Constitutional Courts in Comparative Perspective: A Theoretical Assessment

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Abstract

In many democratic polities, constitutional courts significantly shape the political landscape. Yet, how they are able to do so is a puzzle: With limited resources at their disposal, and no direct powers of enforcement, judges must rely on the willingness of executives and legislators to comply with their decisions and to respect judicial authority. This essay surveys recent literature that has explored the conditions that sustain judicial authority. I contrast explanations that highlight the benefits that independent courts can provide to other policy makers ("endogenous explanations") with explanations that emphasize the constraints that keep executives and legislators from undermining the judiciary ("exogenous explanations"). I conclude by exploring the role of strategic judicial behavior in maintaining and expanding judicial power.

INTRODUCTION

Courts that exercise the power of constitutional review—that is, the power to set aside legislative and executive action on the basis of a conflict with constitutional norms—play a prominent and powerful role in democratic polities around the world. From defining the personal freedoms of individuals to regulating the financing of political competition to ending election disputes and even removing elected prime ministers from office, courts significantly shape the political landscape. As Tate & Vallinder (1995) phrased it in one of the seminal contributions to the academic literature on this phenomenon, we seem to be witnessing a "global expansion of judicial power." To be sure, judges did not wait until the late twentieth century to emerge as significant actors on the political stage. In the United States—the birthplace of constitutional review on the basis of a written constitution—the Supreme Court's impact on politics in the antebellum period was undoubtedly substantial (consider *McCulloch v. Maryland* or *Dred Scott v. Sandford*), and it exercised meaningful, and sometimes controversial, influence in the late nineteenth and early twentieth centuries, particularly on economic policy (consider the Slaughterhouse Cases, *Lochner v. New York*, or the New Deal cases). But it is also true that democratic polities are experiencing a judicialization of politics that accords increasing importance to courts—in part, because the "third wave of democracy" (Huntington 1991) led to the establishment of constitutional courts in newly democratized countries, often on the basis of the European model of centralized constitutional review.[1] Moreover, the increasing importance of courts in the national arena has been accompanied by an expansion of the role of international courts over the past 20 years (e.g., see Garrett 1995, Alter 1996, Carrubba & Gabel 2014). Policy makers are subject to judicial oversight not only at the national level but at the international level as well.

Not surprisingly, the significant role of courts in democratic politics has sparked considerable scholarly interest, and over the past 20 years, a robust literature on comparative judicial politics has emerged in political science, the legal academy, and economics. Indeed, the growth of this literature has been so significant—both in its theoretical and empirical dimensions—that it would be impossible to provide a full overview of all relevant contributions in this limited space. I confront this challenge by focusing on the central theoretical puzzle that holds together this literature.[2]

This puzzle can be stated simply: What explains the (growing) power and influence of the judiciary in democratic politics? This is a puzzle because courts are, by their nature, weak institutions, as famously argued by Alexander Hamilton in *Federalist 78*. Without either "the purse or the sword," they must largely rely on other actors to give life to their decisions. Moreover, policy makers in the executive and legislative branches have considerable capacity to ignore or actively resist judicial decisions they find unpalatable. They also have the tools to undermine the institutional standing and authority of the judiciary more generally. It is not difficult to find historical examples of both strategies: "massive resistance" to *Brown v. Board of Education* in the American South (Tushnet 1994), the elimination of the Austrian Constitutional Court by the Dollfuss government

[1] In the decentralized system of constitutional review practiced in the Anglo-American tradition, any court is free (subject to review by a higher court, of course) to rule on executive and legislative action on the basis of the constitutional text. By contrast, the European model of constitutional review, based on the work of Austrian legal theorist Hans Kelsen, concentrates this power in a special tribunal outside the ordinary judicial hierarchy. Only this constitutional court (also known as a Kelsen court) can exercise constitutional review; all other courts refer constitutional questions to this tribunal (see Cappelletti 1989, Vanberg 2005).

[2] As a result, significant contributions that are more empirically oriented receive short shrift. See Ginsburg (2008) and Hirschl (2008) for excellent reviews. In addition, a growing literature explores the role of constitutional courts in authoritarian and semiauthoritarian regimes (e.g., see Barros 2002, Helmke 2005, Hilbink 2007, Moustafa 2007, Ginsburg & Moustafa 2008, Trochev 2011). Because the focus of the current essay is on democratic systems, I set aside this literature, which must confront issues that diverge significantly from those that are theoretically relevant in democratic polities.

in 1932 (Vanberg 2005, p. 72), President Yeltsin's dismissal of the Russian Constitutional Court in 1993 after it challenged his decree authority (Schwartz 2000, p. 162). To understand when constitutional courts are able to exercise influence in the political realm, it is therefore necessary to explain under what conditions legislative and executive actors will respect judicial independence and authority (and on occasion even create and empower independent courts).

Over the past 20 years, scholars have been prolific in offering answers to this puzzle. These answers fall broadly into two overarching categories, each of which is characterized by a particular logic (although of course accounts within each category vary in the particulars). The first type of explanation focuses on endogenous incentives for executive and legislative officeholders to respect judicial authority. The second focuses on exogenous costs faced by executive and legislative officeholders for attacking judicial independence and authority. In addition, within both categories, a prominent strand of literature has explored the manner in which strategic behavior by judges can help to build and reinforce judicial authority.

The explanations that emerge from these accounts are not mutually exclusive, often reinforce one another, and may even overlap in a single scholar's work. Nevertheless, analytically speaking, they are separate in the sense that they focus on distinct causal mechanisms and highlight different aspects of the interactions among judges, other officeholders, and citizens. They also—as I detail below—face different theoretical challenges. Taken together, these explanations provide a comprehensive understanding of the conditions that sustain the exercise of judicial authority by influential, independent courts. Moreover, the theoretical picture painted by these explanations resonates well with the extensive empirical evidence that has emerged over the last two decades.

ESTABLISHMENT VERSUS MAINTENANCE OF JUDICIAL INDEPENDENCE AND AUTHORITY

Before turning to the conditions that lead policy makers in the executive and legislative branches to respect judicial authority and autonomy, it is useful briefly to discuss the *establishment* of an independent judiciary—a separate issue that is often insufficiently distinguished. The distinction between the creation of an independent judiciary and ongoing respect for judicial authority is significant because demonstrating that instituting an independent, powerful court is viewed as desirable by a decisive coalition at a particular point in time (most obviously at the constitution-writing stage) does not explain the *continuing* influence of such a court in day-to-day politics. The interests and coalitions that are influential at the constitution-writing stage may not be the same as those that dominate the subsequent political process under the constitution (an issue to which I return below in the context of the so-called insurance theory). More importantly, even if a coalition at the founding moment favors the creation of a court, this does not imply that the same coalition is willing to comply with adverse decisions and to maintain the authority of the court on an ongoing basis, once the founding moment passes. Institutional preferences are not necessarily temporally consistent.

One reason for this is that constitutional conventions operate (to varying degrees, of course) in an environment of greater uncertainty about the future distribution of power, and the nature of the political issues that must be resolved, than do governments confronted with specific judicial decisions in the subsequent political process. Behind this "veil of uncertainty," constitutional deliberations are shaped by more general considerations than are decisions in the ongoing political game (Vanberg & Buchanan 1989). For example, a longstanding tradition has argued that judicial independence can help to enforce constitutional limits on political power that restrain temporary passions and protect political minorities (see, e.g., Hayek 1960, Ely 1980, Tocqueville 1988 [1835], Elster 2000, White 2000). The conviction that an independent judiciary can act as

a guardian often plays a significant role in constitutional deliberations. For instance, Schwartz (2000, p. 258, footnote 48) reports that following the overthrow of the Communist regime in Bulgaria, constitution writers deliberately chose to create a constitutional court to curb the powers of legislative majorities. Similarly, consider Konrad Adenauer's remarks (quoted in Vanberg 2005, p. 175) in the West German constitutional convention of 1948–1949:

> Tyranny by a single person is not the only form of dictatorship. Tyranny by a parliamentary majority is also possible. And we want to furnish protection against such tyranny in the form of a constitutional court.

Leaving aside the accuracy of this "guardian vision" as a description of how judicial review operates in practice, the normative considerations underlying this conception—though significant in the context of many constitutional conventions—are less likely to explain why, once the political game unfolds, officeholders confronted with specific unwelcome judicial decisions will exhibit respect for judicial authority. Thus, despite Adenauer's (and the Christian Democrats') vehement appeal for the creation of a strong constitutional court in the constitutional convention, the government he formed after winning the first parliamentary election—which implied that the court now emerged as a potential constraint for the Christian Democrats' legislative plans—dragged its feet for years in adopting the authorizing legislation necessary to establish the court (see Vanberg 2000). This episode powerfully illustrates a central point: Although the establishment of independent, powerful courts poses an interesting and important puzzle in its own right, the critical question that must be answered to understand the continuing (and growing) influence of courts in the political process is why current officeholders choose to respect judicial authority when encountering adverse decisions. We now turn to this question.

ENDOGENOUS EXPLANATIONS FOR JUDICIAL INDEPENDENCE AND AUTHORITY

The first broad category of explanations for judicial independence and authority points to the fact that policy makers in the executive and legislative branches may welcome an independent and powerful judiciary if such a judiciary can help policy makers to achieve their purposes more efficiently than would be possible in its absence. Put differently, under certain conditions, policy makers who are in a position to undermine judicial power may find it is in their interests to favor influential courts. I label as "endogenous" explanations that resolve the puzzle of judicial authority by demonstrating those conditions. These explanations can be divided into two subcategories:

1. Those that identify direct benefits of judicial review for current officeholders, and
2. Those that identify indirect benefits of judicial review for current officeholders.

What both types of endogenous explanations have in common is that they trade on the fact that the maintenance of an influential judiciary is a "package deal." Policy makers in the other branches cannot selectively resist judicial decisions they dislike but maintain the institution of judicial review to benefit from decisions they favor. This is true because many of the tools that can be used to discipline the court (e.g., jurisdiction stripping or budgetary measures) cannot be targeted at specific decisions; they affect the judiciary as a whole. Moreover, noncompliance with specific decisions will undermine the general authority of the judiciary and therefore also reduce the ability of the judiciary to deliver decisions of which the other branches approve. Whittington (2003, p. 449) describes the choice confronting policy makers this way:

> What is at issue in any decision to sanction the courts is the judiciary's institutional integrity, not just the outcome of a particular case. In that context, the courts represent a basket of policy outcomes. From the perspective of the legislator weighing the decision of whether to sanction the courts, the crucial question is the value of that basket as a whole. The legislator must not only take note of the costs of the immediate policy outcome that diverges from his own preferences, but also the costs and potential benefits of a range of future judicial decisions.

Put differently, policy makers face an institutional decision: whether to support an independent, authoritative judiciary, or not. This "all or nothing" feature is critical to endogenous explanations because these explanations do not assert that all judicial decisions serve the interests of policy makers. Judicial review may often result in rulings that current policy makers resent. The key thing is that on balance, policy makers benefit from powerful courts (Whittington 2003, Vanberg 2008, Holmes 2013).

Direct Benefits of Judicial Review

A number of approaches root executive and legislative tolerance for judicial authority in the idea that courts can promote the interests of policy makers. What differentiates these accounts are the particular benefits they highlight.

Rogers (2001) points to the informational benefits policy makers can derive from judicial review. Policy makers attempt to craft policies that will produce particular outcomes, but they face uncertainty about which policies are in fact suitable for achieving a given purpose (see Gilligan & Krehbiel 1990). Often, whether a policy is effective may only become apparent after implementation, when unanticipated consequences begin to manifest themselves. In such circumstances, judicial review can allow courts to strike down legislation that turns out to be undesirable ex post. Because it may be politically costly for legislative coalitions to "undo" previous legislative bargains, relying on courts to "weed out" such legislation may be superior from legislators' perspectives (Rogers 2001, p. 88).[3] Whittington argues that Graber's (2000) account of the land-grant cases decided by the US Supreme Court in the early nineteenth century provides a useful example of this informational logic. In the rush to encourage movement into western lands, Congress passed a number of land grant statutes that—as it turned out—often created competing claims on the same land. As Whittington (2003, p. 453) concludes,

> [w]hen the courts heard the resulting litigation, they were able to sort through the conflicting claims and clean up the mess . . . . Congress faced substantial ex ante uncertainty about the actual effects of its legislation, while the courts possessed substantially greater ex post information about those effects . . . . Congress valued the independent exercise of judicial review in these cases because the legislature was able to rush legislation encouraging western settlement through the door while exploiting the factual record created by litigation to improve the policy outcomes.

A second set of arguments focuses on the benefits that policy makers can derive from judicial independence in light of challenges associated with policy making in the executive and legislative branches. One such challenge concerns the reluctance of democratically elected policy makers to

[3]Note that this informational logic can only apply to a posteriori review, i.e., exercises of review that emerge out of concrete disputes after implementation of a policy. It cannot apply to ex ante, abstract judicial review as practiced in many European systems (see Rogers & Vanberg 2002, Vanberg 2005), nor to the review of policies prior to their implementation (for example, the US Supreme Court's recent Affordable Care Act decision).

make policy choices that may anger significant constituencies. An independent judiciary creates opportunities to shift blame for unpopular decisions from the executive and legislative branches to the courts (Graber 1993; Salzberger 1993; Hirschl 2004; Whittington 2005, 2007). As Graber (1993, p. 37) puts it, policy makers "encourage or tacitly support judicial policymaking both as a means of avoiding political responsibility for making tough decisions and as a means of pursuing controversial policy goals that they cannot publicly advance through open legislative and electoral politics." Graber argues that this logic can lead legislators to adopt vague statutes that avoid concrete policy choices and instead rely on judicial decision making to fill in the details down the road.[4]

Political systems that fragment the policy process—for example, a separation of executive and legislative powers in a presidential system, or a division of power across levels of government in a federal system—also create incentives for policy makers to favor a strong judiciary. In such systems, officeholders can benefit from a judiciary that is independent of the other branches and able to enforce the boundaries of authority between them. For example, in federal systems, officeholders at each level of government are likely to support a judiciary that can protect them against encroachment by the other levels (see Vanberg 2000, Bednar 2005).[5] Moreover, where effective policy making requires the cooperation of actors across different institutions, the ambition of policy makers may often be frustrated by lack of cooperation (or active resistance) by other officials. Whittington (2005, 2007) has stressed the benefits that policy makers in these circumstances can derive from turning to an active court that can engage in "regime enforcement" (2007, p. 105) or "overcoming gridlock" (2007, p. 124) to promote the interests that policy makers cannot advance directly. For instance, Whittington argues that the Supreme Court was instrumental in allowing national leaders in the Democratic Party to overcome opposition from southern members in the civil rights era, opposition that was difficult to resist in the ordinary legislative process.

What unifies all these accounts is that current policy makers (or at least members of the dominant coalition) directly benefit from the presence of an influential judiciary. Under these explanations, an influential judiciary is not, in fact, a nuisance that a dominant coalition would want to eliminate. Although specific decisions may run counter to the preferences of executive and legislative policy makers, on balance, current officeholders in the other branches benefit from the judicial presence. The puzzle of judicial authority is artificial, created by a failure to appreciate that effective judicial review can promote the goals of executive and legislative policy makers.[6]

Indirect Benefits of Judicial Review

A second type of endogenous explanation also roots judicial independence in the interests of policy makers but involves a different logic. This is the insurance theory of judicial review, an argument that has played a prominent role in the judicial politics literature over the past 20 years.

[4]Of course, this logic does not just apply to moving difficult policy choices to the judiciary; legislators often face similar incentives to foist tough decisions onto administrative agencies (Aranson et al. 1982, Fiorina 1982, Stephenson 2006).

[5]In addition, political systems that separate powers offer additional protection to independent courts—once established—because they make it more difficult for other policy makers to successfully attack judicial autonomy, since doing so requires coordinated action across separate institutions. This point is stressed by Vanberg (2000), Tsebelis (2002), Whittington (2003), and Friedman (2004).

[6]A related set of arguments highlights the role of an independent judiciary in helping policy makers to overcome problems of credible commitment, for example to secure property rights (North & Weingast 1989, Olson 1993), long-term constitutional values (Whittington 2007, p. 86), or legislative bargains (Landes & Posner 1975, but see Boudreaux & Pritchard 1994). However, these accounts focus on explaining how a powerful judiciary *if it exists* can solve commitment problems. These arguments are not explicit about the foundations of judicial power, i.e., why politicians who face short-term incentives to violate their commitments will not, in those circumstances, also choose to undermine judicial authority.

Ramseyer (1994) was among the first scholars to articulate this argument systematically in his comparative study of judicial independence in the United States and Japan. The intuition behind the argument is straightforward. Consider a competitive democratic system in which parties expect to alternate in power over time. In such circumstances, governing parties may be willing to tolerate an independent judiciary that constrains their ability to pursue policies unhampered if they expect that the judiciary will also protect the party's interests when it finds itself in opposition. The critical difference between the insurance argument and the explanations reviewed above is that under the insurance theory, current governments do not benefit from judicial review directly and are, in fact, constrained by it. But for the current government, the indirect benefit of the promise of enjoying judicial protection when in opposition more than compensates for this loss.

Stephenson (2003) develops the most explicit version of the insurance argument. He employs a game-theoretic model in which two parties compete for office over an infinite number of periods. In each period, the party in office can select a policy, potentially subject to judicial review. The court can declare a policy illegal but cannot enforce that judgment directly. If a policy is declared illegal, the party in power can choose whether to revise its policy in light of the court's decision or to ignore the ruling. Next, a new election is held to select which party will hold office, and the game repeats. By formalizing the insurance logic, Stephenson's model crystalizes a number of critical implications. The model demonstrates that the insurance logic requires that (*a*) parties—or, more generally, politicians—are risk averse and do not take a short-term view, (*b*) the political environment is sufficiently competitive, and (*c*) judicial decisions are attuned to the preferences of other policy makers and to the relative power of competing parties.

To appreciate these insights, and their implications for thinking about judicial authority, it is useful to consider a simplified version of the Stephenson model. Suppose two parties, L and R, compete for office over time. When in office, parties choose a policy in a one-dimensional policy space. Let party L's ideal point be given by 0 and party R's ideal point by 1. Parties have standard quadratic preferences, i.e., the utility of outcome x for L and R is given by $U_L(x) = -x^2$ and $U_R(x) = -(1 - x)^2$, respectively.[7] The probability that party L is elected to office in any given period is denoted by p, and the corresponding probability for party R by $(1-p)$. Parties discount future payoffs by a common discount factor $\delta \in (0, 1)$. The process of judicial review is modeled as follows: The government's policy choice is reviewed by a court. The court declares policies that fall outside an interval of moderate policies illegal. This interval is given by $[l, r]$, where $l, r \in (0, 1)$ and $l < r$. However, the court can do no more than make such a declaration—whether to comply with the court's ruling is up to the current policy maker.

Consider two (subgame-perfect) equilibria of this infinitely repeated game. The first is an unconstrained equilibrium, in which each party simply implements its most preferred policy when in office. This equilibrium can be interpreted as an equilibrium in the absence of judicial review or as an equilibrium in which the parties simply ignore the court's decisions. Given the election probabilities and ideal points, the ex ante expected utility for each party in this equilibrium is given by

$$EU_L(\text{Unconstrained}) = -\frac{1-p}{1-\delta},$$

$$EU_R(\text{Unconstrained}) = -\frac{p}{1-\delta}.$$

[7] By assuming this specific functional form, which holds the risk aversion of parties fixed, the simplified model cannot investigate the impact of changes in risk aversion. However, it should be intuitive that increases in risk aversion will make parties more willing to accept the lower-variance policy stream promised by judicial review over the higher-variance stream induced by implementing their preferred policy (and having the other party do the same).

Next, consider a judicial-review equilibrium, in which the parties adopt the following strategies: When in office, each party selects the most favorable policy that will be declared legal by the court (or, equivalently, it will amend a policy declared illegal to the most favorable policy that is acceptable to the court) as long as the other party has also respected the court's authority in this manner. But if either party ignores the court and implements a policy that has been declared illegal, the other party will also ignore the court's rulings thereafter. That is, the parties play a "grim trigger" strategy and respect judicial authority conditional on the other party doing so as well.

Given the election probabilities, ideal points, and the interval $[l, r]$ within which the court will declare policies legal, the ex ante expected utility for each party in this judicial-review equilibrium is given by

$$EU_L(\text{Judicial Review}) = -\frac{pl^2 + (1-p)r^2}{1-\delta},$$

$$EU_R(\text{Judicial Review}) = -\frac{p(1-l)^2 + (1-p)(1-r)^2}{1-\delta}.$$

Before demonstrating that such behavior can constitute an equilibrium, an obvious question to ask is why a court is useful in sustaining such cooperation in the first place. Parties could attempt to sustain reciprocal moderation directly (de Figueiredo 2002). However, given the complexities of real-world policy making, sustaining cooperation in this manner may be difficult. Even if parties agree in general that those in power should not ride roughshod over the interests of the opposition, policy makers are likely to disagree about whether concrete policy choices violate this agreement and whether "punishment" is called for.[8] Moreover, parties may strategically claim violations—a possibility that undermines their faith in the sincerity of claims made by the other side. As Stephenson argues, such a breakdown in equilibrium expectations can be prevented by delegating the task of declaring violations to a court, an argument that is consistent with broader understandings of the role of third-party adjudication (Shapiro 1981).[9]

The central question for the insurance theory is under what conditions parties are willing to comply with the constraints imposed by the court when they are in power in order to reap the benefits of the constraints imposed on the other party when they are in opposition. It is straightforward to demonstrate that the strategies described above meet this condition if and only if the political system is sufficiently competitive. Neither party can become so electorally dominant that it no longer values the opposition protection offered by judicial review highly enough to comply. For the simplified model presented here, this will be the case if and only if[10]

$$p \in [T_R, T_L],$$

where

$$T_L \stackrel{\text{def}}{=} \frac{\delta(1-r^2) - (1-\delta)l^2}{\delta(1-r^2+l^2)}$$

[8] Carrubba (2009) argues that international courts, such as the European Court of Justice, serve a similar purpose as an information clearinghouse that allows governments to cooperate under a common regulatory regime, which is easier than monitoring compliance directly.

[9] Technically, the Stephenson model includes a random term in the utility function of each party. Parties observe their own utility but do not directly observe the policy choices or utility of the other party. If this random term is sufficiently large, it ensures that parties cannot directly enforce compliance with an agreement to moderate policy because they cannot disentangle to what extent their payoffs result from the policy choice of the other party and the random component of utility.

[10] Equilibrium requires that each party, once elected, prefers to implement the judicially restrained policy and maintain the judicial review equilibrium to implementing its ideal point and reverting to the unconstrained equilibrium. Taking party L as an example, this requires $-l^2 - \frac{\delta(pl^2+(1-p)r^2)}{1-\delta} > -\frac{\delta(1-p)}{1-\delta}$. Solving this inequality for p yields T_L.

and

$$T_R \stackrel{\text{def}}{=} \frac{(1-r)^2}{\delta((1-r)^2 + 2l - l^2)}.$$

In words, the probability that party L will win a given election must be contained in an interval defined by two thresholds. The upper bound of the interval is imposed by party L: If party L is too likely to win future elections, it will ignore judicial rulings rather than comply; therefore, p may not exceed this threshold. Conversely, party R will ignore judicial rulings if it is too likely to win; therefore, p may not fall below the lower bound of the interval. (Alternatively, we can rewrite this interval as the interval within which judicially sanctioned policies must fall in order to gain compliance for any given value of p.) This simple model illustrates the three key implications of the insurance theory highlighted above:

1. Under the insurance argument, a powerful judiciary requires a sufficiently competitive political system. If p becomes too large or too small and falls outside the compliance interval, judicial authority cannot be sustained.
2. Under the insurance argument, sustaining a powerful judiciary requires that parties have a sufficiently long time horizon so that the benefits of future constraints on the other party outweigh the costs of current compliance.[11]
3. Judicial rulings must be sensitive to the relative competitiveness of the parties. If p falls outside of the (current) compliance interval, the court must adjust l and r to shift the compliance interval to re-establish respect for judicial authority as an equilibrium action. As party L becomes more dominant (p increases), this requires shifting l or r (or both) down. As party R becomes more dominant (p decreases), this requires shifting l or r (or both) up.[12]

In summary, what the Stephenson model makes clear is that the insurance theory offers a compelling explanation of respect for judicial authority primarily where political competition is robust (i.e., no dominant coalition emerges that expects to control policy making well into the future), and judicial decisions temper political outcomes while being sensitive to the distribution of political power "on the ground." The argument highlights that to the extent that respect for judicial authority is a form of "hedging one's bets" for current officeholders, doing so is only reasonable if there is a bet to hedge. Current officeholders must be sufficiently likely to lose office that—given the nature of decisions they expect from the judiciary—complying with current contrary decisions is worth the cost. These results are, of course, reminiscent of the central insights of the literature on cooperation more generally (see Axelrod 1984, Taylor 1987).

In highlighting the central role of the competiveness of the political system, Stephenson's formalization also underscores the importance of clearly distinguishing between explanations for the creation of independent courts and explanations for ongoing judicial authority. A number of scholars have applied versions of the insurance logic to explain the decision of constitution writers to make provisions for a strong judiciary. Most prominently, Ginsburg (2003, p. 25) argues that the establishment of constitutional courts in Asia can be explained by the absence of a dominant party at the constitutional moment: "Explicit constitutional power of and access to judicial review will be greater where political forces are diffused than where a single dominant party exists at the

[11]Technically, $\frac{\partial T_L}{\partial \delta} > 0$ and $\frac{\partial T_R}{\partial \delta} < 0$. This implies that as δ declines, the compliance interval shrinks. Once the thresholds cross, it is impossible to sustain the judicial review equilibrium for any value of p.

[12]Technically, the partial derivatives of the two thresholds with respect to l and r are negative. So if p increases and falls outside the current interval, a sufficient decrease in l and/or r may be able to reestablish the judicial-review equilibrium. The situation is reversed for a decrease in p. If no feasible shift can accomplish this—since $l, r \in (0, 1)$ and $l < r$—the judicial-review equilibrium cannot be sustained.

time of constitutional design." Hirschl (2000, p. 95) offers a closely related theory, arguing that powerful courts are constructed by declining political elites who want to insulate policies against revision once they lose power:

> . . . the process of judicial empowerment through the constitutionalization of rights may accelerate when the hegemony of ruling elites in majoritarian decision-making arenas is threatened by "peripheral" groups. As such threats become severe, hegemonic elites who possess disproportionate access to and influence upon the legal arena may initiate a constitutional entrenchment of rights in order to transfer power to the courts.

These accounts may be well suited to explaining the timing of the creation of a powerful judiciary, but the formalization of the insurance argument demonstrates that they are not sufficient to explain judicial authority on an ongoing basis. Judicial authority requires a continuously competitive political environment; diversity of interests at the constitutional moment is insufficient. Similarly, a declining elite may *wish* to protect its position through judicial empowerment, but if it is replaced by a newly dominant coalition, this dominant coalition may have little incentive to respect judicial authority.

The empirical evidence for the insurance logic is compelling. Ramseyer (1994) argues that the relative dependence of the Japanese judiciary can be explained primarily by the electoral dominance of the Liberal Democratic Party during the period of his study. In contrast, American politics has been sufficiently competitive that ruling coalitions have generally found it in their interest to preserve an independent judiciary should they lose power. Even within this broad characterization, however, Whittington (2003) argues that Congress has been historically far more eager to engage in court-curbing activities in the United States when a dominant political coalition emerged. In a seminal study of the emergence of judicial review in Asia, Ginsburg (2003) demonstrates that the insurance logic can help to explain the absence of a strong independent court in Taiwan (which was politically dominated by a single party) as well as the emergence of a constitutional court with considerable authority in South Korea (which was characterized by a competitive political system). Magalhaes (2003) argues that the insurance logic also helps to explain the divergent paths of Iberian democracies with respect to judicial review. Spain and Portugal, which were both characterized by reasonably competitive political systems following the transition to democracy, adopted strong constitutional courts. In contrast, no independent constitutional court was created after the Greek transition to democracy—in large part, Magalhaes argues, because Greek politics was dominated by a single party. More systematic, quantitative studies also provide strong support. Using data on 150 countries in the mid-1990s, Stephenson (2003) shows that political competition (measured as alternation in government participation) strongly predicts judicial independence. Ginsburg & Versteeg (2014), using a dataset that covers roughly 200 countries over a 200-year period, find clear evidence that electoral competitiveness (defined as the ratio of legislative seats held by the two largest parties) is a major predictor of the adoption of a system of constitutional review.

EXOGENOUS EXPLANATIONS FOR JUDICIAL INDEPENDENCE AND AUTHORITY

In contrast to endogenous explanations, exogenous explanations for judicial authority point to factors that constrain executives and legislators to respect judicial authority even if they would prefer to resist or attack the judiciary. Policy makers respect judicial authority not because doing so provides a positive benefit but because attacking the court or ignoring its decisions is too costly

(e.g., Epstein et al. 2001; Vanberg 2001, 2005). The most common explanation of this type stresses public support for independent courts as the critical factor (Vanberg 2001, 2005; Staton 2006, 2010).[13] The intuition behind this explanation is simple. Considerable empirical evidence suggests that citizens in democratic polities hold courts in high regard, often in higher regard than policy makers in other branches (e.g., see Gibson et al. 1998). If the integrity of the judiciary and respect for its decisions are values that a sufficient number of citizens are willing to defend by withdrawing support from policy makers who attack judicial independence, policy makers are likely to conclude that disciplining the court or resisting unwelcome decisions is not worth the potential costs of a public backlash. Public support provides a shield for judicial independence. A remarkably frank quote by a member of the German Bundestag illustrates this logic: "There is not a single deputy here who thinks it would be advisable to move against the court. A serious confrontation would just create a public discussion in which one could easily get a bloody nose" (quoted in Vanberg 2005, p. 121).

Exogenous explanations that stress the importance of public support raise an obvious question: What explains public support for courts as independent institutions, especially if courts constrain popularly elected and accountable policy makers? This question takes a back seat in much work in this tradition (e.g., Epstein et al. 2001; Vanberg 2001, 2005; Staton 2006, 2010) because the focus of the analysis is on understanding how judges and legislators behave *if* public support is the key enforcement mechanism for judicial opinions (a point to which I return in the next section). But "closing the loop" for these exogenous explanations requires an explicit theory of the origins of public support for judicial authority.

One argument begins from the fact that the political process in democracies represents complex preference aggregation and delegation problems rather than the simple representation of "the people's will" (or even a homogeneous majority's will) of high school civics.[14] Competing interests vie for power in a policy process that divides authority among various institutions and often induces principal–agent relationships between citizens and officeholders. In this environment, recourse to elections offers one method for holding policy makers accountable (see Powell 2000), but given the imperfections of the electoral connection and majoritarian processes (see Buchanan & Tullock 1962, Riker 1982), citizens concerned with limiting the possibility for abuses of power may favor imposing additional limits on the exercise of political power. An independent judiciary can play a crucial role in enforcing such limits.

For example, Carrubba (2009)—in the context of international courts—develops a model in which citizens who observe the interactions between their government and an independent court can use court decisions (and the government's reaction to these decisions) to detect whether their government is unduly beholden to special interests. Over time, this dynamic can generate sufficient public support to provide the court with considerable leverage vis-à-vis the other branches. Stephenson (2004) develops a similar argument in the context of a domestic court. In this three-player model, a government can legislate, and if it does so, a court reviews the proposed bill and accepts or vetoes it. The government can respond to a judicial veto by respecting the court's authority or by implementing its policy despite the veto and disciplining the court. Finally, a voter can choose to discipline a government for failing to legislate, for attacking the judiciary, or both. The challenge confronting the voter is that she is not certain whether the government's and the

[13] Epstein et al. (2001) remain more abstract, simply arguing that there is a "tolerance interval" around the ideal point of political actors that defines judicial decisions they are willing to respect. The width of this interval depends on the costs to be paid for defiance, whatever these costs may be.

[14] The extensive social choice literature deriving from Arrow's Theorem demonstrates the incoherence of such conceptions (see Patty & Penn 2014 for an excellent introduction and assessment).

judiciary's preferences coincide with hers or diverge. Moreover, the voter has limited information about the policy environment and is uncertain about which policies are in her interest. As a result, when a government adopts a specific policy, the voter cannot be sure whether the government is acting in her interest or promoting a policy that hurts her (for example, because it serves a special interest). Stephenson demonstrates that if judicial opposition to legislation is a more informative signal about the desirability of the policy than the government's support for it, voters will prefer an independent judiciary and punish noncompliance with judicial rulings.

A second explanation for the willingness of citizens to defend judicial authority in the face of executive and legislative challenges builds on Weingast's (1997) seminal paper on the origins of "democracy and the rule of law." Weingast's central claim is that constitutional boundaries on political power are ultimately enforced by public backing, that is, by a sufficiently widespread willingness of citizens to withdraw support from policy makers who transgress these boundaries. In the face of such a potential reaction, policy makers either stay within constitutional boundaries in anticipation of public censure or are dismissed from power. Naturally, such citizen backing poses a significant coordination problem. For a particular action X to be deterred, it must be likely that if a policy maker does X, a sufficient number of citizens will come to a coordinated understanding that X is "out of bounds" and withdraw support. (There is—in addition—a potential collective action problem in *acting* on such an understanding. Like Weingast, I leave this issue aside for the moment. As long as the costs of withdrawing support are low, e.g., a refusal to vote for a candidate, this is not a major barrier.)

In Weingast's account, a critical advantage of written constitutions, as well as of prominent historical events in a country's political history, is that they can facilitate coordinated understandings of constitutional boundaries. Yet, it is apparent that written constitutions often fail to resolve the coordination problem confronting citizens; they can instead give rise to a second-order coordination problem. In the face of competing plausible interpretations of constitutional provisions, there may arise legitimate disagreement about whether action X is in or out of bounds. Such disagreements are constitutional in nature but may often be fueled by the narrow partisan implications of choosing one interpretation rather than another. Such disagreements work against coordinated citizen responses to policy maker actions and thus undermine the ability of citizens to enforce a constitution.

The difficulty of achieving spontaneous coordination of citizen understandings in the face of competing constitutional interpretations opens up one way to think about the role and power of courts that has been developed most fully by Sutter (1997) and Vanberg (2011). By resolving a dispute between competing constitutional interpretations, judges provide a clear focal point around which citizens can coordinate their responses to disputed policy maker actions. Once a court has announced that action X is out of bounds, all citizens have received the same signal regarding the appropriate response and, more importantly, all know that all others have received the same signal. As Vanberg (2011, p. 314) puts it, the importance of a judicial decision

> . . . derives from the fact that a judicial verdict (whether "right" or "wrong" in some deeper sense) can serve as an unambiguous signal around which citizens can coordinate their evaluation of sovereign actions. Irrespective of the details of a particular decision, the fact that a decision has been made, and that a policymaker refuses to follow that decision, can send a clear signal that the policymaker is no longer committed to respecting the constitutional order, and should be resisted. Once the Supreme Court announces that Nixon must turn over the tapes, refusal to do so can no longer be explained by divergent interpretations of executive privilege—refusal to comply clearly reveals an attempt to play outside the rules.

This approach to thinking about the role of courts has at least three significant implications. The first is that in this account, what makes constitutional review valuable to citizens is its coordinating power. By coordinating citizen expectations in the face of competing interpretations, courts make it possible to enforce limits on power.[15] The second follows immediately: Primarily, the force of judicial decisions derives not from the judges' legal or constitutional expertise but from their decisions' coordination function. Even "bad" decisions carry weight because their primary value lies in achieving coordinated understandings, not in their legal quality. The final implication follows from the first two: In the face of multiple plausible interpretations of a constitutional provision, judges derive power from their coordinating function, largely independent of the content of their decisions. As a result, there is a broad range of decisions that judges are free to issue—which is to say, they have power to impose *their* interpretation. As Justice Oliver Wendell Holmes famously quipped: "We are under a constitution, but the constitution is what the judges say it is."

Note that I say "largely independent of the content" but not completely so. The ability of the court to maintain its position as the institution that establishes focal points regarding constitutional interpretation depends—at least in the long run—on the ability of judges to convince citizens that on balance they serve citizen interests. This is likely to involve a substantive correspondence between the content of decisions and public opinion, as well as convincing the public that judges are not merely legislators in robes but are constrained by professional codes of conduct that transcend their narrow policy preferences. One way in which judges do so is to justify their decisions with respect to the constitutional text—a requirement typically not imposed on other policy makers. Indeed, considerable evidence suggests that (in addition to substantive evaluations of judicial decisions) citizen support for courts is enhanced by perceptions that judges are apolitical and impartial (see Shapiro 1981, pp. 16–17; Cappelletti 1989, p. 176; Gibson 1989, 1991; Tyler & Raskinski 1991; Schwartz 2000).

STRATEGIC JUDICIAL BEHAVIOR AND JUDICIAL AUTHORITY

Both endogenous and exogenous explanations for judicial authority imply that respect for judicial independence is conditional. Executives and legislators respect judicial authority only as long as, on balance, the presence of independent courts provides sufficient benefits or subverting them is too costly. There are limits to the willingness of the other branches to respect judicial authority. In the language of Epstein et al. (2001), judicial decisions must remain within the tolerance intervals of other actors. The recognition of these limits—by both judges and scholars—has given rise to a third explanation that complements endogenous and exogenous explanations for judicial authority: that strategic judicial behavior plays a role in maintaining and expanding judicial power.

The central assumption of strategic accounts is that judges are forward looking (Knight & Epstein 1998). They choose actions realizing that their own choices shape political outcomes only in conjunction with the actions of others. Moreover, they anticipate that their choices will induce reactions by other actors. In the current context, this implies that judges are aware of the conditional nature of their power. Judicial decisions that consistently frustrate the interests of policy makers in the executive and legislative branches, or that serve to convince large segments of the public that judicial review does not promote the interests of citizens, pose a threat to judicial authority.

[15] Note a similarity between this account and the role played by judicial decisions in the Stephenson model reviewed above. In both accounts, it is the public nature of a judicial decision that is crucial. In the Stephenson model, it allows political parties to condition their punishment strategies on respect for judicial decisions; in the Sutter and Vanberg arguments, it enables citizens to coordinate their responses to policy maker actions.

They reduce the benefits that policy makers derive from the presence of an independent judiciary. They can also undermine public support, which lowers the costs to policy makers of subverting judicial authority. Judges concerned to maintain—and perhaps even enhance—the position of the judiciary will therefore display some sensitivity to the interests of governing majorities and to public opinion. The simplified version of the Stephenson model presented above made this link explicit: To maintain judicial authority, the range within which the court upholds policies, $[l, r]$, must reflect the relative power of the parties and shift in favor of electorally dominant parties.

Over the last two decades, scholars have provided compelling evidence—both quantitative and qualitative—that judges are attuned to the interests of policy makers and the public. Numerous studies suggest that the US Supreme Court, often considered to be one of the most independent and powerful constitutional courts, is responsive to presidential and congressional preferences (e.g., Bergara et al. 2003, Harvey & Friedman 2006, Clark 2011; but see Segal 1997). Similarly, it is now well established that the Court is responsive to public opinion (Mishler & Sheehan 1993, McGuire & Stimson 2004, Friedman 2009, McGuire et al. 2009, Carrubba & Zorn 2010). In a comparative context as well, clear evidence suggests that judges take account of governmental and public preferences in their rulings (e.g., Epstein et al. 2001, Ramseyer & Rasmusen 2001, Helmke 2005, Vanberg 2005, Carrubba & Gabel 2014).

It is important to be clear about what these studies do and do not establish. Judges are aware of the conditional nature of their influence and are protective of their authority, but this does not imply that judges are unable to issue decisions that are genuinely unpopular, either with other officeholders or large swaths of the public. Because attacks on judicial independence are a blunt instrument, and the critical consideration for those in a position to attack the judiciary is the balance of benefits and costs derived from independent courts, judges have considerable latitude, particularly in isolated instances, to make decisions that impose significant costs on other actors. Moreover, we have seen that judicial decisions serve as focal points that help to overcome a coordination problem in enforcing constitutional provisions (Sutter 1997, Vanberg 2011), and to the extent that judicial authority derives from this fact, judges' "discretionary interval" may be quite large. The benefits of coordination are so massive that they often outweigh considerable distributional losses in specific decisions.

Finally, a number of studies stress that judicial sensitivity to the interests of others actors is not merely a passive response to the limits of judicial independence. In a dynamic setting, the perceived benefits of an independent judiciary to other policy makers, and public support for judicial independence, are—at least to some degree—a function of the manner in which judges exercise their authority. In the language of Greif & Laitin (2004), they are "quasi-parameters." By strategically avoiding clashes with powerful actors in the early phase of the court's existence, and by cultivating favorable public perceptions of the judiciary, strategic judges can enhance their authority over time, ultimately gaining considerable latitude in exercising their authority (Epstein et al. 2001, Vanberg 2005, Staton & Vanberg 2008).

For example, in Carrubba's (2009) dynamic model, judges are initially constrained in issuing decisions that run counter to the interests of governments, but they are able to strategically build public support by shaping citizen beliefs about the benefits provided by the judiciary. Ultimately, this allows them to constrain governments in ways that were not possible initially. Such an account clearly fits the early experience of the US Supreme Court. As Graber (1998, p. 232) has observed, the early Marshall court was "desperately avoiding clashes with a potentially hostile administration." Instead, the court largely served the interests of the federal government during the nineteenth century (Whittington 2007; see also Carrubba & Rogers 2003). Similarly, in a cross-national context, scholars have argued that courts are careful to avoid potentially disastrous confrontations in their early years and to build institutional legitimacy over time (Vanberg

2000, 2005; Ginsburg 2008). Failure to take heed of the dangers lurking in such confrontations may quickly eliminate the ability of a constitutional court to establish itself as a powerful actor, a lesson learned by the Russian constitutional court after it was dismissed in 1993 as a result of a confrontation with President Yeltsin over presidential decree powers (Schwartz 2000). On the flip side, judicious exercise of its powers in the early phase of its existence may allow the court to establish a position of influence that becomes more and more difficult for other actors to resist over time—witness the major position achieved by the US Supreme Court or the German Bundesverfassungsgericht.

CONCLUSION

Over the last two decades, a diverse academic literature has investigated the conditions that allow constitutional courts to assert the prominent and powerful role they occupy in many democratic polities around the world. Broadly speaking, scholars have offered two analytically distinct explanations for judicial authority. Judicial authority can be supported when executives and legislators derive direct or indirect benefits from the presence of an influential judiciary (endogenous explanations). Alternatively, broad citizen support for judicial independence can make attacks on judicial autonomy costly for other policy makers and provide a shield for the judiciary (exogenous explanations). Both mechanisms are complemented by the strategic behavior of judges, who exercise their power in ways that build and maintain their authority. Given these explanations, judiciaries are more likely to achieve an authoritative position in competitive political settings where political elites expect to alternate in power on a regular basis; where fragmentation of authority across separate institutions makes coordinated attacks on judicial independence more difficult and enhances the value of an independent judiciary to officeholders; and where judges are attuned to the interests of powerful political actors and to prevailing public attitudes.

This literature has (at least) two significant implications for the place of constitutional courts in democratic politics. The first is that judicial power is a political phenomenon. To the extent that judicial decisions—at least on occasion—constrain other political actors, judicial authority can be sustained only if those actors who are in a position to undermine the judiciary are unwilling or unable to do so. Whether this is the case depends critically on institutional features of the polity (e.g., division of powers) as well as the political environment (e.g., the competitiveness of the party system). Second, there are limits to judicial independence and authority even in well-established constitutional democracies. Judges are influential only as long as respecting their decisions, and the institutional integrity of the judiciary, remains an equilibrium action for other policy makers. To be sure, the conditions under which this will be the case can be broad and can widen over time as courts build up public support. Nevertheless, judges are constrained by the political environment in which they act. In this sense, the positive accounts of judicial authority that have emerged over the last two decades provide a qualification to the voluminous normative literature that has made "the countermajoritarian difficulty . . . the central frame for constitutional theory for the last fifty years" (Friedman 2002, p. 153). Especially over the long run, courts are far more likely to swim with prevailing public attitudes than against them.

Despite significant progress in deepening our understanding of the conditions that favor judicial power, considerable work remains to be done. In closing, I highlight one area that appears particularly pressing: the interaction between the external politics that have been the focus of this essay and the internal politics of collegial courts. The standard approach in studying the relationships between judicial institutions and outside actors (whether other policy makers or the public) has been to treat courts as unitary actors. Doing so is typically justified by the need to reduce the complexity of models and by an appeal to the dominant position of a particular judge on a collegial

court (e.g., the median justice in a one-dimensional model). And yet, over the past decade, scholars studying the interactions among judges have demonstrated that the internal dynamics of bargaining among judges on collegial courts are complex and nuanced—both in terms of the distribution of influence and the properties and qualities of legal rules that emerge from this process (for an excellent overview, see Lax 2011). Integrating these approaches is likely to be productive. External politics may have significant influence on the internal politics of collegial courts by affecting the bargaining position of judges in differential ways. Similarly, the internal politics among judges on collegial courts may have significant implications for the manner in which courts interact with the external world.

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