



# The Constraining, Liberating, and Informational Effects of Non-Binding Law \*

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## Abstract

We show that non-binding law can have a *constraining effect* on political leaders, because legal compliance is a costly signal to imperfectly informed voters that the leader is unbiased. Moreover, non-binding law can also have a *liberating effect*, enabling some leaders to take action when they otherwise would have done nothing. Additionally, our analysis reveals three surprising findings regarding the stringency of the non-binding legal standard: *First*, non-binding law is most constraining when the legal standard is relatively permissive. *Second*, leaders can achieve policy outcomes closest to their ideals when the legal standard is relatively stringent. *Third*, voters' assessments of leader preferences are most accurate when the legal standard is relatively stringent. Thus in contrast to what one would expect if law were exogenously enforced, relatively weak legal standards constrain leaders the most, and relatively strict legal standards give leaders the most flexibility and give voters the most information.

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The binding force of legal rules and judicial decisions is sometimes taken as a given, but explaining why (and when and how) law constrains action—particularly government action—is one of the central puzzles of both traditional legal theory and the positive political theory of legal institutions. We contribute to the literature on this question by considering one of the mechanisms thought to induce government actors to comply with judicial rulings: the constraining force of public opinion. More specifically, we consider a “costly signaling” model of legal compliance in which the policy costs to a government agent of complying with formally non-binding law are positively correlated with some trait that voters dislike, such as bias or capture. In this framework, even non-binding law can induce legal compliance by leaders who would otherwise prefer to take more extreme (and illegal) action, because legal compliance is a way for leaders to signal lack of policy bias to imperfectly informed voters.

In addition to this costly signaling explanation of non-binding law’s constraining effect, our framework also reveals that non-binding can have a liberating or legitimizing effect, enabling some leaders to take action when they otherwise would have done nothing at all. This effect arises because, in the absence of legal standards, leaders can still signal lack of bias through *inaction*—that is, by refraining from even moderate interventions into policy areas where biased leaders tend to prefer more extreme interventions. Moderately stringent (though non-binding) legal standards enable leaders with “intermediate” preferences to take action without appearing overly extreme. Legal theorists have long recognized a version of this liberating effect of law, but it has not been fully integrated into a positive political economy framework, nor has the literature fully appreciated how this liberating effect interacts with the constraining effect described above.

Our costly signaling model of the constraining and liberating effects of non-binding legal standards also has a number of surprising and potentially interesting implications for the stringency of such standards. Three in particular stand out: *First*, non-binding law enforced through the mechanism we describe has the strongest constraining effect when the legal standard itself is relatively permissive (that is, when only very extreme actions would be ruled illegal). This is because as law becomes more stringent, legal compliance decreases

and the liberating effects of law strengthen; these two factors swamp the greater constraint that a stricter standard induces in those leaders who still have an incentive to comply. *Second*, in our framework leaders are (in expectation) best able to achieve outcomes close to their ideal policies when the legal standard is fairly stringent. Again, this occurs because sufficiently stringent law both liberates a large fraction of leaders (those with intermediate preferences) and induces non-compliance by leaders with extreme preferences. *Third*, voters' assessments of leader preferences are most accurate when the non-binding legal standard is relatively stringent. This is because a fairly stringent legal standard induces the greatest feasible equilibrium type separation, with the most moderate leaders choosing inaction, leaders with intermediate preferences choosing legal compliance, and the most extreme leaders choosing noncompliance. Taken together, these results suggest that when the law depends for its binding effect on its function as a costly signal, the stringency of the legal standard has, loosely speaking, the opposite effects from what one would expect if law were exogenously enforced: relatively weak legal standards constrain the most, and relatively strict legal standards give leaders the most flexibility (and give voters the most information).

The paper proceeds as follows. Part I situates our contribution within the existing political economy literature on government compliance with law. Part II presents our model and derives equilibria, thereby demonstrating how both the constraining and the liberating effect of non-binding legal rules can arise in a framework where legal compliance or inaction are costly signals that a leader's preferences are relatively moderate. Part III presents comparative statics results, focusing in particular on how changes in the stringency of the legal standard can affect: (1) the expected extremism of the policy (that is, how much the law constrains outcomes); (2) the expected divergence between the policy outcome and the leader's ideal point (that is, how much the law constrains the leader); and (3) the expected divergence between the leader's actual ideal point and the voter's posterior estimate of the leader's ideal point (that is, how much information the law provides to voters). Part IV concludes. Proofs of all formal statements appear in the appendix.

## I. Public Opinion and Legal Compliance

It is often presumed that political actors, such as legislators or constitution-makers, can specify legal rules and restrictions in advance, and that these rules will constrain subsequent government action. For example, most of the large and rich literature on legislative-bureaucratic relations assumes that a legislature can prescribe the substantive scope for agency discretion (that is, the range of policies which the agency may choose) and/or the procedural rules that the agency must follow when making its choice (Bawn 1995; Epstein and O'Halloran 1999; Gailmard 2009; McCubbins, Noll and Weingast 1987, 1989). Likewise, many analyses of judicial politics—in particular those that investigate the strategic interaction between judges and the elected branches—presume that elected leaders are meaningfully constrained by judicial rulings (Ferejohn and Shipan 1990; Epstein and Knight 1998; Eskridge and Ferejohn 1992; Fox and Stephenson 2011, 2012).

For many purposes, the simplifying assumption that laws and judicial rulings constrain government action is useful and appropriate. At the same time, it is widely understood that law is not self-enforcing, and that the effectiveness of judicial rulings generally depends on the incentives of those affected to comply. Moreover, there is considerable variation in the effectiveness of judicial enforcement across polities, across issue areas, and across time. Attention to this issue is perhaps most evident in the literature on international law, where the lack of a central government has made the “compliance problem” a central—perhaps *the* central—question in the field (Bradford 2005; Chayes and Chayes 1995; Franck 1990; Goldsmith and Posner 2005; Guzman 2008; Keohane 1997). Work in constitutional law and the separation of powers—particularly work that takes a more historical or comparative perspective—has also exhibited increasing sensitivity to this issue (Fallon 2009; Levinson 2011; Schauer 2010, 2011).<sup>1</sup> In these and other contexts, what factors might explain why (or when or to what extent) legal rules and judicial rulings will constrain government behavior?

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<sup>1</sup>Indeed, international law and (domestic) constitutional law may be more alike than is commonly realized, precisely because in both contexts the effectiveness of law, and of the courts that interpret or declare it, cannot rely on exogenous third-party enforcement (Goldsmith and Levinson 2009).

One set of explanations posits that the government leaders comply with legal constraints because the leaders in fact derive policy benefits from these constraints. For example, legal constraints enforced by independent courts might enable leaders to make policies (and the interest group bargains they embody) more credible (Landes and Posner 1975), or might improve policy outcomes—from the leaders’ own perspective—by incorporating courts’ information about the effect of policies at the point of application (Rogers 2001), or might eliminate policies that are disfavored by most leaders but are nonetheless difficult to repeal through the legislative process (Whittington 2005, 2007). The constraints imposed by independent courts could also benefit incumbent leaders by enabling them to deflect blame for unpopular policies or outcomes onto the judiciary (Graber 1993; Salzberger 1993), which might in turn enable leaders to entrench policies that they would otherwise come under pressure to eliminate (Hirschl 2000, 2004). Another possibility is that respect for legal constraints, and for judicial rulings that enforce them, may function as a kind of political insurance: on this view, compliance with legal strictures may emerge as a cooperative equilibrium in an indefinitely repeated game between competing parties or factions, where noncompliance by one side would trigger retaliation by its opponents when they have the opportunity (Carrubba 2005; Ginsburg 2003; Hanssen 2004; Ramseyer 1994; Stephenson 2003).

The above explanations ground government compliance with law in the self-interest of the leaders, without reference to any external enforcer. Another set of explanations (by no means mutually exclusive) identifies public opinion—that is, the threat of citizen retaliation, whether at the ballot box or in the streets—as a key factor that gives political leaders the incentive to comply with laws and court rulings that the leaders would otherwise prefer to ignore. One hypothesis in this vein is that citizens care sufficiently about the “rule of law,” independent of policy outcomes, that they would punish a government that disregarded the law regardless of the effect of the government’s decision on other aspects of these citizens’ welfare. Some contributions to the political economy literature incorporate this idea by assuming that elected leaders incur an exogenous penalty if the citizens observe noncompliance with judicial rulings (Staton 2006; Vanberg 2001). However, while the presumption

that courts enjoy a degree of “diffuse support” or intrinsic legitimacy, independent of instrumental considerations, appears to have some empirical backing (Caldeira and Gibson 1992; Gibson, Caldeira and Baird 1998), it is somewhat unsatisfying, both because the reasons for an intrinsic citizen commitment to the “rule of law” are not self-evident, and because this explanation cannot by itself explain considerable variation in this sort of public support.

For those reasons, several contributions to the political economy literature have sought to derive “public opinion” penalties for noncompliance with law from other, more instrumental considerations, and to use these explanations to generate more refined predictions about when public opinion will induce official compliance with law and when it will not. For example, it might be the case that judicial opposition to a government policy may be a sufficiently strong signal that the policy is not in the voters’ best interest—even if voters are on average more likely to agree with the elected leaders than the courts—that voters would prefer to commit to a strategy in which they punish leaders who defy the judiciary (Stephenson 2004). A related but distinct idea is that clear legal rules or judicial declarations may serve as focal points that enable citizens to coordinate their responses to possible government overreaching in contexts where government restraint is supportable in equilibrium if but only if citizens can credibly threaten *collective* retaliation against government defections (Law 2009; Sutter 1997; Weingast 1997). Carrubba (2009) provides a particularly sophisticated (and complex) synthesis of several of these ideas, developing a model in which powerful courts emerge over time, partly due to their role in facilitating cooperation between governments, but later due to the increase in public confidence that court rulings often reflect citizen preferences.

Our contribution is related to this latter strain in the literature, in that we connect government legal compliance to the public reputational penalties that leaders might suffer if they openly defy the courts, and also in that we seek to derive these reputational penalties from instrumental as opposed to intrinsic considerations. However, the mechanism we elucidate differs substantially from those that have been considered in the existing literature, in that our model does not rely on coordination, repeat play, or ex ante citizen commitment to a punishment strategy. Rather, we develop a model in which: (1) leaders vary in the strength

of their policy interest in violating the law; (2) incompletely informed voters (who may or may not share the incumbent leader’s preferences on the policy dimension at issue) would prefer a leader with less taste for extreme action; (3) the judge will declare an action legal only if it is not too extreme; and (4) voters can observe the judge’s decision and can make crude distinctions between leader “action” and “inaction,” but cannot otherwise observe the leader’s policy choice. Thus compliance with the law, in our model, is a costly signal of the leader’s type (though not as costly a signal as refraining from action altogether, which is also an option in our model). Furthermore, in our framework the relative costs of legal compliance compared to noncompliance, as well as the relative costs of inaction compared to (legal) action, are a function of the substantive stringency of the non-binding legal standard. Our analysis therefore focuses on how patterns of behavior and outcomes change as the legal standard becomes more or less stringent—in a context, again, where public reputational penalties of the sort we derive are the *only* incentive for leaders to comply with the law.

## II. The Model

### A. Players, Payoffs, and Order of Play

Consider a simple policymaking setting with three players: a leader, a judge, and a representative voter. The game consists of three periods: a policymaking stage, a judicial review stage, and an election stage.

In the first stage (the policymaking stage), the leader chooses some policy  $x \in [0, 1]$ , where  $x = 0$  can be thought of as the decision to retain the status quo (that is, to decline to get involved in some new policy area). Any value of  $x > 0$  denotes a new policy initiative, with higher values of  $x$  indicating more aggressive or ambitious initiatives. For example, the decision might concern a possible war against a perceived adversary, with  $x = 0$  denoting the decision not to fight the war at all, and higher values of  $x$  denoting greater and/or more indiscriminate uses of force in the prosecution of the war. Another example might

be the national government’s decision whether or how aggressively to regulate some policy area that traditionally had been left to subnational governments or private markets. Here,  $x = 0$  would denote the decision by the central government not to get involved, while higher values of  $x$  would denote greater transfer of power from subnational governments or private actors to the central government. Yet another example might be the government’s decision whether to “crack down” on a perceived social harm (such as crime, political subversion, obscenity, copyright infringement, etc.). Here,  $x = 0$  would be the decision not to pursue such a crackdown—that is, to leave the matter to the pre-existing “ordinary” methods of regulation or law enforcement—while higher values of  $x$  would indicate progressively more aggressive and intrusive crackdowns. At the start of the first period, the leader’s ideal policy,  $\theta$ , is drawn from a uniform distribution on  $[0, 1]$ .<sup>2</sup> After the leader chooses  $x$ , she incurs a policy loss equal to  $|x - \theta|$ . The leader knows her ideal policy  $\theta$ , but the other players know only the *ex ante* distribution of  $\theta$ .

The leader and the judge can observe  $x$ . The voter cannot, but can discern whether the leader chose  $x = 0$  or some  $x > 0$ . The idea here is that the voter has enough information to make “course” judgments about whether the leader took action in some policy area, but lacks the ability to make more refined judgments as to how aggressive, ambitious, or intrusive that action was. To put this in the context of the previous examples, we assume that the voter can tell whether the leader chose to fight a war, but not how much violence to employ in fighting it; the voter knows whether the central government enacted a new regulatory program, but not the extent to which this new program transfers power away from subnational governments or private market actors; the voter can observe the government’s announcement of a crackdown on a social problem, but not the amount of intrusiveness or curtailment of traditional liberties that this crackdown entails. This assumption is, of course, a simplification: in reality, voters do have access to some information about the

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<sup>2</sup>Assuming a uniform distribution substantially simplifies the exposition, though it does entail some loss of generality. Note that this assumption implies that the leader always prefers a new policy to the status quo; one could incorporate the possibility that the leader prefers the status quo by assuming an atom of positive probability on  $\theta = 0$ , but this adds additional notation without much in the way of additional insight.

aggressiveness of government policy, and moreover the line between “action” and “inaction” is sometimes blurry rather than sharp. Nonetheless, this simplification captures in stark form an important feature of more complex real-world settings: certain kinds of relatively crude policy distinctions (such as action vs. inaction, war vs. peace, regulation vs. non-regulation) are more transparent to voters than differences in how policies are carried out.

In the second stage of the game (the judicial review stage), the judge—who in our model is a non-strategic actor—rules on whether the leader’s policy choice was legal or illegal. More specifically, we assume that there is some legal limit  $L \in [0, 1]$ , known in advance to both the leader and the voter, such that if  $x \leq L$  the judge issues a publicly-observable ruling that the policy is “legal,” while if  $x > L$  the judge rules that the policy is “illegal.”<sup>3</sup> To illustrate with our three earlier examples, the judge can issue a ruling on whether the amount of violence employed in the war is lawful (proportionate in light of legitimate military objectives) or unlawful (disproportionate/excessive); whether the new regulatory program unlawfully encroaches on the prerogatives of subnational governments or private actors; and whether the government’s crackdown respects legal guarantees to liberty, privacy, and fair procedure. We can think of  $L$  as a measure of the strictness of the legal standard applied by the judge, where high values of  $L$  denote relatively lax or permissive standards, under which most values of  $x$  are legal, while smaller values of  $L$  denote more stringent legal standards. A setting with  $L = 1$  would be one in which there is effectively no operative law in the policy area, in that every possible choice of  $x$  would be ruled lawful. A setting with  $L = 0$ , by contrast, would be one in which the law prohibits any new government action in the relevant policy area; in that case inaction ( $x = 0$ ) is the only lawful choice.

Importantly, the judge’s ruling is *non-binding*: it does not alter the policy choice,  $x$ , and there is no exogenous enforcer who prevents the leader from adopting or maintaining an illegal policy. In our model, the only role of the judge’s ruling (and, therefore, the only role for the legal threshold  $L$ ) is to provide additional information to the voter about the

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<sup>3</sup>The assumption that the legal threshold is clear and consistently applied, as well as the assumption that the judge is non-strategic, are obviously unrealistic, but these simplifications allow us to get better purchase on the question of how non-binding law might affect official behavior.

policy choice. Formally, after the leader’s choice and the judge’s ruling, the voter receives one of three signals,  $s \in \{inaction, legal, illegal\}$ , where  $s = inaction$  if  $x = 0$ ,  $s = legal$  if  $x \in (0, L]$ , and  $s = illegal$  if  $x > L$ .

In the third stage (the election stage) the voter decides whether to retain or replace the leader. We assume that the voter cannot commit *ex ante* to a retention rule, even if doing so might improve his expected utility (Fearon 1999). Rather, we assume that the voter simply chooses between the incumbent and some challenger on the basis of the voter’s assessment as to which candidate is expected to confer higher voter utility in future (unmodeled) periods. We further assume that the expected utility to the voter of retaining the incumbent leader is negatively correlated with the leader’s taste for more aggressive policies,  $\theta$ . This implies that the first-period leader’s probability of retaining office is a decreasing function of the voter’s posterior belief about the leader’s type, conditional on the voter’s signal, which we will denote as  $\hat{\theta}(s)$  or sometimes simply as  $\hat{\theta}$ . In other words, the leader suffers a “reputational penalty” that is an increasing function of  $\hat{\theta}$ .

The assumption that a leader with a higher  $\theta$  is, in expectation, worse for the voter is important to our analysis, and so is worth unpacking a bit more. In our example of a possible military intervention, this assumption would be consistent with a setting in which the voter is worried that some fraction of leaders are excessively bellicose, and might entangle the country in unnecessary conflicts in the future; such a voter might rationally conclude that a leader with a greater taste or tolerance for military violence might be a “bad” type of that sort. Likewise, in the context of our other illustrative examples, voters might worry that some fraction of leaders are proto-tyrants who have too strong an interest in centralizing power and too little concern for civil liberties. If so, then voters might be rationally more skeptical of leaders who prefer more expansive central government regulatory programs and/or more intrusive government crackdowns on perceived social problems. Importantly, our assumption does *not* necessarily imply that the voter always prefers lower values of  $x$ , nor that leaders with higher values of  $\theta$  are always worse types. The *expected* quality of the leader could be decreasing in  $\theta$  even if voter and leader ideal points have a tight positive correlation,

with only a very small probability of a “bad” leader, who in turn might only have a very small bias toward a higher level of  $x$ . Nonetheless, given that the voter cannot commit to a retention rule, as long as  $\theta$  is positively correlated—even weakly—with some undesirable trait, then the voter will penalize (though a lower probability of retention) a leader with a higher perceived  $\theta$ .

For simplicity, we assume that the leader’s reputational penalty is linear in  $\hat{\theta}$ , and also that the leader weights policy losses and reputational penalties equally.<sup>4</sup> This implies that the leader’s net utility loss is  $|x - \theta| + \hat{\theta}$ . The leader’s objective is to minimize this loss. The main question of interest is how variation in the legal threshold  $L$  affects leader behavior, expected policy outcomes, and voter learning.

Observe that in our framework, both inaction ( $x = 0$ ) and lawful action ( $x \leq L$ ) are costly signals that the leader’s preferences are more moderate ( $\theta$  low). This is because the policy costs to a leader of choosing a low value of  $x$  are greater when the leader prefers a higher value of  $x$ . In that sense, our model applies some of the core ideas of the costly signaling literature that originates with Spence (1973) to a quite different substantive context.

## B. Equilibrium

We identify perfect Bayesian equilibria (PBE) that satisfy the D1 refinement proposed by Cho and Kreps (1987). In a PBE, each player’s strategy must be a best response, given her beliefs, to the other players’ strategies, and all players’ beliefs must be consistent with Bayes’ Rule on the equilibrium path. The D1 refinement further restricts beliefs off the equilibrium path such that if the voter were to observe a signal that should never arise in equilibrium, the voter will assume (with probability 1) that the leader is whichever type needs the smallest reputational inducement to make this deviation from equilibrium behavior worthwhile (see the appendix for technical details). We also limit attention to those equilibria in which the

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<sup>4</sup>The assumption that the leader’s reputational loss is a continuous function of  $\hat{\theta}$  would be consistent with a setting in which the expected quality of the challenger is drawn from some continuous distribution and is realized between the policymaking stage and the electoral stage (Fox and Stephenson 2011). This seems more realistic than a setting in which the incumbent is assured reelection so long as  $\hat{\theta}$  is above some known threshold value, and sure to be replaced if  $\hat{\theta}$  is below that threshold.

leader, when indifferent between choosing  $x = 0$  and some  $x > 0$ , chooses  $x = 0$ , and in which the leader, when indifferent to some  $x \leq L$  and some  $x > L$ , always chooses the former. (These are benign tiebreaking assumptions that simplify the exposition but do not meaningfully affect the main results.) In what follows we will refer to a PBE that survives these restrictions simply as an “equilibrium.”

As noted above, we are principally interested in how the non-binding legal threshold  $L$  affects the leader’s equilibrium policy choice. As the law becomes stricter—that is, as the maximum value of  $x$  that the judge would deem lawful declines—how does the leader’s equilibrium behavior change, and how do the inferences that the voter draws change? The answer to these questions are given formally in the following proposition, which is the main analytic result of our paper:

**Proposition 1** *Leader behavior and voter beliefs, as a function of the legal threshold  $L$ , are as follows:*

- (a) No law. *If  $L = 1$ , then the leader chooses inaction ( $x = 0$ ) if  $\theta \leq \frac{1}{2}$  and chooses her ideal point ( $x = \theta$ ) if  $\theta > \frac{1}{2}$ . Voter beliefs are:  $\hat{\theta}(\text{inaction}) = \frac{1}{4}$  and  $\hat{\theta}(\text{legal}) = \frac{3}{4}$ . (It is impossible for the leader to choose an illegal policy in this case, so  $\hat{\theta}(\text{illegal})$  is not specified.)*
- (b) Permissive legal standard. *If  $L \in (\frac{3}{4}, 1)$ , then the leader chooses inaction ( $x = 0$ ) if  $\theta \leq \frac{1}{2}$ , chooses her ideal point ( $x = \theta$ ) if  $\theta \in (\frac{1}{2}, L]$ , and chooses the legal limit ( $x = L$ ) if  $\theta > L$ . Voter beliefs are:  $\hat{\theta}(\text{inaction}) = \frac{1}{4}$ ;  $\hat{\theta}(\text{legal}) = \frac{3}{4}$ ; and  $\hat{\theta}(\text{illegal}) = 1$ .*
- (c) Moderate legal standard. *If  $L \in (\frac{1}{3}, \frac{3}{4}]$ , then the leader chooses inaction ( $x = 0$ ) if  $\theta \leq \frac{1}{5} + \frac{2}{5}L$ , chooses her (lawful) ideal point ( $x = \theta$ ) if  $\theta \in (\frac{1}{5} + \frac{2}{5}L, L]$ , chooses the legal limit ( $x = L$ ) if  $\theta \in (L, \frac{2}{5} + \frac{4}{5}L]$ , and chooses her (unlawful) ideal point ( $x = \theta$ ) if  $\theta > \frac{2}{5} + \frac{4}{5}L$ . Voter beliefs are:  $\hat{\theta}(\text{inaction}) = \frac{1}{10} + \frac{1}{5}L$ ;  $\hat{\theta}(\text{legal}) = \frac{3}{10} + \frac{3}{5}L$ ; and  $\hat{\theta}(\text{illegal}) = \frac{7}{10} + \frac{2}{5}L$ .*
- (d) Strict legal standard. *If  $L \in [\frac{1}{4}, \frac{1}{3}]$ , then the leader chooses inaction ( $x = 0$ ) if  $\theta \leq$*

$1 - 2L$ , chooses the legal limit ( $x = L$ ) if  $\theta \in (1 - 2L, 2L]$ , and chooses her ideal point ( $x = \theta$ ) if  $\theta > 2L$ . Voter beliefs are:  $\hat{\theta}(\text{inaction}) = \frac{1}{2} - L$ ;  $\hat{\theta}(\text{legal}) = \frac{1}{2}$ ; and  $\hat{\theta}(\text{illegal}) = \frac{1}{2} + L$ .

- (e) Prohibitive legal standard. If  $L < \frac{1}{4}$ , then the leader chooses inaction ( $x = 0$ ) if  $\theta \leq \frac{1}{2}$  and chooses her ideal point ( $x = \theta$ ) if  $\theta > \frac{1}{2}$ . Voter beliefs are:  $\hat{\theta}(\text{inaction}) = \frac{1}{4}$ ;  $\hat{\theta}(\text{legal}) = \frac{1}{2}$ ; and  $\hat{\theta}(\text{illegal}) = \frac{3}{4}$ .

Proposition 1(a) describes a case in which the judge would declare *any* policy legal. In this case, leaders with more extreme ideal points (those above  $\frac{1}{2}$ ) choose their ideal policies, as one might expect, but leaders with more moderate ideal points (those below  $\frac{1}{2}$ ) take no action whatsoever. Thus when there is no operative law, we have a partially separating equilibrium in which more moderate leaders signal their moderation by abstaining from any action in the controversial policy area, while leaders with more extreme preferences take their most-preferred action, even though they take a reputational hit from doing so. This case serves as a baseline for considering the effect of progressively more stringent legal standards.

As  $L$  decreases a bit from 1, we move to a setting in which there are some possible actions that the judge would declare illegal (those between  $L$  and 1), but the legal standard is still relatively lax. In this case, described in Proposition 1(b), all leaders with moderate preferences ( $\theta \leq \frac{1}{2}$ ) take no action in order to signal their moderation, exactly as they did in the “no law” case described in Proposition 1(a), even though these leaders would prefer some (legal) action to the status quo. This, again, is because when the legal standard is quite lax, “legality” by itself law is not a particularly strong signal, and for leaders with sufficiently low  $\theta$ , the reputational value of signaling low  $\theta$  through inaction exceeds the policy cost. Leaders with more extreme but legal preferences ( $\theta \in (\frac{1}{2}, L]$ ) choose their ideal policies, as they did in the “no law” case. However, leaders who prefer more extreme—and illegal—policies ( $\theta > L$ ) choose  $L$  instead of  $\theta$ .

This last observation is substantively important, as one can think of a leader’s decision to choose the legal limit ( $L$ ) rather than her ideal policy ( $\theta > L$ ) as, in effect, a constraining

effect of non-binding law, driven by public opinion. This legal constraint derives from an implicit threat to the leader's reputation: in this setting the voter would infer that a leader who chooses an illegal policy must have *very* extreme policy preferences.<sup>5</sup> Indeed, because the law in this case is so lax—such that even leaders with quite extreme preferences don't need to give up too much on the policy dimension in order to avoid the reputational loss associated with acting illegally—in equilibrium all leaders, even those with the most extreme policy preferences, comply with the law.

However, once the legal standard becomes sufficiently stringent (decreasing below  $\frac{3}{4}$ ), leader behavior changes in some interesting ways. When the strictness of the legal standard takes some intermediate value, as in Proposition 1(c), leaders with very extreme preferences no longer comply with the law, while some leaders with more moderate (legal) preferences take their preferred action rather than taking no action. To illustrate, suppose  $L = \frac{1}{2}$ , and compare what happens in this case to the case described in Proposition 1(a), where there is no operative law ( $L = 1$ ). When  $L = \frac{1}{2}$ , leaders with  $\theta \in [0, \frac{2}{5}]$  retain the status quo, exactly as leaders in this range did in the “no law” case. Likewise, leaders with  $\theta \in (\frac{4}{5}, 1]$  choose their (illegal) ideal policies, the same policies these leaders would have (legally) chosen in the “no law” case. So, compared to the “no law” case, moderately strict non-binding law ( $L = \frac{1}{2}$ ) has no behavioral effect on leaders with relatively moderate ( $\theta \leq \frac{2}{5}$ ) or extreme ( $\theta > \frac{4}{5}$ ) policy preferences. However, this legal standard *does* affect the policy choices of the leaders in the intermediate range ( $\theta \in (\frac{2}{5}, \frac{4}{5}]$ ). Leaders who prefer a policy somewhat above the legal limit ( $\theta \in (\frac{1}{2}, \frac{4}{5}]$ ) are “constrained” to choose the legal limit ( $L = \frac{1}{2}$ ) rather than their ideal points, much like the leaders with extreme preferences were constrained to choose the legal limit in the case described in Proposition 1(b). Perhaps even more interesting, leaders with preferences within but close to the legal limit ( $\theta \in (\frac{2}{5}, \frac{1}{2}]$ ) are “liberated” by the legal standard to choose their ideal policies rather than choosing to take no action, as leaders in this range did in the “no law” case. That is, for a subset of leaders the presence

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<sup>5</sup>Note here that we make use of the D1 refinement: Because no leader chooses  $x > L$  in equilibrium, PBE does not restrict voter beliefs  $\hat{\theta}(\text{illegal})$ . The D1 refinement, however, implies that  $\hat{\theta}(\text{illegal}) = 1$ , because the leader with  $\theta = 1$  would need the smallest reputational inducement to select  $x > L$  rather than  $x = L$ .

of meaningful (though non-binding) legal restrictions *enables* rather than constrains action.

This “liberation” derives from what can be thought of as the legitimizing effect of sufficiently stringent law, and this legitimizing effect has an important relationship with the *failure* of the law to constrain leaders with more extreme preferences. When law becomes sufficiently stringent that leaders with very extreme preferences would rather suffer the reputational penalty from acting illegally than incur the policy loss necessary to secure judicial approval, then the reputational penalty for legal action, relative to inaction, becomes less severe. In other words, precisely because leaders with very high  $\theta$  switch from legal action to illegal action, the “legal” signal now conveys a stronger indication that  $\theta$  is not too high. This means that a leader who was previously indifferent between inaction and legal action will now prefer legal action, as the reputational cost of the latter has gone down while the policy costs of each choice remain unchanged. (This, however, increases the reputational penalty associated with legal action and decreases the reputational penalty associated with inaction, which moderates the degree to which non-compliance at the higher end induces liberation at the lower end.)

As law becomes even more stringent, moving into the range covered by Proposition 1(d) ( $L \in [\frac{1}{4}, \frac{1}{3}]$ ), we continue to get a separating equilibrium in which leaders with sufficiently low  $\theta$  take no action, leaders with sufficiently high  $\theta$  choose their (illegal) ideal policies, and leaders with intermediate values of  $\theta$  choose legal action. The difference is that when law becomes this strict, the only leaders who choose *legal* action are those who prefer *illegal* policies; leaders in that subset all choose the legal limit  $L$ . Indeed, in this case some leaders who prefer illegal policies choose inaction rather than action (legal or otherwise). As before, law in this case setting exerts a constraint, in that the more extreme leaders in the intermediate range (those with  $\theta \in (\frac{1}{2}, 2L]$ ) choose the legal limit  $L$  rather than their ideal points. Likewise, the more moderate leaders in this range (those with  $\theta \in (1 - 2L, \frac{1}{2}]$ ) are somewhat liberated, in that they can choose the legal limit  $L$  rather than doing nothing (which is what leaders in this range would do in the “no law” case).

Finally, when the legal standard becomes sufficiently strict, as in Proposition 1(e), be-

havior is identical to the “no law” case: leaders with less taste for extreme action ( $\theta \leq \frac{1}{2}$ ) retain the status quo, while leaders with a stronger taste for extreme action ( $\theta > \frac{1}{2}$ ) choose their idea policies. The only difference is that in the “no law” case described in Proposition 1(a), the judge always ruled the leader’s action to be legal, whereas in the case described in Proposition 1(e) the judge always declares the leader’s action to be illegal. But in both cases the judge’s ruling has no information content for the voter (because the judge’s ruling in equilibrium is always the same), and thus does not affect the leader’s behavior.

Figure 1 presents the equilibrium behavioral results of Proposition 1 graphically: the X-axis represents the legal standard  $L$ , the Y-axis represents the leader’s ideal point  $\theta$ , and each region in the space shows the leader’s equilibrium choice ( $x = 0$ ,  $x = L$ , or  $x = \theta$ ) for different combinations of  $L$  and  $\theta$ .

Several features of this equilibrium analysis are worth restating. First, non-binding legal rules can have a constraining effect, because legal compliance can be a costly signal that the leader’s preferences are moderate rather than extreme. Second, when leaders also have the option of sending an even stronger (that is, more costly) signal of moderate preferences by abstaining from controversial action altogether, then non-binding legal rules may have a liberating as well as a constraining effect, because legal compliance provides a way to signal somewhat moderate preferences while still allowing some degree of controversial action. Third, the relative probabilities of inaction, lawful action, and unlawful action depend on the stringency of the legal standard, such that changes in legal strictness can substantially alter outcomes. This last observation invites comparative statics analysis of how a range of outcomes with potential normative significance—such as the expected extremism of the policy outcome, the leader’s ability to realize an outcome close to her ideal point, and the amount of information the voter is able to acquire—vary with the stringency of the non-binding legal rule. Part III takes up this comparative statics analysis.

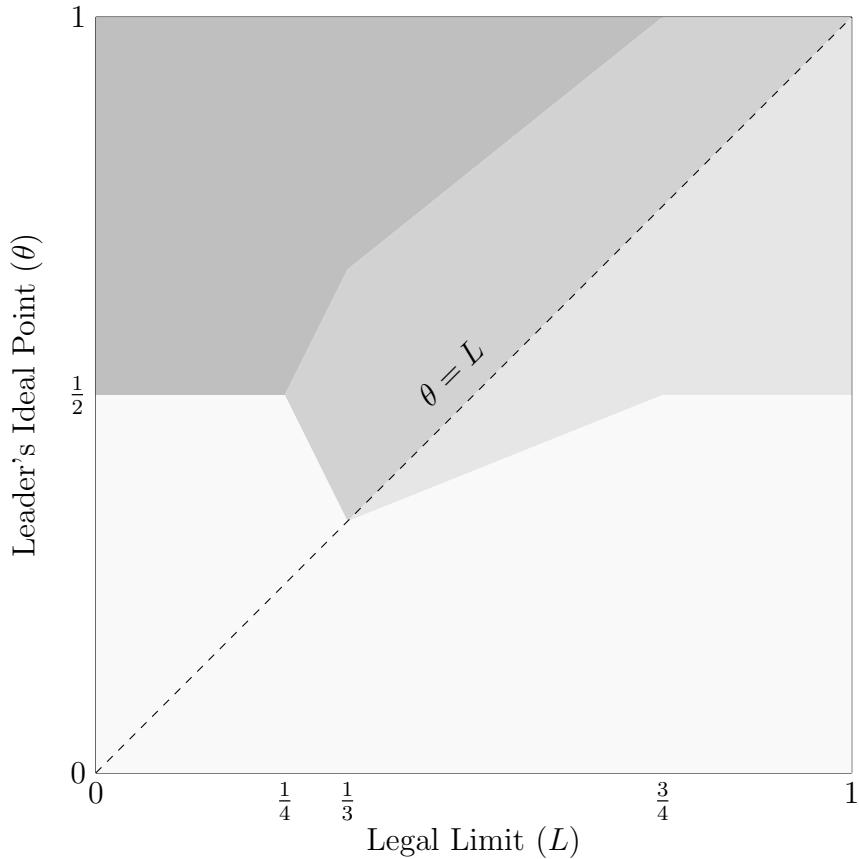


Figure 1: *Policy choice as a function of the legal limit and the leader’s ideal point.* The X-axis represents the the legal limit  $L$  (smaller  $L$ -values indicate a more stringent limit). The Y-axis represents the Leader’s ideal point  $\theta$ . For those  $L$ - $\theta$  combinations in the whitish region, the leader chooses inaction ( $x = 0$ ). For  $L$ - $\theta$  combinations in the light gray region, the leader chooses her ideal point ( $x = \theta$ ); as  $\theta \leq L$  in this region, that policy choice is declared lawful. For  $L$ - $\theta$  combinations in the medium gray region, the leader sets policy at the legal threshold ( $x = L$ ). Finally, for  $L$ - $\theta$  combinations in the dark gray region, the leader chooses her ideal point, which is declared unlawful (because  $\theta > L$  in this region).

### III. Comparative Statics

In addition to the general features of the equilibrium discussed in Part II, we can use Proposition 1 to derive comparative statics that address substantive questions about the relationship between the legal standard,  $L$ , and a set of potentially interesting outcome variables.

One such outcome variable is the expected extremism of the policy outcome,  $x$ . We might, for example, be interested in which legal standard *minimizes*  $E(x)$ , on the logic that the role of the judge and the legal standard, from the voter's perspective, might be to prevent—to the extent possible—government action in the problematic area. That is, we might be interested in how effective laws purporting to restrict the amount of violence in war are at minimizing violence, or how effective laws protecting civil or economic liberty or state autonomy are at curtailing encroachments on those values, putting aside (for the moment) potentially countervailing considerations on the other side. If the legal standard  $L$  were binding (that is, if it were impossible for the leader to enact a policy  $x > L$ ), then the question would be trivial: expected policy extremism  $E(x)$  would be increasing in  $L$ , with  $E(x)$  minimized when  $L = 0$ . However, if the law is not binding, and compliance with the law is induced only by the rational reputational sanctions that voters impose in equilibrium, then the analysis is quite different, as the following corollary to Proposition 1 shows:

**Corollary 1** *The relationship between the legal standard,  $L$ , and the expected extremism of the policy outcome,  $E(x)$ , is as follows:*

- (a) *When the legal standard is prohibitive ( $L \in (0, \frac{1}{4})$ ),  $E(x)$  is invariant in  $L$ .*
- (b) *When the legal standard is strict ( $L \in (\frac{1}{4}, \frac{1}{3})$ ),  $E(x)$  is increasing in  $L$ .*
- (c) *When the legal standard is moderate ( $L \in (\frac{1}{3}, \frac{3}{4})$ ),  $E(x)$  is decreasing in  $L$ .*
- (d) *When the legal standard is permissive ( $L \in (\frac{3}{4}, 1)$ ),  $E(x)$  is increasing in  $L$ .*
- (e)  *$E(x)$  is minimized when  $L = \frac{3}{4}$  (at which point  $E(x) = \frac{11}{32}$ ).*
- (f)  *$E(x)$  is maximized when  $L = \frac{1}{3}$  (at which point  $E(x) = \frac{7}{18}$ ).*

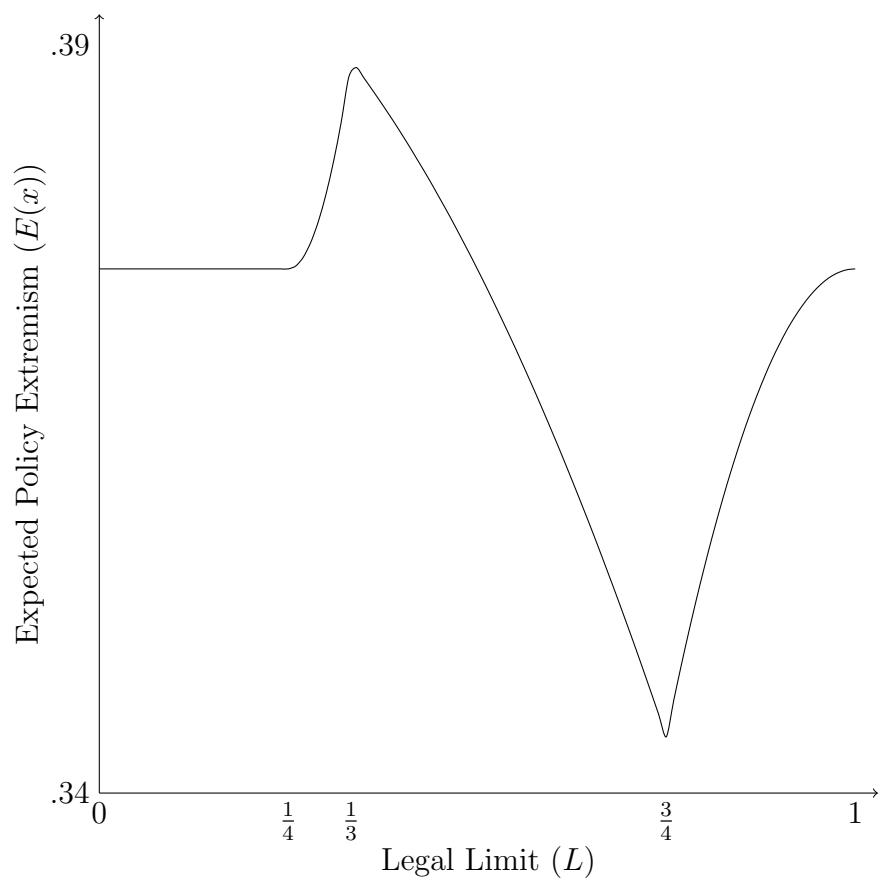


Figure 2: *Expected extremism of leader as a function of the legal limit.*

Corollary 1 is illustrated graphically in Figure 2. The striking result here is that expected policy extremism (e.g., the level of wartime violence, the degree of centralization, the intrusiveness of the crackdown) is minimized when the non-binding legal standard is relatively lax ( $L = \frac{3}{4}$ ), but maximized when the standard is relatively strict ( $L = \frac{1}{3}$ )—results at odds with what one would expect if law had exogenous binding force. The explanation follows from the logic of Proposition 1. If we begin with the “no law” case ( $L = 1$ ) and make law progressively more constraining (decreasing  $L$ ), at first the only effect is to constrain the leaders with the most extreme preferences; this constraining effect reaches its apex when  $L$  drops to  $\frac{3}{4}$ . When  $L$  drops below  $\frac{3}{4}$ , two other things start to happen: first, leaders with extreme preferences begin choosing extreme illegal action (because the costs of compliance have become too high); second, leaders with more moderate preferences start choosing their ideal (legal) action rather than inaction. These effects both increase expected policy extremism, more than offsetting the constraining effect that non-binding law continues to exert. These former effects become relatively more powerful as the legal standard becomes stricter (dropping from  $\frac{3}{4}$  to  $\frac{1}{3}$ ), with expected policy extremism maximized at the bottom end of that range. As  $L$  drops further from  $\frac{1}{3}$  to  $\frac{1}{4}$ , there is a partial reversal, as more low- $\theta$  leaders choose inaction rather than legal action, but noncompliance rates are still high enough that expected policy extremism remains relatively substantial. Because decreases in  $L$  below  $\frac{1}{4}$  induce no behavioral change, they also induce no change in expected extremism.

A second potentially interesting comparative statics question concerns the effect of the legal standard  $L$  on the expected divergence between the selected policy and the leader’s ideal policy. For notational convenience, we denote this divergence by  $\Delta = |\theta - x|$ , and investigate the relationship between  $L$  and  $E(\Delta)$ . In other words, we ask what (non-binding) legal standard is most likely to enable the leader to achieve policy outcomes close to her ideal.<sup>6</sup> The answer to this question can be expressed as a second corollary to Proposition 1:

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<sup>6</sup>The expected divergence between the policy outcome and the leader’s ideal point,  $E(\Delta)$ , may be of interest not only to the leader, but also to society. As noted earlier, it is possible that the voter might prefer, on this decision, to liberate the leader as much as possible, but the voter nonetheless finds himself unable to credibly commit to retain a leader who reveals a high value of  $\theta$  (because higher  $\theta$  may be mildly indicative of potential bias). Or, voters might systematically overestimate the risks posed by leaders with high  $\theta$ .

**Corollary 2** *The relationship between the legal standard,  $L$ , and the expected divergence of the policy outcome from the leader's ideal,  $E(\Delta)$ , is as follows:*

- (a) *When the legal standard is prohibitive ( $L \in (0, \frac{1}{4})$ ),  $E(\Delta)$  is invariant in  $L$ .*
- (b) *When the legal standard is strict ( $L \in (\frac{1}{4}, \frac{1}{3})$ ),  $E(\Delta)$  is decreasing in  $L$ .*
- (c) *When the legal standard is moderate ( $L \in (\frac{1}{3}, \frac{3}{4})$ ),  $E(\Delta)$  is increasing in  $L$ .*
- (d) *When the legal standard is permissive ( $L \in (\frac{3}{4}, 1)$ ),  $E(\Delta)$  is decreasing in  $L$ .*
- (e)  *$E(\Delta)$  is minimized when  $L = \frac{1}{3}$  (at which point  $E(\Delta) = \frac{1}{9}$ ).*
- (f)  *$E(\Delta)$  is maximized when  $L = \frac{3}{4}$  (at which point  $E(\Delta) = \frac{5}{32}$ ).*

Corollary 2 is illustrated graphically in Figure 3. Here again, the result is somewhat counterintuitive, in that the leader's ability (in expectation) to achieve an outcome close to her ideal point is maximized when the (non-binding) law is fairly stringent ( $L = \frac{1}{3}$ ), while the leader is most constrained when the legal standard, though meaningful, is relatively lax ( $L = \frac{3}{4}$ ). The intuition here closely parallels that for Corollary 1: When there is no operative law, leaders with moderate preferences signal this by taking no action, while other leaders choose their ideal points. As the law becomes stricter, the behavior of the former set of leaders doesn't change, but some of the more extreme leaders choose  $L$  rather than their ideal points; thus, the expected distance between the policy outcome and the leader's ideal point goes up. As the law becomes more stringent, some leaders who had been constrained start to break the law (choosing their ideal points), while some more moderate leaders are liberated to choose their (lawful) ideal points rather than choosing inaction. These twin effects mean that as the law becomes more stringent over this range, more leaders are choosing their ideal points, and so  $E(\Delta)$  is getting smaller (even though those leaders who are still constrained have to move further from their ideal points to achieve compliance). Once the legal standard becomes strict enough, however, further increases in stringency cause some leaders to revert to inaction rather than more-preferred legal action, while those leaders who comply with the

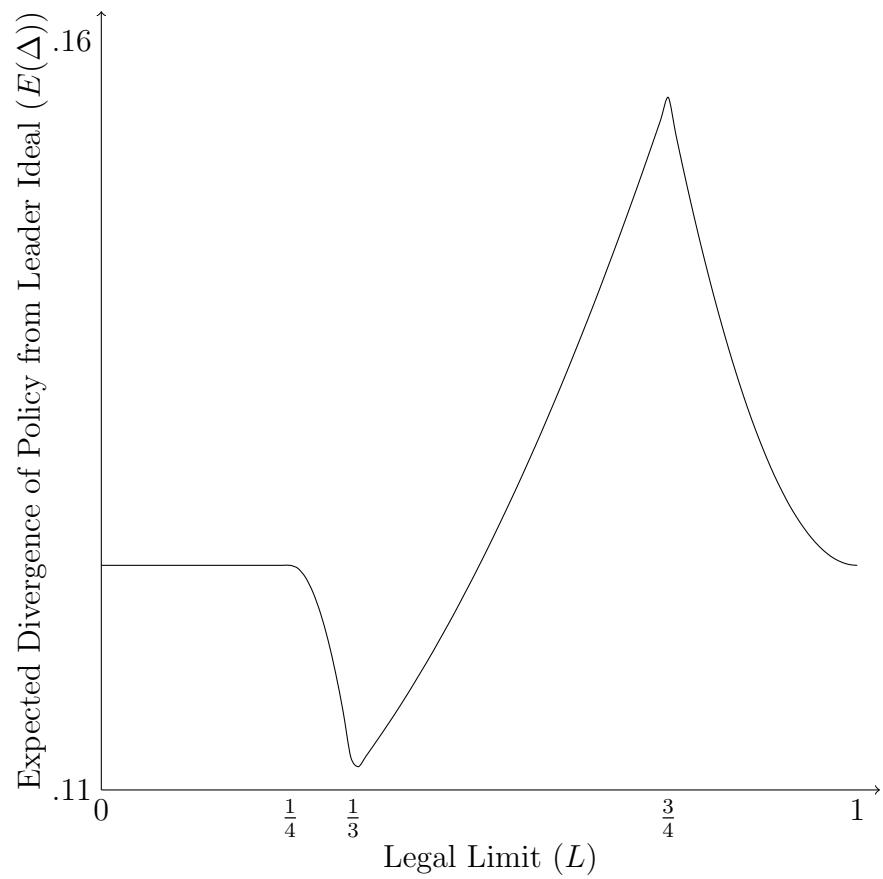


Figure 3: *Expected divergence of the policy outcome from leader's ideal policy as a function of the legal limit.*

law pay a greater policy cost to do so. Thus  $E(\Delta)$  again increases until the law is so strict that it has no effect on behavior, such that the outcome is the same as in the “no law” case.

Another potentially interesting question concerns how the legal standard affects the accuracy of the voter’s inference about the leader’s type; we can denote this (in)accuracy by  $\Gamma = |\hat{\theta} - \theta|$ . The normative significance of this measure is straightforward: our framework presumes that the voter views the incumbent leader’s policy preference on the issue in question (that is,  $\theta$ ) as relevant to the voter’s electoral decision, presumably because this preference correlates inversely (in expectation) with how well the leader will serve the voter on other issues in the future. We therefore derive the relationship between  $L$  and  $E(\Gamma)$  as a third corollary to Proposition 1:

**Corollary 3** *The relationship between the legal standard,  $L$ , and the expected divergence of the voter’s posterior belief about the leader’s ideal point from the leader’s true ideal point,  $E(\Gamma)$ , is as follows:*

- (a) *When the legal standard is prohibitive ( $L \in (0, \frac{1}{4})$ ),  $E(\Gamma)$  is invariant in  $L$ .*
- (b) *When the legal standard is strict ( $L \in (\frac{1}{4}, \frac{1}{3})$ ),  $E(\Gamma)$  is decreasing in  $L$ .*
- (c) *When the legal standard is moderate ( $L \in (\frac{1}{3}, \frac{3}{4})$ ),  $E(\Gamma)$  is increasing in  $L$ .*
- (d) *When the legal standard is permissive ( $L \in (\frac{3}{4}, 1)$ ),  $E(\Gamma)$  is invariant in  $L$ .*
- (e)  *$E(\Gamma)$  is minimized when  $L = \frac{1}{3}$  (at which point  $E(\Gamma) = \frac{1}{12}$ ).*
- (f)  *$E(\Gamma)$  is maximized when  $L \in [0, \frac{1}{4}]$  or  $L \in [\frac{3}{4}, 1]$  (in which case  $E(\Gamma) = \frac{1}{8}$ ).*

Corollary 3 is illustrated graphically in Figure 4. The voter learns the most accurate information about the leader’s type when the law is fairly strict ( $L = \frac{1}{3}$ ). At this point, there is maximum feasible separation of types, with one-third of leaders (those with  $\theta \leq \frac{1}{3}$ ) choosing inaction, one-third (those with  $\theta \in (\frac{1}{3}, \frac{2}{3}]$ ) choosing lawful action, and one-third (those with  $\theta > \frac{2}{3}$ ) choosing unlawful action. This ensures that the voter’s estimate of the

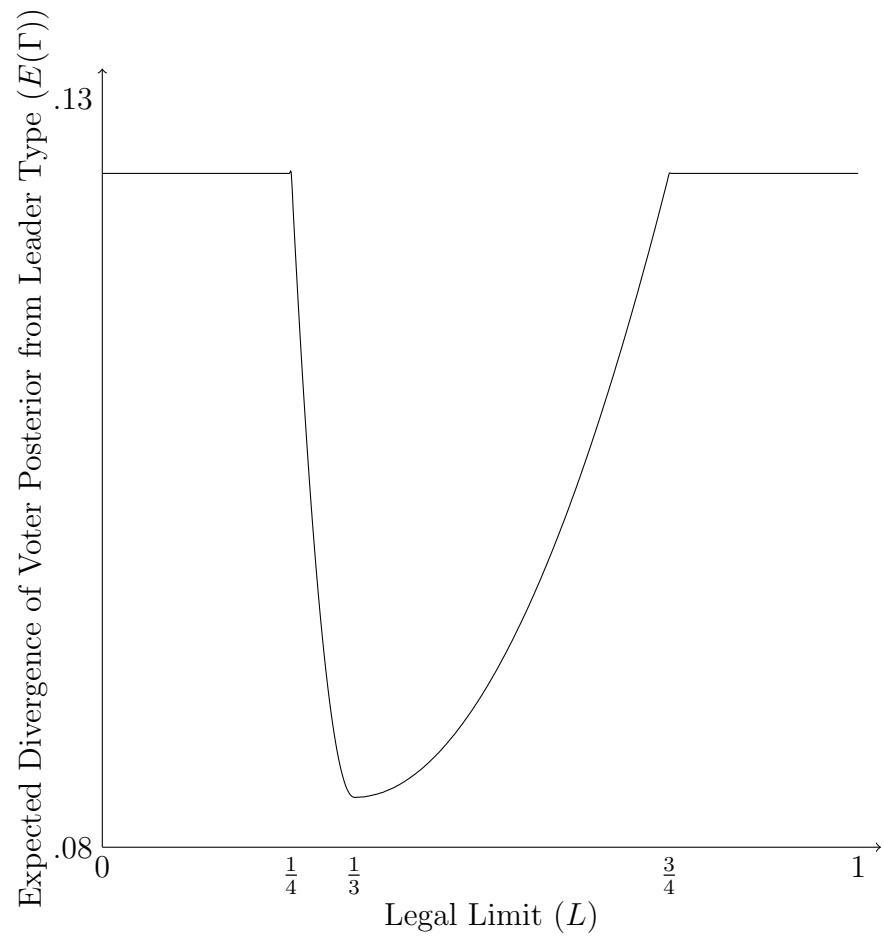


Figure 4: *Expected divergence of voter's posterior belief about the leader's ideal point from the leader's true ideal point as a function of the legal limit.*

leader's type is never off by more than  $\frac{1}{6}$ , and in expectation is off by only  $\frac{1}{12}$ . As  $L$  deviates from  $\frac{1}{3}$ , there is more pooling, and hence less accurate information for the voter. When the law is either very lax ( $L \geq \frac{3}{4}$ ) or very strict ( $L \leq \frac{1}{4}$ ), all leaders more extreme than average take action, all leaders less extreme than average take no action, and the judge's legal ruling is useless because the judge always issues the same ruling in equilibrium.

Note that if the voter prefers to give the leader maximum freedom of action on the policy issue, his interest in learning more about the leader's type creates no conflict: in both cases, the voter would prefer to set  $L = \frac{1}{3}$ . If, however, the voter prefers to minimize policy extremism but also wants to learn more accurate information about the leader's type, then the voter faces a tradeoff: the voter would minimize extremism with a relatively lax legal standard ( $L = \frac{3}{4}$ ), but this standard does not help the voter to draw particularly accurate inferences about the leader's type; by contrast, a more stringent legal standard ( $L = \frac{1}{3}$ ) would likely produce more useful information going forward, but would also lead (in expectation) to a more extreme policy outcome on the issue at hand. If the voter cares about both of these things, then the optimal legal standard is likely to be somewhere in between.

## IV. Conclusion

The question why government officials would comply with legal rules and judicial decisions is a central puzzle in legal and political theory. One important line of explanation emphasizes the constraining role of public opinion, in particular the role of electoral or other reputational sanctions for non-compliance with the law. We contribute to this line of explanation by elucidating a particular causal mechanism by which non-binding legal rulings may give rise to these sorts of reputational sanctions.

In particular, we develop a “costly singaling” model in which leaders have a reputational incentive to show that their policy preferences are moderate rather than extreme, and can do so credibly by selecting more moderate policies—but leaders can do this only if their policy choice is at least partially observable. In a baseline setting where voters can only make crude

distinctions between action and inaction, leaders with more moderate preferences will choose inaction while more extreme leaders will choose their ideal action (and suffer a reputational penalty for doing so). When courts can rule on whether the leader's action is within some legal limit, voters get somewhat more information: instead of distinguishing only between "inaction" and "action," the judicial signal allows the voters to further distinguish between (less extreme) "legal action" and (more extreme) "illegal action." The additional information provided by the judicial signal can induce leaders who would otherwise have chosen their ideal points to instead choose legal action—this is a *constraining effect* of non-binding law. Additionally, however, the judicial signal can induce some leaders who would otherwise have chosen inaction to instead choose legal action—a *liberating effect* of non-binding law.

The relative significance of the constraining and liberating effects of non-binding law depends on the stringency of the non-binding legal standard. This means that the legal standard can affect the expected extremism of the policy outcome, the degree to which the leader is able to select her favored policy, and the amount of information that voters can acquire. Our formal analysis demonstrates that the relationship between the stringency of the non-binding legal standard and each of these three outcome variables is non-monotonic, and furthermore that the legal standard that optimizes on each of these dimensions differs considerably from what one would expect if the law were exogenously enforced. If the legal standard were binding, expected extremism would be minimized with the most stringent possible legal standard; when law is non-binding and enforced through the mechanism we model, expected extremism is minimized with a relatively lax legal standard. If the legal standard were binding, the leader would achieve outcomes closest to her ideal with the laxest possible legal rule; in our model, the leader's ability to achieve outcomes close to her ideal is maximized with a relatively strict legal standard.

These findings suggest the need for caution in analyses that treat legal rules or judicial holdings as if they were exogenously enforced, particularly when this assumption is motivated with reference to public opinion and reputation as a possible enforcement mechanism. It turns out that when this sort of enforcement mechanism is modeled explicitly, the com-

parative statics may differ dramatically from what one would observe if government officials simply suffered an exogenous penalty for violations of legal rules. Of course, our model has considered only one possible mechanism, which may or may not accurately capture real-world settings of interest. Yet the theoretical findings here may suggest directions for future research into the micro-foundations of official compliance (or non-compliance) with law.

## Appendix

[OMITTED.]

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