

The Empirical Case for Judicial Review: Judges as Agents and Judges as Trustees

Abstract

Lawyers, constitutional theorists and political philosophers continue to disagree over the merits and legitimacy of judicial review – the power of judges, now recognized by many constitutions around the world, to disallow democratically enacted laws. Borrowing insights from delegation theory, industrial organization as well as empirical accounts of judicial behaviour, this paper assesses two distinct approaches to the justification of judicial review: (1) Following the Principal-Agent Model, judges are given the authority to review and invalidate legislation to enforce the choices of the constitutional framers over recalcitrant legislative majorities. (2) By contrast, under the Trustee Model, judges are given the power of judicial review to act as trustees of the political system: their task is to ensure that the legislative process produces the “best” outcomes or, at least, policies that are Pareto-optimal. While showing how the two models relate to traditional understandings of the role of judges, the paper assesses the extent to which the organizational setting of courts and the judges’ incentive structure ensure that judicial review works as each model prescribes. It is argued that, from an empirical standpoint, justifying judicial review is easier – albeit by no means unproblematic – under the Trustee than under the Principal-Agent Model. The institutional design of most courts invested with the power of judicial review does more to ensure output legitimacy than to ensure that judges confine themselves to the task of enforcing the determinations of the constitutional framers.

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From America to Europe, and from Europe to the rest of the world, judicial review – the practice of allowing judges to reverse the choices of democratically elected officials – has become a defining feature of global constitutionalism. In places as diverse as India, Israel, Canada, the United States, South Africa, France, Germany or Hungary, judges have become major political actors, with judicial review affecting virtually every facet of public and private life (Tate and Vallinder 1995; Hirschl 2004; Ginsburg 2003; Stone Sweet 2000; Volcansek 2001; Vanberg 2005; Sadurski 2005, 2006: 13-18).

Even so, more than two hundred years after *Marbury v. Madison* judicial review remains an eminently contentious practice. Lawyers, constitutional theorists and political philosophers continue to disagree over the merits and legitimacy of judicial review and the proper place of judges in democratic societies. The debate has spawned a vast literature, with countless essays written in defence of the institution (Dworkin 1985, 1986, 1990, 1996; Ackermann 1998; Kelsen 1928, 1931) and new normative theories of judicial review steadily adding to the existing stock (Bickel 1961; Ely 1980; Kumm 2009; Eisgruber 2001; Waluchow 2007). Meanwhile, long on the defensive, the detractors of “legal constitutionalism” are striking back, reinvigorated by the work of scholars such as Jeremy Waldron and Richard Bellamy (Waldron 1999, 2005; Bellamy 2007; see also Tushnet 2000; Kramer 2004).

Rich, the literature on judicial review also stands out for its philosophical sophistication. Yet this literature and the participants in the normative debate in general have failed to appreciate the empirical dimension of the issue. What is claimed in support or in opposition to judicial review rests on assumptions about the nature of judicial decision-

making and the inner workings of judicial institutions that appear largely unwarranted. To be fair, there is increasing recognition that an argument whether pro or contra judicial review needs to be grounded in an account of how real-world judges – not angels in robe – decide cases and interact with their political environment. Aware of this shortcoming in the normative discussion, Jeremy Waldron specifies that his objections to judicial review are premised on a certain understanding of the way in which democratic and judicial institutions work (Waldron 2005). Going one step further, Richard Bellamy's critique of legal constitutionalism makes numerous references to the public law literature in political science and the work of Martin Shapiro (Bellamy 2007: 5). Still, these efforts have fallen short of bridging the gap between the normative literature and empirical research on judicial behaviour. This is regrettable because the failure to take the empirical dimension seriously makes the normative discussion both less meaningful for the public at large and less relevant for policy-makers. As John Ferejohn points out:

[I]t seems impossible to engage in meaningful normative discourse – to criticize a practice or give advice – without some conception of how political institutions either do or could be made to work. Without some conception of the politically possible, normative advice is inherently vulnerable to utopian impulses. (Ferejohn 1995: 192.)

Normative arguments based on romanticized, naïve or idealized representations of political reality are often superficially attractive. Yet they are largely useless if they come without a roadmap detailing how our dirty, messy and unjust institutions are to be turned into the proffered ideal.

In this essay I seek to bring insights from delegation theory, industrial organization and the empirical research on judicial behaviour to bear on the normative debate. I use delegation theory to contrast two distinct approaches to the justification of judicial review that I take to be implicit in the debate:

- 1) Following the Agent Model, judges are given the authority to review and to invalidate legislation to enforce the choices of the constitutional framers over recalcitrant legislative majorities.
- 2) Under the Trustee Model, judges are given the power of judicial review to act as trustees of the political system: their task is to ensure that the legislative process produces the “best” outcome or, at least, Pareto-optimal policy.

These two models correspond to distinct conceptions of the role of judges and each bears a different relation to traditional notions such as constitutionalism, democracy and the rule of law. The central question, however, is whether the courts’ organizational setting and the judges’ incentive structure actually ensure that judicial review work as the accepted model prescribes. As it exists in today’s democracies, judicial review, I contend, is both closer to and easier to justify under the Trustee Model. The institutional design of courts exercising judicial review does more to ensure independence and output legitimacy than to guarantee that constitutional judges act as indefectible agents of the constitutional framers.

Nevertheless, even taking the normative assumptions of the Trustee Model for granted, the case for judicial review is by no means straightforward. If the institution it is to be defended as more than a “sometime thing” (“I like judicial review because I happen to benefit from decision X or Y”), the Trustee approach is fraught with problems. In many countries, the impact of judicial review is not circumscribed to regulatory issues but extends to redistributive policies. In the absence of even remotely intersubjective criteria to evaluate judicial outcomes, a defence of judicial review based on the idea that judges operate as policy-optimizers faces serious difficulties. What is more, even if we consider that the judges’ power to annul legislative enactments should be limited to specific policy areas where we stand to gain most from the institution, the mechanisms that would prevent courts from overstepping their boundaries remain to be invented.

The paper has three sections. The first introduces the basics of delegation theory and sets out the Agent/Trustee distinction in more details. The second section assesses the distance that separates the Agent Model from the reality of judicial practice. The third section does the same for the Trustee Model.

Agents and Trustees: Judicial Review through the Lens of Delegation Theory

First developed in organizational and transaction costs economics from common law concepts of agency (Moe 1985; Thatcher and Stone Sweet 2002: 3), delegation theory is not really a theory as it does not spell out tight propositions or predictions about when, why and how delegation will take place. Rather it is best understood, especially in the context of the present paper, as a heuristic device: it provides an analytical framework to problematize the phenomenon of delegation, the transfer of authority by one party to another.¹

The Principal-Agent Model

The Principal-Agent (P-A) model constitutes undoubtedly delegation theory's most prominent offshoot. It addresses the difficulties that may arise when a party, the principal, hires another, the agent, to act on her behalf. As in employer/employee relations, the agent's preferences and interests may differ from those of the principal. Hence the principal-agent problem: what mechanisms can the principal use or devise to ensure that the agent act in accordance with the terms of the delegation? The analysis of particular delegation schemes thus becomes a study of the various incentives and control mechanisms – the combination of

¹ In some contexts, though, delegation theory and the principal-agent framework take the character of an ontological assumption. A principal-agent relationship is first posited and the task of the empirical scholar is then conceived as that of unraveling the hidden mechanisms by which the principal achieve or fail to control the agent, see e.g. Garrett and Weingast (1993). For a discussion of the problems raised by such use of delegation theory see Alter (2007).

carrot and stick – that principals have at their disposal to control the behaviour of their agents: commissions, profit sharing, re-contracting, threat of dismissal etc... In political science, the P-A approach was first put to use in the United States in studies examining the delegation of legislative authority to regulatory agencies (Pollack 2002). These studies claimed that the power of an agency was a function of the intensity of legislative oversight, with the zone of discretion enjoyed by the technocrats determined by the sum of all delegated powers, minus the sum of all control mechanisms available to the legislators. When legislators have control over its budget, may easily discharge its staff, roll back its jurisdiction and overrule its decisions, an agency, the argument goes, will tend to kowtow to the legislators' preferences. Conversely, when these instruments of control are lacking or difficult to wield, the agency will have opportunities to deviate from the legislators' preferred position. This literature suggests the existence of a trade-off between the benefits of delegation, which requires that agents have enough authority and autonomy to accomplish their mission, and the costs ("agency loss") associated with the risk that the agents deviate from the terms of the act of delegation. For a legislature delegation will be opportune only when the benefits outweigh the costs.

The Trustee Framework

The Trustee framework is an alternative to the P-A model. In common law, a trust is a contract by which a party, the settlor, grants some property or good to be administered by a second party, the trustee, on behalf of a third, the beneficiary.² A typical example is a will trust, whereby a testator designates a trustee for the execution of his will. Other illustrations are pension and charitable trusts. The trustee is not meant to take her cue from the settlor but to act in the beneficiary's "best interest", which does not necessarily coincide with what the

² Note, however, that the settlor and the beneficiary can be one and the same person.

beneficiary sees as her short-term best interest. It is why the crucial issue in setting up a trust are not the available prods that would ensure that the trustee's behaviour is aligned with the preferences of either the settlor or the beneficiary. Instead the crucial issue is the personality of the trustee herself. Trustees are supposed to be wise and prudent – i.e. “trustable” – persons. Fees and other sweeteners may constitute an additional motivation to act in the beneficiary's best interest. But the rationale for entrusting the administration of a property to a trustee rather than to its beneficiary results primarily from a consideration of the trustee's personal reputation. Setting up a trustee makes sense only insofar as the person acting as trustee is held to have a sense of prudence or a degree of wisdom or expertise superior to the beneficiary and even superior to the settlor.

In economics, it has been argued that independent central banks fit a Trustee rather than a P-A model. Independent central banks are entrusted with the power to set interest rates and issue bank regulations for the citizens' best interest. Independence is meant to insulate central bankers not only from the pressure of the settlor, the elected government who set up the bank, but also from the citizenry, as both may be tempted to sacrifice long term interests for short term benefits (Rasmusen 1997). Similarly, in political science, Giandomenico Majone has argued that the European Commission, the European Central Bank and the European Court of Justice are best thought of as trustees rather than as agents of the Member States and their citizens. The remarkable degree of independence enjoyed by EU institutions cannot be explained by the failure of the control mechanisms established by the Member States because their independence is grounded in the very act of delegation, the Treaty provisions that set them up. By enshrining the institutions' authority in European Treaties and by making Treaty amendments difficult to pass, Member State governments have deliberately relinquished the powers to control their course of action (Majone 2005: 64-82, 2001).

As with central banks and regulatory agencies, delegation theory can be applied to courts and judges to problematize the decision of constitution-makers to entrust judges with the power of invalidating the laws enacted by elected officials. The P-A and Trustee framework help contrast two distinct logics of delegation to judicial institutions, which in turn identify two ways of justifying judicial review. Under the P-A approach, the constitutional framers, acting as principals, delegate to judges, acting as agents, the power to invalidate legislative acts to prevent violations of the constitution. The logic of delegation is one of precommitment and rests on three assumptions. First, the constitution-makers want the legislature to comply with the constitutional norms they have enacted. Second, it is believed that legislators may at times be tempted to disregard their constitutional obligations. Third, it is believed (a) that judges are more likely than legislators to have preferences congruent with those of the framers, and/or (b) that the judges' expertise and incentive structure as well as the courts' institutional design make judges more sensitive to and more likely to behave in accordance with the choices made by the constitution-makers. Within the P-A framework, the case for judicial review will turn on the validity of these assumptions. Thus understood, the case for judicial review is one of input legitimacy: if judicial review is legitimate it is not because it produces good or optimal policies, but because it ensures that laws and policies are made in accordance with the rules and principles spelled out in the constitution. What matters is not whether the practice makes citizens richer, freer and happier, but whether it promotes the supremacy of the constitution.

The Trustee Model, by contrast, casts the case for judicial review in terms that are unambiguously consequentialist. The function of a constitutional court is not to enforce the preferences of the members of the constitutional convention who set it up. Nor is it to cater to the will and desires of those who are meant to be the beneficiaries of the constitutional contract, the people. Rather, the function of such a trustee court is to improve the quality of

legislation, to enhance the efficiency of public policies and, if possible, to facilitate the smooth functioning of the political system. This also means that the Trustee Model best combines not with input but with output legitimacy. Under the Trustee Model, defending the practice of judicial review is a matter of showing that there is empirical evidence to back up juridical claims to output legitimacy. As for independent central banks, the case for judicial review will hinge on an empirical demonstration that judicial institutions and those who sit on the bench do make a significant improvement, at least in the long term, on what policy outcomes would be in their absence.

Challenges to the Agent Model: Incomplete Contracts, Multiple Principals and Judicial Activism

The Agent Model captures traditional understandings of the role of courts in a constitutional democracy committed to the rule of law and the separation of powers. Constitutionalism emphasises the notion of limited government. It recommends that the rules constituting the polity and establishing its citizens' basic rights be entrenched to secure the stability of the political system as well as its commitment to individual freedom. Hence, inasmuch as judges are viewed as agents of the constitution-makers, it seems natural to regard judicial review as a means to achieve this end. Similarly, the rule of law stresses the ideal of "government by law" and sees courts as crucial in protecting citizens against arbitrary governmental decisions. Thus granting judges the power to review legislative acts may be seen, from the perspective of the Agent Model, as a means to consolidate the rule of law by subjecting the entire state apparatus to government by law. The Agent Model sits equally well with conventional separation of powers doctrines. Indeed, it is consonant with the idea underlying commonly held conceptions of the separation of powers that the judiciary fulfils a function distinct from the other two branches. Another attractive feature of the Agent Model is that it seems to make judicial review compatible with democracy. After all, if the job of a court

exercising judicial review is only to enforce the rules enacted by the constitution-makers, the fact that judges occasionally disallow the policies of democratically elected legislators should not be so objectionable as long as the rules in question were themselves adopted through a democratic procedure. Freeman, a staunch advocate of judicial review, sums up this argument as follows:

By granting to a non-legislative body that is not electorally accountable the power to review democratically enacted legislation, citizens provide themselves with a means for protecting their sovereignty and independence from the unreasonable exercise of their political rights in legislative processes...By agreeing to judicial review they in effect tie themselves into their unanimous agreement on the equal basic rights that specify their sovereignty. Judicial review is then one way to protect their status as equal citizens (Freeman 1990: 36).

The fitting analogy is with Ulysses who, having decided he should be tied to his mast in order to resist the charms of the sirens, instructs his crew “if I beg you to release me, you must tighten and add to my bonds” (Elster 1984: 36).

Finally, the Agent Model fits the rhetoric judges typically appeal to to justify their rulings. When their decisions come under attack, judges tend to resort to the argument that “they’re only applying the law”. In his opening statement before the Senate Judiciary Committee, John Roberts, subsequently confirmed as Chief Justice of the US Supreme Court, famously compared the role of a judge to that of an umpire in a ball game:

Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a

judge is critical. They make sure everybody plays by the rules. But it is a limited role.

Nobody ever went to a ball game to see the umpire.³

In similar fashion, on its official homepage, the German Federal Constitutional Court insists that, whatever the consequences of its decisions, its function is not “political” but purely “legal”:

The decisions of the Court do have political consequences. This is most evidently the case when the Court declares a statute unconstitutional. However, the Court is not a political body. Its one and only standard of review is the Basic Law. Considerations of political expediency do not play any role for the Court.⁴

Also in line with the Agent Model, constitutional courts often describe themselves as “guardians of the constitution”.⁵

Equating juridical reasoning with syllogistic logic and portraying courts as the mere “mouth of the law”, many Enlightenment thinkers – among them Beccaria, Kant, Hamilton,

³ For similar statements by Spanish and Portuguese constitutional judges see Magalhães (2003).

⁴ See <http://www.bundesverfassungsgericht.de/organisation/aufgaben.html>.

⁵ See for example the French Constitutional Council : <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/a-la-une/septembre-2009-le-conseil-constitutionnel-et-le-patrimoine.45725.html> (“the Constitutional Council, guardian of the Constitution”), and : <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/2009/decisions-par-date/2009/2009-580-dc/communiquede-presse.42667.html> (“guardian of the Constitution’s rights and freedoms”). See also the address by the Council’s President, Jean-Louis Debré: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/discours_interventions/2007/20070919Debre.pdf (“[the Council Council] is thus integrated as guardian of the Constitution to the legislative process”). For similar statements (“*Hüter der Verfassung*”) by the German Federal Constitutional Court see decisions BVerfGE 1, 184 [195]; 40, 88 [93]; as well as decision of 19 September 2007, BVerfG 2 BvF 3/02 [para. 39].

Condorcet and Montesquieu – espoused a legalistic conception of judging akin to the one underlying the Agent Model (La Torre 2002). Perhaps due to the perception that the Enlightenment values on which modern liberal democracies claim to be founded presuppose such a conception of adjudication, most citizens seem to view judicial institutions through the lens of the Agent Model. They do not object to judges invalidating legislation and overturning the policies of their elected representatives for they take it to be a logical consequence of judges impartially upholding the constitutional compact.⁶ Not least because the public at large believes in the Agent Model, politicians and legal scholars are disinclined to endorse a divergent understanding of judicial review. Even when they criticise the courts, politicians seldom question the soundness of the Agent Model as standard for the evaluation of judicial practices. In fact, far from challenging the Agent Model, the detractors of “judicial activism” perpetuate it just as much as the supporters of the judicial cause. Indeed, what they denounce is not the Model’s soundness but the judges’ failure to live up to it. In the United States for example, Republican presidents and candidates for the oval office ritually promise to appoint judges “who closely hew to the law rather than judicial activists...prone to legislate from the bench” (Kmiec 2004: 1471; Stephenson 1999: 181). Although legal scholars are willing to admit that syllogistic thinking is not all there is to judging, they tend to

⁶ Studies examining public attitudes towards the judiciary show that people who are more educated and more attentive to the courts also tend to be more favourably oriented towards them. Interestingly, this line of research reveals that respondents who are more knowledgeable about courts and things judicial are more, not less, likely to subscribe to the mythology of judicial neutrality and objectivity in decision-making. Caldeira suggests that one reason why greater awareness of judicial institutions creates a less realistic view of the nature of judging is that more familiarity with the court system implies more exposure to judicial rhetoric: “to know courts is to love them, because to know them is to be exposed to a series of legitimizing messages focused on the symbols of justice, judicial objectivity and impartiality” (Caldeira 1998: 345).

reject the notion that judges are political actors. In Europe in particular, law professors have little taste for and are often highly suspicious of studies approaching judges as policy-seekers and describing adjudication in explicitly political terms (Dyevre 2008; Stone 1992).

The question, however, is whether the Agent Model constitutes an accurate or at least a plausible representation of reality. What follows is an attempt to demonstrate why it does not.

Constitutions as Incomplete Contracts: Law's Indeterminacy and the Overrepresentation of Indeterminate Cases in Constitutional Litigation

One reason the Agent Model does not constitute an even remotely plausible account of how judicial review functions in practice has to do with the indeterminacy of constitutional language. Of course, not all constitutional norms are indeterminate. Think, for example, of the US Constitution requirement that the person occupying the office of president be at least 35 years of age. Or consider the formula by which the German Basic Law sets the number of votes for large and small *Länder* in the *Bundesrat*⁷ or the provision fixing the number of rounds in the presidential election in the French Constitution. Generally speaking, when constitutional rules have a constitutive character, as opposed to a regulatory one, they tend to be relatively clear and straightforward. The rules that create the office of president, establish courts, confer upon the actions of a group of individuals the meaning of legislative act etc. do not – and for that matter cannot – leave much to ambiguity. So obviously there are some

⁷ Article 52 Basic Law :

Each Land shall have at least three votes; Länder with more than two million inhabitants shall have four, Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes.

constitutional issues for which there is a single right answer: Who is the current president of the United States? Does Italy have a bicameral or a unicameral parliament? Does the present essay count as a decision of the German Federal Constitutional Court? Nevertheless, my point here is that such questions are seldom raised in the course of litigation. Rules that are constitutive in character or possess a clear and definite meaning hardly feature at all in the cases effectively brought before supreme and constitutional tribunals. The rules making up a legal system address all sorts of real or merely potential social conflicts. Yet not all these social conflicts are brought before a judge and those that are appear to be precisely those vis-à-vis which the law is the most indeterminate. Other things being equal, a case that admits of several, equally right answers seems more likely to be brought before a court and to make it to highest rung of the judicial hierarchy than a clear, straightforward case.

The reason it is so is because the decision to file a lawsuit is determined by several parameters. The litigant has to weigh the probable gain from a favourable ruling against the potential cost in time, money, effort and reputation associated with a defeat. So, to the extent that a clear and unambiguous rule may indicate high probability of a favourable or, on the contrary, of an unfavourable ruling, the degree of determinacy of the law is likely to affect a litigant's cost-benefit analysis and, therefore, her decision to initiate legal action. As long as courts are expected to uphold the law in cases where it is clear and unequivocal, litigants who expect to lose will have an incentive to renounce lodging a lawsuit and to offer a settlement when the adverse party threatens to bring the matter before a judge.

Figure 1 about here

As suggested by Figure 1, considering all possible social disputes and not just the cases brought before a tribunal, it is quite possible that there is overall more clear cases – i.e. social disputes vis-à-vis which the law is determinate – than indeterminate ones. Yet considering

only the cases actually brought before the courts the share of indeterminate cases seems much higher and more so as we go up the court hierarchy. Attorneys together with first instance and appeal judges seem to operate as filters, winnowing the hard cases from the easy ones. To be sure, not all litigants are legal experts and many may wrongly believe that the law is on their side when in fact it clearly is not. But a visit to a lawyer's office will usually suffice to dissuade them from bringing a case certain to fail. Occasionally a litigant will choose to ignore her lawyer's advice or will be drawn before the courts to face a sure defeat because she did not expect that the other party would have the resource to file a lawsuit. So, from time to time clear cases will manage to seep through the first filter and reach first instance tribunals. Still, as it becomes clear that the judges will stick to the letter of the law, few easy cases will be appealed and still fewer will make it to the topmost courts. This is why we should expect to find on the docket of supreme and constitutional courts precisely the cases vis-à-vis which the law is the most indeterminate.⁸

Figures reveal that over the 1973-1995 period the Constitutional Council invoked the principle of equality as a basis for its decision in 39 % of its rulings (Melin-Soucramanien 1997: 17). Equality, the “fundamental principles recognized by the laws of the Republic” and other similarly indeterminate constitutional provisions are the most frequent legal grounds in decisions pronouncing the unconstitutionality of a statute.⁹ Likewise, in Germany the most

⁸ This argument was made early on by American legal realists who argued that adjudication made legal rules appear more indeterminate than they really are because clear cases are settled outside the court system (Leiter 1997: 273; Llewellyn 1931: 1239; Radin 1942: 1271).

⁹ *Recueil de jurisprudence constitutionnelle*, Paris : Litec, 1994, p.4. These figures suggest that the argument from the overrepresentation of indeterminate cases in litigation applies equally well in the context of abstract review where only politicians have the right to challenge legislative acts. In fact the argument may be even stronger in this context. Indeed, for the opposition the cost of a referral, even an unsuccessful one, is relatively

frequently recurring constitutional clause in the FCC's jurisprudence turns out to be Article 2 (1) of the Basic Law, which provides a right to "the free development of one's personality" (Dyevre 2008). Similar to France, the equality clause is the most popular constitutional provision in litigation before the Constitutional Court of Austria (Jakab 2007: 288). In the US, the status of most frequently invoked constitutional provision is assumed by the Fourteenth Amendment's due process clause, followed by its equal protection guaranty (Schauer 1985).

Every time a court strikes down a law, the alleged justification is virtually always that the legislature has violated the constitution. Yet these figures suggest that what the court is really doing most of the time is substituting one linguistically possible reading of the constitution, its own, for another linguistically possible reading of the constitution, the legislature's. In practice, judicial review is not about ensuring compliance with the decisions of the framers. If the constitution is seen as a contract, then the job of a constitutional court is not to guarantee that its terms are respected. Instead, it seems more accurate to say that its job is to put flesh on the contract's incomplete clauses.

Judges Are Policy-Seekers

The Agent Model seems to presuppose that judging is essentially about legal expertise and that ideology and attitudes do little to explain judicial behaviour. However, there is compelling evidence that this is wrong and that judicial outcomes vary significantly depending on who is sitting on the bench.

low and the benefits potentially large in case of victory. So, knowing the opposition will have an incentive to refer to the constitutional court any statute contradicting the letter of the constitution, the legislative majority will be careful to stay within the limits of what the constitution clearly forbids.

The effect of ideology on judicial outcomes is well established by research on the US Supreme Court. Using newspaper editorials to rank judges on liberal-conservative scale, Spaeth and Segal find a strong correlation between the attitudes and the votes on the merits of Supreme Court Justices. On this measure, ideology alone explains 57 per cent of the variance in the votes cast (Spaeth and Segal 2002). Recent studies have shown that the preferences of individual judges constitute a good predictor of judicial outcomes on courts outside the United States too. Taking the political orientation of the appointing authority as proxy for the judges' attitudes, research on the Portuguese and Spanish constitutional courts (Magalhães 2003), the French Constitutional Council and the German Federal Constitutional Court (Hönnige 2007, 2009; Brouard 2009; Frank 2009) as well as the European Court of Human Rights (Voten 2006, 2008) has found significant correlations between ideology and judicial decision-making. Christoph Hönnige demonstrates that the probability of the Constitutional Council annulling a law goes down when the number of judges appointed by the legislative majority goes up. For instance, when five judges (out of nine) have been appointed by the opposition and the odds that the Council annuls a law are one to one (i.e. a probability of 50%) the legislative majority may lower the odds to one to two (33% probability) by appointing one more judge to secure a 5:4 majority (Hönnige 2009). In Germany, the Federal Constitutional Court is a widely revered institution and questions regarding possible political bias among its judges are rarely raised. But a close examination of the Court's output suggests a different story. Of the 31 dissenting opinions filed between 1974 and 2002 in abstract review cases, 24 (77%) were authored by a judge appointed by the political party losing the case. The remaining seven were filed by a "mixed" pair of judges, with one appointed by the victorious and one by the losing political party (Hönnige 2007: 201). What makes the German Court look impartial is not its members' supposedly exclusive preoccupation with the law. Rather, it is the requirement of a 5:3 supermajority to strike

down laws combined with an agreed practice of the two main parties – the Christian-Democrats and the Social-Democrats – following which each party gets to select half the 16 judges sitting on the Court's two Senates. Only between 1975-1976 in the first Senate and 1976-1987 in the second did the Court's composition depart from this practice, with the Christian-Democrats enjoying a 5:3 majority. Yet it is precisely between 1975 and 1982, when Liberal and Social-Democrats were in power under the leadership of Chancellor Helmut Schmidt, that we observe the Court's highest annulment rates. Regressing the probability of the Court finding for the legislative majority on the Court's ideological composition reveals a strong correlation. If the probability that a non-convergent Court – that is a Court in which the opposition holds a majority – finds against the legislative majority is 25% (one to three), it drops to 5% (one to 19) with a convergent Court (Hönnige 2007).

The judicial politics literature implies that a change in judicial personnel may often produce a change in judicial outcomes. In a sense this is not a very surprising finding. Indeed, French and American Presidents, Spanish and German parliamentary groups and those holding the power to appoint judges in general, all seek to promote – at least so is the impression – candidates who share their policy-preferences on some key or salient issue. Why would they care about appointing judges if policy-preferences did not play any role in adjudication? What matters, however, from the standpoint of the Agent Model is that judicial drift appears to be a real possibility and not just a hypothetical scenario. As preferences vary from judge to judge and over time, there is no guaranty that a constitutional court's agenda will coincide with that of the framers.

Divisions among Multiple Principals: Constitutional Rigidity and Judicial Activism

Can constitution-makers do anything to prevent judicial drift? Ex ante procedures like having judicial appointees take an oath of allegiance to the constitution do not look very effective. In

fact, to suggest, as part of a defence of judicial review, that a mere oath to observe the constitution will suffice to dissuade judges from deviating from the framers' position seems self-defeating. Indeed, if an oath of office were enough to ensure that officials behave in accordance with constitutional norms, judicial review would be little more than an expensive superfluity. For compliance with the constitution could be achieved equally well and at a lesser cost by requiring legislators and cabinet members – as they are in some countries¹⁰ – to take an oath of allegiance to the constitutional compact. In addition, because the public tends to believe that the law and the constitution are what the courts say they are (Caldeira 1998: 345), the argument could be made that such oaths of office are even less likely to have an effect on the behaviour of judicial officials than on that of other state officials.

On the face of things, ex post procedures offer a more effective means to rein in the judges. The ex post control mechanisms constitution-makers have at their disposal resemble those available to legislators overseeing regulatory agencies. Sitting as constitution-amending power, they can, in principle, respond to any ruling they dislike by passing an amendment overriding the decision, rolling back the court's jurisdiction or lowering the judges' salary. Moreover, we should expect the mere threat to change the constitution to feed back on judicial decision-making, deterring judges from straying in the first place.

¹⁰ E.g. US Constitution, Article VI clause 3:

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution;

The oath of office for the President is specified in Article II, Section 1:

I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.

However, the effectiveness of the mechanism presupposes that the threat is a credible one and that those wielding it may really put it to execution. Yet constitutions are often difficult to revise. When modifications to the constitutional charter are subject to prior approval by a supermajority in both the lower and the upper chamber of the legislature and ratification by popular referendum, no amendment may be successfully enacted unless there is a broad consensus on the necessity of constitutional change. Generally speaking, the more rigid the constitution, the more actors will be in position to block an attempt to override the courts. This clearly favours judges. A more rigid constitution means they will have less reason to worry about override amendments and will have more room to pursue their own policy agenda. Figure 2 helps grasp the logic of the argument.

Figure 2 about here

Figure 2 depicts a policy space in which the actors have preferences along two dimensions – here decentralisation and property rights, two issues commonly debated in constitutional conventions. Each actor is assumed to prefer an outcome closer to her ideal-point to an outcome further from her ideal-point. Here three political parties – A, B and C – agree on constitutional compromise X which the Court is then responsible to apply to concrete cases. In case the Court moves away from X the three parties may pass a constitutional amendment by unanimous approval. Yet we can see that all outcomes within the A-B-C triangle are Pareto-optimal. This means that any change to an outcome within the triangle will necessarily make one of the parties less well off. So if the Court moves the outcome to Y, which is closer to its ideal-point, party C will want to push for an override amendment, since Y is farther from its ideal-point than X ($Y < X$). But A and B will have an incentive to oppose an override amendment because Y is closer to their preferred position than X ($Y > X$). The argument can be pushed further. The Court does not even need to parties on its side. The

support of only one part will be enough as long as it is better off with the judicially enacted outcome.

More constitutional rigidity means more actors involved in the constitution-amending process, which in turn means a higher probability that an actor will prefer the judicial outcome to any override amendment proposed. Put in the language of delegation theory, a more rigid constitution means multiple principals will be involved in monitoring the activity of judicial agents. So whenever re-contracting is contemplated in response to an instance of judicial drift disagreement is more likely with the effect that the agents are effectively protected from punishment.

This argument is buttressed by empirical evidence showing a correlation between constitutional rigidity and judicial activism. Using data from Lijphart (1999), Figure 3 shows the relationship between constitutional rigidity and judicial activism in 35 countries.

Figure 3 about here

These measures are not indisputable. One may be surprised for example to find Israel's judiciary among the least activist or the French constitution as so flexible in comparison with the German one. However, the correlation is preserved when we use measures developed by other authors, such as Lutz (1994) and Laporta et al. (2003) for constitutional rigidity and Cooter and Ginsburg (1998) for judicial activism.

Judges Simply Don't Care for the Framers: the Living Constitution, Balancing and the Demise of Originalist Theories of Interpretation

If judges really cared about the framers' preferences, then they should follow something resembling an originalist theory of interpretation. It is not quite what we see in practice. Many important constitutional decisions appear to fly in the face of the original

understanding of the provision they purport to apply. The Due Process Clauses of the Fifth and Fourteenth Amendment were meant to apply exclusively to matters of procedure (Harrison 1998; Easterbrook 1982). Yet countless are the decisions where the Supreme Court applies them to matters of substance. The oxymoron “substantive due process” has become one of the Court’s most salient doctrines (Ely 1980). Likewise, the reference to the Declaration of the Rights of Man and to the Preamble of the 1946 Constitution in the Preamble of the Constitution of the Fifth Republic was thought of as a reverential homage carrying no legal weight. But the Constitutional Council turned it into hard law, with the 1946 Preamble and the Declaration serving as justification for the Council’s activist jurisprudence (Stone 1992).¹¹

Generally speaking, courts have favoured loose constructions and flexible standards over rigid doctrines and strict interpretive regimes. The dominant paradigm of global constitutionalism is the “living constitution” rather than the originalist approach defended by Justice Antonin Scalia in the United States (Scalia 1997). In the same vein, the tendency of judges to rely on balancing and means/ends standards like proportionality to frame constitutional issues has made constitutional law even more indeterminate than it already was (Stone Sweet and Matthews 2008).

What Kind of Institutional Design Would the Agent Model Require?

¹¹ That cases invoking the Preamble of the French Constitution or the application of the Fourteenth Amendment Due Process Clause to matters of substance made to it, respectively, to the Constitutional Council and to the Supreme Court may seem to run counter to what we said above about indeterminacy and the under-representation of clear cases in litigation. However, this fact is perfectly compatible with the theory set out above because the belief that clear and straightforward legal norms constitute a reliable indication of how a particular issue will be adjudicated is only the default assumption of litigants and courts can effectively cast off that assumption.

Where judicial review comes closest to the Agent Model is perhaps in Scandinavia. The Finnish and Swedish Constitutions spell out a “clear mistake rule” whereby courts have the power to set aside legislative acts but only in case of “evident” or “manifest” contradiction with the constitution.¹² So far the courts have not evinced any intent to broaden or loosen the definition of these terms and a clear case of constitutional violation by the legislature has yet to be identified (Lijphart 1999; Ferreres Comella 2004: 1732). So it might be said that the beauty of judicial review Scandinavian style is that it is never exercised.

Why Swedish and Finnish judges have carefully observed the clear mistake rule and resisted the siren calls of judicial activism is a question that still waits for an empirical answer. A tentative explanation for Sweden would point to its strongly majoritarian parliamentary system as well as to its Constitution’s relatively flexible revision procedure. Judges tend to be less activist where political power is less fragmented (Dyevre 2010). The electoral and parliamentary dominance of the Social Democratic Party during most of Sweden’s post-war history may have persuaded judges they had to count with override constitutional amendments as a real possibility. For both countries, however, political culture is the explanation that most naturally offers itself. Accordingly what holds back Scandinavian

¹² Section 106 of the Finnish Constitution of 11 June 1999:

If, in a matter being tried by a court of law, the application of an Act turns out to be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.

Chapter 11, Article 14 of the Instrument of Government:

If a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision shall not be applied. If the provision has been approved by the Riksdag or by the Government, however, it shall be waived only if the error is manifest.

judges from activist impulses is a widespread and deep-seated scepticism towards non-majoritarian institutions.

Nevertheless, even if we take this to be true and we accept that the Finnish and Swedish systems fit the Agent Model, it still fails to provide justification for judicial review as it exists in countries like Germany, India, France or the United States. For these we need another model.

Strengths and Weaknesses of the Trustee Model: Judges as Policy-Optimizers

At first blush, the Trustee Model departs from conventional justifications for granting judges the power to invalidate legislation. That judges are sometimes better qualified than elected officials to decide what is best for society is not an argument that is often made explicitly in public debates. Yet many proponents of judicial review implicitly admit that it is the real rationale for the institution. They are fully aware of the indeterminacy of constitutional norms. Miguel Herrero de Miñón, one of the Founding Fathers of the Spanish post-Francoist Constitution, observed that the Spanish constitution-makers had deliberately kept ambiguous a number of constitutional provisions on highly contentious issues, thus leaving their resolution to the newly constituted powers:

[W]ith this Constitution, it is possible to legalize abortion or to forbid it; to keep the death penalty or to abolish it; (...) there is only an open door for divorce, but its full recognition through a future law cannot be squarely pinned down as unconstitutional¹³

That what matters is ultimately the courts' output, not the will of the framers, is also implied by the doctrines that see the Constitution as a "living" document or a "living tree" which the

¹³ Quoted by Magalhães (2003).

judges are in charge of developing according to society's changing needs and values. The Canadian Supreme Court has made its adherence to this judicial philosophy explicit:

The “frozen concepts” reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.¹⁴

Writing for the Court in the case *Re B.C. Motor Vehicle Act*, Justice Antonio Lamer made no bones that this approach to adjudication entailed a complete disregard for the intent of the framers of the Canadian bill of rights, the Canadian Charter of Rights and Freedom:

If the newly planted “living tree” which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth.¹⁵

Because most ordinary citizens, as seen above, still believe in the mythology of judging, judicial bodies like the Canadian Supreme Court continue to describe their decision-making practice in terms of “interpretation” and “protecting rights”. Judges, in general, remain reluctant to come out as policy-makers. But many scholars are more candid. Richard Fallon and Mattias Kumm, for example, defend the practice of judicial review, but not on the grounds that courts are guardians of the constitution protecting constitutional rights and freedoms against corrupt and oppressive legislators. Kumm readily admits that constitutional rights are extremely vague and that proportionality analysis, as used in constitutional adjudication around the world, expose courts as policy-makers (Kumm 2009). Fallon also accepts that the case for judicial review cannot rest on an artificial dichotomy between law

¹⁴ *Re Same-Sex Marriage*, [2004] 3 S.C.R. 698.

¹⁵ [1985] 2 S.C.R. 486, para. 53.

and politics (Fallon 2007). More importantly, the arguments they advance in support of the practice are ultimately institutional and outcome-based. In short, they argue that judicial review of legislation is legitimate because the design of judicial bodies and the way in which courts interact with their political environment help improve policy outcomes.

Arguments along those lines fit the Trustee Model better than the Agent Model. Yet they all raise the same basic question: Why should we think that giving courts the right to amend and veto legislation will improve public welfare? As this section will demonstrate, from the standpoint of the Trustee Model, the case for judicial review is to a large extent similar to the one for independent central banks. Put in a nutshell, if society is better off with judicial review it is because judges enjoy institutional guarantees of independence that make them less inclined to pander to public opinion and more apt to make wise choices than elected officials. Now there are good reasons, empirical as well as theoretical, to think that institutional design allows courts to make decisions they would not make if they were subject to the same constraints as the other branches of power. But the claim that judges make wiser choices is more difficult to substantiate. To some extent, the problem is the same as for independent central banks. However, it is magnified by the range and diversity of issues that courts decide and have *de facto* judicialized.

Acting as Autonomous Trustees: The Parameters of Judicial Independence

Judicial independence can be understood both as the independence of the individual judge and as independence of the court or the judiciary as whole from external influences such as pressures from politicians and the electorate.

Except for a small number of American states, judges are not democratically accountable. They are appointed, not elected, and cannot be removed once in office. High court judges enjoy life tenure (as in the United States) or serve fixed terms. At European

constitutional courts, judges serve an average nine year term. Fixed terms are generally non-renewable, which removes an incentive for the individual judge to try to please her appointing authority as a way of securing re-appointment.¹⁶

No institution is external to society. So the independence of courts is matter of degree. Courts cannot be fully insulated from political pressure. But two factors seem to foster judicial autonomy. One, previously discussed, is constitutional rigidity. When political forces are divided and fragmented, a high level of constitutional rigidity means that courts have fewer reasons to fear the wrath of legislative majorities when they make decisions on controversial issues. The other factor, less intuitively, is public support. At first glance, it would seem that judicial autonomy cannot depend on public support, because, if so, judges would have an incentive to pander to the public. But this is not so. Research on the legitimacy of national high courts shows that citizens do not automatically withdraw their support when their courts make decisions they dislike. The explanation lies in the difference between specific support, support for particular decisions, and diffuse support, support for the institution. Unpopular decisions will enjoy low specific support without affecting diffuse support. As demonstrated by Vanberg (2005), this may even protect the courts from legislators who would otherwise be in position to reverse their decisions. The public may perceive a constitutional amendment seeking to override a ruling, even an unpopular one, as

¹⁶ There is empirical evidence that term renewability does influence judicial behaviour, see Magalhães (2003) for the Portuguese Constitutional Court and Voeten (2006) for the European Court of Human Rights. In the absence of separate opinions, however, term renewability does not seem to affect the conduct of judicial appointees. This applies for the European Court of Justice (ECJ). Given the secrecy surrounding deliberation, national governments, who are responsible for appointing ECJ judges, are not in position to use their right to refuse renewal as an instrument of control.

an attempt to undermine a legitimate institution. So, to avoid a backlash and its potential electoral cost, politicians may prefer to leave the contentious decision undisturbed.

Canada offers a prime example of how public support can make for the absence of political fragmentation and constitutional rigidity. Section 33 of the Canadian Charter of Rights and Freedoms, the so-called “notwithstanding clause”, allows the federal legislature or the legislature of a province to override judicial interpretations of the Charter by simple majority. Hence, given the strongly majoritarian outlook of Canada’s Westminster-style parliamentary democracy, one would expect the judiciary to be highly deferent towards the legislative branch. However, the role played by the Supreme Court in Canadian politics belies this prediction. The public’s perception of legislative overrides as undue interferences with judicial independence and the rule of law has turned the notwithstanding clause into something of a dead letter, thus allowing the Canadian Supreme Court to pursue an activist policy-agenda (Leishman 2006: 249-72).

To be sure, the public’s reservoir of goodwill is not unlimited. If courts make too many unpopular decisions, there is a point at which specific support will begin to affect diffuse support. That is what apparently happened in Germany in the 1990s. The Federal Constitutional Court saw its popularity drop significantly in the mid-1990s in the wake of the controversy sparked by a series of rulings on sensitive issues. To contain the backlash, the Karlsruhe judges kept a low profile and exerted more restraint until the institutional support recovered and the Court could be restored to its status as post-war Germany most respected political institution (Vanberg 2005). Still, strong diffuse support allows judges to go away with unpopular decisions every once in a while.

In most panegyric moments, the rhetoric of the rule of law portrays judges as benevolent and virtuous decision-makers endowed with semi-divine wisdom. Yet, at least at

the theoretical level, there is no need to assume that people in robe are somehow superior beings to believe that they can sometimes make more prudent choices than other officials. Maskin and Tirole build a formal model to compare the welfare effect of decision-making through direct democracy, elected officials and judges, but do not assume that judges have superior expertise compared to elected officials. All state officials are specialists in public decision-making. As such they are more likely to have the experience and information to make wise choices. What makes judges different is that they have much less incentive to pander to the public when they know that a particular action, though popular, is wrong. As for central banks, independence gives them a longer time-horizon than politicians who periodically face elections. Thus, the argument goes, they are less likely to postpone decisions that are unpopular but necessary or to sacrifice long-term benefits for reasons of political expediency. More specifically, when the public knows little about a particular issue but elected officials are primarily actuated by the desire to stay in office, judicial power may outperform representative democracy (Maskin and Tirole 2004).

Congruent Courts: Appointing Mainstream Judges

In the model developed by Maskin and Tirole, however, judicial power outperforms representative only to the extent that judges are not ideologically out of step with the citizens they are meant to serve. This points out the downside of decision-making by unaccountable officials: if a judge turns out to have a policy-agenda diametrically opposed to the preferences and values of the rest of society, there is no way to screen her out, at least until the end of her tenure (which often means until her death on the US Supreme Court). However, the impossibility to weed out noncongruent judges ex post is mitigated by the appointment procedure. The power to appoint supreme and constitutional court judges generally belongs

to the legislature and the head of the executive.¹⁷ Giving elected representative an input in the selection of candidates ensures that judicial appointees are not too far from the ideological mainstream. In Europe, the absence of life-tenure also reduces the risk that discrepancy may result from the passage of time.

Pursuing Efficiency: Regulatory and Redistributive Policy

For courts to operate as policy-optimizers presupposes that policies can be optimized.

Optimization cannot mean that courts simply redistribute wealth, rights and power from one individual or group of individuals to another. Rather, it has to mean that courts improve what everyone gets. This suggests that the Trustee Model works better for regulatory than for redistributive policies. As Figure 4 illustrates, regulatory policies can and are supposed to produce outcomes that benefit everyone, whereas redistributive policies necessarily produce winners and losers.

Figure 4 about here

A policy moving the outcome from X to Z is an efficient regulatory policy because it improves the welfare of both individual A and B. It is Pareto-optimal in that it improves the overall welfare without making anyone less well off. By contrast, a policy moving the outcome from X to Y is not a regulatory but a redistributive policy. Its effect is to transfer wealth from B to A.

With respect to regulatory issues, the claim that independence allows judges to make wiser decisions than elected officials takes on a more straightforward meaning. It means that independence makes courts more likely to produce Pareto-optimal outcomes. This argument

¹⁷ In defending judicial review and the creation of a constitutional court, Kelsen had already argued that constitutional judges should be appointed by members of parliaments.

mirrors the one for independent central banks. Politicians running for re-election, economists say, may be tempted to exploit a possible short-term trade-off between inflation and unemployment, even though the long-term effect of doing so is that unemployment returns to its initial level and inflation is higher. So, since low inflation benefits everyone in the long-term, a country will make itself better off by entrusting its monetary policy to an independent central bank.

There are two problems with this way of justifying judicial review, however. First, constitutional courts do not deal exclusively with regulatory issues. Many questions that judges typically grapple with at the constitutional level involve trade-offs which cannot be addressed without producing winners and losers. Liberty versus security in anti-terrorist legislation is a prime example. Making legislation Pareto-efficient in this context would mean that judges do not go beyond ensuring that the legislature has used the least-restrictive means to achieve its policy goal. Yet courts often go beyond least restrictive means tests, in effect deciding which goal should have priority and which should be sacrificed. This most obviously comes to the fore in cases where judges invoke proportionality (or strict scrutiny in the American context). Sometimes called “proportionality in the strict sense”, the last prong of the proportionality test has judges engaging in an act of balancing. But there are no intersubjective criteria by which this act of balancing could be called an optimization. In its influential work on rights adjudication, Robert Alexy proposes a “law of balancing”: when two principles or policies conflict, the greater the non-satisfaction of one principle, the greater must be the satisfaction of the other (Alexy 2003: 102). Yet Alexy does not offer anything resembling an intersubjective metric to establish whether the satisfaction of principle A is greater than the non-satisfaction of principle B.

Second, the empirical evidence on the effect of independence on efficiency is mixed. Taking, again, the example of central banks, making them independent appears to have no

measurable impact on real economic performances (Alesina and Summers 1993). Even in what is supposed to be their central mission, fighting inflation, their record is not as convincing as one would expect from the theoretical argument. And some argue that the correlation between independent central banks and low interest is spurious (Berman and McNamara 1999).

These elements do not kill the case for judicial review. Nonetheless, they show that even under the Trustee Model the case is an uneasy one.

Conclusion: Democracy and Distrust(ce)

The empirical case for judicial review is stronger, though by no means unequivocal, under the Trustee than the Agent Model. However, the Trustee Model raises normative issues that could not be addressed in this paper. The most important one is its relation with democracy. Some deny that trustee-like institutions are antidemocratic because they are democratically unaccountable. Giandomenico Majone, for example, denies that EU institutions, like the Commission and the Court of Justice, suffer from a democratic deficit because these institutions, he argues, essentially deal with regulatory matters. In his view, democratic legitimacy is a requirement that only applies to redistributive legislation (Majone 1996). On the other side of the spectrum, some say the “dirty little secret” behind much of the legal scholarship supporting judicial review is “a discomfort with democracy” (Unger 1996: 72-3). Distrust of democratic institutions, however, has a long pedigree. Tocqueville famously questioned America’s ability to conduct a successful foreign policy because of the tendency of a democracy to “obey its feelings rather than its calculations and to abandon a long matured plan to satisfy a momentary passion”.

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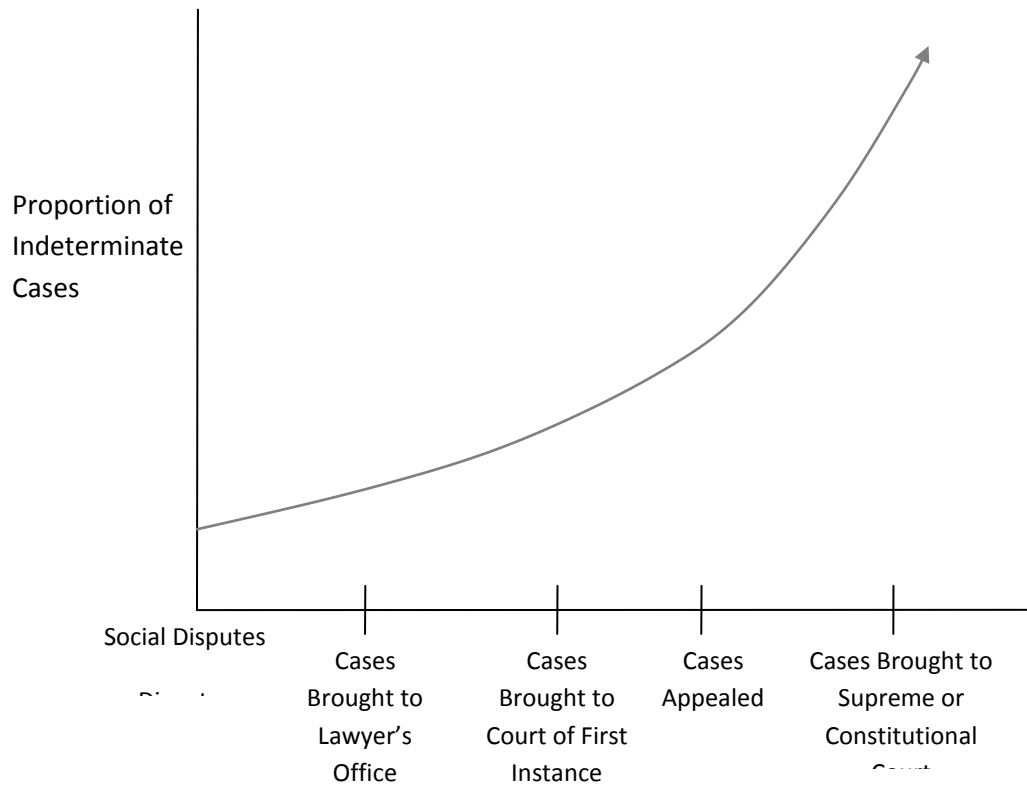
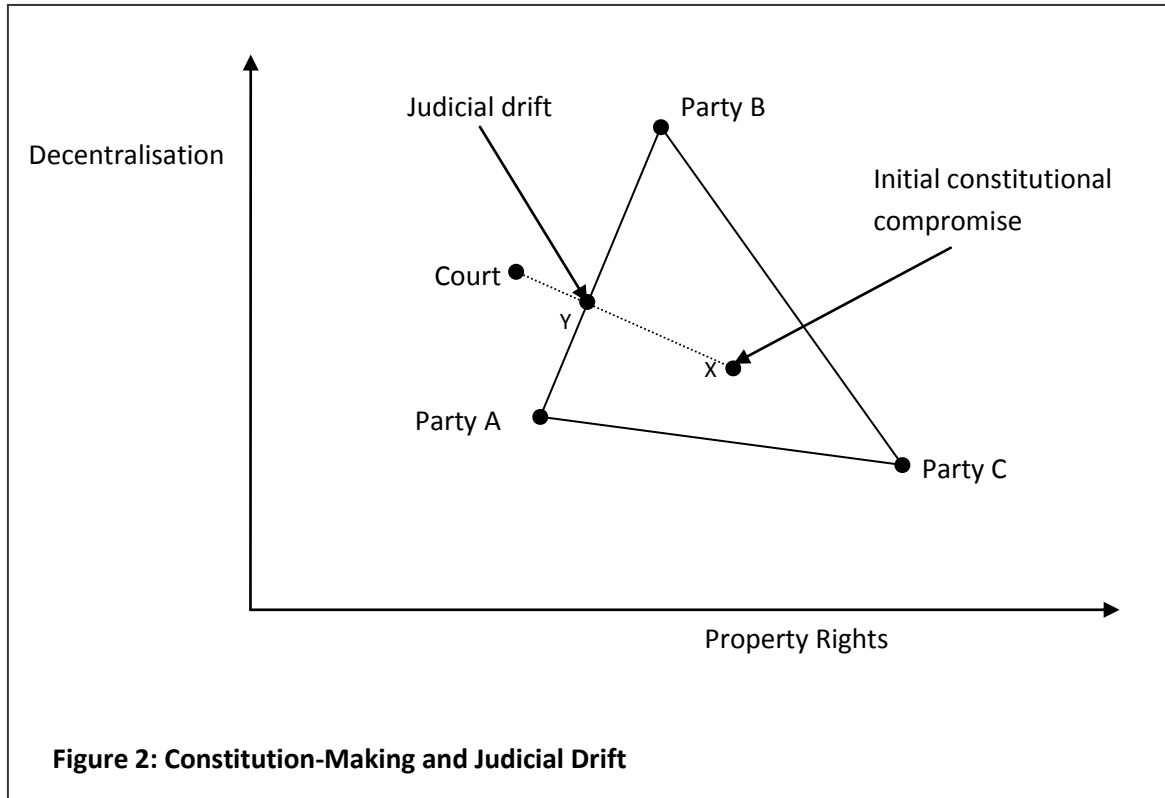


Figure 1: Litigation and the Indeterminacy of Legal Rules



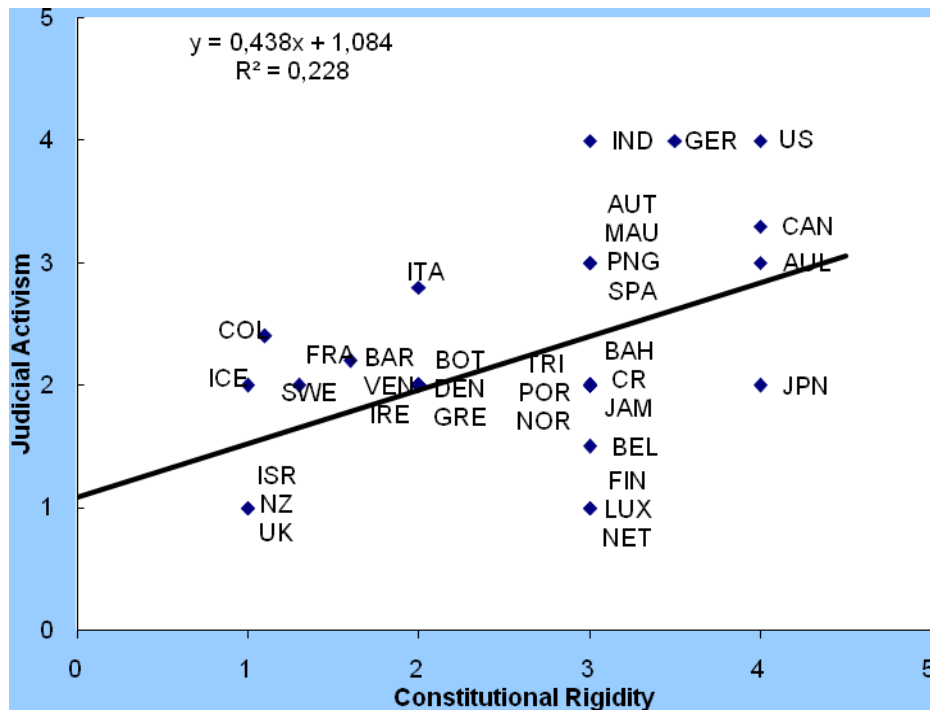


Figure 3: Constitutional Rigidity and Judicial Activism in 35 Democracies

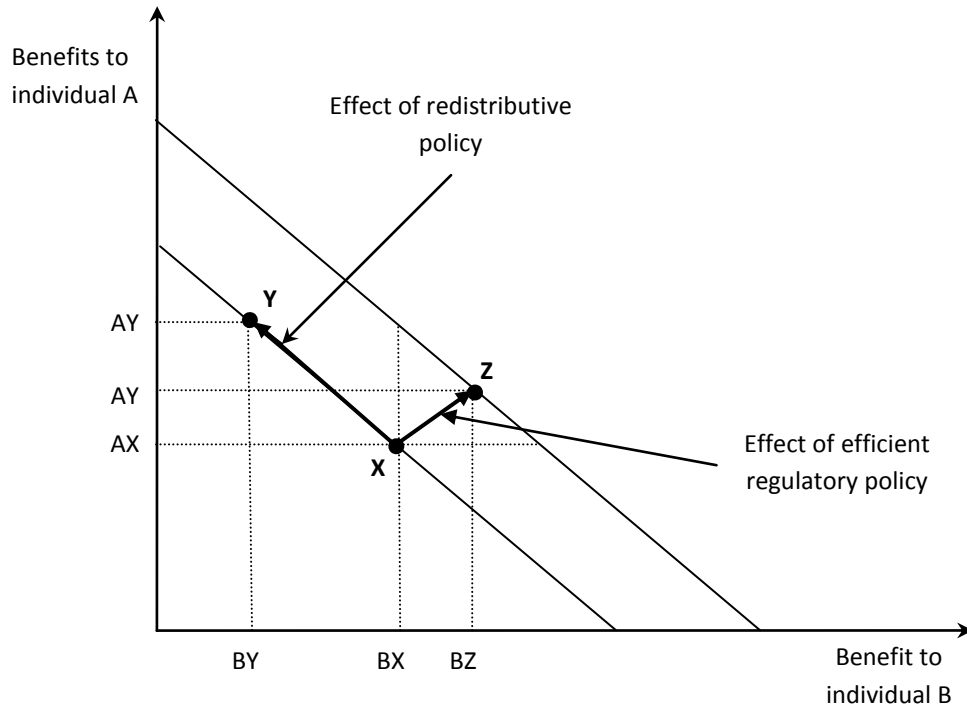


Figure 4: Redistributive and Efficiency-Oriented Policies

M. RADIN, "In Defense of an Unsystematic Science of Law", *Yale Law Journal* 51 (1942), p.1269-1279.