

When Parchment Barriers Matter:
De jure judicial independence and the concentration of power

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Abstract

Formal institutions that insulate judges from political pressures are core pieces of constitutional reforms aimed at ensuring limited government. These institutions are supposed to mute judicial incentives to defer to governments for reasons unrelated to the legal questions they are asked to resolve. Yet empirical research on formal judicial institutions has generated considerable skepticism about the possibility of designing judicial independence. Instead scholars argue that concentrated political power is what matters, and that formal institutions of judicial independence are mere “parchment barriers.” We argue that judicial institutions interact with the fragmentation of political power, specifically the fragmentation of political power. Drawing on a new cross-national database of high court constitutional review decisions (CompLaw), we demonstrate that formal institutional protections designed to ensure judicial independence are important, but only when elected officials are sufficiently unified and thus pose a material threat to judicial posts.

Granting courts the power of judicial review does not necessarily imply that they will exercise the authority effectively. Courts need not rule against governments even when they perceive legal violations (Ferejohn and Shipan, 1990; Staton and Moore, 2011; Helmke, 2005; Rodríguez Raga, 2011). Even if they do rule against governments, court orders requiring government action can be ignored (Vanberg, 2005; Sorauf, 1959; Carrubba and Zorn, 2010; Gauri, Staton and Cullell, 2015). In short, empowering courts formally does not mean that they will influence the public policy process.

Fear of retaliation is one reason judges might be hesitant to rule against the state (Helmke, 2010; Pérez-Liñán and Castagnola, 2009). Attacks against the judiciary can manifest as public statements regarding the integrity and competence of judges (e.g., Clark, 2010; Driscoll, 2011), as when ANC Secretary-General Gwede Mantashe accused the South African judiciary in 2015 of fomenting “chaos.” This attack followed a High Court decision ordering the arrest of Sudanese president Omar al-Bashir so that he could face a series of charges before the International Criminal Court. The arrest order was ignored and the subsequent verbal barrage against South African judges raised questions about that country’s commitment to limited governance.¹ Attacks also can be far more serious, going right to the heart of the judiciary’s role in a system of constitutional control. In 2007, Bolivia’s Constitutional Tribunal was rendered inoperative as a consequence of politically motivated impeachments and resignations (Castagnola and Pérez-Liñán, 2011). Worse still, the mere threat of these kinds of retaliations are thought to create strong incentives for politically motivated judicial deference. Thus, even when we do not observe conflict, we cannot infer that judges are serving as influential pieces of a political system.

Naturally, scholars have been interested in uncovering the conditions under which judges are meaningfully insulated from political retaliation. One focus is on the organization of political power. A considerable literature suggests that high courts are more likely to influence policy outcomes when political power is sufficiently fragmented (e.g., Chávez, Ferejohn and Weingast, 2011; Smithey and Ishiyama, 2002; Ríos-Figueroa, 2007). Fragmentation complicates coordination problems in legislators, which in turn makes it more difficult to meaningfully pressure judges via threats on their posts. Other scholars have suggested that high courts are more likely to influence policy when the government fears public reprisal for evading an adverse court decision (Vanberg, 2005; Staton, 2010; Carrubba, Gabel and Hankla, 2008; Clark, 2010). Public support for the judiciary constrains political responses to unfa-

¹“South Africa ignores its obligations to justice.” Financial Times Online, June, 15, 2015.

vorable decisions and thus frees judges to behave independently. What is striking in these approaches is the relative silence on the role that the formal institutional protections for judges might play. Indeed, there seems to be an implicit assumption that institutional protections designed to insulate judges from external pressure do not matter.

This observation is surprising. Common judicial institutions like fixed tenure or budgetary autonomy are typically understood to ensure that judges do not feel beholden to the politicians whose policies they are empowered to review (Elkins, Ginsburg and Melton, 2009; Brinks and Blass, N.d.; Kornhauser, 2002; Melton and Ginsburg, 2015). Reflecting a strong consensus regarding the likely incentives they create, scholars claim that these institutions themselves reflect *de jure* or “formal” judicial independence (Keith, 2012).² But do these formal protections free judges to (at least) attempt to constrain government? If so, under what conditions? The general empirical record is mixed (See Ríos-Figueroa and Staton, 2014, for a summary), a fact reflected in recent studies. Hayo and Voigt (2007) find support for a moderate but significant insulating effect of formal institutions relying on expert based measures of *de facto* judicial independence. Melton and Ginsburg (2015) also find a small effect of formal institutions on independent judicial behavior, again using expert and proxy based measures of judicial behavior. Critically, though their result is limited to authoritarian regimes. As suggestive as the findings are, it is useful to remember that the studies have relied on expert judgements. Studies that have focused on actual judicial behavior like Herron and Randazzo (2003) and Smithey and Ishiyama (2002) are far more skeptical about the possibility of changing judicial behavior via formal institutions of judicial independence. In particular, they find that the formal rules designed to insulate judges are unrelated to decision outcomes in review of public policies. Although these studies focus on actual behavior, they are limited to a small number of post-communist states. Ideally we should be evaluating our arguments against data on actual judicial behavior derived from a sample that better reflects the variety of political conditions judges confront around the world. To do this, we need a dataset with variation in the levels of judicial independence as well as a quality way of measuring if high courts are issuing rulings meant to constrain government behavior. In this paper, we introduce a new dataset, the Comparative Law Database, which is designed to help scholars answer questions such as these. We use it to test an argument for the conditions

²Of course, there is a large conceptual literature on the concept of independence. We refer readers to Ríos-Figueroa and Staton (2014) for a summary and evaluation of measures of the concept.

under which institutional protections designed to encourage judicial independence should affect judicial decision-making.

Similar to scholarship on institutions outside of the judicial context (e.g., Clark and Golder, 2006; Neto and Cox, 1997), we will argue that rules designed to protect judges channel underlying political processes. In many ways we share the core theoretical concern of Melton and Ginsburg's (2015), which suggests that institutional protections should interact with other features of the state that potentially constrain leaders. Melton and Ginsburg (2015) argue that institutional protections depend on existing checks on government authority, under the view that these institutions will be respected in practice only when there are checks on leaders. Like Melton and Ginsburg we argue that institutional protections interact with existing political constraints. However, whereas their argument contends that constraints make judicial protections viable, we contend that judicial protections are only meaningful in the absence of such constraints. Specifically, we will argue that formal judicial independence should shape judicial incentives created by the degree of power concentration in a state.

We demonstrate that institutional protections change the way that political concentration (or its opposite, political fragmentation) influences judicial deference. Our evidence, drawn from a wide sample of instances of constitutional review carried out by high courts globally, suggests that stronger formal protections for judges attenuate the effect of concentrated political power on high court deference. Where courts are largely unprotected by formal institutions, judges appear to be particularly sensitive to the capacity of government to coordinate on an attack. Where courts are protected, in contrast, judges appear to be less influenced by this capacity. Importantly, this effect is limited to the review of public policies associated with the sitting government, precisely where the pressure to defer is strongest.

This finding has wider implications for the functioning and design of democratic systems. Fundamental "visions" of democracy shape the choices institutional designers make when creating or modifying a democratic state (Powell, 2000). Scholars typically focus on the ways that majoritarian and proportional visions shape democratic accountability, policy flexibility, and even fiscal responsibility (Powell Jr, 2004; Hallerberg and Von Hagen, 1997; Volkerink and De Haan, 2001). Majoritarian electoral rules attempt to maximize identifiability and accountability at the expense of representing as many interests as possible. Assuming that the majoritarian vision still values limited government and that judicial review is a part of the process by which government is limited, our results suggest that these are precisely the systems that stand to benefit the most from granting the judiciary strong *de jure* protections. Put differently,

while de jure judicial protections certainly do no harm in proportional systems, they might actually prevent harm in majoritarian systems.

The rest of the paper proceeds as follows. In the first section, we present the theoretical arguments. We both introduce existing arguments for whether de jure independence should affect judicial deference to governments, as well as our proposed alternative argument. Second, we introduce the new database. In doing so we present the existing data and present a number of its most salient properties through descriptive statistics. Third, we test the various arguments using the new data, and finally we discuss implications of our findings and future directions for the Comparative Law Project.

Judicial Rules and the Outcomes of Constitutional Review

Before discussing when judicial independence is likely to matter, we first need to define the term, since it is subject to multiple interpretations (Ríos-Figueroa and Staton, 2014). Given our focus on institutional rules, we have a de jure concept in mind. When we say that a judiciary is “independent,” we mean that it enjoys institutional protections believed to insulate judges from undue influences on their decisions, consistent with the second United Nations Basic Principle on Judicial Independence.³ Our concept of de jure independence follows standard practice. Concretely, life tenure, strict rules against removal for political reasons, protected budgets and so on are the types of institutional protections that are designed to ensure that judges do not simply defer to governments for reasons unconnected to the legal merits of the cases they review.⁴

³The second principle requires that “The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.” The Principles can be found at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>. In this paper, we are chiefly concerned with undue pressure that can be placed on judges by governments.

⁴In selecting these rules we rely on general agreement in the literature that these rules, if they have any effect at all, will undermine inappropriate forms of deference. This is a standard assumption, though we recognize that theoretical work has raised questions about whether particular institutions, like life

When should parchment protections matter?

We ask whether de jure judicial independence undermines incentives to defer to the interests of current governments. The traditional argument for why judicial independence should undermine deference is straightforward (See Smithey and Ishiyama, 2002; Herron and Randazzo, 2003, for typical summaries.). High courts tasked with judicial review are expected to rule government actions invalid when they run contrary to higher law commitments. Generally speaking, governments prefer to implement the policies they adopt; and, they have a variety of tools with which they can sanction courts for interfering with the political process. Among the many options, salaries can be cut, jurisdiction can be stripped and ultimately judges can be removed from office. A court that fears retaliation through these mechanisms has a strong incentive not to rule against the government. An independent judiciary, one that has institutional protections restricting a governments ability to retaliate through these mechanisms, is relatively free to rule as it wishes.⁵ A first prediction follows from this argument.

Prediction 1 *Courts with higher levels of judicial independence should be more likely to rule against standing governments.*

The argument against judicial independence mattering is equally straightforward. Ferejohn (1999) and Chavez et al (2011) argue that there are robust "subconstitutional practices" (Chavez et al., 2011: 219) that can be used to subvert these institutional protections.

But why would textual provisions in the Constitution – which are mere "parchment barriers" in Madison's words⁶ – be effective in protecting judges? One answer is that courts could

tenure, always increase incentives for more autonomous behavior (Pozas-Loyo and Ríos-Figueroa, 2007; Helmke and Staton, 2011)

⁵See Rodriguez, et al. (2009) for a discussion on how judicial independence is seen as foundational to the rule of law (also see Staton 2010). See North and Weingast (1989), North et al (2000), Barro (1997), Acemoglu et al. (2001), and Frye (2004) for arguments about the benefits that independent judiciaries engender, including ensuring the credibility of state promises to respect individual rights, breeding efficient investment, state solvency, growth and development, and stabilizing democratic regimes.

⁶THE FEDERALIST NO. 47, at 308 (James Madison) (Clinton Rossiter ed. 1961).

overturn any congressional attempt to violate lifetime tenure or to lower judicial salaries. But suppose Congress lowered the bar to impeachment – a bar which it sets implicitly by impeaching and convicting judges from time to time – or suppose that it took advantage of periodic periods of inflation to permit the reduction of real judicial salaries. What would or could be done about “infringements” of this sort? (Ferejohn 1999: 356)

Simply put, these scholars are arguing that institutional guarantees of judicial independence cannot be credible since political bodies have a variety of tools to get around those guarantees. Instead, they argue that judges are protected from impeachment, salary manipulation and more only when the political branches do not have the will to strike out at judges for undesirable rulings. As Ginsburg (2003: 252) writes,

Where a single party retains a dominant position, we would expect constitutional courts are less able to exercise judicial power...even holding institutional design constant. This is because dominant parties have collateral means of constraining the courts so that courts are less likely to exercise independent input into politically salient decisions. In contrast, where the party system fragments, the tolerance zones of institutions that might discipline the court expand and with them the possibilities of exercising judicial power.

The key question on this account is whether a leader controls the parts of the state empowered to materially affect judicial interests. When this is not true, judges are insulated and freed to behave independently. When this is true, when judges are actually under threat, institutional protections are of no assistance because they are not credible. Prediction two follows.

Prediction 2 *Courts facing more concentrated political power should be less likely to rule against governments independent of the level of judicial independence.*

This prediction, which follows from a robust and clear political argument nevertheless relies on a strong assumption: perfect substitutability. Institutional protections are irrelevant because politicians can always get around them through subconstitutional means. There are a number of reasons why this might not be true. First, suppose these “parchment barriers” require politicians to have to work harder to sanction judges (e.g., require cobbling together larger coalitions to pass court-sanctioning actions). As

a result, politicians only can credibly threaten to sanction the court for decisions the politicians consider worth the extra effort. If true, while these protections are not perfect, they can increase a court's ability to rule against governments for a wider set of cases. Alternatively, consider Weingast's (1997) argument that constitutions are coordination devices. In this argument, constitutions matter because they align expectations of what is permissible behavior. The public, or factions of the public more accurately, will then sanction governments for transgressing the constitution's prescribed boundaries. If publics would sanction governments for explicitly violating the institutional protections laid out to protect judicial independence, we might suppose they would do the same for these subconstitutional devices as well.

Consider what we would expect if we merged the institutional and the fragmentation arguments together. In particular, suppose that the underlying logic of the political fragmentation argument is correct, but for the reasons described above institutional protections of judicial independence matter as well. If this is correct, de jure independence should condition the way that political fragmentation influences judicial decision making. In particular, under conditions of low de jure independence, the positive relationship between the concentration of political power and strategic deference should be particularly strong. Under conditions of high de jure independence, this relationship should be substantially attenuated. This argument leads to prediction three.

Prediction 3 *When judicial independence is weak, the more concentrated political power is, the less likely a high court is to strike a standing government's law or action. As judicial independence increases, this relationship should weaken.*

It is important to note what this argument has in common with that advanced by Melton and Ginsburg (2015) and where the arguments differ. Both arguments suggest that institutions are likely to be effective only in some political contexts. Melton and Ginsburg suggest that judicial independence should be most effective when political leaders have some constraints on their ability to take unilateral actions. The logic of the argument is compelling. In order for the rules to matter, we must believe that leaders will respect them in practice; and, a plausible mechanism by which leaders are held to the formal constraints on their power is that leaders require cooperation from opponents to violate the rules. Yet, Melton and Ginsburg do not find evidence consistent with the argument among democracies, the precise sample of states where we expect judicial review to be a potential source of state constraint. We propose a different mechanism. We argue that if institutions designed to insulate judges from undo influence

from the political branches are to matter, judges must be otherwise vulnerable to threats from those branches. If judicial independence is irrelevant, then we will observe an effect of power fragmentation no matter the institutional context; however, if judicial independence matters, we should observe an effect when power is concentrated and leaders are not particularly constrained.

The Comparative Law Database

To evaluate these predictions requires a new source of data. One of the most glaring holes in our empirical arsenal remains the absence of a broad, cross-national database of constitutional review decisions.⁷ There are two consequences of this lacuna. First, our most basic descriptive information about constitutional conflicts depends almost entirely on stitching together studies of single courts, and the worldwide coverage of such studies is incomplete and uneven. We lack an unbiased picture of the participants, questions, sources of law, methods of interpretation, and outcomes of constitutional review around the world. Compare this to the Supreme Court Database in the United States, which provides precisely this type of information for one constitutional court, and has fueled hundreds of studies over the last thirty years. Second, in so far as many of our theoretical claims involve causal factors that often do not vary much within a country (e.g., public legitimacy of the court) but do vary substantially cross-nationally, the lack of cross-national data means that we are simply unable to test our models completely.

Creating a representative sample of cross-nationally comparable data is no trivial feat. Constitutional review is carried out around the world in many different ways and by a variety of different types of courts (e.g. Navia and Ríos-Figueroa, 2005). The massive number of constitutional resolutions produced by the world's legal systems, the lack of international standards for data storage, and the fact that in many parts of the world there are simply no electronic records at all for constitutional decisions,

⁷The National High Courts Database (Haynie et al., 2007) project is a notable exception. The Haynie et al sample consisted of eleven English-speaking common law countries. From these countries, they (frequently) randomly sampled from all cases decided by the court in a given year. Our projects differ in both scope and breadth. First, we sought to construct a sample of courts from a more varied selection of countries, including ones with varied legal traditions, political-legal context, and level of economic growth. Second, we solely focused on sampling constitutional cases to ensure that we would have a sufficient number of constitutional decisions for each of the included countries.

make it practically impossible to capture anything close to the universe of resolutions.⁸ Moreover, since the quality of data storage is likely correlated with economic development, any sample of constitutional decisions, however and wherever obtained, will probably over-represent wealthier states. Bearing these sampling challenges in mind, we sought to build a useful cross-national database on constitutional review. The results of our efforts, CompLaw, is a new database on constitutional review conducted by high courts in the world’s judicial systems (CompLaw). The database currently contains information on courts, cases and political systems in 43 states. Next, we describe the creation, organization, and current content of the database.

Case Selection

CompLaw is guided by six case selection rules. First, we seek information on courts of last resort that exercise constitutional review in the highest level of a state’s legal system. We refer to these courts as “high courts” or “peak courts.” Time permitting we code the decisions of the other high courts, as well. In federal states, we focus on the federal legal system. Second, we select only cases in which the high court engages in constitutional review, so that we exclude the non-constitutional jurisdiction of high ordinary or administrative courts. Third, we only included courts if they published their full text decisions on the web; we did not have resources to visit court archives. Importantly, however, we do not require English language translations of decisions. Relying on a multi-lingual research team, decisions are reviewed and stored in the state’s official legal language. Coded entries are in English. Fourth, we limited our search to decisions issued in (or near) the year 2003.⁹ Fifth, we require that either the state (either national government or the national legislature) is an active participant in the case or that a “policy” of the state is being challenged as unconstitutional. By “policy,” we refer broadly to statutes, executive orders, enforcement actions, administrative acts or decrees.

⁸For example, there are over 400,000 amparos/year in Columbia alone.

⁹This is a pilot study to establish the feasibility of assembling a large cross-national database. We therefore chose one year and attempted to assemble a database for as many courts as possible. Where cases in 2003 were not available online, we resorted to the closest year available, generally 2004. For some courts we had the opportunity to code cases beyond the target year. For example, cases were coded for Indonesia for years before and after 2003.

Finally, given the caseload of constitutional courts like the Sala IV of Costa Rica, which now resolves close to 20,000 cases per year, it was impossible to code every instance of constitutional review even from the courts we select. Our sixth case selection rule concerns our sampling procedures for cases within a selected court.¹⁰ If a court resolved 200 or fewer cases in 2003, we coded all cases. If the court had more than 200 cases, we coded a random sample of at least 200 cases.¹¹

To date our database consists of 10,540 cases, 43 completed states, and 3,235 cases that fall within the scope of our study. Table 1 summarizes the states whose high courts are included in the database and indicates the progress we have made with each state. Coding has been completed for states in the far left column. States that fall in the right column are those for which our team has identified and systematically uploaded raw case files to the server, but the data is yet to be coded.

We place no further restriction on the selection of courts CompLaw considers and their jurisdiction. In practice, this means that the database contains information on a variety of distinct legal actions, including those that involve the concrete review of claims of individual rights violations (e.g., the *amparo* suit), as well as actions that involve more general forms of constitutional control moved by elements of the state (e.g. the action of unconstitutionality). CompLaw’s cases thus include both concrete and abstract review actions, as they emerge under a variety of legal traditions. Among the most current sample of coded cases, 57% of actions involved concrete review.

The CompLaw States

Our case selection rules raise immediate questions about the representativeness of our sample of courts, or more importantly, the states from which they come. Most obviously, focusing on courts that publish full text opinions on the web raises a concern about whether we have captured only relatively wealthy states. Figure 1 shows kernel density estimates of the distributions of four key concepts with respect to the sample of states whose peak court decisions have been uploaded and coded in the CompLaw database (dashed line) and the full sample of states (solid line) during the year 2003. The upper-left panel shows

¹⁰There are some states whose courts have such large case loads, like Venezuela or Costa Rica, where it proved impossible to upload case files to the server manually. In such cases, we have proceed by uploading the cases through an automated process.

¹¹This rule was established after we coded Columbia, a country with more than 200 cases. Note that 20 cases can produce more than 200 rulings based upon our coding scheme.

Uploaded and Completed	Uploaded Only
Albania	Algeria (CE)
Algeria (CC)	Bahamas
Argentina	Barbados
Australia	Belgium (CE)
Austria	Brazil
Belgium (CC)	Bulgaria (CE)
Benin	Cambodia
Bolivia	Czech Republic
Bosnia and Herzegovina	Denmark
Bulgaria (CC)	Estonia
Burkina Faso (CE)*	Finland
Burkina Faso (CC)*	Georgia
Canada	Guam
Chile (CC)	Iceland
Colombia	Jamaica
Croatia	Japan
Dominican Republic*	Latvia
Ecuador	Lebanon
El Salvador	Mexico
France (CC)	Netherlands
France (CE)	Norway
Germany	Portugal
Guatemala	Slovenia
Hungary	Taiwan
India	Trinidad and Tobago
Indonesia	Uganda
Ireland	United Kingdom
Israel	
Italy	
Lithuania	
Luxembourg	
Madagascar	
Mali*	
New Zealand	
Niger	
Poland	
Romania	
Russia	
South Africa	
South Korea	
Spain	
Switzerland	
Turkey	
United States	
Venezuela	

Table 1: *States whose courts with constitutional jurisdiction are included in CompLaw. “CC” reflects a state’s constitutional court whereas “CE” reflects its high administrative court. * indicates that no cases were germane under CompLaw coding rules and so no cases were coded in the database.*

the distribution of economic development as measured by gross domestic product per capita, expressed in current U.S. dollars (Bank, 2013). Although the full range of GDP/cap is captured by the CompLaw sample of states, our database covers far fewer of the poorest states in the world. The sample average for CompLaw is approximately \$16,000.00 whereas it is only \$11,000.00 in the full sample of states. The upper-right panel, which shows distributions of the level of democracy as measured by the Polity IV project's 21 point scale of regimes (Marshall, Gurr and Jaggers, 2013), helps explain the oversample of wealthier countries. As the plot makes clear, the CompLaw sample consists almost entirely of states that were highly democratic in 2003. Only Niger, Burkina Faso and Algeria have Polity IV scores of 6 or less.¹²

The bottom panels, which show estimated distributions for *de facto* and *de jure* judicial independence, provide critical information given the empirical aims of the paper. The bottom-left panel shows Linzer and Staton's (2015) estimates of *de facto* latent judicial independence (LJI). The bottom-right panel shows Voigt, Gutmann and Feld's (2015) estimates of *de jure* independence, which we summarize in some detail below. Both of these indices lie on the unit interval with higher scores reflecting a higher degree of independence. Given the project's focus on democracies it is not surprising the CompLaw sample average for LJI (0.67) is higher than the average for all states in 2003 (0.54). Critically though, the CompLaw sample does pick up the bimodal shape of the LJI distribution – there are many courts in the CompLaw sample that are generally thought to contain judiciaries that are far from independent. Further, the bottom-right panel suggests that, with respect to *de jure* independence, the CompLaw sample is highly representative. Although the CompLaw sample has a higher average (.67 vs. .63) and a lower standard deviation (.12 vs. .14) than the full sample of states in 2003, the differences are both very small and not substantively meaningful. Selecting a sample based on whether courts publish their 2003 resolutions on the web does imply that the CompLaw sample over-represents economically developed states. It hardly contains any authoritarian states at all. That said, with respect to democracies, the courts in the CompLaw sample represent well the variation in judicial independence globally. In sum, CompLaw captures a wide sample of countries that vary substantially in a variety of salient characteristics.

¹²None of these three states are in the main analysis performed below because of the tiny number of cases decided by the courts in 2003. See below for further details.

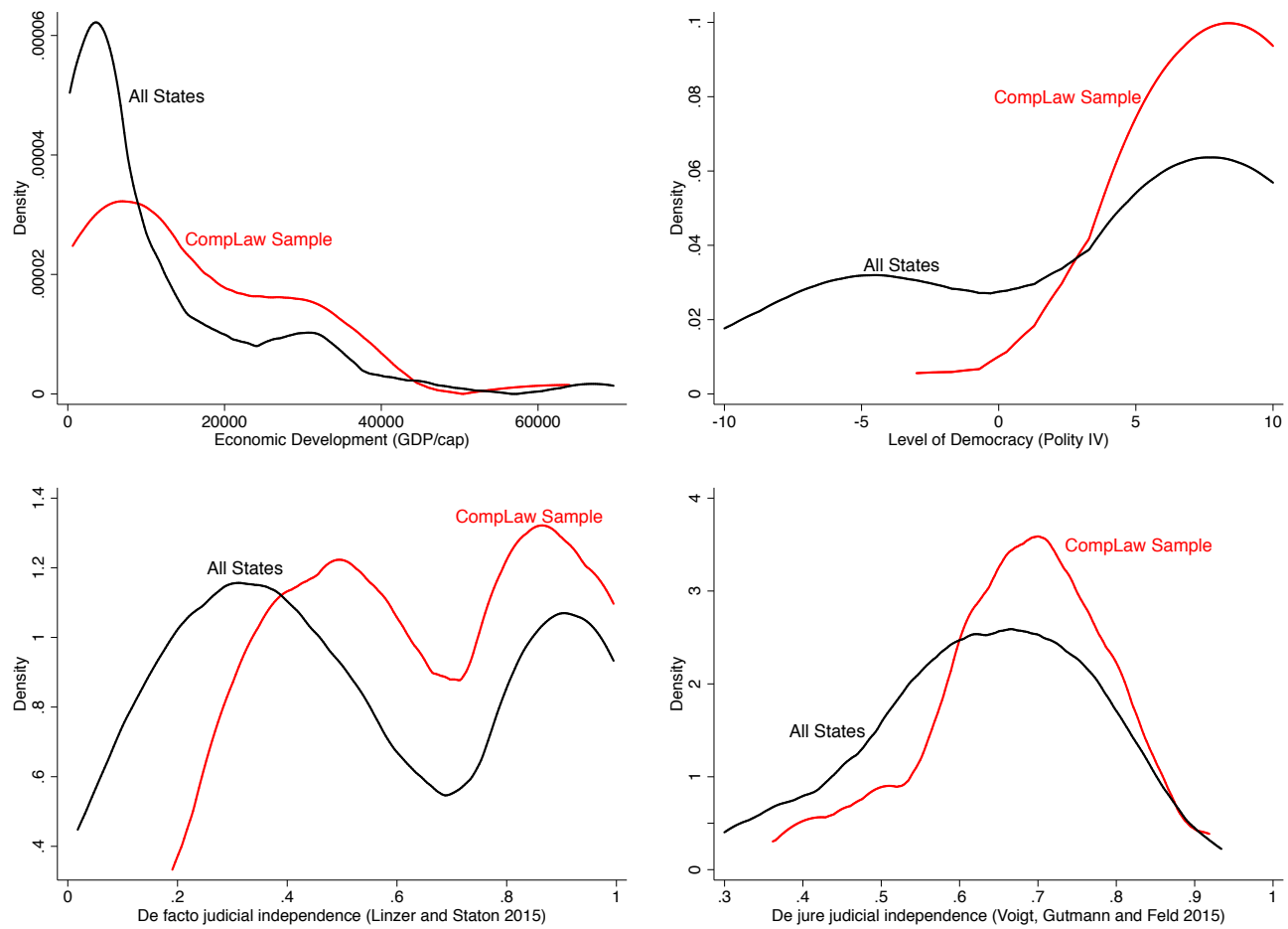


Figure 1: *Plots kernel density estimates of economic development, level of democracy, de facto and de jure judicial independence for the full CompLaw sample of states (coarse dashed), CompLaw sample used in the subsequent analysis (fine dashed) and the full sample of states (black) for the year 2003.*

The Data

Information on database management and all variables coded in our database is provided in the appendix. Here, we describe how cases were coded. We also discuss several of the variables that help clarify CompLaw’s structure and possibilities for research.

The CompLaw database includes 10,540 cases, of which 3,235 were considered germane under our case selection rules and thus coded. The data are organized hierarchically, beginning at the level of the state. We have assembled a database of over 100 extant measures of judicial independence, legal traditions, regime characteristics, public support, and trust in courts and the legal system. All scores are compiled from well-known sources in the fields of law, comparative politics and political economy (e.g., Goemans, Gleditsch and Chiozza, 2009; Marshall, Gurr and Jagers, 2010; Theodore et al., 2001; Elkins and Ginsburg, 2012). These measures are then linked to courts and their case files.

Our approach to coding constitutional decisions centers on the policies (or “actions”) that are reviewed by the courts in our sample. We seek to characterize these policies and describe the grounds on which they are attacked. Of course, in so doing, we capture much additional information. In the end, CompLaw reports information on the policy that has been challenged, the party who is responsible for that policy, the party who has claimed that the policy is constitutional, the grounds, and the outcome of each argument. This process results in data grouped across three levels of analysis.

Case Level Data

Case level variables in CompLaw include a variety of identifiers, as well as information on the dates of admission and decision for the sentence. CompLaw also contains information on the type of review (concrete or abstract), as well as the precise name of the constitutional institution (e.g. amparo) being used. The institutional names are helpful in so far as researchers can code further various legal features of particular types of constitutional review.

The cases’s complainant, i.e., the party alleging a constitutional violation, is recorded at the level of the case. As will become clear, we record the party responsible for the constitutional violation at a lower level of analysis, though this information is easily aggregated. Figure 2 summarizes that information for our current sample of coded cases. By some margin, the modal complainant is an individual, reflecting

the large proportion of dockets made up of individual constitutional complaints, especially in Latin America.

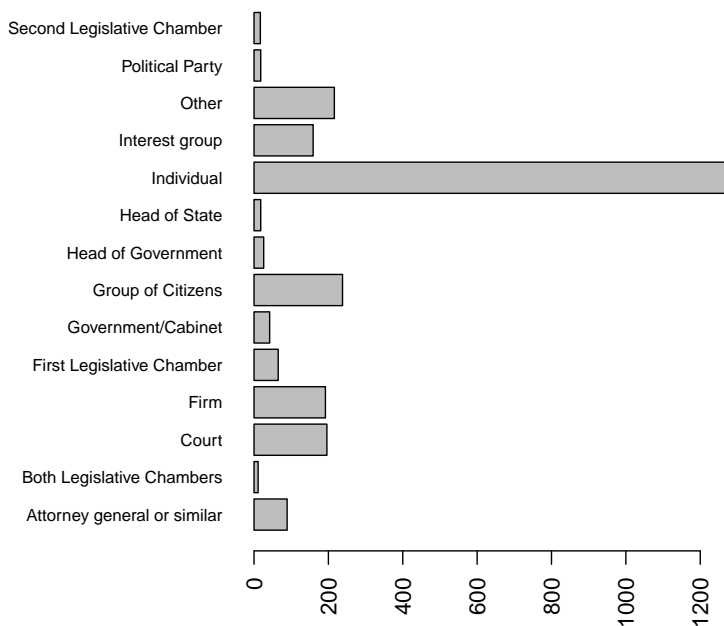


Figure 2: *Displays the type of complainant in the CompLaw sample.*

Although CompLaw does not code individual judge decisions, we do include indicators for whether there was any disagreement among the judges assigned to the case, as well as a count of the number of dissenting positions. This allows a researcher to measure the strength of the majority position, as well as identify for future research the cases in which there exists judge-level variation.

Policy Level Data

Three key pieces of information are recorded at the policy level – the precise name of the policy, the type of policy being challenged, and the year in which the policy was enacted or otherwise promulgated. Among the set of cases that are currently coded, there are 3,590 distinct policies. The average number of policies per case is 1.4. The average is highest in Lithuania and lowest in Algeria. Figure 3 suggests the variety of policy types in our data set. Although national statutes are the most common policies

attacked in our sample, a variety of other policy types are evident, including international treaties and referenda.

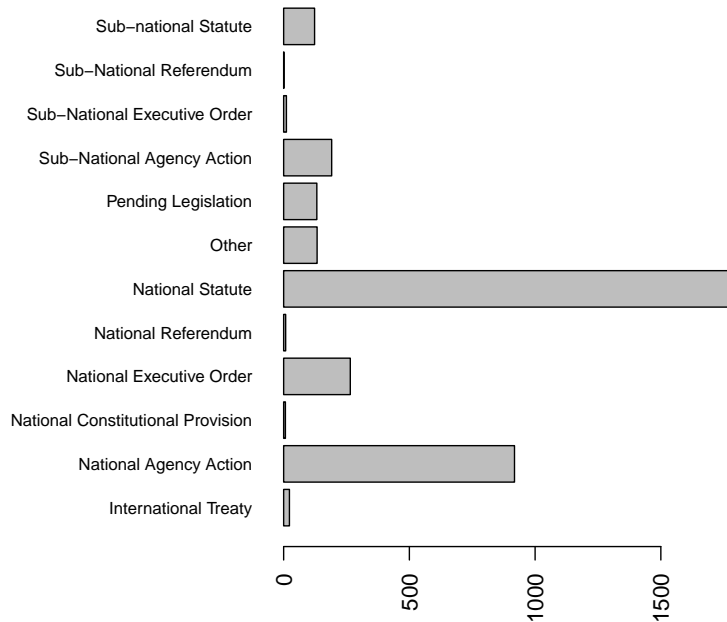


Figure 3: *Displays the type of policies in the CompLaw sample.*

By selecting decisions from a single year, CompLaw’s current status obviously prohibits time series analysis, which might be of interest to scholars looking to track the issues, the development of rules, or parties over time. That said, recording the year in which a policy being challenged was enacted adds a temporal dimension to CompLaw. Figure 4 displays a histogram of the year in which the policies challenged in CompLaw were enacted. The earliest policy being challenged was passed in 1799 in France. As we discuss below, in combination with country level data on the political system, this information can permit researchers to identify the political coalition or party responsible for the policy under review.

Question Level Data

Policies are attacked on numerous constitutional grounds. For each policy we code the constitutional article on which the complainant’s argument is based. There are 10,476 distinct constitutional questions (or bases for a constitutional challenge) in CompLaw. The average number per case is 4.1. For each

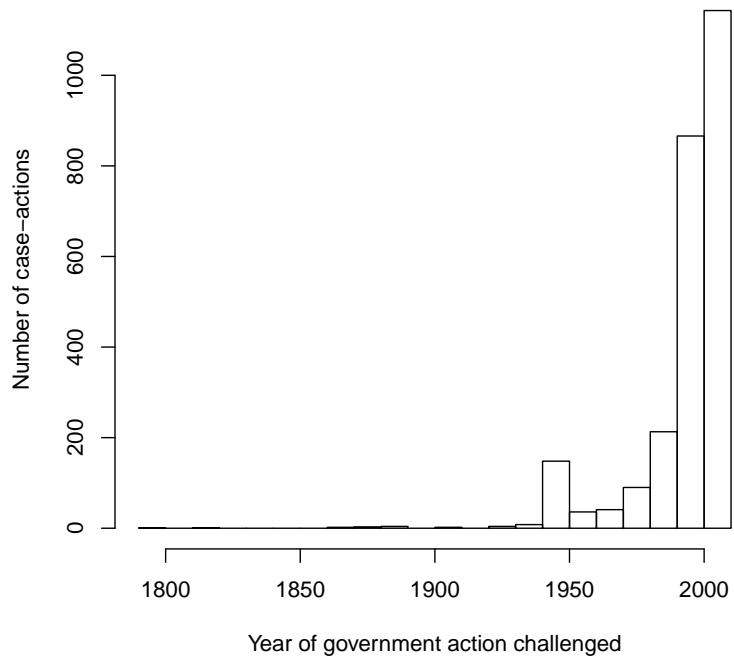


Figure 4: *Displays the years in which policies captured in CompLaw were enacted or otherwise passed.*

question, we code whether the court found that the policy was unconstitutional with respect to the piece of the constitution motivating the argument. Preliminary analysis suggested that there were cases in which the Court’s decision was somewhat ambiguous as to the constitutionality. To address this possibility we asked our coders to indicate their level of certainty with respect to the policy’s constitutional status in light of the decision. For the most part, our coders were fairly sure of the policy’s constitutional status as determined in the ruling. Only 81 questions were coded to indicate significant uncertainty in the result.

The Insulating Effect of de jure Judicial Independence

Having described the CompLaw database, we can return to the theoretical question of this paper: whether de jure judicial independence influences the willingness of high courts to decide cases against national governments. As previously described, we will test three hypotheses. The first hypothesis is that de jure judicial independence should uniformly increase the probability with which high courts decide cases against governments (Prediction 1). The second hypothesis is that de jure independence should not matter. Instead, the less concentrated political power is, the higher the probability that high courts decide cases against governments (Prediction 2). The third hypothesis is that de jure independence should matter, but the way that it matters is by muting the effect of the concentration of political power (Prediction 3). When political power is not concentrated, judges do not need de jure independence to protect them. When it is concentrated, these protections raise meaningful barriers to political manipulation.

Analysis

To evaluate these expectations, we require three types of measures. First and foremost, we require a measure of whether a court has found a challenged government policy unconstitutional. We focus on the policies of the government of the state (i.e., the national or federal government). We rely on the CompLaw *Strike* indicator, which is coded 1 if the court found that a government’s policy was unconstitutional with respect any of the arguments raised by the complainant. It is 0 otherwise, including in cases in which the court either finds a procedural reason to avoid the merits of the case or when the entire complaint is dismissed on procedural grounds. In so far as we have no measures at the

level of the question in this application, we aggregate the score to the policy level. Thus, for current purposes *Strike* is 1 if the Court found the policy unconstitutional under any complainant argument and 0 otherwise.¹³

We also need a measure of the concentration of political power. In presidential systems, political concentration often is conceptualized as whether the party of the president also controls the relevant legislative chambers. We depart from this convention for two reasons. First, many of the countries in our sample are parliamentary systems. Among those, a number do not have upper chambers. Thus, in these countries the issue is not whether the governing party can push a policy through the relevant veto players. Instead the question is the extent to which the governing party controls the legislature. The larger the seat share, the more secure the governing party's control of the chamber and therefore the more likely it can push through a sanction of the courts. Second, even in presidential systems, or systems with a second legislative chamber, the right to initiate a challenge of the judiciary is generally housed in the lower chamber. To the degree that initiation of a challenge is costly to the judiciary, e.g., having an impeachment proceeding started, judges will be particularly careful with the political interests of that lower chamber. This argument is closely connected to an argument by Harvey (2013). Harvey provides evidence that the Supreme Court of the United States is responsive to sanctioning threats from the House of Representatives. It is not responsive to the Senate, a body that must ultimately approve of an initiated sanctioning of the Court by the House. In order to measure the concentration of the government's power, we rely on the Database of Political Institutions (DPI, Keefer (2005)) which includes a measure of the majority margin of the government in the legislature. Specifically, *Margin* is the fraction of seats in the legislature held by the government. In presidential systems, government seats include those held by the party of the president or parties that are listed by DPI sources as part of the government and either (a) they support the president on substantive issues or (b) they did not run a candidate for the presidency.

Finally, we need a measure of de jure judicial independence. We use Voigt, Gutmann and Feld's (2015) measure for this purpose. Voigt, Gutmann and Feld (2015) provide an index of formal rules thought to promote judicial independence, derived from a survey of experts. This measure is based

¹³It is worth noting that we do not conceive of this measure as indicating de facto "judicial independence." Instead, the concept simply measures whether the court struck down a policy as unconstitutional.

on an expert survey and constructed in the same manner as Feld and Voigt (2003). The components include: (1) whether the highest court is anchored in the constitution; (2) how difficult it is to amend the constitution, (3) the appointment procedure of the judges; (4) their length of tenure, (5) whether there is a fixed retirement age of judges in the court; (6) removal procedures; (7) whether reelection of judges is possible; (8) protection and adequacy of salary of judges; (9) accessibility to the highest court; (10) the procedure for the allocation of cases in the court; (11) judicial review powers; and (12) the transparency of the court. The Voigt, Gutmann and Feld (2015) index varies from 0 to 1.

The unit of analysis in our study is the policy. For our main analyses we consider only policies enacted by the government sitting at the time of the court’s decision in 2003. We do so because we want to know when a court is willing to rule against government that is currently capable of responding to the court. Focusing on policies enacted by the sitting government helps ensure this connection. For each model, we fit a multilevel logistic regression model with random intercepts for court.¹⁴ The first model is a simple test for the effect of de jure independence judicial decision-making. Let X denote the de jure independence measure. For policies i and states k the model is as follows:

$$Pr(Strike_i = 1) = \text{logit}^{-1}(\alpha_{k[i]} + \alpha_1 X_{k[i]}),$$

The second model is a simple test for the effect of the concentration of political power on judicial decision-making. For policies i and states k the model is as follows:

$$Pr(Strike_i = 1) = \text{logit}^{-1}(\alpha_{k[i]} + \alpha_1 Xk[i] + \alpha_2 Margin_{k[i]}),$$

The third model tests for the interactive effect of the conditioning variables and the concentration of political power. For policies i and states k the model is as follows:

$$Pr(Strike_i = 1) = \text{logit}^{-1}(\alpha_{k[i]} + \alpha_1 Margin_{k[i]} + \alpha_2 X_{k[i]} + \alpha_3 (Margin_{k[i]} * X_{k[i]})),$$

¹⁴In the sample, we have one court per state.

These data are cross-sectional and have an obvious multi-level character. The dependent variable is measured at the level of the individual ruling, but the independent variables are measured at the level of the court issuing the rulings. We therefore estimate a multi-level generalized linear model with a logit link function and robust standard errors clustered at the level of the court.¹⁵ The models also include random effects for court.

Note that the analysis involves a subset of the courts in our dataset. First, we only include courts for which we have a measure of de jure judicial independence from Voigt, Gutmann, and Feld (2015).¹⁶ Second, we include only courts for which we have rulings that involve constitutional challenges to acts by the standing government. Several courts in our dataset had no such rulings. We also exclude courts with a very small number of such rulings (< 5). Recall that, due to the multi-level nature of the data, we are estimating the relationship between national-level characteristics (e.g., level of judicial independence) and the propensity of the constitutional court to strike government action. Our measure of that propensity is the share of rulings that strike a standing government's action. Where a court made only a few such rulings, the observed rate of strikes is likely a very noisy and coarse measure of the true propensity to strike. For instance, where we have only one ruling, we either have a 100% or 0% strike rate. Consequently, including these courts introduces measurement error in our dependent variable which, at the least, decreases the precision of our estimates and, at the worst, biases our estimates (Woolridge 2010: 77). However, it is important to emphasize that the conclusions we draw from the analyses presented in Table 2 are not sensitive to the exclusion of courts with a small number of rulings.¹⁷

¹⁵We used the procedure 'meglm' in STATA 13.1.

¹⁶We find very similar to results to those presented in Table 2 when we use the La Porta et al. (2004) measure for judicial independence or the original Feld and Voigt (2003). These supplemental analyses, though, cover fewer courts because of the limited coverage of the measures.

¹⁷An analysis of that includes all courts with any rulings involving the current government supports the same inferences drawn from the analyses presented here. In particular, the interaction term remains statistically significant and in the correct direction in the expanded analysis, but as would be expected due to measurement error, the standard error is a bit larger than reported in Table 2.

In the dataset analyzed, courts struck 0.41 of the policies as unconstitutional. The average size of the legislative majority was 0.53 with a standard deviation of 0.12 and range of 0.17 to 0.65. The average level of de jure judicial independence was 0.65 with a standard deviation of 0.12 and range of 0.36 to 0.92.

Table 2: Regression Results

	(1)	(2)	(3)	(4)	(5)
Judicial Independence	-3.49 (4.39)	-3.57 (4.17)	-26.42 (8.05)	-25.88 (7.89)	7.63 (6.26)
Margin		-2.43 (4.51)	-36.28 (11.16)	-34.82 (11.24)	10.51 (10.61)
Margin*Judicial Independence			48.87 (16.91)	47.82 (17.89)	-15.34 (14.58)
Concrete				-0.91 (0.41)	
Presidentialism				-0.07 (1.03)	
Constant	1.70 (2.85)	3.01 (3.60)	18.94 (5.04)	18.56 (4.79)	-6.14 (4.49)
Observations	2,582	2,582	2,582	2,582	3,220
Log Likelihood	-1401.13	-1400.95	-1399.64	-1384.15	-1687.94

Table 2, columns 1-3, presents the results of these three models. As can be seen from the first model, there is no support for the argument that de jure judicial independence has an independent effect on the willingness of courts to rule against national governments. There is also no support for the political power concentration argument (model 2). What stands out is the results from model 3, which tests the third prediction that power concentration matters when judicial independence is weak. This conditional relationship is captured by the interaction term between *Margin* and *Judicial Independence*. As expected, that coefficient is positive and highly significant. Figure 5 provides a visual representation of the effect we estimate. The left panel of Figure 5 plots the probability of a court striking a government action as a function of the size of the legislative majority, assuming a relatively

low judicial independence (one standard deviation below the observed mean level). In that setting, the probability of a strike roughly doubles to 0.70 when we move from the mean level of *Margin* (0.53) to a one standard deviation lower level of *Margin* (0.41). The right panel of Figure 5 plots the same simulated relationship but for a court with a relatively high level of judicial independence (one standard deviation above the mean). In that setting, there is no relationship between the size of the legislative majority and the likelihood of the court striking a standing government action.

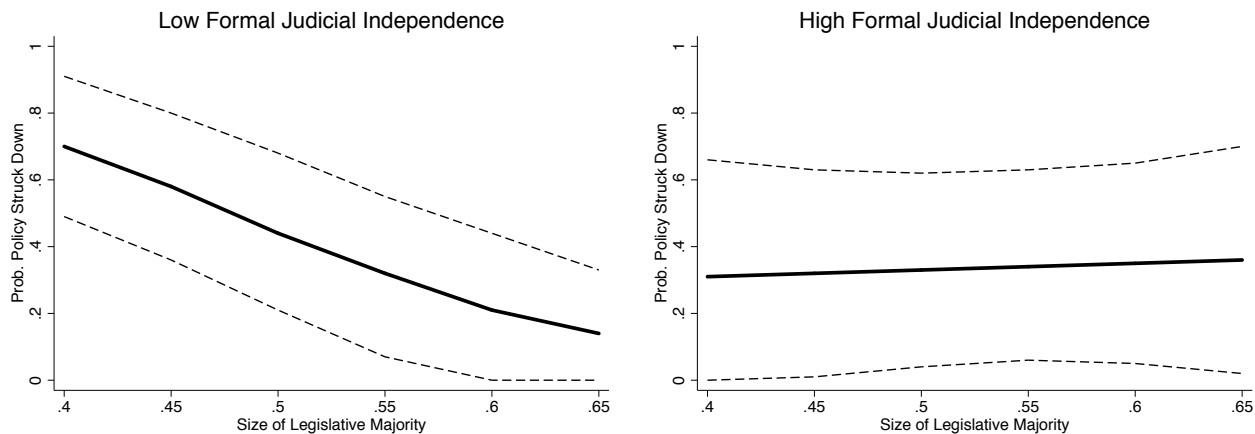


Figure 5: *Displays the predicted probability (with 95% confidence intervals) of striking a policy associated with current government across the range of the government’s seat share in the legislature. The left panel shows these probabilities for a value of the de jure independence index set one standard deviation below the mean. The right panel shows these probabilities for a value of the de jure independence index set one standard deviation above the mean.*

Models 4 and 5 show results of two robustness checks on our analysis. First, we were concerned that the estimates in Model 3 suffer from omitted variable bias due to an alternative explanation for the observed variation in the likelihood different courts strike government actions. Recall that the critical concern here is whether there is an omitted factor that is both causally prior to our key independent variables and is correlated with the dependent variable (Angrist and Pischke, 2008). That is, are there factors that would cause courts to vary in whether they experience low majority sizes and low judicial independence or high majority size and low judicial independence and that correlate with the likelihood of courts striking government actions. We are unaware of any factor that clearly fits that bill. However, we do consider two potential confounds that likely correlate with both the interaction term and the dependent variable and thus introduce some omitted variable bias. The two potential confounds are

the form of judicial review (concrete vs. abstract) and character of executive-legislative institutions (presidential vs. parliamentary).¹⁸

According to Garoupa and Ginsburg (2011, p. 549) constitutional courts are generally more politically motivated when they exercise abstract review than when they exercise concrete review. Concrete review requires the constitutional court to engage the broader court system and maintain the confidence and trust of the ordinary courts. Judges must therefore put legal consistency and consideration of specific attributes of the concrete question at issue ahead of political or ideological considerations. In contrast, abstract review is largely disconnected from the ordinary court system and directly engages the legislative political process, particularly in *ex ante* review. As a result, we would expect the political considerations considered here to be more relevant to abstract review decisions. Also, in our dataset, we generally find abstract review exercised by courts facing larger majorities than do courts exercising concrete review. For this reason, the results presented in model 3 could overstate the interaction effect between ‘margin’ and ‘judicial independence.’ We therefore include a dummy variable ‘concrete’ that is coded (1) for instance of concrete review and (0) for instances of abstract review in Model 4 of Table 2.

We also consider presidential systems as potentially confounding our results. Presidential systems are often associated with weaker respect for “rule of law” and they typically involve smaller legislative majorities than parliamentary systems (Gerring, Thacker and Moreno, 2008; Cheibub, Przeworski and Saiegh, 2004). Furthermore, presidential systems, by definition, are part of separation of powers arrangements, which complicate legislative efforts to punish courts. As a result, one of the key find-

¹⁸Another potential concern involves the ideological/partisan composition of these courts. A variety of scholars (e.g., (Hönnige, 2009)) have shown that courts are less likely to strike legislation by the current government if the majority of judges were appointed by the party currently in control of the legislature. Thus, to the extent variation in the courts’ ideological affinity to the legislative majority is correlated with its *de jure* independence and the legislative majority size, this could confound our analysis. We can reject this concern in our setting. Only one court in the analysis has a majority of members selected by the current government. Six courts have a majority selected by the same party as the current government. These courts are typical in terms of *de jure* judicial independence and the size of the legislative majority. Not surprisingly, controlling for this type of court or eliminating these courts from the analysis has no effect on our findings.

ings presented in Figure 5, that the probability of striking a government policy is relatively high when governments control a small number of legislative seats could be a result of the presidential institutional arrangement. Indeed, in our data, presidential systems are found at the relatively low end of de jure judicial independence and of majority size. We therefore include a dummy variable, coded (1) for presidential systems and (0) otherwise, in Model 4 of Table 2.

Second, we conduct a placebo test for our theoretical argument. If our argument is right, then the effect of majority size, conditional on the level of judicial independence, should be weaker (or non-existent) when the rulings do not involve policies associated with the current government. Recall that our argument about threats of legislative retaliation assume the court is reviewing a government action of the current government. If the court is reviewing acts of previous governments we would expect any such threats to be weaker, particularly if the constitutional challenge involves an act by a party that is currently in opposition. Thus, if we were to find similar results when we consider constitutional rulings involving legislative and executive actions due to past governments, we would be concerned that we had spuriously interpreted the evidence presented in Model 3 as due to our theoretical argument. We present the results from this placebo test in Model 5 in Table 2.

The results of these two types of robustness tests are presented in Models 4 and 5 of Table 2. The results are consistent with our theoretical expectations related to the third hypothesis. The inclusion of the two control variables has no significant effect on the estimates for the interaction term and its component parts. For those coefficients, the results are effectively unchanged by the inclusion of the controls in the model. The placebo test also is consistent with our argument. When considering only rulings that involve actions by past governments, we find no evidence in support of our third hypothesis.

Discussion

These empirical results are important for two reasons. First, substantively, they demonstrate that “parchment protections” can matter. We find that the decisions of high courts to find constitutional violations with governmental policies are associated with the capability of the government to retaliate against judges; however, that relationship is significantly attenuated by strong institutional protections for judicial independence. Formal protections for judicial posts matter. The key point is that the effect of these institutions are only observable when courts are vulnerable to political threats, and that is

particularly likely when political power is highly concentrated. As our analysis shows, when we do not disaggregate among cases with varying levels of concentrated political power, the average effect is marginal.

Second, these results help demonstrate the potential utility of the new CompLaw database. By having a broad database that includes countries covering the range of levels of judicial independence we can more effectively examine how varying judicial independence affects court decision-making. Further, while the concentration of political power varies over time within country, it varies much more widely across countries. Again, CompLaw provides a sample of countries that vary widely on this dimension. Together, we are able to engage in nuanced testing for the effects of institutional design on political behavior. Finally, this data allowed us to distinguish among particular cases by identifying if they were directly relevant to the current government or not. This distinction was central to our analysis and placebo test.

There are a few caveats worth discussing. First, one might be concerned with a standard form of selection bias typical in studies of high courts (See Kastellec and Lax, 2008, for a careful discussion). Specifically, this analysis does not take account of the decision to bring and hear a case. One might reasonably suppose that plaintiffs would hesitate to bring a case if they knew the court was unlikely to decide against the government. Similarly, perhaps the court might decline to hear a case if it knew it was not free to rule against the government. As a result, the cases we examine would be a biased sample, one selecting out cases as a function of attributes we are trying to investigate. If this bias were to be driving our results, we could be drawing incorrect inferences from the results. However, if anything, this form of selection bias would work towards mitigating the relationships we find, not causing it. If plaintiffs do not pursue cases that they think they cannot win, it should be harder to find evidence that courts are more likely to concede on cases they feel threatened over. The win rate for plaintiffs should equilibrate across levels of judicial independence and concentration of government power. Similarly, if courts do not hear cases they anticipate they will strategically concede, it should be harder to find evidence that courts are more likely to concede on cases they feel threatened over. Again, government win rates should equilibrate. Thus, at worst we are underestimating the relationship we find.

Given the implications of our findings for institutional design aimed at incentivizing independent judicial behavior, it is also worth considering alternative interpretations of the outcome measure we consider, which indicates whether the court made a decision in favor or opposed to the government.

This is a fairly standard measure of constitutional review outcomes for the purpose of testing theoretical models predicting undue deference to governments (See Helmke, 2005; Smithey and Ishiyama, 2002; Ríos-Figueroa, 2007; Herron and Randazzo, 2003; Staton, 2010). To review, the key assumptions supporting our interpretation are as follows: (1) generally speaking governments prefer to implement their policies, (2) governments can threaten judges with attacks on their posts, and (3) judges care about these posts and are sometimes willing to prioritize them over making decisions that reflect their sincere preferences. These assumptions jointly imply that when we do see anti-government decisions, we can conclude that judges were sufficiently willing to take an action that can, in principle, result in an attack. Otherwise put, these decisions are inconsistent with deference aimed at avoiding an attack on judicial interests.

It is possible that anti-government decisions reflect behavior that is desired by current governments. Whittington (2005) suggests a variety of reasons why governments might prefer courts to strike down policies they enforce, perhaps even policies that they have enacted themselves or policies that they have publicly argued for. It is also possible that anti-government decisions reflect efforts to avoid punishment by future governments (Helmke, 2005). Independently of how often judges find themselves currying favor with future governments or commanded by current governments to strike down their own policies, these alternative conceptions are not consistent with the empirical findings here. Most importantly, our argument not only predicts the empirical relationships we observe, it suggests that the effects should be particularly strong with respect to policies associated with the current government. These alternatives do not make this distinction. Indeed, if courts are meant to eliminate the policies of past governments which cannot simply be changed by current leaders, then the pressure judicial institutions are supposed to insulate against should have been strongest with respect to older policies, not the policies enacted by the current leadership.

Finally, much of the research on *de jure* judicial independence has looked for associations between measures of *de jure* independence and expert-based evaluations of *de facto* judicial independence (e.g., Hayo and Voigt, 2007). A common *de facto* concept of independence reflects “autonomy.” As Ferejohn (1999) writes, “a [judge] is independent if she is able to take actions without fear of interference by another.” A judge in such a position may be said to offer opinions that are likely to reflect her own views of the record rather than merely reflect the wishes of an outside party. Otherwise put, such a judge makes the decisions that she wants to make. Like us, scholars who have leveraged behavioral

data have looked for associations between measures of de jure independence and the choice of judges or courts to issue rulings against sitting governments, typically in the context of a court's constitutional jurisdiction. Behavioral studies confront natural questions about how to interpret a decision striking down a government's policy on constitutional grounds. The question is typically whether this behavior should be understood as reflective of de facto independence. There are two positions on this issue. One views this behavior as a direct proxy for de facto judicial independence. Consider Becker's (1970) definition of independence (quoted in Herron and Randazzo):

Judicial independence is (a) the degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of judicial role (in their interpretation of the law), (b) in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court (144).

With this definition in mind, it is unsurprising that Becker views the use of judicial review to strike policies as evidence of judicial independence.

More recent scholarship has raised questions about this interpretation (See discussion in Herron and Randazzo, 2003). Judicial independence, understood as autonomy, means the ability of a judge to decide as she wishes to decide, and ruling for the government can reflect sincere views of the record. Further, highly dependent judges can be used by governments to correct policy mistakes or to help shift blame from reluctant politicians onto the judiciary. In light of these concerns, the second view is that striking down policies is not a good proxy for de facto judicial independence. Indeed a strong version of the view might hold that anti-government rulings are not connected to any form of autonomous judicial behavior at all.

Although we are sympathetic to these points, we are also skeptical that anti-government decisions can tell us nothing about de facto judicial independence. Just as we interpret the decisions to shed light on a form of undue deference, on balance they may also reflect an element of de facto independence. The extent to which this is true depends on the assumptions we make and the arguments they support. All of these concepts under consideration are latent, and so when we claim that particular observables are related to them, our claims only make sense within the context of a theoretical argument. For

precisely the same theoretical reasons that support our interpretation of a pro-government decision as reflecting the kind of deference de jure independence reforms are concerned with, anti-government decisions also may reflect an element of autonomy. Specifically, under the common argument linking de jure independence to judicial behavior, to rule against the government requires a minimal level of autonomy. The bottom line is that the findings may also be reflective of a broader connection between de jure and de facto independence.

Conclusion

Over roughly the last two decades, the world has undergone some enormous transformations. In 1989 the cold war ended and a number of communist regimes became democratic. More recently, the United States ended Saddam Hussein's reign in Iraq and has attempted to create a democratic regime in its place. The "Arab Spring" protests initially raised hopes that many authoritarian regimes would collapse from the inside and be replaced by newly democratic regimes. In reality, there were few democratic transitions and the Egyptian experiment has seemingly failed. The current migration crisis in Europe, which has resulted from the very regime conflicts that emerged from anti-authoritarian protest movements, is stressing democratic governance, especially so in the states that transitioned at the end of the cold war.

Leaders in transitional states confront significant challenges over how to implement and consolidate democracy. A variety of opinions exist about how best to do so. The received wisdom is that it is all about getting the institutions right. Should the country have a presidential or parliamentary system? This choice might turn on which system best reflects the normative commitments of its citizen or perhaps best moderates the political tensions of the country. In so far as designers wish to limit government, attention will ought to be given to the rules that insulated the individuals who are called upon to control the constitution. Critically, there is a key link between the great visions of democracy and constitutionalism protected by independent judges. Our findings suggest that institutions that insulate judges from external political pressure are particularly important in the context of political systems that concentrate power. This does not suggest that judicial independence is irrelevant for countries that promote proportional visions. It may be particularly important for contexts in which the governing coalition controls a very large proportion of the legislature (as is often true in Germany).

That de jure independence is an important part of a system of constitutional control is intuitive; however, the empirical record has been mixed at best. The truth is that most studies find that de jure independence has a very weak if any connection to the kinds of behaviors that judges must engage in if they are to effectively constrain the state. Part of the problem has been the absence of judicial behavior data for a wide sample of states. Outside of a variety of country-specific analyses and case studies, we have had remarkably little evidence on this patently important issue. Enhancing the empirical record is one of CompLaw's central motivations. We are interested in questions involving high court capacity to institute the rule of law over national governments (although the data collection exercise is designed with maximal flexibility in mind so other scholars can pursue other questions with this data). In this paper we have presented the structure of the data collection exercise and used what we have found to answer a research question has been difficult to answer with existing data. We find evidence that institutional structure designed to create independent courts does increase a high court's willingness to constrain its national government, and that this is particularly true where courts are under the most threat for political retaliation.

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Appendix

Database Management

This section provides information on how the CompLaw database was managed. The first step in assembling this database was to create a web-based, database management system to coordinate the uploading, coding and distribution of data. The research technology staff of the Center for Empirical Research in the Law (CERL) at Washington University constructed this system, which provides three pieces of essential functionality: (1) an uploading facility, which captures simple features of cases (e.g. names and docket numbers) and stores the full text resolution, (2) a coding facility, which permits research assistants to enter consistent information about the cases from anywhere in the world, and (3) a project management component, which allows our team to assign work to research assistants, track progress, do real-time quality control, and ensure that work is not duplicated across research sites.

The second step involved creating a reference document for each court. This document detailed institutional features of the court and relevant information about the location, format, and interpretation of court documents (most importantly, the court decisions) on the web. We have compiled these documents in a stand-alone handbook. Documents are immediately accessible to research assistants as they upload and/or code cases. Figures 6, 7, 8, and 9 contain screenshots taken from the coding tool. They display the coder's view of a handbook entry, in this case for Venezuela.

Based on the instructions in these reference documents, we then uploaded all decisions for each court from 2003 to our database management system. Uploaded cases were coded so as to (a) determine if it was germane and, if so, (b) create the set of variables described in the appendix. It is important to note that we retain all of the uploaded cases, which means that scholars interested in cases we consider non-germane can still benefit from the data assembled in the CompLaw database.

An on-line coding interface guides research assistants through a common battery of questions with constrained options for answers. This can be a very complicated process, as the uniform battery of questions sometimes does not square with nuanced differences across the various courts in the dataset. To minimize errors in coding and to maximize consistency in the application of coding protocol across courts, we instituted an on-line query feature. This allowed the coder to ask questions of the project managers, and this correspondence was available for all other coders and managers to review. Answers to these questions were then used to answer similar questions in other contexts and inform any clarifications



VENEZUELA REPÚBLICA BOLIVARIANA DE VENEZUELA

1. The basics of the docket for the country's constitutional court:

The Constitution of Venezuela in its article 253 establishes the country's Tribunal Supremo de Justicia (Supreme Tribunal).ⁱ This Tribunal is divided into 7 autonomous and specialized Chambers. One of which is the "Sala Constitucional" or Constitutional Chamber.ⁱⁱ



The Tribunal is the court of last resort and is "empowered to invalidate any laws, regulations or other acts of the other governmental branches conflicting with the constitution."^{iv} In addition, it "hears accusations against high public officials, cases involving diplomatic agents and certain civil actions arising between the State and individuals."^v

Article 5 of the Ley Orgánica del Tribunal Supremo de Justicia de la República Bolivariana de Venezuela ("LOTSJ"), specifies the competency of each Chamber. The Sala Constitucional reviews all matters contained in numerals 3 to 23. According to this Law, the review of all constitutional matters pertains exclusively to the Constitutional Chamber.^{vi}

Additional information about the Supreme Tribunal – including, possibly, information about whether the docket is discretionary – is available in Spanish at the following website: <http://www.tsj.gov.ve/>

Figure 6: *First Coder View of the Handbook Entry for Venezuela.* This page shows the coder some basic information about the organization and jurisdiction of high courts in Venezuela.



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2. Locating a list of opinions for a given calendar year post-2000:

The case law for the Supreme Tribunal is available online at the following website:
<http://www.tsj.gov.ve/jurisprudencia/jurisprudencia.shtml>

To locate cases:

Go to www.tjv.gov.ve This is the home page of the Tribunal Supremo de Justicia. Once there, go to the column on the left side of the page. Look for the title “Información” (Information), once there click on “Decisiones” (Decisions). That will take you to a new page, on that page click on “Sala Constitucional”. The following page will take you to the 2009 decisions. However, decisions from 2000 to 2009 are available. Click on 2003 and it will display them by month and day.

A short cut is to follow this link:

http://www.tsj.gov.ve/decisiones/sala.asp?sala=005&ano_actual=2003&nombre=SalaConstitucional

However, neither the texts of the decisions nor the website where the decisions are located are available in English. Thus, it will be necessary to have an individual who speaks Spanish locate the decisions online.

In most instances, the court provides full cases. Sometimes, the background and discussion are omitted and only the resolution is published.

A brief summary of the cases containing basic information can be found in the Court’s webpage. The following is an example:^{vii}

Numero : 07	N° Expediente : 01-1827	Fecha: 16/01/2003
Procedimiento: Acción de Amparo		
Partes: Alexandra Margarita Stelling Fernández		
Decisión: Declara improcedente		
Ponente: Iván Rincón Urdaneta		

To identify cases that do not involve a constitutional review:

Cases not involving constitutional matters or matters contained in numerals 3 to 23 of LOTSJ are not assigned to the Constitutional Chamber and are reviewed by a different Chamber.

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NSF Award IDs: SES-0751670, SES-0751340, SES-0751796

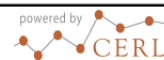


Figure 7: *Second Coder View of the Handbook Entry for Venezuela. This page of the handbook describes how to locate cases that are in the study’s scope.*



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However, it is advisable to review the cases resolved by the Administrative Chamber because this Chamber “hears cases brought against the Republic, its States and municipalities, or any autonomous institution, public body or corporation where the Republic has a controlling and permanent interest in its direction or administration”^{viii}. It also “hears resolves on unconstitutionality or illegality of acts or laws from the Executive and other institutions with “National Public Power”. It also resolves controversies between the Republic and a State.^{ix} Last, because the Constitutional Chamber reviews “acciones de amparo” derived from decisions of lower courts, there are several cases that do not fall into the scope of this investigation. The only way to identify those cases is by reading the Court’s resolution.

For cases involving a constitutional review:

- There is not a way to determine if the cases were resolved based on the merits or on procedural grounds without reading the full case.
- The court’s resolution contains information related to the background of the case, including its procedural history. However, sometimes the background and discussion are omitted and only the resolution is published.

3. How to determine whether the national government is a party in each case:

You can determine if the government is a party in the case by reading the preamble of each resolution. The brief summary in the webpage does not provide this information.

In addition to the government being named as a party itself, the government may be represented by agencies or individual representatives of a department. A list of Cabinet Members in Venezuela is available at the following website:

<https://www.cia.gov/library/publications/world-leaders-1/world-leaders-v/venezuela.html>

Notes:

- All the cases reviewed by the six Chambers and the Plenary Chamber are available online. These Chambers are: Constitutional, Electoral, Civil Cassation, Criminal Cassation, Social Cassation, and Political-Administrative.
- The cases from the Chambers are more salient than those from the Juzgados de Sustanciación. Each Chamber has an assistant court named Juzgado de Sustanciación.
 - **m. Is there a common way of indexing the cases?**
 - **The cases are indexed by year, month and day in the Court’s webpage.**
- There is a standard listing of the parties in the preamble of the case.
- The Constitutional Chamber also creates jurisprudence. However, codification has not allowed case law to reach the same recognition it has within the Common Law system. Case law is limited to fill in legislative blanks.⁷ In the web page, jurisprudence is available. (<http://www.tsj.gov.ve/jurisprudencia/jurisprudencia.shtml>) However, those decisions are out of the scope of this investigation.

Senior Personnel: Martin, Gabel, Carrubba, Helmke, and Staton
NSF Award IDs: SES-0751670, SES-0751340, SES-0751796



Figure 8: *Third Coder View of the Handbook Entry for Venezuela. This page describes how to tell whether the national government is a party in the case selected for uploading.*



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- ¹ Constitution, Tit. V, Ch. III, § 1° Disposiciones Generales, Art. 253 (1999) (Venezuela).
² Constitution, Tit. V, Ch. III, § 2° Del Tribunal Supremo de Justicia, Art. 262 (1999) (Venezuela).
³ <http://www.tsj.gov.ve/eltribunal/sobretribunal/organizacion.shtml> (June, 2009)
⁴ An Introduction to Venezuelan Governmental Institutions and Primary Legal Sources," prepared by GlobaLex, available at: <http://www.nyulawglobal.org/globalex/Venezuela.htm>
⁵ Id.
^{vi} Ley Orgánica del Tribunal Supremo de Justicia de la República Bolivariana de Venezuela, Art. 5 (May 24, 2004) (Venezuela). <http://www.tsj.gov.ve/legislacion/nuevaleysj.htm>
^{vii} http://www.tsj.gov.ve/decisiones/consulta_sala.asp?sala=005&dia=16/1/2003&nombre=SalaConstitucional (June, 2009)
^{viii} http://www.cejamericas.org/reporte/pdfing3/Venezuela_ing.pdf, June, 2009
^{ix} Ley Orgánica del Tribunal Supremo de Justicia de la República Bolivariana de Venezuela, Art. 5 §30, 31 and 32 (May 24, 2004) (Venezuela). <http://www.tsj.gov.ve/legislacion/nuevaleysj.htm>
^x An Introduction to Venezuelan Governmental Institutions and Primary Legal Sources," prepared by GlobaLex, available at: <http://www.nyulawglobal.org/globalex/Venezuela.htm>

Figure 9: *Fourth Coder View of the Handbook Entry for Venezuela. This page provides citations to relevant information for the study.*

in the codebook. The record of this correspondence also provided the material for a “frequently asked questions” resource available on the coding website.

CompLaw Variables

This section provides information on the information coded from the cases uploaded to CompLaw.

Germaneness Variables

1. Does Court Exercise Constitutional Review (*conques*)?– The dummy variable *conques* is coded at the case level and identifies cases that involve constitutional questions (1 “yes”, 0 “no”).
2. Is Government a Litigant (*govlit*)?– The dummy variable *govlit* is coded at the case level and identifies cases that involve a constitutional question *and* the government as a litigant. If a case meets this criteria, it is coded as “1”. If a case involves a constitutional question but not a government as a litigant, it is coded as “0”. Finally, if a case does not involve a constitutional question, *govlit* is coded as NA.
3. Is a National Policy Challenged (*lawchal*)? – The dummy variable *lawchal* is coded at the case level and identifies cases that involve a constitutional question, no governmental litigant, *and* a challenge to a governmental law. If a case meets this criteria, it is coded as “1”. The variable is coded as “0” if it involves a constitutional question, no governmental litigant, and no challenge to a governmental law. In any other case, the variable is coded as NA.

Case Level Variables

1. Docket Number (*docketnumber*) – This variable records the docket number of the case in question.
2. Admission Date (*admitdate*) – This variable records the date at which the court admitted the case for review.
3. Decision Date (*decdate*) [date, coder selects predefined numbers, NA optional] This variable records the date at which the court’s opinion became final.
4. Type of Constitutional Instrument (*instrument*)– This variable records the legal instrument under which the case is organized or documented.

5. Name of Complainant (compname) – This variable identifies the case’s complainant.
6. Type of Complainant (comptyp) – This variable identifies the type of actor raising or pursuing the case.
 - (a) “Head of State”
 - (b) “Head of Government”
 - (c) “The Government/Cabinet”
 - (d) “First (or only) Chamber of the Legislature”
 - (e) “Second Chamber of the Legislature”
 - (f) “Both Chamber of the Legislature”
 - (g) “A court”
 - (h) “An attorney general, prosecutor general or ombudsman”
 - (i) “An individual”
 - (j) “A political party”
 - (k) “A formally organized interest group”
 - (l) “A group of citizens (though not formal organization”
 - (m) “Other”
 - (n) “Firm”
7. Third Party (thirddummy) – This dummy variable identifies whether the pursuant of the case is acting on behalf of a third party.
8. Identify of Third Party (thirdparty) – If a case involves a pursuant acting on behalf of a third party, this variable identifies the type of third party actor. It’s coding rules are identical to `compntype`. If the case does not involve a third party, this variable is coded as “NA.”
9. Concrete Review? (concrete) – This dummy variable identifies cases that as courts to rule on a concrete incident or claim.
10. Appeal? (appeal) – This dummy variable identifies cases that arrived on appeal from a lower court.

11. Are Judges Named? (`judgenames`) – This dummy variable identifies opinions that reveal which judges participated in the voting procedure. Specifically, coders answer the question, “Are the names of the judges listed with the decision?”
12. Is Case Resolved in Plenary Session? (`plenum`) – This dummy variable identifies cases that were heard in plenum.
13. We All Judges Assigned? (`alljudges`) – This dummy variable identifies cases in which judges who were assigned the case participated in it. It is coded as “0” for no, “1” for yes, and “2” for don’t know.
14. Number of Judges Who Participated? (`judgenum`) – This variable records the number of judges that took part in the final resolution.
15. Was There Disagreement? (`disagree`) – This dummy variable denotes opinions in which there is any indication of disagreement between the participating judges.
16. Was There Dissent? (`dissent`) – This dummy variable denotes opinions in which there is a signed dissent or any possible sign that identifies which judges disagree. If `disagree` is coded as “0”, then `dissent` is coded as “NA”.
17. How Many Dissenters? (`dissentnum`) – This variable identifies the number of judges who disagree with the opinion. If `disagree` is coded as “0”, this variable takes a value of NA.

Policy Level Variables

1. Type of Policy (`actiontype`) – This variable identifies the type of government action being challenged in the case. It is coded as follows:
 - (a) “National Statute”
 - (b) “Sub-national Statute”
 - (c) “National Agency Action or Ruling”
 - (d) “Sub-National Agency Action or Ruling”
 - (e) “National Executive Order or Decree”

- (f) “Sub-National Executive Order or Decree”
 - (g) “International Treaty”
 - (h) “National Referendum”
 - (i) “Sub-National Referendum”
 - (j) “National Constitutional Provision”
 - (k) “Sub-national Constitutional Provision”
 - (l) “Other”
 - (m) “Pending Legislation”
2. Name of the Policy (actionname) – This variable identifies the name of the action being challenged in the case.
 3. Year of the Policy (basisyear) – This variable lists the year in which the relevant government policy was adopted.
 4. Did the Decision Overturn a Lower Court’s Decision on this Policy (overturn)? This dummy variable denotes cases in which the court overturned the lower court’s decision on a particular policy. If the case did not arrive on appeal, then this variable is coded as “NA”.
 5. Date of Precipitating Event (precipdate) – This variable identifies the date at which the particular infraction occurred that gave rise to the case, e.g. a law authorizing the collection of a tax may significantly precede the date on which the finance ministry attempted to collect the tax. This variable indicates the latter date.

Question level variables

1. Constitutional Article Associated with the Argument (conarticle) This variable gives the name of the constitutional article or provision being used as the basis on the challenge.
2. Strike (strike) – This variable records how the court responded to the challenged action with respect to the constitutional question. Specifically, it is coded as follows:
 - (a) deemed constitutional

1– deemed unconstitutional

2– discussed, but dismissed for procedural reasons

3– not discussed, but dismissed for procedural reasons.

3. Clarity of Strike (clear) – This variable asks the coder how strongly she agrees with the statement, “The outcome of this case—in terms of its ruling with respect to the national government—was clear.” The coder could choose the following responses:

(a) Completely agree

(b)

(c) Neither agree nor disagree

(d)

(e) Completely disagree