A Theory of Defiant Courts in Non-Democratic Regimes*

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Abstract

Regimes that exhibit authoritarian features while still retaining some traditional democratic institutions are on the rise. Even though such regimes have eliminated important constraints on executive power, some still feature a defiant judiciary. We provide a novel explanation for this phenomenon by focusing on the judiciary’s role as a potential source of valuable information to the government about divisions within the regime’s elites. The model features an office-motivated government that balances the conflicting interests of the voters and the elites in determining a policy and the type of judicial review this policy will be subject to. Under certain conditions, a defiant judiciary is observed in equilibrium only if the resulting revelation on the strength of the elites would be sufficiently informative for the government to warrant reneging on its ex ante optimal policy. Intuitively, in the absence of a strong legislative opposition or a free media, occasional judicial defiance helps the survival of the government by more informatively balancing the interests of the voters and the elites. We characterize when the government would fight a defiant judiciary in equilibrium and show that this cannot be reached on the equilibrium path. Our results contribute to the debates on the survival of defiant institutions in authoritarian regimes.

Keywords: Authoritarian regimes; Judicial defiance; Regime elites.

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1 Introduction

Independent courts are perceived as being intrinsic to democracy. Political scientists, economists, and legal scholars have offered different theories for why a political group that controls the government at one point in time might delegate power to an independent third party. While these theories have also been studied in the context of non-democratic regimes, the survival of defiant courts under some authoritarian leaders remains a puzzle.

Earlier literature has focused on the specific cases of Chile during the Pinochet regime and Egypt before the Arab Spring. These constitute interesting examples of authoritarian regimes that allowed some occasional court misalignment. With the rise of so-called “illiberal democracies” in recent years, a similar phenomenon has been observed in some European countries, such as Hungary and Poland, in Turkey, and even in the PRC (as well as in other parts of the world).\footnote{Zakaria (1997) defines an illiberal democracy based on elections to the legislative branch and functioning courts, both under state regulations. We come back to this discussion in Section 2.} For instance, the National Judicial Council in Hungary has been allowed to challenge Orban’s appointments to the judicial branch. The highest administrative court in Turkey, despite having been subject to interference, overturned the Erdogan government’s decision to end the daily practice of reciting a nationalist pledge in schools, a politically symbolic policy for the government. Judicial decisions by the Court of Final Appeal in Hong Kong are not always to the content of the PRC. Even the Supreme Court of the People has slowly gained attention with a few unexpected decisions. In all these examples, courts do not enjoy judicial independence as in liberal democracies. Still, they can occasionally overturn legislation and decide against the direct political interests of the regime in ways that might contrast with old-style totalitarian regimes like the Soviet Union, Nazi Germany, or Fascist Italy.

There has been some literature providing reasons for why some non-democratic regimes may tolerate judicial review that occasionally invalidates statutes. However, these explanations tend to reflect standard theories of judicial review in liberal democracies: Insurance rationalizations that rely on the government’s protection motive from some form of political competition; theories of delegation of unpopular and difficult decisions to courts; and arguments that self-imposed restrictions enhance the government’s legitimacy and political credibility internally and externally.

In this article, we provide a novel theory of defiant courts in non-democratic regimes by focusing on their role as potential providers of valuable information to the government about divisions within the ruling elites. Specifically, we focus on regimes where power
can be contested through a process that both the public and the regime’s elites can influence. We argue that judges, in particular high court justices, are informed about divisions within the ruling privileged and that this information can add value to the government’s decision-making by helping it stay in power. Friendly and obedient courts cannot provide a signal about divisions within the ruling elites. Thus, only somehow defiant courts can play such a role, which is prized by the government.

The notion that independent courts are a source of information for the other branches of government has been proposed, but only in the context of liberal democracies. Our thesis is that, in the absence of other democratic institutions such as a political opposition or a free media, courts can play an additional role in non-democratic regimes. A non-democratic regime might allow courts the occasional defiance because obtaining information is valuable. At the same time, the risk involved for the stability of the regime may not be as high as otherwise (certainly less than free elections or other forms of political opposition).

Admittedly, the extent to which such a signal is valuable depends on alternative available mechanisms for gathering information and the costs borne by the non-democratic regime from tolerating occasional invalidation of statutes. Most non-democratic regimes simply cannot tolerate unfriendly courts. Even less democratic regimes that allow a degree of judicial defiance do not accept lightly invalidation of statutes all the time. Therefore, we recognize that from an empirical perspective, the range of parameters in which a defiant court could be sustained is likely not large enough to support a general universal phenomenon. Nonetheless, the proliferation of regimes that blend authoritarian elements with defiant political institutions calls for a systematic investigation of the incentives that give rise to such phenomena.

The paper is organized as follows: Section 2 provides a review of the related literature, namely the nature of non-democratic regimes and the role of courts in such regimes. We also discuss and motivate our main idea in Section 2 in the context of this literature. The basic model is described in Section 3, where we introduce defiant courts as an institution that generates information that cannot be obtained elsewhere due to the lack of transparency in other institutions. In that respect, the absence of a liberal democracy is not an endogenous outcome of our model, but the institutional context to study the possibility of judicial misalignment. A canonical result is presented in Section 4, where we show that no judicial defiance would be tolerated under perfect information.

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2Stephenson (2003, 2004) provides theories in which the judiciary’s ruling serves as signals to the opposition party or to voters on the details of the government’s policy. Similarly, Rogers (2001) studies the emergence of independent judicial review in an environment in which the judiciary has more information on the effects of a policy than the legislature.
on the strength of the ruling elites. Section 5 analyzes the equilibrium of our model. Section 6 concludes by discussing empirical implications.

2 Related Literature & Discussion

An important analytical literature rigorously studies the conditions under which independent courts are expected to emerge and survive.\(^3\) More recently, Vanberg (2015) suggests that independent courts exist due to the uncertainty associated with the outcomes of policies, giving support to the insurance motives theory. However, as he notes, this theory requires certain conditions, including a competitive political process, a sufficiently long time horizon, and the responsiveness of judicial rulings to political competition. We would think that these conditions are not necessarily satisfied in non-democratic regimes.

Our paper departs from this technical literature in two significant ways. First, we consider non-democratic regimes rather than democracies (that is, we study regimes without a truly competitive political process or fully-contestable elections). Second, we argue that courts in such regimes can reveal information about possible divisions within the regime’s elites, which is a fundamentally different theory than either the political insurance theory (we do not require the possibility of regime collapse) or the delegation of unpopular policies explanation (since the purpose of delegation is to minimize electoral losses while shifting blame to the courts).

The following subsections discuss in more detail how this article relates to the existing literature on non-democratic regimes and motivate our main assumption that courts can be better informed about certain regime characteristics than the government.

2.1 Defining Non-Democratic Regimes

We develop our model in the context of non-democratic regimes, which requires a discussion on the defining features of such regimes. Zakaria (1997) introduced the term illiberal democracies into the literature and the popular discourse. According to him,\(^3\)

two important features characterize these regimes: some form of elections to the legis-
slative branch of the government (thus providing ideological legitimacy to the ruling elites) and functioning courts. They combine elements of democracy and traditional authoritar-
ianism by allowing a certain degree of plurality, but only under state regulations that rearrange the political spectrum. In such regimes, the salience of a strong leader also limits the actual degree of political competition. As for the judiciary, it exists as an element of a partial democracy and occasionally overturns government decisions, as discussed in more detail in Davenport (2000).

Other authors, such as Levitsky and Way (2002, 2010), argue that regimes that are neither liberal democracies nor traditional authoritarian regimes were traditionally considered as being in a transition state, but can now be regarded as well-established systems of government. We might observe in these regimes some minor organized opposition having a say in the legislature, a complaint judiciary being allowed to go against the government, or the media enjoying limited freedom. These concessions create inherent tensions between the stability of the regime and (limited) opposition challenges (by favoring legalized persecution). The authors argue that more defiant courts (and other soft authoritarian institutions) could be the outcome of different political paths.

For the purpose of our article, we have in mind non-democratic regimes that blend elements of democratic institutions with authoritarian politics. More specifically, as also stated above, we consider regimes where while power can be contested, elections are controlled in the sense that the regime’s elites can influence the outcome. In addition, other forms of potential opposition to the government such as media or civil society organizations are not completely free.

2.2 Defiant Courts in Non-Democratic Regimes

Non-democratic regimes seem to be on the rise. However, well before this trend started, there already existed a non-technical literature that theorized about the plausibility of defiant courts in such regimes. For example, Ginsburg and Moustafa (2008), with a few

4These paths may include, for instance, softening of full-blown authoritarianism, new authoritarianism replacing a previous one with co-existence of different ruling elite classes, or the decaying of a more democratic regime. More recently, focusing mainly on the examples of contemporary Hungary and Poland but also China to some degree, Puddington (2017) adds a few elements to the characterizations of modern authoritarianism: These regimes do not abandon the rule of law completely. In fact, for example, amendments to constitutional law and to legislation follow rule of law patterns. This creates an illusion of pluralism while supporting a functioning oligarchic control. According to scholars, the role of courts is to enforce the rule of law with a mix of order, legitimacy, and prosperity imposed by the regime (Pappas 2014, Kornai 2015).
examples in mind such as Egypt in the 1970s, argued that courts in authoritarian regimes can play several functions, including legitimation. Inevitably, legitimation requires increased judicial autonomy. Other well-studied contexts include Latin America, such as Chile under Pinochet (1973-1990) and Argentina in the early 1980s, and some African countries as well as China.

In a recent article, Epperly (2017) argues that a certain degree of political competition explains the existence of some judicial independence in non-democracies. The author finds that a greater risk of losing power (a form of contestability) empirically enhances the chance of more independent courts. Overall, such evidence suggests that non-democratic regimes also follow patterns that are not very different from democracies, as argued in Aydin (2013), in the sense that they also care about electoral cycles and react to potential challengers. In fact, Ahl (2019) argues that courts in non-democratic regimes are part of “balancing institutions” between “disgruntled citizens” that have no voice in other institutions (for lack of democracy).

In sum, the existence of defiant courts in non-democratic regimes has been observed by many scholars in the past. Their explanations extend the models developed for

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5Legitimation can be either external (due to possible economic and political expropriation of previous ruling elites or foreign interests) or internal (ruling elite cohesion and delegation of difficult reforms to courts).

6Barros (2002, 2003) explains how constitutional rule by law (as opposed to the rule of law) was developed in Chile to provide an ex ante commitment and ex post control to a ruling collective sovereignty. Helmke (2002, 2005) has provided theoretical reasoning and empirical evidence to support the idea that once the collapse of the authoritarian regime becomes a possibility, judges engage in strategic defection against the ruling elites, creating the illusion of truly independent courts. However, the author argues that this is in fact a survival strategy that occasionally pays off. However, no strategic defection is identified for the transitions in Brazil (Arlota and Garoupa, 2014) or in the Philippines (Escresa and Garoupa, 2013) in the 1980s.

7The divergent approaches by African governments to judicial independence have been connected to the insecurities of the ruling elites and the threat posed by the judiciary itself by Von Doepp (2009) and Von Doepp and Ellet (2011).

8In a long exchange between Ahl (2019) and Lin (2019) on the role of courts in the PRC and what they call the “judicialization of authoritarian politics,” the former summarizes why judicial independence could be enhanced in a non-democratic regime under certain conditions. The arguments are, again, not very distinct from those pertaining to democratic regimes: fragmentation of the political system within the non-democratic regime (close to Ferejohn (2002) within liberal democracies as explicitly stated by the author), providing more legal certainty to private interests (promoting economic development), making social control more effective (in enforcing criminal law), reinforcing administrative review (thus checking local officials and local government in assuring loyalty to the regime), or shifting unpopular decisions to the courts, thus protecting the executive and legislative branches. The main difference would be that court expansion is never confrontational, but by delegation of the executive branch and following party guidelines. In addition, Zhang and Ginsburg (2019) argue that defiant courts serve the function of monitoring corruption across the ruling bureaucracy in China.

9Another related study on the relationship between political turnover and constraints on executive power in general is Besley, Persson and Reynal-Querol (2016). Karakas (2016, 2017) investigates a similar question theoretically. Lagunoff (2001) is also closely related to this literature.
liberal democracies by emphasizing political fragmentation, insurance against political competition, or delegation of unpopular policies. In contrast, in this article, we introduce a novel explanation for why defiant courts may be allowed to exist in non-democratic regimes by focusing on the information asymmetries between the government and the courts on certain regime characteristics that the government cares about for its own survival.\(^{11}\) The following subsections discuss in detail this explanation we propose for the phenomenon (occasionally defiant courts in non-democratic regimes) identified above.

### 2.3 Courts as Information Providers in Non-Democracies

A few authors have suggested that courts play a role in less democratic regimes that can support the government’s survival goals. In our model, we interpret this role as one of providing information to the executive branch, a different argument than the literature has thus far made. For instance, Brooker (2009) argues that while the rulers can play a moderating role within the ruling elite, courts could be perceived as the true guardians of the regime, requiring that they are endowed with veto power. In the same vein, Isaac (2017) argues that courts intervene oftentimes to break disputes that arise from the legislative redistribution of property among a changing elite. In this literature, the existence of courts along with the limited leeway they enjoy in overturning legislation are necessary concessions by the regime to stay in power. Clearly, a non-democratic regime maintains strict control of political rights, but acquiesces to certain improvements in the political life of the country for continued power.\(^{12}\)

We argue that non-democratic regimes need institutions to provide information about the ruling elites and balance possible internal struggles. More specifically, while all political regimes need such information-providing institutions, the distinct feature of non-democratic regimes is that they need to balance the need to obtain such information (and, consequently, improve the regime’s policies) and the survival of the regime. Imitating liberal democracies by granting limited independence to courts could provide for such information-providing institutions, albeit at the cost of regime collapse.

Based on the experiences of the regimes discussed in length in Sections 2.1 and 2.2, it is reasonable to assert that courts in such regimes provide valuable information to their

\(^{11}\) A related study of defiant courts in non-democratic regimes is Boleslavsky, Ginsburg and Shadmehr (2019), who argue that an occasionally defiant court can lend legitimacy in the eyes of the public to a repressive policy that has not been struck down.

\(^{12}\) Other scholars have also insisted on the importance of building institutions in non-democratic regimes for the purpose of power-sharing that enhances political survival (Besley and Kudamatsu, 2007; Magaloni, 2008; Greene, 2010; Boix and Svolik, 2013; Jensen, 2014; Bove and Rivera, 2015; Bodea, Garriga and Higashijima, 2019).
governments, since other institutions that would otherwise serve this function such as the media, competitive opposition parties, or civil society organizations are suppressed and muzzled to varying degrees. For instance, despite the occasional defiance by courts observed in Hungary and Turkey that could suggest democracy at work, these regimes have at the same time suppressed civil discourse, particularly through the media and civil society organizations, either by direct pressure or through friendly ownership structures. The Latin American dictatorship experiences from the mid-1960s to the late 1980s also offer additional contexts to study similar institutional permutations. The fact that other more traditional information channels have been intentionally blocked by these regimes to aid their survival points to courts as the governments’ potential resort for their information needs.

Inevitably, the next relevant question becomes why governments in non-democratic regimes rely on courts and not some other democratic institution for information. In their work, Gandhi and Przeworski (2007) find that nominally democratic institutions may broaden the basis of support for a non-democratic regime, but also affect their political survival (an aspect confirmed by their analysis of authoritarian regimes in the 1946-1996 period). In the same vein, Woo and Conrad (2019) argue that non-democratic regimes struggle to find the right institutions to reduce collective dissent and tensions within the elites. These goals can be achieved either by political repression or by simulating democratic institutions, such as allowing for opposition parties or more open legislatures (or by courts, we would add). The problem is that simulating democratic institutions might increase the probability of the regime’s breakdown (in their empirical analysis, it decreases elite coups but increases riots and regime collapse). Thus, we argue that courts, under certain conditions, are the right information-providing institution, because they are less risky and hence less costly for a non-democratic regime compared to alternatives such as fair elections or a free media.

2.4 From Non-Democratic Regimes to a Simplified Model

Our theoretical analysis focuses on regimes in which factors such as a muzzled press or submissive civil society organizations together produce a political environment that lacks transparency on the internal divisions within the regime’s elites, whom we assume help determine, along with voters, the government’s survival. We consider non-democratic regimes in which the government’s re-election is partially determined by the
elites through a non-transparent process. These regimes are particularly interesting to study as they are positioned on a spectrum in between old forms of authoritarian or even totalitarian regimes, where all opposition is obliterated, and a liberal democracy, where opposition to the government is both transparent and fully protected under the constitution.

Our assumption that opposition to the government is not fully transparent in non-democratic regimes is based on the observation that the elites tend to be smaller and a less openly competitive group than in a full democracy. Yet, even within an authoritarian regime’s elites, there still exist ideological wings or political cliques that are differentially impacted by the government’s policies, not least because (a basically fixed sum of) rents has to be divided across these groups. This might not be a significant concern in a totalitarian regime, since the leader can use full state coercion to obliterate any internal challenges. However, in a non-democratic regime, there exist certain mechanisms elites can utilize for disposing of the government, such as an internal challenge for party leadership, a military coup, or a corruption investigation. The existence of such mechanisms implies that the government’s policies need to cater to the interests of these elites. However, the more fragmented the elites are and the more their capacity to act is constrained by internal divisions, the less pressing is the government’s motivation for satisfying them. In contrast, a unified elite poses a greater challenge to the government’s survival and hence commands a greater price for refraining from destabilizing activities.

The enduring existence of opposition forces along with a lack of transparency about their viability introduce the need for governments in non-democratic regimes to elicit this information through means that do not compromise the nature of the regime. Specifically, in the absence of a competitively organized opposition or a vibrant media (which protect the regime from outside opposition), the government needs information devices to reveal the balance of power within the regime’s elites. There are, of course, several possible mechanisms (including internal arrangements within the regime). Still, we argue that courts are an institutional form that can play this role at some bearable cost. As discussed in the previous subsection, relying on them, rather than on parliamentary opposition or media exposure, could be the appropriate strategy for a particular author-

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13 These elites may be members of the military that can threaten a coup, a business council that finances party operations, or in general the upper echelons of the business and legal communities.
14 The threat the “old guard” of the PRI posed in Mexico during the early 1990s to the transformation of the party, the toppling of Thailand’s elected prime minister Yingluck Shinawatra in a military coup, and recordings alleging corruption at the highest levels of Turkey’s government disseminated by a clique inside the security forces constitute instances in which the three types of internal mechanisms for challenging the government were respectively observed.
itarian regime. Specifically, defiant courts could reinforce the government’s stability in office without risking open opposition or political collapse as alternative institutions such as an unconstrained media or free elections might.

As we argued above, non-democratic regimes, under certain conditions, tolerate defiant courts as they may be the most cost-effective mechanism to obtain information about the regime’s elites without disturbing too much the regime’s survival. To aid this goal, a non-democratic regime would allow the composition of the court to reflect the different views of the elites in ways that are considerably different from the other branches of government. This suggests that courts should be more informed about how unified or divided the elites are in their interests, which in turn determine their strength, precisely because these interests are reflected on the bench but not on the legislature and even less on the executive (where they would be a serious threat to the stability of the regime). Simply put, courts could be more informed than the government about the viability of the regime’s elites because they are more representative of elite interests.

If, on the demand side, we should expect the courts to better reflect the interests of the elites than the other branches of government (because the non-democratic regime can tolerate more variance on the bench), there is the supply side to be considered as well. In particular, it may be that the courts are better informed about the strength of the regime’s elites because the elites themselves provide this information to the court through various petitions or cases. Why would the elites use the courts to push their cases? Our suggestion is that in the absence of other mechanisms for challenging government decisions and given the observation that the regime could tolerate occasional defiance, it would be reasonable for the elites to grab this opportunity. Given the absence of other democratic institutions, the decision to file certain types of cases could be the only way to fight against the government within the boundaries of legality. Another argument could be that, in certain occasions, elites may want to use the court system for publicizing their cause or revealing their strength by putting resources into fighting a particular legislation in the courts.

The formal model we present is a simplification of reality in the most obvious sense: it is designed to show the possibility of defiant courts as a salient informational device in a non-democratic regime where alternative mechanisms such as media exposure, open

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15 We re-iterate that governments in non-democratic regimes can have alternative institutional devices besides the judiciary for gathering information on the robustness of the regime’s elites. When better alternative mechanisms or institutional arrangements exist, our expectation is that non-democratic regimes will prefer obedient courts and refuse judicial defiance.

16 We formally model this supply side argument to better motivate how the flow of cases to the courts could inform them on the strength of the regime’s elites.
elections, or parliamentary opposition are too costly. The analysis establishes that under certain conditions on voter behavior, an occasionally defiant judiciary is observed only if the revealed information on the true strength of the elites is sufficiently valuable for the government. Specifically, an occasionally defiant judiciary requires that there exists sufficient difference between the government’s prior and consistent posterior belief on elite strength upon observing a rejection by the judiciary. In all other instances, an obedient judiciary is preferred as it guarantees acceptance of any government policy. Thus, the transparency of the political environment is the main determinant of whether courts will be occasionally defiant. On the equilibrium path, the government never fights a defiant court, highlighting its purpose as an institution that can help the government increase its chances of survival.

3 The Model

In this section, we provide a descriptive overview of our model. A formal description along with more details can be found in Appendix A.

A purely office-motivated government wants to maximize its probability of re-election by choosing a policy and the type of the judiciary that will review this policy. The latter choice consists of deciding between a “friendly” judiciary that is averse to ruling against the government (for example, a non-political judiciary primarily engaged in administrative control) and an “unfriendly” judiciary for which this is not the case.\(^{17}\) The policy consists of a division of the society’s exogenous resources between public spending and rents for the elites. Following the government’s choices, the judiciary rules on this policy.

We assume that the judiciary cares both about policy and its legitimacy, which depends on ruling in favor of the actors that will determine the future government.\(^{18}\) Given the society’s resources, the elites always prefer higher rents while the voters prefer greater public spending, putting their interests in conflict with each other. The characteristic of the regime determines the extent to which the judiciary’s legitimacy motive weighs the elites against the voters. In non-democratic regimes without free elections in which the voters play only a minimal role in determining the future government, this implies an aversion to ruling against the regime’s elites, as would be observed in China. In non-\(^{17}\)In a democracy, the government either faces a prohibitively high cost of choosing a friendly judiciary or always finds it optimal to protect itself against political turnover so that the judiciary is never friendly to the executive branch. Therefore, as discussed in Section 2, we focus on regimes in which the government has a meaningful institutional choice over the type of the judiciary that will review its policies.

\(^{18}\)For studies that lend support to this assumption, see McGuire and Stimson (2004) and Clark (2009).
democratic regimes in which relatively free elections are still an important component of the regime to some degree, such as in Hungary or Turkey, this concern for legitimacy would imply that the judiciary cares about its public prestige and prefers ruling in favor of the voters. In addition, for clarity, we assume that a friendly judiciary receives a sufficiently high payoff from rubber stamping the government that dominates its policy and legitimacy interests so that it accepts all policies.

Acceptance of a policy implies that it prevails. If the judiciary defies the policy, the government chooses between complying with or fighting this ruling. While fighting the judiciary is costly for the government, doing so would let its initial policy choice prevail. On the other hand, compliance lets a status-quo policy stay in effect. Elections take place at the end that determine whether to return the government to office.

The voters and the regime’s elites together determine the government’s re-election probability. The crucial part of the model is that while the government cannot observe whether the elites are weak or strong, which affects its re-election chances, the judiciary is fully informed. We assume that the judiciary’s legitimacy payoff from ruling in favor of the elites is increasing in the elites’ strength so that the judiciary’s ruling can potentially inform the government of its actual re-election chances, allowing it to reverse course by maintaining the status-quo policy in case of defiance if doing so would serve its re-election purpose better than its original policy.

The following summarizes the timing of events:

- Nature determines the elites’ strength as weak or strong;
- The government chooses the type of the judiciary and a policy;
- The judiciary rules on the government’s policy;
- If the judiciary defies the policy, the government chooses whether to comply with or fight this ruling;
- Election takes place and the new government is realized.

There are three main aspects of our model that together provide a novel conceptualization of the policy-making process when the institutions that constrain it are endogenous.

19 For example, this cost may represent a loss of credibility in the eyes of the voters or a backlash from other state institutions for non-compliance.

20 While the model assumes that the elites always prefer higher rents, in reality there may exist internal divisions on how to allocate these rents. One may interpret the absence of such internal divisions as driving the elites’ strength. We provide a simple extension to our model that incorporates such possible divisions in Appendix B in order to motivate why the judiciary could be better informed than the government.
First, the incumbent government’s re-election probability is determined simultaneously by the elites and the voters. Second, the government faces uncertainty on the strength of the elites (as manifested by, for example, internal divisions) and therefore their ability to affect its re-election, while the judiciary is informed. Third, the judiciary cares not only about its own policy preferences but also those of the actors that confer its legitimacy.

The second and the third features together imply that the judiciary’s ruling can potentially provide information to the government on the strength of the elite opposition it is facing, while the first feature is the reason why the government cares about this information. As this constitutes the core of our argument, it is important that the relevant assumptions are well-motivated. In Section 2.4, we discussed two potential channels through which the judiciary may be better informed than the government about the strength of the regime’s elites. On the demand side, we argued that the government may ensure that the elites’ interests (and hence their unity or divisions) are reflected on the bench when making an institutional choice, thereby securing the potential informativeness of an unfriendly judiciary. If the representation of the elites’ heterogeneous views in either the executive or the legislative branches would pose an intolerable risk to the regime’s survival, then it is plausible that the government would make appropriate judicial appointments so as to solicit information that is valuable for its re-election. On the supply side, we argued that the elites may themselves provide this information to the court through the cases they file in opposition to certain government policies. For further motivation, we provide a simple model of when the elites would pursue judicial challenges against the government in a non-democratic regime in Appendix B.

In the following section, we first present a benchmark analysis with no uncertainty on elite strength. This analysis allows us to highlight the role unfriendly courts play in the equilibrium of our model by revealing information to the government.

4 A Benchmark: Transparent Elites

Consider a variant of the model in Section 3 in which the government is able to observe the elites’ strength. Then, a friendly judiciary is always optimal, as summarized in the following lemma:\(^{21}\)

**Lemma 1.** If the government observes the elites’ strength, then the judiciary is always friendly in equilibrium.

\(^{21}\)All analysis and proofs are in Appendix C.
Lemma 1 indicates that since the government maximizes its probability of re-election under complete information on the judiciary’s preferences when elites’ strength is observable, it prefers a friendly judiciary.\textsuperscript{22} The fact that a friendly judiciary upholds any government policy yields an institutional choice for it in equilibrium, since the alternative would imply either modifying policy to satisfy the unfriendly judiciary’s (binding) acceptance constraint, paying a fixed cost of fighting, or acquiescing to a sub-optimal status-quo policy.\textsuperscript{23}

The fact that the government never allows for an unfriendly review of its policy choice in a complete information environment foreshadows our main results presented in the subsequent section. Starting with introducing the equilibrium concept for our model, the following section characterizes this equilibrium under uncertainty on the state of elite strength and hence on the judiciary’s payoffs. The results we present pertain to the intuitively relevant part of this characterization for the emergence of occasionally defiant courts.

5 Equilibrium

Since the government cannot observe the Nature’s choice of elites’ strength as weak or strong, the equilibrium concept we employ is Perfect Bayesian Nash equilibrium. We begin characterizing the equilibrium by focusing on the government’s decision on whether to comply with or fight the judiciary’s defiance.

5.1 Government’s Optimal Compliance

For any given policy and judiciary type, the government fights the judiciary’s defiance instead of complying with it in equilibrium if and only if its expected re-election probability with the given policy net of the cost of fighting is at least as great as its expected re-election probability with the status-quo policy (which would prevail in case of compliance). These expected payoffs are both computed using the government’s consistent posterior belief on elite strength upon observing defiance.

Since a friendly judiciary always upholds any government policy by assumption, we

\textsuperscript{22}That the judiciary is friendly in equilibrium under full transparency on elite strength does not necessarily represent a contradiction to our interpretation of democracy as a regime with open opposition. Note that this analysis takes into account neither the possible costs of enacting friendly institutions nor the government’s policy preferences that would introduce insurance motives to its institutional choices.

\textsuperscript{23}We assume that the government chooses a friendly judiciary when indifferent, which would be the case if the unfriendly judiciary’s acceptance constraint is not binding.
focus here on an unfriendly judiciary. There exist two reasons why the government may find it optimal to comply with an unfriendly judiciary’s defiance by reversing course and letting the status-quo policy prevail: First, the cost of fighting the judiciary may simply be too high to insist on the original policy. Second, the government may have gained information from the judiciary’s defiance that would justify concluding ex post that the status-quo policy yields a greater expected re-election probability. Based on this intuition, the following proposition first describes the government’s equilibrium compliance given judicial defiance in the absence of any learning.

**Proposition 1.** For any given policy the government ex ante prefers to the status-quo that an unfriendly judiciary always defies regardless of elite strength, the government complies with the judiciary’s defiance in equilibrium if and only if the cost of fighting is above a positive threshold.

Proposition 1 indicates that for any given policy the government initially prefers to the status-quo under its prior belief on elite strength and given a judicial strategy according to which this policy would be always defied, the government would always fight defiance in equilibrium if there existed no cost to fighting. This is because the absence of any new information gained from the judiciary’s ruling means the government’s initial preference of the policy over the status-quo remains intact. Accordingly, it is only when fighting is too costly that the government would comply with the ruling and let the status-quo prevail. Clearly, any policy that is inferior to the status-quo under the government’s prior belief on elite strength remains so after the judiciary’s ruling, leading to compliance in equilibrium even with zero fighting cost.

On an equilibrium path where no learning takes place from the judiciary’s ruling, a sufficiently high cost of fighting can be the only reason for compliance, as Proposition 1 suggested. In contrast, the following proposition describes equilibrium compliance when the judiciary reveals information to the government on the elites’ strength. In order to isolate the effect of this information on the government’s equilibrium compliance, we assume away the cost of fighting for this result. Consequently, notice that if the voters vote the same way under the government’s policy and the status-quo, then effectively only the elites’ preferences matter to the government when deciding whether to comply with or fight defiance. Specifically, under this circumstance, the government always fights if its policy awards more rents to the elites than the status-quo, and complies otherwise. Information does not play a role in this decision. Therefore, for clarity, we only focus in the following result on those policies for which the voters vote differently than under the status-quo.
Proposition 2. Suppose there exists no cost to fighting. Then, for any given policy the government ex ante prefers to the status-quo and for which the unfriendly judiciary’s ruling depends on elite strength, the government’s equilibrium compliance can be described as follows:

- If the judiciary upholds the government’s policy if and only if the elites are strong, then the government never complies with defiance in equilibrium if its policy favors the voters over the elites, and complies for sufficiently large differences between its prior and consistent posterior beliefs on elite strength otherwise.

- If the judiciary upholds the government’s policy if and only if the elites are weak, then the government never complies with defiance in equilibrium if its policy favors the elites over the voters, and complies for sufficiently large differences between its prior and consistent posterior beliefs on elite strength otherwise.

In contrast to Proposition 1, Proposition 2 indicates that the government may comply with an unfriendly judiciary’s defiance in equilibrium even if fighting is costless. When letting the status-quo prevail would make the voters change their re-election decision, the government’s equilibrium compliance depends on what it exactly learns from the judiciary’s defiance. If the judiciary reveals that the elites are weak, as described in the first case in Proposition 2, then the government always fights if the status-quo favors the elites relative to the government’s policy. This is because the forces that made the government prefer a policy that favors the voters in the first place over the status-quo are only reinforced with this revelation. Similarly, if the judiciary’s defiance reveals that the elites are strong, as described in the second case in Proposition 2, the government always fights if the status-quo favors the voters for the same reason.

However, the government may comply in equilibrium in certain circumstances depending on whether sufficient learning takes place from the judiciary’s defiance. Specifically, under some cases, the government complies in equilibrium with the defiance of any policy it ex ante preferred to the status-quo as long as a sufficiently large difference exists between its prior and consistent posterior belief that the elites are weak. Informally, whenever the unfriendly judiciary’s defiance catches the government by a large surprise, the government may use this valuable information to reverse course and let the status-quo policy prevail instead of its original policy.

To better understand the role that learning plays on the government’s compliance decision, consider a policy that favors the elites and that the government ex ante prefers to the status-quo. Suppose the judiciary upholds this policy if and only if the elites are
strong. Notice that if the voters would vote the same way under the government’s policy and the status-quo, then the government would always fight the judiciary’s defiance, despite learning that the elites are weak. Therefore, suppose the voters vote differently based on whether this policy or the status-quo prevails. Upon observing the judiciary’s defiance, the government’s only consistent posterior belief must be that the elites are surely weak. As discussed in the above paragraph, this revelation would only strengthen the government’s ex ante preference over the status-quo of a policy that favors the voters. However, for a policy that favors the elites, it is plausible that this preference may reverse upon learning that the elites are weaker than the government initially surmised. Specifically, if the government’s prior belief that the elites are weak was sufficiently low that its original preference over the status-quo for this policy that favors the elites gets reversed as a result of this revelation, then it would comply with the judiciary’s defiance in equilibrium, even with no fighting costs. On the other hand, if this prior belief was already high enough, diminishing the surprise of the revelation, the government insists on its initial policy in equilibrium for bearable fighting costs. A similar intuition applies to a policy that the judiciary upholds if and only if the elites are weak. Under both scenarios, what makes the government reverse course in equilibrium is its realization due to its newly-acquired knowledge that the status-quo serves its re-election goal better than the original policy.

Proposition 2 highlights the important role that unfriendly courts can play and why governments would tolerate occasional defiance in non-democracies: By revealing information about a state (elite strength) that the government cares about for its re-election, occasionally defiant courts allow governments the chance to correct course before the decision on their re-election is made. The following section builds on the results established in this section to describe the government’s optimal institutional choice.

5.2 Optimal Judiciary Selection

Recall that a friendly judiciary always accepts any government policy in equilibrium. This implies that it can provide no information on elite strength through defiance and therefore no opportunity for the government to strategically revert to the status-quo. Thus, conditional on having a friendly judiciary, the government’s optimal policy simply maximizes its expected re-election probability based on its prior belief on elite strength, and this policy prevails. A description of this optimal policy in the absence of any learning opportunities is presented in the following lemma:

**Lemma 2.** Under a friendly judiciary, the government chooses the full extraction of the
society’s resources in favor of the elites whenever their relative importance to the voters and its prior belief that they are strong are sufficiently high.

Lemma 2 is obtained by observing that in the absence of any learning opportunities from the judiciary, the government can set policy so as to either gain the voters’ support or forego it. If it chooses the latter option, the optimal policy is to divert the society’s entire resources to the elites (the full-extraction policy). The analysis indicates that the government opts for this option as opposed to moderating the rents in order to win the voters’ support for sufficiently high relative importance of elites to voters and for sufficiently high prior beliefs that the elites are strong.

The possibility of learning from an unfriendly judiciary can change this calculus for the government. Given a policy that favors the elites (voters) relative to the status-quo and whose defiance the government would comply with in equilibrium, an unfriendly judiciary upholds this policy if and only if its policy payoff together with the legitimacy payoff it would receive by deciding in favor of the elites (voters) exceeds the sum of its status-quo policy payoff and the legitimacy payoff from deciding in favor of the voters (elites). If instead the policy is such that the government would fight its defiance in equilibrium, then only the legitimacy payoffs matter for the judiciary’s decision. Together, these imply that unlike with a friendly judiciary, the government may learn the elites’ strength based on an unfriendly judiciary’s ruling, since the legitimacy payoff from ruling in favor of the elites is increasing in their strength. Then, if the government’s optimal policy conditional on a friendly judiciary does not already induce judicial defiance to reveal information, the government may find it optimal to elicit this information through its policy choice under some conditions, while for others the value of information may not be worth the policy sacrifice required for such elicitation.

We formally present this argument in Appendix C and provide an example. Based on this analysis, we present the government’s optimal institutional choice between a friendly and an unfriendly judiciary in the next result, which indicates that the judiciary is unfriendly in equilibrium only if the government’s optimal policy conditional on one induces different rulings based on elite strength and compliance on the equilibrium path. As before, we only focus in this result on those policies for which the voters vote differently than under the status-quo. Accordingly, the following proposition describes the government’s optimal institutional choice as guided by its interest in the information that an unfriendly judiciary may provide:

**Proposition 3.** Suppose there exists no cost to fighting and suppose the optimal policy conditional on an unfriendly judiciary is such that the unfriendly judiciary’s ruling
depends on elite strength in equilibrium. Then, the government chooses an unfriendly over a friendly judiciary in equilibrium only if there exists a sufficiently large difference between its prior and consistent posterior beliefs on elite strength.

Notice that the government would choose a friendly judiciary if its optimal policy conditional on an unfriendly judiciary results in no information revelation. In particular, if the unfriendly judiciary always upholds this policy in equilibrium regardless of elite strength, then the government would be indifferent between the two types of judiciaries if no policy manipulation was optimal, and strictly prefer the friendly judiciary otherwise. Likewise, if the unfriendly judiciary would always reject this policy, then the government’s preference would again be for a friendly judiciary due to the inferiority of the status-quo to its ex ante optimal policy.

Consequently, Proposition 3 focuses on all parameter values for which the optimal policy under an unfriendly judiciary induces different rulings in equilibrium based on elite strength. It states that while the judiciary is unfriendly in equilibrium only if the government would revert back to the status-quo following a defiance, the converse is not necessarily true. In other words, if the optimal policy conditional on an unfriendly judiciary implies different rulings based on elite strength and compliance in equilibrium, then either type of judiciary could be optimal.

To better understand the government’s incentives in choosing an unfriendly judiciary, note that Proposition 3 holds as an “if and only if” statement whenever a) the government’s optimal policies conditional on the judiciary type are identical, or b) the optimal policy conditional on an unfriendly judiciary manipulates it out of always accepting the optimal policy conditional on a friendly judiciary into ruling differently based on elite strength. For the former, note that both judiciaries yield the same payoff if the unfriendly judiciary upholds the government’s policy. On the other hand, the unfriendly judiciary is strictly preferred if the government would comply with defiance due to the value of the revealed information. This implies that the government would choose an unfriendly judiciary if there is compliance in equilibrium. For the latter, unfriendly judiciary is preferred if the government would comply with defiance of the manipulated policy, because this indicates a preference over another path on which the unfriendly judiciary would always uphold the government’s (non-manipulated) policy, which is identical to the path that would be observed under a friendly judiciary. Since a friendly judiciary is strictly better for the government in case the unfriendly judiciary upholds the policy (due to the cost of manipulation), the fact that manipulation was optimal implies that the revealed information must be sufficiently valuable.
However, the converse of the statement in Proposition 3 fails to hold in general due to the possibility that the optimal policy conditional on an unfriendly judiciary manipulates it out of always rejecting the rents that were optimal under a friendly judiciary. Specifically, while the government prefers an unfriendly judiciary if it would follow defiance by complying in equilibrium, a friendly judiciary is strictly better in case the manipulated policy is upheld. Thus, whether the government would choose an unfriendly judiciary in this scenario depends on whether the value to the government of reverting back to the status-quo ex post dominates the expected payoff from having a friendly judiciary always accept its policy.

Proposition 3 allows us to highlight the role that learning plays on the government’s equilibrium institutional choice. Under certain conditions on voter behavior and no fighting costs, an unfriendly judiciary is observed in equilibrium only if it rules differently based on elite strength and the government would comply with defiance in equilibrium, which requires that there exists sufficient learning from the judiciary’s ruling. However, as discussed above, a large possibility of learning is not by itself sufficient to ensure the choice of an unfriendly judiciary: This depends on the extent to which the government has to make sacrifices on the policy that ex ante maximizes its expected re-election probability in order to elicit information on the true strength of the elites.

We have characterized and discussed the conditions under which an office-motivated government would delegate review authority to an occasionally defiant judiciary as opposed to having its policy choices automatically approved. In particular, in this section, we emphasized the importance that the possibility of learning from a defiant judiciary plays on this decision. While we do not formally offer a model that incorporates other institutions through which information that is valuable for the government’s re-election goal could be obtained, such as formal opposition parties in the legislature or a free media, we argue that the relative resilience of occasionally defiant judiciaries observed across non-democratic regimes compared to other institutions related to checks and balances lends support to the idea that alternative institutions are potentially riskier for the government’s survival. For instance, if the mere presence of an institution such as a free media would ensure the loss of voter support for any policy that awards rents to the regime’s elites, then it is reasonable to expect that an occasionally defiant judiciary for which this is not the case would be the government’s preferred channel through which to balance the competing interests of the various actors within the regime.
Non-democratic regimes are a growing reality. In particular, different forms of non-democratic regimes have been spreading in Europe, Asia, Latin America, and Africa in recent years. One aspect that distinguishes these regimes from traditional totalitarian ones is a certain degree of judicial defiance in an environment of functioning courts and minimal political opposition. In this paper, we developed a theory of courts as information revelation mechanisms to explain why such non-democratic regimes may benefit from these institutional arrangements.

The building aspects of our theory are elite heterogeneity and asymmetric information. The survival of the political regime relies on the influence of the ruling elites to varying extents. These elites can have conflicting interests that the executive branch needs to take into account and balance with the interests of the voters in order to avoid political collapse. This implies that some sacrifices are called for in order to please the ruling coalition and keep the regime in place. At the same time, the government faces uncertainty on the internal divisions within this elite, an uncertainty that an institution such as the judiciary might occasionally help to mitigate. Due to a lack of institutional transparency and limited institutional veins to express opposition, the regime can benefit from a degree of sporadic court defiance.

Defiant courts are clearly not the only institution that can reveal information to the executive branch about opposition to legislation. In fact, there exist numerous such institutions in a liberal democracy such as a free press or civil society organizations. However, for a non-democratic regime, we argue that a judiciary that can oppose policies could be a less costly institution to express opposition. Unconstrained media, free elections, strong party opposition in the legislative chambers, or local governments controlled by dissatisfied political groups could pose more danger to the survival of the regime. Not surprisingly, such regimes are observed to tolerate a certain degree of judicial defiance as long as it is useful. On the other hand, if the government is able to observe the strength of the ruling elites, if there are no conflicts within these elites, or if the position of the ruling leader is not affected by power swings among them, then judicial defiance serves no purpose and we should expect friendly obedient courts.

Our paper offers a testable hypothesis for future empirical work. So far defiant courts in non-democratic regimes have deserved attention by anecdotal evidence primarily. Most systematic empirical evidence has focused on survival aspects (Gandhi and Przeworski, 2007; Magaloni, 2008) and implications for economic policies (Besley and Kudamatsu, 2007; Bodea, Garriga and Higashijima, 2019).
According to our theory, in non-democratic regimes, we should observe that measures of judicial defiance should vary with homogeneity of the ruling elites or the political strength of the leader. For example, we should expect to see less tolerance with court opposition during more personalized political regimes such as the totalitarian experiences in Nazi Germany or Fascist Italy, and also in some non-democratic regimes such as Turkey, Hungary, or Russia. Conversely, in regimes where the leader emerges as a first-among-equals member of the ruling elite composed, for instance, of party bureaucrats or the military, we expect to observe courts showing greater opposition to the executive branch. We believe that non-democratic regimes ranging from Singapore or Hong-Kong to Chile under Pinochet or Egypt under Sadat and Mubarak constitute supporting examples for the theory that we propose.

While our theory suggests a negative correlation between court defiance and homogeneity of the ruling elites or power concentration, a more systematic empirical analysis of courts requires two important methodological clarifications. One refers to quantifying court defiance. Invalidation of statutes comes immediately to mind. However, we are aware of the long and controversial debate about the shortcomings of measuring judicial independence in liberal democracies by focusing on statute invalidation (Garoupa, 2016). A second clarification is how to calculate the homogeneity of the ruling elites or power concentration without a degree of hindsight bias. To a large extent, the distinct institutional analyses from Nazi Germany or Fascist Italy to Chile under Pinochet or Egypt under Sadat and Mubarak result from knowing how these regimes collapsed.

Another possible angle of empirical analysis is comparing court defiance in fully democratic and non-democratic regimes. Our theory suggests that in non-democratic regimes, court defiance is relatively more relevant since other forms of political defiance are absent or repressed. Still, it seems likely that merely comparing invalidation of statutes runs into well-known problems, namely the distinction between lack of judicial deference and judicial activism (Garoupa, 2016). A broader contextualization, including measurement of different political channels, is required to provide for appropriate empirical testing.
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Appendix A: Details of the Model

We analyze an incumbent government’s decision on whether to subject its policy-making authority to review by an unfriendly judiciary. Upon the government’s institutional choice on the type of the judiciary as either unfriendly or friendly, a simple policy-making process ensues followed by an election.

Institutional and Policy Choices:
The government makes both an institutional choice and a policy choice in the beginning. Its institutional choice determines the type of the judiciary as either “friendly” or “unfriendly.” Specifically, the government chooses $J \in \{F, U\}$, where $J = F$ indicates a friendly judiciary that is inherently averse to ruling against the government and $J = U$ indicates an unfriendly judiciary for which this is not the case.

A policy consists of transfers $T \geq 0$ and rents $R \geq 0$ to the elites. This implies a budget constraint given by $T + R \leq Y$, where $Y$ denotes the society’s exogenously available resources, which must be satisfied with equality. We let $g = \frac{R}{Y} \in [0, 1]$ represent the proportion of the total resources allocated to the elites and use it to denote a policy.

The government is purely office-motivated such that its choices maximize its probability of re-election, which depends on support from both the elites and the voters. However, due to non-transparent institutions (for instance, the lack of a vibrant media) in such regimes, the government cannot observe the strength of the elites. To model this, we let $e \in \{e^w, e^s\}$ denote a state of the world, where $e = e^w$ indicates a weak elite (due to, for instance, internal divisions) and $e = e^s$ indicates a strong elite (for instance, a unified one). The government’s prior belief that $e = e^w$ is denoted $\eta_w \in (0, 1)$.

Judicial Review:
After the government decides on the type of the judiciary $J$ and the policy $g$, the judiciary rules on the division represented by $g$. If it upholds this division, then the government’s policy becomes the law and the game moves on to the election stage. If it defies it, then the government can either comply with or fight this negative ruling. If the government fights, then its policy choice prevails. If it instead complies with the judiciary’s decision, then the society’s resources are divided according to the status-quo proportion $q \in [0, 1]$ benefiting the elites so that elite rents become $R_q = qY$ and the transfers become $T_q = (1 - q)Y$. The government bears a fixed cost $c > 0$ of fighting the judiciary.
The judiciary cares both about policy and its legitimacy in an additively separable way. In addition, a friendly judiciary receives a positive payoff from accepting the government’s policies. For the judiciary’s policy motivation, we assume that each type of judiciary has an ideal division of resources between rents and public spending. For legitimacy, we assume that the judiciary is averse to ruling against the interests of those from whom it derives its legitimacy. Specifically, the judiciary derives its legitimacy from those that determine the incumbent’s re-election, i.e. from the elites and the voters. While we do not formally model the elites or the voters, we assume that the elites always prefer higher rents, while the voters always prefer lower rents (and hence greater transfers).

Consequently, we represent the judiciary’s policy payoff as $-|g - j_J|$ for $J \in \{F, U\}$, where $j_J \in [0, 1]$ represents the type-$J$ judiciary’s ideal proportion of resources allocated to rents. In addition, we model the judiciary’s legitimacy payoff as a fixed benefit $\lambda e B$ if the judiciary rules in favor of the elites, where $B > 0$, $\lambda \in (0, 1)$ and $e \in \{e^w, e^s\}$ is such that $e^s > e^w > 0$; and as a fixed benefit $(1 - \lambda)P$ if it rules in favor of the voters, where $P > 0$. Accordingly, $\lambda$ can be interpreted as a parameter that represents the relative importance of the elites in determining the incumbent’s re-election. For clarity, we assume the friendly judiciary’s extra payoff from accepting the government’s policy is sufficiently high that it accepts all policies.

Unlike the government, the judiciary can perfectly observe the strength of the elites. Thus, upon observing the judiciary’s decision, the government updates its prior belief $\eta_w$ that the elites are weak before deciding whether to comply with or fight this ruling.

**Elections:**

The government receives a fixed benefit from re-election. Its re-election probability is determined in part by the elites and in part by the voters. Letting $p^e : [0, 1] \times \{e^w, e^s\} \to [0, 1]$ and $p^v : [0, 1] \to [0, 1]$ be such that $p^e(g, e)$ and $p^v(g)$ respectively denote the government’s probability of re-election if the elites or the voters only determined the future government, we let $p(g, e) \equiv \lambda p^e(g, e) + (1 - \lambda)p^v(g)$ denote the incumbent’s probability of re-election for any given prevailing policy $g \in [0, 1]$ and state of elite strength $e \in \{e^w, e^s\}$.

We simplify the voters’ behavior by assuming that all voters have the same policy preferences and that there exists a challenger that is identical to the incumbent. In this simple setting, we impose that the voters use an optimal retrospective voting rule such that $p^v(g) = 1$ if their policy utility satisfies this rule’s criteria, and $p^v(g) = 0$ otherwise.
We model the elites’ participation in the election process in a similarly simplified way by letting \( p^e(g, e) \) be increasing in \( g \) for any given \( e \). Furthermore, we assume that \( p^e(g, e^w) > p^e(g, e^s) \) for any given policy \( g \), and that \( p^e(g, e) \) exhibits increasing differences in \( (g, e) \) so that \( p^e(g', e^s) - p^e(g, e^s) \geq p^e(g', e^w) - p^e(g, e^w) \) for any \( g' \geq g \). The latter assumption ensures that the government receives a greater return in terms of re-election support from the elites from a marginal increase in rents when the elites are strong.
Appendix B: Motivating the Information Asymmetry between the Government and the Judiciary

Section 2.4 discussed two separate arguments for why the judiciary may be better informed than the government about the strength of the regime’s elites. We re-visited these arguments in Section 3 in light of our formal model. To further motivate this core assumption, this Appendix provides a simple model of when the regime’s elites would file a judicial case against the government to challenge a policy, thereby revealing their strength to the justices.

Suppose there exist two elites \( i = A, B \) and two business sectors \( k = 1, 2 \). Let \( E_i \) denote the set of business sectors that elite \( i \) has interests in. For simplicity, suppose \( E_i \neq \emptyset \) for \( i = A, B \) (so that each elite has an interest in at least one business sector), that \( E_A \) is a singleton if and only if \( E_B \) is a singleton (so that the elites are equally diversified across the sectors), and moreover that \( E_i = \{1\} \) if and only if \( E_{-i} = \{2\} \) for \( i \in \{A, B\} \) (so that each business sector has at least one elite interest). Then, \( e = e^w \) if and only if \( E_i \) is a singleton (for each \( i \) by assumption). In other words, the elites are weak whenever their business interests lie in different business sectors, i.e. whenever they are divided, and are strong otherwise.

Consider a modified version of the model presented in Section 3 and Appendix A according to which the elites first decide whether to challenge the government’s policy in court upon observing the government’s institutional and policy choices. Suppose a single elite is sufficient to file a case, and that the government’s policy automatically prevails in the absence of a court challenge. Given a policy \( g \), let \( g_k \) denote the share of total resources that are awarded as rents to sector \( k \in \{1, 2\} \). Likewise, let \( q_k \) denote the share of resources sector \( k \) would receive under the status-quo represented by the proportion \( q \). Now that the elites are not modeled collectively, assume that each elite cares about the total share of resources awarded to the business sectors that he has an interest in (i.e. each elite \( i \in \{A, B\} \) prefers a higher sum \( \sum_{k \in E_i} g_k \)).

Recall that a friendly judiciary, by assumption, always upholds the government’s policy. This implies that the elites would be indifferent between filing and not filing a case with a friendly judiciary regardless of policy, and that introducing even small legal costs to this decision would tilt it in favor of not challenging the government. Therefore, we would expect to not observe legal challenges against the government in non-democratic regimes with friendly judiciaries. This bolsters the argument that friendly judiciaries mainly serve an administrative function in such regimes.
On the other hand, with an unfriendly judiciary, we find in Section 5 that the government’s optimal policy would induce the revelation of the elites’ strength, leading to compliance with a negative ruling on the equilibrium path. Then, if the policy $g$ and the elites’ strength are such that the judiciary would uphold the policy, then the elites would again be indifferent between filing and not filing a case. As above, even small legal costs would make them refrain from initiating a challenge. However, if the judiciary would defy the government, resulting in compliance and therefore the status-quo policy, then the elites’ decision can be described as follows: If either a) $g < q$; or b) $g > q$, each $E_i$ is a singleton, and $g_k < q_k$ for exactly one sector $k$, then at least one elite would sue.

As stated above, conditional on an unfriendly judiciary, the government’s optimal policy would induce an unfriendly judiciary to choose a different action (uphold or defy the policy) depending on the strength of the elites. Accordingly, as long as $p^*(g, e)$ is determined as before so that the allocation of rents among the elites does not directly affect the government’s re-election, the government would choose $(g_1, g_2)$ such that $g_k < q_k$ for one sector $k \in \{1, 2\}$ if $g > q$ (in order to create one potentially disgruntled elite who would sue). Note that on the equilibrium path, defying a policy $g > q$ requires $e = e^w$ (i.e. that each $E_i$ is a singleton) for an unfriendly judiciary. Then, as long as $g$ and $e$ are such that the judiciary would defy the government, the conditions for at least one elite to file a case are always satisfied on the equilibrium path. If we were to introduce legal costs to challenging the government, then at least one elite would always file a case provided that the difference between the status-quo and government policy rents justify such costs.

In sum, we can conclude that the elites would file a case whenever the unfriendly judiciary would reveal information through defiance, i.e. by allowing the government to revert back to the status-quo. On the other hand, no challenge would be initiated under a friendly judiciary or if the unfriendly judiciary would side with the government. While we do not incorporate this intermediate step between the government’s choices and judicial review to the main analysis, its implication that a challenge would reveal actionable information for the government lends support to our idea that occasionally defiant judiciaries serve primarily an information function in non-democracies where alternative channels for challenging policy are blocked.
Appendix C: Analysis and Proofs

Proof of Lemma 1. Observing the state $e$, the government maximizes its probability of re-election. If $J = F$, the only constraint on this problem is the budget constraint, since a friendly judiciary accepts all policies. If $J = U$, then in addition to the budget constraint the government either has to satisfy the unfriendly judiciary’s acceptance constraint, or if it doesn’t, either pay the fixed cost $c$ of fighting or comply with the status-quo policy. Whenever the unfriendly judiciary’s preferences are such that its acceptance constraint is not binding, the government is indifferent between an unfriendly and a friendly judiciary. In contrast, a friendly judiciary is preferred if this constraint is binding. Assuming a friendly judiciary is picked in case of indifference, the government always chooses $J = F$ in equilibrium.

Strategies and Equilibrium:
A pure strategy for the government consists of a policy $g \in [0, 1]$, an institution $J \in \{F, U\}$, and a fighting rule $f : [0, 1] \times \{F, U\} \rightarrow \{0, 1\}$, where $f(g, J) = 1$ implies the government fights the judiciary’s defiance, thereby letting its policy prevail. Otherwise, $f(g, J) = 0$. A pure strategy for a judiciary of type $J \in \{F, U\}$ is an acceptance rule $a_J : [0, 1] \times \{e^w, e^s\} \rightarrow \{0, 1\}$ such that $a_J(g, e) = 1$ if and only if the type-$J$ judiciary upholds the government’s policy upon observing the state.

A Perfect Bayesian Nash equilibrium consists of optimal strategies for all players given the other players’ equilibrium strategies and beliefs, and a system of beliefs that is consistent with Bayes’ rule and the players’ equilibrium strategies. Given its beliefs on elite strength at each stage of the game, the government’s optimal policy, institution, and fighting rule maximize its expected payoff. Since the policy and institution are chosen before the judiciary’s ruling, this expected payoff is calculated using the government’s prior belief $\eta_w$ that $e = e^w$. Let $\eta'_w(g, J)$ denote the government’s posterior belief that $e = e^w$ upon observing the judiciary’s defiance. The judiciary’s optimal acceptance rule maximizes its payoff, which consists of a policy and a legitimacy component, with an additional payoff for a friendly judiciary from upholding the government’s policy. Since we assume this additional payoff from upholding the government’s policy is sufficiently high, it follows that $a_F(g, e) = 1$ for all $g$ and $e$ in equilibrium. We restrict attention to those Perfect Bayesian Nash equilibria in which the government’s beliefs upon observing judicial defiance off the equilibrium path equal its prior beliefs.
Proof of Proposition 1. Given \( J = U \), consider any given policy \( g \) and acceptance rule such that \( a_U(g, e) = 0 \) for all \( e \). Then, consistent beliefs require \( \eta_w(g, U) = \eta_w \) so that the government fights if and only if

\[
\lambda [\eta_w p^e(g, e^w) + (1 - \eta_w) p^e(g, e^s)] + (1 - \lambda) p^v(g) - c \geq \lambda [\eta_w p^e(q, e^w) + (1 - \eta_w) p^e(q, e^s)] + (1 - \lambda) p^v(q).
\] (1)

Clearly, the government complies in equilibrium if the policy \( g \) is inferior to the status-quo \( q \) under the belief \( \eta_w \) even if \( c = 0 \). For any policy the government prefers to the status-quo, the above condition holds when \( c = 0 \). For any given such policy \( g \), this implies the existence of a threshold \( \bar{c}(g) > 0 \) such that condition (1) holds for all \( c \leq \bar{c}(g) \).

\[ \Box \]

Proof of Proposition 2. Suppose \( J = U \) and let \( g \) be a policy the government prefers to \( q \) given its prior belief on elite strength.

Given this policy, first consider an acceptance rule such that \( a_U(g, e^s) = 1 \) and \( a_U(g, e^w) = 0 \). Then, consistent beliefs upon observing defiance imply \( \eta'_w(g, U) = 1 \) so that the government fights if and only if

\[
\lambda p^e(g, e^w) + (1 - \lambda) p^v(g) \geq \lambda p^e(q, e^w) + (1 - \lambda) p^v(q),
\] (2)

since \( c = 0 \).

For \( g > q \), condition (2) always holds if \( p^v(g) = p^v(q) \). On the other hand, if the optimal voting rule is such that \( p^v(g) = 0 \) and \( p^v(q) = 1 \), then condition (2) reduces to \( \lambda p^e(g, e^w) \geq \lambda p^e(q, e^w) + (1 - \lambda) \).\textsuperscript{24} Note that in this case the government’s ex ante preference for \( g \) over \( q \) implies

\[
\lambda [\eta_w p^e(g, e^w) + (1 - \eta_w) p^e(g, e^s)] \geq \lambda [\eta_w p^e(q, e^w) + (1 - \eta_w) p^e(q, e^s)] + (1 - \lambda). \tag{3}
\]

For sufficiently low prior beliefs \( \eta_w \), condition (3) holds together with the condition \( \lambda p^e(g, e^w) < \lambda p^e(q, e^w) + (1 - \lambda) \) so that \( f(g, U) = 0 \) in equilibrium. To see this, note that as \( \eta_w \) increases, the left-hand side of (3) increases by a magnitude equal to \( \lambda [p^e(g, e^w) - p^e(q, e^w)] \) while its right-hand side increases by \( \lambda [p^e(q, e^w) - p^e(q, e^s)] \).

\textsuperscript{24}Note that \( p^v(g) = 1 \) and \( p^v(q) = 0 \) is not consistent with the optimality of the voting rule.
Since $p^v(g, e)$ exhibits increasing differences in $(g, e)$, inequality (3) would reverse for sufficiently low $\eta_w$ as the government updates its belief that $e = e^w$ up. In contrast, for $g < q$, condition (2) can never hold if $p^r(g) = p^v(q)$. On the other hand, if $p^r(g) = 1$ and $p^v(q) = 0$, then condition (2) reduces to $\lambda p^v(g, e^w) + (1 - \lambda) \geq \lambda p^v(q, e^w)$. The government’s ex ante preference for $g$ over $q$ now implies

$$\lambda[\eta_w p^v(g, e^w) + (1 - \eta_w)p^v(g, e^s)] + (1 - \lambda) \geq \lambda[\eta_w p^v(q, e^w) + (1 - \eta_w)p^v(q, e^s)].$$

(4)

A similar analysis yields the result that inequality (4) would never reverse as the government updates its belief up, resulting in $f(g, U) = 1$ in equilibrium.

Now consider an acceptance rule such that $a_U(g, e^s) = 0$ and $a_U(g, e^w) = 1$. Then, consistent beliefs upon observing defiance imply $\eta'_w(g, U) = 0$ so that the government fights if and only if

$$\lambda p^v(g, e^s) + (1 - \lambda)p^v(g) \geq \lambda p^v(q, e^s) + (1 - \lambda)p^v(q).$$

(5)

We can replicate the above analysis for such acceptance rules. For $g > q$, condition (5) always holds if $p^v(g) = p^v(q)$. On the other hand, if the optimal voting rule is such that $p^v(g) = 0$ and $p^v(q) = 1$, then condition (5) reduces to $\lambda p^v(g, e^s) + (1 - \lambda) = \lambda p^v(q, e^s) + (1 - \lambda)$ can never be satisfied. It follows that $f(g, U) = 1$ must be true in equilibrium. Finally, for $g < q$, condition (5) can never hold if $p^v(g) = p^v(q)$. On the other hand, if $p^v(g) = 1$ and $p^v(q) = 0$, then condition (5) reduces to $\lambda p^v(g, e^s) + (1 - \lambda) \geq \lambda p^v(q, e^s)$. As before, the government’s ex ante preference for $g$ over $q$ implies that condition (4) must be satisfied. Then, it can be observed that condition (4) holds together with the compliance condition $\lambda p^v(g, e^s) + (1 - \lambda) < \lambda p^v(q, e^s)$ (i.e., condition (4) gets reversed as $\eta_w$ decreases) for sufficiently high prior beliefs $\eta_w$.

In sum, for any given policy $g$ ex ante preferred to $q$ and acceptance rule such that $a_U(g, e^w) \neq a_U(g, e^s)$, the government chooses $f(g, U) = 1$ in equilibrium if $g > q$ and $f(g, U) = 0$ in equilibrium if $g < q$ whenever $p^v(g) = p^v(q)$. On the other hand, whenever $p^v(g) \neq p^v(q)$, compliance depends on the particular separating strategy the unfriendly judiciary plays: If $a_U(g, e^s) = 1$ and $a_U(g, e^w) = 0$, then $f(g, U) = 0$ in equilibrium for sufficiently high values of $|\eta'_w(g, U) - \eta_w|$ if $g > q$, and $f(g, U) = 1$ in equilibrium if $g < q$. In contrast, if $a_U(g, e^s) = 0$ and $a_U(g, e^w) = 1$, then $f(g, U) = 0$ in equilibrium.
for sufficiently high values of $|\eta'(w, U) - \eta_w|$ if $g < q$, and $f(g, U) = 1$ in equilibrium if $g > q$.

\textbf{Proof of Lemma 2.} A friendly judiciary always chooses $a_F(g, e) = 1$ in equilibrium for any given policy $g$ and state $e$ by assumption.

Conditional on having a friendly judiciary, if the government chooses $g$ so as to ensure $p^F(g) = 1$, it maximizes its expected re-election probability given by

$$\lambda[\eta_w p^F(g, e^w) + (1 - \eta_w)p^F(g, e^s)] + (1 - \lambda)$$

subject to satisfying the voters’ re-election rule and the budget constraint $T + R \leq Y$. Using the fact that the budget constraint always holds with equality and that the government would never award more utility to the voters than is necessary to ensure that $p^F(g) = 1$, the problem can be re-written as maximizing the elite rents $R$ subject to the constraint that $p^F(g) = 1$. Denote the policy that solves this problem $g^*$. On the other hand, if the government chooses $g$ without regard for the voters, then the optimal way to do so is to set $T = 0$ and $R = Y$. Let $\bar{g}$ denote this full-extraction policy. Then, under a friendly judiciary, the government prefers the policy $g^*$ over $\bar{g}$ if and only if

$$\lambda[\eta_w p^F(g^*, e^w) + (1 - \eta_w)\bar{p}^F(g, e^s)] + (1 - \lambda) \geq \lambda[\eta_w p^F(\bar{g}, e^w) + (1 - \eta_w)\bar{p}^F(\bar{g}, e^s)],$$

which can be written as

$$[p^F(\bar{g}, e^s) - p^F(g^*, e^s)] + \eta_w[(p^F(\bar{g}, e^w) - p^F(g^*, e^w)) - (p^F(\bar{g}, e^s) - p^F(g^*, e^s))]$$

$$\leq \frac{1 - \lambda}{\lambda}.$$  

Condition (8) implies the existence of threshold values $\lambda^*$ and $\eta_w^*$ such that the full-extraction policy $\bar{g}$ is preferred to the policy $g^*$ for all $\lambda > \lambda^*$ and $\eta_w < \eta_w^*$. This is obtained by observing that $(p^F(\bar{g}, e^w) - p^F(g^*, e^w)) - (p^F(\bar{g}, e^s) - p^F(g^*, e^s)) \leq 0$ due to $\bar{g} \geq g^*$ and the increasing differences assumption on $p^F(g, e)$, and that $\lambda \in (0, 1)$.

\textbf{Optimal Policy Conditional on an Unfriendly Judiciary:}

Based on Lemma 2, let $g_F \in \{g^*, \bar{g}\}$ denote the government’s optimal policy conditional on a friendly judiciary. To see how the government may find it optimal to manipulate an
unfriendly judiciary into revealing information about the strength of the elites, consider the following case:

Suppose \( g_F \) is such that \( a_U(g_F,e) = 1 \) for all \( e \). Note that it can never be optimal to choose a manipulated policy \( \tilde{g} \) to ensure \( a_U(\tilde{g},e) = 1 \) for all \( e \), because no information would be revealed from the judiciary’s ruling \( a_U(\tilde{g},e) \) for \( e \in \{e^w, e^s\} \), and the government would either comply to the status-quo \( q \) or pay a fighting cost to maintain the manipulated \( \tilde{g} \). Both of these options are inferior to \( g_F \). On the other hand, denoting by \( \tilde{g} \) the manipulated policy that maximizes the government’s ex ante expected payoff subject to the additional constraint that \( a_U(\tilde{g},e^w) \neq a_U(\tilde{g},e^s) \), consider the case in which \( a_U(\tilde{g},e^s) = 1 \) and \( a_U(\tilde{g},e^w) = 0 \). The government’s ex-ante payoff from this manipulation equals

\[
\lambda [\eta_w p_e(\tilde{g},e^w) + (1 - \eta_w)p_e(\tilde{g},e^s)] + (1 - \lambda)p_v(\tilde{g}) - \eta_w c
\]

if \( f(\tilde{g},U) = 1 \) in equilibrium, or

\[
\lambda [\eta_w p_e(q,e^w) + (1 - \eta_w)p_e(\tilde{g},e^s)] + (1 - \lambda)[\eta_w p_v(q) + (1 - \eta_w)p_v(\tilde{g})]
\]

if \( f(\tilde{g},U) = 0 \) in equilibrium. Compared to the government’s ex ante expected payoff from not manipulating given by

\[
\lambda [\eta_w p_e(g_F,e^w) + (1 - \eta_w)p_e(g_F,e^s)] + (1 - \lambda)p_v(g_F),
\]

expected payoff (9) is clearly inferior. However, whether expected payoff (10) dominates (11) depends on the parameters and the policies \( g_F \) and \( \tilde{g} \). When this is the case, the government would prefer the manipulated policy \( \tilde{g} \) over \( g_F \).

Example: Suppose \( \lambda \) and \( \eta_w \) are such that \( g_F = 1 \). Given \( a_U(1,e) = 1 \) for all \( e \), let the defiance cost \( c \) and the government’s beliefs on elite strength be such that \( f(1,U) = 1 \), and that \( a_U(1,e) = 1 \) for all \( e \) in equilibrium.

Let the manipulated policy that maximizes the government’s ex ante expected payoff subject to the additional constraint that \( a_U(\tilde{g},e^w) \neq a_U(\tilde{g},e^s) \) be \( \tilde{g} = 0.4 \). Let \( q = 0.1 \) be such that \( p_e(0.1) = 1 \) and \( f(0.4,U) = 0 \) in equilibrium. Note that this implies \( p_v(0.4) = 0 \) in equilibrium (since otherwise the government would choose \( f(0.4,U) = 1 \) with sufficiently small \( c \)). Suppose the unfriendly judiciary’s ideal proportion of elite rents \( j_U \) is such that \( a_U(0.4,e^s) = 1 \) and \( a_U(0.4,e^w) = 0 \) in equilibrium.

Based on this example, it can be observed that the government’s ex ante payoff from choosing the policy \( g_F = 1 \) given by \( \lambda [\eta_w p_e(1,e^w) + (1 - \eta_w)p_e(1,e^s)] \) may be dominated
by its ex ante manipulation payoff from choosing the policy $\tilde{g} = 0.4$ given by

$$\lambda[\eta_w p^f(0.1, e^w) + (1 - \eta_w)p^f(0.4, e^s)] + (1 - \lambda)\eta_w. \tag{12}$$

Specifically, while the government loses elite support under both scenarios (whether $\tilde{g} = 0.4$ or $q = 0.1$ prevails) by manipulating policy to elicit information since rents under $q$ and $\tilde{g}$ are both lower than under $g_F$, it gains expected voter support equal to $\eta_w(1 - \lambda)$. This voter support is realized in case $e = e^w$ so that the government’s manipulated policy that awards 40 percent of the society’s resources to the elites is defied, which allows the status-quo policy that awards only 10 percent to the elites to prevail.

In addition to the conditions on the parameters $\lambda$ and $\eta_w$, the marginal re-election probability the government gains from an increase in elite rents based on the function $p^f(g, e)$ must be sufficiently small at all rent levels (and states) in order for the government to find manipulating policy to elicit information profitable.

**Proof of Proposition 3.** Let $g_U$ denote the government’s optimal policy conditional on $J = U$. We first show that if either $a_U(g_U, e^w) = a_U(g_U, e^s)$, or that $a_U(g_U, e^w) \neq a_U(g_U, e^s)$ and $f(g_U, U) = 1$ in equilibrium, then $J = F$ is the optimal institutional choice.

First, suppose $a_U(g_U, e) = 1$ for all $e$. If $g_U = g_F$, then the government is indifferent between the two types of judiciaries. Otherwise, $J = F$ is strictly preferred.

Second, suppose $a_U(g_U, e) = 0$ for all $e$, which implies $g_U = g_F$ since it can never be optimal for the government to manipulate $J = U$ into playing $a_U(\tilde{g}, e) = 0$ for all $e$. Then, $J = F$ is strictly preferred due to a) the inferiority of $q$ compared to $g_F$ if $f(g_U, U) = 0$ in equilibrium, and b) the defiance cost $c$ if $f(g_U, U) = 1$ in equilibrium.

Third, suppose $a_U(g_U, e^w) \neq a_U(g_U, e^s)$ in equilibrium. If $f(g_U, U) = 1$ in equilibrium, then $J = F$ is strictly preferred, because while both types of judiciaries yield at most the same payoff in case the unfriendly judiciary accepts $g_U$, the government pays the cost $c$ in case of defiance.

Overall, we can conclude that if $J = U$ is optimal, then $g_U$ must be such that $a_U(g_U, e^w) \neq a_U(g_U, e^s)$ and $f(g_U, U) = 0$ in equilibrium. Given $p^v(g_U) \neq p^v(q)$ and $c = 0$, Proposition 2 indicates that $f(g_U, U) = 0$ in equilibrium for sufficiently large differences between $\eta_w$ and $\eta_w'(g_U, U)$. Then, $J = U$ in equilibrium only for sufficiently large values of $|\eta_w'(g_U, U) - \eta_w|$. 

$\square$
Example continued:

Suppose the conditions for manipulation to be optimal are satisfied so that the government chooses $\tilde{g} = 0.4$ instead of $g_F = 1$. Also let $c = 0$. Then, based on Proposition 3 and the subsequent discussion, $J = U$ in equilibrium if and only if $f(0.4, U) = 0$. Alternatively, $J = U$ in equilibrium if and only if $\eta_w$ is sufficiently small (so that there exists a sufficiently large difference between it and the government’s consistent posterior belief $\eta_w^*(0.4, U) = 1$).