

The President, the Bureaucracy, and Majoritarian Judicial Review

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Abstract: A number of theories of judicial review argue that the U.S. Supreme Court is majoritarian in nature, striking or upholding laws to advance the policy goals of the president and Congress. While never recognized as such, these majoritarian theories of judicial review are a subset of the larger principal-agent models in the larger bureaucratic politics literature. Elected officials, most notably the president, may rely on the Court as an agent to achieve policy goals when they share ideological preferences. But the existence of the bureaucracy leads to an important question: given the bureaucracy's ability to craft policy, when would the Court ever need to issue a decision to advance the policy goals of the president? I craft a new theoretical model that shows a principal may not choose to delegate to an agent when the costs of reigning in that agent are too high relative to other actors. I then apply it to the decision to rely on the Court or a bureaucratic agency; the Court is an undesirable agent compared to a cabinet department due to its high level of independence but may be a desirable choice compared to an independent agency. I then test my claim by analyzing the propensity of the U.S. Supreme Court to strike down important federal statutes over most of the post-War period. The analysis reveals qualified support for majoritarian theories of judicial review: the Court only invalidates laws in a majoritarian manner when the bureaucratic agency implementing the law is relatively independent.

The defining feature of the U.S. Supreme Court is judicial review. Using its formal power to authoritatively interpret the Constitution, the Court may invalidate laws crafted by Congress and the president should they run afoul of the limits placed upon government. Given this description, it is easy to see why many scholars view this tool of policy change as inherently counter-majoritarian (Bickel 1986). At best, the Court is invalidating the will of the executive and the majority of the legislature; at worst, the Court is invalidating the will of the people. In response to undesired decisions, Congress and the president have a number of tools for punishing the Court, leading many to question why the Court would risk court-curbing by the invalidation of laws (Whittington 2007, Clark 2009, Harvey 2013). The core of this question drives a large research agenda in both American and comparative judicial politics (Vanberg 2001, 2005, Rios-Figueroa 2007, Carrubba 2009, Stephenson 2003). The cumulative empirical results are clear: independent courts usually uphold the laws of their ideological allies and strike down those of ideological enemies.

Yet there are times when elected officials rely on judicial review of their actions. Scholars have suggested a number of circumstances in which the president and Congress might invite the invalidation of statutes by an ideologically friendly Court as a means of policy change (Graber 1993, Rogers 2001, Whittington 2005). This is not to suggest that judicial review is the only means by which elected officials can achieve policy change; the president, for example, can veto incoming legislation and steer the legislative agenda to repealing an existing statute (Cameron 2000, Bond and Fleisher 1990). In the right circumstances, however, the prospect of the Court invalidating undesirable legislation may be preferable to direct action. Thus, judicial review can be majoritarian in its use (Dahl 1957).

Yet the Court is not the only actor elected officials can rely on. The bureaucracy can make policy when it is impractical for elected officials to do so directly. And unlike the Supreme Court – a coequal branch of government – the bureaucracy can be statutorily controlled. Indeed, the president’s vast influence over the administrative state without the need for the approval of another branch of government make bureaucratic action a much more attractive tool for policy change relative to the judicial review. Given the extensive bureaucracy in the U.S., when would the Court ever need to issue a decision to advance the policy goals of the president?

This paper joins the other majoritarian theories of judicial review by highlighting the role of bureaucratic agencies in the decision calculus of the president. I start by reviewing these theories and linking them to the larger principal-agent literature, in which the Court acts as an agent for the government to achieve its policy goals. I then question these theories in light of the large American bureaucracy, arguing that if the bureaucratic agency implementing the law is dependent upon the president then the president will not rely on the Court to achieve policy change. I formalize my ideas in a principal-agent model characterized by drift of agent preferences and the possibility for the principal to reassert control. After deriving a set of testable implications from the model, I then analyze U.S. Supreme Court constitutional decisions on important federal statutes from 1949-2011. The analysis reveals qualified support for majoritarian theories of judicial review: the Court only invalidates laws in a majoritarian manner when the bureaucratic agency implementing the law is relatively independent.

Judicial Review in Democracies

Scholars have long debated whether the U.S. Supreme Court, with its use of judicial review, is a majoritarian or countermajoritarian institution (Dahl 1957, Bickel 1986). This debate has driven a large literature studying the use of judicial review in a variety of contexts, both in

the U.S. and abroad. Much of this work views judicial review as a countermajoritarian tool: judges invalidate laws to advance their ideological and legal views at the expense of democratically elected legislatures and executives. Many scholars question why a constitutional court would invalidate the actions of elected officials given their collective ability to punish a court for undesirable decisions. In the U.S., for example, Congress and the president have the power to punish the Supreme Court by ignoring or circumventing decisions (Epstein and Knight 1998, Meernik and Ignagni 1997, Dahl 1957), starving the Court of resources like support staff and salary increases (Hayo and Voight 2007; Ura and Wohlfarth 2010), limiting the amount of discretion the Court has in determining its docket (Harvey 2013), and pursuing constitutional changes that would damage a constitutional court or even impeach the justices (Whittington 2007). To this end, scholars highlight the necessity of judicial independence for judicial review: some mechanism must protect constitutional courts by constraining the other branches of government to respecting judicial independence before they will exercise judicial review (Vanberg 2001, 2005, Rios-Figueroa 2007, Carrubba 2009, Stephenson 2003).

Other scholars, however, argue that legislatures and executives tolerate occasional countermajoritarian decisions because of the majoritarian benefits judicial review may provide. These benefits go beyond the legitimacy ideologically friendly courts provide when upholding the constitutionality of a law; majoritarian theories of judicial review posit that the invalidation of a law by a constitutional court can advance the government's policy goals in certain circumstances. Some majoritarian theories are driven by uncertainty in the political environment. Rogers (2001) argues that when there is a large degree of uncertainty about the true policy consequences of a statute, legislatures will defer to the judgement of more informed, ideologically congruent courts. Courts can generally be thought of as having better information

because it has access to the same information that legislatures plus the additional information gathered through the legal process, such as the post-enactment information gathered because of the “standing” doctrine in common law courts. Whittington (2003) highlights U.S. Supreme Court land grant cases under Chief Justices Marshall and Taney as examples of this mechanism in practice.

Other majoritarian theories are driven by the ability for courts to act when elected officials are obstructed from realizing their own policy goals. In his essay on majoritarian support of judicial review, Whittington (2005) argues that American political coalitions must occasionally make undesirable policy compromises in order to ensure that legislation passes. The Court provides an avenue for overturning the compromises majority leaders had to make. Graber (1993) makes a similar point. He argues that majority leaders would support judicial review on cross-cutting issues. Such issues threaten to tear apart the majority party if it came to blows, encouraging them to allow the Court to make a decision instead even if it means allowing the court to strike down a statute.

Governments may also turn to judicial review to address situations in which different government actors disagree on a particular course of action. During times of divided government, the president or influential Members of Congress may look to the Court to exercise its will in order to overcome entrenched interests in the status quo. Similarly, dominant national coalitions may look to the Court to enforce its policy agenda onto states and localities with divergent preferences (Whittington 2005). Constitutional courts may also be the answer when different branches of government attempt to settle a dispute over their respective powers (Vanberg 2000).

In a similar vein, scholars argue that constitutional courts can serve governments by shifting blame (Salzberger 1993, Whittington 2005, Fox and Stephenson 2011). Politicians in democracies are highly concerned with public opinion, with some going as far as to describe them as “single-minded re-election seekers” (Mayhew 1974). Sometimes, however, politicians may desire to veto bills or repeal statutes that are politically popular. In order to do so, they may delegate to the Court to make the decision, shifting the blame from themselves to an institution that is relatively insulated from the public. Decisions on social issues like abortion and race are commonly named as instances in which the elected officials shifted the blame to the Court.

Courts as Agents

While scholars are quick to recognize the potential for judicial review to be majoritarian in nature, there is disagreement within the judicial political literature whether the Court can be described as an agent of the government (Dahl 1957, Salzberger 1993, Whittington 2005). Within the bureaucratic politics literature, such a debate does not exist; courts are readily recognized as agents of the government (Shipan 1997, Epstein and O’Halloran 1999, Patty and Turner n.d.). A government must choose whether to pass legislation in response to a court’s statutory decision or delegate the responsibility of these laws to the judicial system. But while this scholarship has recognized statutory interpretation as a method in which a court can be an agent, it has yet to extend it to constitutional interpretation. Majoritarian theories of judicial review, I argue, are a subset of the larger principal-agent models within the bureaucratic politics literature (Bendor, Glazer, and Hammond 2001, Gailmard and Patty 2012). A principal (the government) in an uncertain policy environment must choose between passing the buck to an agent (possibly a court using judicial review) or keep the power of policy-making to themselves.

In a standard principal-agent model, a principal must choose whether to make a policy decision themselves or rely on an agent. The principal has an ideal policy outcome, but policy uncertainty means they cannot choose it directly and hence the need to choose whether to risk delegating to a better-informed agent. The driving force behind this decision lies in the principal's toleration set, or the set of possible agents to whom a principal would tolerate delegating. This toleration set is driven by a number of factors. The uncertainty of the policy environment plays a critical role: as uncertainty increases, the principal willing to entrust policy decisions to agents with more divergent policy preferences (Bender and Meirowitz 2004). This result mirrors the core argument of Roger's (2001) informative judicial review, where a government increasingly respects judicial review as the government's uncertainty in a policy area increases.

Policy uncertainty is not the only driver of the toleration set, however. The "busy boss" extension of principal-agent models introduces a cost to the principal when it decides to personally resolve policy matters (Bender and Meirowitz 2004). An increasing cost to personal action by the principal increases the toleration set. The source of this cost is intentionally allowed to be quiet general to aid in comparisons to real-world situations. Similarly, multiple principals with competing preferences – which can occur under divided government in a separation of powers system – may further increase the toleration set (Ferejohn and Shipan 1990, Volden 2002). These models clearly parallel majoritarian theories of judicial review. When government coalitions are fractious on a particular issue, resolving a policy matter personally can be so costly that judicial review is an attractive alternative (Graber 1993, Whittington 2005). Indeed, many of the theories described in Whittington's (2005) now famous essay can be phrased as increasing costs to policy action. Policy action under divided government, the repeal of popular policies,

and policy-intervention at the state level all increase the costs of policymaking to the point at which passing the buck may be the preferred alternative.

The size of the toleration set alone, however, does not determine whether a principal delegates. The principal must also find an agent whose policy preferences are within the principal's toleration set. If the distance between a principal's ideal point and a potential agent's ideal point is too great, then the principal will choose not to entrust them with a policy area no matter what the political circumstances are. This is known as the ally principle: "[a]ll else equal, a rational boss should choose her closest ally as an agent" (Bendor and Meirowitz 2004, see also Gailmard 2002). This result is not lost on scholars of judicial politics. In most majoritarian theories, scholars have recognized that the government will only invite judicial review from a like-minded court (Graber 1993, Rogers 2001, Whittington 2005).

Some may object to describing majoritarian instances of judicial review with principal-agent models. These models were originally designed for governments delegating to bureaucracies. The key word in the previous sentence is delegation, a means of conferring authority to an inferior entity. The U.S. Supreme Court, as a coequal branch of government enshrined in the U.S. Constitution, is by no means inferior. And the enduring popularity of the Court gives it a strong means of resisting the influence of the political branches (Gibson, Caldeira, and Spence 2003, Gibson and Caldeira 2009). I readily concede that majoritarian theories of judicial review are not delegation as is commonly understood in the literature. But given this objection, I offer two responses.

First, the U.S. Supreme Court is comparatively the weakest branch of government and easiest to be influenced by the other branches. As already described, Congress and the president have a number of tools to influence the Court to decide cases in a favorable way. They can, for

example, create mandatory appellate jurisdiction in certain policy areas to force the Court to hear a case; this could be an attractive tool to force a reluctant, but ultimately reliable, Court to resolve a case that will likely have a desirable outcome. And as experiences in other countries and American history shows, formal decrees in constitutions may have little power to prevent determined elites from controlling a constitutional court when judicial independence is weak (Kramer 2004, Helmke 2010, Helmke and Staton 2011). Using the words of Hamilton, it is difficult for any political institution to be truly independent without the power of the purse or the sword.

Second, majoritarian theories of judicial review do not have to be instances of delegation for them to be under the umbrella of principal-agent models. Nowhere in the mechanics of these models is there a clear assumption about superiority of the principal over the agent. Instead, the models merely assume that a decision-maker must choose between personally resolving an issue and entrusting the issue to another decision-maker. The description of this process may change depending on the context: delegation in terms of governments to bureaucracies and passing the buck in terms of executives and legislatures to courts. But the underlying strategic mechanism behind the decision-making of both the principal and the agent does not change depending on the labels associated with them, making the distinction between the two largely beside the point.

The Judiciary, the Bureaucracy, and the Problem of Drift

Both the U.S. Supreme Court and bureaucratic agencies can create policy change, but they do so in radically different ways. Agencies rely on the discretion granted to them in order to craft and implement policy as they see fit. The U.S. Supreme Court decides what the constitution requires and forbids in certain policy areas and relies on its legitimacy to ensure implementation of those decisions. But despite the differences in the procedures used, the fact that both can

influence policy make the two actors comparable on a number of dimensions. This includes the comparison the president makes when deciding whether to entrust a policy area to a bureaucratic agency or the Court. But given the choice, to whom does the president pass the buck?

A growing body of quantitative evidence supports the notion that the president delegates to the bureaucracy in ways predicted by principal-agent models. Federal agencies issue more rules when they are ideologically aligned with the president, as the ally principle would predict (Potter and Shipan Forthcoming). Agencies are also more powerful when they have greater levels of expertise (Meier 1980) or when there are periods of divided government (Shipan 2004, Boushey and McGrath 2015, but see Potter and Shipan Forthcoming), as predicted by principal-agent models. Corollary evidence for the Supreme Court, however, is lacking; there is little quantitative evidence that the president relies on the Court in that is consistent with the majoritarian theories of judicial review already described.¹ To be fair, the lack of quantitative evidence supporting a theory does not automatically discredit it; this is especially true given the qualitative evidence showing the mechanisms at work. But suppose the lack of quantitative evidence did indicate that majoritarian theories of judicial review did not function as scholars described. Why would the president choose to delegate to bureaucratic agencies and not rely on federal courts?²

Previous scholars have long argued that agencies are preferable to courts because of their relative expertise in certain matters (see Fiorina 1982). To be sure, the level of expertise is an important consideration when choosing to whom to delegate (Bendor and Meirowitz 2004). But

¹ The sole majoritarian theory with evidence is Whittington's (2005) theory that the federal government relies on the Court to reign in states with laws divergent to federal preferences (Lindquist and Corley 2012).

² Others might view this a false dichotomy; why delegate to one agent when you can delegate to two, with a constitutional court serving as a backstop to bureaucratic agencies? This is addressed in the conclusion, but as a first step, this analysis assumes that the government must choose between relying on a bureaucratic agency and a constitutional court.

using this as an argument to prefer agency action over court action has at least three limitations. First, constitutional courts have a plethora of tools for gathering information; in the context of the U.S. Supreme Court, this includes the post-enactment effects of a statute with concrete displays of harm or benefit (Rogers 2001). Second, constitutional courts have the ability to evaluate technical justifications for policy based on the cost required to generate the information evaluated by the court (Stephenson 2006a). Third, many decisions made by agents are at the end of the day primarily value-based, in which an agency has no relative advantage (Stephenson 2006b).

Fiorina (1982) offers an argument in which a government might choose to delegate to an agency rather than a court in order to avoid blame for certain decisions. Agencies can make policy independent of a government, which allows the government to avoid taking blame, while courts merely enforce the government's laws. But this line of reasoning relies on courts making statutory decisions, not constitutional ones. In constitutional cases, the same effect can be achieved by delegating to the court (Whittington 2005, Fox and Stephenson 2011). Thus the argument doesn't apply in this context.

Stephenson (2006) argues that the choice between the court and the bureaucracy is driven by considerations of intertemporal and interissue consistency and risk diversification. Agencies are better when issues must be approached consistently but the approach can vary over time, while courts are better when issues can be approached in diverse, but temporally consistent, ways. The model was designed for the context of judicial statutory interpretation, however, and is more difficult to apply in the constitutional setting. For example, Stephenson argues that courts are more temporally consistent and more issue diverse in their interpretation of laws because they are less partisan and respect precedent. While this may be true for statutory decisions, it is

less so for constitutional ones. There is a strong ideological component to U.S. Supreme Court constitutional decisions in a wide variety of issue areas that tend to reflect the partisan views of the majority coalition, which is true even when you control for the affect precedent (Segal and Spaeth 2002, Bailey and Maltzman 2011). Furthermore, the dominant ideological coalition within the Supreme Court changes over time, which further reflects temporal instability (Martin and Quinn 2002, Bailey 2013).

Rather than rely on existing theory, I make a few observations about the potential agents being considered here in order to develop a new theory. The U.S. Supreme Court is enshrined in the Constitution as a coequal branch of government with formal protections for its members, designed to insulate it from the whims of the elected branches (Segal and Spaeth 2002). The bureaucracy has no such backing; even independent agencies are only granted autonomy via statute. The U.S. Supreme Court also enjoys consistently high diffuse support, which when combined with the transparent media environment in the U.S. makes it exceedingly difficult for the elected branches to circumvent decisions or engage in court-curbing (Gibson, Caldeira, and Spence 2003, Gibson and Caldeira 2009).³ In contrast, the bureaucracy is terminally unpopular, being perceived as both wasteful and undemocratic; it should come as no surprise, then, that it is relatively easy for the president to intervene in the affairs of agencies (Meier 2000, Wood and Waterman 1994). Taken as a whole, this means that reasserting control over the Court after choosing to delegate to it is more costly for the president than reasserting control over bureaucracy.

The costs of reasserting control, as Bendor and Meirowitz (2004) show, does not influence the decision of a principal to delegate when preferences are stable and expertise

³ Though not impossible, as some seem to suggest.

homogenous. After all, if a principal chose to delegate to an agent in the first place then that same principal would likely choose to keep delegating. But occasionally appointees to both the Court and agencies drift away from their apparent original preferences in a way that puts them in conflict with those who appointed them (Bawn 1995). Supreme Court justices are liable to change their preferences; the conservative Nixon appointee Harry Blackmun, for example, retired as a solidly liberal justice (Epstein et al 1998, Martin and Quinn 2002). Bureaucrats are susceptible to similar tendencies; the Carter appointee George Anikis surprised many by issuing few regulations during his tenure at the National Highway Traffic Safety Administration (Wood and Waterman 1991, Carpenter 2001, Aberbach and Rockman 2000). The possibility of drift is not taken into account in such models. If this happens, the president may want to reassert control of a policy area. This now makes the cost of reasserting control relevant in the decision for a president to delegate and to whom they would delegate. For this reason, I now turn to creating a formal model of such a situation.

A Principal-Agent Model with Drift and Varying Reassertion Costs

Consider a game with a principal, $i=\{0\}$, and a finite set of agents, $i=\{1,\dots,k\}$, $k\geq 2$. The players are concerned with a unidimensional outcome space, x . Each player i has a unique ideal point y_i in x . Without loss of generality, assume that the principal's ideal point is equal to zero. Assume that ideal points for the agents have a strict rank-ordering in terms of their Euclidean distance from the principal's ideal point, with the ideal point of agent i being closer to then principal than agent j where $i<j$. In addition, the ideal point of an agent can drift away from the principal. The agent's new ideal point is y_{id} , where y_i and y_{id} may or may not be equal. Let $F_i(|y_{id}|)$ be the probability that distance between the principal and the ideal point of the agent after

drift will be equal to $|y_{id}|$ or less. For any two agents i and j where $i < j$, these functions will be equal over the domain $[|y_j|, \infty]$.

Outcomes are determined by the policy choices of the players. Outcomes are an additive function of a policy p and random shocks ε : $x = p + \varepsilon$. The distribution of this shock is assumed to be uniformly distributed with mean zero and positive variance. This means that if a decision-maker without knowing ε makes a policy choice, they make a policy choice under uncertainty. Because ε is uniformly distributed, so too is x ; the distribution of x given policy p is $f(x|p)$. This also implies that $F(x|p)$ is non-degenerate for all p . Two assumptions are made about the policy technology. First, each agent has an optimal policy given the uncertainty about the mapping from policies to outcomes (though it does not have to be unique). Second, if a decision-maker observes the disturbance, they can create a policy that yields with certainty any feasible outcome. Bendor and Meirowitz (2004) call this perfect shock absorption.

Each player's utility for outcome x is given by a linear, decreasing function of the distance between x and their ideal point y_i . Without loss of generality, assume that the utility for a player that has policy set to their ideal point at the end of the game receives a utility of 0 from that policy. In addition, the principal has cost considerations. If the principal does not delegate and instead picks policy at any point in the game, the principal experiences an additive, non-positive cost c . If the principal decides to delegate and then reasserts control over an agent and picks a policy, the principal also experiences an additive, non-positive cost r_i , where i is between 1 and m . In short, the principal must pay a cost to reassert control over a policy area that changes depending on the agent.

The game proceeds in four stages. First, the principals decides whether to delegate to an agent or to craft policy themselves. If the principal crafts policy themselves, nature determines

the shock and therefore the outcome, payoffs are realized and the game ends. If the principal delegates to an agent, in the second stage nature reveals the shock to the agent and resolves whether the agent experiences drift. Third, the agent crafts policy with knowledge of this shock. Finally, the principal decides whether to reassert control and craft a policy or accede to the outcome created by the agent. Either way, payoffs are realized and the game ends. All of the above information is known to all parties; the only uncertainty in the game is the principal's uncertainty about ε and $|y_{id}|$. We assume that if a principal is indifferent between picking a policy and allowing an agent to pick a policy, the principal will choose to delegate.

Model Equilibrium and Some Observations

As the game is one of full information, the equilibria can be derived from backwards induction. For a given set of parameters, there is a single unique Nash equilibrium. I will descriptively present the results of the game, followed by a few observations. The full proof for both the equilibria and the observations is included in the appendix. In addition, a more general game is also included in the appendix to show that the dimensionality assumptions, distribution assumptions, policy technology, and the linear portion of the utility functions do not determine the results presented here, but are rather a function of the order of play and the costs associated with the principal's strategies.

If the principal chooses to delegate to an agent i , the principal chooses whether to respect the policy decision of the agent or reassert control and pick a policy. Because $F(x|p)$ is non-degenerate and the principal's preferences are single-peaked, the expected utility the principal receives from picking a policy is strictly less than the utility of receiving the principal's ideal point with certainty; the calculation of this expected utility is v . In addition, the principal must pay a cost c for picking a policy and a cost r_i for reasserting control over the agent, which further

decreases the principal's utility. When the three parts of the principal's utility function are taken together, there is a set of outcomes within x equidistant from the principal's ideal point, t^*_{2i} , that when given with certainty would give the principal the same utility as the lottery of reasserting control and picking a policy. This set of outcomes serves as the border for a toleration set T_{2i} . If the outcome that results from the agent's policy choice within T_{2i} , then the principal respects the policy choice of the agent. If it is outside, however, then the principal reasserts control and picks a policy.

If the principal chooses to delegate, the agent i that is delegated to potentially drifts away from the principal and then picks a policy. In the full information of this game, the agent foresees the toleration set T_{2i} . If the agent's ideal point y_{id} is within this point, then the agent chooses a policy p such that the outcome x will be at the agent's ideal point, which the principal will tolerate. But if the agent's ideal point is outside of T_{2i} , then choosing a policy that results in an outcome at the agent's ideal point will result in the principal reasserting control. Instead, the agent will choose a policy with an outcome at the ideal point within T_{2i} that is closest to y_{id} .

At the start of the game, the principal must choose whether to pick a policy or delegate to one of the agents. The lottery received from the principal picking a policy and the cost from the principal taking action result in a new indifference set t^*_1 and a new toleration set T_1 , one that is smaller than T_{2i} and that is not conditional upon the agent. But because every agent has a chance at drifting, the choice to delegate is also a lottery. In order for the principal to delegate, the expected utility of delegating to one of the agents must be greater than picking a policy themselves. If only one agent meets this criteria, then the principal delegates to that agent. If multiple agent's meet this criteria, then the principal delegates to the one with the highest expected utility. Given this equilibria, there are a few general observations from this model:

Proposition 1: *Having an agent with an ideal point within the principal's original toleration set is a necessary but insufficient condition for the principal choosing to delegate to an agent.*

The toleration set for a principal is generated due to the uncertainty that the principal has over the relationship between policies and outcomes. But the introduction of a drift in an agent's preferences results in a new uncertainty that the principal must take into account. Unlike in a standard principal-agent model, it is not the observable preferences of an agent that matter. Rather, it is the preferences that an agent will realize post-delegation that are important. This is problematic for the principal, as reasserting control over an agent that drifts entails an additional policy cost that would not have to be paid if the principal chose policy initially. Therefore, if there is a large enough risk that an agent's eventual ideal point will be too far away from the principal's, then the principal will not delegate to an agent.

Proposition 2: *Given multiple agents to whom the principal would delegate, a principal may not choose to delegate to an agent whose initial ideal point is closest to the principal's if that agent has a larger cost to reassert control.*

When delegating to multiple agents is preferable to the principal picking policy in a standard principal-agent model, the ally principle states that the principal will choose the agent with the closest ideal point. This is true even when the ability to reassert control is inserted into the model (Bendor and Meirowitz 2004) and when drift is introduced, so long as both agents have functionally identical probabilities of drifting away from the principal. This changes, however, when the cost to reassert control is changed from a constant to a variable dependent upon the particular agent chosen. When the agent with the closer ideal point to the principal also has a lower cost of reasserting control, the principal chooses to delegate to the closer agent; this is consistent with the ally principle.

When the agent with the closer ideal point to the principal has a higher cost of reasserting control, however, the ally principal can be violated. The principal must now weigh the benefits of choosing an agent with a closer initial ideal point with the costs of having to tolerate an undesirable policy should the agent's preferences drift. This is not to say that the principal will never choose the agent with the closer initial ideal point. It does, however, show that as the relative cost of reasserting control over an agent plays an important and, at times, decisive role in choosing which agent.

Empirical Implications of Majoritarian Theories of Judicial Review

There are two competing predictions for if and when we should observe the Court striking down statutes for an ideologically-aligned president. The first prediction operates under the assumption that majoritarian theories of judicial review are true without qualification. Borrowing terms from the bureaucratic politics literature, the choice to empower a court to use judicial review depends jointly upon the size of the toleration set and the distance between the president's preferences and the court's. If the preferences of the government and the Court are sufficiently similar, then we should expect to see the Court striking down more laws when political circumstances exist to broaden the toleration set. This leads to a clear hypothesis:

Hypothesis 1: There should be a positive relationship between the size of the president's toleration set and the probability that the Court will strike down a statute when both have similar preferences. This relationship should decline as the distance of the preferences of the Court and the president increase.

The preceding theoretical model, however, casts some doubt on the desirability of using a constitutional court as an agent. The model demonstrates that a principal will not delegate to an otherwise desirable agent when the costs of reasserting control over that agent are too high. As

shown earlier, the cost of reasserting control over the Court are much higher than reasserting control over a bureaucratic agency that might serve the same purpose. As such, there is reason to believe that the president would not rely on the Court in the modern era, instead preferring to delegate to a bureaucratic agency.

Yet not all bureaucratic agencies are created equal. Agencies vary considerably based on the level of independence that the agency has. Some agencies, such as those within the Executive Office of the President (EOP), have relatively little autonomy to make decisions without the consent of other political actors. Other agencies, such as the Federal Reserve, have broad powers to make decisions contrary to the preferences of elected officials. Empirical research shows that the independence of agencies influences the way in which they conduct business (Selin 2015, Potter and Shipan Forthcoming). These empirical considerations temper the skepticism towards elected officials delegating to the courts. If the president had to make a decision between delegating to the EOP or relying on the Court in a policy area, it is highly likely that the EOP will be the preferred agent given the theoretical model above. If the choice is between the Court and the Federal Reserve, however, the president may well turn to the judiciary if the Court's preferences are similar. This leads to an additional hypothesis, with emphasis added to how my theory contributes to it:

Hypothesis 2: There should be a positive relationship between the size of the president's toleration set and the probability that the Court will strike down a statute when both have similar preferences *and the agency implementing the law is independent*. This relationship should decline as the distance of the preferences of the Court and the president increase *or as the independence of the agency implementing the law decreases*.

Research Design

In order to test the above hypotheses, I need to analyze a set of constitutional court decisions with measures of both the distance between the court's ideological preferences and the ideological preferences of the president as well as measures of political contexts in which the president should be willing to pass the buck. U.S. Supreme Court decisions are ideal for at least two reasons. First, significant scholarly attention has been given to the ideal point measures of Supreme Court justices, Members of Congress, and the president in the same ideological space (Epstein, Martin, Segal, and Westerland 2007, Bailey 2008). Second, all of the majoritarian theories described were written with the Supreme Court in mind, as all of the qualitative evidence supporting these claims comes from it; it thus provides the natural test case. For these reason, I analyze a subset of U.S. Supreme Court decisions from 1949-2011.

Rather than solely focusing on U.S. Supreme Court decisions, however, this analysis draws on a statute-centered approach of previous studies (Hall and Ura 2015, Harvey and Friedman 2009, 2006). The study of judicial review inevitably leads to studying court decisions. Solely studying them in presence of a discretionary docket, however, can lead to a selection bias as strategic interactions may happen at the certiorari stage (Friedman 2006). This can negatively impact our ability to make inferences, meaning we must go beyond simply looking at decisions and look at the statutes which the decisions are about. Thus, the unit of observation in this analysis are federal statutes. Of course, there are difficulties with looking at all federal statutes. Collection of the data would be a monumental task and would thus limit analysis to a small time period. As a middle ground, I analyze a subset of statutes enacted between 1949 and 2011. The subset is whether a law is landmark legislation, as defined by Mayhew's "Sweep 1" process

(2005).⁴ This results in 368 important laws, with writs granted 146 times and invalidations by the Court 52 times.

In order to account for potential selection effects in the merits stage, as well as examine interesting relationships at the certiorari stage, the model used in this analysis is a Heckman probit model. The first stage is a model of the Court's decision to hear a challenge of an important statute in a given year. The second stage is a model of the Court's decision to invalidate, in part or in whole, the statute on constitutional grounds. This model allows us to control for potential sample selection bias at the merits stage, though it does not allow for us to entangle what social processes are governing whether a statute is granted a constitutional challenge.⁵ In order to both help with model convergence and control for duration dependence, I include cubic polynomials of years without invalidation in the first stage.

For the measure of the distance between the U.S. Supreme Court and the government, I employ Bailey's (2013) ideal point estimates and construct a measure of the absolute distance between the median justice on the Supreme Court's ideal point and the ideal point the sitting president. This construction reflects the choice that the president has to make between championing repeal efforts of a statute and relying on an agent to create policy change. While not shown in this paper, a measure is also constructed between the median of the Court and the ideal point of the president enacting the statute. While theoretically an important distinction, as it would represent the president's choice between vetoing a law or relying on an agent, analysis shows it to make little empirical distinction. This variable will be included in replication efforts for scholars to examine.

⁴ I would like to thank Joseph Ura and Matthew Hall for sharing the data that would serve as the groundwork for this project.

⁵ The certiorari process is influenced by a number of actors, including litigants, lower court judges, political elites, and the justices themselves.

I also construct a number of measures that would influence the size of the toleration set, reflecting the fact that each majoritarian theory of judicial review has a unique mechanism for enlarging the toleration set. Rogers' (2001) model of informative judicial review posits that a legislature will defer to an ideologically similar court when an issue is of sufficient complexity. To code complexity, I adapt Vanberg's (2001) complexity measure to this analysis. It is a binary measure with any statute whose subject matter dealt with economic regulation, state-mandated social insurance, civil servant compensation, taxation, federal budget issues, or campaign finance is coded as hard and given a 0. All others are coded as easy and given a 1. While Vanberg originally meant for the measure to represent an issue that may have less political transparency, he agrees that these issues "tend to involve technical regulatory questions." These questions are the ones that policymakers may not understand the full impact a statute has when passing it, precisely the types of issues Rogers describes in his theory.

Both Graber (1993) and Whittington (2005) argue that politically divisive issues within the president's party should be ones that the president and Congress defer to Court to resolve the issue. Though their rationale differs, both can be tested simultaneously with a measure of the divisiveness of the president's party on an issue. This is calculated using the votes in the House of Representatives on the statute under review. First I calculated the proportion of individuals in the president's party who voted for the particular statute.⁶ For all voice votes, the value is 1. In order to remove the distinction between unanimous support and unanimous opposition to a bill, I folded this measure. To do this, I subtracted 0.5 from this measure, so that the range was -0.5 to 0.5, and then took the absolute value of the result. Finally, I multiply the resulting number by 2

⁶ Data was gathered from Mayhew's (2005) original data files and updates for his book and supplemented with information from the Congressional Quarterly Almanac.

and subtract this value from 1. The new range of the measure is from 0 to 1, where a value of 1 indicates a perfect split in the party's vote on a statute and a value of 0 unanimity.⁷

$$\text{Equation 1: } Fractiousness = 1 - 2 * \left| \frac{MajorityPartyYeas}{MajorityPartyVotes} - 0.5 \right|$$

Whittington (2005) also argues that when entrenched interests in the status quo prevent a governing party from legislating, they may look to the Court to strike less desirable laws. The American system is notably marked by separation of powers, but there is variation in whether those powers are unified under a single political party. To account for a governing party's inability to pass a law, I adopt I include a dummy measure of in which a 1 indicates the partisan composition of the U.S. Congress and the president is divided and a 0 indicates unified.

In order to test Hypothesis 1, I interact the measure of the distance between the Court's ideological preferences and the government with one of the measures of the size of the governments toleration set. This results in three different models: one for each majoritarian theory tested. For each model, the marginal effect of the toleration set should be positive when the Court and the president have identical preferences, and it should be less positive as the distance between the Court and the government increases. Because all of my measures of the size of the toleration set associate more positive numbers with a larger toleration set, hypothesis 1 would suggest a negative interaction term. A fuller justification of this model as a test of majoritarian theories of judicial review is given in the appendix.

In order to test Hypothesis 2, I must first classify each statutes as to which agency would implement the statute and the level of independence of that agency. To identify which agency would implement the statute, I searched the electronic Code of Federal Regulations (eCFR)

⁷ Again, I calculate this for both the president's Party and the Majority Party to accommodate for differences in opinion regarding whose preferences should matter.

during the month of May 2018 for the statute's short title and public law number. I coded a statute as being implemented by the agency that issued the plurality of regulations under that statute. For some statutes, no regulations were implemented under a statute's authority for various reasons, such as being repealed. In these instances, the text of the statute was consulted to see if it clearly indicated that it amended a statute that did have regulations in the eCFR; if so, then the previous process was applied to the amended statute. If not, then the text was searched for references to an implementing agency. Finally, if no agency could be identified for a statute or if a statute implicates virtually every bureaucratic agency – such as the Omnibus Budget Reconciliation Act of 1981 – then such a case was dropped from the analysis of Hypothesis 2.

After classifying statutes based on which agency would implement them, I then must measure the independence of these agencies. I rely on Selin's (2015) measure of the independence that agencies have over the political review of their decisions. Using a Bayesian factor analytic model of the statutory protections afforded agencies, Selin finds that agencies are independent on two separate dimensions: the political insulation of decision-makers and the protection that agencies have from political review of their decisions. She finds that this second dimension, in particular, predicts the perceived level of independence agencies have from elected officials. Given that my theory revolves around the cost of reigning in decisions made by agents, the political review dimension is used as a measure of the independence the agency implementing a given statute would have.⁸

⁸ Selin's (2015) measure relies on statutory protections of agencies in 2013. This is outside the range of my data, and Selin shows for a random sample of agencies that, for some agencies, the independence agencies' have in the political review of their actions varies from when agencies are first created. Yet the level of independence an agency has at the time of its creation and in 2013, according to Selin's data, is correlated at 0.66. Further, a regression analysis indicates that the linear restriction of a perfect relationship between the independence of agencies at creation and in 2013 cannot be rejected. For these reasons, the measure is thought to be adequate for this analysis.

When testing Hypothesis 2, I create a three-way interaction between the toleration set of the government, the distance between the Court's preferences and the government's, and the independence of the agency that would implement the statute if the president did not rely on the Court. If true, we should observe a positive marginal effect of the toleration set on the probability the Court strikes a law when the Court and the president have identical preferences and when the implementing agency has a high level of independence. To communicate this effectively, I present multiple marginal effects plots for each model: they both show the marginal effect of the toleration set across the empirical distribution of the distance between the Court's and the government's preferences at both high and low levels of implementing agency independence, respectively. Figure 1 contains a hypothetical representation of marginal effects consistent with Hypothesis 2. The Figure is also beneficial for testing Hypothesis 1: if true, the marginal effect of the toleration set would be similar to the subfigure for high levels of agency independence.

I also control for competing explanations of judicial review with a number of control variables. To control for the attitudinal model of U.S. Supreme Court decision-making (Segal and Spaeth 2002), I use a combination of Bailey's (2013) ideal point estimates of justices' ideology and the direction of the decision classification from the Supreme Court Database. If striking a statute was consistent with the median member of the court's ideological predisposition, then the observation is assigned the absolute value of the median member's ideal point. If not, then the observation is assigned the negative of the absolute value of the median member's ideal point. All cases where the ideological implications of a decision were unclear were coded as zero. This results in a measure of the court's attitudes towards the case where positive values indicate the court is ideologically inclined to striking and negative values indicate the court is ideologically opposed to striking.

A growing body of literature shows that court decisions are also influenced by public opinion (McGuire and Stimson 2004). To control for this in my analysis, I use a combination of Stimson's (1999) public mood and the direction of the decision from the Supreme Court database. First, I mean-center public mood for the time period of my analysis so that positive values indicate a liberal public in that time-period and negative values indicate a conservative public. Then, as with the measure of the court's attitude, I assign an observation the absolute value of the transformed public mood if striking is aligned with the public's ideological predisposition. I assign the negative of the absolute value of the transformed public mood if striking is against the public's ideological interests. Positive values mean the public wants a strike and negative values mean the public does not.

The complexity of an issue area is also correlated with the salience of the issue area; less complex issues tend to be more salient ones (Vanberg 2001, 2005). This creates a complication in our models, as a particularly salient case is likely to result in the Court being protected from court-curbing and thus more likely to strike down a statute as unconstitutional. In order to control for the effect of salience, I include a measure of case salience created by Epstein and Segal's (2000) measure of case salience. It is a binary measure where a 1 indicates that the decision was reported on the front page of the New York Times and 0 otherwise; a 1 is an indicator of case saliency.

Analysis

I estimate two sets models in my analysis: a set of models to test Hypothesis 1, and a set of models to estimate Hypothesis 2. Table 1 presents the estimates of the models used to test Hypothesis 1. Notable is the consistent statistical significance for both the court's and the public's ideological predisposition to strike, consistent with prior research on the topic. The

interaction term between the size of the toleration set and the distance between the Court and the president, however, is rarely statistically significant as predicted by Hypothesis 1. Neither is the coefficient for the toleration set, which indicates the effect of increasing the size of the toleration set when the distance between the Court and the government is zero (Brambor, Clark, and Golder 2006). This is important, as the effect of increasing the size of the toleration set should be strongest when the Court and president have largely identical preferences. The exception is for the presidential model of party fractiousness, where the interaction term is negative and statistically significant; this is consistent with Hypothesis 1.

[Table 1 about here]

Figure 2 contains the average marginal effects for a one-unit increase of the toleration set variable across the empirical distribution of the distance between the Court's and the president's preferences (Hanmer and Kalker 2013).⁹ As one can see, these marginal effects do not generally give support to Hypothesis 1. One of the plots show that zero is included in the confidence interval throughout the plot. Another shows statistically significant effects, but they are in the wrong direction. Given that repeated hypothesis testing of null relationships will occasionally show statistical significance, I treat this result as a null. This will be further elaborated upon when examining Hypothesis 2.

Contrasting with the above results, the average marginal effect of the fractiousness of the president's party supports Hypothesis 1. When the president and the Court have virtually identical preferences, a shift from the president's party being perfectly united on an issue to being perfectly divided on an issue results in a 50% increase in the probability that the Court will strike down a law. As the distance between the president and the Court increases, however, the

⁹ Both the complexity measure and the divided government measure instead have the discrete change in predicted probabilities.

marginal effect declines until it is statistically indistinguishable from zero and, at extreme values, becomes negative. This result is consistent with both Graber's (1993) and Whittington's (2005) accounts of the mechanism in action, with Presidents' strategically relying on the Court to resolve so that it could avoid making controversial decisions that would anger political allies.

[Figure 2 about here]

Aside from the above result, the evidence indicates that majoritarian theories of judicial review, as written in the literature, do not have empirical support. But a more nuanced view of the president's decision calculus, as suggested by my theory, could change these results. Table 2 contains the more complex models estimated to test Hypothesis 2. As in the previous models, public opinion continues to play a statistically significant role in the decisions made by the Court. In these models, however, the court's attitude is rarely statistically significant and has a coefficient about half as large as those in previous analysis. This could be an indication that the evidence supporting the role of the Court's ideology in constitutional decisions is being captured by complex strategic decisions made by the Court. Yet to make such a claim is beyond the scope of this paper and is instead left to the work of future scholars.

[Table 2 about here]

There is clear support for these models. The coefficients for the three-way interaction in the models are regularly statistically significant. To aid in the interpretation of the substantive effects these coefficients represent, Figure 3 presents the average marginal effects for a one-unit increase the toleration set variable at different ideological distances between the Court and the president, alternating at high and low levels of agency independence.¹⁰ At high levels of agency independence, a one-unit increase in the toleration set results in a higher probability that the

¹⁰ High agency independence is defined as the 90th percentile within Selin's (2015) estimates, while low agency independence is defined as the 10th percentile.

Court will strike down a statute when the Court and the president have similar preferences. As the differences between the preferences of the Court and the president grows, however, this probability declines and becomes statistically indistinguishable from zero (and at times, negative).

[Figure 3 about here]

When low levels of agency independence, however, this relationship no longer holds. The marginal effect of the toleration set is negative when the Court and the president have similar preferences and becomes more positive as distance increase, eventually becoming positive. While these marginal effects are indistinguishable from zero for the complexity measure, they are strong and statistically significant for the divided government measure. While not predicted by the theoretical approach taken in this paper, they comport nicely with a strategic approach to judicial decision-making (Epstein and Knight 1998). When agency independence is low, the president has a large degree of power in scenarios where delegation is attractive. The Court approaches judicial review in these circumstances based on its ideological affinity to the president and, presumptively, the policies promulgated under the president's control: the Court upholds laws when ideologically similar to the president and strikes them down when ideologically distant.

The one exception to these relationships just described in Figure 3, however, is for the fractious coalitions mechanism. Here, the relationship is flipped: the marginal effect of increasing the toleration set when the Court and the president have similar preferences is positive when agency independence is low, but is statistically indistinguishable from zero when agency independence is high. Admittedly, this result does not meet prior expectations and is therefore treated as a null result. A likelihood ratio test, included within the replication materials, fails to

reject the simplified model presented in Table 1 compared to the more complicated model here. Given the prior results, the fractious coalitions mechanism of judicial review works as described by original scholarship and does not function as my theory predicts.

Discussion

This paper qualifies the conditions under which majoritarian theories of judicial review are likely to be true by arguing that courts are not the only institutions that can achieve desired policy goals of elected officials. Instead, the president may rely on bureaucratic agencies to achieve policy goals, as they are easier to control in the case of preference drift. This logic is demonstrated in a novel principal-agent model. I derive a few empirical predictions from that model, most notably that majoritarian theories of judicial review are only likely to be true when the bureaucratic agency to whom the president could delegate the responsibility of a statute is sufficiently independent so as to make the Court an attractive agent. My empirical analysis supports this claim; when the Court and the president have similar preferences and circumstances exist to make delegation desirable, the Court is only more likely to strike down laws as the independence of the relevant implementing agency increases.

The theoretical orientation presented here has a number of implications for future research. The theoretical model used to explain why the Court might invalidate laws during an ideologically friendly administration focuses on the decision calculus of the president. This implies a few observable features of presidential behavior. The president should be less likely to veto bills and pursue repeal efforts when the Court is ideologically friendly. In addition, the president should also be more likely to raise constitutional concerns in signing statements when the Court is ideologically friendly. It will be interesting to observe whether these implications hold true in future work.

The paper also creates a novel principal-agent model that is applicable to a range of delegation situations. The model focuses on the ability of a principal to reassert control and the possibility of preference drift, finding that a principal values an agent with a low cost of reasserting control. This model was applied to the president's choice to rely on the Court's use of judicial review versus a bureaucratic agency. But it could also be applied to the choice between a bureaucratic agency and an administrative law judge common in American bureaucracy. For instance, administrative law judges may be created in response to independent agencies more than executive agencies. Indeed, the theoretical model here could be combined with others that examine how judges and agencies might work cooperatively, rather than competitively as posited here (Shipan 2000, Fox and Schotts 2009, Turner 2017). There are other potential applications of this model, but only time will tell how scholars will use it.

This study is not without limitations. There is concern about the generalizability of the findings. The research design focuses on statutes that are regarded as important at the time of passage. Many are also considered landmark statutes in retrospective review. But the focus on important statutes excludes statutes with moderate to minor importance. In these cases, it is entirely possible that the results would differ and would be an interesting avenue for future research.

Tables and Figures

Table 1: Majoritarian Theories of Judicial Review

Stage 2: Invalidations of important federal statutes that are challenged	Complexity	Fractiousness	Divided Government
Toleration set	0.18 (0.59)	1.68 (1.11)	-0.93 (0.56)
Ideological Distance	0.27 (0.48)	1.30* (0.59)	-0.37 (0.48)
Toleration set*	0.18 (0.72)	-2.94* (1.45)	1.44 (0.73)
Ideological Distance	0.66* (0.30)	0.51* (0.28)	0.59* (0.28)
Court Ideology	0.05* (0.03)	0.06* (0.03)	0.05* (0.03)
Public Ideology	0.84** (0.29)	- (0.03)	- (0.03)
Salience	0.14 (1.25)	0.47 (1.03)	1.26 (0.89)
Constant			
Stage 1: Challenges to important federal statutes			
Toleration set	0.13* (0.07)	0.23* (0.11)	0.08 (0.07)
Ideological Distance	-0.02 (0.10)	-0.00 (0.10)	-0.01 (0.10)
Years without invalidation	-0.04 (0.02)	-0.04* (0.02)	-0.04* (0.02)
Years without invalidation ²	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
Years without invalidation ³	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
Constant	-1.87** (0.11)	-1.88** (0.11)	-1.86** (0.12)
LR Test of Independent Equations	0.80	2.04	1.44
N Stage 1	11555	11555	11555
N Stage 2	146	146	146

*p<.05, **p<.01, one-tailed tests

Table 2: Majoritarian Theories of Judicial Review by Independence of Agency Implementing Statute

Stage 2: Invalidation of important federal statutes that are challenged	Complexity	Fractiousness	Divided Government
Toleration set	-0.55 (0.83)	3.19 (2.10)	-2.79* (1.29)
Ideological Distance	-0.69 (0.74)	1.32 (0.92)	-3.04* (1.49)
Agency Independence	-1.67* (0.89)	0.44 (0.76)	-3.37* (1.79)
Toleration set*	0.69 (1.01)	-4.62* (2.53)	4.52* (1.87)
Ideological Distance	1.89* (1.13)	-3.04 (2.15)	4.01* (2.05)
Agency Independence	2.18* (1.12)	-0.32 (0.82)	4.65* (2.24)
Ideological Distance*	-2.14 (1.31)	3.71 (2.54)	4.65* (2.24)
Agency Independence	0.40 (0.29)	0.31* (0.29)	0.31 (0.32)
Toleration set*Distance*	0.06* (0.03)	0.06* (0.03)	0.06* (0.03)
Agency Independence	0.76* (0.32)	- -	- -
Constant	1.49 (0.97)	0.25 (1.39)	2.44* (1.11)
Stage 1: Challenges to important federal statutes			
Toleration set	0.08 (0.07)	0.30* (0.11)	0.04 (0.07)
Ideological Distance	-0.06 (0.10)	-0.05 (0.10)	-0.06 (0.10)
Agency Independence	0.13** (0.04)	0.15** (0.04)	0.14** (0.04)
Years without invalidation	-0.03 (0.02)	-0.03 (0.02)	-0.03 (0.02)
Years without invalidation ²	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
Years without invalidation ³	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
Constant	-1.85** (0.11)	-2.01** (0.12)	-1.94** (0.12)
LR Test of Independent Equations	1.72	1.70	0.72
N Stage 1	11189	11189	11189
N Stage 2	138	138	138

*p<.05, **p<.01, one-tailed tests

Figure 1: Hypothetical Marginal Effects Consistent with Hypothesis 2

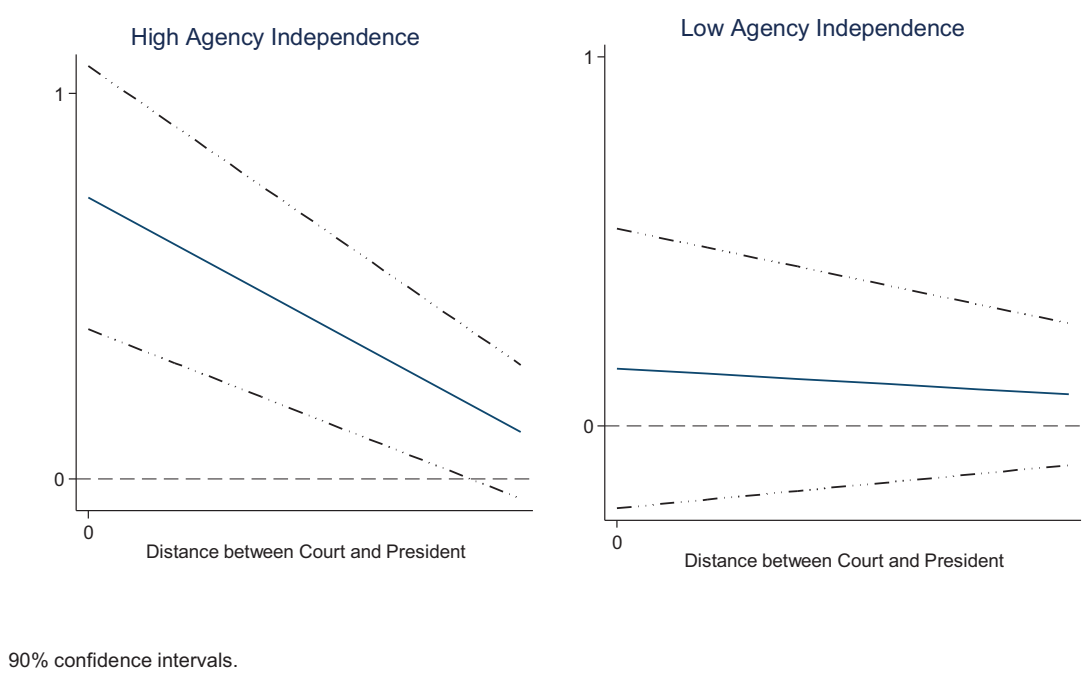


Figure 2: Average Marginal Effect of Increasing the Toleration Set at Varying Levels of Distance between the Court and the president

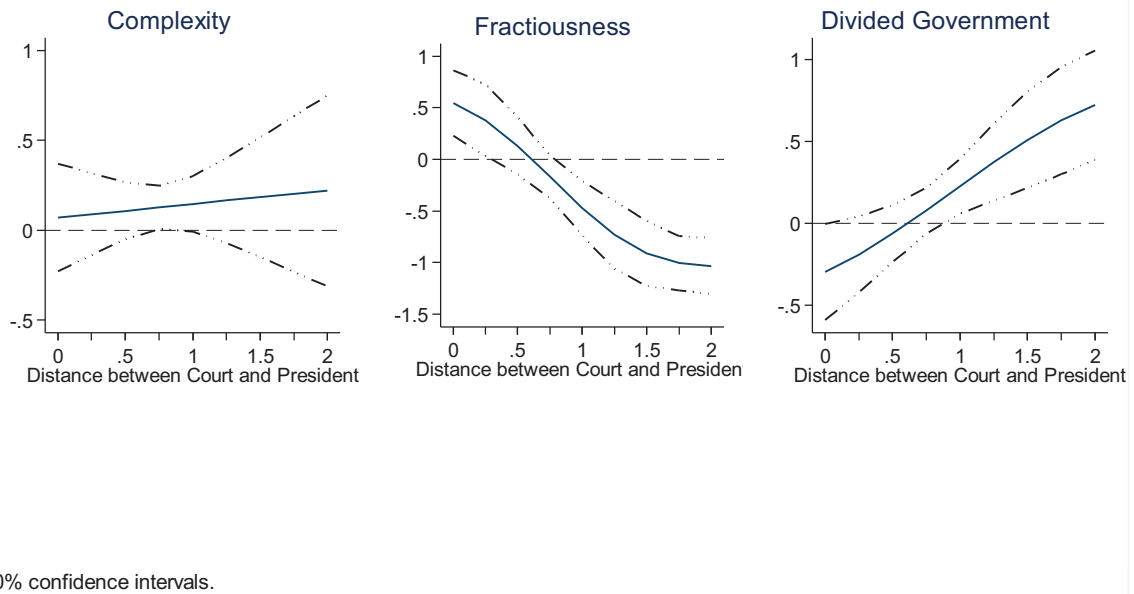
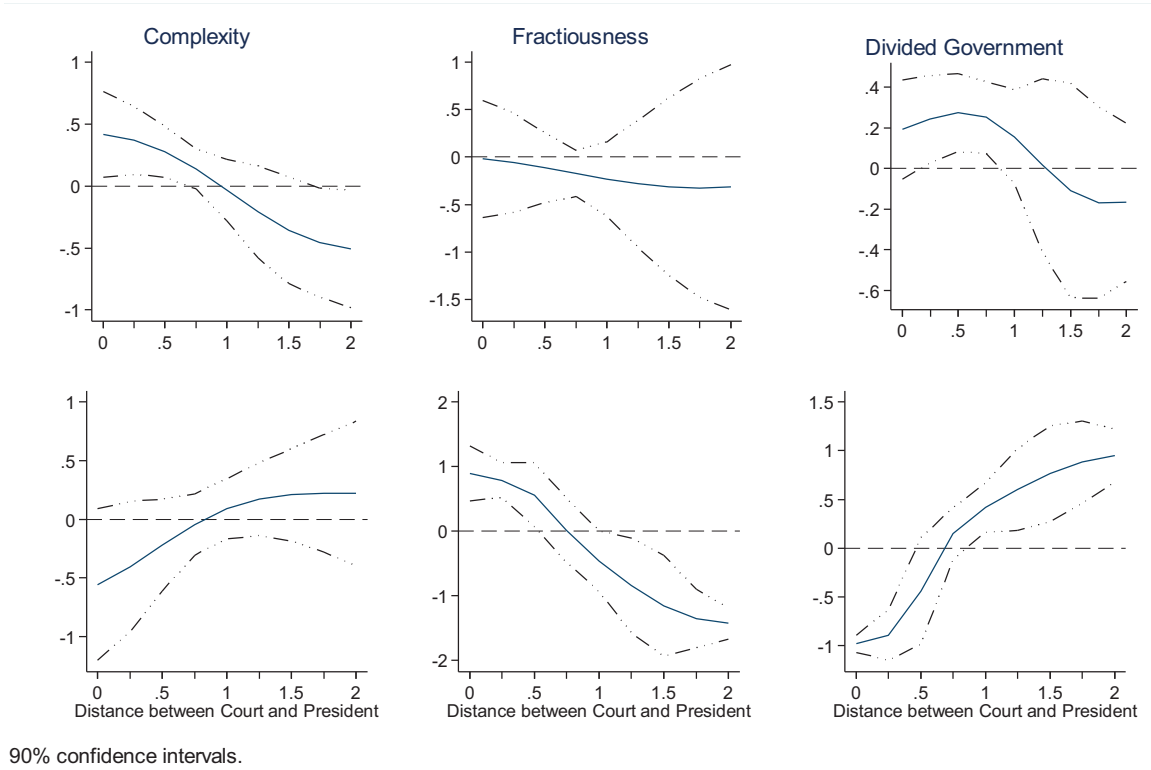


Figure 3: Average Marginal Effect of Increasing the Toleration Set at Varying Levels of Distance between the Court and the president, by High and Low Agency Independence



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Appendix to The President, the Bureaucracy, and Majoritarian Judicial Review

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1 Proof of the Game and Propositions

This game is solved using backwards induction. The principal's utility function is partially determined by the ultimate policy outcome x and whether the principal chooses to delegate and, if so, whether to reassert control. Let $-|x - y_i|$ be the function that determines each player's utility from a particular outcome x . The part of the principal's utility function determined by the ultimate policy outcome x when the principal picks a policy at any stage of the game is

$$\int -|x|dF(x|p) = v$$

The principal will pick a policy p such that the above function is maximized. The principal's utility function from reasserting control from agent i is

$$v - c - r_i$$

It is optimal to delegate iff

$$v - c - r_i \leq -|x_i|$$

where x_i is the policy created by agent i . This results in the creation of an indifference point t^*_{2i} that equals $|(v - c - r_i)|$. In short, the principal is indifferent between reasserting control and acceding to a delegate that achieves an outcome at either t^*_{2i} or $-t^*_{2i}$. Since ε has a positive variance, t^*_{2i} should exist. Delegation occurs iff $v - c - r_i \leq -|x_i|$. This creates a toleration set $T_{2i} := [-t^*_{2i}, t^*_{2i}]$, which is a subset of the real number line around zero. If the outcome from the delegate's policy choice is within this subset, the principal accedes control to the delegate. Otherwise, the principal reasserts policy control and picks a policy in ignorance.

For the agent i who becomes a delegate, they experience drift in their ideal point and receive the new ideal point y_{id} , $|y_i| \leq |y_{id}|$. If y_{id} is within the delegation space T_{2i} , the delegate picks a policy p s.t. $x=y_{id}$. The principal will not overturn this policy and, by assumption, this maximizes the delegate's utility function. But if y_{id} is outside T_{2i} , then choosing a policy p s.t. $x=y_{id}$ will cause the principal to reassert control and pick a policy under uncertainty. If instead the delegate picks a policy p s.t. $\min_{x \in T_{2i}} |x - y_{id}|$, the principal will not reassert control. The delegate's expected utility from this latter outcome is strictly greater than the expected utility received from the outcome chosen at random from the principal's choice of p , regardless of whether this is done by the principal reasserting control and choosing a policy or refusing to delegate and picking a policy. This result means that the delegate picking a policy p s.t. $\min_{x \in T_{2i}} |x - y_{id}|$ is a dominant strategy when the delegates ideal point is outside of T_{2i} .

Choosing whether to delegate or not, the principal's utility function for picking a policy is

$$v - c$$

This results in the creation of a indifference point t^*_1 that equals $|v - c|$. Since ε has a positive variance, t^*_1 should exist. This creates a toleration set $T_1 := [-t^*_1, t^*_1]$, which is a subset of the real number line around zero. If the principal chooses to delegate, the principal's utility depends on the probability that the agent's ideal point will drift and, if so, how far it will drift away from the principal's ideal point. Implicit in this formulation is that, similar to the later stage of the game, the principal will not delegate to an agent

whose initial ideal point is outside T_1 as this course of action is strictly dominated by refusing to delegate and picking a policy under uncertainty.

The principal's utility from delegating to agent i is:

$$F_i(|y_i|) - |y_i| + \int_{y_i}^{t^{*2i}} -|y_{id}|dF_i(|y_{id}|) + (1 - F_i(|t^{*2i}|))(v - c - r_i)$$

The principal will choose to delegate, then, iff

$$v - c \leq F_i(|y_i|) - |y_i| + \int_{y_i}^{t^{*2i}} -|y_{id}|dF_i(|y_{id}|) + (1 - F_i(|t^{*2i}|))(v - c - r_i)$$

for at least one agent i. If only one agent meets this criteria, then the principal delegates to that agent. If more than one delegate meets this criteria, the principal will choose to delegate to agent i over agent j iff:

$$\begin{aligned} F_i(|y_i|) - |y_i| + \int_{y_i}^{t^{*2i}} -|y_{id}|dF_i(|y_{id}|) + (1 - F_i(|t^{*2i}|))(v - c - r_i) \\ \geq F_j(|y_i|) - |y_j| + \int_{y_j}^{t^{*2i}} -|y_{jd}|dF_j(|y_{jd}|) + (1 - F_j(|t^{*2i}|))(v - c - r_j) \end{aligned} \quad (1)$$

Proposition 1: Having an agent with an ideal point within the principal's original toleration set is a necessary but insufficient condition for the principal choosing to delegate to an agent.

As shown earlier, the principal will never delegate to an agent whose initial ideal point is outside of T_1 . Now suppose that agent i's ideal point $|y_i|$ is within T_1 but is only β distance from t^*_1 , where β is an arbitrarily small number. Also suppose that $F_i(|t^*_1|) = \zeta$, where ζ is a different arbitrarily small number within the range of $F_i(|t^*_1|)$. The expected utility from delegating to agent i would be smaller than its utility from picking policy on its own. Therefore, having an agent with an ideal point within T_1 is an insufficient condition for delegation.

Proposition 2: A principal may choose to delegate to an agent whose initial ideal point is farther away from the principal's than another agent. Assume the principal has chosen to delegate and is choosing whether to delegate to agent i or agent j, where $i < j$. This implies

$$|y_i| < |y_j| < t^*_1$$

The principal will choose to delegate to agent i over agent j iff:

$$\begin{aligned} F_i(|y_i|) - |y_i| + \int_{y_i}^{t^{*2i}} -|y_{id}|dF_i(|y_{id}|) + (1 - F_i(|t^{*2i}|))(v - c - r_i) \\ \geq F_j(|y_j|) - |y_j| + \int_{y_j}^{t^{*2j}} -|y_{jd}|dF_j(|y_{jd}|) + (1 - F_j(|t^{*2j}|))(v - c - r_j) \end{aligned} \quad (2)$$

If $t^{*2i} < t^{*2j}$, these functions can be reexpressed as

$$\begin{aligned} F_i(|y_i|) - |y_i| + \int_{y_i}^{y_j} -|y_{id}|dF_i(|y_{id}|) + \int_{y_j}^{t^{*2i}} -|y_{id}|dF_i(|y_{id}|) + (1 - F_i(|t^{*2i}|))(v - c - r_i) \\ \geq F_i(|y_j|) - |y_j| + \int_{y_j}^{t^{*2i}} -|y_{id}|dF_i(|y_{id}|) + \int_{t^{*2i}}^{t^{*2j}} -|y_{jd}|dF_i(|y_{jd}|) + (1 - F_i(|t^{*2j}|))(v - c - r_j) \end{aligned} \quad (3)$$

Which, when reduced, equals

$$\begin{aligned} F_i(|y_i|) - |y_i| + \int_{y_i}^{y_j} -|y_{id}|dF_i(|y_{id}|) + (1 - F_i(|t^{*2i}|))(v - c - r_i) \\ \geq F_i(|y_j|) - |y_j| + \int_{t^{*2i}}^{t^{*2j}} -|y_{jd}|dF_i(|y_{jd}|) + (1 - F_i(|t^{*2j}|))(v - c - r_j) \end{aligned} \quad (4)$$

Because $t^{*2i} < t^{*2j}$, this is always true. Therefore, the principal chooses to delegate to agent i over agent j.

If $t^*_{2j} < t^*_{2i}$, however, these functions can be reexpressed as

$$\begin{aligned}
F_i(|y_i|) - |y_i| + \int_{y_i}^{y_j} -|y_{id}|dF_i(|y_{id}|) + \int_{y_j}^{t^*_{2j}} -|y_{id}|dF_i(|y_{id}|) + \int_{t^*_{2j}}^{t^*_{2i}} -|y_{id}|dF_i(|y_{id}|) + (1 - F_i(t^*_{2i})) (v - c - r_i) \\
\geq F_i(|y_j|) - |y_j| + \int_{y_j}^{t^*_{2j}} -|y_{jd}|dF_i(|y_{jd}|) + (1 - F_i(t^*_{2j})) (v - c - r_j) \quad (5)
\end{aligned}$$

Which, when reduced, equals

$$\begin{aligned}
F_i(|y_i|) - |y_i| + \int_{y_i}^{y_j} -|y_{id}|dF_i(|y_{id}|) + \int_{t^*_{2j}}^{t^*_{2i}} -|y_{id}|dF_i(|y_{id}|) + (1 - F_i(t^*_{2i})) (v - c - r_i) \\
\geq F_i(|y_j|) - |y_j| + (1 - F_i(t^*_{2j})) (v - c - r_j) \quad (6)
\end{aligned}$$

Unlike in the previous example, this equation is not immediately true or false but depends on the values of $F_i(|y_{id}|)$, $F_j(|y_{jd}|)$, $|y_i|$, $|y_j|$, $|t^*_{2j}|$, and $|t^*_{2i}|$. If there is a substantial difference between $|y_i|$ and $|y_j|$ but only a trivial difference between $|t^*_{2j}|$ and $|t^*_{2i}|$ (as well as $F_i(|x|)$ and $F_j(|x|)$), then the principal will again choose to delegate to agent i. But if there is a substantial difference between $|t^*_{2j}|$ and $|t^*_{2i}|$ but only a trivial difference between $|y_i|$ and $|y_j|$ (as well as $F_i(|x|)$ and $F_j(|x|)$), then the principal will choose to delegate to agent j rather than agent i, even though agent i has the closer initial ideal point. Thus, the choice of delegation now depends on both the initial ideal points of agents i and j but also the costs of reigning each agent in, as well as the cumulative distribution function of agent i.

2 A More General Proof

The game presented in the paper has simplifying assumptions to make it accessible to a broad readership. Most of these simplifying assumptions are not needed in order to arrive at the equilibria and propositions presented. I will now present a more general game derive the same implications from it.

Consider a game with a principal, $i=0$, and a finite set of agents, $i = 1, \dots, k, k \geq 2$. The players are concerned with an n-dimensional Euclidean outcome space, X ; a particular outcome is a vector x . Each player i has a unique ideal point y_i in X . Without loss of generality, assume that the principal's ideal point is a vector containing zeroes. Assume that ideal points for the agents have a strict rank-ordering in terms of their Euclidean distance from the principal's ideal point, with the ideal point of agent i being closer to then principal than agent j where $i < j$. In addition, the ideal point of the delegate, or an agent that has been delegated to, can drift away from the principal. The delegate's new ideal point is y_{id} , where y_i and y_{id} may or may not be equal. Let $F(|y_{id}|)$ be the probability that distance between the principal and the ideal point of the delegate after drift will be equal to $|y_{id}|$ or less.

Outcomes are determined by the policy choices of the players. Policies are located in a m-dimensional policy space P , where m and n can be different; a particular policy is a vector p . Outcomes are a function of a policy p and random shocks ε . The distribution of this shock is assumed to be non-degenerate but otherwise has no assumptions. This means that if a decision-maker without knowing ε makes a policy choice, they make a policy choice under uncertainty. Because ε is a random variable, so too is x ; the distribution of x given policy p is $F(x|p)$. This also implies that $F(x|p)$ is non-degenerate for all p . $F(x|p)$ can be modeled as a function $x=g(p,e)$, where e is a high-dimensional random variable. This allows for flexibility in how shocks affect outcomes. Two assumptions are made about the policy technology. First, each agent has an optimal policy given the uncertainty about the mapping from policies to outcomes (though it does not have to be unique). Second, if a decision-maker observes the disturbance, they can create a policy that yields with certainty any feasible outcome. Bendor and Meiorowitz (2004) call this perfect shock absorption.

Each player's utility for outcome x is given by a common, continuous, and decreasing function of the distance between x and their ideal point y_i . Without loss of generality, assume that the utility for a player that has policy set to their ideal point at the end of the game receives a utility of 0 from that policy. In addition, the principal has cost considerations. If the principal does not delegate and instead picks policy at any point in the game, the principal experiences an additive, non-positive cost c . If the principal decides to delegate and then reasserts control over a delegate and picks a policy, the principal also experiences an additive, non-positive cost r_i , where i is between 1 and m. In short, the principal must pay a cost to reassert control over a policy area that changes depending on which agent is the delegate.

The game proceeds in four stages. First, the principals decides whether to delegate to an agent or to craft policy themselves. If the principal crafts policy themselves, nature determines the shock and therefore the outcome, payoffs are realized and the game ends. If the principal delegates to an agent, in the second stage nature reveals the shock to the delegate and resolves whether the delegate experiences drift. Third, the delegate crafts policy with knowledge of this shock. Finally, the principal decides whether to reassert control and craft a policy or accede to the outcome created by the delegate. Either way, payoffs are realized and the game ends. All of the above information is known to all parties; the only uncertainty in the game is the principal's uncertainty about ε and $\|y_{id}\|$. We assume that if a principal is indifferent between picking a policy and allowing an agent to pick a policy, the principal will choose to delegate.

This game is solved using backwards induction. The principal's utility function is partially determined by the ultimate policy outcome x and whether the principal chooses to delegate and, if so, whether to reassert control. Let $h(\|x - y_i\|)$ be the function that determines each player's utility from a particular outcome x ; assumes $h(\cdot)$ is a strictly decreasing continuous function. The part of the principal's utility function determined by the ultimate policy outcome x when the principal picks a policy at any stage of the game is

$$\int h(\|x\|)dF(x|p) = v$$

The principal will pick a policy p such that the above function is maximized. The principal's utility function from reasserting control from agent i is

$$v - c - r_i$$

It is optimal to delegate iff

$$v - c - r_i \leq h(\|x_i\|)$$

where x_i is the policy created by agent i . This results in the creation of a indifference point t^*_{2i} that equals $h^{-1}(v - c - r_i)$. In short, the principal is indifferent between reasserting control and acceding to a delegate that achieves an outcome at t^*_{2i} . Since $h(\cdot)$ is strictly decreasing and $F(x|p)$ is non-degenerate, t^*_{2i} should exist. Delegation occurs iff $v - c - r_i \leq h(\|x_i\|)$, which is equivalent to $t^*_{2i} \geq \|x_i\|$. This creates a delegation space $T_{2i} := z \in X : t^*_{2i} \geq \|z\|$, which is a high-dimensional, non-empty ball around zero. If the outcome from the delegate's policy choice is within this space, the principal accedes control to the delegate. Otherwise, the principal reasserts policy control a picks a policy in ignorance.

For the agent i who becomes a delegate, they experience drift in their ideal point and receive the new ideal point y_{id} , $\|y_i\| \leq \|y_{id}\|$. If y_{id} is within the delegation space T_{2i} , the delegate picks a policy p s.t. $x=y_{id}$. The principal will not overturn this policy and, by assumption, this maximizes the delegate's utility function. But if y_{id} is outside T_{2i} , then choosing a policy p s.t. $x=y_{id}$ will cause the principal to reassert control and pick a policy under uncertainty. If instead the delegate picks a policy p s.t. $\min_{x \in T_{2i}} \|x - y_{id}\|$, the principal will not reassert control. The delegate's expected utility from this latter outcome is strictly greater than the expected utility received from the outcome chosen at random from the principal's choice of p , regardless of whether this is done by the principal reasserting control and choosing a policy or refusing to delegate and picking a policy. This result means that the delegate picking a policy p s.t. $\min_{x \in T_{2i}} \|x - y_{id}\|$ is a dominant strategy when the delegates ideal point is outside of T_{2i} .

Choosing whether to delegate or not, the principal's utility function for picking a policy is

$$v - c$$

This results in the creation of a indifference point t^*_1 that equals $h^{-1}(v - c)$. Since $h(\cdot)$ is strictly decreasing and $F(x|p)$ is non-degenerate, t^*_1 should exist. This creates a delegation space $T_1 := z \in X : t^*_1 \geq \|z\|$, which is a high-dimensional, non-empty ball around zero. If the principal chooses to delegate, the principal's utility depends on the probability that the agent's ideal point will drift and, if so, how far it will drift away from the principal's ideal point. Implicit in this formulation is that, similar to the later stage of the game, the principal will not delegate to an agent whose initial ideal point is outside T_1 as this course of action is strictly dominated by refusing to delegate and picking a policy under uncertainty.

The principal's utility from delegating to agent i is:

$$F_i(\|y_i\|)h(y_i) + \int_{y_i}^{t^*_{2i}} h(\|y_{id}\|)dF_i(\|y_{id}\|) + (1 - F_i(\|t^*_{2i}\|))(v - c - r_i)$$

The principal will choose to delegate, then, iff

$$v - c \leq F_i(\|y_i\|)h(y_i) + \int_{y_i}^{t^{*2i}} h(\|y_{id}\|)dF_i(\|y_{id}\|) + (1 - F_i(\|t^{*2i}\|))(v - c - r_i)$$

for at least one agent i. If only one agent meets this criteria, then the principal delegates to that agent. If more than one delegate meets this criteria, the principal will choose to delegate to agent i over agent j iff:

$$\begin{aligned} F_i(\|y_i\|)h(y_i) + \int_{y_i}^{t^{*2i}} h(\|y_{id}\|)dF_i(\|y_{id}\|) + (1 - F_i(\|t^{*2i}\|))(v - c - r_i) \\ \geq F_j(\|y_j\|)h(y_j) + \int_{y_j}^{t^{*2j}} h(\|y_{jd}\|)dF_j(\|y_{jd}\|) + (1 - F_j(\|t^{*2j}\|))(v - c - r_j) \end{aligned} \quad (7)$$

Proposition 1: Having an agent with an ideal point within the principal's original toleration set is a necessary but insufficient condition for the principal choosing to delegate to an agent.

As shown earlier, the principal will never delegate to an agent whose initial ideal point is outside of T_1 . Now suppose that agent i's ideal point $\|y_i\|$ is within T_1 but is only β distance from t^{*1} , where β is an arbitrarily small number. Also suppose that $F_i(\|t_1^*\|) = \zeta$, where ζ is a different arbitrarily small number within the range of $F_i(\|t_1^*\|)$. The expected utility from delegating to agent i would be smaller than its utility from picking policy on its own. Therefore, having an agent with an ideal point within T_1 is an insufficient condition for delegation.

Proposition 2: A principal may choose to delegate to an agent whose initial ideal point is farther away from the principal's than another agent. Assume the principal has chosen to delegate and is choosing whether to delegate to agent i or agent j, where $i < j$. This implies

$$\|y_i\| < \|y_j\| < t_1^*$$

The principal will choose to delegate to agent i over agent j iff:

$$\begin{aligned} F_i(\|y_i\|)h(y_i) + \int_{y_i}^{t^{*2i}} h(\|y_{id}\|)dF_i(\|y_{id}\|) + (1 - F_i(\|t^{*2i}\|))(v - c - r_i) \\ \geq F_j(\|y_j\|)h(y_j) + \int_{y_j}^{t^{*2j}} h(\|y_{jd}\|)dF_j(\|y_{jd}\|) + (1 - F_j(\|t^{*2j}\|))(v - c - r_j) \end{aligned} \quad (8)$$

If $t^{*2i} < t^{*2j}$, these functions can be reexpressed as

$$\begin{aligned} F_i(\|y_i\|)h(y_i) + \int_{y_i}^{y_j} h(\|y_{id}\|)dF_i(\|y_{id}\|) + \int_{y_j}^{t^{*2i}} h(\|y_{id}\|)dF_i(\|y_{id}\|) + (1 - F_i(\|t^{*2i}\|))(v - c - r_i) \\ \geq F_i(\|y_j\|)h(y_j) + \int_{y_j}^{t^{*2i}} h(\|y_{id}\|)dF_i(\|y_{id}\|) + \int_{t^{*2i}}^{t^{*2j}} h(\|y_{jd}\|)dF_i(\|y_{jd}\|) + (1 - F_i(\|t^{*2j}\|))(v - c - r_j) \end{aligned} \quad (9)$$

Which, when reduced, equals

$$\begin{aligned} F_i(\|y_i\|)h(y_i) + \int_{y_i}^{y_j} h(\|y_{id}\|)dF_i(\|y_{id}\|) + (1 - F_i(\|t^{*2i}\|))(v - c - r_i) \\ \geq F_i(\|y_j\|)h(y_j) + \int_{t^{*2i}}^{t^{*2j}} h(\|y_{jd}\|)dF_i(\|y_{jd}\|) + (1 - F_i(\|t^{*2j}\|))(v - c - r_j) \end{aligned} \quad (10)$$

Because $t^{*2i} < t^{*2j}$, this is always true. Therefore, the principal chooses to delegate to agent i over agent j.

If $t^{*2j} < t^{*2i}$, however, these functions can be reexpressed as

$$\begin{aligned} F_i(\|y_i\|)h(y_i) + \int_{y_i}^{y_j} h(\|y_{id}\|)dF_i(\|y_{id}\|) + \int_{y_j}^{t^{*2j}} h(\|y_{id}\|)dF_i(\|y_{id}\|) + \int_{t^{*2j}}^{t^{*2i}} h(\|y_{id}\|)dF_i(\|y_{id}\|) + (1 - F_i(\|t^{*2i}\|))(v - c - r_i) \\ \geq F_i(\|y_j\|)h(y_j) + \int_{y_j}^{t^{*2j}} h(\|y_{id}\|)dF_i(\|y_{id}\|) + (1 - F_i(\|t^{*2j}\|))(v - c - r_j) \end{aligned} \quad (11)$$

Which, when reduced, equals

$$F_i(\|y_i\|)h(y_i) + \int_{y_i}^{y_j} h(\|y_{id}\|)dF_i(\|y_{id}\|) + \int_{t_{2j}^*}^{t_{2i}^*} h(\|y_{id}\|)dF_i(\|y_{id}\|) + (1 - F_i(\|t_{2i}^*\|))(v - c - r_i) \\ \geq F_i(\|y_j\|)h(y_j) + (1 - F_i(\|t_{2j}^*\|))(v - c - r_j) \quad (12)$$

Unlike in the previous example, this equation is not immediately true or false but depends on the values of $F_i(\|y_{id}\|)$, $F_j(\|y_{jd}\|)$, $\|y_i\|$, $\|y_j\|$, $\|t_{2j}^*\|$, and $\|t_{2i}^*\|$. If there is a substantial difference between $\|y_i\|$ and $\|y_j\|$ but only a trivial difference between $\|t_{2j}^*\|$ and $\|t_{2i}^*\|$ (as well as $F_i(\|x\|)$ and $F_j(\|x\|)$), then the principal will again choose to delegate to agent i. But if there is a substantial difference between $\|t_{2j}^*\|$ and $\|t_{2i}^*\|$ but only a trivial difference between $\|y_i\|$ and $\|y_j\|$ (as well as $F_i(\|x\|)$ and $F_j(\|x\|)$), then the principal will choose to delegate to agent j rather than agent i, even though agent i has the closer initial ideal point. Thus, the choice of delegation now depends on both the initial ideal points of agents i and j but also the costs of reigning each agent in, as well as the cumulative distribution function of agent i.

3 Justification of Empirical Model

The empirical model presented in the paper is an adequate test of the related theories described. First, it is an adequate test of majoritarian theories of judicial review. Most of these theories do not have explicit empirical predictions or formal models; at best, they recognize both circumstances in which passing the buck is ideal and the spirit of the ally principle (Graber 1993, Salzberger 1993, Whittington 2005). In these circumstances, I feel an interaction between the distance between the Court's and government's ideal points and a measure of the toleration set accurately captures the theories presented in the paper. Rogers (2001) does have a formal model, with both the probability that the government and the Court share preferences and the probability that a statute is appropriately crafted enter in to the decision calculus of the legislature, oftentimes in a multiplicative manner. Therefore, my empirical model would match Rogers' game so long as the measures accurately capture the concepts in the paper, which I believe they do.

The model is also a good test of the strategic interaction in principal-agent models more generally. This is a more difficult sell, as delegation is not a probabilistic decision but rather a binary one. At first glance, this would make it difficult for my model, especially for those measures of the toleration set that are not binary. I argue, however, that the real-world is more accurately captures by imperfect information: player's have expectation's about the ideal points of other players, but due to the uncertainty of the world these ideal points are drawn from nature with some probability distribution. This uncertainty would make my formulation based on probabilities more defensible.