

# Comparative Judicial Politics

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## 1. Introduction

It is hard to think of a political system that does not trumpet its commitment to “the rule of law,” based on the principle that citizens are better off when the political system establishes rules for all to follow, rather than subjecting citizens either to arbitrary rule or to anarchy<sup>1</sup>. By entrusting the interpretation and enforcement of laws to legal specialists, the government agrees to abide by its own laws, and the courts can rule against the government to uphold the “laws of the land.” Governments in most political systems are at least rhetorically deferential to this concept.

Less universally embraced is the power of courts not only to enforce, but also to review and potentially to overrule legislative statutes. What is the justification in a democracy for a non-majoritarian body of experts to second-guess the majoritarian institutions charged with drafting the laws in a way that reflects society’s interests? We explore briefly, both normatively and positively, the reasons for and against both kinds of judicial oversight.

Because this chapter is comparative in focus, we spend most of our effort considering reasons for cross-national variation in judicial powers. In the United States, where an independent judiciary is now taken for granted, the state conventions were concerned that the new federal judiciary would be too powerful and insisted on adding additional procedural rights such as jury trials for civil cases. Democratic theory in Europe remained infused with the Rousseauian notion of the “sovereign assembly” far longer. The German jurist, Carl Schmitt, opposed judicial review on grounds that it would lead both to the judicialization of politics and the politicization of the judiciary (Schmitt 1958, cited in Stone 1992). He was, of course, right about these effects. Courts undertaking judicial review make decisions with potentially large political consequences and hence make themselves unelected political actors. And from the judicialization of politics springs the politicization of the judiciary, for nowhere does the judiciary grow in importance without politicians also becoming more interested in influencing judicial appointments and processes (Ferejohn 2002). As we argue below, the differences between the U.S. and European judiciaries have less to do with the prevailing theories of how popular sovereignty relates to jurisprudence, but with the institutional capacities of courts to act independently of political actors.

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<sup>1</sup> Barros (2003) distinguishes between “rule of law” differs and “rule by law” when a government uses laws as a tool of control.

Whether the blurring of lines between the political and judicial is an evil trend to avoid, as Schmitt feared, depends on how one evaluates the countervailing benefits of courts being empowered to protect a hierarchically ordered set of legal principles. Countries that have become democracies since World War II have overwhelmingly embraced the idea of explicit constitutional oversight by a specially designated court, presumably because bad experiences with authoritarian rule have eroded the public's confidence in parliamentary sovereignty, or perhaps in judiciaries enforcing fascist laws (Ferejohn 2002; Ferejohn and Pasquino, 2004).

Insulating courts from political manipulation is another matter. Behind the “veil of ignorance” during a period set aside for constitutional design, any group lacking certainty of future majority status may have an interest in constitutional protection of basic rights. But once in control of a legislative majority, that same group may want to reduce the power of courts to overturn duly legislated policies. Appointing judges for life can protect individual judges from being punished for rulings the government doesn't like, but if the political branches of government can draft new legislation that overturns court rulings or can legislatively change the composition of the court, personal security does not leave room for the courts to play a large autonomous role. Individually independent judges can function collectively as a politically dependent judiciary (Ferejohn 1999). Here, the specific institutional setting matters. Appointing judges by a legislative supermajority has the normatively desirable effect of creating a relatively nonpartisan or at least an ideologically pluralistic bench. But even here, the space for autonomous court action will be determined by the rules governing court re-composition. This is an example of the more general point that rules are powerful in inverse proportion to the costs involved in coordinating against them (Hardin 1989). As we will argue, the government's command of the legislative quorum required to reconstitute the court is the single best predictor of court activism regardless of the court's structure and internal composition. At the same time, this power is not sufficient; judicial independence is also affected by the broader features of the institutional and political setting.

In parts of the third world where social conventions strain to promote socially constructive behavior under conditions of unstable political institutions, judicial independence may be both more important and more difficult to secure. Governments struggling to stay in power may relinquish control of judicial appointments and promotions, or grant judges wide jurisdictional scope, though rarely both at the same time. A government can use friendly judges to harass the opposition (Maravall and Przeworski 2003: 14). But we also know from variation in judicial independence across and within countries that shaky public support for the incumbent government sometimes gives the judiciary opportunities to rule against the government. A more nuanced understanding of the causes of judicial independence can also help us evaluate arguments about its effects.

The rest of this chapter is organized as follows. Section 2 defines more systematically what we mean by judicial independence. Section 3 presents theoretical explanations, normative and positive, for judicial independence. In Section 4 we examine judicial

systems in a classificatory rather than fully empirical way, leaving open many avenues for, and we hope inspiring interest in, future research. We sketch out some of our own ideas for empirical research in Section 5. Section 6 concludes.

## 2. Defining Judicial Independence

We take judicial independence to mean court autonomy from other actors. To the extent that a court is able to make decisions free of influence from other political actors, and to pursue its goals without having to worry about the consequences from other institutions, it is independent. The greater the level of input that these other actors have on the court's personnel, case selection, decision rules, jurisdiction, and enforcement of laws, the less independent it is. In other words, we are equating judicial independence with the court's ability to act sincerely according to its own preferences and judgments.

It is easy to conceive of courts that are at the polar ends of complete independence and utter dependence, at least in hypothetical terms; but in reality, most courts occupy a middle ground on this continuum. More difficult is to assess which factors influence the level of independence and how much weight each of these should receive. We will return to these measurement issues in subsequent sections.

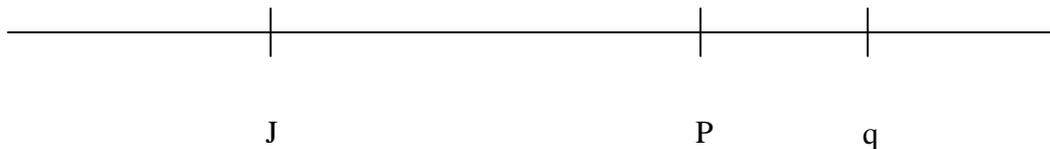
### 2.1 Statutory Judicial Review

We start by distinguishing between two kinds of court actions to which political actors can respond. First, courts may engage in *statutory judicial review*, in which they may determine that actions by regulatory agencies or rulings by lower courts are inconsistent with existing law. Second, supreme courts or constitutional courts may be empowered to rule on the constitutionality of legislation itself. In many countries, this power of *constitutional judicial review* is given to a constitutional court that is separate from the regular judiciary and is deliberately structured to be more autonomous. But in countries such as the U.S., where the Supreme Court is both an appellate court and a constitutional review body, the same court may have different levels of autonomy across these domains. Institutional hurdles for legislatures to override these different types of judicial actions, along with the legislature's ability to influence the court's personnel, will shape the level of judicial autonomy in each domain (Epstein, Segal, and Victor 2002). We consider each in turn.

If a court can determine that the rulings of regulatory agencies or other political actors (e.g., subnational governments, lower courts, etc.) are incompatible with existing law, a legislature has the option, if it has a coherent majority, to pass new legislation that overrides the court's ruling. Spatial models show how the threat of a legislative override can cause a court to implement a policy different from what it would choose if it were completely independent (e.g., Ferejohn and Shipan 1990). Consider, for example, two actors – a Judiciary, denoted by J, and a Parliament (or more generally, a Politician) denoted by P – and a status quo point denoted by  $q$ , which represents a policy chosen by some other political actor, such as an agency. Assume that the Judiciary has the option to choose a policy rather than being limited to an up or down vote; that the Parliament has

the opportunity to respond to the court's decision; and that the Parliament will act in this policy area only once another actor, such as the court, disrupts the current equilibrium and makes the Parliament worse off than it currently is (perhaps because a committee works to protect  $q$  from legislative action). Figure 1 presents this scenario.

**Figure 1**



If the court were independent and did not need to worry about being overridden, it would simply choose to implement  $J$ , its ideal point. But in this example – and in most political systems – the Parliament will have the opportunity to respond to the court's action. Thus, if the court were to try to implement  $J$ , the Parliament would respond by selecting  $P$ . The court, then, realizes that the best it can do is to move policy to  $P$ . In effect, the court is forced to take the Parliament's preferences into account in order to avoid triggering an override; and to do so, it is forced to select a policy that is distant from its most preferred policy.

## 2.2 Constitutional Judicial Review

The second kind of court action we consider, one that is weightier than judgments on agency or lower court rulings, is *constitutional judicial review*.<sup>2</sup> This type of review applies only to supreme courts or constitutional courts that are constitutionally authorized to review the constitutionality of legislation passed by the legislature. The strategic interaction between the judicial reviewing court and the legislature is analytically the same as what we have sketched out for overrides, except that the legislature can overturn the court's ruling only by changing the constitution itself, or by recomposing the courts to get a new ruling. Overturning constitutional review or changing the composition of courts often require supermajorities of the legislature or other cumbersome processes that are intended to give the courts more autonomy in these kinds of deliberations. Whether or not legislative coalitions are sufficiently large either to amend the constitution or to reconstitute the court determines the effective level of autonomy the court can exercise in judicial review.

In the following section we examine normative theories for why the court ought to be independent, either to enforce laws of the land, or to review the constitutionality of the

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<sup>2</sup> Throughout the remainder of this paper, when we discuss “judicial review” we will be referring to constitutional judicial review, unless otherwise noted.

laws themselves. We then return to positive analysis of the institutional and other conditions under which a court is likely in practice to be able to act autonomously from political actors.

### **3. Explaining Judicial Independence**

#### *3.1 Normative Theory*

Even dictators, disingenuously or not, often claim that courts should enforce the “laws of the land.” By allowing the government to make credible commitments not to confiscate wealth, a guardian judiciary might increase the level of private economic investment, reduce the cost of government debt, and promote economic growth (Landes and Posner 1975; North and Weingast 1989; Kerman and Mahoney 2004; Djankov, La Porta, Lopez-de-Lilanes, Schleifer 2003). For these purposes, judicial independence, which allows judges to enforce contracts without the possibility of government interference, may be more important than judicial review, which typically does not protect private parties from each other.

The power of judicial review is less universally accepted, especially among democracies, because it sets the courts above majoritarian institutions in articulating and defending constitutional values above duly passed legislation. The most straightforward normative rationale is probably that everyone can be better off, from behind a veil of ignorance, when society is governed by fairly constructed constitutional principles that stipulate rights and duties, and that these might be better protected, particularly for minorities, by legal experts than by political actors supported by shifting majorities. Even without recourse to a belief in a “natural law” that is waiting for legal experts to uncover on our behalf, it is straightforward to see why a commitment to agreed-upon principles such as political equality may not be best left to political agents whose incentives are to execute that commitment selectively. The underpinning idea is that constitutional principles are more fundamental than legislation that may reflect bargains of convenience at the expense of others’ political rights.

Democracies have a systematic defense against a certain kind of judicial independence in that they insist that the legislature or the people ought to have the last word on court jurisdiction. In practice however, democracies usually support other forms of independence by granting judges lifetime or long tenure, by protecting their salaries, and by making it procedurally difficult to change the composition of the courts.

An additional public interest argument for an independent judiciary rests on the premise that incomplete information about the future effects of legislation on outcomes would lead to excessively conservative laws were it not for the existence of an ex post check on legislative actions. To our knowledge no one has evaluated this proposition empirically. But at least hypothetically, countries with constitutional review may adopt a more risk-accepting approach to legislating without suffering from the effects of ideas gone wrong since the courts can tamp them down in fairly short order (Rogers 2001). This logic breaks down, however, if one worries about judiciaries being unaccountable to the public,

particularly if judiciaries are thought have their own goals that could be out of line with the public interest.

Indeed, against arguments for judicial independence is the long standing European concern that the legislature, as the embodiment of popular sovereignty, is the most suitable organ for making decisions in a democracy. Judiciaries can themselves be mercurial or overbearing, as some American colonists feared and as Nigerian citizens have experienced, and a better solution to the problem of protecting minority rights might be to give minorities a stronger voice in the assembly (Olowofoyeku 1989; Shapiro 2002). Others argue that legal incrementalism tends to frustrate radicals reforms and naturally favors conservative causes (Landfried 1989 cited in Stone Sweet 2002b).

This debate reduces to an empirical question about the trade-offs entailed in a court-based versus an assembly-based protection of political and other rights, and is impossible to answer without intimate knowledge of the political institutions and processes of each country in question. We will return to these questions in the conclusion, but sidestep for now the normative debate by noting that the public good has rarely been sufficient reason for politicians to adopt any particular institutional arrangement. As Stephen Holmes quips, law does not descend upon societies from a Heaven of Higher Norms (Holmes 2003: 53). Or in Jon Elster's words, "nothing is external to society" (1989: 196). If politicians can make themselves better off by reneging, why would they choose to tie their hands? Even if long-term interaction among the same players might increase the possibility that politicians would be willing to delegate oversight authority to the courts to regularize competition, we know from the Folk Theorem that this does not preclude other equilibria. We turn now to positivist accounts that look more closely at politicians' incentives.

### *3.2 Political Independence*

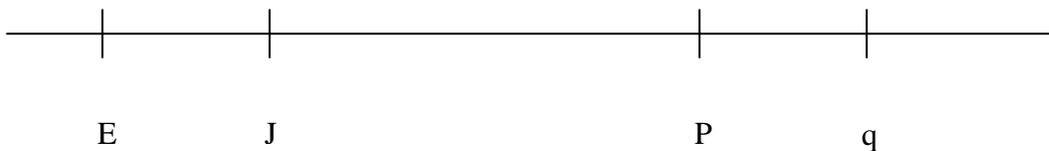
There are multiple explanations for why some judiciaries may be more politically independent or perhaps politically consequential than others.<sup>3</sup> Here, we focus on how political fragmentation gives courts space to take more independent action. Elected politicians have a variety of tools they can use to influence the actions of courts, such as appointing justices to their liking, passing legislation that overrides court rulings, or possibly even amending the constitution. But politicians are only able to undertake those measures to the extent that they are sufficiently coherent as a group to amass the legislative votes needed in each case. This line of argument points to political fragmentation as a crucial factor for predicting judicial independence, or to its converse, political cohesion, for predicting a weak judiciary.

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<sup>3</sup> Some scholars stress different traditions of common law versus civil law countries (for example Djankov, Simeon, Rafael La Porta, Laforencio Lopez-de-Silanes, and Andrei Shleifer, 2003), but we think this may miss deeper institutional reasons for differences in legal politics. Others model judicial autonomy as the result of deliberate delegation by legislatures (Landes and Posner 1975; McCubbins and Schwartz 1984; Graber 1993; Salzberger 1993). We think delegative models often fail to show the conditions under which an independent judiciary would be less trouble for the legislature than the problems they are supposed to solve, even in the short run. More fundamentally, they often fail to show how competing parties could agree to keep their hands off the courts. See for example Ramseyer and Rosenbluth 1993.

According to this point of view, the more fragmented are the political actors in a political system, the more room this provides for the court. In fragmented political systems, courts have less need to worry about reprisal or override.<sup>4</sup> We can revisit the diagram discussed earlier to show this. Assume that, in addition to the actors presented in Figure 1, we now include a separate actor: an Executive, denoted by E, which is distinct from the Parliament. Assume also that the Parliament and Executive must agree on any policy in order to pass a law.

**Figure 2**



In our earlier example, the court was unable to implement its most preferred policy and was forced instead to choose something that was more acceptable to the Parliament. Now, however, with the Executive located to the left of the court and the Parliament to the right, the court is free to pursue its goals unfettered, and can implement J. It is able to do so because the fragmentation among the other political actors would prevent them from joining forces to overturn the court's policy choice.

In the example shown in Figure 2, fragmentation can occur between a legislature and an executive, much as occurs under divided government in a separation of powers system. Fragmentation, however, is not limited to divisions between an executive and a legislature, nor is it guaranteed in such systems. Fragmentation would be much lower, for example, under unified government than under divided government. And fragmentation can occur between two chambers in a bicameral system (if the upper chamber has legitimate powers), or between partners in a coalition. The point is that fragmentation can exist in a wide range of systems. Furthermore, the amount of fragmentation within a political system can vary across time with implications for judicial autonomy.

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<sup>4</sup> Bednar, Eskridge and Ferejohn, (2001) discuss fragmentation as a cause of judicial independence, while Ferejohn (2002) takes fragmentation to be a cause of the judicialization of politics. In fragmented political systems, he argues, governments are less able to reach policy decisions and so these decisions are moved to the courts. This is clearly related to the idea that fragmentation can lead to independence – once courts act, in these systems, fragmentation diminishes the likelihood that governments will be able to respond negatively and forcefully to the court's actions. See also Chavez, Ferejohn, and Weingast (2004).

Consider now the implications of the fragmentation hypothesis for how politicians might use appointment power, legislative overrides, or constitutional revision to keep courts in line with their preferences. In many political systems, and in virtually all common law systems, elected politicians determine which justices get to serve on the courts, but in all cases, political coherence intervenes crucially in determining the effect of appointment power on court autonomy.<sup>5</sup> There is a wide range of possibilities, and it is important to know considerable institutional detail to understand how much coordination is possible among and within the political branches in using appointments to hold the judiciary in check. In some systems, such as Germany, responsibility is shared between federal and state level politicians, with the Bundestag appointing half of the members of the constitutional court and the Bundesrat, representing the states, appointing the other half. Depending on the partisan composition of those units, resulting judicial appointments may be multi-partisan and beyond the ability of any coherent coalition to control.<sup>6</sup> In some separation of powers systems, such as the United States, this responsibility is shared by the executive and the legislature, with the result that the influence is shared and at times favors one actor or the other (Moraski and Shipan 1999). In Russia, similarly, and in France, the president and the leaders of the two legislative chambers appoint judges and members of the constitutional courts. In Mexico, on the other hand, the president heavily dominates the process and selects judges. In South Africa, a nonpartisan Judicial Services Bureau recommends judges to serve on the Supreme Court; but the president then gets to choose some of these himself, and some in conjunction with the chief justice. And in many parliamentary systems, authority lies in the hands of the coalition government, though there is often a supermajority requirement for confirmation that requires a large legislative coalition to support the government's choice.<sup>7</sup>

To the extent that elected politicians agree on who should sit on courts, judicial independence is limited. A coherent legislative majority can also shape the processes by which courts make decisions, thereby influencing the outcomes of judicial actions. In the U.S., for example, Congress has a variety of tools with which to influence how courts review agency actions (e.g., Shipan 1997, 2000). It can give the authority for review to one court rather than another; indicate that certain actions are not reviewable by the courts; specify the grounds on which courts can make decision; determine whether the courts must defer to agency expertise; and set deadlines for action. Another example occurs in the German system, where the Bundestag could allow the courts to review the government's environmental decision but has chosen not to do so (Rose-Ackerman 1995).<sup>8</sup> More generally, legislatures can alter a court's jurisdiction, and thus its discretion. And they can increase the likelihood that courts will have to hear certain

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<sup>5</sup> See Epstein, Knight, and Shvetsova (2001) for a thorough examination of different selection mechanisms.

<sup>6</sup> Furthermore, the requirement of a 2/3 supermajority for appointments effectively grants a veto over appointments to the major political parties (Vanberg, forthcoming).

<sup>7</sup> The states in the U.S. provide another comparative forum for examining judicial selection mechanisms. Not surprisingly, we see a wide range of mechanisms—some judges are appointed by governors, others are appointed by the governor together with the legislature, some are selected by commissions, and others are elected, to list just some of the mechanisms in place.

<sup>8</sup> Rose-Ackerman elaborates: "The Bundestag majority has no incentive to permit the courts to review bureaucratic policy-making. An independent judiciary could make decisions that might be embarrassing to the governing coalition." (1995: 12)

types of cases by providing easier access to courts by citizens (Smith forthcoming). But if politicians are divided among themselves, these powers are muted in their effect.

Cohesiveness among the political actors who might respond to court decisions also increases their ability to use other tools to limit judicial independence. Legislatures may pass laws that limit judicial independence by influencing the courts' personnel in numerous ways – restricting judicial tenure, for example, or cutting salaries – and they will be more able to do so when fragmentation is low. At the same time, lack of fragmentation may not be sufficient to limit judicial independence. Previous legislatures may take actions that protect courts from future legislative action, by putting these things out of the reach of legislatures. Depending on whether court personnel and jurisdiction are established constitutionally or by simple legislative majority or something in between, the political independence of the judiciary can vary substantially.

In the next section, we examine how institutional rules of appointment, override, and constitutional revision shape the interaction between political and judicial actors in different types of judicial systems. The U.S. is somewhat atypical in not clearly specifying judicial review powers in the constitution; but it provides good material for seeing how changes in political cohesion or fragmentation affect the court's scope for autonomous action. We then consider other presidential systems, and parliamentary systems with and without constitutional courts.

## **4. Political Fragmentation in Practice**

### *4.1 The U.S. Judiciary*

Nowhere does the U.S. Constitution state that the judiciary shall be the guardian of the constitution to ensure that the acts of other branches are in constitutional conformity. Supreme Court Justice John Marshall asserted the Court's powers of judicial review in the landmark case *Marbury v. Madison* in 1803, and the other branches of government allowed this statement to stand. The irony of this case is that the Court, composed of Federalist appointees, was at the time in a strategically weak position and refrained from exercising judicial review against the Jefferson administration. Thomas Jefferson's Democratic-Republicans, who had won the presidency and a decisive legislative majority from John Adams' Federalists, were angry that before leaving office, the Federalists had passed "midnight" legislation creating several new federal judgeships and other judicial positions, which they assigned to their partisans. Once in office, the Jeffersonians repealed the legislation creating the judgeships and refused to deliver five of the new judicial commissions that Adams had signed before leaving the White House.

Marbury, one of the Federalist appointees whose commission Jefferson blocked, sued the new government for not delivering the judicial commissions that Adams had authorized. The Democratic-Republicans then repealed the Judiciary Act that had added the federal judgeships. Marshall was astute enough to know that Jefferson and his Congressional

majority could not only draft new legislation, but he knew that Jefferson could ignore a court order with impunity. Marshall's ruling on *Marbury v. Madison* was profoundly political: recognizing his weak bargaining position, he ruled that, while the Supreme Court had the right to review the constitutionality of legislative acts, the repeal of the Federalists' Judiciary Act was constitutional. Marshall established the principle and precedent of judicial review by striking down part of a congressional statute, while not taking the risk of having a court order be ignored by the president. (Clinton 1994, Knight and Epstein 1996; Chavez, Ferejohn, and Weingast 2004).

The Jeffersonians allowed Marshall's bold statement about the Court's constitutional prerogatives to stand, because their concern was not with the principle of judicial review but how it might be used against them. As long as Marshall recognized the strategic reality that a united executive and legislature could withstand judicial encroachment, no further measures were required. Marshall's bold proclamation about judicial review notwithstanding, the Court did not rule unconstitutional acts of the other branches until the Dred Scott decision of 1857 when Congress was deeply divided over slavery and secession.

Chavez, Ferejohn, and Weingast (2004) find, in fact, that the pattern of judicial activism and quiescence follows predictably from the degree of fragmentation or cohesion in the other branches of government. When a legislative majority stands ready to work with a president, attempts by the court to rule against legislation or executive orders would be met with new legislation and possibly worse—attempts to impeach particular justices or assaults on judicial autonomy. They identify some periods of relatively weak courts on account of legislative-executive cohesion, but these periods tend to be short and rare: a few years after the 1800 election, a few years after the Jackson election, about six years after the Civil War, and the early New Deal. Franklin Roosevelt had a sufficiently strong coalition to eventually shift the ideology of the Court, although his more blatant attempt to “pack” the Supreme Court with sympathetic justices failed. As de Figueredo and Tiller (1998) have pointed out, political alignment of the House, Senate, and President makes for weak courts. Much of the tension between the judiciary and other branches of government occurs when appointees of a previous era confront a new configuration in the political branches (Dahl 1957). Courts reduce their activism when faced with unified opposition from the other branches, and even more when appointments begin to bring the judiciary in line with the elected branches.

#### *4.2. Presidential Systems Outside the U.S.*

The argument about the effects of political fragmentation on judicial powers fits the U.S. case particularly well, but it also characterizes some other presidential systems. The heyday of Argentina's high court was between 1862 and Juan Peron's presidency in 1946. Different parties controlled the presidency and legislature, and an internally heterogeneous majority party governed the legislature itself. Presidents were unable to pack the courts or purge uncooperative justices, and respected the constitutional provision that granted judges life tenure during good conduct (Chavez, Ferejohn, and Weingast 2004: 19). During this period the Court overruled both the legislative and executive

branches in defense of individual rights, freedom of the press, and on behalf of political dissidents. When president's party gained control of both legislative houses between 1946 and 1983, however, the Supreme Court kept a low profile. Alfonsin's party that replaced Peron was considerably weaker on account of its minority status in the Senate, and the judiciary declared unconstitutional a number of Alfonsin policies. Menem replaced Alfonsin in 1989 with a far stronger administration because it commanded majorities in both houses of Congress. Not surprisingly, by the fragmentation logic, the courts became docile (Iaryczower, Spiller, and Tommasi 2002; Chavez, Ferejohn, and Weingast 2004).<sup>9</sup>

For other presidential systems as well, we would expect that, as a first approximation, judicial activism would be inversely related to the coherence among the political branches. The Mexican jurist Pablo Gonzalez Casanova and comparative judicial scholar Carl Schwarz have both found that the Mexican Supreme Court has a history of finding against the government with some regularity (cited in Larsen 1996; see also Hale 2000). We would want to know not only how seriously those rulings inconvenienced the government, but also if those rulings cluster in times when the government's capacity for overruling the Supreme Court is relatively low.

The Philippine Supreme Court before Marcos declared martial law in 1972 was regarded as "one of the world's most independent, important, and prestigious supreme courts" (Tate and Haynie 1993). Presumably it was precisely because Marcos could not control the other branches of government that he used the military to shut them down and replaced them with his friends and relatives. Needless to say, Marcos's hand picked court was compliant, as were the courts of Bhutto's and Zia's military regimes in Pakistan (Tate 1993). But the fluctuation of court activism in tandem with the court's expectation of the president's ability to command a legislative majority seems a general pattern (Helmke 2002).

The general point is that fragmentation gives courts a certain measure of independence. When other political institutions are more fragmented, courts have less to worry about in terms of override or reprisal. As a result, they are free to challenge the government.

#### *4.3 Judicial Powers in Old European Democracies*

Given the broad public appeal of robust political and economic rights, why is judicial review not universal among democratic regimes? Our answer has two parts. Institutionally, the fusion of the legislative and executive branches in parliamentary systems removes the possible space between branches for autonomous court action to emerge on its own. But institutions represent political choices, and even parliamentary systems can choose to adopt organs of judicial review, as we will see in the following

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<sup>9</sup> Helmke (2002), while providing an account that is consistent in some ways with the fragmentation story spelled out in the text, emphasizes a different angle. She argues that although Supreme Court justices nominally were guaranteed independence through lifetime tenure, from the 1930s through the 1980s, the membership of the Court was routinely changed with each regime transition. As a result, justices began to behave strategically, ruling against the outgoing party and in favor of those who were soon to take office.

sections. As long as governments retain voter trust in their ability to uphold basic rights, the demand for institutional adjustment may remain dormant.

The effects of institutional coherence on judicial discretion are clearest in Westminster countries where a single majority party typically controls the executive. Sir Edward Coke, Chief Justice of the Court of Common Pleas stated in 1610 that “in some cases the common law will control acts of Parliament and sometimes adjudge them to be utterly void” (Mezey 1983: 689). But this dictum, which found fertile soil in America’s institutional environment, never became common practice in the UK.

To be sure, the Act of Settlement of 1701 that protected judges from being dismissed on grounds other than judicial malpractice introduced a measure of judicial independence. Kerman and Mahoney (2004) find that share prices increased following the Act because investors were assured that the courts were in a strong position to enforce contracts. Salzberger and Fenn (1999) find that UK judges are promoted on the basis of how frequently their opinions are reversed, rather than on the basis of how often they find against the government. But it is also true that the judiciary takes on the government only rarely, and on issues that are of relative minor political significance (Salzberger 1993; Shapiro 2002; Chalmers 2000). This is precisely what we would expect in equilibrium. With legislative and executive functions of government organized hierarchically, court rulings at odds with the legislative majority can easily be overturned.

Parliamentary countries with proportional electoral rules are more fragmented than Westminster systems in the sense that multiple parties with distinct constituencies and platforms join together to form coalition governments. Even there, however, the legislative parties in coalition operate according to “treaties” that the courts have little reason to believe they can overturn without being overruled as long as the coalition government is in power. Because the legislative and executive branches remain fused, the courts have little room for maneuver.

If the court’s capacity to review legislation were high principally in presidential systems, especially under conditions of divided government, the case for the political fragmentation hypothesis would seem especially strong. Among parliamentary systems, however, variation in levels of political fragmentation alone is a poor predictor of judicial independence. In some European countries such as Switzerland, Belgium, and Luxembourg, judicial review is explicitly prohibited in the constitution. The possibility of constitutional review exists in Scandinavian countries and the Netherlands but is rarely employed. Other countries in Europe and elsewhere adopted constitutional courts during the decades after World War II with the express purpose of protecting political and economic rights: Austria, Germany, Italy, France, Spain and Portugal as well as Canada, Israel, Korea, South Africa, and post Communist countries in Eastern Europe. Clearly this latter is a very different path to constitutional review than the informal ebb and flow of judicial powers that can occur in politically fragmented systems.

#### *4.4. Constitutional Courts in Europe and Beyond*

In what Bruce Ackerman (1997) calls the “new beginnings” of constitutional democracy in the post World War II era, the choice of judicial regime seems to reflect a compromise between the American and old European models. Most new constitutions include provisions for judicial review, but within the context of a separate constitutional court that is independent of the regular judicial system and is more circumscribed by the political branches. In this section we consider only briefly why some countries have opted for the constitutional court model over the U.S. or older European models. Our greater concern, which we sketch out here but leave in large part to future research, is with the effects of political cohesion or fragmentation on how these courts function in practice.

Ferejohn and Pasquino (2003: 250) note that "In all cases the constitutional court has developed a jurisprudence aimed at, and increasingly effective at, protecting fundamental rights." Constitutional courts have not only placed important limits on the ordinary political processes, but they have done it increasingly well. Perhaps the popularity of the courts have grown with their demonstrated effectiveness in protecting rights, and the governing coalition has less political room for undermining court autonomy.

*Anti-Authoritarian Backlash.* The European concept of the constitutional court was developed by the Austrian jurist Hans Kelsen after World War I. Unlike U.S.-style judicial review, which Kelsen regarded as giving the U.S. Supreme Court creeping legislative powers, Kelsen’s narrower view of the court’s role in guarding the constitution was potentially a better fit with the European philosophical commitment to sovereign assemblies (Kelsen 1942; Stone). While Austria and Czechoslovakia adopted constitutional courts in 1920, Kelsen’s ideas did not find broader resonance in Europe until after World War II, when all of the countries that had experienced fascist regimes established constitutional courts (Brzezinski 1993). Following Austria’s decision to re-implement its constitutional court in 1946, Italy (1947) and the Federal Republic of Germany (1949) followed suit.

Italy and Germany seem to have adopted constitutional courts partially in response to “a deep distaste for the dismal past” (Merryman and Vigoriti 1966) and to guard citizens against the possibility of a political hijacking of the sort that Mussolini and Hitler had been able to pull off (Adams and Barile 1953; Cole 1959: 967).<sup>10</sup> As Franz Kafka memorialized in fiction, freedom from law gives totalitarianism its means to rule arbitrarily (Dyzenhaus 1998: vii).

In both countries, however, the legislative opposition was more eager for judicial powers than the ruling coalition. In Italy it was only after the Socialists and Communists gave up hope for commanding a legislative majority that they stopped dragging their feet on

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<sup>10</sup> A large percentage of the “civil liberties cases” in Italy have involved the constitutionality of legislation enacted under Mussolini. Cole says that 1/3 of the first 40 decisions of the Court involved the constitutionality of laws and regulations of Fascist vintage (Cole 1959: 980).

passing enabling legislation.<sup>11</sup> In both countries a legislative supermajority approves the members of the constitutional court, which ensures a broadly trans-partisan or nonpartisan bench (Cole 1959: 969). To be sure, politicians have created ways of dealing with the supermajority requirement, such as the *lottizzazione* in Italy whereby the principal parties agree to split court appointments among themselves. This also occurs in Spain. While this means that the court will be multi-partisan if not non-partisan, it nonetheless remains outside the control of any single party.

The establishment of constitutional courts in Greece in 1975, Spain in 1978, and Portugal in 1982 followed a similar pattern to that of Italy and Germany. With the collapse of authoritarian regimes in those countries, there was strong public support for a judicial counterweight to potential collusion by the other branches of government. Majority parties that otherwise might have resisted this impulse might well have felt vulnerable to electoral backlash.

Decisions to adopt constitutional courts in former communist Eastern Europe and in other former authoritarian regimes look broadly similar. Following the collapse of the communist regime in the late 1980s, the Polish legislature established a new tribunal with substantially stronger powers of judicial review including the authority to issue “generally binding interpretations of statutes” (Brzezinski 1993: 186). Between 1989 and 1994 the Tribunal found unconstitutional 40 of 60 statutes it reviewed (Schwartz 1999: 201-202). A simple legislative majority chooses the Tribunal’s members to nine-year terms it is likely that the Tribunal will sometimes represent the government’s coalition and at other times will represent the coalition of the previous government. This would suggest a wave-like pattern in court activism. In the early years the Tribunal’s rulings could be overturned by a two-thirds vote in the legislature, but in the 1997 constitution this is no longer stipulated (Rose-Ackerman 2004: 73). To overrule the court the legislature must either draft new legislation or revise the constitution, depending on the nature of the dispute.

In Hungary a group of roundtable negotiators created a constitutional court in 1989, five months before the first legislative elections under the new post-communist regime. To prevent the incumbent government from dominating the court, members were to be appointed by a representative committee of the National Assembly, and approved by a two-thirds vote by the full legislature (Pogany 1993; Rose-Ackerman 2004: 76). In the early years of the new regime the court was active, striking down laws even before the first legislature began to sit. The legislature did not reappoint many of the first justices when their terms expired in 1998 and the new court has been more conservative about using natural law to decide cases where the constitution is ambiguous (Rose-Ackerman 2004: 80). It may be that the consolidation of coalition governments reduced the government’s ability to organized legislative majorities to overturn bills.

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<sup>11</sup> For eight years the legislature failed to vote implementing legislation until it became clear that the Christian Democrats (DC) were consolidating their political strength (LaPalombara 1958; Volcansek 1999).

In Russia, Yeltsin shut down the constitutional court in 1993 that parliament had established two years earlier, and later established one that would be easier for the president to manage. Instead of being elected by the Dumas, the court's 19 members would be chosen by the president and approved by the Federation Council where the president has greater bargaining leverage (Remington 2002). Strong presidents have subsequently kept the court from functioning with much vigor.

In Korea, three constitutions between 1948 and 1987 paid lip service to judicial review, but the executive branch overpowered any attempts of the judiciary to exercise its constitutionally stated prerogatives. In 1988, following massive anti-government protests that ended decades of autocratic rule, Korea adopted a constitutional court on the European model along with democratic reforms. There was widespread skepticism about the independence this court would exhibit, given that all nine justices are appointed by the President, though three of the nine must be from among nominees submitted by the National Assembly and three from among nominees submitted by the Chief Justice of the Supreme Court (West and Yoon 1992). The court seems to have understood its strategic location: it held unconstitutional fourteen of the 37 pieces of legislation it reviewed between 1988 and 1991 but, as Yang notes, the court was self-restrained in dealing with politically charged cases (Yang 1993). Still the court's room for maneuver made the government uncomfortable, particularly as parties began alternating in power and the composition of the court became harder for the incumbent government to control. In the early 1990s the ruling party considered a constitutional amendment to curtail the jurisdiction of the court but backed down in the face of strong public objections.

As the apartheid regime in South Africa collapsed, a broad coalition supported judicial authority to protect political rights: not only the many whose rights had been infringed in the past, but also the outgoing whites who wanted to ensure themselves a soft political landing. In 1986, two years after declaring that a bill of rights would be inconsistent with the political tradition of the Afrikaner, the minister of justice commissioned a study group on human rights. The 1994 constitution following the abolition of apartheid included strong provisions for judicial review (Hirschl 2000). A more representative group of judges eventually replaced the white male judges that sat on the first constitutional court (Sarkin 1999). But the South African case shows that judicial powers may be strengthened not only at the instigation of newly empowered majorities, but also by outgoing governments who feel newly insecure.

*The Non-Authoritarian Cases: The Legislative Politics of Minority Protection.* In some countries, such as France, Canada, and Israel, the constitutional role of courts was strengthened at the instigation of political actors who were, or expected soon to be, out of government and therefore for whom the political insulation from courts was no longer of value. As part of the minority, their interests more closely matched those of the public whose interest in constitutional protections may routinely be higher than those of the ruling government.

Post-revolution France has oscillated between the attractions of legislative sovereignty and strong executive power, and has experimented periodically with its constitutional

design to adjust mix. The 5th Republic under Charles de Gaulle was meant to correct the problems of weak governments in the hands of unstable legislative majorities. Of judicial review, de Gaulle's opinion was that "Three things count in constitutional matters. First, the higher interest of the country...and of that I alone am judge." The other two constitutional matters for de Gaulle were political circumstances that had to be taken into account, and legalism, for which he reserved the greatest disdain (cited in Beardsley 1975: 212). The President, Assembly, and Senate each select three of the 9 members of the court for 9 year terms, but the Gaullists in the early years of the 5<sup>th</sup> Republic controlled all three branches. The only way to invoke the Conseil's review powers was to appeal either to the president or to majority leaders of the parliament.

Charles de Gaulle left office in 1969 and in the hands of weaker administrations the provision for constitutional review took new shape. Once the Gaullists' legislative majority narrowed, space opened for the court to act with some autonomy. In 1971, in what is sometimes known as France's *Marbury v. Madison*, the court struck down a government bill that restricted freedom of political association (Morton 1988). More important was a 1974 amendment of Article 61 of the constitution, initiated by a government that saw the time was coming when it would be out of government. Passed by the requisite 3/5 legislative supermajority, the amendment extended the constitutional court's authority to rule on the constitutionality of a law upon petition by any sixty members of the National Assembly or Senate. Prior to that, only the President, the Prime Minister, the President of the Assembly, or the President of the Senate could refer a law to the court (Deener 1952). Since all four were usually members of the governing coalition, they were unlikely to submit one of their own laws for review. This amendment has increased the court's scope for action, as we will discuss later.

Israel's secular parties (Labor, Meretz, the Liberal Party's section of Likud, and others) established judicial review in Israel in 1992 after they had collectively lost legislative seat share in successive elections to religious and minority parties. The Shas party alone, representing Orthodox religious residents of development towns and poor urban neighborhoods, increased its seat share from 4 Knesset seats in 1984 to 10 in 1996 and to 17 in 1999, making it the third largest party in the Knesset after Labor and Likud (Hirschl 2000: 109). The situation was much changed from 1949, when the Mapai, the precursor to the Labor party representing secular middle class voters, was an unchallenged ruling party and had no reason to delegate authority to the judiciary. The parties representing secular voters formed a coalition to establish a strong judicial oversight body that would protect their constituents' political and economic rights from encroachment by a shifting parliamentary majority (Hirschl 2000; Hofnung 1996).

#### *4.5 Consequences: Judicial Politics in Constitutional Court Systems*

What have constitutional courts done in practice, and how does their authority differ from that of supreme courts of the U.S. type? Constitutional courts themselves vary in their scope not only by their enabling provisions but also inversely by the coherence of the political branch(es). Given super majority rules that are typical for appointing members of constitutional courts and for changing constitutions, however, we would expect only

extraordinary levels of parliamentary coherence to have an effect on constitutional court behavior.

The current French constitution, which combines presidentialism and parliamentarism, gives the court room for maneuver when the president does not control an extraordinarily large parliamentary coalition. Legislative minorities have made ample use of the amendment of 1974 that allows any group of 61 legislators to invite the court to review legislation. The Socialists, who had opposed the amendment, regularly used the petition provision to oppose the d'Estaing's government. by appealing its legislation to the Conseil. It was the conservatives' turn in the early 1980s when Mitterand's government began trying to nationalize industries (Morton 1988). Upon appeal from parties on the right on behalf of share holder constituents, the court's ruling added 28% to the government's cost of nationalization by requiring fuller compensation to the previous private owners than the government had intended (Stone 1992).

Even for coherent coalition governments, courts may have additional scope for action when the court's preferences are closer than the government's to those of the voting public's. In an argument similar to Susanne Lohmann's about how public opinion can increase the effective independence of the central bank, Vanberg (2001, forthcoming) notes that the German government is more likely to alter legislation in anticipation of a possible negative ruling of the constitutional court when its position is less popular and when the process is transparent.

## **5. Measuring Independence Empirically**

The previous section provided a typological sketch of the workings of, and variation among, different types of judicial system, and considered some anecdotal evidence to check these claims. In this section we think about how propositions of the sort we have advanced might be tested empirically with greater rigor in future research.

As we noted earlier, one of the difficulties in grappling with the concept of judicial independence lies in measuring independence. We can identify various aspects of this concept – the ease with which a government can respond to a court ruling, for example, and the set of alternatives the government has for responding to this ruling – but identifying these aspects does not directly provide a measure that we could use in tests of independence. Furthermore, the various tools that governments can use in response to a court decision tend to exist in different combinations in different political systems, and it is not clear how much weight should be assigned to each of these tools.

What scholars can do, however, is to rely on surrogate measures. That is, rather than directly measuring independence by taking account of, and somehow adding up, its constitutive factors, we can look for a measure that reflects the behavior we would expect to find for different levels of independence. Two potential measures strike us as appropriate and useful. First, we can examine how often the court overturns the actions of the government. Second, we can examine court reactions to governmental attempts at

nationalization. We consider each in turn, and then identify conditions under which these actions should be more likely to occur.

### *5.1 Overturning the actions of government*

Political systems vary in the extent to which government can override judicial decisions and the ease with which governments can change the court's personnel. Both of these types of actions play an important role in establishing independence: to the extent that the government maintains dominance over the personnel on the court or can easily override its actions, we would expect to see fewer instances of the court behaving independently. And one indication that a court is behaving independently is that it is willing to overrule the government's actions. Consequently, one way to compare levels of independence across political systems is to see how often the court overturns government actions. More specifically, scholars can examine how often constitutional courts, or at least courts with constitutional powers (in countries that do not have separate constitutional courts), rule that laws passed by the government are unconstitutional.

There is, of course, a potential downside to such a measure. Courts will anticipate government reprisals; and to the extent that the court knows that the government will respond to and perhaps even push the court, it will not take actions that invite such reprisals. Put differently, in equilibrium, we might expect to find that the court never rules against the government.

While this is a valid criticism, studies of strategic anticipation have produced mixed results thus far – the jury is still out, so to speak. In one of the most comprehensive statistical examinations of this phenomenon, Segal (1997) found almost no evidence of judicial actors in the U.S. modifying their behavior in anticipation of future congressional actions. On the other hand, Bergara, Richman, and Spiller (2003), examining the same data, do find evidence that under certain conditions judicial actors do behave strategically by anticipating future overrides. Rich case studies by Epstein and Knight (1998) reach a similar conclusion, as does an earlier statistical study by Spiller and Gely (1992).<sup>12</sup>

More importantly, two additional factors need to be taken into account. First, as we have already noted, the tools that government against the courts can use differ in severity. All impose some costs on courts, but some impose greater costs than others. Being fired, for example, is more costly than being overturned. Courts will then weigh the costs they might face against the potential benefits of reaching a policy outcome that they prefer. The ratio of these costs to these benefits is likely to be larger in political systems where the court has less independence, and smaller in countries where the courts have a great deal of independence.

Second, and related to the first point, it is possible that the court will make “mistakes” in assessing these costs and benefits and, in particular, in the likelihood of being punished for actions that it takes. Spatial models that operate under the assumption of complete

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<sup>12</sup> Furthermore, numerous studies demonstrate that Congress does respond to judicial decisions (e.g., Eskridge 1991, Spiller and Tiller 1996).

information typically predict that the action being investigated will never occur – agencies never take actions that invite legislative reprisal, committees never introduce bills, and so on. At the same time, however, these models also can provide insights into the conditions under which the action in question might occur. Probably the best example of this can be found in Cameron’s (2000) masterful examination of presidential vetoes in the U.S. Cameron begins his analysis with a perfect information model that, while providing other insights in the veto process, also predicts that, in equilibrium, vetoes will never occur, because the legislature and the president will perfectly anticipate each other’s preferences and actions. He then shows how introducing uncertainty – over the location of the legislator who will be pivotal in overriding the veto, or on the president’s preferences – can trigger vetoes.

In much the same way, uncertainty about the likelihood of reprisal can lead the court to underestimate that costs that it might face if it takes actions that oppose the government. If, for example, the court has a mistaken notion of the government’s preferences, or if it underestimates the likelihood of government reprisals, we would expect it to be more likely to challenge the government. In effect, then, the court is making a mistake – had it known that the government would respond, and that the costs would exceed the benefits, it would not have acted. Mistakes, or uncertainty about reactions, are more likely to occur under some conditions than others, and we explore these conditions below. For now we just establish that because of this possibility, court actions overturning the government can serve as a useful measure of judicial independence.<sup>13</sup>

## 5.2 *Nationalizations*

In addition to ruling on the constitutionality of laws passed by the government, courts are also called upon to rule on other actions that the government takes. One example of this occurs when the government nationalizes segments of the economy. The court can, if it chooses, strike down these actions. Particularly when the judges on the court are of different ideology, or party, or even outlook from the government – and to the extent that these judges are independent – we would expect that courts would be more likely to overturn these sorts of actions. Our knowledge of government coherence and institutional rules of court recomposition provide us with *ex ante* expectations of how much autonomy courts should have *vis-à-vis* the government. We think a fruitful line of empirical inquiry would be to see how well our expectations comport with how aggressive or quiescent courts were in protecting minority rights. How courts have

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<sup>13</sup> A significant literature in the U.S. focuses on the specific question of whether the Supreme Court is a partner with the elected branches of government or rather serves a counter-majoritarian function. The seminal paper in this area is Robert Dahl’s (1957) “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,” in which he establishes that the Supreme Court rarely remains out of step with the other branches for very long, mainly because these other branches have the power to appoint members to the Court. A long line of research has examined this question, sometimes supporting Dahl and sometimes reaching the opposite conclusion (e.g., Funston 1975, Gates 1992). Most recently, see Epstein, Knight, and Martin (2001) for how strategic behavior provides an alternative explanation for Dahl’s conclusion. They argue that the Supreme Court is in step with other political actors not because of replacement, as Dahl suggested, but rather because Supreme Court justices make decisions strategically to ensure that they are not out of step.

responded to governments' nationalization schemes would be one such line of investigation. Again, courts may take such actions because they consider that the benefits of doing so or because they have made mistakes in interpreting the preferences of other political actors. We turn next to an examination of when such mistakes will be likely to occur.

### *5.3 Elections and Independence*

We have noted that to the extent that political actors all perfectly anticipate each other's actions, we should not expect to see any court decisions that run counter to the government's preferences. But we also argued that the court might make mistakes. It would seem useful, then, to identify the conditions under which these mistakes are most likely to occur.

Most obviously, courts are most likely to make mistakes when they are uncertain about the preferences of other governmental actors. Perhaps the highest levels of this sort of uncertainty occur right after an election, when new political actors take office. The court, accustomed to dealing with the previous political officeholders, will be less certain about the exact preferences of the new politicians, and may also be uncertain about how far the new politicians will turn in order to punish the court. In other words, the courts will be uncertain about the potential costs that they will face.

Any election, of course, can increase uncertainty about preferences. But courts are more likely to be uncertain when an election leads to a major shift in party control of government. This can occur when a new party takes over in a single-majority system, with a left party being replaced by one on the right, or vice versa; when an election brings new partners into a coalition; or when a shift occurs from divided to unified control of government. In any of these cases, there will be a period where the court is trying to figure out exactly what the government will, or will not tolerate. And this uncertainty is likely to lead to more judicial actions that challenge the government. Hence, we should expect to find more instances of courts overturning governmental laws or ruling against nationalizations right after elections.

## **6. Conclusions**

This essay has not attempted a comprehensive survey of the vast literatures on the nexus between politics and law, but has primarily focused instead on the narrower subject of judicial independence: what is it, how does it arise, and how do we know it when we see it? We have sketched out an argument for why judicial autonomy ought to relate inversely to the level of coherence in the political branch(es) of government, relative to the level of coherence needed to overturn the court's rulings.

Though this seems simple enough, it is harder than one might suppose to gauge judicial independence empirically because, if courts and legislatures anticipate the other's response in their own actions, there may be little conflict that erupts in public view.

Without knowing the ideological position of the court or of the political coalition trying to hold judicial interference at bay, the absence of judicial findings against the government could mean either that the court had restrained itself rather than to invite legislative override, or that the legislature had incorporated the court's position in its laws rather than to invite a negative judicial ruling. In fact, if the actors have perfect information about the other's preferences and if they behaved strategically, we ought never to see legislative overrides and negative judicial rulings. One is reminded of the French constitutional court, which has explicitly incorporated consultation between the court and government with the result that laws include the anticipated reactions even before they are promulgated.

Although strategic anticipation certainly complicates empirical analysis, we nevertheless think it would be useful to take advantage of ideologically polarized or low information situations, such as following new elections, to look for episodes of failed self-restraint. Even in France, Stone Sweet (1992) tells of conflicts between the constitutional council and the government in periods when members appointed by the previous government dominated the court. We might also expect that courts and governments might have relatively poorer information about the other's likely behavior following elections.

We have left many questions unanswered. Perhaps the most burning issue we have left on the table is what accounts for the national variation we observe in provisions for constitutional review in the first place. Political fragmentation seems to go far in explaining the correlation between divided governments and judicial autonomy. But why do some systems without particularly fragmented political systems establish constitutional courts, or for that matter, why do majorities in parliamentary systems without constitutional courts so often restrain themselves from infringing on the rights of minorities? We are inclined to think that electoral competition, and the fear that majority coalitions have of losing support at the margins, is a common underpinning in the judicial politics of all democracies. Given the importance to judicial autonomy insufficient legislative coherence for possible overrides, competitive elections are likely to be more fundamental than the trappings of "independent" courts for rule of law and minority protection in developing countries.

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