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Independent judicial review: A blessing in disguise

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ABSTRACT

Traditional political-economy wisdom implies that independent judicial review is a commitment device, used by politicians to credibly validate policies they sell to special-interest groups. This study suggests a somewhat opposite thesis, whereby independent judicial review allows politicians to credibly commit to *destabilizing* the validity of such policies. Due to the probable judicial intervention—as a result of the independent judicial review process—the expected policy in force will align more closely with general-interests, insofar as constitutional standards are so oriented. Thus social welfare increases and the politician gains electoral benefits which are otherwise unattainable in equilibrium.

1. Introduction

Why do politicians accommodate independent judicial review, which seemingly restrains their latitude and may even prevent them from implementing their desired policies? Is there some political benefit underlying it and, if so, what is its nature? This paper offers a new political rationalization for independent judicial review.

Early works suggest that independent judicial review is an exogenous product of rigid constitutional provisions. That is, politicians do not choose to submit to this institution; they simply have to. This explanation, however, is insufficient, at least in the long run where any constitutional provision can also be amended (Stephenson, 2003). Furthermore, not all elements that enable independent judicial review are protected by constitutions; some are regulated by laws, executive orders and even tradition (see also Ramseyer, 1994).[1]

Accordingly, it would be wrong to assume that politicians have no influence on any element which may affect the independency of judges or the results of their review.[2] The executive branch sets the budget of the judiciary and the salaries of judges, enforces their verdicts, and in many jurisdictions it can also influence their nomination, promotion and retention (Feld & Voigt, 2003). It is not surprising, therefore, that extensive literature from various disciplines—law, economics and political science—addresses the political foundations of judicial independence.

This work focuses on one such approach, which explains independent judicial review in the context of interest-groups theory. This line of works was pioneered by Landes and Posner (1975), who argue that the way to rationalize an independent judiciary with self-interested politicians is for the courts to be enforcers of bargains between the incumbent and special-interest groups. This has been criticized on several grounds (see, e.g., Boudreaux & Pritchard, 1994; Epstein, 1990; Salzberger, 1993; Stephenson, 2003). In this

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[1] In the U.S., for example, the nomination and retention methods of state supreme court judges is embedded in constitutions, laws, executive orders and in some cases even the practice of prior governors (see the Appendix). Moreover, the fact that a certain nomination and retention method of judges is anchored in a constitution, in itself, does not imply that politicians cannot influence the nomination process. It could be the other way around. For instance, the state constitution may provide that judges shall be nominated in a political process such as partisan elections (as in Alabama, Texas, Illinois and other states). In which case, presumably, constitutional rigidity does not favor judicial independence; rather, it favors political influence.

[2] Even U.S. Supreme Court justices, who enjoy life tenure, salary protection and other structural features that secure their independence (Article III to the U.S Constitution), are not totally immune to political pressure. Aside from being appointed by the President, a fact which in itself implies some political influence over the ideological balance in the Supreme Court, politicians can use different ways to discipline it. President Franklin D. Roosevelt's did try such a way. Roosevelt threatened to pack the court with 6 Justices, in addition to the 9-member team. By that, he aimed to change the Supreme Court's ideological balance so that his New Deal acts, which had been struck down as unconstitutional, would be upheld. The attempt to pack the court failed, but its underlying strategy was successful. Justice Owen Roberts changed his constitutional leaning ("the switch in time that saved nine"). The President's regulatory reform became constitutionally valid.

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work I present an alternative model that allows independent courts to overturn special-interests legislation, yet rational politicians will nonetheless support it, because it enhances their chances for reelection.

Using Grossman and Helpman (1994) lobbying contribution model as baseline, I maintain that independent judicial review induces some normative instability. This is because laws and policies, which are adopted in favor of strong special-interest groups, are reviewed in light of—and may be effectively replaced by—some public-regarding constitutional standard. As a result the prevailing policy better aligns with general-interests instead of special ones. Thus social welfare increases in expected terms, and the politician gains electoral benefits.

Seemingly, one may argue that the politician herself can divert the policy to be more public-regarding, without the mechanism of independent judicial review. This is impossible, however, for a simple reason: the original policy is biased in favor of strong and well-organized special-interest groups in equilibrium. Any deviation by the politician toward a different policy by definition makes her worse off. Only a *probabilistic* deviation can improve her wellbeing. The politician, however, cannot credibly commit to probabilistically canceling her own policy in equilibrium unless independent judicial review exists.

Lastly I show that even if the constitutional standard is endogenous and exposed to pressures by special-interest groups, the effectiveness of such "constitutional lobbying" is lower, relative to day-to-day policies, on account of the rigidity of constitutions (see Boudreaux & Pritchard, 1993). Hence, the constitutional standard would be less biased in favor of special interests in comparison to regular laws, which is all that needed to reinforce the argument of this work.

The remainder is organized as follows. Section 2 conducts a literature review. Section 3 models the interaction between a politician and special-interest groups. Section 4 extends the baseline setup to account for independent judicial review. Section 5 describes the conditions in which independent judicial review is politically beneficial, for either an exogenous or endogenous constitution. Section 6 compares the model to the prominent traditional theory in the field, in light of some stylized facts and previous empirical works. Section 7 concludes.

2. Literature

Economic analysis of the policymaking process suggests that many ordinary policies or laws are profoundly affected by special-interest politics. According to the interest-groups theory, a policy is a commodity which is "produced" by politicians and "procured" by competing organized voters, or lobbies (see Olson, 1965; Peltzman, 1976; Stigler, 1971). Therefore, the better organized an interest group is, and the more cohesive, the more successful are its actions at the expense of weaker, diffuse and less organized groups (see, e.g., Becker, 1983; Grossman and Helpman, 1994; Becker & Mulligan, 2003).

Many law scholars, in line with this argument, believe that this structural flaw should be remedied by a close and less deferential inspection by the judiciary. It is argued that judicial oversight decreases the bias of the political process by inflating the costs of special-interests politics and thus limiting its effectiveness (see Macey, 1986; Sunstein, 1985).[3]

Since such judicial scrutiny is normally guided by constitutional standards, then, this normative insight implicitly assumes that constitutions, as opposed to regular laws and daily policies, are more general interest-regarding.[4]

One famous idea that may explain why in fact constitutions are general interest-regarding is the hypothetical "veil of ignorance". Arguably, subjecting a decision-maker to uncertainty with respect to the distribution of the benefits and burdens of her decision suppresses her self-interest (see Buchanan & Tullock, 1962; Mueller, 1996). Therefore, decisions made behind the "veil" normally take account of the general interest rather than special ones. Since a constitution has long-term effects, and its framers are uncertain whether they will be the beneficiaries or losers of any arrangement, they act as if they are behind such a veil. Thus, while day-to-day policies are indeed subject to self-interest and factional struggle, constitutional choices are taken to be more impartial and inclined toward the general interest (see Vermeule, 2001).[5]

A second theory that characterizes constitutional rules as general interest-regarding relies on the principal-agent paradigm. Accordingly, constitutional institutions are not the product of special interests; to the contrary, they are designed to impede any side bargaining between interest groups and politicians (see, e.g., Epstein, 1990). Examples of such constitutional institutions are the separation of powers and judicial independence (La Porta, Lopez-de-Swelanes, Pop-Eleches & Shleifer, 2004; Macey, 1986; McCubbin & Schwartz, 1984; Sunstein, 1985); executive veto power; the bicameral system (Buchanan & Tullock, 1962; McCormick & Tollison, 1981); and the equal protection and due process clauses (Sunstein, 1985). See also Persson, Roland, and Tabellini (1997), Anderson and Hill (1986) and Sutter (1995) for the constitutional role in reducing agency costs.[6]

Combining these two lines of literature highlights a puzzle. On one hand, day-to-day policies are special interests-regarding; on the other hand, constitutional standards are general interests-regarding. Hence, when the courts conduct judicial review of the

[3] Macey (1986), for example, argues that the proper role of the federal judiciary in the constitutional scheme is to serve as a check on factionalism and legislative excess. On the other hand, Elhauge (1991) maintains that any allegation that the political process is flawed due to the activity of interest groups depends, in fact, upon some moral or normative judgment regarding what the content of the law should be. Hence, the court is not necessarily the correct body to rectify these flaws.

[4] Historic evidence in the U.S. leaves no room for doubt regarding the role of constitutions: "Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. . . By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse or passion, or of interest, adversed to the right of other citizens, or to the permanent and aggregate interests of the community. . . If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. . . When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed." (James Madison, *The Federalist No. 10*, 22.11.1787) And later on: "The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust." (James Madison, *The Federalist No. 57*, 19.2.1788) On the other hand, an opposite concept of constitutionalism altogether considers it the product of special-interest politics, much like ordinary policies. According to this approach, constitutional standards benefit the framers themselves. Beard (1913) conceived this view, Easterbrook (1984) and Sutter (1995) also somewhat support it, and McGuire and Ohsfeldt (1986) argue that this hypothesis is empirically supported.

[5] Rawls (1971) offers a different rationalization for constitutional standards as "veil rules". He argues that the framers of the original position willingly stepped behind such a veil as a moral act to ensure that their decisions would be impartial.

[6] Another clear and simple demonstration of the public-regarding nature of constitutions is the 'general welfare clause' in the Taxing and Spending section (Article I, section 8 of the U.S. constitution), whereby federal tax proceeds should finance public interests, as opposed to the interests of specific sectors in it.