

THE POLITICS OF JUDICIAL IMPARTIALITY

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Abstract

Empirical evidence in United States supports the theoretical claim that greater awareness of constitutional courts increases their legitimacy, in part because increased exposure to judging produces beliefs in judicial impartiality. Surprisingly, the evidence from abroad is mixed. Why might this be so? I argue that the answer lies in cross-national variation in the incentives for strategic constitutional review. Beliefs about judicial impartiality should be increasingly sensitive to inter-branch politics as awareness increases. Where courts are relatively unconstrained by external political pressures, awareness should be positively associated with beliefs in impartiality; however, where courts are constrained, this relationship may break down. Survey data on support for constitutional courts in the Europe and North America support the argument. This paper suggests implications for the international trend toward increasing judicial transparency. In particular, if constitutional judges are likely to face pressures to engage in strategic review, it is unclear that greater transparency will build judicial legitimacy.

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Introduction

One of the most provocative claims in public law is that as people become more familiar with their courts they are increasingly likely to believe in their legitimacy (Casey 1974; Gibson, Caldeira and Baird 1998). A standard explanation is that as people attend to their courts, they become exposed to and convinced by judicially framed messages and symbols (e.g., opinions that cite past jurisprudence, formal dress, even hierarchical seating arrangements) that promote a mythical sense of adjudication (Gibson, Caldeira and Baird 1998, 345). A fundamental component of this myth is that judges render decisions impartially. As impartial adjudicators, courts are deserving of a deep institutional commitment from the public. While empirical studies in the United States have found support for the standard account (Caldeira, 1986; Casey, 1974; Murphy and Tanenhaus, 1968), comparative research does not suggest that “to know a court is to love a court” everywhere in the world.

Table 1 reviews key results from Gibson, Caldeira and Baird’s (1998: 353, hereafter GCB) study of high court public support in the United States and seventeen European countries, the only systematic comparative analysis of the relationship between awareness and judicial legitimacy. GCB provide two empirical tests of the standard impartiality argument at the individual level. First, for each country, they regress individual beliefs in the legitimacy of high courts on the self-reported level of familiarity with those courts. As Table 1 summarizes, they find a positive relationship in 15 out of 18 countries, encouraging results for sure. Second, they re-estimate these models adding a single control variable that measures the degree to which the respondent is favorably disposed toward his court’s output (i.e., specific support). Surprisingly, once specific support is controlled, the relationship between awareness and legitimacy is positive and significant in only eight countries. Since the messages and symbols that reinforce judicial impartiality are essentially constant across the world’s high courts (Stone Sweet 2000), these results are puzzling.

[Table 1]

There are three potential explanations. GCB themselves suggest that increasing awareness likely inflates specific public support for a court's output but does not directly increase legitimacy.² Second, although awareness inflates beliefs in judicial impartiality, beliefs in impartiality do not increase beliefs in judicial legitimacy (Mondak, 1993). While plausible, these arguments fail to explain why greater awareness appears to be associated with legitimacy in some states, even once we control for specific support. A more satisfying explanation is that there is a positive relationship between impartiality and legitimacy as Tyler (1990) suggests, but that the relationship between awareness and impartiality is conditional. That is, people are more likely perceive a court as legitimate if they perceive its judges to be impartial; however, *it is not always the case that increasing awareness induces beliefs in judicial impartiality.*

I argue that the puzzling results in the GCB study can be understood with a political theory of constitutional review, one that takes account of the strategic dynamics induced by separating the powers of government. Where politicians are both empowered to enforce judicial decisions and maintain control over judicial institutions, judges are sometimes incentivized to resolve cases in contrast to their preferences (Rogers 2001; Vanberg 2001). Of course, a key insight of the separation of powers literature is that courts are often insulated from external pressures, and in so far as they are, decisions should sincerely reflect their preferences (Segal 1997). The key theoretical claim I advance is that the inferences people derive about judicial impartiality, and by implication judicial legitimacy, should be increasingly sensitive to the interactions between courts and politicians as they become better informed. In short, it is the most aware that should be most likely to recognize strategic or sincere behavior, and accordingly, the effect of awareness on legitimacy should be conditioned by the varying incentives for strategic judicial

² While this causal explanation is possible, the authors do not model the recursive system of equations the suggestion implies at the individual level of analysis. The only empirical analysis they conduct is aggregate, which does not directly test the theoretical argument and is limited by the extremely small sample size (i.e., n=18).

behavior. Since not all political systems equally incentive strategic behavior, the effect of awareness on judicial legitimacy should vary cross-nationally. As I discuss below, where courts are relatively free from the external pressures that induce strategic behavior, awareness should be positively associated with beliefs in judicial legitimacy. In contrast, where courts are strongly constrained by external pressures, awareness may produce the opposite effect.

Explaining the puzzling results in the GCB study is more than just an academic exercise. If the standard explanation is correct, it suggests a straightforward approach for developing judicial legitimacy: Inform the public. Judges on high courts around the world have seemingly acted on this advice over the past decade, increasing transparency by educating their publics on legal institutions and jurisprudence, and making it easier to voluntarily access information regarding constitutional review (Davis 1994, Staton 2006). In addition, the implications of the standard argument are highly appealing for anyone interested in democratic theory. Scholars contend that judicial review facilitates the creation of credible commitments (North and Weingast 1989), promotes legislative compromise (Landes and Posner 1975), and can even increase public support for policies adopted by ruling coalitions (Dahl 1957). In order to produce these results, however, other scholars argue that the public must endow the courts exercising judicial review with legitimacy (Friedman 2000; Vanberg 2001).³ Thus, if judicial legitimacy enhances the positive effects of judicial review, and increasing public awareness leads to legitimacy, the standard account also sketches a path toward institutionalizing a coherent separation of powers system. Of course, if the standard account is incomplete, and if the argument I offer is accurate, then simply providing greater transparency will not build legitimate courts or a coherent separation of powers systems in all states. Real political interests will constrain these efforts. In what follows, I develop the theoretical argument and test it against the publicly available data analyzed by GCB.

³ Unsurprisingly, judges also echo this sentiment, as well. A classic example is found in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 866 (1991), where the Court frames its discussion of *stare decisis* around the need to maintain its legitimacy.

A Separation of Powers Model of Judicial Impartiality

Why might increasing awareness only sometimes increase beliefs in judicial impartiality? To answer this question, I develop a model of judicial-government interaction and ask how a person observing this interaction might develop beliefs about judicial impartiality. The approach, which is a model of policy making under the separation of powers, is explicitly game theoretic. As such, it no doubt ignores alternative mechanisms through which individuals learn about judicial impartiality. In this sense, the model is both abstract and incomplete. The advantage, however, is that separation of powers models were designed precisely to explain how inter-branch relationships affect judicial decision-making, and these relationships are crucial for my argument. If separation of powers models reasonably reflect underlying political dynamics, then it will be these dynamics to which individuals are increasingly exposed as they become more familiar with their courts, and thus, it will be these dynamics that affect the beliefs people derive about judicial impartiality (also see Carrubba 2006).⁴ By embedding the individual's learning process in such a model, I square the theoretical argument with a standard approach to understanding inter-branch politics and examine whether such an approach can explain the puzzling GCB results. Moreover, while judicial-government interactions are not the only opportunities for individuals to learn about the impartiality of their high courts, they do involve the most visible and powerful members of their societies, and as such, present excellent opportunities to put conflicting beliefs about judicial impartiality to the test.

The theoretical analysis is designed to answer two questions. Can a person learn anything about judicial impartiality by observing a constitutional court's interaction with the government? If so, how

⁴ This manuscript differs from Carrubba (2006) in two key ways. Most importantly, the "public" in Carrubba's model is only interested in the court's type in so far as it helps it learn about the nature of the government. Here, the nature of the court is what is at stake and voters are assumed to value sincere judicial decision-making. Second, Carrubba's model is a one of endogenous institutional change. This is not the concern of the current analysis.

does awareness affect the person's inferences? The answers to these questions unfold in a series of steps. I begin by defining judicial impartiality. I then describe the game and characterize its equilibria, highlighting how the individual learns about impartiality in each equilibrium. I then define awareness and show how awareness affects the learning process. Finally, I discuss how the political context alters the players' equilibrium behavior, thus linking the political environment to the process by which individuals learn about impartiality.

Judicial Impartiality

Spaeth *et al* (1972:119) define judicial impartiality as a method of decision-making under which justice is “situationally determined; that is, the personal attributes of the litigants [are] never relevant to the case.” Following this conception, I define a constitutional court as impartial *if it renders decisions according to its sincere evaluation of the policy's constitutionality*. If presented with identical constitutional questions, an impartial court's resolutions to those questions must be invariant to changing litigant identities, partisan or otherwise, or changing extra-judicial pressures. To be clear, the concept places no constraints on the etiology of the court's sincere evaluation (i.e., its constitutional philosophy), which may derive from a recognized legal interpretive theory (e.g., original intent) or from raw political ideology, as long as the court systematically resolves similar cases by consistently applying its philosophy. This concept is more general than a common alternative, in which impartial judges put aside their “values” and render purely “legal” decisions” (GCB, 345; Scheb and Lyons 2000: 929). I adopt the less restrictive concept of impartiality for two reasons. First, Casey (1974: 394) finds no significant support for the notion that people believe in fundamental legal truths to which judges might appeal, and I have yet to find convincing empirical results that unambiguously identify a public belief under which judicial decisions are produced by appealing to a set of knowable, legal truths.⁵ Second, if a reader

⁵ Although Scheb and Lyons (2000: 934) claim to provide evidence for a belief among many Americans that Supreme Court decisions are independent of political or ideological concerns, their results are

chooses to do so, the model can be interpreted as if there were such legal truths and judicial impartiality means adhering to them. Under a pure legal interpretation of the model, the court will learn the legal “truth,” which tells it how to sincerely evaluate the policy.⁶ Most important, if the judicial impartiality is interpreted in this way, the model produces the same effects of awareness on beliefs in impartiality as it does with the broader conception I give above. With a definition of impartiality in hand, we can now describe the game.

Sequence of Play

The game is played between a constitutional court, a president and a voter. For expository purposes, I conceptualize the voter as the polity’s median, but one might interpret him as a powerful opinion leader capable of influencing public opinion – an editorialist for a major national media outlet for example. Prior to the interaction analyzed here, a president is elected. She implements a suite of policies desired by the median voter. A proportion, $\beta \in (0,1)$, of these policies are personally salient to the president, while the remaining policies are enacted merely to satisfy a campaign promise. Subsequently, a member of society challenges the constitutionality of one policy in the suite.

Figure 1 summarizes the sequence of play that follows the constitutional challenge. The court moves first. It may choose to uphold or veto the policy. If the court vetoes, the president chooses to accept the resolution or defy the court. I conceptualize defiance broadly. While it always involves the continued implementation of the vetoed policy, defiance may also involve taking retributive actions against the court, the severity of which I parameterize in the court’s payoff function. The voter moves last, after observing one of three events. In order to capture Dahl’s claim that legitimate judges can legitimate policies adopted under majority rule, if the court upholds the policy, the voter may raise his specific

consistent with a belief in which Supreme Court decisions are strongly affected by both *ideology* and *legal models of interpretation*.

⁶ The voter would still be uncertain about that “truth.” His prior belief regarding the “truth,” however, would be α .

support for the policy or not. Symmetrically, if the president accepts the court's veto, the voter may lower his specific support for the policy or not. Finally, if the president defies the court, the voter may punish the president's recalcitrance (see Vanberg 2001 or Staton 2006 for similar choices). The challenge for the voter will be to use both what he believes about the court and the president and what he observes to draw inferences about the court's impartiality. These inferences will determine how he should respond to the president.

[Figure 1]

What do the players know?

The voter confronts three sources of uncertainty. First, he is initially unsure about genuine salience of the policy to the president. His belief that the policy is salient is β . Also, he is uncertain about how the court sincerely evaluates the policy. There two possibilities: Either the court believes that the policy violates the constitution (with probability $\alpha \in (0,1)$) or it does not (with probability $1-\alpha$). The third piece of uncertainty concerns the nature of the court, the critical piece of information the voter is trying to discover. I allow for three court types.

With probability $\pi \in (0,1)$ the court is "impartial." Following the definition above, an impartial court is one whose decisions are fully determined by its sincere evaluation of the record. Once the court reads the record and develops its sincere opinion, there is nothing left to do but announce it. Unfortunately for the voter, there are two ways in which the court might issue decisions that do not reflect it's sincere view of the record. With probability $\pi' \in (0,1)$, the court is "strategic." A strategic court type may prefer to veto a policy associated with the president, however, it is reluctant to challenge the president if the institutional consequences are severe enough. That is, strategic courts are willing to veto policies under particular conditions, which derived below. Finally, with probability $1-\pi-\pi'$, the court is "partisan," in the sense that it will never strike down a policy associated with this president no matter how egregious the behavior under review and no matter how it might evaluate a similar policy associated with another president. While the strategic court type is not a presidential rubber stamp like the partisan court,

it may behave as if it were when the stakes are high enough. Similarly, the strategic court may behave as if it were impartial when the stakes are low enough. The question is whether the voter can distinguish between these types given his prior beliefs and the behavior he observes. Naturally, I assume that the court learns its type and how it sincerely evaluates the policy; however, I will assume that it remains uncertain about the true salience of the policy to the president. For simplicity, I assume that the president learns the state of the world perfectly, though this is immaterial to the key results.⁷

Preferences

The players' preferences, though simple, depend on the state of the world. The president gains one unit of utility for continuing to implement the status quo policy, if she perceives it to be salient. This is true whether the court upholds the policy or if she defies a veto. If the voter raises (lowers) his specific support for a salient policy, the president gains (loses) $r > 0$. Finally, if the voter punishes the president's defiance, she pays $b+r$ if the policy is salient and pays only b if it is not ($b > 0$). Thus b and r parameterize the constituent-induced costs and benefits associated with defying a constitutional court and having the voter change its opinion concerning a salient policy, respectively.

The court gains one unit of utility under the following circumstances: 1) if it is impartial and issues a resolution that is consistent with its sincere evaluation, 2) if it is strategic and issues a resolution that is consistent with its sincere evaluation, assuming the president accepts a veto, and 3) if it is partisan and upholds the president's policy. This means that if the strategic court strikes down a policy it believes to be unconstitutional and the president ignores the resolution, the strategic court gains no policy-related

⁷ This follows directly from the president's preferences as defined in the text that follows. The value the president places on the policy and the cost she pays for ignoring the court are independent of the court's type and how the court sincerely evaluates the policy. Thus, these issues do not matter to the president, and they drop out of any expected utility calculus in versions of the model where I assume the president shares the voter's uncertainty.

utility.⁸ Further, strategic and partisan courts absorb a cost $c > 0$ in the event that the president defies a judicial veto.

The voter wishes to raise (lower) his support for the policy or punish the president for defiance only if he perceives the court to be impartial. In particular, the voter gains a unit of utility if he 1) raises (lowers) his opinion of a policy upheld (vetoed) by an impartial court, 2) punishes defiance of an impartial court and 3) does nothing following any other type of decision. Since the voter supports all policies in the president's policy suite (which is why the president produced them in the first place) the payoff structure assumes that the voter is willing to give-up a policy it supports in order to ensure respect for an impartial court. This assumption simplifies matters; however, I believe it is sound on both theoretical and practical grounds. Theoretically, it captures the essence of the judicial legitimacy concept, which suggests that people may be willing to defend decisions with which they disagree in order to preserve a legitimate institutional arrangement. Practically, explicitly modeling the policy implications for the voter of the president accepting a judicial veto (which would naturally induce a policy loss) would not add much. In fact, any case in which the voter would be unwilling to punish presidential defiance, because he values the policy too much would be identical to cases in which the president's cost of

⁸ This clarifies an important distinction between the impartial and strategic courts. Even if we assume that the court's sincere evaluation of the policy is derived from values and not the law, *the impartial court is not an attitudinal court* in the sense of Segal and Spaeth (1993: 64-73). Recognize that the strategic court's preferences vary over the full range of outcomes in ways required by the attitudinal model, while the impartial court merely cares about getting the legal question right. The attitudinal model applies to the United States Supreme Court not because the justices do not care about policy outcomes or having their jurisdiction stripped – it applies because attitudinalists assume that the justices do not have to worry about enforcement or serious political pressure. Accordingly, we can interpret the model as capturing an “attitudinal” court if the court evaluates the costs of defiance as terrifically low; however, this is just to say that an “attitudinal” court may be observed in equilibrium – it is not a court type per se.

defiance is insufficient to induce her to accept the resolution (i.e., for sufficiently low b). These cases, and the beliefs that the voter derives in each are described in Equilibria 1 & 2 below. Alternatively, since it is the voter that imposes b , we might also simply interpret the model such that b varies with the importance of the policy to the voter.

Equilibria

The solution concept is Perfect Bayesian Equilibrium (PBE). The PBE can be divided into three cases. In the first two, the cost of public punishment is never sufficient to induce the president to accept a veto of a salient policy ($b < 1$); in the third it is ($b \geq 1$). Within each case, the equilibrium strategies of the court and the president are identical. The voter's equilibrium strategy depends of the value of π . In what follows, I list the players' PBE strategies. I provide a full statement of the equilibrium beliefs in the appendix.

Case 1: Low Salience and Low Constituent Cost for Defiance

For $b < 1$ and $\beta < \frac{1}{1+c}$ the PBE strategies are as follows:

- Court: Partisan type upholds all policies, strategic and impartial types uphold policies they believe are constitutional and veto those they believe are unconstitutional.
- President: Accepts vetoes of non-salient policies but defies vetoes of a salient policies.
- Voter: If $\pi > \max\{\pi', \frac{1+\pi'\alpha-\pi'}{1+\alpha}\}$, Raise opinion, Lower opinion and Punish defiance
 If $\pi \in (\pi', \frac{1+\pi'\alpha-\pi'}{1+\alpha}]$, Do not raise opinion, Lower opinion and Punish defiance
 If $\pi \leq \min\{\pi', \frac{1+\pi'\alpha-\pi'}{1+\alpha}\}$, Do not raise opinion, Do not lower opinion and Do not punish defiance.

Case 1 is represented graphically in the light region in Figure 2A, where the cost to the court of presidential defiance, c , is on the horizontal axis, and the probability that the court is impartial, π , is on vertical. The voter's equilibrium strategy is listed inside the relevant areas of the figure. In all three light areas of Figure 2A, the cost of a voter backlash is not large enough to convince the president to accept judicial vetoes. Accordingly, the court expects to be defied if the policy turns out to be salient. Still, the

strategic court behaves as if it were impartial because it is insufficiently likely that the policy is salient. Sensibly, the light region expands to the right across Figure 2A for decreasing values of c . Indeed, for extremely low values of c , the light region spans the space, highlighting that we should expect sincere constitutional review when the costs of doing so are negligible.

[Figure 2]

When the voter's prior over the court's impartiality is extremely high, in the upper-left region, he will raise and lower his opinion of the policy in response to the court's decision and he will punish the president for defiance (futilely as it turns out). Consistent with legitimacy theory, as π decreases, the voter's behavior changes. In the middle-left region, although the voter lowers his support for a vetoed policy and defends the court if the president ignores a veto, the court does not influence the voter's opinion of a policy that is upheld. Finally, when π is extremely low, as it is in the lower-left region, the voter's opinion of the policy will not be influenced by the court's decision and the voter will not come to the court's defense.

What is happening in this region reflects an important piece of the learning process identified by the model. The judicial veto of public policies associated with the president is always informative for the voter, and it will never decrease beliefs in the court's impartiality. This is because the voter knows 1) that a partisan court will never veto a presidential policy and 2) that no court type will veto a policy that it sincerely believes to be constitutional (doing otherwise does not advance the court's interests and only risks inducing defiance). Accordingly, if the voter observes the court veto a policy, he knows that either a strategic or impartial court type struck down a policy it sincerely believed was in violation of the constitution. Although the updated values of π and π' do not change relative to one another, the court's veto eliminates the possibility that the court is partisan and the voter distributes the density assigned to the captured court type equally across the remaining two possibilities. As long as $\pi > \pi'$, the voter will lower its opinion of the policy and punish defiance. While a veto is never predicted to decrease beliefs in judicial impartiality, every time a court upholds a presidential policy, beliefs in its impartiality are

reduced.⁹ As I shortly demonstrate, awareness affects how far beliefs in impartiality fall when the voter observes the court uphold a policy.

Case 2: High Salience and Low Constituent Cost for Defiance

For $b < 1$ and $\beta \geq \frac{1}{1+c}$ the players' PBE strategies are as follows:

Court: Partisan and strategic types uphold all policies. Impartial type upholds a policy believed to be constitutional yet vetoes a policy believed to be unconstitutional.

President: Accepts vetoes of a non-salient policies but defies vetoes of salient policies.

Voter: If $\pi > \frac{1}{1+\alpha}$, Raise opinion, Lower opinion and Punish defiance

If $\pi \leq \frac{1}{1+\alpha}$, Do not raise opinion, Lower opinion and Punish defiance.

Case 2 is represented graphically in the dark region in Figure 2A. Although the cost of public punishment is still insufficient to induce compliance ($b < 1$), it is now fairly likely that the policy is salient. Accordingly, the strategic court will separate from the impartial court and behave as if it were partisan. A judicial veto is now extremely informative for the voter. This is because only a truly impartial court would challenge the president over such a salient policy. This result suggests that politically charged cases offer ideal opportunities to learn about judicial impartiality. This is especially true if the court is, in fact, impartial. On the other hand, if the court happens to take extra-legal factors into account (i.e., it is strategic), voters will never observe such a highly informative decision in equilibrium, because such courts will defer to the president over such policies. The sole difference between equilibrium behavior in the two regions of Case 2 is that in the upper-right region, where π is relatively high, the voter will be influenced by a decision upholding the policy, but where π is relatively low, he will not. Again, since only an impartial court will strike down a policy in the dark region of Figure 2A, the voter learns the court's true type with certainty and rationally punishes defiance.

Case 3: High Constituent Cost for Defiance

For $b \geq 1$ and all values of c , the players' PBE strategies are as follows:

⁹ See appendix for proof.

Court: Partisan type upholds all policies, strategic and impartial types uphold policies believed to be constitutional and veto policies believed to be unconstitutional

President: Accepts all vetoes.

Voter: If $\pi > \max\{\pi', \frac{1 + \pi'\alpha - \pi'}{1 + \alpha}\}$, Raise opinion, Lower opinion and Punish defiance

If $\pi \in (\pi', \frac{1 + \pi'\alpha - \pi'}{1 + \alpha}]$, Do not raise opinion, Lower opinion and Punish defiance

If $\pi \leq \min\{\pi', \frac{1 + \pi'\alpha - \pi'}{1 + \alpha}\}$, Do not raise opinion, Do not lower opinion and Punish defiance.

Case 3 is depicted in Figure 2B, which is completely light, reflecting the fact that the strategic and impartial courts pool in all areas. Here, the cost of public defiance is sufficiently high to induce the president to accept a judicial veto. In so far as the president is expected to accept the veto, the strategic court type pools with the impartial type for all values of β . The equilibria in the upper two regions of Figure 2B depict a constitutional politics in which public support is sufficient to induce respect for the rule of law among even the most powerful members of society. For extremely low values of π , there is an equilibrium in which the president accepts unfavorable resolutions over salient policies; however, this equilibrium is only sustained by strange voter beliefs off the equilibrium path. Since the court's strategy in this case is identical to Case 1 above, the voter would learn about the court precisely as it did before, with one exception. The information set following presidential defiance is never reached in equilibrium, because the president is expected to comply. Technically, beliefs at that information set may be anything, as long as they induce a rational choice (Osborne and Rubenstein 1994, 233), but since the voter's prior on the court's impartiality is low, it is not particularly clear why unexpected defiance would somehow convince the voter to believe in the court's impartiality. Thus, while there is an equilibrium in which a president accepts a decision from a court that is widely believed to be partial; it is not as substantively appealing. Moreover, for $\beta < \frac{1}{1 + c}$, there is another equilibrium in the same area under which the strategic court pools with the impartial court yet the public will fail to punish, and the president will thus optimally defy (see appendix). In any event, since the key claims I make about how awareness affects the

learning process ultimately depend on learning that takes place at information sets that are reached in equilibrium, this result does not meaningfully affect the analysis.

To summarize, the voter learns about judicial impartiality in each equilibrium. Whether the court upholds or vetoes the policy, the voter's prior beliefs in judicial impartiality will change. The question now is whether and how awareness might affect these changes. To answer these questions, we need a definition of awareness.

Modeling Awareness

As originally formulated, the judicial awareness concept was intended to capture a person's court-specific knowledge. The behavioral literature offers a number of measures of awareness, including respondent self-evaluations and exposure to media coverage about a court.¹⁰ Better measures of awareness code the ability of respondents to correctly identify the United States Supreme Court's constitutional role (Murphy and Tanenhaus 1968, 365), or better still, the ability to correctly recall particular decisions. Confirming the utility of this approach, Casey (1974, 405) found that judicial knowledge is cumulative. People who could recall obscure decisions were likely to recall landmarks and people with no recollection of landmark decisions were highly unlikely to recall those that are lesser known. In order to tap into the conception of awareness as a form of judicial knowledge, I model it through the voter's belief in the how the court will sincerely evaluate the policy: α .

Let α_i be any individual i 's belief that the court sincerely believes the policy is constitutional.

Definition. Individual i is considered more *aware* than individual j , $i \neq j$, if and only if $\alpha_i \geq \alpha_j$ when the court truly believes the policy is constitutional and $\alpha_i \leq \alpha_j$ when the court truly believes the policy is unconstitutional.

¹⁰ For examples of these measures in order of textual reference, see Scheb and Lyons (2000: 934) and Caldeira (1986: 1216).

In other words, awareness increases the accuracy of voter beliefs about the way the court sincerely evaluates the policy. Note that this definition places no restriction on the absolute accuracy of any two voters' beliefs. The more aware individual, i , could believe that the court is sure to evaluate the policy as constitutional when the court sees the policy as unconstitutional. It is merely the case that whatever are i 's beliefs, they are at least as accurate as j 's.¹¹

So, how does awareness influence voter inferences about the impartiality of the court?¹²

Answering this question requires asking how the voter evaluates the court's impartiality whenever it has to make a choice. There are three possible events the voter could have observed. The court could have upheld, the president could have accepted a veto or the president could have defied a veto. Of course, there are many histories (i.e., prior paths of play) that are consistent with these events. How might the voter distinguish between these histories? Let I_{uphold} represent the voter's information set after which he has observed the court uphold the policy; let I_{accept} represent the information set after which the voter has observed the president accept a judicial veto; and let I_{defy} represent the information set after which the voter has observed the president defy a veto. Unsurprisingly, the voter's beliefs in the court's impartiality depend on whether the strategic court separates from or pools with the impartial court. There are four possible beliefs to consider. At information sets I_{accept} and I_{defy} , the voter's beliefs are as follows.

¹¹ The awareness definition does rule out the possibility that less aware voters might accidentally have more accurate beliefs than more aware voters. Ultimately, whether or not awareness increases the accuracy with which people can predict sincere judicial preferences is an empirical question, one I have yet to see fully analyzed. Still, if this conception of awareness is not suitable, the underlying result that it reflects remains. Prior beliefs about the court's preferences are going to influence the way people learn about impartiality in ways that are conditioned by the political environment.

¹² If the court is truly "partisan" or "impartial," awareness will continue to increase to the voter's sensitivity to the type. It is just that it is considerably harder to learn, and more theoretically interesting, if the court is truly strategic.

$$\Pr(\text{Impartial} | I_{\text{accept}} \text{ or } I_{\text{defy}} \text{ and strategic court } \textit{separates} \text{ from impartial court})= 1 \quad (1)$$

$$\Pr(\text{Impartial} | I_{\text{accept}} \text{ or } I_{\text{defy}} \text{ and strategic court } \textit{pools} \text{ with impartial court})= \frac{\pi}{(\pi + \pi')} \quad (2)$$

At I_{uphold} , his beliefs are:

$$\Pr(\text{Impartial} | I_{\text{uphold}} \text{ and strategic court } \textit{separates} \text{ from impartial court})= \frac{\pi\alpha}{1 - \pi(1 - \alpha)} \quad (3)$$

$$\Pr(\text{Impartial} | I_{\text{uphold}} \text{ and } \textit{pools} \text{ with impartial court})= \frac{\pi\alpha}{1 - (\pi + \pi')(1 - \alpha)} \quad (4)$$

These results suggest a number of propositions about the relationship between awareness and beliefs in judicial impartiality.

Proposition 1. The inferences voters draw about judicial impartiality are independent of judicial awareness when the court vetoes the policy.

In any equilibrium, if the court strikes down a presidential policy, prior beliefs over how the court sincerely evaluates the policy, α , do not influence the voter's inferences. This is immediately apparent in Expressions 1 and 2, where α is conspicuously absent. As I note above, a veto teaches the voter precisely what the court sincerely believed, because no court type will veto a policy it believes to be constitutional in equilibrium. Accordingly, judicial awareness will not influence the voter's inference about judicial impartiality when the court vetoes the policy. As is clear from comparing Expressions 1 and 2 with Expressions 3 and 4, if awareness matters, it only matters when the court upholds the policy.

Proposition 2a. When a court upholds a policy that it sincerely believes to be constitutional, beliefs in judicial impartiality among more aware voters are reduced no more than those of less aware voters. If there is a difference, more aware voters will reduce their beliefs in impartiality less.

Proposition 2b. When a court upholds a policy that it sincerely believes to be unconstitutional, beliefs in judicial impartiality among more aware voters are reduced by at least as much as those of less aware voters. If there is a difference, more aware voters will reduce their beliefs in impartiality more.

In other words, there is sometimes a weak positive relationship between awareness and judicial impartiality and sometimes a weak negative relationship. Figure 3, which displays the relationship between α and updated beliefs in the judicial impartiality, clarifies these propositions.¹³

[Figure 3]

Consider two voters, i and j . Assume that both share identical beliefs about the court's true type, say $\pi = \pi' = 0.33$. The only difference between i and j is their degree of awareness of the court's jurisprudential history. Let i be more aware than j . Now consider two policies, x and y , and assume that the court sincerely believes that policy x is unconstitutional while policy y is constitutional. Finally, and without loss of generality, assume that j 's prior beliefs about the court's sincere evaluation of the policies are identical: $\alpha_j(x,y) = 0.5$

The arrows in Figure 3 represent how voters i and j update their beliefs after observing the court uphold policies x and y . The difference between the inferences that i and j draw clearly depend on i 's awareness advantage; however, awareness is not universally translated into stronger beliefs in impartiality. Consistent with the standard account, when voter i observes the court uphold policy y , the policy the court sincerely believes to be constitutional, she reduces her belief in the court's impartiality much less than voter j . As $\alpha_i \rightarrow 1$, such a resolution is precisely consistent with voter i 's expectations, and there is effectively no change in her beliefs. In contrast, when voter i observes the court uphold policy x , which the court sincerely believes to be unconstitutional, her updated beliefs are reduced by a far greater margin than voter j 's. For voter i , the court's validation of policy x comes as a surprise. As such, i is more likely than j to infer that the court has either avoided conflict with the president by strategically misrepresenting its preferences or worse, that the court is a mere partisan tool of the president. It is voter i 's superior familiarity with the court's jurisprudential philosophy that translates such a decision into a significantly *reduced* belief in the court's impartiality.

¹³ This is the graph of Expression 4, though the graph of Expression 3 makes precisely the same point.

This result suggests that the standard story about the relationship between awareness and legitimacy may be missing a crucial conditional relationship. Still, the analysis is not complete, because there is no necessary reason to believe that voters will ever observe the court uphold a policy it sincerely believes to be unconstitutional in equilibrium. If they do not, then perhaps the standard account can be sustained. In order to address this possibility, we must consider whether or not there is a pattern to learning under particular types of equilibria.

Proposition 3. The relationship between awareness and judicial impartiality is weakly positive in all equilibria in which the strategic court pools with the impartial court. When the strategic court separates from the impartial court, the relationship is likely to be weakly negative but may be weakly positive, depending on the mix of cases the court hears.

Consider any equilibrium in the light regions of Figure 2, where the strategic court pools with the impartial court. In all of these, the strategic court is free to resolve cases consistent with its sincere evaluation of the policy's constitutionality. As such, its behavior is indistinguishable from the impartial court. In such a world, the voter will never observe the court uphold a policy it sincerely believes to be unconstitutional. Consequently, more aware voters will be more likely to believe in judicial impartiality than less aware voters, because they will observe a consistency between their expectations and judicial outcomes. In a sense, this result reinforces the logic of the standard legitimacy account. Perhaps the reason why people become influenced by the trappings of formal legal analysis in worlds characterized by the light regions in Figure 2 is because there is a match of sorts between the symbols and rhetoric of judicial analysis and actual judicial behavior that conforms to sincere preferences. It is easier to believe in judicial impartiality when judges tell you they are impartial and they behave as if they were. The question, however, is whether this relationship holds in the dark shaded regions?

When the strategic court separates from the impartial court, the relationship between awareness and impartiality is not as straightforward. In the dark region of Figure 2A, the relationship depends on the nature of the policy the court reviews. If the court reviews a policy it sincerely believes to be constitutional (e.g., policy y in Figure 3), more aware voters will be more likely to accept the impartiality

of the decision than less aware voters. The intuition is as follows. Even though the policy is salient enough to induce the strategic court type to separate from the impartial court type, the more aware voter will be more likely than a less aware voter to attribute a decision upholding the policy to the court's sincere evaluation of the policy rather than to the political pressure or raw partisanship. Although beliefs in impartiality are reduced for more aware voters, they are reduced less than for the less aware, as depicted in Figure 3. On the other hand, if the court reviews a policy that it sincerely believes to be unconstitutional (e.g., policy x in Figure 3), greater awareness will induce a greater reduction in the updated beliefs of judicial impartiality. This is precisely because more aware voters do not expect an impartial court to uphold such a policy. More aware voters will be more likely to attribute a decision upholding a policy like y to some sort of extra-judicial explanation. The court is either partisan or it is upholding the policy to save its skin. Since it is likely that courts will eventually be presented with policies they sincerely believe to be in violation of the constitution, it is likely that the relationship between awareness and impartiality in the dark region will be weakly negative. That said, if courts possess discretionary jurisdiction, they may select out those cases that present the highest risk. Additionally, courts may develop a political questions doctrine precisely to avoid these kinds of cases. Finally, the political branches may simply disallow courts to exercise jurisdiction over highly sensitive matters. If any of these possibilities hold, it is indeed possible that courts in political contexts that incentivize strategic behavior may never have to behave strategically. If this is true, then the relationship between awareness and impartiality may indeed be weakly positive in the dark regions, as well.

To summarize, there are equilibria in which people will expect courts to strategically uphold policies they believe to be unconstitutional, and it is in those equilibria that the positive relationship between awareness and impartiality may break down. Only one concern remains. Can the model give us conditions under which we should expect sincere or strategic constitutional review?

The political environment

The model's key implication is that where sincere judicial behavior is likely to emerge, we should observe a weakly positive relationship between awareness and legitimacy; however, where courts are

expected to strategically avoid conflict the relationship is likely to be weakly negative. So, when should we expect sincere judicial behavior? As Figure 2A suggests, such behavior becomes increasingly likely as the judicially born costs of presidential defiance decrease.¹⁴ Specifically, as $c \rightarrow 0$, the light region spans to the right across the space, and the strategic court type will pool with the impartial court type for higher and higher probabilities that the policy is salient. The question of course is what might explain why courts perceive smaller or larger values of c . While it may not be possible to precisely measure the subjective costs of presidential defiance, it seems likely that the political environment in which judges operate will affect c . In worlds where judicial vetoes of salient policies are met with serious challenges to constitutional jurisdiction or even the removal of judges from the bench (Helmke 2004), we might expect judges to perceive a relatively high c . In contrast, where vetoes are ordinarily respected, and defiance manifests itself as simply failure to fully implement decisions rather than severe attacks on the judiciary, we might expect judges to perceive a relatively low c . In this sense, different political contexts induce different kinds of constitutional politics, which in turn produce different opportunities for learning about judicial impartiality. If this is true, then we should expect the public learning process about judicial impartiality (and by implication judicial legitimacy) to vary across political contexts.

Empirics

This paper began with a simple puzzle. If all high courts in Europe and North America emit signals that should produce beliefs in judicial impartiality, and beliefs in judicial impartiality produce

¹⁴ Of course, the equilibria in Figure 2B all involve the strategic court pooling with the impartial court, even for relatively high values of c . Thus, it is also true that courts should be decreasingly likely to engage in strategic behavior when they simply expect presidential acceptance, no matter the salience of the policy and no matter the cost of defiance. Fortunately, it would appear that the external political environment should affect the values of c and simple expectations of compliance in similar ways. That is, the places where judges are generally insulated from serious external intrusion should be precisely the same places where judges simply expect acceptance.

beliefs in judicial legitimacy, it is difficult to explain why awareness is positively related to judicial legitimacy in only 45% of the states GCB study. As just reviewed, the theoretical model suggests a potential answer to this puzzle. In what follows, I test its claims against the publicly available data from the GCB study. The data come from surveys conducted in 1995 in Bulgaria, Poland, Russia, Spain, France, Hungary and the United States, and account for 40% of the states in the original analysis (see Cohn, White and Sanders 2000 for details). Although limited, the data establish a difficult test for my argument. Even if I had access to the full GCB data, I would still only be testing the argument on European and North American states. With the possible exception of Russia, these are not political contexts we typically associate with imposing severe costs on judges for overly active behavior. There is no Argentina here, no Venezuela, no Zimbabwe. The distribution of any variable I use to measure the political context will be skewed toward systems that induce sincere behavior. Accordingly, if there are conditional results here, it seems likely that there would be results with data that allow the political context variable to reflect political environments in which judges face significant risks when exercising their authority.

GCB Models

GCB measure judicial legitimacy with a three item summated index. Item 1 asks whether the respondent would support *doing away* with her highest court if it started making unpopular decisions. Item 2 asks whether the respondent would support restricting the court's *jurisdiction* under the same scenario. These first two pieces of the measure directly tap into the key element of the "diffuse support" concept of legitimacy: institutional commitment (GCB 1998, 348). To these, GCB add a third: Item 3 asks whether the respondent *trusts* the court to make decisions that are good for the country.¹⁵ The

¹⁵ The institutional commitment question was, "If the [HIGHEST COURT of YOUR COUNTRY] started making a lot of decisions that most people disagree with, it might be better to do away with the (HIGHEST COURT OF YOUR COUNTRY) altogether" (strongly agree to strongly disagree). The jurisdiction question was, "The right of the (HIGHEST COURT OF YOUR COUNTRY) to decide

dependent variable, *Judicial Legitimacy*, is the average of the responses to these three items, normalized on the [0,100] interval. While judicial trust is related to the legitimacy concept, it is plausible to contend that judicial trust and diffuse support are distinct concepts. Conceptually, I may trust a court because I believe it will produce policies that benefit me or my vision for the country, but if those outputs changed I would be willing to support a change in its constitutional role. Practically, the trust measure is much less strongly correlated with the other two measures of legitimacy than they are with each other, and Gibson and Caldeira (1998) themselves propose an alternative legitimacy measure in which they exclude the trust variable.¹⁶ Since this alternative measurement approach is conceptually clear, and since Gibson and Caldeira themselves suggest such a measurement, I run my analysis on both the three and two variable indices.

For each country in their study, GCB estimate the following simple additive model, whose results were summarized in Table 1:

$$\text{Legitimacy} = \beta_1(\text{Awareness}) + \beta_2(\text{Satisfaction}) + \varepsilon.$$

Awareness is the respondent's self-reported familiarity with her country's high court, and *Satisfaction* measures the respondent's specific support for her high court's policy output.¹⁷ I have fully replicated

certain types of controversial issues should be reduced" (strongly agree to strongly disagree). Finally, the trust measure was "The (HIGHEST COURT OF YOUR COUNTRY) can usually be trusted to make decisions that are right for the country as a whole" (strongly agree to strongly disagree).

¹⁶ The correlation between *institutional commitment* and *jurisdictional commitment* is .34 (p<.001). The correlation between *trust* and each of the other measures is .11(p<.001) and .15(p<.001) respectively.

¹⁷ The awareness question was, "Now a few questions about the (HIGHEST COURT OF YOUR COUNTRY) would you say you are very aware, somewhat aware, not very way or have 1=never heard of you never heard of the (HIGHEST COURT OF YOUR COUNTRY?" Like Gibson, Caldeira and Baird, I excluded from the analysis all respondents who had never heard of the court. I was able to reproduce the estimates they report in paper. Results available upon request.

their results using this approach, finding significant effects of awareness only in the United States, Spain, Poland and France. The effort here will be to rerun the GCB models using the pooled data set and test whether political context conditions the effect of *Awareness*.

Testing the Argument: The Rule of Law

Properly testing the theoretical argument is complicated by the nature of the GCB data. The most precise test requires measuring features of particular judicial-government interactions and knowing that each respondent was exposed to the same interactions. While there is no indicator in the survey of the kinds of decisions each respondent has observed, there are two ways to get a degree of control over this issue. First, it is possible to measure the conditions that could have induced strategic judicial behavior in some cases in these countries; that is, it is possible to measure c . Standard measures of the rule of law should capture judicial expectations about the costs of political defiance. Where defiance at most manifests as the failure to fully implement a decision, costs should be low; where defiance manifests itself as impeachment, costs should be high. To measure c , I appeal to the *International Country Risk Guide's* (*ICRG*) rule of law measure, which is scaled from 0 to 6, with higher scores indicating higher levels of the rule of law. To be fair, the *ICRG* measure is a yearly score, and as such it is probably best thought of as an average measure of c across multiple cases. Still, given the nature of the data, such a measure is about as good as it will get. As a robustness check, I have also run the analysis with an alternative to the *ICRG*, the Freedom House Civil Liberties index, which in part measures the degree to which a government is committed to the rule of law (Freedom House 2004). In the interests of space, I leave these results out of the paper, but they key results are identical and available upon request.

Even with a measure of c in hand, it is likely that respondents have derived their inferences regarding judicial legitimacy from cases resolved in years other than 1995, the year the surveys were administered. To address this possibility, in addition to the 1995 rule of law score, I also estimate the models using the five and ten year averages of these scores (i.e., from 1990 to 1995 and from 1985 to 1995). The idea here is to average across varying political over the recent history of the court, the history respondents would be most likely to know. Since the Russian Constitutional Court was created in 1993

and the Bulgarian Constitutional Court in 1991, I only take averages from 1993-1995 and 1991-1995, for those countries, respectively.

In order to remain faithful to GCB's specification, I estimate the following multiplicative interaction model.

$$\text{Legitimacy} = \beta_1(\text{Awareness}) + \beta_2(\text{Rule of Law}) + \beta_3(\text{Awareness} * \text{Rule of Law}) + \beta_4(\text{Satisfaction}) + \varepsilon$$

The hypothesis I wish to test is that where judicial costs of defiance are low (i.e., the rule of law is high), the effect of *Awareness* on *Legitimacy* should be non-negative; however, where these costs are high (i.e., the rule of law is low), the effect is likely non-positive. In terms of the statistical model, this is to say that $\beta_1 + \beta_3 * \text{Rule of Law}$, the marginal effect of *Awareness*, should be non-negative at relatively high values of *Rule of Law*, but will likely decrease as *Rule of Law* decreases.

Results

Table 2 contains the parameter estimates and White-Huber standard errors (clustered on the country) for the pooled models of judicial legitimacy using the three and two item indices. The three item models are at the top of the table. Reading across the table, the only change is the measure of *c*: the 10 year average *ICRG* score, the 5 year average and the 1995 value. The results provide initial support for a conditional effect of *Awareness*. Across all models, the effect of *Awareness* (again $\beta_1 + \beta_3 * \text{Rule of Law}$) is negative for relatively low values of *ICRG*, and positive for relatively high values. These effects are strongest in the two item models, where *judicial trust* is excluded. The interaction term is relatively large and is itself statistically significant at the .05 level (two-tailed) in four of six models. That said, the significance of this term on its own is of limited theoretical value. Our interest lies in the marginal effect of *Awareness* on *Legitimacy* across the range of *ICRG*, and while we can determine the marginal effect directly from the Table 2, the table provides little in the way of judging our uncertainty, since the standard error of this effect is not a constant (Friedrich 1982).

[Table 2]

Figure 4 shows the marginal effect of *Awareness* across the range of the rule of law variable in the two item legitimacy models. I have cut-off the *ICRG* axis at two, because there are no cases in the data set that have an *ICRG* score below that level. Figure 4A shows the effects estimated in the models using the 10 year *ICRG* average and 4B shows the same effects for the 1995 value. The figures also include the 95% confidence intervals for the marginal effect, which allows us to evaluate the significance of the result across the full range of the conditioning variable (Bromber, Clark and Golder 2006). The figures underscore the conditional effect of *Awareness*. In both models, the effect of *Awareness* is positive and significant where the rule of law is high, but as the rule of law decreases, so does the effect. Indeed, for low values of the rule of law, the effect is negative and significant. These effects are precisely what the theoretical model expects. Moreover, the positive, statistically significant effect of *Awareness* when *ICRG* is relatively high is identical in the three item legitimacy models. The only difference between the two and three item models is that while the effect of *Awareness* is negative in all models at low values of *ICRG*, in the three item legitimacy models, the effect is insignificant from zero when *ICRG* is relatively low. Of course, this result is not inconsistent with the theory. I should also note that these results are robust to the alternative measure of rule of law, the Freedom House Civil Liberties index.

[Figure 4]

To summarize, the empirical results suggest that the relationship between awareness and judicial legitimacy is conditioned by the political environment in which judges operate. In states where judges have been generally free to sincerely resolve their cases (e.g., United States and France), the relationship is positive; however, where political conditions likely induced strategic behavior (e.g., Russia), the relationship is no longer positive. While these results do not suggest that legitimacy theory is wrong in some fundamental sense, they do suggest that a positive political model of legitimacy can add much to the traditional story.

Conclusion

The present argument suggests that separation of powers system dynamics, which tie the interests of courts to those of the other political branches, produce variants of constitutional politics that influence

the relationship between awareness and legitimacy. In places where courts are free to pursue their interpretations of the constitution, judges should produce a consistent, predictable jurisprudence, which will allow the most aware citizens to conclude that resolutions which might be classified as politically motivated are easily explainable in purely legal terms. In these worlds, we should observe a positive relationship between awareness and legitimacy, because people are more likely to find credible evidence of impartial constitutional review as awareness increases. In contrast, where courts are constrained by external pressures, it is the more aware that are most likely to observe instances of strategic judicial deference. Thus, we should not be surprised if the relationship between awareness and legitimacy is negative in such environments. Of course, it is possible for this negative relationship to break down in such environments if courts never review cases that might induce deference (because lawyers do not pursue such cases, because courts avoid them or because the state restricts jurisdiction in sensitive policy areas). While this mechanism is framed in separation of powers logic, it may very well reinforce the traditional legitimacy argument. This is particularly true if messages of impartiality, which all courts send, are matched by judicial behavior. That said, the notion that courts build legitimacy by signaling impartiality cannot explain the absence of a positive relationship between awareness and legitimacy evident in the GCB article, while a separation of powers story can.

To return to the beginning, constitutional judges around the world have begun to behave as if awareness unconditionally promotes beliefs in impartiality. Every constitutional court in the world maintains a publicly accessible website, which contains information from basic rules of jurisdiction to summaries or complete versions of actual resolutions. If awareness were unconditionally related to legitimacy, we might expect this interest in transparency to produce healthy separation of powers systems by constructing legitimate constitutional courts. Unfortunately, the analysis here suggests a caveat. Namely, courts that pursue unlimited transparency may very well induce lower beliefs in their legitimacy among citizens that pay attention, if the political conditions of their country are unfavorable to sincere judicial review. This is no recommendation for a turn away from transparency; however, we should set our expectations for the ability to construct legitimate courts appropriately, because constitutional judges

are sometimes constrained by real political interests. This also suggests that a state interested in constructing a legitimate constitutional court must be both willing to accept that court's resolutions and successfully communicate that intention to both the court and the public. If threatening judges, even in the most subtle ways, erodes the judicial interest in sincere adjudication, and these dynamics are perceived by the public (or by opinion leaders), judicial legitimacy will be undermined.

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Table 1. The Relationship Between Awareness and Legitimacy Across 18 Countries

One Variable Model		Two Variable Model (Controlling for Specific Support)	
Positive and Significant Estimate	Insignificant Estimate	Positive and Significant Estimate	Insignificant Estimate
Belgium	Bulgaria ^b	Belgium	Bulgaria ^b
Denmark	Luxembourg ^b	France ^a	Denmark
France ^a	Russia	Great Britain	Germany (East)
Germany (East)		Italy	Germany (West)
Germany (West)		Netherlands	Greece
Greece		Poland	Hungary
Great Britain		Spain ^a	Ireland
Hungary		United States	Luxembourg ^b
Ireland			Portugal
Italy			Russia
Netherlands			
Poland			
Portugal			
Spain ^a			
United States			

Note. Summary of Gibson, Caldeira and Baird's (1998) results.

^aModels run on surveys conducted in both 1993 and 1995.

^bCoefficient estimate is negative, though not significant.

Table 2. Regression of Legitimacy on Satisfaction, Awareness and Civil Liberties

	Rule of Law Measure		
	10 Year Average ^a	5 Year Average ^a	1995 Value
Three Item Legitimacy Index	β	β	β
	(RSE)	(RSE)	(RSE)
Awareness	-9.72 (4.82)	-10.25 (6.16)	-9.37 (6.69)
Rule of Law	-3.12* (1.22)	-2.48* (.77)	-1.70 (1.15)
Awareness*Rule of Law	2.37* (.96)	2.35 (1.17)	2.06 (1.20)
Satisfaction	10.41* (1.17)	10.36* (4.82)	10.29 (.98)
Constant	45.49* (7.09)	43.03* (5.60)	39.67* (7.77)
N	3594	3594	3594
R ²	.15	.15	.15
Two Item Legitimacy Index			
Awareness	-19.96* (6.07)	-22.18* (8.41)	-18.51# (9.12)
Rule of Law	-3.09 (2.26)	-2.19 (1.57)	-1.65 (1.44)
Awareness*Rule of Law	4.73* (1.23)	4.94* (1.55)	4.07* (1.63)
Satisfaction	9.63* (1.40)	9.49* (1.26)	9.57* (1.20)
Constant	41.67* (11.70)	38.05* (9.62)	35.51* (10.0)
N	3602	3602	3602
R ²	.12	.11	.11

Notes. Parameter estimates displayed with robust standard errors, clustered on country. The upper portion of the table includes estimates from the three item judicial legitimacy models, used by Gibson, Caldeira and Baird (1998); the lower portion of the table includes estimates from the two item judicial legitimacy model used by Gibson and Caldeira (1998).

*p<.05, #p<.10

^aTen year average Rule of Law score is from 1985 to 1995. The five year average is from 1990 to 1995. For Russia, these averages are constrained to the 1993-1995; for Bulgaria the averages are similarly constrained to the period 1991-1995. This is done to reflect the fact that the Bulgarian and Russian courts were not created until 1991 and 1993, respective. Results are identical in models where I do not make this correction.

Figure 1. Sequence of Actions

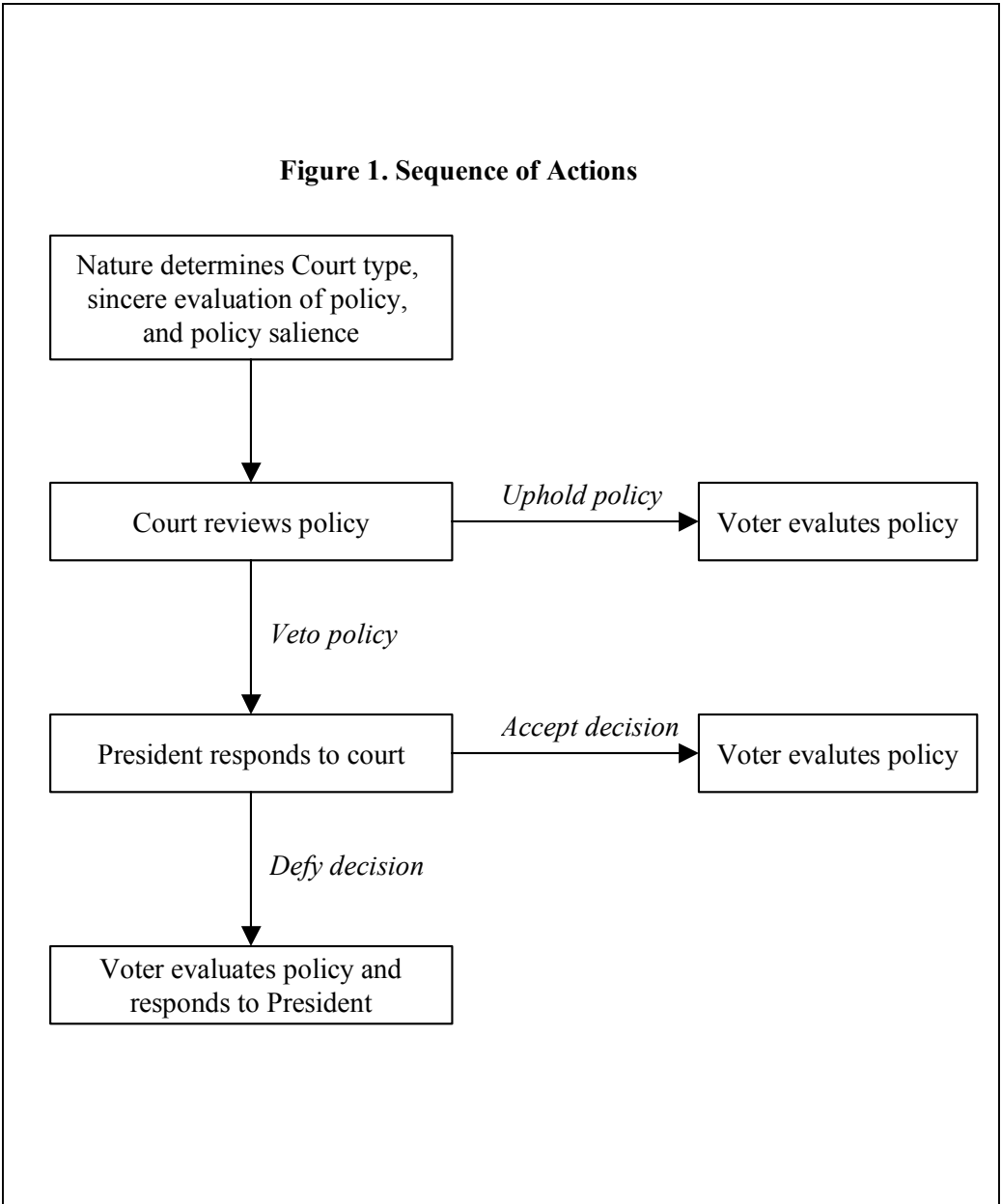


Figure 2A. Equilibrium Summary when cost of public punishment is low ($b < 1$)

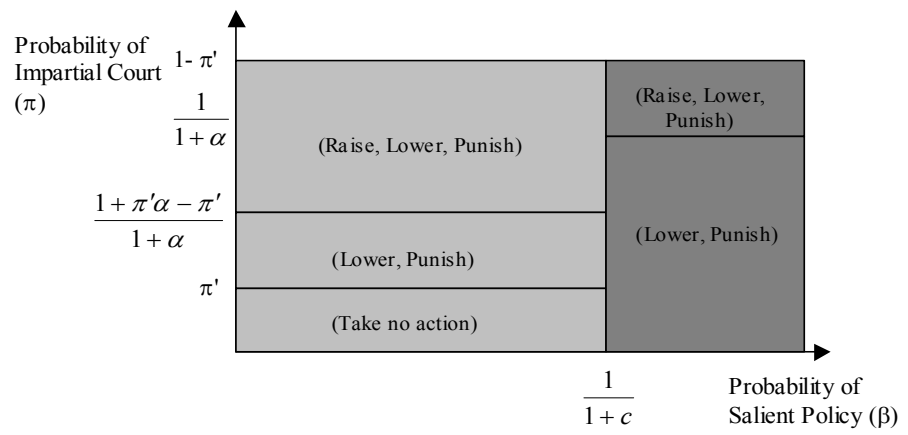


Figure 2A. Equilibrium Summary when cost of public punishment is high ($b \geq 1$)

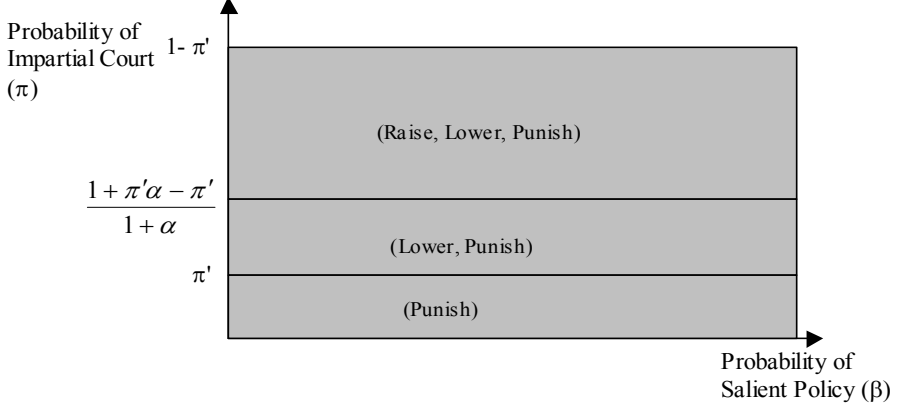


Figure 2. Shows equilibrium predictions in the π - β space. The voter's PBE strategy is listed. Figure 2A shows equilibrium behavior for $b < 1$. Figure 2B shows equilibrium behavior for $b \geq 1$. Light gray regions show equilibria in which the strategic court pools with the impartial court; dark gray regions show equilibria in which the strategic court separates from the impartial court

Figure 3: Updated Beliefs in Impartiality when Court Upholds Policy

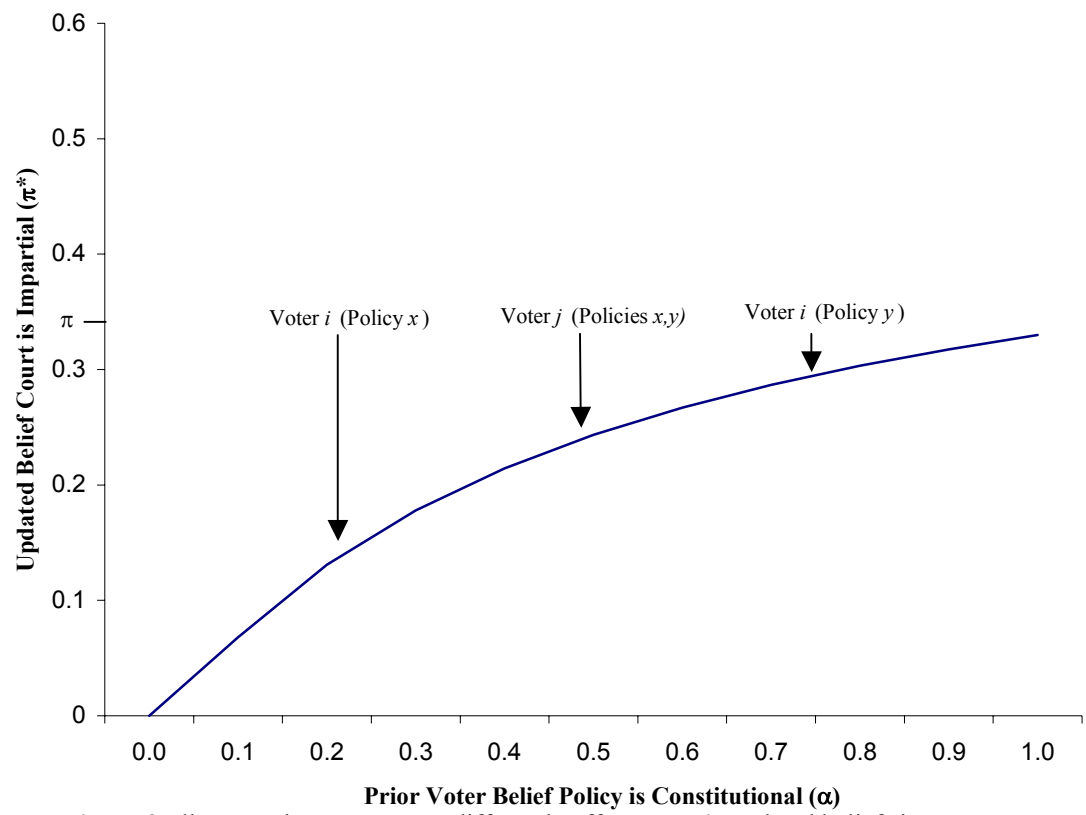


Figure 3. Illustrates how awareness differently affects voter's updated beliefs in judicial impartiality when the court upholds a policy. For the policy the court sincerely believes to be unconstitutional, x , the more aware voter, i , reduces his beliefs by a greater margin than j . On the other hand, for the policy the court sincerely believes to be constitutional, y , voter i 's beliefs are reduced by a smaller margin than voter j 's. The curve traced here is Expression 4, assuming $\pi = \pi' = .33$.

Figure 4A. The Marginal Effect of Awareness on Judicial Legitimacy as Rule of Law Changes (Two Variable Legitimacy Index)

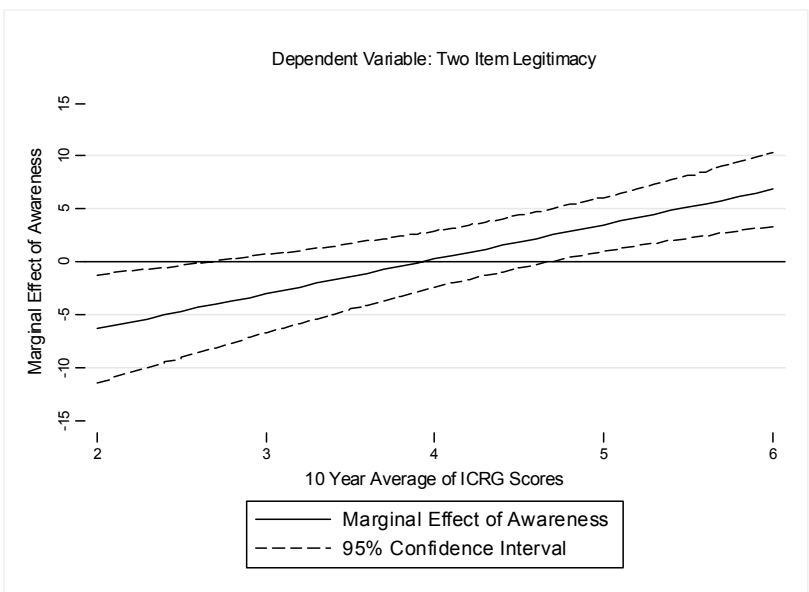
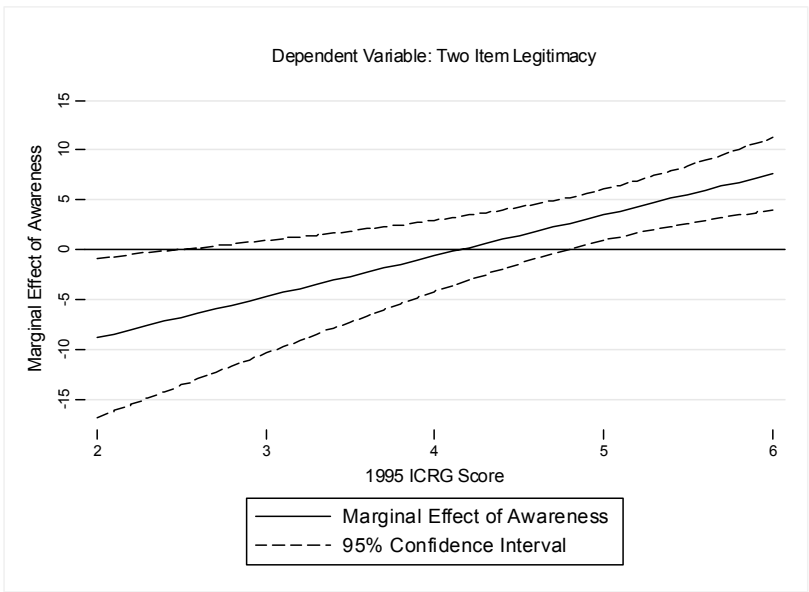


Figure 4B. The Marginal Effect of Awareness on Judicial Legitimacy as Civil Liberties Changes (Three Variable Legitimacy Index)



Appendix

I solve for Perfect Bayesian Equilibria (PBE). A PBE contains a sequentially rational strategy profile and a profile of beliefs that both support the strategy profile and are determined by it via Bayes Rule whenever possible (Osborne and Rubenstein 1994: 233). I assume that no player takes a strictly dominated action on or off the equilibrium path. I assume that indifferent, the court upholds, the president accepts, and the voter does not raise, lower or punish.

Case 1: Low Salience and Low Constituent Cost for Defiance

As reviewed on page 10 of the text, the PBE strategies in Case 1 are listed below. I wish to establish that these strategies and the subsequent beliefs constitute a PBE when $b < 1$, $\beta < \frac{1}{1+c}$ and π satisfies the conditions below.

- Court: Partisan type upholds all policies, strategic and impartial types uphold policies they believe are constitutional and veto those they believe are unconstitutional.
- President: Accepts vetoes of non-salient policies but defies vetoes of a salient policies.
- Voter: If $\pi > \max\{\pi', \frac{1 + \pi'\alpha - \pi'}{1 + \alpha}\}$, Raise opinion, Lower opinion and Punish defiance
 If $\pi \in (\pi', \frac{1 + \pi'\alpha - \pi'}{1 + \alpha}]$, Do not raise opinion, Lower opinion and Punish defiance
 If $\pi \leq \min\{\pi', \frac{1 + \pi'\alpha - \pi'}{1 + \alpha}\}$, Do not raise opinion, Do not lower opinion and Do not punish defiance.

The players' beliefs are as follows. For the president, beliefs are trivial, because she is perfectly informed. Similarly, the court's beliefs are identical in all cases since it moves first. For the court, $\Pr(\text{Salient}) = \beta$ and $\Pr(\text{Not Salient}) = 1 - \beta$ at each information set when it is the court's turn to play. The only concern is the voter's beliefs.

Let (X, Y, Z) denote a state of the world, where X is the set of court types, Y is the set of sincere judicial evaluations and Z is the set of presidential evaluations of salience. In particular, $X = \{I, S, P\}$, where I is the impartial type, S is the strategic type and P is the partisan type. Let $Y = \{C, \sim C\}$, where C and $\sim C$

represents policies the court sincerely believes to be constitutional and unconstitutional, respectively.

Finally, let $Z=\{V, \sim V\}$, where V and $\sim V$ represent policies the president perceives to be salient and not salient, respectively. Given the court and president strategies, when the voter observes the court uphold the policy, his beliefs are as follows.

$$\begin{aligned} \Pr(I, C, V | I_{uphold}) &= \frac{\pi\alpha\beta}{1 - (\pi + \pi')(1 - \alpha)} & \Pr(I, C, \sim V | I_{uphold}) &= \frac{\pi\alpha(1 - \beta)}{1 - (\pi + \pi')(1 - \alpha)} \\ \Pr(I, \sim C, \bullet | I_{uphold}) &= \Pr(S, \sim C, \bullet) = 0 & \Pr(S, C, V | I_{uphold}) &= \frac{\pi'\alpha\beta}{1 - (\pi + \pi')(1 - \alpha)} \\ \Pr(S, C, \sim V | I_{uphold}) &= \frac{\pi'\alpha(1 - \beta)}{1 - (\pi + \pi')(1 - \alpha)} & \Pr(P, C, V | I_{uphold}) &= \frac{(1 - \pi - \pi')\alpha\beta}{1 - (\pi + \pi')(1 - \alpha)} \\ \Pr(P, \sim C, V | I_{uphold}) &= \frac{(1 - \pi - \pi')(\beta - \alpha\beta)}{1 - (\pi + \pi')(1 - \alpha)} & \Pr(P, C, \sim V | I_{uphold}) &= \frac{(1 - \pi - \pi')(\alpha - \alpha\beta)}{1 - (\pi + \pi')(1 - \alpha)} \\ \Pr(P, \sim C, \sim V | I_{uphold}) &= \frac{(1 - \pi - \pi')(1 - \alpha)(1 - \beta)}{1 - (\pi + \pi')(1 - \alpha)} \end{aligned}$$

When the voter observes the president accept veto, his beliefs are:

$$\Pr(I, \sim V, \sim V | I_{accept}) = \frac{\pi}{\pi + \pi'} \quad \Pr(S, \sim C, \sim V | I_{accept}) = \frac{\pi'}{\pi + \pi'}$$

The probability of being at any other history is 0 at I_{accept} . Finally, when the voter observes the president defy, his beliefs are:

$$\Pr(I, \sim C, V | I_{defy}) = \frac{\pi}{\pi + \pi'} \quad \Pr(S, \sim C, V | I_{defy}) = \frac{\pi'}{\pi + \pi'}$$

The probability of being at any other history is 0 at I_{defy} .

Proof By assumption the president always accepts vetoes of non-salient policies. Thus the only question for the president is what will she do if a salient policy is vetoed. Assume that the voter's strategy is (Raise, Lower and Punish). Given this strategy, the president expects $-r$ if she accepts the veto and $1-r-b$ if she defies. Accordingly, the president's strategy is sequentially rational if and only if $b < 1$.

By assumption we know the actions of the partisan and impartial courts. The question concerns what the strategic court will do when it reviews a policy it believes to be unconstitutional. Since the

president will defy if the policy is salient, the court expects $1-\beta(1+c)$ if it vetoes it and 0 if it upholds.

Accordingly, the court's strategy is sequentially rational if and only if $\beta < \frac{1}{1+c}$.

Finally, I turn back to the voter. Given the voter's beliefs at I_{uphold} , he expects

$\frac{\pi\alpha}{1-(\pi+\pi')(1-\alpha)}$ if he raises his opinion and $\frac{1-\pi-\pi'+\pi'\alpha}{1-(\pi+\pi')(1-\alpha)}$ if he does not. Accordingly, the

voter will raise its support if and only if $\pi > \frac{1+\pi'\alpha-\pi'}{1+\alpha}$. At the voter's other two information sets he

expects $\frac{\pi}{\pi+\pi'}$ for either lowering his support or punishing recalcitrance and $\frac{\pi'}{\pi+\pi'}$ for doing nothing.

Clearly the voter lowers and punishes defiance if and only if $\pi > \pi'$. If $\pi \leq \pi'$, then the voter neither punishes nor lowers.

Thus, (Raise opinion, Lower opinion and Punish defiance) is sequentially rational if and only if

$\pi > \max\{\pi', \frac{1+\pi'\alpha-\pi'}{1+\alpha}\}$. If $\pi \in (\pi', \frac{1+\pi'\alpha-\pi'}{1+\alpha}]$, then (Do not raise opinion, Lower opinion and

Punish defiance) is sequentially rational. Finally, if $\pi \leq \min\{\pi', \frac{1+\pi'\alpha-\pi'}{1+\alpha}\}$, (Do not raise opinion,

Do not lower opinion and Do not punish defiance) is sequentially rational.

Case 2. High Salience and Low Constituent Cost for Defiance

As reviewed on page 12, the PBE strategies in Case 2 are as follows. I wish to establish these

strategies and the subsequent beliefs constitute a PBE when $b < 1$, $\beta \geq \frac{1}{1+c}$ and when π satisfies the

conditions below.

Court: Partisan and strategic types uphold all policies. Impartial type upholds a policy believed to be constitutional yet vetoes a policy believed to be unconstitutional.
 President: Accepts vetoes of non-salient policies but defies vetoes of salient policies.
 Voter: If $\pi > \frac{1}{1+\alpha}$, Raise opinion, Lower opinion and Punish defiance

If $\pi \leq \frac{1}{1+\alpha}$, Do not raise opinion, Lower opinion and Punish defiance.

Since the strategic and impartial courts separate, the voter's beliefs at I_{uphold} are different than they were in Case 1. They are as follows.

$$\Pr(I, C, V | I_{uphold}) = \frac{\pi\alpha\beta}{1 - \pi(1 - \alpha)}$$

$$\Pr(I, C, \sim V | I_{uphold}) = \frac{\pi\alpha(1 - \beta)}{1 - \pi(1 - \alpha)}$$

$$\Pr(I, \sim C, \bullet | I_{uphold}) = 0$$

$$\Pr(S, C, V) = \frac{\pi'\alpha\beta}{1 - \pi(1 - \alpha)}$$

$$\Pr(S, C, \sim V | I_{uphold}) = \frac{\pi'\alpha(1 - \beta)}{1 - \pi(1 - \alpha)}$$

$$\Pr(S, \sim C, V | I_{uphold}) = \frac{\pi'(1 - \alpha)\beta}{1 - \pi(1 - \alpha)}$$

$$\Pr(S, \sim C, \sim V | I_{uphold}) = \frac{\pi'(1 - \alpha)(1 - \beta)}{1 - (\pi + \pi')(1 - \alpha)}$$

$$\Pr(P, C, V | I_{uphold}) = \frac{(1 - \pi - \pi')\alpha\beta}{1 - \pi(1 - \alpha)}$$

$$\Pr(P, \sim C, V | I_{uphold}) = \frac{(1 - \pi - \pi')(\beta - \alpha\beta)}{1 - (\pi + \pi')(1 - \alpha)}$$

$$\Pr(P, C, \sim V | I_{uphold}) = \frac{(1 - \pi - \pi')(\alpha - \alpha\beta)}{1 - \pi(1 - \alpha)}$$

$$\Pr(P, \sim C, \sim V | I_{uphold}) = \frac{(1 - \pi - \pi')(1 - \alpha)(1 - \beta)}{1 - \pi(1 - \alpha)}$$

When the voter observes the president accept an unfavorable resolution, his beliefs are $\Pr(I, \sim C, \sim V | I_{accept}) = 1$, and the probability of being at other history is 0. Finally, when the voter observes defiance, his beliefs are $\Pr(I, \sim C, V | I_{accept}) = 1$ and the probability of being at any history is 0.

Proof Since the president is still expected to defy and the courts beliefs are as they were in Case 1, the equilibrium conditions are the same. Thus, as long as $\beta \geq \frac{1}{1+c}$, the strategic court will separate.

Similarly, since the voter is expected to punish defiance, the president's strategy to defy the court's veto of a salient policy is still optimal as long as $b < 1$. Given the voter's beliefs, it is clearly optimal for him to punish defiance and lower his opinion if ever he observes the court veto a policy. This is because only an impartial court would have vetoed a policy it sincerely believed to violate the constitution in this

equilibrium. At I_{uphold} he expects $\frac{\pi\alpha}{1-\pi(1-\alpha)}$ if he raises his opinion and $\frac{1-\pi}{1-\pi(1-\alpha)}$ if he does not.

Accordingly, he will raise his opinion if and only if $\pi > \frac{1}{1+\alpha}$. If $\pi \leq \frac{1}{1+\alpha}$, he will not raise.

Case 3: High Constituent Cost for Defiance

As reviewed on page 13, the PBE strategies in Case 1 are as follows. I wish to establish that these strategies and the subsequent beliefs constitute a PBE for $b \geq 1$, all values of c , and when π satisfies the conditions below.

Court: Partisan type upholds all policies, strategic and impartial types uphold policies believed to be constitutional and veto policies believed to be unconstitutional

President: Accepts all vetoes.

Voter: If $\pi > \max\{\pi', \frac{1+\pi'\alpha-\pi'}{1+\alpha}\}$, Raise opinion, Lower opinion and Punish defiance

If $\pi \in (\pi', \frac{1+\pi'\alpha-\pi'}{1+\alpha}]$, Do not raise opinion, Lower opinion and Punish defiance

If $\pi \leq \min\{\pi', \frac{1+\pi'\alpha-\pi'}{1+\alpha}\}$, Do not raise opinion, Do not lower opinion and Punish defiance

Proof Since the president accepts all vetoes, the strategic court will clearly pool with the impartial court for all values of c . Similarly, since the voter is expected to punish, and $b \geq 1$, the president will accept all vetoes. With these strategies, the voter's beliefs at I_{uphold} are the same as they were in Case 1, so the equilibrium condition on π is identical what it was in Case 1. Also, since the beliefs are identical at I_{accept} in this case as they were in Case 1, again, the equilibrium condition on π above which the voter will lower its opinion of the policy is identical to that in Case 1. Finally, the voter's beliefs at I_{veto} are undefined via Bayes Rule, so they may be anything that induces a rational choice. There are thus an infinite set of PBE here, but for simplicity, I assume that $\Pr(P, \sim C, V | I_{veto}) = 1$.

Now, for $\beta < \frac{1}{1+c}$, $b \geq 1$ and $\pi < \pi'$, there is an additional PBE where the strategic court pools

with the impartial court, the president accepts only vetoes of non-salient policies and the voter refuses to

raise or lower its opinion or punish defiance. Beliefs in this final case are as they are in Case 1, and since the president defies some vetoes, the voter's beliefs at I_{veto} are defined as they were in Case 1. With those beliefs and given the low prior on π , this equilibrium is more intuitively appealing than what is described in Case 3. Still, this equilibrium falls in the light region, so the predictions regarding the relationship between awareness and impartiality still hold.

A2. Beliefs in judicial impartiality decrease when court upholds

I proceed by contradiction. Assume that there exists some allowable set of parameter values such that $\Pr(\text{Impartial}) < \Pr(\text{Impartial}|I_{v1})$. This is to claim that there are some allowable values of the parameters under which the following is true.

$$\pi < \frac{\pi\alpha}{1 - (\pi + \pi')(1 - \alpha)}$$

Multiplying both sides of the inequality by $\frac{1 - (\pi + \pi')(1 - \alpha)}{\pi}$ yields

$$1 - \pi - \pi' + \pi\alpha + \pi'\alpha < \alpha,$$

which can be expressed as

$$1 - \pi - \pi' < \alpha(1 - \pi - \pi'),$$

which is true only when $\alpha > 1$. This can never be the case since $\alpha \in (0, 1)$.