EMPIRICAL LEGAL STUDIES AND CONSTITUTIONAL COURTS

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I. INTRODUCTION

Empirical legal studies have emerged lately as an important area in legal scholarship.[1] Notwithstanding, courts have been the focus of empirical work by political scientists and economists for more than twenty years.[2] The U.S. Supreme Court has been the focus of much attention by empirical scholars. Different theories have been developed to explain judicial decision-making in the U.S. Supreme Court. Formalists take the view that constitutional judges simply interpret and apply the Constitution in a conformist view of precedents. In a completely different perspective, the attitudinal model sees judicial preferences, with special emphasis on ideology, as the main explanatory model. Finally, agency theorists recognize the importance of judicial preferences but argue that they are implemented taking into account political and institutional realities.[3]

We probably know more about the U.S. Supreme Court than any other court in the world. Empirical studies about courts outside of the United States are growing but still limited.[4] Concerning the

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1 A good introduction is provided by Robert M. Lawless, Jennifer K. Robbennolt and Thomas S. Ulen, *Empirical Methods in Law*, Aspen Publishers (2009).

2 See, among others, Barry Friedman, The Politics of Judicial Review, *Texas Law Review* 84, 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.), *Handbook of Political Economy*, Oxford University Press, (2006).

3 See, among others, Saul Brenner and Harold J. Spaeth, Ideological Position as a Variable in the Authoring of Dissenting Opinions on the Warren and Burger Courts, *American Politics Quarterly* 16, 317 (1988); J. A. Segal and A. D. Cover, Ideological Values and the Votes of U.S. Supreme Court Justices, *American Political Science Review*, 83, 557 (1989); Lee Epstein and Jack Knight, *The Choices Justices Make*, Congressional Quarterly Inc. (1998); Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, Cambridge University Press (2002); Thomas G. Hansford and James F. Springgs II, *The Politics of Precedent on the US Supreme Court*, Princeton University Press (2006).

4 For example, on Canada, see C. Neal Tate and Panu Sittiwong, Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations, *Journal of Politics* 51, 916 (1989); Benjamin Alarie and Andrew J. Green, Should They All

particular case of constitutional courts, the empirical literature is recent, with emphasis on Germany[5], France[6] and Italy.[7] The slow start of empirical scholarship about courts outside of the United States, and particularly constitutional courts, can be explained by the difficulty in accessing data. However, most constitutional courts now report online their decisions. Many courts have invested seriously in new information technologies and allow online access to decisions back to the early 1980s. Technology has made access to information easier, therefore reducing the costs to produce serious empirical studies in constitutional law.

There are still significant language barriers, mainly due to the fact that decisions are in the native language. A short summary in English is usually inappropriate and incomplete for purposes of coding and statistical testing. Not surprisingly, the development of empirical constitutional law studies follows closely the influence of econometrics on local legal communities. Unfortunately empirical legal studies have been received harshly by traditional formalist legal scholarship, much

Just Get Along? Judicial Ideology, Collegiality, and Appointments to the Supreme Court of Canada, *University of New Brunswick Law Journal* (2008) and Andrew J. Green and Benjamin Alarie, Policy Preference Change and Appointments to the Supreme Court of Canada, *Osgoode Hall Law Journal* 47, 1 (2009). On Germany, see Martin R. Schneider, Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal, *European Journal of Law and Economics* 20, 127 (2005). On Japan, see J. Mark Ramseyer and Eric B. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan*, University of Chicago Press, (2003), and on the particular case of the Japanese Supreme Court, see J. Mark Ramseyer and Eric B. Rasmusen, The Case for Managed Judges: Learning from Japan after the Political Upheaval of 1993, *University of Pennsylvania Law Review* 154, 1879 (2006). On Taiwan, Korea and Mongolia, see Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press (2003). On Argentina, see Rebecca Bill Chávez, *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina*, Stanford University Press (2004) and G. Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina*, Cambridge University Press (2004). On Chile, see Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile*, Cambridge University Press (2007). More generally, see Diana Kapiszewski and Matthew M. Taylor, Doing Courts Justice? Studying Judicial Politics in Latin America, 64 *Perspectives in Politics* 741 (2008).

5 See Georg Vanberg, *The Politics of Constitutional Review in Germany*, Cambridge University Press, (2005).

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

7 See A. Breton and A. Fraschini, The Independence of the Italian Constitutional Court, *Constitutional Political Economy* 14, 319 (2003); Nadia Fiorino, Fabio Padovano and Grazia Sgarra, The Determinants of Judicial Independence: Evidence from the Italian Constitutional Court (1956-2002), *Journal of Institutional and Theoretical Economics* 163, 683 (2007); and Fabio Padovano, The Time-Varying Independence of Italian Peak Judicial Institutions, *Constitutional Political Economy* 20, 239 (2009).

the same way as law and economics and other legal scholarly innovations.[8] Consequently, the production of empirical studies in constitutional law has been much slower than we would desire and almost entirely the work of political scientists.

The constitutional courts have attracted considerable attention from theoretical perspectives in political science and economics well before the movement for empirical legal studies started. There is a consensus among political scientists and lawyers that the appropriate design of judicial review plays an important role in assessing and analyzing constitutional frameworks.[9] Constitutional adjudication is a central element in determining the various dimensions of political and legal reform. Long-run interests usually conflict with political short-run opportunism. Therefore, the precise mechanism by which constitutional adjudication responds to these conflicting goals determines political and economic stability.

Macro empirical economic analysis seems to show that independent courts and constitutional review are factors that should be taken into account not only if the goal is to guarantee political freedom, but also to protect economic liberties and foster economic growth.[10] In that light, empirical studies in constitutional law provide for more detailed evidence that should help scholars to understand how local institutions promote economic growth and political development.

Clearly we cannot understand the role of a given constitutional court without paying attention to the political process underlying the production of the Constitution.[11] In that respect, generalizations and uniform solutions are likely to be incorrect because the design of a

8 See, for example, Nuno Garoupa and Thomas S. Ulen, The Market for Legal Innovation: Law and Economics in Europe and the United States, *Alabama Law Review* 59, 1555 (2008).

9 A good introduction is provided by Tom Ginsburg, Economic Analysis and Design of Constitutional Courts, *Theoretical Inquiries in Law* 3 (2002).

10 See, among others, Rafael La Porta, Florencio Lopes-de-Silanes, Christian Pop-Eleches, Andrei Shleifer, Judicial Checks and Balances, *Journal of Political Economy* 111, 445 (2004) and Lars P. Feld and Stefan Voigt, "Judicial Independence and Economic Growth: Some Proposals Regarding the Judiciary," in Roger D. Congleton and Brigitta Swedenborg (eds.), *Democratic Constitutional Design and Public Policy. Analysis and Evidence*, MIT Press (2005), although one of their findings is that constitutional review powers vested in the highest judicial instance reduce economic growth.

11 See Donald Lutz, Toward a Theory of Constitutional Amendment, *American Political Science Review* 88, 355 (1994); Robert Cooter, The Minimax Constitution as Democracy, *International Review of Law and Economics* 12, 292 (1992); Francisco Ramos, The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions, *Review of Law and Economics* 2, 103 (2006).

constitutional court corresponds to specific trade-offs as projected by the constitutional legislators.[12] It seems to us that empirical studies in constitutional law are more appropriate for the understanding of local conditions than macro empirical analyses.

Whatever model prevails, judicial decision-making in a constitutional court, as in any court, is the result of personal attributes,[13] attitudes (including policy or ideological preferences), peer pressure, intra-court interaction (a natural pressure for consensus and court reputation; a common objective to achieve supremacy of the constitutional court), and party politics (loyalty to the appointer) within a given constitutional and doctrinal environment.[14] Constitutional judges are appointed by heavily politicized bodies, and could be heavily influenced by political parties when these play an active role in the appointment process. Therefore, judicial independence becomes an issue. However, judges are also somehow interested in maintaining a certain *status quo* that does not hurt the prestige of the court, thereby, keeping some distance from active party politics.

Conformity between constitutional judges and party interests can be explained by two different phenomena. First, given the political choice of constitutional judges, they exhibit the same preferences as the party that selects them (i.e., there is an ideological consensus). Second, when the constitutional judges do not have lifetime appointments, they might want to keep a good relation with the party

12 In fact, a point already mentioned by Hans Kelsen in his own comparative work, see Lech Garlicki, Constitutional Courts versus Supreme Courts, *International Journal of Constitutional Law* 5, 44 (2007).

13 For judicial preferences, see Richard Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else), *Supreme Court Economic Review* 3, 1 (1993); Richard Posner, Judicial Behavior and Performance: An Economic Approach, *Florida State University Law Review* 32, 1259 (2005); and Richard Posner, *How Judges Think*, Harvard University Press (2008). See also Frank H. Easterbrook, What's so Special about Judges?, *University of Colorado Law Review* 61, 773 (1990); Laurence Baum, What Judges Want: Judges' Goals and Judicial Behavior, *Political Research Quarterly* 47, 749 (1994), Frederick Schauer, Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior, *University of Cincinnati Law Review* 68, 615 (2000); and Chris Guthrie, Jeffrey J. Rachlinski and Andrew J. Wistrich, Blinking on the Bench: How Judges Decide Cases, *Cornell Law Review* 93, 1 (2008).

14 For example, see the models developed by Tracey E. George and Lee Epstein, On the Nature of Supreme Court Decision Making, *American Political Science Review* 86, 323 (1992); Andrew D. Martin and Kevin M. Quinn, Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the US Supreme Court, *Political Analysis* 10, 134 (2002); or Jeffrey R. Lax and Charles M. Cameron, Bargaining and Opinion Assignment on the US Supreme Court, *Journal of Law, Economics and Organization* 23, 276 (2007).

that selected them for future appointments to the court or elsewhere (regardless of whether the terms are renewable or not). In both models, judges have a political bias incentive and are not fully independent, but the underlying reasons are significantly different.

The process of recruitment and the appointment of judges are necessarily major variables in the design of the constitutional courts. Overly party-oriented mechanisms are especially bad for independent judicial review,[15] but are quite likely to smooth conflicts with the other bodies of governance. Cooperative mechanisms that require a supermajority deliver consensual constitutional courts, which are more deliberative than active lawmakers.[16] Representative mechanisms can create *de facto* party quotas, depending on the stability of the party system.

The extent to which constitutional judges respond to party interests is a matter for adequate empirical work. In this paper, we discuss the growing empirical evidence on constitutional courts, in particular those of the so-called Kelsenian or German-type. We start by looking at the design of these courts, and argue that their politicization is inevitable (section 2). However, there are important aspects that limit the extent to which ideology plays an overwhelming role in constitutional adjudication. We then discuss several constitutional courts to assess the balance between party influence and other goals (section 3). Conclusions are addressed in the final section.

II. CONSTITUTIONAL COURTS: THEORY

The design of most constitutional courts in the Western world has been influenced by the original ideas and legal theories of Hans Kelsen.[17] Under this legal theory, ordinary judges are mandated to apply law as legislated or decided by the parliament (the legislative branch of government). Consequently there is subordination of the

15 Theories of judicial independence include William Landes and Richard Posner, The Independent Judiciary in an Interest-Group Perspective, *Journal of Law and Economics* 18, 875 (1975); R. Epstein, The Independence of Judges: The Uses and Limitations of Public Choice, *Brigham Young University Law Review* 827 (1990); J. Mark Ramseyer, The Puzzling (In)dependence of Courts, *Journal of Legal Studies* 23, 721 (1994).

16 See Ginsburg, *supra* 4, and references therein.

17 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, 183 (1942).

ordinary judges to the legislator. However, due to a strict hierarchy of laws, judicial review is incompatible with the work of an ordinary court. 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, conventionally called the constitutional court, operates as a negative legislator because it has the power to reject legislation (but not propose legislation).[18]

In fact, the centralization of constitutional review in a body outside of the conventional judiciary has been important to secure independence and the commitment to democratization after a period of an authoritarian government in many countries. The judiciary is usually suspected of allegiance to the former regime, and hence, a new court is expected to be more responsive to the democratic ideals contemplated in the new constitution.[19]

The application of the Kelsenian model in each country has conformed to local conditions, and therefore, the competences and organization of constitutional courts are usually much broader than a simple "negative legislator." *Ex ante* review of legislation (i.e., before promulgation) has been extended to *ex post* review (i.e., after promulgation) in many countries. Abstract review (such as traditionally in France) has been conjugated with concrete review (such as in Germany or in Spain). 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 and administrative functions, such as performing as judicial council as seen in Taiwan.[20]

The Kelsenian-type courts for constitutional review exist now in most countries of the EU of civil law tradition, with the Netherlands and the Scandinavian countries being the most striking exceptions. Also most former communist Central and Eastern countries have now

18 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.

19 See Ginsburg *supra* 4 on Taiwan, Mongolia and Korea. See more generally Garlicki, *supra* 12.

20 See Ginsburg *supra* 4 for discussion of ancillary powers of constitutional courts in Asia. Also Tom Ginsburg, "Beyond Judicial Review: Ancillary Powers of Constitutional Courts," in Tom Ginsburg and Robert A. Kagan (eds.), *Institutions and Public Law,* (2005).

developed a similar institutional structure. France has embraced a much narrower judicial review of legislation in accordance with their traditions, but now expanded to include a form of concrete review.[21] Clearly, the institutional design followed in Germany and in Spain broadens the initial Kelsenian model, whereas the original French model, with narrower competences and almost exclusively preventive review, offers less than what is expected from a Kelsenian-type court. Indeed, the Austrian model of the early 1920s limited constitutional review to abstract review of the legislation, but incidental referrals that effectively provided for concrete review were introduced not much later, in the 1930s.

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. The consequence is a less transparent delimitation of jurisdictions, and consequently the emergence of conflicts of competence between the constitutional court and other higher courts.[22] Preventive review by its very nature provides a weak position for a constitutional court to try to condition other courts because 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's idea of "conforming interpretation," although dependent on the voluntary compliance by other courts, is still conceptually influential.[23] Yet, where abstract review is very limited (such as in Italy or in South Korea), the ability to shape legislative outcomes is reduced and constrains the political influence of the court.[24]

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21 See Alec Stone Sweet, The Politics of Constitutional Review in France and Europe, *International Journal of Constitutional Review* 5, 69 (2007). 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 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.

22 See Garlicki, *supra* 12.

23 See Garlicki, *supra* 12.

24 See Sweet, *supra* 17.

The possibility of a conflict between the major courts has substantive legal and political implications.[25] First, it puts pressure on constitutional judges to achieve a coherent and prestigious body of constitutional jurisprudence or doctrines.[26] Therefore, it transforms the nature and scope of constitutional review by empowering the court and putting pressure for a façade of apolitical decision-making. Second, it increases the political value of constitutional review because these conflicts 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.[27] 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.[28]

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.[29] Constitutional law cannot be apolitical. Inevitably constitutional courts as idealized by Kelsen are political in nature.[30]

Having established that a constitutional court is political, we should recognize that being political in nature is not the same as being politicized. We can expect partisan politics to exert some influence, either by common ideological goals (filtered through the appointment mechanism) or by direct pressure. However, politics inside the court could differ from straight partisan agendas. The difference between partisan politics and judicial politics can be explained by the court

25 See discussion by Nuno Garoupa and Tim Ginsburg, Building Reputation in Constitutional Courts: Party and Judicial Politics, mimeograph (2010) (presenting a complete theory of judicial politics in the context of the Kelsenian courts).

26 In the limit, developing a court-made consistent and coherent constitution that supplements or even replaces the original text. See, for example, Garlicki, *supra* 12.

27 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, 151 (2006).

28 See Sweet, *supra* 17.

29 Id.

30 Id.

exposure to diverse audiences.[31] For example, differences in the professional background are usually presented as an explanation for the different propensities to judicial activism.[32] Certainly the particular nature of the institution and the political process determine the extent to which partisan agendas prevail.

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 in Europe) creates an inevitable "judicialization" of politics for three reasons. First, as a consequence of the particular position of the constitutional court, the goal of self-expanding institutional power affects the delicate balance between the judicial and the political structures (at the expense of the higher courts and the other powers of government). Second, naturally most of the expansion of institutional power and influence generates conflict. Third, political diffusion makes the role of a constitutional court more important. The constitutional court provides the institutional body for the judiciary to interplay with the politics. The inevitable "judicialization" of politics necessarily politicizes the court. Hence, politics inside the constitutional court becomes unavoidably contaminated by party politics and ideological agendas. The stakes are simply too relevant and important for political parties not to interfere.

We can conclude that each constitutional court will therefore exhibit two important political dimensions: judicial politics (in an effort to expand competences, enhance prestige, and achieve supremacy over the higher courts) and partisan politics (in the sense of advancing ideological goals). In democratic regimes, judicial politics necessarily creates peer-pressure within the court to comply with an apolitical façade and provide a coherent body of case law. Advancing ideological goals divides the court, and politicizes the court's decisions. Hence, the tension between judicial and partisan politics is inevitable.[33]

Judicial activism can be regarded as a court strategy from several perspectives. The most immediate and standard interpretation of judicial activism is to give content to particular ideological agendas.[34] However, judicial activism could also be a response of the court to

31 See Garoupa and Ginsburg, *supra* 25.

32 See Garlicki, *supra* 12.

33 See Garoupa and Ginsburg, *supra* 25 (also making the point that, in authoritarian regimes, unanimity in the court could be perceived as lack of independence from the government).

unwelcomed intromissions by the other powers of government, thus providing the needed legal doctrines. Finally, judicial activism can also help the court in establishing or enhancing prestige with the higher courts if focused on promoting coherent case law. As a consequence, judicial activism is consistent with different degrees of politicization.[35]

From an empirical perspective, the relevant question is the extent to which the behavior of constitutional judges can be systematically explained by ideology or partisan alignment. There is plenty of anecdotal evidence of politicization on constitutional courts. The media and other sources of information provide abundant accounts of particular decisions or significant controversies. The advantage of a serious empirical study is to detect if there is a pattern on judicial behavior, or if the anecdotal evidence is just that, anecdotal.

At the same time, as easily derived from our discussion, even the most ideologically driven judges will occasionally engage in commitment or consensus building given the multiplicity of goals. Observing patterns of unanimity versus fragmentation is not enough to prove or disprove the influence of ideology in judicial behavior. Only empirical work that controls for all the appropriate variables and recognizes the particular determinants in a specific jurisdiction can provide some serious evidence in this respect.

For practical reasons we have noted before (mostly referring to traditional limitations on available data), that there are not many consistent and coherent empirical studies about the Kelsenian courts. In the next section, we discuss the existing empirical studies.

III. CONSTITUTIONAL COURTS: EMPIRICAL EVIDENCE

The precise characteristics of Kelsenian-type constitutional courts around the world vary widely, namely in composition (they go from seven judges in Latvia to sixteen judges in Germany), appointment

34 For a general discussion see Barry Friedman, The Politics of Judicial Review, *Texas Law Review* 84, 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.), *Handbook of Political Economy*, Oxford University Press, (2006).

35 For a discussion of judicial activism by a Continental constitutional court, see Donald Kommers, The Federal Constitution Court in the German Political System, *Comparative Political Studies* 26, 470 (1994). There is also evidence of judicial activism by the French constitutional court since the early 1980s. See, for example, Michael H. Davis, The Law/Politics Distinction, the French Conseil Constitutionnel and the US Supreme Court, *American Journal of Comparative Law* 34, 45 (1986) and John Bell, Principles and Methods of Judicial Selection in France, *Southern California Law Review* 61, 1757 (1988).

mechanism, term duration (from four years in Turkey to life in Austria and Belgium), the possibility of renewal, the minimum number of career judges (frequently the actual number will be higher), the different possible types of review, and procedural rules (reporting votes and publication of concurring and dissenting opinions). Clearly, the conclusion can only be that there is significant diversity of institutional arrangements within the Kelsenian constitutional courts.

Diversity of institutional arrangement compromises easy generalizations from empirical work based solely on data from one particular country. However, as we argue in this section, the current empirical evidence for several countries suggests common aspects that presumably could constitute a set of possible generalizations.

The empirical evidence shows that constitutional courts are politicized in the sense that some appropriate measure of party alignment does predict the behavior of judges. At the same time, the empirical work points out that many other contextual variables also matter. Consistent with our theoretical discussion, ideology or party alignment is not the only relevant explanatory variable of judicial behavior. Finally, the politicization of the court usually follows a more complex framework than a simple left-right division. Such complexity reflects the political importance of constitutional adjudication (for example, federalism, religion, linguistic, or cultural divisions), but also the influence of diverse interests in shaping both the composition and the workload of the court. Finally, most empirical studies are based on the most salient cases (those that are likely to be more politicized), and therefore the importance of party alignment is likely to be over-estimated. Many other relevant variables exist to predict judicial behavior. Unlike traditional formalists, we should not downplay party alignment. However, we should not incur in the opposite mistake, and conclude that only party alignment explains judicial behavior.

(a) GERMANY

The German constitutional court was designed after WWII following the Kelsenian model and the Austrian experience in the 1930s. It was contemplated by 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, the provisions about the new constitutional court were among the least controversial issues of

the new Constitution.[36]

The Federal Constitutional Court Act, 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). As a consequence of the appointment mechanism (supermajority in the federal parliament), there is a need for a consensus between major parties. Constitutional judges are effectively appointed in party tickets.[37] Hence the fact is that the supermajority requirement (a two-thirds majority) has created a *de facto* quota system.[38] 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.[39]

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.[40] 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*

36 Vanberg, *supra* 5.

37 See discussion by Rainer Nickel, "The German Federal Constitutional Court: Present State, Future Challenges," in Andrew Le Sueur (ed.), *Building the UK's New Supreme Court: National and Comparative Perspectives*, Oxford University Press (2004).

38 See Kommers, *supra* 35, and Vanberg, *supra* 5.

39 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. 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 with the social democrats, three with the liberals, and one with the ecologists. See Vanberg, *supra* 5.

40 See Vanberg, *supra* 5.

decision in 1995.[41] 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" because laws are passed with an eye on the court reaction.[42] 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.[43]

The most comprehensive empirical study on the German constitutional court thus far does not look in detail into the voting patterns of the constitutional judges (the possibility of separating opinions was introduced in the early 1970s).[44] It looks at the decision for unconstitutionality in the aggregate (court decision, not individual vote) for all 329 decisions on the constitutional review of legislation from 1983 to 1995. The regression analysis shows that they are explained by oral arguments being held,[45] political support for unconstitutionality,[46] and affected government claims unconstitutionality. Constitutionality seems more likely in complex policy areas (presumably more politicized or ideologically driven as seen in economic regulation, social insurance, federal budget issues, party finance, and civil servant compensation). Judicial support for unconstitutionality[47] does not seem to be statistically significant. One possible conclusion seems to be that the German constitutional court is more sensitive to political than judicial controversies. In fact, the underlying hypothesis that we should expect the German constitutional court to be more deferent when the legislative majority has a particular strong interest does not seem to find strong support (there seems to be no distinction between state and federal law in this respect). One possibility is that transparency and public opinion accountability dominates decision-making.[48] Alternatively, if political

41 *Id.*

42 See Donald P. Kommers, "Autonomy versus Accountability: The German Judiciary," in Peter H. Russell and David M. O'Brien (eds.), *Judicial Independence in the Age of Democracy, Critical Perspectives around the World*, University of Virginia Press, (2001)

43 Christine Landfried, The Judicialization of Politics in Germany, *International Political Science Review* 15, 113 (1994).

44 See Vanberg, *supra* 29.

45 Usually the cases with great political significance, 44 of the 329 cases.

46 Measured by briefs being filed by other political actors or governments other than the government in question.

47 Measured by briefs filed by lower courts.

48 See Vanberg, *supra* 29.

ideology plays a role and a *de facto* quota system prevails, we should not expect a strong correlation between the decision of the court and the particular interests of a given legislative majority.

These general results seem to be confirmed by a more recent study.[49] This empirical work tests the correlation between the party affiliation of the pivotal judge and oppositional success empirically for all abstract reviews filed between 1974 and 2002. It concludes that the likelihood of an oppositional victory or defeat varies with the ideological position of the pivotal judge. The author concludes that German constitutional judges decide on the basis of their political preferences.

(b) FRANCE

The *Conseil Constitutionnel* is the highest constitutional authority in France.[50] The French constitutional court was conceived as a political body that progressively evolved in its judicial competences. Not surprisingly, politics has been part of the court from 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 parliament, the Constitution of 1958 established the French Constitutional Council. The founders of the *Conseil* saw it as a referee established to settle the conflicts of legislation between the executive and the parliament. 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).[51]

The *Conseil* is not formally a part of the French judiciary. For example, the impact from the decisions of the *Conseil* is traditionally concentrated exclusively on the legislature (it is a form of abstract and preventive constitutional review with no formal access procedure for individuals other than specific political actors).[52] The *Conseil* is

49 See Christoph Hönnige, The Electoral Connection: How the Pivotal Judge affects Oppositional Success at European Constitutional Courts, *West European Politics* 35, 963 (2009).

50 See Davis, *supra* 35, and Michael H. Davis, A Government of Judges: An Historical Re-View, *American Journal of Comparative Law* 35, 559 (1987). Also see Tallon, The Constitution and the Courts in France, *American Journal of Comparative Law* 27, 567 (1979). See also discussion by Sylvain Brouard, 2009, The Politics of Constitutional Veto in France: Constitutional Council, Legislative Majority and Electoral Competition, *West European Politics* 32, 384.

51 Sweet, *supra* 21.

52 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

composed of nine members who serve a nine-year, non-renewable 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.[53] The appointments to the *Conseil* are not always judges, in a few rare cases they are not even legally trained,[54] but rather are predominantly professional politicians.[55] Therefore, the most important criterion for appointment to the council is political affiliation and membership.[56]

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 empirical analysis.[57] However, the politicization of the council at later stages became clear.[58]

An extraordinary departure from the conformist approach was illustrated by the decision to find 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."[59] 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

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minutes verbatim of the plenary meetings and decisions will become public after twenty-five years, now available up to 1983 [*Loi Organique sur le Conseil Constitutionnel*, July 2008, *Loi Organique* 2008-695].

53 Article 56 of the French Constitution of 1958.

54 See Bell, *supra* 35. 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.

55 Sweet, *supra* 21.

56 Sweet, *supra* 21, and Davis, *supra* 35 and 49.

57 See related discussion by Jean Louis Goutal, Characteristics of Judicial Style in France, Britain and the USA, *American Journal of Comparative Law* 24, 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.

58 See Sweet, *supra* 21.

59 See Peter L. Lindseth, Law, History and Memory: "Republican Moments" and the Legitimacy of Constitutional Review in France, *Columbia Journal of European Law* 3, 49 (1997), and Sweet, *supra* 19.

electoral defeat in March 1986 and the "cohabitation" between a socialist president and a conservative prime minister that followed.[60] The transfers of power in 1981 and 1986 created a gap between the council's interpretation of the republican tradition and the contemporary partisan political concerns of its nominators.[61] 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.

The alternation between right and left after the 1980s is at the heart of the empowerment of the council. For example, referrals by the opposition have increased from the early 1980s.[62] The political parties tried to use the constitutional court to block action by the executive, which was dominated by the other party. The court responded by developing a kind of judicial activism alien to 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 court.

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. However, many legal scholars have tried to explain the degree of politicization in the court. For example, the accusation that the members of the council decide on the basis of ideology or political formations, and not according to the law, has been rejected by the observation that case law is coherent and consistent.[63] However, not only is this the natural outcome of secret voting, but clearly makes sense in the setting of what we have designated as judicial politics dimension. The weak position of the constitutional court vis-à-vis the judiciary makes the achievement of a coherent body of law as the priority and main goal. Furthermore, a stable median voter in the court can easily explain such observation. Clearly, since the 1980s, the balance between right and left has been stable, reinforcing the view that a political court can produce a coherent and consistent body of law.

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60 See Sweet, *supra* 21.
61 Id.
62 Id.
63 See Sweet, *supra* 21.

Recently one important article has looked empirically at the French case in detail.[64] It studies the 526 decisions provided by the court between 1959 and 2006, distinguishing the laws adopted by right-wing governments (1958 to 1981, 1986 to 1988, 1992 to 1997, and from 2002 to the end of the sample) and left-wing governments (1981 to 1986, 1998 to 1992, and 1997 from 2002). The dependent variable is a decision for unconstitutionality. The explanatory variables include the content or type of law, the composition of the court (in terms of ideology and background), the political actor who requested the constitutional review, and the political situation (for example, "cohabitation"). The main conclusion seems to be that a more divided polity (in the period 1997 to 2002 while "cohabitation" took place) increases the likelihood of unconstitutionality. Some particular laws, such as those related to the budget, are also more likely to be declared unconstitutional. This article clearly shows that the French Constitutional Court is politicized. However, constitutional judges seem to respond to certain political situations such as "cohabitation" which could indicate that the role played by ideological agendas varies according to particular political circumstances.[65]

(c) ITALY

The Italian constitutional court was established in 1955, although, contemplated since 1948 by the Italian Constitution after WWII. 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.[66] 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.

There are fifteen judges appointed by three different actors, which appoint five judges each. All of them are selected among active or retired judges, professors of law, or lawyers with more than twenty

64 See Franck, *supra* 6.

65 A result largely confirmed by Hönnige, *supra* 49.

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

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).[67] 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) also getting 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).[68] The five judges elected by the judiciary have always been (although, not mandatory) career magistrates.

Several mechanisms have been implemented to avoid explicit party alignments, which includes the writing of single opinions, secret votes, and opinions which are approved in such a way that make the decision unitary, where no concurring or dissenting opinion is allowed. Not surprisingly, the empirical work cannot rely on individual behavior.[69]

One early study[70] argues that constitutional judges are likely to be independent in Italy because the former Presidents and Vice-Presidents of the court seem to take jobs afterwards that are not political in nature. A more recent study[71] casts doubt on such casual

67 *Id.*

68 *Id.*

69 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). 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.

70 See Breton and Fraschini, *supra* 7.

71 See Fiorino et. al, *supra* 7.

observations. For example, they show that a share of constitutional judges elected by the magistracy (and present when the court votes) and the age of the President of the court (a relevant indicator of independence when tenure is limited) are positively correlated with unconstitutionality. However, they do not consider how the decision of the court responds to particular ideological or political trends in the composition of the college of voting judges for each individual case. In an ongoing study, we show that, in the context of reviewing regional laws, the court responds to political interests.[72] The correlation between the political affiliation of pivotal judges (President and Reporter) as well as the majority of the court and the legislative majority in the central government is strong. This conclusion seems to confirm that party interests matter in explaining judicial behavior in the Italian constitutional court, at least when assigning federal competences.

(d) SPAIN

The Spanish constitutional court was established by the 1978 Constitution.[73] It is composed of twelve judges who elect a President among themselves; four judges are chosen by each of the parliamentary chambers (Congress and Senate) with a three-fifths majority, two are nominated by the Government, and the remaining two are selected by the judicial council (*Consejo General del Poder Judicial*). They serve for a nine-year nonrenewable term.[74]

This mixed appointment mechanism has diluted the possibility of a *de facto* stable quota system as the one in Germany, in Italy, or in Portugal (except in the parliamentary appointment, where the majority elects three and the minority elects one judge). However, the ideological identification is easily provided by political appointment or membership of a judicial association (for career magistrates).[75]

72 See Lucia Dalla Pellegrina and Nuno Garoupa, Choosing between the Government and the Regions: An Empirical Analysis of the Italian Constitutional Court Decisions, mimeograph (2010).

73 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*, Oxford University Press (2004). See also Elena Merino Blanco, *Spanish Law and Legal System*, Thomson (2nd edition, 2006) [discussing the Spanish constitutional court in chapter 7].

74 There have been forty-six judges in the period 1980-2010, of which sixteen were career magistrates and twenty-seven were law professors.

75 Spanish judicial associations are usually associated to a given political party. Twenty-five constitutional judges have been closely identified with the socialists and twenty-one with the conservatives.

The powers of the court include *ex post* abstract review of national and regional laws, to remedy violations of fundamental rights committed by public bodies or courts against individual citizens, and to resolve conflicts of competence or authority between the central government and the regions, and between regions.

The area of constitutional review that has deserved empirical analysis is the case of plea for constitutional review initiated by political actors, such as the prime minister; a number (fifty) of congressmen or senators; the regional governments, or a majority of a regional parliament – in this case, only against laws approved by the state; and the state ombudsman (*Defensor del Pueblo*). Not surprisingly, a major fraction of the court's docket is in matters of constitutional review (apart from individual claims against violation of rights and liberties that vastly outnumber other sources of workload), which focuses on regional competence issues because the Spanish constitution is subject to different interpretations regionally.[76] Furthermore, the balance of power between the regional governments and the central government is ideologically controversial, with the right being usually less favorable to reading extensive competences to the regional governments in the 1978 Constitution than the left.

An early empirical study[77] showed, using basic cluster analysis, how the judges who sided in favor and against the government (a socialist government with a solid parliamentary majority), in the two most contested issues decided in the 1980-1985 period by the constitutional court[78] actually formed two clusters (socialist and conservative) in the sense of concurring significantly more often with judges of the same cluster than with those of the other. However, the paper does not investigate political dependence, as a powerful explanatory factor in the actual (observed and recorded) voting by the members of the court.

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76 See Borrajo Iniesta, *supra* 73. He argues that the court plays a vital role in achieving the appropriate balance of decentralized public power and allocating power between central and regional governments. According to him, there have been too many cases because the Senate has failed to act as a chamber of territorial interests that filter this work. In turn this has enhanced regional interests in constitutional appointments.

77 Pilar del Castillo Vera, Notas para el Estudio del Comportamiento Judicial. El Caso del Tribunal Constitucional, *Revista Española de Derecho Constitucional* 20, 177 (1987), in Spanish.

78 STC 11/83, on the legislative expropriation of a failing industrial holding controlled by an entrepreneur (allegedly) opposed to the socialist government, and STC 53/85, on the de-criminalization of abortion.

A more comprehensive empirical study[79] however, seems to question the validity of such analysis. Using all the constitutional review decisions (without separating court-initiated and politically-initiated cases) during the period of 1980 until 2001, the study argues that the level of unanimous decisions and the institutional constraints that individual judges face in the court (non-renewable terms, shorter post-court careers due to late entry into the court) suggest that individual accountability of the judges *vis-à-vis* the appointing political parties is relatively weak.

In a more recent paper,[80] we argue that there is strong evidence of political influence, both in terms of findings of unconstitutionality and on the alignment of the vote with the interest of the appointing party. However, the regional dimension seems to play an important role in explaining behavior in the Spanish constitutional court. Judicial politics is relevant and easily detected by the fact that unanimous decisions for constitutional review initiated by political actors represent around two-thirds of the cases in the period 1980-2006 (of which 64% were unanimous decisions for constitutionality and 36% were unanimous decisions against constitutionality). As for the political influence, the vote for constitutionality seems essentially dominated by judicial review sought by the judge's party at the national level. The involvement of nationalist parties (which represent regional interests) seems to play a role, although in differential ways; strengthening the incentive to behave according to the interests of the appointing party when the nationalist parties seek constitutional review, and decreasing the incentive when the law that is challenged was passed under a regional government in which the nationalist parties were involved (usually in coalition with the socialists). Furthermore, in voting according to party interest, the national party interest seems to be significant in explaining judicial behavior, whereas, the regional interest of the party does not come out as statistically significant.

Another recent paper analyzes non-unanimous decisions in 2000-2009 and shows that there is a majority-minority pattern easily

79 Pedro C. Magalhães, Judicial Decision-Making in the Iberian Constitutional Courts: Policy Preferences and Institutional Constraints, PhD Dissertation, Department of Political Science, Ohio State University (2002).

80 See N. Garoupa, F. Gomez-Pomar and V. Grembi, Judging under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court, mimeograph (2010).

understood in a political perspective. Confirming previous work, the empirical exercise confirms that both left-right and regional interests shape these coalitions in the court.[81]

These empirical results seem to indicate a delicate balance between judicial and party politics in the Spanish constitutional court, where not surprisingly the regional dimension plays a relevant part. One could be tempted to argue that the way national politics prevail over regional politics indicates that constitutional judges are more responsive to party interests when the stakes are higher.

(e) PORTUGAL

The Portuguese constitutional court was inaugurated in 1982 (after the first constitutional reform)[82] and exercises a preventive, concrete, and abstract method of constitutional review, according to the 1976 Constitution.[83] As expected, the method of preventive review (before legislation is enacted and upon request or referral by the President; in the case of supermajority laws, the Prime-Minister, or the request of one fifth of the Parliament) is the one that usually provides more political controversy.[84] However, we should note that the vast majority of the work by the constitutional court is on concrete judicial review.[85] Moreover, the Portuguese constitutional court has very little control over the selection of cases (although, the right of rejecting a plea for lack of merit in the context of concrete judicial review has been exercised on several occasions).[86]

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.

81 See Chris Hanretty, Dissent in Iberia: The Ideal Points of Justices on the Spanish and Portuguese Constitutional Tribunals, mimeograph (2010).

82 Between 1976 and 1982 there was a constitutional standing committee within the Council of Revolution (the guardians of the military coup that abolished the conservative dictatorship in 1974). This council was abolished in 1982 marking the definitive consolidation of democracy.

83 There is another peculiar form: unconstitutional by omission. The President can ask the constitutional court to signal omission in certain legislative areas necessary to implement constitutional rights. They do not bind other branches of government. Obviously they are very rare.

84 See António de Araújo and Pedro C. Magalhães, A Justiça Constitucional: Uma Instituição Contra as Maiorias, *Análise Social* 35, 207 (2000), in Portuguese.

85 More than 85% of the cases heard by the constitutional court in the period 1983-2007.

86 See discussion by Pedro C. Magalhães, *supra* 79.

The elected judges, in practice, 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 four major parties. Therefore, the Portuguese constitutional court broadly reflects parliamentary preferences without major bias against either of the two main blocks (left or right). There is apparently an agreement between the main parties that establishes six judges for each block, and it is then, within each ideological block, that the main party negotiates the distribution with minor parties leaving the last judge in a neutral position.[87] 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).[88]

The Portuguese constitutional court has been studied empirically because individual votes are easily observable and recorded.[89] Early studies showed that the higher the proportion of judges within the court that are affiliated with the party or parties that support a piece of legislation, the lower the probability that the court will declare the legislation unconstitutional. With respect to preventive review, there is a high correlation between party affiliation and voting. Moreover, judges appointed by the same party or belonging to the same block (left-right) exhibit above-average inter-agreement scores. Furthermore, being a career magistrate, or being appointed, does not seem to be a good indication of how judges vote.

In a more recent piece, we have tested for party conformity.[90] We find that almost 80% of right-wing votes were in favor of

87 As a consequence of this deal, any given court has six left-wing judges (zero to two communists, four to six socialists) and six right-wing judges (zero to two Christian-democrats, four to six conservatives). Details of this informal agreement are explained by António de Araújo, *O Tribunal Constitucional (1989-1996), Um Estudo de Comportamento Judicial*, Coimbra Editora (1997), in Portuguese.

88 In the period 1982-2007, there have been thirty-five judges, of which seventeen were career judges. In particular, thirteen socialists, thirteen conservatives, three communists, three Christian-democrats and three neutral.

89 Pedro Coutinho Magalhães and António Araújo, A Justiça Constitucional entre o Direito e a Política: o Comportamento Judicial no Tribunal Constitucional Português, *Análise Social* 33, 7 (1998) and Araújo and Magalhães, *supra* 84, both in Portuguese; Pedro C. Magalhães, Judicial Behavior in Constitutional Courts: The Case of Portugal, Paper presented at the 1998 Annual Conference of the Scientific Study of Judicial Politics (1998); Magalhães, *supra* 79.

90 See S. Amaral Garcia, N. Garoupa and V. Grembi, Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal, *Journal of Empirical Legal Studies* 6, 381 (2009), and S. Amaral Garcia, N. Garoupa and V. Grembi, Explaining Dissent in the Kelsenian Constitutional Courts: The Case of Portugal, mimeograph (2010).

constitutionality, as compared to well under 50% of left-wing votes. These results are even more striking when unanimous decisions are excluded. More than 85% of right-wing votes were in favor of constitutionality as compared to 35% of left-wing votes. A reasonable proportion of decisions taken by the court are voted unanimously (around a third). We argue that a high proportion of unanimous decisions certainly restrains an ideological bias, but the evidence still suggests that it plays an important role (evidenced by the fact that judges appointed by right-wing parties are much more prone to vote for constitutionality than judges appointed by left-wing parties, whereas, the neutral judges are somewhere in the middle).

The regression analysis confirms that constitutional judges are politicized when voting and when dissenting from the President of the court. However, the fact that the judge's political party is in government also indicates some opportunism.[91] From our study, the econometric results suggest that party politics, as well as peer pressure or judicial politics, matter in the Portuguese constitutional court. Furthermore, these results suggest that party politics matter at two different levels. Constitutional judges have their preferences aligned with the parties that appoint them, and naturally, they vote frequently in the same manner. However, the robustness of the marginal effect of the party in power indicates some opportunistic behavior by political parties (party alignment is stronger when the interests of the party are more significant).

Another recent paper analyzes non-unanimous decisions in 1989-2009 and confirms that there is a majority-minority pattern easily understood in a partisan perspective. It shows that these coalitions in the court are usually consistent with left and right clusters.[92]

f. OTHER EUROPEAN COURTS

There is virtually no empirical work about judicial behavior in other European courts, in particular the cases of Austria, Belgium and Turkey.

91 The explanation that legislation approved by a left-wing parliamentary majority is of a different nature of legislation approved by a right-wing parliamentary majority does not seem plausible because the legislation reviewed by the court is filtered by the President, who was center-left from 1982 to 2006. In fact, if one takes a public choice perspective that a center-left President is more likely to favor center-left legislation, then the legislation reviewed by the court when a left-wing majority prevails should be clearly more unconstitutional than when a right-wing majority prevails.

92 See Hanretty, *supra* 81.

The Constitutional Court of Austria was established in 1920 following the ideas of Kelsen. The court was suspended from 1934 to 1945. After the reinstatement of the 1920 Constitution in 1945, the Constitutional Court resumed its competences over constitutional review. It consists of fourteen members (including a President and a Vice-President) plus six substitute members. It operates *en banc*. The appointment mechanism involves the federal government (President, Vice-President and six members) and both chambers of the parliament (three members each), although all appointments are technically made by the President of Austria. Not surprisingly, the appointment mechanism has resulted in a *de facto* quota system allocation of seats.[93] Judges are appointed for life (subject to a mandatory retirement age).

Although a matter of discussion since Germany changed its policy in 1971, separating opinions are not allowed in the Austrian Constitutional Court. Until the late 1970s, the Court tended to follow more closely the "negative legislator" model without expanding scope of review. Such trend apparently changed in the early 1980s. Inevitably this has created occasional frictions with the Austrian federal government and regional governments (some governors such as the late Jörg Haider blatantly ignored the Constitutional Court's decisions) in important areas of basic rights.[94] Nevertheless, no regression analysis of the decisions taken by the Court has been presented so far.

The Constitutional Court of Belgium was created in 1984 under the name of *Cour d'Arbitrage* after the 1980 constitutional amendment that created a federal state. The powers of the court have been expanded quite significantly in the following decades and it was renamed *Cour Constitutionelle* in 2007. There are twelve judges elected by the parliament with a two-thirds majority (from a list of two names proposed alternatively by the lower chamber and the higher chamber), six Flemish speaking and six French speaking. Also, six are politicians (with a minimum of five years experience in parliament) and six are law professors or career judges. Belgian constitutional judges have life tenure (subject to a mandatory retirement age). Each linguist group

93 The seats have been traditionally divided by the two main parties, social-democrats and conservatives. The rising of the liberals at the end of the 1990s has produced a reallocation of quotas which now includes an occasional judge for the junior partner in the federal government coalition.

94 See discussion by Alexander Somek, Constitutional Theory as a Problem of Constitutional Law: On the Constitutional Court's Total Revision of Austrian Constitutional Law, 32 *Israel Law Review* 568 (1998).

elects their own President, and they alternate as President of the Court for a period of one year. Given the complexities of the appointment mechanism and the linguist arrangements, a *de facto* quota system allocation of seats has been developed. Although the constitutional judges are asked to hear controversial cases concerning the balance of powers within the Belgium federal arrangements, no systematic empirical analysis has been performed of the court decisions (there are no separating opinions and the deliberations are secret).

The Constitutional Court of Turkey was established in 1962 and currently exercises constitutional review under the 1982 Constitution. It is composed of eleven regular judges and four substitute members. They are appointed by the President of Turkey from a list of three names for each vacancy chosen by the career judiciary (five judges), the military courts (two judges), the high education council (one judge) and the senior administrative staff (three judges). The political role of the court in Turkey has been noted. It has entertained controversial political cases and skirmishes with political actors have taken place. Although separating opinions are allowed and, to some extent, not uncommon, there has been no comprehensive empirical analysis of judicial behavior.

g. ASIAN COURTS

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 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.[95] Since 2003, the number of

95 See Nuno Garoupa, Veronica Grembi, and Shirley Lin, Explaining Constitutional Review in New Democracies: The Case of Taiwan, *Pacific Rim Law & Policy Review* (2011).

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.[96]

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).[97] The court also has other ancillary powers, in particular operating as judicial council although formally distinct from its constitutional jurisdiction.[98] 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).[99] The disproportional influence of the KMT appointed judges is evident.

In a new article, we study ninety-seven decisions issued by the Taiwanese constitutional court in the period 1988-2008. Our econometric analysis does not provide strong evidence for a strong partisan alignment in the court. Faced with a transition from a one-party political regime to a democracy, the Taiwanese Grand Justices needed to assert their independence from the other branches of government and gain credibility, thus dissenting more often, periodically and individually voting against the interests of the dominant party.

In fact, dissent rates increase during the political transition and seem to go down once democracy has taken root. Our interpretation is that politics matter in the Taiwanese constitutional court, but not in the straightforward government-opposition or left-right conventional dimensions. During the political transition from authoritarian to democratic regime, the Judicial Yuan had to liberate itself from the KMT tutelage and establish a solid reputation for judicial

96 *Id.* (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).

97 *Id.*

98 See discussion by Ginsburg, *supra* 4.

99 In particular, Lee Teng-hui (1988-2000, KMT); Chen Shui-bian (2000-2008, DPP); Ma Ying-jeou (since 2008, KMT).

independence. As a consequence, Grand Justices appointed by KMT Presidents were willing to disfavor the KMT in a more systematic way. Dissent rates went up to signal independence from the KMT. As democracy emerges, dissent rates go down. Now, as in many other "Kelsenian" constitutional courts, the Grand Justices need to assert their independence from the other branches of government by establishing consensus and sound legal doctrines. Dissent rates no longer serve the purpose of signaling independence.

The process of appointment and term in office of the Taiwanese constitutional court also does not generate solid party quotas or majority versus minority coalitions as seen in other similar courts. This might reduce the likelihood of political allegiance to the President emerging as a solid predictor of Justices' voting behavior. Nevertheless, at the end of a political transition and faced with a consolidated liberal democracy, we might observe more party politics in the Judicial Yuan in the future.

Other Asian constitutional courts that have been carefully studied are Korea,[100] Thailand, and Mongolia. However, the empirical analysis of the functioning of these courts is in preliminary stages.[101] It tends to confirm that political and ideological divisions matter, but it is unclear the extent to which they play a significant role in explaining judicial behavior.

IV. SOME CONCLUSIONS

Constitutional review in the Kelsenian model is politicized by nature. Some degree of alignment between constitutional judges and the appointers is to be expected. Not surprisingly ideology plays an important role in constitutional interpretation. However, constitutional judges face a multiplicity of additional goals that dilute party alignment. The goal of achieving supremacy and expanding influence introduces peer-pressure for coordination and conformity inside the constitutional

100 It has served as a model to other courts such as the Indonesian Constitutional Courtestablished in 2001. In the case of Indonesia it is of particular relevance the interaction between the Indonesian Constitutional Court and specialized Human Rights Court. See general discussion by Hendrianto, Institutional Choice and the New Indonesian Constitutional Court, and Mark Cammack, "The Indonesian Human Rights Court," in Andrew Harding and Penelope Nicholson eds., *New Courts in Asia* (2010).

101 See Ginsburg, *supra* 4, James M. West and Dae-Kyu Yoon, The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence at the Vortex, *American Journal of Comparative Law* 40, 73 (1992), Andrew Harding and Peter Leyland, The Constitutional Courts of Thailand and Indonesia: Two Case Studies from Southeast Asia, *Journal of*

court. The production of a coherent body of constitutional case law is significantly important in this respect. Inevitably judicial politics operate as a constraint to partisan politics.

Current consistent empirical work seems to confirm such a theory. The empirical evidence shows that constitutional courts are politicized in the sense that some appropriate measure of ideology does predict the behavior of judges. At the same time, the empirical work points out that many other contextual variables also matter. Finally, the politicization of the court usually follows a more complex framework than a simple left-right division. Such complexity reflects the political importance of constitutional adjudication (for example, federalism, religion, linguistic or cultural divisions), but also the influence of diverse interests in shaping both the composition and the workload of the court.

Clearly, more empirical work has to be done before we can provide a more comprehensive mapping of the balance between judicial and party politics within constitutional review. It seems too hasty to conclude that party politics play a very limited role, whereas judicial politics overwhelm the production of constitutional case law. It is also quite likely that such balance varies across cases depending on institutional arrangements, stability of the party system, and empowerment of the career judiciary.

Given the current available empirical information, it is difficult to use econometric work to inform the comparative analysis of institutional design differences, for example, the balance between concrete and abstract review or variations in appointment mechanisms. All these questions require empirical testing that constitutes a fruitful and challenging research project for the coming years. Hopefully, such a research agenda will contribute to reducing the current existing gap between what we know about the U.S. Supreme Court and the Kelsenian-type constitutional courts.

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