple two-period setup. An electorate decides whether to re-elect an incumbent politician after their performance in the first period. The politician can anticipate whether the voters will re-elect her and optimally adjust her strategy (Ashworth, 2012, p.184). If the voters do not effectively select for a “good” politician, then a “bad” politician could be re-elected and make a decision that negatively affects the voters’ utility in the second period. These models help us explore the factors that determine how effective elections are for maximizing the utility of voters.

Specifically, this thesis borrows directly from the model of electoral accountability used in Maskin and Tirole (2004). Maskin and Tirole (2004) is a model of political agency where office holding incentives and imperfect information create incentives for incumbents to pander to what the electorate believes is their preferred policy. However, imperfect information will act differently in my model. Voters in my model will have information about a part of the state of the world instead of having no information.

The assumptions in the model are not just based on the literature with which I am engaging, but also economic perspectives of judicial behavior. Most scholars of judicial behavior assume that judges not only respond to their own personal policy preferences, but also to electoral incentives to remain in office. This assumption is important so judges can be modeled in a rational setting. In empirical analyses of judicial behavior, elected judges appear to engage in strategic behavior by pandering to the electorate (Canes-Wrone et al., 2014). Judges are certainly not legislators, but they are susceptible to the same incentives that incentivize politicians. Although the institution of the judiciary has been designed to prevent judges from being susceptible to economic incentives,

judges, like ordinary people and politicians, want to maximize their own utility (Posner, 1993). However, it is difficult to conceive what makes up that utility function which is why it is somewhat uncommon to model judicial behavior using formal theory. I will assume a judge's utility reflects three main sources based on the analysis from (Posner, 1993): policy preferences, electoral incentives, and constitutional constraints. To understand how elections undermine the goals of constitutionalists, I will focus my analysis on whether elections incentivize judges to make decisions on constitutional grounds.

## The Model

Voter choice in a judicial election is modeled as an accountability and selection problem where voters know their own policy preference, but they only have partial information about the the constitutionality of the enacted policy. There are three players: the Judge ( $J$ ), the Voter ( $V$ ), and the Challenger ( $C$ ). I refer to the Judge as “she” and the Voter as “he.” There are two periods. Each period is denoted by  $t$  where  $t \in \{1, 2\}$ . At the beginning of each of period, legislation is enacted. Then the Judge makes a decision ( $d_t$ ). The Judge can either “uphold” ( $d_t = 1$ ) or “strike” ( $d_t = 0$ ) the legislation. The value of  $d_t$  affects the payoffs for each player in the game.

The Judge can be one of four types. Each type is a combination of two dimensions: activism and congruence. The Judge's is denoted by  $\beta$  where  $\beta \in \{0, 1\}$ . The Judge is “principled” when  $\beta = 1$ , and the Judge is “activist” when  $\beta = 0$ . I denote the probability that  $\beta = 1$  as  $\sigma$ . The Judge's preference congruence is denoted by  $\theta$  where  $\theta \in \{0, 1\}$ . The Judge is “congruent” when  $\theta = 1$ , and the Judge is “noncongruent” when  $\theta = 0$ . I denote the probability that  $\theta = 1$  as  $\pi$ . Thus, combination of these two dimensions yields four types of the Judge in the game: “principled–congruent” ( $\beta = 1$ ;  $\theta = 1$ ), “principled–noncongruent” ( $\beta = 1$ ;  $\theta = 0$ ), “activist–congruent” ( $\beta = 0$ ;  $\theta = 1$ ), and “activist–noncongruent” ( $\beta = 0$ ;  $\theta = 0$ ). The realization of these

Table 1: The Types of the Judge

Type	$\{\beta, \theta\}$	Probability of Being Type
principled-congruent	$\{1, 1\}$	$\sigma\pi$
principled-noncongruent	$\{1, 0\}$	$\sigma(1 - \pi)$
activist-congruent	$\{0, 1\}$	$(1 - \sigma)\pi$
activist-noncongruent	$\{0, 0\}$	$(1 - \sigma)(1 - \pi)$

two type variables is independent of one another.

In each period  $t$ , legislation is enacted that the Voter prefers to be upheld. The legislation can be either constitutional or unconstitutional. The constitutionality of the legislation is denoted by  $c_t \in 0, 1$ . Although I make reference to a “legislature” in the discussion of this model, the legislature is not an actor in the game. For simplicity, I model the legislation’s constitutionality as the state of the world over which the Judge and the Voter have varying levels of information.

Formally, the payoff function for the Voter is:

$$U_t^V = d_t \tag{1}$$

Notice that the Voter will receive a payoff of 1 if the legislation is upheld ( $d_t = 1$ ) and a payoff of 0 if the legislation is struck down ( $d_t = 0$ ). Again, I assume that Voter prefers the legislation to be upheld in each period.

The Judge, like the Voter, has a policy preference over whether the legislation is upheld or struck down. If the Judge is congruent, then the Judge has the same policy preference as the Voter and prefers the legislation to be upheld. If the Judge is noncongruent, then the Judge prefers the legislation to be struck down. However, the Judge’s payoff function is also affected by whether she is principled ( $\beta = 1$ ). If the Judge is principled, her payoff function is affected by the value of  $c_t$ . When  $c_t = 1$ , a principled type receives an additional payoff of  $G$  if she upholds. When  $c_t = 0$ , a principled type receives an additional payoff of  $G$  if she strikes.

$$U_t^J = \theta d_t + (1 - \theta)(1 - d_t) + G\beta(d_t c_t + (1 - d_t)(1 - c_t)) \quad (2)$$

Notice that if the Judge is activist ( $\beta = 0$ ), the value of  $G$  does not affect the Judge's payoff. The activist type's payoff is not directly affected by the value of  $c_t$ .

Finally, the Judge receives a wage  $w$  for being in office. I also employ a standard discount factor  $\delta \in (0, 1)$  which is the discount that the Judge puts on future payoffs. In other words,  $\delta$  is the relative weight that the Judge puts on trying to maximize her utility immediately in the first period versus trying to maximize her utility for the future. The Judge with a sufficiently low  $\delta$  will receive a higher payoff for trying to maximize her utility in the first period than trying to be re-elected.

After the Judge makes her first period decision, the Voter will choose to either re-elect the Judge or elect the Challenger. If the Challenger is elected, the Challenger's types are realized. The challenger, like the Judge, is activist with probability  $\sigma$  and is congruent with probability  $\pi$ . The Challenger's utility function is the same as the Judge.

## Timing

1. Nature determines the value of  $c_1 \in \{0, 1\}$ , and the types of the Judge and the Challenger
2. The Judge chooses whether to uphold or strike the legislation:  $d_1 \in \{0, 1\}$
3. If the judicial elections are used, the Voter decides whether to re-elect the Judge or elect the Challenger
4. Nature determines the value of  $c_2 \in \{0, 1\}$
5. The Judge, if re-elected, chooses to uphold or strike the legislation in the second period:  $d_2 \in \{0, 1\}$ . If the Challenger is re-elected, the Challenger chooses to

uphold or strike the legislation in the second period:  $d_2 \in \{0, 1\}$ .

## Properties of the Model

Before I present the equilibrium, I will discuss the properties and features of this model and how they relate to the questions presented earlier.

First, the concept of “activism” in this model is defying the legal precedent or constitutional constraint. Activism is not defined by whether the Judge strikes down legislation but by whether the Judge makes a constitutional decision under her constitutional theory. Judges do not all share a common constitutional theory or jurisprudence, but, for simplicity, I assume that there is one constitutional theory shared by all types of the Judge that determines the value of  $c_t$ . Obviously, judicial review is far more complicated than judges making a correct or incorrect decision. However, this simplicity allows us to explore how elections could theoretically encourage judges to make decisions based on policy preferences instead of on constitutional principles.

Second, the main modification from Maskin and Tirole (2004) is that the officeholder, in this case the Judge, can be one of four types instead of just two. Two of the types have a very similar utility function as the Politician in Maskin and Tirole (2004). The other two types’ utilities, however, are dependent on the factor  $c_t$ . In Maskin and Tirole (2004), the electorate faces the political agency problem of electing the type who shares their preferences over the type that has the opposite preferences. In my model, the Voter faces an additional problem: principled versus activist. The constitutional constraint can prevent a principled-congruent type from choosing the Voter’s preferred decision and can prevent the principled-noncongruent type from choosing the unpopular action. The Voter has to weigh the risks between a choosing a politician-like judge or the ideal judge who makes decisions based on a factor that does not affect the Voter’s utility and is, from the Voter’s perspective, arbitrary.

## Analysis of Equilibria

In this section, I analyze the conditions for a Perfect Bayesian Equilibrium in pure strategies. Generally, each equilibrium was found using backwards-induction starting from the strategy of the Judge in the second period. The Voter, based on the equilibrium strategies for each type of the Judge, will form beliefs about the Judge's type and choose a voting rule that maximizes his expected utility in the second period. Based on the Voter's voting rule and the expected utility from making a second period decision, the Judge will choose a first period strategy that maximizes her expected utility in both periods.

Each equilibrium exists under different relative values of the parameters  $w$  (the benefit for being in-office),  $G$  (the weight the Judge puts on making constitutional decisions), and  $\delta$  (the discount factor). These parameters not only affect how the Judge will act in the first period, but  $G$  affects how the Judge will act in the second period. I split this section by the relative values of these parameters and deduce how each equilibrium was solved.

### Full Policy Oriented Equilibrium

We start by assuming that  $1 \geq G + \delta(1 + w + G)$ . This assumption implies  $G \leq 1$ . If  $G \leq 1$ , then payoff from choosing the preferred policy choice (1) is greater than the payoff of adhering to the constitutional constraint ( $G$ ). Thus, the principled types value choosing their preferred policy decision more than choosing the constitutional decision. In an equilibrium where  $G \leq 1$ , the principled-congruent type upholds and the principled-congruent type strikes in the second period. Therefore, in an equilibrium where  $G \leq 1$ , the principled types and the activist types use the same strategy in the second period.

Intuitively, the Voter does not care about whether the Judge is activist or principled since that does not affect his payoff. The Voter's utility is only affected by whether the

Judge is congruent or noncongruent. In equilibrium, the Voter will implement a voting rule that maximizes his expected utility in the second period. If  $G \leq 1$ , then the Voter's payoff is only affected by whether the Judge is congruent or noncongruent. Thus, the Voter will implement a voting rule that best selects for congruent types

If  $1 \geq G + \delta(1 + w + G)$ , then it is sufficient that all types of the Judge value choosing their preferred policy decision in the first period more than trying to be re-elected (see Appendix Proposition A1).  $1 \geq G + \delta(1 + w + G)$  means that the Judge's payoff from choosing her preferred policy (1) is always greater than being re-elected or choosing the constitutional decision  $G + \delta(1 + w + G)$ . In equilibrium, the congruent types choose uphold ( $d_1 = 1$ ) and the noncongruent types choose strike ( $d_1 = 0$ ). Since these two types make different decisions, the Voter can use a voting rule that perfectly selects for congruent types.

**Proposition 1.** *If  $1 \geq G + \delta(1 + w + G)$ , an equilibrium exists where the congruent type chooses uphold and the noncongruent type chooses strike; the Voter re-elects if and only if the Judge chooses uphold.*

*Proof.* To satisfy the conditions of a Perfect Bayesian Equilibrium, the Voter must use Bayes's Rule to form beliefs about the Judge's type that is conditional on the observed decision in the first period and the Judge's strategy.

For the Voter's voting rule to be a best response to seeing uphold, it must hold that:

$$\begin{aligned} \Pr(\theta = 1 | d_1 = 1) &\geq \pi \\ 1 &\geq \pi \end{aligned}$$

The left side of the inequality is the expected utility of re-electing the Judge, and the right side is the expected utility of electing the Challenger. Since the congruent types always uphold, the Voter knows with probability 1 that the Judge is congruent if she

chooses uphold. The Voter believes with probability  $\pi$  that the Challenger is congruent. Since  $1 \geq \pi$  always holds, this voting rule is a best response when the Voter sees uphold. For the Voter's voting rule to be a best response to seeing uphold, it must hold that:

$$\Pr(\theta = 1 | d_1 = 0) \leq \pi$$

$$0 \leq \pi$$

Since the noncongruent type always chooses strike, the Voter knows with probability 0 that the Judge is congruent if she chooses strike. Since  $0 \leq \pi$  always holds, this voting rule is a best response when the Voter sees strike.  $\square$

### Full Pandering Equilibrium

We start by assuming that  $1 \leq G + \delta(1 + w + G)$ . Since  $1 \geq G$  by implication, the principled types and the activist types still behave the same in the second period. In the second period, the congruent types still choose to uphold and the noncongruent types still choose to strike. However, if  $1 \leq G + \delta(1 + w + G)$ , then all types of the Judge value being re-elected over making their preferred policy decision in the first period (see Appendix Proposition A2). In equilibrium, the congruent and the noncongruent types will choose uphold in the first period.

The Voter knows that the all types of the Judge will choose uphold in the first period. Therefore, he does not learn anything about the Judge's type after the first period because all types use the same strategy in the first period. The Voter believes that the Judge and the Challenger are congruent with the equal probability. Thus, the Voter is indifferent between re-electing the Judge and electing the Challenger since  $\pi = \pi$ .

**Proposition 2.** *If  $1 \leq G + \delta(1 + w + G)$ , an equilibrium exists where all types choose*

*uphold in the first period; the Voter chooses to re-elect the Judge.*

### **Partial Policy Oriented Equilibrium**

If there is a strong constitutional constraint  $G \geq 1$ , the dilemma presented earlier in this thesis arises: will voters always prefer judges who act like a politician over an ideal judge who makes decisions based on the legal precedent?

We start by assuming that  $G \geq 1 + \delta(w + G + 1)$  and  $1 \geq \delta(w + 1)$ . Since  $G \geq 1 + \delta(w + G + 1)$ , the principled types value making constitutional decisions over making their preferred policy choice and being re-elected. Thus, in equilibrium, the principled-congruent type and the principled-noncongruent type both making constitutional decisions in both periods (see Appendix Proposition A3). Since  $1 \geq \delta(w + 1)$ , the activist types always value making their preferred policy decision over being re-elected (see Appendix Proposition A3). Thus, the second period equilibrium strategy for each type is: activist-congruent type upholds; activist-noncongruent type strikes; principled types uphold if and only if  $c_t = 1$ .

In equilibrium, the activist-congruent type gives the Voter's the highest expected utility in the second period. The activist-congruent type will always give the Voter 1 in the second period. Both principled types will base their decision on the value of  $c_t$ . Thus, the principled types will make the Voter's preferred decision if and only if  $c_t = 1$  which occurs with probability  $\mu$ . In the second period, the Voter's expected utility from an activist-congruent type is 1 and the Voter's expected utility from both principled types is  $\mu$ . Since  $1 \geq \mu$ , the Voter would prefer to have an activist-congruent type over a restrained type. In the first period, there is no pandering so each type uses the same strategy from the second period.

**Proposition 3.** *If  $G \geq 1 + \delta(w + G + 1)$ , and  $1 \geq \delta(w + 1)$ , an equilibrium exists where the activist types always choose their preferred policy decision and the principled types always base their decision on  $c_t$  ; the Voter re-elects if and only if the Judge chooses*

*uphold.*

*Proof.* The Voter's postulated strategy satisfies a best response if and only if the expected utility of re-electing the Judge after seeing uphold is greater than the expected utility of electing the Challenger, *and* the expected utility of re-electing the Judge after seeing strike is less than the expected utility of electing the Challenger. For the voting rule to be a best response to seeing uphold, it must hold that:

$$\Pr(\theta = 1 \cap \beta = 0 | d_1 = 1) + \mu(\Pr(\beta = 1 | d_1 = 1)) \geq \pi(1 - \sigma) + \sigma\mu$$

$$\frac{\pi(1 - \sigma)}{\pi(1 - \sigma) + \sigma\mu} + \frac{\sigma\mu^2}{\pi(1 - \sigma) + \sigma\mu} \geq \pi(1 - \sigma) + \sigma\mu$$

$$\frac{\pi - \pi\sigma + \sigma\mu^2}{\pi - \pi\sigma + \sigma\mu} \geq \pi - \pi\sigma + \sigma\mu$$

$$\pi - \pi\sigma + \sigma\mu^2 \geq \mu^2\sigma^2 - 2\pi\mu\sigma^2 + 2\pi\mu\sigma + \pi^2\sigma^2 - 2\pi^2\sigma + \pi^2$$

$$0 \geq \mu^2\sigma^2 - 2\pi\mu\sigma^2 + 2\pi\mu\sigma + \pi^2\sigma^2 - 2\pi^2\sigma + \pi^2 - (\pi - \pi\sigma + \sigma\mu^2)$$

$$0 \geq (\mu^2\sigma^2 - \sigma\mu^2) + (-2\pi\mu\sigma^2 + 2\pi\mu\sigma) + (\pi^2\sigma^2 - 2\pi^2\sigma + \pi^2) + (\pi\sigma - \pi)$$

$$0 \geq \mu^2\sigma(\sigma - 1) - 2\pi\mu\sigma(\sigma - 1) + \pi^2(\sigma - 1)^2 + \pi(\sigma - 1)$$

$$0 \geq (\sigma - 1)(\mu^2\sigma - 2\pi\mu\sigma + \pi^2\sigma - \pi^2 + \pi)$$

$$0 \geq (\sigma - 1)$$

$$1 \geq \sigma$$

Since  $1 \geq \sigma$  is always true, the voting rule is a best response to seeing uphold. For the voting rule to be a best response to seeing strike, it must hold that:

$$\begin{aligned}
\mu \Pr(\beta = 1 | d_1 = 0) &\leq \pi(1 - \sigma) + \sigma\mu \\
\frac{\sigma\mu(1 - \mu)}{\sigma\mu(1 - \mu) + (1 - \pi)(1 - \sigma)} &\leq \pi - \pi\sigma + \sigma\mu \\
\sigma\mu - \sigma\mu^2 &\leq \sigma^2\mu^2 + \sigma\mu - \pi^2\sigma^2 + 2\pi^2\sigma - \pi^2 + 2\mu\pi\sigma^2 - 2\mu\pi\sigma - \pi\sigma + \pi \\
0 &\leq -\mu^2\sigma(\sigma - 1) - \pi^2(\sigma - 1)^2 + 2\mu\pi(\sigma - 1) - \pi(\sigma - 1) \\
0 &\leq -1(\mu^2\sigma(\sigma - 1) + \pi^2(\sigma - 1)^2 - 2\mu\pi(\sigma - 1) + \pi(\sigma - 1)) \\
0 &\geq \sigma - 1 \\
1 &\geq \sigma
\end{aligned}$$

Since  $1 \geq \sigma$  is always true, the voting rule is a best response to seeing strike. Therefore, the postulated strategies satisfy an equilibrium.  $\square$

## Partial Pandering Equilibrium

Under conditions where the activist types pander and the principled types only choose constitutional decisions, the Voter must weigh the risk of electing a type that may be noncongruent with their preferences against the risk of electing a type that makes her decision on an arbitrary factor that does not directly affect the Voter's utility.

We start by assuming that  $G \geq 1 + \delta(w + G + 1)$  and  $\delta(1 + w) \geq 2$ . The right side of  $\delta(1 + w) \geq 2$  is 2 because the Judge can receive a payoff from the Challenger sharing her preferences in the second period (see Appendix Proposition A4). In the second period, both activist types choose their preferred action and both principled types base their decision on  $c_t$ . In equilibrium, the Voter cannot successfully select for the activist-congruent type. To satisfy an equilibrium using pure strategies when  $\delta(1 + w) \geq 2$ , the activist types must pander to whatever voting rule the Voter uses (see Appendix Proposition A4). Intuitively, the Voter, in equilibrium, will choose a strategy of re-elect if and only if the Judge chooses uphold so that the activist types will choose the Voter's

preferred decision.

**Proposition 4.** *If  $G \geq 1 + \delta(w + G + 1)$  and  $\delta(1 + w) \geq 2$ , an equilibrium exists where the activist types always pander and the principled types always base their decision on  $c_t$ ; the Voter re-elects if and only if the Judge chooses uphold.*

*Proof.* The Voter's postulated strategy satisfies a best response if and only if the expected utility of re-electing the Judge after seeing uphold is greater than the expected utility of electing the Challenger, *and* the expected utility of re-electing the Judge after seeing strike is less than the expected utility of electing the Challenger. For the voting rule to be a best response to seeing uphold, it must hold that:

$$\Pr(\theta = 1 \cap \beta = 0 | d_1 = 1) + \mu(\Pr(\beta = 1 | d_1 = 1)) \geq \pi(1 - \sigma) + \sigma\mu$$

$$\frac{\pi(1 - \sigma)}{(1 - \sigma) + \sigma\mu} + \mu \frac{\sigma\mu}{(1 - \sigma) + \sigma\mu} \geq \pi - \pi\sigma + \sigma\mu$$

$$\sigma\mu^2 + \pi - \pi\sigma \geq \pi\sigma\mu - 2\pi\sigma + \pi - \pi\sigma^2\mu + \pi\sigma^2 - \pi\sigma + \sigma^2\mu^2 - \sigma^2\mu + \sigma\mu$$

$$-\pi\sigma - \pi\sigma^2 - \pi\sigma^2\mu + 2\pi\sigma + \pi\sigma\mu \geq \sigma^2\mu^2 - \sigma^2\mu - \sigma\mu^2 + \sigma\mu$$

$$\pi\sigma(\sigma\mu - \sigma - \mu + 1) \geq \sigma\mu(\sigma\mu - \sigma - \mu + 1)$$

$$\pi \geq \mu$$

Therefore, if the voting rule is a best response to seeing uphold, then it must hold that  $\pi \geq \mu$ . For the voting rule to be a best response to seeing strike, it must hold that:

$$\mu \Pr(\beta = 1 | d_1 = 0) \leq \pi(1 - \sigma) + \sigma\mu$$

$$\frac{\sigma\mu(1 - \mu)}{\sigma(1 - \mu)} \geq \pi(1 - \sigma) + \sigma\mu$$

$$\mu - \sigma\mu \leq \pi(1 - \sigma)$$

$$\mu(1 - \sigma) \leq \pi(1 - \sigma)$$

$$\mu \leq \pi$$

Therefore, if the voting rule is a best response to seeing strike, then it must hold

that  $\pi \geq \mu$ . Therefore, the postulated strategies satisfy an equilibrium if and only if  $\pi \geq \mu$ . □

## Discussion

The equilibria found in this simple model supports the hypothesis that judicial elections cause judges to be activist. If the electorate's utility is only affected by their policy preferences over legislation, then judges may either pander to those policy preferences or be removed from office. Under the assumptions of this model, elections uniquely contribute to activism under certain conditions.

Proposition 1 and Proposition 2 show that if all types of judges make decisions purely on policy preferences, then elections are not going to uniquely contribute to activism. Both principled types and activist types will choose their preferred policy decision. Judicial elections would simply give voters the opportunity to hold judges accountable.

However, Proposition 3 and Proposition 4 present an interesting conundrum for constitutionalists. Proposition 3 states the equilibrium strategies in a partial policy-oriented equilibrium. In this equilibrium, elections do not effectively filter out the restrained types if  $\mu$  is sufficiently high. Recall in the partial policy-oriented equilibrium that the activist types choose their preferred policy decision in the first period and the principled types choose the constitutional decision in the first period. Since the Voter re-elects if and only if the Judge chooses uphold, the activist-noncongruent type is always replaced with the Challenger because the activist-noncongruent chooses to strike. Therefore, elections filter out the activist-noncongruent type and only filter out the restrained types when  $c_1 = 0$  which occurs with probability  $1 - \mu$ . If  $\mu$  is sufficiently high, then elections will be unlikely to filter out restrained types.

Proposition 4 states the equilibrium strategies in a partial pandering equilibrium.

In this equilibrium, the Voter still uses the strategy of re-elect if and only if the Judge chooses uphold. However, this strategy is in equilibrium only if  $\pi \geq \mu$ . There are two ways to interpret Proposition 4. The first interpretation is: if the probability that an activist judge will positively affect the voters' utility is low enough, then there is no equilibrium strategy where voters try to elect activist judges. This thesis presents this probability as the probability that a judge is noncongruent. However, a different paper using the same model structure could interpret it as the probability that an activist judge knows the preferences of the voters. The probability  $\pi$  just needs to be low enough such that the activist type is unlikely to select the voters' preferred action. Distrust in politicians among voters could lead them to support principled judges.

The second interpretation is: if the constitutional doctrines used by judges is likely to lead to the voters' preferred policy being upheld, then voters have little reason to support activist judges (assuming there is a risk to electing an activist judge). If judges were using more majoritarian constitutional theories when reviewing legislation, then voters would not necessarily support activist judges over principled judges. Perhaps the problem is not with judicial elections but with counter-majoritarian constitutional theories or the Constitution itself being too counter-majoritarian.

However, this model does not present any way out of the hypothesized problems with judicial elections. There is no equilibrium where the Voter effectively filters out activist types or induces the Judge to make constitutional decisions. If the Voter had complete information about the state of  $c_t$ , then perhaps an equilibrium could exist where the Voter either filters out activist types or induces activist types to make constitutional decisions. But under the assumptions of this model, elections only weakly filter for restrained types under Proposition 3. In almost every equilibrium, constitutionalists who advocate for principled judges would be better off selecting a random type from a pool of judges than relying on elections. However, Proposition 3 and Proposition 4 show that the reasons why elections incentivize activism are not inherently tied to the

Voter's policy preferences. The Voter only wants his preferred policy upheld. If the Voter distrusted activist types or believed that the Constitution would not prevent his preferred policies from being upheld, then the Voter could actually be better off with the principled types.

It is interesting to consider whether the assumptions and features of this model are not representative of judicial elections or whether voters would support a principled judiciary if constitutional law was more majoritarian. The reasons why voters support activist judges may be because of the hypotheses presented in the introduction of this thesis: that voters only have policy preferences and lack knowledge about constitutional law. However, an additional reason is that the Constitution is too counter-majoritarian.

This thesis is a first step into formally analyzing judicial elections. This paper does not incorporate existing spatial models of judicial review (Zorn, 2006). This thesis also does not explore saliency in judicial elections. Future research can continue to explore assumptions about judicial elections using different models of judicial review or electoral accountability.

## Appendix

**Proposition A1.** *If  $1 \geq G + \delta(1 + w + G)$  then the Judge in equilibrium will always choose their preferred policy decision in the first period. The Judge is playing a best response under Proposition 1.*

*Proof.* Let's start with the principled types. The principled-congruent type is playing a best response if and only if the expected utility from choosing uphold is greater than the expected utility from choosing strike. If  $c_1 = 1$ , then the principled-congruent type is playing a best response if and only if  $1 + G + \delta(1 + w + G\mu) \geq \delta[\pi + G(1 - \pi)(1 - \mu)]$  The left side of the inequality represents the expected utility from choosing uphold. The right side of the inequality represents the expected utility from choosing strike. Her second

period payoff is based on the probability that the Challenger is congruent which gives her a payoff of 1 and  $G\mu$  and the probability that the Challenger is noncongruent which gives her a payoff of  $G(1 - \mu)$ . If  $c_1 = 0$ , then the principled-congruent is playing a best response if and only if  $1 + \delta(1 + w + G\mu) \geq G + \delta[\pi + G(1 - \pi)(1 - \mu)]$ .

For the principled-noncongruent to be playing a best response, the expected utility from choosing strike must be greater than or equal to the expected utility from choosing uphold. If  $c_1 = 1$ , the principled-noncongruent type is playing a best response if and only if  $1 + \delta[(1 - \pi)(1 + G(1 - \mu))] \geq G + \delta(1 + w + G(1 - \mu))$ . If  $c_0 = 0$ , the principled-noncongruent type is playing a best response if and only if  $1 + G + \delta[(1 - \pi)(1 + G(1 - \mu))] \geq \delta(1 + w + G(1 - \mu))$ .

The activist types' utilities are not affected by the value  $c_t$ . The activist-congruent type is playing a best response if and only if  $1 + \delta(1 + w) \geq \delta(\pi)$ . This is always true. The activist-noncongruent type is playing a best response if and only if  $1 + \delta(1 - \pi) \geq \delta(1 + w)$ .

Notice that assuming  $1 \geq G + \delta(1 + w + G)$  satisfies all of the above conditions for a best response for each type of the Judge.  $\square$

**Proposition A2.** *If  $G \leq 1$  and  $1 \leq G + \delta(1 + w + G)$ , then all types of the Judge will pander in the first period in equilibrium.*

*Proof.* If all types of the Judge are pandering in the first period, then all types are choosing uphold. Therefore, the expected utility for choosing uphold must be greater than or equal to the expected utility of choosing strike for all types of the Judge. Let's start with the principled types. If  $c_1 = 1$ , then the principled-congruent type is playing a best response if and only if  $1 + G + \delta(1 + w + G\mu) \geq \delta[\pi + G(1 - \pi)(1 - \mu)]$ . If  $c_1 = 0$ , then the principled-congruent type is playing a best response if and only if  $1 + \delta(1 + w + G\mu) \geq G + \delta[\pi + G(1 - \pi)(1 - \mu)]$ . These two inequalities are the same as the ones analyzed in Proposition A1.

For the principled-noncongruent type to be playing a best response, the expected utility from choosing to uphold must be greater than the expected utility of choosing to

strike. If  $c_1 = 1$ , the principled-noncongruent type is playing a best response if and only if  $G + \delta(1 + w + G(1 - \mu)) \geq 1 + \delta[(1 - \pi)(1 + G(1 - \mu))]$ . If  $c_1 = 0$ , the principled-noncongruent type is playing a best response if and only if  $\delta(1 + w + G(1 - \mu)) \geq 1 + G + \delta[(1 - \pi)(1 + G(1 - \mu))]$ .

The activist-congruent type is playing a best response if and only if  $1 + \delta(1 + w) \geq \delta(\pi)$ . This is always true. The activist-noncongruent type is playing a best response if and only if  $1 + \delta(1 - \pi) \leq \delta(1 + w)$ . The left sides of the inequalities are the expected utilities of choosing uphold and the right sides are the expected utilities of choosing strike.

Notice that assuming  $\delta(1 + w) \geq 2(1 + G)$  satisfies all of the above conditions for a best response for each type of the Judge. The right side of the inequality must account for the principled-noncongruent type who can receive  $1 + G + \delta[(1 - \pi)(1 + G(1 - \mu))]$  for deviating from uphold to strike. Assuming  $\delta(1 + w)$  is sufficiently high, all types will pander.  $\square$

**Proposition A3.** *If  $G \geq 1 + \delta(w + G + 1)$  and  $1 \geq \delta(w + 1)$ , then the activist types will choose their preferred policy decision in both periods and the principled types to choose the constitutional decision in both periods.*

*Proof.* For the principled types to always make constitutional decisions in equilibrium, the expected utility from basing their decision on  $c_t$  must always be a best response. Let's start with the principled-congruent type. If  $c_t = 1$ , then the principled-congruent type is playing a best response if and only if  $1 + G + \delta(\mu + w + G) \geq \pi(1 - \sigma) + \sigma(G + \mu)$ . The left side of the inequality is the expected utility of choosing uphold in the first period and the right side of the inequality is the expected utility of choosing strike in the first period. The right side of the inequality is derived from the principled-congruent type receiving  $G$  if the Challenger is principled and receiving 1 if Challenger is activist-congruent or if the Challenger is principled and the legislation is constitutional. This inequality is always true. If  $c_t = 0$ , then the principled-congruent type is playing a best response if and only

if  $G + \pi(1 - \sigma) + \sigma(G + \mu) \geq 1 + \delta(\mu + w + G)$ . The left side of the inequality is the expected utility of choosing strike in the first period and the right side of the inequality is the expected utility of choosing uphold in the first period.

The activist types are not in an pandering equilibrium under Proposition 3. The activist-congruent type is playing a best response if and only if  $1 + \delta(1 + w) \geq \sigma\mu + \pi(1 - \sigma)$ . The left side of the inequality is the expected utility from choosing uphold in the first period, and the right side of the inequality is the expected utility from choosing strike in the first period. The activist-noncongruent type is playing a best response if and only if  $1 + \sigma(1 - \mu) + (1 - \pi)(1 - \sigma) \geq \delta(1 + w)$ . The left side of the inequality is the expected utility from choosing strike in the first period, and the right side of the inequality is the expected utility from choosing uphold in the first period.

Notice that assuming  $G \geq 1$  and  $G \geq 1 + \delta(\mu + w + G)$  is sufficient for both principled types to always make constitutional decisions. Assuming  $1 \geq \delta(1 + w)$  is sufficient for both activist types to always choose their preferred policy decision.  $\square$

**Proposition A4.** *If  $G \geq 1 + \delta(w + G + 1)$  and  $\delta(1 + w) \geq 2$ , then the activist types will pander in the first period and the principled types will choose the constitutional decision in both periods.*

*Proof.* The same analysis from Proposition A3 applies to the principled types in an equilibrium where the activist types pander and the principled types always make constitutional decisions.

The activist types are in an pandering equilibrium under Proposition 4. The activist-congruent type is playing a best response if and only if  $1 + \delta(1 + w) \geq \sigma\mu + \pi(1 - \sigma)$ . The left side of the inequality is the expected utility from choosing uphold in the first period, and the right side of the inequality is the expected utility from choosing strike in the first period. The activist-noncongruent type is playing a best response if and only if  $\delta(1 + w) \geq 1 + \delta[\sigma(1 - \mu) + (1 - \pi)(1 - \sigma)]$ . The left side of the inequality is the expected utility from choosing uphold in the first period, and the right side of the

inequality is the expected utility from choosing strike in the first period. Notice that  $\delta$  and  $w$  must be sufficiently high enough such that the activist types always pander regardless of the Challenger's type. If  $\delta(1 + w) \geq 2$ , then the activist types will always value being re-elected over choosing their preferred policy choice.

Notice that assuming  $G \geq 1 + \delta(\mu + w + G)$  and  $\delta(1 + w) \geq 2$  is sufficient for both principled types to always make constitutional decisions and for both activist types to pander. □

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