

Judicial Review Timing and Legislative Posturing:  
Reconsidering the Moral Hazard Problem\*

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## Abstract

The prospect of judicial review may cause legislators to adjust their behavior to anticipate the court's response. This can serve as a source of moral hazard for legislators. Legislators can pursue irresponsible policies that are potentially electorally valuable and then rely on the court to bail them out by overturning the policy before implementation. We examine this issue by extending a seminal model of judicial review (Fox and Stephenson 2011) to include review both before the implementation of policy - ex ante review - and after the implementation of policy - ex post review. Our analysis shows that the moral hazard concerns are reduced when review occurs after policy costs are realized because politicians self-discipline. However, the full welfare implications for voters are complex and each form of review has advantages.

**Keywords:** Judicial Politics, Legislative Politics, Constitutional Courts, Judicial Review

Supplementary materials for this article, including proofs and additional analysis, are available in the appendix in the online addition. Professor Gabel acknowledges the financial support of the National Science Foundation (grant SES-0751670).

Judicial review – the opportunity for a court to strike a law as unconstitutional – can markedly shape legislative behavior. One longstanding concern is that judicial review induces legislators to behave more recklessly than they would otherwise (Thayer 1893). This potential adverse effect is modeled in a seminal piece by Fox and Stephenson (2011) – henceforth “F&S”. F&S shows that judicial review can cause low-quality legislators focused on electoral considerations to “posture” – adopt bold but irresponsible policies – in order to appear competent to voters. They show that posturing can lower voter welfare in terms of both the quality of policy and the efficacy of the electoral process.

We reconsider this moral hazard problem by comparing F&S with a setting where legislators anticipate that laws will have a policy impact prior to review. In F&S, legislators expected all laws to face judicial review before they had any policy impact. This induced irresponsible legislative behavior because the court could “rescue elected officials from the consequences of ill-advised policy” (F&S, p. 397). But if legislators expect laws to have some policy effects before review, they can no longer count on a complete rescue. This suggests that the normative and positive conclusions of F&S may not apply in this setting.

This setting is empirically relevant for legislative behavior in contemporary democracies. When constitutional courts exercise *ex post* review, which typically occurs after a law is promulgated and implemented, they cannot prevent damage from bad policy. This is the most common timing of judicial review (Corkin 2015; Ginsburg 2008; Navia and Ríos-Figueroa 2005). Furthermore, even where review occurs before a law is promulgated– i.e., *ex ante* review – legislators may foresee that the consideration of the law will have tangible effects on relevant parties before review.

The results of our analysis show that, indeed, legislators behave differently when they anticipate judicial review after a law’s policy impact obtains. We find that *ex post* review never induces more posturing than *ex ante* review and often induces less posturing. However, *ex post* review is not always better for voters. When the reductions in posturing eliminate equilibria characterized by policy-motivated legislators that posture at high rates, voters

benefit. But, when legislators are re-election focused and irresponsible in policy making, voters are better off with *ex ante* review.

## A Model of Judicial Review and Policy Making

Our model follows closely F&S. The game has three players: a Politician, a Judge, and a Voter. The game begins with Nature determining whether the state of the world,  $\omega$ , is such that an extreme policy ( $\omega = x$ ) or a normal policy ( $\omega = n$ ) is appropriate and whether the Politician is a high-ability ( $t = h$ ) or low-ability ( $t = l$ ) type. The players share a common belief about the state of the world:  $p = Pr(\omega = n) > \frac{1}{2}$ . The Politician knows his type; the others only know the prior probability of a high-type Politician,  $q \in (0, 1)$ . The policy-making stage follows, with the Politician selecting a policy,  $a \in \{n, x\}$ . High-ability Politicians observe  $\omega$  prior to selecting a policy; low-ability Politicians do not.

At the next stage, the Judge exercises one of two forms of judicial review. Under *ex ante* review, the Judge receives a private signal,  $s \in \{n, x\}$ , about  $\omega$ , where the Judge's level of expertise,  $\gamma \in [\frac{1}{2}, p)$ , determines the signal's accuracy:  $\gamma = Pr(s = \omega)$ . The Judge then rules on the policy:  $d \in \{uphold, strike\}$ . When a policy is struck down, it is replaced with the other policy. The resulting policy is implemented for two periods. Policy payoffs are realized but not observed during implementation: for period  $i \in \{1, 2\}$ ,  $u_i = 1$  if policy matches the state and 0 otherwise. Under *ex post* review, the implementation periods are separated by the judicial review stage. An election ends the game. The Voter, having observed  $a$  and  $d$ , chooses to retain the Politician probabilistically according to a continuous and increasing function of her updated belief about the Politician's ability:  $F(\hat{q}) \in [0, 1]$ .

The Judge's and Voter's utility is  $u_1 + u_2$ . The Politician's utility depends on reelection and policy, with the value placed on policy given by  $\alpha \in [0, 1)$ . When reelected, the Politician's utility is  $\alpha(u_1 + u_2) + (1 - \alpha)$ ; otherwise it is  $\alpha(u_1 + u_2)$ .

## Analysis

Our solution concept is Perfect Bayesian Equilibrium.<sup>1</sup> As in F&S, we make two simplifying

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<sup>1</sup>Proofs and additional analyses are available in the online appendix.

assumptions about the players' behavior. First, we assume that the high-ability Politician always matches policy to the state of the world. Second, we assume that the Judge can only strike down the extreme policy. We focus on three forms of judicial decision making. The Judge adopts a *passive* strategy by always upholding the Politician's policy, a *strict* strategy by always striking down the extreme policy, or an *active* strategy by ruling based on her signal – choosing  $d = \textit{strike}$  if  $s = n$ , and  $d = \textit{uphold}$  if  $s = x$ . For the low-ability Politician, we focus on the posturing rate, or the frequency of proposing the extreme policy:  $\pi = \textit{Pr}(a = x | t = l)$ . We refer to equilibria according to the strategy (passive, strict or active) adopted by the Judge.

### Effects on the Players' Behavior

The central tension in the model follows from a dilemma faced by the low-ability Politician. Were he to focus entirely on producing the best policy, he would exclusively propose  $a = n$ , since the normal state is always more likely. However, if he did this, the Voter would infer that any Politician who proposes  $a = x$  is high-ability, thereby reducing his re-election prospects. This re-election concern produces the posturing incentive. But posturing also generates a policy cost. Thus, the low-ability Politician faces a trade-off between re-election and policy, with the posturing incentive decreasing in  $\alpha$ .

Judicial review affords the Politician an escape from this dilemma through a *bail-out effect*: if the Judge strikes down  $a = x$ , the low-ability Politician gets the reelection benefit of posturing without suffering the full policy cost. Critically, the bail-out effect is weaker under *ex post* review than under *ex ante* review. When the Judge strikes down  $a = x$  under *ex ante*, then  $a = n$  is implemented in both periods. In contrast,  $a = x$  is implemented for one period before the Judge can replace it with  $a = n$  under *ex post* review. Proposition 1 clarifies how this difference impacts the equilibrium posturing rate ( $\pi^*$ ):

**Proposition 1.** *Holding the Judge's strategy constant, posturing is weakly higher under ex ante review ( $\pi_{ex\ ante}^* \geq \pi_{ex\ post}^*$ ).*

This proposition reflects the *self-disciplining effect* of *ex post* review on the low-ability Politi-

cian. As a consequence of its weaker bail-out, the low-ability Politician must temper his posturing, selecting a  $\pi^*$  low enough to ensure that the policy costs do not outweigh the electoral benefits. By forcing the low-ability Politician to more fully bear the costs of his posturing, *ex post* review induces less reckless policy-making.

In some contexts, posturing is the same under both review forms. Review timing does not alter posturing in a passive equilibrium because there is no bail-out effect. Also, when the Politician has an extremely large or small level of policy motivation ( $\alpha$ ), he will either never posture (if  $\alpha$  is large) or exactly mimic the high-ability Politician, setting  $\pi^* = 1 - p$  (if  $\alpha$  is small), regardless of review timing.

For a given level of posturing, review timing does not impact the Judge's behavior, as she is the last player to set policy in both settings. The Judge's decision to adopt the passive, strict, or active strategy depends on her posterior belief that  $\omega = n$ . This belief,  $\hat{p}(s; \pi)$ , is based on the state suggested by the Judge's private signal,  $s$ , and the rate of posturing,  $\pi$ . She will uphold or strike policies such that the implemented policy matches the state her posterior suggests is most likely.<sup>2</sup>

Yet, the timing of review is not completely inconsequential for judicial behavior. When posturing decreases – as Proposition 1 shows can be the case when the review regime is changed from *ex ante* to *ex post* – the Judge's posterior puts more weight on  $\omega = x$ . This can lead the Judge to switch to a strategy that more often upholds  $a = x$ . That is, there is a spillover effect of *ex post* review's reduced bail-out on judicial behavior: by inducing the low-ability Politician to self-discipline, it allows the Judge to uphold the extreme policy more often. This offers a political rationale for deferential forms of review under *ex post* review (e.g., the doctrine of Chevron deference in the United States' administrative law): when judges knows that the agents have to internalize some of the costs of being reckless, they can afford to be more deferential than under *ex ante* review.

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<sup>2</sup>When her posterior suggests both policies are equally likely, she is indifferent between striking and upholding.

Combining the above effects of review timing on player behavior, Proposition 2 describes the impact of review timing on the existence of passive and non-passive equilibria:

**Proposition 2.** *Equilibria always exist under both review regimes. Further, we have:*

- a. *Passive Equilibria. The set of  $\alpha$  values that support a passive equilibrium is the same under both review regimes.*
- b. *Non-Passive Equilibria. Under ex ante review, all values of  $\alpha$  support at least one non-passive equilibrium. Under ex post review, non-passive equilibria do not exist if  $\alpha$  is too large.*

The result for passive equilibria is straightforward. From above, we know that review timing does not impact posturing in this case, and that it does not impact the Judge's decision. Review timing, therefore, has no impact on the set of  $\alpha$  values that sufficiently limit posturing to support a passive equilibrium. This is not the case for non-passive equilibria. Under *ex ante* review, posturing has no policy cost if the Judge uses the strict strategy, meaning that any low-ability Politician is willing to choose  $\pi$  large enough to support a strict equilibrium. In contrast, under *ex post* review, posturing generates policy costs even with a judicial bailout. Consequently, a Politician with sufficiently high  $\alpha$  is unwilling to posture at a high enough rate to support a non-passive equilibrium.

This result suggests that *ex post* review partially ameliorates an undesirable feature of *ex ante* review: the existence of equilibria where the Politician postures at high rates despite the alignment of his interests with the Voter (i.e. a large  $\alpha$ ). As F&S (p. 411) show, these equilibria are often harmful to the Voter. By eliminating these equilibria, *ex post* review protects the Voter from moral hazard on the part of a policy-motivated but low-ability Politician. We return to this point in the welfare analyses below.

### **Electoral Selection Effects**

Review timing also influences the Voter's ability to distinguish high- from low-ability Politicians, which in turn affects the efficacy of elections as mechanisms for retaining only competent politicians. Like F&S, our model limits us to examining how *ex post* and *ex*

*ante* review impact the Politician's electoral reputation. Nevertheless, because a Politician's reputation influences his reelection, the timing of review can shape the rate at which competent Politicians are retained and incompetent ones are removed. Specifically, if review timing alters the Politician's behavior, the Voter will be better able to distinguish low- and high-ability Politicians under *ex post* review. To see this, note that the less frequently the low-ability Politician proposes  $a = x$  relative to the high-ability Politician, the better the Politician's reputation when proposing  $a = x$ . And, recall from Proposition 1 that the low-ability Politician postures weakly less under *ex post* review than *ex ante* review, while the high-ability Politician's rate of proposing  $a = x$  is unaffected by review timing. In contrast, when there is no difference in the rate of posturing between *ex ante* and *ex post* review in any strict, passive, or active equilibrium, the Voter's assessment of the Politician's ability is not affected by review timing. This follows from the fact that the Politician and Judge's behaviors alone drive the Voter's posterior belief about the Politician's ability.

### **Policy Effects**

Given the advantages of *ex post* review discussed above, it would appear that the Voter should fare better under that form of review. However, the welfare effects turn out to be quite complicated and not unambiguously in favor of *ex post* review. The Voter welfare effects of judicial review depend on the expected number of policy periods in which the correct policy is implemented. Proposition 3 clarifies how welfare varies across review regimes within each type of equilibrium:

#### ***Proposition 3.***

- a. Passive equilibria. *In a passive equilibrium, the Voter's expected policy payoff is the same under both ex ante and ex post review.*
- b. Strict equilibria. *In a strict equilibrium, the Voter's expected policy payoff is strictly greater under ex ante than ex post review.*
- c. Active equilibria. *In an active equilibrium, the ordering of the Voter's expected policy payoff between ex ante and ex post review is ambiguous.*



Part (a) of Proposition 3 is uncomplicated: if the Judge upholds all policies, the timing of review will not matter for welfare. Parts (b) and (c) are a consequence of three effects that impact the Voter's utility. First, consider the *costly overreach effect* of posturing. Under *ex ante* review, the Judge can prevent the Voter from suffering the cost of an overreaching policy. Under *ex post* review, she cannot. Second, consider the *expertise effect* of the high-ability Politician's policy being implemented. Under *ex post* review, the Judge cannot prevent a high-ability Politician from implementing the appropriate policy in the first period. But under *ex ante* review, a strict or active Judge can do this, which denies the Voter the benefit of the Politician's expertise. Third, recall the *self-disciplining effect* of review, which reduces posturing under *ex post* review. This effect increases Voter welfare under *ex post* review, because, all else equal, the Voter's expected payoff increases as posturing decreases.

Whenever a strict equilibrium exists under both forms of review, the costly overreach effect is so large that *ex post* is always worse for the Voter. In an active equilibrium, the relative strength of all three effects impacts the ordering of *ex ante* and *ex post*. In general, larger  $\alpha$  values favor *ex post*, because they reduce the posturing rate, in turn reducing the costly overreach penalty, while smaller  $q$  values favor *ex ante*, as benefits of the expertise effect are smaller when there are fewer high-ability Politicians.

Review timing also impacts welfare by altering the regions of the parameter space in which passive and non-passive equilibria exist. Proposition 4 clarifies the impact of variation in the existence of equilibria between the two review regimes on Voter welfare:

**Proposition 4.** *If policy motivation ( $\alpha$ ) is sufficiently high that ex post review only supports a passive equilibrium, then ex ante review weakly decreases welfare relative to ex post review.*

When the Politician's policy motivation is relatively high, self-disciplining reduces posturing enough that only the passive equilibrium exists under *ex post* review. Under *ex ante* review, however, self-disciplining is weaker, and, in this same region of the parameter space, both passive and non-passive equilibria exist. These non-passive equilibria weakly lower the Voter's welfare relative to a passive equilibrium, as the benefits of the Judge striking down

unnecessary extreme policies are (weakly) outweighed by the costs of increased posturing and wasted high-ability Politician expertise.<sup>3</sup> Consequently, when  $\alpha$  is high, replacing *ex ante* review with *ex post* review will never hurt the Voter, and in many instances, will benefit the Voter. Specifically, if *ex ante* review induces a non-passive equilibrium that lowers welfare in comparison to a passive equilibrium, the Voter is better off under *ex post* review.

Combining the above results shows that which regime is better for the Voter largely hinges on the Politician's electoral motivation. When  $\alpha$  is low, *ex ante* review is preferred, as this protects the Voter from costly overreaches in non-passive equilibria under *ex post* review. At moderate levels of  $\alpha$ , no form of review is consistently better for the Voter; the superior form of review depends on the existence of multiple equilibria and the interplay among self disciplining effects, costly overreach effects, and expertise effects across the parameter space. Finally, at high levels of  $\alpha$ , *ex post* is better for the Voter, as it eliminates damaging equilibria in which policy-motivated Politicians posture at high rates.

## Conclusion

When politicians pass potentially unwise policies in order to feign competence, voters suffer in two ways: first, they endure potentially damaging policies, and, second, they have greater difficulty using elections to retain competent politicians and replace incompetent ones. Building off of F&S, we developed a formal model of judicial review to investigate how politicians' incentives to posture change depending on whether they expect at least some policy impact to obtain prior to review.<sup>4</sup> The main insight from this analysis is that the moral hazard for legislating decreases as the policy costs incurred before judicial review grow. Specifically, our analysis revealed that *ex ante* review generates at least as much posturing as *ex post* review and, under plausible conditions, can generate significantly more.

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<sup>3</sup>Welfare is equal only if passive and active equilibria both exist with equal posturing rates.

<sup>4</sup>Note that our model is not exclusively about the *ex post* review institution exercised by courts. It should apply to any setting where legislators make policy assuming the policy will have effects prior to judicial review.

The mechanism driving this result is that the “bail-out” for unwise policy choices is not as valuable to legislators under *ex post* review as it is under *ex ante* review.

However, the consequences of review timing for voter welfare depend on the context. When politicians are highly electorally motivated, *ex ante* review is better, as the costs of posturing are significantly higher under *ex post*. In contrast, when politicians are policy-motivated, *ex ante* can be worse, as it supports more equilibria with high levels of posturing. Review timing also impacts the efficacy of elections: because posturing is lower under *ex post* review, voters can infer more about a politician’s competency under this system.

The model also has normative implications for the appropriate combination of review procedures and legislative and electoral institutions. Recall that the Voter’s welfare under the two forms of review depends on the legislative context. When legislators regard re-election as more important than policy outcomes and legislators are of low quality, *ex ante* review is better for voters. But, as legislators become more concerned about policy and their quality increases, the value of *ex post* review for voters increases. Thus, voters are best served by matching the timing of judicial review with compatible legislative features that determine legislators’ competency and how motivated they are by re-election relative to policy goals. Term-limits, for example, obviously reduce dramatically legislators’ concerns about re-election. Legislative capacity or professionalism as indicated by legislative resources (e.g., staff, salaries, and time demands of service) can enhance the competency of a legislature (Huber and Shipan 2002; Squire 2007). Tying all of this together, our model implies that voters with a high-capacity legislature with term-limits would be best served by *ex post* review. *Ex ante* review is a better match with contextual factors that push legislators to focus on re-election – e.g., electoral laws that facilitate new party or candidate entry.

These nuanced conclusions contrast with the key result reported by Dragu, Fan and Kuklinski (2014), which finds that *ex ante* is generally the more normatively desirable review. We suspect this difference is due, at least in part, to our assumption that legislators are motivated by both policy and *electoral* considerations. Our model highlights how tradeoffs

between the two affect the normative value of judicial review.

More generally, our finding regarding moral hazard applies beyond the specifics of our model of judicial review. Where actors with partly common policy interests decide policy under uncertainty and through sequential moves, the final mover often is left to defend the common interest at the expense of its other concerns. This can be limited by allowing the realization of some policy consequences before that final move.

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