

PARTY POLARIZATION AND ITS CONSEQUENCES FOR JUDICIAL POWER AND JUDICIAL INDEPENDENCE

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In this article I reconsider the party-level forces affecting the establishment of judicial review and judicial independence. Though most current theory examines the competitiveness of the party system, I argue instead that the level of party polarization should lead to demonstrable effects on the establishment of judicial review and judicial independence rules. Using data on party polarization from the Manifesto Project, I test this theory on 38 (mostly European) countries. Results indicate a robust relationship between polarization and the presence of strong judicial independence protections, and also reinforce the importance of party competition for the establishment of judicial review. These results have important implications for constitutional design and the development of judicial power, as well as practical implications for the ability of polarized societies to develop institutions that mediate conflict.

Keywords: Judicial independence, judicial power, party polarization, judicial review

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I. INTRODUCTION

Independent and powerful judiciaries have long been seen as the best way to limit the power of government and promote the rule of law. Yet, political actors generally adopt the formal (*de jure*) rules of independence that protect courts, and the political response to court decisions largely determines the power provided to courts. Given the ability of independent courts to constrain the actions of elected leaders, scholars, jurists, and political thinkers have long sought to examine the circumstances in which political actors choose to adopt both strong judicial powers and strong independence protections for judges.

Most prominent theories today focus on competition among political parties as a primary influence on the level of independence and power granted to the judicial system.¹ According to this 'insurance' or 'electoral market' family of theories, political parties will be unlikely to seek any form of check on their lawmaking power when they believe their party will dominate the future

¹ Mary Volcansek, 'Bargaining Constitutional Design in Italy: Judicial Review as Political Insurance' (2010) 33 *West European Politics* 280; Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004); Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003); Matthew Stephenson, 'When the Devil Turns...': The Political Foundations of Independent Judicial Review' (2003) 32 *Journal of Legal Studies* 59; J Mark Ramseyer, 'The Puzzling (In)dependence of Courts: A Comparative Approach' (1994) 23 *Journal of Legal Studies* 721.

legislative process. However, if parties believe they will, at some point in the future, be voted out of power, they should seek to implement minoritarian institutions and rules – notably, judicial review and judicial independence-enhancing rules – that will help them to maintain a check on government when they are out of power.²

In this article, I reconsider the party-level forces affecting the establishment of judicial independence and judicial power. Building on the large literature in American politics³ and comparative politics⁴ that examines the conditions under which legislatures will transfer policy-making authority to other actors, I investigate whether the level of party *polarization*, rather than the level of party competition, better reflects the desire by political parties to establish independent courts with strong judicial power. For parties within polarized political systems, characterized by large ideological divisions between parties on important policy areas, the introduction of both judicial review⁵ and strong judicial independence protections can help to rectify failures of coordination and provide a practical solution to problems of governmental functioning that, as Sartori noted, may otherwise threaten the stability of the political system.⁶

I examine the role of party polarization both *statically* by using common factors present at the time when judicial independence rules are adopted in

² Ginsburg (n 1); Ramseyer (n 1); see also Anna Grzymala-Busse, *Rebuilding Leviathan: Party Competition and State Exploitation in Post-Communist Democracies* (Cambridge University Press 2007) for an extension outside of courts.

³ Gyung-Ho Jeong, Gary Miller, and Andrew Sobel, 'Political Compromise and Bureaucratic Structure: The Political Origins of the Federal Reserve System' (2009) *Journal of Law, Economics & Organization* 472-498; Terry Moe, 'The Politics of Bureaucratic Structure' in John Chubb and Paul Peterson (eds), *Can the Government Govern?* (Brookings Press 1989).

⁴ Ginsburg (n 1); Ramseyer (n 1); Grzymala-Busse (n 2); Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30 *Journal of Law, Economics & Organization* 587.

⁵ I refer to judicial review and constitutional review interchangeably in this paper. I use the term judicial review to denote a system in which at least one court has the power to interpret the constitution and potentially hold other governmental actors accountable under the constitution.

⁶ Giovanni Sartori, *Parties and Party Systems: A Framework for Analysis* (Cambridge University Press 1976).

each country, and *dynamically*, testing whether levels of polarization over time can contribute to the adoption of judicial review. Using Russell Dalton's well-established index of party polarization and Manifesto Project (MP) data from 38 countries, I find that *polarization* among political parties has a significant effect on the propensity of political actors to accept strong judicial independence protections.⁷ However, there is also strong evidence to support the conclusion that party *competition* drives the decision to adopt judicial review. In proposing the importance of party polarization, I am not suggesting that the competition for policy-making power among parties does not matter in the establishment of judicial review or judicial independence protections. Quite the opposite, the competition between political parties should be critical to the dual decisions to establish judicial review and create strong independence rules. Rather, as Dalton notes, the degree of party competition may be a 'surrogate for a richer characteristic' of the political system – the *polarization*, or policy extremity, between parties.⁸ And ultimately, party polarization should be associated with the decision to adopt strong judicial independence protections.

II. BACKGROUND

Polarization in politics has long held negative connotations. From the dissolution of the Weimar Republic in Germany to the collapse of democracy in 1970s Chile, the consequences of polarization can be dramatic. Still, as Russell Dalton and others have shown, polarization can vary within countries over time, rising and falling according to the strategic and ideological choices political actors make.⁹ We see this today in the second decade of the twenty-first century, where the effects of polarization – both good and ill – have become dominant topics in both the popular media and

⁷ Russell Dalton, 'The Quantity and the Quality of Party Systems: Party System Polarization, its Measurement, and its Consequences' (2008) 41 *Comparative Political Studies* 899. For an indication of how widely used the Dalton index is, see Konstantinos Matakos, Orestis Troumpounis, and Dimitrios Xefteris, 'Electoral Rule Disproportionality and Platform Polarization' (2015) 60 *American Journal of Political Science* 1026.

⁸ Dalton (n 7) 918.

⁹ *Ibid* 908.

the academic world.¹⁰ Yet, what precisely is meant by polarization in the party system? *Party polarization* is defined most broadly as the degree of ideological differentiation among political parties on a common ideological space.¹¹ Polarization involves more than just political differences among parties: it refers to a system-wide differentiation among social groups or factions, with those groups defined by their strong within-group identity and their alienation from or opposition to other groups in society.¹² In practice, polarized systems are characterized by the presence of significant parties or factions on the extreme ends of the left-right spectrum. As Rehm and Reilly explain, if a relatively large party exists on the extremes of the left-right spectrum, we should witness (and should empirically measure) greater polarization.¹³ Conversely, smaller parties at the extremes should contribute less to overall polarization, as their smaller numbers make their 'gravitational pull' on the party system weaker than the pull of political parties with many voters and many seats in parliament. Likewise, domination of the party system by one party should also result in lower levels of overall party system polarization: As a given party accumulates more and more voters, the ideological distance between that party and any other party will be offset by the low number of voters who associate with other parties.¹⁴

Both social and institutional factors can contribute to party polarization. Examining the United States from the 1950s to the present, McCarty, Poole,

¹⁰ Eduardo Porter 'A Threat to U.S. Democracy: Political Dysfunction' *New York Times* (New York, 3 January 2017) B1; Ronald Inglehart and Pippa Norris, 'Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash' (2016) Harvard Kennedy School Research Paper RWP 16-026 <https://papers.ssrn.com/abstract_id=2818659> accessed 28 February 2017; Noam Lupu, 'Party Polarization and Mass Partisanship: A Comparative Perspective' (2015) 37 *Political Behavior* 331.

¹¹ Eg Philipp Rehm and Timothy Reilly, 'United We Stand: Constituency Homogeneity and Comparative Party Polarization' (2010) 29 *Party Politics* 40, 40; Sartori (n 6); Dalton (n 7).

¹² Dalton (n 7); Joan Esteban and Gerald Schneider, 'Polarization and Conflict: Theoretical and Empirical Issues' (2007) 45 *Journal of Peace Research* 131, 134; Joan Esteban and Debraj Ray, 'On the Measurement of Polarization' (1994) 62 *Econometrica* 819.

¹³ Rehm and Reilly (n 11).

¹⁴ *Ibid.*

and Rosenthal find that periods of large income inequalities are associated with greater polarization among US political parties.¹⁵ Others suggest polarization may be caused by members of the legislature adapting to increased homogenization within legislative districts.¹⁶ Whatever its roots, scholars have long posited distinct political and social outcomes arising from polarized systems. Polarized party systems provide incentives for parties to take extreme positions on social and economic policy dimensions, which result in intense ideological debates over political outcomes.¹⁷ For some scholars, notably Noam Lupu, the intense debates can be beneficial for society, as voter choices become clarified and party attachment is developed.¹⁸ At the same time, the consequences of polarization present distinct challenges for governing in the short-term, while also potentially damaging the legitimacy and the stability of the entire political system over the long-term.¹⁹

Judicial independence refers to two related concepts. First, it refers to the expected effect from formal rules given to judges that should enable them to decide cases free of influence from outside actors, including other political actors, the parties to the case, and even the judicial hierarchy itself.²⁰ A second view of judicial independence is more behavioral: it refers to how judges make decisions and whether those decisions are respected by other governmental actors – particularly decisions these other actors disagree

¹⁵ Nolan McCarty, Keith Poole, and Harold Rosenthal, *Polarized America: The Dance of Political Ideology and Unequal Riches* (MIT Press 2006).

¹⁶ Sean Theriault, 'Party Polarization in the U.S. Congress: Member Replacement and Member Adaptation' (2006) 25 *Party Politics* 483.

¹⁷ Dalton (n 7) 901; Sartori (n 6).

¹⁸ Lupu (n 10); Corwin Smidt 'Polarization and the Decline of the American Floating Voter' (2017) 61 *American Journal of Political Science* 365.

¹⁹ Timothy Frye, 'The Perils of Polarization: Economic Performance in the Postcommunist World' (2002) 54 *World Politics* 308; Sartori (n 6).

²⁰ James Melton and Tom Ginsburg, 'Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence' (2014) 3 *Journal of Law and Courts* 187; David O'Brien and Yasuo Okhoshi, 'Stifling Judicial Independence from Within' in Peter Russell and David O'Brien (eds), *Judicial Independence in the Age of Democracy* (University Press of Virginia 2001).

with.²¹ This second conceptualization focuses on the *de facto* powers given to courts, while the first refers mostly to *de jure* powers.

In this paper, I focus on legislative preferences affecting *de jure* independence. Certain institutional rules, notably term lengths and guarantees on salaries, have long been thought to augment the independence of the judiciary by better allowing judges to rule in ways free of influence from outside actors. Salary and tenure guarantees mean that judges cannot face monetary loss or the loss of their position if they exercise judicial review or rule against the government, a belief that goes back to the foundations of modern democratic thought.²² Alexei Trochev's discussion of efforts to change term lengths for high court judges in Spain, Italy, and Portugal show the continued importance of these institutional rules in political debates today.²³ The ultimate effect of judicial independence is to make judges free to decide cases sincerely, based on their own best interpretation of the law, without fear of reprisals from other actors.²⁴ Thus, independence-enhancing rules like term lengths and salaries also indirectly provide opportunities for judges to maximize their own influence in the policy realm. In fact, it is often stated that without judicial independence, judicial activism (understood as the practice of courts challenging the pronouncements of other branches of government) cannot take place.

III. PREDICTORS OF JUDICIAL POWER AND INDEPENDENCE

Why would political actors ever willingly create independent courts with judicial review powers? After all, political actors place an important constraint on their own power when they allow for the judicial review of legislation. Given the potential that judges will use judicial review to overturn the decisions of the executive and the legislative branches, legal and political

²¹ Drew Linzer and Jeffrey Staton, 'A Global Measure of Judicial Independence, 1948-2012' (2015) 4 *Journal of Law and Courts* 223; Julio Rios-Figueroa and Jeffrey Staton, 'An Evaluation of Cross-National Measures of Independence' (2014) 30 *Journal of Law, Economics & Organization* 104.

²² Charles Geyh, *When Courts & Congress Collide: The Struggle for Control of America's Judicial System* (University of Michigan Press 2006), 42.

²³ Alexei Trochev, *Judging Russia* (Cambridge University Press 2008), 259.

²⁴ See Rios-Figueroa and Staton (n 21).

theorists have long sought to understand why politicians would place this type of constraint on their own policy making power. Mark Graber, for example, has focused on the potential benefits to politicians in having independent courts solve politically difficult or sensitive policy issues.²⁵ Graber describes several notable instances in US history in which legislative actors sought, both actively and implicitly, to foist off a problematic issue onto the Supreme Court. The Court's infamous *Dred Scott* decision, which ratified slavery in the United States, is one example in which legislative leaders saw benefits to judicially created policymaking.²⁶

Alternatively, judicial independence may be necessary for courts to effectively utilize their information advantage when reviewing legislative policies. In exercising judicial review, courts can correct problems in the lawmaking process, striking down parts of laws that have not worked well while keeping those that have worked. However, courts can only do so effectively if given independence from political actors.²⁷ Landes and Posner's classic work on judicial power focused on the ability of independent courts to effectively enforce political bargains, thus encouraging and making credible the deal making done by politicians and interest groups.²⁸

One particularly powerful line of argument focuses on the competitiveness of the party system as an important theoretical and empirical predictor of both the judicial review powers and the independence ultimately given to courts.²⁹ The 'insurance' or 'electoral market' model begins with the proposition that parties in power, or those groups vying for power at the initial stage of party competition, face competing goals and pressures. Parties would like to stay in office forever, yet in democratic systems with high levels of political competition parties know with great certainty that they will, at some point in the future, be voted out of office.³⁰ With this loss of office comes a loss of

²⁵ Mark Graber, 'The Non-Majoritarian Difficulty' (1993) 7 *Studies in American Political Development* 35.

²⁶ *Dred Scott v Sandford* 60 US 393 (1857).

²⁷ James Rogers, 'Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction' (2001) 45 *American Journal of Political Science* 84.

²⁸ William Landes and Richard Posner, 'The Independent Judiciary in an Interest-Group Perspective' (1975) 18 *Journal of Law & Economics* 875.

²⁹ Ginsburg (n 1) 60; Ramseyer (n 1) 740.

³⁰ Ginsburg and Versteeg (n 4); Ginsburg (n 1); Ramseyer (n 1); Stephenson (n 1).

policy-making authority in government and the legislature. However, parties can hedge their bets against future electoral losses by establishing independent courts with the power to review and potentially overturn the laws passed by parliament. Independent courts, then, allow forward-looking political parties in competitive environments to minimize risks from political competition – that is, to provide 'insurance' against an uncertain political world. In the end, parties in these competitive political environments trade off some level of current policy freedom for the possibility to veto or limit future policy when they are out of power.³¹

The relevance of the political insurance theory can be seen vividly today in Hungary. In the 1990s and into the 2000s, Hungary's constitutional court developed a strong reputation for independence and power within the Hungarian political system, with one prominent observer of the country terming Hungary a 'courtocracy' due to the central role of the constitutional court in shaping the parameters of policy debates.³² However, after Viktor Orbán's Fidesz party won a surprising two-thirds supermajority in 2010, the party swiftly sought to clip the independence of the constitutional court and other independent actors in government. After the constitutional court ruled against Fidesz in several prominent cases, the party used its supermajority to curtail the jurisdiction of the court, even formally passing laws and amendments to eliminate the relevance of past court precedent.³³ Why would Fidesz take these actions? The insurance theory explains that limiting judicial power is a natural reaction to the *lack* of true political competition in the Hungarian political arena. With a commanding two-thirds supermajority and a weak, fragmented opposition, Fidesz was able to control the rules of the political game, and thus had no need for the political insurance that the constitutional court would otherwise provide. Ultimately, the decision to curtail the court's powers flowed from Fidesz's lack of real competition and

³¹ Ramseyer (n 1) 722.

³² Kim Scheppele, 'Democracy by Judiciary: Or, Why Courts Can Be More Democratic than Parliaments' in Adam Czarnota, Martin Krygier, and Wojciech Sadurski (eds), *Rethinking the Rule of Law after Communism* (Central European University Press 2005).

³³ Kim Scheppele, 'The Fog of Amendment' (*New York Times*, 12 March 2013) <<http://krugman.blogs.nytimes.com/2013/03/12/guest-post-the-fog-of-amendment/>> accessed 5 January 2017.

the absence of any political insurance requirements. Still, the insurance theory may have its limits. With a smaller majority in parliament, and a stronger opposition, the insurance theory arguably does not explain similar court curbing behavior taken by Law and Justice (PiS) in Poland since their ascendance to power in late 2015.³⁴

Similar explanations also have been used to show how the political uncertainty arising from political competition can lead to the creation of constitutional review powers for the judiciary. Examining 204 countries, Ginsburg and Versteeg find that electoral competition between the two main parties is a primary contributor to the adoption of constitutional review over time.³⁵ Ran Hirschl uses a similar theory to show how new competition within political systems previously dominated by one party also can lead established regimes to adopt judicial review.³⁶ Country-based investigation has found that the insurance theory largely explains the establishment of judicial independence rules and expansion of judicial review powers in Mexico, and at least partly accounts for the motivations and actions of Italian parties during the creation and implementation of the Italian Constitutional Court.³⁷

However, other research has questioned the positive relationship between political competition and the creation of rules favoring strong courts. In unconsolidated democracies, political competition may have no effect – or even a negative effect – on judicial independence. With potentially large costs in giving up power to often-mistrusted opponents, there may be incentives for incumbents to pressure courts to rule in their favor. In Ukraine, increased electoral competition has been shown to increase the pressure placed on courts by political actors, decreasing judicial

³⁴ For a possible explanation, see Benjamin Bricker, 'Do Competitive Political Environments Always Lead to Judicial Empowerment?' (2017) Working Paper (unpublished manuscript).

³⁵ Ginsburg and Versteeg (n 4).

³⁶ Ran Hirschl, 'The Nordic Counternarrative' (2011) 9 I-CON 449; Hirschl, *Towards Juristocracy* (n 1).

³⁷ Volcansek (n 1); Jodi Finkel, 'Judicial Reform as Insurance Policy: Mexico in the 1990s' (2005) 46 *Latin American Politics & Society* 87.

independence in practice.³⁸ Similarly, Alexei Trochev found that the creation of sub-national constitutional courts in 1990s Russia was limited to regions in which local governors faced little to no political competition.³⁹ Rather than creating courts to hedge against political competition, local governors instead appeared to create these regional courts to consolidate their own power. Examining a large number of countries, Aydin finds the validity of the insurance or electoral market theory of judicial independence to be dependent on the level of democratization.⁴⁰ Notably, she concludes that high levels of political competition do not necessarily lead to increases in judicial independence in unconsolidated democracies, though this relationship is seen in advanced democracies.

While many scholars have examined the effects of party competition, few have examined the potential influence of polarized political systems. Hayo and Voigt studied the effects of socio-economic and linguistic fractionalization on judicial independence in a cross-national study of 39 countries, finding that countries dominated by large urban centers are less likely to adopt strong judicial independence protections. However, they do not directly examine polarization in the political arena.⁴¹ In fact, Hanssen's study of state courts in the United States is one of the only previous works to examine whether policy differences can affect judicial independence rules.⁴² Using the national voting records of members of Congress, Hanssen finds that greater within-state policy differences (ie, greater polarization) among Democrats and Republicans elected to represent their respective states in the US Congress is associated positively with the use of the Missouri Plan, a non-partisan selection and retention plan for state supreme court

³⁸ Maria Popova, 'Political Competition as an Obstacle to Judicial Independence: Evidence from Russia and Ukraine' (2010) 43 *Comparative Political Studies* 1202, 1205.

³⁹ Alexei Trochev, 'Less Democracy, More Courts: A Puzzle of Judicial Review in Russia' (2004) 38 *Law & Society Review* 513.

⁴⁰ Aylin Aydin, 'Judicial Independence Across Democratic Regimes: Understanding the Varying Impact of Political Competition' (2013) 47 *Law & Society Review* 105.

⁴¹ Bernd Hayo and Stefan Voigt, 'Mapping Constitutionally Safeguarded Judicial Independence' (2014) 11 *Journal of Empirical Legal Studies* 139.

⁴² Andrew Hanssen, 'Is There a Politically Optimal Level of Judicial Independence?' (2004) 94 *American Economic Review* 712, 717.

appointments that, some contend, leads to greater judicial independence. Yet the Missouri Plan still involves an election to retain office, and not all scholars agree that the Missouri Plan necessarily leads to greater independence. Instead, it may simply trade one problem for another, establishing independence from politicians at the cost of dependence on majority electoral approval for judicial decisions. Though initially appointed to office by the state's governor (who generally works in conjunction with an independent selection committee to make the appointment), Missouri Plan judges are still subject to a public vote on whether to retain them in office, often after only a few years in office. Canes-Wrone, Clark, and Park found that Missouri Plan judges were particularly likely to respond to public opinion on 'hot-button' issues, possibly because of the need to gain future electoral approval.⁴³ These findings call into question whether the Missouri Plan of appointment followed by electoral 'retention' truly is independence enhancing.

The varying conclusions seen above leave questions regarding the exact effect that party competition has on the establishment of real judicial power and judicial independence protections. Still, despite these divergent findings in the existing literature, it nevertheless seems intuitive that some aspect of political competition should be related to the establishment of powerful courts with at least some amount of judicial independence. I expand on this thought in the next section, outlining how the extent of party polarization within countries can help to explain the development of judicial review and strong judicial independence rules.

IV. PARTY POLARIZATION AND THE DEVELOPMENT OF JUDICIAL INDEPENDENCE

In essence, works gathered or subsumed under the 'insurance' or 'electoral market' theory umbrella have established two different tracks with two distinct outcomes: one in which minimal party competition leads to minimal judicial independence guarantees, the other in which robust party competition leads to the establishment of strong judicial review and judicial

⁴³ Brandice Canes-Wrone, Tom Clark, and Jee-Kwang Park, 'Judicial Independence and Retention Elections' (2012) 28 *Journal of Law, Economics & Organization* 211.

independence rules. Certainly, when one party or faction believes it will be politically dominant, there is little reason to believe it will seek to constrain its own governing power. Whether in party systems or in international relations, unipolarity generally results in the creation of rules favoring the interests of that actor.

However, given the range of empirical findings, the second outcome – that of greater judicial powers in response to anticipated party competition – may require greater specification. Rather than the basic presence of competition among parties, the true driving force behind the creation of strong and independent judiciaries could be the *extremity* of political differences between these politically viable groups. Specifically, the *polarization* of the party system should have an effect on the power and independence provided to courts, with greater polarization leading to greater power and independence provided to courts.

Why should one focus on the more specific concept of party polarization, rather than the broader notion of party competition as the driver of judicial power? In short, a greater extremity of differences between political parties should lead actors in those parties to realize the governance-enhancing and problem-solving benefits that come from establishing a third-party arbitrator of disputes over the constitutional text. And even though it is true that polarized and competitive political systems share some similarities, they are also quite distinct in many ways. Political systems with greater polarization are defined by large ideological divisions between major groups or parties in the system, with major parties being significant in size and having high within-group homogeneity.⁴⁴ These characteristics are thought by many scholars to produce particularly acrimonious political dialogues.⁴⁵ By contrast, competitive party systems do not require stark intergroup differences, merely a plurality of political parties – in other words, a system in which more than one party has a legitimate shot of being in government. In fact, it would be easy to imagine a highly competitive system in which parties compete among one another for voters – particularly parties close to one another on the political spectrum, a point noted by Esteban and Schneider.⁴⁶

⁴⁴ Rehm and Reilly (n 11).

⁴⁵ Dalton (n 7); Sartori (n 6).

⁴⁶ Esteban and Schneider (n 12) 134.

In a competitive party system that lacks strong antipathy or distance among parties, political actors might believe that conflicts within the political arena could be arbitrated within the legislature, and thus not feel the need to create a strong and independent outside body to adjudicate disputes. The same cannot be said for polarized party systems, where hostility for opposing groups is commonplace. However, as explained in detail below, this antipathy and mistrust between competing parties and groups could actually spur the provision of constitutional review powers and durable independence protections that will allow courts to act as both a problem solver and as a strong, governance-enhancing arbitrator.

1. The Governance-Enhancing Aspects of Judicial Independence in Polarized Systems

Polarized party systems are defined by the large ideological divisions that separate parties. As a result, the potential policy implications from changes in government should similarly be more pronounced. Sartori found these ideological differences, and the swings in policy that can accompany them, potentially threatening to the integrity of the democratic system.⁴⁷ To solve this problem, parties or factions seeking a lasting political system have incentives to create minoritarian institutions, such as courts with judicial review powers. Courts can essentially act as third-party arbitrators between rival factions, providing re-enforcement of systemic political weaknesses as well as incentives for parties (and political and social interest groups) out of power to not abandon the political system. To prevent co-option by any one political group, all parties have an additional incentive to provide this third-party arbitrator (the court) with sufficient power and sufficient independence to act as a credible intermediary between political factions.

Past scholarship has long emphasized the benefits of powerful courts in divided societies. For Cass Sunstein, the creation of a strong and independent judiciary can serve as way to offset the natural tension that exists within a polarized political system.⁴⁸ Sartori concluded that 'polarized pluralist' systems can only endure if the centrifugal tactics of electoral competition taking place in these systems are 'lessened, or eventually counteracted in ...

⁴⁷ Sartori (n 6).

⁴⁸ Cass Sunstein, 'On Property and Constitutionalism' (1993) 14 *Cardozo Law Review* 922.

other arenas' within society or government.⁴⁹ Though Sartori does not explicitly state what these other arenas are, courts are increasingly touted as forums to de-politicize these intractable social battles. This is not to say that the search for political advantage is non-existent in the development of high courts: parties can also attempt to create rules that favor their own ability to appoint preferred actors to the courts, for example. And by providing independence to the court of constitutional review, parties also open up the possibility of increased judicial activism – activism that can potentially work against any given political party's interests. At the same time, the participation of political actors in some appointment systems is not absolute: some countries allow the judiciary itself, or a judicial council, to play a role in high court appointments. For example, the Italian judiciary elects five of the 15 judges on the Italian Constitutional Court, and the Latvian Supreme Court elects two of the seven justices on the Latvian Constitutional Court. Later in the article I examine whether the actors involved in apex court appointments could influence the independence that courts receive.⁵⁰ However, the creation of institutional arrangements, such as independent courts with judicial review powers, should also serve as a method for opposing groups to strengthen the long-term viability of the political system.

2. The Problem-Solving Benefits of Independent Courts to Polarized Party Systems

The more extensive differences between parties in polarized societies provide a second reason to expect stronger judicial powers in polarized party systems. Though these societies should be able to agree on the broad rules of

⁴⁹ Sartori (n 6) 145.

⁵⁰ The importance of appointment rules shows how meaningful high courts have become to governing today. The search for advantage in this process can be seen prominently today in Poland and the United States. To mediate the role of politics, some countries turn to non-partisan judicial councils to select their career judiciary, while others emphasize the role of political actors (see Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2012) 57 *American Journal of Comparative Law* 201). In statistical testing later in the article, I include the number of actors involved in appointing supreme court or constitutional court judges as a potential factor explaining the commitment to judicial independence. See parts V and VI. In some countries, the judiciary, or a judicial council, is one of the actors involved in appointing constitutional judges.

government and institutions, greater polarization should make it less likely that the competing parties in these societies will be able to agree to key, specific details in any governing agreement. Thus, a constitution, a set of organic laws, or even a commercial code should be more likely to end up underspecified, and in need of future elaboration and adjudication. While all constitutions are in some ways incomplete contracts, polarized societies should be particularly less able to resolve key constitutional provisions with specific statements of policy or belief, and thus more likely to need a third party to adjudicate future problems.

At the same time, the legislative outputs from a polarized parliament are more likely to be displeasing to some significant portion of voters. However, as Georg Vanberg has shown through formal models of court-legislative behavior, the presence of a potential check from judges exercising constitutional review should force parliamentary majorities to move toward a more centrist position that will not be overturned by the high court.⁵¹ Similar to Vanberg, Alec Stone Sweet uses specific examples from Spain, France, Germany, and Italy to show that successfully contesting legislation at the constitutional court can force otherwise intransigent governing parties or coalitions to moderate their legislative output.⁵² Such exercises in moderation should have particular benefits to polarized political systems, where the pull of major parties toward the left-right ideological poles potentially threatens the democratic order.⁵³ Similarly, when discussing reasons why constitutional designers choose to establish strong court systems, Jon Elster notes the potential benefits from being able to 'dump a problem on the [...] Constitutional Court, [rather] than to try to resolve it immediately.'⁵⁴ For politicians in polarized societies, there may be no choice but to pass off unsolvable issues to the courts.

⁵¹ Georg Vanberg, 'Abstract Judicial Review, Legislative Bargaining, and Policy Compromise' (1998) 10 *Journal of Theoretical Politics* 299.

⁵² Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000).

⁵³ Sartori (n 6).

⁵⁴ Jon Elster, 'Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea' (1993) 71 *Public Administration* 169, 192.

The ability of independent courts to solve problems and moderate the behavior of distrustful actors also fits well with existing theories of agency and central bank independence. Jeong et al. find that political compromise among disparate, competing groups largely explains the institutional independence given to the US Federal Reserve System.⁵⁵ Competing interests, both in and out of the legislature, sought to check one another through the rules of the proposed Federal Reserve System; the result of this distrust was a compromise to create an independent organizational structure. Similarly, Terry Moe concludes that the uncertainty from competitive political systems contributes to the creation of independent agencies that protect the main political groups from the 'dangers of democracy' – notably, from being out of power and thus unable to shape the legislative agenda.⁵⁶

Finally, it is worth noting that the very nature of polarized party systems means they are almost assured of being among those seeking through judicial review the political 'insurance' that is the hallmark of party competition theories. As noted earlier, polarized systems require more than one viable political party, with those parties being located far apart on a left-right scale. Thus, the greater independence given to some courts, which may at first glance be viewed as an issue of party *competition* or fractionalization, could instead be a product of party *polarization*.

In short, the establishment of judicial review powers and strong judicial independence rules should involve not just a prevalence of parties, but also the presence of serious debates and divisions within society such that parties will believe it in their respective interests to establish a strong and independent court that can both regulate policy and provide the possibility of future (or current) checks on the power of political opponents. Thus, it is reasonable to predict that when there is greater polarization in the party system at the time when judicial review is adopted, we will also see the adoption of greater formal independence for high court judges.

⁵⁵ Jeong et al (n 3).

⁵⁶ Moe (n 3) 275. However, Moe does not find many positive consequences from agency independence.

V. RESEARCH DESIGN, DATA, AND VARIABLES

To examine whether polarization of the political system contributes, first, to the adoption of judicial review and, second, to greater independence for judges, I employ two strategies. First, I use longitudinal data from 38 countries to see whether polarization over time is associated with the decision to adopt judicial review.⁵⁷ Second, I examine nearly all of those same countries at the time judicial review is adopted to answer a related question: is the adoption of judicial review also associated with greater formal protections given to the judiciary?

Thus, this article examines two questions: to what degree does polarization lead to the adoption of judicial review, and to what degree does it lead to the adoption of strong judicial independence rules. To avoid the problem of selection bias in answering the first question, countries included in this study were not selected based on whether they had adopted judicial review. Instead, selection is based on the availability of data – particularly, data on the party system within each country over a long period of time. As a practical reality, though, nearly all of the countries observed in this study (though not all) eventually do adopt some form of judicial review. As explained in detail below, I use the Manifesto Project's data on political parties because, with data going back to 1945, it covers the longest time period of any database on electoral parties.

However, the presence and timing of judicial review is crucial to answer the second question on the adoption of judicial independence protections, as the decision to create judicial review provides the necessary precondition for courts to potentially overturn legislative acts. With only statutory interpretation powers, courts do not have the final word on policy or on legal interpretation: legislatures could always modify any judicial interpretation of statutes by re-writing or amending the laws. By creating judicial review political actors limit themselves in a very real sense, which makes the independence protection they afford to courts a critical question. Thus, for this second question I examine only those countries that have adopted judicial review.

⁵⁷ See appendix 3 for the list of countries.

I measure *party polarization* using the Manifesto Project's (MP) left-right party scores. The Manifesto Project is a longstanding, comprehensive effort by political scientists to collect all party statements and policy positions from official party manifestos, or platforms, and use them to create numerical left-right scores for every party competing in national elections. Currently, their database covers party preferences for over 1,000 parties in over 50 countries. Combined with its extensive coverage period, Manifesto Project scores are ideal for observing the presence and extent of polarization across multiple countries over time. However, several countries with current MP data and judicial review powers had to be excluded from study because the adoption of judicial review occurred before MP data begins. Australia, Norway, Brazil, Argentina, Mexico, Denmark, and the United States all initiated judicial review well before accurate MP party data is available, and thus were excluded from the study.⁵⁸ Appendix 3 lists the countries included in the study.⁵⁹

1. Dependent Variables

To examine the onset of judicial review, I created a dichotomous variable that captures the year in which judicial review was adopted in each country.⁶⁰ With my party polarization measure based on Manifesto Project data, I am able to track the onset of judicial review as far back as their data allows me – generally, the first post-World War II election. Similar to the approach used

⁵⁸ Ginsburg and Versteeg (n 4) conclude Denmark does not have judicial review, likely due to the Danish Supreme Court's historical reticence to use its power. See also Jens Rytter and Marlene Wind, 'In Need of Jurisotcracy? The Silence of Denmark in the Development of European Legal Norms' (2011) 9 I-CON 470, 474.

⁵⁹ Greece is included in the study, though its unique constitutional court appointment structure could result in its exclusion. Judges on both the Court of Cassation and Council of State (who have life tenure) are selected randomly to serve two-year terms on the Supreme Special Court, which hears final constitutional claims (see Epaminondas Spiliotopoulos, 'Judicial Review of Legislative Acts in Greece' (1983) 56 Temple Law Quarterly 463). Thus, the judges on Greece's constitutional court could be considered to have two-year terms, or life terms. In line with Ginsburg (n 1), I chose to code the Greek constitutional court judges as holding two-year terms, a much harder test for my hypotheses.

⁶⁰ As noted in footnote 5, I define judicial review as the establishment of a court with the power to interpret the constitution and potentially hold other governmental actors accountable under the constitution.

by Ginsburg and Versteeg, observations from that country disappear from the dataset once judicial review is established.

To examine the strength of judicial independence rules, I use two common measures that indicate a commitment to judicial independence. The first is an additive judicial independence index created by Feld and Voigt.⁶¹ That index consists of 12 factors that should promote greater judicial independence, including term lengths, salary guarantees, salary adequateness, reappointment possibilities, judicial review powers, publishing powers, and ease of constitutional amendment.⁶² Their analysis included 71 countries, 31 of which overlap with the countries included in this study. I was able to complete Feld and Voigt scores for the six remaining countries by following the basic coding scheme set out in their paper. Though this index is commonly used for testing purposes, the Feld and Voigt index also has been criticized for its measurement strategy. Rather than 12 concepts affecting judicial independence equally, it is possible that a much smaller, core set of variables best captures the credibility of judicial independence rules.⁶³ An additional concern comes from the fact that Feld and Voigt's data are based on contemporary (as of 2003) observations of judicial independence institutions, though later studies indicate that constitutional change in any one of these variables is extremely rare.⁶⁴

Because this study examines whether there is any link between the party system (specifically, party polarization) and the creation or ratification of judicial independence rules at the time the power of judicial review is

⁶¹ Lars Feld and Stefan Voigt, 'Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators' (2003) 19 *European Journal of Political Economy* 497.

⁶² The 12 factors are: (1) court powers specified in constitution; (2) ease of amendment to constitution; (3) appointments to court; (4) judicial tenure; (5) judicial removal procedures; (6) judicial re-appointment possibility; (7) salary guarantees; (8) adequate court pay compared to legal peers; (9) ability to access court; (10) case allocation rules; (11) constitutional review powers; (12) courts publish decisions.

⁶³ Eg Melton and Ginsburg (n 20); Ginsburg (n 1); Raphael La Porta, Florencio Lopez-de-Silanes, Cristian Pop-Eleches, and Andrei Shleifer, 'Judicial Checks and Balances' (2004) 112 *Journal of Political Economy* 445. All of these works use between one to six core variables to measure judicial independence.

⁶⁴ Hayo and Voigt (n 41).

established, I use as a second dependent variable the term length given to judges on the final court of constitutional review when judicial review was established.⁶⁵ Term lengths, the only common variable within the previous studies of *de jure* judicial independence mentioned above, should provide a strong indication of commitment on the part of political actors to judicial independence. Longer term lengths signal to judges that they will not be punished with loss of office by the current government for decisions made while on the court. Longer term lengths also help to avoid career-based independence pressures, notably the concern that departing high court judges would need to curry favor with the current government to advance their post-court career plans.⁶⁶ Similarly, as Geyh and Ginsburg both note, shorter term lengths allow current legislative majorities a greater ability to punish judges who rule against their interests.⁶⁷

Though life tenure is often granted to judges, many countries also mandate retirement ages, typically at 65 to 70 years of age. Thus, 'life tenure' is often much shorter than initially assumed. Because of this caveat, Ginsburg makes the assumption for testing purposes that life tenure equals the longest fixed term in his dataset.⁶⁸ My own testing will consider life tenure in two ways. First, in line with Ginsburg's previous work, I will measure life tenure as one year longer than the longest fixed term in my dataset set – in this case 16 years (15 years is the longest fixed term in my dataset). Thus, the outcome I am examining ultimately is a count of the number of years in the terms given to

⁶⁵ Using data from Zackary Elkins, Tom Ginsburg, and James Melton, *Comparative Constitutions Project* (2015) <<http://www.comparativeconstitutionsproject.org>> accessed 21 September 2016; Ginsburg (n 1); Robert Maddex, *Constitutions of the World* (CQ Press 1995).

⁶⁶ Eg Benjamin Bricker, *Visions of Judicial Review* (ECPR Press 2016); Lucia Pellegrina and Nuno Garoupa, 'Choosing Between the Government and the Regions: An Empirical Analysis of the Italian Constitutional Court Decisions' (2013) 52 *European Journal of Political Research* 1.

⁶⁷ Geyh (n 22); Ginsburg (n 1). O'Brien and Okhoshi (n 20) also discuss the importance of tenure in the context of the Japanese judiciary, though its importance to independence can be seen as far back as 1600s England (see Douglass North and Barry Weingast, 'Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England' (1989) 49 *Journal of Economic History* 803).

⁶⁸ Ginsburg (n 1).

constitutional judges that is 'top-censored' (that is, limited at the maximum number of years granted to judges), which calls for the use of a negative binomial model.⁶⁹ The negative binomial model is a commonly-used generalized linear model that provides accurate parameter estimates when the dependent variable is a count⁷⁰ and the data is overdispersed – that is, where the conditional variance exceeds the conditional mean, as occurs here.⁷¹

I have also created a second operationalization of the dependent variable in which judicial tenure is indexed into four groups, with life tenure receiving the highest score ('4'), tenures between 10 and 15 years receiving a score of '3,' tenures between seven and nine years a score of '2,' and tenures of one to six years receiving the lowest score ('1'). This second operationalization requires an ordered logit model to be used, as the response variable is categorical, contains more than two response categories, and can be ordered. Both the negative binomial and the ordered logit model are specific iterations of what is referred to as a 'generalized linear model,' or GLM. GLMs are a class of regression models that can be used when the classical Ordinary Least Squares

⁶⁹ In Appendix 2, I report the results of tests using Ordinary Least Squares (OLS) regression in place of negative binomial regression. Substantive results do not change using OLS.

⁷⁰ In classical statistical terms, the count refers to the number of times some phenomenon occurs. This can include the number of wars that occur over a time period or the number of days until an event occurs, such as the number of days it takes to sign a contract.

⁷¹ Variance represents the expectation of how far apart a random data point will be from the mean. In statistics, variance is measured by squaring the standard deviation. Here, the variance of tenure is 16.1 and the mean is 11.2. The negative binomial is appropriate in these circumstances, as it is essentially an extension of a Poisson model that allows for greater variance. In the negative binomial, the dependent variable count is assumed to follow a Poisson distribution while the variation in the mean follows a gamma distribution – thus the observed dependent variable is assumed to mix the Poisson and gamma distributions. The count is assumed to be a random variable, which makes it particularly well suited to examining heterogeneous data – for example, data from multiple countries. See Gary King, 'Variance Specification in Event Count Models: From Restrictive Assumptions to a Generalized Estimator' (1989) 33 *American Journal of Political Science* 762, 767-68; Michael Finkelstein and Bruce Levin, *Statistics for Lawyers* (Springer 2015).

(OLS) linear regression model is not appropriate. Specifically, GLMs can be used when certain OLS assumptions do not hold, including the assumption of a linear relationship between outcome and predictor variables and the assumption that data is normally distributed. Relatedly, with some data OLS regression may not be the most efficient – that is, the OLS estimator may not provide the lowest variance. Count data is one instance in which OLS is not the most efficient estimator. GLMs are most often used for binary data, count data, and ordered responses, and use a link function to linearize the relationship between the predictor variables and the response.

The use of either model is based on the type of outcome that is analyzed. The ordered logit is most appropriate for *categories* of outcomes, with the values within the categories having a true sequential order from low to high. Examples in which the ordered logit should be used include the level of happiness reported by individuals in a survey (low, medium, high), or bond ratings (A, AA, AAA).⁷² The negative binomial is most appropriate when the outcome is a count of some phenomenon, including the number of wars fought by a country, the number of years given to judicial terms, or the number of days it takes to sign a contract, and the data is overdispersed.⁷³

2. Independent Variable

For both sets of tests, the main *independent variable* is the left-right *party system polarization* score for each country in the election year immediately preceding, or closest to, the establishment of judicial review. As noted earlier, to measure polarization I begin by using the statements on major issues that are contained in each political party's official manifesto, as collected by the Manifesto Project (MP).⁷⁴ After collecting each party's official statements,

⁷² Peter Kennedy, *A Guide to Econometrics* (Blackwell 2008), 258–60; Alan Agresti, *Foundations of Linear and Generalized Linear Models* (Wiley 2015), 202–06.

⁷³ Joseph Hilbe, *Negative Binomial Regression* (Cambridge University Press 2011); King (n 71); Agresti (n 72) 247.

⁷⁴ MP uses their data to create a general right-left score (called RILE), which is comprised of 26 issue dimensions, including social and economic issues. The issues used to create the left-right polarization score are: 104, 201, 203, 305, 401, 402, 407, 414, 505, 601, 603, 605, 606, 103, 105, 106, 107, 202, 403, 404, 406, 412, 413, 504, 506, 701. For complete descriptions of each issue, see Manifesto Project Database,

MP researchers then code those statements numerically to create a left-right score for each party competing in every national election. Listed in Appendix 4, the statements used to create the left-right score run the gamut from party views on global trade and labor protections to statements on socio-political issues like nationalism, social harmony, and imperialism. The left-right scores created by MP are then used in Russell Dalton's party polarization index formula to create the polarization score for each country.⁷⁵ Dalton's formula utilizes the summed total of each party's vote share multiplied by that party's left-right score minus the party system left-right score, measured as follows:

Party system polarization score =

$$\sqrt{\{\sum(\text{party vote share}_i) * ([\text{party}_i \text{ R/L score} - \text{party system avg. R/L score}] / 5)^2\}}$$

By multiplying each party's vote share in a given election by their numeric difference from the average party system left-right score in that same election, the equation allows us to numerically observe the extent of polarization in every election within each country. Larger numbers from the equation indicate higher levels of polarization and smaller numbers indicate less polarized party systems.

Other researchers have developed similar left-right scores for political parties, though for my research Manifesto Project scores are preferable to other party system measurements.⁷⁶ First, the MP data extends over a much longer time period – their quantitative data covers democratic elections since 1945.⁷⁷ This temporal element is particularly important for this study, in that

<<https://manifesto-project.wzb.eu>> accessed 21 September 2016. The issue categories are listed in Appendix 4.

⁷⁵ Dalton (n 7) 9.

⁷⁶ Prominent alternatives include the Comparative Study of Electoral Systems (CSES) and the Chapel Hill Expert Survey. See CSES, <<http://www.cses.org>> accessed 12 April 2017; Ryan Bakker and others, '2014 Chapel Hill Expert Survey' <chesdata.eu> accessed 12 April 2017.

⁷⁷ MP provides quantitative data analysis of elections since 1945. I do not expect any selection bias, or any correlation between the countries selected and party polarization as a result of this choice of data. In fact, the presence of competitive elections only makes successfully testing my theory more difficult. Andrea Volkens, Pola Lehmann, Theres Matthieß, Sven Regel, Nicolas Merz, and Annika

I seek to measure the positions of parties (and judicial independence rules) at the time judicial review was created. One prominent party scoring alternative, the Comparative Study of Electoral Systems (CSES), has relatively wide geographical coverage but is a relatively recent project: its coverage only goes back to 1996. Yet, virtually all of the countries studied here adopted judicial review previous to 1996. Similarly, another party placement estimator, the Chapel Hill Expert Survey, begins in 1999 – too late for the purposes of this project.⁷⁸

Second, the Manifesto Project's focus on political party statements should lead to more accurate placements. One questionable feature of citizen surveys is the ability of citizens to accurately place all relevant parties on a left-right continuum.⁷⁹ At the same time, some have criticized reliance on party manifesto statements, viewing them as posturing or position taking designed to appeal to the party's core supporters, but that have little chance of becoming governing policy. In one sense, this could detract from the reliability of MP scores. Yet, for this study such posturing should only highlight the underlying polarization of society.

The observations used for the establishment of judicial independence rules represent the time at which the latest democratic constitution was established. Thus, the establishment of judicial review is often roughly concurrent with the establishment of constitutional democracy. However, in some countries tenure and access rules had already been created previous to the establishment of judicial review. For example, in Sweden constitutional revisions in the 1970s gave courts judicial review powers, and in Finland major legislative revisions in 2000 also provided judicial review for the first time in that country's history.⁸⁰ Yet even in circumstances in which tenure rules had been established previous to the establishment of judicial review, the polarization of the legislature at the time judicial review is established should

Werner, *The Manifesto Data Collection* (Wissenschaftszentrum Berlin für Sozialforschung 2016).

⁷⁸ Marco Steenbergen and Gary Marks, 'Evaluating Expert Judgments' (2007) 46 *European Journal of Political Research* 347.

⁷⁹ G Bingham Powell, 'The Ideological Congruence Controversy: The Impact of Alternative Measures, Data, and Time Periods on the Effects of Election Rules' (2009) 42 *Comparative Political Studies* 1475, 1477.

⁸⁰ Hirschl, 'Nordic Counternarrative' (n 36) 450.

still matter. Notably, parliament, in introducing its new rules on judicial review, is free to take steps to alter the existing tenure of judges (as in the cases of Sweden in the 1970s, Canada in 1982, and Finland in 2000).

3. *Control Variables*

I include several control variables to account for other factors that could potentially influence the creation of (a) judicial review and (b) strong judicial independence rules. Regarding the establishment of judicial review, I largely follow the fixed effects variables used by Ginsburg and Versteeg in their own analysis of the decision to adopt judicial review.⁸¹ Specifically, I include their data for variables capturing whether (a) sharing a common history of legal origin (eg common law, civil law, or other tradition), (b) sharing a common religion, and (c) sharing common borders with other countries that adopted judicial review could contribute to the likelihood that a given country will adopt judicial review itself.⁸² I also use their over-time measure of party competition, which records the seat difference between the top two parties in parliament.

As with the adoption of judicial review, legal origins also could contribute to the differences seen among countries in the adoption of judicial independence rules, notably term lengths.⁸³ Common law systems often provide for life tenure. Conversely, civil law systems generally provide only limited terms for constitutional court judges. Thus, it may be expected that common law systems will exert a positive effect on judicial tenures and other independence rules, all else equal.

Additionally, the number of constitutional actors involved in the appointment and confirmation process could contribute to the formation of judicial independence rules. Shorter tenures and other limits on formal judicial independence may be particularly prevalent when one actor has sole discretion over appointments, as that actor holds sole power to alter the

⁸¹ Ginsburg and Versteeg (n 4).

⁸² Ginsburg and Versteeg differentiate between Christian denominations in their data. Their categorization includes Catholicism, Eastern Orthodox, Anglican, and Protestantism. Thus, despite the fact that most countries are Christian, there is significant variation among the countries included in the study.

⁸³ La Porta et al (n 63); Ginsburg (n 1).

composition of the court. Accordingly, the variable *Constitutional Appointers* tracks the number of actors or institutions given at least partial responsibility over high court appointments.

Finally, I account for the effect of political competition in the creation of judicial independence rules. Previous testing has operationalized party competition as differences between party vote or seat percentages.⁸⁴ I follow this strategy, measuring the variable *Party Competition* as the percentage vote difference between the top vote-getting parties in the election closest to the establishment of judicial review.

VI. RESULTS AND DISCUSSION

1. *The Decision to Establish Judicial Review*

The first set of tests examines to what extent party polarization affects the likelihood that countries will adopt judicial review. I examine every election held by 38 countries until the year in which constitutional judicial review is adopted.⁸⁵ Though the selection of cases was based on Manifesto Project data availability, all but one country in my dataset (the Netherlands) eventually did adopt some form of constitutional review procedure. Additionally, all observations of the rate of party polarization, party competition, and other variables are based on the data available in each election year until the year judicial review is adopted, after which the country disappears from the analysis.⁸⁶ Overall, a total of 109 election years are examined. Because the data can include multiple election years from one country, I use a logit model with robust standard errors clustered by country. The logit model is ideal for an outcome that is dichotomous. In this case, the outcome is whether a country adopts judicial review (1) or not (0) in a given year.

Examining the initial data on the adoption of judicial review, there is evidence that the level of party competition has a moderate influence on the likelihood that judicial review will be adopted, and no evidence that party

⁸⁴ Ginsburg (n 1); Popova (n 38); Ginsburg and Versteeg (n 4).

⁸⁵ South Korea is excluded from this first analysis due to the absence of needed control data on legal origin and common religion (see Ginsburg and Versteeg (n 4)).

⁸⁶ Because polarization is measured based on party electoral manifestos, polarization of the party system is measured in each election year.

polarization influences the decision to adopt judicial review. This largely confirms Ginsburg and Versteeg's conclusion regarding the important role of party competition in the development of judicial review, though it should be noted that party competition reaches only a modest level of statistical significance (the 0.10 level). This somewhat weak connection between party competition and the establishment of judicial review could be the result of the shorter time frame I consider: Ginsburg and Versteeg do not consider party polarization, and so are able to utilize a longer time period for their analysis (which begins in the 1790s).

Table 1. Logit estimates of the decision to adopt judicial review, by election.

	<u>Model 1</u>
<u>Constant</u>	<u>-63.97</u> <u>(40.18)</u>
<u>Party Polarization</u>	<u>0.01</u> <u>(0.14)</u>
<u>Party Competition</u>	<u>1.87*</u> <u>(1.00)</u>
<u>Legal Origin</u>	<u>2.61*</u> <u>(1.42)</u>
<u>Common Borders</u>	<u>-0.16</u> <u>(1.09)</u>
<u>Common Religion</u>	<u>2.09**</u> <u>(1.01)</u>
<u>Year adopted</u>	<u>0.03</u> <u>(0.02)</u>
<u>N</u>	<u>109</u>
<u>Wald χ^2</u>	<u>24.15**</u>
<u>Pseudo-R²</u>	<u>0.24</u>
<u>Log Likelihood</u>	<u>-52.70</u>
<u>AIC</u>	<u>119.39</u>

* $p \leq 0.10$, ** $p \leq 0.05$. Robust standard errors clustered by country are in parentheses. Results are two-tailed. Squaring the 'year adopted' variable does not change results significantly.

2. *The Establishment of Judicial Independence Rules*

Though polarization has a limited relationship to the establishment of judicial review, its role in the creation and maintenance of strong judicial independence protections appears quite strong, as seen in Table 2 below. To analyze the connection between polarization and the creation of judicial independence rules, I estimate regression models for the two main dependent variables of interest: the Feld and Voigt 12-part index of judicial

independence, and judicial term lengths. The first dependent variable in this study is the number of years granted to judges on courts of constitutional review, and is estimated using a negative binomial model. The second dependent variable is an indexed measure of tenure, and is estimated using an ordered logit model. The final dependent variable is the 12-part Feld and Voigt judicial independence index, which takes values distributed as a proportion between 0 and 1. Beta regression models are the most appropriate estimator for modeling continuous dependent variables, like percentages and proportions, that are distributed within the 0 to 1 interval.⁸⁷

From the first column of Table 2 (see Model 1), which presents the results of the negative binomial model, it is apparent that more polarized party systems exert a direct and significant effect on judicial independence protections. Notably, increased polarization leads to concomitant increases in the average term length given to high court judges. This remains true even when accounting for the effect of direct party competition, measured here as the difference between the vote percentages obtained by the first and second highest vote-getting parties.⁸⁸

Further, the effect of polarization is strong and significant even with the presence of additional controls for common law legal origin, the level of democracy within each country, and the number of different institutional actors involved in the selection of judges. Regression coefficients from a negative binomial model cannot be interpreted in the same way as an Ordinary Least Squares (OLS) model: notably, the coefficients do not show the effect of a one-unit change in a predictor variable on the outcome variable. However, the coefficients can be interpreted as the 'average response,' with the average response being one estimate of the marginal

⁸⁷ Silvia Ferrari and Francisco Cribari-Neto, 'Beta Regression for Modelling Rates and Proportions' (2004) 31 *Journal of Applied Statistics* 799. I also estimate this model using Ordinary Least Squares (OLS) regression. Results from OLS regression are substantively similar to the Beta regression model.

⁸⁸ The correlation between the Polarization variable and the Competition variable is minimal (correlation = 0.029), which suggests including both variables in one statistical test will not skew results. This also suggests that the two variables are capturing different aspects of the political world, and that the two concepts can meaningfully be separated out for analysis.

effect of a one-unit increase in the independent variable.⁸⁹ Using this average response, results from model 1 indicate that a country with high polarization will increase the average tenure of high courts by 1.1 years. For purposes of comparison, this average increase is similar to the result obtained using an OLS regression model (see Appendix 2).

⁸⁹ A Colin Cameron and Pravin Trivedi, 'Essentials of Count Data Regression' in Badi Baltagi (ed), *A Companion to Theoretical Econometrics* (Blackwell Press 2001) 334.

Table 2. Results: Adoption of Judicial Independence Rules.

	<u>Model 1</u> <u>(term length, years)</u>	<u>Model 2</u> <u>(terms, indexed)</u>	<u>Model 3</u> <u>(Feld-Voigt Index)</u>
<u>Party Polarization</u>	<u>0.12**</u> <u>(0.04)</u>	<u>0.81**</u> <u>(0.29)</u>	<u>0.18**</u> <u>(0.07)</u>
<u>Party Competition</u>	<u>-0.01**</u> <u>(0.00)</u>	<u>-0.06**</u> <u>(0.03)</u>	<u>0.00</u> <u>(0.01)</u>
<u>Common Law Origin</u>	<u>0.43**</u> <u>(0.17)</u>	<u>17.68</u> <u>(227.97)</u>	<u>0.04</u> <u>(0.32)</u>
<u>Constitutional Appointers</u>	<u>0.03</u> <u>(0.06)</u>	<u>0.12</u> <u>(0.38)</u>	
<u>Constant</u>	<u>2.12**</u> <u>(0.18)</u>		<u>0.18</u> <u>(0.22)</u>
<u>Log-Likelihood</u>	<u>-90.82</u>	<u>-36.06</u>	<u>25.70</u>
<u>AIC</u>	<u>199.55</u>	<u>85.54</u>	
<u>Likelihood Ratio χ^2</u>	<u>19.24**</u>	<u>20.55**</u>	
<u>Pseudo R²</u>	<u>0.10</u>	<u>0.22</u>	<u>0.16</u>
<u>Estimator</u>	<u>Negative Binomial</u>	<u>Ordered Logit</u>	<u>Beta</u>
<u>N</u>	<u>36</u>	<u>36</u>	<u>36</u>

* $p \leq 0.10$, ** $p \leq 0.05$. Standard errors are in parentheses. Results are two-tailed. The variables used in these tests do not suffer from problems of collinearity, or excessive covariance. A simple correlation tests finds only one pair of variables (common law origin and constitutional appointers at 0.37) has a correlation score above 0.15. A test to determine whether variables have equal means can be rejected at $p \leq 0.05$. Additionally, log-likelihood and AIC scores for all models are lower using the above models as compared to the null model. Luxembourg was removed from this analysis because the judiciary is solely responsible for appointments (Elkins et al (n 64)). However, results remain nearly identical with the inclusion of Luxembourg.

Perhaps most notable is the effect of polarization given the presence of a control for common law legal systems. Common law systems certainly have longer tenures, on average, than other legal systems, a finding that is in

accordance with previous research.⁹⁰ Yet, even accounting for this effect, countries with greater polarization at the time judicial review is established are given longer terms in office. Notably, no country with low polarization provides life tenure for courts of judicial review. Nor are the countries with life tenure exclusively common law systems: Austria, Belgium, Armenia, Estonia, and Turkey are some of the many countries providing judges with life tenure.

Table 2 also shows results of the ordered logit models using the four-part term length index (see Model 2). Results using this specification of the dependent variable are substantively similar to the first set of models: party polarization is associated with longer term lengths given to high court judges, even when accounting for numerous alternative explanations. One way of getting a better understanding of the coefficients from an ordered logit model is to examine predicted probabilities of the outcome (length of tenures) as party polarization increases. When polarization is at its mean level (2.8), the likelihood of adopting life tenure for courts of constitutional review is 63 percent. However, when polarization is high (a score of 4.1), the likelihood of adopting life tenure rises to over 82 percent. Conversely, when polarization decreases by one standard deviation (ie, when polarization falls from 2.8 to 1.5), the likelihood of adopting strong rules declines to under 39 percent. These dramatic differences in probability illustrate the strong role of party polarization at the time judicial independence rules are created.

Finally, I examine the effect of party polarization on the 12-part battery of judicial independence institutions described by Feld and Voigt.⁹¹ As shown in Model 3, polarization remains a strong predictor of this larger set of judicial independence rules.⁹² Due to potential endogeneity with the dependent variable, I exclude the number of constitutional appointers from the list of control variables in this test. Recall, however, that the Feld and Voigt index examines the existence of rules encouraging judicial independence as of 2003, which creates some temporal disconnect between my primary independent variable (party polarization at the time judicial review is established) and the

⁹⁰ Ginsburg (n 1); La Porta et al (n 63).

⁹¹ See n 61-62 for a full summary of the 12 factors in Feld and Voigt's index.

⁹² Regression diagnostics of the model's residuals suggest no change is needed to the model specifications.

outcome measured. However, given the difficulty of institutional change, recent research by Hayo and Voigt has shown there is a large amount of consistency over time in the judicial independence rules contained in the Feld and Voigt index.⁹³ In fact, they find 85 percent of constitutions never experience a single change in judicial independence rules after those rules were created. Thus, the results from this final test indicate the perpetuation of strong judicial independence rules in polarized party systems while also showing (albeit more imperfectly) a connection between polarized party systems and the creation of judicial independence rules.

In sum, the findings from all models in Table 2 provide strong corroboration for the idea that polarization among political parties drives the creation and maintenance of strong judicial independence rules. Parties in polarized systems should be more concerned than parties in non-polarized systems about the potential consequences of being out of power. To mitigate the effects of being out of power, parties in polarized political systems are more likely to adopt judicial review and agree to institutional rules that provide the judiciary with independence from other political actors – specifically, from current legislative majorities. The results also indicate that it may be necessary to re-think previous theories that focus exclusively on party competition as the driver of judicial independence particularly and the establishment of minoritarian institutions in general. Though party competition, broadly conceived, should matter to these decisions, the findings in this study show that the more complex concept of party *polarization* – the quality or depth of division between parties on a left-right scale – ultimately contributes most to the decision to create independent courts.

These results also have substantive significance for modern governance. They show that polarized party systems – those potentially in greatest need of institutional safeguards – may be able to devise rules that help protect the integrity of democratic institutions and the political process. Severe policy splits among the major parties are potentially destabilizing to government

⁹³ Hayo and Voigt (n 41) 188-89. Examining a 50-year period, their findings show that over 85 percent of all constitutions remain unchanged with regard to judicial independence rules. This is all the more remarkable when considering that there is 56 percent likelihood of political system breakdown.

performance, and polarization in the party system places those systems at the greatest risk for destabilization and poor governance outcomes.⁹⁴ Yet, independent courts can help to constrain such extreme position taking and encourage policy moderation – a statement that is all the more true at the highest court of constitutional review.⁹⁵ Similarly, independent courts can potentially punish recalcitrant officers in government, and can provide even a divided political system with a forum to legitimate government decisions. Yet, for these benefits to accrue political actors in those polarized systems must provide judges with the formal protections to encourage independence in thought and action. The results here suggest that political actors do provide courts with the independence to make government work.

VII. CONCLUSION

Developing the rule of law has become an important marker for good democratic performance, and independent judiciaries with the power to oversee the grand constitutional bargain are increasingly viewed as the most significant institutional check on parliamentary and governmental actions. Given the potentially important role courts can have in overseeing government and society, political actors certainly have incentives to restrict court power, but also to allow judicial power to grow. While most existing theory focuses on party competition generally to explain why politicians provide judicial power, the evidence presented here suggests it is the *extremity* of policy difference between parties – ie, the polarization within party systems – that is more strongly associated with the willingness of parties to establish and maintain strong rules of judicial independence. By focusing on polarization, this study does not intend to depreciate the importance of competition among parties. Without meaningful party competition, the need to establish strong judicial powers likely would not arise. And, in fact, party competition does best explain why different countries choose to adopt the institution of judicial review. Yet, in systems in which parties do compete for power, a richer characteristic – the polarization that exists among the parties – better explains the establishment of longer term lengths, which encourages strong court independence. Higher polarization at the time of

⁹⁴ Frye (n 19).

⁹⁵ Stone Sweet (n 52) 52; Landes and Posner (n 28).

adoption also encourages the perpetuation of strong independence rules, as seen through the Feld and Voigt index of judicial independence.

There are compelling reasons to believe that the polarization within political systems should lead to the development of strong checks on governmental power. The vast disparity of views within polarized systems may result in a greater need for a third-party actor to adjudicate disputes. Specifically, constitutional texts may be underspecified, and in need of judicial interpretation. Alternatively, legislation passed in parliament may be potentially threatening to the long-term functioning of the democratic system of government. Establishing a strong and independent court with the powers to adjudicate constitutional disputes can relieve some of the pressure polarized party systems place on the functioning of government.

At the same time, while the results presented here focus on judicial review powers and judicial independence, the ideas need not be limited to courts. This story could help us understand the establishment of and independence given to other non-majoritarian democratic institutions in government. A similar logic could apply to central bank independence. Jeong et al. find that the creators of the Federal Reserve System provided the bank with independence protections largely as a consequence of the competition and mistrust between the major competing interests seeking monetary policy reform – Wall Street bankers, rural farmers, populists, and small business owners.⁹⁶ This example suggests that the extent of partisan disagreement among political actors or interests could contribute to the desire of political actors to promote power and independence in other democratic institutions, as well.

Overall, this study demonstrates a clear relationship between polarized party systems and the development of strong judicial powers. The results indicate that parties in the legislature, or groups establishing a constitution, may recognize the potential need for third-party adjudication and respond to that need with appropriate institutions and rules. In this sense, the results shown here ultimately indicate something hopeful: that parties are able to correctly recognize and provide mechanisms to ease anticipated future problems in governing.

⁹⁶ Jeong et al (n 3).

Appendix 1. Descriptive Statistics. This table presents the descriptive statistics for the variables used in Tables 1 and 2.

<u>Variable</u>	<u>Mean</u>	<u>Maximum</u>	<u>Minimum</u>	<u>Std. Dev.</u>
<u>Polarization: Establishment of Judicial Independence</u>	<u>2.81</u>	<u>5.36</u>	<u>0.57</u>	<u>1.27</u>
<u>Polarization: Establishment of Judicial Review</u>	<u>3.69</u>	<u>8.64</u>	<u>0.04</u>	<u>1.76</u>
<u>Common Law</u>	<u>0.10</u>	<u>1</u>	<u>0</u>	<u>0.31</u>
<u>Const. Appointers</u>	<u>2.13</u>	<u>4</u>	<u>1</u>	<u>0.96</u>
<u>Tenure</u>	<u>11.35</u>	<u>16</u>	<u>2</u>	<u>4.01</u>
<u>Party Competition</u>	<u>15.18</u>	<u>59.0</u>	<u>0.3</u>	<u>12.85</u>
<u>Feld-Voigt Index</u>	<u>0.66</u>	<u>0.89</u>	<u>0.39</u>	<u>0.13</u>
<u>Legal Origin</u>	<u>0.48</u>	<u>0.80</u>	<u>0</u>	<u>0.31</u>
<u>Common Borders</u>	<u>0.46</u>	<u>1</u>	<u>0</u>	<u>0.39</u>
<u>Common Religion</u>	<u>0.40</u>	<u>0.96</u>	<u>0</u>	<u>0.40</u>

Appendix 2: OLS Regression results.

<u>Model</u>	<u>Model 1</u> (term length, years)	<u>Model 2</u> (term length, indexed)	<u>Model 3</u> (Feld-Voigt Index)
<u>Party Polarization</u>	1.28** (0.42)	0.37** (0.11)	0.04** (0.02)
<u>Party Competition</u>	-0.10** (0.04)	-0.03** (0.01)	-0.00 (0.00)
<u>Common Law Origin</u>	5.35** (2.08)	1.38** (0.58)	0.04 (0.08)
<u>Constitutional Appointers</u>	0.34 (0.60)	0.04 (0.16)	
<u>Constant</u>	7.76** (1.93)	1.81** (0.53)	0.51** (0.08)
<u>R²</u>	0.44	0.44	0.18
<u>N</u>	36	36	36

Note: ** $p \leq 0.05$. Standard errors are in parentheses.

Appendix 3. Countries Studied

Albania	Latvia
Armenia	Lithuania
Austria	Luxembourg
Belgium	Macedonia
Bulgaria	Moldova
Canada	Montenegro
Croatia	The Netherlands
Czech Republic	Poland
Estonia	Portugal
Finland	Romania
France	Russia
Georgia	South Korea
Germany	Serbia
Greece	Slovakia
Hungary	Slovenia
Ireland	Spain
Israel	Sweden
Italy	Turkey
Japan	Ukraine

Appendix 4. Categories used to create the Manifesto Project left-right score (used to create the party polarization index).

- 103: Anti-Imperialism
- 104: Military: Positive
- 105: Military: Negative
- 106: Peace
- 107: Internationalism: Positive
- 201: Freedom and Human Rights
- 202: Democracy: Favorable
- 203: Constitutionalism: Positive
- 305: Political Authority
- 401: Free Enterprise
- 402: Economic Incentives
- 403: Market Regulation
- 404: Economic Planning
- 406: Protectionism: Positive
- 407: Protectionism: Negative
- 412: Controlled Economy
- 413: Nationalism
- 414: Economic Orthodoxy
- 504: Welfare State Expansion
- 505: Welfare State Limitation
- 506: Education Expansion
- 601: National Way of Life: Positive
- 603: Traditional Morality: Positive
- 605: Law and Order
- 606: Social Harmony
- 701: Labor Groups: Positive

Appendix 5. Data used for Table 2.

Country	Adopted Jud. Rev.	Tenure	Tenure index	Appointer s	Civ. law	Com. law	Party Polarization	Party Competition
<u>Albania</u>	<u>1991</u>	<u>9</u>	<u>2</u>	<u>2</u>	<u>0</u>	<u>0</u>	<u>1.22</u>	<u>27.1</u>
<u>Armenia</u>	<u>1997</u>	<u>16</u>	<u>4</u>	<u>2</u>	<u>0</u>	<u>0</u>	<u>3.20</u>	<u>25.8</u>
<u>Austria</u>	<u>1945</u>	<u>16</u>	<u>4</u>	<u>4</u>	<u>1</u>	<u>0</u>	<u>4.20</u>	<u>5.2</u>
<u>Belgium</u>	<u>1980</u>	<u>16</u>	<u>4</u>	<u>2</u>	<u>1</u>	<u>0</u>	<u>2.82</u>	<u>6.6</u>
<u>Bulgaria</u>	<u>1991</u>	<u>9</u>	<u>2</u>	<u>3</u>	<u>0</u>	<u>0</u>	<u>0.57</u>	<u>1.3</u>
<u>Canada</u>	<u>1982</u>	<u>16</u>	<u>4</u>	<u>1</u>	<u>0</u>	<u>1</u>	<u>2.75</u>	<u>18.1</u>
<u>Croatia</u>	<u>1990</u>	<u>8</u>	<u>2</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>1.27</u>	<u>12.1</u>
<u>Czech Rep.</u>	<u>1993</u>	<u>10</u>	<u>3</u>	<u>3</u>	<u>1</u>	<u>0</u>	<u>1.51</u>	<u>3.2</u>
<u>Estonia</u>	<u>1991</u>	<u>16</u>	<u>4</u>	<u>1</u>	<u>0</u>	<u>0</u>	<u>3.92</u>	<u>8.4</u>
<u>Finland</u>	<u>2000</u>	<u>16</u>	<u>4</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>3.83</u>	<u>0.5</u>
<u>France</u>	<u>1958</u>	<u>9</u>	<u>2</u>	<u>3</u>	<u>1</u>	<u>0</u>	<u>5.18</u>	<u>10.9</u>
<u>Georgia</u>	<u>1995</u>	<u>10</u>	<u>3</u>	<u>3</u>	<u>0</u>	<u>0</u>	<u>1.94</u>	<u>16.8</u>
<u>Germany</u>	<u>1949</u>	<u>12</u>	<u>3</u>	<u>2</u>	<u>1</u>	<u>0</u>	<u>3.52</u>	<u>4.0</u>
<u>Greece</u>	<u>1974</u>	<u>2</u>	<u>1</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>3.45</u>	<u>34.3</u>
<u>Hungary</u>	<u>1989</u>	<u>9</u>	<u>2</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>1.46</u>	<u>3.3</u>
<u>Ireland</u>	<u>1945</u>	<u>16</u>	<u>4</u>	<u>1</u>	<u>0</u>	<u>1</u>	<u>4.96</u>	<u>28.4</u>
<u>Israel</u>	<u>1992</u>	<u>16</u>	<u>4</u>	<u>3</u>	<u>0</u>	<u>0</u>	<u>5.06</u>	<u>9.8</u>
<u>Italy</u>	<u>1948</u>	<u>12</u>	<u>2</u>	<u>3</u>	<u>1</u>	<u>0</u>	<u>3.21</u>	<u>17.5</u>
<u>Japan</u>	<u>1947</u>	<u>16</u>	<u>4</u>	<u>1</u>	<u>0</u>	<u>1</u>	<u>2.32</u>	<u>5.1</u>
<u>Latvia</u>	<u>1996</u>	<u>10</u>	<u>3</u>	<u>3</u>	<u>0</u>	<u>0</u>	<u>4.20</u>	<u>3.1</u>
<u>Lithuania</u>	<u>1993</u>	<u>9</u>	<u>2</u>	<u>3</u>	<u>0</u>	<u>0</u>	<u>2.52</u>	<u>22.8</u>
<u>Macedonia</u>	<u>1992</u>	<u>9</u>	<u>2</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>1.31</u>	<u>5.8</u>
<u>Moldova</u>	<u>1994</u>	<u>6</u>	<u>1</u>	<u>3</u>	<u>0</u>	<u>0</u>	<u>1.21</u>	<u>21.1</u>
<u>Montenegro</u>	<u>2007</u>	<u>9</u>	<u>2</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>3.16</u>	<u>6.8</u>
<u>Poland</u>	<u>1992</u>	<u>8</u>	<u>2</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>3.09</u>	<u>0.3</u>

Portugal	1982	6	1	2	1	0	2.29	18.2
Romania	1991	6	1	3	1	0	2.96	59
Russia	1990	16	4	2	0	0	5.36	7.4
S. Korea	1988	6	1	3	1	0	1.60	10.0
Serbia	2006	9	2	3	1	0	1.65	52.0
Slovakia	1993	9	2	2	1	0	1.34	22.6
Slovenia	1992	9	2	2	1	0	3.77	9.3
Spain	1978	9	2	4	1	0	2.18	5.1
Sweden	1979	16	4	1	1	0	3.65	18.6
Turkey	1961	16	4	3	1	0	2.21	2.0
Ukraine	1996	9	2	3	0	0	1.09	7.6