

**Casting the Gimlet Eye on Judicial Review:  
Can Judicial Review be Democratically Debilitating?**

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**Abstract.** Modern scholars tend to assume that judicial review is a good thing. And it might be. But an assumption is not an argument. This paper examines the institution of judicial review and asks this question: Is judicial review on balance good? The question, “good relative to what” is first answered, then the costs of judicial review are considered relative to the institution’s benefits. This analysis is preliminary, so no definitive answer is attempted (let alone actually provided). Nonetheless, the possibility exists that judicial review can create a “moral hazard” problem that can debilitate democratic citizenship as well as the legislative process and outcomes.

Legal scholar Barry Friedman concluded his five-article series on the intellectual history of the “countermajoritarian difficulty” by challenging scholars to focus on the real impact of judicial review rather than remaining “obsessed” (his word) on the abstract consistency of judicial review with democratic decision making. We care about democratic processes not as abstract procedures but because they serve other human ends. Therefore, Friedman concluded, scholars should “undertake to assess realistically whether judicial review is a net gain or loss for values we hold dear, be they economic growth and security, individual liberty, or equality. Stated differently, is judicial review worth it even though we deplore particular results?” (2002, 257). (We could add to Friedman’s last sentence and ask equally whether judicial review is “worth it” even when we endorse or celebrate particular results.) The surprise of Friedman’s challenge, however, that it needs to be made at all. For the tens of thousands of pages devoted to studying judicial review over the past two centuries, scholars still need to be admonished to consider the basic question whether “judicial review is a net gain or loss” for any society. That’s a shoker.

Friedman ends his series with that admonition. So let’s start where he concludes. Friedman invites scholars, as it were, to move to a broader scale of analysis. Popular, and often scholarly, reactions to the institution of judicial review often seem tied to whether we approve or disapprove of the particular results generated by the institution – whether, as a policy matter, we approve or disapprove of abortion, or whether we approve or disapprove of more rather than less economic regulation. These are, to be sure, important policy questions, but they are questions tertiary to the issue of whether the addition of judicial review *by itself* to a political system is on balance good or bad.

I am agnostic on the overall answer to the question. Given the common opinion that judicial review is an unalloyed good – or, at least, that there’s nothing wrong with judicial review that the right type of judicial review cannot remedy – I want to move beyond the institution’s impact on particular policies and focus more broadly on its costs and benefits in the abstract. I should add here that I do not answer the overall question, whether judicial review “worth it.” But I do lay out a framework for answering the question. This framework, I hope, suggests not only a theoretical research agenda, but an empirical one as well.

I use essentially a comparative approach – I characterize outcomes or behavior without the institution of judicial review, then add the institution, characterize the new outcomes or behavior, and then compare the latter to the former. This paper focuses on three areas: the generic policy costs and benefits of the judicial veto; the legislative moral hazard problem created by judicial review; and the democratic moral hazard problem created by judicial review. The upshot is that there is a possibility that judicial review might not be “worth it” overall, even if we approve of particular case results provided by U.S. courts.

Before turning to its consideration, I should probably note that there is, of course, a lot more to the judicial task than judicial review. An outside observer might be surprised at that given all of the attention – some might call it an obsession – paid by scholars and the press to the Supreme Court and to constitutional decisions. Nonetheless, the day-to-day work of the judicial system comes in the thousands of trial and appellate courts, as the legal system implements and administers legislative enactments. Considering all of the trials at the national, state, and municipal level, the role of the

judiciary as a system of administration almost dwarfs bureaucratic administration. Despite its ubiquitous role in our lives – even if we have not been a litigant, the deterrent affect of the possibility of litigation structures much of our everyday behavior – we are often myopic, both as citizens and as scholars, about the massive administrative apparatus that the judicial system represents (see, e.g., Fiorina 1982, Stephenson 2006, Farhang 2008). In contrast to the U.S. experience in which ordinary courts consider constitutional claims in the midst of their cases, many European courts do not even consider constitutional questions. These, rather, are left to specialized “constitutional courts” (Vanberg 2004). The administrative task of the judiciary is of interest in its own right, as well as the fact that courts and bureaus represent rival administrative systems.

With a nod to this vitally critical role of courts in the U.S. political system, we now turn to focus more narrowly on the impact of judicial review.

### **I. Policy Costs and Benefits of the Judicial Veto**

A few years ago, when presenting a paper at a law school, I referred repeatedly to the “judicial veto.” In the question and answer period after the talk, the law school’s dean (a friend of mine), sniffed and said, “Judges do not veto legislation, they strike down legislation.” “Ah,” I replied, “that’s exactly the distinction this paper aims to blur.” Even though judges are often elected or appointed because of their political connections and backgrounds, we often think of judges as immune from policy interests that other politicians aim to realize or to influence. However it may be, no one would complain about judicial review if objectively and universally recognized “bad” laws were the only laws that the judicial veto obviously eliminated. The issue with judicial review, however, is that in empowering a group of individuals to veto laws for “good” reasons, we also

empower them to veto laws for not-so-obviously good reasons. In the case of judges, while they will always *say* that they are vetoing a law because it is unconstitutional, they also have the concomitant power to veto laws simply because those laws do not align with their own policy preferences.

So the benefit of judicial review is that at least some “unconstitutional” laws are struck down. But a “cost” of the judicial veto is that judges can also strike down some laws, not because they are “unconstitutional” (even assuming that unconstitutional laws necessarily represent bad policies) but because the judge disagrees with the law’s policy. Here, then, is one place where the “countermajoritarian” nature of the judicial veto likely has some bite. On average, one would think that the policy output of an electorally accountable institution such as a legislature would better align with popular preferences than the policy output of the courts. (Judicial systems in which judges are elected may be an exception to this.) Hence, whether judicial review is, on balance, a net good or a net bad for society depends on the incidence of the vetoing of “bad” laws relative to the vetoing of “good” laws.

Beyond this, the exercise of the judicial veto not only affects legislation that is litigated – by deterring the legislature initially from adopting legislation, the mere threat of litigation can have an indirect affect on legislation that is never litigated (see, e.g., Rogers and Vanberg 2007, Rogers and Whittington 2007). This possibility is straight forward to motivate.

Let’s say that there is a payoff every year (i) to enacting a law, whether it is constitutional or not. The discounted future payoff (II) to the legislator for enacting a law that is never struck down or repealed is:

$$(1) \Pi = \sum_{i=1}^{\infty} \delta^i U_i(p) > 0.$$

There are, presumably, some costs to legislating laws. We label these generic transaction cost,  $c_t$ . Laws for which  $\Pi - c_t \geq 0$  will be enacted and implemented. Figure 1 provides a baseline diagram of in legislation that the legislature choose to enact and choose not to enact, given different configurations of costs and benefits. This is legislation that is enacted without judicial review (i.e., in a system of legislative supremacy).

Now let's add a judicial veto. It usually takes some time – often a matter of years – for legislation to be litigated and then struck down by a judge. If a policy is struck down, then the time horizon over which the legislature receives a payoff is limited to “n” years rather than to an indefinite period of time. Let's label that payoff  $\Pi'$ . Clearly,  $\Pi' < \Pi$ .

$$(2) \Pi' = \sum_{i=1}^n \delta^i U_i(p) < \sum_{i=1}^{\infty} \delta^i U_i(p) = \Pi.$$

To keep things simple (although at the cost of some realism), we'll assume that legislators do not know for certain whether a judge will veto a law. So let  $q$  represent the probability a judge wills strike down a statute if legislators enact it. From (2), the payoff to legislation in this context declines as a result of the addition of judicial review:

$$(3) q\Pi + (1-q)\Pi' - c_t < \Pi - c_t.$$

As illustrated in Figure 2, the number of unenacted policies increases as a result of judicial review. Further, of the laws that are enacted, some of these laws are struck down. Therefore, in this static context, judicial review deters some laws that would otherwise have been passed, and eliminates some laws that were passed because a judge strikes them down.

To be sure, the laws that the legislature forgoes enacting as a result of judicial deterrence might, on average, be bad laws (by whatever measure). But there's no reason to assume that. At the institutional level, it seems equally plausible that the value to the public of the policies that are never enacted as a result of the deterrent effect of judicial review plus those that are actually struck down could be equal to or greater than the disutility of the laws that are deterred plus the laws that are actually struck down. Whether judicial review is a net cost or a net benefit is indeterminate in this context.

## **II. Legislative Moral Hazard: Does Judicial Review Induce the Enactment of More and Dumber Laws?**

The next two sections of this paper move beyond the static setup used above. This section discusses how judicial review creates a moral hazard problem for the legislature – and how that can harm the legislative process – and the next section discusses how judicial review might create a moral hazard problem for voters, and how that can debilitate the democratic process. A bit of motivation is useful, however, before focusing on those immediate questions.

Judicial review must be more than the courts saying “no” to the legislature. Recognition of this fact comes from the literature on courts in separation of power political systems. After all, legislators ordinarily enact legislation because they want to see legislation implemented. If judicial review only stymies the ability of legislative majorities to reach their statutory purposes, then we have a real puzzle: If these same legislative majorities have the means to control or eliminate the exercise of the judicial veto, then why don't they use those tools to prevent courts from interfering with achieving their policy goals? Some legislatures do maintain systems of legislative

supremacy – the British Parliament is perhaps the leading example. The puzzle, however, is why legislatures *ever* tolerate a system that includes judicial review when they have it within their power to create a system of legislative supremacy. One obvious answer to the puzzle is that legislative majorities tolerate judicial review because it is in their interest to tolerate judicial review. That is, there must be some countervailing benefit for maintaining judicial review that compensates legislative majorities for the policy loss they incur from the judicial veto.

I divide the incentives for legislatures to create and maintain independent judiciaries into “internal” and “external” categories. Theories that identify internal inducements for legislatures to support judicial independence focus on how judicial review might assist legislators in attaining their own policy purposes. These theories do not reference the interests of actors other than those of the legislators themselves. These theories argue that in some fashion judicial review is intrinsically valuable to legislators. Theories that identify external inducements typically hold that judicial review only stymies the ability of legislative majorities to attain its policy goals. Legislative majorities nonetheless maintain independent judiciaries because of support for judicial independence outside of the legislature somehow induces legislative majorities to tolerate of judicial review.

Internalist theories include Landes and Posner’s (1975) argument that legislatures maintain independent judiciaries to extend the life of legislation beyond the enacting legislature. Because legislative majorities desire their policy preferences to be implemented beyond their hold on power, each will maintain an independent judiciary while they are in power so that their statutory bargains will be enforced when they no

longer govern.<sup>1</sup> Whittington (2005) inverts the central feature of Landes and Posner's theory and instead argues that current legislative majorities support judicial review because the judicial veto can clear out the obstructing clutter of old legislation enacted by past legislatures. Rogers (2001) identifies several reasons that judges will have better information on the policy consequences of legislation relative to the enacting legislature. Exercise of the judicial veto by sympathetic judges – i.e., judges whose policy preferences *converge* with those of the enacting legislature – can then assist the legislative majorities to attain their policy goals. Graber (1993) and Lovell (2003) argue that legislatures delegate controversial questions to courts because legislatures cannot or do not want to resolve them. Legislators value judicial independence in these cases because it allows them to avoid responsibility for potentially controversial decisions. Internalist theories identify ways in which an independent judiciary serves legislative policy interests.<sup>2</sup>

Externalist theories focus on how outside forces can induce legislators to maintain an independent judiciary. These theories usually identify public support for the courts as a key mechanism that generates compliance on the part of legislatures and other officials (see, e.g., Caldeira 1986, Gibson, Caldeira and Baird 1998, Murphy and Tanenhaus 1990, Weingast 1997). Staton (2005) develops and tests a model in which perceptions of judicial “impartiality” affects public beliefs about the legitimacy of the court. Vanberg (2001) identifies two conditions necessary for electoral pressures to induce legislative

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<sup>1</sup> Rogers (2006) places Landes and Posner's argument in a game-theoretic context and argues that current legislatures have incentives to defect from sustaining judiciaries that enforce the statutory bargains of past legislatures.

<sup>2</sup> Pickerill (2005) might also be included among internalist theories because he outlines a theory in which both courts and legislatures can achieve their policy goals in a separation-of-power system. In his theory, however, both institutions can simultaneously “win” because their maximizing along different policy dimensions.

compliance with judicial decisions. First, “there must exist sufficient public support for the court generally (or for its particular decision) to make an attempt at noncompliance unattractive.” And, secondly, “voters must be able to monitor legislative responses to judicial rulings effectively and reliably” (Vanberg 2001, 247). Vanberg assumes public support for the court and focuses his study on the second condition – the impact on legislative compliance of the differential ability of voters to monitor legislative responses to judicial rulings. One line of scholarship identifies the electoral concerns of legislators as the reason that legislators support judicial review. It argues that reelection-oriented legislators tolerate judicial review because voters support judicial review and will not reelect legislators who seek to undermine it (Caldeira 1986, Gibson, Caldeira and Baird 1998, 343, Vanberg 2001, 2005). But this answer only pushes the original question back one step and raises the question of why popular majorities support judicial review. On the one hand, when judges are not elected and legislators are, the obvious expectation would be that popular majorities would side with the legislative majorities they elected rather than side with the courts against legislatures. On the other hand, even when judges are elected, why would we expect popular majorities systematically to support courts against legislatures?<sup>3</sup> The obvious route to an answer must again be that that popular majorities support judicial review because the institution supplies a benefit to popular majorities that induces their support.

In this section, I have an “internalist” focus on the impact of judicial review on legislative behavior and outcomes. In the next section, I take an “externalist” focus, examining the impact of judicial review on voter behavior.

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<sup>3</sup> Put another way, why would we expect elected judges to be more representative than elected legislators?

When legislative interests are not directly adverse to judicial interests – as when the legislators care about the constitutionality of the laws they enact – there is the possibility that non-deferential judicial review might actually increase the enactment of unconstitutional laws, and decrease the constitutional “quality” of laws. The argument has been advanced for over a century, most forcefully by James B. Thayer, a Harvard professor of law. His views significantly influenced the jurisprudence of “Harvard” justices in the 20<sup>th</sup> Century (Holmes, Frankfurter and others). In an 1893 article in the *Harvard Law Review*, Thayer argued:

It has been often remarked that private rights are more respected by the legislatures of some countries which have no written constitution, than by ours. No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they way, the courts will correct it. If what I have been saying is true, the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs. The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent. . . . Under no system can the power of courts go far to save people from ruin; our chief protection lies elsewhere. (156)

What Thayer identifies here is an example of moral hazard. The term “moral hazard” originated in the insurance literature, but identifies a problem generic even to implicit insurance systems. Moral hazard arises when an individual does not have to bear the full consequences of risk. The result is that people behave differently, acting less carefully than they would otherwise, and thereby increasing social cost overall. The classic example is auto insurance. If a driver does not bear the full cost of an accident, the

driver drives in a more risky fashion than without insurance, and likely drives more as well than if s/he bore the full cost of an accident.

Judicial review can “insure” a legislature against the full consequences of enacting unconstitutional legislation – at least if “unconstitutionality” has any objective reference at all (see, e.g., Rogers 2001). While Rogers (2001) did not focus on this topic, one of the implications of the results derived there was that, as a result of judicial review, the legislature enacted more legislation than it would otherwise, and that the legislation it enacted was “riskier” than it would be in the absence of judicial review.

This does not necessarily mean that society is worse off with judicial review than without it. But it does raise the possibility. Given that legislation often takes years to reach the courts even when they are ultimately struck down, society incurs the cost throughout the period that a statute is implemented. If there is any slack between voter welfare and legislative interests – as there almost certainly is – then it is possible that judicial review generates a net cost to society. Further, the problem can be amplified if legislators and courts have inconsistent conjectures about the level of scrutiny provided by the judiciary. The irony is that by providing ex post quality control, the judiciary induces legislatures to enact sloppier (or “riskier”) legislation than they otherwise would.

Recognition of this problem need not be limited to concrete policy losses. The specter that Thayer raises is a more general concern with what we could call the “republican ethos” of a legislature. That is, would the legislative process be somehow better, even more “democratic,” if legislators recognized their singular responsibility for the constitutionality of the legislation they enacted. Examples abound. Perhaps the most notorious recent example is when President George W. Bush famously expressed

skepticism about the constitutionality of parts of the McCain-Feingold law when he signed it, yet signed it anyway, saying that its constitutionality would be a matter that the courts would determine.

One final observation on the impact of the moral hazard problem that judicial review creates for the legislative process. For over two hundred years, a more or less explicit understanding of the “veto” powers written into the U.S. Constitution has been that the system of veto powers established by the Constitution created a status-quo preserving policy system. This expectation is in *The Federalist*, and this expectation was the centerpiece of Progressive-era criticism of judicial review and bicameralism. Scholars today routinely note the status-quo preserving nature of the constitutional system as well, although they do so usually in passing.

The source of the belief is easy to understand. Say we have a system of legislative supremacy – there is no judicial review, no executive veto, and no second legislative chamber. This legislature enacts, say,  $N$  laws in a year. Now we add our judicial veto player (or executive or legislative veto player), who then vetoes “ $n$ ” of those laws. Well,  $N - n < N$ . Therefore, the thought goes, the addition of veto players increases the status-quo preserving nature of a political system.

While obvious and intuitive, the conclusion is nonetheless incorrect. In fact, the impact of the addition of veto players on the quantity of legislation is indeterminate. The conventional wisdom neglects the fact that the addition of a veto player changes the incentive structure a legislature faces when enacting laws, and thereby can induce greater legislative production with the addition of the veto player than without the veto player. (The content of the legislation enacted would presumably change as well.) At the level of

the overall system, the addition of a judicial veto player can make a political system more status-quo *changing* than it would be without the addition of the veto player.<sup>4</sup> In any event, the idea that the checks and balances in the U.S. Constitution means that the system is necessarily more status-quo preserving than it would be without one or more of the checks is false.

### **III. How Judicial Review can Debilitate Democracy**

In this section we turn from implications of judicial review that are internal to the legislative process, to implications that are external to that process. Nonetheless, as with legislators, judicial review can create a moral hazard problem for voters because it insures against risky behavior on the part of voters. In this instance, however, the risky behavior comes in the form of their attentiveness to the legislative or political process.

Early in the semester in my constitutional law courses I usually ask my students who or what is primarily responsible for protecting our constitutional rights in the American political system. Almost universally students say that the courts have the primary responsibility. They typically are surprised that their answer would have shocked the constitution's framers, and isn't even a perspective that the courts invoke to justify their use of the judicial veto. The students' answer, however, is entirely consistent with Thayer's warning about the possible consequences of judicial review – that the institution can undermine incentives that voters have to be attentive to legislative actions.

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<sup>4</sup> This is an implication of judicial review (Rogers 2001). The executive veto could presumably have a similar effect. The argument vis-à-vis a second legislative chamber can work a little differently. In the U.S., both legislative chambers can originate legislation as well as “veto” legislation. If policy entrepreneurship is even somewhat uncorrelated across the two chambers, then it is very easy for a bicameral legislative system to produce more legislation than the same number of legislators would if seated together in a single legislative body (Rogers 2003).

In classical American political thought, republicanism – that is, electoral accountability – is the primary guarantor of rights and liberties. Second on the classical list of what protects our liberty, a la *The Federalist* No. 51, the rival interests of competing institutions were expected carve out space for individual rights and liberties. To be sure, judicial review has its role even in classical American political thought. Nonetheless, the judiciary is relegated to the “least dangerous branch” because of its reactive character and its dependence on the other branches of government. Indeed, even in constitutional jurisprudence, judicial intervention is sometimes – although contestably – justified by judges themselves as a response to failures of the political process to remedy certain outcomes. The second and third paragraphs of the famous “footnote four” of *Carolene Products* (1938) stands as the exemplar of this approach.

There is, however, more potential bite to the students’ answer than its inconsistency with classical American political thought. Anthony Downs popularized the notion of “rational ignorance” in political science. The idea is straight forward: when the acquisition of information is costly, it does not always make sense of individuals to be fully informed about events that affect their lives. Sometimes ignorance is rational. As with legislatures, the existence of judicial review can affect incentives that voters have to acquire and act upon political relevant information. To put it colloquially, the existence of judicial review can affect whether voters turn to the front page or to the sports page.

As with the legislature, the existence of judicial review insures voters at least partially against risky behavior, in this case their failure to be attentive to legislative actions. This behavior, of course, is rational given the insurance mechanism provided by judicial review. Identifying rationally ignorant or inattentive voters must then come from

normative theories of citizen behavior in republican political systems or from a positive theory more subtle than the one advanced here. In most normative theories of republican governance, citizen attentiveness to the actions of their representatives is a critical feature of individuals taking responsibility for their own governance. That the existence of judicial review can create incentives that undermine the behavior that is assumed necessary for the success of republican polities is then a problem from these perspectives. To the extent that the institution affects citizen behavior in this way, and to the extent that we think that voter attentiveness is important in republican political system, then judicial review can be democratically debilitating. To the extent that the existence of judicial review undermines republican character among citizens, then to that extent it can arguably undermine the justification for its own existence – the preservation of rights and liberties. To an extent yet fully to be explored, judicial enforcement of rights might actually reduce the liberties enjoyed by a society in the long run.

The Thayerian answer to this is to have judges reflexively defer to legislative enactments, striking them down only if there are unconstitutional beyond all doubt. With perhaps a few exceptions at one time or another, no Supreme Court justice has ever adopted that approach consistently. Instead, justices have struggled to justify “two-tiered” review in which some laws receive deferential “rationality review” by judges, while other laws receive heightened or more rigorous review. The resulting system of constitutional jurisprudence is difficult to defend against the charge that areas that receive heightened scrutiny – such as speech and privacy – do so because justices personally value individual liberty in those areas more than in other areas such as economics or property rights. It is

difficult to defend those judgments, however, as anything more than personal policy preferences.

## **Conclusion**

Judicial review is a well accepted feature of the U.S. constitutional system. New and developing democracies appear also to have accepted judicial review as a feature of their political systems rather than alternative models of legislative supremacy. Political scientists in general, and judicial scholars specifically, also seem largely to have received judicial review as a good thing. As Barry Friedman suggested by implication in the quotation that opened this paper, I also think that the biggest questions regarding this institution have yet to be explored rigorously and scientifically. It is not clear why the institution of judicial review would be necessary for the preservation of liberty in the U.S., but not in Britain. Because many factors are correlated with judicial review – legal tradition, social habits, education, prosperity – it is unclear that what we ascribe to judicial review is actually caused by judicial review as opposed to one or more of these other variables.

This paper sought to cloud the issue a bit, and to suggest ways in which the institution of judicial review could impose net losses on the societies that adopt it. I should stress that I have not argued that judicial review is a bad thing, I've only argued that whether the institution *itself* is a net gain or loss for a society is still a very open scientific question. I've identified three separate ways in which judicial review might be more costly than it is beneficial – that judicial discretion can result in judges setting aside welfare-enhancing laws because of their personal disagreement with those laws, that the institution creates a moral hazard problem for legislatures, in which they enact more and

dumber laws than they would without the institution, and that it creates a moral hazard problem for citizens, inducing them to act in ways inconsistent with the long-run success of republican political systems. Answering these questions would seem to be of first-order importance if we really want to understand what, if any, unique benefit judicial review confers on a political system.

Figure 1. Baseline

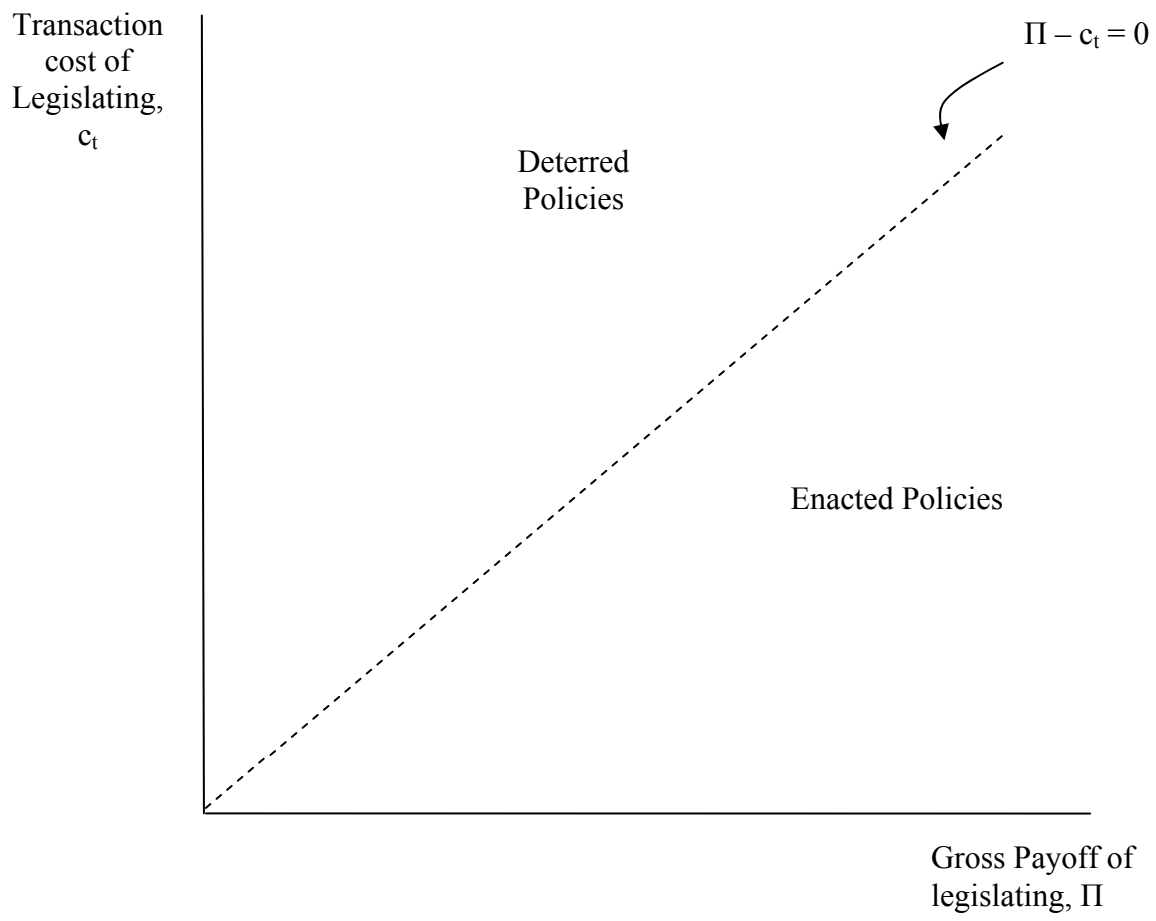
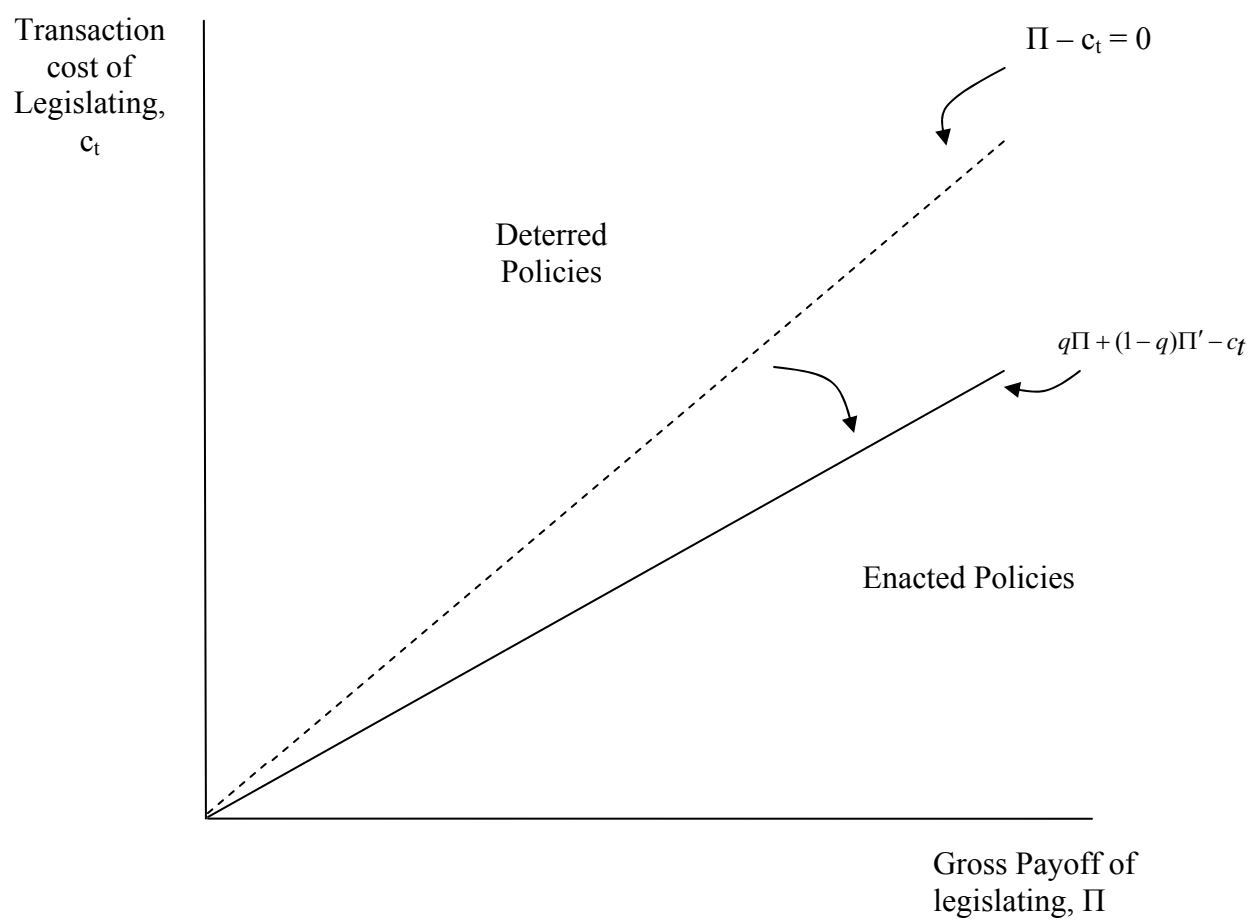


Figure 2. Impact of the Addition of Judicial Review with only Transaction Costs



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