Can Courts be Bulwarks of Democracy? Judges and the Politics of Prudence

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April 30, 2020

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Chapter 1

Introduction

> If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty. *Alexander Hamilton, Federalist 78*

The election of Donald J. Trump to the presidency of the United States disrupted the otherwise abstract and politically disconnected world of American political science. Scholars once content to publish in journals hidden behind paywalls began writing opinion pieces in print media sources and granting interviews with broadcasters, radio stations, and podcasts, all questioning whether American democracy was indeed in

danger. With the assistance of a young journalist core committed to evidence-based reporting, scholars mobilized to bring decades of research on the nature of authoritarianism to the public discourse.[1] As the field promoted past research, it also created new measurement strategies designed to characterize changes in important elements of democratic life, engaging the whole discipline in the process of data production.[2]

In a global context in which right-wing populist leaders are stressing democratic projects in a diverse set of states including Hungary, Poland, France, Italy, Austria, the Philipines, and Brazil, scholars have questioned the durability of the American system. In a New York Times opinion piece in December of 2016, Steven Levitsky and Daniel Ziblatt put the matter bluntly, writing

> Is our democracy in danger? With the possible exception of the Civil War, American democracy has never collapsed; indeed, no democracy as rich or as established as America's ever has. Yet past stability is no guarantee of democracy's future survival. We have spent two decades studying the emergence and breakdown of democracy in Europe and Latin America. Our

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[1] See for example the reporting in Amanda Taub's "The Rise of American Authoritarianism," `https://www.vox.com/2016/3/1/11127424/trump-authoritarianism`

[2] See for example the work of John Carey, Gretchen Helmke, Brendan Nyhan and Susan Stokes developing Bright Line Watch, `http://brightlinewatch.org/about-us-new/`.

research points to several warning signs."[3]

Noting that many Americans place their faith in the U.S. system of checks and balances, Levitsky and Ziblatt remind us that the ultimate success of formal checks on the politically powerful depend on a variety of informal norms, including the notion of a legitimate opposition, partisan and presidential restraint. To this list, we should add respect for general rule of law values, including a deep societal commitment to an independent judiciary as the arbiter of fundamental constitutional norms.

Just eight days after President Trump's inauguration, the American system of checks and balances was tested. On January 27, 2017, with little input from the Departments of State, Homeland Security or Defense, President Trump issued Executive Order 13769, which immediately prohibited entry into the United States nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen.[4] The order also suspended the U.S. Refugee Admissions Program (USRAP) for a period of 120 days, widening the policy's impact beyond the seven named states. As a consequence of requiring the immediate implementation of the order hundreds of individuals were detained at the nation's airports, some of whom enjoyed permanent U.S. residency status.

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[3] `https://www.nytimes.com/2016/12/16/opinion/sunday/is-donald-trump-a-threat-to-democracy.html?_r=0`

[4] Executive Order: Protecting the National from Foreign Terrorist Entry into the United States, January 27, 2017.

By Sunday January 29, the Department of Homeland Security clarified that it would not bar the entry of permanent residents, yet roughly 500,000 residents would nevertheless be subject to extended screening activities.[5] President Trump's order required that upon resumption of the USRAP, the Secretary of Homeland Security would be directed to "make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." Critically, in an interview with the Christian Broadcasting Network, President Trump clarified that this element of the order was designed *to aid individuals of the Christian faith*.[6]

Almost immediately, dozens of legal challenges to the executive order were launched. Many of the initial challenges took the form of habeas corpus petitions seeking the release of individuals who were detained at the nation's airports.[7] The State of Washington filed for declaratory and

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[5] `http://www.vox.com/2017/1/28/14425150/green-card-ban-muslim-trump`.

[6] `http://time.com/4652367/donald-trump-refugee-policy-christians/`

[7] For example, Aziz v. Trump No. 1:17-cv-00116 (E.D.Va. 2017) involved two Yemini brothers, Tareq Aqel Mohammend Aziz and Ammar Aqel Mohammed Aziz, who were detained by the U.S. Customs and Border Protection at Washington-Dulles Airport pursuant to the executive order despite having been previously granted Lawful Permanent Resident status by the State Department. Similarly, Darweesh v. Trump involved two Iraqi men

injunctive relief in order to protect its "residents, employers and educational institutions," which it argued would be powerfully harmed by the executive order. On January 28, Judge Ann Donnelly of the U.S. District Court for the Eastern District of New York issued an emergency stay of removal, which arguably halted the continued enforcement of Trump's order; and on February 3, U.S. District Court Judge for the Western District of Washington James L. Robart issued a temporary restraining order on a nationwide basis enjoining the most important sections of Executive Order 13769. This decision was affirmed by a three judge panel of the Ninth Circuit Court of Appeals on February 9. Reflecting on Judge Donnelly's emergency stay, ACLU Executive Director Anthony Romero exclaimed, "What we've shown today is that the courts can work. They're a bulwark in our democracy."[8]

Yet weeks after the Ninth Circuit's decision the Trump administration issued a second executive order in March and a proclamation in late September, which modified the original order, changing the states subject to the ban and adding a variety of exemptions resulting in a more limited travel ban. Revisions to the first executive order ultimately produced more than 50 separate litigations carried out across most of the country's legal system. In June 2018, a divided Supreme Court upheld the proclamation,

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who were detained at John F. Kennedy International Airport despite having valid U.S. visas.

[8] `http://www.latimes.com/nation/la-na-aclu-profile-20170131-story.html`.

finding among other things that there was a facially valid rationale for the administration's restrictions.[9]

Ultimately, the Trump administration succeeded in some aspects of its original plan. Travelers from a number of majority Muslim countries have been effectively banned from entry. The Court declined to find an unconstitutional religious rationale for the restrictions. Instead the Court found a facially neutral explanation based in the president's authority to protect national interests through immigration policy. Yet the policy that survived judicial scrutiny was considerably changed from the original. Lawful permanent residents and individuals who will be granted asylum are exempted, among many other cases.

Our book considers Anthony Romero's claim that the courts of the United States are a bulwark of democracy? Under what conditions, if any, can courts be defenders of democratic regimes? If they can, how do they do it?

1.1 Defenders of Democracy

The notion that judges should act as defenders of democratic systems, their values, and their processes is a common and well-developed position. Writing in the *Harvard Law Review*, former Israeli Supreme Court President Aharon Barak clarifies the breadth of Anthony Romero's proposition, placing it in historical context. He writes:

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[9]Trump v. Hawaii, 585 U.S. (2018).

> The [role] of the judge in a democracy is to protect the constitution and democracy itself. Legal systems with formal constitutions impose this task on judges, but judges also play this role in legal systems with no formal constitution. Israeli judges have regarded it as their role to protect Israeli democracy since the founding of the state, even before the adoption of a formal constitution. In England, notwithstanding the absence of a written constitution, judges have protected democratic ideals for many years. Indeed, if we wish to preserve democracy, we cannot take its existence for granted. We must fight for it. This is certainly the case for new democracies, but it is also true of the old and well. Anything can happen. If democracy was perverted and destroyed in the Germany of Kant, Beethoven, and Goethe, it can happen anywhere ... I do not know whether the supreme court judges in Germany could have prevented Hitler from coming to power in the 1930's. But I do know that a lesson of the Holocaust and of the Second World War is the need to enact democratic constitutions and ensure that they are put into effect by supreme court judges whose main task is to protect democracy (Barak, 2002).

Judge Barak's position reflects a consensus that developed in the 20th century among the global legal community, which mobilized around the goal of promoting democratization and human rights. A highly professional and independent judiciary came to be understood as one of

the central pillars of rule of law advocacy efforts aimed at supporting new democracies and encouraging reform in authoritarian contexts. The clear recognition of an obvious theoretical tension between majoritarian values and legal limits on authority notwithstanding (e.g. Friedman, 2002), judges exercising various forms of constitutional review came to be viewed as key defenders of democratic norms. In the introduction to its 2002 report on the promotion of judicial independence and impartiality, the U.S. Agency for International Development writes

> Judicial independence is important for precisely the reasons that the judiciary itself is important . . . In democratic, market-based societies, independent and impartial judiciaries contribute to the equitable and stable balance of power within the government. They protect individual rights and preserve the security of person and property. They resolve commercial disputes in a predictable and transparent fashion that encourages fair competition and economic growth. They are key to countering public and private corruption, reducing political manipulation, and increasing public confidence in the integrity of government (Miklaucic, 2002).

In times when core democratic norms appear to be threatened, when historical understandings of the limits of state power are suddenly called into question, there is a undeniable optimism in these perspectives. Norms of legislative and executive constraint may be violated, perhaps discarded

entirely, yet as long as the courts of law are open for business and judges are willing to constrain the state, democracies may backslide but they are unlikely to collapse. It is a comforting story.

The story is comforting not only because of its clear normative appeal but also because of well-known examples in which courts have either claimed or been explicitly delegated a role for protecting democratic norms. In its 1951 Southwest States Case (1 VBerfGE 14), the German Federal Constitutional Court was asked to invalidate two federal statutes designed to reorganize three Laender created during the period of allied occupation, Baden-Württemberg, Baden and Württemberg-Hohenzollern, into the single Land Baden-Wüttemberg. The first statute extended the lives of the Laender parliaments until the reorganization could be completed, thus suspending upcoming elections. The second statute laid out the procedures for the reorganization. In its opinion, the Court wrote

> An individual constitutional provision cannot be considered as an isolated clause and interpreted alone. A constitution has an inner unity, and the meaning of any one part is linked to that of the other provisions. Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate ... Thus this Court agrees with the statement of the Bavarian Constitutional Court, 'That a constitutional provision itself may be null and void, is not conceptually impossible just because it is part of the constitution. There are constituent principles that are so

> fundamental and such an extent an expression of a law that precedes even the constitution that they also bind the frame of the constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles.' (as quoted in Jackson and Tushnet, 2006, p. 588).

Against the backdrop of the principle that the Basic Law ought to be thought of as a logical whole, the nature of which is itself limited by certain higher principles of law, the Court continued, writing

> The Basic Law has decided in favor of a democracy as the basis for the governmental system ... As prescribed by the Basic Law, democracy requires not only that parliament control the Government, but also that the right to vote of eligible voters is not removed or impaired by unconstitutional means ... It is true that the democratic principle does not imply that the life of a Landtag must not exceed four years or that it cannot be extended for important reasons. But this principle does require that the term of a Landtag, whose length was set by the people in accepting their constitution, can only be extended through procedures prescribed in that constitution, i.e., only with the consent of the people. (as quoted in Jackson and Tushnet, 2006, p. 588).

By extending the Laender parliaments' life without consent of the voters in

the affected areas, the federation had violated the right to vote. Beyond invalidating federal statues in order to preserve fundamental democratic liberties, the Court endorsed a powerful principle restricting amendments to the Basic Law that might contravene fundamental norms of a democratic society. Conceived of in this way, constitutional review serves as a backstop against any legislative effort that might undermine basic democratic principles.

An extraordinary variant of this power was conferred upon the South African Constitutional Court during its transition to democracy. A key element of the compromise that allowed for the relatively peaceful transition to democracy involved an agreement at the Multi-party Negotiating Process to 34 Constitutional Principles which would guide the drafting of South Africa's new constitution. The Constitutional Court was explicitly delegated the power to certify that the constitution conformed to the 34 principles (see Constitutional Court of South Africa Case 23/96.).

By the end of the 20th century, providing a form of constitutional review had become a common piece of transitioning states' institutional architecture. Notably, democratic reforms across post-communist Europe were accompanied by forms of constitutional control relying on powerful constitutional courts whose initial appointments were drawn from pools of highly qualified and well-regarded jurists (See the excellent discussion in Schwartz, 2000). Despite clear variation in the level of activism, courts across the region were credited with decisions helping transition from an authoritarian past to a democratic form of government. Indeed, the

Constitutional Court of Hungary played such an important role in the provision of social and economic rights during the 1990s that Kim Scheppele called it "arguably more democratic than the Parliament even though the judges are not directly elected" (Scheppele, 2005).

So too in Latin America have courts been a part of the story through which democratic norms come to be fully adopted. The Constitutional Court of Colombia is recognized internationally for giving meaning and force to core commitments of the 1991 Constitution, requiring the state to provide the social and economic rights which the highest law demands (e.g. Cepeda-Espinosa, 2004; Uprimny, 2003). The Constitutional Court is also credited for developing a flexible jurisprudence on the limits of military jurisdiction, which has allowed for the successful negotiation of civil-military relations during a prolongated period of violent conflict (Ríos-Figueroa, 2016). Similarly the Constitutional Chamber of the Costa Rican Supreme Court is credited with massively expanding access to justice over social and economic rights claims, especially in the context of health (Wilson and Rodríguez Cordero, 2006). And following a notorious delay, in the late 1990s, the judiciary of Chile eventually began to investigate credible claims of gross human rights abuses under the Pinochet regime, a critical source of accountability in the aftermath of the democratic transition (e.g. Huneeus, 2010; Sikkink, 2011).

Across many years and multiple political contexts, courts have been empowered to speak to the nature of a state's democratic practices. They have developed jurisprudence identifying the limits of state authority

under democratic constitutions; and, they have provided access to citizens seeking redress for violations of core democratic principles. In all of these ways, judges look to be defenders of democracy.

1.2 Defensive Failures

Just as there are powerful stories of judges coming to the defense of democratic states, it is clear that courts, even courts that are formally independent and unconnected politically from sitting governments, are far from successful sources of democratic restraint in all cases. Created by the communist regime in 1982, the Polish Constitutional Tribunal (CT) emerged through the democratic transition as an important source of constitutional control. Beginning in the middle of the 2000s, the CT would become a locus of conflict in the political competition between the Christian democratic Civic Platform (PO) and the conservative, national Law and Justice Party (PiS). The battle would come to a dramatic head in the weeks following the October 2015 parliamentary election.

Following eight years as the dominant coalition partner in Poland's government, public opinion polling in the summer of 2015 strongly suggested that PO was likely to lose a considerable number of seats in the October parliamentary elections. In June, the PO government enacted a new statute on the CT, which permitted it to replace five judges, all of whom had terms that were set to expire after the pending election. Two terms would expire after the seating of the new parliament. Under the prior institutional framework, the new government would have been

empowered to appoint these judges.

The five additional PO appointments meant that it had appointed 14 out of 15 CT judges; however, Andrzej Duda, the President of Poland, refused to administer the oath of office for the five new appointees. After taking office following an election that gave it a majority of seats in the Sejm, the PiS amended the PO's constitutional court act, annulling the appointment of the five PO judges. The amendment created five new positions, limited the term of office for the President of the Tribunal, ended the tenure of the sitting President and Vice President, and stipulated that a judge's term begins only after the administration of the oath of office before the President of Poland. On December 2, the PiS-controllled Sejm appointed five new judges in direct defiance of a CT order demanding the Sejm abstain for doing so until the constitutionality of the amendment could be reviewed. President Duda administered the oath of office to the new PiS judges.

On December 3, a five judge panel of the CT found that the three PO-appointed judges who replaced judges whose terms were expiring prior to the new parliamentary session were validly appointed. On December 9, the CT found multiple aspects of the PiS amendments to the Constitutional Tribunal Act to be unconstitutional, including the termination of the President and the Vice President's terms. The government rejected the decision, refusing to publish it in the state's Journal of Laws.

By the end of the January, 2016 the government had passed a budget bill

cutting the CT's yearly budget by roughly 10 percent. Ignoring concerns expressed by the European Commission that it was undermining judicial independence and democracy, the PiS continued its efforts to reform the judiciary well into 2018, amending rules for appointing and removing judges across the system and at all levels (Commission, N.d.).

The Polish experience is far from unique. Courts seeking to constrain leaders are often the target of institutional attacks. Judges are removed from their posts. Key institutions of judicial powers are reformed or eliminated altogether. Appointment rules are changed so as to concentrate staffing authority in a single power center (Helmke, 2010; Pérez-Liñán and Castagnola, 2009). Some of the attacks are so serious that they effectively eliminate the courts as a source of constraint. Indeed, in 2007, Bolivia's Constitutional Tribunal was rendered inquorate as a consequence of politically motivated impeachments and resignations in the context of major conflict between the judiciary and President Evo Morales (Castagnola and Pérez-Liñán, 2011).

Figure 1.1 reveals a key empirical pattern. It shows a plot of an index of attacks on judicial institutions on a measure of *de facto* judicial independence, developed below (Coppedge and Ziblatt., 2018; Linzer and Staton, 2015).The points in the figure show the combination of judicial attacks and judicial independence for all states of the world in 2015. As the figure displays, judiciaries are less likely to be the target of government attacks as independence increases; however, the integrity of courts are called into question and judges are purged for political reasons even on

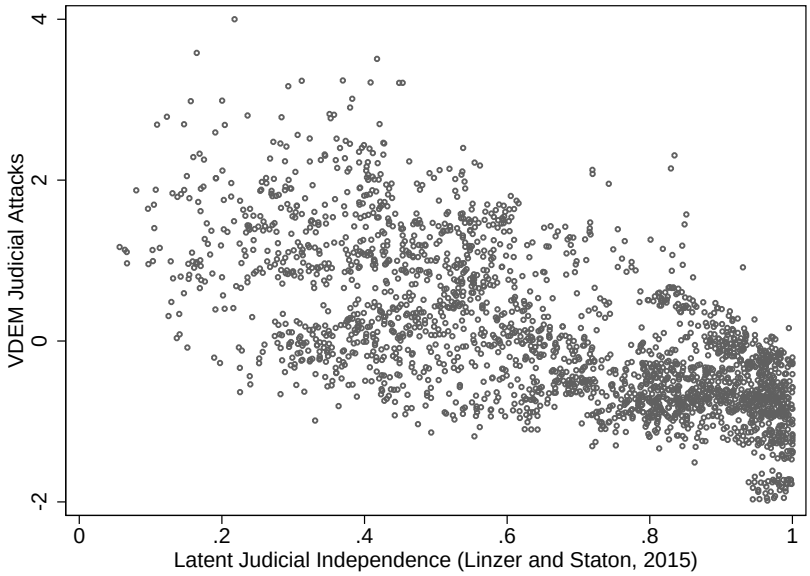

Figure 1.1: *Attacks on the Judiciary and De Facto Judicial Independence*

courts that enjoy a relatively high level of independence.

The Polish case also reminds us that judicial orders are broadly understood to not be self-enforcing, a challenge that is particularly pressing when the target of an order is the state itself (Becker and Feeley, 1973; Birkby, 1966). Critically, although there many examples of non-compliance in settings characterized by low levels of the rule of law (Ginsburg and Moustafa, 2008), courts are not always obeyed in states characterized by high levels of the rule of law (Vanberg, 2005; Carrubba, Gabel and Hankla, 2008; Chilton and Versteeg, 2018). The Constitutional Bench of Costa Rica's Supreme Court confronts a variety of compliance challenges in its amparo jurisdiction (Staton, Gauri and Cullell, 2015).

The Netanyahu government's pattern of evading High Court and administrative court decisions across a very wide set of issue areas is particularly notorious (for Civil Rights in Israel, N.d.). Figure 1.2, which plots the Varieties of Democracy measure of high court noncompliance on judicial independence underscores the point. There is a negative association between non-compliance and judicial independence, but independent courts are not always obeyed.

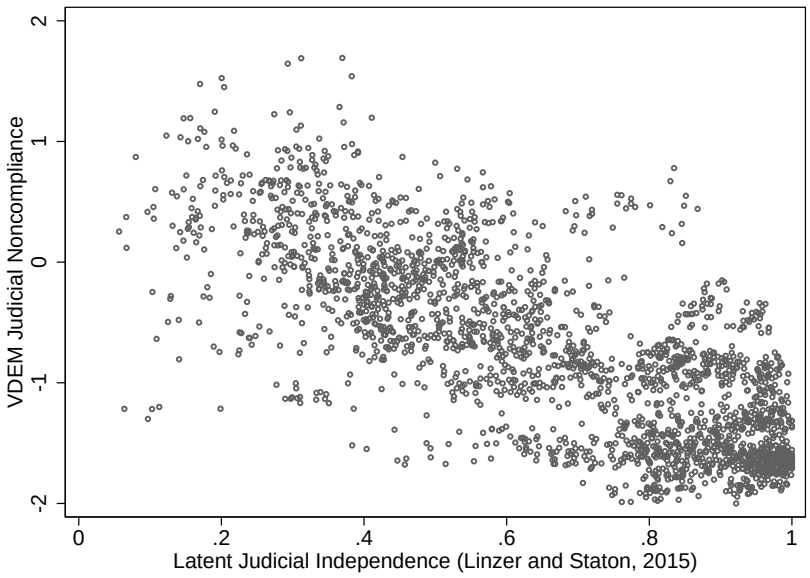

Figure 1.2: *Non-compliance and De Facto Judicial Independence*

Perhaps of greatest concern, scholars have suggested that in order to avoid conflict and non-compliance, judges often engage in politically deferential patterns of decision making, at least in particularly salient cases, which render the constraints they might place on governments practically non-binding (e.g., Bill Chávez and Weingast, 2011; Rodríguez-Raga, 2011;

Carrubba, Gabel and Hankla, 2008). Summarizing these challenges, USAID's Office of Democracy and Governance writes:

> [I]n several countries, governments have refused to comply with decisions of the constitutional court (e.g., Slovakia and Belarus) and substantially reduced the court's power (e.g., Kazakhstan and Russia). This illustrates the dilemma constitutional courts often face: Should they make the legally correct decision and face the prospect of non-compliance and attacks on their own powers, or should they make a decision that avoids controversy, protects them, and possibly enables them to have an impact in subsequent cases? Bold moves by constitutional courts can be instrumental in building democracy and respect for the courts themselves. However, the local political environment will determine the ability of the courts to exercise independent authority in these high stakes situations (Democracy and Governance, 2002).

These facts raise serious questions about the capacity of courts to serve as defenders of democracy. If judges attempting to hold leaders accountable are often the target of institutional attacks; if courts are constructed to represent the political interests of appointers; if jurisdiction can be tailored to reduce constraints of courts on political power; if court orders can be ignored even in states with seemingly significant commitments to the rule of law; and if politically savvy judges avoid conflict precisely when they are

needed, how is it that courts can serve as bulwarks of democracy?

1.3 Argument Summary

Our argument knits together and elaborates upon ideas from related but separate research traditions. Understanding whether, and if so, under what conditions courts might be bulwarks of democracy requires a model of what democracy is, what challenges groups confront when they organize themselves democratically, and an account of how courts influence these challenges, if they do so at all.

Drawing on a robust literature on political regimes, we conceive of democracy as a kind of social equilibrium in which groups exchange risky and violent lotteries over complete control of the state for peaceful lotteries over the transfer of power via elections (Acemoglu and Robinson, 2006; Boix, 2003; Boix and Rosato, 2012; Przeworski, 2005). Favorable outcomes of conflict are more profitable and potentially more enduring than the favorable outcomes of elections; however, the unfavorable outcomes of conflict can be worse than electoral losses. At its core, democracy requires compromise across a community's salient political cleavage(s). Supposing that compromises necessary to sustain democracy are possible, a fundamental challenge of sustaining these compromises will involve policing limits on the authority of the state. Democracies commonly institutionalize compromises over the allocation of resources and values via a series of limits on the powers of governing parties. These limits, which we refer to as as "regime rules," are typically entrenched in constitutions.

If it were possible to classify every action of the state with respect to the regime's rules, that is, if it were clear when a policy has exceeded a limit on the authority of the state, groups out of power could police regime rules alone (e.g. Przeworski, 2005). Yet, because there is uncertainty about what governments do, why they do it, and in many cases what regime rules genuinely imply, policing the rules that structure democratic compromises involves resolving a critical informational problem over whether leaders are in fact remaining faithful to regime rules (Carrubba and Gabel, 2015; Reenock, Staton and Radean, 2013).

We argue that courts can influence regime instability by affecting the informational problem inherent in policing regime rules. They do so in three ways: (1) by providing a mechanism through which private information about the rationale for policy choices that arguably violate a regime rule can be clearly communicated between leaders and the opposition, (2) by encouraging leaders to less frequently make decisions that raise concerns about rule violations, and (3) by encouraging the opposition to accept more often potential rule violations. The central implication of this argument is that courts influence democratic regime survival primarily by encouraging prudence on the part of leaders and the opposition. Although we can identify instances in which courts make decisions stopping arguably undemocratic actions, it is the second face of judicial power that is ultimately essential to the ability of a judicial system to make democratic regimes stable.

In making this argument, we draw on three literatures in judicial politics.

The first claims that independent courts are products of democratic political competition (Epperly, 2019; Ginsburg, 2003; Stephenson, 2003; Hanssen, 2004). Independent courts emerge and are sustained when competing groups expect turnover in power via free and fair elections. From this perspective, independent courts offer a kind of "insurance policy" against electoral losses. We will argue that when the underlying social, economic, and cultural conditions for broad democratic compromises in the sense of Przeworski are met, then elites will have incentives to build and sustain independent judicial bodies.

A second literature in judicial politics suggests a way in which courts provide the kind of insurance envisioned by the first literature on which we draw. They do so by influencing the ability of parties to police the boundaries of fundamental regime rules. Scholars argue that judicial processes can help resolve uncertainty for parties in conflict in a variety of ways (e.g. Ríos-Figueroa, 2016; Carrubba and Gabel, 2015). On Ríos Figueroa's account, constitutional courts can act as a kind of mediator by creating jurisprudence that avoids creating clear winners and losers, instead inviting parties to experiment with a possible solutions. This experimentation helps parties credibly reveal to each other what types of legal interpretations will be politically feasible. Carrubba and Gabel also suggest that judicial processes give competing parties a centralized means of transferring information to each other about the kinds of compromises regarding the meaning of regime rules that politically feasible. We draw on these ideas, arguing that courts offer insurance by helping political groups more peacefully police the boundaries of their fundamental democratic

compromises. They do so by influencing the information problem essential to managing regime instability.

We also draw on a third literature that considers how political pressures influence judicial decision-making (e.g. Martin, 2006; Helmke, 2005; Vanberg, 2005; Rodríguez-Raga, 2011; Epstein and Knight, 1998). Courts can be rendered dependent on governments through the appointment of political allies; however, courts need not be packed in order to function like extensions of the government. If judges care about their posts, their jurisdiction, and potentially with compliance with their decisions, this literature tells us that judicial decision-making will be tied to the interests of officials with control over these matters. In order to influence regime outcomes, courts must overcome these routine political pressures.[10]

An immediate implication of our argument is that while courts *can be* bulwarks, it certainly does not follow that they *will be* bulwarks in all cases. Courts can also be important sources of social control and repression. They can be used to neutralize opposition leaders and to render the powerful immune from prosecution. Judicial systems can be penetrated and judges can be co-opted. When commitments to democratic compromises waiver, courts are natural targets. In such environments,

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[10]Ginsburg and Huq (2018) recognize this limitation on judicial authority in practice, and for that reason, they are justifiably skeptical about the ability of courts to serve as saviors of democracy (See discussion on pp. 141-148).

when key groups of political actors no longer find it useful to sustain commitments to the peaceful transfer of power, we ought not to expect judges to be useful defenders of democracy. They may, in fact, be used to undermine the regime.

Elites might also wish to continue transferring power via elections while rejecting limits on their powers while they govern. In such cases, courts may be called upon to check government policy decisions. Lacking independent sources of violent or financial power, the ability of courts to influence political conflicts will always be subject to particular conditions (Rodríguez-Raga, 2011; Epstein and Knight, 1998; Staton and Moore, 2011). If judges are unwilling to be effective checks or if their decisions can be ignored by governments without consequence, courts will not meaningful influence either policy-making, or more importantly, the interaction between governments and the opposition that risk democratic regime collapse.

We develop this argument further in Chapters 2 and 4, focusing on the conditions necessary to support this system and the variety of ways in which it can break down. For the mechanism we envision to work, like Ríos Figueroa, we will argue that judges must have preferences that are sufficiently distinct from at least the sitting government. We also share with Ríos Figueroa a belief that non-compliance must be consequential for state leaders. But we will stress that judges must also be willing to risk non-compliance. The risk of non-compliance, as well as non-compliance, itself is a critical part of the mechanism by which judges help stabilize

regimes. Indeed, the simple threat of non-compliance (1) creates incentives for more prudent elite behavior, and (2) can create the possibility for elites to credibly communicate about their intentions.

1.3.1 Methodological Approach

We confront two core empirical challenges in evaluating our argument's implications. A natural challenge is whether we will be able to identify exogenous variation in some of our core concepts, such that we can estimate causal effects. Second, as will become clear later, if we are correct about the role that courts play in reinforcing democratic compromises, direct evidence for the mechanism will be hard to come by. The reason is that the primary effect of independent courts is to incentivize political prudence on the part of state and opposition leaders. Finding evidence of roads considered but not taken or even roads that were simply never considered all is a fundamental empirical challenge. In many cases the best evidence we could marshal will not make it into the historical record.

The empirical strategies that we employ address both of these challenges. We pursue two primary strategies. First whenever possible we adopt credible observational designs for causal identification. Specifically we rely on matching, instrumental variables, and difference-in-differences techniques when we can. When this is not possible, we are careful with the interpretation of our findings. In some cases, we are confident that we have identified causal evidence and when we are not we attempt to provide interpretation in light of our theoretical argument while identifying

potential alternative explanations. Our second approach is to look for behaviors and events that indirectly reveal the mechanisms that we propose. In these case, our goal is not necessarily causal inference but rather description that is consistent with our theoretical account.

1.4 Plan of the Book

Chapter 2 begins by defining terms. What do we mean by democracy? What does it mean to defend democracy? What is an independent court? We then present our argument in general terms. When groups in society wish to compete for power peacefully via free and fair elections, they will have strong incentives to construct and support independent judicial bodies. Independent courts, in turn, can cause leaders to pursue policy initiatives more prudently and cause the opposition to police democratic compromises less aggressively. This reinforces commitments to democracy. To have these effects, courts must be staffed by judges who are sufficiently independent of (at least) sitting governments. Judges must also be willing to risk non-compliance with their orders. If judges are not incentivized to independently evaluate the cases before them regimes will be less stable. Similarly and more transparently, if the background conditions necessary for democratic compromises are not met, elites will no longer have incentives to support independent courts. Just as walls can be constructed, they can be torn down.

In Chapter 3, we investigate the first key element of our argument: the well-known claim that increases in political competition cause judicial

independence. This is the primary subject of Epperly's (2019) recent work. In some cases, we draw on research designs that Epperly employs, fit to a larger sample of states. In other cases, we present new designs. We present evidence of a causal relationship between political competition *de facto* judicial independence. We will argue that this relationship is best interpreted as coming from the transition from autocracy to democracy. Basically, judicial independence is a feature of democracy. Interestingly, we do not find a causal relationship between the formal rules that are supposed to incentivize independent judicial behavior and independent behavior itself.

In Chapter 4, we present a theoretical model that is designed to shed light on whether, and if so how, courts might protect democratic regimes from collapse. The model identifies conditions under which courts can influence the exchange of information between leaders and the opposition. It also identifies the conditions under which courts can help stabilize democratic regimes even when they cannot influence information exchange.

In Chapter 5, we present evidence bearing on key empirical predictions implied by the model developed in Chapter 4. We both summarize existing scholarship and offer new evidence on the relationship between judicial independence and a variety of policy choices that can be destabilizing: electoral system reform, the investigation of political rivals, and declarations of states of emergency. We also investigate relationships between judicial independence, coups, and democratic breakdown. We show that judicial independence is associated with lower probabilities of

governments declaring emergencies when there is a greater likelihood for disagreement over the need for extraordinary responses but not when this likelihood is lower. We show that judicial independence is associated with lower probabilities of coups and democratic breakdowns. We also show that attacks on courts increase the likelihood of coups and breakdowns. Critically, we show that non-compliance is not positively associated with coups or breakdown. Indeed, we observe a small negative association. These findings suggest that while attacking courts in democracy can be profoundly destabilizing, some degree of non-compliance with judicial orders can be a part of a healthy democratic system.

Chapter 6 considers the recent pattern of attacks on courts around the world in light of the argument we make in the book. We describe where courts are being attacked. We return to the case of the United States and speculate on the ability of the U.S. federal judiciary to serve as a bulwark of U.S. democracy. Finally, Chapter 7 offers three general lessons that our study suggests for research on political regimes and judicial politics.

Chapter 2

Democratic Regimes and their Survival

> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. *James Madison, Federalist 51*

This chapter answers four questions. What do we mean by democracy and what does it mean to say that a court has defended democracy? What is the threat democracies confront, which courts might defend against? How might courts address this threat? With answer to these questions, we then present our conceptual framework in broad prospective. The argument connects political incentives to opt for democratic political competition to the incentives to create and support independent judicial bodies. It also explains how it is that independent courts influence an important

informational challenge that is critical to survival of democratic regimes.

The second part of our argument raises theoretical questions that require more space than we can devote in this chapter. Therefore we return to it in Chapter 4, where we present a formal model that accounts for how different degrees of judicial independence affect the ability of courts to promote democratic peace through information transmission. Our model also identifies the conditions under which courts influence democratic peace even when they cannot influence information.

2.1 What is democracy?

Recognizing that democracy's meaning is essentially contested (Gallie, 1956), our conceptual goal is limited. We will adopt a concept that both clarifies a fundamental problem for democratic regime survival and makes the measurement of key ideas tractable.

Definitions of democracy are conceived of as either minimalist-procedural or maximalist-substantive. The minimalist definition, best associated with Schumpeter (1975), conceives of democracy as nothing more than a political system in which elites compete for mass support via free and fair elections. Although the meaning of democracy is vigorously contested by political theorists, scholars agree that free and fair elections are essential components of any concept. Disagreements emerge over whether to include in the definition substantive values that democracies might advance, and if so, which values. Democracy in the maximalist or substantive sense are

Schumpeterian political systems that also, for example, protect private property, promote economic equality, require clear and vigorous public debate, among many other features. In light of the large number of combinations of potential substantive criteria, it is possible to conceive of a very large number of maximalist varieties of democracy (Coppedge et al., 2011).

The Minimalist Concept of Democracy

We adopt the minimalist definition for several reasons. First and foremost, the definition focuses our attention on a critical normative outcome. A social commitment to transferring power via elections means that groups shun violence as a means of seeking state power. We take it as obvious that avoiding violence is a normatively appropriate goal (Przeworski, 1999).

Second, the minimalist concept allows us to consider connections between the independence of the judiciary and democracy. Ginsburg and Huq (2018) study the survival of liberal constitutional democracies. A liberal constitutional democracy on this account is a political regime in which there are free and fair elections, robust associational rights (speech, association, and assembly), as well as a bureaucracy governed by the rule of law (pp. 9-15). Our thinking on the connection between courts and democracy has been influenced considerably by Ginsburg and Huq's analysis. They offer an account of democratic erosion, which complements Levitsky and Ziblatt's (2018) focus on democratic norms by connecting it to scholarship on constitutional jurisprudence and empirical studies of

constitutional courts around the world. That said, we will separate the concept of democracy from the concept of judicial independence, which is, after all, a common component of the rule of law concepts on which Ginsburg and Huq draw (e.g. Raz, 1997). We do so in order to consider how, if at all, undermining rule of law institutions influences political commitments to elections.

Third, the minimalist concept links nicely to research on judicial independence as political insurance, which forms the first link in our argument. Under conditions of democratic competition via elections, elites turn to courts as insurance against the loss of political power. We develop an account of how courts help reinforce commitments to democracy, and in that way provide a mechanism through which insurance is provided.

Fourth, the minimalist concept simplifies a series of important measurement challenges. On a minimalist account, courts defend democracy in so far as they reinforce social commitments to the peaceful transfer of power via elections. How they might do this will require some explication and drawing inferences connecting courts to regime survival will require a mix of strong theory and credible research design. Yet measuring the collapse of a democratic regime under a minimalist concept, though not without difficulty, is a common and largely solved problem in comparative politics (Boix and Rosato, 2012; Przeworski et al., 2000).

The measurement challenges implied by arguments envisioning courts as protectors of substantive concepts of democracy are significantly more complicated. Arguments about courts as protectors of substantive

concepts of democracy focus on the ways particular decisions are line with substantive democratic values. Consider Kim Scheppele's discussion of the Hungarian Constitutional Court's democratic role in the 1990s. She writes, "the new post-Soviet citizens would not believe that a democracy was real until the *substance* of the previous policies had changed. The new constitutions not only guaranteed this, but also gave these institutions more radically democratic *content* through the "thickness" of the post-Soviet constitutions." The Hungarian Court's primary function was to invalidate both old and new laws that were inconsistent with the substantive goals of the founding document. The Court required the privatization of nationalized property, constrained the Parliament's investigations of former communist leaders in order to protect a principle against retroactive justice, and undermined state control of the media (41). In each of these ways, the Court protected, in fact it enhanced, a Hungarian view of democracy. As Scheppele understands it, this democracy is much more than a commitment to free and fair elections.

Scheppele's account of the Hungarian Constitutional Court suggests that courts defend democracy by vetoing policies that violate core substantive provisions of a democratic system or by requiring that governments adopt policies that bring the state in line with its commitments to particular values. This is a highly reasonable perspective. No doubt, it captures what many people believe courts are doing when they claim that they are defending a democratic system. We are drawn to this language in cases where courts are called upon to review arguably unconstitutional state behavior on matters that are highly salient. And yet consider what it

would mean for a general account of courts as defenders of democracy. In order to conceptualize the extent to which a court, or perhaps the judiciary as a whole, has defended democracy in a maximalist sense will require precise interpretations of the many substantive features of a political system that a court might be called upon to protect.

Suppose that we adopt a liberal conception of democracy. Here democracy is understood to involve both the competition for power via free and fair elections as well as a commitment to limited government that respects a series of individual rights and freedoms. Suppose further that we imagine that liberal democracy also requires a commitment to free market exchange. The constitutions of many countries guarantee some elements of market freedom. The 10th amendment to the United States Constitutions prohibits laws "impairing the obligation of contracts." Article 314 of the Bolivian constitution prohibits monopoly. Article 45 of the Constitution of Ireland prohibits "the concentration of the ownership or control of essential commodities in a few individuals to the common detriment" Article 333 of the Constitution of Colombia and Article 27 of the Egyptian Constitution ensure that all individuals have the right to free economic competition (Elkins et al., 2014). Article 42 of the Constitution of Argentina provides specifically that state authorities must provide for the "defense of competition against any type of market distortion, for the control of natural and legal monopolies." Article 42 also provides consumers the right to "adequate and truthful information" in their relationships with the provides of goods and services.

With our liberal concept in hand, one might naturally look to cases in which, say, the Supreme Court of Argentina is called upon to review the regulation of public utilities with respect to Article 42. In August of 2016, the Supreme Court of Argentina invalidated energy price increases on residential users, finding that government had failed to hold "obligatory" public hearings prior to the price hike, in violation of Article 42's public information provision.[1] Did this decision protect Argentina's liberal democracy? One's interpretation of the meaning of Article 42 in light of the facts of the case, and here we mean a researcher's interpretation, will critically affect how one views a decision permitting or striking down the regulation. The researcher's interpretation is not merely an important consideration. It is essential to the entire enterprise. Absent a clear understanding of how particular substantive values constitute democracy in a regime, it will be impossible to know whether a court has defended the regime or not.

Deepening the challenge, we must recognize that legal scholars, lawyers, and judges, commonly disagree over the precise meaning of constitutional terms. For this reason, it is not immediately obvious how a researcher will choose the correct interpretation of a rule governing a substantive value for a court to defend, much less a group of scholars working in a research

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[1]Fallo 339:1077, "Centro de Estudios para la Promoción de la Igualdad y la Solidaridad y otros c/Ministerio de Energía y Minería s/ amparo colectivo."

program.[2] Yet this kind of term-by-term constitutional analysis would have to be carried out for many judicial decisions across multiple policy areas in order to say anything meaningful about the ability of the judiciary to protect the substantive aspects of democracy via its decisions.

Making matters worse is the issue of aggregation. Suppose for the sake of argument that there is consensus over the meaning of every substantive term of every state's constitution (written or unwritten) in every year. States will violate some of these terms in some years, perhaps in all years (Law and Versteeg, 2013). Yet they likely will not violate all of them. How should we aggregate across the different dimensions of a maximalist view of democracy? Do some elements, e.g., voting rights, speech rights, access

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[2]Law and Versteeg (2013) offer one potential solution. In a study of state commitments to constitutional promises, the authors characterize state constitutions as "shams" by identifying mismatches between a state's constitutional promise (e.g., right to vote) and it's observed behavior (limitations on voting rights) as judged by experts like Cingranelli and Richards (2008). Here Cingranelli and Richards, with help from the the U.S. Department of State and Amnesty International, give us an evaluation of the state's behavior. But the kind of arguments that are made about courts as protectors of the substantive aspects of democracy would need to be far more careful. We would require an account of whether placing an election on a Tuesday or whether districts that are drawn with political considerations in mind violate a constitutional right to participate. These are questions that reasonable people can disagree about.

to justice, quality health care, or housing, count more than other elements? If so, how much more? On the other hand, if all substantive elements are considered equal, what proportion of them must be respected in a particular state and year in order for democracy to "survive?" We view the Varieties of Democracy Project measures of liberal, egalitarian, participatory and deliberative variations on democracy as plausible measures of substantive concepts; however, they are very clearly aggregations of a tremendous amount of information. We can envision a study attempting to connect courts to these substantive measures, but for the reasons we have summarized, we strongly prefer to focus on courts as protectors of the Schupeterian core.

2.1.1 Democracy as political compromise

Our minimalist definition focuses on democratic procedures; however, it is important to stress that the substantive concerns on which Scheppele focuses play a role in our account. We define democracy as a political regime in which groups, typically parties, compete for power by winning votes. This definition eases the challenge of measuring regime types and their failure, but it does not have much to say about why it is that groups commit to the peaceful transfer of power via elections. By taking a position on this issue, we clarify the link between the substantive values that democratic regimes might respect even if we only consider democracy itself to involve a commitment to selecting leaders via elections. We also illuminate the core problem of democratic governance.

Following Przeworski (2005), we envision democracy as a broad compromise between groups over the control over the authoritative allocation of values and resources. It is an equilibrium in which competing groups opt for peace and the corresponding lotteries over election outcomes instead of pursuing control over the state via violence. Whereas the outcome, i.e., free and fair electoral competition, is procedural, democracy conceived of in this way is influenced by many substantive concerns.

Substantive considerations influence the choice to continue contesting power via elections, precisely because what holding power means is control over substantive outcomes, e.g., the language in which our children are taught, our religious freedoms, our ability to speak and publish freely, our rights when we are accused, the tax burdens we confront, etc. The democratic compromise we envision is predicated on choices to limit the state's power. All but five countries in the modern world have codified constitutions, which identify rights, grant powers and limit state authority (Miaschi, 2017). We will refer to these limits on state authority as "fundamental regime rules." Violations of these rules, many of which are substantive in nature, can call into question a leader's commitment to elections.

To summarize, we adopt a Schumpeterian, miminalist concept of democracy. Although democracy for us only requires free and fair competition for state power, we view democracy as involving compromises over the uses of state authority, which have implications for substantive outcomes that people value. Competing groups in society strike an

agreement, which involves trading a violent struggle for unconstrained governance for a peaceful struggle for constrained governance. This trade depends critically on believing that the parties that enjoy power will be constrained during their period in office. Uncertainty about whether this is true in practice can be significantly destabilizing.

2.1.2 What does it mean to defend democracy?

When we say that a judiciary has defended a democratic regime, we will mean that courts have positively influenced the survival of the regime as conceived of under a minimalist or maximalist concept. Otherwise put, we mean to say that the regime would have been less stable in the absence of courts. The counterfactual is important here. To defend a democracy does not imply that the regime would have *failed* in the absence of courts. Democratic regimes might survive for many years in the absence of a well-functioning judicial system and democratic regimes may collapse even if courts are working well. Well-functioning judicial systems are neither necessary nor sufficient for regime survival. To defend democracy simply implies that courts have made the system more robust, more stable than they would have been without courts.

2.2 The Fundamental Problem of Democratic Governance

Democracies are threatened by failures to resolve a fundamental governance problem. The problem, stated succinctly by Publius in

Federalist 51, involves seeking a balance between two seemingly irreconcilable goals. We want a government powerful enough to ensure social peace, defend the territory from outside aggressors, produce public goods and generally meet the social challenges that communities confront, without being so powerful that it cannot be controlled. We want a powerful but constrained state.

To clarify for leaders the extent of their powers and to help opposition groups police potential violations of regime rules, written constitutions specify the nature and limits of state authority; however, no constitution can completely and precisely characterize all limits on state actions. Some limits and powers will be implied. Naturally, there will be disagreements over claims about implied powers. Similarly there will be uncertainty and corresponding disagreements about the meaning of the fundamental regime rules that political communities actually do write down. In so far as some leaders do not act in good faith, opposition groups must police the limits on state power. And yet since there will be uncertainty about these limits, it is possible for a democratic compromise to break down as a consequence of mutual misunderstandings about whether leaders are acting within the constraints of fundamental regime rules. The key point is that managing the right balance between constrained and powerful states will necessarily involve solving an *informational problem* over whether leaders are committed to regime rules.

Complicating the informational challenge, many regime rules are context dependent. Public health or economic crisis, natural disasters, domestic

disturbances, and war all typically require a leader to pursue extraordinary actions, which might not be ordinarily tolerated.[3] Informational asymmetries between governors and the governed make this problem particularly vexing. Leaders often have more precise information about the possibility for implementing policy initiatives. This advantage makes it possible for leaders to be less than truthful about the true reasons behind a change in policy and for that reason skepticism is a sensible reaction to government actions that plausibly violate regime standards. The Israeli Interior Ministry's rationale for failing to comply with High Court decisions on a variety of policies dealing with the separation barrier, treatment of migrant workers and educational equality between the Arab and Jewish populations highlighted practical difficulties, relied on appeals about impracticalities. Specifically, the ministry claimed that delays in changing their policies were due to the

> [E]xtreme complexity of these cases, some of which entail significant budget expense, some which have implications for third parties, some of which require the establishment of new procedures and various complex administrative actions. Because of their complexity, these court rulings require an

[3]Of course, some constitutional arrangements typically anticipate this problem, calibrating the state powers so as to properly meet economic crises, natural disasters or security threats (Gross, 2011); however, even when present, these "states of exception" are themselves open to interpretation.

> extended period during which they can be implemented (for Civil Rights in Israel, N.d.).

Was this true? Were the conditions such that these policies could not be amended or was the Interior Ministry simply refusing to do what it surely could have? In the absence of the Interior Ministry's information, opposition groups would have had to draw an inference about whether compliance would have been too complicated or expensive. Uncertainty of this type is

Also, consider the Peruvian constitutional crisis of the early 1990s. After nearly a decade of attempting to bring to heel elements of the Shining Path and the Tupac Amarú Revolutionary Movement (MRTA), newly elected Peruvian President Alberto Fujimori sought to enhance his powers via emergency power legislation. By the President's account, "his emergency measures were needed both to battle terrorism and to restructure the state and economy. He required an iron hand to reform the judiciary and break the gridlock created by the opposition in Congress" (Cameron, 1998, pp.127). Suspicious that President Fujimori's plea for greater authority to fight domestic terrorism was in actuality a raw power grab, Congress resisted. It altered the legislation to "subordinate the executive to the rule of law, assert congressional supremacy over law-making, and require the executive to justify its use of emergency powers" (Cameron, 1998, pp.127). Soon after, Fujimori, in conjunction with the intelligence community and the military, initiated his *autogulpe*.

2.3 How Can Courts Influence the Fundamental Problem?

Efforts to strike a balance between powerful and constrained states have looked to legal solutions to police the boundaries of fundamental regime rules. The 20th century witnessed the development of a variety of constitutional review mechanisms in nearly all states. Indeed, Ginsburg and Versteeg (2013) report that by the second decade of the 21st century 83% of the world's constitutions contain some form of constitutional review, permitting courts to set aside statutes, regulations, decrees, and international treaties for their violation of constitutional rules.

Although this monitoring function is most associated with constitutional review powers, administrative law and judicial review in the sense of that practiced historically in the United Kingdom serves a similar purpose (Vanhala, 2012). As Cane (2004, , p.16) writes, judicial review can be defined as "scrutiny by the judicial branch of government of decisions and actions of the executive branch to police compliance with rules and principles of 'public law' (including, but not limited to, 'higher law')." This kind of authority can also be used to police what we are calling fundamental regime rules. Importantly, it will be more limited than that exercised under jurisdiction that, say, permits a court to strike down an act of Parliament as begin inconsistent with a state's constitution. However, since democracies are commonly threatened by uncertainty whether executive actions are lawful, judicial review in the sense that Cane means it, can be an extremely powerful tool.

The basic institutional logic is straightforward. The problem to be solved is one of policing the boundaries of regime rules. Judicial processes provide a centralized and public venue for raising claims that rules have been violated. Thus, a judicial solution to the problem involves creating a kind of fire alarm monitoring system for democratic compromises. Judges are asked to police the boundaries of regime rules. We are led to ask how the process of reviewing state actions might change beliefs about whether a potential violation of regime rules ought to be tolerated or challenged outside the context of normal democratic rules for leadership selection.

2.3.1 Judges as Trustees

One simple possibility is that once the power to review acts of the state has been delegated to courts (or a particular court) designed to be independent, the informational challenge is solved. Actors in the system simply rely on the judgement of courts. This argument follows from scholarship that conceptualizes judges as trustees of the constitutional system rather than as agents of their appointers (e.g. Stone Sweet and Brunell, 2013; Stone Sweet, 2000). Alter (2008) writes,

> Trustees are actors created through a revocable delegation act where the Trustee is: (1) selected because of their personal and/or professional repuations; (2) given authority to make meaningful decisions according to the Trustee's best judgment or the Trustee's professional criteria; and (3) is making these decision on behalf of a beneficiary.

Judges appointed because of their expertise, who are given authority to exercise judicial review powers, and who do so with the interests of the public generally in mind might simply be granted the authority to resolve uncertainty about the meaning of regime rules and the conditions that might give rise to particular kinds of powers of leadership. As long as judges are not perceived to be doing the work of leaders or the opposition, i.e., they are assumed to be independent, we resolve the informational problem by simply deciding not to worry about it.

People will certainly hold different views about the finer points of regime rules in light of new circumstances. Some facts of the world are simply impossible to convey with perfect credibility to another person. What it means to use an independent judiciary to police the boundaries of regime rules is to recognize that the informational challenge to be overcome is simply unresolvable. In so far as that is true, we agree to let judges solve these difficult problems for us so that we can go on living in peace. This is the essential logic of triadic dispute resolution (Shapiro, 1981).

The argument may well be part of the overall story of how courts help democracies survive. Yet, it is helpful to see that this account is hard to square with some key facts presented in Chapter 1. If independent courts are trustees, why are independent courts attacked? Why is the integrity of respected jurists called into question? Why would respected judges face non-compliance with their decisions? And why would we observe patterns of decisions that raise questions about whether judges are strategically avoiding conflict on occasion? These facts suggest that the authority of

judges is not a settled matter at the point of delegation or appointment. It should be thought of as an ongoing concern.

2.3.2 Judges as Mediators

Ríos-Figueroa (2016) offers a compelling alternative. Drawing on international relations scholarship on the role of mediation in the resolution of inter-state conflicts, Ríos Figueroa claims that constitutional courts can help resolve seemingly intractable domestic political conflicts by offers creative jurisprudential frameworks, which create incentives for competitors to explore potential resolutions through experimentation and dialogue. In developing this argument, Ríos Figueroa draws a distinction between courts as "arbitrators" and courts as "mediators." He writes, "A court behaving as an arbitrator simply determines the outcome of a case based on the record adjudicating responsibility between disputing parties." In contrast, when courts behave as mediators their decisions are "not case circumscribed, ... creative, forward looking, nonshaming, and transparent in [their] argumentation that should be robustly grounded on constitutional principles and norms (p. 34)."

Courts acting in this way do not create clear winners and losers. They look for compromises and establish incentives to continue a dialogue moving forward. For courts to act as mediators, Ríos Figueroa emphasizes that they must be independent, accessible, and ultimately powerful. Indeed, he refers to courts as a particular species of mediator: they are mediators with power. Accessibility allows courts to learn about how law works on

the ground across a very wide variety of situations (Rogers, 2001; Clark and Staton, 2015; Whittington, 2009). Independence in turn gives courts credibility in their evaluation of constitutional conflicts. And finally, courts that enjoy significant control over their docket provides the discretion they require to pick the kinds of cases that best allow them to engage in the flexible kind of jurisprudence associated with mediation. Courts that satisfy these conditions can reduce uncertainty about "the legal consequences of certain actions," "the bounds of the exceptions and the weight of extraordinary circumstances," and "how to balance clashing constitutional principles or rules in particular cases."

2.3.3 Courts as Settings for Information Transmission

Another possibility is that the judicial review process reveals special information to judges about the true nature of the political conflict they resolve. Judges might then consider revealing what they learn to uncertain parties. Carrubba's (2005) model of judicial review assumes such a role for a court. As long as judges are reasonably certain that governments will comply with their decisions, they will be willing to reveal the information that they learn via the litigation process. It is no doubt common to assume that litigation, generally speaking, reveals information about the case facts and parties' motivations (Bull and Watson, 2004; Clark and Kastellec, 2013). So, perhaps all that is necessary is to assume that some information will be revealed about a leader's motives during the course of a case. The difficulty with this assumption is that regime

misunderstandings follow from beliefs that some kinds of leaders have incentives to dissemble. And if that is true, it is unclear why a litigation process that involves a party believed to be less than truthful would necessarily convince another party that what has been presented or said or recorded is in fact true. This lack of trust is exactly what causes the problem of managing regime understandings. It is the problem we are trying to solve. Assuming that courts simply provide this information does not answer why and how they might do it.

Carrubba and Gabel (2014) provide a mechanism by which information could be revealed in the process of litigation. They develop a model in which regime rules are managed via litigation before a court. The particular setting that they have in mind is the Court of Justice of the European Union. The problem on which they focus is that in some years, some member states of the European Union will confront local challenges that make it inefficient to comply with long-run commitments to European regulations. Other governments in the system might agree with this state's interest in violating the treaty under these facts, at least in the short-run; however, there is an informational asymmetry. Only the non-compliant state truly knows whether the local challenge it confronts is sufficient to render its long-run commitments inefficient. Carrubba and Gabel suggest that the litigation process provides states with an opportunity to send costly signals about their private information.

2.3.4 Information and Judicial Review

In Chapter 4, we offer a formal analysis of the ways in which judicial review can influence the fundamental problem of democratic governance. It draws on ideas developed by Ríos Figueroa and Carrubba and Gabel. Here we highlight what our account shares with their accounts. We also highlight ways in which we depart from their work. We conclude by specifying four conditions that are necessary for courts to influence democratic regime survival.

We agree with Ríos Figueroa that courts lacking independence, at least from sitting governments, are unlikely to influence conflicts between leaders of the state, the political opposition, or other interests in society. We agree with both Ríos Figueroa and Carrubba and Gabel that influencing the ability of parties to deal with their uncertainty about the underlying nature of a political conflict can be an important element of the way in which courts stabilize democratic regimes. And with Carrubba and Gabel, we share the view that judicial processes can influence the credibility of communication even if courts do not behave as mediators in the sense of Ríos Figueroa.

Our account also differs from their work, but in complementary ways. As we show in Chapter 4, judicial review can help reduce political conflict even if courts act in ways that would be classified as "arbitrators" on Ríos Figueroa's account. The model of judicial review we develop is sparse. Judicial decisions act as a kind of veto only. There is no dialogue. Indeed,

there is no jurisprudence at all. This does not imply that mediator-like courts are no better than the type of court we imagine. They very well be. Nevertheless, we believe it useful to identify the conditions under which an arbitrator style court can work to promote peace as well.

Our model identifies conditions under which courts are able to incentivize the revelation of private information. This, as it turns out, has a lot to do with how we conceive of judicial preferences, and ultimately judicial independence. As we show, for courts to influence the informational problem directly by helping the parties to the conflict communicate credibly, they must be not only independent of the sitting government, but independent of all parties. Whether it is politically feasible to imagine a court that is somehow independent of all political cleavages in society is not completely clear; however, if courts do operate largely independently of all interests, then there are conditions under which they can incentivize leaders to fully reveal their private information in ways that the opposition will find credible.

We will also depart slightly from Ríos Figueroa on the issue of judicial power and compliance with court orders. He writes, "In this framework compliance goes hand in hand with the transmission of information... Transmitting information effectively does not assume compliance, but arguably simply issuing creative and forward-looking jurisprudence would incentivize the actors in the conflict to apply the solution suggested by the mediator (p. 40)." We do not disagree with this logic, but in our model it is the threat of non-compliance and the costs

that leaders can sometimes bear for defying court orders that creates the costs necessary to send credible signals about their reasons for acting in extraordinary ways. Indeed, this argument provides a simple rationale for understanding where the costs associated with the signals in Carrubba and Gabel's account come from. In our argument, courts are defied and yet defiance can be part of a mechanism through which democracy is stabilized.

Finally and critically, the model we develop in Chapter 4 shows how judicial review can promote democratic peace even when courts do not in fact influence the information that leaders transmit to the opposition. As long as non-compliance is sufficiently costly, judicial review will incentivize leaders to less frequently engage in extraordinary policy-making, thus making the scenarios that can result in conflict less likely to observe. This effect in turn will make opposition leaders less likely to aggressively police potential violations of regime rules when they observe them. In short, judicial review lowers the temperature of political conflicts even when courts cannot influence information transmission.

2.4 The Argument

We are now in a position to recombine the preceding ideas in support of courts as bulwarks of democracy. Figure 2.1 summarizes our argument. The first link in our account recognizes that democratic governance can be usefully conceived of as a social equilibrium, where competing groups forego violence in exchange for some degree of limited state power

(Przeworski, 2005). If nothing else, democracy requires a commitment to the peaceful transfer of power. Underlying this equilibrium are fundamental compromises or understandings made between groups on the nature of power in a democratic state. Modern democratic governance is indeed limited in a variety of ways, with limits often expressed formally in written constitutions but sometimes only understood implicitly by members of society (Weingast, 1997). Judicial systems are constructed to solve a monitoring problem inherent in this arrangement. Groups out of power will find it useful to have some mechanism for revealing violations of regime commitments (Reenock, Staton and Radean, 2013). Critically, as monitoring solutions, courts will be useful only in so far as competing groups wish to sustain democratic cooperation.

The incentives to construct effective monitoring systems are heightened when competition in a democracy is strong. Where elites might find themselves in control of the state in one year and yet out of power in the next, monitoring systems are in great demand. A generation of scholarship on the determinants of judicial independence suggests that courts operated by independent judges are particularly useful in this role (Epperly, 2019; Ginsburg, 2003; Stephenson, 2003; Hanssen, 2004; Finkel, 2008; Epperly, 2013). Thus, communities that compete in competitive electoral environments have strong incentives to build independent judiciaries. This relationship constitutes the first link in Figure 2.1.

The second and third links in the argument address how independent courts influence a critical information challenge that must be addressed to

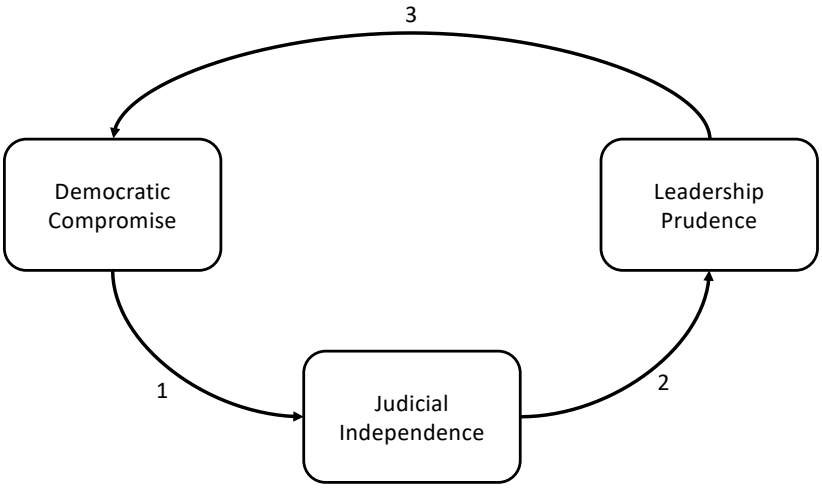


Figure 2.1: Courts and Democracy

render democratic regimes stable. One opposition party leader's claim that a president has fundamentally violated the constitution may be the president's necessary use of power under exigent circumstances. Failing to communicate clearly and credibly about the reasons for arguably unconstitutional behavior can be fundamentally destabilizing for a regime. By offering a centralized and visible venue for raising claims that officials have violated limits on their authority, courts present a potentially useful means of coordinating beliefs about whether limits on authority have been violated. In Chapter 4, we develop a model that identifies how courts can help parties reveal regime stabilizing information. Our key claim is that in doing so independent courts encourage leaders to be more prudent, adopting fewer policies or engaging in fewer actions that would raise concerns that rules have been violated. At the same time courts encourage opposition leaders to be less aggressive in their efforts to police regime

compromises, accepting more often potentially extreme policies in the interests of peace. The result is that courts promote more prudent politics, lowering the stakes of holding power; and this prudence reinforces commitments to democratic competition.

To sustain this reinforcing relationship, several conditions of a political system are essential.

1. **Minimal Conditions for Democratic Compromise:** Courts can only help reinforce democratic arrangements if competing parties are in principle committed to peaceful, democratic competition. A monitoring system is not useful is if there is no agreement to monitor. We will discuss and provide evidence for the claim that minimal conditions of economic development, necessary to sustain broad redistributional compromises between economic groups, remain essential for democratic stability. In states where the economic conditions for democratic compromise are met, we will suggest that independent courts can be particularly useful mechanisms for monitoring state power. To be fair, independent courts may help promote economic development in underdeveloped states, but it is less clear that courts will be effective monitors of the state. In such contexts, courts may be more effective tools of social control than monitors of state behavior.

2. **Minimal Judicial Independence:** Our argument highlights the need for a monitoring system that can solve informational problems

that complicate democratic compromises (Carrubba and Gabel, 2014; Ríos-Figueroa, 2016). A judicial system whose judges can be separated politically from both current governments as well as opposition parties can powerfully influence the ability of competing parties to communicate credibly about the true rationales behind potentially destabilizing policy choices. Of course, this claim immediately raises a question about the conditions under which judges can truly be separated from major competing interests in a political system. Although the appointment mechanisms for judges vary considerably Brinks and Blass (2018), no system completely purges politics from the process and it is not clear how it could be done. So, we might be skeptical about the ability of courts to fully resolve a regime's informational challenges. Critically, we will show that merely disconnecting judges from sitting governments can nevertheless incentivize political prudence and by so doing promote peace and regime stability. The absence of independence, whether because judges share the preferences of sitting governments or because judges behave as if they do in order to protect their posts, will not necessarily result in the demise of a democratic regime. It will mean that democratic regimes will only be as robust as the parties' non-institutionally assisted efforts to sustain democratic compromises.

3. **Costly Non-Compliance:** The model we develop envisions courts as offering leaders a visible way of credibly signaling a sincere rationale for engaging in behavior that might be interpreted as violations of

fundamental limits on authority. Leaders can do this by defying court orders. For this mechanism to work there must be consequences to non-compliance. We argue that a robust civil society that mobilizes public support for judicial authority commonly serves this purpose.

4. **Judges Who Tolerate Non-compliance:** To sustain the mechanism we develop, judges must be willing to accept defiance of their orders. In this way we will depart from existing literature in which the democracy-promoting revelation of information follows from judges being politically prudent Carrubba and Gabel (e,g. 2014). On our account, judges impact democratic compromises through sincerely resolving their cases, by inviting some degree of inter-branch conflict. Our argument shares the perspective of Ríos-Figueroa (2016) where the ability of a court to successfully mediate depends on its independence. We will show that in order to defend democracy, judges simply must accept some degree of non-compliance their orders. Indeed, on this account some level of non-compliance with judicial decisions can be a healthy part of a functional system of judicial review. By accepting a degree of non-compliance in exchange for issuing decisions that invite leaders to violate orders, judges permit the translation of violent inter-party conflict into more peaceful inter-institutional conflict.

2.5 The Path Forward

This chapter has provided a conceptual framework for our account. We adopt a minimalist concept of democracy and state the fundamental problem of democratic governance. In doing so we also describe how the substantive values that make up maximalist concepts of democracy are precisely what creates the fundamental problem. With the problem stated, we propose that judicial review, broadly defined, might be a part of the solution.

In the subsequent chapter, we consider the first link in our argument. We consider evidence associated with the claim that elites have incentives to build and sustain independent courts when they opt to compete for power via elections. In Chapter 4, we develop a formal model of the ways in which judicial review can influence conflict in democracy. We show how different degrees of judicial independence affect the ability of courts to promote democratic peace through information transmission and we identify the conditions under which courts influence democratic peace even when they cannot influence information. We evaluate key empirical implications of that model in Chapters 5. Chapter 6 considers the implications of our argument for the survival of democracy in the United States. Chapter 7 concludes.

Chapter 3

Political Competition and Judicial Independence

> Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor. *The Spirit of the Laws, Baron de Montesquieu 1748*

This chapter addresses the first link in our argument. Are independent courts a direct product of the incentives that democracy provides? Or, are they simply epiphenomenal, occurring in conjunction with, but not generated by, competitive political arrangements? The most widely

accepted explanation of judicial independence suggests that democratic competition causes judicial independence. Under conditions of increasing democratic competition for political office, elites face strong incentives to construct, fund, support, and sometimes simply tolerate independent judicial bodies. On this account, courts are understood as a kind of political "insurance" against losses of political power (Epperly, 2019; Ginsburg, 2003; Stephenson, 2003; Hanssen, 2004; Finkel, 2008; Epperly, 2013). Although independent courts might frustrate leaders while they hold office, they are important sources of protection for the opposition.

A few empirical predictions follow from this argument. First, we ought to observe associations between politically competitive environments and the formal rules that are thought to enhance judicial independence. These *de jure* judicial institutions ought to appear when politically competitive regimes emerge and deepen as competition grows. Second, we ought to observe associations between politically competitive environments and the *de facto* judicial independence with which courts operate. Again, we expect these associations to both surface and develop as products of competition. Last, adopting formal rules or *de jure* judicial institutions ought to generate incentives for judges to behave independently and in doing so ought to enhance *de facto* judicial insulation.

We begin this chapter with a discussion of our measurement approach for judicial independence. We then take up the predictions we have just identified. Our primary goal is to evaluate the empirical validity of each of these claims with creative research designs that enable us to draw causal

inferences when possible. Our secondary goal is to explore associations between the key variables operating within the 'courts as insurance' literature, making use of newly-available data from the Varieties of Democracy (V-dem) project. At the broadest scope, V-Dem data is available for all countries for over 110 years, offering the widest data coverage ever put to these questions. Accordingly, throughout the chapter, we introduce visualizations that draw on these new data to explore the foundational claims of the insurance model. We offer three separate causally-oriented empirical analyses to triangulate on whether and to what degree political competition encourages judicial independence.

3.1 Measuring *de facto* Judicial Independence

Judicial autonomy is the ability of a judge to render a decision that reflects her sincere preferences (Ríos-Figueroa and Staton, 2014, pp.107) We require a measure of judicial independence that reflects autonomy or whether a judge resists undue pressures to resolve cases with a particular interest in mind. Scholars have produced a large number *de facto* judicial independence measures, but each confronted notable limitations as a consequence of related patterns of measurement error and data missingness.[1]

Prior research teams assessed the concept of *de facto* judicial independence

[1]For a complete review of available measures of de facto independence see Linzer and Staton (2011).

with different conceptual definitions. This resulted in slight variations in the operational concept being measured. Moreover, different teams often had varying levels of expertise across cases and over time and, most critically, despite the potential for such measurement error to propagate through a research team's work, no estimate of the uncertainty around the final measures are provided. Prior measures also offered spatially or temporally incomplete data coverage. Critically, this missingness was often correlated with measurement error and other features of a country (e.g. economic development).

Linzer and Staton (2011) offer a measurement model of *de facto* judicial independence that builds upon the insights and data of prior work but improves upon the limitations discussed above. This approach offers wider spatial and temporal coverage, providing measures of judicial independence for 200 countries between 1948-2012. Their original measurement model did face, however, a rather unfortunate limitation. Due to temporal restrictions on data availability prior to 1948, any attempt to estimate their measurement model prior to 1948 would need to rely on only a single indicator spanning this earlier period – Polity's measure of Executive Constraints. We remedy this limitation by updating the Linzer and Staton (2011) judicial independence scores, taking advantage of newly available data from the The Varieties of Democracy Project project (V-Dem).

V-Dem measures offer a temporal domain from 1900-2015 and provide several additional variables to incorporate into the Linzer and Staton (2011) model, prior to 1948. To update their scores, we began by

identifying any datasets, used in the original model, that offer more recent versions of their data. Accordingly we included newer versions of Cingranelli-Richards (CIRI) judicial independence variable (Cingranelli and Richards, 2008), Polity's executive constraints variable (Marshall et al., 2002), the 'law and order' variable from the PRS Group (Political Risk Group, 2004), Feld-Voigt (Feld and Voigt, 2003), and Global Competitiveness Report (GCR) are included.

We also include two new variables from the V-Dem project: an indicator of high court independence (V-Dem variable *v2juhcind*) and an indicator of high court compliance (V-Dem variable *v2juhccomp*). The high court independence item asks expert coders to answer the following question, "When the high court in the judicial system is ruling in cases that are salient to the government, how often would you say that it makes decisions that merely reflect government wishes regardless of its sincere view of the legal record?"(Coppedge and Ziblatt., 2018, pp.153). The compliance questions asks, "How often would you say the government complies with important decisions of the high court with which it disagrees?"(Coppedge and Ziblatt., 2018, pp.154).[2] By updating LJI with the most current indicators, including Polity before 1948, and adding two V-Dem indicators,

[2]Unless otherwise stated, all coding conventions from the original estimation were used. In the case of GCR, a new interval measure was used containing seven categories instead of the ten that were used in the original dataset. In all estimations in our update, the new GCR measure is treated as an additional indicator to the original eight. For Feld-Voigt, if a value in the update differed from the original dataset, the more current value was used for the entirety of the 1980-2015 time period. Unless otherwise stated, all coding conventions from the original estimation were used.

we nearly double the country-year coverage of *de facto* judicial independence.

A potential concern of estimating a new latent variable model is whether or not the updated version corresponds to the original estimates. In the aggregate, these two models are quite consistent. The original and the update both have means of .45. Likewise, the average posterior standard deviation changes from .05 to .04, suggesting equal or even greater certainty across estimates. Moreover, at the country level, the updated measures are quite consistent with the originals. Consider the original and updated LJI data for Spain displayed in 3.1 below. The first obvious benefit of the updated data is the longer time-frame. With the newly available V-DEM data, we were able to back-date the LJI data to 1900, providing additional insights into how judicial independence developed in the earlier half of the 20th century.

Where the series overlap, we have a very tight correspondence between the two, save the 1950s through 1970s, during the Franco years. The original data registers slightly lower LJI scores during this period compared to our updated version. In the newly extended period however, the LJI data pick up the dynamics of the last remnants of the constitutional monarchy under the reign of Alfonso XIII and the eventual coup and dictatorship of Primo de Rivera between 1923-1930. The series grows in accordance with the Second Spanish Republic and the commitment to constitutional principles between 1931-1939 and then descends again as Franco's dictatorship takes hold after 1939.

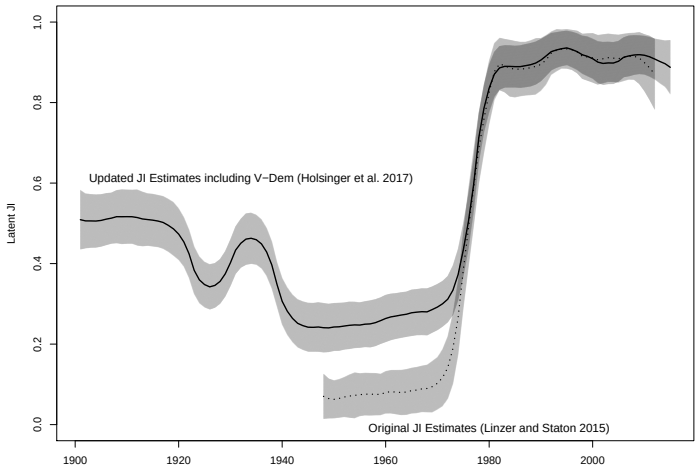


Figure 3.1: Original and V-Dem-updated LJI estimates for Spain:1900-2015

Consider as well the original and updated LJI data for the U.S. displayed in 3.2 below. With the updated LJI data, we gain a different perspective on the U.S. courts, providing additional insights into how the they grappled with challenges to their authority in the middle of the 20th century. The original LJI data portrays U.S. *de facto* judicial independence as highly independent and essentially static from 1948-2015.

The inclusion of the new V-Dem indicators, however, reveals a slightly different story. While the series suggests that the U.S. courts were highly independent throughout the century, they did weather a challenge beginning in the 1950s. These data are likely picking up the challenges that the U.S. courts, particularly the Warren Court, faced to their authority over cases dealing with racial segregation in education, voting and housing. It is important to note, of course, that the range on the

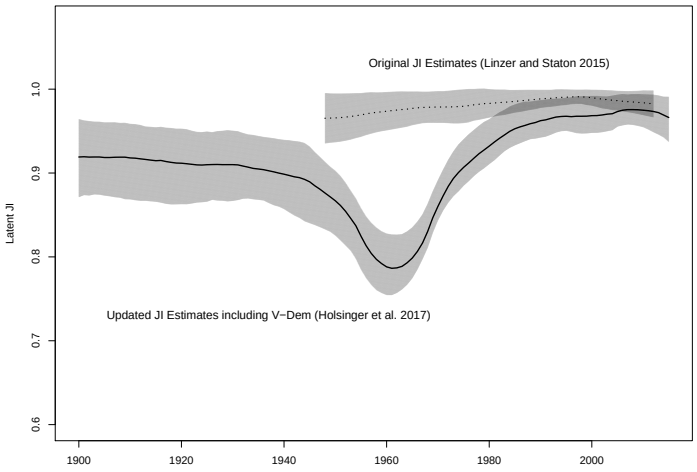


Figure 3.2: Original and V-Dem-updated LJI estimates for the United States:1900-2015

y-axis for the U.S. plot is restricted compared to the Spain plot above. This is because despite the challenges that the U.S. courts may have faced during this time, they never registered an LJI score in the entire series lower than .79 in 1961. This suggests that, despite the challenges the U.S. system faced, if we were to adopt a dichotomous threshold approach to coding judicial independence it is likely that any research team would have still coded the U.S. system as 'independent.'

Our updated and expanded LJI data offer superior spatial and temporal coverage over the original Linzer and Staton (2011) data. Accordingly, for the remainder of this book, we make use of our updated version of LJI to measure *de facto* judicial independence in all contexts.

3.2 Measuring *de jure* Judicial Independence

De jure conceptualizations of judicial independence focus on the formal rules or institutions that have direct consequences for judicial insulation from undue interference by actors external to the court. By this conceptualization, a more independent judiciary is one in which any number of formal rules incentivize non-judicial actors to respect the court's autonomy. These rules are thought to accomplish this goal by raising the costs that non-judicial actors bear in attempting to violate the constitutional boundaries vis-á-vis the court (Hayo and Voigt, 2007).

De jure conceptualizations of judicial independence immediately confront two challenges when migrating to the empirical world. The first challenge is, among the many rules regarding judicial operation that might contribute to a court's independence, e.g lifetime tenure and non-political appointment, which precise formal rules are likely to raise the costs of court interference? The second challenge is whether any one rule is sufficient *in sui* to ensure judicial independence or whether a given rule complements or compounds the contribution of another to the development of judicial independence.

Scholarship on *de jure* measures of judicial independence has focused on identifying features of the political system that are believed to limit external actors' ability to influence members of the court. These features are reflected in the legal foundations of the court as expressed in either statutory or constitutional provisions. Imagining judicial independence as

a latent variable that is not observable directly, scholars have identified a variety of institutional features that were designed to promote judicial independence from other actors. And while the precise inputs to *de jure* measures of judicial independence have varied, over nearly two decades of research, a relatively high degree of consensus exists across various applications.

The early 2000s witnessed an uptick in the empirical explorations of *de jure* judicial independence. An early application by Keith (2002) examined the relationship between judicial independence and human rights by focusing on seven constitutional provisions across all states from 1976-1996. She found that one in particular, the guarantee of tenure in office, was related to enhanced human rights protection.[3] In addition, she also noted a synergy between four inputs in particular. When adopted jointly, guaranteed terms, separation of powers, a ban on military courts and fiscal autonomy had particularly strong associations with human rights protections. Apodaca (2004) applied these data as well but with an additive scale across Keith's seven items.

Feld and Voigt (2003) provide another empirical innovation of *de jure* judicial independence. Using a questionnaire administered to country experts, they assessed a variety of features of the court's power as found in

[3]Keith's seven inputs were terms of office, finality of decisions, exclusive authority, ban against military of exceptional courts, fiscal autonomy, separation of powers, and enumerated qualifications

legal documents in the aggregate over the period 1960-2002.[4] They used 12 inputs as represented in legal documents and constitutional provisions to yield an index of *de jure* independence that was eventually summed across all available inputs and normalized by the total inputs available, resulting in a scale that ranged from 0 to 1.[5]

La Porta et al. (2004) also provided a measure of *de jure* judicial Independence and constitutional review. Their measure of judicial independence gathered data over 71 states for the year 2003. Their judicial independence measure consists of three inputs: supreme court judicial tenure, administrative court judicial tenure and whether case law serves as precedent and their constitutional review measure consists of two: the difficulty to amend the constitution and judicial review of government action.

Across each of these empirical treatments of *de jure* judicial independence the correspondence between inputs is quite high. Indices often include items related to the relative ease with which judicial institutions can be amended, judicial appointment and tenure, the political insulation of judicial salaries, the process of allocating cases, the existence of

[4]These indicators were not gathered annually but rather are an aggregate estimates of a country's de jure judicial independence over the entire time period.

[5]The 12 inputs included in their index were: whether the high courts is 'anchored' in the constitution and the ease with which it could be amended, appointment procedures, judicial tenure, renewable terms, salary independence, competitive salary, court accessibility, rules on case allocation, constitutional review and whether the court publishes its decisions.

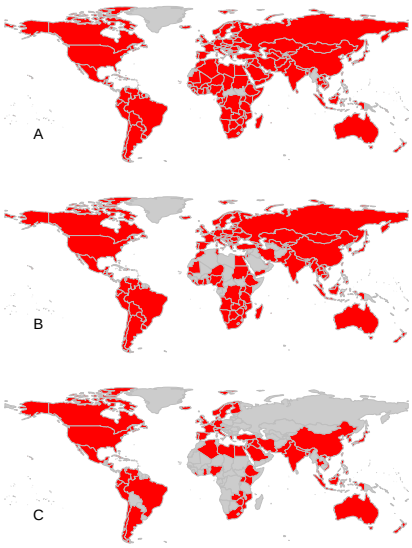
constitutional review, and the extent to which the court publishes its decisions, including minority decisions.

In addition to their inputs, each measure possesses another, familiar, similarity: non-random missingness in their data. The temporal and spatial scope over which various inputs for each judicial independence measure are available is non-random. Some measures offer more complete spatial coverage including a great number of countries around the world but select non-randomly on time. Others offer detailed legal documentation of various institutions over longer periods of time but select non-randomly on cases. The challenge for users looking to apply any of these *de jure* measures is that often this non-random missingness is correlated with features of the political system under study (e.g. data is unavailable for developing states or states for which legal documentation was not readily available). As a result the analyst must theorize carefully about the impact of the non-random patterns in the data on the question at hand.

The Comparative Constitutions Project (CCP) described in Elkins, Ginsburg and Melton (2009) provides a solution to several of these challenges. Founded in 2005, The Comparative Constitutions Project has spent the last decade collecting and analyzing constitutional texts for all independent states since 1789. The Project uses the information contained in constitutional texts in conjunction with a survey instrument and a coding team to generate a comprehensive dataset of government

institutions.[6] These publicly available data, first released in 2010, allow scholars to extract any combination of constitutional institutions believed to be linked to judicial independence.

Figure 2.2 below displays the relative advantages in geographic coverage across these datasets.



Panel A represents (Elkins, Ginsburg and Melton, 2014), Panel B represents Feld and Voigt (2003), and Panel C represents La Porta et al. (2004).

Figure 3.3: *Data Availability across De Jure Judicial Independence Datasets*

Panel A displays the countries that are covered by the suite of variables included in the CCP. Compared to prior datasets, the CCP offers more complete geographic coverage without the standard trade-offs of either a limited time period or number of institutions covered. In fact, the

[6]See http://comparativeconstitutionsproject.org/

temporal coverage, relative to prior data is equally impressive.

We use the CCP to generate a measure of *de jure* judicial independence that Elkins, Ginsburg and Melton (2014) used. This measure utilizes six aspects of constitutions believed to contribute to judicial autonomy. These include constitutional statements on judicial independence, judicial tenure, selection procedures, removal procedures, limited removal conditions and salary insulation. These data offer superior spatial and temporal coverage. Accordingly, for the remainder of this book, we make use of the CCP data and these six inputs to construct our measure *de jure* judicial independence in all contexts.

3.3 Courts as Political Insurance: A Snapshot

We begin by considering whether *prima facie* evidence supports the expectation that policy makers construct independent courts under competitive political environments. If policymakers construct courts as devices of political insurance then we ought to observe more formal institutions associated with independent courts under democracy compared to autocracy. To consider this question, we examined the relationship between *de jure* judicial independence and regime type using the Elkins, Ginsburg and Melton (2014) data. If regime types differ over the incentives they supply for the adoption of formal institutional court protections, we might expect two triangular patterns in Figure 3.4. Among autocratic regimes, we would expect a triangular relationship with most regimes adopting either none or very few institutions and even fewer

adopting more. Among democratic regimes we would expect an inverted triangular relationship, with most democracies adopting many of these formal protections and only a minimal number adopting few.

Figure 3.4 below offers a snapshot of all states, democratic and autocratic, as well as their *de jure* judicial independence in 2010. Regime type is represented on the x-axis and a state's total number of formal institutions associated with *de jure* judicial independence is represented on the y-axis. In 2010, we have 91 democracies in our data and 70 autocracies.

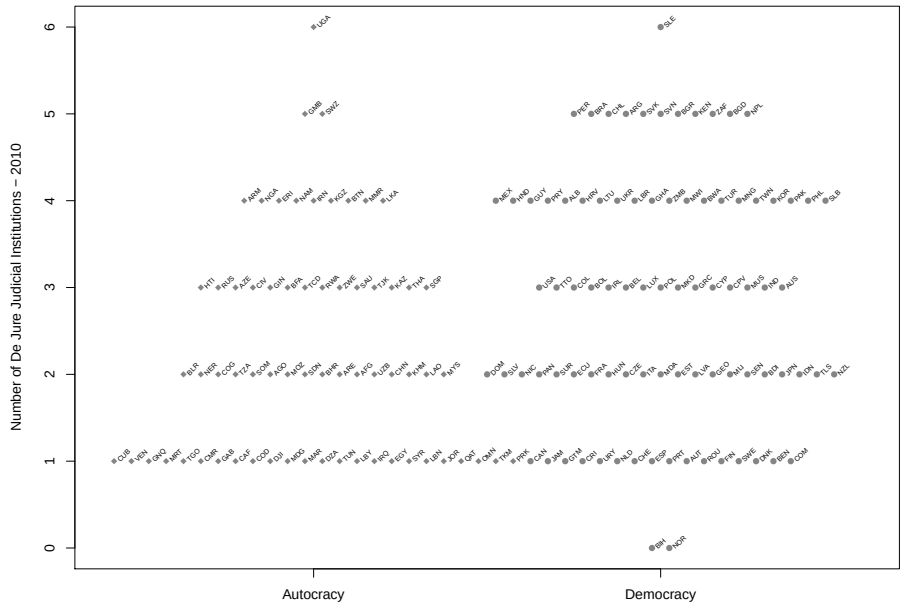


Figure 3.4: *Total de jure constitutional items present among autocracies (left panel) and democracies (right panel). Country abbreviations are displayed.*

The figure is consistent with our expectations for autocratic regimes. Most

autocracies include at least one formal rule, some include two or three and very few contain four or more. The pattern is less clear for democracies and whether they generate formal institutional protections for courts. Democratic regimes appear nearly evenly distributed across the possible number of formal rules adopted, suggesting the possibility that there may be alternate pathways for democracies to secure judicial independence.

Of course this figure assumes that each of these six institutional forms offers similar levels of insulation for the courts. What if one particular form, say protections for judicial tenure, is particularly critical in supplying political protections to the courts? What might we observe across these specific forms? To examine this, we consider the distribution of specific formal institutions across regime type.

In Figure 3.5 below we disaggregated the Elkins, Ginsburg and Melton (2014) data to consider a snapshot of adoptions of specific *de jure* rules by regime type in 2010. For each of the six formal institutions that we consider, we see the distribution of adoptions among democracies and autocracies. For each formal rule, states that have adopted the rule are shown on the upper plot in solid markers and states that have elected to not adopt the rule are shown on the lower plot in hollow markers. What is immediately obvious is that of the many formal rules that could be adopted to encourage court independence, authoritarian regimes most preferred rule is to include a statement in their constitutions that the courts are independent. The adoption of other formal rules, among autocratic states, are far less popular. The least popular among autocratic regimes are

formal rules for securing insulated salaries for judges and including a clause outlining limited conditions under which judges can be removed.

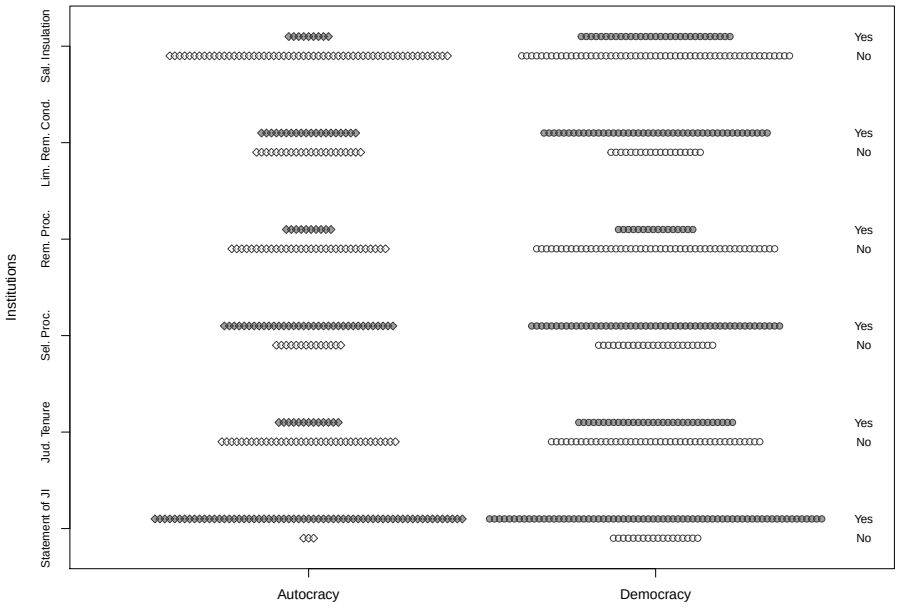


Figure 3.5: *Number of states that have adopted a specific de jure rule among autocracies (left panel) and democracies (right panel). States with adoptions are solid markers, states without adoption are hollow markers.*

On the democratic side, the most popular formal rules are language declaring that judges shall be independent, language highlighting independent nominating procedures, limited conditions for constitutional removal and establishing salary security. But we need to keep in mind, however, the prior figure that suggests democratic states offer unique combinations of these formal rules and that while adopting these rules appears to be more popular compared to their autocratic counterparts, the

only clear picture to emerge from these figures is that formal institutions are ubiquitous in democracies less so among autocracies. Most regimes, regardless of type, have at least one of these formal institutions. And there would appear to be no clear combination of formal rules that competitive arrangements encourage.

In the absence of an emergent pattern between the formal rules that ought to incentivize independent courts and regime type, we might have little optimism to observe courts operating with greater independence under democracy. But Figure 3.6 below suggests otherwise. We generated this figure to display a 2010 snapshot of the relationship between regime type and *de facto* judicial independence with regime type represented on the x-axis and a state's *de facto* judicial independence represented on the y-axis. Regimes are located at the general level of LJI with an offset or jitter, allowing us to see the country abbreviation.

The pattern in Figure 3.6 is more in line with the expectation that independent courts are more likely to be constructed in the presence of political competition. On average, democratic judges (the right side of the panel) operate with greater insulation compared to their autocratic counterparts (the left side of the panel). The mean LJI score for democratic courts is .66 compared to .25 for autocratic ones. Croatia, Jamaica, and Bulgaria are representative of the democratic group mean, while Saudi Arabia, Pakistan and Angola are centrally located autocratic courts. There is to be sure variation in judicial independence around these central tendencies within each regime. Compared to democracies,

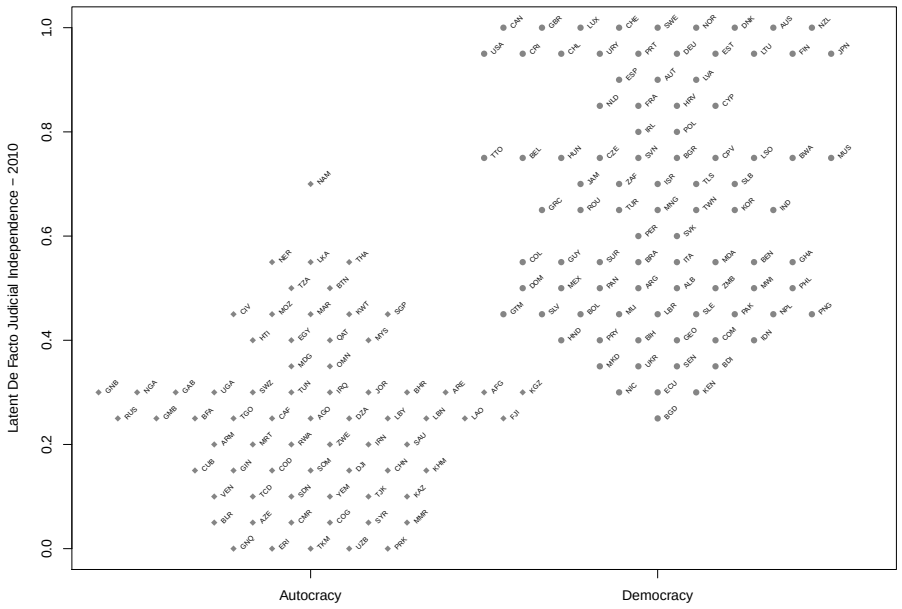


Figure 3.6: *De Facto judicial independence (LJI) over autocracies (left panel) and democracies (right panel). Country abbreviations are displayed.*

autocracies are more tightly clustered around their group mean, with only Namibia and the Solomon Islands having scores above the democratic mean. Democracies on the other hand exhibit greater variation. Despite being members of the democratic family in 2010, the difference between the most politically insulated courts and the least is stark. At the upper bound we see states like Danish, Norwegian and Swedish courts operating with the highest degrees of insulation. Contrast this with Ecuador, Nicaragua and Kenya, which are located so low in the tail of the democratic distribution that they flirt with the average level of court insulation under autocracy.

On the whole, the snapshots presented in this section suggest two possibilities. First, political competition may very well provide incentives that enhance judicial independence. Second, competition may not necessarily provide insulation through the adoption of formal judicial rules. Each of these snapshots, however, masks the developmental process by which formal rules are constituted and the temporal sequencing of any eventual gains in *de facto* judicial independence. To understand this process we will need to consider other data.

3.4 Courts as Political Insurance: A Process

The previous section paints a picture generally consistent with the view that judicial institutions are products of democracy. But, of course the illustrated relationship above is only static, making it difficult to assess any sense of the causal processes by which these features may be related.

In this section, we consider three empirical exercises focused on how shifts in competition lead to changes in judicial independence.

First, we consider the dynamic responses of *de jure* and *de facto* judicial institutions in the lead-up to and the aftermath of democratic transitions and breakdowns. While we acknowledge that democratic transitions and breakdowns are not exogenous to judicial independence, we do believe there is value in assessing whether these judicial institutions vary in the immediate aftermath of a regime transition. Second, we consider how judicial institutions changed in Eastern Bloc countries in the wake of the collapse of the Berlin wall compared to matched autocratic regimes that did not experience such political shocks. Last, we utilize an instrumentation strategy to identify the relationship between shifts in political competition and judicial independence. We instrument political competition with per capita production of petroleum, coal, natural gas and metals, and examine its effect on *de jure* and *de facto* judicial independence. We proceed with each of these strategies in turn.

3.4.1 Competition, Judicial Independence and Regime Transitions

How might large scale shifts in political competition be associated with the formal institutions believed to help construct independent courts? To consider this question we examined the relationship between *de jure* judicial independence using the Elkins, Ginsburg and Melton (2014) data and regime dynamics. Figure 3.7 below displays a count of the number of

de jure judicial independence indicators as noted by Elkins, Ginsburg and Melton (2014) in the lead-up to and aftermath of a transition to democracy (left panel) and a breakdown from democracy (right panel).

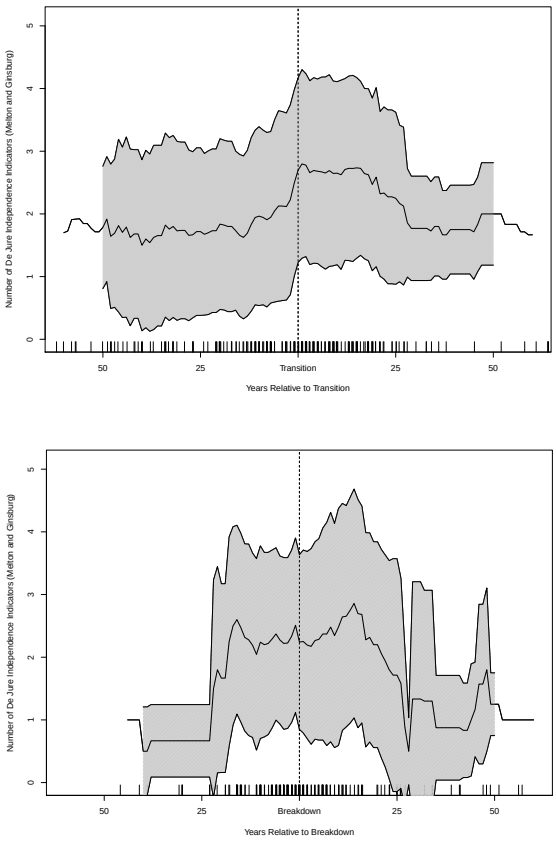


Figure 3.7: *De Jure judicial independence pre- and post-democratic transitions (left panel) and breakdowns (right panel). Shaded area represents one standard deviation around series mean.*

The shaded area in the figure represents one standard deviation around the series mean for a given year and the figure is centered around the point of transition. The data suggest that formal institutions designed to

enhance judicial independence are not particularly likely to be strengthened after a transition to democracy nor eradicated after a breakdown. In the left panel, we see that after a transition to democracy there is indeed a rise in the formal institutions associated with an independent court. But there is a good deal of variance among newly inaugurated regimes within the first 25 years on this measure and this institutional advantage appears to weaken with regime age. Older democratic regimes appear to possess fewer of these indicators compared to their younger compatriots. In the right panel, we see hardly any effect of democratic regimes that break down into authoritarianism on the number of indicators associated with *de jure* judicial independence.

Now we turn to Figure 3.8, which summarizes the changes in de facto judicial independence following transitions to democracy and we see a striking difference from the prior figure. Figure 3.8 below displays the mean levels of *de facto* judicial independence using the Linzer and Staton (2015) (or LJI) measure in the lead-up to and aftermath of a transition to democracy (top panel) and a breakdown from democracy (right panel). The shaded area in the Figure represents one standard deviation around the series mean for a given year. The plot provides simple but striking support for the notion that *de facto* judicial independence responds to large scale shifts in democratic competition reflected in the transition between democratic and autocratic regimes. We see in the left panel that after transitioning to democracy, *de facto* judicial independence experiences rather rapid growth in the first 20 years, continuing to climb until roughly 50-60 years under democracy where it plateaus at or near its

measurable limit. Enhanced political competition appears to be associated with increased *de facto* judicial independence.

The plot showing change in judicial independence around the aftermath of a democratic collapse also shows a decline. Yet it is important to stress that the average LJI score for states that would experience a breakdown dropped prior to the fall of democracy. While the top panel suggests that increases in judicial independence lags transitions to democracy, the bottom panel suggests that decreases in independence may lead breakdown.

We can examine more carefully the relationship between competition and judicial independence by considering an empirical model that not only accounts for their causal relationship but also recognizes the potential for endogeneity between political competition and judicial independence. After all, while the insurance model suggests that political competition ought to breed more independent courts, it may also be the case that less-independent courts, as mere extensions of the executive branch, are less likely to protect opposition parties from government harassment. Therefore any association between political competition and judicial independence presents a challenge to identify the causal direction between the two. We pursue two strategies to assess this possibility in the next two sections. First, we consider the response of judicial independence to the fall of the Berlin wall and the transition of the Eastern Bloc countries. Next, we consider an instrumentation strategy that uses petroleum endowments to identify the relationship between autocratic transitions to democracy.

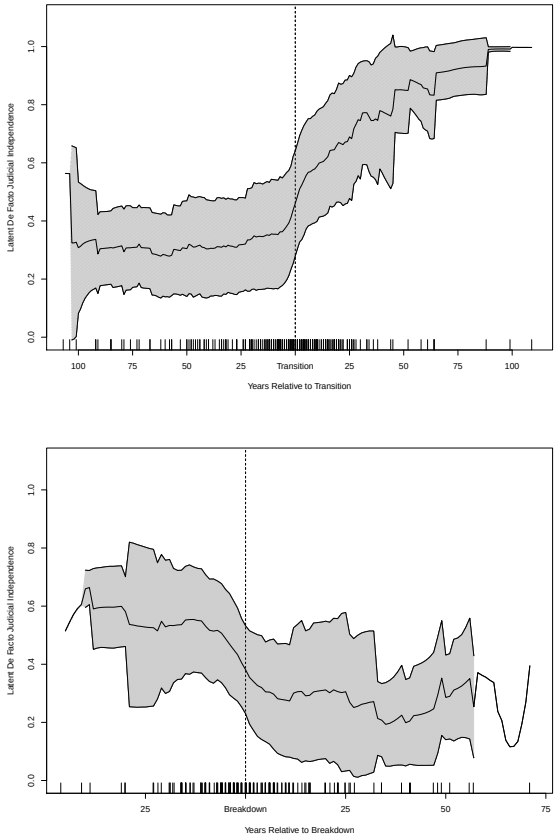


Figure 3.8: *De Facto judicial independence pre- and post-democratic transitions (left panel) and breakdowns (right panel). Shaded area represents one standard deviation around series mean.*

3.4.2 An Exogenous Intervention: The Fall of the Wall and Judicial Independence

To evaluate the relationship between political competition and judicial independence, we require an exogenous shock of competitive elections being introduced in an otherwise closed political system. Identifying the introduction of competitive elections is relatively straightforward; being convinced that such introductions are exogenous is another matter entirely. One instance that we believe approximates the rapid onset of an exogenous shock to a set of states was the fall of the Berlin wall and the transition of Eastern Bloc countries toward democracy after 1989.

As the decade of the 1980s drew to a close, most regimes in the Eastern Bloc, while economically anemic, were nevertheless believed to be relatively secure from imminent regime change. A best case might be made that Poland was an outlier. By 1988, Poland had already experienced years of economic stagnation accompanied with political protests, strikes and resistance. The regime's response over the decade was characterized by fits and starts of repression and liberalization. In a short window the regime that featured political openings for workers to organize and strike, as with Solidarity, also featured crackdowns in the form of martial law and political murders. Attempts to stabilize the regime bore little fruit. Increased resistance in the form of national strikes, the failure of a nationwide referendum in the fall of 1987, and interventions by the Catholic church all laid the groundwork for the regime to request additional negotiations with Solidarity (Linz and Stepan, 1996).

Eventually the Round Table negotiations led to the first free election in the summer of 1989. This election would set the tone for the events that reshaped Eastern Europe in November of that same year.

Still, only now, from our vantage point with perfect hindsight, did Poland appear to have been steadily marching toward an inevitable democratic transition. For the other Eastern Bloc regimes, the vision of an imminent democratic transition was blurrier. In Albania, Bulgaria, Hungary, and Romania, the lead-ups to their democratic transitions were briefer and less strewn with signs of the potential political shock that was to hit in the fall of 1989. Kuran famously diagnosed the failure of intelligence agencies, professional political scientists and journalists alike to foresee the events of 1989 as a case of 'imperfect observability' due to preference falsification among the citizens (Kuran, 1991). In short, predicting the timing of such revolutions was and continues to be difficult when citizens have incentive to falsify their support for the regime and dissemble their thresholds for taking to the streets. Given the wide failure to predict these regime transitions in 1989, we are reasonably confident to treat the onset of political competition within them as exogenous.

To understand how political competition informed the development of judicial independence in the wake of the events of 1989, we consider how *de jure* and *de facto* independence changed relative to other autocratic states that experienced no such shock. To match states that did not experience a transition against the Eastern Bloc states, we identified authoritarian counterparts in the pre-intervention period (i.e. 1987) using

a Coarsened Exact Matching algorithm (Iacus et al., 2009). For each Eastern Bloc country we matched on GDP per capita, GDP growth, and ethnic fractionalization, using a coarsened binning procedure in which we segmented each variable into three bins. We also utilized binary indicators for regime type (authoritarian/democratic) and whether or not the state was experiencing a civil war. Three of the five states, Poland, Albania and Romania each matched to the same group, as a result we have three distinct comparison strata.[7]

Figure 3.9 displays separate plots for each of these states and their matched cohorts. Our measure of *de facto* judicial independence is plotted on the y-axis with time plotted on the x-axis. A dashed vertical line marks the 1989 collapse of the Berlin wall. Each Eastern Bloc country series is displayed with a dashed line, while the mean for their autocratic-matched cohort is displayed with a solid line, bordered with with gray shaded confidence bands plotted around the mean.

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[7]Strata 1: Paraguay, Poland, Albania, Romania, Republic of the Congo, South Africa, Egypt, North Korea, and Indonesia. Strata 2: Hungary, Serbia, Mali, Burkina Faso, Togo, Nigeria, Gabon, Central African Republic, Democratic Republic of Congo, Kenya, Tanzania, Rwanda, Zambia, Malawi, Swaziland, Madagascar, Comoros, Libya, Qatar, United Arab Emirates, China, Mongolia, Taiwan, South Korea and Bangladesh. Strata 3: Bulgaria, Guinea-Bissau, Equatorial Guinea, Senegal, Liberia, Sierra Leone, Ghana, Lesotho, Yemen, Kuwait, and Nepal.

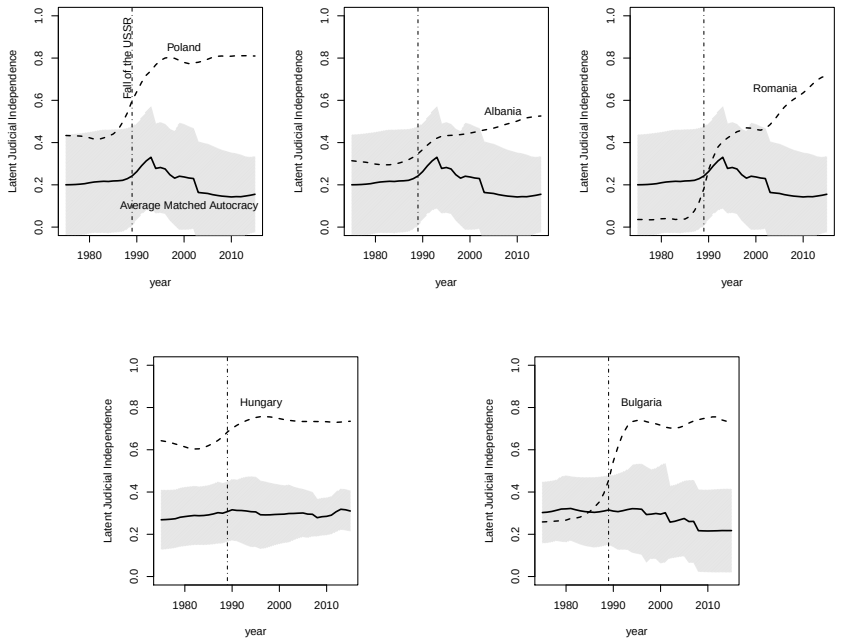

Figure 3.9: Eastern Bloc states *de facto* judicial independence compared to pre-1989 intervention coarsened exact matched autocracies.

Visually, the results are compelling. With varying degrees of intensity, the Eastern Bloc states responded to the rapid onset of political competition after 1988 with increases in judicial independence. Albania and Hungary registered fairly muted increases, while Poland, Bulgaria, and Romania experienced pronounced shifts in *de facto* judicial independence. These descriptive data are consistent with the claim that competitive environments provide incentives for leaders to support an independent

judiciary.

To consider the effect of this shift in competition more precisely we calculated the average treatment effect among the treated with a pooled sample across all five Eastern Bloc states. Ten models were fit on ten windows of change in *de facto* judicial independence, starting with the difference between 1988 and 1990 and ending with 1988 and 1999. Table 3.10 displays the estimates of the average treatment effects among the treated as a difference of means test comparing the judicial independence of Eastern Bloc states experiencing exogenous shocks of political competition (treated) to that of matched authoritarian states (control) across ten increasingly large windows of time. The only complication is that the resulting estimates are weighted according to the relative sizes of the three strata. These ten time-frames characterize the increasing cumulative effect of more years with political competition. The estimated shifts in *de facto* judicial independence displayed in the table offer additional support to evidence displayed in the figures above. The opening of political competition after just one year (1988-1990) results in a .07 increase in a state's latent judicial independence. After ten years post-treatment, (1988-1999) the effect increases to .15 or 7.5% of the entire range of LJI.

	Δ JI				
	1 yr	2 yr	3 yr	4 yr	5 yr
(Intercept)	0.03**	0.05***	0.06***	0.07***	0.08***
	(0.01)	(0.01)	(0.01)	(0.02)	(0.02)
Treatment	0.07**	0.09*	0.11*	0.12*	0.13*
	(0.02)	(0.03)	(0.05)	(0.06)	(0.06)
	Δ JI				
	6 yr	7 yr	8 yr	9 yr	10 yr
(Intercept)	0.09***	0.09***	0.07***	0.07***	0.07***
	(0.02)	(0.02)	(0.02)	(0.02)	(0.02)
Treatment	0.13*	0.14*	0.15*	0.16**	0.15*
	(0.06)	(0.06)	(0.06)	(0.06)	(0.06)

$^{***}p < 0.001$, $^{**}p < 0.01$, $^{*}p < 0.05$

Table 3.1: Change in Eastern Bloc states' *de facto* judicial independence compared to pre-1989 intervention coarsened exact matched autocracies.

Do we observe similar changes in the formal institutions believed to protect judicial independence? To consider this possibility, we conducted an identical analysis on the observed changes in the number of *de jure* institutions in response to the fall of the Berlin wall. Figure 3.10 displays separate plots for each of the Eastern Bloc states and their matched cohorts. However, we now plot our measure of *de jure* judicial independence on the y-axis with time plotted on the x-axis. As before, a dashed vertical line marks the 1989 collapse of the wall.

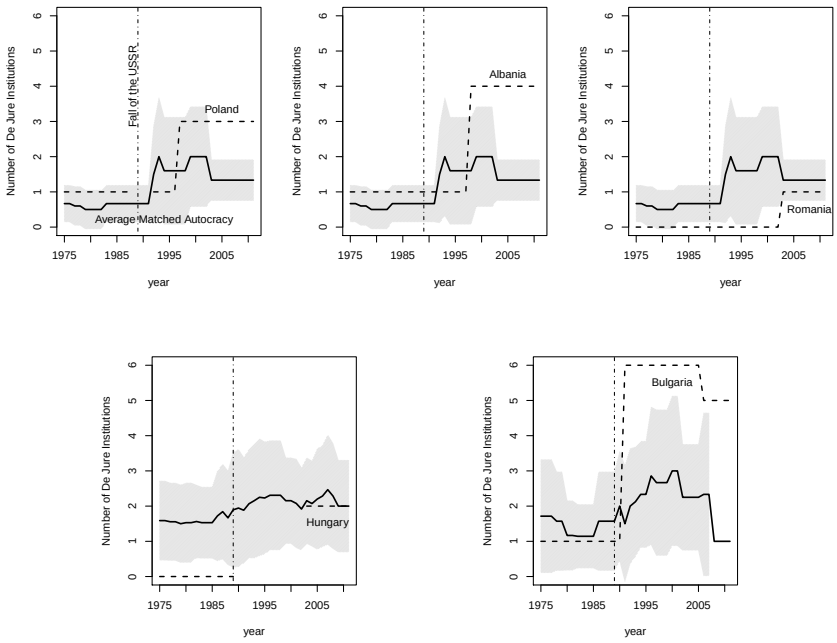

Figure 3.10: Eastern Bloc states *de jure* judicial independence compared to pre-1989 intervention coarsened exact matched autocracies.

Similar to the *de facto* results, the panels suggest that, in the wake of the 1989 shock, newly inaugurated regimes that amended or completely re-wrote their Constitutions included new rules designed to enhance *de jure* judicial independence. Prior to the adoption of a new constitution, each of these regimes either included no formal rules regarding judicial independence or included only one – a statement that the courts are to be independent. However, after adopting new or significantly amended

constitutions, these inaugural democratic regimes included several additional provisions. The most frequent new appearance, observed in Poland, Hungary, Bulgaria and Albania, was the inclusion of a statement on the independent procedures for nominating judges. Three additional rules were adopted by two states each. These rules included statements regarding independence of tenure (i.e. Poland and Bulgaria), removal conditions (i.e. Albania and Bulgaria) and independence of judicial salaries (i.e. Albania and Bulgaria).

One notable difference between the *de facto* panels and the *de jure* rules is the lag between the shock of the wall falling and the adoption of these new formal rules. Most new constitutions were not formally adopted until several years after the shock. In the interim, states operated under constitutional rules that were holdovers from the Communist regimes, from which they just emerged, or under provisional rules.

To consider the effects of the 1989 shock on the development of *de jure* judicial independence we again conducted an analysis that estimated the average treatment effect among the treated with a pooled sample across all five Eastern Bloc states. Table 3.2 reports the results of this analysis.

Our analysis suggests that the patterns displayed in the figures above are merely suggestive as only one specification suggests that *de jure* institutions increased with an opening of competition in the Eastern Block states. We cannot confidently reject that possibility that all of the other changes in *de jure* judicial independence are any different from changes occurring within the matched control group.

	Δ De Jure Institutions				
	1 yr	2 yr	3 yr	4 yr	5 yr
(Intercept)	0.05	0.06	0.78**	1.12***	1.18***
	(0.05)	(0.14)	(0.26)	(0.28)	(0.00)
Treatment	−0.05	1.6**	0.47	0.13	0.07
	(0.19)	(0.51)	(0.80)	(0.86)	(0.88)
	Δ De Jure Institutions				
	6 yr	7 yr	8 yr	9 yr	10 yr
(Intercept)	1.18***	1.35***	1.35***	1.34***	1.34***
	(0.28)	(0.31)	(0.30)	(0.30)	(0.30)
Treatment	0.07	−0.10	0.40	1.16	1.16
	(0.88)	(0.96)	(0.95)	(0.93)	(0.93)

$^{***}p < 0.001$, $^{**}p < 0.01$, $^{*}p < 0.05$

Table 3.2: Change in Eastern Bloc states' *de jure* judicial independence compared to pre-1989 intervention coarsened exact matched autocracies.

In sum, our investigation using the fall of the Berlin wall as an exogenous shock, supports the claim that political competition provides leaders with incentives to enhance judicial independence. Similar to our analysis in the previous section, however, we find that competition has uneven effects across our indicators of judicial independence. While competition uniformly enhances *de facto* judicial independence it appears to provide less consistent incentives for *de jure* rule adoptions.

Given the restricted domain of our sample, we are, of course, cautious about over-generalizing from this analysis. To consider a broader domain of cases, both spatially and temporally, however, will require a different tactic to address endogeneity concerns. In the next section, we consider the link between political competition and judicial independence of all states from 1900-2015, using an instrument for political competition.

3.4.3 Instrumentation

In this section we adopt the approach suggested by Epperly (2019). Specifically, we appeal to an instrumental variable for political competition – the per capita production of petroleum, coal, natural gas and metals Under what conditions would per capita production of these fixed assets offer a valid instrument for political competition? First, the instrument would need to be relevant to the endogenous regressor, political competition. This is a reasonable expectation given the dynamics between regimes and natural resources assets and as we demonstrate below this is borne out empirically. Second, the instrument must itself be exogenous. On this point, it would again appear reasonable for us to assume that the natural deposits of these resources are 'randomly assigned' by nature and therefore are as-if random and predetermined with respect to any regime's judicial independence. Last, our instrument must meet the exclusion restriction. We must be able to rule out any direct effect of the instrument, natural resources, on our outcome variable, judicial independence, other than through the path of political competition. On theoretical grounds we believe this to be a reasonable assumption.

In the analyses that follow, we present our instrumentation analysis for the effect of political competition on both *de facto* and *de jure* judicial independence. For each analysis, we first consider the relationship between competition and judicial independence across all regimes and then we consider the nature of this relationship within democracies and autocracies, in turn. We consider four measures of political competition.

First, we include an index created from Polity's PARREG and PARCOMP variables, which combines information about a system's regulation government restrictions on political competition. Second we include a competition based on Vanhanen and extracted from Coppedge et al. (2017). This variable is generated by "subtracting from 100 the percentage of votes won by the largest party (the party which wins most votes) in parliamentary elections or by the party of the successful candidate in presidential elections." Last, we include two variables from the Varieties of Democracy Project (Coppedge et al., 2017). We include, Suffrage, or the approximate percentage of enfranchised adults older than the minimal voting age as well as a variable, Competition, that is a dichotomous variable reflecting whether election are characterized by uncertainty.

Prior to presenting the identification analysis, we first consider a plot of the lagged changes in political competition along with the contemporary change in *de facto* judicial independence.[8] Figure 3.11 displays the plot of changes in *de facto* judicial independence on the y-axis with lagged changes in political competition plotted on the x-axis. Autocratic regimes are displayed on the left panel and democratic displays are displayed on the right panel. We also scaled the diameter of the markers to reflect regime age; smaller markers denote newer regimes.

[8]We conduct this analysis for the Polity political competition index, however, the data patterns are similar across all of our competition indicators.

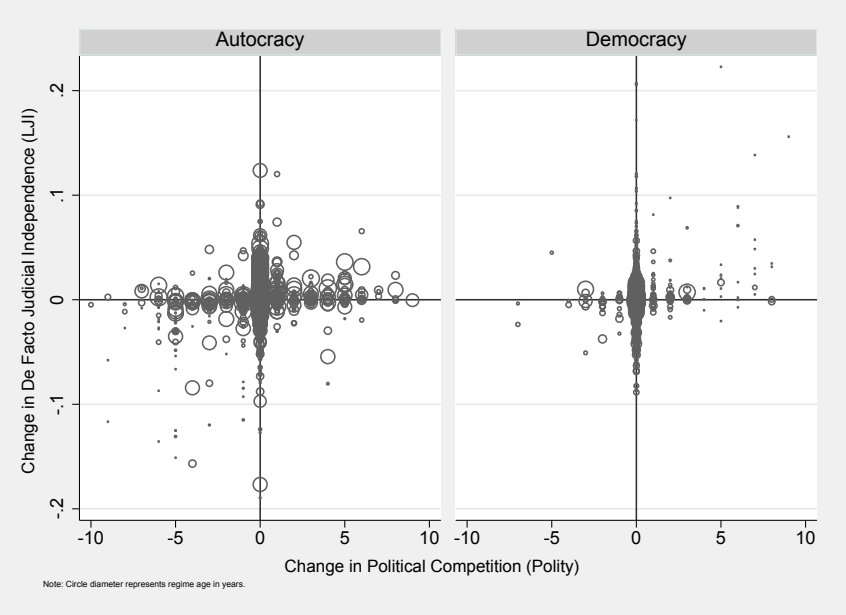

Figure 3.11: Changes in *de facto* judicial independence (LJI) plotted against changes in political competition (Polity) by regime for all states 1900-2015.

Before we turn to the figure we should note that change in political competition is a relatively rare event within both autocratic and democratic regimes. Among democracies, 96.72% of our country-years experience no change in political competition, compared to 93.84% among autocracies. When democracies do experience a change in competition 74% of the time it is an increase in competition rather than a decrease, while autocracies are more balanced, experiencing increases in competition 48% of the time. Among democracies, 45% of all increases in competition occur within the first year of the regime and 84% occur within the first 20 years of the regime. Reductions in competition, albeit rare, are evenly spaced throughout the lifetime of democracies. Among autocracies,

competition increases evenly throughout their lifetime, whereas 35.4% of reductions occur in the first year and 59% of competition reductions occur in the first 20 years of the regime.

Turning to the figure, the right panel displays the relationship between changes in political competition and changes in *de facto* judicial independence. The competition-judicial independence thesis predicts data to be dominant in the upper-right quadrant of the plot. Indeed, the plot suggests *prima facie* evidence that changes in political competition are associated with positive shifts in *de facto* judicial independence, particularly among new democracies – the smaller diameter markers. Moreover, the data are less dominant in the lower-right quadrant, ruling out that increasing competition decreases judicial independence.

The left panel displays an opposite pattern. The lower-left quadrant is data dominant – particularly among new autocracies, suggesting that contractions in competition are associated with restrictions of judicial independence when autocratic regimes are inaugurated. The lack of competition is associated with newborn autocrats seeking to bring courts to heel. This pattern also underscores an important distinction from the pattern observed among democratic regimes. Any association between competition and judicial independence among autocratic regimes is more likely to be driven by reductions in competition and contractions in independence (in the lower-left quadrant) than by increases in competition and deepening of independence (in the upper-right quadrant). This interpretation is highlighted by the relative paucity of data in the

upper-right quadrant of the autocratic panel.

We now turn to our identification analysis. We estimated each model with a fixed effect two-step efficient generalized method of moments (GMM) estimator that is robust to heteroskedasticity and autocorrelated disturbances. We include three time-varying covariates to further identify the relationship: GDP per capita, GDP growth and a counter for years spent under the current regime. Our fourth competition variable, Competition (V-Dem), is a dichotomous endogenous variable. Accordingly, ala Wooldridge (2002) to avoid the so-called forbidden regression we first estimate a probit on our endogenous first stage variable X_1 including instruments: X_2 X_3 Z_1, predict $\hat{X}_1$ and then estimate a two-stage instrumental regression with Y X_2 X_3 ($X_1 = \hat{X}_1$).

Table 5.A.2 displays the results for the instrumented analysis of competition on *de facto* judicial independence across all regime types. First, note that our instrument performs relatively well, with several tests for weak instruments suggesting support for fixed assets as a reasonable instrument for political competition among all regimes. (We will see below that the strength of this instrument varies within specific regime type but performs quite well between them). We see that for all regimes, enhanced political competition, regardless of measure, appears to enhance *de facto* judicial independence.

An increase of one standard deviation for each of our measures of political competition results in a .22, .19, .18 and .20 increase in *de facto* judicial independence, respectively. These effects are substantively impressive

Table 3.3: Instrumented Estimates for Political Competition's Impact on *de facto* Judicial Independence (All Regimes)

	Effects of Competition on De Facto JI			
	ParComp(Polity)	Competition(Vanhanen)	Suffrage(V-Dem)	Competition(V-Dem)
Political Competition (Instrumented)	0.0598***	0.0073***	0.0044***	0.4024***
	(0.0054)	(0.0011)	(0.0007)	(0.0696)
Time-Varying Controls				
ln(GDP per capita)	0.0106**	0.0074	-0.0246*	-0.0032
	(0.0053)	(0.0101)	(0.0146)	(0.0131)
GDP Growth	-0.0732***	-0.0532***	-0.0645***	-0.0295*
	(0.0196)	(0.0170)	(0.0237)	(0.0157)
Years under Regime	0.0003**	0.0005***	0.0002*	0.0011***
	(0.0001)	(0.0002)	(0.0001)	(0.0003)
Stock-Yogo Weak Id Critical Value 10%	16.38	16.38	16.38	16.38
Kleibergen-Paap Weak Id F-test	30.00	31.00	40.12	40.96
Stock-Wright Weak Instrument LM S statistic (Chi2, df(1))	28.43(1)**	27.30(1)**	27.77(1)**	44.65(1)**
C statistic, Endogeneity Test (Chi2, df(1))	21.054(1)**	20.815(1)**	25.228(1)**	18.588(1)**
Fixed Effects	YES	YES	YES	YES
Autocorrelation Robust	YES	YES	YES	YES
Heteroskedasticity Robust	YES	YES	YES	YES
Number of Observations	7935	8127	8248	8188
Years Covered	1900-2015	1900-2015	1900-2015	1900-2015

Note: Standard errors are clustered on country-episodes. Two-tailed tests of statistical significance are displayed: $^{*}p < .05$, $^{**}p < .01$.

given that the mean of our *de facto* judicial independence measure, LJI, is .45 with a standard deviation of .28. Consider, for example, that on the 10-point ParComp index of political competition, the average democracy is located at 8.76 (e.g. Ecuador or Liberia circa 2015), while the average autocracy is located at 3.09 (e.g. Thailand or Morocco circa 2015). The results from Table 5.A.2 suggest that this difference of 5.67 would translate into a gain of .34 on our LJI judicial independence scale. This would be equivalent to moving Thailand from its 2015 LJI score of .56 to a 2015 LJI score of .90 – putting it on par with Finland, Japan and Chile.

Table 3.4 displays the results for the instrumented analysis of competition on *de facto* judicial independence among democratic regimes only. Among democracies, our instrument performs less well. Two of the tests for weak instruments suggest that fixed assets is not a reasonable instrument for political competition as measured by our Competition (Vanhanen) or our

Suffrage variables. Of the remaining models, we see again support that enhanced political competition, within democracies, enhances *de facto* judicial independence. These substantive effects are on the order of those estimated across all regimes.

Table 3.4: Instrumented Estimates for Political Competition's Impact on *de facto* Judicial Independence (Democratic Regimes Only)

	Effects of Competition on De Facto JI			
	ParComp(Polity)	Competition(Vanhanen)	Suffrage(V-Dem)	Competition(V-Dem)
Political Competition (Instrumented)	0.0645**	0.3444	0.0049**	0.2550**
	(0.0138)	(2.8083)	(0.0015)	(0.0598)
Time-Varying Controls				
ln(GDP per capita)	-0.1375**	-0.4221	-0.1473**	-0.0918**
	(0.0370)	(3.1156)	(0.0484)	(0.0244)
GDP Growth	0.0257	-1.3942	-0.0049	0.0619**
	(0.0143)	(11.9862)	(0.0284)	(0.0089)
Years under Regime	-0.0005	0.0030	-0.0004	-0.0004
	(0.0003)	(0.0314)	(0.0003)	(0.0002)
Stock-Yogo Weak Id Critical Value 10%	16.38	16.38	16.38	16.38
Kleibergen-Paap Weak Id F-test	19.79	0.01	12.76	31.26
Stock-Wright Weak Instrument LM S statistic	6.97(1)**	5.59(1)*	5.64(1)*	17.17(1)**
C statistic, Endogeneity Test (Chi2, df(1))	6.764(1)**	5.470(1)*	5.548(1)*	9.834(1)**
Fixed Effects	YES	YES	YES	YES
Autocorrelation Robust	YES	YES	YES	YES
Heteroskedasticity Robust	YES	YES	YES	YES
Number of Observations	3337	3404	3432	3400
Years Covered	1900-2015	1900-2015	1900-2015	1900-2015

Note: Standard errors are clustered on country-episodes. Two-tailed tests of statistical significance are displayed: *$p < .05$, **$p < .01$.

Table 3.5 displays the results for the instrumented analysis of competition on *de facto* judicial independence among autocratic regimes only. Among autocracies, our instrument performs poorly. Fixed assets does not map well onto levels of political competition within autocratic regimes. Every model suggests that fixed assets is not a reasonable instrument for political competition.

Now consider the instrumented analysis for political competition on *de jure* institutions. In the tables that follow, we present our instrumented analysis for the effect of political competition on *de jure* judicial independence. For each analysis, we first consider the relationship between

Table 3.5: Instrumented Estimates for Political Competition's Impact on *de facto* Judicial Independence (Autocratic Regimes Only)

	Effects of Competition on De Facto JI			
	ParComp(Polity)	Competition(Vanhanen)	Suffrage(V-Dem)	Competition(V-Dem)
Political Competition (Instrumented)	-0.0008	-0.0019	0.0000	0.0582
	(0.0156)	(0.0036)	(0.0006)	(0.2243)
Time-Varying Controls				
ln(GDP per capita)	-0.0102	0.0010	-0.0082	-0.0088
	(0.0160)	(0.0227)	(0.0126)	(0.0148)
GDP Growth	-0.00041	-0.00098	-0.0040	-0.00022
	(0.0092)	(0.0083)	(0.0086)	(0.0052)
Years under Regime	0.0007**	0.0008**	0.0007**	0.0006**
	(0.0003)	(0.0003)	(0.0002)	(0.0002)
Stock-Yogo Weak Id Critical Value 10%	16.38	16.38	16.38	16.38
Kleibergen-Paap Weak Id F-test	8.72	1.45	17.37	12.05
Stock-Wright Weak Instrument LM S statistic	0.00(1)	0.49(1)	0.00(1)	0.07(1)
C statistic, Endogeneity Test (Chi2, df(1))	1.311(1)	1.108(1)	0.024(1)	0.011(1)
Fixed Effects	YES	YES	YES	YES
Autocorrelation Robust	YES	YES	YES	YES
Heteroskedasticity Robust	YES	YES	YES	YES
Number of Observations	4594	4720	4812	4784
Years Covered	1900-2015	1900-2015	1900-2015	1900-2015

Note: Standard errors are clustered on country-episodes. Two-tailed tests of statistical significance are displayed: $^{*}p < .05$, $^{**}p < .01$.

competition and judicial independence across all regimes and then we consider the nature of this relationship within democracies and autocracies, in turn. We utilize a measure of *de jure* judicial independence taken from Melton and Ginsburg (2014). We coded all new *de jure* institutions across five *de jure* indicators as interventions between 1959-2008. These institutions included provisions for lifetime terms, selection procedures, removal conditions, removal procedures and salary insulation. We create an additive index of these indicators, equally weighted, as our dependent variable for our investigation of the effect of political competition on *de jure* judicial independence. This variable ranges from 0 to 6, with a mean of 2.01 and a standard deviation of 1.33.

Table 3.6 displays the results for the instrumented analysis of competition on *de jure* judicial independence across all regime types. First, note that our instrument performs relatively well, with several tests for weak

instruments suggesting support for fixed assets as a reasonable instrument for political competition among all regimes. The one model that is questionable is the competition measured as suffrage model for which the weak identification test suggests weak instrumentation. The results in the table suggest that for all regimes, enhanced political competition, regardless of measure, appears to enhance *de jure* judicial independence. A one standard deviation increase in each of our measures of political competition results in a .33, .036, .03 and 5.96 increase in *de facto* judicial independence, respectively. These effects are less substantively impressive compared to those reported for the *de facto* analysis above. Given that the mean of our *de jure* judicial independence measure has a mean of 2.01 with a standard deviation of 1.33. the relative effects are quite small with most measures of political competition barely registering movement on our *de jure* scale. The outlier of course is the last model with the dichotomous outcome. Regimes that are politically competitive are 4.48 units higher than non-competitive regimes for our *de jure* scale.

Table 3.7 and 3.8 display the results for the instrumented analysis of competition on *de facto* judicial independence among democratic regimes and autocratic regime, respectively. Our instrument performs poorly for both subsets. Fixed assets do not instrument for political competition well for these subsets of regimes, save two models in the autocratic findings table. As a result, we can conclude only that political competition have a weak positive effect on *de facto* judicial independence across all regimes and a null relationship among similar regimes.

Table 3.6: Instrumented Estimates for Political Competition's Impact on *de jure* Judicial Independence (All Regimes)

	Effects of Competition on De Jure JI			
	ParComp(Polity)	Competition(Vanhanen)	Suffrage(V-Dem)	Competition(V-Dem)
Political Competition (Instrumented)	0.2491**	0.0267**	0.0240*	4.4838*
	(0.0660)	(0.0097)	(0.0111)	(1.1099)
Time-Varying Controls				
ln(GDP per capita)	-0.0785	0.1141	0.1115	0.3570
	(0.1483)	(0.1324)	(0.1812)	(0.2038)
GDP Growth	-0.0306	0.0196	-0.3275	0.5480**
	(0.0781)	(0.0970)	(0.2653)	(0.1904)
Years under Regime	-0.0001	-0.0002	-0.0036**	0.0158**
	(0.0017)	(0.0019)	(0.0012)	(0.0056)
Stock-Yogo Weak Id Critical Value 10%	16.38	16.38	16.38	16.38
Kleibergen-Paap Weak Id F-test	16.66	60.66	11.25	24.59
Stock-Wright Weak Instrument LM S statistic	8.76(1)**	10.02(1)**	8.56(1)**	45.30(1)**
C statistic, Endogeneity Test (Chi2, df(1))	3.076(1)	3.672(1)	6.785(1)**	32.558(1)**
Fixed Effects	YES	YES	YES	YES
Autocorrelation Robust	YES	YES	YES	YES
Heteroskedasticity Robust	YES	YES	YES	YES
Number of Observations	5390	5525	56501	5579
Years Covered	1900-2015	1900-2015	1900-2015	1900-2015

Note: Standard errors are clustered on country-episodes. Two-tailed tests of statistical significance are displayed: $*p < .05$, $**p < .01$.

Table 3.7: Instrumented Estimates for Political Competition's Impact on *de jure* Judicial Independence (Democratic Regimes Only)

	Effects of Competition on De Jure JI			
	ParComp(Polity)	Competition(Vanhanen)	Suffrage(V-Dem)	Competition(V-Dem)
Political Competition (Instrumented)	-0.2439	1.1156	-0.0179	-0.1263
	(0.3362)	(18.6096)	(0.0221)	(0.9793)
Time-Varying Controls				
ln(GDP per capita)	-0.1085	0.4308	-0.1786	-0.1884
	(0.3435)	(11.2944)	(0.2500)	(0.2182)
GDP Growth	0.9286*	-1.2758	0.9974*	0.6571**
	(0.4371)	(32.1504)	(0.4648)	(0.0853)
Years under Regime	-0.0163**	-0.0999	-0.0152**	-0.0138**
	(0.0052)	(1.4384)	(0.0037)	(0.0020)
Stock-Yogo Weak Id Critical Value 10%	16.38	16.38	16.38	16.38
Kleibergen-Paap Weak Id F-test	1.98	0.00	6.39	7.52
Stock-Wright Weak Instrument LM S statistic	1.56(1)	1.57(1)	1.65(1)	0.02(1)
C statistic, Endogeneity Test (Chi2, df(1))	2.087(1)	1.157(1)	3.542(1)	0.355(1)
Fixed Effects	YES	YES	YES	YES
Autocorrelation Robust	YES	YES	YES	YES
Heteroskedasticity Robust	YES	YES	YES	YES
Number of Observations	2112	2170	2183	2172
Years Covered	1900-2015	1900-2015	1900-2015	1900-2015

Note: Standard errors are clustered on country-episodes. Two-tailed tests of statistical significance are displayed: $*p < .05$, $**p < .01$.

Table 3.8: Instrumented Estimates for Political Competition's Impact on *de jure* Judicial Independence (Autocratic Regimes Only)

	Effects of Competition on De Jure JI			
	ParComp(Polity)	Competition(Vanhanen)	Suffrage(V-Dem)	Competition(V-Dem)
Political Competition (Instrumented)	-2.5711	0.0236	0.0194	3.2384**
	(5.9942)	(0.0170)	(0.0178)	(1.0588)
Time-Varying Controls				
ln(GDP per capita)	2.4706	0.1899	0.2144	0.4375**
	(5.3354)	(0.1501)	(0.1888)	(0.1679)
GDP Growth	-1.1882	0.0198	-0.3487	-0.0172
	(2.6471)	(0.0567)	(0.3214)	(0.0655)
Years under Regime	0.0302	-0.0014	-0.0047	-0.0021
	(0.0694)	(0.0022)	(0.0056)	(0.0019)
Stock-Yogo Weak Id Critical Value 10%	16.38	16.38	16.38	16.38
Kleibergen-Paap Weak Id F-test	0.20	19.98	3.62	17.22
Stock-Wright Weak Instrument LM S statistic	3.15(1)	3.45(1)	2.64(1)	8.86(1)**
C statistic, Endogeneity Test (Chi2, df(1))	3.208(1)	0.852(1)	2.221(1)	8.442(1)**
Fixed Effects	YES	YES	YES	YES
Autocorrelation Robust	YES	YES	YES	YES
Heteroskedasticity Robust	YES	YES	YES	YES
Number of Observations	3274	3350	3413	3402
Years Covered	1900-2015	1900-2015	1900-2015	1900-2015

Note: Standard errors are clustered on country-episodes. Two-tailed tests of statistical significance are displayed: *$p < .05$, **$p < .01$.

3.5 The Effect of Rules

We conclude our interrogation of the relationship between competition and judicial independence by considering the relationship between *de jure* and *de facto* judicial independence over the lifetime of different regimes. Figure 3.12 below displays measures of *de facto* and *de jure* judicial independence on the y- and x-axes, respectively. Democratic regimes are circles (primarily on the top of the plot) while autocratic regimes are diamonds (primarily on the bottom of the plot). Object size corresponds to the regime's age, with large bubbles representing older regimes. The panels represent two years of data, twenty years apart. The upper panel is from 1990 and the lower panel is from 2010.

A reasonable expectation from the literature would be for democratic regimes to yield a triangular distribution with low *de jure* democracies

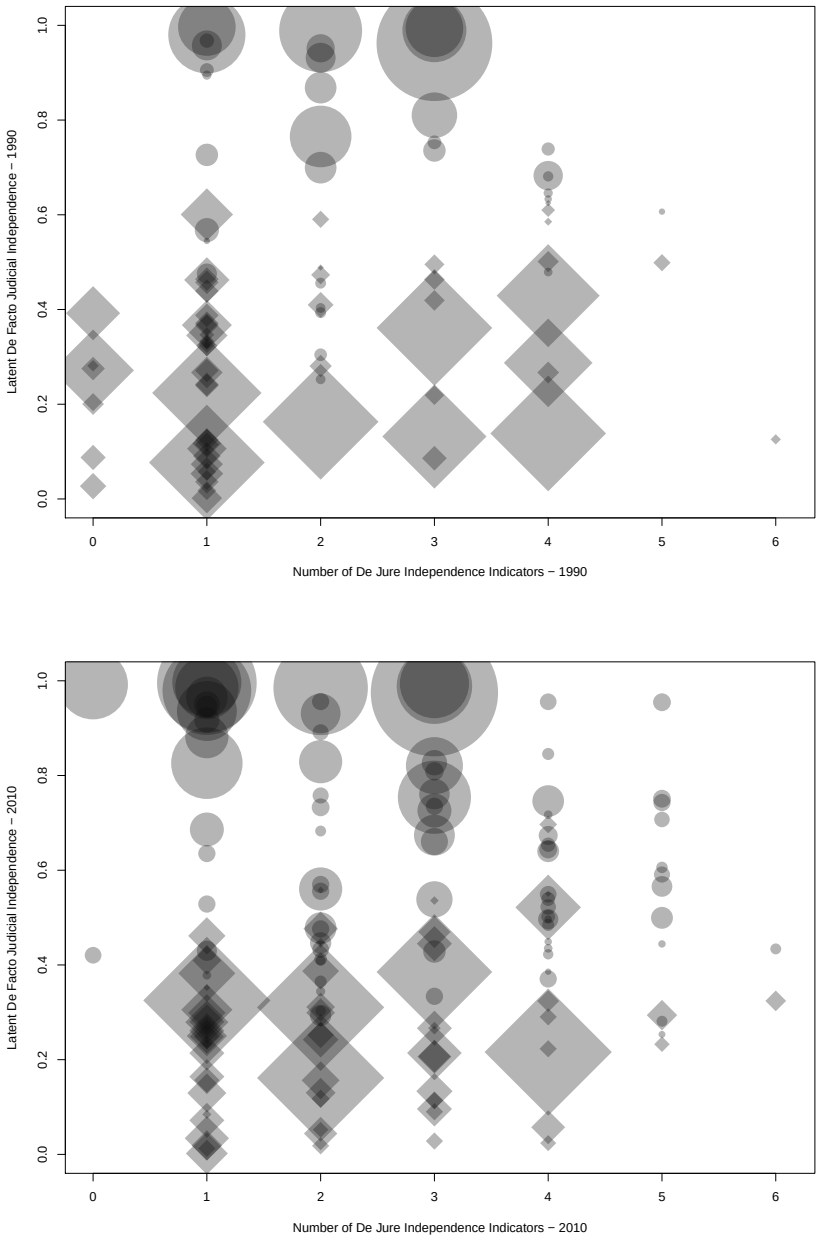

Figure 3.12: *Plots of De Facto and De Jure Judicial Independence by Regime Type and Age. Circles are Democratic while diamonds are Autocratic. Marker Size Corresponds to Regime Age. Shading has no meaning other than the overlap of shapes.*

having a broad distribution of *de facto* judicial independence along the x-axis, but a relatively tight clustering of democratic regimes in the upper-right corner of the graph. We would expect consolidated democracies to have several *de jure* institutions (e.g., fixed tenure, high barriers to removal, etc.) in their constitutions and relatively high *de facto* independence. This expectation is, however, only partially realized.

It is the case that long-lived democracies migrate from the bottom to the top of the figure, moving from mid- to high-level *de facto* independence over their lifetime. However, this migration appears to be independent from the formal *de jure* institutions adopted in their constitutions. There are many consolidated democracies with independent judiciaries that have few traditional markers of formal independence enshrined in their constitutions.

On the other hand, younger democracies appear to believe that adopting *de jure* institutions may be the pathway to establishing an independent court. Most new democracies (the smaller circles) have several formal institutional protections represented in their constitution despite having relatively less independent courts. Also interesting to note is that autocratic states of all ages appear to adopt *de jure* institutions committing the state to an independent judiciary despite having extremely low *de facto* independence, suggesting that their formal institutional commitment may very well be little more than window dressing.

What about a longer view of the relationship between *de jure* and *de facto* judicial independence over the lifetime of democratic regimes? Figure 3.13

below displays the same measures of *de jure* and *de facto* judicial independence on the y- and x-axes, respectively. Except we consider only democratic regimes that had uninterrupted runs from 1970 through 2010, and we display a figure every twenty years. The size of the figures displays the regime.

Here again we fail to see evidence of a strong association. These democratic states possess a variety of *de jure* rules regarding judicial independence and vary little over the rime periods. On the other hand, most of these regimes register positive growth on *de facto* judicial independence. Regimes that start out near the middle of the y-axis migrate upward over time, increasing their LJI scores. But there is not clear evidence that the selection of rules is driving this movement.

Of course the figures above are only able to convey zero-order associations. We also considered whether *de jure* institutions have a causal effect on *de facto* judicial independence. We began with the Melton and Ginsburg (2014) dataset and coded all new *de jure* institutional changes across five *de jure* indicators as interventions between 1959-2008. These institutions included provisions for lifetime terms, selection procedures, removal conditions, removal procedures and salary insulation. Interventions for each of these institutions were quite rare over the time period with 7, 18, 9, 7 and 6 treatments, respectively. We then used coarsened exact matching to match these intervention cases to control cases that shared economic development, population and religious characteristics. We then analyzed the effect of these institutional interventions on *de facto* judicial

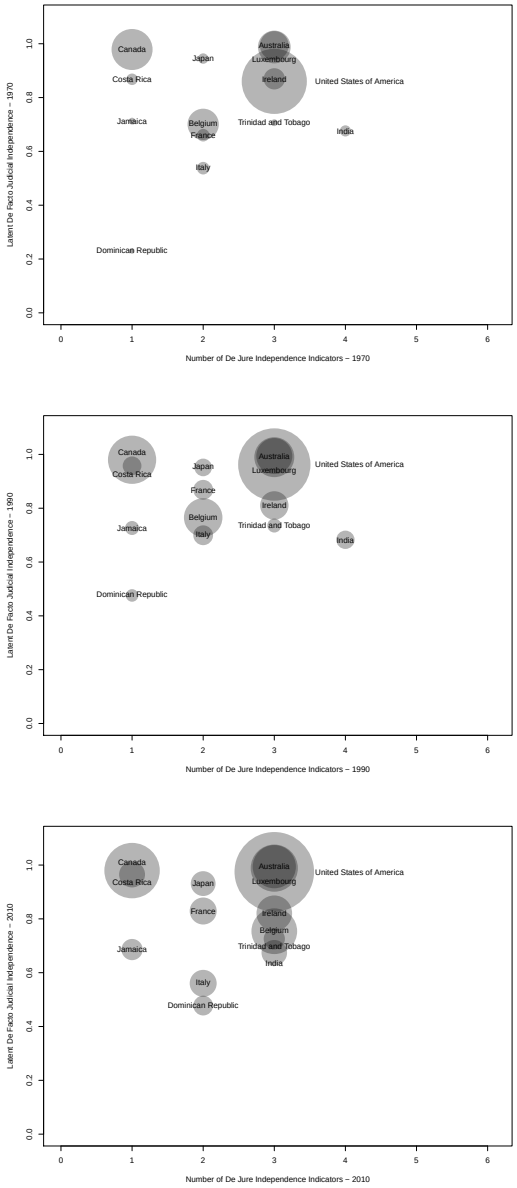

Figure 3.13: *Plots of De Facto and De Jure Judicial Independence across Democracies of varying age for 1970, 1990, and 2010. Circles are Democratic while diamonds are Autocratic. Marker Size Corresponds to Regime Age. Shading has no meaning other than the overlap of shapes.*

independence with a difference-in-difference analysis with fixed effects for both units and time.

Table 3.9: Difference-in-Difference Estimates for Impact of *de jure* Institutions on *de facto* Judicial Independence

	Effects of De Jure Institutions on De Facto JI				
	Life Term	Selection Proc.	Removal Condition	Removal Proc.	Salary Insulation
De Jure Institution	0.059	-0.029	-0.009	0.021	0.010
	(0.031)	(0.0175)	(0.015)	(0.097)	(0.010)
Time-Varying Controls					
GDP per capita (thousands)	0.163**	0.091	0.061	0.072	0.108
	(0.076)	(0.067)	(0.032)	(0.039)	(0.137)
Population	-0.048	0.037	-0.236	0.051	0.056
	(0.221)	(0.121)	(0.105)	(0.045)	(0.148)
Constant	-0.489	-0.484	-2.045	-0.264	-0.985
	(1.647)	(1.279)	(0.788)	(0.635)	(1.500)
Unit Fixed Effects	YES	YES	YES	YES	YES
Time Fixed Effects	YES	YES	YES	YES	YES
Number of Observations	212	745	253	134	155

Note: De jure institution coefficients are estimated from a difference-in-difference estimator modeled around changes in particular de jure institutions. Standard errors are clustered on country-episodes. Two-tailed tests of statistical significance are displayed: $*p < .05$, $**p < .01$.

The results of this analysis, reported in Table 3.A.1, suggest that newly adopted *de jure* institutions have no independent causal effect on *de facto* judicial independence. Take together with the prior evidence presented in this chapter, we are left to conclude that while competition may provide leaders with incentives to insulate judges via rules adoption and enhancing judicial power, it does not appear that they adoption of such rules has a direct effect on establishing *de facto* judicial independence. We believe that there must be another feature of society that broadens the insulation within which the courts operate.

3.6 Conclusion

Our goal in this chapter was to interrogate the first link in our argument by evaluating the central predictions of the insurance model of judicial independence: that leaders in competitive electoral environments have strong incentives to build independent judiciaries. Using new data on both *de jure* and *de facto* judicial independence as well as political competition we were able to evaluate this model including all regimes across the globe for over 110 years. We employed research designs that allowed us to draw credible inferences on whether political competition is a key causal driver of independent courts.

Our findings suggest that this causal claim is credible and substantively meaningful but with provisos. Increases in political competition are causally linked to both enhanced independent judicial behavior as well as the adoption of formal rules aimed to protect judicial independence. We observe this effect primarily between democratic regimes that operate competitively and autocratic regimes that do not. Among all regimes, we saw evidence that positive changes in political competition, reflective of whether the core conditions of the democratic compromise are met, establish incentives to generate gains for both *de jure* and *de facto* judicial independence. The effect within each regime type is considerably more murky.

Within democracies, we produced evidence that competition insulates judges. But we observe this relationship only for judicial behavior not for

de jure rules, suggesting that the mechanism that links competition and *de facto* judicial independence is unlikely to run through the formal institutions that are believed to incentivize this behavior. Within autocracies, we were unable to generate evidence that changes in competition lead to changes in either formal rules or in judicial behavior. We should raise a note of caution regarding the analyses on autocratic regimes. Our instrument performs best between democratic and autocratic regimes and weakest among autocracies. So our null findings for competition and judicial independence may be due to endogeneity. Still, the null finding for autocratic states is not particularly surprising given that while many autocratic regimes have many of the same institutional judicial forms that democracies have adopted, autocratic leaders have many more avenues available to them to navigate around these institutional protections.

Last, we saw no evidence that formal rules led to changes in judicial behavior. The absence of strong evidence for this connection suggests that there is some other feature of society under democracy that is helping judges behave independently that is not necessarily the formal rules relating to the courts. As we will see in the coming chapters,

Having considered incentives for supporting independent courts, the second half of the book turns to the role that courts play in democracy. Here we are primarily interested in understanding whether, and if so how, courts might protect democratic regimes from collapse.

	Δ JI				
	1 yr	2 yr	3 yr	4 yr	5 yr
(Intercept)	0.03**	0.05***	0.06***	0.07***	0.08***
	(0.01)	(0.01)	(0.01)	(0.02)	(0.02)
Treatment	0.07**	0.09*	0.11*	0.12*	0.13*
	(0.02)	(0.03)	(0.05)	(0.06)	(0.06)
	Δ JI				
	6 yr	7 yr	8 yr	9 yr	10 yr
(Intercept)	0.09***	0.09***	0.07***	0.07***	0.07***
	(0.02)	(0.02)	(0.02)	(0.02)	(0.02)
Treatment	0.13*	0.14*	0.15*	0.16**	0.15*
	(0.06)	(0.06)	(0.06)	(0.06)	(0.06)

$^{***}p < 0.001$, $^{**}p < 0.01$, $^{*}p < 0.05$

Table 3.10: Change in Eastern Bloc states' *de facto* judicial independence compared to pre-1989 intervention coarsened exact matched autocracies.

Appendix

3.A Some title for an appendix

Table 3.A.1: Difference-in-Difference Estimates for Impact of *de jure* Institutions on *de facto* Judicial Independence

	Effects of De Jure Institutions on De Facto JI				
	Life Term	Selection Proc.	Removal Condition	Removal Proc.	Salary Insulation
De Jure Institution	0.059	-0.029	-0.009	0.021	0.010
	(0.031)	(0.0175)	(0.015)	(0.097)	(0.010)
Time-Varying Controls					
GDP per capita (thousands)	0.163**	0.091	0.061	0.072	0.108
	(0.076)	(0.067)	(0.032)	(0.039)	(0.137)
Population	-0.048	0.037	-0.236	0.051	0.056
	(0.221)	(0.121)	(0.105)	(0.045)	(0.148)
Constant	-0.489	-0.484	-2.045	-0.264	-0.985
	(1.647)	(1.279)	(0.788)	(0.635)	(1.500)
Unit Fixed Effects	YES	YES	YES	YES	YES
Time Fixed Effects	YES	YES	YES	YES	YES
Number of Observations	212	745	253	134	155

Note: De jure institution coefficients are estimated from a difference-in-difference estimator modeled around changes in particular de jure institutions. Standard errors are clustered on country-episodes. Two-tailed tests of statistical significance are displayed: $^{*}p < .05$, $^{**}p < .01$.

Chapter 4

Judicial Effects on Democratic Regime Stability

> The art of being sometimes audacious and sometimes very prudent is the secret of success.
> *Napoleon Bonaparte*

Democratic compromises are easier to sustain when parties out of power believe that parties in power will govern within boundaries, often explicitly stated in constitutions but also implicitly understood as part of the underlying social understandings that make it useful for opposing groups to compete for power via elections. We have referred to these boundaries as establishing fundamental regime rules, rules that leaders are expected to follow while in office. Yet fundamental regime rules cannot cover every possible contingency. Some leaders will confront scenarios that have yet to have been contemplated, and so there will be no precedent for what constitute appropriate actions. Other rules are understood to allow for a

degree of discretion on the part of leaders. For example, under exigent circumstances of various types, presidents are delegated powers that they do not enjoy during normal times.

Critically, opposing parties in a system may have very different perceptions of whether observed actions of the state violate rules. This can be because there is a disagreement over the meaning of a rule. It can also arise when there is consensus about a rule, but differences of opinion over the facts under which the rule is being applied. The nature of political leadership and the corresponding powers that it confers mean that leaders will have different, commonly better, information about facts.This asymmetry can be destabilizing because it creates opportunities for some leaders to take advantage of perceptions that they are better informed Svolik (2012). This is particularly problematic when the facts determine the scope and limits of the rule itself. Solving these problems is an important part of making democracies robust.

The claim we wish to investigate is that processes that give judges powers to evaluate the appropriateness of state actions can help manage this informational challenge. Broadly, we will argue that judicial systems do so by incentivizing prudence on behalf of leaders and the opposition, and that this prudence reinforces commitments to democratic compromises. In this chapter, we consider how this might be so. Our approach draws on ideas developed by Ríos Figueroa and Carrubba and Gabel. Since our argument is most related in for to Carrubba and Gabel, it is useful to review it here.

Recall that Carrubb and Gabel are studying the politics of the European

Union. They have in mind the Court of Justice of the European Union (CJEU) and the challenges of managing conflicts over whether a member state has violated treaty provisions. The argument has three steps. First, private parties (or perhaps the European Commission) file law suits alleging that an EU regulation has been violated. Second, states decide whether to file briefs in support or in opposition to a state's legal position in a case. Third, in light of the distribution of briefs, the defendant state can take costly efforts to convince the states that have filed in opposition to their position that non-compliance with an unfavorable CJEU decision ought not to be punished collectively by the states acting together. Only states that confront significant local challenges will be willing to take the effort necessary to convince their treaty partners of the inefficiency of complying with European regulations in the current instance. The first step in this process alerts states to potential violations of law while the second and third steps provide a coordinated process for revealing information about collective understandings of European law.

Our approach as broadly consistent with Carrubba and Gabel's account, but we depart from their model in a number of ways, which we believe helps to shed light on important parts of the problem that they do not highlight. In the Carrubba and Gabel model, judicializing the process always results in the revelation of private information held by defendant states. This happens because some types of governments (i.e., those who are being forced to pay very high costs for compliance with European law) will always be wiling to make the effort necessary to convince other states of their position. Yet we should consider the possibility that judicial

processes do not result in information revelation. A core feature of the politics of managing regime rules is that it is sometimes impossible to discern a leader's type because the information she reveals is consistent with what all leaders would say.

We develop a model that identifies conditions under which courts are able to incentivize the revelation of private information. This, as it turns out, has a lot to do with how we conceive of judicial preferences, and ultimately judicial independence. Second, we ask whether judicial processes might reduce regime conflict even if they do not materially affect information transmission. We find that they do and yet in doing so, courts produce other challenges for regimes. Third, the costly signal that states send in Carrubba and Gabel's model is worth considering carefullly. In the model, states simply expend "effort." The authors suggest that effort can be understood as persuasive in nature. Of course, it is unclear how a well-constructed argument about why a state has not violated a regime rule would either be particularly costly to that state or persuasive to the other states or both. Legal argumentation might be profitably understood as cheap talk.

If effort can instead be understood as forms of payments to states or otherwise as direct benefits to state interests, then we will have to consider the possibility that the opposing briefs that governments file are designed to prompt targeted states to buy off their support. If this is possible, then the distribution of briefs offers defendant states a far from perfect sense of who really supports them. At its core, the Carrubba and Gabel argument

depends on the costliness of these "signals." We agree with this position. The question is how to conceive of what would generate costly signaling. In our model, we will suggest that a natural costly signal is non-compliance with a court order.

4.1 An informational model of regime breakdown

We will consider a model that deals with a fundamental challenge of managing a regime compromise, which reflects key elements of the Stephenson and Fox (2011) model of pandering. Consider a political regime that consists of a leader, endowed with governing power, and a supporter on whom the leader depends.[1] We assume that the leader and the follower have come to some understanding about regime rules, which may include, for example, promises to limit terms of office, exercising extreme caution when considering a criminal investigation of a political rival, or promises to divide regime surplus in particular ways. The players know that the political context in which they operate sometimes requires the leader to take actions that are inconsistent with the general understanding of regime rules. In order to maintain the spirit of a regime compromise, leaders are sometimes called upon to take extraordinary actions, which in normal

[1]The leader here may be thought of as a governing party or coalition in a either a democratic or autocratic context. The supporter may be conceptualized as whatever set of individuals on whom the leader depends for continued leadership. This may be thought of as a party, a group of individuals or the leader's "winning coalition." The key point is that the leader has immediate and formal control over the instruments of governance.

times would surely constitute a violation of regime rules. Indeed, if the political context does not warrant extraordinary policy measures, such measures may be used to shift the balance of power in the favor of the leader. Critically, the supporter cannot necessarily know that a leader who is taking an extraordinary action is doing so appropriately, i.e., as would be expected under the regime's rules. We first consider several properties of this regime in the absence of a court. We will then introduce a court and consider the possible differences that it makes.

4.1.1 Baseline Model

Following the setup in Stephenson and Fox (2011) we begin by assuming that a political context can be understood by the players to be "normal" or "extraordinary." Likewise, leaders can adopt "normal" or "extraordinary" policies and supporters may respond "normally" or "extraordinarily." Specifically, let $X = \{n, x\}$ denote the set of possible descriptions of political contexts or actions taken by the leader or supporter. We denote a political context $\omega \in X$. We assume that a political context is drawn from a Bernoulli distribution over X, which is known commonly to the players. We let π reflect the probability of an extraordinary context. We assume further that the leader observes ω and then proposes a policy response, $p \in X$, where $p = x$ reflects an extraordinary policy that might violate regime rules and $p = n$ reflects a policy that is clearly understood not to violate these rules. Given this information structure, the leader may be conceived of as one of two types, $t \in X$. We will refer to the leaders as the

extraordinary and normal types. Observing p, the supporter responds to the policy, choosing an $r \in X$. We assume that $r = x$ induces a costly conflict of uncertain outcome with the leader whereas $r = n$ results in continued support of the leader per the regime rules. A mixed strategy for the leader, σ_l, assigns a probability distribution over X for each state, where $\sigma_l(\omega)$ indicates $Pr(p = x|\omega)$. Similarly, a mixed strategy for the supporter, σ_s, assigns a probability distribution over X for each policy she observes, and where $\sigma_s(p)$ indicates $Pr(r = x|p)$.

Preferences

The problem on which the model focuses is how to ensure that policy choices the leader makes are appropriate given the state of the world, while also minimizing conflict. To focus on that problem, we normalize the value of the regime agreement to 1. A failure to respond to an extraordinary political context reduces the value of the regime to both players. We scale the regime value by $\gamma \in (0, 1)$ in the event that the $\omega = x \neq p$. We assume that conflicts, should they emerge, are resolved probabilistically. Specifically, if $r = x$, the leader receives v, where $v \sim \mathcal{B}e(\alpha, \beta)$. In the event that $\omega = r = x \neq p$, the leader and supporter receive γv and $\gamma(1 - v)$, respectively. Finally, should $\omega = n = r \neq p$, and the normal leader has unnecessarily taken the extraordinary policy, we assume that the value of the regime to the leader (supporter) increases (decreases) by $k > 1$. This implies the following payoff function for the leader:

$$u_l = \begin{cases} 1 & \text{if } \omega = p \wedge r = n \\ 1+k & \text{if } \omega = n = r \neq p \\ \gamma & \text{if } \omega = x \neq p = r \\ v & \text{if } r = x \wedge \neg(\omega = x \neq p) \\ \gamma v & \text{if } \omega = r = x \neq p. \end{cases}$$

Likewise, the payoff function for the supporter is giving by

$$u_s = \begin{cases} 1 & \text{if } \omega = p \wedge r = n \\ 1-k & \text{if } \omega = n = r \neq p \\ \gamma & \text{if } \omega = x \neq p = r \\ 1-v & \text{if } r = x \wedge \neg(\omega = x \neq p) \\ \gamma(1-v) & \text{if } \omega = r = x \neq p. \end{cases}$$

Analysis

Our solution concept is Perfect Bayesian equilibrium. We assume that beliefs are derived via passive conjectures at information sets that are not reached.[2] There are two types of equilibria in the model, one in which both leader types adopt the same policy, and one in which the types partially separate from each other.

We begin by considering the possibility for a complete revelation of the political circumstances. First note that the supporter will react normally

[2]This means that if a player reaches an information set that should not be reached in equilibrium, the player does not update her prior beliefs beyond what has been updated prior to reaching this information set.

to the normal policy, no matter her beliefs. Independently of the political context, an extraordinary response to a normal policy only wastes resources since the leader has not attempted to shift the balance of power. In the worst case scenario, where the state warrants an extraordinary action but the leader acts normally (i.e., $\omega = x \neq p$), the supporter would only compound the problem (i.e., $\gamma(1 - \mathbb{E}(v)) < \gamma$).

The key question for the supporter is how to respond to an extraordinary policy. Suppose that the leader chooses a policy that is matched to the state ($p = \omega$). If this were true, the supporter would infer the leader's type upon observing the policy. Thus, upon observing the extraordinary policy, the supporter would accept the policy, selecting a normal reaction ($r = n$). This kind of reaction would provide the normal leader with a strong incentive to adopt an extraordinary policy, and thus the equilibrium would unravel.

Now suppose that each type selected a policy mismatched to the state. In this case, the supporter would again correctly infer the leader's type from the policy. Upon observing the extraordinary policy, she would know that she confronts a normal leader attempting to change the balance of power. For that reason, she would react extraordinarily (setting $r = x$), and that would incentivize the normal leader to adopt the normal policy. Thus, the baseline model is inconsistent with communication that fully reveals to the supporter the true state of the world.

Lemma 1 *There is no PBE in which the types fully separate.*

Political Opportunism and Political Failure

There are two types of equilibria in this model, one in which the leader types can be expected to take the same action and another in which the extraordinary leader can be distinguished partially from the normal leader. Consider the first type of equilibrium. In an equilibrium in which both leaders adopt the extraordinary policy, the supporter's beliefs are defined via Bayes's rule when she observes the extraordinary policy ($p = x$). By passive conjectures, she holds the same beliefs when observing an unexpected normal policy. As the prior probability of an extraordinary political event increases, the supporter is naturally more likely to accept an extraordinary policy response.

Definition 1 *Let* $\bar{\pi} \equiv 1 - \frac{\alpha}{k(\alpha+\beta)}$ *denote the prior probability of an extraordinary set of political circumstances above which the supporter will choose* $r = n$ *if she observes* $p = x$ *when she expects the leaders to adopt the same policy.*

When the probability that the political context is extraordinary is sufficiently high (when $\pi \geq \bar{\pi}$), the supporter will accept an extraordinary policy response, knowing that sometimes she will fall victim to opportunistic behavior by the normal leader – a leader whose extraordinary policy is ill suited to the state. As the consequences of an inappropriate use of the extraordinary policy become increasingly problematic (k increases), that is, for large shifts in the nature of the regime that follow from opportunistic leader behavior, it becomes increasingly difficult to

sustain this kind of behavior. Still, if ever the supporter is expected to behave in this way, both leaders will select the extraordinary policy for all other values of the model's parameters. In contrast, for low values of π, the model is consistent with a pooling equilibrium in which both leaders simply adopt the normal policy, independent of the state, expecting the supporter to select $r = x$ if she observes the extraordinary policy. For this kind of profile of strategies to be part of a PBE, the extraordinary leader must be unwilling to engage in conflict, which requires that the consequences of failing to respond to extraordinary circumstances must be less severe than the political conflict that would ensue were he to move forward with an extraordinary policy (i.e., $\gamma \geq \mathbb{E}(v)$).

Proposition 1 *For $\pi \geq \bar{\pi}$, there exists a pooling PBE in which both leaders adopt $p = x$ and the supporter sets $r = n$ in response to all policies. For $\pi < \bar{\pi}$ and $\gamma \geq \mathbb{E}(v)$, there exists a pooling equilibrium in which both types adopt $p = n$ and the supporter sets $r = n$ if $p = n$ and $r = x$ if $p = x$. The supporter's beliefs are equal to her priors at all information sets.*

Interpretation These equilibria reflect two distinct, and yet related problems of managing regime rules. The first, investigated carefully by Svolik (2012), involves deterring leaders from reneging on regime rules by taking advantage of uncertainties about the true nature of policy challenges. An equilibrium in which the leaders pool on the extraordinary policy involves such rule violations – they are successful in political contexts in which the likelihood that regime rules ought to be bent is

relatively high. In such contexts, opportunistic leaders can take advantage of perceived crises to alter bargains that were previously necessary for compromise.

The second problem, addressed by Stephenson and Fox (2011), is that sometimes leaders with the best of intentions are deterred from taking extraordinary actions when such actions would be appropriate, i.e., political circumstances that call for extraordinary action are not responded to appropriately. This kind of policy failure emerges in the second equilibrium when it appears that political circumstances do not warrant extraordinary action, yet in reality they do. Leaders hoping to act in good faith can be deterred from doing so because of the very same uncertainties that can produce opportunistic behavior. Despite the fact that these equilibria present one of two political failures, critically, the players avoid conflict in both cases, albeit for different reasons.

Political Conflict

The second type of equilibrium will involve conflict between the players, at least on occasion. Here, the extraordinary leader always moves forward with the extraordinary policy. The normal leader only sometimes faithfully implements the normal policy; sometimes the normal leader implements the extraordinary policy. The supporter always accepts the normal policy, but when she observes the extraordinary policy, she sometimes responds in kind. These are the circumstances in which there is conflict. In this kind of equilibrium, the supporter must be selecting the extraordinary response at

a sufficient rate to deter the normal leader from always attempting to take advantage of the supporter's uncertainty (i.e., always setting $p = x$); and, yet the normal leader cannot be too aggressive so that the supporter would always react extraordinarily (i.e., always setting $r = x$).

Definition 2 *Let* $\rho \equiv \frac{k}{k+1-\mathbb{E}(v)}$ *denote the value of* $\sigma_s(x)$ *such that the normal leader is indifferent between his two policies; and, let* $\lambda \equiv \frac{\pi}{(1-\pi)(1-\mathbb{E}(v)k^{-1})} - \frac{\pi}{(1-\pi)}$ *denote the value of* $\sigma_l(n)$ *such that the supporter is indifferent between her two responses, when the extraordinary type is expected to adopt* $p = x$.

It is useful to note that $\frac{1}{2} \leq \rho \leq 1$ and that $0 \leq \lambda \leq 1$ as long as $\pi < 1 - \frac{\alpha}{k(\alpha+\beta)}$, so that this kind of equilibrium requires that the prior probability that the state is extraordinary is sufficiently low (i.e., $\pi < \bar{\pi}$).

Proposition 2 *For* $\pi < \bar{\pi}$ *and* $\gamma < \mathbb{E}(v)$, *there exists a semi-separating equilibrium in which the players adopt the following strategies:*

$$\sigma_l(\omega) = \begin{cases} 1 & \text{if } \omega = x \\ \lambda & \text{if } \omega = n \end{cases}$$

$$\sigma_s(p) = \begin{cases} 0 & \text{if } p = n \\ \rho & \text{if } p = x, \end{cases}$$

The supporter believes $Pr(\omega = x | p = x) = \frac{\pi}{\pi+(1-\pi)\lambda}$ *and may have any beliefs having observed* $p = n$.

In this case, policy failure is avoided, however, it is exchanged for both allowing violations of regime rules and costly conflict on occasion.[3]

The probabilities of regime violations and conflict depend on the equilibrium rates with which normal leaders adopt extraordinary policies and supporters refuse to accept them. What is more, a third political problem emerges. Specifically, conflict, when it emerges, can reflect efforts to stop opportunism, but it can also reflect a fundamental miscalculation – where supporters react extraordinarily to a leader's good faith effort to solve a serious policy problem.

Interpretation Figure 4.1.1 summarizes features of the three equilibria in the baseline model. The left panel displays the probability with which the normal leader adopts the extraordinary policy in any equilibrium. When it is sufficiently likely that the state is extraordinary (above $\bar{\pi}$), the game's equilibrium will involve both leaders selecting the extraordinary policy (pooling on $p = x$), where the normal leader always takes advantage of the fortuitous situation. Below $\bar{\pi}$, equilibrium opportunism depends on the way in which the consequences to the extraordinary leader of failing to

[3]The same strategy profile can be part of a PBE if $\gamma \geq \mathbb{E}(v)$, as long as k is sufficiently small ($k < \frac{1-\gamma-\mathbb{E}(v)(1-\gamma)}{\gamma-\mathbb{E}(v)}$). To simply the discussion, we will assume that k is larger than this threshold in cases where it would matter. This assumption does not influence the findings that follow. In the appendix, we will show that as k increases, the probability of conflict at lower levels of π decreases. This result holds should there also be a mixed strategy equilibrium for $\gamma \geq \mathbb{E}(v)$, since in such a case, increasing k would make it more difficult to sustain such an equilibrium, and in it's place would be a pooling equilibrium in which the conflict probability is 0.

match the state relate to the expected outcome of a conflict. Should the consequences of a policy failure be insignificant relative to the expected outcome of a regime conflict (i.e., $\gamma > \mathbb{E}(v)$), both leaders will adopt the normal policy, resulting in a policy failure but one that avoids a costly conflict. However, should the consequences of policy failure be significant relative to the expected outcome of a regime conflict, then the equilibrium will be in mixed strategies. As the figure suggests, the normal leader's probability of choosing the extraordinary policy rises in the prior probability that the state is extraordinary, reflecting the fact that it becomes easier to take advantage of the supporter as expectations become increasingly certain that the political circumstances do in fact warrant extraordinary action.

The right panel shows the equilibrium probability of conflict across our three cases. Notably, when a conflict is likely to be particularly costly (or when policy failures are insignificant), there will be no conflict in equilibrium. This is reflected by the blue curve, which tracks the probability of conflict in the pooling equilibria. When the policy failure consequences are significant (again relative to expected outcomes of a conflict), in contrast, the probability of conflict rises in the prior probability of extraordinary circumstances, but only up to $\bar{\pi}$, after which it drops to zero, because once people believe that the state of the world is truly extraordinary, supporters will accept extraordinary policies and normal leaders will take advantage of them. Thus, in the baseline model, the probability of conflict is both non-linear in expectations about the seriousness of potential political crises, as well as conditional on the

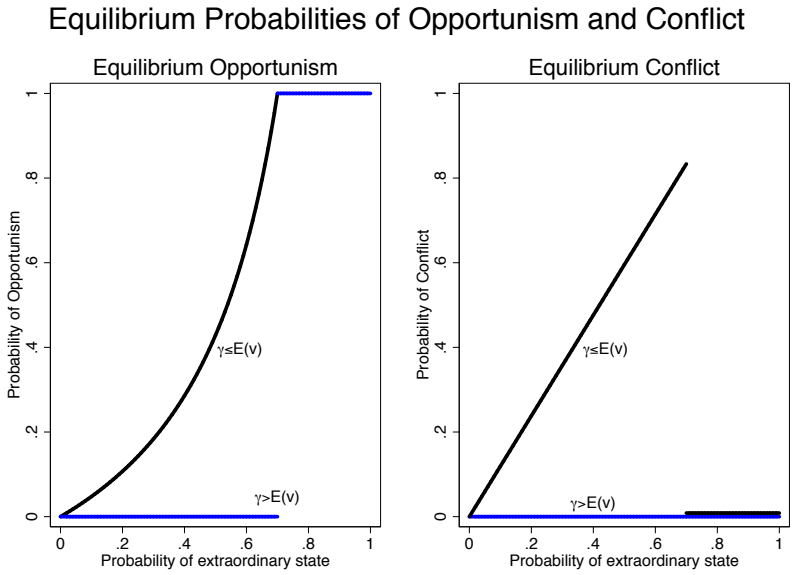

Figure 4.1.1: *The left panel displays the equilibrium probability of opportunism in the model's three equilibria. The right panel shows the probability of regime conflict.*

consequences of failing to respond to those consequences.

4.1.2 Judicial Review Model

We now consider a model in which a court endowed with judicial review powers is called upon to evaluate the policy produced by the leader. The model is sparse. For one, we assume that the policy is reviewed if enacted, setting aside concerns over who would have the incentive to challenge a policy in court, as well as questions of jurisdiction or standing, which might limit the ability of potentially aggrieved parties to sue. Likewise, a judicial decision will come in the form of a veto, setting aside concerns over

rules that the court might set to govern future policy outcomes , as well as properties of rules, which might complicate the interpretation of the decision. Despite these simplifications, the model is designed to address the core ideas in work on courts and their effects on regime compromise. What is essential here is that the court can issue a decision that, formally at least, sets aside the policy adopted by the leader.

Timing and information

In this version of the model, we continue to assume that a political context is first drawn from a Bernoulli distribution over X, and that the leader adopts a policy $p_1 \in X$. If $p_1 = n$, then the structure is identical to the baseline, i.e., the supporter chooses a reaction $r_1 \in X$. Instead, if $p_1 = x$, we assume that the court is called upon to issue a decision. The court selects a decision $d \in \{0, 1\}$, where 0 indicates a ruling finding that the policy does not violate regime rules and where 1 indicates the opposite. Should the court select 0, as in the baseline, the supporter then selects an $r_2 \in X$. Should the court select 1, the leader is called upon to play again, and may select $p_2 \in X$. We conceive of $p_2 = x$ as a policy reimplementing the extraordinary policy, the consequences of which we parameterize. Finally, the supporter selects an $r_3 \in X$ should the leader adopt $p_2 = x$.

A mixed behavioral strategy for the leader, σ_l, assigns a probability distribution over X for each state, and for all histories $(\omega, x, 1)$. Similarly, a mixed behavioral strategy for the supporter, σ_s, assigns a probability distribution over X for all histories (ω, n), $(\omega, x, 0)$, and $(\omega, x, 1, p_2)$.

Preferences

The supporter's preferences reflect those of the baseline. She wishes the policy to match the state; she loses utility from opportunistic leadership behavior (reflected by k), from a policy failure (reflected by γ) and in the event of conflict $(1 - v)$, precisely as in the baseline. None of this is influenced by the court's decision, so that in particular, the supporter does not pay a cost for the litigation, and does not care whether the leader adopts $p_i = n$ if $\omega = n$ in response to a court order or when first called upon to set the policy. We make a similar assumption about the leader, however, we also assume that should the leader defy a court order, he pays a cost $b > 0$. This cost may be interpreted in a variety of ways from the consequences of public protest, electoral losses, a decrease in international investment flowing from increased uncertainty about the inviolability of contracts, etc. The key point is that defying a court order may be more or less costly to the leader. We assume that in the event that $p_1 \neq p_2$, the leader may accept the court's decision without cost.

Our approach to the court's preferences reflects elements of the literature in comparative judicial politics. We will assume first that the court wishes to allow extraordinary policies only should the state of the world warrant it. Thus, we assume that the court's preferences track the supporter's identically. We do so in order to provide minimal autonomy from the government, which is necessary for any information to be influenced by the court, but the assumption also sets the stage for a court to play the role of political insurance. We also assume that, all else equal, the court would

prefer to be obeyed, and thus assume that the court pays a cost $c > 0$ should the leader defy an order. We do not assume that the court receives a special signal about the true state of the world. Instead, the court will have to infer it as anyone else in society. The court's utility is characterized as follows.

$$u_c(p_i, r_j; \omega) = I_1 a - I_2 c$$

for $i = 1, 2$, $j = 1, 2, 3$; and, where I_1 is an indicator variable that takes the value of 1 when the court has set $d = 0$ if $\omega = p_1$ and 0 otherwise; and, where I_2 is an indicator variable that takes the value of 1 if $p_2 = x$ and 0 otherwise. Thus, a reflects the value of the making a decision that matches the state and c the cost of being defied, as described above.

Analysis

As in the baseline model, the supporter will always react normally to the normal policy. We can restrict the leader's strategies as well. Note that the leader is indifferent between setting $p_1 = n$ and setting $p_1 = x$ and $p_2 = n$, whatever the supporter's strategy. For this reason, we will not consider strategies that involve the leader initially adopting the extraordinary policy, knowing that the court will strike it down, a decision that he will ultimately accept. We do this to reduce the number of cases to consider, but it is important to consider this choice from a substantive perspective. A strategy like this, i.e., in which the leaders selects $p_1 = x$ and $p_2 = n$, could be party of a PBE. They would would exist in precisely the same

region of the parameter space consisting with pooling equilibria in which the leader types both adopt $p_1 = n$, what we are calling the "policy failure" cases. In substantive terms, these equilibria are reflected by politics in which presidents adopt polices, which are struck down by a court whose decision is respected.

As in the baseline, this version of the model is inconsistent with behavior that fully reveals the state of the world to the players who are uncertain about it. Suppose that the leader sets $p_i = \omega$. Upon observing the $p_1 = x$, the court would uphold the policy and the supporter would accept it. This would incentivize the normal leader to set $p_1 = x$, as well. And of course, if the leader set $p \neq \omega$, then upon observing $p_1 = x$, the court would infer that the normal leader had engaged in opportunism, strike down the policy, and the normal leader would accept the decision, knowing that the supporter would set $r_3 = x$ should he not back down.

Lemma 2 *There exists no fully separating equilibrium in the judicial review game.*

The equilibria in the judicial review game turn on the court's beliefs over the state, which are shared of course by the supporter. For sufficient confidence that the state is extraordinary, the court will declare the extraordinary policy to be an acceptable use of power.

Definition 3 *Let* $\bar{\pi}_c \equiv \frac{a-c}{2a}$ *denote the value of* π *above which the court will select* $d = 0$ *if the leader types are expected to adopt the same policy.*

This threshold depends on the cost the court perceives for being defied. As will be clear, any case in which $c > a$, and the court cares more about compliance than exercising its judgment sincerely, results in equilibria that reflect the baseline case precisely. Obviously a highly deferential court, one that behaves as if it were not part of the political system, will not influence behavior at all. The interesting cases involve those in which $a > c$, and thus the court might be willing to exercise its authority to declare policies invalid under regime rules.

Equilibria in the Judicial Review Game

The judicial review model contains three classes of equilibria, which reflect closely the results of the baseline model, as the following proposition suggests. We first state these conditions formally, and then compare the results to the baseline, relying in part on Figure 4.1.2 below.

Proposition 3 *There are two types of pooling equilibria in the judicial review game, which can be divided into four sub cases:*

Case 1a: For $\pi \geq max\{\bar{\pi}, \bar{\pi_c}\}$*, there exists a pooling PBE in which both leaders adopt* $p = x$*, the court selects* $d = 0$*, and the supporter always sets* $r = n$*.*

Case 1b: For $\bar{\pi} \leq \pi < \bar{\pi_c}$ *and* $b \leq min\{k, 1 - \gamma\}$*, there exists a pooling PBE in which both leaders adopt* $p = x$*, the court selects* $d = 1$*, and the supporter always sets* $r = n$*.*

Case 2a: For $\bar{\pi_c} \leq \pi < \bar{\pi}$ and $\gamma \geq \mathbb{E}(v)$, there exists a pooling PBE in which both leaders adopt $p = n$, the court selects $d = 0$, and the supporter selects $r = n$ if $p_i = n$; the support selects $r = x$ if $p_i = x$.

Case 2b: For $\pi < min\{\bar{\pi}, \bar{\pi_c}\}$ and $\gamma \geq \mathbb{E}(v) - b$, there exists a pooling PBE in which both leaders adopt $p = n$, the court selects $d = 1$, and the supporter selects $r = n$ if $p_i = n$; the support selects $r = x$ if $p_i = x$.

Beliefs for the court and supporters are equal to their priors at all information sets.

As in the baseline model, there are also mixed strategy equilibria in which the extraordinary leader adopts the extraordinary policy for sure yet the normal leader choses the extraordinary policy with positive probability.

Proposition 4 *In a mixed strategy equilibrium of the judicial review game, the extraordinary leader always sets $p_i = x$ and the normal leader chooses $p_i = x$ with probability λ. The court sets $d = 0$ if either $a < c$ or if $a > c$ and $\lambda \leq \frac{a-c}{(1-\pi)(a+c)}$. It sets $d = 1$ otherwise. The supporter chooses $r = n$ if ever $p = n$, chooses $r = x$ with probability equal to ρ if the court sets $d = 0$; otherwise, she sets the probability of $r = x$ to $\rho_2 \equiv \frac{k-b}{k+1-\mathbb{E}(v)}$. The supporter and court believe that $Pr(\omega = x|p = x) = \frac{\pi}{\pi+(1-\pi)\lambda}$. The supporter may have any beliefs having observed $p = n$.*

Importantly, if ever the players adopt mixed strategies in equilibrium, the normal leader plays the exact same strategy as he did in the baseline. The reason is that if ever the supporter is called upon to react to an

extraordinary policy – independently of the court's decision – her expected utility calculus is identical to the baseline model. Thus, to render the supporter indifferent, the normal leader adopts the same probability distribution over X. In contrast, the mixed strategy that the supporter adopts depends on the court's decision. Should the court uphold the policy in equilibrium, the supporter would adopt the same mixed strategy; however, should the court be expected to strike the policy down, the normal leader confronts an additional cost to opportunism. This is because he must defy the court order. For that reason, the supporter's equilibrium probability of an extraordinary action must drop in order to prevent the normal leader from simply adopting the normal policy. Thus we can state the following result.

Result 1 *In any mixed strategy equilibrium of the judicial review game, the probability of conflict is weakly lower than it is in the baseline game.*

Interpretation Figure 4.1.2 provides a visual summary of the key differences between the equilibria of the baseline and judicial review games. The x-axis reflects the prior probability that the state is extraordinary, whereas the y-axis reflects the consequences of a failure of the extraordinary leader to choose an appropriate policy. The top panel shows the results for the baseline model. The middle panel shows the results for the judicial review game, in a case where the costs to the court of being defied are relatively large. The bottom panel depicts the results of the judicial review game, but for relatively low costs of defiance.

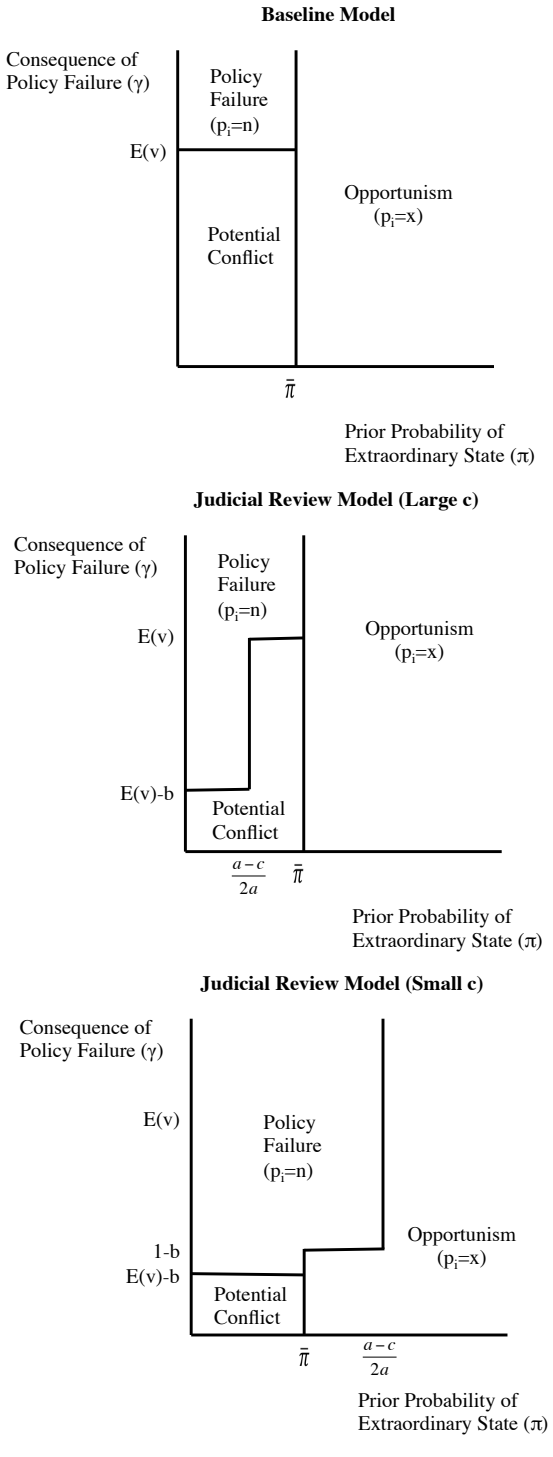

Figure 4.1.2: *Classes of Equilibria in the Baseline and Judicial Review Games. The upper left panel describes equilibria in the baseline model for varying levels of γ and π. The upper right panel describes equilibria for the judicial review model for large values of c. The bottom panel describes equilibria for the judicial review game with small values of c.*

The figure displays immediately the consequences of including judicial review in this interaction, even a form of judicial review that does not inject the interaction with additional information about the underlying state of the world. Consider the middle panel. Although the region of Opportunism has not changed, because the court's threshold for upholding policies is relatively low, what has changed is the region where mixed strategy equilibria were possible. In their place we find pooling equilibria in which policy failures result. The addition of the court increases the cost of adopting the extraordinary policy. Clearly, if the costs of defying a court (b) are close to zero, then the constitutional model reduces to the baseline, as the lower threshold on the y-axis would converge on the higher threshold. Similarly, as we discussed above, if the court's costs of defiance (c) increase, the first threshold on the x-axis converges on zero, and again, the judicial review game reduces to the baseline.

The bottom panel displays the effects of judicial review when judges do not perceive considerable costs to being defied. The region in which mixed strategies are possible is further reduced, because the court is willing to strike policies at higher probabilities when the state is extraordinary (i.e., $\omega = x$), and thus the costs of pursuing the extraordinary policy are higher in a larger set of contexts. Similarly, the policy failure region begins to invade the region in which opportunism was possible.

Combining this analysis with Result 1, the role of a court in helping elites manage regime rules becomes clear. First, by raising the costs of taking extraordinary measures, courts endowed with review powers encourage

leaders to be careful about how they respond to political challenges. Importantly, however, this effect comes at a price – namely leaders who might have attempted to solve policy challenges with extraordinary measures are more likely to let such opportunities go. This avoids conflict, but it does so by inviting policy failure.

The second mechanism by which courts reduce conflict is more subtle. In an equilibrium in which the normal leader sometimes engages in opportunistic behavior, if the court is expected to strike such policies, the equilibrium probability with which the supporter reacts aggressively is lower relative to the game without the court. The reason is that since the costs of opportunism have been increased, the supporter must be less likely to react extraordinarily (set $r = x$) in order to offset the normal leader's increased incentive to adopt the normal policy ($p = n$).

Figure 4.1.3 shows the practical effects of these dynamics. The left panel shows the equilibrium probabilities of conflict in the baseline model versus those in the judicial review model. We consider the case in which $\gamma < \mathbb{E}(v)$, where there is the possibility of mixed strategies (and thus conflict) in both the baseline and judicial review games. The left panel shows the equilibrium probabilities of conflict for $\mathbb{E}(v) - b < \gamma < \mathbb{E}(v)$. We refer to this as middling values of γ – substantively we are considering a case in which the consequences of failing to solve the policy crisis are reasonably high. For values of π below the court's threshold for upholding policies, the difference in probabilities is striking. Where the model without review shows an increasing probability of conflict, the model with

judicial review shows that the probability of conflict is flat and zero for low values of π. Above that threshold, at roughly $\pi = .38$ in the example, conflict emerges in the judicial review game but it is always lower than in the baseline. Likewise, the rate at which the probability increases is lower than it is in the baseline model. Above $\bar{\pi}$ conflict is equally likely in both cases, i.e., there is no conflict, since both types of leaders adopt the extraordinary policy and the support accepts it.

Turning to the right panel, the results are nearly identical. When $\gamma < \mathbb{E}(v) - b$, and the consequences of failing to respond to a political crisis are highly significant, conflict emerges with positive probability in both game types; however, the rate at which this probability increases remains lower in the judicial review game. We can thus state the following result.

Result 2 *The probability of conflict is weakly lower in the judicial review game than in the baseline game.*

Summary

The baseline model identified conditions under which we might expect opportunism, policy failure and political conflict as elites attempt to manage regime rules. The judicial review model suggests that conflict is less likely with judicial review carried out by a minimally independent court, even one that does not enjoy special informational advantages. To do so, courts first must be willing to use their authority and they must accept that doing so will result in conflict with leading officials.

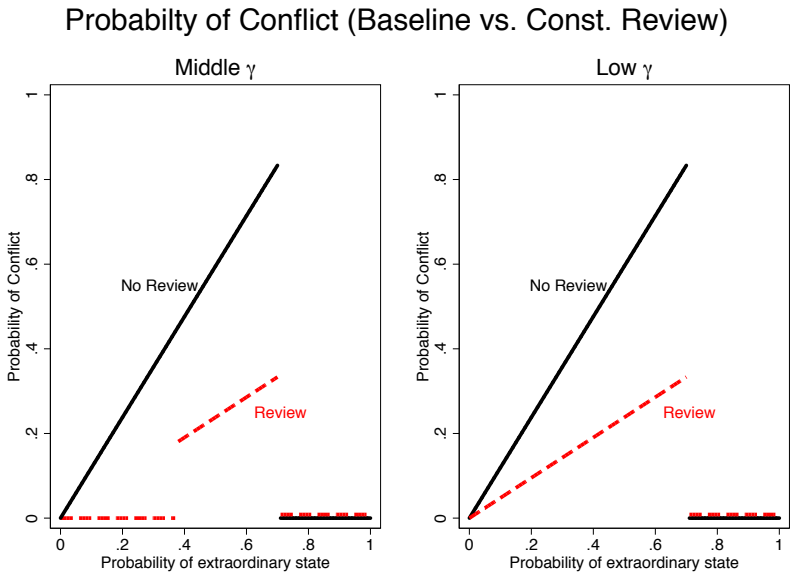

Figure 4.1.3: *Equilibrium Conflict Probabilities in Baseline and Judicial Review Games. Black curves indicate probabilities in the baseline model whereas the dashed red curves indicate probabilities in the judicial revue game. The left panel shows the results for middling values of γ. The right panel shows results for high values of gamma. In each panel, the probability of conflict in the judicial review game is never larger than it is in the baseline game, for all values of π.*

Non-compliance must be a part of the process by which courts help groups manage regime compromises. Judicial review also is likely to reduce opportunism. However, both of these effects, decreases in conflict and opportunism, come at the expense of an increased likelihood of policy failures. By encouraging leaders to limit their power, tensions are relieved, yet leaders will sometimes fail to respond to policy challenges when their supporters would like them to do so.[4]

4.1.3 A Model with a Stronger Version of Autonomy

The court in our model is autonomous in the sense that it does not necessarily share the preferences of the leader – it simply wants the policy to match the state. Of course, modeled this way attaches the court to the supporter, which is itself another way to lack autonomy. That is, the court asked whether there is evidence of compelling contextual reasons for an extraordinary policy – this is exactly what the supporter wants to know. Set up in this way, judicial review nevertheless reduces conflict, but it does so without powerfully resolving the elites' information problems. An alternative approach to autonomy might do more.

Consider the court's payoff function. Suppose that we let I_1 take on the value of 1 only if $p_1 = \omega$ and the court judges the means to be appropriate to the ends. That is, the court is no longer simply interested in knowing

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[4]In the appendix, we consider a final version of the model, in which our concept of judicial autonomy is somewhat stronger than it has been in the judicial review model.

whether the facts warranted an extraordinary action. Instead, it wants to know whether the means are appropriate, say given the norms and traditions of a democratic society. Consider a policy in which the court does not find the means appropriate even if $\omega = x$. Here, the court would strike down the policy for all beliefs in the state, so long as $a > c$.

In this case, there exists a fully separating equilibrium, one in which *only the extraordinary leader sets* $p = x$. For this to work, the extraordinary leader must be prepared to defy the court, while the normal leader is not, so that $k \leq b < 1 - \gamma$. The costs of a backlash must not be too high so that the extraordinary leader would be willing to accept a policy failure; but, they must not be low enough to induces the normal leader to act opportunistically.

In this equilibrium, the supporter would learn the true state of the world. The court would still be defied if $\omega = x$, but the benefit to society of defiance is clear communication of the elite's understandings of regime rules. Conflict would be avoided because of the accurate communication of the leader's true motives. The bottom line is that a court that is sufficiently independent from important political interests in society can powerfully resolve the regime's communication problems. Such a court would do so by exercising judgment, even knowing that it's decisions are likely to be met with resistance or outright defiance.

4.2 Discussion

We began this chapter by discussing how existing theoretical accounts envision a role for judges in the management of uncertainty about the meaning and application of regime rules. One kind of account, which considers judges as trustees of the regime, more or less assumes that problem away. Once we recognize that competing groups in society will never fully agree on the meaning of regime rules, the possibility of simply delegating the problem becomes attractive. Courts are often asked to resolve conflicts over constitutional meaning. As long as we believe that they are independent from political interests in society, we simply agree to accept their interpretations. A second argument, associated with the work of Clifford Carrubba and Matthew Gabel, directly addresses the problem. Their account highlights the ways in which judicial proceedings provide groups in a political system the ability to coordinate information about the collective understanding of regime rules as well as the ability of potential violators to signal their resolve. Our model builds on these accounts in a number of ways.

4.2.1 Policy Failure and Opportunism Tradeoffs

There is a sense in which the central problem to solve is relatively transparent. Uncertainty and misunderstandings about whether leaders are respecting regime rules can lead to political conflict. The problem to solve is conflict. Our analysis clarifies several aspects of this challenge.

Consider a president who has received credible information that his political opponent, a leader of the opposition party, has violated a public corruption law. Suppose that the president moves forward with a public investigation. The most obvious aspect of the challenge concerns how to incentivize opposition party leaders to accept this kind of investigation, or at least to remain committed to protesting via legitimate democratic mechanisms. In so far as courts produce that result, they obviously risk opportunistic behavior on behalf of unscrupulous leaders. This is the first tradeoff independent courts ask us to confront. A second aspect of the problem is that opposition parties might engage in conflict when leaders are doing exactly what they would like them to do. This would be true here if the leader under investigation is in fact guilty, and opposition party members believe that corruption ought to be punished.

A third aspect of the problem is that leaders might fail to address policy challenges for fear of starting a regime conflict. Should the president pursue the corruption investigation and risk a regime conflict? A choice to move forward will naturally raise concerns that there are political motivations for the prosecution, and many presidents will elect not to prosecute. Yet should the opponent be guilty in fact, the president will have failed to exercise authority that the majority of opposition party members might have preferred. Thus, in so far as independent courts reduce political conflict, they invite a second tradeoff between conflict and policy failure.

4.2.2 When Can Courts Help the Parties Reveal Information?

Under what conditions might courts exercising some kind of judicial review power help leaders reveal private information? In our model, courts change the nature of the communication between elites under three conditions. The first and most important condition is that judges must have preferences that are disconnected from both the leadership and the opposition in order to directly affect learning among the parties. This is a very particular kind of judicial independence. Simply rendering courts independent of the government is not enough for the judicial process we consider to help reveal information. The reason is courts of this type share preferences and information with opposition leaders. When it appears that the context in which leaders are making decisions are likely to warrant an extraordinary response, judges will defer to leadership. This is exactly the same decision that opposition party leaders would make were they sitting on the court. The key point is that without some special access to information and with preferences that match those of the opposition, judges do not influence the information that leaders reveal.

On the other hand, if judges have preferences that are disconnected in some way from both parties to the conflict, they can influence information transmission. If this is true, then there may be cases in which judges share opposition beliefs that the conditions are sufficiently likely to warrant an extraordinary measure and yet still believe that what the leader has done violates limits on authority. The example we consider is one in which

judges might first ask if the context is such that an extraordinary power might be warranted. They then engage in a second line of questioning. They ask whether the particular means adopted are appropriate. They might find that the means are out of proportion to the problem being addressed. They might instead find that there were different means available, which could have been adopted. The key point is that if judges are willing to strike down a policy even when they perceive the context to be extraordinary, it is possible for leaders to credibly reveal their information. In this situation, leaders will be given an opportunity to signal their concerns. This will require non-compliance; and, so the second condition is that judges must be willing to accept non-compliance with their orders. Indeed, since non-compliance is essential to generate costly signaling, it is also important that judges be willing to be defied. The third condition is that leaders confronting extraordinary challenges must be willing to accept backlash for non-compliance; and, that leaders considering an opportunistic policy must be unwilling to accept such a backlash. In these circumstances, judicial review can improve communication about the rationales for taking actions that appear to violate regime rules.

It is worth asking whether this scenario is likely to emerge in many states during many years. In other words, where exactly are we to find judges whose preferences are disconnected from the central political cleavages of a state. Appointment processes commonly connect judges to particular political projects. Alternation of power can produce diverse judiciaries but it is unclear how judges can ever be fully disconnected from the central cleavages that structure the politics of their states. And yet courts can

influence regime stability even if they are unable to meaningfully influence communication among elites, a point to which we now turn.

4.2.3 Can Courts Influence Regime Conflict if they do not Influence Information?

We believe they can. Even in cases where courts do not materially influence the exchange of information, they influence regime conflict in two ways. The first way, alluded to above, is by incentivizing leaders to be more prudent – to make fewer policy decisions that might raise opposition concerns than they would in the absence of independent courts. Levitsky and Ziblatt (2018) argue that leadership forbearance, or the commitment to not using all of the powers available to the majority, is a norm essential to managing potential regime conflicts. Independent courts incentivize forbearance in the form of more prudent policy making. As we have argued, this effect comes with a cost – that some actions that should be taken will not precisely because leaders are concerned about generating conflict. This effect has much in common with the concept of "autolimitation" (e.g., Engst, 2019; Vanberg, 1998). Law and courts scholars have described a "second face" of judicial power, in which legislators anticipate judicial reactions to policies, and thus craft bills with judicial review in mind. In this sense, our argument is that autolimitation in not merely about the power of courts but about the survival of democratic regimes. Indeed, the court in our model is not particularly powerful – it can always be ignored.

The second effect of independent courts is to make opposition party leaders less aggressive in their own policing of regime rules. Conditional on a leader taking an action that might plausibly be understood as a rule violation, opposition leaders will be less likely to respond outside the boundaries of normal democratic competition in the presence of independent courts.

In these two ways judicial processes lower the temperature of intra-elite conflict even if they do not influence the parties' ability to communicate. Uncertainties about the true rationales behind the use of power will remain. But commitments to democracy are nevertheless stronger with independent courts. Such courts help translate potential conflict in political society into inter-institutional conflict.

For this type of mechanism to work, judges must not be "single-minded pursuers of compliance," an assumption that seems to pervade much of the political science literature on judicial politics. While it is unlikely that judges prefer a world in which orders are routinely ignored, there is abundant evidence that judges understand that legal systems sometimes require flexibility. It is useful to recall that non-compliance need not manifest as a categorical refusal to implement a judicial order forever and under all circumstances. Some forms of non-compliance emerge in contexts where judges and administrators negotiate the best way for the state to fulfill its duties - a process that plays out over time. In these contexts, judges understand that their orders will not be implemented.

The Colombian Constitutional Court's effort to force the Colombian state

to address a massive failure to protect victims of the internal conflict is particularly instructive in this regard (Cepeda, 2009). So too is the experience of international judges, especially judges on regional human rights courts (European Court of Human Rights or the Inter-American Court of Human Rights) where non-compliance is understood to be a massive problem. A participant at a Brandeis University conference of international jurists, commenting on the the eventual implementation of decisions regarding gay rights suggested, "There is wisdom in waiting, as events occur later, and decisions that are not enforced become enforced" (The International Center for Ethics and Life, N.d.). Although the problems international judges confront are often thought to be distinct from those confronted by domestic judges, in many respects they are quite similar. It may be that in that similarity may lie useful insight into how legal systems might best wrestle with the tensions that follow from pursuing many rule of law values.

The bottom line is that some types of non-compliance with judicial orders can be part of a robust political system. Clearly, there are well-understood normative rationales for expecting leaders to comply with judicial orders. And broad disrespect for judicial authority could have negative consequences for a wide array of economic and political activities. That said, non-compliance can also also be part of a process by which leaders communicate about their resolve and the seriousness of the policy problems they confront. This kind of communication can strengthen regimes.

Appendix

4.A Some title for an appendix

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4.B Some title for an appendix

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Chapter 5

Imprudent Politics

> "Is there any point to which you would wish to draw my attention?"
>
> "To the curious incident of the dog in the nighttime."
>
> "The dog did nothing in the night-time."
>
> "That was the curious incident."
>
> *The Adventure of Silver Blaze*, Sir Arthur Conan Doyle

When Anthony Romero claims that the federal courts of the United States are bulwarks of democracy, he envisions them as active protectors of the American constitutional system. Set against the backdrop of Executive Order 13769, Romero was concerned with the judiciary's checking function, declaring, "And when President Trump enacts law or executive orders that are unconstitutional and illegal, the courts are there to defend

everyone's rights." This, too, is Kim Scheppele's vision of European constitutional courts as defenders of democratic principles. Courts defend democracies through findings of unconstitutionality, especially so when their decisions are grounded in a jurisprudence that evaluates government actions with respect to the substantive rights that give meaning to a democratic system. Whether or not courts set aside government policies on account of their violation of individual rights or some other defect, the key point is that courts defend democracy through actively using their powers.

The model we developed in the previous chapter captures this kind of active behavior;[1] and we surely believe that active courts can serve to hold political leaders within the legal limits on their authority. Yet, our argument highlights a related but distinct force through which courts influence democratic regime survival. They do so by incentivizing prudence on behalf of both political leaders and the opposition.

Independent courts encourage leaders to eschew policies that are likely to raise concerns about potential violations of regime rules. They encourage the opposition to avoid extraordinary responses to policy choices that might appear to lie outside of the boundaries of democratic compromises. While we do not deny that courts might defend democracy through their

[1]The equilibrium that we title "Policy Failure" is one which even the government that receives the extraordinary signal chooses the normal policy. As we discussed in the text, the parameter values that sustain this equilibrium are consistent with another equilibrium, in which both types of governments initially pursue the extraordinary policy, but following a judicial decision against this policy, they accept it and adopt the normal policy moving forward.

checking function, we believe that the more important force lies with the second face of judicial power and the ways in which judiciaries encourage political elites to take paths less subject to claims of illegitimacy and less likely to result in conflict. To put it in the terms of Levitsky and Ziblatt, courts encourage forbearance on the part of leaders and patience on the part of the opposition.

In this chapter, we will discuss and examine empirical implications of our model with this kind of judicial independence in mind. We will present evidence bearing on key empirical predictions implied by the model developed in Chapter 4. We both summarize existing scholarship and offer new evidence on the relationship between judicial independence and actions that may reflect prudence on behalf of governments and oppositions. Namely, we investigate extraordinary actions on behalf of the government (emergency declarations), extraordinary reactions on behalf of the opposition (coups), and finally – the survival of democracy.

5.1 Empirical Implications

Our focus on prudence has important implications for how to evaluate our empirical claims. Judicial decisions that strike down laws and executive orders or which compel leaders to take (or refrain from taking) some type of action are readily observable. They make front page news. They are debated in scholarly circles. But if the second face of judicial power is the most important force through which democracies are protected, then evidence of its effects will not necessarily be found in court decisions.

Evidence will be found in choices not taken, proposals never proposed, and conflicts that do not happen. Indeed, by the time a court is called upon to review a controversial decision of a state's leaders, it may be too late.

This chapter focuses on three types of outcomes: (1) extraordinary actions of leaders, (2) extraordinary responses of those out of power, and (3) democratic regime collapse. The primary effect of independent courts is to encourage leaders to less frequently make choices that raise allegations of regime rule violations. Importantly, this effect should be particularly strong when it is insufficiently likely that the state of world warrants extraordinary actions on the part of leadership (in our model this would reflect a low value of π). The reason is that when the evidence any person can readily observe about the world strongly suggests that leaders confront a challenge that warrants an extraordinary response, extraordinary policy choices are much less likely to be perceived as unjustifiable violations of regime rules. Judges, including judges who are independent of the sitting government, are likely to draw similar conclusions; and for that reason, leaders will not believe that courts, independent or otherwise, will reflect impediments to their policy goals. Thus, when readily observable evidence suggests that exigent circumstances exist, independent courts are unlikely to be important. On the other hand, as it becomes less and less likely that an extraordinary action is warranted, the presence of independent courts matters. This suggests the following empirical implication.

> *Extraordinary Actions: Leaders should be less likely to take extraordinary actions in the presence of independent courts, as*

long as observable evidence about the rationale for an extraordinary action is not sufficiently compelling.

Evaluating this kind of expectation requires that we identify types of leadership decisions that might reasonably reflect what we mean by "extraordinary actions." These should be decisions that are likely to raise suspicions that leaders are violating regime rules in an effort to aggrandize power. Ideally, we will also have variation in beliefs among people in a state about the circumstances that warrant extraordinary actions. In this chapter, we discuss three types of choices: (1) the choice to pursue electoral reform, (2) the choice to investigate political rivals, especially former leaders and (3) the choice to declare a state of emergency following (a) natural disasters and (b) terrorist attacks.

Electoral reform can surely change the balance of power in a democracy by insulating leading coalitions from meaningful political accountability or by creating the opportunity to extend the tenure of a popular leader. This is most obvious in cases of the drawing of district boundaries and eliminating presidential term limits. The investigation of former leaders is sometimes warranted by the facts, but it is also sometimes a political tactic designed to simply eliminate a rival and increase the power of leadership. National emergencies typically confer new or special powers on current leaders, and so the decision to declare one is very closely related to the extraordinary action concept.

Importantly, these choices are typically carried out in very different

political contexts, which we believe plausibly reflect variation in beliefs about the circumstances in which policy choices are made (i.e., π). Electoral reform proposals are not typically made in contexts where people are likely to perceive extraordinary circumstances. This is not to say that countries never undergo electoral reform in a context of political crisis. It is just that changing electoral rules in unlikely to be a policy responding to some special concern which only leaders are likely to understand. The investigation of political rivals, in contrast, typically involves slightly more uncertainty about circumstances. By either directly controlling the investigative arms of the state or by having influence through appointments, state leaders will likely have more information about the underlying facts that speak to the necessity of a criminal investigation. To be sure, uncertainty will vary. There will be clear evidence of malfeasance against some leaders suggesting extraordinary circumstances; however, there will be cases in which the facts are less clear. Finally, states of emergencies are very often called in contexts characterized by considerable evidence of exigent circumstances, though here too there can be uncertainty. We will consider the decision to declare states of emergencies following natural disasters and terrorist attacks. Our view is that the former can reflect more uncertainty about extraordinary circumstances than the latter, when many people in a state will believe that extraordinary responses are likely warranted.

The secondary effect of independent courts operates on opposition leaders. Specifically, the opposition should be less likely to engage in an extraconstitutional conflict over power in the presence of independent

courts.[2] To evaluate this mechanism, we turn to coup and coup attemps.

> *Coups: Coup attempts should be less likely in the presence of independent courts.*

Ultimately, our model has predictions for the survival of democratic regimes, which in our model is possible only if leaders and the opposition act in extraordinary ways. We will evaluate the following implication.

> *Democratic Breakdown: Democratic breakdown should be less likely in the presence of independent courts.*

In addition to these implications we should also observe that coups and democratic breakdowns are less likely in the presence of features of a political system that incentivize judges to behave independently and features of the system that encourage leaders to comply with court orders. We will consider the consequences for democratic survival of government attacks on courts, which might be understood to significantly raise the costs of challenging the state (high c in our model). Courts might be less likely to veto government policies in settings whether their judges' integrity is called out in public and where judges are removed for political reasons. We will also consider the consequences of a robust civil society, which might be understood as the primary force through which leaders will

[2] As before, this effect should be conditioned on beliefs about the state of the world. We have yet to identify an empirical test that allows us to test that prediction.

perceive a significant public backlash for ignoring court orders (high b in our model). Finally, we will consider the consequences of non-compliance. One interpretation of expected non-compliance is that it raises the costs of vetoing a policy in our model (i.e., an increase in c), though since non-compliance merely leaves a decision unenforced, merely expecting non-compliance is likely to reflect far lower costs of vetoing government policies than would an expectation of efforts to attack judicial institutions directly. Indeed, as our model suggests, non-compliance can be a part of an equilibrium in which courts help stabilize democratic regimes. Thus, we we should not expect to observe that non-compliance with court orders destabilizes democratic states. The following summarizes these claims.

Judicial orders are broadly understood to not be self-enforcing, a challenge that is particularly pressing when the target of an order is the state itself (Becker and Feeley, 1973; Birkby, 1966). Critically, although there many examples of non-compliance in settings not characterized by high levels of the rule of law (Ginsburg and Moustafa, 2008), courts are not always obeyed in rule of law states (Vanberg, 2005; Carrubba, Gabel and Hankla, 2008). The Constitutional Bench of Costa Rica's Supreme Court confronts a variety of compliance challenges in its amparo jurisdiction (Staton, Gauri and Cullell, 2015). The Netanyahu government's pattern of evading High Court and administrative court decisions across a very wide set of issue areas is particularly notorious (for Civil Rights in Israel, N.d.).

Perhaps of greatest concern, scholars have suggested that in order to avoid conflict and non-compliance, judges often engage in politically deferential

patterns of decision making, at least in particularly salient cases, which render the constraints they might place on governments practically non-binding (e.g., Bill Chávez and Weingast, 2011; Rodríguez-Raga, 2011; Carrubba, Gabel and Hankla, 2008; Chilton and Versteeg, 2018). Summarizing these challenges, USAID's Office of Democracy and Governance writes:

> [I]n several countries, governments have refused to comply with decisions of the constitutional court (e.g., Slovakia and Belarus) and substantially reduced the court's power (e.g., Kazakhstan and Russia). This illustrates the dilemma constitutional courts often face: Should they make the legally correct decision and face the prospect of non-compliance and attacks on their own powers, or should they make a decision that avoids controversy, protects them, and possibly enables them to have an impact in subsequent cases? Bold moves by constitutional courts can be instrumental in building democracy and respect for the courts themselves. However, the local political environment will determine the ability of the courts to exercise independent authority in these high stakes situations (Democracy and Governance, 2002).

Judicial Attacks, Civil Society and Non-Compliance: Coups and democratic breakdown should be more likely in the presence of attacks on the judiciary, less likely in the presence of a

vibrant civil society, and no more or less likely when courts experience non-compliance with their orders in salient cases.[3]

5.2 Extraordinary Actions of Leaders

What are the types of leadership choices that might reflect what we have called "extraordinary actions" in Chapter 4? A key feature of these actions is that while there might be a perfectly reasonable rationale for them, given the circumstances that leaders confront, they have the possibility of altering the balance of power within the state. Every democracy is likely to have its own particular set of actions that would raise significant questions

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[3]We might also consider the implications if the judiciary is independent both of the interests of the leadership and the opposition. This kind of court is capable of influencing the transmission of information from leadership to the opposition, a scenario discussed at the end of Chapter 4.

For this to work, the consequences for leaders of defying a court order have to be sufficiently severe to deter opportunism but insufficiently severe to ensure that the leader who truly observes extraordinary facts about the world to move forward. In the presence of this kind of court system, even extraordinary actions on the part of leaders will be understood as necessary given exigent circumstances. In such cases, the opposition will accept the leader's behavior because only leaders who perceive a genuine need to exercise authority unnecessary in normal circumstances would take extraordinary actions.

We do not believe that we can fully distinguish in our data between independent courts of the first and second types. That said, we can unambiguously claim that this kind of independent court would powerfully reduce the incentives for coups as well as the rates of democratic regime breakdown. Similarly, an independent court of the second type should be less likely to exist when judges are routinely attacked. They are also increasingly likely to be found in states with strong civil societies. Thus, the core predictions we have described above hold for this kind of judicial independence.

among the opposition, though we believe that there are four examples of leadership choices that have raised concerns in many democracies. We consider the choice to reform the electoral system, the choice to investigate (or allow an investigation) a political rival, the choice to declare a state of emergency, and the choice to attacks the courts themselves.

5.2.1 Electoral Reform

The rules for translating votes in a election into seats in a legislature constitute the core institutions of representative democracy. List structures under proportional representation, district magnitude, electoral thresholds, and district boundaries in the context of proportional and majoritarian electoral systems all have powerful effects on the kinds of interests that are ultimately represented. For this reason, choices to reform electoral systems are always salient and often controversial.

In Latin America, in particular, the issue of reelection generally and of presidential reelection has been a salient matter since independence (Carey, 2003). Between 1988 and 2015, there were thirty six attempts to either eliminate restrictions on presidential terms (e.g., Argentina (1994), Bolivia (2009), Colombia (2005) or add new restrictions (e.g. Brazil (1988), Colombia (2015), Paraguay (1992)) Corrales (2016). Efforts to free presidents to run for successive terms can be profoundly destabilizing. Manuel Zelaya's likely pursuit for reelection was certainly the most

immediate policy responsible for the coup in Honduras in 2009.[4]

Many electoral rules are left to secondary legislation and thus are commonly subject to judicial review; however, some electoral rules are entrenched in constitutions and are amended only via constitutional reform itself. Presidential reelection is one such example. Yet even here courts have been called upon to evaluate the constitutional validity of amendments to presidential terms. This has been accomplished often through the application of what has come to be known as the "unconstitutional constitutional amendment" doctrine Roznai (2013); Landau, Roznai and Dixon (2018). The doctrine has been increasingly applied across the region. The basic idea is that there are some parts of a constitution, which are so fundamental to the structure of the state, that their amendment requires a fundamental reform of the constitution rather than a mere amendment. Changes to rules on presidential term limits have been challenged via this doctrine since 2005 in Colombia, Costa Rica, Nicaragua, Honduras, and Bolivia Landau, Roznai and Dixon (2018).

Given the salience of the decision and the possibility for generating regime instability (e.g., Honduras), reform of presidential reelection rules would seem a particularly useful case to consider our empirical claims. Although there are not many existing studies, recent work does line up with our model's predictions. Kouba (2016) studies a sample of all Latin American presidents from 1990 to 2013 who served a full term and were barred from

[4]We return to this case in our conclusion.

reelection. Kouba finds that judicial independence (here measured with the original Linzer and Staton latent judicial independence scores) are strongly and negatively associated with successful attempts to remove term limits.

? study electoral reforms more broadly in Latin America. They conduct and event history analysis of 112 major legislative and executive electoral reforms from the early 1980s to 2015. They find a strong and negative relationship between the V-Dem judicial constraints index and the hazard of observing a major electoral reform. They write "after 10 years, close to 35% of countries with high judicial constraints engaged in major electoral reforms compared to almost 60% of countries with low judicial constraints."

5.2.2 Investigating Former Leaders

Every concept of democracy contains within it a commitment to compete for power peacefully via the counting of ballots. In principle, political rivals in the opposition are allowed to mobilize free from undue constraints. Former leaders are permitted to live out their lives in peace should they so desire. The choice to investigate former leaders for simple malfeasance or worse is a choice not to be taken lightly. It is in a certain sense one of the most extraordinary actions a democratic leader can take, as it might fundamentally call into question her commitment to a basic tenet of democratic competition.

Of course, there are often very good reasons to investigate the former

leaders of states. An overwhelming amount of evidence existed linking Augusto Pinochet to conspiracies to commitment terror attacks, murder, torture, and embezzlement (Roht-Arriaza, 2009). Video evidence of Alberto Fujimori's secret-police chief and co-conspirator Vladimiro Montesinos Torres bribing Supreme Court Justices, members of the National Elections Board, members of Congress, television executives, among others was broadcast to a horrified nation (McMillan and Zoido, 2004). It would have appeared quite likely that Fujimori was guilty of serious crimes. In the context of our model, these are surely cases in which the probability of an extraordinary set of circumstances would have been extremely high.

Yet, former leaders commonly call the legitimacy of these cases into question, arguing that investigations are politically motivated and designed to eliminate a political rival. Their claims are sometimes quite believable. The many investigations into former Ukrainian prime minister Yulia Tymoshenko were widely believed to be politically motivated and directed by then president Viktor Yanukovych (See extended discussion in Epperly, 2013). As Conaghan (2012) writes,

> While it is clearly in the interest of the accused to represent prosecutions as a judicialised form of political persecution, this dark view is also supported by a considerable body of historical evidence. As Sznajder and Roniger convincingly show, Latin America has a long history of driving former presidents into exile, with legal charges serving as the basis for forcing this

type of political exclusion.

While some, perhaps most, investigations of former leaders take place in the context of credible evidence of wrong doing, things are not always clear. As Bahry and Kim (Forthcoming) write

> When malfeasance in the former administration is exposed, it can be difficult to establish the leader's personal involvement. The president-PM may have arranged illicit transactions such as embezzlement of government funds or biased deals on state contracts through intermediaries, rather than in person. Funds diverted from government coffers or received via bribes may have been laundered through multiple non-transparent channels. Orders from the president-PM to use extrajudicial force against civilians or to use illegal wiretaps may have been unwritten. Without an eyewitness who can provide details of the former leader's personal involvement, the evidence can be ambiguous; and even eyewitness accounts can be challenged. Given the ambiguities, an incumbent administration has some latitude in deciding whether to proceed with a case or not.

This ambiguity creates the kind of informational problem that can risk regime instability. Of course, court systems are important actors in these in contexts. Just as independent courts might serve to block or slow down politicized prosecutions, dependent court systems are highly useful tools.

Thinking broadly about the use of prosecutions to undermine opposition political movements Popova (2010, p.1206) writes

> A subservient judiciary can severely undermine the opposition by prosecuting its financial backers for tax evasion or fraud, siding with municipal authorities to deny meeting permits for opposition rallies or prosecuting opposition activists on trumped up hooliganism or vandalism charges.

Existing scholarship on the role of independent courts in the prosecution of former political leaders is consistent with the predictions of our model. Epperly (2013) studies the post-tenure fate of state leaders from 1960-2004. Leveraging data from the Archigos Project (Goemans, Gleditsch and Chiozza, 2009) and an earlier version of the Linzer and Staton Latent Judicial Independence measure, Epperly finds a very strong and substantively meaningful positive relationship between the independence of a state's judiciary and the probability that its former leaders will go unpunished.

Research by Bahry and Kim (Forthcoming) is even more illuminating. The authors collected data on investigations of all former, democratically elected state leaders for states that became a democracy in 1970 or later, and for all years between 1970 and 2011. They further focus on states where the successor was also democratically elected and on investigations begun by the successor. They also find a strong and substantively meaningfully negative relationship between the Linzer and Staton Latent

Judicial Independence scores and the probability that a leader will be investigated for malfeasance after leaving office. Importantly, Bahry and Kim find that the effect of judicial independence is negative only when there is no "insider" providing evidence against the former incumbent. When there is such evidence, which is highly credible, judicial independence is not an important predictor of investigations. Independent courts matter when there is comparatively weaker evidence. This finding in particular is highly consistent with our model, in so far as we expect the primary impact of independent courts to be in cases where the probability that the state of world is extraordinary is insufficiently high. In other words, we should be particularly likely to see an effect of judicial independence when the evidence against a former leader is inconclusive.

5.2.3 States of Emergency

A court's propensity to incentivize prudence can also be observed in an executive's willingness to declare a state of emergency. Such declarations are one of many tools that executives can use to respond to emergencies, such as natural disasters or domestic turmoil. Once enacted, emergency declarations temporarily reduce or remove certain checks on executive authority, providing the executive additional power to respond to an event. Importantly, however, these declarations also raise the prospect that an executive may engaging in opportunism, attempting to alter fundamental regime rules under the cover of responsibly responding to a domestic event. The challenge for members of the opposition is to decipher an executive's

intentions.

In the presence of such declarations, the opposition may hold different beliefs about whether some event, natural or political, is indeed extraordinary. As we note in our model in Chapter 4, the prior probability of the state of the world being extraordinary, π, can be conceived of mapping into an empirical distribution of events that are more or less likely to represent audience agreement about the event being extraordinary. When audiences have substantial agreement that an event is indeed extraordinary, or high π, then courts are likely to offer little incentive to be prudent. However, at medium levels of π, where there is greater disagreement over whether an event is indeed extraordinary, courts are better able to incentivize prudence.

Prior work offers supporting evidence that courts may indeed encourage prudence in such contexts. Bjørnskov and Voigt (2018) examine emergency declarations, for both natural disasters and political events, across all regimes, both autocracies and democracies, between 1976-2007. While not the main focus of their investigation, their analysis supports the claim that courts appear to incentivize prudence on emergency declarations. In the presence of independent courts, executives are less likely to declare emergencies for natural disasters. However, this association does not extend to those emergencies declared for domestic political events (measured as domestic conflict from Banks). Of course,Bjørnskov and Voigt's (2018) analysis only reports findings for all regimes, they do not distinguish between democracies and autocracies.

In the sections below, we examine declared states of emergency to assess the degree to which judicial independence incentivizes democratically-elected leaders to be prudent in their declarations. We employ a statistical strategy to assess how executive's state of emergency declarations vary under two contexts that we believe represent two levels of π, or the likelihood of being in an extraordinary state: natural disasters and the occurrence of terrorist acts.

Judicial Independence, Emergency Declarations and Opportunism

Declaring a state of emergency (SOE) is a formal legal action taken by the government to expand its the powers (Ramraj, 2008).[5] We follow Bjørnskov and Voigt (2018) and utilize data on emergency declarations from the original Hafner-Burton, Helfer and Fariss (2011) study. These data include all states of emergency from 1976-2007 and offer two separate codings for emergency declarations. The first codes *declared states of*

[5]For our purposes, emergency declarations refer to procedures which find their basis in either statutory or constitutional foundation. *Extralegal* emergency declarations are conceptually distinct and indications of a putsch, or an effort by elements from within the regime to subvert democracy. We believe that citizens would have a relatively high level of confidence that a government declaring an emergency, when it has no legal foundation to do so, is unjustifiably attempting to alter the regime's rules and such an action would be better characterized as an attempted coup.

emergency. A declared state of emergency exists if a "decree or order of the President or Prime Minister of the country, or a bill passed by the country's legislature." (pg. 2 SoE Codebook). To be coded as such, the state must publicly declare or announce an emergency. A country remains coded as being under the declared state until it is removed. The second codes *undeclared states of emergency* as the presence of some crisis that is of sufficient magnitude that it may threaten the country's population, political independence, or human rights institutions. Hafner-Burton, Helfer and Fariss (2011) offer three types of undeclared emergencies in their data: national political, natural disaster and extra-territorial. To construct our dependent variable, we utilize information from these undeclared emergencies to sort the declared emergencies into two types.

We are interested in examining whether judicial independence incentivizes government prudence in declaring an emergency, accordingly, we wish to code declared emergencies as our dependent variable. However, we are interested in assessing different levels of the likelihood that the state of the world is extraordinary. To accomplish this, we generate two dependent variables from the Hafner-Burton, Helfer and Fariss (2011) data. We generate a variable, *declared political declaration*, which we code "1" when both *declaredsoe* and *nationalpoliticalsoe* are coded "1." We also generate a variable, *declared natural disaster declaration*, which we code "1" when both *declaredsoe* and *naturaldisastersoe* are coded "1." The result of these coding decisions yields two dependent variables that reflect different types

of emergency declarations.[6]

Over the time period the data are available, 1976-2007, among democratic regimes there were 312 political emergencies declared compared to 129 natural disaster emergencies. Over the course of a democracy's lifetime, political emergency declarations average 5.83 per democratic-year, with a standard deviation of 10.69 compared while natural disaster declarations average 2.62 declarations per democratic-year, with a standard deviation of 11.29.

Our interest is in how these declarations co-vary with judicial independence. To begin, we consider the distribution of emergency declaration rates over democratic regime tenure split by high and low judicial independence.[7] Figure 5.2.1 displays the rate of emergency declarations (in percentages) for a given year of a democratic regime's tenure for both high and low judicial independence. Natural disaster emergency declarations are displayed in the left panel and political emergency declarations are displayed in the right panel.

The figure highlights several interesting features of emergency declarations.

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[6]We ignore extra-territorial declarations. Such declarations are relatively rare, registering only 29 over the time period, and heavily populated by one state – Israel with 11.

[7]High and Low Judicial independence represents a median split on LJI. High judicial independence democracies averaged an LJI of .894, while low judicial independence democracies averaged an LJI of .513.

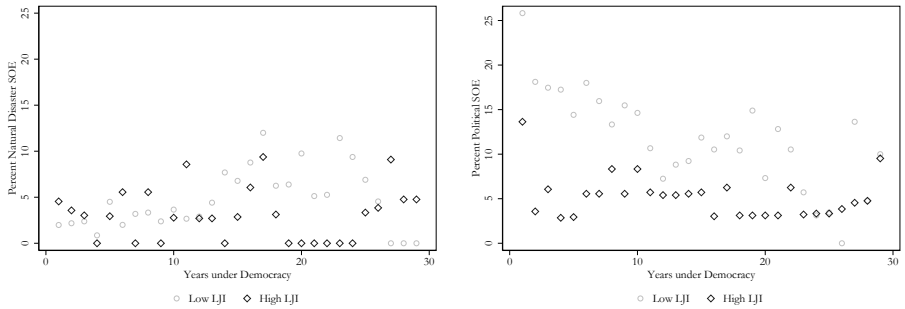

Figure 5.2.1: *Plots of emergency declaration rates by democratic regime age and judicial independence. Democracies with high judicial independence are black diamonds, while gray circles represent low independence courts. Natural disaster emergency declarations are displayed in the left panel and political emergency declarations are displayed in the right panel.*

The left panel shows that at any given age in a democracy's lifetime, a small percentage of democratic regimes have declared emergencies for natural disasters and there appears to be relatively no difference between the declaration rate between democracies with different levels of court independence. The right panel suggests that while emergency declarations are consistently low for democracies operating with independent courts, democratic regimes with more political courts appear to have higher rates of declared political emergencies.

The differences over the first ten years of a democracy's life, thought to be the most vulnerable years in a democracy's tenure, are particularly noteworthy. For natural disaster declarations, the average rate of declarations over the first ten years of a democracy's life for low and high independence courts are 2.65 and 2.80, respectively. This difference widens dramatically when we consider political declarations. The average rate of

declarations for political emergencies is 6.24 and 17.04, for low and high independence courts, respectively.

Another perspective is whether independent courts affect the average amount of time that passes since a democracy's last emergency declaration. If courts are incentivizing prudence then we might expect to observe longer periods of time passing between emergency declarations. Figure 5.2.2 considers this possibility. The figure displays the time since the last emergency declaration (in years) over a democratic regime's tenure split by high and low independence courts. Natural disaster emergency declarations are displayed in the left panel and political emergency declarations are displayed in the right panel.

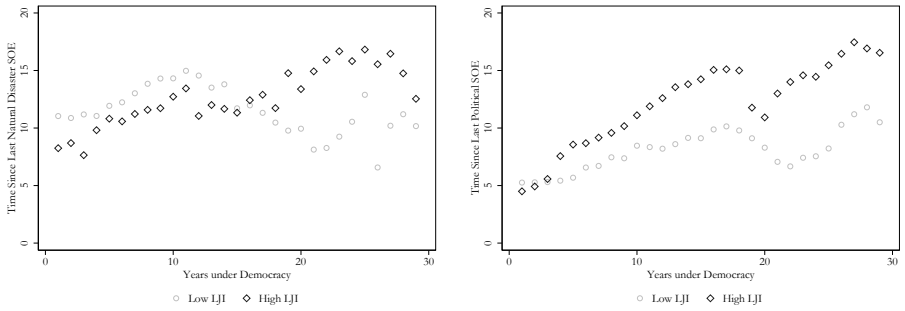

Figure 5.2.2: *Plots of time since last emergency declaration by democratic regime age and judicial independence. Democracies with high judicial independence are black diamonds, while gray circles represent low independence courts. Natural disaster emergency declarations are displayed in the left panel and political emergency declarations are displayed in the right panel.*

The panels reveal descriptive support for the expectation that courts may incentivize prudence. In both panels, democratic regimes with high independence courts are generally more resilient to repeated emergency

declarations. The average amount of time between emergency declarations for high and low independent courts is quite similar early in a democracy's lifetime. This pattern can be seen on the left-hand side of the panels for both natural disasters and political emergencies. However, as democracies age (the right-hand side of the panels) high independence courts appear to incentivize prudence among democratic governments, generating longer wait times between declarations.

Of course, one cautionary note for both of the preceding figures is that neither controls for features of democracy that are well-documented to ease the distributional tensions within a regime. Economic development, economic growth, and social homogeneity lower the stakes of the democratic game. As such, the apparent benefits of an independent court incentivizing prudence on emergency declarations may be spurious to these other features. Moreover, not all emergencies offer the same potential for political opportunism and conflict, but rather depend upon whether the true state of the world is likely to demand an extraordinary action from the government.

In the following sections, we consider multivariate models of emergency declarations that examine two types of emergency declarations: natural disasters and terrorist acts. If these circumstances offer contexts for citizens to hold different beliefs as to the whether extraordinary actions are warranted, then we ought to see uneven court influence on incentivizing prudence across these contexts.

Natural Disasters and Opportunism: Middling π

To assess the presence of a domestic crisis that may reflect a middling level of π, we include an exogenous measure of natural disaster impact. Using data from the Emergency Events Data (EM-DAT0)[8](Guha-Sapir, Hoyois and Below, 2014), we construct an annual index of natural disasters. To ensure that our index is exogenous to the politics within a country, we include all natural disasters that are reasonably independent from human intervention[9] and we drop disasters that are potentially endogenous or not 'natural,' if they have a reasonable likelihood of being influenced by political choices[10] We also consider different controls for natural disaster impact including 1) a dichotomous measure of whether a natural disaster occurred, 2) the number of deaths (1000s) resulting from a natural disaster and 3) the damage costs ($100,000s) associated with a natural disaster.

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[8]Database is located at http:// www.emdat.be/.

[9]We include natural disasters including: ash fall, avalanche, coastal flood, cold wave, convective storm, drought, extra-tropical storm, flash flood, ground movement, heat wave, landslide, lava flow, locust, mudslide, pyroclastic flow, riverine flood, rockfall, severe winter conditions, subsidence, tropical cyclone, and tsunami.

[10]We exclude disasters including: air, bacterial disease, chemical spill, collapse, explosion, famine, fire, forest fire, gas leak, grasshopper, land fire (brush, bush, pasture), oil spill, other, parasitic disease, poisoning, radiation, rail, road, viral disease, and water.

We run separate models with each of these controls.

When we cross our dichotomous measure of natural disaster occurrence with our dichotomous indicators of natural disaster declarations, we see that of the 1113 country-years that have experienced some type of a natural disaster, emergencies were declared in only 117 country-years. Emergency declarations also appear to be linked to the extent of economic destruction wrought by a given disaster more than the total number of lives lost. The average amount of economic damage associated with a natural disaster for which an emergency was declared was $2,062,000 compared to $777,000 for those in which an emergency was not declared. Emergency declarations do not appear to be driven by the total lives lost, however, with a statistically non-significant difference between 680 lives lost and a emergency declaration and 651 lives lost for those with no declaration.

We estimate the annual risk of a natural disaster emergency declaration as a function of judicial independence, three measures of natural disaster impact and a set of controls. We employ a random effects cross-sectional, time series logit parameterization of the occurrence of a declaration. We report the associations of covariates in this model as odds-ratios, which represent the relative change in the odds of an events occurring for a unit-change in a given independent variable. We report estima tes that are clustered on country, yielding a consistent estimator in the presence of serial correlation or heteroskedasticity.

We also include a set of controls that are likely to be correlated with our key judicial variables and our outcome of interest, natural disaster

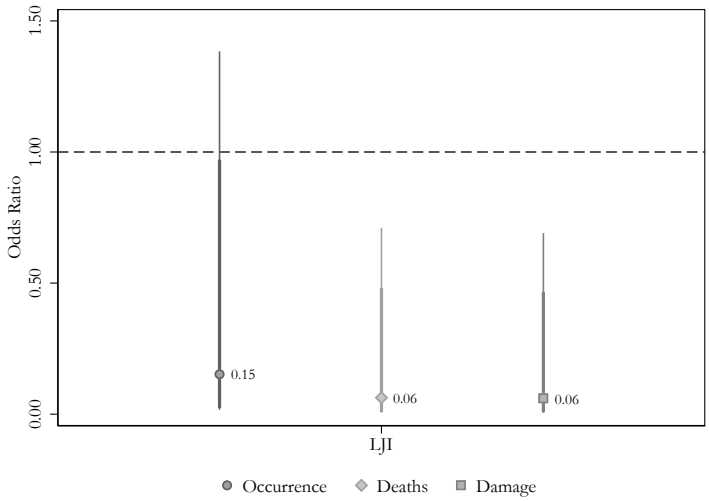

Figure 5.2.3: Odds Ratios of LJI estimates on Declarations of States of Emergency for Natural Disasters: 1960-2007. Ratios less than 1 suggest a reduction in odds. Results reported for three different controls for extent of disaster: Occurrence (dichotomous), Deaths (1000s), and Damage Cost ($100,000s). Full models are reported in Appendix 5A. Two-tailed intervals for $p < .05$ and $p < .10$ reported in Figure.

emergency declaration. To control for economic development and growth, we use data from Beckley (2018) to assess both annual GDP per capita (in thousands) and annual GDP growth. We also control for the effect of political institutions, including political competition and the robustness of civil society. We also include a variable to reflect the presence of domestic conflict in the form of civil war and control for the size of the country's population. We also include a counter and set of cubic splines to account for the serial dependence between observations.

Figure 5.2.3 reports the odds ratios for our measure of judicial independence (LJI) for three models each controlling for a different

measure of natural disaster impact. In each model, a independent judiciary is associated with a reduction in the odds of the government declaring an emergency, controlling for the presence or the severity of the disaster. Recall that LJI is measured on a scale of 0-1, so each odds ratio reports the estimated association of comparing the extremes of judicial independence. Of course we do not have any country in our data with an LJI of 0. Therefore it is more useful to consider a change in LJI of .5, or two standard deviations. This suggests that when we control for the occurrence of a natural disaster (Model 1), enhanced judicial independence, corresponding to an increase in LJI of .5, is associated with an approximate 61% reduction in the odds of an emergency declaration. Moreover, this association is relatively robust across the three models. Whether we operationalize natural disaster with its occurrence (Model 1), the number of deaths (Model 2), or the total damage in financial terms (Model 3), an independent judiciary incentivizes prudence in declaring natural disaster emergencies. Regarding the substantive size of these associations, for the sake of comparison, consider that the occurrence of a natural disaster increases the odds of a natural emergency declaration by nearly 800%. This suggests that the presence of an independent court has a non-trivial influence shaping government incentives.

Terrorism and Opportunism: High π

To assess the presence of a domestic crisis that is likely to reflect a high level a π, we use three different measures of violent domestic crises. First,

we make use of two variables from the Global Terrorism Database (2018). We include a simple dichotomous variable indicating the occurrence of a terrorist incident within a given calendar year. The GTD defines a terrorist attack as the "threatened or actual use of illegal force and violence by a non-state actor to attain a political, economic, religious, or social goal through fear, coercion, or intimidation." (LaFree and Dugan, 2007). Second we include a measure of total deaths (1000s) resulting from a terrorist incident. Last, we include a weighted conflict index from the Domestic Conflict Event Data set (Banks, N.d.). This measure is an additive scale of with different weights assigned to each item.[11]

When we consider the joint distribution of our dichotomous indicators of terrorist occurrence and political emergency declarations, we see that of the 1150 country-years that have experienced a terrorist incident, emergencies were declared in 244 of these country-years. Emergency declarations also appear to be linked to the deaths related to a terrorist incident. The average amount of killed and wounded associated with a terrorist incident that saw an emergency declared was 250 compared to 39 for those where one was not declared.

We again estimate the annual risk of a natural political emergency declaration as a function of judicial independence, three measures of

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[11]The index (with weights in parentheses) includes Assassinations (25), Strikes (20), Guerrilla Terrorism/Guerrilla Warfare (100), Government Crises (20), Purges (20), Riots (25), Revolutions (150), and Anti-Government Demonstrations (10). Database is located at https://www.cntsdata.com/.

violent domestic disaster impact and a set of controls. We employ a random effects cross-sectional, time series logit parameterization of the occurrence of a declaration. We report the associations of covariates in this model as odds-ratios, which represent the relative change in the odds of an events occurring for a unit-change in a given independent variable. We report estimates that are clustered on country, yielding a consistent estimator in the presence of serial correlation or heteroskedsaticity.

We also include a set of controls that are likely to be correlated with our key judicial variables and our outcome of interest, natural political emergency declaration. To control for economic development and growth, we use X to assess both annual GDP per capita (in thousands) and annual GDP growth. We also control for the effect of political institutions, including political competition and the robustness of civil society. We also include a variable to reflect the presence of domestic conflict in the form of civil war and control for the size of the country's population. We also include a counter and set of cubic splines to account for the serial dependence between observations.

Figure 5.2.4 reports the odds ratios for our measure of judicial independence (LJI) for three models each controlling for a different measure of terrorist act impact. It is useful to consider a change in LJI of .5, or two standard deviations. This suggests that for the first model, controlling for the occurrence of a natural disaster, an increase in judicial independence, corresponding to a shift in LJI of .5, is associated with an approximate 61% reduction in the odds of an emergency declaration. For

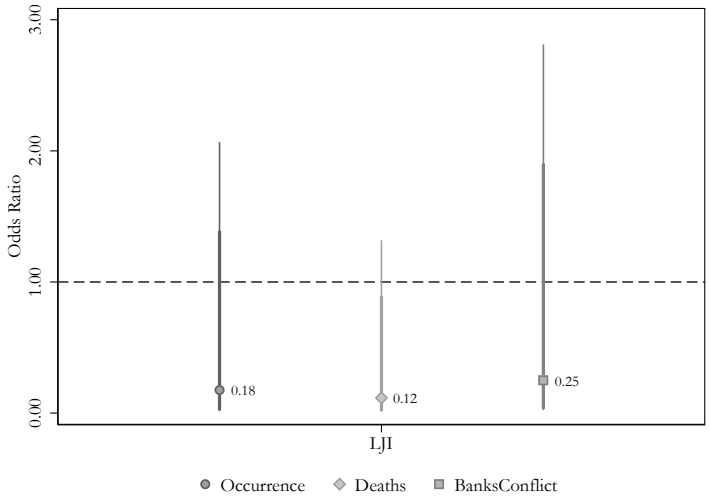

Figure 5.2.4: Odds Ratios of LJI estimates on Declarations of States of Emergency for Political Emergencies: 1960-2007. Ratios less than 1 suggest a reduction in odds. Results reported for three different controls for extent of disaster: Occurrence (dichotomous), Deaths (1000s), and Banks Conflict Index. Full models are reported in Appendix 5A. Two-tailed intervals for $p < .05$ and $p < .10$ reported in Figure.

the sake of comparison, the occurrence of a natural disaster increases the odds of a natural emergency declaration by nearly 800%. Still, an independent judiciary does appear to stem the declaration of emergencies.

5.3 Extraordinary Reactions: Coups

Our model also suggests that an opposition ought to be less likely to engage in an extraconstitutional conflict over power in the presence of judges that have incentives to behave independently. To evaluate this mechanism, we consider an empirical interrogation of coups and attempted coups. Recall from the beginning of the chapter that we have two sets of expectations on how independent courts may influence incentives to attempt a coup. First, they may do so directly by offering members of the opposition incentives to behave more prudently in situations that may call for extraordinary actions. Second, coups should be more likely in the presence of attacks on the judiciary, less likely in the presence of a vibrant civil society, and no more or less likely when courts experience non-compliance with their orders in salient cases. We will examine all of these expectations in turn.

We begin evaluating our propositions by selecting a set of democratic regimes for our analysis. We use the democratic regime event history dataset by Boix and Rosato (2012) to classify the set of regimes within which an attempted coup may occur. Our data contain every democratic regime from 1900 to 2015. Using this definition of democratic episodes, we use the coups in the world dataset by Powell and Thyne (2011) to measure

the onset of a successful or attempted coup, providing data from 1950-2015. An attempted coup is one that,"includes illegal and overt attempts by the military or other elites within the state apparatus to unseat the sitting executive" Powell and Thyne (2011, pp.252). A successful coup is one where,"the perpetrators of a coup seize and hold power for at least seven days" Powell and Thyne (2011, pp.252). Given that our expectations are about an opposition's incentives to subvert the current government, we do not need to distinguish between successful vs. attempted coups. Accordingly, we code democratic regimes that experienced either an attempted coup or successful coup as "1" and code others "0". In these data, we have 3865 country-years of data, 104 of which experience at least one form of a coup.

We estimate the annual propensity of a coup as a function of judicial independence, actions that could reduce court independence (judicial attacks), civil society, judicial noncompliance and a set of controls. We employ a random effects cross-sectional, time-series logit parameterization of coup propensity. We report the associations of covariates in this model as odds-ratios, which represent the relative change in the odds of an event occurring for a unit-change in a given independent variable. We report estimates that are clustered on country, yielding a consistent estimator in the presence of serial correlation or heteroskedsaticity.

To examine our expectations' empirical validity, in the ideal, we would desire data on government beliefs about the perceived costs of defying the court and a court's perceptions or beliefs about their expected costs for

being defied. Such beliefs are latent constructs and cannot be observed directly. As a result, we require indicators that accurately assess these latent concepts as well as data that reflect a court's independence and the propensity of government noncompliance with the court. Historically, comparative analysis of these court features has been restricted due to the absence of reliable, cross-national datasets with comprehensive temporal and spatial coverage. However, the Varieties of Democracy (V-Dem) project enables us to conduct our analysis with V-Dem data on national judicial features for all states from 1900 to 2015. We discuss the specifics of these data below.

To measure judicial independence, we again use LJI. We use V-Dem data as indicators of our latent constructs on government beliefs about the perceived costs of defying the court and a court's perceptions of the expected costs for being defied. V-Dem's primary measures are derived from a Bayesian, graded item response model fit to categorical scores provided by thousands of international country experts (Coppedge and Zimmerman., 2015*b*). We also use VDEM data to measure judicial independence and noncompliance with judicial orders. To measure a court's perceived costs of defiance, we create a scale of V-Dem's *Government Attacks on Judiciary* and *Judicial Purges* variables, which results in a scale with a Cronbach Alpha of .81. To assess the potential costs that leaders perceive of defying court orders, we include V-Dem's *Civil Society* index to control for the role that civil society groups may play in mitigating institutional conflict. The V-Dem civil society index assesses the degree to which the government represses civil society, controls

the entry and exit of civil society groups and the degree to which the public partitipates in civil society organizations. To measure judicial independence, we use our updated LJI which includes V-Dem's *High Court Independence* and *Lower Court Independence* variables. Last, to measure government noncompliance with the court, we create a scale of V-Dem's *Compliance with High Court* and *Compliance with Lower Court* variables and reverse its polarity to assess noncompliance. This results in a scale with a Cronbach Alpha of .94. Each of these scales is standardized to ease interpretation.

We also include a set of controls that are likely to be correlated with our key judicial variables and our outcome of interest, political order. To control for economic development and growth, we use Madison's Historical Statistics (2003) to assess both annual GDP per capita (in thousands) and annual GDP growth. We also control for the effect of political institutions, including dummy variables reflecting whether the democratic regime employed a presidential or parliamentary system. Each of these dummy variables is compared to base category of having a mixed system. We also include dummy variables that code whether the authoritarian government prior to the democratic episode was headed by the military, civilians, or a monarchy. Each of these dummy variables is compared to the base category of a country not having been independent prior to the transition.

The complete tables reporting the coefficients and model statistics for our analyses are included in Appendix 5. The odds ratios of the key variables along with benchmark control variables are displayed in Figure 5.3.1 below.

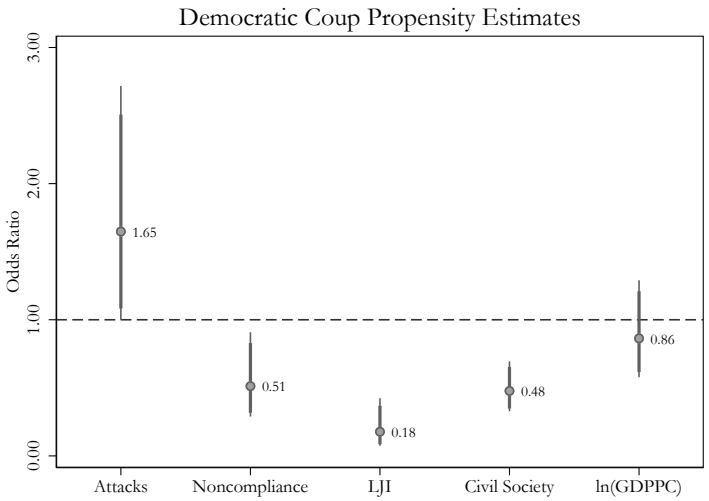

Figure 5.3.1: Odds Ratios of estimates on Coup Propensity with Democracies: 1950-2015. Ratios less than 1 suggest a reduction in odds. Full models are reported in Appendix 5A. Two-tailed intervals for $p < .05$ and $p < .10$ reported in Figure.

The propensity for the occurrence of a coup is lower among democracies with independent courts. Democratic regimes that possess courts that are one standard deviation more independent than their counterparts are associated with a 82% reduction in the odds of a coup. This suggest that democratic regimes experience a greater regime instability when their courts can provide incentives for prudence among potential challengers. Closely related to this, in the presence of government actions that raise the costs to the courts of challenging the state in the form of regular purge attempts or verbal attacks against the court, such judicial attacks reduce the likelihood that a court will veto government policies and provides incentives for oppositions to mount a coup. In the presence of such attacks (1 std. dev. higher), the odds of a coup increase by 65%. Judicial

independence is a clear resource for democratic regimes to draw upon, but attempts to erode that independence can draw down that resource and diminish its ability to provide regime benefits.

Additionally we see that when governments perceive relatively higher costs of defying the court, assessed by our civil society variable, democratic regimes are better insulated from destructive political conflict. Democracies whose citizens are entrenched in non-governmental organizational life, or one standard deviation above the mean, are associated with a 52% reduction in the odds of a coup. Importantly, judicial noncompliance is not associated with an attempt to overthrow a regime. In fact, noncompliance with judicial orders has a negative association with coup propensity.

5.4 The Survival of Democracy

Our model also suggests that the survival of democracy, perhaps the most extreme indicator of extraconstitutional conflict, ought to be enhanced in the presence of independent courts. To evaluate this mechanism, we consider democratic regime collapse. Our analysis combines well-known data on democratic regimes with new data on comparative judicial politics. Specifically, we focus on a salient indicator of political instability – democratic regime collapse. We use the democratic regime event history dataset by Boix and Rosato (2012) to classify the onset and collapse of our democratic episodes. Our data contain every democratic regime between 1900 and ending in 2015. Democratic regimes that break down prior to

2015 are coded as reversals, and those that experienced no breakdown by the end of our temporal window are coded as right-censored. Episodes that began prior to our temporal window are left-censored. Left censoring is adjusted for in the initial coding of the regime count variable. In these data, we have 5224 country years of data, with 185 episodes of democracy, of which 88 end in breakdown. Missing data reduces our usable data to 181 episodes of democracy, of which 81 end in breakdown.

For every democratic state-year between 1900 and 2015 we again make use of the Varieties of Democracy Project's (V-Dem) estimates of two types of attacks on the judiciary (Coppedge and Zimmerman., 2015*a*). We use LJI to assess judicial independence. To measure a court's perceived costs of defiance, we again use V-Dem's *Government Attacks on Judiciary* and *Judicial Purges* variables to create a Judicial Attack variable. To measure noncompliance with the judiciary, we again use a scale of V-Dem's *Compliance with High Court* and *Compliance with Lower Court* variables and reverse its polarity (so that higher numbers reflect "non-compliance." Finally, to assess the potential costs that leaders perceive of defying court orders, we include V-Dem's *Civil Society* index to control for the role that civil society groups may play in mitigating institutional conflict. The V-Dem civil society index assesses the degree to which the government represses civil society, controls the entry and exit of civil society groups and the degree to which the public participates in civil society organizations (**?**). We standardize all of these variables for ease of interpretation.

We estimate the hazard of a democratic regime experiencing a regime

collapse using fully parametric event history estimators. We employ a Weibull parameterization of the baseline hazard, which assumes a monotonic baseline hazard rate and possesses the proportional hazards property, where the effect of a covariate induces a change in the hazard that is proportional to baseline hazard and this change is presumed to be constant over time.[12]. We estimate these models with a Gamma frailty parameter with standard errors clustered on country to account for unobserved heterogeneity.[13]

We also include a set of controls that are likely to be correlated with our key judicial variables and our outcome of interest, political order. To control for economic development and growth, we use Madison's Historical Statistics (2012) to assess both annual GDP per capita (in thousands) and annual GDP growth. We also control for the effect of political institutions, including dummy variables reflecting whether the democratic regime employed a presidential or parliamentary system. Each of these dummy

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[12]We also estimated Cox, Exponential, Log-Log and Log-Normal parameterizations of the hazard. Using AIC and BIC criteria, examination of alternative models suggest that the Weibull offered the best fit to the data (See Table A5 in this chapter's Appendix)

[13]We also estimated an Inverse Gaussian fraily model, but seeing no gains, resorted to the more common Gamma frailty (See Table A6 in this chapter's Appendix). Conditional Risk models stratified on democratic spell also suggest that our inferences are not sensitive to the multiple-failure nature of the data (See Table A7 in this chapter's Appendix).

variables is compared to base category of having a mixed system. We also include dummy variables that code whether the authoritarian government prior to the democratic episode was headed by the military, civilians, or a monarchy. Each of these dummy variables is compared to the base category of a country not having been independent prior to the transition. We include two indicators of colonial legacy – a dummy variable indicating whether a country was never a colony and another indicating whether a country was a former British colony. Last, we include a control for the presence of other democracies in the region.

As we turn to the findings, it is worth pausing to consider interpretation. This is particularly important in light of the fact that we are fitting a statistical model to cross-national, country data, some of which is derived from a measurement model fit to the results of an international expert survey. Three natural concerns arise. The first is that modeling all of the possible sources of heterogeneity across states that is materially related to the political contexts in which judges operate is challenging. The second is that we should be skeptical that the V-Dem scores are measured without error, and it seems possible that like efforts to measure judicial independence cross-nationally, measurement error will not be random (Ríos-Figueroa and Staton, 2014). Third, it seems possible theoretically that judicial attacks and non-compliance are endogenous to regime breakdown – that as regimes fall, judges attempting to hold the regime to old rules will be ignored and ultimately attacked and purged. Our design, which includes a frailty parameter for each state addresses the first concern in part. As we shortly discuss, we will consider the results of our models

when we allow measurement error to propagate through our inferences, addressing the second concern. We do not have, and do not believe that there is a strong candidate for an instrument for the two types of V-Dem judiciary measures (See discussion in Reenock, Staton and Radean, 2013). We can, however, consider the issue of reverse causality from a theoretical perspective. As we will discuss, we believe that the findings are consistent with the argument we give and inconsistent with the most obvious alternative. Having said that, absent a strong identification strategy for the causal effect of judicial attacks/non-compliance on democratic breakdown, we prefer to interpret our findings as providing prima facie evidence of a possible causal connection that is understandable in light of our theory, rather than as strong evidence of causation.

Complete tables reporting the coefficients and model statistics for our analyses are included in Appendix 1. The coefficients of the key variables along with benchmark control variables are displayed in 5.4.1 below. The frailty model estimates a frailty variance that is not statistically distinguishable from zero. Given our frailty model and the fact that effect sizes are conditional on the frailty, all substantive effects discussed below report the effect at the start time of a typical democracy's risk exposure.

A democratic regime's ability to survive is enhanced by the presence of independent courts. Democratic regimes that possess independent courts (1 std. dev. higher) 88% reduction in the odds of a regime breakdown. Take together with our analysis of coups, the results from 5.4.1 suggest that democratic regimes that do not have the resource on an independent

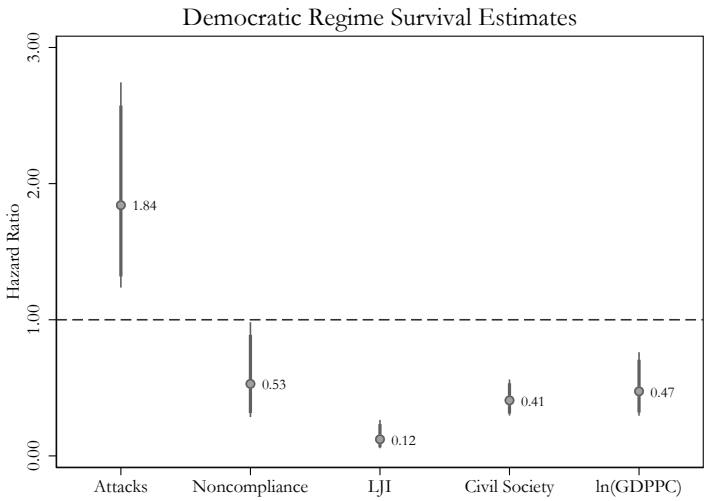

Figure 5.4.1: Hazard Ratios of estimates on Democratic Regime Survival: 1900-2015. Ratios less than 1 suggest a reduction in hazard of breakdown. Full models are reported in Appendix 5A. Two-tailed intervals for $p < .05$ and $p < .10$ reported in Figure.

judiciary are more likely to experience not only attempts to over throw the regime, but also conflict that eventually overwhelms democratic institutions and their very survival.

Our results also suggest that democratic regimes experience greater regime instability when their courts are regularly purged or verbally attacked for their decisions. Democracies experiencing a higher level of judicial attacks (1 std. dev.) are associated with a newly inaugurated regime's hazard of breakdown increasing by 84%. A change in judicial conflict on this scale is well-within the bounds of our data and reflects a relative shift in inter-institutional conflict akin to moving from Costa Rica throughout most of the 1960s and 1970s to Guatemala during the same time period.

However, when governments perceive relatively higher costs of defying the court, measured by our civil society variable, democratic regimes are better insulated from destructive political conflict. Democracies whose citizens well-involved in civic organizations, or one standard deviation above the mean, are associated with a 59% reduction in the hazard of regime collapse. Importantly, again we see that judicial noncompliance is not associated with a higher propensity for democratic breakdown.

To provide additional context for our findings, consider the following comparisons with the economic benchmarks in the figure. On average a $1,000 increase in GDP per capita is associated with a 25.9% reduction in the hazard of a regime collapse.[14] A 10% contraction in the economy during the prior year, is associated with a 177% increase in the hazard of regime collapse for newly inaugurated democracies. Each of these estimates are in line with expectations from prior work (Svolik, 2008) and suggest that the effects of our judicial context variables are substantively meaningful.

5.4.1 Measurement Error in the V-Dem Scores

To this point, our analysis has assumed no measurement error in the V-Dem point estimates of our key variables. Importantly, the measurement approach in V-Dem assumes that there will be error. The measurement

[14]These estimates drawn from a model with non-logged GDP for ease of interpretation.

model addresses it and we make it very easy for future users to account for it in their applications. The values of the V-Dem measures we have used so far are means from the posterior distribution of the relevant latent variable for each state-year. Importantly, we also have access to 2000 samples from the posterior distribution of each parameter in V-Dem's measurement model, including of course the latent variable itself.

To allow measurement error to propagate through the model we adopt an iterative Monte Carlo procedure known as the "method of composition," as discussed in Tanner (1996) and used previously by Treier and Jackman (2008) and Pemstein, Meserve and Melton (2010). The method follows three steps.

Step 1: For each state-year of each V-Dem variable, draw a sample from its posterior distribution. Combine the results of this step (new V-Dem variables that now incorporate measurement error) with the data described above.

Step 2: Fit the event history model described above, saving estimated parameters as well as the variance-covariance matrix.

Step 3: Draw one sample of each coefficient in the model from the multivariate normal density of the coefficients with the mean vector and variance-covariance matrix set to the estimates in Step 2.

These steps are iterated 2,000 times. The estimates at each iteration can be considered samples from the posterior distributions of each of the model's parameters. Figure 5.4.2 plots the posterior distributions for each of the key V-Dem variables in our study derived via the method of

composition. Measurement error in the V-Dem variables contributes to the uncertainty of our coefficient estimates – country-level experts differ in their assessments of judicial context with respect to judicial attacks, judicial noncompliance and civil society. However, these sources of measurement error do not substantially alter the inferences that we reported above. We can see from Figure 5.4.2 that the error-adjusted estimates of the coefficients for judicial attacks, judicial noncompliance, and civil society are quite similar, albeit muted, compared to our original estimates. Judicial Attacks are associated with regimes with greater hazards of breakdown while, democracies with robust civil societies are associated with lower hazards of democratic collapse and judicial noncompliance is not necessary problematic for democratic regime survival.

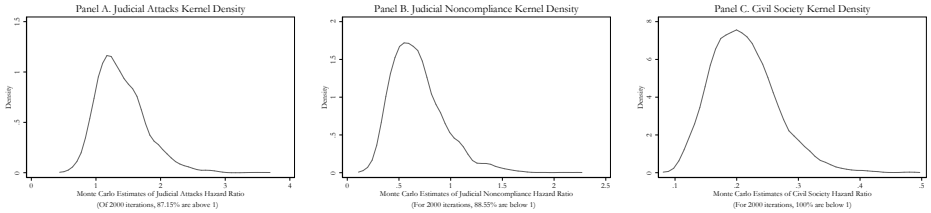

Figure 5.4.2: *Monte Carlo Analysis Allowing for Measurement Error in V-Dem Variables. Panels display kernel density plots of V-Dem indicator posteriors for Judicial Attacks (left panel), Judicial Noncompliance (center panel) and Civil Society (right panel), respectively.*

5.4.2 Reverse Causality

The most significant threat to interpreting the hazard ratios as unbiased estimates of the causal effects is that judges are attacked, judges are

ignored and civil society is dismantled as regimes collapse. Absent good instruments or some other stronger design for causal inference in observational data, we are comfortable treating our findings are associations that are predicted by the theoretical argument we provide. Having said that, we might also consider the results in light of this straightforward alternative. A claim that our estimates reflect reverse causality should be able to explain all that we find, not just one or two results. Our theoretical argument suggests that attacks are judges are problematic for regime survival but that non-compliance need not be. If what we are observing is merely a consequence of regime breakdown, then the question is why would regime breakdown force the state to purge the judiciary but not simply ignore their decisions. Simple non-compliance in particular cases is not particularly costly relative to a complete overhaul of the entire judiciary and we know that it is routine. So, if it were the case that regime collapse is what induces inter-institutional conflict, we should see not only an increasing hazard for collapse in our model for judicial attacks, but for non-compliance as well.

5.4.3 An Alternative Interpretation of Judicial Attacks

We have presented our analyses of coups and democratic survival with an interpretation of government attacks on courts that view such attacks as an action that potentially raises the costs of the court challenging the state (high c in our model) by possibly eroding independence. Under this interpretation, in the presence of government rebukes and judicial purges,

courts would be less likely to veto government policies, undermining the court's role that we envision. A reasonable alternative interpretation of judicial attacks is that they are another example of a government pursuing extraordinary actions, similar in intent to government attempts at electoral reform discussed above.

Under this alternate interpretation, judicial attacks are manifestations of a government's attempt to respond to an extraordinary state of the world either faithfully or opportunistically. The opposition is in the familiar position of needing to determine whether the government's action is a reasonable response to the state of the world or an unreasonable violation of regime rules. The controversial decision that the court is called upon to consider is an attack against the court itself. Despite this, under the extraordinary action interpretation, our vision of the court retains its proposed function. As a result, sufficiently independent courts will incentivize prudence from both the government and the opposition. Independent courts ought to be targeted for attacks less frequently than those captured by the government. And this is what we observe in the data.

Recall Figure 1.1 from our Introductory Chapter that displayed a plot of judicial attacks on de facto judicial independence for 2015. That plot suggests that judiciaries are less likely to be the target of government attacks as independence increases. Less independent courts are more likely to find themselves targets of government interference. But if a court operates with less autonomy from the government, then why would a

government need to attack it? Historically, less autonomous courts are targets of newly inaugurated political coalitions seeking to unseat court layovers from the previous coalition. Indeed, all political coalitions have incentive to remove policy frustrating members of the court. But, in systems with a history of a strong independent court, the incentive to dismantle the court gives way to more prudent behavior. Of course, even among those courts that enjoy a relatively high level of independence, we see governments attempt to question the virtue of the courts. But these sorts of challenges occur at much lower levels, when courts are sufficiently independent.

5.5 Conclusion

Managing beliefs about the extent to which leaders are constrained is an important political challenge. We have argued that judiciaries can help address this challenge in a number of ways. They incentivize leaders to be careful about the possible solutions to policy challenges that they see, though in so doing they create the possibility that leaders fail to take decisive action when they should. In cases where leaders are willing to move forward with arguably questionable policies, courts can help translate conflict among political competitors into conflict within the institutions of the state. It is in this regard that independent courts help establish credible commitments and serve as insurance policies in the even of a power transfer.

In so far as judges influence regime survival on our account, they encounter a dilemma. Courts charged with holding leaders accountable to limits on their authority are asked in many systems to make decisions that may be institutionally and personally costly. In such settings, the incentives for strategic deference are particularly high; and yet, if courts are strategically deferential, they do not serve their state constraint function. We have considered how judges that confront such rule of law tensions might nevertheless contribute to regime stability.

We have found considerable evidence that regimes characterized by a latent propensity for significant inter-branch conflict, where courts are openly critiqued and purged when possible are particularly vulnerable to instability. We envision two types of consequences of this kind of politics. The first, on which we focus considerable theoretical attention, is that judges in such contexts will have particularly strong incentives to avoid political conflict. This type of dynamic is reflected in former Venezuela Supreme Court president Cecilia Sosa's comments as she stepped down from her post following the Court's approval of the Chavez led Constituent Assembly's assertion of emergency powers, "The court simply committed suicide to avoid being assassinated. But the result is the same. It is dead."[15] The second consequence, which would undermine judicial independence in a distinct way, is that courts in these contexts become simple tools of inter-party competition (Pérez-Liñán and Castagnola,

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[15]Top VenezuelanJudgeResigns, BBC NEws, Aug. 25, 1999, `http://news.bbc.co.uk/1/hi/world/americas/429304.stm`

2009), tools used to discredit opposition leaders or otherwise harass domestic competitors (e.g. Aydın, 2013; Popova, 2010). This kind of court may become embroiled in political controversy, but there is no serious sense in which its involvement will be understood as injecting independent judgment. In neither case will judges materially impact regime outcomes – indeed, they may be part of the process by which the regime collapses.

Yet we have also found that a latent propensity for non-compliance with important decisions is not particularly problematic for democratic regime survival. We do not claim that the routine defiance of courts with judicial review authority is to be promoted or itself necessarily without harm. We claim instead that non-compliance need not be a totally uncommon or particularly destructive element of a political system. In many cases, non-compliance will follow from an executive's judgement that the particular context in which the decision is issued simply cannot be prudently obeyed. In a speech to Congress explaining his refusal to release John Merryman from a Ft. McHenry prison cell at the beginning of the U.S. Civil War, Abraham Lincoln asked, "[A]re all the laws, but one, to go unexecuted, and the Government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the Government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it" (Hutchinson, 2010)? More than a century later, echoes of Lincoln's rationale are heard in the Israeli Interior Ministry's rationale for non-compliance. There simply are political contexts in which judicial orders cannot be implemented without significant

risk to the system, in terms of budgets or national security interests.

Of course, these types of claims can very well mask goals that fundamentally undermine regime rules. The point is that courts that enjoy reasonably broad support, especially courts that are understood to be independent of major political competitors in a society raise the stakes of non-compliance, and by so doing, help transfer information about the true motives of a leader. It is in this way that we understand the periodic forms of non-compliance in states with reasonably strong rule of law commitments like the United States, Costa Rica, Germany or Israel. Rationales for non-compliance may be fabrications, but they are less likely to be perceived in that way by relevant actors than they are in contexts that do not possess such courts.

Appendix

5.A Appendix: Chapter 5

Table 5.A.1: Declaration of State of Emergencies for Natural Disasters and *de facto* Judicial Independence (Democratic Regimes)

	Association between SOEs and *de facto* JI		
	Occurrence	Deaths(1000s)	Damage(100000s)
Natural Disaster	2.2173***	0.0078	0.0048*
	(0.2864)	(0.0098)	(0.0026)
de facto Judicial Independence	-2.2941*	-3.2916**	-3.3260**
	(1.3346)	(1.4635)	(1.4713)
Civil War	-0.1726	-0.2645	-0.2659
	(0.2440)	(0.2653)	(0.2645)
ln(GDPPC)	-0.0019	0.1246	0.1045
	(0.2392)	(0.2837)	(0.2837)
GDP Growth	0.0872*	0.0954**	0.0972**
	(0.0459)	(0.0441)	(0.0445)
Civil Society	-0.0175	0.0921	0.1031
	(0.2530)	(0.2975)	(0.2990)
Party Competition	0.0344	0.0816	0.0830
	(0.1610)	(0.1869)	(0.1870)
Population	-0.0000	0.0000	0.0000
	(0.0000)	(0.0000)	(0.0000)
Constant	-3.4634**	-3.0579	-2.9116
	(1.6701)	(2.1071)	(2.1125)
lnsig2u	0.9386**	0.7954*	0.8078*
	0.4063	0.4403	0.4499
Log-likelihood	-312.1746	-330.2912	-329.6813
AIC	656.3492	692.5823	691.3626
BIC	743.5319	779.7650	778.5452
Random Effects	YES	YES	YES
Autocorrelation Robust	YES	YES	YES
Heteroskedasticity Robust	YES	YES	YES
Number of Observations	2171	2171	2171
Years Covered	1900-2015	1900-2015	1900-2015

Note: Standard errors are clustered on country-episodes. Two-tailed tests of statistical significance are displayed: *$p < .05$, **$p < .01$.

Table 5.A.2: Declaration of State of Emergencies for Political Emergencies and *de facto* Judicial Independence (Democratic Regimes)

	Association between SOEs and *de facto* JI		
	Terror (Occurrence)	Terror (Deaths/Wounded(1000s))	Banks Conflict Index
Domestic Acts	0.6396**	0.0009**	0.0003**
	(0.2883)	(0.0004)	(0.0001)
de facto Judicial Independence	-1.4975	-1.8759	-1.1202
	(1.4707)	(1.4494)	(1.4245)
Civil War	0.1385	0.1663	0.1162
	(0.1755)	(0.1790)	(0.1650)
ln(GDPPC)	-0.0787	-0.0203	-0.0154
	(0.2517)	(0.2482)	(0.2487)
GDP Growth	-0.0512*	-0.0551*	-0.0486*
	(0.0297)	(0.0301)	(0.0272)
Civil Society	-0.4042	-0.4228	-0.4778
	(0.3378)	(0.3513)	(0.3443)
Party Competition	0.0135	0.0282	0.0963
	(0.2123)	(0.2157)	(0.2179)
Population	-0.0000	-0.0000	-0.0000
	(0.0000)	(0.0000)	(0.0000)
Constant	-0.2058	-0.2295	-1.0268
	(1.6045)	(1.6213)	(1.7306)
lnsig2u	0.9386**	0.7954*	0.8078*
	0.4063	0.4403	0.4499
Log-Likelihood	-312.1746	-330.2912	-329.6813
AIC	656.3492	692.5823	691.3626
BIC	743.5319	779.7650	778.5452
Random Effects	YES	YES	YES
Autocorrelation Robust	YES	YES	YES
Heteroskedasticity Robust	YES	YES	YES
Number of Observations	2171	2171	2171
Years Covered	1900-2015	1900-2015	1900-2015

Note: Standard errors are clustered on country-episodes. Two-tailed tests of statistical significance are displayed: *$p < .05$, **$p < .01$.

Table 5.A.3: Propensity of a Successful or Attempted Coup by Features of the Judicial System (Democratic Regimes)

	Propensity of Successful or Attempted Coup
Judicial Attacks	1.648*
	(0.42)
Judicial Noncompliance	0.512*
	(0.15)
LJI	0.177**
	(0.08)
Civil Society	0.477**
	(0.09)
ln(GDPPC)	0.863
	(0.18)
Growth	0.917**
	(0.03)
Executive Form (Parliamentary)	1.735
	(0.93)
Executive Form (Presidential)	1.492
	(0.74)
Previous Autocratic Regime (Military)	3.931*
	(2.37)
Previous Autocratic Regime (Civilian)	0.989
	(0.66)
Previous Autocratic Regime (Monarchy)	1.000
	(.)
Time Since Last Coup	1.042
	(0.10)
Cubic Spline1	1.001
	(0.00)
Cubic Spline2	0.999
	(0.00)
Cubic Spline3	1.001*
	(0.00)
Constant	0.004**
	(0.01)
lnsig2u	1.217
	(0.63)
Log-likelihood	-317.260
Random Effects	YES
Autocorrelation Robust	YES
Heteroskedasticity Robust	YES
Number of Observations	3789.000
Years Covered	1900-2015

Note: Standard errors are clustered on country-episodes. Two-tailed tests of statistical significance are displayed: $^{*}p < .05$, $^{**}p < .01$.

Table 5.A.4: Hazard of Democratic Regime Breakdown by Features of the Judicial System (Democratic Regimes)

	Hazard of Democratic Regime Breakdown
Judicial Attacks	1.842**
	(0.37)
Judicial Noncompliance	0.529*
	(0.17)
LJI	0.122**
	(0.05)
Civil Society	0.408**
	(0.07)
ln(GDPPC)	0.474**
	(0.11)
Growth	0.903**
	(0.03)
ln(Population)	1.004
	(0.16)
Executive Form (Parliamentary)	0.698
	(0.40)
Executive Form (Presidential)	0.523
	(0.29)
Previous Autocratic Regime (Military)	0.772
	(0.53)
Previous Autocratic Regime (Civilian)	0.808
	(0.53)
Previous Autocratic Regime (Monarchy)	0.212*
	(0.18)
Constant	0.060
	(0.17)
Duration Parameter	2.103**
	(0.17)
Frailty Parameter	1.589
	(0.58)
Log-likelihood	-100.501
Random Effects	YES
Autocorrelation Robust	YES
Heteroskedasticity Robust	YES
Number of Observations	4743.000
Years Covered	1900-2015

Note: Standard errors are clustered on country-episodes. Two-tailed tests of statistical significance are displayed: *$p < .05$, **$p < .01$.

Table 5.A.5: Supplementary table A5

	Different Baseline Hazard Parameterizations				
	Exponential	Weibull	Log-Log	Log-Normal	Cox
Judicial Attacks	0.638**	0.761*	0.747*	0.780*	1.543*
	(0.10)	(0.08)	(0.09)	(0.09)	(0.26)
Judicial Noncompliance	1.573*	1.337	1.559*	1.586*	0.610*
	(0.34)	(0.21)	(0.35)	(0.30)	(0.14)
LJI	3.077**	2.452**	2.650**	2.812**	0.258**
	(0.70)	(0.41)	(0.61)	(0.56)	(0.07)
Civil Society	1.889**	1.523**	1.566**	1.667**	0.512**
	(0.20)	(0.13)	(0.16)	(0.16)	(0.07)
ln(GDPPC)	1.281	1.307**	1.360**	1.294*	0.727
	(0.19)	(0.13)	(0.16)	(0.14)	(0.14)
Growth	1.067*	1.044*	1.059**	1.061**	0.923**
	(0.03)	(0.02)	(0.02)	(0.02)	(0.03)
ln(Population)	0.897	0.967	0.976	0.988	1.086
	(0.09)	(0.07)	(0.08)	(0.07)	(0.12)
Executive Form (Parliamentary)	1.202	1.163	1.072	1.129	0.819
	(0.42)	(0.29)	(0.35)	(0.34)	(0.35)
Executive Form (Presidential)	1.554	1.530	1.439	1.358	0.574
	(0.50)	(0.36)	(0.41)	(0.36)	(0.23)
Previous Autocratic Regime (Military)	0.745	0.701	0.755	0.842	1.500
	(0.31)	(0.20)	(0.26)	(0.26)	(0.67)
Previous Autocratic Regime (Civilian)	1.209	0.948	1.068	1.165	0.953
	(0.51)	(0.27)	(0.38)	(0.37)	(0.45)
Previous Autocratic Regime (Monarchy)	1.114	1.251	1.868	1.757	0.761
	(0.47)	(0.35)	(0.71)	(0.64)	(0.34)
Constant	133.834*	19.851*	8.727	9.856	
	(264.71)	(29.54)	(14.40)	(14.14)	
Weibull Shape Parameter		1.629**			
		(0.14)			
Log-Log Scale Parameter			0.438**		
			(0.04)		
Log-Normal Sigma				0.774**	
				(0.05)	
Log-likelihood	-120.920	-108.149	-115.987	-113.450	-289.016
AIC	267.840	244.299	259.975	254.900	602.031
BIC	351.878	334.801	350.477	345.402	679.604
Random Effects	YES	YES	YES	YES	YES
Autocorrelation Robust	YES	YES	YES	YES	YES
Heteroskedasticity Robust	YES	YES	YES	YES	YES
Number of Observations	4743	4743	4743	4743	4743
Years Covered	1900-2015	1900-2015	1900-2015	1900-2015	1900-2015

Note: Standard errors are clustered on country-episodes. Two-tailed tests of statistical significance are displayed: $^*p < .05$, $^{**}p < .01$.

Table 5.A.6: Supplementary Table A6

	FrailtySpecifications	
	Gamma	Inverse Gaussian
Judicial Attacks	1.605*	2.216*
	(0.33)	(0.71)
Judicial Noncompliance	0.596	0.388*
	(0.18)	(0.18)
LJI	0.220**	0.060**
	(0.07)	(0.03)
Civil Society	0.494**	0.260**
	(0.06)	(0.06)
ln(GDPPC)	0.641*	0.465*
	(0.12)	(0.16)
Growth	0.927*	0.866*
	(0.03)	(0.05)
ln(Population)	1.055	1.080
	(0.12)	(0.22)
Executive Form (Parliamentary)	0.793	0.608
	(0.34)	(0.47)
Executive Form (Presidential)	0.499	0.307
	(0.21)	(0.25)
Previous Autocratic Regime (Military)	1.760	2.515
	(0.87)	(2.24)
Previous Autocratic Regime (Civilian)	1.052	0.974
	(0.55)	(0.86)
Previous Autocratic Regime (Monarchy)	0.647	0.461
	(0.35)	(0.39)
Constant	0.007*	0.003
	(0.02)	(0.01)
Duration Parameter	1.666**	3.042**
	(0.15)	(0.37)
Frailty Parameter	0.032	37.755**
	(0.08)	(36.38)
Log-likelihood	-108.085	-106.960
AIC	246.170	243.921
BIC	343.137	340.887
Random Effects	YES	YES
Autocorrelation Robust	YES	YES
Heteroskedasticity Robust	YES	YES
Number of Observations	4743	4743
Years Covered	1900-2015	1900-2015

Note: Standard errors are clustered on country-episodes. Two-tailed tests of statistical significance are displayed: $^*p < .05$, $^{**}p < .01$.

Table 5.A.7: Supplementary Table: Sensitivity to Repeated Entry

	Stratified/ConditionalRiskModels	
	Cox	Weibull
Judicial Attacks	1.5959*	1.5732*
	(0.3252)	(0.2989)
Judicial Noncompliance	0.6651	0.6405
	(0.1595)	(0.1574)
LJI	0.2860**	0.2338**
	(0.0923)	(0.0654)
Civil Society	0.5163**	0.5043**
	(0.0665)	(0.0587)
ln(GDPPC)	0.7511	0.6180**
	(0.1512)	(0.1112)
Growth	0.9164*	0.9312*
	(0.0326)	(0.0302)
ln(Population)	1.0878	1.0486
	(0.1137)	(0.1198)
Executive Form (Parliamentary)	0.9333	0.8253
	(0.4358)	(0.3828)
Executive Form (Presidential)	0.6191	0.4869
	(0.2608)	(0.1959)
Previous Autocratic Regime (Military)	1.7385	1.8014
	(0.9261)	(1.0233)
Previous Autocratic Regime (Civilian)	1.0823	1.1181
	(0.5644)	(0.5659)
Previous Autocratic Regime (Monarchy)	0.7245	0.6800
	(0.3601)	(0.3121)
Democratic Spell=1		1.0000
		(.)
Democratic Spell=2		1.1664
		(0.8409)
Democratic Spell=3		0.1099
		(0.1731)
Democratic Spell=4		8.2614**
		(5.7790)
Democratic Spell=5		0.0002**
		(0.0004)
Constant		0.0109
		(0.0253)
Weibull Shape Parameter		
Democratic Spell=1		1.0000
		(.)
Democratic Spell=2		1.0048
		(0.1393)
Democratic Spell=3		1.4594
		(0.2972)
Democratic Spell=4		0.6567
		(0.1472)
Democratic Spell=5		0.0000**
		(0.0000)
Constant		1.6281**
		(0.1548)
Log-likelihood	-215.2172	-105.6128
AIC	454.4344	253.2257
BIC	532.0075	388.9786
Random Effects	YES	YES
Autocorrelation Robust	YES	YES
Heteroskedasticity Robust	YES	YES
Number of Observations	4743	4743
Years Covered	1900-2015	1900-2015

Note: Standard errors are clustered on country-episodes. Two-tailed tests of statistical significance are displayed: $*p < .05$, $**p < .01$.

Chapter 6

Will Courts be Bulwarks of Democracy in the United States?

I ask my judicial colleagues to continue their efforts to promote public confidence in the judiciary, both through their rulings and through civic outreach. We should celebrate our strong and independent judiciary, a key source of national unity and stability. But we should also remember that justice is not inevitable. *Chief Justice John Roberts 2019*

As we write this chapter, it is the middle of April, 2020, and the questions

raised in this book are all the more pressing compared to when we embarked on the study. We write from bedrooms, porches, and family rooms in Tallahassee, Florida and Decatur, Georgia, as we separately shelter-in-place during the COVID-19 pandemic. In multiple ways, the pandemic presents chief executives around the world with challenges that may require extraordinary actions. In many cases, few will register concerns about motives. Yet, in other cases, governments will make decisions that raise precisely the kind of questions we have claimed can be particularly destabilizing for democracy.[1]

Sixteen U.S. states postponed their 2020 spring elections. Arizona, Florida, and Illinois went forward with theirs on March 17 and Wisconsin voted on April 7, well after widespread societal lockdowns.[2] As the United States approaches its November federal elections, the states and the federal government could confront a series of questions that will call into question the motives of leaders. Whether to hold elections, and if so, how exactly to ensure that voters have access to ballots will trigger existing partisan conflicts over voting rights and ballot integrity. The U.S. Constitution grants Congress the power to set the time for federal elections and since the mid-19th century, election day has always fallen on the first Tuesday

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[1]We should also note that the pandemic reminds us that sometimes decisions not to act can be considered extraordinary. We leave a discussion of this possibility for future work.

[2]`https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html`

following the first Monday in November. An executive order from the President of the United States delaying the November elections would seem to exceed his power under Article II, but in the context of an ongoing global health crisis, the possibility was debated among political pundits.[3] Perhaps more plausible, what if Democratic (Republican) governors called for a delay while Republican (Democratic) governors asked for the elections to go forward? What if some states move to accept absentee ballots filed after state imposed filing deadlines?

These are very far from implausible questions. On April 6, the Supreme Court of the United States overturned a decision of the District Court for the Western District of Wisconsin in which the court had granted a seven day extension of the absentee ballot filing period in light of the Wisconsin Legislature's decision to block the Governor's effort to delay in-person voting.[4] The 5-4 decision broke on familiar ideological grounds, which given the membership of the 2020 Supreme Court also broke on partisan lines. As we think about the judiciary's defensive democratic role in American politics, we will need to ask how the Supreme Court is likely to be understood by political elites during this period. There is little question that the Court would be perceived as beholden to the interests of a Democratic President, but elites will naturally ask whether the Court is

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[3]For example, consider `https://www.businessinsider.com/trump-cant-cancel-or-postpone-the-november-election-over-coronavirus-2020-3`.

[4]Republican National Committee, et al vs. Democratic National Committee, et al, 589 U.S. (2020)

sufficiently independent of the U.S. president or of the Republican Party. Answers to that question may have profound effects on the kinds of policy responses we observe and how those actions are perceived by members of opposition groups. We return to this issue below.

In some respects, the crisis induced by the novel coronavirus is hardly 'novel' in terms of the past three years of the Trump Administration. American politics were turbulent between 2017 and 2020. With several crises raising questions about the ability of American political institutions to provide meaningful oversight over the actions of the American president; the connection between free media and an informed public; the United States' role in the international system; and, ultimately the ability of the American electoral system to offer representation to vast numbers of people in the country. Notably these concerns have provoked scholars to evaluate the robustness of the American political regime to these times (Levitsky and Ziblatt, 2018; Ginsburg and Huq, 2018). Our goal in this chapter is to consider whether U.S. courts are likely to offer the kind of defense of democracy that we have envisioned. We will consider the U.S. case from the perspective of our model and evaluate it through the lens of the four key conditions necessary for courts to influence regime survival.

Our account suggests a defensive role of courts in the stabilization of democratic regimes. The role that we envision is one in which the mere possibility of judicial review carried out by sufficiently independent courts, whose judges are willing to risk non-compliance, and whose decisions are not trivially ignored promotes regime survival by encouraging prudence on

behalf of leaders and the opposition. In this way, courts help resolve differences of opinion over whether political acts go beyond constitutional limits on authority. But are courts in the U.S. currently able to provide this role? In the remainder of the chapter, we consider this question from the perspective of the four conditions we propose as necessary for courts to promote democracy: (1) minimal conditions for democratic compromise, (2) minimal judicial independence, (3) judges willing to risk non-compliance, and (4) meaningful costs to politicians for non-compliance.

6.1 Minimal Conditions for Democratic Compromise

In a number of ways, the American state is insulated from the kinds of political conflicts that risk breakdown. Several distributive conflict approaches to democracy emphasize the ability of structural features of the economy to ease bargaining difficulties between economic classes. Perhaps the most well-known empirical relationship in the study of political regimes is the positive association between economic development and democracy (Lipset, 1959; Przeworski et al., 2000). Przeworski (2005) provides a compelling theoretical argument for the association. His argument is that conflicts over levels of redistribution is salient in every political regime, and that the failures to solve conflicts around this cleavage are profoundly destabilizing. The collective wealth of a state influences the ease with which this conflict can be managed. Specifically,

finding compromises between social classes over redistribution is easier when the size of the pool to be distributed is large. Redistribution can have significant impacts on problems commonly confronted by people living in poverty at relatively low rates of taxation. Similarly, wealthy interests are more willing to accept higher rates of taxation when states are themselves wealthy, since a violent conflict risks losing a massive financial advantage. This logic would suggest that the United States, being highly developed ought to be well-insulated from breakdown.

Notwithstanding its wealth, however, income inequality has been on the rise in the United States for nearly 40 years. Compared to absolute wealth, Acemoglu and Robinson (2006) argue that income inequality is more likely to be the catalyst that exposes democracy either to political erosion or collapse. Indeed, greater income inequality drives satisfaction with democracy among electoral winners and losers (Han and Chang, 2016). Moreover, wealth may exacerbate inequality's threat to democracy. Uneven income distributions in the face of higher economic development are more readily recognized and deemed unacceptable by citizens, leading to heightened risk of breakdown (Reenock, Bernhard and Nordstrom, 2007).

Still the United States, in addition to its wealth and despite its inequality, lacks many of the structural and institutional traits that are believed to undermine regimes. Although natural resources are plentiful, it possesses a diverse economy which limits its exposure to risks associated with the types of fixed assets that make inequality particularly problematic for democracy, since asset mobility acts as a sort of brake on redistributive

demands (Boix, 2003). Gaining control of the U.S. state for the purpose of predating on the resources of its citizens would not be particularly fruitful, as U.S. citizens could move their assets relatively easily.

Institutional structures that are thought to promote instability are also absent. The United States is a presidential system; however, it features two political parties. The kind of political gridlocks associated with the combination of presidentialism and multipartism characterized by the Latin American experience in the 20th century have been far less prevalent (e.g. Mainwaring, 1993; Linz, 1990). Of course, scholars have questioned whether "the difficult combination" is actually threatening to democratic survivial (e.g. Pereira and Melo, 2012; Power and Gasiorowski, 1997). Cheibub et al. (2007) argues that what appeared to be a causal link between regime instability, presidents, and multiple parties was confounded by the failure to account for a long history of military involvement in politics.

Yet even here the United States would appear to be relatively insulated. The country has a long history of civilian control of the military. Despite its current voluntary service model, the military remains a diverse institution along gender, race, and social class.[5] Even its officers are primarily drawn from its reserve officer training program, distributed across 1,000s of institutions of higher learning. This diversity in training and emphasis on professionalism ought to be insulating. By one line of

[5]See `https://www.cfr.org/article/demographics-us-military`.

scholarship, officers raised with professional norms that emphasize political neutrality ought to accept their subordination to elected civilians. But recent work cautions that elected civilians may sometimes threaten these norms. David Kuehn suggests a scenario under which military officers can be coaxed from their barracks by an elected leader.

> Especially when confronted with economic crises, elected civilians often tighten control and begin "hollowing out" the democratic institutions with support by the military, who are rewarded with generous material and political privileges ... Especially if elected incumbents start meddling with the military-internal promotion processes in an attempt to balance military-internal factions against each other and to turn the military into a personal political power base, military leaders have strong incentives for siding with the opposition or staging a "pre-emptive" military coup (Kuehn, 2017, p. 790).

Despite the potential for such institutional erosion, there is little evidence that U.S. military institutions have changed noticeably along these lines.

6.1.1 The Importance of the Judiciary under Favorable Conditions for Democracy

The American regime lacks many of the structural and institutional features long associated with fragile regime commitments. What this

means under our argument is that the American regime should profit from an effective monitoring system in order to help manage uncertainty about whether leaders are respecting fundamental regime rules. Of course, it is possible that structural conditions are sufficient. One natural possibility is that the wealth of the American state is sufficient to insulate American democracy from breakdown, really independently of the functioning of the court system. As we discussed in Chapter 2, our argument connects naturally to Przeworski's (2005) model. In so far as parties representing social classes will find it easier to commit to democratic elections in wealthier states, and in so far as courts are commonly a key element of the monitoring system for fundamental democratic regime rules, judicial independence should be increasingly important to democratic regime survival as the level of development of a state increases. This is exactly what Reenock, Staton and Radean (2013) find. We replicate those findings here on a broader dataset, making use of new measures. We re-estimate our democratic survival models from Chapter 5, but this time, we do so conditioning the effect of judicial independence on economic development. We expect that any benefits reaped by democratic regimes in possession of independent courts ought to be greater at higher levels of economic development. Or conversely, at higher levels of economic development, democratic regimes will find it increasingly more challenging to endure with less independent courts.

Complete tables reporting the coefficients and model statistics for our analysis are included in Appendix 6A. The marginal association between a

decrease in a court's independence and the mean expected duration of a democratic regime are displayed in Figure 6.1.1. For democracies at low levels of democracy, where mutual commitments to democratic competition are arguably more difficult to sustain, the benefits of an independent court would appear to be modest. Reductions in judicial independence are unlikely to deliver meaningful benefits on policing the democratic bargain. Yet at higher levels of economic development, where parties are more likely to commit to democratic competition, judicial independence is more important. Indeed, at higher levels of development, e.g., between 7 and 9 ln(GDP) in the figure, democracies that have an LJI score one standard deviation between the mean, are expected to register substantially shorter lifetimes.

International aid projects aimed at judicial independence have looked to build independent courts in developing states. There are many reasons to support this kind of effort. That said, it is important to recognize that independent courts are doing work in developed states. Defending assaults on their independence is just as important as building judicial institutions in the developing world.

6.1.2 Warning Signs

Despite its favorable structural and institutional features, scholars have raised questions about whether old commitments to democracy in the United States are as strong as they once were. Levitsky and Ziblatt point

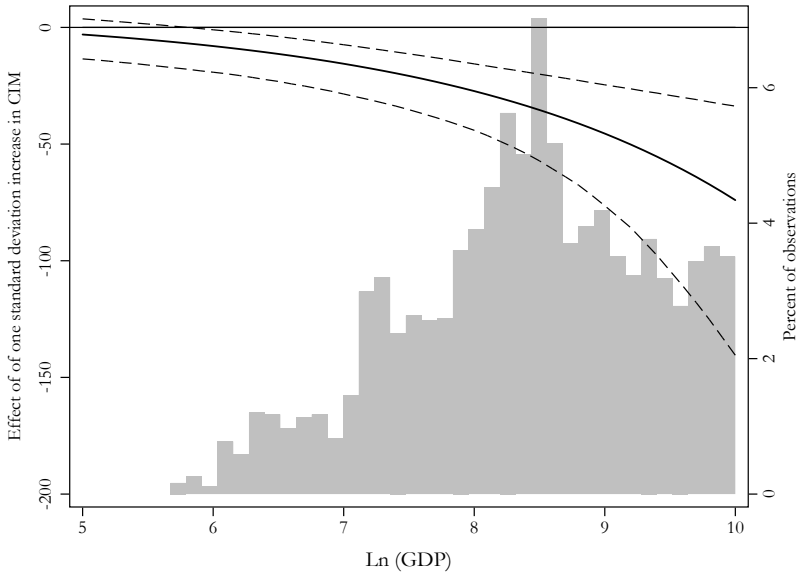

Figure 6.1.1: Mean Expected Duration of Democratic Regimes: 1900-2015. Marginal difference between regimes with a one standard deviation reduction in LJI displayed. Full models are reported in Appendix 5A. Two-tailed intervals for $p < .05$ reported between dashed lines in Figure.

to breakdowns in related norms of "forbearance" and "mutual tolerance." Mark Tushnet points to the increasing appeal to "constitutional hardball," or the use of constitutional procedures to violate pre-existing norms. Ginsburg and Huq point to "populism" in the form of Tea Party Republicans, though the campaign of Bernie Sanders shares many of the features of a populist movement from the left. Levitsky and Ziblatt write,

> If, twenty-five years ago, someone had described to you a country in which candidates threatened to lock up their rivals, political opponents accused the government of stealing the election or establishing a dictatorship, and parties used their legislative majorities to impeach presidents and steal supreme court seats, you might have thought of Ecuador or Romania. You probably would not have though of the United States (167).

Of particular importance for our discussion is the fact that many of the alleged violations of forbearance and mutual toleration have involved the judiciary itself. Although the judiciary has always been a location of partisan conflict, by the beginning of the 20th century, strong norms of appointments existed, which incentivized cooperation and moderation. Most obviously, the Senate's 60 vote majority necessary to close debate provided the minority party with a key role in the nomination process even if a single party held the presidency and the Senate. Minorities infrequently relied on the filibuster to stop appointments, because the

threat alone was sufficient to ensure that Presidents sent to the Senate judges who would be considered acceptable to the minority. Beginning during the administration of George W. Bush, in the wake of the highly controversial end to the 2000 presidential campaign, Senate Democrats began using the filibuster to stop the presidents' judicial nominees. When Senate Republicans used the same strategy to stop Barack Obama's nominations, Senate Democrats ended the practice of the filibuster for lower court appointments. The Senate ultimately ended the practice of the filibuster for even Supreme Court nominations in order to end debate on Justice Neil Gorsuch, who received his appointment only after Senate Republicans refused to act on President Obama's nomination of Merrick Garland for over a year.

The effective end of the "blue slip" also points to a breakdown in old norms of appointment. By tradition, Senators were empowered to stop committee action on nominations to courts in their home states. Although the specific approach to the blue slip has varied over time, in 2020 the practice is largely advisory.[6]. The end of the filibuster and the traditional blue slip practice means that the Republicans are now able to fill the judiciary with nominees who never would have been supported by the Democratic minority under previous rules. There is no reason to believe that a future Democratic president, with a future Democratic Senate majority will behave differently. Consequently, federal judicial appoints are

[6]https://www.nytimes.com/2017/09/13/us/politics/mcconnell-federal-judges-trump.html

now governed by purely majoritarian rules at best.

6.1.3 Attacks on the U.S. Judiciary

Parties always attempt to shape the ideological nature of the federal courts. We should expect a politically-oriented appointments process. Of greater concern are recent attacks on sitting federal court judges. Using our measure of judicial attacks derived from V-Dem scores, Figure 6.1.2 displays trends in attacks on courts from 1900 to 2017. To provide global context, we calculated the mean and standard deviation of court attacks for democracies and autocracies across each year. By looking at the trend lines and the overlap of the standard deviations for autocracies and democracies, a "third wave of autocratization" is evident. The substantial distinction between regime types exists for the 20th century, but starting around 2005, the level of court attacks of the two regime types converge until 2017 where they are nearly indistinguishable.

Turning towards the case of the United States, historically the US has ranged widely on the intensity of court attacks. Across all states in the time frame, the United States ranges from a low in the early 2000s at about where it ranks in the third percentile of all state-years to a high in the early 40s at the 66th percentile. The peak in attacks in the US occurred during the Franklin D. Roosevelt administration, when he clashed with the court over executive overreach, and released several statements, fomenting public dissatisfaction with the court. Conflict with the courts

manifested as a result of promises and attempts to take greater executive action to reduce unemployment and employ other New Deal policies. It is perhaps no coincidence that the attacks coincided with what some historians argue is the closest the US has come to a democratic breakdown in recent history. Stoked by the fears of wealthy businessman,"The Business Plot" sought to recruit military to consider a coup.

Since FDR, attacks on the courts remained low. A nadir was reached during the Bush administration post 9/11, court attacks have since climbed such that attacks on the judiciary in the US are worse than that of the average democracy. Court attacks have recently spiked, returning to levels previously observed under Roosevelt. The administration of Donald Trump has returned the United States to a state of court attacks exceeding that of the average autocracy.

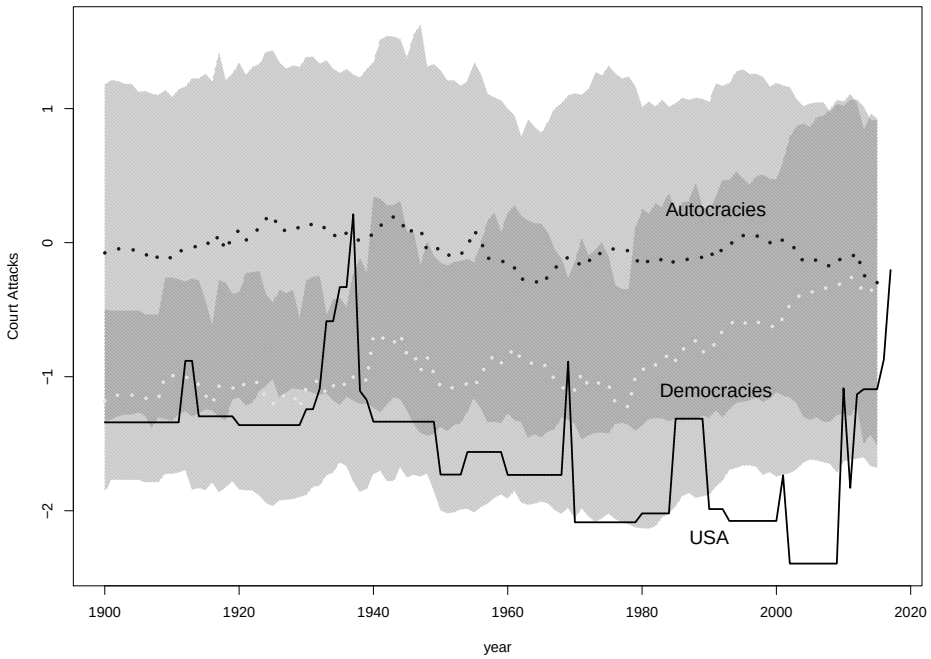

Figure 6.1.2: Attacks on Courts (1900-2018): V-Dem-based judicial attacks scores for the United States are plotted using the solid black line. The white-dotted series reflects the average of attacks scores for democratic regimes; the black-dotted series shows the same information for autocracies.

In Figure 6.1.3, we provide additional global context for what we are seeing in the United States. The figure plots the judicial attacks scores for countries in 2017 on those scores in 2007. Points above the 45 degree line are democracies where court attacks have increased from one decade prior. Some of the largest increases in court attacks occur in Turkey, and El Salvador. Other notable states that are seeing attacks lie in Eastern

Europe in Albania, Hungary, Poland, Romania, and Ukraine. Note that while some of these are poor states, many exceed wealth thresholds for development.

Observe the left hand side of the figure. These are democracies that had lower levels of court attacks roughly a decade ago. Of this subgroup, the democracies that have increased court attacks the most are Brazil, Hungary, India, Suriname, and notably, the United States. The United States appears to be seeing a medium number of attacks in the global context, but of the states in the lower quartile of attacks in 2007, it has experienced the greatest increase!

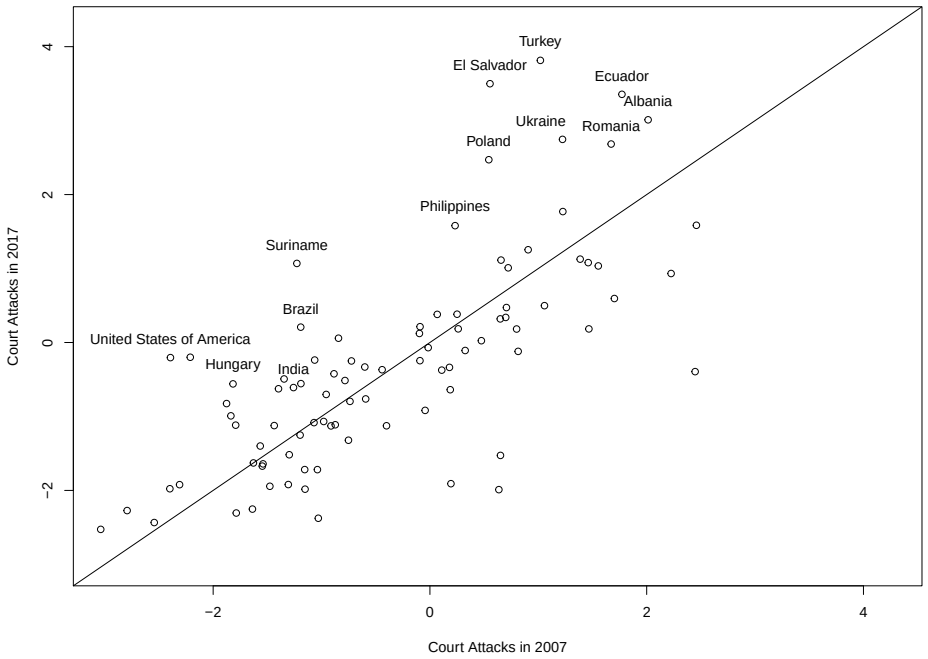

Figure 6.1.3: Change in Judicial Attacks over Time: Displays a plot of the V-Dem-based judicial attacks scores in 2017 on the same scores in 2007. States that lie above the diagonal are those whose attacks scores increased over 10 years.

Given the increase in verbal attacks that we document, it is worth considering these attacks in greater detail. Public statements on the judiciary in the United States most often have taken the form of official White House statements and official speeches. President Trump is unique in that his administration releases a wealth of statements on a multitude of topics via social media. Between his inauguration on Jan 20, 2017 and

May 19, 2019, Mr. Trump had tweeted 8,839 times. In an attempt to analyze this corpus of tweets for statements regarding the courts, we coded dummy variables for every instance that the President used "jud," "scotus," and "circuit." This yields a corpus of 259 times that the President mentioned the courts in his twitter feed.[7]

Given the recency of the use of social media by a president, the best available comparison to President Trump's mentioning of the courts is that of President Obama. During the corresponding time frame in the Obama administration, the White House and the POTUS account tweeted 2,561 times with 21 tweets concerning the courts.

Figure 6.1.4 and Figure 6.1.5 show the content, timing, and volume of tweets of the first 800 days in office of Presidents Obama and Trump.

[7]The coding procedure yielded five false positives where Trump uses these terms to discuss issues unrelated to his stance on the court such as personal lawsuits, a feud with fashion mogul Anna Wintour, and a shooting that happened to take place in a court house.

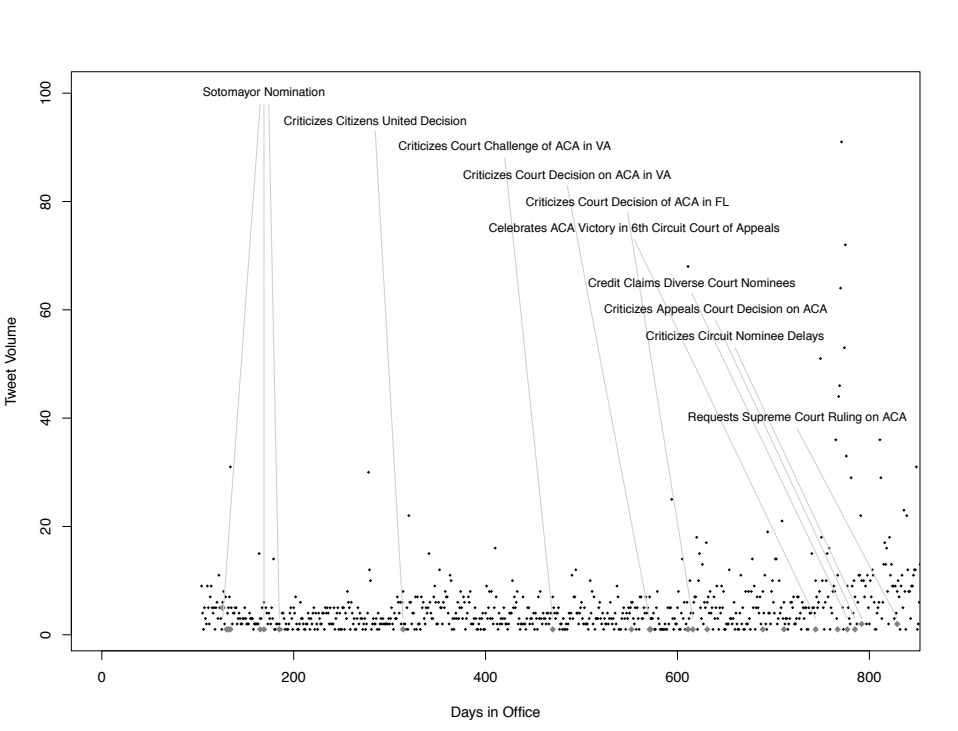

Figure 6.1.4: Obama Tweets: Displays a count of tweets by Barak Obama over time. Tweets concerning the judiciary are highlighted.

The Obama administration's comment on the courts is overall seldom. He invoked the institution largely to credit claim for the court nominees and to publicize the nomination of Justice Sotomayor. Obama's negative tweets rarely involved criticism of the court. Rather, these statements target the obstruction of Congress in considering his nominations. Occasionally the administration would go so far to criticize court rulings on keystone legislation such as the Affordable Care Act, suggesting they had hoped for a different outcome or to announce that they intend to pursue the matter

in a higher court. No statements from the administration use language that imply the court is political, corrupt, or inept.

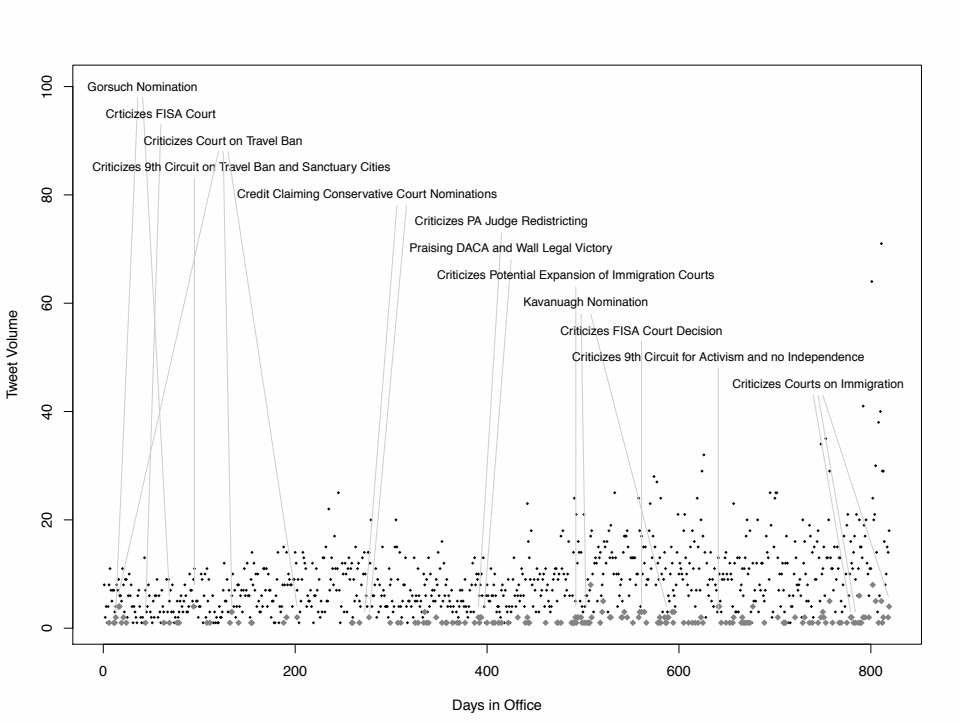

Figure 6.1.5: Trump Tweets: Displays a count of tweets by Donald Obama over time. Tweets concerning the judiciary are highlighted.

The Trump administration, however, appears to be very willing to invoke this language. The administration attacks the quality of these decisions by referring to them as “terrible” and “ridiculous. Notoriously, following district court judge James L. Robart’s opinion temporarily blocking the original Trump Muslim travel ban, President Trump referred to Robart as a “so-called” judge. Figure 6.1.6 shows the tweet.

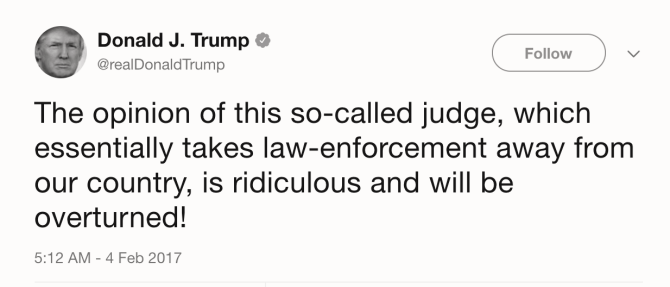

Figure 6.1.6: So-called Judge: Text of Donald Trump's tweet concerning

In saying, "Justice Roberts can say what he wants but the 9th Circuit is a complete & total disaster," the President called into question the opinion of the Chief Justice. Additionally, the Trump administration's attacks on the courts often make reference to putting the security of the country at risk. "Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!" This is often done in the context of court decisions that do not favor his policies on immigration.

Beyond attacking individuals, the administration also refers to the institution as a whole, "In any event we are EXTREME VETTING people coming into the U.S. in order to help keep our country safe. The courts are slow and political!" In other instances he refers to the 9th circuit as "broken" and "unfair," undermining the functionality and impartiality that the confidence in the courts relies upon. He is also quick to refer to the courts as engaging in "Judicial Activism," in their rulings surrounding sanctuary cities and the circumstances under which migrants can apply for

asylum.

6.1.4 Interpretation

It is clear that the rules governing judicial appointments have changed. It is also clear that the Donald Trump engages in aggressive verbal attacks on U.S. judges with whom he disagrees. In light of the empirical relationships we demonstrated in Chapter 5, these are surely alarming facts.

Two interpretations are natural. The first interpretation is that we are observing the behavior of elites who have abandoned their commitments to democratic competition. Although legal in nature, the Republican Party and the President of the United States are engaged in a slow but steady process aimed at eliminating the possibility of losing power. The second interpretation, which we think is more likely, is that the Republican party and the President of the United States are carrying out a straightforward form of constitutional hardball, designed to create a federal judiciary that shares its views of economic regulation and democratic institutions, including electoral boundaries and rules that influence voter turnout. Under this interpretation, we are not necessarily observing direct efforts to fully eliminate democratic political competition. The Republican Party is still very much committed to fighting elections; it wants to lock-in its ideological commitments and its current electoral advantages under existing rules.

Unfortunately, both interpretations are problematic from the perspective

of the survival of U.S. democracy and specifically from the perspective of a positive judicial influence on democracy. The best case scenario is that the country has been set off down a path of politicization of the judiciary. This has both obvious and more subtle effects on the remaining conditions for courts to influence democracy.

6.2 Judicial Independence

In most respects, it also would seem obvious that in the spring of 2020 the United States possesses the kind of independent judiciary that our model envisions. This has been accomplished over time via the combination of super-majoritarian appointment norms and considerable political turnover. As we have just discussed, appointment rules are no longer super-majoritiarian. Yet despite recent Republican successes in the appointments process, the federal courts remain balanced in partisan terms. As of April 2020, fifty percent of the judges serving below the level of the Supreme Court were nominated by a Democratic president; Obama appointees represent forty percent of the total. Although Republican appointees make up the majority of seven circuits, the majorities are very small on a number of circuits.

Our international judicial independence scores reflect this reality. The United States judiciary was placed at or above the 82nd percentile in every year from 1900 to 2015. American judges are still welcomed into countries throughout the world in order to give seminars and lectures of building

and maintaining judicial independence. At least relative to the distribution of world judiciaries, the American federal judiciary stands out for its professionalism, competence, and autonomy. This is to say that there is very much is a judiciary whose independence is worth defending in the United States.

6.2.1 Caveats

There are two caveats. The first is that law and politics scholarship has provided compelling theoretical models and empirical evidence in support of a limited form of judicial independence. Judicial decision-making does appear to be sensitive to political constraints. The separation of powers system gives Congress and the President control over both judicial resources, from their budgets to jurisdiction, and the implementation of their decisions. Scholars argue that when the stakes are clear and significant, American judges will take into account the preferences of external actors (Carrubba and Zorn, 2010; Clark, 2010; Epstein and Knight, 1998; Martin, 2006).

The implications of these findings are important for present purposes, especially in so far as we focus on behavior of the President of the United States in the context of national emergency, health or otherwise. Salient actions which raise questions about the constitutionality may be exactly the kind of cases that scholars might suggest would result in strategic deference. If that is so, then even though the United States has as

independent a court system as is politically possible, it may not be sufficiently independent to influence a major conflict over emergency powers.

The second caveat concerns the Supreme Court of the United States. An argument that the federal judiciary of the United States is merely an arm of the Republican party or the current President of the United States is very far from compelling. It is unclear how a judiciary as diverse as the American one could serve this purpose. As an empirical matter, the President and his agents commonly lose in federal court.[8]

Less clear is how the Supreme Court is coming to be understood. Writing in USA Today in the wake of the Court's decision on the Wisconsin election, Kurt Bardella put the problem as follows.[9]

> For anyone hoping the Supreme Court will assert its role as the third branch of government, it has delayed hearing cases, including three lawsuits involving Trump's tax returns and financial dealings. And yet, somehow, the Supreme Court managed to reverse a federal judge's order to extend absentee voting by a week in Wisconsin's 2020 primary. The result was

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[8]See `https://www.law.com/nationallawjournal/2019/12/27/trumps-2019-court-tab-all-the-major-losses-and-a-few-big-wins/`.

[9]`https://www.usatoday.com/story/opinion/2020/04/09/trump-removes-inspectors-general-blatant-corruption-column/2973535001/`.

> that voters had to choose between their health and their civic duty.
>
> The court's refusal to move forward with cases that impact the president, coupled with its willingness to interfere with the Wisconsin election, foreshadows a very dangerous path as we look ahead to the November elections. In essence, the court's conservative majority is just another political instrument for Trump to wield.

We do not need to take a position on whether this is the right view of the current Supreme Court with respect to the current President of the United States or perhaps the Governors of the several states. What matters is how current political leaders see matters. If the Court is broadly understood to share the interests of Republican executives, then it follows that the Court should be broadly understood to oppose the interests of Democratic executives. There are two direct implications from our model if this represents essential politics of the moment. The first is that Republican executives will be more likely to engage in the kind of aggressive policy making at the boundaries of their constitutional powers. The second is that Democratic executives will be less likely to do so. Another way of putting this is that Republican executives are better positioned to respond to true emergencies and yet also better positioned to aggrandize power opportunistically.

6.3 Judges willing to Risk Non-Compliance

The third condition we identify is that judges must be willing to risk non-compliance. Strategic models of judging often assume that, all else equal, courts would like to avoid non-compliance (Carrubba, 2005; Staton and Vanberg, 2008). That said, we also know that non-compliance is far from an uncommon feature of American judicial politics (Spriggs, 1997, 1996). Figure 6.3.1 plots the V-Dem compliance with high court scores for the United States from 1900 to 2018. Although the Supreme Court's record of compliance is clearly strong, there have been notable exceptions. The series picks up widespread forms of non-compliance with Warren Court decisions in the context of school prayer and desegregation. It also suggests that U.S. judges are willing to issue bold decisions, which are politically unpopular, risking non-compliance.

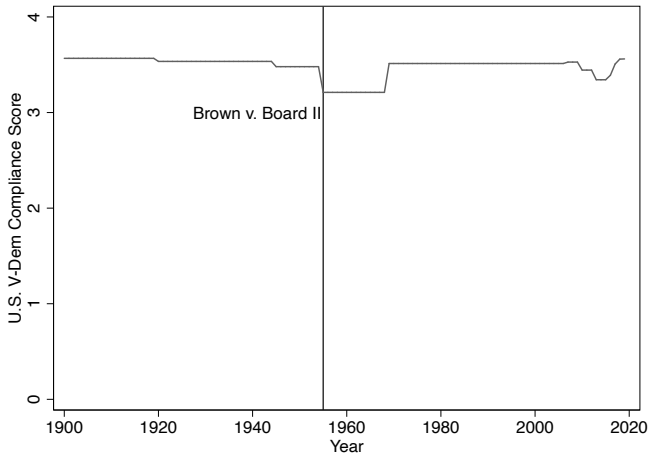

Figure 6.3.1:

The 8th Circuit's recent reaction to a decision of the Board of Immigration Appeals (BIA) illustrates the point further. The 8th Circuit had reviewed an appeal of a BIA decision finding that an immigration court judge lacked the authority to provide a waiver necessary for the Department of Homeland Security to consider the application for a U-Visa of a Mexican national.[10] The Court remanded the matter to the BIA with instructions to consider two legal questions that it yet to consider, and which would be necessary in order to sustain the judgment that the immigration court judge lacked the claimed authority. Writing for the Court in a petition reviewing the BIA's decision, Judge Frank Easterbrook describes the case as follows.

> What happened next beggars belief. The Board of Immigration Appeals wrote, on the basis of a footnote in a letter the Attorney General issued after our opinion, that our decision is incorrect. Instead of addressing the issues we specified, the Board repeated a theme of its prior decision that the Secretary has the sole power to issue U visas and therefore should have the sole power to decide whether to waive inadmissibility. The Board did not rely on any statute, regulation, or reorganization plan transferring the waiver power . . . We have never before

[10]The U visa provides a pathway for admission to the United States of an alien who has been a victim of a crime and provided material assistance to the state in prosecuting the perpetrator. See `https://www.uscis.gov/humanitarian/victims-human-trafficking-and-other-crimes/victims-criminal-activity-u-nonimmigrant-status`.

> encountered defiance of a remand order, and we hope never to see it again. Members of the Board must count themselves lucky that Baez-Sanchez has not asked us to hold them in contempt, with all the consequences that possibility entails ... Once we reached a conclusion, both the Constitution and the statute required the Board to implement it.

This is the kind of clear and direct writing and decision making that we typically expect from American federal judges. Of all of the conditions on our list, the presence of brave judges who are willing to exercise their powers is the most likely one to be met.

6.4 Costly Non-Compliance

The final condition we identify concerns how costly it is for political officials to defy an order of a federal court, including the Supreme Court of the United States. It would appear relatively straightforward that overt non-compliance with a decision of the Supreme Court would be significant. The Supreme Court continues to be viewed favorably by a majority of Americans. According to a nationally representative Gallup Poll in September 2019, 54% of respondents expressed approval for the Supreme Court's "handling of its job." Only 42% disapproved.[11] Scholars have also argued that the Supreme Court continues to enjoy considerable legitimacy,

[11] https://news.gallup.com/poll/4732/supreme-court.aspx.

understood through Easton's concept of diffuse support, even if there are short run fluctuations in public opinion regarding the job that it is doing (Nelson and Gibson, 2017).

Figure 6.4.1 displays the status of civil society in the United States over time. If a robust civil society is a resource that can be drawn down in the defense of democratic institutions (Michael Bernhard and Lindberg, 2020), then the United States appears to be in a favorable position. Participation in civil society organizations is strong and the legal profession is especially committed to advocating on behalf of courts, their judges, and judicial independence. So, in many ways, this condition is very likely to be met as well.

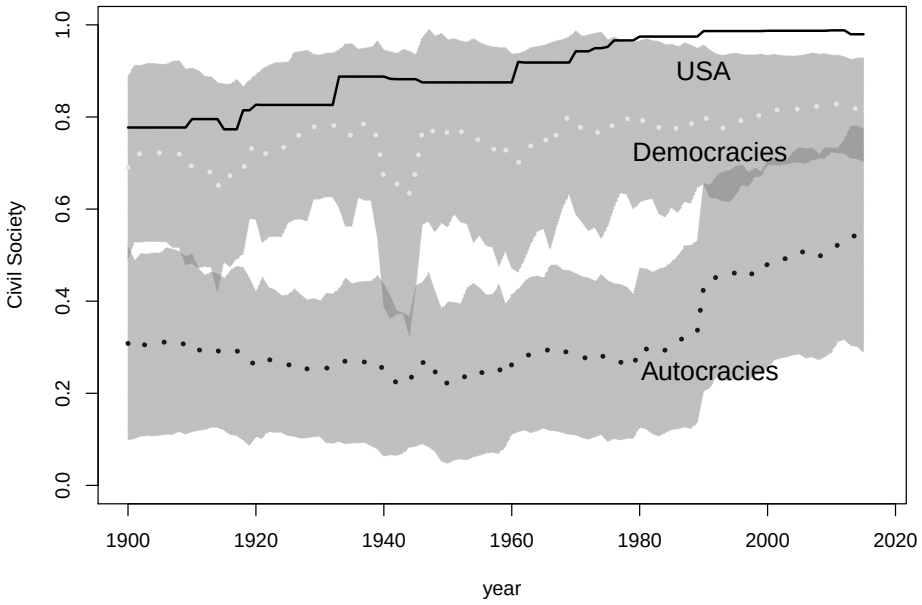

Figure 6.4.1: Civil Society (1900-2018): V-Dem-based civil society scores for the United States are plotted using the solid black line. The white-dotted series reflects the average of attacks scores for democratic regimes; the black-dotted series shows the same information for autocracies.

A consideration of the long term processes does raise a few flags. First, the Pew Research Center has documented an increasingly polarized view of the Supreme Court. In July 2019, there was a 26 point gap between Republicans and Democrats' favorable views of the Supreme Court (76 to 49). Likewise, the share of liberal democrats who have a favorable view of

the Court dropped to a historic low of 40%.[12] It is not surprising that as polarization has increased views of national institutions have also polarized. But if the Court comes to be viewed as "just another part" of the American political landscape, it is unclear that it will be able to draw on its legitimacy indefinitely.

A more alarming long term issue concerns the information about the Supreme Court to which Americans are increasingly exposed. Legitimacy theorists suggest that the Supreme Court's legitimacy is constructed over time, both through an educational system that promotes an idealized view of the judiciary in American politics and via continuing favorable media coverage. Recent work by Bass (2018) has demonstrated that since roughly the year 2000, the media coverage of the Supreme Court has become increasingly politicized and sensationalized. Where typical news stories about the Court focused on jurisprudential points, stories in the modern era have increasingly placed the Supreme Court directly into a political discussion. This has been particularly true of coverage on cable news and blogs. If favorable media coverage that focuses on aspects of the "myth of legality" (the idea that American judges make decisions in fundamentally apolitical ways) is critical to the Supreme Court's sustained legitimacy, changes in its media coverage may have profound negative consequences.

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[12]See discussion in `https://www.pewresearch.org/fact-tank/2019/08/07/partisan-gap-widens-in-views-of-the-supreme-court/`

6.5 Where the American judiciary stands

In this chapter, we have considered the claim that the American judiciary will be a bulwark of American democracy. There are many reasons to believe that the courts in the United States are well positioned to help insulate the state from breakdown. The federal judiciary is minimally independent, its judges are brave, non-compliance with court orders is costly, and the structural and institutional conditions for democratic compromise are generally met. That said, we have also highlighted a few caveats. Verbal attacks on federal judges are as high as they were during the 1930s. The Supreme Court's conservative majority may incentivize riskier behavior on behalf of Republican executives. Public opinion about the Court is polarized and there are reasons to worry that a polarized media environment is no longer possible to sustain a favorable long term and positive image, which itself may reduce the costs of compliance.

We have placed considerable focus on the short term, where the Supreme Court's majority shares interests with the Republican President. Yet it is worth considering what may happen following a transition to a Democratic administration. Concerns about a lack of sufficient independence between the President and the Court would flip overnight. A series of different questions would emerge. Would the Democratic Party, if it could, take the opportunity to increase the size of the Court at least in order to address the perceived illegitimate appointment of Neil Gorsuch. How would that be viewed by Republicans in the opposition? This potential path of

politicization has a very plausible end point: it may well take the costs of non-compliance with Court orders to zero for some presidents.

The breakdown of the Honduran democracy at the beginning of the 21st century provides a cautionary tale. In March of 2009, Manuel Zelaya, President of Honduras, instructed the National Statistics Institute (INE) to prepare a non-binding referendum in which Hondurans would be asked to reveal an opinion about the possibility of holding a constituent assembly. Zelaya had been moving toward the political left for several several years, filling his cabinet with progressive members of the Liberal Party and building relationships with Hugo Chávez and Daniel Ortega. These moves alienated both the major political parties of the country as well as economic elites and the military (Ruhl, 2010).

The proposed referendum was widely understood to be part of an effort to eliminate Honduras's constitutional prohibition on presidential reelection. Article 239 of the Constitution not only prohibits reelection but it makes even an indirect effort to advocate for the amendment of the article grounds for immediate loss of one's public office followed by a 10 year ban on holding any public function. When Zelaya's efforts were struck down by electoral and administrative courts, the president continued undeterred.[13] On June 26, 2009 the Supreme Court found that the president had failed to comply with the administrative order and ordered his arrest to answer

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[13] "Juzgado ordena a FF AA no participar en encuesta." La Prensa Online 19 June 2009 `https://www.laprensa.hn/honduras/531803-97/juzgado-ordena-a-ff-aa-no-participar-en-encuesta`.

charges against him. The military carried out this order, but instead of bringing Zelaya to answer questions before a court, it carried out a coup, flying Zelaya to exile in Costa Rica.

Honduran courts are very far from independent in the strong sense of the concept, i.e., in the sense that Honduran judges are unconnected to any particular political interest of party in the sate. They also enjoy very low public support. Only 29% percent of respondents in the 2008 Honduras Latinobarometer sample provided a positive evaluation of the judiciary's work. In the case of Zelaya, the Supreme Court stood with forces opposed to the president, including the center and right wings of the Liberal Party. Zelaya would have expected some opposition from the courts, but given the low esteem with which the court's are held in Honduras, coupled with his efforts to build a new mass coalition, it is doubtable that the president would have necessarily expected much of a public backlash from ignoring a court order.

There is certainly a colorable argument that the court's decision aimed to protect a fairly important element of the Honduran constitution. This is the kind of active use of a court's power that we might like to point to as illustrating how courts defend democracies. The episode nevertheless illustrates how an active attempt to defend principles may not succeed. The counterfactual we would like to consider is whether Zelaya would have pushed forward with his proposal if the Honduran judiciary enjoyed strong public support and was not understood to be strongly connected to his rivals.

If political elites in the United States are not careful, if they insist on politicizing the courts, they may very well eliminate a very useful source of democratic stability by freeing American presidents to more frequently engage in behavior on the boundary of regime rules.

Chapter 7

Conclusion

> Remember Democracy never lasts long. It soon wastes exhausts and murders itself. There never was a Democracy yet, that did not commit suicide.
> *John Adams 1814*

Democracy is under assault worldwide. Newly inaugurated democracies are registering shorter lifetimes and even well-established regimes are backsliding on critical features of liberal democracy (Levitsky and Way, 2010; Lührmann and Lindberg, 2019). Moreover, illiberal threats to democracy have spared no region of the world. Symptoms of democratic decline exist on nearly every continent with indicators of regime health

flashing yellow. Across the globe, scholars, practitioners, and international NGOs have all sounded warnings. The overriding question(s) facing the international democratic community is how to shore up current democracies against further slippage. Specifically, what institutions, if any, might help democracies endure?

7.0.1 How Courts May Defend Democracy

In this book, we have considered how one institution, the courts, might play a role in promoting democratic regime survival. To do so, we have built upon insights from scholars writing within two traditions: the literatures on democratic regimes and judicial politics. We have attempted to argue that each of these traditions offer valuable starting points into the inquiry on how courts may help stabilize regimes.

We built our argument on insights from the democratic regimes' literature to understand the role that institutions play in easing the democratic compromise. The standard view of democracy as a self-enforcing equilibrium between contending political forces, underscores conducive structural conditions, such as high levels of income, as critical to easing bargaining dilemmas. This view minimizes the role of institutions. Perhaps the most extreme expression of this view is that other than declaring the winners and losers of elections, institutions need play no role in securing the democratic equilibrium, economic development is sufficient (Przeworski et al., 2000; Przeworski, 2005). Still, others allow a role for

specific democracy-preserving institutions if they enhance the power of the elite, providing added weight to elite preferences (Acemoglu, Johnson and Robinson, 2001). If under certain conditions, citizens may opt to employ institutions such as party systems or presidentialism as commitment devices to afford greater weight to elite preferences, then prospects for consolidated democracy may strengthened. We have taken a slightly different tack here.

Building on our earlier work, we have argued that institutions under democracy can play a role in policing the democratic compromise (Reenock, Staton and Radean, 2013). By relaxing assumptions in prior work regarding collective action and coordination, we have argued that institutions are useful at resolving a problem that immediately arises when groups transfer power peacefully by election – the implementation and maintenance of the democratic bargain. We argued one institution in particular, independent courts, can help by addressing 1) monitoring problems that follow from the nature of democratic policymaking and 2) challenges of social coordination that are essential to the process by which observed violations of limits on state authority are remedied. We have argued that, when the underlying conditions for democratic compromise have been met, the courts help leaders establish credible promises to respect rights, thereby avoiding unnecessary conflict.

We also built our argument on insights from the literature on judicial politics that highlight independent courts as a product of democracy itself. Scholars have suggested that independent courts are desirable under

conditions of high political competition. They are "insurance policies" against losses of power. We agree that incentives to create and sustain independent courts are strongest under conditions of high political competition. We have argued that part of the way in which courts offer insurance is by creating a mechanism that helps opposition groups monitor current leaders. But more importantly, we suggest that the system itself lowers incentives among current leaders to engage in behavior that arguably violates fundamental regime rules.

To serve this kind of role, judges encounter a dilemma. Courts charged with holding leaders accountable to limits on their authority are asked in many systems to make decisions that may be institutionally and personally costly. In such settings, the incentives for strategic deference are particularly high; and yet, if courts are strategically deferential, they do not serve their state constraint function. We have considered how judges that confront such tensions might nevertheless contribute to regime stability.

In the end, we have offered an account that merges insights across these literatures with our own to explain how independent courts can assist democratic survival. Our account provides an explanation for why elites might wish to provide independent judicial systems, illustrates how independent courts help reinforce democratic commitments by both solving informational problems and incentivizing prudent policy-making, and identifies what is required of a political system for this mutually reinforcing relationship to work. In short, courts help provide incentives

for leaders and the opposition to be prudent, and thus lower the stakes of holding power.

Of course, independent courts are not a universal remedy for democratic shortcomings. Our results suggest that court's ability to provide benefits for democratic regimes is circumscribed by underlying structural conditions as well as socio-cultural features that embolden judges and provide them space within which to function as we propose. We discuss these conditions below.

7.0.2 Courts as Defenders of Democracy:Important Implications

Like others before us, we find that judicial independence is broadly promoting of democratic regime survival. Managing beliefs about the extent to which leaders are constrained is an important political challenge. We have argued that independent judiciaries help address this challenge in a number of ways. They incentive leaders to careful about the possible solutions to policy challenges that they see, though in so doing the create the possibility that leaders fail to take decisive action when they should. In cases where leaders are willing to move forward with arguably questionable policies, independent courts help translate conflict among political competitors into conflict within the institutions of the state. It is in this regard that independent courts help establish credible commitments and serve as insurance policies if power is transferred. There are however,

important implications that follow from our argument.

Courts Cannot Police Nonexistent Bargains

A critical lesson of our earlier work and one that we wish to emphasize again here is that courts will only be useful in so far as competing groups wish to sustain democratic cooperation (Reenock, Staton and Radean, 2013). If fundamental structural conditions for democracy are not met or are tenuous, then courts will find it quite challenging to function as a tool for reinforcing democratic commitments. Simply put, courts do not lock in commitments to democracy; they help resolve monitoring problems inherent in the democratic arrangement. But the basis of that arrangement must exist for courts to play a democracy-preserving role.

To be clear, we are not claiming that independent courts bestow no benefits upon either newly inaugurated democracies or those with delicate democratic commitments. Independent courts contribute to broader rule of law assurances, leading to greater incentives for domestic and international investment (Voigt, Gutmann and Feld, 2015) and reduced corruption (Ríos-Figueroa, 2012). All of these potential outcomes may indirectly ease distributional conflict through economic growth and development (Acemoglu, Johnson and Robinson, 2001; Haggard and Tiede, 2011). Moreover, public commitments to democracy may be shaped in part by citizen evaluations of judicial independence (Gibson and Nelson, 2014). Despite these potential indirect paths, we nevertheless caution against

concluding that courts are bulwarks for democracy under all conditions. If underlying commitments are sufficiently weak, independent courts will be unable to enhance directly a democratic regime's likelihood to survive.

Courts Cannot Police Bargains That Have Already Broken Down

An additional lesson of our book is that the primary power of the court lies in incentivizing prudence among political leaders. A powerful court is one that can encourage other actors to forego certain behaviors. This notion of power is one that evokes earlier work in political science on the "second face of power' or what Bacrach and Baratz called the "restrictive face of power' (Bachrach and Baratz, 1962, p. 952). In highlighting what one actor's ability to exert power over another they note:

> But whatever the case, the central point to be made is the same: to the extent that a person or group-consciously or unconsciously creates or reinforces barriers to the public airing of policy conflicts, that person or group has power. (Bachrach and Baratz, 1962, p. 949).

In other words, in addition to a court's ability to set aside government actions, another avenue of a court's power can be found in its ability to incentivize leaders to *never take up* certain actions or policies. The court function that we imagine is one that incentivizes leaders to resist advancing questionable policies. An important implication of our

argument for the question of evaluating Anthony Romero's claim that courts serve as bulwarks of democracy, is that when courts are called upon to defend democracy in the face of an aggressive executive, it may already be too late. In this respect, the view of courts as an effective external check on government authority has already broken down.

While judicial independence is a particularly helpful resource for democratic interests to draw upon, it is also one that can experiences rapid breakdowns. One element of the current worldwide erosion of liberal democracy is concerted attacks against independent courts. We have found considerable evidence that regimes characterized by a latent propensity for significant inter-branch conflict, where courts are openly critiqued, purged and packed when possible are particularly vulnerable to instability. We envision two types of consequences of this kind of politics. The first, on which we focus considerable theoretical attention, is that judges in such contexts will have particularly strong incentives to avoid political conflict. This type of dynamic is reflected in former Venezuela Supreme Court president Cecilia Sosa's comments as she stepped down from her post following the Court's approval of the Chavez led Constituent Assembly's assertion of emergency powers, "The court simply committed suicide to avoid being assassinated. But the result is the same. It is dead."[1]

The second consequence, which would undermine judicial independence in a distinct way, is that courts in these contexts become simple tools of

[1]Top VenezuelanJudgeResigns, BBC NEws, Aug. 25, 1999, `http://news.bbc.co.uk/l/hi/world/americas/429304.stm`

inter-party competition (Pérez-Liñán and Castagnola, 2009), tools used to discredit opposition leaders or otherwise harass domestic competitors (e.g. Aydın, 2013; Popova, 2010). This kind of court may become the embroiled in political controversy, but there is no serious sense in which its involvement will be understood as injecting independent judgment. In neither case will judges materially impact regime outcomes – indeed, they may be part of the process by which the regime collapses.

Noncompliance, Courts and Democracy?

We have also found that a latent propensity for non-compliance with important decisions is not particularly problematic for democratic regime survival. We do not claim that the routine defiance of courts with constitutional review authority is to be promoted or itself necessarily without harm. We claim instead that non-compliance need not be a totally uncommon or particularly destructive element of a political system. In many cases, non-compliance will follow from an executive's judgement that the particular context in which the decision is issued simply cannot be prudently obeyed. In a speech to Congress explaining his refusal to release John Merryman from a Ft. McHenry prison cell at the beginning of the U.S. Civil War, Abraham Lincoln asked, "[A]re all the laws, but one, to go unexecuted, and the Government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the Government should be overthrown, when it was believed that disregarding

the single law, would tend to preserve it?"[2]

Of course, these types of claims can very well mask goals that fundamentally undermine regime rules. The point is that courts that enjoy reasonably broad support, especially courts that are understood to be independent of major political competitors in a society raise the stakes of non-compliance, and by so doing, help transfer information about the true motives of a leader. It is in this way that we understand the periodic forms of non-compliance in states with reasonably strong rule of law commitments like the United States, Costa Rica, Germany or Israel.

In the end, for this type of mechanism to work, judges must not be "single-minded pursuers of compliance," an assumption that is commonly made in the political science literature on judicial politics. While it is unlikely that judges prefer a world in which orders are routinely ignored, there is abundant evidence that judges understand that legal systems sometimes require flexibility.

7.0.3 Open Questions

Perhaps the single greatest open question is, given the potential returns on investment, how might reformers go about constructing judicial independence? Our work here has little to say on designing judicial independence. The path to constructing independent courts, to the extent

[2]Abraham Lincoln. Message to Congress in Special Session. July 4, 1861.

that such institutional engineering is possible, is fraught with challenges. Our analyses from Chapter 3 suggest that the provision of *de jure* institutions, while perhaps a necessary condition for independent courts, is likely not a sufficient one. There does not appear to be a magical combination of formal rules alone that will render courts independent. Therefore even reformers with the purest intentions are likely to fall short of 'constructing' independent courts through formal institutional designs alone.

Rather, as many scholars of judicial politics have argued, courts rely, in part, on large reservoirs of public support to enhance their judicial independence. To enhance a court's independence, then any strategy must include a plan to build up the public's confidence in the courts system. But how do citizens' establish their priors and update their beliefs about the courts? Gibson and Nelson (2014) offer a summary of whether and how judicial decisions can change public opinion. In brief, they suggest that democratic values strongly relate to individual assessment of court legitimacy. Moreover, the public's reaction to judicial decisions may hinge on important societal actors' attempts to frame the public's interpretation. The media, elites and citizens own preexisting attitudes serve as lenses through which they will view judicial acts. While more research on these mechanisms is required, political elites may very well have legitimacy-enhancing effects on citizen attitudes toward the courts, but only if they are more judicious in their words, more mindful of their actions, and more cautious in how they respond to crises – in other words,

more prudent.

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