BUILDING REPUTATION IN CONSTITUTIONAL COURTS: PARTY AND JUDICIAL POLITICS[•]

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ABSTRACT

This paper explains how specialized constitutional courts struggle between two different external audiences, the political audience and the judicial audience. We argue that achieving supremacy over other higher courts constrains the ideological goals of the constitutional judges. Depending on the political regime (democracy versus authoritarian regimes) and on other institutional features, dissent rates vary across time.

I. INTRODUCTION

Specialized constitutional courts have expanded all over the world in the recent decades. Originally conceived by Hans Kelsen for Austria and later adopted in post-war Germany and Italy, they have expanded to Southern Europe when the right-wing dictatorships collapsed in the 1970s, to many Asian countries with the political reforms of the 1980s, and to former socialist countries in Central and East Europe the 1990s. Even some Latin America countries, typically influenced by US constitutional arrangements, have adopted some version of the Kelsenian model, such as Chile (in 1981) and Colombia (1991). The most notable exceptions in Europe are the Benelux, Switzerland and Scandinavian countries that have not (yet) adopted a Kelsenian model. Initially, France embraced a much narrower judicial review of legislation in accordance with its traditions, but its court is coming to resemble the specialized model.[1]

[•] We thank (…)and the seminar participants at the Hamburg University School of Law, the University of Basel Department of Economics, and the Italian Society of Law and Economics (SIDE, Florence, 2009). Excellent research assistantship was provided by (…). The usual disclaimer applies.

[1] See Alec Stone Sweet, The Politics of Constitutional Review in France and Europe, *International Journal of Constitutional Review* 5 (2007) 69. See also Alec Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, Oxford University Press, (1992) and Henry J. Abraham, *The Judicial Process*, Oxford University Press, (1998) [discussing of the French constitutional court in chapter 7]. The introduction of concrete review after the 2008 constitutional reform will increase the similarities between the French *Conseil Constitutionnel* and the other Kelsenian courts in Europe.

The design of specialized constitutional courts in the Western world has been influenced by the ideas and legal theories of Kelsen.[2] His model of the "negative legislator" has been adopted by many (civil law) countries.[3] In his view, ordinary judges are mandated to apply law as legislated or decided by the parliament. There is a strict hierarchy of laws that makes judicial review by a constitutional court incompatible with the subordination of the ordinary judges to the legislator. Hence, only an extrajudicial organ can effectively restrain the legislature and act as the guarantor of the will of the constitutional legislator. The Kelsenian model proposes a centralized body outside of the structure of the conventional judiciary to exercise constitutional review. This body, typically called a constitutional court, operates as a negative legislator because it has the power to reject (but not propose) legislation.

The application of the Kelsenian model in each country has depended on local conditions, and therefore, the competences and organization of constitutional courts are usually much broader than a simple "negative legislator" as idealized by Kelsen himself. *Ex ante* abstract review of legislation (i.e., before promulgation and framed outside of a specific case) has been extended to *ex post* abstract review (i.e., after promulgation) in many countries, including the benchmark courts of Austria and Germany. Abstract review has been conjoined with concrete review, allowing individual citizens to access the constitutional courts, either directly or indirectly (in distinct forms of general or incidental referrals from other courts). France, the last bastion against concrete review, has succumbed recently.[4] At the same time, most constitutional courts have expanded ancillary powers in different, but important, areas such as verifying elections, regulating political parties (declaring them illegal or regulating their activities), and other relevant political, judicial and administrative functions.[5]

Constitutional courts have to address two different audiences. One is naturally the political audience: The other branches of government, and the political establishment more generally. Constitutional courts are inevitably political actors. Even in the narrow sense of a Kelsenian "negative legislator", they have the power to reject legislation, and hence their decisions have political consequences. The constitutional judges are political agents, not least because the appointment mechanism is usually politicized and has sometimes resulted in stable *de facto* quotas for the different influential political parties. The interaction of constitutional judges and the political audience is not fully understood, but depends on several hypotheses about judicial behavior. First, some believe that judges tend to share the same preferences than their appointers, meaning that they have the similar views about legislation and constitutional interpretation. Second, judges might be primarily concerned about their future once the term in the court is over. Even if they have life tenure, they might care about what happens once they retire in

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[2] For a general discussion, see A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press, (2000). Also see Hans Kelsen, Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution, *Journal of Politics* 4 (1942) 183.

[3] The notion of a "negative legislator" is based on the idea that the court expels legislation from the system and therefore shares legislative power with the parliament.

[4] Constitutional reform law of July 2008. Concrete review is now possible according to article 61-1 of the French Constitution as the *Cour de Cassation* and the *Conseil d'Etat* can refer to the *Conseil Constitutionnel* in matters of law (to be developed by statute soon).

[5] See Tom Ginsburg, Beyond Judicial Review: Ancillary Powers of Constitutional Courts, in Tom Ginsburg and Robert A. Kagan (eds.), *Institutions and Public Law* (2005) and Tom Ginsburg And Zachary Elkins, *Ancillary Powers of Constitutional Courts,* 87 Texas Law Review 1431 (2009).

terms of prospective appointments for other prestigious governmental posts or profitable legal consultancy jobs. The interaction between politics on the one hand and constitutional and statutory interpretation on the other has been the focus of much literature on the US Supreme Court and most constitutional courts, both theoretical and empirical.[6] Many scholars have discussed the extent to which judges advance their own ideology sacrificing formalism and originalism,[7] while others have considered the judicialization of the legislative body; other branches of government try to anticipate the decisions of the courts and adjust legislation to avoid setbacks with constitutional review.[8] The political dimension of constitutional review has been acknowledged and is subject to an intense legal debate.

A second audience that a constitutional court faces is other courts, and this judicial audience has not been subject to extensive analysis in previous work. In traditional civil law countries, constitutional courts have been inserted as a "special court" into a legal system that traditionally relied on higher judicial courts. Even though civil law countries usually have different specialized courts with well defined jurisdictions (such as administrative, tax or labor courts), these tend to be depoliticized and traditionally have been fairly deferential to the other branches of government. The constitutional courts appears more political in nature and different from regular courts, hardly surprising since insulation of ordinary courts from politics was one of the goals of the Kelsenian theory. However, the resulting politicization of the constitutional court may create a problem in terms of acceptance and deference of the higher judicial courts with respect to the constitutional court. Furthermore, there may be institutional rivalries between the top courts of the ordinary jurisdiction, accustomed to its superior place in the judicial hierarchy, and the new constitutional court.

Conflicts between the supreme court and the constitutional court have taken place in many countries and they usually arise from the supreme court rejecting the supremacy of the constitutional court.[9] These conflicts are usually exacerbated once concrete review is developed to a full extent since the interaction between judicial courts and the constitutional court is more intense, and coordination between the two systems is essential. The natural goal in this context is to achieve supremacy as the

[6] For a general discussion, see Barry Friedman, *The Politics of Judicial Review*, 84 *Texas Law Review* 256 (2005), and Matthew D. McCubbins and Daniel B. Rodriguez, The Judiciary and the Role of Law: A Positive Political Theory Perspective, in B. Weingast and D. Wittman (eds.), *The Handbook of Political Economy* (2006).

[7] For example, see the models developed by Tracey E. George and Lee Epstein, On the Nature of Supreme Court Decision Making, 86 *American Political Science Review* 86 (1992) and by Jeffrey R. Lax and Charles M. Cameron, Bargaining and Opinion Assignment on the US Supreme Court, 23 *Journal of Law, Economics and Organization* 276 (2007).

[8] See Alec Stone Sweet, *Complex Coordinate Construction in France and Germany*, in C. Neal Tate and Torbjörn Vallinder (eds), The Global Expansion of Judicial Power, NYU Press (1995) (explaining the judicialization of the legislative process by consequence of referrals to the court; the constitutional courts are no longer a "negative legislator" only, they have and exercise creative legislative powers to recast policies, shape legislative solutions, and promote more precise terminology).

[9] Lech Garlicki, Constitutional Courts versus Supreme Courts, *International Journal of Constitutional Law* 5 (2007) 44.

highest court in the country; in other words, the constitutional court aims at securing the control of a traditionally depoliticized and deferential judicial system.[10]

Our paper explicitly addresses the interaction between the political and the judicial dimensions at the level of the Kelsenian constitutional courts. We focus on jurisdictions with a distinct constitutional court sitting alongside a supreme court, though of course there are also intra-judicial politics within unified court system. However, the problem is of much less importance since there is no potential dispute between the supreme court and the constitutional court for supremacy since they are the same. Furthermore, there is no obvious difference in terms of institutional structure, since all judges in a unified court system are appointed through the same process (which is politicized in the United States).

In the next section, we focus on the importance of these two dimensions, political and judicial, in terms of predicting the internal behavior of the Kelsenian constitutional courts. In Part III, we develop a formal model to explain the dynamics of consensus and dissent in the Kelsenian constitutional courts in a stable democracy and in authoritarian political regimes. In Part IV, we discuss some particular representative cases. Part V concludes the paper.

II. MOTIVATION

As we have argued, the Kelsenian constitutional courts have to consider two different audiences in exercising both abstract and concrete review, but the relative importance is different depending on the type of review.[11]

In abstract review, the main influence of the court is exercised through screening legislation and influencing policymaking. Naturally, the political audience is more directly relevant than the judicial audience. This is not to say that the other courts are irrelevant. In many cases, the constitutional court might actually need the judicial courts to enforce their decisions (in particular, if the other branches of government undermine the purging of legislation by the constitutional court). Nevertheless, the judicial audience is relatively more relevant in concrete review since such cases often—though not always--require cooperation between the constitutional court and regular courts. Clearly, concrete review blurs the separation between the constitutional court and the rest of the judiciary, whether it is initiated by incidental referrals or direct constitutional complaints. It induces the constitutional court to participate in the resolution of individual cases, either substituting or complementing ordinary dispute resolution. The constitutional court substitutes for ordinary courts when it decides cases that would otherwise be within the judicial province; it complements them when it serves to resolve constitutional questions that are then implemented by ordinary courts. Neither function was intended by the original Kelsenian model (apparently Kelsen was opposed to concrete review). The consequence is a less transparent

[10] See, among others, Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2008) (explaining how constitutional courts pursuit the monopoly over constitutional adjudication and how they search for institutional legitimacy, in between the judicial and the legislative branches).

[11] See Sadurski, *supra* 10 (observing that legitimacy is politically more complicated in abstract rather than concrete review, even if the court has undisputed formal legitimacy).

delimitation of jurisdictions, and consequently the emergence of conflicts of competence between the constitutional court and the higher judicial courts.[12]

Abstract review, in particular preventive or ex ante promulgation, by its very nature, provides a weak mechanism for a constitutional court to try to condition other courts. There is no obvious relation between the review of legislation in the abstract and the work of courts. However, given the importance of the constitutional court, creative techniques can be developed to achieve such goals. For example, the French idea of "conforming interpretation," although dependent on the voluntary compliance by other courts, is still conceptually influential.[13] Yet, where abstract review is very limited (such as in Italy), the ability to shape legislative outcomes is reduced and constrains the political influence of the court.[14]

The possibility of a conflict between the two major courts has substantive implications. First, it puts pressure on constitutional judges to achieve a coherent and prestigious body of constitutional jurisprudence or doctrines.[15] Therefore, it transforms the nature and scope of constitutional review by empowering the court and creating pressure for a façade of apolitical decision-making. The constitutional court must be a better legal craftsman when it relies on ordinary courts to implement its decisions. Second, conflict or competition among the courts increases the political value of constitutional review because it might provide an indirect mechanism for influencing policy on one hand, but also the judiciary (if politicians use the constitutional court to interfere with the ordinary courts) on the other hand. The natural inclination for the constitutional court is to expand competences (the progressive constitutionalization of private law in several jurisdictions is just one example) that make it politically more relevant. Third, the balance of power is shaped by the constitution itself, that is, the extent to which a constitutional court is conceived of as not only a negative legislator, but as a positive legislator with formidable powers of statutory interpretation.[16] In such systems the court not only strikes laws but actively interprets the conditions under which they can be implemented. If a constitutional court has a role as a positive legislator, it can act either as a counterweight against the parliamentary majority or as a substitute if no stable parliamentary majority exists.[17]

Concrete review is not immune from politics. However, the capacity to advance an ideological agenda through concrete review is more limited than through abstract review. Concrete review requires the court to develop specific legal reasoning in terms of rhetoric and judicial syntax that makes it similar to a decision of a regular court while at the same time advancing a particular ideological agenda. Since regular courts do not engage in abstract review, the constitutional court is not under pressure to use similar specific legal reasoning.

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[12] See Garlicki, *supra* 9.
[13] Id.
[14] See Sweet, *supra* 1.
[15] In the limit, developing a court-made Constitution that supplements or even replaces the original text. See, for example, Garlicki, *supra* 9.
[16] See the Spanish case, for example, in Leslie Turano, Spain: *Quis Custodiet Ipsos Custodes?*: The Struggle for jurisdiction between the *Tribunal Constitucional* and the *Tribunal Supremo*, *International Journal of Constitutional Law* 4 (2006) 151.
[17] See Sweet, *supra* 1.

Another type of review is preventive (abstract) review, in which a court merely blocks unconstitutional policies before implementation. Whereas concrete review "judicializes" constitutional courts, preventive review has the opposite effect. Mere preventive review makes a constitutional court less judicial and more political in nature.[18] Constitutional courts as idealized by Kelsen are political in nature. Their work, albeit judicial in form and procedure, is fundamentally political. Hence, they should not be part of the traditional judiciary or court structure. The point is that constitutional law is political in nature, and constitutional adjudication is a necessary part of the political process. If law is the mere formalization of politics, then constitutional review is necessarily political. The distinction between law and politics is likely not to be clear in constitutional review.[19]

The double role as a political and a judicial institution (not supported by the original "negative legislator" model but now pursued by all existing constitutional courts) creates an inevitable **"**judicialization**"** of politics for three reasons. First, because as a consequence of the particular position of the constitutional court, as compared to the higher courts and the other powers of government, the goal of self-expanding institutional power affects the delicate balance between the judicial and the political structures; the political awareness of the court raises the same kind of political awareness on the part of other potential political agents. Second, the expansion of institutional power and influence naturally generates conflict, which might or might not constitute the appropriate framework for the institutional development of democracy. Third, political diffusion makes the role of a constitutional court more important. The constitutional court provides the institutional body for the judiciary to interact with politics. The inevitable "judicialization of politics" necessarily politicizes the court. Hence, politics inside the constitutional court becomes unavoidably contaminated by party politics. The stakes are simply too relevant and important for political parties not to interfere.[20]

At the same time, the ongoing skirmishes between the two major courts can actually contaminate the supreme court, leading it to depart from traditional decision-making, including the style and content of decisions. The documented process of replacing literal statutory interpretation through the embracing of general principles of law invented and created by courts in Europe has been explained as a byproduct of the interaction between the two higher courts. One particular striking case is France. Traditionally, the legal authority of the French higher courts insisted on judicial deference to the legislative and executive branches and favored administrative review of legality and good governance over judicial review of constitutionality.[21] The slow development of constitutional principles applied to individual rights and liberties by the French *Conseil Constitutionnel*, after the 1970s, coupled with other external factors, resulted in significant changes in the legal culture of the French courts.[22] Recently, the French

[18] Id.
[19] Id.
[20] See, for example, Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, Annual Review of Political Science 11 93 (2008) (explaining the political consequences of systematic unwelcomed judgments concerning contentious political issues and how that creates unstable courts).
[21] Michel de S.-O.-l.'E. Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (2009).
[22] Id. (discussing the external European influence on imposing "judicial review" and "fundamental rights and principles": the European Court of Human Rights (the jurisprudence on fair trial), the European Court of Justice and the construction of EU law, including domestic interpretation of European law).

higher courts have shifted towards the use of fundamental principles at the expense of code law. Partially, this trend has responded to more individual capacity in participating in the judicial process (by making use of individual rights). Inevitably, the higher courts have been more frequently asked to deliberate and decide on these (largely uncodified) general principles that inevitably affect public policy.[23] Although this shift has been criticized by many French legal commentators for undermining legal security, we can argue that this form of judicial activism by the *Cours de Cassation* and the *Conseil d'Etat* responds to the activist approach taken by the *Conseil Constitutionnel* since the early 1980s.

We can therefore summarize our predictions in the following way:

TABLE ONE

	CONCRETE REVIEW IS POSSIBLE	CONCRETE REVIEW IS NOT POSSIBLE
ABSTRACT REVIEW IS POSSIBLE	BOTH POLITICAL AND LEGAL AUDIENCES MATTER AND MAY BE COMPETITIVE [GERMANY, SPAIN, PORTUGAL, OTHERS]	POLITICAL AUDIENCE PREVAILS. THE CC IS IN A DIFFICULT POSITION TO INFLUENCE THE COURTS [FRANCE before 2009]
ABSTRACT REVIEW IS NOT POSSIBLE	JUDICIAL AUDIENCE PREVAILS, THE CC IS IN A DIFFICULT POSITION TO INFLUENCE LEGISLATION [ITALY]	NO CONSTITUTIONAL REVIEW

Most literature addresses these two realities –the political and judicial dimensions—as implicitly separated. Given the US model, the judicial dimension has not attracted the same scholarly attention that the political dimension has raised. These two dimensions are necessarily interrelated and generate a complicated trade-off between advancing the political agenda of the constitutional court, or competing with the higher courts for judicial supremacy. In some cases, the goals might coincide. For example, promoting human rights might simultaneously enhance the reputation and respect of the court with judicial and political audiences. However, in many circumstances, these two goals conflict.

Some literature has identified the trade-off faced by American courts in terms of ideological activism and institutional activism.[24] Appealing to a political audience in our model can be seen as ideological activism, in the sense of propensity to strike down legislation that is incompatible with the ideology of the court.[25] However, as to interacting with a judicial audience in our model, this is a specific form of institutional activism, which has less to do with being deferential to other branches of government, and more with achieving judicial supremacy of the constitutional court.

Our approach is to consider the internal decision making of a constitutional court confronted with potentially conflicting external audiences. The court is composed of individual judges with a range of ideological and legal preferences. In other work, we consider the job of the court as a whole to be a

[23] Id.
[24] Stefanie A. Lindquist and Frank B. Cross, Measuring Judicial Activism (2009).
[25] Id.

problem of team production.[26] Individual judges might prefer to emphasize their individual contributions to the quality of decision-making; but the court as a whole will also have a reputation for quality. Here, we assume that the court can resolve internal collective action problems to the extent it wishes to produce unified opinions, but it might also prefer to signal the internal preferences of its individual members.

In particular, we can think that there are two "pure" strategies available for the court. On the one hand, the court can follow a *consensual decision-making* approach; decisions in the court are taken by unanimity and negotiated to achieve a consensus of all judges. This makes the constitutional court look like any other judicial higher courts. Alternatively, the court can follow a strategy of *fragmentation*; decisions in the court are taken by majority, with concurring and dissenting opinions if allowed, thus revealing, directly or indirectly, division in the constitutional court.[27]

The "mixed" strategy available to court consists of a mix of fragmented and consensual decisions. It could vary with the type of constitutional review (for example, being more fragmented in abstract review and more consensual in concrete review, and vice versa) and across time (depending on the political cycle).[28]

The implementation of a "mixed" strategy will depend on significant variables. One immediate variable to consider is the opportunity for exercising constitutional review. Usually abstract review has to be triggered by political actors (other branches of government, opposition, other political actors), and therefore the court has little control over these occurrences. As to concrete review, there are different possibilities. Direct constitutional complaints are generated by private actors and citizens in general. In most cases, unlike the US Supreme Court, constitutional courts have little control over their dockets in terms of being given the possibility to decline appeals. Finally, incidental referrals are controlled and subject to the influence of the ordinary courts.

A second important variable is the extension of competences of the constitutional court or, in the other words, the distinction between constitutional and infraconstitutional matters. Formally, the extension of constitutional law is explicitly defined by the Constitution. But a constitutional court engaging in maximizing supremacy and jurisdiction will use caselaw to increase the scope of constitutional law. It could also exercise influence on the other branches to promote constitutional amendments that further consolidate the role of constitutional law. For example, the inevitable instability of federal arrangements might empower the constitutional court to interfere in areas that were not anticipated in the earlier

[26] Nuno Garoupa and Tom Ginsburg, Reputation, Information and the Organization of the Judiciary, *Journal of Comparative Law* (2010).

[27] If the procedure does not allow formal dissent, there may be informal mechanisms for conveying such situation as media coverage.

[28] The application of a game theory conceptual framework to explain the way courts aim at judicial supremacy is not new. See, among others, Jack Knight and Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 Law and Society Review 87 (1996) (explaining institutional development of judicial supremacy as the outcome of strategic choices because courts consider the legal and political environment and respond to the audiences addressed by their decisions; judicial supremacy is not necessarily achieved by some intended institutional design or benefiting from overwhelming political support).

times (Spain, Germany and the European Union are good examples). So the extent to which the delimitation of constitutional vis-à-vis infraconstitutional matters is expressed in the Constitution and caselaw cannot expand the scope of constitutional law emerges as an important exogenous variable.

Inevitably the enlargement of constitutional law and the reduction of infraconstitutional law will result in clashes with the higher courts. Formally most legal systems allocate to the constitutional court the monopoly over the decision of which matters are constitutional. The so-called *Kompetenz-Kompetenz* question seems to be solved in most legal systems and therefore conflicts should not exist in theory. However such a formalistic approach ignores the practicalities of judicial decision-making and disregards the ingenious abilities of higher courts to undermine the formal solution to potential conflicts.

Another relevant variable to understand the extent to which a constitutional court cares about achieving supremacy is its composition. Limited tenure certainly reduces the incentives for long-run specific investments in court reputation while incentivizing the judges to be concerned about outside employment opportunities after the term in the court is finished. Career magistrates might be less interested in sacrificing the influence and scope of powers of the supreme court since they will presumably return there after their term is over. Life tenure certainly seems to foster more judicial concerns about achieving supremacy and increase the willingness of the constitutional judges to trade achieving goals in short-run against gains in the future.

In a well-established democracy, political fragmentation of the constitutional court is an impediment to achieve supremacy as a court; a fragmented court does not look like a judicial court in civil law systems where unanimous decision making prevails. Not surprisingly, constitutional courts tend to be quite consensual when they are formed, and become increasingly polarized as time goes by; judicial activism and judicial boldness take a while to emerge. Constitutional courts that are weak vis-à-vis the supreme court, such as those in France and Italy, take a long time to become polarized (and even now these two courts still preserve the façade of unanimous decisions). Even though the long-run trend seems to be toward increasing polarization, cycles are observable in all countries; these cycles seem to be related to more or less political unstability or transition (Germany in the late 1960s, France in the 1980s, Italy and Portugal in the 1990s, Spain in the 2000s).[29]

In authoritarian regimes, unanimous decisions can be perceived as being subservient to the government (loyal constitutional courts). In order to achieve a reasonable reputation of judicial independence, the constitutional court might need to show fragmentation, where at least a minority signals that there is dissent and hence the court has some degree of independence from the executive. In fact, at least in final stages of authoritarian regimes, fragmentation could become dominant as a way to signal a more democratic court (for example, Chile after 1981 and Argentina before the transition to democracy).[30]

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[29] See discussion by Nuno Garoupa, The Politicization of the Kelsenian Constitutional Courts: Empirical Evidence, in KC Huang (ed.), *Empirical Judicial Studies* (2009).

[30] Gretchen Helmke and Mitchell S. Sanders, Modeling Motivations: A Method for Inferring Judicial Goals from Behavior, *Journal of Politics* 68, 867 (2006) , call a policy-seeker court, where the example is Argentina, although that is not a specialized constitutional court. See also Gretchen Hemlke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina*, Cambridge University Press (2005) on Argentina and Lisa Hilbink, *Agents of*

We can summarize the idea in the following table:

TABLE TWO

	DEMOCRATIC REGIMES (MULTIPLE PARTIES SYSTEM)	AUTHORITARIAN REGIMES (ONE PARTY SYSTEM)
POLITICAL AUDIENCE: IDEOLOGICAL GOALS	FRAGMENTATION	UNANIMITY
JUDICIAL AUDIENCE: SIGNAL INDEPENDENCE OR ACHIEVE SUPREMACY	UNANIMITY	FRAGMENTATION

We should emphasize that our model applies to "strategic" unanimity and fragmentation. In many constitutional courts such as France and Italy no separate opinions are allowed (in keeping with the style of court decisions in alignment with the civil law tradition). Naturally all decisions are formally unanimous. However, it is well-known that even in these formally consensual courts, there are significant opportunities to expose division and signal dissent if needed.[31]

Depending on the nature of the political regime, unanimity and fragmentation might appeal in different ways to the political and judicial audiences. However, since both audiences co-exist in different degrees, constitutional courts are expected to exhibit a "mixed strategy" in both political regimes. The characterization of the "mixed strategy" should depend on how the two audiences, political and judicial, interplay. Presumably, in order to influence the judiciary, the constitutional court needs to accumulate reputational capital (that, of course, is quicker if the higher courts do not have a very high reputation because, for example, they are packed by judges appointed by a former authoritarian government). In relation to the political audience, the court does not require a high stock of reputation since the judges are politically appointed (hence individually likely to be reputable with the appointers from the start). Therefore, the likely path is that constitutional courts start by sacrificing political goals in order to accumulate judicial reputation. Once the accumulated judicial reputation is quite high, the marginal cost in reputation of occasional political decisions is lower. However, if political decisions become too frequent, the marginal reduction in judicial reputation can be significant. We might actually have cycles where constitutional courts start by investing in judicial reputation, then become more politicized, and at some point need to engage again in judicial reputation building.

The implications of the analysis are twofold. First, in a consolidated democracy (as in Western Europe), we expect constitutional courts to be rather consensual in the early stages, then fragmentation expands as the political stakes are higher, and eventually it will go into cycles, depending on the extent to which

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Anti-Politics: Courts in Pinochet's Chile, in Tom Ginsburg and Tamir Moustafa (eds.), Rule by Law: The Politics of Courts in Authoritarian Regimes (2008) on Chile.

[31] For example, in the recent case debated by the Italian constitutional court on the immunity of Prime-Minister Berlusconi and other higher authorities of Italy, the Italian media widely reported that the "unanimous" decision of the court against the prime-minister had six dissents (constitutional judges who supported the prime-minister's legal argumentation). The recent publication by the French constitutional court of the internal debates over the landmark cases from 1958 to 1983 also shows the extension of dissent in the court.

concrete and abstract review are requested and interplay with political interests. Second, in a non-democratic system or unconsolidated democracies (such as in Asia or in Latin America), we expect the constitutional court to be fragmented in concrete review cases with political intensity (where judicial independence is easier to signal), and consensual in abstract review that challenges directly the government (to appease the authoritarian executive); when approaching political transitions, we expect fragmentation to dominate for sake of survival.[32]

These ideas are developed in a formal model. The proofs of the results are in appendix.

III. BASIC ANALYTICAL MODEL

IIIA. MODEL FOR DEMOCRATIC REGIMES

Let us assume that the two relevant dimensions –judicial & political—are modeled the following way in a consolidated democracy:

There are two periods, present and future. For simplicity, we will assume that the time discount rate is one, but the results are quite general.

There is a majority and a minority in the constitutional court (for example, left and right). The majority in period one has a probability p of being majority in period two. The minority in period one has a probability 1-p of being majority in period two. Therefore, the parameter p measures the stability of the court majority.

If the decisions in the court are non-consensual, the majority imposes its will and the payoffs are (V1,V2), that is, V1 for the majority (whose ideological agenda is advanced) and V2 for the minority (their ideological agenda is not advanced now as it is defeated in the court, but the minority may gain some benefit from revealing its position; also, dissents might be influential in determining future constitutional law), where V1>V2 (the current political gains of the majority are more substantial than those of the minority). For simplicity, let us normalize V2 to zero and redefine V1 as V.[33]

If the decisions in the court are unanimous resulting from a consensus, the payoffs are (V/2,V/2), that is, we assume that the majority and the minority equally share the gains. This way the choice between consensus and fragmentation in any period is a zero sum game, where the problem is of redistribution of payoffs across the court (there are no additional gains from cooperation except for enhancing prestige in the future).

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[32] See See Tamir Moustafa and Tom Ginsburg, Introduction: The Functions of Courts in Authoritarian Politics, in Tom Ginsburg and Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008) (explaining how the judiciary exercises self-restraint to avoid conflicts and how reform minded judges are likely to choose the less conflictive areas and avoid the more sensitive areas, such as political liberties; courts tend to press at the margin and avoid impinging on the core areas of the authoritarian regime.)

[33] Under some specific circumstances, it could be that V1<V2 (the minority has a more significant gain from expressing their point of view than the majority from advancing its own ideological agenda). As a consequence, it must be the case that V<0. The results of model can be easily extended when this possibility arises.

If the decisions in the court are unanimous resulting from the minority joining the majority and not revealing its position, the payoffs are (V,-V), that is, we assume that the worst outcome for the minority is to join the majority with no compromise, abdicating its own ideological preferences.

The gains obtained by the majority and the minority depend on the extent the court is influential with other courts, in particular, the extent to which the supreme court acknowledges the importance and eventually the supremacy of the constitutional court. This recognition is expressed by a factor *a*, that goes from zero (no respect from the other courts) to one (maximum respect from the other courts). This factor *a* varies across time (and depends on the exact nature of constitutional review, being higher when concrete review dominates and lower when abstract review is dominant). Initially the value is a_1 in the first period. If decisions are unanimous in the first period, the factor grows to $a_2 > a_1$ since unanimity makes the constitutional court more respected by the other courts whereas division is interpreted as political or ideological fragmentation. If decisions are polarized in the first period, the factor does not grow in the second period and stays at a_1.

The sequence of the game in each period is the following. First, the majority decides whether or not to offer a compromise with the minority. If the majority decided to compromise, then the minority decides whether or not to accept the compromise. If the majority decided to compromise, then the minority decides whether or not to join the majority.

In the second period, the equilibrium of the game is simple. There is no reason for either the majority or the minority to compromise since there is no additional gain in terms of reputation. So, in the second period, the constitutional court will be fragmented and the payoffs are (V,0) for the majority and the minority respectively.

In the first period, each side of the court has to balance the immediate gain in advancing their own ideological interests against the gains in future reputation.

RESULT ONE:

(1) The majority never compromises and the minority joins the majority if and only if $a_2/a_1 > (2-p)/(1-p)$.

(2) Suppose $p > 1/3$. The majority and the minority compromise if $1 + 1/(2p) < a_2/a_1 \leq (2-p)/(1-p)$.

(3) Otherwise, neither side compromises and there is no consensus.

First, notice that the minority is in a weak position. The majority only compromises when the additional gains in future reputation are significant and compensate for current losses in terms of not advancing its ideological agenda. If these additional gains in prestige are not significant, the majority never compromises and the minority is left with either joining the majority or expressing dissenting opinions. Hence the conditions established by Result one are essentially driven by the opportunistic behavior of the strongest player (the majority).

Second, there is a consensus through compromise or the minority joining the majority if (a) the gains in reputation are reasonably important (a_2/a_1) and (b) the court majority is reasonably stable (p is sufficiently large). The prediction is that constitutional courts that are initially in a weak position vis-à-vis other courts and have a stable majority will be likely to act by consensus, resulting in unanimous decisions. Constitutional courts that are in a strong position vis-à-vis other courts or have unstable majority coalitions will be likely to be more polarized from the early start.

Finally, compromise versus the minority simply joining the majority depends on the extension of the reputation gains. If they are overwhelming, the minority will always side with majority and therefore putting it in a weaker position to bargain for a compromise. If these gains are important but not overwhelming and the court majority is stable (enabling the current majority to recoup losses later), both sides will achieve a compromise.

Summing up, consensual constitutional courts in democratic regimes should emerge when the additional gains from prestige are significant (when "looking like" an ordinary judicial court is important in terms of signaling political independence and establishing supremacy) and the court majority tends to be stable.

IIIB. MODEL FOR AUTHORITARIAN REGIMES

For authoritarian regimes, we can re-interpret judicial reputation such that $a_1>a_2$. Every time the court decides unanimously and avoids fragmentation, it is perceived as loyal to the authoritarian regime. Hence, the court loses reputation as a judicial court (the opposite of a democratic regime).

We maintain the two-period model. There is a majority (pro-authoritarian government) and a minority (potentially pro-opposition). There is a probability β that the authoritarian regime collapses at the end of the first period. If the authoritarian regime collapses, the majority in period one (pro-authoritarian government) has a probability p of being majority in period two. The minority in period one (pro-opposition) has a probability 1-p of being majority in period two. Therefore, the parameter p measures the likelihood of a pro-authoritarian government majority surviving a political transition.

The nature of the payoffs is the following. If the decisions in the court are non-consensual, the majority imposes its will and the payoffs are (0,0). This is because the revelation of non-unanimity might create some problems for the authoritarian regime, so we model the non consensual character of the decision as mitigating any policy benefits which is a cost to the majority (pro-authoritarian regime). Hence, if the same decision had been taken with the support of the minority, the payoffs are (V, -V) because the majority enjoys the fact the court supports the political regime while the minority would have to abdicate completely its ideological goals. If the decisions in the court are unanimous resulting from a consensus, the payoffs are (V/2,V/2) since each side compromises. Therefore compromising is now a positive sum game due to the political gains.

In the second period, the constitutional court will be fragmented if the authoritarian regime collapses and hence the payoffs are (V,0) for the majority and minority respectively (since they are now playing the first round of the "democratic" game). However, if the authoritarian regime has not collapsed, the

court will compromise because the minority is never willing to simply join the majority (the worst outcome for the minority) whereas the majority prefers compromise to fragmentation due to effect on the political stability of the authoritarian regime (a second best solution for the majority); hence the payoff is (V/2,V/2).

In the first period, each side of the court has to balance the immediate gain in compromising for the sake of the authoritarian regime or advancing their own ideological interests to secure gains in future reputation.

RESULT TWO:

(1) The majority and the minority compromise when (i) $p \geq ½$ and $a_1 \beta(1-2p) + a_2 [1-\beta(1-2p)] > 0$ or (ii) $p \leq ½$ and $a_1 \beta(2p-1) + a_2 [1+\beta(1-2p)] > 0$.

(2) Otherwise, neither side compromises and there is no consensus.

First, note that in some situations the minority might favor compromise but the majority prefers not to do so and vice-versa. Hence the condition established by Result two refers to the opportunistic behavior of both sides, majority and minority.

Second, there is a consensus if (a) the losses in future reputation are not too severe (hence a_1/a_2 is not too high), and (b) the authoritarian regimes is likely to survive (the probability β is low enough).

Third, the relationship between the survival of the court majority and compromise is complex. Suppose the likelihood of survival is high. Marginal variations of the probability p have a negative effect on compromise. However, consider the case when the likelihood of survival is low. Marginal variations of the probability p have a positive effect on compromise. Therefore we can conclude that marginal variations have the most significant effect on compromise when p= ½. The intuition for this result is that compromise is determined by the majority when p is more than ½ and by the minority when p is less than ½. A higher probability of the current court majority surviving makes compromise less acceptable for the majority (since they will dominate the court after the political transition) and more so for the minority (since they will not dominate the court after the political transition). Therefore when p increases, the likelihood of settlement decreases when the majority dominates the game (p is more than ½) and increases with the minority dominates the game (p is less than ½).

In conclusion, the prediction is that constitutional courts in authoritarian regimes are very dependent on the behavior of the (pro-opposition) minority and the (pro-authoritarian regime) majority, which are likely to fragment the court if the regime is unconsolidated.

IIIC. SUMMARY OF MODEL PREDICTIONS

In a democratic regime, consensus emerges when the majority is in a strong incumbent position (in order to be willing to delay political gains) and judicial reputation building is very important vis-à-vis the regular courts. In a more authoritarian regime, consensus prevails as long as the probability of collapse is low.

In both regimes, minority and majority face a trade-off between an immediate payoff and a future payoff. Under democracy, consensus provides an immediate benefit in terms of enhancing reputation for judicial independence against a cost of delaying ideological goals. Under a more authoritarian regime, consensus provides an immediate benefit with respect to favoring the ruling elite against a cost of losing reputation for judicial independence in the future. In both cases, the behavior of the court is determined by the speed at which the court can accumulate (in democracy) or lose (in authoritarian regimes) reputation. In both cases, the stability of the court also matters, but for different reasons. Under democracy, stability allows the majority to defer gains with minimal risk. Under authoritarianism, stability reduces the likelihood of a damaging political transition.

IV. DISCUSSION OF PARTICULAR CASES

IVA. THE GERMAN FEDERAL CONSTITUTIONAL COURT

The German Constitutional Court was designed after WWII following the Kelsenian model and the Austrian experience in the 1930s under the 1949 Basic Law. The extensive powers of the court were advocated having in mind the need to provide an effective mechanism to exert control over legislation when the career judiciary could not be trusted. Apparently, it was actually one of the least controversial issues of the new Constitution. The Federal Constitutional Court Act of 1951 established the court. The sixteen constitutional judges are appointed by the parliament; eight by the lower house (the *Bundestag*) and eight by the upper house (the *Bundesrat*). The German Constitutional Court is usually composed of Supreme Court judges (six as a mandatory minimum), law professors, and former politicians (usually formal regional or federal ministers of justice). Most constitutional law scholars describe that the court has a success story in German jurisprudence and politics.[34]

As a consequence of the appointment mechanism (supermajority in the federal parliament), there is a need for a consensus between major parties.[35] Constitutional judges are effectively appointed in party tickets without public hearings. Some scholars argue that those package deals lack transparency.[36] The fact is that the supermajority requirement (a two-thirds majority) has created a *de facto* quota system.[37] Traditionally, the two major parties divide the seats; with the occasional appointment of a judge from one of the minor parties to reflect parliamentary composition and ongoing governmental coalitions.[38] From 1951 to 1973, there were forty-seven constitutional judges; twenty-three chosen by the Christian-democrats, twenty by the social democrats, three by the liberals, and one by a minor party (Germany Party, DP, in 1951).[39] From 1983 to 2003, there were fifty constitutional judges; twenty-four affiliated or associated to the Christian-democrats (two of them with the Bavarian wing of the party), twenty-two

34 See Rainer Nickel, *The German Federal Constitutional Court: Present State, Future Challenges*, in Building the UK's New Supreme Court: National and Comparative Perspectives (Andrew Le Sueur ed., Oxford Univ. Press 2004).
35 See Georg Vanberg, *The Politics of Constitutional Review in Germany*, Cambridge University Press, (2005).
36 See Nickel, *supra* 34.
37 See Donald P. Kommers, *Judicial Politics in West Germany: A Study of the Federal Constitutional Court*, SAGE Publications (1976), and Vanberg, *supra* 35.
38 As a result, the social-democrats (SPD) and the Christian-democrats (CDU/CSU) usually have seven or eight judges, whereas the minor parties such as the liberals (FDP) or the Green Party might have one judge.
39 See Kommers, *supra* 37.

with the social democrats, three with the liberals, and one with the ecologists.[40] As a consequence, we can conclude that the majority in the court is reasonably stable.

The politicization of the German Constitutional Court has been observed and studied by constitutional law scholars. Naturally, there have been tensions between the federal government and the court from the early start, in particular, when the parliamentary majority did not coincide with the court majority.[41] Initially, German federal politics were dominated by the Christian-democrats. The social-democrats were confined to a minority status until the 1960s (hence, calling for interventions of the Constitutional Court was a natural part of the political strategy). The alternation of both parties in government since the 1960s has empowered the court to solve deadlocks and influence policy-making. Specific cases highlighted the political dimension of the court such as party finance in 1992 or the crucifix decision in 1995.[42] Other cases have reflected the delicate balance between the political and judicial spheres of influence from the German Constitutional Court. Some authors argue that because the court is effectively unaccountable, this has contributed to the growing "judicialization of legislation" since laws are passed with an eye on the court reaction.[43] If the role of the German Constitutional Court has contributed to the judicialization of politics in Germany, naturally, it has further developed the politicization of the court.[44] However, notice that it has been argued that the domination of party cartels over the appointment of the Constitutional Court is not detrimental because the results are more balanced; they conform and shape the rest of German society, and increase democratic legitimacy.[45]

The relationship between the German Constitutional Court and the rest of the courts has not always been easy. Although the German Constitutional Court was inserted into a complex structure headed by five supreme courts, these courts were in a weak position in the early 1950s given their failure to oppose the Nazi regime and the despicable Nazi laws they enforced. Clearly, the German Constitutional Court was clean from any Nazi past and was perceived as the guarantor of the new democratic regime.[46] Therefore, as predicted by our model, initially the court focused on the political audience, achieving administrative and budgetary autonomy in 1952. The confrontation with the other courts emerged later.[47]

By the late 1950s there were some skirmishes over procedural rules, in particular when the German Constitutional Court decided that the supreme courts could not submit their own opinions in the context of incidental review of constitutionality and later abolished their participation in judicial referrals. The supreme courts protested. However, more was to come. In landmark decisions in 1957 and 1958, the

40 See Vanberg, *supra* 35.
41 Id.
42 Id.
43 See Donald P. Kommers, Autonomy versus Accountability: The German Judiciary, *in Judicial Independence in the Age of Democracy, Critical Perspectives around the World* (Peter H. Russell & David M. O'Brien eds., Univ. Va. Press 2001).
44 Christine Landfried, *The Judicialization of Politics in Germany*, 15 International Political Science Review 113 (1994).
45 See Kommers, *supra* 37.
46 See Garlicki, *supra* 9.
47 Id.

court extended a general right to "individual liberty" therefore effectively subjecting all private law to constitutional review. Inevitably this caused the supreme courts to lose effective jurisdiction over many areas of the law. A clear refusal by regular courts to follow the doctrines of the court is rare given the legal status of the German Constitutional Court, but legal scholars have identified areas where divergences have been taking place (for example, the "expropriation" clause or compliance with length of detention). Occasionally, one of the supreme courts is more vocal against doctrines developed by the German Constitutional Court (for example, the Supreme Court in civil and criminal matters, *Bundesgerichtshof*), but by enlarge they appear to accommodate them.[48]

In fact, some scholars argue that the situation in Germany is less confrontational than in other jurisdictions.[49] Our model explains this path by emphasizing the historical weak position of the supreme courts, both in terms of their limited jurisdiction (each of them vis-à-vis the other four supreme courts) and the Nazi period. On the other hand, the stable majority in the German Constitutional Court allows the development of doctrines that emphasize the judicial role at the expense of advancing particular short-run ideological gains.

IVB. THE FRENCH CONSTITUTIONAL COUNCIL

The *Conseil Constitutionnel* is a specialized body separated from the judiciary and the other branches of government.[50] It could be considered more like a fourth branch of government rather than a judicial court.[51] The French Constitutional Court was conceived originally as a political body that progressively has evolved in its judicial competences. Not surprisingly, given its nature, politics has been part of the court for its early stages. During the Fifth Republic, in an effort to facilitate the centralization of the executive branch, and to limit the power of the legislative branch, the Constitution of 1958 established the French Constitutional Council. Formally, the duty of the *Conseil* is to ensure that the principles and rules of the constitution are upheld.[52] Therefore, the *Conseil* was established to act as a watchdog on behalf of the executive branch given the well-known French antipathy to judicial interference in governmental affairs.[53] The founders of the *Conseil* saw it as a referee established to settle the conflicts over legislation between the executive and the parliament, though it was not meant to be neutral, but

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[48] Id.

[49] Id.

50 See Stone Sweet (1992), *supra* 1. See also Articles 37 and 41 of the French Constitution of 1958.

51 See Michael H. Davis, *The Law/Politics Distinction, the French Conseil Constitutionnel and the US Supreme Court*, 34 Am J Comp. L. 45 (1986) and Michael H. Davis, *A Government of Judges: An Historical Re-View*, 35 Am. J. Comp. L. 559 (1987). See also Denis Tallon, *The Constitution and the Courts in France*, 27 Am. J. Comp. L. 567 (1979).

52 Articles 37 and 41 of the French Constitution of 1958.

53 As a natural reaction against the judges under the monarchy and the role of civil law in subordinating the courts to the legislature. However, France has a long tradition of legal control of executive action by the *Conseil d'État*, which by necessity has had to immerse itself in politics. See, among others, Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 NYU L. Rev. 363 (1982); Cynthia Vroom, *The Constitutional Protection of Individual Liberties in France: the Conseil Constitutionnel since 1971*, 63 Tul. L. Rev. 265 (1988); Martin M. Shapiro, *Judicial Review in France*, 6 J.L. & Pol. 532 (1989). For example, in 1980, the constitutional court affirmed that the independence of the judiciary is a fundamental principle protected by the preamble of the 1958 Constitution.

rather favor the interests of the executive.[54] The *Conseil* was a natural reaction against the political situation of the Fourth Republic (De Gaulle intended a significant power shift from the parliament to the government).

The *Conseil* is composed of nine members who serve a nine-year, nonrenewable term. The council is renewed in thirds every three years. Three of its members are named by the President of the Republic, three by the President of the National Assembly, three by the President of the Senate. In addition to the nine members, former Presidents of the Republic are members of the constitutional council for life.[55] The appointments to the *Conseil* are not always judges, in a few rare cases they are not even legally trained[56], but rather are predominantly professional politicians.[57]

Individual behavior cannot be monitored due to the collegiality of the *Conseil.* The secret nature of judicial deliberations; the façade of unanimity, the lack of dissenting opinions, the lack of methods for detecting division, the lack of public discussion or hearings are impediments to provide the ideal framework for our analysis.[58] Table three summarizes the stability of the court majority from 1959 to 2007. The council was overwhelmingly dominated by the right for a long time while *Gaullists* were in government. The influence of the socialists in the 1980s is reflected in a left-wing majority for the period from 1986 to 2002, loosely described as divided government or "cohabitation" (where in general the President of one party has to "cohabitate" with a parliamentary majority and a government of the other party).[59] Since 2002, the council is again dominated by the right.

The long dominance of the right in the council and the consequences of later polarization are confirmed by anecdotal evidence. The members of the council were initially mainly the trusted supporters of General De Gaulle, founder of the Republic. In those early years, the council was clearly subservient to the mandate of De Gaulle and his ideas for the new Republic.[60] It was argued that it would be absurd to contradict the author of the Constitution as to its own interpretation.[61]

An extraordinary departure from this conformist approach was illustrated by the decision to find

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[54] As the French Constitutional Court clearly shown in the constitutional crisis of 1962 between the legislature and the President. See Cindy Skach, *Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the French Fifth Republic* (2005).

55 Article 56 of the French Constitution of 1958.

56 See John Bell, *French Constitutional Law*, Oxford University Press, (1992). He argues that the goals of selection aim at achieving competence, legitimacy, and participation. In his view, this naturally results in procedural elitism in selection where legal competences and judicial self-participation are purely instrumental.

57 See Raphael Franck, *Judicial Independence under a Divided Polity: A Study of the Rulings of the French Constitutional Court*, 1959-2006, 25 J.L. Econ. & Org. 262 (2009).

58 See related discussion by Jean Louis Goutal, *Characteristics of Judicial Style in France, Britain and the USA*, 24 Am. J. Comp. L. 43 (1976). Notice that procedure is very different between the constitutional court and the regular courts in France since in the latter the statement must be offered in the context of a particular case; regular courts hear cases, the *Conseil* does not. It solves cases by legislative empowerment of different affected interests rather than particular situations.

[59] The French "cohabitation" has been described as majority divided government in the American literature. See Skach, *supra* 54.

60 See Stone Sweet (1992), *supra* 1.

61 Id.

unconstitutional an important amendment to the law governing private associations in 1971 (after the death of General De Gaulle), marking what many scholars call the "birth of judicial politics in France."[62] However, the 1980s would see further changes. In 1983 and 1986, the socialists, in power for the first time since the creation of the Fifth Republic, sought to ensure greater representation on the council, particularly, in anticipation of the electoral defeat in March 1986 which started a "cohabitation" between a socialist president and a conservative prime minister.[63] The transfers of power in 1981 and 1986 created a gap between the court's interpretation of the republican tradition and the contemporary partisan political concerns of its nominators.[64] The hostility of a conservative court against a socialist executive branch departed from the traditional spirit of the 1958 Constitution, where the court was an ally of the government. This trend was further pursued in the 1990s due to both the character of the people nominated and the nature of the tasks. The court became a battleground for socialists and Gaullists in a stage of weak governments.

The alternation between right and left after the 1980s is at the heart of the empowerment of the court. For example, referrals by the opposition have increased considerably from the early 1980s.[65] The political parties tried to use the constitutional court to block action by the executive, who was dominated by the other party. The council responded by developing a kind of judicial activism alien to the more traditional French legal culture. Furthermore, the incorporation of rights into the Constitution through constitutional review since the early 1970s has contributed to the empowerment of the court, as well as, to the politicization of the council. The shift from a more narrow constitutional interpretation to a focus on (uncodified) general principles has inevitably transformed the council.

Given the way procedural rules were designed and due to the fact that there is no published concurring or dissenting opinions, the façade of unanimous decisions prevails. A recent study looking at the decisions of the court identifies the composition of the court (in terms of ideology and background) and the political situation ("cohabitation" periods versus strong government) has significant explanatory variables. [66] Some particular laws, such as those related to the budget, seem to attract more political attention and concentrate a higher likelihood of being declared unconstitutional. The main conclusion of the paper seems to be that the French Constitutional Council is politicized, but constitutional judges are opportunistic by taking advantage of certain political situations such as "cohabitation" (divided government).

As we have explained before, given the nature and formal role of the court, it is not surprising that the political audience seems to have a played a larger role. At the same time, the particularities of the institutional arrangements has not helped the interaction between this court and the other major courts (*Cour de Cassation* and *Conseil d' État*). To start with, the *Conseil* is not formally a part of the French judiciary. For example, the impact from the decisions of the *Conseil* is concentrated exclusively on the

62 See Peter L. Lindseth, *Law, History and Memory: "Republican Moments" and the Legitimacy of Constitutional Review in France*, 3 Colum. J. Eur. L. 49 (1997).
63 See Stone Sweet (1992), *supra* 1.
64 Id.
65 Id.
66 See Franck, *supra* 57.

legislature (it is a form of abstract and preventive constitutional review with no formal access procedure for individuals other than specific political actors).[67]

Still, there is some indication that the French constitutional judges have been concerned with the judicial branch. There has been an effort to provide coherent and consistent case law.[68] At the same time the shift to more general (uncodified) principles of law has influenced significantly the *Cour de Cassation* which has tended to align the legal doctrines developed by both courts. Traditionally, the *Conseil d'État* was less accommodating to the cooperation mode, but that has changed in recent years. The informal sharing of clerks among the three top courts has also contributed to the harmonization of procedure and sentencing.[69] The recent reforms introducing concrete review will inevitably reinforce the judicial audience, and we can expect some significant skirmishes in the future.

IVC. THE ITALIAN CONSTITUTIONAL COURT

The Italian Constitutional Court was established in 1955, although, contemplated since 1948 by the Italian Constitution after WWII. There are fifteen judges appointed by three different actors who appoint five judges each. All of them are selected among active or retired judges, professors of law, or lawyers with more than twenty years of professional experience, for nonrenewable terms of nine years.

The judges appointed by the parliament require a supermajority (in a joint vote of the two chambers; by a two-thirds majority for the first three rounds, and thereafter, a three-fifths majority). As expected, this has resulted in a structural arrangement that corresponds to a *de facto* quota system. Until 1994, two judges would be allocated to the Christian-democrats, one to the socialists (PSI), one to the communists (PCI), and the last one to a minor party depending on governmental coalitions (republicans, PRI; liberals, PLI; or social-democrats, PSDI).[70] The political storm of the early 1990s did not unravel the arrangement. For a while, vacancies were not filled due to the need for coordination between the new parties. However, after 1996, the slots were reallocated much in same way; the right getting two judges, the left (PDS and allies) getting also two judges, and the last one for minor parties.

The five judges appointed by the President of the Republic tend to belong to the majority that supported his election by the parliament; although, occasionally unexpected or symbolic choices happen (such as promoting gender diversity in the court).[71] The five judges elected by the judiciary have always been (although, not mandatory) career magistrates.

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67 Concrete review has been introduced recently (July 2008). Under the terms of the new article 61-1, the *Cour de Cassation* and the *Conseil d'Etat* can refer to the *Conseil Constitutionnel* in matters of law, a mechanism to be developed by statute soon. At the same time, the minutes verbatim of the plenary meetings and decisions will become available to the public after 25 years, now up to 1983 [*Loi Organique sur le Conseil Constitutionnel*, July 2008, *Loi Organique* 2008-695].

68 See Stone Sweet (1992), *supra* 1.

69 See Stone Sweet (1992), *supra* 1 (discussing how decisions by the French Constitutional Court are short and declarative as the ones by the *Cour de Cassation* as a way to make them look similar and more influential; also how the *Conseil d'Etat* was initially hostile but now accepts that case law dictated by the *Conseil* is source of law). See also Garlicki, *supra* 9.

70 See Mary L. Volcansek, *Constitutional Politics in Italy*, MacMillan Press, (2000)

71 Id.

Seventy-seven constitutional judges served from 1956 until 1997, of which thirty were career judges (twenty-five chosen by the judiciary, three by the President, and two by the parliament). The President usually appoints law professors, which are also favored by the parliament (twenty-three appointed by the President and fourteen by the parliament).[72] A few practicing attorneys have been constitutional judges (three chosen by the President and seven chosen by the parliament). Some scholars suggest that this mixed appointment mechanism has resulted in ideological factions (left, center, and right), which are not associated with political parties, but rather with personal allegiances.[73] In any case, several mechanisms have been implemented to avoid explicit party alignments, which includes the writing of single opinion, secret votes, and opinions are approved in such a way that make the decision unitary, where no concurring or dissenting opinion is allowed.

The political nature of the court was clear from the beginning because it was favored by the Christian-democrats (DCI) as a constraint on a left-dominated parliament.[74] In fact, while the Christian-democrats enjoyed an overall majority, the establishment of the court was delayed. Earlier decisions by the court were not turbulent. However, this changed during the 1980s. The court became more active with respect to executive decrees that resulted in a considerable increase in the caseload. During the 1990s, with the political crisis, the court moved into a more reluctant intervention mode. However, with respect to regional conflicts, the court has emerged as an important political actor, particularly, in the preventive control of regional laws.[75] The importance of the political audience in the Italian Constitutional Court has been empirically documented.[76]

The confrontation between the Constitutional Court and the other top courts in Italy has been widely documented.[77] The main source for the difficult relationship between the Italian Constitutional Court and the regular courts is the process of submission of "legal questions." Once a regular court submits a "question," the court decides on constitutional interpretation and the ruling is an important part of law applied to the case.[78] The court develops particular techniques of interpretation that occasionally collide with the doctrines developed by the ordinary courts. There were major clashes between the Italian Constitutional Court and the Italian Court of Cassation in 1965 (when the Constitutional Court refused to apply a 1958 doctrine of the Court of Cassation on summary investigations and the latter decided that the new doctrine could only be applied prospectively and not retrospectively).[79] More skirmishes followed in the 1970s and in the 1980s. Recently new confrontations have taken place in the area of criminal law and criminal procedure with the refusing by the Court of Cassation to apply interpretative

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[72] Id.

73 Id.

74 Id.

[75] Id.

76 See A. Breton and A. Fraschini, *The Independence of the Italian Constitutional Court*, 14 Const. Pol. Econ. 319 (2003) and Nadia Fiorino, Fabio Padovano and Grazia Sgarra, *The Determinants of Judicial Independence: Evidence from the Italian Constitutional Court (1956-2002)*, 163 J. Institutional & Theoretical Econ. 683 (2007).

[77] See J. H. Merryman and V. Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, *15* Am. J. Comp. L. 665 (1967).

[78] See Garlicki, *supra* 9.

[79] Id.

developments pursued by the Constitutional Court.[80]

The difficult coexistence of top courts in Italy is well explained by our model. The dockets of the Constitutional Court rely heavily on actions interposed by regular courts. Hence there is a direct relationship that creates tension since the decisions by the Constitutional Court affect immediately the outcome of the cases heard by the regular courts, hence limiting their influence. The application of the law is still a monopoly of the regular courts, hence the Constitutional Court has to convince the regular courts that a cooperative mode is better for all. Inevitably the judicial audience plays a very important role in explaining the behavior of the court.

IVD. THE SPANISH CONSTITUTIONAL COURT

The Spanish constitutional court was established by the 1978 Constitution which introduces a parliamentary regime under a constitutional monarchy after almost forty years of dictatorship led by General Franco. The court has the competence of guaranteeing the Constitution.[81] It operates as a court, but it is not formally a part of the judiciary, and therefore, it is a body distinct from the judicial branch. Formally, it has a jurisdiction of its own.[82] Significant skirmishes between the Spanish Constitutional Court and the Spanish Supreme Court have been widely documented.[83]

The court is composed of twelve judges, a mix of career magistrates, law professors and other legal professionals. There have been forty-six judges in the period 1980-2010, of which, sixteen were career magistrates and twenty-seven were law professors.[84] They are nominated for a nine-year nonrenewable term. The mixed appointment mechanism that involves the government, the two chambers of the Parliament, and the judicial council has diluted the possibility of a *de facto* stable quota system as the one in Germany or in Portugal. We can easily see from Table four that the incumbent party has a strong influence in the composition of the court. Therefore we can see that the court majority tends to reflect the parliamentary majority.

The powers of the court essentially include *ex post* abstract review national and regional laws, resolving conflicts of competence or authority between the central government and the regions, and between regions, and providing remedies for violations of fundamental rights committed by public bodies or courts against individual citizens (*recurso de amparo*). The latter has produced a very significant level of tension with the Spanish Supreme Court (*Tribunal Supremo*), the highest court for infraconstitutional matters, due to the leading constitutional role in guiding lower courts in interpreting laws that affect

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[80] Id.

81 A good introduction to the Spanish constitutional court is provided by Ignacio Borrajo Iniesta, Adjudicating in Divisions of Powers: The Experience of the Spanish Constitutional Court, in Andrew Le Sueur (ed.), Building the UK's New Supreme Court: National and Comparative Perspectives (2004). See also Elena Merino Blanco, *Spanish Law and Legal System* (2th ed. 2006) (discussing the Spanish constitutional court in chapter 7).

82 For example, the judiciary is regulated by title VI whereas the constitutional court is regulated by title IX of the Spanish Constitution.

[83] See Turano, *supra* 16.

[84] See Nuno Garoupa, Fernando Gómez Pomar, and Veronica Grembi, Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court, mimeograph (2010).

individual rights and liberties.[85]

Table four suggests the increasing polarization of the court, a result largely confirmed by more rigorous econometric analyses.[86] Our model suggests an additional explanation for this observed pattern. The long period of a socialist government (1982-1996) provided for a stable overwhelming left-wing majority in the court, thus increasing the willingness of the constitutional judges to defer ideological gains and focus on achieving supremacy over the Spanish Supreme Court. The following period of a conservative government (1996-2004) followed by a minority socialist government (since 2004) has reduced the stability of the court majority. At the same time, the parliamentary weakness of the recent socialist government has increased the importance of the constitutional court to undermine legislation and change public policies. Inevitably the court has become more politicized. The two main parties (socialists and conservatives) have been unable to come to an agreement to replace the constitutional judges that terminated their terms in 2006.[87] The incapacity for the court to decide on the constitutionality of the Catalan Constitution due to its internal polarization has contributed to a serious deficit of reputation.[88] At the same time, the ongoing conflict with the Spanish Supreme Court has not been reduced in frequency.[89] The resulting loss of credibility of the Spanish Constitutional Court was been widely discussed by the media.[90]

IVE. THE PORTUGUESE CONSTITUTIONAL COURT

The Portuguese Constitutional Court was inaugurated in 1982 (after the first constitutional reform) and exercises both abstract (*ex ante* and *ex post* promulgation) and concrete methods of constitutional review, according to the 1976 Constitution. As expected, the method of preventive review (before legislation is enacted and usually upon request or referral by the President) is the one that usually provides more political controversy. However, we should note that the vast majority of the work by the constitutional court is on concrete judicial review.[91] Moreover, the Portuguese Constitutional Court has very little control over their dockets (although, the right of rejecting a plea for lack of merit in the context of concrete judicial review has been exercised in several occasions).[92]

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85 See Turano, *supra* 16. See also Pablo Salvador Coderch and Fernando Gómez Pomar (eds.), *Libertad de Expresión y Conflicto Institucional* (2002) (in Spanish).

86 See Garoupa et. al., *supra* 84.

87 There are five constitutional judges to be appointed at this point.

88 The *Estatut de Catalunya* was approved by the Spanish Parliament and after a referendum in the region in 2006 and still waits for the Spanish Constitutional Court's decision (after a petition from the conservative party that opposed this law).

89 For example, consider a recent case (STC 29/2008, of 20 February 2008), absolving two prominent Spanish financiers of a white-collar crime against the interpretation of the Spanish Supreme Court on the statute of limitation for criminal offenses.

90 See, for example, the media cover by the main newspaper *El Pais,* http://www.elpais.com/todo-sobre/organismo/TC/Tribunal/Constitucional/58/

91 More than 85% of the cases heard by the constitutional court in the period 1983-2007 according to Sofia Amaral Garcia, Nuno Garoupa and Veronica Grembi, *Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal*, 6 Journal of Empirical Legal Studies 381 (2009).

92 Id.

There are thirteen constitutional judges. Ten of the judges are elected by the Parliament, which requires a two-thirds majority (elected judges), and the remaining three are chosen by the elected judges (appointed judges). Six of them must be career magistrates. In practice, the elected judges are extracted from a unique list of names negotiated by the parliamentary leadership of the main parties. Moreover, a *de facto* quota system exists, which allocates party seats to the major parties, thus explaining the stability of the court majority as observed in Table five. There are six right-wing judges and six left-wing judges, the thirteenth being a personality perceived to be politically neutral.[93]

Constitutional judges are elected for non-renewable terms of nine years (the mandate was for six years and renewable for a second period in office before the 1997 reform). In the period 1982-2007, there have been thirty-five judges, of which seventeen were career judges.[94]

As we can see from Table five, the court has been very polarized from the early start. The explanation has to do with the fact that the right-wing parties have largely been opposed to the 1976 Constitution (which had a clear leftist content in terms of opposing a market economy), thus leading to important constitutional amendments in 1989 and later. At the same time, the left-wing parties were largely favorable to the original Constitution and have endorsed later amendments with caution. Important empirical work has shown that Portuguese constitutional judges have been quite ideological in assessing abstract constitutionality and their behavior tends to reflect this left-right difference.[95]

The strong politicization of the Portuguese Constitutional Court in matters of abstract review does not seem to have contaminated the court decision-making in concrete review. In fact, there have been few conflicts between the Portuguese Constitutional Court and the Portuguese Supreme Court. Part of the explanation has to do with the hybrid system by which lower courts can also perform constitutional review in concrete cases (a design of US influence that reached Portugal through the 1891 Brazilian Constitution).[96] Under our model, the stability of the court majority might have helped the constitutional judges to defer particular ideological gains when exercising concrete review, focusing on consolidating the position of the court vis-à-vis the ordinary courts (thus entertaining many appeals on constitutional issues from lower courts), while using abstract review to signal party allegiance.

IVF. THE TAIWANESE CONSTITUTIONAL COURT

The Taiwanese Constitution is one of the oldest currently in force, dating from its adoption on the mainland in 1947. Similarly, the Taiwanese Constitutional Court (known as the Grand Justices of the Judicial Yuan) predates almost all the other specialized Kelsenian constitutional courts. Although composition and competences have been reformed in the last fifty years, the Taiwanese Constitutional Court is not a new product as its counterparts in many third-wave democracies (for example, Spain, Portugal, Eastern European countries, and Chile), but an institution that has prevailed throughout the authoritarian period and the more recent emerging democracy. The duration and the role of the

[93] Id.
[94] Id.
[95] Id.
[96] Id.

Taiwanese Constitutional Court make it quite different from other constitutional courts around the world.

Prior to 2003, the court was composed of seventeen judges who were appointed by the President with approval of the Control Yuan (1948-1992) or the National Assembly (1992-2000), and served for renewable terms of nine years.[97] Since 2003, the number of constitutional judges has been reduced to fifteen. They are now appointed by the President with the majority consent of the Legislative Yuan, and serve non-renewable terms of eight years.[98] From the lifting of martial law in 1987 to 2008, forty-five constitutional judges have served on the bench. A large proportion of the constitutional judges in Taiwan have been career magistrates, namely twenty-three.[99]

The powers of the Taiwanese Constitutional Court can be described largely as abstract review, including the interpretation of the Constitution, the unification of statutory interpretation, and addressing political cases (the impeachment of the President and Vice-President and dissolution of unconstitutional political parties).[100] The court also has other ancillary powers, in particular exercising as judicial council although formally distinct from its constitutional jurisdiction.[101] Only the Judicial Yuan can exercise constitutional review.

From the transition to democracy in the late 1980s to today there have been three Presidents, two affiliated with the traditional KMT (Chinese Nationalist Party; Kuomintang) and one supported by the opposition (DPP). [102] The disproportional influence of the KMT appointed judges is clear from Table five which is not surprising given the appointment mechanism. However, it is quite clear that the profile of constitutional judges appointed by KMT President Lee in 1994 and in 1999 is different from his predecessors, at least in terms of party allegiance.[103]

Table six summarizes the available statistics for a selected sample of cases. It shows a peak of dissent during the transition under KMT President Lee. This observation has been confirmed by more sophisticated empirical analyses.[104] Our model suggests an explanation. During the 1990s, the Taiwanese Constitutional Court was faced with a transition to democracy while the influence of the KMT on the appointment of the incumbent judges had been overwhelming. It needed to signal independence from the interests of the dominant party. At the same time the increasing divisions within the KMT (between the supporters of President Lee and the hardliners) diversified the political audience (since there were different wings within the KMT). Dissent signaled a more stimulating constitutional review

[97] See Nuno Garoupa, Veronica Grembi, and Shirley Lin, Explaining Constitutional Review in New Democracies: The Case of Taiwan, mimeograph (2010).
[98] Id.
[99] Id.
[100] Id.
[101] See discussion by Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003) and *supra* 5.
[102] In particular, Lee Teng-hui (1988-2000, KMT); Chen Shui-bian (2000-2008, DPP); Ma Ying-jeou (since 2008, KMT).
[103] See Garoupa et. al., *supra* 97.
[104] Id.

than before the 1990s. With the election of DPP President Chen and the mixture of constitutional judges from both parties, the court entered into the standard dynamics of a constitutional court in democracy. In particular, keeping with the civil law tradition and embracing a fruitful dialogue with the Taiwanese Supreme Court (known as the Supreme Court of the Republic of China), the highest court for infraconstitutional matters, the rate of dissent has decreased.

IVG. THE KOREAN CONSTITUTIONAL COURT

The Korean Court was established in late 1988 as part of the constitutional establishment of Korea's Sixth Republic. Though expected by the constitutional drafters to be a relatively quiescent institution, the Court has become the embodiment of the new democratic constitutional order of Korea. The Court is routinely called on to resolve major political conflicts and issues of social policy, and has decided several thousand cases. It retains a good deal of popularity.

Modeled closely on the Federal Constitutional Court in Germany, the Court's jurisdiction includes providing interpretations of the Constitution at the request of ordinary courts (as in the German system of concrete norm-control); hearing public petitions relating to the Constitution as prescribed by law; deciding issues of impeachment; the constitutionality of political parties; and deciding jurisdictional conflicts between local and central governments or central government branches. There are, however, a couple of jurisdictional differences between the Korean and German courts. Unlike the German Court, the Korean Court cannot be requested by designated government agencies to perform "abstract" review outside the context of a real dispute, nor can it review ordinary court decisions. In addition, constitutional review of administrative action was to be left to the ordinary court system.

The Court consists of nine justices who serve six-year renewable terms, now staggered so that justices are appointed in sets. Six votes are required to declare a law unconstitutional, to dissolve a political party, to accept a constitutional complaint or to overrule a previous precedent of the Constitutional Court. Three justices each are appointed by the Supreme Court, the National Assembly and the President. They have come from a variety of backgrounds, including judges, prosecutors and politicians.

The Korean Constitutional Court has been engaged in an occasional struggle with the Supreme Court over jurisdiction. The distinction between administrative and legislative interpretation is not as clear or straightforward as might be imagined. The question of the constitutionality of an administrative regulation frequently requires interpretation of the relevant statutory text. A restrictive interpretation of a statute will tend to void on constitutional grounds any administrative actions taken under it, where those actions rely on a broad reading of the statute. So the Constitutional Court is able to shape Supreme Court constitutional interpretations where the Constitutional Court is able to issue a prior decision on the statute underlying administrative action. But if it acts second, it cannot always do so.

The problem is caused in part by the design flaw that ordinary court decisions are not explicitly included within the jurisdiction of the Constitutional Court.[105] At the same time, the law provides that rulings of the Court on unconstitutionality are to be respected by ordinary courts, other state agencies and local

[105] *Constitution of the Republic of Korea* art 111(1).

government bodies.[106] This means that while ordinary courts must abide by Constitutional Court decisions, they are themselves the sole determiners of what those decisions require. Ordinary courts cannot be corrected by the Constitutional Court for failure to apply its decision correctly. Rather the Supreme Court is the sole body able to overrule lower court decisions. Therefore, much is at stake on the question of whether Supreme Court decisions can be appealed to the Constitutional Court.

In 1990, the Constitutional Court unilaterally decided that it had implied jurisdiction over administrative regulations issued pursuant to statutes, and that the assignment of administrative review in Article 107(2) to the ordinary courts was not exclusive.[107] In response to that decision, the Supreme Court issued a statement to all ordinary judges condemning the Constitutional Court decision, and stating that it had 'gone beyond its domain'.[108] Later, in 2005, the Constitutional Court declared a tax law partially unconstitutional, and dictated that it could only be applied if given a particular narrow interpretation by ordinary courts.[109] The Supreme Court responded that, since the Constitutional Court had no authority over ordinary court judgments, its decision could only be taken as an expression of opinion regarding constitutionality, and had no binding force over ordinary courts. The ordinary courts then proceeded to apply the controversial tax law in the manner that the Constitutional Court had criticized. In December 1997, the original petitioner again sought relief from the Constitutional Court, and the Court obliged by annulling the Supreme Court judgment, even though it had no explicit power to do so in the Constitutional Court Act. The Court also voided that portion of the Constitutional Court Act that excluded ordinary court decisions from constitutional review, saying that Constitutional Court decisions must be binding on all. The Supreme Court responded by holding a press conference, asserting that it would reply through a judgment.[110] Subsequently, the Constitutional Court continued to consider ordinary court judgments in certain cases and it now appears that the theory of the Constitutional Court has been accepted de facto.

Table Seven provides data on the rate of internal fragmentation (as measured by dissent rates) over time. During the early years of the Constitutional Court, dissent was associated with only one or two justices appointed by opposition parties. This was a period of democratic consolidation and the court was typically unanimous. This stance was maintained during the period of conflict over jurisdiction with the ordinary Supreme Court. Once that battle was won, however, the Court found itself in the contentious period of the presidencies of Kim Dae Jung (19997-2002) and Roh Moo-hyun (2003-2008). This period featured divided government, contentious politics, and a notable impeachment case against

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[106] *Constitutional Court Act* art 47(1).

[107] Rules implementing the Certified Judicial Scriveners Act Case, 2 KCCR 365, 89Hun-Ma178, October 15, 1990. Article 107(2) reads '[t]he Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or dispositions, when their constitutionality or legality is a prerequisite to a trial'.

[108] See James M. West and Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence at the Vortex*, 40 American Journal of Comparative Law 73 (1992), at 103.

[109] See discussion in Ginsburg, *supra* 101, at 232.

[110] This high-profile conflict led the Korea Herald to call for legislative resolution of the problem: "This complicated and subtle conflict between the two supreme juridical bodies calls for an intervention of the President and the National Assembly which can exercise their legislative prerogatives toward illuminating the balance of power and division of labour between the two highest courts." "Editorial," *Korea Herald*, December 30, 1997.

Roh in which the Court confirmed that he could stay in office.[111] During this period of greater institutionalization, we see higher—though also highly variable—rates of dissent. It reflects the same trajectory of other courts in our study: internal cohesion when audiences are primarily legal, and diverse opinions when audiences are political.

V. CONCLUSION

This paper has proposed an explanation for why Kelsenian constitutional courts may be less fragmented than a mere attitudinal model would suggest. We argue that constitutional judges want to advance their ideological agenda. However they face competition from other higher courts in terms of influencing the law and the court system. In order to advance their ideological agenda, constitutional judges need to have influence. We suggest that in order to increase influence and achieve supremacy over other higher courts, constitutional judges may have to sacrifice immediate ideological goals.

[111] Tom Ginsburg, *The Constitutional Court of Korea*, in Andrew Harding, ed., New Courts in Asia (2010).

TABLE THREE: STABILITY OF COURT MAJORITY IN THE FRENCH CONSTITUTIONAL COUNCIL, 1959-2007

		% Right-wing Judges
1959-1969	President de Gaulle	85.7%
1970-1981	Presidents Pompidou and G. d'Estaing	90.5%
1982-1986	President Mitterrand	62.5%
1987-2002	Cohabitation	43.3%
2003-2007	President Chirac	63.4%
	TOTAL	66.7%

Excluding the two former Presidents.

Source: Raphael Franck, Judicial Independence under a Divided Polity: A Study of the Rulings of the French Constitutional Court, 1959-2006, 25 Journal of Law, Economics and Organization 262 (2009).

TABLE FOUR: DISSENT RATES IN THE SPANISH CONSTITUTIONAL COURT , 1981-2006
ABSTRACT REVIEW ONLY (EX POST PROMULGATION DECISIONS)

		% Right-wing Judges	% Decisions with Dissent	Number of Cases
1981-1982	Transition	58.3%	28.5%	21
1983-1993	Strong Left Government	22.2%	26.5%	147
1994-2000	Minority Governments	33.3%	36.8%	68
2001-2004	Strong Right Government	52.8%	50.0%	38
2005-2006	Minority Left Government	50.0%	69.6%	23
	TOTAL	45.7%	35.4%	297

Source: Nuno Garoupa, Fernando Gómez-Pomar, and Veronica Grembi, Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court, mimeograph (2010).

TABLE FIVE: DISSENT RATES IN THE PORTUGUESE CONSTITUTIONAL COURT, 1983-2007
ABSTRACT REVIEW ONLY (EX ANTE AND EX POST PROMULGATION DECISIONS)

		% Right-wing Judges	% Decisions with Dissent	Number of Cases
1983-1985	Transition	50.0%	100.0%	6
1986-1995	Strong Right Government	50.0%	66.3%	193
1996-2001	Minority Left Government	50.0%	84.2%	19
2002-2005	Strong Right Government	50.0%	66.7%	33
2006-2007	Strong Left Government	50.0%	73.7%	19
	TOTAL	50.0%	68.9%	270

Source: Sofia Amaral Garcia, Nuno Garoupa and Veronica Grembi, Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal, 6 Journal of Empirical Legal Studies 381 (2009) and Sofia Amaral Garcia, Nuno Garoupa and Veronica Grembi, Explaining Dissent in the Kelsenian Constitutional Courts: The Case of Portugal, mimeograph (2010).

TABLE SIX: DISSENT RATES IN THE TAIWANESE CONSTITUTIONAL COURT, 1988-2008
ABSTRACT REVIEW (MOST RELEVANT CASES)

		% KMT President Appointed Judges	% Decisions with Dissent	Number of Cases
1988-1993	End of Authoritarian Regime	100.0%	30.8%	26
1994-2000	Transition with President Lee (KMT)	100.0%	42.9%	35
2001-2008	Opposition wins with President Chen (DPP)	58.1%	30.6%	36
	TOTAL	64.2%	35.1%	97

Source: Nuno Garoupa, Veronica Grembi, and Shirley Lin, Explaining Constitutional Review in New Democracies: The Case of Taiwan, mimeograph (2010).

TABLE SEVEN: DISSENT RATES IN THE KOREAN CONSTITUTIONAL COURT, 1988-2008
Reported full bench cases only

	Events	% Decisions with Dissent
1990		0
1992	First non-military president elected	0
1994		12.5%
1996	Battle with supreme court	N/A
1998	Kim Dae Jung presidency	43%
2000		5%
2002	Roh Moo Hyun elected	6.7%
2004	Impeachment case	6.3%
2006		16.8%
2008		16.7%

Source: Authors Calculations.

MATHEMATICAL APPENDIX

Proof of Result 1

If there is an agreement for consensus, the expected payoffs are:

(Majority) $a_1 V/2 + p\, a_2 V$

(Minority) $a_1 V/2 + (1-p)\, a_2 V$

If there is no agreement, the expected payoffs are:

(Majority) $a_1 V + p\, a_1 V$

(Minority) $(1-p)\, a_1 V$

If the minority joins the majority, the expected payoffs are:

(Majority) $a_1 V + p\, a_2 V$

(Minority) $- a_1 V + (1-p)\, a_2 V$

Immediately it can be seen that, if the majority compromises, so does the minority. However, if the majority does compromise, the minority only joins the majority when $a_2/a_1>(2-p)/(1-p)$.

From the perspective of the majority, if $a_2/a_1>(2-p)/(1-p)$, it is anticipated that the minority will give in and so the majority never compromises. However, when $a_2/a_1<(2-p)/(1-p)$, the majority has to compare the current loss from compromising with the additional future gain from prestige. The majority compromises if $a_2/a_1>1 + 1/(2p)$.

By direct comparison of the expected payoffs, result one follows. QED

Proof of Result 2

If there is an agreement for consensus, the expected payoffs are:

(Majority) $a_1 V/2 + (1-\beta)\, a_2 V/2 + \beta\, a_2\, p\, V$

(Minority) $a_1 V/2 + (1-\beta)\, a_2 V/2 + \beta\, a_2\, (1-p)\, V$

If there is no agreement, the expected payoffs are:

(Majority) $(1-\beta)\, a_1 V/2 + \beta\, a_1\, p\, V$

(Minority) $(1-\beta)\, a_1 V/2 + \beta\, a_1\, (1-p)\, V$

If the minority joins the majority, the expected payoffs are:

(Majority) $a_1 V + (1-\beta)\, a_2 V/2 + \beta\, a_2\, p\, V$

(Minority) $- a_1 V + (1-\beta) a_2 V/2 + \beta a_2 (1-p) V$

Immediately it can be seen that, if the majority does not compromise, the minority prefers dissent to joining the majority. However, if the majority does compromise, the minority only joins the majority when $a_1 \beta(2p-1) + a_2 [1+\beta(1-2p)] > 0$, that is, if the reputation as an independent court is not too damaged by compromising. Whereas this condition is trivially satisfied when $p \geq 1/2$, it is not the case when $p < 1/2$ (when the minority has a good chance of taking over the court after the collapse of the authoritarian regime).

From the perspective of the majority, if the above condition is not satisfied, it is anticipated that the minority will never compromise, so the majority never compromises. However, when the above condition is satisfied, the majority has to compare the current gain from compromising with the additional future losses from a reduction in judicial prestige. The majority compromises if $a_1 \beta(1-2p) + a_2 [1-\beta(1-2p)] > 0$. Whereas this condition is trivially satisfied when $p \leq 1/2$, it is not the case when $p > 1/2$ (when the majority is likely to survive the political transition, it has less incentives to compromise).

By direct comparison of the expected payoffs, result two follows. QED