The Constraining, Liberating, and Informational Effects of Nonbinding Law

Justin Fox*
Washington University in St. Louis

Matthew C. Stephenson
Harvard Law School

We show that nonbinding 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, nonbinding law can also have a liberating effect, enabling some leaders to take action when they otherwise would have done nothing. In addition, we illustrate how voters may face a trade-off between the legal standard that induces optimal behavior of the current leader (i.e., that most effectively addresses the moral hazard problem) and the legal standard that optimizes selection of future leaders (i.e., that most effectively addresses the adverse selection problem). We discuss a range of positive and normative implications that follow from our analysis. (JEL D72, K40).

1. Introduction

This article investigates two questions concerning legal constraints on government action, one positive and the other normative. The positive question is why government decisionmakers comply with legal rules (or judicial rulings). The normative question concerns the optimal stringency of legal constraints on government action—that is, how much the law should restrict the discretion of government officials. These positive and normative questions are related, in that the optimal stringency of substantive law may depend on the mechanism through which law affects official behavior.

*Department of Political Science, Washington University in St. Louis, MO, USA.
Email: jfox26@wustl.edu

We are grateful to Dan Bernhardt, Gabriella Blum, Jack Goldsmith, Stuart Jordan, John Patty, Yuki Tagaki, Richard Van Weelden, and Aaron Zelinsky, and three anonymous referees as well as to participants in faculty workshops at Harvard Law School, Harris School of Public Policy, Princeton University, and Yale Law School, and conference participants at the 2013 Annual Meeting of the Midwest Political Science Association, the 2013 Annual Meeting of the American Law and Economic Association, and the 2013 Political Economy and Public Law Conference for helpful comments and discussions on earlier drafts.

The Journal of Law, Economics, and Organization, Vol. 31, No. 2
doi:10.1093/jleo/ewu013
Advance Access published July 22, 2014
© The Author 2014. Published by Oxford University Press on behalf of Yale University.
All rights reserved. For Permissions, please email: journals.permissions@oup.com
We investigate these questions using a “costly signaling” model of legal compliance in which the costs to a government agent of complying with the law are positively correlated with some trait that voters dislike, such as policy bias. In this framework, even without exogenous third-party enforcement or an intrinsic citizen preference for legality, law can have a constraining effect on leaders, because legal compliance is a way for leaders to signal lack of bias to imperfectly informed voters. In addition, and perhaps more interestingly, our framework also reveals that nonbinding law can have a liberating 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 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 legal standards enable unbiased leaders to take action without appearing overly extreme.

Furthermore, we show that nonbinding legal rulings may have an informational effect on voter learning about the characteristics of elected officials, which in turn affects voters’ ability to make well-informed electoral decisions. Most straightforwardly, if some leaders accept legal constraints while others do not, and this behavior is associated with the leader’s degree of policy bias, then nonbinding legal rulings may communicate valuable information to voters. On the other hand, sometimes in the absence of law more moderate leaders would distinguish themselves by maintaining the status quo. In such settings, introducing law may cause biased and unbiased leaders to converge on lawful actions that are observationally equivalent to voters, impeding voter learning and thus worsening electoral selection.

Turning to our principal normative question, we show that our costly signaling model of the constraining, liberating, and informational effects of nonbinding legal standards has a number of surprising and potentially interesting implications for the optimal stringency of such standards. Four in particular stand out: First, nonbinding law enforced through the mechanism we describe has the strongest constraining effect when the legal standard itself is not too strict; sometimes, relatively lax legal standards induce the greatest constraining effect, but under other circumstances the law must be at an intermediate level of stringency in order to exert any constraint on leaders with extreme policy preferences. Second, the liberating effect of nonbinding law arises only when the substantive legal standard is relatively demanding. This implies that (moderate) leaders may sometimes support seemingly stringent limits on their own discretion, precisely because these seeming constraints in fact liberate them to take (moderate) action, rather than retaining the status quo. Third, when setting the substantive legal standard, a benevolent lawmaker often faces a trade-off between inducing optimal behavior of the current leader (i.e., choosing the legal standard that most effectively addresses the moral hazard problem) and optimizing selection of future leaders (i.e., choosing the legal standard...
that most effectively addresses the adverse selection problem). Fourth, for the settings we consider, there is always some form of nonbinding law that benefits the voter, so long as it is calibrated appropriately. Thus, although legal constraints on the discretion of elected officials are sometimes seen as in tension with majoritarianism, our model highlights one mechanism by which legal “constraints” may serve majoritarian ends.

The paper proceeds as follows. Part 2 situates our contribution within the existing political economy literature on government compliance with law. Part 3 presents the basic structure of our model. Part 4, the heart of the paper, analyzes the effect of law on leader behavior and voter welfare when law is enforced endogenously by public opinion. Part 5 discusses several of our model’s substantive and empirical implications, and, in doing so, compares and contrasts these implications with those that arise from alternative approaches to understanding when and how nonbinding law matters. A brief conclusion follows. Proofs of our main formal statements appear in an online appendix (available at Journal of Law, Economics, and Organization online).

2. Public Opinion and Legal Compliance

It is often presumed that lawmakers can specify legal rules that will constrain subsequent government action. For example, most of the rich literature on legislative–bureaucratic relations assumes that a legislature can prescribe the scope of agency discretion (i.e., the range of policies which the agency may choose) and/or the procedural rules that the agency must follow (McCubbins et al. 1987, 1989; Bawn 1995; Epstein and O’Halloran 1999; Gailmard 2009). 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 Shiban 1990; Eskridge and Ferejohn 1992; Epstein and Knight 1998; Fox and Stephenson 2011, forthcoming).

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 depends on the incentives of those affected to comply. Moreover, there is considerable variation in the effectiveness of legal constraints on government 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 (Franck 1990; Chayes and Chayes 1995; Keohane 1997; Bradford 2005; Goldsmith and Posner 2005; Guzman 2008). 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; Schauer 2010, 2011; Levinson 2011). In these and other contexts, what factors might explain why (or when or to what extent) legal rules and judicial rulings constrain government behavior?

One set of explanations posits that government leaders derive policy benefits from constraints on their own discretion. 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 be pressured to eliminate (Hirschl 2000, 2004). Another possibility is that respect for legal constraints and judicial rulings may function as a kind of political insurance: on this view, legal compliance may emerge as a cooperative equilibrium in an indefinitely repeated game between competing parties or factions or states, where noncompliance by one side would trigger retaliation by its opponents when they have the opportunity (Ramseyer 1994; Ginsburg 2003; Stephenson 2003; Hanssen 2004; Carrubba 2005).

The above explanations ground government legal compliance in the self-interest of 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

---

1. 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).

2. Although most of the literature postulating this sort of compliance incentive presumes that the leaders themselves might be punished by the public for legal noncompliance, this may not be necessary. In a recent paper, Dragu and Polborn (2013) show that if the lower-level officials charged with policy implementation anticipate future punishment for vigorously enforcing unlawful policies, then leaders have a greater incentive to comply with the law in order to stimulate greater effort by subordinates. Although this is a useful insight, particularly in the context of authoritarian regimes, our analysis focuses on the distinct question of why voters would sanction the leaders themselves for violating legal constraints.
they would punish a government that disregarded the law. Closely related, yet distinct, is the idea that judicial opposition to a government policy is an indication that the policy is not in the voters’ interest, which in turn leads the public to punish leaders who defy the judiciary (Stephenson 2004). Yet another hypothesis holds that clear legal rules or judicial declarations may serve as focal points that enable citizens to coordinate their responses to government overreaching in contexts where government restraint is supportable only if citizens can credibly threaten collective retaliation against government defections (Sutter 1997; Weingast 1997; Law 2009).

We are also interested in how public opinion influences the incentives of elected officials to comply with the law. In particular, we build off of recent work that has used game-theoretic analyses to explore how and when public opinion shapes legal compliance. Vanberg (2001) was among the first to model how the threat of public opinion backlashes against officials defying the judiciary affects compliance with the law. In Vanberg’s model, and other models that extend his approach (Staton 2006; Carrubba 2009; Carrubba and Zorn 2010), the size and magnitude of these “public opinion penalties” for noncompliance are treated as parameters. Our contribution to this line of literature is in providing explicit micro-foundations for such penalties by modeling the inferences the public draws when observing the court declare an elected official’s decision unlawful, and how these inferences influence support for the official.3

As in other models in which nonbinding law influences the behavior of elected officials (Stephenson 2004; Dai 2005; Carrubba 2009), we consider a setting in which the role of courts is to facilitate the transmission of

---

3. Although our model may provide a potentially fuller view as to how public opinion penalties arise than earlier contributions on such matters (Vanberg 2001; Staton 2006; Carrubba 2009; Carrubba and Zorn 2010), these contributions often provide richer frameworks for analyzing other aspects of the policymaking process. For example, these contributions treat courts as strategic actors that take into account the effects of potential noncompliance when issuing their rulings. This important facet of judicial decision making, as well as others, are suppressed in our modeling framework, and are left for future work.

We also note that we are not the first to provide micro-foundations for the public opinion penalties that appear in Vanberg (2001) and those that extend his approach. For instance, Stephenson (2004) considers a one-period model in which voters must choose a retention rule that specifies the probability with which the incumbent is re-elected as a function of his (and the court’s) observed behavior. In Stephenson’s framework, candidates are homogenous, making all retention rules consistent with equilibrium behavior; the equilibrium selected is assumed to be the one that induces optimal ex ante incentives for the incumbent. Dai (2005) similarly employs an optimal contracting approach to illustrate the effects of nonbinding law on policy. She illustrates how international law can make elected officials more responsive to domestic constituencies by increasing the accuracy of the information these constituencies have about the policy choices of elected officials. While providing many insights, a limitation of the optimal contracting approach is that the retention rules that maximize the voters’ ex ante welfare may not be time-consistent once one allows for heterogeneity in politician traits (Fearon 1999).
information to voters. In our setup, judicial decisions provide information that voters would otherwise lack about incumbent policy choices. Voters are then able to use this information to draw inferences about the extent to which the policy preferences of incumbents are congruent with their own. These inferences, in turn, can influence voter decisions about whether to re-elect the incumbent leaders.

Specifically, we develop a model in which: (1) leaders vary in their policy preferences; (2) incompletely informed voters prefer a leader with less taste for “extreme” action; (3) the courts will declare an action legal only if it is not too extreme; and (4) voters can observe judicial decisions (or, more generally, can make coarse distinctions between “legal” and “illegal” actions) and can also make crude distinctions between government “action” and “inaction”, but cannot otherwise observe the leader’s policy choice. Thus, compliance with the law 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 with noncompliance, as well as the relative costs of inaction compared with (legal) action, are a function of the substantive stringency of the legal standard. Our analysis therefore considers how outcomes change as the legal standard becomes more or less stringent, in a context where public reputational penalties of the sort we derive are the only incentive for leaders to comply with the law.

3. The Model

3.1 Players, Information, and Order of Play

We consider a two-period model with an election held between periods. In each period, a single government official (the “leader”) makes a policy choice on behalf of a representative voter. The leader is one of two types: moderate (M) or extreme (E). A moderate leader shares the voter’s policy preferences, whereas the extreme leader does not. The prior probability that the first-period leader (the “incumbent”) is moderate is denoted π ∈ (0, 1). The voter does not observe the leader’s type.

In each period, the leader chooses either to do nothing or to take action. For instance, a leader can choose to keep the peace (inaction) or engage in war (action). Or, the leader may adopt a new regulatory scheme (action) or maintain the status quo (inaction). If the leader takes action, he must also determine how aggressive that action should be. For instance, conditional on deciding to go to war, the government must decide how aggressively to prosecute the war. Likewise, a new regulatory scheme may be relatively more interventionist (transferring a great deal of power from private actors or subnational governments to the central government) or...
relatively less so. To capture this formally, let $z$ denote a number strictly less than 0, and let $x \in X \equiv \{z\} \cup [0, \infty)$ denote leader’s policy choice. When the leader sets $x = z$, we will say the leader has taken no action (i.e., maintained the status quo); when $x \in [0, \infty)$, we will say the leader has taken action, with higher values of $x$ indicating more aggressive action (e.g., greater or more indiscriminate uses of violence in war, more interventionist regulatory policies, etc.). The voter is able to distinguish inaction from action, but unable to distinguish among different levels of action. For example, the voter can distinguish between war and peace, but has difficulty ascertaining the aggressiveness with which a war is prosecuted. Similarly, the voter knows if the national government adopted a new regulatory scheme, but has difficulty assessing how much power that scheme actually transfers from subnational governments or private actors. This assumption is, of course, a simplification: in reality, voters have access to some information about the 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 war versus peace, regulation versus nonregulation) are more transparent to voters than are differences in how policies are carried out.

The incumbent and the challenger receive zero utility when out of office. In contrast, when a leader is in office, his utility equals the sum of the intrinsic value of office, denoted $\delta \geq 0$, and the leader’s policy payoff. Let $\alpha_M$ and $\alpha_E$ denote the ideal action levels of the moderate and extreme leaders, respectively, where $\alpha_E > \alpha_M \geq 0$, and let a leader’s policy payoff from choosing $x$ be $u(x; \alpha_t) = -(x - \alpha_t)^2$. These assumptions imply that, as a matter of policy, both leader types strictly prefer the minimal level of action ($x = 0$) to inaction ($x = z$), and also that inaction has lower policy costs for the moderate type than for the extreme type. The voter cares about the policy chosen in each period, and her per-period payoff, when policy $x$ is implemented, is $u(x; \alpha_M)$. Thus, the policy preferences of the voter are the same as those of a moderate leader.

---

5. This utility specification—that is, one in which the leader’s payoff when out of office does not depend on the policy chosen—potentially captures a setting in which leaders care about creating a legacy and that only those policies a leader personally implements contribute to that legacy [see Maskin and Tirole (2004:1039) for such an interpretation]. That said, the assumption that the leader’s utility when out of office does not depend on the policy chosen, while fairly common in much of the literature analyzing political agency models (e.g., Coate and Morris 1995; Maskin and Tirole 2004), is clearly an unrealistic simplification. Nevertheless, we impose it for reasons of technical convenience, as it allows us to treat each leader type as having an equally strong interest in re-election. We note, however, that the constraining, liberating, and informational effects of nonbinding law that we discuss below are present in a setting in which a leader’s utility when out of office depends upon the policy chosen.
Between periods there is an election in which the voter chooses either to re-elect the incumbent or to replace him with the challenger. Importantly, the challenger’s identity is not realized until after the first-period leader’s policy choice. Hence, when choosing policy, the incumbent leader is unsure whether he will be running against a challenger who is perceived to be moderate or extreme. To model this, we assume that at the time of the election the voter will perceive the challenger’s probability of being moderate as \( \pi_C \), where \( \pi_C \) is a draw from a distribution function \( F \) with support \([0,1]\) (we assume that \( F \) is continuous, increasing, and \( F(0) = 0 \)). The realization of \( \pi_C \) occurs after the incumbent leader’s policy choice. This means that in the first period, \( \pi_C \) is a random variable from the incumbent’s perspective.6

In what follows, we consider two settings: one with “no law” and one with “law.” In a world with no law, the only thing the voter knows about the incumbent’s policy choice when deciding whether to re-elect him is whether the leader took action. In a world with law, the voter knows whether the leader took action, and in the event the leader does take action, the voter can also observe whether the action taken exceeds an exogenous threshold, \( L \), which we refer to as the legal standard or the legal limit. A natural way to interpret this assumption is that the leader’s policy choice is scrutinized by a court which declares the policy choice “lawful” if \( x \leq L \), but declares it “unlawful” when \( x > L \), and the voter can observe the court’s ruling even though she cannot observe the policy \( x \) directly. Three observations about this assumption and this interpretation are appropriate here:

First, the sharp distinction between “legal” and “illegal” action, like the sharp distinction between “action” and “inaction”, is an artificial simplification: in the real world, the line between lawful and unlawful action may be both fuzzy and contested. Nonetheless, our simplified characterization is meant to capture the fact that legal limits on government action often feature significant “threshold” effects, both in the sense that relatively small changes in policy near a legal threshold may have a much greater impact on the likely legal ruling than equivalent policy changes far from the threshold, and in the sense that voters and other lay observers have an

6. It is worth noting here that the assumption of a terminal second period is artificial and somewhat problematic, both substantively and theoretically. It is, however, a conventional modeling shortcut to provide microfoundations for the plausible claim that voters care about the policy preferences of the leaders they select, and hence that re-election-seeking politicians have an incentive to appear to have the “right” preferences from the voters’ perspective. In a two-period model, these features arise because the second-period leader will pick his most-preferred policy. The same features would presumably arise in an indefinitely repeated game in which leaders could influence some policy outcomes “behind the scenes”, and thus escape voter discipline on those matters, or if voters have some intrinsic taste for selecting leaders who share their values. All of our results hold so long as a leader’s probability of re-election (or some other reward) is increasing in the voter’s posterior estimate of the probability the leader shares the voter’s preferences.
easier time observing a (binary) legal declaration (lawful/unlawful) than finer distinctions among policy choices.

Second, we treat the legal threshold $L$ as exogenous, which implies that the court is not a strategic actor. While that simplifying assumption may be appropriate in some contexts, in others it might be more appropriate to assume that the court has its own objectives. Although we leave an analysis of a model that incorporates strategic judicial behavior to future research, we note that our analysis here provides the foundation for a more complete strategic model, in that the analysis here would provide the best response of the other players (the leaders and the voters) to the court’s choice of $L$. A full strategic model would need to add to this an analysis of the court’s best response to leader and voter behavior in order to derive equilibria in which the behavior of leaders, voters, and courts are fully micro-founded. While that full analysis goes beyond what we attempt here, it is worth noting that if the court’s preferences are over policy outcomes—say, if the court has an ideal point in the same policy space as the leaders and the voters—and the court is able to credibly commit to any legal standard that it chooses, then it would be straightforward to incorporate the court as a strategic actor, because our subsequent analysis establishes precisely the link between the chosen $L$ and expected policy outcomes in each period.

Third, although in the exposition and analysis of the model we will refer to the decisions of a “court”, the institution transmitting information about legality to the voter need not be a court in the formal sense. For example, many international human rights treaties and similar agreements are not judicially enforced, but do provide for monitoring bodies that issue declarations on the legality or illegality of government conduct (Helfer and Slaughter 1997). Indeed, although our substantive focus is on legal limits on government action, our analysis is sufficiently general that it could apply, with appropriate modifications, to third-party auditing of elected officials more broadly, including, for example, by the media or civil society.

Importantly, the law in our model is nonbinding: 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 judicial ruling (and therefore the only role for the

7. Much of this literature on third-party auditors shows that providing more information about either what policy the leader chose (e.g., Besley and Burgess 2001) or the desirability of that policy (e.g., Warren 2012) can induce leaders whose preferences diverge from those of the public to more faithfully pursue the public interest, although this literature also highlights conditions under which the opposite may be true. Our model differs in that the information our third-party auditor provides about the leader’s policy choice is extremely coarse—the legal/illegal signal in our model does not reveal the specific policy the leader chose, but only whether that policy fell above or below some threshold.

8. To be clear, in using the term “nonbinding”, we do not mean to distinguish between those laws or judgments that lawyers and judges would consider formally binding and those that are formally nonbinding. This doctrinal distinction, though important in some contexts, is not relevant to our analysis. Likewise, by “nonbinding law” we do not mean law that does not affect behavior; indeed, one of our main objectives is to show how “nonbinding law”, as
legal limit $L$) is to provide additional information to the voter about the policy choice. Formally, the incumbent’s policy choice and the court’s ruling (if there is one) generates a signal, $s$, that the voter may use to update her assessment of the probability the incumbent is moderate. Without law, this signal may take one of the two values: $s =$ inaction when $x = z$, and $s =$ action otherwise. With law, this signal may take three values: $s =$ inaction when $x = z$, $s =$ lawful when $x \in [0, L]$, and $s =$ unlawful otherwise.

3.2 Solution Concept

As the above model is a sequential game of incomplete information, our solution concept is perfect Bayesian equilibrium (PBE). In a PBE, all players must behave optimally given their beliefs, and beliefs must be formed via Bayes’ Rule whenever possible. A candidate PBE consists of strategies for the incumbent, the challenger, and the voter, as well as a belief system for the voter. A strategy for the incumbent is a policy choice in the first and second periods, where these policy choices can depend upon the incumbent’s type. A strategy for the challenger is a policy choice for the second period, which can depend upon the challenger’s type. A strategy for the voter is a decision whether to re-elect the incumbent as a function of her signal $s$ and the realization of $p_C$ (the perceived probability the challenger is moderate). Finally, for every possible signal $s$ the voter could observe, the voter must hold a belief about the probability that the incumbent who generated that signal is the moderate type. Additionally, in order to rule out equilibria supported by implausible voter beliefs off the equilibrium path, we restrict attention to PBE that survive an adaptation of the D1 refinement of Cho and Kreps (1987). We henceforth refer to PBE that survive this refinement as D1 equilibria.

4. Analysis

4.1 Preliminaries

Our main interest is in how the legal standard, $L$, affects the first-period leader’s behavior compared with the “no law” case, as well as how variation in $L$ (which can be thought of as variation in the “stringency” of the legal standard) affects leader behavior and voter welfare. We first establish two preliminary results: First, under the assumptions of our model the voter prefers to elect whichever candidate (the incumbent or the challenger) is more likely to be moderate, and second, this implies that the first-period incumbent has a reputational incentive to take actions that increase the voter’s confidence that the incumbent is moderate.

The first of these points follows straightforwardly from the fact that in the second period, moderate and extreme leaders both choose their ideal
policies \((x = \alpha_M \text{ for moderate types and } x = \alpha_E \text{ for extreme types})\). As the voter’s policy preferences are moderate, she will re-elect the incumbent if and only if she believes the incumbent is more likely to be moderate than the challenger.\(^9\) We state this formally as follows:

**Lemma 1:** In any PBE, the second-period leader selects his ideal policy. Furthermore, in any such equilibrium, the voter re-elects the first-period incumbent if and only if the voter believes the incumbent is at least as likely to be moderate as is the challenger.

The decision rule described in Lemma 1, taken together with the first-period incumbent’s uncertainty about the challenger’s characteristics, implies that the incumbent can improve his re-election prospects by pursuing policies that enhance his reputation for being moderate. Formally, let \(\mu(s)\) be the voter’s posterior belief that the leader is moderate upon observing signal \(s\). The leader is re-elected if and only if the challenger’s perceived probability of being moderate, \(\pi_C\), is weakly less than \(\mu(s)\). As \(\pi_C\) is realized after the first-period incumbent’s policy choice, this means that from the incumbent’s perspective at the time he chooses the policy that leads to signal \(s\), his probability of re-election is

\[
\Pr[\pi_C \leq \mu(s)] = F[\mu(s)].
\]

As \(F\) is increasing, policies that enhance the leader’s reputation for being moderate also enhance his probability of re-election.

### 4.2 The Impact of Nonbinding Law

As noted above, our primary objective is to better understand how nonbinding law, of varying degrees of substantive stringency, may affect leader behavior and voter welfare. To do this, we discuss two scenarios.

First, we consider a scenario in which, in the absence of law, both the moderate and extreme leader would pursue their ideal policies in the first period. In this setting, we illustrate how nonbinding law can induce the extreme leader to moderate his policy choice. That is, we demonstrate how law can have a *constraining effect* on leaders, even in the absence of exogenous enforcement. In addition, if the legal standard does not induce all leaders to take lawful action, nonbinding law also has an *informational effect*, in that the court’s ruling allows the voter to more accurately distinguish moderate incumbents from extreme incumbents, and to use this information to elect better leaders.

Second, we consider a scenario in which, in the absence of law, moderate leaders’ reputational interests lead them to maintain the status quo, even though both the moderate leader and the voter would prefer a moderate level of action. In this case, we show that nonbinding law can have a *liberating effect* on moderate leaders, and in so doing, can enable them to more faithfully pursue the voter’s policy goals. In this scenario, however,

---

\(^9\) Throughout, we assume that if the voter is indifferent between the incumbent and the challenger, the voter supports the incumbent.
law may have an *adverse informational effect*, in that it may cause all leaders to take actions that are observationally equivalent to the voter, thereby worsening electoral selection.

4.2.1 The Constraining and Informational Effects of Nonbinding Law. We begin by considering a setting in which the following assumption holds:

**Assumption 1:**

\[ u(a_M; a_M) > u(z; a_M) + \delta \]

When Assumption 1 holds, reputational concerns are never sufficient to induce either leader type to choose inaction.\(^{10}\) Not surprisingly, then, under Assumption 1, equilibrium behavior in the absence of law involves both moderate and extreme leaders pursuing their ideal policies in the first period.

**Proposition 1:** Suppose Assumption 1 holds. In the absence of law, in any D1 equilibrium (indeed, in any PBE) the moderate and extreme incumbent both take action, with the moderate leader setting \( x = a_M \) and the extreme leader setting \( x = a_E \).

Two important features of equilibrium behavior in Proposition 1 are worth noting. First, while the moderate leader implements the voter’s ideal policy, the extreme leader takes action that is more aggressive than the voter would want, causing the voter to suffer a policy loss whenever the incumbent is extreme. Second, along the equilibrium path, there is no voter learning about the leader’s type, because both leader types always take action, and voters cannot distinguish among levels of action. This means the voter may inadvertently replace a moderate leader with an extreme leader, or fail to replace an extreme leader with a moderate leader, either of which leads to a second-period policy loss. Our next proposition illustrates that nonbinding law can ameliorate one or both of these problems. In particular, for any legal standard \( L \in [a_M, a_E] \), nonbinding law either enhances learning about the leader’s type (an informational effect), or induces the extreme leader to moderate his policy choice (a constraining effect).\(^{11}\) In fact, for some legal standards, both effects are operative.

---

\(^{10}\) Given our assumption that \( F(0) = 0 \) and the fact that \( F(1) = 1 \), Assumption 1 is equivalent to \( u(a_M; a_M) + \delta F(0) > u(z; a_M) + \delta F(1) \). As such, Assumption 1 implies that the moderate leader prefers choosing his ideal level of action to choosing inaction, even if the latter guarantees re-election and the former guarantees defeat. As the policy costs of inaction are even higher for the extreme leader, Assumption 1 also implies that the extreme leader never has an incentive to choose inaction.

\(^{11}\) Throughout the article, we restrict attention to \( L \in [a_M, a_E] \) to highlight the qualitative results of greatest interest. One can show that equilibrium behavior when \( L \leq a_E \) is equivalent to that with no law. In contrast, when \( L < a_M \), nonbinding law can induce
The effects of nonbinding law depend in part on the substantive stringency of the legal standard, $L$. One can think of lower values of $L$ as more stringent, in that fewer possible actions would be ruled “lawful”, whereas higher values of $L$ imply a laxer standard in which the court would uphold more aggressive policies. Before stating the next proposition, we define two “threshold” values of $L$ in terms of other model parameters:

$$\phi_L \equiv \alpha_E - \sqrt{\delta}$$

and

$$\phi_H \equiv \alpha_E - \sqrt{\delta F(\pi)}.$$

Note that because $\pi < 1$, it follows that $F(\pi) < 1$, which implies that $\phi_L < \phi_H$.

We can now state formally the proposition that demonstrates the constraining and informational effects of nonbinding law:

**Proposition 2:** Suppose Assumption 1 holds, and fix the legal standard $L \in [\alpha_M, \alpha_E]$.

(a) Lax legal standard: if $L \geq \phi_H$, then in any D1 equilibrium, the moderate leader chooses his ideal policy $x = \alpha_M$ (as he does in the “no law” baseline case). In contrast, the extreme leader chooses the upper bound of the set of lawful actions, setting $x = L < \alpha_E$. The action chosen by both leaders is declared lawful.

(b) Intermediate legal standard: if $L \in (\phi_L, \phi_H)$, then in any D1 equilibrium, the moderate leader chooses his ideal policy $x = \alpha_M$. In contrast, the extreme leader mixes between the legal limit ($x = L$) and his ideal action ($x = \alpha_E$). The moderate leader’s action is declared lawful, but the extreme leader’s action is declared lawful only when he sets $x = L$.

(c) Strict legal standard: if $L \leq \phi_L$, then in any D1 equilibrium, each leader chooses his ideal action. That is, the moderate leader chooses $x = \alpha_M$ and the extreme leader chooses $x = \alpha_E$. The moderate leader’s choice is declared lawful, whereas the extreme leader’s choice is declared unlawful.

Understanding the logic of Proposition 2 is a matter of understanding the incentives of the extreme leader. Given Assumption 1, and the fact that the legal standard $L < \alpha_E$, the extreme leader has two plausible actions to
consider, \( \alpha_E \) and \( L \).\(^{12}\) Thus, the extreme leader will either pursue his ideal policy, knowing that the court will declare it unlawful, or else he will moderate his action level, choosing the upper bound of the set of lawful actions. In deciding whether to moderate, the extreme leader weighs the policy costs of moderation against the potential reputational rewards.

As noted in Proposition 2, the moderate leader always chooses his (lawful) ideal policy (\( \alpha_M \)), though the voter cannot distinguish this choice from any other lawful action. Hence, if the extreme leader always chose his (unlawful) ideal policy (\( \alpha_E \)), the judicial signal would perfectly reveal the leader’s type to the voter. If leaders followed such strategies, the leader would be re-elected if and only if he pursued lawful action. But this is consistent with equilibrium behavior only if the legal standard is sufficiently strict \( [L \leq \phi_L] \), as in Proposition 2(c)]. Otherwise, the electoral rewards to the extreme leader from choosing his most-preferred lawful action (\( L \)) rather than his ideal action (\( \alpha_E \)) would outweigh the policy costs incurred from such moderation.

Thus, if \( L > \phi_L \), the extreme leader must choose lawful action \( L \) with positive probability. If the legal limit is sufficiently lax \( [L \geq \phi_H] \), as in Proposition 2(a)], then the extreme leader will always choose \( L \) rather than his ideal policy \( \alpha_E \), because in this case the policy costs of choosing \( L \) rather than \( \alpha_E \) are sufficiently small relative to the reputational benefits. Of course, the fact that extreme types as well as moderate types choose lawful action reduces the reputational benefits of choosing lawful action, but for a sufficiently lax legal standard even this reduced reputational benefit outweighs the small policy cost to the extreme type of complying with the legal limit.\(^{13}\)

However, for intermediate legal standards \( [L \in (\phi_L, \phi_H)] \), as in Proposition 2(b)], there is no longer an equilibrium in which the extreme leader always chooses lawful action. The costs of complying with the legal limit for the extreme type are now large enough that they offset the reputational gains that result when the voter expects both types to pool on lawful action. This fact, combined with the fact that the extreme leader must choose lawful action \( L \) with positive probability whenever \( L > \phi_L \), implies that for all \( L \in (\phi_L, \phi_H) \), in any equilibrium, the extreme leader

---

\(^{12}\) The extreme leader would never choose any \( x > L \) other than \( \alpha_E \), because all such actions yield an identical probability of re-election, and \( \alpha_E \) is the extreme leader’s ideal policy. Similarly, all lawful actions yield identical re-election probabilities, and of these \( L \) is closest to the extreme leader’s ideal policy \( \alpha_E \). Furthermore, Assumption 1 guarantees that no leader would ever choose inaction.

\(^{13}\) The reputational gain from pursuing lawful action relative to unlawful action in this case is equal to \( F(\pi) \). The reason is that when all leader types take lawful action, the voter learns nothing about the leader’s type, so the posterior probability that the incumbent is moderate equals the prior probability, \( \pi \), which means that an incumbent taking lawful action is re-elected with probability \( F(\pi) \). If a leader were to deviate by selecting unlawful action, then under the D1 refinement the voter would infer the leader is an extreme type, and his re-election probability would drop to zero.
mixes between lawful action \((L)\) and unlawful action \((\alpha_L)\). In such equilibria, the extreme leader’s reputational gain from pursuing lawful action exactly offsets the policy cost.

From the perspective of voter welfare, nonbinding law may benefit the voter either due to the information that legal compliance (or lack thereof) provides about the leader’s type (the informational effect), or the fact that nonbinding law may induce the extreme leader to pursue more moderate policies (the constraining effect). The former effect enhances the voter’s expected second-period payoff, whereas the latter effect enhances the voter’s first-period payoff. Which effect is operative depends on the stringency of the legal standard. When the legal standard is sufficiently lax \([L \geq \phi_H]\), as in Proposition 2(a), the extreme leader moderates his policy choice (the constraining effect), but because both leader types always pursue lawful action, there is no informational effect. In contrast, when the legal standard is sufficiently strict \([L \leq \phi_L]\), as in Proposition 2(c), both leader types behave as they do in the absence of law (there is no constraining effect), but the judicial signal perfectly reveals the leader’s type (an informational effect). Finally, for intermediate legal standards \([L \in (\phi_L, \phi_H)]\), as in Proposition 2(b), the extreme leader sometimes moderates his action to comply with the law, but sometimes chooses his (unlawful) ideal action. Thus, for this range of legal standards, both the informational and constraining effects of nonbinding law are operative, though to a lesser extent than in either of the “pure” cases.

Importantly, the legal standard that maximizes the voter’s first-period utility need not maximize her second-period utility. For instance, suppose that \(\phi_L > \alpha_M\), as will be the case whenever the leader places sufficient weight on policy relative to officeholding.\(^{14}\) Then the legal standard that maximizes the voter’s second-period payoff falls weakly below \(\phi_L\), because only under such stringent legal standards will legal compliance or noncompliance perfectly reveal the leader’s type. However, the legal standard that maximizes the voter’s first-period payoff falls above \(\phi_L\), because only such lax legal standards constrain extreme leaders. Figure 1 illustrates this feature of our model graphically. The solid line is the voter’s first-period expected payoff as a function of the legal standard \((L)\), whereas the dashed line is the voter’s second-period expected payoff as a function of \(L\). Under the conditions used to generate Figure 1, the voter’s first-period payoff is maximized when \(L = \phi_H\) (this value of \(L\) induces the maximum expected constraining effect), whereas the voter’s second-period payoff is maximized when \(L \leq \phi_L\) (because \(L\) values in this range maximize the informational effect).

It is worth emphasizing here a key difference between law that is exogenously enforced (as in many conventional analyses) and law that is enforced endogenously via the mechanism we model. Suppose the court

\(^{14}\) More formally, \(\phi_L > \alpha_M\) whenever the parameter measuring the intrinsic value the incumbent attaches to holding office, \(\delta\), is not too large.
had the power to ensure that policy never exceeded the legal limit. Then, under Assumption 1, the moderate leader would implement \( x = \alpha_M \) and the extreme leader would implement \( x = L \). Consequently, the legal standard that maximizes the voter’s first-period payoff would be \( L = \alpha_M \), which induces both moderate and extreme leaders to select the voter’s ideal policy. In our model, however, if the legal limit were this strict, the extreme leader might choose not to moderate his policy choice. This is the case in the scenario considered in Figure 1, and is true more generally whenever \( \phi_L > \alpha_M \). When law is enforced endogenously through electoral sanctions of the sort we model, and when leaders’ policy incentives to deviate from the voter’s ideal policy are sufficiently strong (\( \phi_L > \alpha_M \)), courts can constrain extreme leaders only if the courts are willing to uphold policies that exceed the voter’s ideal policy. Hence, under such conditions, a social planner seeking to maximize the voter’s first-period policy payoff would set the legal standard to the right of \( \alpha_M \).\(^{15}\) This result is consistent with qualitative observations in various fields, such as the observation by international law scholars that when legal obligations are too stringent, the result may be noncompliance rather than constraint, whereas a less demanding standard may produce more meaningful (though modest) constraints.\(^{16}\)

4.2.2 The Liberating Effect (and Adverse Informational Effect) of Nonbinding Law. The preceding subsection considered a scenario in which, in the absence of law, both moderate and extreme leaders would take action of some kind. That result was driven by Assumption 1, which ensured that regardless of the reputational benefits associated with inaction, both the moderate and extreme leader were better off selecting their ideal policies. We now consider a setting in which Assumption 1 does not hold. Specifically, we make the following alternative assumption:

**Assumption 2:**

\[
u(z; \alpha_M) + \delta > u(\alpha_M; \alpha_M) + \delta F(\pi).\]

Under Assumption 2, the moderate leader will choose inaction if doing so sufficiently enhances his re-election prospects. As a result, in the absence of law, there are no longer D1 equilibria in which both leader types

---

\(^{15}\) Endogenizing the choice of legal standard is beyond the scope of this article. However, it would be interesting to compare various mechanisms by which the legal standard could be set: via direct democracy, via representative democracy, or via a common law-like process. As noted earlier, it is also possible that the legal standard might be selected by a strategic court with its own policy or other objectives.

\(^{16}\) For example, Blum (2007) persuasively argues that the 1996 Israel–Lebanon Understanding concerning the protection of civilians in war was less effective than it could have been because it demanded too much of the parties.
take action. We can say more about equilibrium behavior under Assumption 2 if we make the following additional assumption:

**Assumption 3:**  
\[ u(z; \alpha_E) + \delta < u(\alpha_E; \alpha_E). \]

Under Assumption 3, the extreme leader’s policy costs from inaction are sufficiently high that it is always optimal for him to take action. Assumptions 2 and 3 together allow us to establish the following proposition about leader behavior in the absence of law:

**Proposition 3:** Suppose Assumptions 2 and 3 hold. In the absence of law, in the unique D1 equilibrium a moderate incumbent chooses not to take action \((x = z)\), whereas an extreme incumbent chooses his ideal policy \((x = \alpha_E)\).

17. When the D1 refinement restricts beliefs, it requires that the voter take account of each leader type’s policy incentives. In particular, if inaction is off-path and the D1 refinement restricts beliefs, it requires that the voter believe the leader is whichever type incurs the lowest policy cost from inaction. Clearly, this is the moderate type. But if the voter believes the leader is moderate when she observes inaction, Assumption 2 ensures that the moderate type would have a strict incentive to deviate from an equilibrium in which both types take action. In short, under Assumption 2, the value of holding office is large enough that the moderate leader is willing to incur the policy costs associated with inaction provided that doing so allows him to separate from the extreme type.
In this scenario, neither the moderate leader nor the extreme leader pursues the voter’s ideal policy. The moderate leader’s desire to distinguish himself from the extreme leader leads him to choose inaction, whereas the extreme leader chooses an action that is too extreme from the voter’s perspective. Nevertheless, in this case the leader’s decision perfectly reveals his type. Thus, in contrast to the case considered in the previous subsection, here nonbinding law can never have a beneficial informational effect, and (as we shall see) may sometimes have an adverse informational effect. The constraining effect discussed in the previous subsection does continue to obtain, but only when the legal limit \( L \) is neither too lax nor too strict.18 The most important contrast between this case and the case considered in the previous subsection, however, concerns the behavior of the moderate leader. As the next proposition indicates, under Assumptions 2 and 3, nonbinding law can induce the moderate leader to take action when he would not otherwise. We refer to this as the liberating effect of nonbinding law.

Proposition 4: Fix the legal standard \( L \in [\alpha_M, \alpha_E] \). If Assumptions 2 and 3 hold, there exists a threshold value \( \phi' \in (\phi_L, \phi_H) \) such that:

(a) Lax legal standard: if \( L > \phi' \), then in any D1 equilibrium, the moderate leader chooses inaction \((x = z)\) and the extreme leader chooses his ideal policy \((x = \alpha_E)\), which is declared unlawful.

(b) Intermediate legal standard: if \( L \in (\phi_L, \phi'] \), there exists a D1 equilibrium in which the moderate leader chooses his ideal policy \((x = \alpha_M)\), which is declared lawful, whereas the extreme leader mixes between the legal limit \((x = L)\), which is declared lawful and his ideal policy \((x = \alpha_E)\), which is declared unlawful. This equilibrium is unique if \( L < \phi' \).

(c) Strict legal standard: if \( L \leq \phi_L \), then in any D1 equilibrium, each leader chooses his ideal policy. That is, the moderate leader chooses \( x = \alpha_M \) (declared lawful) and the extreme leader chooses \( x = \alpha_E \) (declared unlawful).

Proposition 4(c) most clearly illustrates the liberating effect of nonbinding law. Suppose \( \phi_L > \alpha_M \) and \( L \in [\alpha_M, \phi_L) \). Under these assumptions, the moderate leader chooses lawful action \((x = \alpha_M)\) and the extreme leader chooses unlawful action \((x = \alpha_E)\). Hence, the court’s ruling perfectly reveals the leader’s type, which means the moderate leader is always re-elected and the extreme leader is always defeated.19 Recall from

---

18. This contrasts with the previous case, in which the constraining effect disappeared when the legal limit was sufficiently strict but applied when the legal limit was lax.

19. That this is an equilibrium follows from the facts, first, that the moderate leader has no incentive to deviate because doing so can neither increase his policy payoff nor his probability of re-election and, second, that the extreme leader cannot benefit from choosing lawful action when \( L \leq \phi_L \), because \( L \leq \phi_L \) implies that the policy costs of lawful action for the extreme type are prohibitive.
Proposition 3 that in the absence of law, the moderate leader in this scenario would choose inaction. Thus nonbinding law “liberates” the moderate type, allowing him to be a more faithful agent of the voter than he would be otherwise. Perhaps counterintuitively, the existence of a legal limit on the aggressiveness of policy action causes the moderate leader to choose a more aggressive (though lawful) policy. The explanation for this liberating effect runs as follows: in the absence of law, the moderate leader risks being misidentified as extreme if he takes any action, because the voters cannot accurately distinguish (desirable) moderate action from (undesirable) extreme action. This leads the moderate leader to choose inaction. This is costly for him, and for the voter. The publicly observable legal ruling helps redress this problem, because the moderate leader can now choose a lawful action that is closer to what he and the voter would prefer while still achieving separation from the extreme type. (So long as the legal standard is sufficiently strict, the extreme leader finds it too costly policy-wise to pursue lawful action, regardless of the electoral benefits.) However, in this case nonbinding law exerts no constraining effect on the extreme leader, who continues to choose his (unlawful) ideal policy, and the voter continues to learn the leader’s type perfectly.

For intermediate legal standards in the range considered in Proposition 4(b), not only does nonbinding law liberate the moderate type, but it also constrains the extreme type. Both effects improve the voter’s expected first-period policy payoff, relative to the “no law” baseline. The cost of nonbinding law over this range of parameters is that it reduces the informativeness of the leader’s policy choice, which lowers the voter’s second-period policy payoff relative to the “no law” case (an adverse informational effect). However, once the legal standard becomes sufficiently lax, as in Proposition 4(a), the liberating effect of nonbinding law disappears and leader behavior is exactly as it is in the case of no law. Thus, for those legal standards considered in part (a), law has no effect on the voter’s welfare.

As was true in the case considered in the earlier subsection, the legal standard that maximizes the voter’s first-period payoff need not maximize her future welfare, as illustrated by Figure 2.20 The parameters used to generate Figure 2 are identical to Figure 1 with the exception of the value of holding office ($\delta$), which is now larger. As Figure 2 illustrates, the voter’s second-period payoff (the dashed line) is maximized when $L \leq \phi_L$ or $L > \phi'$ (as in these ranges the adverse informational effect is eliminated). However, the voter’s first-period payoff (the solid line) is maximized when $L = \phi'$ (as this generates the optimal combination of liberating and constraining effects).

---

20. There exists a continuum of D1 equilibria when $L = \phi'$. These equilibria differ in the probability with which the moderate leader (and the extreme leader) pursues lawful action. To generate the figure, we assume that when $L = \phi'$, the equilibrium selected is the one in which the moderate leader always chooses lawful action.
We conclude by highlighting that the liberating effect arises precisely because law in our setting is nonbinding. If the law were binding, the extreme leader would either choose lawful action $x = L$, choose inaction, or possibly mix between the two. This, in turn, would mean that a moderate leader would risk being mistaken for an extreme leader if he were also to pursue lawful action; in light of this risk, under Assumption 2, the moderate leader would choose inaction. Thus, for law to have its liberating effect, the law must help the voter to distinguish moderate from extreme leaders. And for law to have such a sorting effect, the extreme leader must pursue unlawful action with sufficiently large probability, something that can only arise in a setting in which law is nonbinding. Thus, for the liberating effect to arise (in the context of our basic setup), the law cannot bind.

5. Discussion
Having presented our main theoretical results, we now discuss several items that highlight the substantive and empirical relevance of our analyses.

First, as noted above, our model predicts that under some circumstances—in particular, when both leader types would choose their ideal policies in the absence of law—the constraining effect of law tends to be greater when the legal standard is relatively undemanding, while more stringent legal standards lead to less actual constraint. The simple intuition for this seeming paradox is that when law is nonbinding, overly stringent law will lead to wholesale noncompliance, whereas more
moderate legal standards will induce some degree of compliance. We are certainly not the first to generate a model that produces such a result, which would tend to arise whenever legal noncompliance generates a penalty that is insufficiently proportional to the degree of noncompliance. But we provide a specific and distinct rationale for why this is so: the extreme type must trade off his policy interest in extreme policy against his reputational interest in mimicking the moderate leader, whose ideal action would be deemed lawful.

Second, the specific mechanism we identify highlights important limits to the above result. It turns out that it is not always true that laxer legal standards impose more constraints on the extreme type, even when law is nonbinding. In particular, this result does not hold if the moderate leader would maintain the status quo in the absence of law. In this case, it is still true that an overly stringent legal standard does not constrain the extreme type, because he would prefer simply to disregard the law [as in Proposition 4(c)]. At the same time, as Proposition 4(a) shows, an overly lax legal standard also fails to discipline the extreme leader—even when the legal standard is arbitrarily close to the extreme leader’s ideal policy. This follows from the fact that, in our model, the value of complying with the law for the extreme leader is reputational, as he would like to mislead voters into believing he is moderate. But legal compliance only works as a means to boost the extreme leader’s reputation if moderate leaders are also sometimes willing to take (lawful) action rather than maintaining the status quo. If the legal standard is very lax (close to the extreme leader’s ideal policy), the moderate leader will stick with the status quo \( (x = z) \), which means that there is no reputational benefit to the extreme type of choosing legal action. In this case, the only way that law can constrain the extreme leader is if the law is both sufficiently stringent that the moderate leader is induced to choose lawful action rather than inaction (the liberating effect), but also sufficiently lax that the extreme leader does not strictly prefer noncompliance to compliance [see

21. Results of such flavor have appeared in models of compliance with international law, such as those in which compliance results from the threat of retaliation by other nation states (e.g., Downs et al. 1996) and those in which compliance is driven by norm diffusion across nations (e.g., Guzman and Linos 2014).

22. To see why the moderate leader will pursue inaction under these conditions, suppose that Assumption 2 holds and that the legal standard is sufficiently lax. Further suppose, contrary to our claim otherwise that the moderate leader pursues lawful action with probability 1. Then the extreme leader will do the same. But we know that under Assumption 2 there cannot be a D1 equilibrium in which both types pool on lawful action: if both types pooling on lawful action is to be consistent with equilibrium behavior, inaction cannot result in certain re-election. But under the D1 refinement, if both types were to pool on lawful action, any leader who pursues inaction must be re-elected with probability 1. Hence, there are no D1 equilibria in which the moderate leader pursues lawful action with probability 1. A somewhat related dynamic allows one to rule out equilibria in which the moderate leader mixes between inaction and lawful action. As a result, when the legal standard is sufficiently lax, the moderate leader will always pursue inaction (in a D1 equilibrium).
Proposition 4(b)]. In short, our analysis illustrates that the mechanism by which nonbinding law influences the behavior of policymakers can influence how and when the constraining effects of nonbinding law operate. With alternative mechanisms for the enforcement of nonbinding law, such as repeat play, lax legal standards tend to discipline extreme leaders. However, in our approach, this need not be the case.

Third, our identification and explication of the liberating effect of nonbinding law provides an explanation for an empirical phenomenon that Guzman and Linos (2014) refer to as “human rights backsliding.” Building upon the empirical literature on compliance with human rights treaties (e.g., Hathaway 2002), Guzman and Linos note that nations that sign human rights treaties sometimes weaken their domestic human rights standards relative to those they maintained prior to becoming a treaty signatory—in effect, backsliding toward the standards set forth by the treaty, even though the treaties themselves often state explicitly that the standards they impose are floors rather than ceilings. Guzman and Linos explore how norm diffusion across nations might be the cause of such backsliding. Other scholars, in a somewhat related vein, have suggested that the legal regulation of warfare, though intended to curtail the destructiveness of war, may sometimes produce the opposite result by displacing questions of morality and legitimacy in favor of questions of legal permissibility (Kennedy 2006). Our model suggests another, and substantially different, explanation for this sort of “backsliding”: by increasing the transparency of the policy choices of elected officials to domestic constituencies, international legal regimes liberate moderate leaders to pursue more aggressive policies than they otherwise would. That is, prior to signing onto an international human rights agreement, a moderate leader may avoid taking actions that some would view as violating human rights due to the absence of a third-party auditor that could distinguish his actions from the more aggressive actions that might be taken by an extreme leader. With a human rights agreement in place and a mechanism to verify treaty compliance, such concerns might be less pressing: The moderate leader could be relatively confident that his actions will be declared to be within the treaty’s scope, and thus not as aggressive as the actions that his constituents would expect from a more extreme leader.

Fourth, and closely related to the above point, our model also provides an account of why (moderate) leaders would sometimes prefer to submit themselves to legal restraints enforced through the mechanism we identify. If such law would produce a liberating effect, these moderate leaders would directly benefit. For example, consider a leader who would like to engage in some form of controversial military action, such as using drones to make targeted strikes on terrorist leaders. Even if the general public, or important constituencies, would support moderate and restrained use of drone strikes, they might rationally worry that an extreme leader would employ drones too frequently and indiscriminately. Moreover, the public might be able to observe whether the leader is
carrying out drone strikes but not be able to distinguish restrained from indiscriminate use of drones. In this case, if the moderate leader is sufficiently concerned about signaling to his constituents that he is not too extreme, he may feel compelled to refrain from drone strikes altogether. In this scenario, the moderate leader would welcome relatively stringent legal review of drone strikes—in which a monitoring body would verify to the public that the leader’s use of drones was not too indiscriminate—because this would enable the moderate leader to engage in drone warfare while still distinguishing himself from a more extreme leader, who would engage in widespread drone warfare whether or not some court or other monitoring body would declare his actions illegal.23

Finally, although we do not explicitly model the process by which the legal standard \( L \) is chosen, it is worth highlighting that so long as elected officials are sufficiently policy motivated, the voter in our model would always prefer some \( L \in [\alpha_M, \alpha_E] \), enforced through the public opinion mechanism we describe, to a world with no law.24 Sometimes this is because of the liberating and/or constraining effect law has on the incumbent’s policy choice. Sometimes it is because of the informational effect of the legal ruling: precisely because some leaders ignore the legal standard, judicial rulings provide valuable information about leaders’ preferences. Of course, voter preferences may not be the appropriate normative benchmark, so we cannot assert that nonbinding law of some form is always socially optimal, but it is at least interesting to note that in our model voters would often prefer, and would presumably demand, some form of nonbinding law. Indeed, even though judicial review of the decisions of elected government officials, or other forms of legal oversight, are sometimes seen as in tension with majoritarian democracy (for good or ill), our analysis highlights one mechanism through which such legal oversight mechanisms may in fact serve majoritarian ends.

A closely related observation: A recent theme in the political economy literature is that checks and balances can enhance the efficacy of the

23. In this regard, President Obama’s proposal for a “drone court” that would sign off on proposed drone strikes is intriguing, though we must be cautious about using our model to “explain” this proposal in light of the myriad other factors which our simple framework may not capture.

24. To see why this is so, recall, that the extreme leader never pursues a policy less than \( \phi_L \), even if doing so ensures his re-election. Now suppose that leaders are sufficiently motivated by policy—that is, \( \phi_L > \alpha_M \)—and begin by considering the case in which the moderate leader pursues inaction with positive probability in a world with no law. Then, any legal standard \( L \in [\alpha_M, \phi_L] \) will improve voter welfare, because relative to the no law case, only the moderate leader’s behavior will be affected, with the moderate leader being a more faithful agent of the voter (implementing \( x = \alpha_M \)). At the same time, the judicial signal will enable the voter to perfectly sort moderate leaders from extreme leaders. Alternatively, suppose that in a world with no law, both moderate and extreme leaders pool on taking action. Then if the legal standard is sufficiently lax [i.e., \( L \in (\phi_L, \alpha_E) \)], the only effect nonbinding law will have is to induce the extreme leader to moderate his policy choice. This moderation improves the voter’s first-period policy payoff and cannot harm her second-period policy payoff.
electoral mechanism in disciplining and screening incumbent leaders (Persson et al. 1997; Stephenson and Nzelibe 2010). Our work builds upon this theme. In our model, legal oversight can compensate for the failure of the electoral mechanism (on its own) to incentivize extreme leaders to moderate their policy choices. Further, even when legal oversight fails to have a moderating effect on extreme leaders, such oversight may provide valuable information to voters, enabling voters to better sort leaders who share their policy preferences from those who do not. That said, our identification of a potential adverse informational effect also shows that legal oversight can sometimes interfere with the ability of voters to use elections to select good agents. Perhaps most interesting, our analysis shows that even though nonbinding law can have a beneficial impact on voter welfare, there is often a trade-off between how effectively law disciplines the policy choices of incumbent leaders (and thereby compensates for the imperfections of the electoral mechanism in incentivizing good behavior by incumbent) and the extent to which legal oversight provides valuable information to voters (and thereby enhances the performance of the electoral mechanism in selecting good agents).

6. Conclusion

The question why government officials 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 noncompliance with the law. We contribute to this line of explanation by elucidating a particular causal mechanism by which nonbinding legal rulings may give rise to these sorts of reputational sanctions.

In particular, we develop a “costly signaling” 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 a more moderate policy—but 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, a moderate leader can signal his type by choosing inaction. When courts can rule on whether the leader’s action is within some legal limit, voters may 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 extreme leaders who would otherwise have chosen their ideal points to instead choose legal action—this is a constraining effect of nonbinding law. Additionally, however, the judicial signal can induce moderate leaders who would otherwise have chosen inaction to instead choose legal action—a liberating effect of nonbinding law.
Furthermore, nonbinding legal rulings may affect the accuracy of voter information and hence the efficiency of electoral selection in choosing good leaders. In some situations, voters would not be able to distinguish moderate leaders from extreme leaders in the absence of judicial evaluation of the leaders’ actions, but after the introduction of law, moderate leaders choose lawful action, whereas extreme leaders choose unlawful action. This enables voters to distinguish among leaders, and so can be deemed a beneficial informational effect of nonbinding law. However, in other circumstances moderate leaders would distinguish themselves in the absence of law by maintaining the status quo. In these settings, law can sometimes have an adverse informational effect, in that nonbinding law can induce both moderate and extreme leaders to choose lawful actions that the voters cannot distinguish.

Taken together, our costly signaling framework enriches the growing literature on when and how nonbinding law influences the decisions of office holders. And even though nonbinding law in our setting may sometimes be ineffective (if the legal standard is too strict) or have adverse informational effects (if the legal standard is too lax), our model suggests that, from the perspective of the median voter, properly calibrated nonbinding law will often be preferable to the absence of legal monitoring. Thus, our analysis offers a guardedly optimistic perspective concerning the potential for law, even if nonbinding, to serve the interests of the citizenry.

**Supplementary Material**

The online appendix for this paper is available at *Journal of Law, Economics, & Organization* online.

**References**


