

BUILDING REPUTATION IN CONSTITUTIONAL COURTS: PARTY AND JUDICIAL POLITICS
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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 by post-war Germany and Italy, they have expanded to Southern Europe when the right-wing dictatorships collapsed there in the 1970s, to many Asian countries with the political reforms of the 1980s, and to Central and East European former socialist countries in the 1990s. Even some Latin countries, typically influenced by American 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 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

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 conjugated with concrete review, allowing individual citizens to access the constitutional courts, either directly or indirectly (in distinct forms of general or incidental referrals from

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].

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.

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 (illegalizing them or auditing their accounts), and other relevant political, judicial and administrative functions.⁵

Constitutional courts have necessarily 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 are political in nature and have political consequences. The constitutional judges are political agents, not least because the appointment mechanism is usually politicized and has frequently resulted in stable *de facto* quotas for the different influential political parties. There be might different reasons for the way in which constitutional judges interact with the political audience broadly defined. First, they tend to share the same preferences than their appointers, meaning that they have the similar views about legislation and constitutional interpretation. Second, they care 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 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 product by which 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 subject to intense legal debate.

A second audience that a constitutional court faces is other courts. This judicial audience has not been extensively analyzed 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 depoliticized and traditionally have been fairly

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).

⁶ Citation

⁷ Citation

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).

deferential to the other branches of government. The constitutional courts seem to be 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.

Not surprisingly, constitutional courts try to “look like” the supreme courts in order to influence regular courts. For example, many constitutional courts develop procedural rules that are similar to those of the higher judicial courts. 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. The natural goal in this context is to achieve supremacy as the highest court in the country.¹⁰

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 form of constitutional review forces a direct interaction between the constitutional court and regular courts. Clearly, concrete review blurs the separation between the constitutional court and the rest of the judiciary either in the form of incidental referrals or of direct constitutional complaints. It induces the constitutional court to interfere with judicial decisions and participate in the resolution of individual cases, which was not intended by the original Kelsenian model (apparently Kelsen was opposed to concrete review). The consequence is a less transparent 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 position for a constitutional court to try to condition other courts. There is no obvious relation between the review of legislation in abstract and concrete adjudication. 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

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

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

¹¹ *Id.* (observing that legitimacy is politically more complicated in abstract rather than concrete review, even if the court has undisputed formal legitimacy).

¹² See Garlick, *supra* 9

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. Second, it increases the political value of constitutional review because it might provide an indirect mechanism for influencing the judiciary. The natural inclination for the constitutional court is to expand competences (the progressive constitutionalization of private law in several jurisdictions is just an 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 not conceived as a negative legislator, but as a positive legislator with formidable powers of statutory interpretation.¹⁶ However, once a positive legislator, a constitutional court 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.

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 (even that is presumably debatable), 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 possible 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

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.

¹⁸ Id.

¹⁹ Id.

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, naturally most of the expansion of institutional power and influence generates conflict, which might or might not constitute the appropriate framework for 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

We can summarize our prediction in the following way:

	CONCRETE REVIEW IS POSSIBLE	CONCRETE REVIEW IS NOT POSSIBLE
ABSTRACT REVIEW IS POSSIBLE	BOTH AUDIENCES MATTER AND COULD BE CONFLICTIVE [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 American 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 majority and minority, or compete 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.²¹ 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 against the ideology and uphold laws that are aligned with ideology of the court.²² However, as to interacting with a judicial audience in

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 Stefanie A. Lindquist and Frank B. Cross, *Measuring Judicial Activism* (2009).

²² Id.

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.

In particular, we can think that there are two “pure” strategies available for the court. On one hand, the court can follow *consensual decisions*; 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.²³

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).²⁴

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. Weak constitutional courts vis-à-vis the supreme court, in particular the French and the Italian cases, 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 for increasing polarization, cycles are observable in all countries; these cycles seem to be related to more or less political instability or transition (Germany in the late 1960s, France in the 1980s, Italy and Portugal in the 1990s, Spain in the 2000s).²⁵

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).²⁶

²³ If the procedure does not allow formal dissent, there may be informal mechanisms for conveying such situation as media coverage.

²⁴ 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*, *Law and Society Review* 30 (1996) 87 (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).

²⁵ Citation.

²⁶ 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 Helmke, *Courts under Constraints: Judges*,

We can summarize the idea in the following table:

	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

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, it is 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 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

Generals, and Presidents in Argentina, Cambridge University Press (2005) on Argentina and Lisa Hilbink, *Agents of 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.

government (to appease the authoritarian executive); when approaching political transitions, we expect fragmentation to dominate for sake of survival.²⁷

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

II. BASIC ANALYTICAL MODEL

IIA. 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 (V_1, V_2) , that is, V_1 for the majority (whose ideological agenda is advanced) and V_2 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 $V_1 > V_2$ (the current political gains of the majority are more substantial than those of the minority). For simplicity, let us normalize V_2 to zero and redefine V_1 as V .²⁸

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).

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.

²⁷ 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.)

²⁸ Under some specific circumstances, it could be that $V_1 < V_2$ (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.

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.

IIB. 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) $p \geq \frac{1}{2}$ and $a_1 \beta(1-2p) + a_2 [1-\beta(1-2p)] > 0$ or (ii) $p \leq \frac{1}{2}$ 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 $p = \frac{1}{2}$. The intuition for this result is that compromise is determined by the majority when p is more than $\frac{1}{2}$ and by the minority when p is less than $\frac{1}{2}$. 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 $\frac{1}{2}$) and increases with the minority dominates the game (p is less than $\frac{1}{2}$).

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.

IIC. 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 lowers the likelihood of a damaging political transition.

III. DISCUSSION OF PARTICULAR CASES

Here we should address different experiences focusing in the elements of our story: the need to build reputation versus potential ideological goals.

IIIA. Europe

IIIB. Asia

IIIC. Eastern Europe

IIID. Latin America

IV. Conclusions

MATHEMATICAL APPENDIX

Proof of Result 1

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

$$\text{(Majority)} \quad a_1 V/2 + p a_2 V$$

$$\text{(Minority)} \quad a_1 V/2 + (1-p) a_2 V$$

If there is no agreement, the expected payoffs are:

$$\text{(Majority)} \quad a_1 V + p a_1 V$$

$$\text{(Minority)} \quad (1-p) a_1 V$$

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

$$\text{(Majority)} \quad a_1 V + p a_2 V$$

$$\text{(Minority)} \quad -a_1 V + (1-p) a_2 V$$

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:

$$\text{(Majority)} \quad a_1 V/2 + (1-\beta) a_2 V/2 + \beta a_2 p V$$

$$\text{(Minority)} \quad a_1 V/2 + (1-\beta) a_2 V/2 + \beta a_2 (1-p) V$$

If there is no agreement, the expected payoffs are:

$$\text{(Majority)} \quad (1-\beta) a_1 V/2 + \beta a_1 p V$$

$$\text{(Minority)} \quad (1-\beta) a_1 V/2 + \beta a_1 (1-p) V$$

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

$$\text{(Majority)} \quad a_1 V + (1-\beta) a_2 V/2 + \beta a_2 p V$$

(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

TOM'S NOTES FROM DISCUSSION: Uncertainty→internal cohesion goes down.

Would it be helpful to demonstrate incoherence→punishment.

Russian coherent.

If court in transition Too coherent→punishment?

If court too incoherent, reputation is poor, no political support→

Korean:

Why dissent? Courts cant admit they are political. Fear of politics.

So dissent is a signal.

French const court didn't want concrete review power. Not just maximizing power but a more amorphous idea of reputation and role.

Another top-down reform-like Japan.

Selection problems—courts will draw the cautious.