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**CONDITIONS FOR JUDICIAL INDEPENDENCE**

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## Conditions for Judicial Independence

by McNollgast\*

### Abstract

Judicial dependence is much discussed in political science and law, but the definitions are often contradictory or inconsistent. Instead of defining judicial independence as a permanent feature of the institutional environment, we develop a model in which judicial independence is an equilibrium outcome of a game between the judiciary, legislature and executive. Accordingly, the independence of the judiciary varies with changes in the composition of the branches of government. This approach to judicial independence helps to explain some of the major confrontations between the judiciary and other branches of government in both the United States and other countries.

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The judiciary, ... may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>1</sup>

What does it mean for a judiciary to be “independent”? What are the conditions required for judicial independence to exist? Many scholars have addressed these questions, but there remains much disagreement as to the answers.<sup>2</sup> For some, judicial independence requires little more than life tenure for judges,<sup>3</sup> while for others, judicial independence requires budgetary control<sup>4</sup> or an appointment process that involves more than legislators doing the choosing.<sup>5</sup> Still other scholars tout the virtues of judicial independence without defining clearly what they mean by “independence”,<sup>6</sup> and others (such as legal realists and most political scientists) suggest that judges are at least partially independent because they exercise discretion with every decision.<sup>7</sup>

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<sup>1</sup> THE FEDERALIST NO. 78 (Alexander Hamilton) (emphasis in original).

<sup>2</sup> For a survey, see Lydia Tiede, *Judicial Independence: Often Cited, Rarely Understood* \_\_\_\_ J. CONT. LEG. ISS. \_\_\_\_ (2006).

<sup>3</sup> Stephen Burbank, Barry Friedman, & Deborah Goldberg, *Introduction*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* (Stephen Burbank & Barry Friedman, eds., 2002).

<sup>4</sup> Pilar Domingo, *Judicial Independence: the Politics of the Supreme Court in Mexico*, 32 J. LATIN AMERICAN STUDIES 705 (2000).

<sup>5</sup> Erika Moreno, Brian F. Crisp, & Matthew Shugart, *The Accountability Deficit in Latin America*, *DEMOCRATIC ACCOUNTABILITY IN LATIN AMERICA* ( Scott Mainwaring & Christopher Welna, eds., 2003).

<sup>6</sup> Eugenia F. Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. LEG. STUDIES 131 (1991).

<sup>7</sup> Most modern public law scholars in political science, including Dahl, McCloskey, Murphy, Nagel, Pritchett, Schubert, and Spaeth, and his various coauthors, can be housed within the halls of the Realist School. See R. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, in 6 J. PUB. LAW 275 (1957) [hereinafter R. Dahl, *Decision-Making in a Democracy*]; R. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (1960); WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY*, (1964) [hereinafter MURPHY, *ELEMENTS OF JUDICIAL STRATEGY*]; S.S. NAGEL, *THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE* (1969) [hereinafter NAGEL, *THE LEGAL PROCESS*]; C.H. PRITCHETT, *THE ROOSEVELT COURT* (1948) [hereinafter PRITCHETT, *THE ROOSEVELT COURT*]; G. SCHUBERT, *EMPIRICAL ANALYSES OF THE COURT* (1959) [hereinafter SCHUBERT, *EMPIRICAL ANALYSES*]; G. SCHUBERT, *THE JUDICIAL MIND* (1965) [hereinafter SCHUBERT, *THE JUDICIAL MIND*]; H. SPAETH, *SUPREME COURT POLICY MAKING* (1963) [hereinafter SPAETH, *SUPREME COURT*].

The Realists were ascending during the turbulent 1930s, when the Supreme Court was trying to hold Roosevelt and the New Deal Democrats to *Lochner* era concepts of the role of the state, property, and contracts. Thus, the Realists confronted the debate about popular versus judicial sovereignty head on. Many Realists, including nearly all modern political scientists, argued for some form of popular sovereignty.

Most modern political scientists who study the court, though not entirely normative, do take a realist

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position. That is, they assume that law is policy and that judges are engaged in policy making. Much of the focus of political scientists' research, then, has been to find the source of judicial preferences. One branch, called the attitudinalists, search for judicial preferences in the personal attitudes and characteristics of the judges. These scholars follow Pritchett, Schubert, Nagel, and Spaeth, whose pioneering studies developed many of the techniques used to study judges' attitudes. See PRITCHETT, *THE ROOSEVELT COURT*, *supra*; SCHUBERT, *EMPIRICAL ANALYSES*, *supra*; SCHUBERT, *THE JUDICIAL MIND*, *supra*; S.S. Nagel, *Political Party Affiliation and Judges' Decisions*, in 55 AM. POL. SCI. REV. 843 (1961); NAGEL, *THE LEGAL PROCESS*, *supra*; and H. SPAETH, *SUPREME COURT POLICY MAKING* (1963). More recent works in this paradigm include Tanenhaus et al., Giles and Walker, Rohde and Spaeth, Baum, Carp and Rowland, Segal, Carter, Songer and Reid, Perry, Segal and Spaeth, Songer, Segal and Cameron, Kobylka, and Songer and Lindquist. See J. TANENHAUS, M. SCHICK, M. MURASKIN, & D. ROSEN, *THE SUPREME COURT'S CERTIORARI JURISDICTION: CUE THEORY*, in *JUDICIAL DECISION MAKING* (Schubert ed., 1963); M.W. Giles & T.G. Walker, *Judicial Policy-Making and Southern School Segregation*, in 37 JOURNAL OF POLITICS 917 (1975); D. ROHDE & H. SPAETH, *SUPREME COURT DECISION MAKING* (1976); L. Baum, *Responses of Federal District Judges to Court of Appeals Policies: An Exploration*, in 33 W. POL. Q. 217 (1980); L. Baum, *Measuring Policy Change in the U.S. Supreme Court*, in 82 AM. POL. SCI. REV. 905 (1988); ROBERT A. CARP & C. K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* (1983); J. A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-81*, in 78 AM. POL. SCI. REV. 891 (1984); S. Carter, *The Confirmation Mess*, in 101 HARV. L. REV. 1185 (1988); D.R. Songer & S. Reid, *Policy Change on the U.S. Courts of Appeals: Exploring the Contribution of the Legal and Democratic Subcultures* (unpublished typescript 1989) (on file with author); H.W. PERRY JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE U.S. SUPREME COURT* (1991); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); D.R. Songer, J.A. Segal, & C.M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, in 38 AM. POL. SCI. REV. 673 (1994); J.F. Kobylka, *The Mysterious Case of Establishment Clause Litigation: How Organized Litigants Foiled Legal Change*, in *CONTEMPLATING COURTS* (Epstein ed., 1995); Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1049 (1996). Other scholars have looked for the source of judicial preferences in public opinion. See B.B. Cook, *B.B. Public Opinion and Federal Judicial Policy*, in 21 AM. J. POL. SCI. 567 (1977); J. Kuklinski & J.E. Stanga, *Political Participation and Government Responsiveness: The Behavior of California Superior Courts*, in 73 AM. POL. SCI. REV. 1090 (1979); D. Barnum, *The Supreme Court and Public Opinion: Judicial Decision-Making in the Post-New Deal Period*, in 47 J. OF POLITICS 652 (1985); G.A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court Packing Plan*, in 81 AM. POL. SCI. REV. 1139 (1987); G.A. Caldeira, *Courts and Public Opinion*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* (Gates & Johnson eds., 1991); T.R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* (1989). Still others have looked to the pressures of interest groups. See M. Galanter, *Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change*, in 9 LAW & SOC'Y REV. 95 (1974); K. O'CONNOR, *WOMEN'S ORGANIZATIONS' USE OF THE COURT* (1980); K. O'Connor & L. Epstein, *Beyond Legislative Lobbying: Women's Rights Groups and the Supreme Court*, in 67 JUDICATURE 134 (1983); L. EPSTEIN, *CONSERVATIVES IN COURT* (1985); C. Sunstein, *Interest Groups in American Public Law*, in 38 STAN. L. REV. 29 (1985); J.R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, in 86 COLUM. L. REV. 223 (1986); G.A. Caldeira & J. Wright, *Organized Interests and Agenda-Setting in the U.S. Supreme Court*, in 82 AM. POL. SCI. REV. 1109 (1988); J.F. KOBYLKA, *THE POLITICS OF OBSCENITY* (1991); J.F. Kobylka, *The Mysterious Case of Establishment Clause Litigation: How Organized Litigants Foiled Legal Change*, in *CONTEMPLATING COURTS* (Epstein ed., 1995). A final set of scholars follows Peltason and Dahl in looking for the institutional sources of judicial preferences. See J. PELTASON, *THE FEDERAL COURTS IN THE POLITICAL PROCESS* (1955) [hereinafter PELTASON, *THE FEDERAL COURTS*]; R. Dahl, *Decision-Making in a Democracy*, *supra*. These scholars, the New Institutionalists, include Adamany, Funston, O'Brien, Gates, Marks, Epstein, Walker and Dixon, Gely and Spiller, Rosenberg, Eskridge and Ferejohn, George and Epstein, Schwartz, Spiller, Spiller and Spitzer, Zuk et al., Cameron, Schwartz et al., Epstein and Walker, Epstein and Knight, and Knight and Epstein. See D.W. Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, in 3 WIS. L.

In this paper, we shed new light on the debate about judicial independence by defining judicial independence as an outcome that emerges from strategic interactions among the judiciary, the legislature, and the executive. Indeed, for us, judicial independence is not the automatic result of constitutional or statutory provisions that establish life tenure for judges, nor is judicial independence limited by checks and balances or legal traditions. Rather, judicial independence waxes and wanes with changes in the political composition of our three branches of government. For instance, during periods of divided government, we expect one chamber of the legislature or the executive branch to protect judicial independence by vetoing (or threatening to veto) legislative actions that would overturn Supreme Court decisions. On the flip side, we expect unified control of government to weaken judicial independence, as the legislature and executive can coordinate on governmental changes that may undermine the judiciary's

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REV. 790 (1973); D.W. Adamany, *The Supreme Court's Role in Critical Elections*, in REALIGNMENT IN AMERICAN POLITICS (Campbell and Trilling eds. 1980); R. Funston, *The Supreme Court and Critical Elections*, in 69 AM. POL. SCI. REV. 796 (1975); D. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS (1986); J.B. Gates, *Partisan Realignment, Unconstitutional State Policies, and the U.S. Supreme Court: 1837-1964*, in 31 AM. J. POL. SCI. 259 (1987); J.B. GATES, THE SUPREME COURT AND PARTISAN REALIGNMENT (1992); B. Marks, A Model of Judicial Influence on Congressional Policymaking: *Grove City College v. Bell* (Ph.D. Dissertation, Department of Economics, Washington Univ. 1988) (on file with author); L. Epstein, T.G. Walker & W.J. Dixon, *A Neo-Institutional Perspective of Supreme Court Decision Making*, in 33 AM. J. POL. SCI. 825 (1989); R. Gely & P.T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions, with Applications to the State Farm and Grove City Cases*, in 6 J. L. ECON. & ORG. 263 (1990); Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Statutory Decisions: The Case of Roosevelt's Court Packing Plan*, 12 INT'L REV. L. & ECON. 45 (1992) [hereinafter Spiller, *The Political Economy of Supreme Court Statutory Decisions*]; Rafael Gely & Pablo T. Spiller, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor Decisions, 1949-1987*, RAND JOURNAL OF ECONOMICS (1992) [hereinafter Gely, *Congressional Control*]; G. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); W. Eskridge & J. Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, in 8 J. L. ECON. & ORG. 165 (1992); T.E. George & L. Epstein, *On the Nature of Supreme Court Decision Making*, in 86 AM. POL. SCI. REV. 323 (1992); Edward P. Schwartz, *Policy, Precedent, and Power: A Positive Theory of Court Decision Making*, 8 J. L. ECON. & ORG. 219 (1992); Pablo T. Spiller, *Rationality, Decision Rules, and Collegial Courts*, in 12 INT'L REV. L. & ECON. 86 (1992); Pablo T. Spiller & Matthew Spitzer, *Judicial Choice of Legal Doctrines*, 8 J. L. ECON. & ORG. 46 (1992) [hereinafter Spiller, *Judicial Choice of Legal Doctrines*]; Gary Zuk, Gerard S. Gryski, & Deborah J. Barrow, *Partisan Transformation of the Federal Judiciary, 1869-1992*, 21 AM. POL. Q. 439 (1993); C. CAMERON, NEW AVENUES FOR MODELING JUDICIAL POLITICS (Typescript 1994) (on file with author); E. Schwartz, Pablo T. Spiller, & S. Urbiztondo, *A Positive Theory of Legislative Intent*, in 57 LAW & CONTEMP. PROBS. 51 (1994); L. Epstein, & T.G. Walker, *The Role of the Supreme Court in American Society: Playing the Reconstruction Game*, in CONTEMPLATING COURTS (Epstein ed., 1995); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (Washington D.C.: CQ Press 1998); Jack Knight & Lee Epstein, *The Norm of Stare*

independence. These are just two of the many predictions that we generate about the “waxing” and “waning” of judicial independence, and in order to explore these predictions and several others, we draw upon positive political theory to model formally the game that is played among our three branches of government.

The foundation of our model stems from Alexander Hamilton’s observation in Federalist No. 78 that courts, by themselves, cannot implement their own orders or opinions. Indeed, for judicial orders and opinions to have force, courts (most notably, the Supreme Court) must get the executive and perhaps even the legislative branch behind them. Although it is difficult for Congress and the president to overturn a court decision with which they disagree,<sup>8</sup> it is much more difficult to get them to implement a policy that they oppose. However, for judicial orders and opinions to have an effect, the Supreme Court must obtain compliance from those to whom the orders and opinions are directed: lower courts, executive agencies, commissions, state and local governments and their agencies, corporations, and individuals. These actors are the agents of judicial impact, who, of course, have their own ideas about what they should and should not be doing, and who will spend their resources optimally between compliance and dodging oversight.

Thus, in the principal-agent relationship that characterizes the judiciary and its many agents, the judiciary has neither the capacity to enforce its will, nor the ability to oversee compliance with its instructions. In this way, the limits on judicial independence are the direct results of the relative impoverishment of judicial power and of the legislature and executive’s ability to take advantage of the judiciary’s relative weakness. For example, the judiciary does not have a General Accounting Office (GAO) and its nearly 50,000 oversight agents, as the legislature does. Nor does it have a far-flung fire-

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*Decisis*, 40 AM. J. POL. SCI. 1018 (1996).

<sup>8</sup> On congressional overturns of court decisions, *see*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Pablo T. Spiller & Emerson Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT’L REV. L. & ECON. 503 (1996); JEB BARNES, *OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS* (2004).

alarm network from which it can cull reliable signals about compliance and non-compliance and from which it can distinguish shirking from bad luck.<sup>9</sup> As an illustration of the many enforcement difficulties that the judiciary faces, note how overseeing compliance with school desegregation decrees, especially in the face of hostile school boards, is a lifetime ambition for the Court, one which necessarily precludes addressing other matters and one for which compliance notoriously fades into the shadows once the spotlight no longer shines on the issue.

The purpose of this article is to explore the ideas central to Hamilton's argument in Federalist No. 78. To do this we model the Supreme Court's choice of doctrine within a policymaking game, where doctrine defines the rules by which policy is to be chosen, but does not itself define the policy choices.<sup>10</sup> The core of the model involves a game wherein the Court sets doctrine and monitors compliance with its doctrine. We then examine the tradeoffs that arise as a result of scarcity and uncertainty in attaining compliance from the Court's agents.

Our key conclusions are threefold: First, the Court, due to imperfect information and limited resources for hearing appeals, cannot induce perfect adherence to its doctrine by its agents. Indeed, we show how doctrine results from the Court's attempts to maximize compliance from its various agents. Doctrine on this account is not what the Court believes is the best policy to pursue for its own sake, but rather is an instrument used to gain compliance. In areas where potential case numbers are huge relative

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<sup>9</sup> A fire-alarm network differs from a police-patrol network in that fire alarms are a decentralized way to acquire information about one's agents and their behavior whereas police patrols involve active oversight and monitoring of agents. A fire-alarm network allows principals to respond only to violations of procedure or policy that generate complaints, rather than having to observe all actors comply with the appropriate process. See Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

<sup>10</sup>For example the Supreme Court created the Chevron Doctrine which directs courts to take a two-stage process during review of agency decisions. First, determine if there is Congressional intent and if so it governs the decision at hand, regardless of the agency's decision. If the court finds that legislative intent cannot be determined, then it is to defer to the agency's decision as long as it is reasonable. See McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995) [hereinafter McNollgast, *Politics and the Courts*]; Jeffrey R. Lax & Charles C. Cameron, *Beyond the Median Voter: Bargaining and Law in the*

to the Court's ability to review cases, the Court must set a lax standard—as in *Brown*'s ambiguous message to school districts to desegregate with “all deliberate speed.” In areas where the cases are relatively few and the Court highly values the outcome, such as abortion, the Court can set a tight standard.

Second, *stare decisis* emerges in this model from strategic interaction by the Supreme Court in its supervisory role of the lower courts, not from any norm or preference on the part of judges to follow precedent. In our model, a lower court that must decide whether to comply with the Court's doctrine will either choose its ideal point (and not comply) or the closest point in the set of acceptable decisions (and hence comply). Non-complying lower courts risk review by the Court and, if found to be non-complying, having their decision overturned and moved to the Court's ideal point. This threat induces many lower courts to comply. Of course, per our first point, the Court must adjust its doctrine to fit the circumstances of compliance: the greater the potential number of non-complying courts and the lower the value of the issue area to the Court, the laxer the doctrine and the wider the range of acceptable decisions. Our approach implies that *stare decisis* emerges as an equilibrium outcome in a game between the Court and its agents.

Third, political actors can take advantage of this situation by exacerbating the Supreme Court's scarcity; that is, they can influence judicial doctrine by expanding the number and reach of executive agencies, commissions, lower courts and so on. By forcing the Court to face more cases or by restricting its ability to review cases, legislators and the executive indirectly affect doctrine by forcing the Court to widen or narrow the range of acceptable decisions. In this way, elected officials use structure and process to influence judicial policy in much the same way that they use administrative structure and process to influence agency policymaking.<sup>11</sup>

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Supreme Court (working paper, Columbia University 2005) (on file with authors).

<sup>11</sup> McNollgast, *Administrative Procedures, as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987);



For example, our previous work demonstrated how a unified set of political branches opposing a Supreme Court could force it to alter its doctrine in their favor by expanding the lower judiciary and forcing the Court to face many more potentially non-complying lower courts.<sup>12</sup> Lower court expansion exacerbates the Court's compliance problem, forcing them to expand the range of acceptable decisions in the direction favored by legislators and the executive. Indirectly they affect the agenda for the judiciary's choice of doctrine, causing the Court to shift its focus in policymaking, leaving some areas unattended, while forcing the Court to use its scarce resources to affect doctrine in other areas. Our main result is that the more closely aligned and coordinated are the political branches, the more likely they are to agree on policy outcomes, which enables them to reduce the number of issues on which the Court can exercise meaningful independent discretion.

This paper proceeds as follows. In Section 1, we discuss various theories of judicial decisionmaking and present our model. In Section 2, we derive the key comparative statics of our model. In Section 3, we conclude with a discussion of how our model sheds light on the waxing and waning of judicial independence in the United States, and we also discuss the application of our model to the comparative context.

## 1. Courts and Agency Compliance

It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. ... This may be inferred with certainty, from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. ... There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted (sic) with it,

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McNollgast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); McNollgast, *The Political Origins of the Administrative Procedure Act*, in McNollgast, 15 J. L. ECON. & ORG. 180 (1999).

<sup>12</sup> McNollgast, *Politics and the Courts*, *supra* note 10, at 1651.

while this body was possessed of the means of punishing their presumption, by degrading them from their stations.<sup>13</sup>

Our approach to judicial independence draws inspiration from the work of Spiller and his colleagues,<sup>14</sup> who examine the political setting within which courts are situated, and from Cohen and Spitzer,<sup>15</sup> who highlight the relationship between the courts and the executive and explain how this relationship drives the choice of doctrine. We also build on Shapiro,<sup>16</sup> Pritchett,<sup>17</sup> and Peltason<sup>18</sup> to advance the idea that courts have limited abilities to implement and oversee their orders and opinions. Finally, we draw on our earlier work,<sup>19</sup> which first developed the model of judicial hierarchy on which this paper relies. It is with humility to these other scholars and to Alexander Hamilton that we proceed to model the Supreme Court and its agents.

We have three actors in the game that we model. First, the Court must pick an order or opinion on each of many policy dimensions in anticipation of how the targets of its policy choices will react. Orders and opinions are not precise in the sense of specifying a point on a line; rather, they define a range of acceptable actions by the targets (i.e., agents) of their orders and opinions. We call this range of

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<sup>13</sup> THE FEDERALIST NO. 81 (Alexander Hamilton) (emphasis in original).

<sup>14</sup> Spiller, *Judicial Choice of Legal Doctrines*, *supra* note 7; Gely, *The Political Economy of Supreme Court Statutory Decisions*, *supra* note 7; Gely, *Congressional Control*, *supra* note 7; Mario Bergara, Barak Richman, & Pablo T. Spiller, *Modeling Supreme Court Preferences in a Strategic Context*, LEGIS. STUD. Q. (2002); Pablo T. Spiller, *Regulatory Agencies and the Courts*, in PALGRAVE DICTIONARY OF LAW AND ECONOMICS (P. Newman, ed., 1997); Matias Iaryczower, Pablo Spiller, & Mariano Tommasi, *Judicial Decision-Making in Unstable Environments: The Argentine Supreme Court, 1935-1998*, 46 AM. J. POL. SCI. 699-716 (2002); Rebecca Bill Chavez, *The Construction of the Rule of Law in Nascent Democracies: Judicial Autonomy in Latin America* (unpublished Ph.D. Dissertation, Stanford University Department of Political Science 2001) (on file with author); Rebecca Bill Chavez, John Ferejohn, & Barry R. Weingast, *A Theory of the Politically Independent Judiciary* (working paper, Hoover Institution, Stanford University 2004) (on file with author); Barry R. Weingast, *Rational Choice Institutionalism*, in POLITICAL SCIENCE DISCIPLINE AS DISCIPLINE: RECONSIDERING POWER, CHOICE, AND THE STATE (Ira Katznelson and Helen V. Milner, eds., New York: Norton 2002).

<sup>15</sup> Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431 (1996).

<sup>16</sup> M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT (1964); Martin Shapiro, *The Supreme Court: From Warren to Burger*, in THE NEW AMERICAN POLITICAL SYSTEM (Anthony King, ed., 1978).

<sup>17</sup> C. H. PRITCHETT, CONGRESS VERSUS THE SUPREME COURT: 1957-60 (1961).

<sup>18</sup> J. PELTASON, THE FEDERAL COURTS, *supra* note 7.

<sup>19</sup> See generally, McNollgast, *Politics and the Courts*, *supra* note 10.

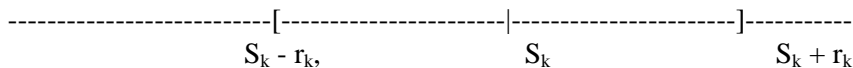
acceptable policies legal doctrine. Second, the agents to whom the Court addresses its orders and opinions then act. These agents, whether they are executive agencies, lower courts, state and local governments and so on, have their own policy preferences and react to and anticipate the Court's decisions. Third, the Court then reviews a subset of the agents' actions.

We model the choice of legal doctrine in an  $n$  dimensional policy space. We assume that each dimension,  $k$ , is separable, so we examine each issue separately. Thus the choice of legal doctrine is a policy choice game, where the Court makes a decision one dimension at a time. The Court's ideal point on any dimension is  $S_k$ ; and  $W_k$  is the weight (importance) the Court places on any dimension.

Each agent's decision is modeled as a choice of a point on a closed interval  $[0, 1]$ . We denote the decision of an agent,  $i$ , on a particular dimension as  $D_{ik}$ ;  $N_k$  is the total number of decisions by agents in each dimension.<sup>20</sup> Agent  $i$ 's ideal point on any dimension is  $L_{ik}$ . The final decision is  $F_{ik}$ .

There are three stages to this game. In the first stage, the Court chooses doctrine on each of the dimensions by setting an interval of acceptable decisions around its ideal policy,  $S_k$ . It does so by choosing  $r_k$ , which defines the interval of acceptable decisions,  $[S_k - r_k, S_k + r_k]$ , around the Court's ideal point,  $S_k$  (see Figure 1).<sup>21</sup> This interval is the Court's doctrine on issue  $k$ . If the Court's agent chooses from this interval, it can be assured not to have its decisions overturned on review.

Figure 1: The Court's Range of Acceptable Decisions



In the second stage of the game, the agents make their decisions. In this stage, the agents choose  $D_{ik}$  strategically to ensure that the final outcome will be as close to their ideal points as possible. In the

<sup>20</sup> It could also denote the total number of courts, assuming each court makes only one decision. This is a safe assumption if we model subsequent decisions by a particular court as different courts.

<sup>21</sup> As will be seen below, the model does not require that the interval be symmetric about the court's ideal point, but

third stage, the Court chooses  $R_k$ , the number of cases on dimension  $k$  to review. The Court must pay a cost,  $C_k$ , to review any decision, and their total budget is  $B$ . The cases are drawn at random from  $N_k$  – the Court has no information in advance as to which cases are in compliance with its doctrine, save for a minimal filtering effect in its production function, which we discuss later.

The agents and the Court share a common set of beliefs,  $\theta_k$ , about the distribution of agent ideal points on any dimension. The Court's ideal point and the range of acceptable doctrine are also common knowledge. However, no player knows what any agent's decision is (except its own).<sup>22</sup> Because the agents only know the distribution of the other agents' ideal points and the range of acceptable doctrine and because the Court chooses which cases to review at random, the agents are "price takers." This means that no single agent can affect the probability with which its case will be reviewed.

This game defines a three step linear programming problem. To solve it, we use the technique of backward induction. Thus, we start with stage three first. Let  $NC_k$  be the number of non-complying decisions on any dimension. Then  $P_k = NC_k/N_k$  is the probability that an agent is non-complying on dimension  $k$ . Although the Court does not know which agents are in compliance, it can calculate  $NC_k$  in equilibrium from the distribution of ideal points.

This also implies that  $E_{ik} = \sum_{i \in NC_k} (P_k | S_k - D_{ik} / N_k)$  is the expected policy change of reviewing a given case on dimension  $k$  and moving the agent's decision (if non-complying) from  $D_{ik}$  to  $S_k$  or letting it stand (if complying). The Court's expected payoff is  $W_k E_k$ , which it expects for each case it reviews on this dimension and which increases from reviewing a case on dimension  $k$ .

In the third stage, the Court therefore chooses the number of cases to review across all dimensions,  $\{R_1, R_2, \dots, R_k\}$ , to maximize:

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we use this formulation to make the model simpler.

<sup>22</sup> An agent does know what its decision is, but no agents know what any other agents' decisions are. Furthermore, the court does not know any agents decisions until it pays  $C_k$ .

$$\sum_K (W_k R_k E_k). \quad (1)$$

The Court cannot review more cases than its budget allows, so there is a budgetary constraint:

$$\sum_K R_k C_k \leq B. \quad (2)$$

We can now obtain the following Lagrangian:

$$L = \sum_K (W_k R_k E_k) - \lambda(B - \sum_K R_k C_k). \quad (3)$$

The first order constrained maximization conditions for this function obtain when  $\partial L / \partial R_k = 0$ , as below:

$$(W_k E_k) + \lambda C_k = 0, \quad k = 1 \dots K. \quad (4)$$

This implies that, since the Court does not know if a given case on any dimension complies with its decision or not, the marginal value of reviewing an additional case on dimension  $k$  is equal for all cases. These equations imply that the Court will rank order the dimensions from highest to lowest according to its utility weights,  $W_k$ , so that  $k \in K \{1, 2, \dots, k\}$ . Once the dimensions are rank ordered, the Court then selects the most important dimension (the one with the highest rank ordering) and reviews all the cases on this dimension first;  $R_k = N_k$  for this dimension. It then chooses its next highest ranked alternative and reviews all cases on that dimension. The Court then reviews all possible dimensions in this way until it expends its budget  $B$ . The dimension it is reviewing when its budget is spent receives only partial enforcement.

This sequence results in a unique optimization strategy for all  $k$ , except where the marginal net payoff among dimensions is equal. In that case, we make a tie breaking assumption: In the event of a tie, the Court chooses to enforce the dimension where the ordinate ranking is highest ( $k > j$ ).

In the second stage, the agent makes its decisions knowing how the Court will behave in the third stage. Agents do not want to be overturned, because they are better off when the final outcome is closer to their ideal point. So the agent makes a decision  $D_{ik}$  to minimize the following:

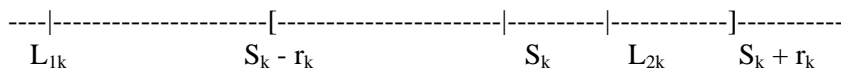
$$\sum_K W_{ik} |F_{ik} - L_{ik}|$$

where  $F_{ik}$  is the final outcome after stage three and  $W_{ik}$  is the weight an agent  $i$  places on dimension  $k$ .

Notice that  $F_{ik}$  is either  $D_{ik}$  or  $S_k$ , since non-complying decisions will either be overturned ( $F_{ik} = S_k$ ) or not reviewed ( $F_{ik} = D_{ik}$ ) and complying decisions will not be changed ( $F_{ik} = D_{ik}$ ).

Because there are only two outcomes, there are only two strategies an agent can choose. The agents either “stick” with their own ideal point or “switch” their ideal point to the upper or lower bound of acceptable doctrine. An agent whose ideal point is outside of the range of acceptable decisions will pick its ideal point if it chooses not to comply. We illustrate two different agents’ decisions in Figure 2. First, consider agent 2, who has an ideal point at  $L_{2k}$ . This agent faces no dilemma: because its ideal point falls within the range of acceptable decisions, it can choose this without risk; indeed, if reviewed, the Court will let this decision stand. Now consider agent 1, who has an ideal point at  $L_{1k}$ . If agent 1 chooses not to comply and hence to decide its ideal policy,  $L_{1k}$ , it risks being overturned upon review. With probability  $P_k$ , the Court will review agent 1’s decision and will overturn it in favor of its own ideal policy,  $S_k$ ; with probability  $(1-P_k)$ , agent 1 will not be reviewed and its decision will stand. Alternatively, agent 1 can decide to conform and choose  $S_k - r_k$ . Clearly, agent 1 ranks these alternatives  $L_{1k}, (S_k - r_k), S_k$ .

Figure 2: The Agents’ Decision about whether to Comply



Agent  $i$ ’s behavior is determined as follows. If  $L_{ik} \in [S_k - r_k, S_k + r_k]$ , then the agent will stick. If the agent’s ideal point is not contained in  $[S_k - r_k, S_k + r_k]$ , then there are two cases: the ideal point below the interval, i.e.,  $L_{ik} \in [0, S_k - r_k)$ ; or above, i.e.,  $L_{ik} \in (S_k + r_k, 1]$ . If below, the agent will stick if and only if:

$$\Psi_k |L_{ik} - S_k| \leq |L_{ik} - (S_k - r_k)| \quad (6a)$$

where  $\Psi_k$  is the odds ratio of being reviewed/ not reviewed, i.e.,  $P_k/(1 - P_k)$ . Similarly, if its ideal is above the interval, the agent will stick if and only if:

$$\Psi_k |L_{ik} - S_k| \leq |L_{ik} - (S_k + r_k)|. \quad (6b)$$

The choice to stick or switch always yields a unique optimizing strategy for the agents at stage two. An important lemma follows directly from equations (6a) and (6b): there is a “tipping point” at each end of the interval ( $T_{ik}^L$  and  $T_{ik}^U$ ). These points determine the range where all agents will have a dominant strategy to stick (ie  $L_{ik} \in [0, T_{ik}^L]$ ) to their own ideal point and the range where all agents have a dominant strategy to switch (ie  $L_{ik} \in [T_{ik}^L, S_k - r_k]$ ) to the upper or lower bound of acceptable doctrine.

Finally, in the first stage of the game, the Court chooses the range of acceptable doctrines  $\{r_1, r_2, \dots, r_k\}$  for each dimension it can afford to enforce. The Court chooses doctrine to minimize:

$$\sum_1^K \sum_1^{N_k} |F_{ik} - S_k|. \quad (7)$$

where  $F_{ik}$  is the outcome following each agent’s decision, as determined by the next two stages of play. The optimal strategy for the Court, then, is to pick doctrine on each dimension that induces agents’ responses at stage two and a reviewing strategy at stage three that yield the highest utility. This is a large linear programming problem that can be solved since the Court knows the distribution of the agents’ ideal points,  $\theta_k$ . From this distribution, the Court can calculate the tipping points for any choice of doctrine. From these points, the Court can calculate  $NC_k$ , which allows it to calculate the dimensional rankings in the third stage. Since there exists a unique response by the agents to the Court's choice of doctrine at stage one and since there also exists a unique response by the Court at stage three, we know each choice of doctrine yields a unique payoff.

The Court therefore chooses  $\{r_1, r_2, \dots, r_k\}$  to minimize the following:

$$NC_k/N_k(\sum_K | S_k - E_k |) + (1 - NC_k/N_k)(\sum_K | S_k - E_k |). \quad (8)$$

It is clear that there is a constrained minimum to this equation that is simply the sum of the estimated probabilities and expected values, all of which are defined for each stage. The only problem might arise if there is a tie, and our tie breaking assumption is the same as the one that we used for stage three: That is, in the event of a tie, the Court picks the one where the sum of dimensional rankings is the greatest. It is now clear that there is a unique optimal strategy for all players at all stages of the game. This leads us to proposition 1:<sup>23</sup>

Proposition 1: There exists a unique subgame perfect equilibrium for each round of play.

## 2. Implications of the Model

The model implies that the Court never reviews cases on some issues (those of lesser importance to it), while it focuses carefully on the issues it cares about.

The model also implies that an agent's compliance with legal doctrine results not from a preference for stability or an adherence to a norm, but rather from the Court's threat to enforce its doctrine. Further, when the Court punishes agents, the punishment meted out is not a loss of prestige or reputation, but rather a loss in utility to the agents from the substitution of the Court's ideal point for the agent's decision.

Finally, the greater the resources the Court allocates to a dimension of choice, relative to the number of cases it must review, the greater the number of agents on that dimension who will choose to comply with legal doctrine.



### 3. Comparative Statics

Although a number of predictions stem from our model, we devote our attention to four specific comparative statics and invite the interested reader to derive the others. Specifically, we are interested in how a change in the number of agents (which increases all the  $N_k$ ), the number of the cases on a dimension ( $N_k$ ), the cost of reviewing a case on a dimension ( $C_k$ ), and the weight the Court puts on a dimension ( $W_k$ ) affect the Court's choice of doctrine ( $r_k$ ).

Our previous work<sup>24</sup> studied in detail the comparative statics that follow from an increase in the number of agents. The idea there was that increases in the number of agents have different effects, depending on the location of the new agents' ideal points. In particular, we considered the case of the judicial hierarchy where the agents are lower courts. We showed that expanding the lower courts by creating many new courts whose ideal points lie outside the existing range of acceptable decisions would in turn force the Supreme Court to expand its range of acceptable decisions. The reason for this is that adding lower courts with ideal points outside the existing range of acceptable decisions decreases the probability of any of the lower courts' decisions getting reviewed. Strategically, lowering this probability induces more lower courts to choose their ideal policies instead of complying. The reaction of the Supreme Court, in turn, is then to increase the range of acceptable decisions to counteract lower court behavior: expanding the range of acceptable decisions means that more lower courts will automatically comply (their ideal points are within the expanded set) or will be induced to comply because their ideal points have become closer to the position demanded by the Supreme Court, making conforming less costly. These decisions combine to increase the probability that the remaining non-complying courts will be reviewed, thus reinforcing the compliance effect.

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<sup>23</sup> McNollgast, *Politics and the Courts*, *supra* note 10, at 1675-83.

<sup>24</sup> *Id.*

This comparative static implies that expanding the federal judiciary is a political tool used by legislators and the executive to force the Supreme Court to alter doctrine in a way preferred by political actors. Of course, not all political officials want to do this. Indeed, we showed that this effect was most likely to occur when a new party attained unified government after being in the opposition for some time so that the other party came to dominate appointments to the judiciary.<sup>25</sup> This includes the Jeffersonian takeover in 1801 after the Federalists had dominated American politics; the Republicans' takeover in 1861 after the dominance of the Jacksonian Democrats; and the Democrats' takeover in 1933 after the Republicans dominance. The evidence supports this and related propositions.<sup>26</sup>

For our next comparative statics result, consider an increase in  $N_k$ , perhaps due to a secular increase in the number of cases or particular type of problems that arise. Because an increase in  $N_k$  increases  $NC_k$ ,<sup>27</sup> we examine  $\partial r_k / \partial NC_k$ . There are three possible strategies that the Court has, depending on the characteristics of the relevant dimension:

1. If the dimension is ranked highly (i.e., if it is a dimension of complete enforcement), then an increase in the number of non-complying decisions on that dimension leads to a decrease in enforcement on some other dimension  $j$  ( $j \neq k$ ). To see this, recall that the rankings of the dimensions reflect the marginal value of reviewing a case. A case on a highly ranked dimension  $k$  has, by definition, a higher value than  $j$ . Hence, an increase in the number of decisions on dimension  $k$  forces the Court to review fewer cases on a lower dimension  $j$ .

We thus get the expected and sensible result that, since the Court has limited resources, reviewing more cases on a particular dimension leads to less enforcement on another.

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<sup>25</sup> *Id.*

<sup>26</sup> See generally, McNollgast, *Politics and the Courts*, *supra* note 10, at 1657-58; McNollgast, *A Theory of Judicial Decision Making: The Politics of Creating Federal judgeships* (working paper, Stanford University 2001) (on file with author); John de Figueiredo, Gerry Gryski, Emerson H. Tiller & Gary Zuk, *Congress and the Political Expansion of the Federal District Courts*, 2 *Am. L. Econ. Rev.* 107 (2000).

<sup>27</sup> *Ceteris Paribus*, since  $\theta_k$  and  $E_k$  remain the same, when  $N_k$  increases, so does  $NC_k$ .

2. If  $k$  is a dimension that the Court ranks low (i.e., if it is a dimension without enforcement), then there are two possible outcomes:

i. There is no change in the enforcement strategy of the Court. A change in the number of non-complying decisions does not make the Court enforce its doctrine on this dimension at all.

ii. Since the marginal value of reviewing a case increases,  $k$  moves up in rank to a position where it gets reviewed. This leads to a decrease in enforcement on a separate dimension,  $j$  ( $j \neq k$ ).

3. If the dimension  $k$  is a dimension that the Court reviews when it spends its entire budget (i.e., if it is the dimension with partial enforcement), then an increase in the number of non-complying decisions leads to either no change in enforcement or more enforcement ( $\Delta R_k \geq 0$ ) on dimension  $k$ , and either no change in enforcement or less enforcement on another dimension  $j$  ( $j \neq k$ ).

The third comparative static we examine is the change in reviewing strategy that results from an increase in the cost of reviewing a decision on any dimension. The results are similar to those above and follow a similar logic:

1. On a highly ranked dimension, as  $C_k$  increases, there is no change in enforcement on that dimension; however, there is a decrease in enforcement on another, lower ranked dimension  $j$  ( $j \neq k$ ). The reason is that reviewing cases on a highly ranked dimension is now more expensive and leaves a smaller remaining budget with which to review cases of lower value.

2. On a dimension that the Court ranks low, an increase in  $C_k$  will have no effect.
3. On a dimension with partial enforcement, an increase in  $C_k$  will reduce the number of cases the Court will be able to review. In this case, there are two possible outcomes:
  - i. The Court will continue to partially enforce this dimension, but it will review fewer cases.
  - ii. The Court will substitute the next highest ranked dimension,  $j$ , and drop enforcement on  $k$  altogether. This follows since an increase in  $C_k$  leads to a decrease in the value of reviewing a marginal case on dimension  $k$ . Thus, a decrease in enforcement on  $k$  will lead to an increase in the rank of the next highest ranked dimension,  $j$  ( $j \neq k$ ).

Finally, we examine the effect of a change in the importance of any dimension to the Court on its choice of doctrine ( $\Delta W_k$ ). A change in weights may occur for several reasons. For example, political changes, secular economic or demographic changes, or changes in the Court's personnel may affect the relative policy salience of various dimensions.

Again, there are three possibilities that follow the logic presented above:

1. On a highly ranked dimension, an increase in  $W_k$  leads to no change in enforcement or doctrine and to no change on any other dimension.
2. On a dimension that is not enforced, an increase in  $W_k$  has two possible effects:
  - i. The increase in importance will not be sufficient to raise the ranking of  $k$  into the dimensions with full or partial enforcement. In this case, there is no change in the Court's strategy at any stage.

ii. The increase in importance will make  $k$  important enough to merit full or partial enforcement. This implies that the Court will either abandon or reduce enforcement on some other dimension  $j$  ( $j \neq k$ ).

3. On a dimension with partial enforcement, there are two possible outcomes as well:

i. The Court will continue to partially enforce that dimension.

ii. The dimension  $k$  will become fully enforced, and the Court will either reduce or abandon enforcement on some other dimension  $j$  ( $j \neq k$ ).

#### 4. Implications

The various comparative statics results show that judicial independence is never absent, nor is it ever complete. Several parameters affect the Court's ability to control the agents. First, the distribution of agent ideal points affects the size of acceptable doctrine and hence judicial doctrine – the greater the number of agents far from the Court's ideal doctrine, the looser the Court's doctrine must be. Second, the greater the resources allocated to the Court (both in terms of direct inputs to its own cases and also through cases recognized and highlighted through signals from the appellate courts), the greater the ability of the Court to control its agents. Taken together with what we know from other models, on issues of high political salience that attract the attention of the political branches, the Court may also be limited in its discretion and so may not act independently. The reason for such limited discretion, of course, is that the political branches (particularly when they are unified) can affect the cost of reviewing a particular case, the number of agents far from the Court's ideal point, as well as the weight associated with a particular dimension.

## 5. Conclusions

Judicial independence waxes and wanes. Although political scientists have well characterized these changes, what they have done less well is explain them. There is a tendency to assume that judicial independence is a characteristic inherent in the judiciary itself, such as the norms of judges or the life tenure of judges.<sup>28</sup> Murphy showed that the courts are political and they respond to political pressure. Others have shown how the Solicitor General affects the Supreme Court's agenda.<sup>29</sup> In our previous work we have shown that doctrine can be affected by stacking the deck in the appointment of judges to lower courts.<sup>30</sup> In the preceding, we have shown instead that the power of the judiciary depends critically on the relationship between the judiciary and the other branches of government.

The model in this paper yields a range of implications for judicial behavior. First, *stare decisis* emerges as an equilibrium outcome in the strategic interaction of the Supreme Court with the lower courts. Our comparative statics results imply that the greater the potential for non-compliance by the lower courts, the more lax is judicial doctrine. The same result holds for the importance of the issue: issues of less salience to the Supreme Court are likely to have more lax doctrine. In this approach, doctrine is a tool used by the Supreme Court to induce compliance.

The model also shows how legislators and the executive have various strategies to affect the Supreme Court's doctrine. As mentioned, increasing the number of lower courts affects the ability of the

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<sup>28</sup> MURPHY, ELEMENTS OF JUDICIAL STRATEGY, *supra* note 7.

<sup>29</sup> Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General during the Warren and Burger Courts: A Research Note*, 41 W. POL. Q. 135 (1988); Karen O'Connor, *The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation*, 66 JUDICATURE 256 (1983); H.W. PERRY JR., DECIDING TO DECIDE: AGENDA SETTING IN THE U.S. SUPREME COURT (1991).

<sup>30</sup> McNollgast, *Politics and the Courts*, *supra* note 10, at 1651.

Supreme Court to enforce its doctrine and therefore forces it to expand its doctrine.<sup>31</sup> Political actors have a range of structure and process to affect the Court's decisions, including setting up specialty courts. The latter not only remove jurisdiction from the Court, but also allow a much higher percentage of cases to be heard. In general, elected officials use structure and process as a means of influencing judicial policy in much the same way that they use administrative structure and process to influence agency policymaking.<sup>32</sup>

Finally, our model has implications for the broad overview of judicial doctrine and the waxing and waning of judicial independence over American history. One implication of our model is that the judiciary will be more independent during periods of divided partisan control of government than during periods of unified partisan control. Indeed, during periods of divided control, one legislative chamber or the executive branch serves to protect judicial independence by vetoing (or threatening to veto) legislative actions to overturn court decisions.

Unlike the gridlock and inaction that characterize periods of divided government, however, periods of unified government are characterized by an expansion of government activity that ultimately limits judicial independence. As we and others demonstrate in previous work, during periods of unified control the government seeks to expand and stack the judiciary to serve its own ends.<sup>33</sup> It is also well known that the size and scope of government action greatly expands during periods of unified government, as each party, once ensconced in power, seeks to enact and implement its platform and to redirect the existing governmental structure to its purposes. This expansion of activity during periods of unified government will necessarily cause the Court to focus on fewer issue areas to enforce its doctrinal choices and will, therefore, limit judicial independence.

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<sup>31</sup> *Id.*

<sup>32</sup> See generally, McNollgast, *Administrative Procedures*, *supra* note 11; McNollgast, *Structure and Process*, *supra* note 11; McNollgast, *The Political Origins*, *supra* note 11.

<sup>33</sup> McNollgast, *Politics and the Courts*, *supra* note 10, at 1666-68.

To take a real world example of how judicial independence waxes and wanes with periods of divided and unified government, consider the history of judicial independence in the United States. Prior to World War II, the typical pattern was for one party to dominate electoral institutions and the courts: the Federalists prior to 1800, the Jeffersonian and Jacksonian Democrats until 1860; the Republicans until 1930; and the Democrats until the end of WWII. Indeed, in the seventy years between 1860 and 1930, the Republicans held unified government in half the Congresses, while the Democrats held unified government in only four. Except for some crucial appointments during the Wilson presidency, the Republicans dominated appointments to the courts during this era.

This pattern has not held in the post-World War II era, with divided government and swings between the parties becoming the norm. Although each party has held unified government for short periods of time,<sup>34</sup> the bulk of this time period has been characterized by periods of divided government, particularly with a Republican president and a Democratic Congress or a divided Congress (1955-60, 1969-76, 1981-92). Given such periods of divided government, no party has been able to dominate appointments to the courts since World War II.

The patterns of judicial independence that characterized these periods of unified and divided government fit well with the predictions of our model. For example, during the periods of unified government prior to World War II, courts were instruments of the ruling party and exhibited relatively little independence on statutory issues. In contrast, the courts have been most independent during periods of divided government after World War II, becoming major interpreters of legislation and champions for a host of new rights. Although every major Supreme Court decision during this period has been followed by elected officials decrying it, nearly all have also had elected officials supporting it. In this way, the absence of sustained unified government has given the Court the independence to exercise its authority in

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<sup>34</sup> *See, e.g.*, the Democrats from 1961-68, 1977-80, 1993-94; the Republicans from 1953-54, and from 2001 to the present.



many areas.

Our model also explains two major confrontations between the courts and the elected branches—the first occurring in the late 1860s during Reconstruction and the second occurring in the 1930s during the New Deal. Although these time periods differ significantly, both featured partisan and ideological changes that resulted in a confrontation between a determined set of elected officials and a judiciary of very different persuasion. In both cases, the Supreme Court suddenly faced a unified government with very different preferences from its own. Without any political officials to protect it, the Supreme Court capitulated.

Our model also yields a range of implications about the independent authority of courts in other countries. In political environments where the legislature is subordinate to the president, the latitude of courts is small, so they cannot exert much political independence or authority. In the strong presidential systems of Latin America, for example Argentina or Mexico, the courts typically exercise relatively little independent authority. Yet, as Chavez shows,<sup>35</sup> our perspective explains the vicissitudes of judicial independence in Argentina since democratization. When government is divided (at least one branch held by the opposition), courts have more latitude. Thus, the courts were relatively independent during the Alfonsín presidency in the 1980s, when the opposite party held one chamber of the legislature. In contrast, the dramatic pliancy of the courts through most of President Menem's term in the early 1990s reflected his party's hold of unified government. The emergence of a more independent judiciary at the end of Menem's term occurred when he, too, faced divided government.

This perspective also explains aspects of judicial independence in Chile.<sup>36</sup> In the post-authoritarian era, Chile has been characterized by both a strong presidency and divided government. As

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<sup>35</sup> Rebecca Bill Chavez, *supra* note 14.

<sup>36</sup> *Id.*; Brian Levy & Pablo Spiller, *The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation*, 10 J.L. ECON. & Org. 201 (1994); JOHN B. LONDREGAN, LEGISLATIVE INSTITUTIONS AND IDEOLOGY IN CHILE (New York: Cambridge University Press 2000).

noted above, the system is rigged so that the opposition holds a working majority in the Senate through the institutional senators. As our model predicts, Chile also has an independent judiciary (also initially rigged to a degree to favor Pinochet's interests).

Further, Barros<sup>37</sup> emphasizes that there was also a degree of judicial independence during Chile's authoritarian period and that such independence emerged as a result of conflict between two branches of the armed services. Although the range of judicial independence was relatively small in comparison to that in the democratic era, Barros shows that it was non-negligible after 1980 and grew over time. Judicial independence arose in part because the branches of the armed services had no mechanism for coordinating their activities. This problem emerged during the first days of the coup, when two different branches issued conflicting curfew decrees. In the 1980s, the courts began to rule on constitutional issues. Although the courts' latitude was relatively small, the regime's preference for a referee allowed the courts to emerge as an interpreter.

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<sup>37</sup> Robert Barros, Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile, (paper prepared for the Conference on Democracy and the Rule of Law, Centro de Estudios Avanzados en Ciencias Sociales, Instituto Juan March, Madrid, España (June 22-24, 2000) (on file with author).