



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M University School of Law
Texas A&M Law Scholarship

Faculty Scholarship

1-2011

Building Reputation in Constitutional Courts: Political and Judicial Audiences

Nuno Garoupa
ngaroup@gmu.edu

Tom Ginsburg

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>



Part of the [Law Commons](#)

Recommended Citation

Nuno Garoupa & Tom Ginsburg, *Building Reputation in Constitutional Courts: Political and Judicial Audiences*, 28 *Ariz. J. Int'l & Comp. L.* 539 (2011).

Available at: <https://scholarship.law.tamu.edu/facscholar/478>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

BUILDING REPUTATION IN CONSTITUTIONAL COURTS: POLITICAL AND JUDICIAL AUDIENCES

Nuno Garoupa* & Tom Ginsburg**

I. INTRODUCTION

Specialized constitutional courts have expanded all over the world in recent decades. Originally conceived by the great legal theorist Hans Kelsen for the Austrian Constitution of 1920 and later adopted in post-war Germany and Italy, they have expanded to Southern Europe, Asia, and Eastern Europe during subsequent waves of democratization.¹ Even some Latin American countries, though historically influenced by U.S. constitutional arrangements, have adopted versions of the Kelsenian model; examples include Chile (1981), Colombia (1991), Bolivia (1994), and Ecuador (1996).² The most notable exceptions in Europe are the Netherlands and Scandinavian countries that have not (yet) adopted a Kelsenian model.³ Initially, France embraced a much narrower judicial review of legislation in accordance with its traditions of parliamentary sovereignty, but its court (the *Conseil Constitutionnel*) is coming to resemble the specialized Kelsenian model of institutional design.⁴

* Garoupa is Professor of Law, the H. Ross and Helen Workman Scholar, and Co-Director of the Illinois Program in Law, Behavior and Social Science, University of Illinois.

** Ginsburg is Professor of Law, University of Chicago, and Research Fellow, American Bar Foundation. We thank Omri Ben-Shahar, Gregory Caldeira, Wen-chen Chang, Martin Gelter, Tom Miles, Mark Ramseyer, Lydia Tiede, and the seminar participants at the Hamburg University School of Law, the University of Basel Department of Economics, the University of Tel-Aviv School of Law, the Italian Society of Law and Economics (SIDE, Florence, 2009), the American Law and Economics Association (ALEA, Princeton, 2010), and the 2010 Interim Meeting of RC09 Comparative Judicial Studies (Bologna, 2010). Excellent research assistance was provided by Nuria Gonzalez. The usual disclaimer applies.

1. See generally Tom Ginsburg, *The Global Spread of Constitutional Review*, in THE OXFORD HANDBOOK OF LAW AND POLITICS, 81–95 (Daniel Keleman & Keith Whittington eds., 2008).

2. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] arts. 81–83; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 239–245; CONSTITUCIÓN POLÍTICA DE BOLIVIA [C.P.] art. 119; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [C.P.] arts. 174–178.

3. Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INT’L J. OF CONST. L. 44, 44 (2007).

4. See ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 226–30 (1992); Alec Stone Sweet, *The Politics of Constitutional Review in France and Europe*, 5 INT’L J. CONST. L. 69, 70 (2007); Henry J. Abraham, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 310–11 (5th ed. 1986)

The ideas and legal theories of Kelsen and his model of the court as a “negative legislator” have influenced the design of specialized constitutional courts in the Western world.⁵ Kelsen, in accordance with his positivist jurisprudence, believed in a strict hierarchy of laws and that ordinary judges should apply only law that is legislated by the parliament.⁶ To effectively restrain the legislature and ensure the compatibility of law with the higher normative order of the constitution, Kelsen believed, a special, extrajudicial organ was necessary.⁷ The Kelsenian model establishes a centralized body outside of the structure of the conventional judiciary to exercise constitutional review and act as the guarantor of the constitutional order. This body, typically called a constitutional court, operates as a negative legislator because it has the power to reject but not propose legislation.⁸

The application of the Kelsenian model in each country depends on local conditions, and the general trend has been toward expanding the competencies of constitutional courts over time well beyond Kelsen’s simple model of the negative legislator. One distinction is between concrete and abstract review. In some countries, the courts can consider disputes only in the context of real legal disputes; the U.S. limitation of judicial review to “cases and controversies” is an example of this “concrete” approach.⁹ In others, courts can hear challenges to legislation as a general or “abstract” matter. The Constitutional Court of Germany has both abstract and concrete review powers.¹⁰ France, the last bastion against concrete review, recently succumbed.¹¹ At the same time, most constitutional courts have expanded ancillary powers in important areas such as verifying

(discussing the French constitutional court). The introduction of concrete review after the 2008 constitutional reform will increase the similarities between the French *Conseil Constitutionnel* and the other Kelsenian courts in Europe. *See infra* note 11.

5. *See generally* ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 134–35 (2000). *See also* Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. 183, 187 (1942). The notion of a “negative legislator” is based on the idea that the court expels legislation from the system and therefore shares legislative power with the parliament. *Id.*

6. HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 134–36 (1945).

7. *Id.* at 157.

8. *Id.* at 268–69.

9. U.S. CONST. art. III, § 2, cl. 1.

10. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 13 (2d ed. 1997).

11. Loi constitutionnelle 2008-724 du 23 juillet 2008 de modernisation des institutions de la Vème République [Constitutional Law 2008-724 of July 23, 2008 on the Modernization of the Institutions of the Fifth Republic], *JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 23, 2008. Concrete review is now possible according to the French Constitution as the *Cour de Cassation* and the *Conseil d’État* can refer to the *Conseil Constitutionnel* in matters of law (to be developed by statute soon). *Id.* art. 61-1.

elections, governing political parties (declaring them illegal or regulating their activities), and other relevant political, judicial, and administrative functions.¹²

Comparative legal scholars have considered the development of the Kelsenian model as one of the most relevant transformations of legal systems in the last fifty years.¹³ They also praise these courts' ability to avoid the politicization that exists in American courts.¹⁴ Constitutional judges in the Kelsenian model do not seem to develop "ideologically distinct public personalities," as some legal scholars have said.¹⁵ Moreover, even if an appointment is political in nature, there is no process of campaigning for a certain type of judge or judicial philosophy.¹⁶

This article examines internal consensus and fragmentation of the constitutional court as a function of the need to communicate to two different external audiences: political and judicial. The political audience consists of other branches of government and the political establishment more generally. Constitutional courts are inevitably political actors. Even in the narrow sense of a Kelsenian negative legislator, they have the power to reject legislation, and hence their decisions have political consequences. Constitutional judges are political agents, in part because the appointment mechanism is usually politicized and has sometimes resulted in stable de facto quotas for influential political parties.¹⁷ The interaction of constitutional judges and the political audience is not fully understood, but scholars have tended to rely on several hypotheses about judicial behavior; some believe that judges tend to seek to advance the preferences of their appointers, and others view judges as primarily concerned about their future once their term in the court is over.¹⁸ Even if they have life tenure, prospective appointments for other prestigious governmental posts or profitable legal consultancy jobs after they retire may influence judges' decision-making.¹⁹

The interaction between politics and constitutional and statutory interpretation has been the focus of much theoretical and empirical literature on

12. See Tom Ginsburg, *Beyond Judicial Review: Ancillary Powers of Constitutional Courts*, in *INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES* 225, 230–31 (Tom Ginsburg & Peter Lang eds., 2005); Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 *TEX. L. REV.* 1431, 1431, 1440–41 (2009).

13. See John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 *TEX. L. REV.* 1671, 1672 (2004).

14. *Id.*

15. *Id.*

16. *Id.*

17. See, e.g., KOMMERS, *supra* note 10, at 22 (describing political influence on appointments in Germany).

18. See JEFFREY SEGAL & HERBERT SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (arguing that appointment politics dictate judicial behavior); BATHULA VENKATESWARA RAO, *CRISIS IN INDIAN JUDICIARY* 150 (2001) (judges interested in post-retirement jobs).

19. RAO, *supra* note 18, at 150.

the U.S. Supreme Court and most constitutional courts.²⁰ Many scholars have discussed the extent to which judges advance their own ideologies while sacrificing formalism and originalism.²¹ Others have considered the judicialization of the legislative body, as government branches try to anticipate court decisions and adjust legislation to avoid setbacks with constitutional review.²² In short, the political dimension of constitutional review has been subject to an intense legal and scholarly debate.

A second audience that a constitutional court must face is other courts, whose cooperation is needed to effectuate constitutional decisions in ordinary cases.²³ The relationship between constitutional courts and this judicial audience has not been subject to extensive analysis. In traditional civil law countries, the constitutional court has been inserted as a “special court” into a legal system with an existing hierarchy of courts.²⁴ Though civil law countries usually have different specialized courts with well-defined jurisdictions (such as administrative, tax, or labor), these tend to be depoliticized and fairly deferential to the other branches of government. The constitutional courts, however, appear more political and qualitatively different from regular courts—hardly surprising since one goal of the Kelsenian theory was insulation of ordinary courts from politics.²⁵ However, the resulting politicization of the constitutional court may create a problem in terms of deference by the higher courts. Furthermore, there may be institutional rivalries between the top courts of ordinary jurisdiction—accustomed to their superior place in the judicial hierarchy—and the new constitutional court. This can lead to legal incoherence and gridlock.²⁶

Conflicts between the highest court of ordinary jurisdiction (supreme court) and the constitutional court have taken place in many countries and usually arise when the supreme court rejects the authority of the constitutional court in a

20. See generally Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 258 (2005); Matthew D. McCubbins & Daniel B. Rodriguez, *The Judiciary and the Role of Law: A Positive Political Theory Perspective*, in THE HANDBOOK OF POLITICAL ECONOMY 273 (B. Weingast & D. Wittman eds., 2006).

21. See, e.g., Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 324–26 (1992); see generally Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the U.S. Supreme Court*, 23 J.L. ECON. & ORG. 276, 276–301 (2007).

22. See Alec Stone Sweet, *Complex Coordinate Construction in France and Germany*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 206 (C. Neal Tate & Torbjörn Vallinder eds., 1995) (explaining the judicialization of the legislative process by consequence of referrals to the court: the constitutional courts are no longer only a negative legislator; they have and exercise creative legislative powers to recast policies, shape legislative solutions, and promote more precise terminology).

23. See Garlicki, *supra* note 3, at 50.

24. See Ferejohn & Pasquino, *supra* note 13, at 1676–77.

25. Donald P. Kommers, *An Introduction to the Federal Court*, 2 GERMAN LAW JOURNAL 30 (2001).

26. Ferejohn & Pasquino, *supra* note 13, at 1676–77

particular case.²⁷ These conflicts are typically exacerbated once concrete constitutional review is fully developed because the interaction between judicial courts and the constitutional court becomes more intense, and coordination between the two systems is essential.²⁸ The natural goal for the constitutional court in this context is to achieve normative supremacy as the highest court in the country; in other words, the constitutional court aims to establish a degree of control over a traditionally depoliticized and deferential judicial system.²⁹

One might expect that the need for constitutional courts to establish and enhance authority over the judicial courts would create a significant aversion to dissent. Too much dissent will signal that the law is unsettled and may undermine the image of the constitutional court as superior. Not surprisingly, constitutional courts tend to be quite consensual when they are first formed and become increasingly polarized as time goes by; judicial activism and judicial boldness take a while to emerge. Constitutional courts that are weak vis-à-vis their supreme courts, such as those in France and Italy, take a long time to become polarized; even now France and Italy preserve the façade of unanimous decisions and do not publish dissents. Although the long-term trend seems to be toward increasing polarization, all countries appear to undergo cycles of agreement and discord. These cycles seem to be related more or less to political instability or changes in the broader party system (e.g., Germany in the late 1960s, France in the 1980s, Italy and Portugal in the 1990s, Spain in the 2000s).³⁰

This article explicitly addresses the interaction between the political and the judicial dimensions of Kelsenian constitutional courts, focusing on jurisdictions with a distinct constitutional court sitting alongside a supreme court. Although there are intra-judicial politics within unified court systems, the problem is of much less importance because there is no potential conflict over supremacy between the supreme court and the constitutional court. Furthermore, there is no obvious difference in institutional structure because all judges in a unified system are appointed through the same process.

Other literature on constitutional courts has stressed internal incentives that suppress dissent, such as the value of a pleasant workplace or the costs of writing a dissent.³¹ This article emphasizes external incentives to eschew dissent,

27. See Garlicki, *supra* note 3, 54–55.

28. *Id.*

29. See WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 19–20, 33–34 (2008) (explaining how constitutional courts pursue a monopoly over constitutional adjudication and how they search for institutional legitimacy, in between the judicial and the legislative branches).

30. See Nuno Garoupa, *The Politicization of the Kelsenian Constitutional Courts: Empirical Evidence*, in EMPIRICAL JUDICIAL STUDIES 149, 162–83 (KC Huang ed., 2009).

31. Lee Epstein, William Landes, & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 101–04 (2011); Paul H. Edelman et al., *Consensus, Disorder, and Ideology on the Supreme Court: A Challenge to Attitudinalism* (Vanderbilt Law and Econ., Res. Paper No. 10-07, March 30, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564291.

specifically the desire to provide consistent legal doctrines and obtain the approval and respect of judicial courts. Moreover, Kelsenian constitutional courts tend to satisfy the conditions for dissent aversion recognized in recent work, namely, that they are small and have a heavy workload (unlike the U.S. Supreme Court).³²

The approach we developed to explain the behavior of the Kelsenian constitutional judges is broadly inspired by the distinction between policy preferences and dispositional preferences.³³ Policy preferences are associated with the court's opinion, while dispositional preferences reflect an ideal position associated with the judge's opinion. Constitutional judges have to trade policy losses (regardless of whether a judge supports the court's opinion) against dispositional losses (regardless of whether a judge delivers an opinion consistent with the most preferred solution). Policy losses are determined by the interaction between the constitutional and the supreme courts, whereas dispositional losses are independently determined in each court because they are fully determined by individual judges. In a broader view, this article belongs to the literature on strategic judicial decision-making. Rather than relying on mere attitudinal

32. See Epstein, Landes & Posner, *supra* note 31, at 104; Edelman et al., *supra* note 31, at 1–4. There are other factors besides audience selection that will influence dissent rates. Docket control, for example, will allow a court to focus on the most difficult and important cases, which presumably will produce higher rates of dissent. Internal turnover on a court may matter as well. See Scott R. Meinke & Kevin M. Scott, *Collegial Influence and Judicial Voting Change: The Effect of Membership Change on U.S. Supreme Court Justices*, 41 *LAW & SOC'Y REV.* 909, 910–11 (2007).

33. *E.g.*, Andrew F. Daughety & Jennifer F. Reinganum, *Speaking Up: A Model of Judicial Dissent and Discretionary Review*, 14 *SUP. CT. ECON. REV.* 1, 6–7 (2006). Consider the following situation: justices on the U.S. Supreme Court decide whether to grant certiorari based on the extent to which the decision at appeal is closer to their preferences and if there are reasoned dissents that provide reasons to reverse the decision on appeal. Court of Appeals judges have an incentive to write dissenting opinions when they disagree with the majority to force certiorari and increase the chances of a reversal. The majority at the appellate court has an incentive to search for a compromise to avoid reasoned dissent and therefore being overturned by the Supreme Court. Strictly speaking, our framework is different because: 1) there is no appeal from the constitutional court to the supreme court, 2) there is no certiorari since the principle of legality prevails, and 3) there is no court hierarchy. Charles M. Cameron and Lewis A. Kornhauser, in *Modeling Collegial Courts III: Adjudication Equilibria* (2010) (mimeograph on file with the authors), show that the final outcome might not be the position of the median justice because it depends on the entire distribution of ideal points. The model also suggests the importance of opinion assignment. See Lewis A. Kornhauser, *Modeling Collegial Courts I: Path-Dependence*, 12 *INT'L REV. L. & ECON.* 169, 170 (1992) (explaining that path-dependence in collegial courts results from the fact that no single judge controls lawmaking); Lewis A. Kornhauser, *Modeling Collegial Courts II: Legal Doctrine*, 8 *J.L. ECON. & ORG.* 441 (1992) (pointing out that, due to collective decision-making, case-by-case and issue-by-issue approaches can result in different outcomes. The development of legal doctrines is determined crucially by how collegial courts operate).

inclinations, courts in that literature are modeled as behaving in anticipation of reaction by the other branches of government (in this case, the supreme court).³⁴

Our concepts of judicial and political audiences are ideal. Constitutional courts also interact with other audiences; namely, losing parties (convincing them of the legitimacy of the unfavorable court decision), legal scholars, and the general public. By focusing primarily on the political and judicial audiences, we capture the countervailing forces that constrain or influence a Kelsenian-type constitutional court.

The next section focuses on the importance of the political and judicial dimensions in terms of predicting the internal behavior of the Kelsenian constitutional courts. In Part III, we further discuss some particular institutional aspects. An empirical analysis of twenty-one jurisdictions follows. We apply our approach to several representative cases and conclude that there are strong incentives for internal cohesion within courts as they struggle to influence external audiences.

II. INTERNAL DECISION-MAKING AND EXTERNAL AUDIENCES

This article centers on the tension between the political and judicial audiences for constitutional jurisprudence. Most judicial behavior literature addresses these two sets of constraints on decision-making as implicitly separate,³⁵ and the judicial dimension has not attracted the same scholarly attention as the political dimension. This may be because the literature has been developed most extensively in the United States, where there is only one highest court. But the two dimensions are necessarily interrelated and generate a complicated trade-off between advancing the political agenda of the constitutional court and competing with the higher courts for judicial supremacy. In some cases, the objectives might coincide. For example, promoting human rights might simultaneously enhance the reputation of and respect for the constitutional court with both judicial and political audiences. In many circumstances, however, these two objectives conflict.

Some literature has identified the trade-off faced by American courts in terms of ideological and institutional activism.³⁶ Appealing to a political audience in our context is a form of ideological activism, in the sense of a propensity to strike down legislation that is incompatible with the ideology of the court.

34. See Pablo T. Spiller & Rafael Gely, *Strategic Judicial Decision Making* 8 (Nat'l Bureau of Econ. Research, Working Paper No. 13321, 2007) (arguing that for civil law jurisdictions, because of a strong and unified polity, courts are inherently more deferent because exercising independence will trigger political conflict and retaliation); see also Pablo T. Spiller & Richard G. Vanden Bergh, *Toward a Positive Theory of State Supreme Court Decision Making*, 5 BUS. POL. 7, 12 (2003).

35. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

36. See STEFANIE A. LINDQUIST & FRANK B. CROSS, *MEASURING JUDICIAL ACTIVISM* 62–63, 81–82 (2009).

Interacting with a judicial audience, however, is a specific form of institutional activism; it has little to do with being deferential to other branches of government and everything to do with achieving the *judicial* supremacy of the constitutional court.

Our approach is to consider the internal decision-making of constitutional courts confronted with potentially conflicting external audiences. The key variable is whether decision-making is unified or fragmented, represented by the existence of separate opinions. Fragmentation, in our view, is a function of the external audience to which the court is appealing. It is assumed that the court is composed of individual judges with a range of ideological and legal preferences. In previous work, we described the task of the court as a whole as a problem of team production.³⁷ Individual judges might prefer to emphasize their individual contributions to the quality of decision-making, but the court as a whole will also have a reputation that may require suppressing individual judges' reputations. This article assumes that the court can resolve internal collective action problems to the extent it wishes to produce unified opinions, but it also might prefer to signal the internal preferences of its individual members.

In particular, this article presents two available strategies. On the one hand, the court can follow a *consensual* decision-making approach: decisions are made unanimously after internal negotiation to achieve a consensus. This makes the constitutional court look like any other judicial higher court. Alternatively, the court can follow a strategy of *fragmentation*: cases are decided by majority, with concurring and dissenting opinions, if allowed, thus revealing, directly or indirectly, division in the court.³⁸

In a well-established democracy, political fragmentation of the constitutional court is an impediment to achieving supremacy;³⁹ a fragmented court does not look like the prototypical judicial court in civil law systems, where unanimous decision-making prevails. The top ordinary courts may thus resist implementing decisions that appear fragmented.

Differences in appointment mechanisms across systems may play a role in determining the incentives of individual judges to appeal to political or judicial audiences. The mechanisms of appointments of constitutional courts are typically

37. See Nuno Garoupa & Tom Ginsburg, *Reputation, Information and the Organization of the Judiciary*, 4 J. COMP. LAW 226, 235–39 (2010).

38. If the procedure does not allow formal dissent, there may be informal mechanisms for conveying information, such as media coverage, as we see in France or Italy.

39. Fragmentation in less democratic contexts is a costly signal because it is usually unwelcomed by the authoritarian regimes, and reprisals might take place. See Gretchen Helmke & Mitchell S. Sanders, *Modeling Motivations: A Method for Inferring Judicial Goals from Behavior*, 68 J. POL. 867, 870 (2006) (defining a policy-seeker court, where the example is Argentina, although that is not a specialized constitutional court); see also GRETCHEN HELMKE, *COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA* (2005); Lisa Hilbink, *Agents of Anti-Politics: Courts in Pinochet's Chile*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 102, 104–05 (Tom Ginsburg & Tamir Moustafa eds., 2008) (Chile).

different from the ordinary courts. Constitutional judges belong to a “recognition” judiciary, appointed at senior stages in their careers, while ordinary judges are members of a career judiciary, appointed at young ages and spending their whole lives in the job.⁴⁰ In many cases, the appointment mechanisms of constitutional courts will be perceived as more political than those of the supreme court justices. The mechanisms of judicial appointment also explain division within a constitutional court. In civil law, there is a general conviction that each legal issue can have only one correct answer.⁴¹ Under the conventional theory, the personality and the ideology of the judge is irrelevant because there is only one correct answer.⁴² As a consequence, dissenting and concurring opinions are rare and not welcomed. The practice of allowing dissent in constitutional courts signals that they are not entirely judicial but at least partly political in character.⁴³ Allowing separate opinions and dispensing with unanimous voting sends a costly signal, because it means the ideologically important goal of having a single correct answer is being sacrificed.

Consensus in a constitutional court thus expresses “legal” decision-making rather than “political” decision-making. This type of legal decision-making may enhance legitimacy in the eyes of the other higher courts as well as the general public. At the same time, consensus can deter more explicit intervention by political actors into the operation of the court. By projecting the image of legal decision-making, a constitutional court raises the cost (in terms of public opinion) to political bodies of interference or manipulation. In addition, a fragmented decision does not usually produce a strong formal constitutional precedent in the sense of *jurisprudence constante* or *doctrina jurídica*, and even less in the common law sense of *stare decisis*.⁴⁴ Therefore, a fragmented decision could leave the constitutional court in a weaker position vis-à-vis the supreme court, which in most civilian jurisdictions does not allow separate opinions.

40. See generally Garoupa & Ginsburg, *supra* note 37.

41. See Ferejohn & Pasquino, *supra* note 13, at 1673 n.7 (noting that the disallowance or absence of dissents in many European constitutional courts reflects “the archaic civil law notion that the law is fixed, clear and discoverable and that all judges do is discover and apply it”).

42. See generally Dieter Grimm, *The German Constitutional Court*, in HOW CONSTITUTIONAL COURTS MAKE DECISIONS (Pasquale Pasquino & Barbara Randazzo eds., 2009).

43. See Victor Ferrer Comella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, 82 TEX. L. REV. 1703, 1729–30 (2004).

44. Maria Angela Jardim de Santa Cruz Oliveira & Nuno Garoupa, *Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach*, (April 2011) (unpublished manuscript) (on file with authors); THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS (Joseph Dainow ed., 1974); see generally INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (Neil D. MacCormick & Robert Summers eds., 1997) (*stare decisis*).

At the same time, fragmentation may be desirable from the point of view of individual judges. A judge appointed by a particular political actor might want to signal loyalty, even in a minority view in a particular case. A credible ability to dissent also allows individual judges to push the outcome in a direction that might eventually be favorable. Fragmentation also can undermine the precedential value of decisions, which may be desirable when the law is in transition. The political audience creates pressures for fragmentation, even as the legal audience favors unanimity.

As a caveat, this discussion applies to “strategic” unanimity and fragmentation. In many constitutional courts, such as those of France and Italy, no separate opinions are allowed (in keeping with civil law tradition), so all decisions are formally unanimous. However, it is well known that even in these formally consensual courts, there are significant opportunities to expose division and signal dissent, if needed.⁴⁵

III. INSTITUTIONAL FACTORS AND THE CHOICE OF AUDIENCE

While Kelsenian constitutional courts have to consider two different audiences in exercising constitutional review, there are significant institutional aspects that determine the balance between the two audiences. This section addresses these institutional aspects.

A. Abstract and Concrete Review

The first important aspect is the balance of abstract and concrete review.⁴⁶ In abstract review, the main influence of the court is exercised through screening legislation and shaping policymaking. Naturally, the political audience is more directly relevant to this activity than the judicial audience. This is not to say that the other courts are irrelevant. In many cases, the constitutional court might need the judicial courts to enforce its decisions (particularly if other branches of government reject the constitutional court’s decision to void

45. For example, in the recent case debated by the Italian constitutional court on the immunity of Prime Minister Berlusconi and other higher authorities of Italy, the Italian media widely reported that the “unanimous” decision of the court against the prime minister had six dissents (constitutional judges who supported the prime minister’s legal argument). The recent publication by the French constitutional court of the internal debates over the landmark cases from 1958 to 1983 also shows the extent of dissent in that court. See JEAN-PIERRE MACHELON ET AL., *LES GRANDES DÉLIBÉRATIONS DU CONSEIL CONSTITUTIONNEL 1958 – 1983* (2009).

46. See SADURSKI, *supra* note 29, at 68 (observing that legitimacy is politically more complicated in abstract rather than concrete review, even if the court has undisputed formal legitimacy).

legislation).⁴⁷ Nevertheless, the judicial audience is relatively more important in concrete review cases because implementation often (though not always) requires cooperation between the constitutional court and regular courts.⁴⁸

Clearly, concrete review blurs the separation between the constitutional court and the rest of the judiciary, whether it is initiated by incidental referrals from ordinary judges or direct constitutional complaints. It induces the constitutional court to participate in the resolution of individual cases, either substituting or complementing ordinary dispute resolution. The constitutional court substitutes for ordinary courts when it decides cases that would otherwise be within the judicial province; it complements them when it serves to resolve constitutional questions that are then implemented by ordinary courts. Neither function was intended by the original Kelsenian model. (Apparently, Kelsen was opposed to any form of concrete review by constitutional courts.)⁴⁹ The consequence is a less transparent delimitation of jurisdictions and the emergence of conflicts of competence between the constitutional court and the higher judicial courts.⁵⁰

Abstract review, in particular, preventive or *ex ante* promulgation, provides a weak mechanism for a constitutional court to try to condition other courts. There is no obvious relation between the review of legislation in the abstract and the work of regular courts. However, given the importance of the constitutional court, creative techniques can be developed to achieve influence over ordinary judges. For example, the French idea of “conforming interpretation,” although dependent on the voluntary compliance of other courts, is still conceptually influential;⁵¹ yet courts that lack abstract review (e.g., Italy) have a reduced ability to shape legislative outcomes and consequently have less political influence.⁵²

The possibility of a conflict between the two major court systems has substantive implications. First, it puts pressure on constitutional judges to achieve a coherent body of constitutional jurisprudence or doctrines to convince the ordinary court of the legal integrity of constitutional decision-making.⁵³ Therefore, it transforms the nature and scope of constitutional review by demanding apolitical decision-making. The constitutional court must be a better legal craftsman when it relies on ordinary courts to implement its decisions.

47. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 134–37 (2003) (on court relations in Taiwan).

48. In Chile, for example, until 2005, the Constitutional Court exercised abstract review while the Supreme Court performed concrete review. Royce Carrol & Lydia Tiede Beshear, *Judicial Behavior on the Chilean Supreme Court*, 8 J. EMP. LEGAL STUD. 856, 860 (2011).

49. KELSEN, *supra* note 6, at 246.

50. See Garlicki, *supra* 3, at 65.

51. *Id.* at 62.

52. See Stone Sweet, *supra* note 4, at 88.

53. In the limit, developing a court-made constitution that supplements or even replaces the original text. See, e.g., Garlicki, *supra* note 3, at 68.

Second, conflict or competition among the courts increases the political value of constitutional review because it might provide an indirect mechanism for influencing both policy and the judiciary—particularly if politicians use the constitutional court to interfere with the ordinary courts. The natural inclination for the constitutional court is to expand its reach into areas that make it more politically relevant, one example being the progressive constitutionalization of private law in several jurisdictions.⁵⁴ Third, the balance of power is shaped by the constitution itself; that is, the extent to which a constitutional court is conceived not only as a negative legislator, but also as a positive legislator with formidable powers of statutory interpretation.⁵⁵ As a positive legislator, the court strikes laws and actively interprets the conditions under which they can be implemented. If a constitutional court has a role as a positive legislator, it can act either as a counterweight against the parliamentary majority or as a substitute if no stable parliamentary majority exists.⁵⁶

Concrete review is not immune from politics. However, the capacity to advance an ideological agenda through concrete review is more limited than through abstract review. Concrete review requires the constitutional court to develop specific legal reasoning in terms of rhetoric and judicial syntax that makes it similar to a decision of a regular court while at the same time advancing a particular ideological agenda. Because regular courts do not engage in abstract review, the constitutional court is not under pressure to use similar specific legal reasoning in those cases.

Another type of review is preventive (abstract) review, in which a court blocks unconstitutional policies *before* implementation. Whereas concrete review “judicializes” constitutional courts, preventive review has the opposite effect. Preventive review makes a constitutional court less judicial and more political—indeed legislative.⁵⁷ Constitutional courts as idealized by Kelsen are political in nature, notwithstanding their judicial form and procedure.⁵⁸ Hence, they should not be part of the traditional judiciary or court structure. Constitutional law is political in nature, and constitutional adjudication is a necessary part of the political process. Therefore, the distinction between law and politics is not likely to be clear in constitutional review.⁵⁹

The double role as a political and a judicial institution (not supported by the original negative legislator model, but now pursued by all existing constitutional courts) creates an inevitable “judicialization” of politics for three

54. Rogério B. Arantes, *Constitutionalism, the Expansion of Justice and the Judicialization of Politics in Brazil*, in *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* (Rachel Sieder et al. eds., 2005).

55. See Leslie Turano, *Spain: Quis Custodiet Ipsos Custodes?: The Struggle for Jurisdiction Between the Tribunal Constitucional and the Tribunal Supremo*, 4 *INT’L J. CONST. L.* 151, 152–53 (2006).

56. See Stone Sweet, *supra* note 4, at 42.

57. *Id.*

58. Garoupa, *supra* note 30, at 149; Stone Sweet, *supra* note 5, at 135–37.

59. Stone Sweet, *supra* note 5, at 136.

reasons. First, as a consequence of the constitutional court's particular institutional position, its tendency to expand its institutional power affects the delicate balance between judicial and political structures. As the court becomes more politically involved, other political agents will become aware of it and will respond. Second, the expansion of institutional power and influence naturally generates conflict, which could undermine the appropriate framework for the institutional development of democracy. Third, political diffusion makes the role of a constitutional court more important, as disparate political groups seek a third party to resolve disputes. The inevitable "judicialization of politics" necessarily politicizes the court. Hence, politics inside the constitutional court becomes unavoidably contaminated by party politics. The stakes are simply too relevant and important for political parties not to interfere.⁶⁰

At the same time, the ongoing skirmishes between the two major courts can contaminate the supreme court, leading it to depart from traditional decision-making, including the style and content of decisions. In Europe, for instance, literal statutory interpretation has given way to general principles of law invented and created by courts in Europe.⁶¹ France serves as a particularly striking example.⁶² Traditionally, the legal authority of the French higher courts insisted on judicial deference to the legislative and executive branches and favored administrative review of legality and good governance over judicial review of constitutionality.⁶³ The slow development of constitutional principles applied to individual rights and liberties by the French *Conseil Constitutionnel* after the 1970s, coupled with other external factors, resulted in significant changes in the legal culture of the French courts.⁶⁴ Recently, the French higher courts have shifted toward the use of fundamental principles at the expense of code law.⁶⁵ This trend was partially a response to enhanced individual capacity in participating in the judicial process because of the expansion of individual rights. Gradually, the higher courts have been more frequently asked to deliberate and decide these (largely uncodified) general principles, which naturally affect public policy.⁶⁶ Although this shift has been criticized by many French legal commentators for undermining legal certainty, this form of judicial activism by the *Cour de Cassation* (the equivalent of the supreme court) and the *Conseil*

60. See, e.g., Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93, 98 (2008) (explaining the political consequences of systematic, unwelcome judgments concerning contentious political issues and how that creates unstable courts).

61. ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 2 (1998).

62. See MICHEL DE S.-O.-I.'E. LASSER, *JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE* 271–72 (2009).

63. *Id.*

64. *Id.* (discussing the external European influence on imposing "judicial review" and "fundamental rights and principles").

65. *Id.*

66. *Id.*

d'État (the top administrative court) responds to the activist approach taken by the *Conseil Constitutionnel* since the early 1980s.

B. Opportunity Structure and Other Factors

A constitutional court is not likely to be either fragmented or consensual all of the time. In that sense, we expect a “mixed” strategy that responds to the relative importance of both political and judicial audiences in any given context. The implementation of a mixed strategy will depend on a number of factors.

One immediate aspect to consider is the opportunity for exercising constitutional review. This is partly a function of institutional design. Political actors (other branches of government, parliamentary opposition groups) usually trigger abstract review, and therefore the court has little control over these occurrences.⁶⁷ As for concrete review, there are different possibilities. Generally, private actors and citizens generate direct constitutional complaints. In many countries, however, ordinary citizens can access the constitutional court only through incidental referrals by ordinary courts in the context of concrete cases.⁶⁸

Presumably, docket control could increase the collegiality of the court and therefore promote consensus.⁶⁹ However, unlike the U.S. Supreme Court, most constitutional courts have little discretionary control over their dockets and lack the ability to decline appeals.⁷⁰ Political actors influence and determine a constitutional court’s agenda, in particular when abstract review plays an important role.

A second important aspect is the extension of jurisdiction of the constitutional court beyond its constitutional mandate.⁷¹ Formally, the extent of constitutional court review is explicitly defined by a constitution, but a constitutional court engaging in maximizing supremacy will use case law to increase its jurisdiction. It also could influence the other branches to promote constitutional amendments that further consolidate its power. For example, the inevitable instability of federal arrangements might empower the constitutional court to interfere in areas that were not anticipated in earlier periods. (The role of the European Court of Justice in the European Union is a good example.)

In many cases, the enlargement of constitutional law will result in clashes with the higher courts. Formally, most legal systems empower the constitutional

67. STONE, *supra* note 4, at 233–34 (describing expansion of jurisdiction of French *Conseil Constitutionnel* in 1974 to include parliamentary minorities).

68. This is the Italian model. See John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication, Italian Style*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 294 (Tom Ginsburg ed., 2012).

69. See Meinke & Scott, *supra* note 32, at 911–12.

70. STONE SWEET, *supra* note 5, at 46.

71. For example, Brazil has a constitutional court (*Supremo Tribunal Federal*) and an infraconstitutional court (*Supremo Tribunal de Justiça*). The hierarchical relationship between these two courts is established by the 1988 Brazilian Constitution.

court to decide which matters are constitutional.⁷² The so-called *Kompetenz-Kompetenz* question (the power to decide one's own power) has been resolved fairly early in most constitutional systems. While one might think that conflicts should not exist, at least in theory, such a formalistic approach ignores the practicalities of judicial decision-making and disregards the ingenious abilities of higher courts to undermine formal solutions to potential conflicts.

A constitutional court's composition is another relevant variable that affects the extent to which it cares about achieving supremacy. Limited tenure certainly reduces incentives for investments in court reputation while increasing concern about outside employment after judges' terms in the court are finished. Career magistrates might be less inclined to sacrifice the influence and power of the supreme court in favor of their own employment security because they will presumably return to the ordinary courts after their term is over. On the other hand, life tenure may foster more judicial concern about achieving supremacy and increase the willingness of constitutional judges to trade off short-term goals against future gains.

At the same time, court turnover affects the ability to generate consensus. It could be that there is a period of acclimation, during which new constitutional judges avoid confrontation and are more willing to sacrifice ideological preferences.⁷³ However, as previously argued, consensus requires stability in the composition of the court, which is likely to be compatible with high turnover rates. This effect is likely to be more relevant if the appointment process is politically divisive.

In short, institutional factors related to constitutional court design and practice will naturally influence how it interacts with political and legal audiences, and thus the degree of fragmentation on the court. Judges who come from the ordinary courts may favor consensual judicial approaches, but frequent turnover will encourage fragmentation. Abstract review tends toward the political and thus fragmentation, while docket control may push toward consensus. The particular configurations vary and should impact the frequency of dissent.

IV. EMPIRICAL ANALYSIS

This section presents quantitative evidence from more than twenty Kelsenian constitutional courts (including France). Table 1 summarizes the findings in terms of incidence of conflicts between constitutional and supreme courts (as reported in the news media and in legal journals) and the stability of the

72. See, e.g., LUIGI CORRIAS, THE PASSIVITY OF LAW: COMPETENCE AND CONSTITUTION ON THE EUROPEAN COURT 23 (2011) (German Constitutional Court exercising *Kompetenz-Kompetenz* about what matters are constitutional).

73. See Saul Brenner & Timothy M. Hagle, *Opinion Writing and the Acclimation Effect*, 18 POL. BEHAV. 235, 236 (1996).

court majority (as measured by a stable allocation of seats to political parties according to expert assessment).⁷⁴

Table 1: Conflict and Stability in Constitutional Courts

	Stable Party Composition	Variable Party Composition
Low Incidence of Conflicts	Germany (after 1970s), Austria, Belgium, Portugal, Taiwan (before 2000s), Hungary, Lithuania, Turkey, South Africa	France,* Chile, Korea, Slovakia, Slovenia, Latvia, Ukraine
Occasional Incidence of Conflicts	Germany (before 1970s), Poland, Russia	Spain, Italy, Colombia, Czech Republic, Taiwan (after 2000s)

* Ex ante promulgation abstract review only (before 2009).

This article predicts that there is an important relationship between court stability and conflict between the constitutional court and the supreme court. Conflicts are likely to occur between the constitutional and the supreme courts when there is court instability, all else equal. This section provides evidence that supports our hypothesis and discusses several illustrative examples.

A. Preliminary Quantitative Evidence

We have coded stability and conflict in the courts with two dummies, where one represents instability in the allocation of seats on the court and the other the existence of occasional confrontation between the supreme court and the constitutional court. Our hypothesis is that there is a positive correlation between these two dummies. A correlation of 0.3105 is found between these two variables, as we can see from Table 2. If we exclude France (the only jurisdiction with only abstract review and therefore a constitutional court with less direct influence over the local supreme courts), the correlation increases to 0.3553.⁷⁵

74. In both cases, we have relied on previous empirical work by the authors and a review of secondary sources. We operationalize stability by considering whether there have been any reported conflicts over appointments or changes to the mechanism of appointment during the period under review.

75. For these calculations, we have excluded Germany (before 1970s) and Taiwan (before 2000s).

Table 2: Correlations

	Conflict	Instability	Rule of Law	Population	DPpc
Conflict	1.00				
Instability	0.3105	1.00			
Rule of Law	-0.2325	0.0115	1.00		
Population	0.3482	-0.1719	-0.5097	1.00	
GDPpc	-0.0504	-0.0594	0.7105	-0.1078	1.00

Other control variables include the rule of law indicator of the World Bank for 2009,⁷⁶ GDP per capita for 2009, and population estimation for 2009. Our estimation approach is a probit model, where the dependent variable is the existence of dissent, and the independent variables are instability of the court majority and the control variables. We ran the probit regressions with and without France in the sample. In both regressions, the coefficient for instability is statistically significant and has the correct (positive) sign. The probability of occasional conflicts between supreme and constitutional courts increases by 56.9% (with France) and 41.5% (without France) when the court majority is instable. Table 3 presents the results.

Table 3: Regression Analysis

	Probit Conflict	Probit Conflict (Excluding France)
Pseudo R2	0.233	0.338
Number of Obs.	22	21
Constant	-1.604 (1.849)	-3.287 (1.99)
Instability	1.258* (0.71)	1.802** (0.903)
Rule of Law	-0.004 (0.264)	0.011 (0.026)
Population	0.019* (0.011)	0.031*** (0.011)
GDPpc	0.002 (0.036)	-0.0002 (0.039)

Robust standard errors in parentheses; *p<0.1, **p<0.05, ***p<0.01

The empirical evidence seems to support our hypothesis. However, it is clear that the sample is small, and the measures of stability and conflict are crude. Unfortunately, there is no readily available data set that allows the development of

76. *Worldwide Governance Indicators*, WORLD BANK, <http://info.worldbank.org/governance/wgi/index.asp> (last visited Dec. 31, 2011).

a more sophisticated empirical test because constitutional courts do not uniformly report dissent rates. A more informed empirical assessment requires a better institutional analysis than a crude cross-country correlation.

B. Stable Court Majority and Low Incidence of Conflict

1. Germany

The Federal Constitutional Court was established in 1951.⁷⁷ It is composed of sixteen judges divided into two eight-judge senates, based in specialized areas of constitutional law.⁷⁸ The sixteen constitutional judges are appointed by the parliament—eight by the lower house (the *Bundestag*) and eight by the upper house (the *Bundesrat*).⁷⁹ As a consequence of the appointment mechanism, which requires a supermajority (two-thirds) in the federal parliament, there is a need for a consensus between major political parties.⁸⁰ Over time, a norm has developed so that constitutional judges are effectively appointed on party tickets without public hearings.⁸¹ The supermajority requirement has created a de facto quota system;⁸² the two major parties divide the seats, with the occasional appointment of a judge from one of the minor parties to reflect parliamentary composition and ongoing governmental coalitions.⁸³ As a consequence, we can conclude that the majority in the German court is reasonably stable.

Dissenting opinions were traditionally regarded as inappropriate by German constitutional judges, who were trained in the civil law orthodoxy of a single correct answer to a legal dispute.⁸⁴ Dissent was formally introduced in

77. KOMMERS, *supra* note 10, at 15.

78. One senate deals with basic rights, whereas the other senate looks at abstract review and major constitutional disputes. The full court exists but plays a secondary role. See Alfred Rinke, *The Federal Constitutional Court and the German Political System*, in CONSTITUTIONAL COURTS IN COMPARISON: THE U.S. SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT 55, 72 (Ralf Rogowski & Thomas Gawron eds., 2002).

79. KOMMERS, *supra* note 10, at 17–18.

80. See GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* 83 (2005).

81. See Rainier Nickel, *The German Federal Constitutional Court: Present State, Future Challenges*, in BUILDING THE UK'S NEW SUPREME COURT: NATIONAL AND COMPARATIVE PERSPECTIVES 175, 183–84 (Andrew Le Sueur ed., 2004) (arguing those package deals lack transparency); Grimm, *supra* note 42 (arguing that such package deals eliminate the possibility of electing extremists to the court and therefore reduce polarization).

82. See DONALD P. KOMMERS, *JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT* 89 (1976); VANBERG, *supra* note 80, at 83–85.

83. KOMMERS, *supra* note 10, at 22; VANBERG, *supra* note 80, at 83, 85.

84. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 37 (2d ed. 1997).

1970.⁸⁵ In the early 1970s, however, many constitutional judges regretted the move, viewing it as proving the court to be more political than other German courts.⁸⁶ Many constitutional judges, in particular career magistrates, refused to file dissenting opinions.⁸⁷

The relationship between the German Constitutional Court and the rest of the courts has not always been smooth, but, overall, explicit conflicts are rare. Cooperation is required to effectuate constitutional decisions; constitutional questions that arise in ordinary disputes are referred to the Constitutional Court through the incidental reference mechanism, after which the interpretation of the Constitution is sent back to the originating court to apply.⁸⁸ Although the German Constitutional Court was inserted into a complex structure headed by five supreme courts, the supreme courts were in a weak position in the early 1950s because they failed to oppose the Nazi regime and enforced despicable Nazi laws.⁸⁹ The new German Constitutional Court was untainted by any Nazi past and was perceived as the guarantor of the new democratic regime.⁹⁰ As anticipated by our thesis, the court focused its early decisions on the political audience, deciding many important issues about the political process, and achieving administrative and budgetary autonomy in 1952. Confrontation with the other courts emerged later.⁹¹

By the late 1950s, there were some skirmishes over procedural rules. For example, the German Constitutional Court decided that the supreme courts could not submit their own opinions about constitutionality in the context of incidental review and later abolished their participation in judicial referrals.⁹² The supreme courts protested, but there was more to come. In landmark decisions in 1957 and 1958, the court extended a general right to “individual liberty,” thereby effectively subjecting all private law to constitutional review.⁹³ This stripped the supreme courts of exclusive jurisdiction over many areas of the law. A clear refusal by regular courts to follow the doctrines of the court is rare given the status of the German Constitutional Court, but legal scholars have identified areas where divergences have been taking place (e.g., the “expropriation” clause or

85. VANBERG, *supra* note 80, at 91.

86. See Grimm, *supra* note 42, at 52. In the early 1950s, the opposing Social Democrats favored the use of dissenting opinions, while the governing Christian Democrats opposed it. Consistent with our prediction, the movement for dissenting opinions emerged in the late 1960s once the German Constitutional Court was well established, strong enough to face the political audience and sufficiently credible in the eyes of the other courts (and of the general public). *Id.*

87. *Id.* at 52–53.

88. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I art. 100(1) (Ger.).

89. KOMMERS, *supra* note 10, at 5–10.

90. See Garlicki, *supra* note 3, at 50.

91. *Id.*

92. *Id.* at 51–53.

93. *Id.* at 51.

compliance with length of detention).⁹⁴ Occasionally, one of the supreme courts is more vocal against doctrines developed by the German Constitutional Court (e.g., the supreme court in civil and criminal matters, the *Bundesgerichtshof*, has been somewhat resistant), but by and large, they appear to accommodate them.⁹⁵

In fact, some legal scholars argue that the situation in Germany is less confrontational than in other jurisdictions.⁹⁶ Our approach attributes this to the historically weak position of the supreme courts, both in terms of their limited jurisdiction (each of them vis-à-vis the other supreme courts) and the Nazi period. On the other hand, the stabilized political appointment processes in the German Constitutional Court have allowed doctrines to develop that emphasize the judicial role over short-run ideological gains.⁹⁷ Stability has led to effective subordination of the ordinary courts.

2. Portugal

The Portuguese Constitutional Court was inaugurated in 1982 (after the first constitutional reform) and exercises constitutional review according to the 1976 Constitution.⁹⁸ There are thirteen constitutional judges; ten are elected by Parliament with a two-thirds majority, and the remaining three are appointed by

94. *Id.* at 53. See also Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 6, 2005, 1 BVERFGE 1905/02, 2005 (Ger.).

95. *Id.*

96. *Id.*

97. Another example, in the context of the German-speaking world, is Austria. The fourteen Austrian constitutional judges are chosen by the federal government (President, Vice-President and six members) and both chambers of Parliament (three members each), although the President of Austria technically makes all appointments. The appointment mechanism has resulted in a de facto quota system allocation of seats. Judges are appointed for life (subject to mandatory retirement age). Although a matter of discussion since Germany changed its policy in 1971, separate opinions are not allowed. The Austrian Constitutional Court has engaged in controversial decisions, but there are few instances of skirmishes with regular courts. See Alexander Somek, *Constitutional Theory as a Problem of Constitutional Law: On the Constitutional Court's Total Revision of Austrian Constitutional Law*, 32 *ISR. L. REV.* 567, 569 (1998). Until the 1970s, the conservatives had a solid court majority. Then, one "conservative" seat was taken by the social-democrats under the Kreisky government, saving the new legislation promoted by the social-democrats but provoking the resignation of the president of the court in the mid-1970s. In 2003, the liberals got a "social democratic seat" (first ever of a third party). Such move has solidified the current conservative majority. There have been sporadic conflicts, mainly between the Constitutional Court and the Supreme Administrative Court, for example, concerning expulsion of a foreigner (1980) or freedom of religion with respect to Jehovah's Witnesses (1987). See MANFRED STELZER, *THE CONSTITUTION OF THE REPUBLIC OF AUSTRIA: A CONTEXTUAL ANALYSIS* (2011).

98. Constituição da República Portuguesa [Constitution] arts. 221–224 (Port.).

the elected judges.⁹⁹ In practice, the elected judges are chosen from a list of names negotiated by the parliamentary leadership of the main parties.¹⁰⁰ A de facto quota system allocates party seats to the major parties,¹⁰¹ thus explaining the stability of the court majority. There are six right-wing judges and six left-wing judges, and the thirteenth is a person perceived to be politically neutral.¹⁰² Constitutional judges are elected for nonrenewable terms of nine years. (The mandate was six years and renewable for a second term before the 1997 reform.)¹⁰³ The political structure of the court is thus fairly stable and predictable.

There have been very few conflicts between the Portuguese Constitutional Court and the Portuguese Supreme Court. This is partly due to the hybrid system by which lower courts can perform constitutional review in concrete cases (a feature of U.S. jurisprudence that reached Portugal through the 1891 Brazilian Constitution).¹⁰⁴ Under our approach, the stability of the court majority might have helped the constitutional judges to defer particular ideological gains when exercising concrete review, focusing on consolidating the position of the court vis-à-vis the ordinary courts (thus entertaining many appeals on constitutional issues from lower courts), while using abstract review to signal party allegiance.¹⁰⁵

C. Moving from Low Conflict to High Conflict: Taiwan as a Hybrid Case

The Republic of China (Taiwan) Constitution is one of the oldest currently in force, dating from its adoption on the mainland in 1947.¹⁰⁶ Similarly, the Taiwanese Constitutional Court (known as the Grand Justices of the Judicial

99. Brent Wible, *Filibuster vs. Supermajority Rule: From Polarization to a Consensus-and Moderation-Forcing Mechanism for Judicial Confirmations*, 13 WM. & MARY BILL RTS. J. 923, 960 (2005).

100. See Sofia Amaral Garcia, Nuno Garoupa & Veronica Grembi, *Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal*, 6 J. EMPIRICAL LEGAL STUD. 381, 387 (2009).

101. *Id.*

102. *Id.* at 388–89 n.28.

103. *Id.* at 386.

104. *Id.* at 385.

105. For example, in an important case (STC 810/93, of December 7, 1993), the Portuguese Constitutional Court decided that the judicial doctrines produced by the Supreme Court, even those “with general obligatory force,” as stated by the civil code, are not a source of law. Therefore, such judicial doctrines are not binding; they do not establish horizontal or vertical precedent. However, in a concession to the Supreme Court, the Portuguese Constitutional Court recommended that the lower courts consider judicial doctrines for sake of legal stability and certainty. See VICTOR FERRERES COMELLA, *CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE* 173 (2009).

106. ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 172 (2009).

Yuan) predates almost all the other specialized Kelsenian constitutional courts.¹⁰⁷ Although composition and jurisdiction have been reformed in the last fifty years, the Taiwanese Constitutional Court has persevered throughout the authoritarian period and the more recent emerging democracy.¹⁰⁸ The age and role of the Taiwanese Constitutional Court make it quite different from other constitutional courts.

Before 2003, the court was composed of seventeen judges who were appointed by the President with approval of the Control Yuan (1948–1992) or the National Assembly (1992–2000) and served for renewable terms of nine years.¹⁰⁹ Since 2003, the number of constitutional judges has been reduced to fifteen.¹¹⁰ They are now appointed by the President with the majority consent of the Legislative Yuan and serve nonrenewable terms of eight years.¹¹¹

Dissent was unusual in the authoritarian period.¹¹² From the transition to democracy in the late 1980s to present day, there have been three presidents, two affiliated with the traditional KMT (*Kuomintang*, or Chinese Nationalist Party) and one supported by the opposition DPP.¹¹³ The disproportional influence of the KMT appointed judges is clear, although the KMT should not be mistaken as a monolithic party. The court majority has been stable even after the election of DPP President Chen Shui-bian.

Taiwan's court exercises exclusively abstract power: it requires ordinary courts to refer cases to it in concrete cases, and decisions in such cases require implementation by the ordinary courts.¹¹⁴ Until 1993, this referral power was concentrated in the Supreme Court of the Republic of China and the Supreme Administrative Court, as lower courts could not refer cases.¹¹⁵ Furthermore, in the initial design of the Constitutional Court, it was not seen as having the power to review Supreme Court decisions that might potentially conflict with the Constitution.¹¹⁶ Just as democratization was beginning in 1986, the Constitutional Court moved to assert jurisdiction over Supreme Court decisions.¹¹⁷ It later ruled that lower court justices could refer cases directly to the Constitutional Court, empowering the lower ranks of the judicial hierarchy and securing supremacy over the Supreme Court.¹¹⁸ With the need to communicate unity to the judicial

107. GINSBURG, *supra* note 47, at 112.

108. *Id.*

109. See Nuno Garoupa, Veronica Grembi & Shirley Lin, *Explaining Constitutional Review in New Democracies: The Case of Taiwan*, 20 PAC. RIM L. & POL'Y J. 1, 5 (2011).

110. Minguo Xianfa art. 1-11 (2000) (Taiwan).

111. David Law & Wen-chen Chang, *The Limits of Transnational Judicial Dialogue*, 86 WASH. L. REV. 523, 545 (2011).

112. GINSBURG, *supra* note 47, at 128.

113. In particular, Lee Teng-hui (1988–2000, KMT); Chen Shui-bian (2000–2008, DPP); Ma Ying-jeou (since 2008, KMT).

114. GINSBURG, *supra* note 47, at 135.

115. *Id.* at 138.

116. *Id.* at 135.

117. Interpretation No. 242 (1989); see GINSBURG, *supra* note 47, at 136.

118. See GINSBURG, *supra* note 47, at 124–28.

audience resolved, the court became more involved in political matters, adjudicating major policy questions.¹¹⁹ Dissent rates increased from a low base, though the court still insists on unity in certain important cases.¹²⁰ The political audience became primary.

Taiwan represents a kind of hybrid case for our theory. As the Constitutional Court began to become more powerful in a democratic era, conflicts emerged with the Supreme Court. Furthermore, with an increased profile, the political audience has become more important, and the court has fragmented. Interestingly, the conflicts preceded fragmentation on the court, or at least occurred simultaneously, resulting in a sequence different from those observed in other cases.

D. Unstable Court Majority and High Incidence of Conflict

1. Italy

The Italian Constitutional Court was established in 1955. Three different political actors appoint five judges each, for a total of fifteen judges. The five judges appointed by Parliament require a supermajority (in a joint vote of the two chambers, two-thirds majority for the first three rounds and a three-fifths majority thereafter).¹²¹ As expected, this has resulted in a structural arrangement that corresponds to a de facto quota system. However, the five judges appointed by the President and the five judges elected by the judiciary disrupt the existence of a stable court majority.

Several mechanisms have been implemented to avoid explicit party alignments, including the writing of single opinions, secret votes, and the disallowance of concurring or dissenting opinions.¹²² The confrontation between the Constitutional Court and the other top courts in Italy has been widely documented.¹²³ The main source for the difficult relationship between the Italian Constitutional Court and the regular courts is the process of submitting “legal questions.” Once a regular court submits a “question,” the court decides the constitutional interpretation; the ruling is an important part of law, which the ordinary court applies to the case.¹²⁴ The Constitutional Court has developed

119. *Id.*

120. *See, e.g.,* Judicial Yuan Interpretation No. 627 (June 5, 2007), available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=627 (discussing former President Chen Shui-bian’s immunity from prosecution).

121. Ferejohn & Pasquino, *supra* note 68, at 294.

122. *Id.*

123. *See* J. H. Merryman & V. Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, 15 AM. J. COMP. L. 665, 665–86 (1967); MARY L. VOLCANSEK, CONSTITUTIONAL POLITICS IN ITALY 100 (2000); Ferejohn & Pasquino, *supra* note 68, at 294.

124. *See* Garlicki, *supra* note 3, at 54–57.

particular techniques of interpretation that occasionally collide with doctrines developed by the ordinary courts.¹²⁵ There were major clashes between the Italian Constitutional Court and the Italian Court of Cassation in 1965, with more skirmishes following in the 1970s and in the 1980s.¹²⁶ Recent confrontations have taken place in the area of criminal law and criminal procedure, with the Court of Cassation refusing to apply interpretations from the Constitutional Court.¹²⁷

The difficult coexistence of top courts in Italy is easily explained by our analysis. The dockets of the Constitutional Court rely heavily on questions interposed by regular courts.¹²⁸ Hence, there is a direct relationship that creates tension because Constitutional Court decisions immediately affect the outcome of the cases heard by the regular courts, limiting their influence. The *application* of law is still a monopoly of the regular courts, so the Constitutional Court has to convince regular courts that a cooperative mode is better for all. The importance of the judicial audience explains the behavior of this court. Instability in the composition of the Constitutional Court has limited its ability to effectively discipline the lower courts, and conflict has continued.

2. Spain

The Spanish Constitutional Court was established by the 1978 Constitution, which introduced a parliamentary regime under a constitutional monarchy after almost forty years of dictatorship led by General Franco.¹²⁹ The Court is composed of twelve judges. They are nominated for nine-year, nonrenewable terms. The appointment mechanism is mixed, involving the government, the two chambers of Parliament, and the judicial council, and has diluted the possibility of a *de facto* quota system.¹³⁰ Significant skirmishes between the Spanish Constitutional Court and the Spanish Supreme Court have been widely documented.¹³¹ Tension becomes evident because the Spanish Constitutional Court guides lower courts in interpreting laws that affect individual rights and liberties.¹³²

More recently, the Constitutional Court, due to its internal polarization, was unable to decide on the constitutionality of the Catalan Constitution, further

125. *Id.* at 54.

126. *Id.*

127. *Id.*

128. Tania Groppi, *The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review*, in CONSTITUTIONAL COURTS: A COMPARATIVE STUDY (Andrew Harding & Peter Leyland eds., 2009).

129. Nuno Garoupa, Fernando Gomez Pomar & Veronica Grembi, *Judging Under Political Pressure: An Empirical Analysis of the Constitutional Review Vote in the Spanish Constitutional Court*, 27 J. L. ECON. & ORG. (forthcoming 2013).

130. *Id.*

131. See Turano, *supra* note 55, at 151–52.

132. *Id.*

harming its reputation.¹³³ At the same time, conflict with the Spanish Supreme Court has continued unabated.¹³⁴ The resulting loss of credibility of the Spanish Constitutional Court has been widely discussed by the media.¹³⁵ Again, internal fragmentation harms the external supremacy of the Constitutional Court.

3. Korea

The Korean Constitutional Court was established in late 1988 as part of the constitutional establishment of Korea's Sixth Republic.¹³⁶ Though the constitutional drafters expected a relatively quiescent institution, the court has become the embodiment of the new democratic constitutional order of Korea.¹³⁷ The court consists of nine justices who serve six-year renewable terms, now staggered so that justices are appointed in sets. The Supreme Court, the National Assembly, and the President each appoint three justices.¹³⁸ Consequently, there is no stable majority.

The Korean Constitutional Court has engaged in occasional struggles with the Supreme Court over jurisdiction, caused by the fact that the Constitutional Court has no jurisdiction over challenges to the constitutionality of administrative action.¹³⁹ The distinction between administrative and legislative interpretation is not as clear or as straightforward as might be imagined. The question of the constitutionality of an administrative regulation frequently requires interpretation of relevant statutory text.¹⁴⁰ A restrictive interpretation of a statute will tend to void, on constitutional grounds, administrative action that relies on a broad reading of the statute. So the Constitutional Court is able to shape the Supreme Court's constitutional interpretations if it issues a decision on the statute prior to administrative action. However, if it acts second, it cannot always do so.

133. The *Estatut de Catalunya* was approved by the Spanish Parliament in 2005, and after a referendum in the region in 2006, it had to wait until July 2010 for the Spanish Constitutional Court's decision (after a petition from the conservative party that opposed this law).

134. For example, consider a recent case absolving two prominent Spanish financiers of a white-collar crime against the interpretation of the Spanish Supreme Court on the statute of limitation for criminal offenses. S.T.C., Feb. 20, 2008 (S.T.C., No. 29) (Spain), available at <http://www.tribunalconstitucional.es/en/jurisprudencia/Pages/Sentencia.aspx?cod=9455>.

135. See EL PAIS, <http://www.elpais.com/todo-sobre/organismo/TC/Tribunal/Constitucional/58/> (last visited Dec. 31, 2011).

136. Ginsburg, *supra* note 47, at 207.

137. Tom Ginsburg, *The Constitutional Court and the Judicialization of Korean Politics*, in *NEW COURTS IN ASIA* 145 (Andrew Harding et al. eds., 2009).

138. GINSBURG, *supra* note 47, at 220.

139. *Id.*

140. *Id.* at 239–41 (describing cases involving tax and judicial scriveners law).

Ordinary court decisions are not explicitly included within the jurisdiction of the Constitutional Court,¹⁴¹ yet rulings of the court on unconstitutionality are to be respected by ordinary courts, other state agencies, and local government bodies.¹⁴² This means that while ordinary courts must abide by Constitutional Court decisions, they are themselves the sole determiners of what those decisions require. Ordinary courts cannot be corrected by the Constitutional Court for failure to apply its decision correctly. Rather, the Supreme Court is the sole body able to overrule lower court decisions. Therefore, much is at stake on the question of whether Supreme Court decisions can be appealed to the Constitutional Court.

In 1990, the Constitutional Court unilaterally decided that it had implied jurisdiction over administrative regulations issued pursuant to statutes and that the assignment of administrative review in Article 107(2) to the ordinary courts was not exclusive.¹⁴³ In response to that decision, the Supreme Court issued a statement to all ordinary judges condemning the Constitutional Court decision and stating that it had “gone beyond its domain.”¹⁴⁴ In 1995, the Constitutional Court declared a tax law partially unconstitutional and dictated that it could be applied only if given a particular narrow interpretation.¹⁴⁵ The Supreme Court responded that, because the Constitutional Court had no authority over ordinary court judgments, its decision could be taken only as an expression of opinion regarding constitutionality and had no binding force over ordinary courts.¹⁴⁶

In December 1997, the original petitioner again sought relief from the Constitutional Court, and the court obliged by annulling the Supreme Court judgment, even though it had no explicit power to do so in the Constitutional Court Act.¹⁴⁷ The court also voided that portion of the Constitutional Court Act that excluded ordinary court decisions from constitutional review, saying that Constitutional Court decisions must be binding on all.¹⁴⁸ The Supreme Court responded by holding a press conference, asserting that it would reply through a judgment.¹⁴⁹ Subsequently, the Constitutional Court continued to consider

141. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 111(1) (S. Kor.).

142. Constitutional Court Act No. 10546, Apr. 5, 2011, art. 47(1) (S. Kor.).

143. Constitutional Court [Const. Ct.], 89Hun-Ma178, Oct. 15, 1990, (2 KCCR, 365) (S. Kor.). Article 107(2) reads, “The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or dispositions, when their constitutionality or legality is a prerequisite to a trial.” HUNBEOB art. 107(2).

144. See James M. West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence at the Vortex*, 40 AM. J. COMP. L. 73, 114 (1992).

145. See GINSBURG, *supra* note 47, at 232.

146. *Id.*

147. *Id.*

148. *Id.*

149. This high-profile conflict led the *Korea Herald* to call for legislative resolution of the problem: “This complicated and subtle conflict between the two supreme juridical bodies calls for an intervention of the President and the National Assembly which can

ordinary court judgments in certain cases, and it now appears that the theory of the Constitutional Court has been accepted de facto.

4. Colombia

The Constitutional Court of Colombia was established in 1992. It is composed of nine judges serving eight-year terms.¹⁵⁰ The president, the Supreme Court of Colombia, and the Colombian Supreme Administrative Court each propose three candidates to be selected by the Senate.¹⁵¹ The resulting composition of the court is not ideologically stable and has led to well-documented conflicts between the Colombian Constitutional Court and the Supreme Court.¹⁵² Because the Supreme Court and Supreme Administrative Court (*Consejo de Estado*) traditionally rendered res judicata rulings (thus without any revision or appellate process available), conflicts of power were triggered after the new constitutional mandate was in place.¹⁵³ The bolder doctrines developed by the Colombian Constitutional Court on personal rights conflicted with the approaches taken by the higher courts.¹⁵⁴ The inevitable antagonism between these institutions led to legislation in 2000 to subordinate the higher courts to the Constitutional Court.¹⁵⁵ This is an example of how the political audience ultimately had to intervene to ensure supremacy of the constitutional court after costly conflict.

exercise their legislative prerogatives toward illuminating the balance of power and division of labour between the two highest courts.” *Editorial*, KOREA HERALD, Dec. 30, 1997.

150. Luz Estella Nagle, *Evolution of the Colombian Judiciary and the Constitutional Court*, 6 IND. INT’L COMP. L. REV. 59, 81 (1995).

151. *Id.*

152. *See, e.g.*, Martha I. Morgan, *Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court*, 30 U. MIAMI INTER-AM. L. REV. 253, 322 (1998).

153. *Id.*

154. Alicia E. Yamin & Oscar Parra-Vera, *How Do Courts Set Health Policy? The Case of the Colombian Constitutional Court*, 6 PLoS MED. 147 (2009); Maria Paula Saffon, *Can Constitutional Courts Be Counterhegemonic Powers vis-a-vis Neoliberalism – the Case of the Colombian Constitutional Court*, 5 SEATTLE J. SOC. JUST. 536, 539–40 (2007).

155. L. 1382, julio 12, 2000, [44082] DIARIO OFICIAL [D.O.] (Colom.). This provision brought two changes. First, higher courts that rendered decisions that were to be reviewed under the protection of constitutional rights doctrine had to be noticed. Second, the Supreme Court had to review actions filed against its own decisions and then submitted to the Constitutional Court for revision. Nonetheless, the mandatory notice did not solve the existing nuisances, nor did Supreme Court judges accede to examine petitions to review its own decisions. Conflict persisted; several sanctions were imposed by the Supreme Council of the Judiciary disciplinary branch on judges under prevarication grounds as a result of their refusal to comply with decisions rendered by the Constitutional Court.

In short, Colombia's experience is consistent with our framework. An institutionally determined appointment structure led to a lack of stable majorities on the Constitutional Court. This exacerbated inter-court conflicts of jurisdiction, ultimately requiring political intervention.

E. The Special Case of the French Constitutional Council

The *Conseil Constitutionnel* is a specialized body separated from the judiciary and the other branches of government.¹⁵⁶ It could be considered more like a fourth branch of government, or a third house of the legislature, rather than a judicial court.¹⁵⁷ The French Constitutional Court was originally conceived as a political body that progressively has evolved in its judicial competences. Not surprisingly, politics has been part of the court from its early stages. Formally, the duty of the *Conseil* is to ensure that the principles and rules of the Constitution are upheld.¹⁵⁸ Therefore, the *Conseil* was established in 1958 to act as a watchdog on behalf of the executive branch; French antipathy to judicial interference in governmental affairs is well-known.¹⁵⁹

The *Conseil* is composed of nine members who serve nine-year, nonrenewable terms.¹⁶⁰ Appointments are staggered every three years.¹⁶¹ The president, the president of the National Assembly, and the president of the Senate each name three members.¹⁶² In addition to the nine members, former presidents of France are considered members of the constitutional council for life.¹⁶³ The appointments to the *Conseil* are not always judges. In a few rare cases, they are not even legally trained¹⁶⁴ and are sometimes professional politicians.¹⁶⁵

156. See STONE, *supra* note 4, at 47–48. See also 1958 CONST. 37, 41 (Fr.).

157. See Michael H. Davis, *The Law/Politics Distinction, the French Conseil Constitutionnel and the U.S. Supreme Court*, 34 AM. J. COMP. L. 45, 52 (1986); Michael H. Davis, *A Government of Judges: An Historical Re-View*, 35 AM. J. COMP. L. 559, 559–79 (1987); Denis Tallon, *The Constitution and the Courts in France*, 27 AM. J. COMP. L. 567, 575 (1979).

158. 1958 CONST. 37, 41 (Fr.).

159. This emerged as a natural reaction against the judges under the monarchy and the role of civil law in subordinating the courts to the legislature. However, France has a long tradition of legal control of executive action by the *Conseil d'État*, which by necessity has had to immerse itself in politics. See Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 385 (1982); Cynthia Vroom, *The Constitutional Protection of Individual Liberties in France: the Conseil Constitutionnel Since 1971*, 63 TUL. L. REV. 265, 309–14 (1988).

160. JOHN BELL, FRENCH CONSTITUTIONAL LAW 34 (1992).

161. *Id.*

162. *Id.*

163. 1958 CONST. 56 (Fr.).

164. See BELL, *supra* note 160, at 35–36 (arguing that the goals of selection aim at achieving competence, legitimacy, and participation. In his view, this naturally results in

The *Conseil* presents a difficult case to analyze. Its collegiality precludes evaluating individual behavior. In addition, its judicial deliberations are secret, and it endorses a facade of unanimity with no dissenting opinions.¹⁶⁶ Thus, there is a dearth of methods for detecting division.¹⁶⁷ Nevertheless, there are clues that provide some support for our position.

First, the court majority has been unstable. The right overwhelmingly dominated the council while Gaullists were in government, but the election of the socialist Francois Mitterand in 1986 had a profound influence. The rising influence of the socialists in the 1980s was reflected in a left-wing majority from 1986 to 2002.¹⁶⁸ Since 2002, the right has again dominated.

Given the formal role of the court, it is not surprising that the political audience seems to have played a large role. At the same time, the particularities of the institutional arrangement have not helped streamline the interaction between this court and the other major courts (*Cour de Cassation* and *Conseil d'État*). To start, the *Conseil* is not formally a part of the French judiciary.¹⁶⁹ Until 2009, *Conseil* decisions were addressed only to the legislature.¹⁷⁰ France had a form of abstract and preventive constitutional review that no individuals other than specific political actors could access.¹⁷¹

Still, there is some indication that French constitutional judges have been concerned with the judicial audience. There has been an effort to provide coherent and consistent case law.¹⁷² At the same time, the shift to more general (uncodified) principles of law has significantly influenced the *Cour de Cassation*, which has tended to align the legal doctrines developed by both courts.¹⁷³ Traditionally, the *Conseil d'État* was less accommodating to the cooperative mode, but that has changed in recent years. The informal sharing of clerks among the three top courts has also contributed to the harmonization of procedure and

procedural elitism in selection where legal competences and judicial self-participation are purely instrumental).

165. See Raphael Franck, *Judicial Independence Under a Divided Polity: A Study of the Rulings of the French Constitutional Court, 1959–2006*, 25 J.L. ECON. & ORG. 262, 263 (2009).

166. BELL, *supra* note 160, at 41, 47.

167. See Jean Louis Goutal, *Characteristics of Judicial Style in France, Britain and the USA*, 24 AM. J. COMP. L. 43, 59–60 (1976).

168. The French “cohabitation” has been described as majority divided government in the American literature. See CINDY SKACH, *BORROWING CONSTITUTIONAL DESIGNS: CONSTITUTIONAL LAW IN WEIMAR GERMANY AND THE FRENCH FIFTH REPUBLIC* 17 (2005).

169. 1958 CONST. 56–63 (Constitutional Council) (Fr.). The judiciary is independent of the Constitutional Council. *Id.* at 64–66.

170. Concrete review has been introduced recently in July 2008. Under the terms of the new article 61-1, the *Cour de Cassation* and the *Conseil d'État* can refer to the *Conseil Constitutionnel* in matters of law, a mechanism to be developed by statute soon. *Id.* 61-1

171. STONE, *supra* note 4, at 8.

172. See *id.* at 73.

173. MARTIN A. ROGOFF, *FRENCH CONSTITUTIONAL LAW* 98 (2011).

sentencing.¹⁷⁴ The recent reforms of 2009 introduced concrete review and will inevitably reinforce the importance judicial audience, and we can expect some significant skirmishes in the future.

V. CONCLUSION

This article has proposed an explanation for why Kelsenian constitutional courts may be less fragmented than a mere attitudinal model would suggest. Constitutional judges want to advance their ideological agenda; however, they face competition from other high courts in terms of influencing the law and the court system. In order to advance their ideological agenda, constitutional judges need to have influence over other high courts, requiring them to sacrifice immediate ideological goals through demonstrating unity. When the composition of constitutional courts is unstable or divided, however, this unity is more difficult to achieve, and one result is conflict.

This article has provided preliminary empirical evidence and reviewed several important cases from the perspective of our theory. All cases reveal a significantly politicized constitutional court in terms of the appointment mechanism and political audience. Some cases exhibit a more tense relationship between the constitutional court and other higher courts (Italy, Spain, Colombia, and Korea), whereas other cases show a more collaborative mode (Germany, France, and Portugal). Taiwan represents both patterns at different periods in its history: a cooperative attitude during dictatorship, and a struggle for power during democracy, leading to constitutional court dominance. This article identified factors that account for the varying developments observed in these jurisdictions; namely, stable and consistent court majority, and the legal and judicial stature of the constitutional court. With increased stability, constitutional courts are better able to overcome tendencies toward internal fragmentation and thus are better able to assert superiority over other courts.



174. See LASSER, *supra* note 62, at 41 (discussing how decisions by the French Constitutional Court are as short and declarative as the ones by the *Cour de Cassation* to make them look similar and more influential, and also how the *Conseil d'État* was initially hostile but now accepts that case law dictated by the *Conseil* is a source of law).