BEYOND LANDES POSNER MODEL: MODELLING INDEPENDENT JUDICIARY BASED ON SOCIAL CHOICE THEORY

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ABSTRACT

The paper presents a novel model of an independent judiciary based on moderate and rational assumptions within the framework of Social Choice Theory. This model seeks to address a fundamental question: Why is the judiciary granted structural and functional independence, greater than constitutionally envisioned, in modern democratic political institutions, despite certain constitutional authority of other branches of government to curtail such independence? This model improves upon earlier frameworks, such as the Landes-Posner model, which relies on rigid assumptions and when tested to its limitations, the Landes-Posner model fails to accurately reflect judicial institutions. The key finding of this paper is that other branches of government allow judicial independence as a rational mechanism to resolve issues arising from cyclical preferences in decision-making (preference deadlocks). By providing a stable and impartial resolution, the judiciary plays a crucial role in maintaining institutional equilibrium.

Keywords: *Independent judiciary, Social Choice Theory, institutional equilibrium, judicial independence, democratic governance, preference cycling, Landes-Posner model*

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1. INTRODUCTION

This paper examines the importance of judicial independence from an economic perspective, addressing the fundamental question of why an independent judiciary is a nearly universal feature in all democratic countries. This study explores why democratic countries maintain independent judiciaries despite powerful interests that might seek to control them. It examines the gap between how independent courts are structured to be (e.g., legal protections) versus how they actually function in practice. The paper examines the Landes-Posner model, which portrays the judiciary as a contractual enforcer acting as a buffer between the legislature and interest groups. While the Landes-Posner model suggests that judicial independence is pivotal for legislative durability and the enforcement of original intent, this paper proposes an alternative framework. The proposed model challenges the rigid assumptions of the Landes-Posner framework, offering a flexible and broadly applicable approach to understanding judicial operation in pluralist societies. Drawing on public choice and social choice theory, the alternative model conceptualizes an independent judiciary as a form of delegated legislative power that mitigates issues inherent in collective decision-making. This perspective advances our understanding of the judiciary's role within the political economy, offering new insights into the relationship between judicial independence, institutional dynamics, and democratic governance. The study asks two key questions: (1) Does the Landes-Posner model truly reflect how independent courts work in democracies? and (2) Do lawmakers rationally delegate power to courts to serve their own interests? By analyzing existing research and decision-making theories, the paper explains how independent courts help stabilize democracies and resolve strong political gridlock.

2. LITERATURE REVIEW

Landes and Posner (1975) is a classic in forming a model for Independent judiciary and will be a primary component of this paper. The paper argues that an independent judiciary is essential for interest-group theory of government. The authors explain that an independent judiciary is necessary for the functioning of interest-group theory and discuss several implications of their theory, including the relationship between judicial independence and administrative regulation, interest-group legislation, judicial tenure, and constitutional adjudication. However, it is important to note that the article's perspective on interest-group theory assumes that legislation is

a set of contracts brought by special interest groups. This assumption has been criticized for perpetuating a cynical view of legislation, and for failing to fully explain the complexity of the legislative process and the range of factors that may influence the passage of laws. Therefore, while the article provides valuable insights into the relationship between the independent judiciary and interest-group theory, it is important to consider other perspectives and factors that may impact legislative decision-making and the role of the judiciary in shaping policy. The exact gap that the newly proposed model will try to understand in an improving manner.

The Landes-Posner model is not without its critics. Buchanan (1975) provides a critical commentary on the model by evaluating the merits and demerits of the model through the lens of Public Choice Theory. Buchanan agrees with certain assumptions of the model, such as rational wealth maximization and a positivist approach to the judiciary, but disagrees with the assumption that legislation is a set of contracts brought by special interest groups. Buchanan's critique highlights a fundamental flaw in the Landes-Posner model, legislations as set of contracts, as it perpetuates a grim sense of any laws passed and fails to thoroughly explain all laws passed. Nevertheless, his commentary serves as a basis for the development of the newly proposed model that accounts for the concerns he raised. He posits that public choice theory presents a superior alternative for understanding the structural workings of the judiciary as an institution. Along a similar line of reasoning, Boudreaux and Pritchard (1994) critique this theory, highlighting its significant shortcomings. They contend that the "strong" positive version of the theory fails to account for collective-action problems faced by both the legislature and the judiciary in fostering judicial independence. Additionally, they argue that the "weak" descriptive version inadequately captures the full historical context of judicial independence. Boudreaux and Pritchard reinterpret empirical findings previously thought to support the Landes-Posner theory, offering a revised perspective. They conclude that the independence of the United States federal judiciary is not merely a byproduct of interest-group bargains but was intentionally designed by the Constitution's framers to promote sound governance. This re-evaluation underscores the constitutional foundations of judicial independence, challenging the economic-centric view and emphasizing its role in ensuring effective and impartial governance.

Shetreet and Deschenes (1985) provide that in the realm of constitutional law, the concept of judicial independence is a crucial element to ensure the effective functioning of the judiciary. The study provides a comprehensive and concrete understanding of the very concept of judicial

independence. However, to understand the practical implications of this concept, it is necessary to examine its application in different legal systems. Although conducted in Israel, this study on the different aspects of judicial independence in Israel provides valuable insights into the conceptual roots of the judiciary, the increasing role played by the judiciary in society, and the constitutional role of the judiciary in reviewing legislative acts. Although this study is focused on judicial independence in Israel, the fundamental ideas and concepts discussed can be extrapolated to understand the concept of independence of judiciary in other contexts. However, Salzberger and Fenn (1999) provide a critique to the Landes-Posner model in its exploration of the intersection between political influence and judicial decision-making. While Landes and Posner argue that judicial independence enhances the durability of legislative deals with interest groups by ensuring credible enforcement, Salzberger and Fenn provide empirical evidence that political considerations, such as promotion prospects influenced by the Lord Chancellor, may affect judicial behavior. This challenges the Landes-Posner assumption of a purely independent judiciary acting as a neutral enforcer of interest-group bargains. Instead, Salzberger and Fenn suggest that judicial independence can be compromised by political incentives, raising questions about the extent to which judges remain insulated from external pressures.

Kenneth Arrow (1950) introduces the impossibility theorem, a foundational result in social choice theory, which demonstrates that no ranked voting system can translate individual preferences into a collective ranking while satisfying unrestricted domain, non-dictatorship, Pareto efficiency, and independence of irrelevant alternatives when three or more options are involved. The theorem highlights the inherent challenges in resolving the cycling problem, where ranked voting systems produce cyclic preference orders that fail to meet these criteria. This paper uses Arrow's theorem to explicate the cycling problem in a democratic system, arguing that an independent judiciary plays a critical role in mitigating such issues within ranked voting systems.

3. RESEARCH METHODOLOGY

This study employs an interdisciplinary approach by including established research from legal theory, political economy, and social choice theory to understand the need for judicial independence. The methodology combines theoretical modeling and empirical validation in two phases. First, a conceptual critique of the Landes-Posner model is conducted highlighting flaws in its assumptions about legislative demand and judicial behavior. Second, a novel social choice-based model is developed, formalizing judicial independence as a mechanism to resolve

legislative cycling through spatial voting frameworks and veto-player theory. The theoretical framework synthesizes public choice theory (legislators as rational actors), social choice theory (preference aggregation challenges), and new institutionalism (structural rules shaping delegation). The methodology ensures rigor in addressing the question of - why democracies delegate power to courts despite self-interested incentives.

4. BASIC THEORETICAL ASSUMPTIONS

In Law and Economics, there exist certain sets of assumptions that schools of thought take to derive and guide their models in understanding rational behavior. The strong Chicago school and the moderate Yale school exist. They are categorized as strong and moderate based on the rigidity of their assumptions. The Chicago School is based on three sets of assumptions: First, the individual's behavior is determined by the immediate pursuit of their personal objectives. Second, the primary objective of the individual is to optimize their own well-being and welfare. Third, the well-being of a person is exclusively reliant on their individual consumption and needs (Sen, 1985). The moderate Law and Economics school adopts the first assumption about individuals pursuing self-interest or objectives, however, it tries to alternate between the second assumption and the third assumption. The moderate school of Law and Economics incorporates a reasoned approach to assumptions by considering principles beyond just wealth maximization as its normative goal (Sen, 1985). It acknowledges principles such as distribution and recognizes the importance of fairness and equity in decision-making. Furthermore, the moderate school derives its normative principles through decision-making rules as it draws inspiration from social contract theories that predate utilitarianism, emphasizing the significance of collective agreement and societal consensus. The rational assumptions of moderate law and economics are regarded as an advancement over the strong school.

This paper adopts the moderate approach to law and economics. In doing so, the paper analyzes the independence of the judiciary by considering the motives and incentives of other branches of government. It assumes that individuals are rational actors primarily driven by self-interest however, the paper takes the moderate approach by recognizing that self-interest can encompass considerations beyond self-welfare or self-centered welfare. Individuals may also prioritize the welfare of others while pursuing their own interests. This broader interpretation of self-interest

aligns with philosophies like civic virtuism and common good communitarianism, as exemplified by India (Jayal, 2006).

5. UNDERSTANDING JUDICIAL INDEPENDENCE

The purpose of this chapter is to understand the concept of independence and to arrive at a tentative analytical definition. However, before understanding the independence of the judiciary, it is crucial to have a clear understanding of what exactly constitutes the judiciary. Further elaboration on this topic may lead to a circular argument since one of the fundamental characteristics of the judiciary is its independence. Therefore, this paper will adopt a general definition of the judiciary. Therefore, the judiciary can be defined as a body of individuals primarily responsible for resolving disputes by applying established rules and standards, and structurally, the judiciary is considered an institution of the state and is distinguished from other entities by its characteristic features of impartiality and independence (Ref. to U.S. Const. art. III; US Constitution' definition of judiciary aligns with the definition taken in the paper).

The subsequent focus of this chapter will be understanding independence. To derive an analytical understanding of the independence of the judiciary, the paper will utilize the works of Israeli comparative constitutional law scholar Shimon Shetreet. In a 1985 book with Justice Deschenes, they derive four elements that comprise judicial independence: substantive, collective, personal, and internal (Shetreet & Deschenes, 1985). Substantive independence ensures that judges make decisions based solely on the law, free from any political or external pressures. Personal independence pertains to the stability and security of judicial terms and office. Collective independence entails the judiciary's involvement in the governance and management of the entire judicial system. Internal independence means that individual judges maintain autonomy from their superiors within the judicial hierarchy. However, the analysis of judicial independence by Shetreet lacks clarity. The categorization of the components of independence, such as personal independence, collective independence, internal independence, and substantive independence, raises confusion. There is a failure to clearly differentiate between the definition of independence and the institutional arrangements aimed at achieving it. For example, The distinction between personal independence and substantive independence becomes blurred, as both ultimately seek decision-making free from external influence.

Salzberger rightfully criticizes Shetreet's notion of independence, describing it as a mere list of components rather than an analytical definition. In his analysis, Salzberger introduces a

distinction between dynamic independence and static independence (Salzberger, 1993). The dynamic independence relates to the expression of independence by judges, while static independence focuses on the institutional arrangements established to safeguard this independence. By collapsing the diverse features proposed by Shetreet, Salzberger categorizes independence into two main types: a functional form that pertains to the adjudication process, and a structural form that encompasses the institutional nature of the judiciary.

This study focuses on a two-fold phenomenon observed in various judicial system. Firstly, no constitutional system has managed to establish absolute structural judicial independence. Secondly, there tends to be a disparity between the degree of structural dependency and functional independence of the judiciary, with the latter taking precedence. Functional judicial independence, as defined earlier, pertains to judges making decisions or functioning free from government or legislative influence. It is to be noted that the term "government" here and throughout this paper refers to the executive and legislative branches, unless explicitly referring to the judiciary. On the other hand, structural judicial independence encompasses the institutional arrangements that facilitate functional independence, such as salaries, appointment, age of retirement and removal. This observation implies that no legal system guarantees complete structural independence for the judiciary. Moreover, despite having the authority to do so, governments often refrain from fully exerting their power to curtail functional judicial independence. In essence, the legislature and executive typically allow a certain level of judicial independence that surpasses the provisions outlined in the structural framework.

Let's take the example of Britain. The nature of judicial independence in Britain is problematic and paradoxical. The judiciary is structurally dependent on Parliament, as there are no restrictions on legislative powers through some written Constitution. While legislation guarantees some components of structural independence, such as tenure and fixed salaries, these arrangements can be changed easily (McIlwain, 1913). The judiciary is also structurally dependent on the executive through appointments and other administrative aspects. However, the government does not take advantage of the dependency and allows functional independence—an example of this functional independence is the judiciary adjudicating against the preferences of the government. Similar observations regarding judicial independence can be found in other constitutional states like the United States and India (Ref. Article: U.S. Const. art. III, §§ 1-2; United States *v.* Klein). India's judicial system has grappled with a complex separation of power

battle that has preserved judicial independence, particularly following the ruling on the National Judicial Appointments Commission (NJAC). However, prior to the ruling, the scenario was similar, with the judiciary having to navigate challenges to its independence (Ref. SCAORA *v.* Union of India, (2015) AIR 2015 SC 5457).

Despite the dependency of the judiciary on the government, both the executive and legislature possess the power to restrict judicial independence. However, they often choose not to fully exercise this power, even in the face of judicial actions that go against their interests. This phenomenon, where politicians have the ability to limit independence but refrain from doing so, calls for an explanation within the framework of law and economics, where individuals, including politicians, are driven by self-interest. Before we proceed, it is important to understand Public Choice Theory, as it forms the basis for the Landes-Posner model and the model proposed in this paper.

6. UNDERSTANDING PUBLIC CHOICE THEORY

Public choice theory applies economic models and tools to non-market issues. The foundation of the public choice theory was laid by James Buchanan and Gordon Tullock (Buchanan & Tullock, 1962). Emerging in the 1960s, it initially focused on collective decision-making and has since grown to encompass political and legal issues as well. It forms the basis for understanding how individuals' self-interest and incentives shape their behavior in the public sphere. In the context of the judiciary, public choice analysis explores the intersection between political science and law. The influential work by Landes and Posner on the independence of the judiciary forms the center of discussion in this paper. However, this article will first discuss the challenges of making decisions collectively, as it is a crucial component of Public Choice.

The public choice approach in law is based on two key foundations: the theory of Interest-groups and the Social choice theory. Unlike the Pluralists and Republicans, Public choice theorists argue that the legislature, despite being democratically elected, may not truly represent the general public's views. Instead, powerful interest groups tend to influence legislative decisions due to their organizational and informational advantages, as well as the issue of free riding (Landes & Posner, 1975). Landes-Posner argues that politicians actively seek and support these interest groups, treating legislation as a market transaction of contracts. However, the model proposed in this paper deviates from this strong and superstitious view of legislative and does not rely heavily on the interest-group perspective of legislation and rather relies on the Social choice

theory. While interest-group theory focuses on individual actors and their behavior, collective decision-making theories such as Social choice theory examine the aggregation of individual preferences to reach group decisions. As significant decisions in the public sphere are made by collectives, this analysis is crucial in understanding law from an economic perspective.

Social choice theory examines the three key elements of the decision-making process: the range of possible decisions, the group responsible for making the decision, and the rules governing the decision-making process. The collective decision is the result of a process in which the group responsible for making the decision utilizes the established rules to select one option from the range of possible decisions (List, 2022). The public choice school offers a positivistic interpretation of legislation, viewing it as a series of contracts sold to interest groups. However, there are differing perspectives within this school of thought. Some scholars, like Posner, argue that legislation is sold to one interest group at the expense of others. In contrast, this paper takes a different view, arguing that legislation should seek consensus among competing interests so as to exclude as few people as possible. This approach aligns with the assumption of self-interest in public choice theory, as it maximizes gains for legislators.

However, this paper seeks to critically examine the fundamental process of legislation. It views legislating as a process wherein multiple members of parliament vote on a variety of alternative bills, guided by the rule of a simple majority. This definition of legislating is consistent with various constitutional states such as the United States and India (Ref. U.S. Const. art. I, § 7, cl. 2; Ind. Const. art. 107). The fundamental problem with simple majority legislating is found in a problem called Cycling. However, prior to exploring the inherent issue of cycling and delving deeper into it, the paper now proceeds to offer a primary critique of the Landes-Posner Model. This critique is presented after providing a background understanding of the public choice school and its fundamental assumptions.

7. FLAWS OF LANDES-POSNER MODEL

In their article titled "The Independent Judiciary in an Interest-Group Perspective," Richard Posner and William Landes aimed to develop a model of an independent judiciary by bridging the Chicago School of Law and Economics with behavioral assumptions from the Public Choice School (Landes & Posner, 1975). Building upon the previous critiques provided by Salzberger, this paper will offer a comprehensive analysis of the Landes-Posner model, challenging two

fundamental positions they presented in their article (Salzberger, 1993). The first problem being the inaccurate determination of legislative demands and the second problem being exogenous assumptions made about the behavior of an independent judiciary. The Landes-Posner Model can be divided into five supposedly causal elements. Legislation is a tradeable commodity, bought by specific interest groups from the legislature. The value of legislation depends on its durability, but it can change if the legislature sells alternative laws to competing interest groups. Two ways to extend contract duration: procedural rules in the legislature and an independent judiciary. A dependent judiciary serves the current legislature and changes meaning according to the current legislature, while an independent judiciary upholds the original legislative intent. An independent judiciary benefits the legislature by ensuring original contract enforcement and increasing legislative profits. To formally analyze the model, we can represent it using algebraic notations. This allows for a systematic approach to studying the model and performing subsequent evaluations.

i.   *Formalizing Landes-Posner Model*

Let P be the price of legislation in the market, Q be the quantity of legislation sold, and D be the demand curve for legislation. Let C be the cost of producing legislation, and let π be the profit of the legislature from selling legislation which can be formalized in an algebraic manner like this $\pi = P(Q) * Q - C$. The durability of legislation is determined by its ability to withstand legal challenges in court. Let D be the durability of legislation, and let f(D) be the demand curve for such a durable legislation. Therfore, $f(D) = \frac{k}{D}$ where k is a constant that represents the value of durable legislation to interest-groups.

The legislature can extend the duration of contracts by enacting procedural rules that hinder the enactment of new laws or the repeal of old ones. Let R be the effectiveness of these procedural rules, and let g(R) be the demand curve for legislation that is protected by effective procedural rules. Therfore, $g(R) = \frac{m}{R}$ where m is a constant that represents the value of legislation protected by effective procedural rules to interest-groups.

An independent judiciary can also extend the duration of contracts by enforcing the original intent of the legislature. Let J be the independence of the judiciary, and let h(J) be the demand curve for legislation that is protected by an independent judiciary. Therefore, $h(J) = \frac{n}{J}$ where n is

a constant that represents the value of legislation protected by an independent judiciary to interest-groups. The optimal level of independence for the judiciary is the level that maximizes the profits of the legislature:

$$\max_{Q} \quad \pi = P(Q) \cdot Q - C$$
$$\text{s.t} \quad Q = \min(D, R, J)$$

where Q is the quantity of legislation sold, and $\min(D, R, J)$ represents the minimum of the durability of legislation, the effectiveness of procedural rules, and the independence of the judiciary. The optimization problem seeks to find the value of Q that maximizes the profits of the legislature subject to the constraints of Q. In practical terms, the equation implies that the legislature can increase its profits by finding the optimal balance of durability, effectiveness of procedural rules, and independence of the judiciary. The optimal level of independence for the judiciary is determined by finding the value of J that results in the maximum profit. By enforcing an independent judiciary and ensuring the durability of legislation, the legislature can attract interest groups and increase the demand for legislation. This, in turn, leads to higher profits for the legislature. The Landes-Posner model shows that an independent judiciary can increase the profits of the legislature by extending the duration of contracts and that the optimal level of independence for the judiciary depends on the demand for durable legislation and legislation protected by effective procedural rules.

ii.   *Flawed Economic Assumptions on Demand of Legislation*

In their analysis, Landes and Posner introduce a Supply-Demand Model of Legislation where the demand curve is (d0) and the supply curve is (S0). The demand curve represents the willingness of certain groups to pay a higher price for protective legislation, as they anticipate greater benefits from it and the supply curve represents the constant costs incurred by the legislature in creating the legislation. The equilibrium (E0) occurs where the quantity of legislation sold (L0) intersects with the price (P0). Despite acknowledging multiple problems with the model, the authors downplay their significance by asserting that these issues have minimal impact on the overall model. This paper presents a contrasting viewpoint by arguing that the identified problems are indeed significant and each wrong assumption pointed out has taken the previous assumption as a given to delve deeper into the faults.
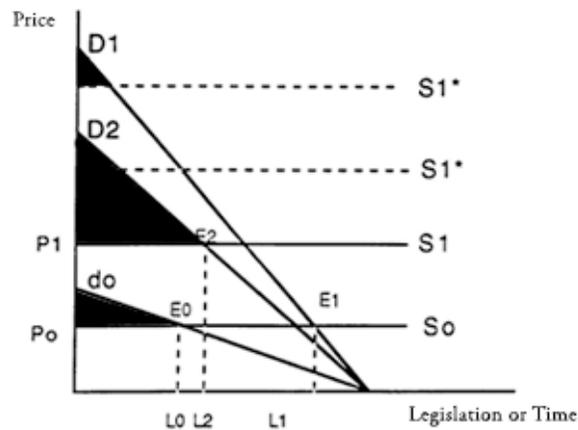
Figure 1: Supply - Demand Model of Legislation

(Source: Landes and Posner, 1975)

The first problem in the Landes-Posner model pertains to the nature of the supply curve, which is assumed to be perfectly horizontal. The supply curve represents the costs incurred by the legislature in creating specific legislation. However, the model incorrectly assumes these costs to be constant and unchanging. This assumption does not align with the reality of the legislative process, where the process of legislating is dynamic. The correct assumption would be an upward-sloping supply curve. As more legislation is introduced, it consumes additional time and resources of the legislators. These increased demands on their time and resources can be quantified as costs, taking into account opportunity costs associated with allocating resources to different legislative tasks. Consequently, the assumption of a constantly flat supply curve fails to capture the increasing marginal costs of legislation production. While the omission undermines the accuracy and applicability of the model, it can still be accepted for the sake of simplicity or other reasons. The way Landes-Posner assumes the surplus from the deal between the legislature and interest groups is distributed raises some more issues in their economic model. The surplus is identified by the triangle formed by the Price axis, the Demand curve(d0), and the Supply curve(S0). In a competitive market, all the surplus would go to the interest groups. In a perfect discriminating monopoly, the entire surplus would be gained by the legislature. However, if we consider the legislature as a simple monopoly, the market would not reach the expected equilibrium point, resulting in less legislation being produced. The only way for there to be a shared surplus is if there is a upward sloping supply curve as identified earlier and if the

legislature does not generate any profits, as evident from the Landes-Posner, it would lack the public choice incentive to maintain an independent judiciary in the first place.

The second problem in the Landes-Posner model lies in their misunderstanding of the dynamics of creating new legislation. According to Landes-Posner, if a certain piece of legislation could be guaranteed to last beyond the current legislature's term or to last for an infinite period without the risk of removing the marketed legislation, the demand for it would causally reflect the long-term profits it would generate. This new demand, referred to as (D1) in the graph, would be a multiple of the single-period demand. Assuming no changes in the costs of producing legislation, the equilibrium point would shift to a new point where more legislation is produced, resulting in increased profits for both the legislature and interest groups. This would result in more surplus to be shared among the legislators and the interest groups derived through the triangle formed by the new demand curve (D1), the constant supply curve (S0), and the price axis. However, the problem is that when a legislature sells long-term legislation, it essentially exhausts the opportunities for future legislatures to sell similar legislation. This is because the long-term legislation remains in effect beyond the term of the current legislature, limiting the availability of similar legislation that can be sold in the future. Landes-Posner model fails to account for the diminishing supply of legislation over time. It assumes that each legislature has an unlimited pool of legislation to sell, without recognizing the depletion of opportunities caused by previous sales of long-term legislation.

The third problem with the Landes-Posner model is their misunderstanding of the dynamic costs associated with the durability of a particular legislation. It is assumed, ignoring earlier arguments, that the legislature has the ability to produce long-term legislation, but it cannot be assumed that this is without costs. As mentioned earlier, one Landes-Posner Model argue that legislation can be made durable through procedural constraints or by an independent judiciary that enforces the original meaning.

The first method of increasing durability is by implementing procedural constraints in legislation and this comes with associated costs. These costs include the difficulty of repealing or removing old legislation, as well as the increased costs of creating new legislation due to the added complexity. In their original paper, Landes and Posner acknowledge that the introduction of procedural constraints leads to an upward shift in the supply curve, from (S0) to (S1). This shift reflects the higher costs incurred in the legislative process. However, they argue that despite the

increased costs, the new equilibrium point at (E2) is still more favorable compared to the previous equilibrium point at (E0). According to Landes and Posner, the benefits of durability and stability brought about by the procedural constraints outweigh the additional costs incurred. This assumption regarding the effectiveness of procedural constraints in legislation can indeed be challenged. The introduction of the (S1*) supply curve, which represents scenarios where the costs of implementing constraints outweigh the benefits, suggests that there can be situations where the equilibrium with constraints is not preferable. In order for this to function, one must make the assumption that the legislature will have complete awareness of the restrictions that are imposed and the ability to purposefully assess the advantages and costs of this measure. This presumption is patently unfounded, and it is not reasonable to adopt it at face value in the absence of supporting evidence.

The second method proposed by Landes and Posner to increase durability is by having an independent judiciary. While it is not the intent of this paper to delve into the specifics, some basic critique can be provided. This approach, like the first method, is not without costs, such as the potential non-enforcement of contracts. This could lead to a decrease in demand, as represented by the demand curve (D2). Landes and Posner argue that this new demand curve will still yield better outcomes than the single-period demand curve (d0). They support this claim with statistical evidence based on the analysis of judicial nullification of statutes and legislation. However, their argument overlooks the possibility of implicit nullification through interpretation against the government. This introduces a level of uncertainty and potential drawbacks similar to the previous method.

iii.   *Flawed Behavioral Assumptions on Judiciary*

The Landes-Posner model heavily relies on an exogenous assumption regarding the behavior of a judiciary and its independence. An exogenous assumption is an assumption made in a model or analysis that is external to the model itself. It is typically taken as given and not derived within the model. In other words, it is an assumption that is imposed from outside the system being analyzed and is not endogenously determined by the model's internal dynamics. To streamline the study and zero in on details, economic models often include exogenous assumptions as starting points. However, before digging into the assumption, it is essential to have a clear understanding of what Landes and Posner mean when they refer to independence. There are two different meanings within the context of Landes-Posner model: First, Independence is defined as

the judiciary being loyal to the original legislature, and measures are taken to ensure this loyalty. Second, there is an external, objective definition of "independence," and the legislature seeks to make the judiciary independent because it believes that an independent judiciary will be loyal to the original legislature and increase the profits from selling legislation.

The exogenous assumption in Landes-Posner model is that by providing the judiciary with structural supports such as salaries and immunities, it is possible to establish an independent judiciary. This independent judiciary is expected to make decisions based on the intentions of the original legislature, free from political influences or control. The assumption suggests that specific institutional arrangements can create an alignment between the judiciary and the original legislature's intentions. While Landes-Posner model argues that an independent judiciary, as defined by their model, aligns with the intentions of the original legislature, it is evident that this assumption lacks logical support. Merely establishing that an independent judiciary does not decide based on the wishes of the current legislature does not imply that it will act in accordance with the intentions of the original legislature. The relationship between independence and aligning with the original legislature's intentions requires a more substantive explanation. It is not a matter of logical deduction such as - If not this, then that. Consequently, this unverified assumption undermines the foundational causal chain on which the Landes-Posner model is constructed.

The Landes-Posner model is plagued by two critical issues: the unverified and highly limiting assumptions regarding legislative demand, and the unverified external assumptions about the behavior of an independent judiciary. In the next chapter, this paper will introduce a novel model rooted in Public Choice theory, emerging from the theory of social choice and collective decision-making. However, before exploring the new model, it is crucial to grasp the concept of cycling, a fundamental problem intrinsic to the legislative process that can undermine the stability of governance structures. Understanding The cycling issue is crucial since it provides one of the underlying premises around which the new model is constructed.

8. CLASSIC PROBLEM OF CYCLING IN VOTING SYSTEMS

Imagine a situation where there are two options, A and B, being discussed for new legislation. There is also the choice to keep things as they are, represented by the status quo option, S. Three legislators are involved in the decision-making process, and each of them has their own order of

preference among the three options which also satisfies the criteria for transitivity. In certain scenarios, a simple majority vote may not lead to a stable decision, despite the common expectation that the option preferred by the majority would be chosen. This situation can be demonstrated through the table shown below.

Table 1: Instability and Cycling as per Arrow-Condorcet Theorem (Source: Author's Own)

Legislator	Preferences
L1	A > S; S > B
L2	A > S; B > S; B > A
L3	S > A; S > B; B > A
Pairwise Comparison	Result
A vs. S	A wins (2 votes to 1)
S vs. B	S wins (2 votes to 1)
B vs. A	B wins (3 votes to 0)

Now, let's analyze the pairwise majority votes. The pairwise majority vote is a voting method where each option is compared against another option in a pairwise manner. Each legislator casts a vote indicating their preferred option in each pairwise comparison, and the option that receives a majority of votes in each comparison is considered the winner. The pairwise majority vote involves comparing these options in all possible pairwise combinations: A vs. S; S vs. B; B vs. A. However, as shown in the example, due to conflicting preferences among the legislators, no option consistently receives a majority of votes in all pairwise comparisons, resulting in a cycling of preferences and the absence of a stable and non-arbitrary winning option. A procedural constraint may prevent the endless cycling but the chosen option will be an arbitrary one.

In decision-making processes, single-peaked preferences play a crucial role. When preferences are single-peaked along a one-dimensional spectrum, majority rule leads to a stable and non-arbitrary outcome, favored by the median voter (Niemi & Rasch, 1987). However, when dealing with multiple dimensions or issues, single-peakedness alone does not guarantee such an equilibrium. In multidimensional models, where positions are represented in a two or more-dimensional space, voters' preferences are captured by indifference curves. These curves connecting alternatives of equal preference contain each other, with inner curves indicating

higher preference. While single-peakedness ensures a simple majority equilibrium in one-dimensional settings, it does not guarantee the same outcome in multidimensional settings.

Furthermore, it is worth noting that a more comprehensive perspective on the cycling problem was put forth by Kenneth Arrow, leading to the formulation of Arrow's impossibility theorem (Arrow, 1950). This theorem highlights the inherent challenges and limitations associated with aggregating individual preferences into a coherent and consistent collective decision-making process. The theorem states that no ranked voting system can convert the ranked preferences of individuals into a community-wide ranking while also meeting the criteria of unrestricted domain, transitivity, non-dictatorship, Pareto efficiency, and independence of irrelevant alternatives. Despite the perception of unending doom in decision-making processes, legislatures demonstrate more stability in their decision-making than anticipated. This paper argues that one fundamental reason for this stability is the existence of an independent judiciary, which allows for the delegation of legislative powers to itself and contributes to overall system stability by preventing the issue of cycling from happening.

9. A NOVEL MODEL OF INDEPENDENT JUDICIARY

In legal systems, the judiciary is characterized by a certain level of independence, although it is not absolute and relies on the other branches of government to varying degrees (In the United States, all Justices are nominated by the President and confirmed by the Senate Judiciary Committee. See, U.S. Const. art. II, § 2, cl. 2.). This dependence can be seen as a gap between structural independence, which pertains to formal institutional arrangements, and functional independence, which refers to the actual exercise of judicial decision-making without undue influence.

The existence of this gap can be understood within the framework of the republican model of civic virtues, where it is acknowledged that no institution, including the judiciary, can operate in complete isolation from the larger political context and that they must uphold certain virtues commonly held by the people. However, from the perspective of Public Choice theory, which assumes that individuals act in pursuit of their self-interests, it can be argued that political actors have a vested interest in allowing the judiciary to possess a certain level of functional independence.

This paper presents the contention that legislators or parties stand to benefit from the existence of an independent judiciary. It is to be noted that the distinction between individual legislators and political parties is significant, particularly in constitutional contexts where the primary political responsibilities are vested either in their constituencies (e.g., United States) or through political parties (e.g., India) See, Indian Const., art. 102; sch. 10) It allows them to delegate some of their legislative powers, thereby relieving them of certain burdens and responsibilities. By entrusting decision-making to the judiciary, legislators can also address issues of uncertainty and information asymmetry. Delegating power to the judiciary can also facilitate the resolution of collective decision-making challenges that arise within multi-member legislative bodies, where reaching consensus can be difficult.

i.   Assumptions of the Model

There are three theories that attempt to explain the legislative process: pluralism, republicanism, and public choice theory. Pluralists argue that the legislature represents the diverse interests of the population, with decisions reflecting the views of the plural majority. Republicans, on the other hand, contend that the legislature seeks the common good and acts based on civic virtues. Public Choice theorists posit that legislators are driven by self-interest (Tollison, 1988). Upon closer examination, it can be argued that pluralists and public choice theorists share a common thread as both groups acknowledge the influence of self-interest in legislative decision-making. Pluralists recognize the pursuit of interests within the majority, while public choice theorists explicitly focus on legislators' self-interested behavior. Pluralists and public choice theorists have distinct perspectives on the legislative process. Pluralists emphasize the role of the plural majority in shaping legislation, considering it as the outcome of majoritarian representation. In contrast, public choice theorists argue that the legislative process is influenced not only by the plural majority but also by interest groups. They contend that these interest groups hold significant sway and can override the preferences of the plural majority. Public choice theorists view legislation as a process of marketing commodities, where various actors, including legislators, pursue their self-interests (Tollison, 1988).

Both the Landes-Posner model and the model proposed in this paper are rooted in Public Choice theories. However, they diverge in their understanding of the sale of legislation. According to Landes-Posner's view in Public-Choice theory, legislation is a set of contracts that is sold to the highest bidding interest group, creating winners and losers in a zero-sum game. Without an

independent judiciary, the legislature can breach contracts and sell the same legislation to rival interest groups. This highlights the need for an independent judiciary as an enforcer to prevent such breaches and maintain the profits for the legislature. However, the public choice perspective on legislation does not entail that a particular legislation is marketed only to one interest group. Interactions among diverse interest groups often lead to mutually acceptable agreements that satisfy the concerns of multiple stakeholders. These compromises are a strategic response by the legislature to ensure the maintenance of political support while striving to minimize any potential exclusion. Therefore, this paper operates under the assumption that the legislative process aims to facilitate consensus-building and minimize the marginalization of any particular group or interest.

ii.   *Understanding Delegation of Powers*

Delegating legislative powers is a well-discussed topic in legal literature, primarily focusing on situations where the legislature delegates law-making powers to administrative agencies for the purpose of rule-making. However, the concept of delegation, as explored in this paper, goes beyond this limited perspective. In most legal systems, the legislature holds the ultimate authority, or a monopoly, to create and modify laws, with certain limitations related to substantive and procedural considerations. For instance, constitutional rights in the United States and India cannot be violated by legislation. Foregoing these limitations, the legislature maintains full autonomy in law-making. Therefore, there is delegation of legislative powers, when a body other than the legislature exercises rule-making powers not constitutionally assigned to it.

Delegation of legislative powers can take two forms: explicit and implicit (Cheadle, 1918). In explicit delegation, the legislature directly instructs other bodies, such as the executive, and committees, to create rules in a specific area instead of legislating directly. Implicit delegation, on the other hand, occurs when the legislature does not regulate a particular legal field and leaves it to the courts to develop the law over time. However, the courts may always decline to use their discretionary authority and send the issue back to Congress. An example of implicit delegation can be observed in the extensive and longstanding system of Common Law. Delegation of legislative powers is often motivated by several key factors. Firstly, delegating legislative powers is driven by limited parliamentary time, technical complexity, the need for flexibility, and expedited decision-making in times of crisis. With the expanding scope of regulation due to the

welfare state and increased state intervention, lawmakers face constraints in addressing all issues directly. Secondly, delegation allows for efficient resource allocation and prioritization of pressing matters. Delegating to experts ensures context-specific rules. Thirdly, Flexibility is crucial to adapt regulations to evolving circumstances, allowing for quicker adjustments and responsive governance. Delegation empowers specialized entities to make timely rule changes. Finally, in emergencies, delegation facilitates quick decision-making and the implementation of measures. Granting specific entities authority ensures the legislative process keeps pace with changing circumstances.

However, when evaluating the delegation of powers to the courts, these factors alone are inadequate to justify the larger breadth of rulemaking delegation. They under-report the extent to which ex-post delegation and rulemaking powers have been delegated to the judiciary. For example, issues involving contracts and morality are not often considered technical problems that need specialized knowledge, nor are they issues that need to be regulated quickly or revised often. For example, the Indian Contract Act provides certain examples of morality, however, the broader gaps are to be filled by the Judiciary. (Ref. The Indian Contract Act, 1872, § 23) It is established that an even broader explanation is needed for this delegation of power.

The explanation put forward in this paper aligns with the principles of Public Choice theory, which asserts that individuals' actions are driven by self-interest. According to this perspective, the delegation of legislative powers can be understood in terms of self-interest. When the legislature voluntarily relinquishes its exclusive authority to create rules and laws, it does so with some level of self-interest in mind. Furthermore, delegation occurs when the collective decision-making process fails to reach an equilibrium. As explained earlier, the simple-majority system encounters cycling, where no clear consensus or majority position can be reached. As a result, delegation becomes a practical solution to address this impasse. This paper aims to elaborate on these foundational propositions and provide a comprehensive model that elucidates the dynamics of delegation in legislative processes and the Independence of the judiciary.

iii.   *Solving Cycling through Delegation to Judiciary*

Delegation of legislative power can occur even in situations where there are no doubts or information issues concerning voter preferences and no anticipated political advantages for the legislator or party. This indicates that the decision to delegate is not solely motivated by these factors. Even if the entire constituency unanimously supports a specific arrangement, legislators

may still opt for delegation. This choice is influenced by the challenges of reconciling the preferences of individual legislators or parties during the process of collective decision-making. This situation shows the problems with traditional social choice analysis, especially the problems with depending only on the simple majority rule, which we already talked about. Delegation of legislative powers can be viewed as a way to address these limitations. By delegating powers, legislators strike a trade between normative majority rule and positive stability. Delegation offers a mechanism to overcome the complexities associated with collective decision-making, enabling a more streamlined and efficient legislative process. The social choice rule of simple majority simply cannot ensure a stable result. In this chapter, we will employ a two-dimensional policy framework to demonstrate how delegation can effectively address the issue of cycling.

In our analysis, we consider a scenario with five legislators or parties who know the preferences of their constituents. Choosing a pair of arrangements along two ideological axis can be referred to as the process of legislation. Each legislator's preferences follow a single peak within this two-dimensional space. They have specific points on the (x_i, y_i) axes that represent the expected support from their constituency. The current arrangement or the status quo arrangement is labeled as (x_0, y_0). The shaded areas on the graph represent all the arrangements that can be chosen using the simple majority rule essentially the possibilities of legislation. These areas are known as the preference-consistent alternatives or $P(x_0, y_0)$. Each distinct area within these alternatives represents a potential winner, as it is preferred over the current arrangement by a minimum of three legislators. In essence, these regions highlight the alternative options that have sufficient support from a majority of legislators, thereby making them eligible contenders for the winning position.
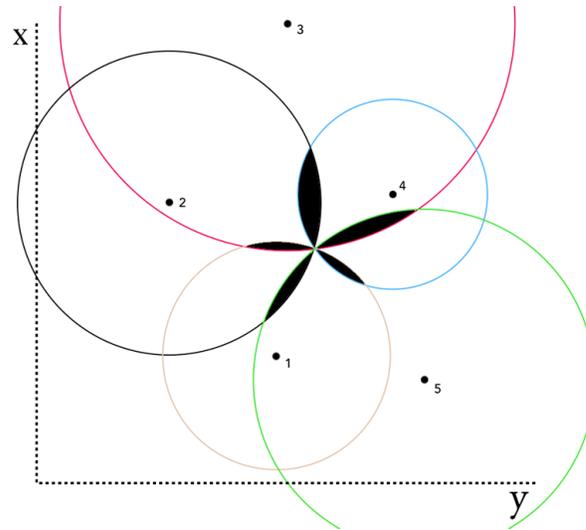
Figure 2: Preference-Consistent Alternatives in a 2D-Policy Space

(Salzberger, 1993)

However, we encounter here the fundamental problem of cycling. In the two-dimensional space, the set of preference-consistent alternatives that can win through the simple majority rule is not necessarily empty. This means that multiple possible winning options could be selected as the preferred arrangement. The presence of multiple options can lead to cycling, where different arrangements may be favored at different times, resulting in a lack of stability or a clear consensus. Cycling typically occurs when there are more than two options to choose from, and the preferences of the legislators or parties differ across these options. In order to address the problem of cycling and promote more stable decision-making processes, various institutional measures can be implemented.

One such approach is to establish controlled agenda setting, whereby the introduction of proposals to the legislative agenda is carefully regulated by assigning an authority the monopoly to set the agenda to a specific entity or subgroup. Monopoly over agenda can be addressed in a formal sense. Let $L = \{1,2,3,\ldots,n\}$ represent the set of legislators, where n is the total number of legislators. Each legislator i has their preferred arrangement represented by the coordinates (x_i, y_i) in the policy space.

Now, let's consider a subgroup of legislators $S \subseteq L$ who have the exclusive power to propose bills or amendments. Assuming legislator L2 $\in$ S has the monopoly on the legislative agenda, they will propose a motion represented by (x_2', y_2') within the policy space. The goal is to find

(x_2', y_2') that is the closest option to L2's most preferred arrangement (x_2, y_2) within the set of preference-consistent alternatives $P(x_0, y_0)$. To achieve this, we can select the arrangement (x_2', y_2') from the preference-consistent alternatives $P(x_0, y_0)$ that is nearest to (x_2, y_2). In other words, we want to find the point in the set of preference-consistent alternatives that minimize the distance to (x_2, y_2): $(x_2', y_2') = \text{argmin}_{(x,y) \in P(x_0, y_0)} D\big((x_2, y_2), (x, y)\big)$.

Here, the distance function $D\big((x_2, y_2), (x, y)\big)$ measures the proximity between (x_2, y_2) and (x, y). The preference-consistent alternatives $P(x_0, y_0)$ represent the set of arrangements that are acceptable according to the current arrangement (x_0, y_0). If this is plotted on our 2D policy-space framework, it would produce the following:
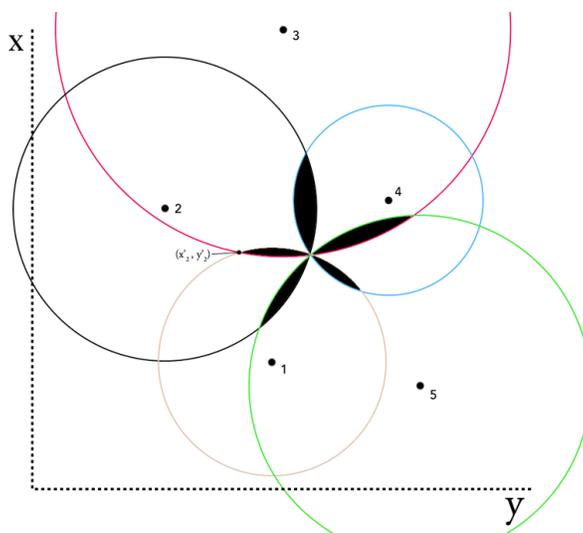

Figure 3: Monopoly Agenda Setting by Legislator 2

(Salzberger, 1993)

This graph illustrates the formal model, depicting the scenario where Legislator 2 holds the exclusive power to control the agenda. Acting in their self-interest, Legislator 2 aims to promote an arrangement that maximizes their own preferences, denoted by (x_2', y_2'). However, this proposed arrangement must also meet the majority preference criterion. Consequently, the outcome of this process will eventually converge on the derived arrangement, thereby eliminating the cycling problem.

However, as seen this leads to a concentration of power in a subgroup of legislators. Another method to eliminate this problem of cycling while still controlling the concentration of power to L2 by giving him a restricted power to create an agenda is through allowing an entity power to

merely remove the whole arrangement while still not being able to engage in the activities of legislation. This essentially be considered as a veto power or the power to judicial review. Now, if L2 being a rational and self-interested legislator understands that the area of operation has been reduced and will try to accommodate the needs of the veto-holder while also choosing the arrangement nearest to their peaked preference. To address the problem of cycling while maintaining power concentration in legislator l_2, one possible method is to grant a separate entity, denoted as V, the power to veto the entire arrangement without actively participating in the legislative activities. This veto power allows V to reject any proposed arrangement. Mathematically, we can represent the veto power as follows:

Let L be the set of legislators, and $L_2 \in L$ represent legislator L_2. Each legislator $L_i \in L$ has their preferred arrangement represented by the coordinates (x_i, y_i) in the policy space. Additionally, there exists a veto power holder V with their own preference curve represented by the coordinates (x_V', y_V'). Given this setup, legislator L_2 aims to choose an arrangement that is closest to their peaked preference while considering the preferences of others, including the veto holder V. Mathematically, we can express this as:

$$\min_{(x_2', y_2') \in P(x_0, y_0)} \quad d\big((x_2, y_2), (x_2', y_2')\big)$$
$$\text{s.t} \quad (x_2', y_2') \in (x_V', y_V')$$

In this formulation, the preference indifference curve of the veto holder V restricts the feasible set of arrangements that can be proposed by legislator L_2. The objective is to find the arrangement that minimizes the distance to legislator L_2's peaked preference while satisfying the preferences of the veto holder V.
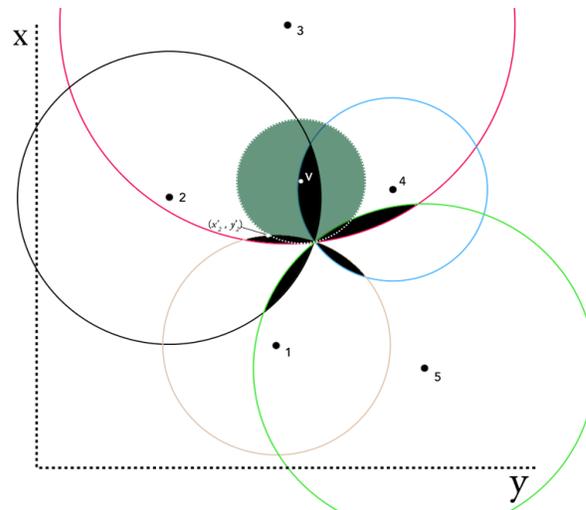
Figure 4: Veto Power and Restricted Agenda Setting

(Salzberger, 1993)

This graph illustrates the formal model derived in Eq. 2, depicting the scenario where Legislator 2 holds the exclusive power to control the agenda, however, they are still restricted by the preferences of the veto-holder V. Acting in their self-interest, Legislator 2 aims to promote an arrangement that maximizes their own preferences, denoted by (x_2', y_2'). However, this proposed arrangement must also meet the majority preference criterion and the newly created criterion of V. Consequently, the outcome of this process will eventually converge on the derived arrangement, thereby eliminating the cycling problem and the problem of concentration in one entity to control the agenda and the production of legislation. In this specific situation, the form of the extra limitation will show the distinctions between an individual with veto authority and a collective approving body, such as a second chamber. Specifically, the form of the additional restriction serves to highlight the contrasts between an individual with veto power and a collective approving body. However, given the scope of this paper, the chapter will not go into depth about these differences and their specifics.

The fundamental question of the paper though partially addressed, the question of Independent judiciary remains unaddressed. The core argument of this paper is that addressing the issue of cycling in decision-making can be effectively accomplished by granting the judiciary greater independence through the delegation of certain rule-making powers beyond its functional independence. This proposition challenges the customary normative restrictions typically associated with the role of the judiciary. Drawing upon insights from realist scholars'

perspectives of the judiciary, who posit that the functions of the judiciary and the legislature are converging, this paper highlights the significance of the judiciary as a crucial institution within the legal and political framework of a government. By recognizing the evolving nature of the judiciary and its alignment with legislative functions, this paper underscores the importance of granting the judiciary increased independence in addressing the problem of cycling.

The fundamental nature of the model presented in this paper may face criticism similar to the critiques raised against the Landes-Posner model. The Landes-Posner model aims to establish a linkage between an independent judiciary and the functions of parliament, as well as the rules governing legislatures. However, this contention emphasizes a clear distinction between the two models. The Landes-Posner model contends that the functional independence of the judiciary should be permitted to prolong the enforcement of legislation by interpreting it in accordance with the intentions of the enacting legislature and the original meaning. This approach imposes technical constraints on the judiciary and relies on normative conclusions concerning methods of interpretation.

The model presented in this paper contends that the judiciary plays a fundamental role in achieving stable and non-cyclical legislation, placing emphasis on the legislature's capacity in this regard. In contrast to this model, the paper adopts a more lenient stance on the functioning of the judiciary. Importantly, the model does not enforce any normative limitations on the functional independence of the judiciary, refraining from specifying a particular approach to interpretation. Instead, it assumes that the judiciary possesses the necessary authority to exercise decision-making power. The distinguishing factor lies in the fundamental nature of the judiciary. While the Landes-Posner model emphasizes the durability of legislation, the current model asserts that the judiciary's role is more profound, contributing to the legislature's ability to achieve a non-cyclical legislation.

Building upon the insights of realist scholars who contend that the judiciary and the legislature are increasingly converging in their functions, it is important to examine this phenomenon through the lens of delegation. Traditionally, delegation is understood as a process whereby the legislature, as the sole authority responsible for creating laws and rules, delegates the task of interpretation and application to the judiciary. While the executive branch is typically seen as the enforcer of these laws, the judiciary, through its decisions, effectively directs the executive on how to act. However, this paper challenges this traditional understanding. It argues that the

dynamics of delegation are more complex. While the legislature creates the rules, it often leaves considerable leeway in their specifics. Sometimes, the legislature fails to anticipate specific questions that may arise from the arrangements it establishes. On other occasions, legislative language intentionally remains broad and lacks detail. In these cases, where there is no explicit delegation to the administrative agencies, the legislature implicitly entrusts the courts with the authority to fill the gaps. In essence, the legislature is effectively delegating its monopoly over rule-making to the courts by granting them the power to decide on matters not explicitly addressed in the legislation. To formalize the model, let's take the usual example of five legislators on a two-dimensional policy framework:
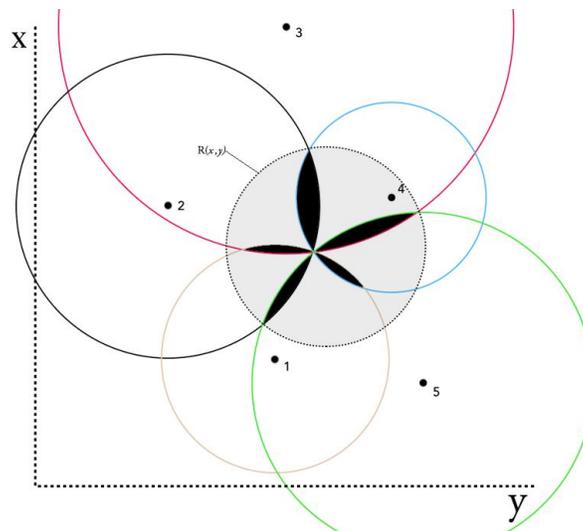

Figure 5: Delegation Region and Judicial Decision-Making

(Salzberger, 1993)

Legislative goals refer to the objectives that the legislature aims to achieve through the enactment of specific legal arrangements. These goals are represented by the point (x_0, y_0) in a two-dimensional space. Preference-consistent alternatives can be defined as:

$$P(x_0, y_0) = \{(x, y) \mid \text{preferred by } k \text{ legislators}\},$$

where k is the minimum number of legislators required for a legal arrangement to be considered a preference-consistent alternative. In this context, k = 3. The set $P(x_0, y_0)$, therefore, is a subset of the two-dimensional space that includes all legal arrangements satisfying this criterion. The delegation region represents a shift in the decision-making process. Instead of choosing a specific point within the set of preference-consistent alternatives, the legislature defines a

broader region, $R(x, y)$, that encompasses a range of possible legal arrangements. This region reflects the legislature's intent to allow flexibility while still aligning with its broader goals. Delegation to the courts occurs when the legislature assigns the task of selecting a specific legal arrangement within the region $R(x, y)$ to the judiciary. This delegation enables the courts to apply their expertise and judgment to determine the final legal arrangement, denoted by (x_c', y_c'), such that $(x_c', y_c') \in R(x, y)$. By delegating this authority to the courts, the model ensures a balance between stability and flexibility while preventing the excessive concentration of power in a single entity. Building on the previously proposed theoretical solution to address the issue of cycling through the implementation of veto powers, we can examine a scenario involving the judiciary and its authority to review and invalidate legislation that falls outside its preference indifference curve. In this framework, the preference region is defined by constitutional or legal constraints that establish the boundaries within which legislation must comply. This scenario prompts a critical question: why would a legislature, which holds a monopoly on rule-making and lawmaking, choose to delegate its authority to the judiciary? If the legislature is acting in its own self-interest, as suggested by theoretical models, there must be a balanced exchange that justifies delegating this power. This exchange would need to provide benefits to the legislature that outweigh the advantages of either retaining this authority internally or delegating it to administrative agencies.

iv.   *Some Empirical Evidences from United States*

Substantive due process is a principle in United States constitutional law, empowering courts to establish and safeguard fundamental rights by protecting them from government interference (Wurman, 2020). Unlike procedural due process, which primarily examines the fairness of the procedures followed in enacting laws, substantive due process scrutinizes the substantive content and impact of legislation on the indiduals. While substantive due process raises significant normative concerns, particularly regarding the potential erosion of democratic rule in favor of judicial decision-making, this paper focuses on the understanding the positive extent of delegation by the legislature to the courts through the usage of substantive due process (Scalia, 2018).

An empirical research study delved into the nature of courts and the utilization of substantive due process across different states in the United States (Anderson, 1987). The study revealed a trend where state supreme courts in several states began shifting away from substantive due process

and instead emphasized procedural due process. However, it was also observed that in certain states, this shift did not occur. The crucial finding of this research was the striking negative correlation between the usage of substantive due process by state courts and the volume of legislative activity. In other words, in states where substantive due process was more prevalent, there tended to be less legislative activity. This negative correlation supports the established assumption that legislatures are indeed delegating their monopoly power to the courts as a means of achieving stability and reducing the problems associated with cycling preferences. By entrusting the courts with the responsibility of interpreting and applying substantive due process, legislatures seek to address the challenges inherent in formulating and maintaining stable legislation.

One prominent example that exemplifies the interplay between the current model's finding, the inverse correlation between legislation and the usage of substantive due process, is the landmark case of Roe v. Wade 410 U.S. 113 (1973). Prior to this Supreme Court decision, the legislature possessed full authority to enact laws concerning abortion. However, due to the cycling of preferences and the ensuing lack of stability, the legislature struggled to establish a durable and consistent framework for abortion legislation. To resolve this problem, the Court stepped in and, through its decision in Roe v. Wade, effectively legislated by recognizing a constitutional right to abortion. The legislature, recognizing the need for stability and resolution, allowed the Court's decision to govern the matter. This delegation of power to the courts to resolve the cycling problem and establish a stable framework for abortion laws highlights the significance of substantive due process in mitigating legislative challenges. The legislature too, without any interference, had permitted the court's decision to govern the matter until recently, when the court overruled the precedent in Dobbs v. Jackson, 594 U.S.(2021).

10. CONCLUSION

The primary aim of this paper was to examine the functioning of the judiciary within the framework of public-choice theory. Beginning with the theoretical foundations of law and economics, the paper adopted a balanced approach that recognizes the behavioral dimensions of political actors, moving beyond rigid assumptions. It explored the concept of judicial independence, analyzing its structural and functional aspects. A key finding was the paradoxical observation that, despite the ability of political entities to restrict judicial independence, they

have allowed functional independence to flourish. This presents a contradiction to the core assumption of public-choice theory, which posits that individuals act in their self-interest, seemingly at odds with the interests of the legislature. The paper first critiqued the Landes-Posner model, identifying flaws in its assumptions about the demand for legislation and the behavioral tendencies of the judiciary. It then addressed the challenges posed by majority rule and proposed a model of an independent judiciary to explain the paradoxical persistence of judicial independence. This model emphasized the critical role of an independent judiciary in resolving the cycling problem, supported by empirical evidence. Through this analysis, the paper successfully achieved its objective of providing a positive explanation for judicial independence within the public-choice framework. For future research, the paper may investigate the behavioral dynamics of individual legislators and their motivations for delegating power, potentially through an analysis of how public perception influences decision-making. Such studies would assist in the understanding of judicial independence and its interplay with political and legal systems, offering insights into the broader implications of public-choice theory.

As Justice William O. Douglas once said, "The independence of the judiciary is the bedrock of our constitutional democracy." Recognizing the importance of an independent judiciary and its ability to provide profound stability, we pave the way for a deeper understanding of the delicate balance between legislative power and judicial authority.

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