Law and Economics Working Papers Series
Working Paper No. 00-25
May, 2001

ECONOMIC ANALYSIS AND THE DESIGN OF CONSTITUTIONAL COURTS

Tom Ginsburg*

*Assistant Professor of Law, University of Illinois at Urbana-Champaign

ECONOMIC ANALYSIS AND THE DESIGN OF CONSTITUTIONAL COURTS

Forthcoming, *Theoretical Inquiries in Law*, Dec. 2001.

Tom Ginsburg[+]

Abstract: *Though nominally exercised on behalf of citizens, constitutional judicial review also performs an insurance function for politicians who see themselves losing power in future elections. This paper discusses the various dimensions of institutional design of constitutional courts and argues that the extent and power of judicial review should increase with political uncertainty at the time of constitutional design. The paper then develops a simple empirical test of this hypothesis using data from Eastern Europe, regressing measures for various aspects of court design on the strength of the largest party in the legislature. The paper shows that the design of constitutional courts reflects the interests of dominant political parties, and that more independent and powerful courts are associated with situations of divided or deadlocked politics.*

Judicial review, by which I mean review of legislation or administrative action for conformity with the constitution, is a central feature of many constitutional systems.[1] It is somewhat surprising, then, that the literature on the economic analysis of constitutions has not yet devoted much attention to the design of constitutional courts, either from a positive perspective or from the point of view of normative institutional design.[2] There are numerous questions of institutional design that constitution-makers must address

---

+ Assistant Professor of Law, University of Illinois, Urbana-Champaign. For helpful comments, thanks to Jay Kesan, Anna-Maria Marshall, Mark Ramseyer, Tom Ulen and participants at the Conference on Constitutional Law and Economics held at the CEGLA Institute, Tel Aviv University, December 2000. This paper is dedicated to the memory of Noah Baum.

[1] I use constitutional review and judicial review interchangeably in this paper. Technically, some bodies that carry out constitutional review are not judicial bodies and judicial review by judges need not be restricted to constitutional issues. These distinctions are not considered here.

[2] One exception is Dennis Mueller who has written on optimal appointment procedures for judges. *See, e.g.*, Dennis Mueller, CONSTITUTIONAL DEMOCRACY 279-291 (1996); Dennis Mueller, *On Amending Constitutions*, 10 CONST. POL. ECON. 385, 386-87 (1999). Other contributions to the constitutional law and economics literature include ROBERT COOTER, THE STRATEGIC CONSTITUTION (2000); *Symposium on Constitutional Law and Economics*, 12 INT'L REV. L. & ECON. 123-296 (1992); and *Symposium on Constitutional Political Economy*, 90 PUBLIC CHOICE 1-324 (1997).

when establishing a system of constitutional review, including whether to centralize review in a designated court, how to appoint judges, and how much access to give the public. What insights come from political economy?

To proceed we must start with foundational questions. On whose behalf is constitutional review exercised and what is the role of third party monitors? These issues are discussed in Part I. Part II lays out the major design questions, including whether constitutional review power should be restricted to a designated body or given to any court of law, how judges should be appointed, and the question of standing. Part III considers empirical evidence on how constitutional courts are actually designed. This part argues that a key determinant of the design of constitutional courts is the political configuration in place at the time of the court's design. To explore this issue, I construct a sample of 18 countries, and regress measures for various aspects of court design on the strength of the largest party in the legislature. Through this simple model, I find that the design of constitutional courts reflects the interests of dominant political parties, and that more independent and powerful courts are associated with situations of divided or deadlocked politics. Part IV concludes.

I. **Preliminary Considerations**

A. Whose Constitution?

The two major recent contributions on Constitutional Law and Economics by Cooter and Mueller both follow Buchanan and other contractarians in treating constitutional democracy as a mechanism to satisfy individual preferences through

collective action.[3] These authors analogize the democratic constitutional scheme to a series of principal-agent relationships wherein the people rely on politicians as agents to satisfy their collective demands. If the people are the principal on whose behalf the constitution is created, constitutional adjudication should reflect the need to monitor these political agents. Judicial review of legislation exists to prevent politicians from reneging on the founding bargain with citizens.

This contractarian perspective is normative rather than positive, and is open to criticism on empirical grounds. There are numerous reasons to be suspicious that actual constitutional design reflects the interests of citizens. Most obviously, constitutional design would only reflect citizen interest if the designer-politicians who actually draft and agree on the constitutional text were themselves pure agents of those citizens. But that can hardly be the case because citizens are subject to collective action problems that prevent them from organizing to monitor constitutional debates. So there is theoretical reason to suspect politicians can exploit this slack to advance their own interests. Much empirical evidence supports the assertion that constitution-making is dominated by short-term interests of the designers rather than the long-term interest of the citizenry.[4] Under such circumstances, it is likely that politicians who draft the constitution seek to design institutions that benefit them narrowly rather than citizens broadly.

B. Why Constitutional Review?

---

[3] Cooter, *supra* note 2, at 243; Mueller, *supra* note 2, at 61-67; JAMES BUCHANAN, THE LIMITS OF LIBERTY (1975).

[4] Stefan Voigt, *Positive Constitutional Economics: A Survey*, 90 PUBLIC CHOICE 11, 26 (1997); Mueller, CONSTITUTIONAL DEMOCRACY, *supra* note 2, at 316-18.

In light of the agency problem of constitutional design, we must ask why self-interested politicians would design a system of judicial review. It is not sufficient to describe constitutional review as a device to protect citizens from future politicians without explaining why it serves the interests of present politicians who serve as a veto gate for the constitution. I argue that the answer depends on the prospective power positions of constitutional designers in post-constitutional government. Constitutional design is akin to a two-stage game. The designers choose institutions that become embodied in the constitution. The designers then participate in a post-constitutional election. The election determines whether they are able to participate in government and receive payoffs. Prospects of electoral success and payoffs are in part determined by the constitutional choices, but the actual election involves a random draw.

To understand why designers in this game might desire constitutional review requires a brief review of current theories of judicial independence. One influential model, proposed by Landes and Posner, emphasizes the present value of legislation.[5] An independent judiciary, argue Landes and Posner, can prevent future legislators from deviating from earlier statutory bargains, increasing the present value of legislation to interest groups. Therefore, rational politicians will seek to maintain independent courts so as to maximize present income. This theory has generated numerous criticisms, especially concerning its disregard of the possibility of future legislative over-rides of either the initial legislation or subsequent judicial interpretation.[6] If a legislature can

[5] William Landes and Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, J. LAW & ECON. 875 (1975).

[6] Nicholas Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 N.W. UNIV. L. REV 296 (1993); *see also* Donald J. Boudreaux and A.C. Pritchard, *Reassessing the Role of the Independent Judiciary in Enforcing Interest-Group Bargains* 5:1 CONSTITUTIONAL POLITICAL ECONOMY 1, 8-9 (1994) (current legislature has more power over

"correct" judicial interpretation of statutes, what is to prevent a future legislature from merely passing new legislation whenever it chooses? In other words, how does a court serving as an agent of a previous legislature constrain the current legislature from selling new legislation to a new interest group? This question is particularly salient because the later legislature controls judicial salaries and budget. Landes and Posner's argument makes sense for a legislature that wishes to restrain administrative agencies from disregarding the statutory bargain, as much literature has shown,[7] but courts alone do not prevent future legislatures from repealing statutory commitments.

Landes and Posner focus on judicial review as a pre-commitment device. In contrast, Ramseyer adopts an electoral perspective. He argues that politicians will prefer judicial independence when politicians believe that elections will continue but that the politicians are likely to lose a future election.[8] Otherwise, politicians will prefer dependent courts that can be manipulated to achieve policy outcomes. Ramseyer's theory includes a constitutional condition (future elections likely) and a political condition (future success unlikely) and provides an adequate theory of the emergence of judicial independence at the constitutional level. Although it might be argued that future politicians might themselves reverse judicial independence when it no longer serves their interests, this critique has less bite in the context of constitutional review. The problem of restraining future coalitions may exist for ordinary legislation, but is less important when it comes to constitutional constraint and judicial review. Because constitutions are

---

judiciary than previous legislature). Another critique of Landes and Posner focuses on the problem of determining what constitutes "independent" decision-making. Voigt, *supra* note 4 at 40-41.

[7] *See, e.g.*, Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

[8] J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts*, 23 J. LEGAL STUD. 721 (1994).

costly to amend,[9] the risk of future repeal is less salient. Constitutional courts can be manipulated, but that too is politically costly. Constitutional designers thus adopt a system of judicial review by independent courts to restrain future governments that they will *not* control, a different theoretical proposition than that offered by Landes and Posner who focus on constitutional designers tying their own hands.

Judicial review will, of course, constrain the constitutional designers themselves if they happen to end up in power. So rational constitutional designers will prefer stronger judicial review to the extent that they see themselves being out of power. Politicians who see themselves out of power may like to have some constraint on government, whereas those who are confident in their ability to remain in power after the post-constitutional election will prefer less constraint. Judicial review becomes a minimax strategy to prevent future harms to designers who may lose power.[10]

I call this the *insurance model of constitutional review*. By serving as an alternative forum in which to challenge government action, constitutional review provides a form of insurance to prospective electoral losers during the constitutional bargain. Just as the presence of insurance markets lowers the risks of contracting, and therefore allows contracts to be concluded that otherwise would be too risky, so the possibility of judicial review lowers the risks of constitution-making to those drafters who believe they may not win power. Judicial review thus helps to conclude constitutional bargains that might otherwise fail.

---

[9] Donald Lutz, *Toward a Theory of Constitutional Amendment*, 88 AMERICAN POLITICAL SCIENCE REVIEW 355-370 (1994).

[10] *See also* Robert Cooter, *The Minimax Constitution as Democracy*, 12 INT'L REV. L & ECON. 292 (1992).

As a form of insurance, judicial review is relatively inexpensive because it can be exercised by a court staffed with a few members. While a court, like other branches of government, may seek to expand its budget, it is certainly cheaper to run than, say, a second house of a legislature (which might protect the constitutional bargain because of its different representational system). Thus judicial review, to the extent it serves the interests of the founders in constraining majorities, is cheap minoritarianism. As a risk-reduction device, judicial review has positive value even if it does not provide perfectly complete protection against all contingencies. No risk-reduction device is foolproof: insurers can go bankrupt just as courts can be ineffectual. But if the expected gains from a relatively inexpensive insurance contract outweigh the potentially catastrophic risk of a failed constitutional scheme, judicial review should be adopted.

Other things being equal, uncertainty increases demand for the political insurance that judicial review provides. Under conditions of high uncertainty it may be especially useful for politicians to adopt a system of judicial review to entrench the constitutional bargain and protect it from the possibility of reversal after future electoral change. The presence of elections – the *sine qua non* of democracy – increases uncertainty and therefore the demand for judicial review. Autocrats have no need for judicial review. The expansion of judicial power around the globe *reflects* democratization, and is not anti-democratic as suggested by some analysts.[11] Appendix 1 presents some data on the recent expansion of constitutional review around the globe.

The discussion so far can be understood in terms of a simple inequality. Constitutional designers will choose judicial review if and only if the expected costs of

[11] *Cf.* Robert Dahl, DEMOCRACY AND ITS CRITICS (1989).

electoral loss (the probability of electoral loss times the average expected cost) exceed the agency costs of judicial review. As the risk of electoral loss increases, the incentive to adopt judicial review increases as well. Similarly, any increase in perceived loyalty of the judiciary to the constitutional designer, either for ideological or political reasons, will increase the incentive to adopt judicial review, holding electoral risks constant.

The insurance theory is superior to the "pre-commitment" theory in at least one respect. By tying judicial review to electoral uncertainty, it helps us to understand why there has been a global expansion of judicial review accompanying the recent wave of democratization. There is no theoretical reason to think that parties in a democracy are more eager to pre-commit themselves than autocracies. The two theories also differ in their empirical predictions. If pre-commitment is necessary to enter into a constitutional bargain, we should expect the level of judicial constraint to *increase* with the size of the dominant party: there will be more demand for such commitment because of fear that the dominant party will win post-constitutional elections and run roughshod over smaller parties. If judicial review reflects insurance needs we should expect the level of judicial constraint to *decrease* with the size of the dominant party. This is because the dominant party, knowing it is likely to govern after the post-constitutional election, will want maximum flexibility.

II. Design Issues

A. Introduction

This section considers several different design issues relevant to constitutional courts: centralization versus decentralization, access to the court, court size, term length of judges, abstract versus concrete review, and appointment mechanisms. Each of these

issues is discussed with regard to its effects on the costs of reaching an accurate decision. I leave aside "internal" issues of court design and decision-making criteria: voting rules, agenda control, and others. These issues are not typically considered in constitutional design, though of course they are relevant to the broader question of court design.

I adopt for purposes of this argument an empirically doubtful but simplifying assumption that there is indeed a "true" constitutional solution to any issue. One need not be a post-modernist to doubt that a single "true" answer is possible. However, the assumption is not essential to my argument as long as one accepts that particular constitutional interpretations can be more or less accurate. One can argue that the constitutional provision that one must be 35 years old to become President of the United States is open to interpretation, but most people would dismiss out of hand an interpretation that said that an 18-year old could become president. Thus the problem for the court is to deliberate to an accurate solution within the resource constraints it faces.

Whether review is designed to protect citizens from their agents, as assumed by normative theorists, or to protect designers from the short-term risk that citizens might throw them out of office, it is plausible to assume that accuracy is a concern of institutional designers. Constitutionally accurate review preserves the constitutional bargain as it is adopted. Some prospective judicial ability to render accurate review is always pareto-optimal at the time of constitutional design. Because each member of the constitutional coalition does not know its position in the post-election government, each prefers to know that the bargain will be preserved, even if the member would seek to defect from the bargain after winning a post-constitutional election.

There is a tradeoff between accuracy and deliberation costs. If time were no constraint, judges would deliberate until the risk of reaching an inaccurate decision fell to zero. In reality, deliberation is costly and judges must render a decision at some point where such risks of error are positive. At what point should they do so? The standard economic answer is when the marginal cost of an additional unit of deliberation equals the marginal benefit obtained from increased accuracy. Determining the marginal benefit from increased accuracy assumes that we can evaluate all the social costs and benefits of a particular decision. While it may be difficult to determine this as a practical matter, it is clear that design issues may be relevant to the ability of courts to render accurate constitutional adjudication. If politicians care about optimizing judicial power they are likely to design courts accordingly. In evaluating the design elements below we will consider the effects on the costs of reaching a correct answer.

B. Centralization and Decentralization

The broadest issue to be faced in designing a system of judicial review is whether to adopt a centralized or decentralized form of review. Should constitutional review be limited to a special designated body that has exclusive power to review laws for constitutionality? Or should any court be empowered to declare any law unconstitutional? The latter design is found in the United States, the homeland of judicial review. Since World War II the centralized system, designed by Hans Kelsen for Austria and subsequently adopted in Italy and Germany, has been predominant. Of 66 systems of judicial review revived or adopted after 1980, for example, 47 utilized some form of

centralized designated body for constitutional review.[12] In contrast, a 1978 study of constitutions found that only 26% of Constitutions included provision for a designated constitutional court with the power of judicial review.[13] It is clear that a designated constitutional court has become a norm among drafters of democratic constitutions. Is there a justification for this shift?

Consider first the risk of inconsistent or inaccurate rules in the decentralized system. In a decentralized system, the first decision on constitutionality will typically be made by a court of first instance. Allegedly inaccurate decisions will be appealed. So while error costs may be high in the first instance, they are systematically reduced through the appeals process with the Supreme Court serving as final arbiter. In contrast, the centralized system achieves accuracy through specialization. Just as the continental systems separate out administrative cases (and sometimes other areas of law as well) for specialized adjudication, some continental systems adopt a designated constitutional court with the exclusive power of constitutional interpretation.[14] Specialization allows judges to render more accurate decisions because they see only one type of issue. In short, decentralized systems rely on many (relatively) inaccurate judges; centralized systems rely on a few accurate ones.

---

[12] See Appendix 1. Of course, not all systems of review are explicitly sanctioned in new constitutions, as the discussion of Israel demonstrated. Constitutional amendments can also lead to a system of judicial review.

[13] HENC VAN MAARSEVEEN AND GER VAN DER TANG, WRITTEN CONSTITUTIONS (Dobbs Ferry, Oceana, 1978).

[14] Although this is sometimes characterized as the "European" model, in fact only 4 of 15 current EU members use this model: Italy, Germany, Spain and Austria. Scandinavian countries have never used the model. There is a clear correlation between size and centralization in Europe, an interesting fact that has not yet been accounted for.

Let us assume that the transaction costs of deliberation increase with the number of judges that consider the issue and the number of instances at which an issue is heard. The decentralized system utilizes at least two instances. As between a centralized court of *n* members and a decentralized system where the supreme court has *n* members, decision costs are lower in the centralized system, because there is a single instance as opposed to two. The decentralized system uses more judges and instances to reach the same decision. Furthermore, the centralized system may be more accurate if benefits from specialization offset the benefits from the increased number of decision makers in the decentralized system. Because decision costs are likely to be lower, the constitutional designer should choose the centralized system unless there is reason to believe that many non-expert decision makers are more likely to be accurate than fewer specialized decision makers.

It is probably impossible to determine, either as a theoretical or empirical matter, that the centralized or decentralized system is more accurate. Constitutional accuracy is difficult to measure at a systemic level. While one can use proxies for the accuracy of a particular court or judge (such as percent of decisions overturned on appeal), there is no way of determining whether the court of final instance has decided accurately. From the standpoint of politicians who seek insurance, however, the centralized model typically features more political appointment mechanisms (See Section F below). It can, but does not necessarily, feature more open standing requirements. Thus, the particular configuration of constitutional review may be more important than the broadest question of whether to adopt a centralized or decentralized system.[15] If this is the case, the choice

[15] Some scholars argue that the decentralized approach of the common law is a better design. See discussion in Mauro Cappelletti, *The Doctrine of Stare Decisis and the Civil Law: A*

to adopt a centralized or decentralized model may depend on such factors as legal tradition and the level of confidence in ordinary judges.

In new democracies there may be particular reasons to distrust a decentralized system. After all, the judiciary was typically trained, selected, and promoted under the previous regime. While some judges may be closet liberals, there is little ability to ensure that these judges will wield power in a decentralized system. Furthermore, there is significant popular distrust of the judiciary. Giving the ordinary judiciary the power of constitutional review risks dragging the prestige of the constitution down to the level of the adjudicators in the public eye. Setting up a specialized body, by contrast, designates constitutional adjudication as a distinct, important function. So one explanation for the shift toward centralized review may be that widespread democratization has occurred and that decentralized review is particularly unattractive in new democracies.

One virtue of the decentralized system is that it allows many more monitors of the constitutional process. This prevents a monopoly on adjudication in the event of the capture of the (supreme) constitutional court by a single faction. Nevertheless, it is important not to overstate this distinction, because even if a rogue first-instance court is free of political influence and therefore renders accurate adjudication, this decision could be quashed on appeal by a politically dependent supreme court. For example, there is some evidence that the Supreme Court of Japan is more conservative than the lower appeals courts, and thus serves as an instrument of political influence on the part of the long-ruling Liberal Democratic Party.[16]

Fundamental Difference—or No Difference at All?, in FESTSCHRIFT FÜR KONRAD ZWEIGERT 381, 384-87 (H. Bernstein et al., eds. 1981).

[16] Ramseyer, *supra* note 8.

Another advantage of the decentralized system is that it places all law and courts in a single hierarchy. Systems that divide legal authority between a constitutional court and a supreme court face coordination problems when allocating jurisdiction and resolving inconsistencies. This has led to problems, particularly in new democracies where a new constitutional court competes with an old, established Supreme Court reluctant to concede authority.

C. Standing and Access

Constitutional review systems differ widely on the question of who has standing to bring a claim. One can array access to the court on a spectrum from very limited access, as in the original design of the Austrian model in 1920, in which only state and federal governments could bring cases, to the present design of the German constitutional court, where not only political bodies but individuals may enjoy direct access through constitutional petitions, and ordinary judges may refer questions as well. The present Hungarian Constitutional Court has perhaps the widest access of any such body in the world today, as the right of constitutional petition is not even limited to citizens or to concrete cases.[17]

Like other elements of institutional design, access can change over time. For example, 1974 Constitutional amendments in France extended the right of petition to any group of 20% of parliamentary deputies, allowing minority parties to challenge governmental action on constitutional grounds. Judicial decisions can also expand or

[17] The Slovak court allows petition by "anyone" whose rights are the subject of inquiry, but this right is probably limited to citizens. Slovak Constitution (1991), Articles 130(f), 127.

contract standing.[18] Standing doctrine in the United States Supreme Court has changed over time reflecting different judicial agendas.[19]

Table 1: Accessibility of Constitutional Adjudication (Lower on Table = more accessible)

ACCESS MECHANISM	EXAMPLES
Special bodies only	Austria 1920-29, France before 1974
Special bodies + Legislative Minorities	France after 1974, Bulgaria, Rumania
Special bodies + any court	Poland before 1997
Any litigant	U.S.
Special bodies + any court + citizen petition	Germany, Korea
Special bodies + any court + open petition	Hungary

From the perspective of a normative theory of rights, it seems likely that the more open access the better. The Hungarian solution of universal standing seems ideal, at least if non-citizens have some rights under the constitution (as they typically do through non-derogable human rights provisions.) Universal standing increases the chance that constitutional violations will be identified and corrected.

Economic theory sheds new light on the question of optimal access. If the point of access is to increase monitoring and decrease constitutional violations, we have to take into account the possibility of spurious claims being filed. We can assume that the possibility of a spurious claim increases with access. This assumption is plausible because the costs of bringing a claim decline with access. If access is restricted to, for

[18] *See, e.g.*, *Flast v. Cohen* 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 947 (1968) (taxpayer standing in the United States).

[19] MAXWELL STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING (2000) especially Chapter 6.

example, any group of one-third of the members of parliament, then the citizen will have to expend resources to convince a parliamentary party to espouse his claim. These costs will be factored into the decision whether to bring a claim. Open access will lead to more claims of lower average quality.

Furthermore, claimants in open access systems are less likely to be repeat players. Where access is restricted to particular political bodies, the players are likely to gain an understanding of what the constitution requires. Average quality of claims should increase not only because access is costly, but because the players are likely to be better informed and therefore less inclined to bring losing claims. We should expect "win rates" to be higher in systems with more restricted access.[20]

There is some evidence for this proposition. Compare three prototype courts that have been influential models for others around the world: the French *Conseil Constitutionnel*, the German Federal Constitutional Court, and the United States Supreme Court. We would predict that success rates of claims would be highest in the French system, where access is limited to politicians who tend to be repeat players, next highest in the United States, where claimants must incur significant litigation expenses to get to the Court, and lowest in Germany where large numbers of spurious claims can be filed through the constitutional petition mechanism.

Available evidence is consistent with this prediction. Stone reports that from 1981-92, the French *Conseil Constitutionnel*, found 52.1% of laws referred to it wholly or partially unconstitutional.[21] During an overlapping period, the Rehnquist court in the

[20] I am aware of the inevitable problems of analyzing win rates, identified by George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

[21] ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE 239 (1992). The peculiar position of the Conseil as a quasi-legislative body exercising only *a priori* abstract review explains this

United States struck 16.1% of federal laws that it ruled on in its first four terms.[22] Another study that included instances where the Court used the constitution to interpret a statute narrowly found that since the New Deal, the Court struck or narrowed 29.4% of federal statutes challenged in cases accepted for review.[23] As for other decentralized courts, a large sample of cases from 16 American State Supreme Courts showed that 19.4% of constitutional cases resulted in a declaration of unconstitutionality.[24]

Success rates vary for constitutional claims before the German Court by access mechanism: abstract review is initiated by governments or legislative minorities at either state or federal levels; these cases form a very small percentage of the Court's caseload. Concrete cases are raised through ordinary courts when a constitutional issue is pending, and have a success rate of around 5%. The majority of claims, however, have been brought through citizen petition, totaling over 80,000 complaints to date. Only around 4% of these lead to a decision by the Court, as the vast majority are rejected for lack of

---

high rate. Since bills can be reformed before promulgation without serious consequence to the governing party, the penalty suffered by such a finding is much lower than where the court strikes a law after promulgation. Indeed, since the governing party is assured of post-promulgation constitutionality, it may value the pre-promulgation check by the *Conseil*.

[22] SEGAL AND SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 320, n.62 (1993). The Rehnquist Court, although not generally considered to be an activist court, was comparable to the more activist Warren Court by this measure.

[23] Nicholas Zeppos, *supra note* 6, at 309.

[24] Robert Kagan et al., *The Evolution of State Supreme Courts* 76 MICH. L. REV. 961 (1978). Those courts with high discretion to select cases struck laws in 30.1% of cases. For more on the difficulties of evaluating aggregate "win-rates" such as these, see Clermont and Eisenberg, *Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 584-92 (1998). Note that it may be true that courts are more likely to challenge regime interests on constitutional grounds than on others, because of the difficulty of passing over-riding amendments that could "correct" a politically unpopular judicial interpretation. Clermont and Eisenberg study win rates in Federal courts and report that plaintiffs challenging the federal government in civil cases win around 19% of the time in original jurisdiction. Where the government is a plaintiff, however, it wins almost 97% of the time in original jurisdiction. Clermont and Eisenberg, *id.* at 594.

jurisdiction or on the merits by an initial panel of the Court. The success rate of constitutional petitions, as a percent of those filed, was 2.25% through 1991.[25]

Again, it is difficult to draw normative conclusions about court design. We do not have a simple way of evaluating the social cost of a constitutional violation or the marginal benefits from increased accuracy. We do not know the marginal costs of considering spurious claims. Thus, it seems difficult to determine whether, for example, the German-style open system is preferable to the less-open French system, even though the open system leads to a smaller percentage of valid claims.

It might also be argued in favor of open access that the availability of constitutional petitions has an educative function. By making access to review widely available, this system makes the public more aware of, and thus engaged in protecting their constitutional rights. This argument relies on a notion of constitutional review as a repeated game. Open access, over time, should improve the quality of petitions as citizens learn about their rights and improve their monitoring capabilities. On the other hand, it might be argued to the contrary that the experience of sending petitions to the constitutional court, a large percentage of which are rejected, might denigrate the constitution in the eyes of the population.

Regardless of normative conclusions, there is a positive conclusion to be drawn. Politicians who believe they are likely to be out of power will want to ensure open access to the constitutional court so that they can challenge the government in court. Open access also allows watchdog groups that might share the policy preferences of the "pessimistic" politicians to make claims and assist in monitoring the government. We

[25] Christine Landfried, *Germany,* in THE GLOBAL EXPANSION OF JUDICIAL POWER (C. NEAL TATE AND THORSTEN VALLINDER, EDS., 1995).

should thus expect a correlation between political uncertainty and open access. This proposition will be tested in Part III below.

D. Court Size

The constitutional designer may specify in the constitution the number of judges on the court. The major tradeoff here again is between speed and accuracy. The greater the number of judges, the higher the costs of deliberation. At the other extreme, a single judge deciding all cases would be a relatively cheap method of judicial decision-making. The problem with a single judge is that we recognize that the potential error costs of such a system are high.[26] It seems plausible to assume that error costs are reduced by deliberations, and there is ample empirical evidence that group decision-making is of higher quality than individual decision-making.[27] As the number of judges increases, average quality of the decisions increases (assuming that judicial quality is constant). Hence, it is common for judicial panels to grow larger as an issue rises through a system of appeal. For example, United States Federal Appeals courts frequently decide cases in panels of three judges with appeal to the court *en banc*.

One might argue that the salient variable to examine is panel size rather than court size. But the size of panels is typically a matter left to ordinary law or the organic statutes of a constitutional court, rather than being specified in the constitutional text.

[26] At an extreme, in the United States, we let the trial judge decide the initial matter himself even though his preferences may not reflect those of the court as a whole or of the median judge. Warren F. Schwartz & C. Frederick Beckner III, *Toward a Theory of the "Meritorious Case": Legal Uncertainty as a Social Choice Problem*, 6 GEO. MASON L. REV. 801 (1998).

[27] At least in certain contexts. *See* Robert J. Haft, *Business Decisions by the New Board, Behavioral Science and Corporate Law*, 80 MICH. L. REV. 1 (1981); Stephen Bainbridge, *The Corporate Board and Group v. Individual Decision-making* (unpublished draft on file with author).

Furthermore, because important cases will often be heard *en banc*, the overall size of the court is a relevant variable subject to influence by constitutional designers.

There is some empirical support for the proposition that designated constitutional courts are larger than their counterparts that are the courts of final appeal for all issues. For new constitutional courts set up after 1989 (n=25), the mean number of justices was 11.25. For supreme courts given the power of constitutional review in the same period (n=8) the mean size is 8.25. The fact that supreme courts are smaller even though they have non-constitutional cases to consider may indicate that first-instance consideration of the issues saves time later on.

Richard Posner has recently argued that an expansion in court size may be associated with a *decline* in quality of decisions, in part because norms of work are less sustainable with larger groups. However, his evidence is not dispositive on the question.[28] Furthermore, he is considering overall court size for an appeals court whose initial decisions are made by panels, so the research does not directly address the argument made here about *en banc* constitutional review.

E. Term Length

Term length is typically seen as being a key component of judicial independence.[29] Like central bank governors, judges are at risk of undue pressure to advance short-term political interests rather than the long-term collective good. Other things being equal, it is argued, the longer the term of appointment, the freer a judge will

[28] Richard Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEG. STUD. 711 (2000).

[29] *See, e.g.*, Landes and Posner, *supra* note 5.

be in exercising discretion. The longer the appointment, the more independent a judge can be of prevailing political sentiments. We should thus expect longer terms to correlate with politicians who value judicial accuracy and independence. Term length does not, however, have any connection with the cost of the system, other than the costs of choosing new judges.

While one might think that lifetime appointments are always longer than designated terms, this is not the case because virtually all systems with "lifetime" appointments provide for a mandatory retirement age of 65-70 years of age.[30] Even if this were not the case, appointments could come late in life as a reward for political loyalty rather than an incentive for independent adjudication. Thus actual time served on such courts may in fact be lower than judges on courts with specific and limited terms.

F. Appointments

Appointments are among the most crucial of design issues. Constitutional designers are unlikely to adopt constitutional review unless they believe it will be carried out by impartial appointees. If designers believe they are likely to lose post-constitutional elections, they will not be in a position to appoint judges. So overly partisan mechanisms are especially unattractive. The normative task is to select an appointment mechanism that will maximize the chances that the judge will interpret the text in accordance with the intentions of the constitution–writers. This in turn requires

[30] For example, Israel's judges must retire at age 70.

considering judges' utility functions, an issue concerning which there is no consensus in the literature.[31]

Appointment mechanisms are designed to insulate judges from short-term political pressures, yet ensure some accountability. The United States Federal judicial system has lifetime appointments for insulation, but puts tremendous effort into screening potential candidates in the appointment process. Other systems set up mechanisms for ensuring accountability for judicial performance *ex post* by providing for renewable terms. Many American states use a system of elections that allow a judge to be appointed by a Governor upon recommendation by a mixed committee.[32] Judges are then subjected to recall elections where they "run on the record", that is, without opposition. Judges in these systems are very rarely recalled so the threat may not be much of a constraint in reality.

Mueller persuasively argues that a supermajority requirement for judicial selection will tend to protect the minority from losing in both the courts and the legislature, and by extension will tend to produce more moderate, acceptable judicial candidates.[33] Mueller also considers the merits of having the judiciary and the chief executive serve as appointing authorities for the judiciary. He favors such professional appointments by existing judges, noting that the judiciary has internal incentives for

---

[31] J. A. SEGAL AND H. J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (judges vote their political preferences); LEE EPSTEIN AND JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998) (judges are strategic maximizers); L. BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997) (reviewing evidence and discussing poor state of knowledge on this question); RICHARD POSNER, OVERCOMING LAW (1995).

[32] This is the so-called Missouri plan. MARY VOLCANSEK AND JACQUELINE LUCIENNE LAFON, JUDICIAL SELECTION (1998).

[33] Mueller, *supra* note 2, at 281.

competent selection.[34] A judiciary that appears incompetent invites modification of the appointment system. Indeed, one design suggested by Mueller would allow judiciary-nominated judges to take office barring legislative intervention by supermajority.[35] This proposal combines accountability and independence, since most appointments would be routine, but there is a mechanism for political intervention should judges nominate candidates who are far out of step with political opinion.

I divide appointment mechanisms into three broad types: professional appointment mechanisms, as in Mueller's proposal; cooperative appointing mechanisms; and representative appointing mechanisms. Theoretically, one can also have single-body appointment mechanisms where, for example, an executive can appoint all members of the constitutional court without legislative oversight. Single-body mechanisms of this type are unusual because they lead to all-or-nothing composition of the court. If the president can appoint all the judges, the presumption of effective constitutional constraint disappears. Therefore the insurance rationale for judicial review loses its appeal.

Cooperative appointment mechanisms require the cooperation of two bodies to appoint constitutional justices; the American, Russian, and Hungarian procedure of presidential nomination followed by legislative confirmation is one example. These systems seem consistent with the objective of supermajoritarian requirements of ensuring broad support (institutional or political) for those who are to interpret the constitution. They risk deadlock, however, since they require the agreement of different institutions to

[34] Dennis C. Mueller, *Fundamental Issues in Constitutional Reform: With Special References to Latin America and the United States*, 10:2 CONSTITUTIONAL POLITICAL ECONOMY 119, 125 (1999).

[35] *Id*.

go forward. While there are no institutional barriers to such bargains being concluded, it is possible that in circumstances of political conflict, appointments would not be made.

Finally, *representative* mechanisms utilize multiple appointing authorities: for example, in Italy a third of the nine-member court is nominated by the President, a third by the parliament, and a third by the Supreme Court.[36] This system has been copied in such diverse places as Bulgaria, Korea, and Mongolia. (Alternative versions provide for one-third of appointments by each house of a bicameral legislature and one-third by the chief executive. In some countries the appointments by the judiciary are made by a professional council. Representative systems can be distinguished from the cooperative system in that, theoretically, appointees can be much closer to pure agents of the appointers. Because no other institution must agree to the appointment, there is no need for compromise. There may also, however, be a dynamic that prevents politicized appointments where there are three appointing bodies. Each body that appoints a person who appears to be a pure agent signals that it may plan to engage in extraconstitutional action and needs to influence the court to uphold its action. By appointing someone who appears "neutral" and non-partisan, the appointing authority signals that it does not anticipate needing or using the court to uphold its own controversial actions. Thus representative mechanisms may provide an incentive for moderate appointments.

Despite their popularity, representative systems have a disadvantage compared with cooperative systems. Although a dynamic of moderation as described above may come into play, there is some possibility that politicians will simply nominate pure agents. Opinions issued by a court of pure agents are likely to be internally fragmented

[36] Volcansek and Lafon, *supra note* 32.

and of lower quality than those issued by a more centrist, consensual deliberative body as appointed through cooperative mechanisms. Cooperative mechanisms closer approximate the supermajority principle of constitutional economics but risk deadlock in the appointing process. Representative systems ensure a smooth appointment process but risk deadlock on the court.

In the German system, wherein each house of the legislature can appoint an equal number of members to the Constitutional Court, supermajority requirements are used in selecting judges.[37] This has led to a norm of reciprocity that has established *de facto* party seats distributed among the three major parties. The norm produces a stable court that reflects broad political preferences without over-representing either of the two main factions. This version of the legislative-centered system turns parties, not institutions, into the important players. The system is stable because the party system is stable.

The dynamics of party systems are a crucial variable in evaluating the desirability of selection systems. A system of self-appointments by a professional judiciary may be the most likely to produce accurate review under our assumption of judicial neutrality, but can lead to a court that dominates the legislature if the party system is too fragmented and unstable to provide a constraint on judicial decisionmaking. In stable systems, supermajority requirements will produce moderate judges, but appointments may not be made if there is deadlock. Representative systems ensure appointments but create other risks. For example, if the chief executive is the head of the majority party in one or both houses of parliament, this system will lead to a court that is allied with the chief

[37] The Bundestag appoints its members through a two-thirds vote of a Judicial Selection Committee with party representation proportional to that of the body as a whole, and the Bundesrat through a two-thirds vote of the body as a whole DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (1989).

executive. Where there is little party discipline or where the chief executive is independently elected, however, institutional rivalries can lead to a more divided court.[38] In short, various dynamics can come into play under any system, but other things being equal, cooperative appointment systems seem to be preferable from the point of view of the hypothetical constitution-drafter who values accuracy.

F. Abstract v. Concrete Review

The centralized-decentralized dimension of constitutional court design concerns who *conducts* review and the access dimension concerns who can *bring a claim* for review. Another dimension concerns what the prerequisites of bringing a case are. Concrete review requires litigation of constitutionality in the context of a particular case. Abstract review determines the constitutionality of a statute without a specific case. The remedy for a finding of unconstitutionality in a concrete case consists of relief for the particular plaintiff, and a finding that the statute is unconstitutional, meaning either non-applicable or void. The remedy for a finding of unconstitutionality in an abstract case only affects the statute without affecting any particular legal rights.

A related issue concerns the *timing* of review. In the French system, review can only take place *ex ante* promulgation of the law. This means that the law can be modified by the legislature to conform with the decision of the *Conseil Constitutionnel*; this form of review makes the *Conseil* more akin to a third house of the legislature than a court. *Ex post* review allows for more types of claims: a claimant can argue not only that a statute

[38] Bailey proposes that constitutional issues be decided by a legislature, possibly the previous sitting legislature that appointed judges if the issue is legislation passed by the current legislature. Martin Bailey, *Toward a New Constitution for a Future Country*, 90 PUBLIC CHOICE 73, 99 (1997).

is unconstitutional on its face and its purpose, but also in its effects. *Ex ante* constitutional review may increase the average quality of legislation—patently unconstitutional bills cannot be passed. But *ex post* constitutional review may also have a similar effect. By demonstrating that unconstitutional legislation cannot be effectively implemented, *ex post* review may reduce the incentives to pass such legislation.[39] To the extent that review after promulgation allows more information to be considered, there may be an advantage for *ex post* monitoring.

Arguably, concrete review should be more accurate than abstract review for the same reasons *ex post* review is better than *ex ante*. This is because the Court has a specific fact situation in which to decide the case; the Court has more information about the questioned statute than it would in a purely abstract procedure. It can evaluate the statute not only on its face and in light of its purpose, but in the context of its actual effects. Concrete review also is more expensive because it typically requires a lower court to determine issues of constitutionality, and lower court gatekeepers are costly.[40]

---

[39] Of course, politicians could pass the unconstitutional legislation to claim credit from their supporters and shift blame to the court for striking it. For example, members of Congress, often proposed anti-abortion legislation of dubious constitutionality in the aftermath of *Roe v. Wade*, 410 U.S. 113 (1973). *See* NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES : ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE (1996).

[40] In the German system, the lower court does not decide constitutionality, but must evaluate whether or not a constitutional issue exists in the case. If it does not find necessary grounds for referral to the Constitutional Court, there is no constitutional review. One way to look at this mechanism of access is as an appeal process that actually protects the state. If the plaintiff believes the statute violates the constitution but cannot prove it to the satisfaction of the ordinary judge, she must look to other mechanisms of access to the court, such as the citizen petition where available. Where such other mechanisms do not exist (e.g., Bulgaria, Rumania, Poland until 1997), the statute will stand, without having been challenged before the constitutional court. But where the citizen is able to show that the law is unconstitutional in the first instance, the state gets automatic review on this issue *de novo* before the constitutional court. Where the citizen fails, the citizen cannot appeal.

In short, pure concrete review in the United States system may be more accurate than pure abstract review such as in France, but also requires significantly more expenditure because private parties will have to bear the initial cost of a constitutional violation and then the cost of litigating for a remedy. The German system, on the other hand, with multiple access channels and means of challenging a statute, allows review *both* before and after actual application of the law and, therefore, may maximize opportunities to identify constitutional violations. The positive implication is that prospective losers will seek to broaden review to include concrete and abstract review.

G. Summary

To summarize the argument so far, each dimension of design choice has certain effects on the capacity of the court to render accurate review. The table below summarizes the three prototype constitutional courts along these dimensions. For each, the court with the presumptively more accurate and/or costly option is shaded.

Table 2: Dimensions of Design Choice

	Germany- ***Constitutional Court***	**United States-** ***Supreme Court***	**France-** ***Conseil Constitutionnel***
Size	16 members in two Senates of 8	9 members	9 members
Standing	Petition + courts + requests from government	Access through courts only	Restricted standing
Justiciable questions	Concrete and abstract	Concrete only	Abstract only
Decentralization	Centralized	Decentralized	Centralized
Appointments	Representative-2 houses parliament (supermajority)	Cooperative- president + parliament	Representative - president, 2 houses parliament
Term	12	Life – no age limit	9

III. Evaluating Constitutional Court Design

The normative task of the court designer is to optimize accuracy given that it is costly. But we should not assume that designers should automatically adopt the shaded institutions, for they can make tradeoffs across and within dimensions. Suppose a country adopted a large court, whose judges served for life upon appointment by a cooperative or supermajority method, with the power to hear both abstract and concrete cases brought by individual citizens. It would have the power to identify and remedy all sorts of violations. But it would still have limitations of capacity. It might be more

effective to adopt a smaller court with less open access that could focus more intensively on the questions before it.

Even if there is no single optimal design for accurate review, the framework laid out above can help us determine whether actual court design is consistent with the theoretical concerns laid out in Part I. To summarize that argument once more, judicial review provides an insurance policy for prospective losers in the electoral arena. If politicians design constitutional review to meet their "insurance" needs, we ought to expect that politicians who are not confident will seek a configuration that allows more accurate review. This is because they foresee themselves being out of power after the post-constitutional election and want a court that can accurately identify violations of the constitutional bargain. Thus we ought to see such politicians designing courts that lean toward the shaded dimensions of Table 2. Politicians who see themselves winning do not value constraint. They may wish to restrict standing, for example, as a means of keeping the opposition from challenging government policy in court. Let us consider the evidence.

A. Judicial Review as Insurance: Anecdotal Evidence

There is strong anecdotal evidence to support the hypothesis that judicial review will be more accessible and powerful where political forces are diffused at the time of the constitutional bargain, and more limited when a single party controls the process.[41] This

[41] There is similar evidence that central bank independence is strongly correlated with politicians' time horizons. As politicians' time horizons shorten, independence increases. JOHN GOODMAN, THE POLITICS OF CENTRAL BANK INDEPENDENCE (1992).

would seem to support the insurance theory over the pre-commitment theory of judicial review.[42]

Take as an initial example the French system, sometimes referred to as limited constitutional review. Constitutional review is restricted to abstract, *ex ante* review by a centralized body, with limited standing restricted to certain designated governmental bodies, and, since 1974, minority groups of parliamentary deputies. Limited standing and abstract *ex ante* review imply that decision costs are relatively low: there are few frivolous cases, and no need for complex factual inquiries into the actual operations of allegedly unconstitutional statutes. Few frivolous cases means the success rate of constitutional claims is high. However, since nominal constitutionality is assured after promulgation, it is possible that irresolvable constitutional deficiencies may appear later that were not apparent *ex ante* promulgation.

This analysis is perfectly consistent with the history of the French Fifth Republic. The *Conseil* was adopted at the instigation of General De Gaulle, who wanted a strong executive to prevent the legislative deadlock that had characterized the Fourth Republic. De Gaulle's confidence was such that he drafted the entire constitution around his personal popularity, and did not trust parties or parliamentarians. By allowing the *Conseil* to consider only statutes *before* promulgation, he placed a check on the parliament's ability to dictate policy. Restricted standing allowed De Gaulle and government agencies to bring cases, but not ordinary citizens, who might challenge legislation that the government wanted. Furthermore, eliminating concrete review meant that the government would be able to act without constitutional scrutiny once policies were adopted.

[42] See Appendix for countries that have adopted this system

This scheme changed radically when standing was broadened in 1974 to include any minority group from the parliament. This change was initiated by President Giscard d'Estaing, who headed the small Republican Party that governed briefly. As a minority party heading a coalition government, the Republicans valued expanded standing that would provide a guarantee of access once they were out of power. These changes have had a profound effect on French constitutional law.[43] Predictably, expanded standing led minority groups in parliament to complain frequently to the *Conseil*, and to judicialize the very issues they had lost in the legislature.

The German system features a centralized body that can engage in both abstract and concrete review. Standing is broad and includes constitutional petitions. Thus, decision costs are high because many spurious claims must be discarded for every meritorious one. The Court deals with this through a staff of lawyers who scan constitutional petitions as an initial matter, and by restricting concrete review to those cases where lower courts have already completed the fact-finding *and* made a preliminary assessment as to unconstitutionality.[44] Accuracy is likely to be high because the court benefits from concrete application of the allegedly unconstitutional provision.

The design of the German system reflected a strong ideological desire to maintain an open and effective system.[45] The strong emphasis on basic rights, combined with the post-war distrust of the ordinary judiciary, meant that the centralized constitutional court was an attractive option. The German Basic Law was in many respects a compromise between those who emphasized "positive" economic and social rights and those who

---

[43] STONE, *supra* note 21.

[44] See note 40 *supra*.

[45] MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE (1989).

emphasized "negative" rights, such as the right to property. An easily accessible constitutional court served the interests of both groups.

The Israeli system illustrates how judicial review can also be adopted in established democracies as political configurations change.[46] Demand for insurance should increase when established political forces believe that they will no longer be able to remain in power. A deeply divided society at independence in 1947 (as today), Israel's founders chose not to adopt a constitution but rather to use a series of incrementally enacted non-entrenched Basic Laws to embody the nation's central political principles. For many years, a secular Ashkenazi elite dominated Israeli politics. The election of Menachem Begin in the late 1970s initiated an alternation of power between Likud and Labor parties. As political outcomes became less predictable, the Israeli Supreme Court became more assertive as the expositor of the constitution. This move was tolerated, and in fact institutionalized, by secular politicians who passed two Basic Laws protecting civil rights and explicitly empowering the Court to void any legislation not in accordance with their provisions and the basic values of the State of Israel.[47] These politicians faced increased political uncertainty caused by the rise of religious parties in conjunction with a massive wave of immigration from Russia. Judicial review was an attractive way of ensuring that the values of the secular, Ashkenazi elite remained protected from future attack.

---

[46]See Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, L. SOC. INQUIRY 91 (2000). Israel's system of judicial review is structurally similar to the American with the exception that judges must retire at age 70.

[47] *Basic Law: Human Dignity and Liberty* and *Basic Law: Freedom of Occupation* (1992).

Consider as a further example the post-1989 East European Constitutions.[48] Where communist parties remained intact and able to enact new constitutions quickly, judicial review was limited in scope. In Bulgaria, for example, there is no public access to the constitutional court; rather, only designated political bodies can assert constitutional claims. Similarly, the Rumanian Constitutional Council follows the French design wherein review is limited to reviewing legislation before promulgation, and cannot be addressed by ordinary citizens.[49] Where communist parties were more thoroughly discredited and new parties were also quite diffuse, as in Hungary, constitutional courts are powerful bodies that are accessible to the public.

B. Judicial Review: Empirical Evidence

We can undertake a simple empirical test of the insurance model by examining the constitutional courts adopted in the former Soviet bloc after 1989. Nearly every post-communist country has adopted a constitutional court, usually following the German model of a centralized body. But the details of institutional design vary across countries. The following table presents some data on these countries and their constitutional courts.

[48] *Discussed in* JON ELSTER *ET AL.*, INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA (1998).

[49] On France see *supra* note 21.

Table 3: Constitutional Courts in Post-Socialist Countries

COUNTRY	CONSTITUTION YEAR	JUDGES #	TERM in years	ACCESS (dummy)	PARTY STRENGTH
Albania	1991*	9	9	1	0.37
Armenia	1995	9	life	0	0.58
Belarus	1994	11	11	0	0.03
Bulgaria	1991	12	9	0	0.17
Czech	1993	15	10	0	0.04
Estonia	1992	17	life	1	0.21
Georgia	1995	9	10	1	0.31
Hungary	1949/1990	15	9	1	0.18
Lithuania	1992	9	9	0	0.39
Macedonia	1991	9	9	1	0.24
Moldova	1994	6	6	1	0.37
Mongolia	1992	9	6	1	0.20
Poland	1997	12	8	1	0.05
Rumania	1991	9	6	0	0.59
Russia	1993	15	life	1	0.06
Slovakia	1993	10	7	1	0.28
Slovenia	1991	9	9	1	0.09
Ukraine	1996	19	9	1	0.19

To examine whether demand for political insurance is a determinant of constitutional court design, we must evaluate the relationship between demand and those features of court design predicted to produce more accurate constitutional review. To capture demand for insurance, we use a proxy variable PARTY STRENGTH, the difference in the first post-constitutional election between the seat shares of the strongest and second-strongest parties or blocs of parties in the legislature. This captures the extent to which there is a dominant party and should correlate with the degree of political uncertainty during constitutional drafting.[50] The lower the differential between seat

[50] For our purposes this indicator is superior to another one frequently used in comparative political studies, namely the effective number of parties. The effective number of parties is $N_S = 1/\sum p_i^2$ where p_i equals the percent share of seats in the legislature of the *i*th party. M. Laakso and R. Taagepera, *Effective Number of Parties: A Measure with Application to West Europe*, 12

shares, the less certain will be the leading party or bloc that it will end up in power. Note that in most cases we cannot use the political configuration *before* democratization, as the former configuration was generally a one-party system that did not reflect the true range of political views. The political configuration in the first election after the adoption of the court is a reflection, albeit an imperfect one, of the true extent of diffusion before adoption of the constitution Therefore we draw data from the first post-constitutional election where earlier data is unavailable.

The column TERM provides the number of years in a nominal appointment to the constitutional court. The prediction is that as the level of party dominance rises, the term of judges will fall. This is because re-appointments and short term length give politicians the ability to influence judges, especially if a party anticipates staying in power through multiple reappointment cycles. In practice, judges may not actually serve as long as provided in nominal appointments, but the constitutional courts of Eastern Europe are too young to have reliable data on actual time served. There is the additional problem of assigning term length for purposes of statistical tests to judges with lifetime appointments. In the data analyses that follow, we therefore assume, somewhat arbitrarily, that "lifetime" appointments are eleven years long, precisely the same length as the longest designated term in the dataset.

COMPARATIVE POLITICAL STUDIES 3 (1979); R. TAAGEPERA AND M. SHUGART, SEATS AND VOTES: THE EFFECTS AND DETERMINANTS OF ELECTORAL SYSTEMS (1989); J. Ishiyama and M. Velten, *Presidential Power and Democratic Development in Post-Communist Politics*, 31 COMMUNIST AND POST-COMMUNIST STUDIES 217, 222 (1998). Effective number of parties might correlate inversely with political uncertainty as the smaller number of parties indicates a greater chance of each to capture seats in government. However, it would not capture the situation of political deadlock among two equally large parties, which would create high uncertainty but a low number of parties. Thanks to Omri Yadlin for pointing out this problem in an earlier version of this paper.

ACCESS is a dummy variable that captures standing. The value is 1 if citizens have the right to petition the court or if ordinary courts can refer constitutional questions to the court. Thus, both a decentralized system such as that of Israel and a centralized system like that of Germany would carry ACCESS value 1. Systems of limited access where only designated political institutions can bring questions to the court have ACCESS value 0. This is a feature of the French model but also is found in some courts that otherwise look like the German model. The predicted relationship between extent of party dominance and access is negative. The stronger the dominant party in constitutional drafting, there is less incentive to design an open system of access to the court.

The table below presents the results of three separate least-squares regression operations with PARTY STRENGTH as the sole independent variable.

Table 4: Regression results: insurance model of design

	Constant	Regression Coefficient (t-stat)	Regression Confidence Level
Regression one: y= court size	13.80	-.10 (-2.30)	95%
Regression two: y= term length	9.62	-3.05 (-1.22)	75%
Regression three: y= access	0.83	-0.71(-1.03)	70%

N = 18

The regressions demonstrate relatively strong results for all three dependent variables. All coefficients have the predicted sign and the results for court size are statistically significant. Three features thought to enhance independence and accuracy of the court are those that are chosen in diffused party systems, where politicians should have an incentive to do so. This presents support for the insurance model. If the pre-

commitment model were correct, we would have expected to see that stronger parties led to *more* open access, longer terms and larger courts because there would be greater need for pre-commitment. The insurance model has more explanatory power.

Conclusion

Judicial review, though nominally exercised on behalf of citizens, is political insurance for constitution-drafters. Given that no insurance contract is perfect or infallible, drafters must consider various institutional configurations that might achieve their goal of reducing risk. Because designers make simultaneous choices along several dimensions of court design, there is no single optimal configuration, but rather a pareto set. Even with various design options, agency problems may lead to sub-optimal design because drafters pursue their own short-term interests. Data from constitutional court design in post-communist settings supports these propositions and shows that features of design that enhance judicial ability to constrain future politicians correlate with weaker political parties.

Appendix 1: Constitutional Review in New Democracies

Country	Year of constitution/last major amendment (*= amendment only)	Form of Constitutional Review (Key: CR= review by special body; JR = review by courts; L = scope of review or access limited
Albania	1991*	CR
Argentina	1853	JR
Armenia	1995	CR
Bangladesh	1972/1991*	JR
Benin	1991	LCR
Bolivia	1994	JR
Brazil	1988	JR/CR
Bulgaria	1991	JR/CR
Burkina-Faso	1991	LCR
Cape Verde	1992	JR
Central African Republic	1994	CR
Chile	1981	LCR/LJR
Colombia	1991	CR
Czech	1993	CR
Ecuador	1979	JR/CR
El Salvador	1983	JR
Estonia	1992	JR
Ethiopia	1995	LCR
Fiji	1990/1997	JR
Gabon	1991	LCR
Georgia	1995	CR
Ghana	1993	JR
Greece	1975	CR
Guatemala	1985	JR/CR
Guyana	1992	JR
Haiti	1987	LJR
Honduras	1982	LJR
Hungary	1949/1990	CR
Korea	1988	CR
Kyrgyz Republic	1993	CR
Latvia	1922/1991	LCR
Lesotho	1993	JR
Lithuania	1992	CR
Macedonia	1991	CR
Madagascar	1992	CR

Malawi	1994	JR
Mali	1992	CR
Moldova	1994	CR
Mongolia	1992	CR
Morocco	1992	LCR
Mozambique	1990	JR/CR
Namibia	1990	JR
Nepal	1990	JR
Nicaragua	1987	LJR
Pakistan	1973	LJR
Panama	1972	JR
Paraguay	1992	JR
Peru	1993	JR/CR
Philippines	1987	JR
Poland	1997	CR
Portugal	1976	JR/CR
Rumania	1991	LCR
Russia	1993	LCR
Sao Tome & Principe	1990	JR
Senegal	1991*	LCR
Seychelles	1993	JR
Sierra Leone	1991	JR
Suriname	1987	JR
Slovakia	1993	LCR
Slovenia	1991	CR
South Africa	1994	JR/CR
South Korea	1961/1987	CR
Spain	1978	LCR
Taiwan	1947/1997	CR
Tanzania	1992*	JR
Thailand	1997	CR
Ukraine	1996	CR
Uruguay	1997	JR
Zambia	1991	LJR/LCR

Source: ROBERT MADDEX, CONSTITUTIONS OF THE WORLD (1995); UNITED STATES DEPARTMENT OF STATE, HUMAN RIGHTS REPORTS (1997); FREEDOM HOUSE, FREEDOM IN THE WORLD. Note that Rumania is spelled as per THE NEW INTERNATIONAL WEBSTER'S DICTIONARY, DELUXE ENCYCLOPEDIC EDITION (1995). Dates of Constitutions were supplemented through the CIA Factbook at http://www.theodora.com/wfb/.